

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
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J. R. RADIN & CO., INC., et al. :
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INITIAL DECISION

Washington, D.C.
April 24, 1975

Edward B. Wagner
Administrative Law Judge

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APPEARANCES: Roger M. Deitz and Martin S. Cohen of the
New York Regional Office for the Division
of Enforcement

Charles Snow of Wofsey, Certilman, Haft, Snow
& Becker, New York, New York for respondents
Continental Consultants Corp., Herman R. Gans
and Hy Wilstein.

John Robert Radin, Sr., pro se.

BEFORE: Edward B. Wagner, Administrative Law Judge

THE PROCEEDING

On April 12, 1973, the Commission instituted this public proceeding, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act), against J. R. Radin & Co., Inc. (Radin, Inc.), Continental Consultants Corp. (CCC), John Robert Radin, Sr. (Radin), Herman R. Gans (Gans),^{1/} Hy Wilstein (Wilstein) and John J. Ferrara (Ferrara).

Insofar as here pertinent the order for proceedings charges:

1. Radin, Inc.,^{2/} with net capital and bookkeeping violations^{3/} and CCC, Radin, Gans and Wilstein with having wilfully aided and abetted such violations;
2. CCC with wilful net capital, bookkeeping and reporting^{4/} violations and Radin, Gans and Wilstein with having wilfully aided and abetted violations of such provisions by CCC;

1/ Radin, Inc. did not appear at the hearing and thereby defaulted. Ferrara appeared pro se at the beginning of the hearing but before its conclusion submitted an offer of settlement which was accepted by the Commission.

As a result of the above, the Commission has issued an order revoking the broker-dealer registration of Radin, Inc. and imposing sanctions upon Ferrara. SEA Rel. No. 10963 (August 14, 1974).

This initial decision has application only to the remaining respondents, although Radin, Inc. and Ferrara will necessarily be mentioned.

2/ Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, 17 CFR 240.15c3-1.

3/ Section 17(a) of that Act and Rules 17a-3 and 17a-4 thereunder, 17 CFR 240.17a-3, 17a-4.

4/ Section 17(a) of that Act and Rule 17a-5 thereunder, 17 CFR 240.17a-5.

3. That CCC, Radin, Gans and Wilstein failed reasonably to supervise^{5/} persons who committed such violations;
4. That a decree of permanent injunction has been entered in a United States District Court enjoining Radin, Inc. and Radin from further violations of the net capital provisions; and
5. That, upon the application of the Securities Investor Protection Corporation (SIPC), a trustee was appointed for the liquidation of Radin, Inc. pursuant to the Securities Investor Protection Act of 1970 (SIPA).

The events charged are alleged to have taken place in 1972.

A four-day hearing was held in April and May, 1974 in New York City. CCC, Gans and Wilstein appeared throughout the hearing and were represented by attorney Charles Snow. On the morning the hearing was to commence Radin asked for an indefinite postponement. When this request was denied, he stated that he would not appear, despite the fact that he was advised that failure to appear could subject him to a default. Radin was subpoenaed as a witness by the other respondents to testify on the third day of the hearing. During the course of his testimony Radin determined to appear as a party and thereafter participated fully in the hearing, representing himself^{6/}.

^{5/} Section 15(b)(5)(E) of that Act.

^{6/} The Division withdrew an earlier motion to the Commission to enter a default judgment against Radin on the basis of his failure to appear.

The Division and respondents CCC, Gans and Wilstein filed Proposed Findings, Conclusions and Briefs. The Division filed a Reply Brief. Radin made no filings.

The findings and conclusions herein 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.

Corporations and Officers Involved

Radin, Inc. is a New York corporation, located at 70 Wall Street, New York, New York, and has been registered as a broker-dealer since March 30, 1970. Radin, Inc. was a member of the National Association of Securities Dealers, Inc. (NASD).

Directors and officers of Radin, Inc. were:

Director and President - Radin
Director and Vice President - Ferrara
Director, Vice President and Secretary - Gans
Director, Vice President and Treasurer - Wilstein

CCC, a New York corporation, maintains its offices at 95-20 63rd Road, Rego Park, New York and has been registered as a broker-dealer since May 22, 1965. It is a member of the NASD.

Radin, Ferrara, Gans and Wilstein held the same offices in CCC as they did in Radin, Inc.

During the relevant period CCC owned all of the outstanding stock of Radin, Inc.

Corporate Violations

Radin, Inc.

As of February 29, 1972 Radin, Inc. had a net capital deficit of \$350,592.14 and a net capital deficiency of \$386,802.41. Radin, Inc. made use of the mails in conducting business as a broker-dealer on that date.

On March 2, 1972 Radin, Inc., at the instance of Gans and Wilstein, advised the Commission's New York Regional Office by telegram that it was unable to meet the net capital requirements and had ceased all operations.

The very large net capital deficiency was substantially caused by a \$10 increase in the price of stock of Graphic Scanning, Inc. As President of Radin, Inc., Radin had increased the firm's short position in this stock to approximately 24,000 ^{7/} shares.

I, accordingly, conclude that Radin, Inc. violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1.

On March 9, 1972, the Commission filed a complaint against Radin, Inc. and Radin in the United States District Court for the Southern District of New York (S.E.C. v. J.R. Radin & Co., Inc. et al., 72 Civil 987). The complaint charged that Radin, Inc., under the direction of Radin, had violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. On March 9, 1972,

^{7/} As of January 14, 1972 the short position had been 11,375 shares.

the Court issued a Judgment of Permanent Injunction by consent against defendants Radin, Inc. and Radin. On the same date the Court upon the application of SIPC appointed a Trustee for the liquidation of Radin, Inc., pursuant to Section 5(b)(3) of SIPA.

Estimated net cost incurred by SIPC from the liquidation of Radin, Inc. was \$317,460.

Touche, Ross & Company was appointed as accountant for the SIPC trustee of Radin, Inc. The senior accountant managing this engagement found, among other deficiencies, that Radin's general ledger from July 1, 1971 to February 29, 1972 contained numerous postings in pencil, erasures and cross-outs, that total figures in the ledger were incorrect, that the figures used in a trial balance as of January 31, 1972 did not agree with figures found in the general ledger, that the cash accounts contained many irreconcilable differences, that bank reconciliations were in substantial error, that customer accounts had not been reconciled to the general ledger control accounts for approximately 6 months and that generally Radin's books and records were inaccurate and not currently maintained.

It was necessary totally to reconstruct Radin, Inc.'s books and records in order to proceed with liquidation of the firm.

Tamas Revai (Revai), an accountant employed by Radin, Inc. at the insistence of Gans and Wilstein, had earlier found that the 1971 books contained numerous errors which were perpetuated in the 1972 figures.

Radin, himself, called Gans on the night of March 1, 1972 to disclose possible noncompliance with the Net Capital Rule stating that his bookkeeper had made a mistake in overstating his assets.

On the basis of the foregoing, I conclude that Radin, Inc. violated Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.

CCC

CCC was organized by Gans and Wilstein on January 27, 1965. For the most part, it has been continually engaged through its wholly-owned subsidiaries in the general life insurance business. From 1965 on, approximately 75% of the revenues of the combined operation were from life insurance sales and 25% from mutual fund sales. Mutual fund sales were principally an adjunct to the insurance business. After 1970, total securities business of the operation lessened to 5% until 1972 when it was down to 1% or 2% over-all.

As of March 8, 1972 CCC had a net capital deficiency of \$2,960.75. Respondents contend that no such deficiency existed because certain assets were excluded from the capital computation and because certain liabilities were treated as "real liabilities rather than capital liabilities" (Respondents' Brief, p.7).

In so contending, respondents point out that CCC had three wholly-owned subsidiaries. It owned G.W. Consultants, Inc. directly. G.W. Consultants, Inc. in turn owned all of the stock of Agents Training, Inc. and of Gans-Wilstein Agency, Inc. which were thus indirectly wholly-owned by CCC. Respondents argue that the value of the stock of these subsidiaries -- in excess of \$60,000 -- should have been included and further that assets of the subsidiaries, including a minimum of \$50,000 in savings deposits which could have been directed to the coffers of the parent, should have been credited to CCC. Respondents also argue that liabilities to Agents Training, Inc. and Gans-Wilstein Agency, Inc. in excess of the \$2,960.75 deficiency should have been treated as capital liabilities because CCC, as the parent company, could have directed that such indebtedness be subordinated.

Although conceding that restricted securities not having a market value -- such as the stock of the wholly-owned subsidiaries here in issue -- are not ascribed value under the Net Capital Rule, respondents contend that the stock of the subsidiaries should be given value to the extent of the advances of the subsidiaries actually made to CCC, citing Midwest Planned Investments, Inc., 42 S.E.C. 558 (1965).

However, as the Division contends, Midwest is distinguishable in that the securities involved there, a large block of control stock of an issue traded in the over-the-counter market, were given value under a specific provision of the rule to the extent an independent bank accepted them as collateral for a loan. As the Division points out, if the principle of the Midwest case were accepted here, CCC could increase the value of the stock of its subsidiaries at will merely by increasing its borrowings from them.

The short answer to respondents' contentions that assets of subsidiaries should be treated as though transferred to the parent and liabilities to them dealt with as though subordinated is that such actions were not taken prior to the computation and therefore have no affect upon it. Madison Management Corporation, 42 S.E.C. 390, 391 (1964); Handley Investment Company, 42 S.E.C. 370 (1964).

As the Division also points out, even if respondents were arguing that the parent and its subsidiaries should be treated on a consolidated basis, and that argument were accepted, certain assets and certain liabilities cannot be separated out and given effect if favorable, while the total financial picture is ignored.

CCC made use of the mails in doing business as a broker-dealer on and after March 8, 1972. On March 9, 1972, the New York Regional Office received telegraphic notice from CCC that it was unable to meet the requirements of Rule 15c3-1 and that it had ceased all operations.

On the basis of the foregoing, I conclude that CCC wilfully violated Section 15(C)(3) of the Exchange Act and Rule 15c3-1 thereunder.

An NASD examination conducted in early November 1966 disclosed that CCC's general ledger was posted only through June, 1966. Wilstein at that time assured the NASD that CCC's books would be posted currently.

A further examination in 1970 established that the ledger was still not being currently posted and that customer records were not being properly maintained. CCC through Wilstein at that time advised the NASD that corrective action had been taken.

However, an NASD examination in March 1972 disclosed that CCC's general ledger had not been posted since December 31, 1971. Despite assurance from Gans that compliance would be achieved, an examination conducted from September 7 through 12, 1972 established that the general ledger was posted only on a monthly basis and that a few customers ledgers were incomplete.

The charge is that the violations took place during the period December 31, 1971 to September 1, 1972. Respondents contend that posting of the general ledger on a monthly basis -- which was the practice in September, 1972 -- was sufficient in view of the level of CCC's business activity. See SEA Rel. No. 10756 (April 26, 1974). However, such posting is appropriate only if it is clear that interim, unrecorded transactions would not affect compliance with the Net Capital Rule, and here, when such additional entries were made, it was determined that the firm was out of compliance on March 8, 1972.

On the basis of the foregoing, I conclude that during the period charged CCC wilfully violated Section 17(a) and Rules 17a-3 and 17a-4 thereunder.

CCC's annual report on Form X-17A-5 for the year ending December 31, 1971 was filed on March 29, 1975. Rule 17a-5 requires that such reports be filed not more than 45 days from year-end. Thus, the report was due on February 14, 1972, and no extension was requested or granted.

Accordingly, I conclude that CCC wilfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder.

Individual Violations

Radin's Involvement in and Responsibility for the Radin, Inc. Violations

I conclude, and, indeed, there is little room for doubt, that Radin wilfully aided and abetted the foregoing violations of Radin, Inc.^{8/}

Radin was the principal executive officer of Radin, Inc. He supervised and controlled all employees of Radin, Inc. and had authority over its daily operations. As President of Radin, Inc., he had general supervision over the firm's bookkeeping. Reval stated that part of the reason why Radin, Inc.'s books and records were not kept accurate and current was because of failure to employ a sufficient number of qualified back-office employees.

^{8/} In view of this conclusion, the charge of failure to supervise with respect to Radin for these same violations is dismissed. See Anthony J. Amato, SEA Rel. No. 10265 (June 29, 1973); Fox Securities Company, Inc., SEA Rel. No. 10475 (November 1, 1973); Charles E. Marland & Co., Inc., SEA Rel. No. 11065 (Oct. 21, 1974)

Involvement in and Responsibility for CCC's Violations of Gans and Wilstein

I conclude and there is likewise little room for doubt,^{9/} that Gans and Wilstein wilfully aided and abetted CCC's violations.

Gans and Wilstein literally were CCC insafar as its separate operation as a broker-dealer and parent of the insurance subsidiaries was concerned. They were officers and directors of CCC from it inception in August, 1971 to the present. They directed the daily operation of CCC and worked at that firm on a daily basis. They had general supervision over its bookkeeper. They were made aware of its bookkeeping deficiencies on a number of occasions and took no appropriate action.

More difficult questions are involved in determining whether Radin aided and abetted or failed to supervise with respect to the CCC violations, and the relationship of CCC, Gans and Wilstein to the Radin, Inc. violations. Resolution of these matters requires an examination of relevant background information.

^{9/} Charges of failure to supervise in this area are dismissed. See p 10, fn 8 .

Background

CCC was originally organized by Gans and Wilstein to become an agent of Continental American Insurance Company. As previously stated, CCC was engaged primarily in the insurance business through its wholly-owned subsidiary, G.W. Consultants, Inc., which owned all of the stock of Gans-Wilstein Agency, Inc. and Agents Training, Inc.

In January, 1970 CCC offered its shares publicly pursuant to Regulation A under the Securities Act of 1933. One of the purposes for which the proceeds of the offering were to be used was expansion into the general securities field. The offering was completed and the funds obtained.

In view of the expense involved, it was then determined not to expand directly. Instead, it was decided to join with an on-going brokerage firm having experience in the over-the-counter field. CCC negotiated with several brokerage firms beginning in the Spring of 1970, but determined not to join with them. In June 1970, Gans learned that Radin, who had been a high school classmate, had his own securities firm, Radin, Inc. Radin had been in the business for a number of years and had served as an examiner with the NASD.

By the end of 1970, discussions had been initiated by Wilstein and Gans for the acquisition of Radin, Inc. by CCC. Negotiations were deferred for a period of about six months while CCC elected to use Radin, Inc.'s over-the-counter facilities to clear transactions on a trial basis.

In May or June 1971, there were renewed meetings to negotiate the merger of CCC and Radin Inc. Gans, Wilstein, Radin and Ferrara attended these meetings. During the negotiations the parties were represented by McKenna, a former Commission attorney, who also attended the meetings. Gans and Wilstein were also represented by their own attorneys, Simons and Barse.

Acquisition of Radin, Inc. by CCC occurred on August 31, 1971. Under the agreement of that date, CCC acquired all of the stock of Radin, Inc. in exchange for the issuance to Radin and his wife of 239,000 shares of CCC stock. Paragraph 12 of the agreement provided that CCC proceed to distribute the shares of G.W. Consultants, Inc., which owned Gans-Wilstein Agency, Inc. and Agents Training, Inc., to shareholders of CCC. Radin and his wife waived their right to receive shares of G.W. Consultants, Inc. If the agreement had been followed, the result would have been that the shares of stock of G.W. Consultants, Inc. would have been spun off to the shareholders of CCC, excluding the Radins. CCC would have continued with its own mutual fund brokerage

¹⁰/ This was the same number of shares owned by Gans and Wilstein together.

business with Radin, Inc. as a wholly-owned subsidiary. The Radins would have owned 45% of CCC's outstanding stock, Gans and Wilstein 45%, and the public, introduced through the Regulation A offering, the balance of 11/10%. In the agreement it was represented that Radin, Inc. had a net worth of \$70,000.

The intent of the agreement was that CCC divest itself of the insurance business so that Gans and Wilstein would operate this part of the business separately. G.W. Consultants, Inc., the insurance operation, was, as noted, spun off from CCC. Radin was to operate Radin, Inc. and the mutual fund business of CCC.

McKenna had advised that the spin-off could be accomplished on the basis of a no-action letter from the Commission Staff. It was not until the agreement had been executed that it developed that a no-action letter could not be obtained. It became necessary to file a registration statement. Steps taken in that direction were not completed, because Radin, Inc. went out of business.

11/ The agreement provided that if the spin-off were not consummated, the whole arrangement was to be cancelled and the CCC shares delivered to Radin under the escrow described hereinafter returned to CCC.

As an adjunct to the agreement CCC was required to and, in fact, did advance funds to Radin, Inc. as a subordinated loan. Approximately \$100,000 to \$125,000 was advanced, and no money was ever recovered by CCC.

During the period prior to the contemplated spin-off, and also of the violations here in issue, 119,500 of the shares issued to Radin were placed in escrow and it was agreed through the device of an irrevocable proxy that Gans and Wilstein would vote these shares, as well as shares owned by them, for themselves, Radin and Ferrara as the four Directors of CCC. Ferrara was Radin's friend, continued as a Radin, Inc. employee and was Radin's nominee on the Board of Directors. He could be counted upon to side with Radin in crucial votes of the Board. Since the stock subject to this agreement constituted far and away the majority of the outstanding stock of CCC, the boards of Directors of both CCC and its wholly-owned subsidiary Radin, Inc. were effectively fixed and could not be changed without the agreement of both factions.

12/ These same persons were the four Directors of Radin, Inc.

Radin was President of both Radin, Inc. and of CCC.

The other officers of CCC and of Radin, Inc. were as stated at p. 3 of this initial decision.

As their counsel had advised Gans and Wilstein, the result was a "Mexican stand-off" or deadlock on the Boards of Directors with Radin in his position of President of Radin, Inc. and CCC able to run the companies virtually as he pleased.^{13/} Radin had authority to countermand orders of the other officers. Assuming no direction from the deadlocked boards, Radin had authority to do whatever was legal.^{14/}

Gans and Wilstein had objected to the deadlock feature, but Radin had insisted and had prevailed. Radin wished to have an unfettered hand in running the securities business because he knew that business, and Gans and Wilstein did not. The only real power left to Gans and Wilstein was, as they were advised by their counsel, that of liquidating Radin, Inc.

^{13/} Radin took the position that he was President of CCC in name only until such time as the spin-off was accomplished and never functioned in that capacity (Tr. 681).

^{14/} This was the uncontested testimony of New York attorney Simons. For a judicial statement to the same effect, see Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E. 2d 131, 136 (1960):

"By virtue of his assumption of the prime office of president at a time of mutual agreement between the owners of all the shares, and the support of his family with one half of the shares, Joseph Gidwitz is able to manage, operate and control Lanzit almost as a sole proprietorship, while paying technical respect to the existing corporate structure and the laws relating to corporations."

because of corporate deadlock. Gans and Wilstein served as officers of Radin, Inc. merely for the purpose of following the firm's activities.

It is against this background that the actions of Radin, Gans and Wilstein in respect to the Radin, Inc. and CCC violations must be viewed.

Radin's Responsibility for CCC Violations

Radin, as stated above, was nominally President of CCC and a Director. While he did not regard his appointment as President as operative until after the contemplated spin-off was effected, there is nothing to show that the appointment was on such terms. Despite his position as chief executive officer Radin made no effort to exercise his supervisory authority and took no part in the day-to-day affairs of CCC. The record contains no showing that he would or could have been frustrated if he had made such an effort.

There is, however, nothing to show that he was aware of conditions at CCC or involved in any way in the violations and, accordingly, the charges of aiding and abetting these violations is dismissed.

Radin was in a position to ascertain the situation at CCC and to do something about it. He did neither. Accordingly, I conclude that he failed reasonably to supervise with respect to the bookkeeping and net capital violations of CCC. See J. Vander Moere & Co., 42 S.E.C. 288 (1964).

Responsibility of CCC, Gans and Wilstein for Radin, Inc. Violations

As indicated above, Gans and Wilstein became officers of Radin, Inc. to monitor their investment which existed both in the form of CCC stock paid for Radin, Inc. and the subordinated loan to the firm.

The relationship of Gans and Wilstein with Radin was a difficult one.

In October, 1971 Radin advised them that he and his wife were going to an NASD convention in Florida. Their expenses were to be borne by the company. Gans and Wilstein objected in view of the recent merger and the seemingly unjustified cost, but Radin informed them that he "needed a vacation" (Tr. 576) and was going anyway. They consulted their attorney, Simons, and were informed that they could do nothing to stop him but threaten to liquidate the company. Gans and Wilstein determined that this was a minor matter, not justifying liquidation. Radin and his wife attended the convention at company expense.

A few weeks later they reminded Radin that they had a verbal agreement to choose the auditor to prepare the 1971 report pursuant to Rule 17a-5. Radin stated that he remembered no such agreement and that he would use his own accountant, Martin Bach. Gans and Wilstein wished to use their accountant, Max Wasser, because they wanted an independent source of

information concerning the operations of Radin, Inc. They arranged for a third accountant, Revai, to attend the final meeting at which this was discussed and which occurred just prior to Christmas, 1971.

As a result of threatening to liquidate Radin, Inc., Gans and Wilstein were able to prevail upon Radin to retain Revai.^{15/}

Revai immediately encountered difficulties in getting information from Radin. In January 1972, as a result of a continuing failure to obtain a trial balance as of December 31, 1971, a meeting was had with Radin at which Gans and Wilstein attempted to intercede for Revai. When Revai still was not getting cooperation from Radin in late January, 1972, Gans and Wilstein concurred that Revai should send a letter to Radin threatening to terminate his engagement if the required information were not forthcoming.

The above letter was sent, but Revai continued to encounter difficulties. Although Revai found the books to be inaccurate, differences in the balances were not so large in amount as to impugn the accuracy of the estimate he made that Radin, Inc. was in compliance with the Net Capital Rule. Gans and

^{15/} Bach, whom Gans and Wilstein had no reason to distrust but who could be expected to be primarily loyal to Radin, continued as the regular accountant for Radin, Inc.

Wilstein asked that Radin, Inc.'s books be brought into balance and pressured Radin to get help from Bach's office to work on the books and bank statements. Such help was obtained.^{16/} Radin had promised Revai, Gans and Wilstein on a number of occasions to bring the books up to date.

In mid-January Radin advised Gans and Wilstein that Radin, Inc. had taken a large short position in the stock of Graphic Scanning Corp.^{17/} They stated that a position in any one stock should be limited, that the short position should be covered and, in any event, not increased.

Shortly afterwards Radin informed Gans that the short position had increased.^{18/} Gans and Wilstein called a meeting at the offices of Radin, Inc. to discuss the matter. They asked that both their accountant, Wasser, and Radin's accountant, Bach, be present. Radin assured everyone that no net capital problem existed. It was concluded that the short position would be decreased, and the January 31, 1972 figures of Radin, Inc. were prepared and reviewed. From then until early February, 1972 Radin advised that the short position was being reduced and reported full compliance with the Net Capital Rule.

^{16/} No substantial help was obtained from any other quarter, because Radin claimed that assistance in this area fell within the scope of Bach's engagement. Bach disputed this.

^{17/} An analyst at Radin, Inc. told Gans and Wilstein that he thought the stock was a good short sale, and Radin said that there was a large seller of the stock in the market.

^{18/} As of January 17, 1972 the short position amounted to around \$275,000 (number of shares multiplied by ask price).

In the first week in February, Radin again informed Gans that the Graphic Scanning short position had been increased. This precipitated another meeting of Gans, Wilstein and Wasser with Radin at the offices of Radin, Inc. Gans, Wilstein and Wasser rejected Radin's attempted explanations and walked out.

The meeting with Radin resulted in a decision by Gans and Wilstein to seek legal assistance to liquidate Radin, Inc. They consulted Schulman, Gasarch & Scheicket -- attorneys recommended to them as having SEC experience. They asked Schulman, formerly an SEC staff attorney, to investigate the Graphic Scanning Corp. short position, to take steps to liquidate Radin, Inc. and to salvage as much of the assets of CCC devoted to Radin, Inc. as could be accomplished.

Schulman got in touch with Radin thereafter on two or three occasions in an effort to examine Radin, Inc.'s books and records and to evaluate its financial condition. Radin assured Schulman that Radin, Inc. was in compliance with the Net Capital Rule. Radin was evasive with Schulman and seemed unwilling to set up a meeting where the facts could be discussed and evaluated. As a result of Gans and Wilstein's failure to obtain necessary information, instructions were given to Schulman to advise Radin that Radin, Inc. must be liquidated. Schulman made such written demand in a certified letter, dated February 24, 1972. Radin

thereafter advised Gans and Wilstein that he had taken steps to initiate liquidation.

On the night of March 1, 1972 Radin called Gans and Wilstein and advised them that his bookkeeper had overvalued certain assets and that Radin, Inc. was not in compliance with the Net Capital Rule. Gans and Wilstein immediately called Schulman who went to Radin's office early the following morning. Radin asked for time to work out of his position. This request was rejected. On behalf of CCC, Gans and Wilstein, Schulman participated in dictating telegrams to the SEC and the NASD under Rule 17a-11 of the Exchange Act that Radin, Inc. was ceasing operations as a broker-dealer. Schulman insisted that these telegrams be sent, and they were sent.^{19/}

The Division argues that Gans and Wilstein had a large degree of control through their power to liquidate Radin, Inc. because of corporate deadlock and that the "feeble steps" which were taken were "woefully inadequate" (Div. Reply Brief, p.8). The Division contends that they relied upon Radin's "casual assurances" and made a poor choice in Max Wasser, who was unschooled in SEC matters, as the monitor of Radin, Inc.'s financial condition. The Division argues that these respondents

^{19/} CCC later commenced a lawsuit against Radin to recover damages for fraud and to recover CCC stock from Radin and his wife. Ultimately, the 119,500 shares of CCC stock held in escrow in the name of Radin and his wife, 72,990 CCC shares in Radin's name and 21,150 shares of CCC stock held by Mrs. Radin were returned to CCC in a settlement of the litigation. Radin stated that he returned the stock under duress since he could not afford an attorney.

were obligated to take immediate and effective measures and did not do so, and that "as officers and directors of a broker-dealer, they assumed the duty of insuring that firm's compliance with the securities laws" (Reply Brief, p. 6).

In opposition, respondents argue that events occurring after Radin, Inc.'s acquisition do not evidence an attitude on the part of these respondents to shun their responsibilities. They contend that "they frequently sought information from Radin, they frequently confronted Radin with objections to courses of business he followed, they demanded he be more reserved, they sought professional advice from three law firms and two accounting firms, in addition to an independent person to do the year-end audit" and that when they discovered that Radin, Inc. had foundered they directed Schulman to take appropriate regulatory action and demand immediate cessation of its business (Respondents' Brief, p. 2).

The critical issue is whether the actions of these respondents were reasonable and adequate under the circumstances. A close question is presented.

The principal case cited by the Division is distinguishable. In Aldrich, Scott & Co., Inc., 40 S.E.C. 775 (1961), Aldrich was Vice-President, Secretary, Director and a 20% stockholder during the time of the violations. The Commission stated, "His own failure to exercise any control or supervision over registrant's activities, and his allowing Benedict to

take over the entire active management of the business cannot exculpate him from accountability for registrant's violations -- engaging in the securities business while insolvent and with a net capital deficiency" (Id. at 778). However, Gans and Wilstein did not absent themselves from the firm during the critical period as Aldrich did. They made continuing efforts to inform themselves of Radin, Inc.'s condition and used their only real weapon, the threat of liquidation, in situations where the stakes were high enough to justify its use. Further, there is nothing in the Aldrich opinion to indicate that he would have been lulled into complacency concerning the condition of the firm had he made the inquiry. Gans and Wilstein were led to believe that the books and records would be put in order and that the short position would be reduced.

Other cases acknowledge indirectly that officers and directors are not insurers and that adequate steps can be taken which result in exculpation which may, nevertheless, fall short of successfully preventing violations. Thus, Sutro Bros. & Co., 41 S.E.C. 470, 480 (1963), states:

"Under these circumstances the actions taken by Rudd cannot be considered to have been appropriate or adequate inquiry or investigation into the identity of the seller of the stock or into the circumstances of his acquisition of such stock." (underlining added).

F.S. Johns & Co., Inc., 43 S.E.C. 124, 130 (1966), states:

"While these men were silent partners who never actively participated in the business of F.S. Johns, they had a duty as principal officers, directors and stockholders, to take appropriate steps to prevent or guard against such a pervasively fraudulent operation as existed here." (underlining added).

Reynolds & Co., 39 S.E.C. 902, 917 (1960), states:

"Wilful violations are committed not only by the person who performed the misconduct but also by those who did not properly perform their duty to prevent it." (underlining added)

While on the basis of hindsight, it may appear that these respondents could have taken other and additional actions which might have forestalled the Radin, Inc. violations, I conclude that under all the circumstances their conduct in discharge of their responsibilities was adequate, appropriate and reasonable. Their authority was limited. They were misled, and they had no reason to distrust Radin, a former NASD employee with a previously good record, who had a greater knowledge of the securities business and who was, in effect, their new partner. They did act forcefully and promptly when the facts were apparent.

Accordingly, the charges against CCC,^{20/} Gans and Wilstein of aiding and abetting Radin, Inc.'s violations and failing reasonably to supervise in this connection are dismissed.

^{20/} In view of Radin's authority over CCC as its President, the charge against CCC in this area is essentially a charge against him. Since Radin had been found to have directly aided and abetted these violations, this charge against CCC is dismissed.

Public Interest

The violations committed by Radin are of important provisions of the federal securities laws. Blaise D'Antoni Associates v. SEC, 289 F. 2d 276, 277 (5th Cir. 1961), cert. denied, 368 U.S. 899 (1961); Midas Management Corporation, 40 S.E.C. 707 (1960). He has further been enjoined in the Federal District Court from engaging in business while in violation of the Net Capital Rule.

Radin persisted in taking undue risks in connection with the short position in Graphic Scanning despite the repeated urgings of Gans and Wilstein to reduce that position. As a result of Radin's conduct, Radin, Inc. is insolvent and is being liquidated. In the course of this liquidation a large amount of SIPC funds have been expended.

Under these circumstances nothing less than a permanent ^{21/}bar from the securities business is warranted.

^{21/} It should be noted that such a bar does not preclude the person barred from making such application to the Commission in the future as may be warranted by the existing facts. Fink v. SEC, 417 F. 2d 1058, 1060 (2d Cir. 1969).

CCC, Gans and Wilstein committed and aided and abetted violations of the net capital, bookkeeping and reporting requirements. The net capital violation was reported and quickly rectified. The reporting violation involved the filing of an X-17A-5 Report a month and one half late. The bookkeeping deficiencies are the most serious of the violations committed. Gans and Wilstein have conceded their responsibility for the firm's bookkeeping. Although CCC's securities business was a limited one, the latter violations occurred after repeated warnings by the NASD and repeated assurances by Gans and Wilstein that such deficiencies would be corrected.

Under these circumstances, I have concluded that a 45-day suspension from the securities business for CCC, Gans and Wilstein will adequately impress upon them the need for strict compliance with the securities laws in the future and thus best serve the public interest.

Accordingly, IT IS ORDERED as follows:

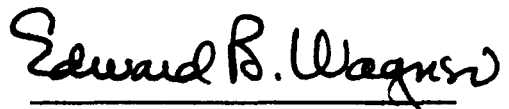
- (1) John R. Radin, Sr. is barred from association with any broker or dealer;
- (2) the registration of Continental Consultants Corp. as a broker-dealer is suspended for a period of 45 days;

(3) Herman R. Gans is suspended from being associated with any broker or dealer for a period of 45 days; and

(4) Hy Wilstein is suspended from being associated with any broker or dealer for a period of 45 days.

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.^{22/}


Edward B. Wagner
Administrative Law Judge

Washington, D.C.
April 24, 1975

^{22/} 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.