ADMINISTRATIVE PROCEEDING
FILE NO. 3-5794

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter | : |
| ROYAL W. CARSON, JR. | : |
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INITIAL DECISION

Washington, D.C.
December 21, 1979

Edward B. Wagner
Administrative Law Juc

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APPEARANCES:

Cecelia G. Hansen and Robert M. Fusfeld, 411 West Seventh Street, Fort Worth, Texas, appearing on behalf of the Division of Enforcement, Securities and Exchange Commission.

Joel L. Carson and Scott Rayburn, Carson & Trattner, 300 Dan H. Leininger Bldg., 3545 N.W., 58th St., Oklahoma City, Oklahoma, appearing on behalf of Royal W. Carson, Jr.

BEFORE: Edward B. Wagner, Administrative Law Judge.

## The Proceeding

This public proceeding was instituted by the Commission on July 12, 1979 pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 (Exchange Act).

The order for proceedings contains charges of the Division of Enforcement that the respondent, Royal W. Carson, Jr., wilfully violated Section 15(b)(6) of the Exchange Act by becoming associated with a broker-dealer, namely his own firm— Royal W. Carson & Co., Inc.— during the period May 16 through June 9, 1978 while a Commission order suspending him from such association was in effect. A hearing was directed for the purpose of determining the truth of the charges, to offer respondent an opportunity to establish any defense, and to decide what, if any, remedial action was appropriate.

The hearing was held in Fort Worth, Texas on August 14, 1979. In accordance with a schedule set at the conclusion of the hearing, the Division and respondent made post-hearing filings.

The findings and conclusions in this case are based upon the evidence as determined from the record and upon observation of the witnesses. Preponderance of the evidence is the standard of proof applied. [1/]

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1/ The "clear and convincing" standard, for which respondent's counsel contends, is applicable only where fraud is charged. Collins v. S.E.C., 562 F.2d 820 (D.C. Cir. 1977); Whitney v. S.E.C., 604 F.2d 676 (D.C. Cir. 1979). Application of the "clear and convincing" standard would not, however, change my findings.

## Respondent and Carson Co.

Royal W. Carson & Co., Inc. (Carson Co.) of 3545 N.W. 58th Street, Suite 310, Oklahoma City, Oklahoma has been registered with the Commission as a broker-dealer in securities since 1961. Royal W. Carson, Jr. (Carson), who is around 57 years old, has been the firm president from 1961 to date. From 1969 to date he has owned from 75 to 100 percent of its outstanding voting stock and has been its treasurer and a director.

Up until 8 or 9 years ago, Carson Co. was a big firm with a large number of employees throughout the country, handling investments for 32 national life insurance companies. During that period average monthly transactions ran from $15,000,000 to $20,000,000. At that point Carson for reasons involving protection of his personal health drastically cut back its operations, closing all branch offices.

From 1977 to the present Carson Co. has had only two active employees other than Carson. These employees were his daughter, Elizabeth Carson (Elizabeth) and Thomas Summers (Summers), the firm's trader and salesman. For the last 7 or 8 years business has run from $300,000 to $400,000 a month.

## The Suspension

Carson, who is a tournament tennis player, had sold mineral interests to from 10 to 15 persons who were friends and tennis associates. The registration requirements were not complied with.

On November 15, 1977, the Commission instituted an administrative proceeding against Carson and Carson Co. alleging wilful violation of the registration provisions of the Securities Act of 1933 and the bookkeeping provisions of the Exchange Act. On April 17, 1978 an offer of settlement from respondents executed by Carson was accepted by the Commission and an Order entered finding the above violations and suspending Carson Co's broker-dealer registration for 15 days (May 1 through May 15, 1978) [2/] and Carson "from being associated with brokers or dealers pursuant to Section 15(b) of the Exchange Act for a period of 40 calendar days" (May 1, 1978 through June 9, 1978). Respondents in that proceeding were represented by counsel.

Operation of Carson Co.

The discussion which follows describes the operation of Carson Co. from 1977 on.

Carson Co. is managed and controlled by Carson exclusively. Carson and his son Royal, III, who has not been active in the firm since before 1977, are the only registered principals with the National Association of Securities Dealers (NASD). Carson Co. does not normally maintain an inventory of securities, and virtually all of its trades are executed with other broker-dealers.

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2/ There is no charge that the firm's 15-day suspension was not observed.

Summers, the firm's salesman and trader, conducts business for Carson Co. from a location in another part of town and is responsible for 90 percent of the firm's securities transactions.

Summers prepares an order ticket for each securities transaction and telephones Elizabeth on a daily basis at 3 p.m. telling her the details. Each afternoon Elizabeth prepares a list of these transactions. That afternoon or the next morning Elizabeth visits Summers' office, picks up the order tickets and brings them to the offices of the firm. Elizabeth then prepares confirmations from the list and mails them out.

Carson normally reviews the list of transactions on a daily basis and reviews the order tickets written by Summers. Either Elizabeth or Carson places the initials "RWC" (standing for Royal W. Carson, Jr.) on the line labeled "Approved" on each order ticket.

Elizabeth has no authority to approve or disapprove transactions and performs routine, ministerial duties only. All of her work is routinely reviewed by Carson, and her initialing of the order tickets has been pursuant to his instructions and based upon his belief that it is a physical impossibility for him to initial every ticket.

Carson's normal routine is to arrive at the office at 8:00 a.m., check the order tickets and initial them, open the mail, give Elizabeth her instructions for the day and then at 11:00 a.m. to adjourn to his tennis club. 3/

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3/ He also performs activities involving another company in which he has a 50% ownership interest and which maintains its office on the premises.

Elizabeth routinely writes him a check every month for customer entertainment. This roughly totals $1,800 to $2,000 a year. Prior to his personal suspension he handled a small number of transactions personally.

Necessary loans from the local bank to pay for securities transactions are arranged by having a supply of 20 or so blank notes signed by Carson in the safe of the president of the bank. When the firm needs money, Elizabeth stops by the bank, tell the bank president the amount needed and the amount is filled in on a signed bank note. 4/ The interest rate is 1/2 or 1/4% over the New York prime rate, and no collateral is required. She pays off these loans when the money comes in.

During the period of his suspension (May 16 through June 9, 1978) the only change of significance in Carson's activities was that he did not handle transactions personally on behalf of the firm. 5/

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4/ As Carson put it "whatever Elizabeth needs, Elizabeth gets" (Tr.58).

5/ Carson's testimony in this respect was as follows:

"Q. The days that you were in the office, how was your conduct different from what it has been before and what it was after?

A. I wasn't doing any trading.

Q. You do two or three trades a month.

A. Well, I wasn't doing any."
(Tr.88).

Carson had earlier stated that he was "probably handling" more than 2 or 3 transactions a month at the time in question (Tr.31).

While Carson also testified that he did not write letters or make customer contacts during this period, there is no evidence that such activities normally occupied any appreciable amount of his time.

Carson took a trip of unspecified duration to San Francisco during the period of his suspension.

He continued to review the firm's transactions and to supervise the firm's activities and employees. During this period Carson Co. engaged in 112 securities transactions. Order tickets reflecting 102 of these transactions were located. Of the 97 tickets bearing the initials "RWC", Carson personally initialed 23 and Elizabeth 74. On May 11, 1979, he received a check for $300 from Carson Co. for customer entertainment for April and May 1978. On June 5, 1978 he received another check for $150 from the firm for customer entertainment. Both these checks were cashed by Carson. Loans from the bank and repayments thereof occurred during the suspension period in the same fashion as described above.

Events Occurring After the Suspension Period

On June 12, 1978, the Kansas City Office of the NASD, after reviewing the firm's May 31, 1978 periodic report, wrote to Carson, stating "it appears the firm did have a substantial number of transactions, notwithstanding the SEC's 15-day suspension of the firm, your 40-day suspension, and your son's 30-day suspension. In view of the fact that you and Royal III [Carson's son], are the only registered principals, you are also requested to submit your written explanation as to how these transactions were supervised in the absence of any registered principal." Carson responded to this request by letter dated June 19, 1979 stating, "The 15-day suspension of the firm was observed, but of course that didn't prevent me from being at the office every day and 'running' the company . . . . The transactions handled

after the 15-day suspension and as far as supervision was concerned, even though I didn't handle any transactions personally, because of my suspension, it did not prevent me from observing the business done by our registered representatives."

In February or March, 1979 a Commission examiner engaged in a broker-dealer examination at the firm noticed that the order tickets for the period of Carson's suspension were marked approved by "RWC." When the examiner called this matter to Carson's attention and asked for copies of the order tickets Carson threw up his arms in disgust and indicated that the examiner must be joking. Carson furnished him with the copies. The day after the tickets had been called to Carson's attention, he brought his daughter Elizabeth to the examiner and stated, "She has something to tell you. Go ahead and tell him" (Tr.14). Elizabeth then told the examiner that she had signed the order tickets.

On April 4, 1979 in his investigative testimony Carson stated that he had signed some of the order tickets.

Carson stated that he decided about 2 years ago to wind down his securities firm and spend more time in the oil and gas business he owns. Possible sales of the brokerage firm did not work out for various reasons, and he determined to dissolve the company and advised that he was going to cease doing business on July 31, 1979. No new business has been done since that date.

Evidentiary Matters

Respondent's counsel objects to a proposed finding by the Division that Carson never sought the advice of an attorney concerning the restrictions upon his activities required by the suspension order. Counsel points out that, while Carson testified that he did not seek such legal advice subsequent to the suspension, he also testified that his attorney at the time agreed with his interpretation. Counsel argues that "it is reasonable to assume that the advice which Carson did obtain was prior to the suspension" (Carson Br. p. 12). It is argued that the logical explanation for his not consulting an attorney after the suspension was that he had already consulted one. However, when Carson himself was asked why he had not consulted an attorney after the suspension, he significantly did not say he had already consulted one. He said he had no particular reason (Tr.50). Further, counsel for Carson in this proceeding in his closing statement said that Carson did not see fit to talk to his lawyer in the prior proceeding about the meaning of the suspension and that if he had it to do all over again he would have, but he didn't then (Tr.109).[6/] It is also noted that in his reply to the June 12, 1978 NASD inquiry and in connection with the later broker-dealer examination by the Commission Carson did not profess reliance on counsel.

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6/ The same law firm represented Carson in both this proceeding and the prior proceeding which was settled, although different individual attorneys were involved.

Under the above circumstances, I conclude that while Carson's original attorney agreed with Carson's interpretation of the suspension order, whatever advice he may have given to Carson occurred after the conduct in question, and does not help Carson in any way.

It is argued that, while Carson at some time placed his initials on order tickets for transactions occurring during the suspension period, there is no evidence that the initialing was done during that period (Carson Br. p.8). Carson, however, was unable to deny "as a matter of certainty" that the initials were placed on the orders during the suspension period (Tr. 87). The evidence does show that the normal procedure was for the initialing to take place within a short time after the orders were written. No deviation from that procedure has been shown. It is therefore concluded that the initialing generally took place during the suspension period.

In any event, the precise time when the initials were added is of little significance. The order, as will be explained more fully later, precluded Carson from supervisory activity, and the record clearly shows that such activity, of which the initialing was merely a written manifestation, continued during the period.

Respondent's counsel and the Division disagree as to the significance of Carson's bringing his daughter to the Commission examiner and having her state that she had signed

the order tickets. Counsel contends that the incident merely shows Carson's cooperative attitude, stating:

> "What the Commission does not mention is that her statements are true. She did place Carson's initials on order tickets. The record does not indicate which tickets the examiner was referring to and, in fact, she placed Carson's initials on more than 75% of the order tickets, dated during that period of Carson's suspension." (Carson Br. p.13).

The Division argues that Carson was attempting to mislead the Commission staff into believing that he had not signed order tickets when, in fact, he had. In the context in which the conversation occurred with the question at issue clearly being Carson's supervisory activity during the suspension period, the Division's explanation is much more reasonable and is accepted. 7/

Applicable Law

Section 15(b)(6) of the Exchange Act provides in part:

> "It shall be unlawful for any person as to whom such an order suspending ...him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission...."

Section 3(a)(18), spelling out the meaning of "associated", provides in part:

> "The term 'person associated with a broker or dealer' or associated person of a broker or dealer means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or in-

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7/ It is also noted that Carson made no effort to explain this incident in his testimony.

> directly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer,...." 8/

Respondent's counsel contends that a distinction should be made between a suspension from association with "brokers or dealers" (which was the wording used in the order under review) as opposed to a suspension from association with "any broker or dealer", or with "a broker or dealer." It is argued that "when a suspension uses plural tenses it means plural" (Carson Br. p. 10).

Counsel argues that the interpretation which Carson allegedly placed on the suspension order, that he merely could not trade on behalf of his firm with other broker-dealers, is consonant with the plural prohibition because "one of the ways to associate with two broker-dealers is engaging in trading" (Carson Br. p. 10). However, merely dealing with another firm across the table does not constitute "association" with that firm. The only way to be associated with more than one broker-dealer would be to establish managerial or employment relationships with two or more firms at that same time. In view of the remedial purpose—temporarily withdrawing a violator from the business as a protection to the public—to be served by Commission suspension

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8/ Respondent's counsel argues that Section 3(a)(18) is inapplicable, apparently on the basis that it defines "person associated with a broker or dealer" and "associated person of a broker or dealer" rather than the precise words contained in the order in this case, Section 3(a)(18), which specifically refers to Section 15(b), obviously defines the relationship of association and is controlling in this case.

orders, it would be absurd to interpret the order to be applicable to Carson only in the unlikely event that he so associated with two broker-dealers at the same time. Accordingly, the plural words must be read in the distributive sense. 9/

In its closing statement the Division made clear that it would not have insisted on Carson's resigning as president, treasurer and a director of Carson Co. during the period of his personal suspension. The Division suggested that he might have appointed an independent manager to serve in his stead to run the firm and that, if he had done so, no complaint would have been lodged. Respondent's counsel argues from these statements that Section 3(a)(18) must mean something different from what it says and that, if the Commission intended it to have a different meaning, it should have so informed Carson. It was not, however, my impression that the Division's remarks at the hearing were intended as an interpretation of the statute. 10/ It merely took a common sense approach that in view of the short period of suspension it would not be objectionable for the officer and director merely to insulate himself from managerial and supervisory activity during the period

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9/ While I have always employed the singular form in my own orders, since the statute uses that form, I find no ambiguity in use of the plural.

10/ That is not to say that a functional interpretation, i.e., that a suspension is merely a debarment from the function involved in being associated and does not require a change in status, is necessarily an incorrect interpretation. Webster's Third New International Dictionary (Unabridged, 1961) provides the following definition of "suspend" as an alternative: "to debar or cause to withdraw temporarily from any... function."

and that it would not be necessary for him to resign his offices. In view of the position taken by the Division it is not necessary to decide whether mere retention of an office without more is precluded by a suspension from association. Carson's activity involved the exercise of control over the firm. There is no doubt that such supervisory activity constituted association with the firm and was precluded by the suspension order.

There is further no doubt that Carson's actions were wilful within the meaning of Section 15(b)(6). The Division is correct in stating that it is not necessary to show that Carson knew the law and intended to violate it. The Court of Appeals for the Second Circuit has stated:

> "It has been uniformly held that 'wilfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." Tager v. S.E.C., 344 F.2d 5,8 (2d Cir. 1965).

See also Hughes v. S.E.C., 174 F.2d 969,977 (D.C. Cir. 1949; Arthur Lipper v. S.E.C., 547 F.2d 171,180 (2d Cir. 1976), rehearing denied 551 F.2d 915 (1977), cert. denied 434 U.S. 1009 (1978). 11/

Accordingly, I conclude that Carson wilfully violated Section 15(b)(6) of the Exchange Act as charged.

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11/ The scienter requirement stemming from the decision in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), for which respondent argues, is applicable only in fraud cases.

Public Interest

The Division seeks a bar from the securities business for Carson. Respondent's counsel argues that no sanction should be imposed.

The Division asserts that Carson took no steps to ascertain what the suspension order required of him. In fact, he neither consulted his counsel nor the Commission staff as to how to conduct himself while subject to the suspension. While he claims that he believed it merely prevented him from personally handling transactions, a number of factors make Carson's explanation difficult to accept. First, his extensive experience in the business is inconsistent with any such view; he has been in the securities business for 27 years. During much of this time he owned and ran a large broker-dealer firm. Second, his reply to the June 12, 1978 letter from the NASD is clearly evasive and dissembling in its effort to explain supervision away in terms of mere "observing". Third, he involved his daughter in attempting to deceive the Commission examiner, apparently on the mistaken basis that if she had initialed all of the order tickets he was absolved. 12/

His conduct is thus inconsistent with a good faith belief that he had done nothing wrong. I do not credit

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12/ Under the circumstances present here, her initialing of the order tickets was as much a manifestation of his supervisory activity as was his own.

his statement about his belief and conclude that he virtually ignored the personal suspension order.

His evasive response to the NASD and attempt to mislead Commission personnel are matters which support increased sanctions. Roald George Gregersen, 9 SEC Docket 828,831 (1976). The fact that he has previously been sanctioned is also such a factor. See Goffe-Carkener-Blackford Securities Corporation, 7 SEC Docket 985,987 (1975). These matters far outweigh the laudatory letter concerning Carson from the firm's banker, which was received in evidence.

While Carson testified that he had ceased doing business on July 31, 1979 and I have so found, his counsel did not propose a finding to that effect. His intentions are, of course, subject to change. Carson has not withdrawn his firm's broker-dealer registration nor renounced association with other broker-dealers. Accordingly, I have not determined that there is a reduced need for a sanction on this account.

It might be argued that the most evident aspect of supervision involved, approval of the trades, was unimportant, since the relationship between Carson and Summers was such that no trades written by Summers were ever refused. However, an NASD Rule of Fair Practice required that:

> "Each member shall review and endorse in writing, on an internal record, all transactions... of its registered representatives pertaining to the solicitation or execution of any securities transaction." 13/

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13/ Article III, Section 27. CCH NASD Manual ¶2177.

Approval of the transactions and supervision were therefore vital to continuing the proper operation of the firm. Carson was well aware of the NASD requirement.

Another factor which is being taken into account in determining an appropriate sanction is that Carson did not in fact serve the 25 day balance of the suspension to which he had agreed. Clearly, any sanction should at least require him to be suspended for that period.

In assessing sanctions, attention must be given both to the deterrent effect upon the individual involved and upon standards of conduct generally in the securities business. Steadman v. S.E.C., 604 F.2d 126, 145 (5th Cir. 1979); Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 184 (2d Cir. 1976), cert. denied 434 U.S. 1009 (1978).

As the Division points out, the ability to sanction persons in the securities business is an essential aspect of the regulatory framework. Persons subject to such sanctions cannot be permitted to ignore them without consequence. For these reasons and because of the aggravating circumstances present here I have concluded that a four-month suspension will best serve the public interest.

Accordingly, IT IS ORDERED that Royal W. Carson, Jr. is suspended from association with a broker or dealer for four months. [During that period Carson may retain his stock interest in and various offices with Royal W. Carson & Co., Inc. and collect any dividends but may not collect any salary or bonus from that firm nor participate in any way (managerial or non-managerial) in its activities].

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 14/

Edward B. Wagner
Administrative Law Judge

Washington, D.C.
December 21, 1979

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14/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.