ADMINISTRATIVE PROCEEDING
FILE NO. 3-3253

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

KOSS SECURITIES CORPORATION

THEODORE KOSS

INITIAL DECISION

December 12, 1973
Washington, D.C.

David J. Markun
Administrative Law Judge

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APPEARANCES: Allan A. Martin and Jerome M. Weinberg, attorneys, with William D. Moran, Regional Administrator, and Donald N. Malawsky, Allan M. Lerner, Jerome M. Weinberg, attorneys, New York Regional Office, on the briefs (assisted by Robert Perez, Legal Clerk), for the Division of Trading and Markets.

N. George Turchin, New York, N.Y., attorney for Respondent Koss Securities Corporation.

Morris Weissberg, New York, N.Y., attorney for Respondent Theodore Koss.

BEFORE: David J. Markun, Administrative Law Judge

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated September 14, 1971 ("Order"), pursuant to Sections 15(b), 15A, and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether twelve (12) named respondents committed charged violations, inter alia, of the registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") [1] and of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 [2] thereunder, in connection with transactions in the common stock of Spectrum, Ltd. ("Spectrum"), and the remedial action, if any, that might be appropriate in the public interest.

An evidentiary hearing involving six hearing days was held in New York, N.Y., during July, 1973, as respects Respondents Koss Securities

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1 / 15 U.S.C. 77e. Under Section 5(a) it is unlawful to sell or deliver a security by use of the mails or the facilities of interstate Commerce unless a registration statement is in effect as to the security. Under Section 5(c) it is unlawful to offer to sell or offer to buy a security by such means unless a registration statement has been filed as to the security.

2 / 15 USC 77q(a); 15 USC 78j(b); 17 CFR 240.10b-5. Rule 10b-5 provides as follows:

> Rule 10b-5. Employment of Manipulative and Deceptive Devices. It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Corporation ("Koss & Company," "Koss Corp." or "Registrant")[3] and Theodore Koss ("Koss"), all other respondents having been removed from the proceeding through severance[4] or settlement.[5] Accordingly, this initial decision has application only to the two remaining respondents, referred to herein as the "Koss respondents" or simply as "Respondents".

The parties have filed proposed findings, conclusions, and supporting briefs[6] pursuant to Rule 16 of the Commission's Rules of Practice, 17 CFR 201.16. The findings and conclusions herein are based upon the record and upon observation of the demeanor of the various witnesses. Preponderance of the evidence is the standard of proof applied.

FINDINGS OF FACT AND LAW

The Respondents

Respondent Koss Corp. is currently registered as a broker-dealer with the Commission pursuant to Section 15(b) of the Exchange Act, and

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3 / See footnote 7 below.

4 / Respondent Morgan, Kennedy & Co., Inc., on the motion of its trustee in liquidation, concurred in by counsel for the Division of Enforcement ("Division"), was severed from the proceeding at the commencement of the hearing. R., pp. 32, 33.

5 / Securities Exchange Act Releases Nos.: 9641, June 11, 1972; 9656, July 6, 1972; 9724, August 11, 1972; 9952, January 22, 1973; 10533, November 30, 1973.

6 / Counsel for Respondents filed a two-page letter dated October 25, 1973, challenging certain positions taken in the Division's reply brief, which letter has also been considered.

through its predecessor, Koss & Company, a sole-proprietorship owned by Koss, has been so registered since 1963.[7] Registrant is a member of the National Association of Securities Dealers, Inc. ("NASD").[8] Registrant was incorporated in New York on August 1, 1969 and has its offices in New York, N.Y.

Respondent Koss is the president and 60% owner of Registrant. His wife, Katherine Koss, is secretary-treasurer and owns the remaining 40% of the firm.

Violations of the Registration Provisions of §5(a) of the Securities Act Through Transactions in Unregistered Stock of Spectrum, Ltd.

The record establishes, as alleged in the Order, that Registrant[9] wilfully violated and that Koss wilfully aided and abetted violations of

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7 / Although Koss Corp.'s application to become a registered broker-dealer with the Commission did not become formally effective until February 26, 1970, and the withdrawal from registration as a broker-dealer of Koss & Company did not become formally effective until May 8, 1970, the parties have stipulated that Koss Corp. succeeded to the business of Koss & Company on or about December 31, 1969, and an application for registration as a Broker-Dealer received by the Commission from Koss Securities Corp. on January 27, 1970, shows the "Date of succession" as December 31, 1969. Rule 15b1-3 under the Exchange Act provides that when a broker-dealer succeeds to and continues the business of another registered broker-dealer, the registration of the predecessor shall be deemed to remain effective as the registration of the successor for a period of 60 days, provided that an application for registration is filed by such successor within 30 days. The record indicates a number of transactions subsequent to Dec. 31, 1969 executed in the name of Koss & Company. Wherever the term "Registrant" is used herein it refers either to Koss Corp. or to its predecessor, or to both, depending upon the time frame and the context generally.

8 / The NASD is a national securities association within the meaning of Section 15A of the Exchange Act.

9 / This charge against Registrant was added by amendment to the Order offered and allowed at the outset of the hearing. (ALJ Exhibit #1).

Section 5(a) of the Securities Act through the sale of shares of common stock of Spectrum during the first quarter of 1970, through the use of jurisdictional means,[10/] for which shares no registration statement was in effect.[11/]

In the latter part of January, 1970, at the suggestion of Heinrich "Hank" Lorin ("Lorin"), a customer of Koss's, one Louis Marder ("Marder") telephoned Koss, identified himself as the president of Central National Fund ("Central"), stated he was either an officer or director of Spectrum, and said that Central had 12,000 shares of Spectrum that it would like to sell. This having been the first time that Koss had ever heard of or from Marder, Spectrum, or Central, and the 12,000 shares having represented in Koss's view a sizable block of stock, Koss asked Marder to supply him with some information concerning Spectrum;[12/] however, Koss made no inquiry of Marder or any other source as to Central or its relationship to Spectrum.

Thereafter, on or about January 28, 1970, Registrant received from Marder the 12,000 Spectrum shares owned by Central that Marder and Koss had earlier discussed. In the course of a second telephone conversation

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10/ The mails and telephones were utilized in connection with the violative sales.

11/ The Order also alleges violation of Section 5(c) of the Securities Act through offer for sale of Spectrum shares "when no registration statement was in effect as to such securities" but fails to allege, as required by §5(c), that no registration statement had been filed with reference to such shares. Accordingly, no violation of Section 5(c) is found herein.

12/ See pp. 12, 21 below for a discussion of the "information" regarding Spectrum that was furnished.

between Marder and Koss the two agreed that Registrant would purchase the 12,000 Spectrum shares at $.50 per share. That having been done, Koss on or about February 4, 1970 placed the shares in the firm's trading position and had the transfer agent, Registrar and Transfer Company, transfer the shares into Registrant's name.

Thereafter, during the period from about February 5, 1970, to about March 16, 1970, Registrant sold to its customers from the firm's trading position 28,300 shares of Spectrum stock, including the 12,000 shares it had purchased from Central.

Contrary to Respondents' contention, the evidence does establish that the 28,300 Spectrum shares Registrant sold from its firm-trading account were unregistered. Respondents urge that there is no proof that these particular shares were in fact unregistered. They note that of the some 7 million shares of Spectrum outstanding at the time 150,000 13/ of such shares were registered. Next, Respondents point out that the twelve one-thousand-share stock certificates (numbered U8566 to U8577) delivered by Central to Registrant are not included among the stock certificates received by Central as a shareholder of Westward Investment Corp. ("Westward") when Westward was merged into Spectrum and received Spectrum stock in exchange. Respondents observe that the 174,496 shares of Spectrum received by Central in November, 1969, upon the merger of Westward into Spectrum were represented by 173 stock certificates for 1,000 shares each, certificate numbers U5762 to U5934 and one certificate for 1,496 shares, bearing the number U5935.

13/ While only 50,000 shares were the subject of a registration statement, the number of free-trading shares was increased to 150,000 in a 3 for 1 split of the stock.

From these facts Respondents urge that the 12,000 shares of Spectrum sold by Central to the Registrant could well have been among the 150,000 outstanding registered shares and that, at any rate, the Division has not carried its burden of proving that the shares were unregistered.

The record does not show how or from what source Central obtained the specific 12 stock certificates representing 12,000 shares that it sold to Registrant. But that fact is not relevant here in light of the uncontradicted testimony of Andrew R. Buzzelli ("Buzzelli"), manager and assistant vice-president of the transfer agent (Registrar and Transfer Company)[14/], after examination of his transfer records, available at the hearing, that none of the shares of Spectrum transferred to Registrant were among those outstanding Spectrum shares that were registered. This testimony apparently applied not only to the 12,000 Spectrum shares sold to Registrant by Central but to the remaining 16,300 shares of Spectrum sold by Registrant out of its trading account.[15/]

Witness Buzzelli has had many years' experience at his work and was fully subject to cross examination. Based upon these factors and upon observation of his demeanor during direct and cross examination, his testimony is credited.[16/] Accordingly, it is concluded that the 28,300 shares of Spectrum stock that Registrant purchased for and sold out of its trading account, which shares included the 12,000 shares purchased from Central, were unregistered.

14/ This was the transfer agent during all of the relevant period, i.e. the first quarter of 1970, and for some time prior thereto.

15/ In addition to the 12,000 Spectrum shares purchased from Central, Registrant had purchased for its trading account 17,500 shares from broker-dealers during the relevant period and also purchased 8,000 shares from its customer, Lorin.

16/ As already noted, there is no contrary evidence on this point in the record

Registrants contend, alternatively, that the transactions in Spectrum stock in its firm trading account were exempt[17/] from the registration requirements of Section 5 of the Securities Act as "transactions by a dealer" under Section 4(3) of the Securities Act, 15 U.S.C. §77 d(3).

As the Courts have recognized, the Securities Act of 1933, 15 U.S.C. 77a, et seq., requires the disclosure of pertinent business and financial data in connection with the public offering of securities so that investors will be provided with a means of reaching an informed judgment as to the investment merits of the security. Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 463 (1959).[18/] Section 5, 15 U.S.C. 77e, provides, generally, that it is illegal to offer to sell a security unless a registration satement containing prescribed information has been filed with the Commission, and that it is illegal to sell or deliver a security unless a registration statement has become effective. This prohibition was not intended to prohibit everyday trading between members of the investing public; therefore, Section 4(1) contains an exemption for "transactions by any person other than an issuer, underwriter or dealer," 15 U.S.C. 77d(1). Section 4 exempts certain designated transactions by issuers and dealers as well. But that section leaves subject to Section 5 all transactions that involve an "underwriter." The term "underwriter" is broadly defined to include anyone who directly or indirectly participates in a distribution of securities from an "issuer" to the public; and for this purpose the term "issuer" is defined "to include not only the issuer but

17/ The burden of proving clear entitlement to an exemption lies upon him who claims the exemption. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126 (1953).

18/ See also, Securities and Exchange Commission v. North American Research and Development Corp., 424 F.2d 63 (C.A. 2, 1970); Securities and Exchange Commission v. Culpepper, 270 F. 2d 241 (1959); Securities and Exchange Commission v. Chinese Consol. Benev. Ass'n 120 F. 2d 738 (1941), certiorari denied, 314 U.S. 618 (1942).

also affiliates or subsidiaries of the issuer and persons controlling the issuer. . . ." H.R. Rep. No. 85, 73d Cong., 1st Sess. 13 (1933). The breadth of this definition has been emphasized in Securities and Exchange Commission v. Chinese Consol. Benev. Ass'n., 120 F. 2d 738 (1941), certiorari denied, 314 U.S. 618 (1942), and Securities and Exchange Commission v. Culpepper 270 F. 2d 241 (1959). Thus, the registration provisions of the Act were intended generally to cover sales of stock by controlling persons through intermediaries. As the courts have emphasized, the registration provisions of the Securities Act and the definition used therein "are so designed as to prevent any circumvention of the registration requirements by devious and sundry means." Securities and Exchange Commission v. North American Research and Development Corp., 424 F. 2d 63, 71 (1970).

Under the facts presented by this record, as found below, Respondents' claim of exemptions under §4(3) lacks merit, at least as to the 12,000 shares Registrant acquired from Central through Marder.

It is well settled that the exemption afforded a dealer under Section 4(3) of the Securities Act does not apply to a dealer engaged in a distribution.[19/] Section 4(3) exempts only transactions by dealers qua dealers and not transactions by dealers qua underwriters.[20/]

Before its merger into Spectrum in November, 1969, Westward, a Nevada corporation whose shares were unregistered and privately held, was controlled by Marder, its president. One of the more substantial holders of Westward stock prior to the merger was Central, which was also controlled by Marder. The stockholders list of Westward indicates that on February 12, 1969, Central

19/ SEC v. Mono-Kearsarge Con. Min. Co., 167 F. Supp. 248 (1958); SEC v. Culpepper, 270 F. 2d 241, 246-7 (C.A. 2, 1959); SEC v. North American Research & Development Corporation, 280 F. Supp. 106, 124-5 (1968).

20/ Loss, Securities Regulation, Vol. IV, p. 2329 (Supplement to Volume I, 2d edition.)

became a shareholder of Westward, having obtained 192,000 shares from Marder. Westward's stockholders list further indicates that of some 92 of its shareholders, some 35 obtained their shares from Marder, and the record indicates that all or many of these shareholders were under Marder's control.

When the merger of Westward into Spectrum occurred, Westward received in exchange for its assets 4,596,465 shares of Spectrum stock, and these shares were in turn distributed on a pro rata basis[21/] to the existing Westward shareholders. In accordance with instructions and a schedule provided the transfer agent by Marder, the stock certificate for 4,596,465 shares to Westward was cancelled and new certificates were issued to the Westward shareholders. In this exchange Marder personally received 20,903 shares, Central received 174,496 shares, and other persons controlled by Marder received varying numbers of shares.[22/]

At the time of the merger Spectrum was a little known corporation whose interests lay in the franchising field[23/] and which was in need of additional capital. One of the purposes of the merger was to bring into the surviving corporation the purported franchising expertise and experience of Marder, who was to become, directly or indirectly, a dominant element in the management of Spectrum. By using Central and other controlled recipients of Spectrum stock received as a result of the merger, Marder planned to sell off substantial amounts of the Spectrum stock in what amounted to a public distribution of

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21/ 5,057,536 shares of Westward were held at the time by its shareholders.

22/ Exhibits 14,30. (The Division's exhibits are numbered and those of the Respondents are lettered.

23/ Its first endeavor was to franchise TIE CITY, a mens' accessory store specializing in medium priced neck ties and related accessories. TIE CITY had been in business since 1947 and was then operating some 19 stores in the Metropolitan New York area. Spectrum had acquired $800,000 worth of prepaid advertising from Downe Communications (publisher of Ladies Home Journal, American Home, and Family Weekly), which it planned to utilize in its franchising programs.

Spectrum.[24] This made Marder a statutory underwriter under Section 2(11) of the Securities Act and made those who participated in the distribution, directly or indirectly, i.e. Respondents, sub-underwriters or co-participants in the illegal distribution of unregistered stock.

As part of the plan to distribute unregistered Spectrum stock Marder obtained from Spectrum's general counsel, Morton Berger ("Berger")[25], an opinion letter dated November 10, 1969 ("Berger opinion letter") in which Berger stated his opinion, based on data given him by Marder or otherwise available to him, as to which Spectrum shares received by former Westward stockholders should bear restrictive legends and which might not have to. The Berger opinion concluded, among other things, that the shares issued to Marder personally should be marked restricted because he was a control person of Westward. However, the Berger opinion letter did not indicate that the Spectrum shares received by Central should be marked restricted because Marder had not told him, and Berger was not otherwise aware, of the fact that Marder controlled Central. Berger testified that if he had been aware of such

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24/ 15 U.S.C. 77b(11). The text reads:

> "(11) The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

25/ Berger was not a "general counsel" of Spectrum in the sense that he was a regular employee of Spectrum. Berger was in the private practice of law, but undertook to handle a number of general legal problems for Spectrum on a continuing basis for about 6 months for which he was compensated in stock (20,000 shares of unregistered shares) of Spectrum, inasmuch as the firm was short on cash.

control relationship he would clearly have concluded that Central's Spectrum stock should have been marked restricted. The Berger opinion letter was utilized by the transfer agent in concluding whether Spectrum shares issued to former Westward shareholders should be marked with a restrictive legend or not.

In the latter part of January, 1970, Marder telephoned Koss[26/], identified himself as the president of Central and an officer or director of Spectrum, and indicated that he wished to sell 12,000 shares of Spectrum held by Central. Koss was unfamiliar with Spectrum, and in response to his inquiry to Marder concerning it Koss received some "press releases"[27/] concerning Spectrum, the Berger opinion letter, and a letter of November 13, 1969 from the transfer agent to Marder, setting forth various shareholders, including Central, whose Spectrum stock was stated to be freely tradeable.[28/]

The record establishes the following chronology of events concerning Registrant's transactions in, or actions respecting, Spectrum stock obtained from Central through Marder or from other sources, e.g. other broker dealers.

On January 28, 1970, Registrant received from Central 12,000 shares of Spectrum stock. On February 2, 1970, Registrant received an additional 18,000 shares of Spectrum from Central. On January 28, 1970 (trade date) and February 4, 1970 (settlement date) Registrant purchased for its trading account

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26/ Koss had not met or had business dealings with Marder before this call; Marder called Koss at the suggestion of Lorin, a customer of Koss's, as already noted above.

27/ The so called press releases were actually reports to shareholders of Spectrum. See page 21 below.

28/ As it happens, Respondents are not able to claim reliance upon the Berger opinion letter and the related November 13, 1969 letter from the transfer agent because the Central shares there identified by certificate numbers do not include the 12,000 shares purchased and resold by Registrant, as Respondents have themselves pointed out in the course of arguing that the 12,000 shares might have been registered. See exhibits 13T, 13U, and T. Koss's Exhibit B.

from Central 12,000 of the Spectrum shares received from Central, at a price of $.50 per share. On February 5, 1970, Registrant received from Central an additional 100,000 shares of Spectrum stock which were placed in Central's account, like the previous 18,000 shares, and on March 10, 1970 an additional 70,000 shares of Spectrum were so received. On March 26, 1973, after Koss had earlier concluded there was a question as to the free tradeability of the Spectrum shares held in Central's account with Registrant, and had advised Marder he wanted to return such shares to him, Koss, at Marder's direction, "journaled" or transferred 80,000 of Central's Spectrum shares to Lorin, the customer of Registrant who had first "introduced" Marder to Koss. On April 2, 1970, Registrant returned to Central the 108,000 Spectrum shares remaining in Central's account.[29/]

During the period from about February 5, 1970 to about March 16, 1970, Registrant sold from its trading account 28,300 shares of Spectrum to Registrant's customers, including the 12,000 shares of Spectrum that Registrant had purchased from Central through Marder.

There were numerous red flags that should have put Koss on notice of the need for making further inquiry before participating in a distribution of unregistered Spectrum shares by selling the 12,000 Spectrum shares acquired from Central.[30/]

29/ Interestingly enough, these remaining 108,000 shares of Spectrum were registered variously in the names of Central, Koss & Co., and 7 other broker-dealer firms or individuals.

30/ SEC v. Mono-Kearsarge Con. Min. Co., 167 F. Supp. 248, 259 (1958); Cf. Dlugash v. SEC, 373 F. 2d 107 (C.A. 2, 1967).

Thus, Koss had no knowledge of Spectrum or of Central when Marder first telephoned him with regard to Spectrum and Koss had not previously met or dealt with Marder. Nevertheless, even though Koss learned from Marder that Marder was the president of Central and an officer or director of Spectrum and learned from examining the Berger opinion letter[31/] that Marder's 20,903 Spectrum shares (received as a result of the merger of Westward into Spectrum) had been marked restricted, Koss did not make the necessary inquiry to ascertain how Central's stock could be free-trading if Marder's was not or to find out what the precise relationship of Marder to Central and to Spectrum was. Koss failed to make or to initiate such needed inquiry even though by March 5, 1970, about the time Registrant commenced selling Spectrum stock to its customers, Marder had sent Registrant a total of 130,000 shares of Spectrum, a not insubstantial block.[32/] The record indicates that Koss at no time asked Marder how many shares Central had and intended to sell.[33/] As already noted, by about March 10, 1970, Marder had sent Koss a total of 200,000

31/ At the hearing Koss testified he doubted that he read the Berger opinion letter before selling the 12,000 Spectrum shares. This testimony is not credited on the basis of: his demeanor; the fact that, as he testified, it was his custom to read such opinion letters before having transactions in a stock; and the fact that such opinion letter was one of the items Marder furnished him in response to Koss's request that he be given some data on the Spectrum stock.

32/ Thus, the bulk of the 12,000 shares of Spectrum purchased by Registrant from Central were sold after Registrant had received from Central a total of 130,000 shares. But see footnote 34 below.

33/ The transfer agent's letter of November 13, 1969, to Marder, based on the Berger opinion letter, which was also furnished Koss, should have made it evident to Koss that Central had at least 174,496 shares of Spectrum, i.e. the shares it had received through the merger.

shares of Central's Spectrum stock.[34/] This figure exceeded the 174,496 shares of Spectrum indicated as belonging to Central, and as being freely tradeable stock, in the transfer agent's letter of November 13, 1970, to Marder. (See footnote 33 above).

The record is not entirely clear as to precisely when Koss came to have his doubts about whether Central's Spectrum stock was freely tradeable. Interestingly, however, none of the Spectrum stock held in Central's account with Registrant for possible sale in agency transactions was ever sold, even though Registrant was making a market in Spectrum during the relevant period in which it sold off the 12,000 shares of Spectrum it had purchased from Central as a principal. This fact gives added support to the conclusion that Koss was well aware of factors that should have prompted him to make fuller inquiry before proceeding to sell off to customers the 12,000 shares purchased from Central.

34/ Respondents contend that Koss was unaware until "late February" that Marder had sent Spectrum shares beyond the 12,000 shares that Registrant purchased as principal into Central's account with the Registrant. Respondents contend this was done by arrangement with Lorin, the customer of Registrant who had first suggested that Marder talk to Koss about Spectrum (see pp. 26-8 below regarding Respondents' contention that Marder's investigative transcript of testimony would support this contention). It seems unlikely that in a firm as small as the Registrant's (the firm had some 7 registered representatives), and given Koss's prior conversations with Marder, Koss would have been unaware of the receipt of the additional shares from Spectrum. Assuming, arguendo, that Koss was unaware of that fact until late February, this would still not excuse his failure to inquire as to the 12,000 shares in light of what he had learned from Marder about them and about Marder's relationship to Central and Spectrum or to inquire of Marder as to how many additional shares Central might have that it wished to sell. Moreover, the record does not indicate that Koss made any real inquiry of Lorin, who had suggested Marder call Koss, as to Marder's operations with Spectrum stock.

Clearly, Respondents have failed to carry their burden[35/] of proving that Registrant's sales of the 12,000 shares of Spectrum stock were exempt from the registration requirements.[36/] Their violations of Section 5(a) of the Securities Act through sale of the unregistered shares were wilfull.[37/]

35/ See footnote 17 above.

36/ Respondentes urge they were entitled to rely upon the indications in the Berger opinion letter and in a subsequent opinion letter of Dec. 4, 1969, from Stuart Schiffman, an attorney, to one William Doyen (Exhibit 28), that the Spectrum shares held by Central were freely tradeable. The Schiffman letter was written after Berger refused to write an additional opinion letter, after having learned in the interim of Marder's control relationship to Central and other former shareholders of Westward. In light of the numerous red flags of which Respondents were or should have been aware, they had no basis for relying upon such opinion letters without making further requisite inquiry. Also see footnote 28 above respecting the apparent inapplicability of the opinion letters, which dealt with the Spectrum shares acquired by Central in the Westward merger into Spectrum, to the specific 12,000 Spectrum shares here involved.

37/ All that is required to support a finding of willfulness is proof that a respondent acted intentionally in the sense that he was aware of what he was doing and either consciously, or in careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. Hanley v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (2d Cir. 1969); NEES v. Securities and Exchange Commission 414 F.2d 211, 221 (9th Cir. 1969) Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 109-10 (2d Cir. 1967); Tager v. Securities and Exchange Commission, 344 F.2d 5,8 (2d Cir. 1965).

Violations of the Antifraud Provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder in Connection With Transactions in Spectrum, Ltd. Stock

The Order alleges that Registrant and Koss wilfully violated and wilfully aided and abetted violations of the antifraud provisions of Section 17(a) (15 U.S.C. 77q) of the Securities Act and Section 10(b) (15 U.S.C. 78j) of the Exchange Act and Rule 10b-5 thereunder[38/] through use of jurisdictional means[39/] by making untrue statements of material facts and by omitting to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the offer and sale of Spectrum stock to their customers. The false or misleading statements or omissions allegedly concerned, among other things, the financial condition of Spectrum, the operations and business of Spectrum, and the market activity of Spectrum.

On or about March 6, 1970, Koss approached at their place of employment E.W. and M.F., note tellers at a bank near the Registrant's offices, and recommended to them the purchase of Spectrum. Koss told

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38/ The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or instrumentalities of interstate commerce or of any facility of any national securities exchange in connection with the sale of any security by means of any untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

39/ The record establishes that the mails and telephones were utilized in carrying out the allegedly violative transactions.

them he had a good stock that was going to make a lot of money for them if they got in then on the boom. He told them the stock was going to go up and might go up as high as $30 in a short time. He recommended they buy 1,000 shares each and urged that they buy promptly because the stock would be going up quickly.

Based on Koss's representations and recommendations, E.W. on Friday, March 6, 1970, jointly with her husband, purchased 1,000 shares of Spectrum from Registrant and M.F., jointly with her husband,[40/] purchased 1,000 shares on Monday, March 9, 1970.

Subsequently, after Spectrum had declined in price, Koss told E.W.'s husband ". . . it is going to make its move, it is just holding there, you know, sit tight with it right now." In response to M.F.'s query about why Spectrum was not moving up Koss advised her to be patient and assured her that "Things will come along."

Koss did not advise these purchasers of the financial condition of Spectrum or of what its operations and business were.

Koss's testimony that he did not solicit the purchase by E.W. and that he cautioned the purchasers of the risks involved in purchasing this speculative security is not credited. This conclusion is based on the contrary testimony of the customers and upon observation of the demeanor of Koss and the two witnesses.

40/ While each of these two customers approached by Koss consulted with her husband before the purchases were made, it appears that the decision to buy or not to buy was left essentially to the wives and that the decisions to buy were predicated upon Koss's recommendations and representations concerning the stock.

On February 16, 1970, J.T., an assistant principal in the New York City schools, purchased from the Registrant 1,000 shares of Spectrum, based upon Koss's recommendation of the stock and his representations that he knew of the company, had personally checked it out, and thought that it had a potential to appreciate in value. Apart from telling the customer that Spectrum was in the franchise field Koss did not advise him of the issuer's business or operations or of its financial condition.

On or about January 19, 1970, M.S. (a businessman), while at Registrant's offices,[41] was approached by Koss concerning Spectrum, a firm M.S. had not previously heard of. Koss told M.S. that Spectrum was the parent or owner of "Tie City". Koss stated that Spectrum should appreciate considerably within two or three weeks and that it should be a good investment for him. Based on these representations by Koss, M.S. purchased 300 shares of Spectrum.[42]

At about the same time, i.e. on or about January 19, 1970, H.S. (also a businessman), brother of M.S., received a phone call from Hersh Knopfler ("Knopfler"), his registered representative at the Registrant firm.[43] Knopfler told H.S. he had a good stock he wanted him to

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41/ A relative of M.S. was employed at the time by Registrant and M.S., as well as H.S., his brother, would occasionally drop by to chat with her.

42/ The shares were actually purchased in his wife's name, S.S.

43/ Knopfler was also the registered representative of M.S.

purchase and that he wanted him to talk to Koss about it. Koss then got on the phone and told H.S. that he had a stock by the name of Spectrum that should appreciate considerably very shortly. Koss told H.S. that his brother, M.S., had been there previously and had bought some of the stock and that H.S. should buy himself a thousand shares. Based upon Koss's recommendation, H.S., jointly with his wife, purchased 300 shares of Spectrum.

About a month later, on or about February 16, 1970, M.S. and H.S. were both at the Registrant's offices and expressed dissappointment over the fact that Spectrum, instead of having risen sharply, had fallen some in price. Koss assured them that, based on his inside information about the company, the stock should double in two to three weeks and recommended they buy additional shares.[44/] Based on Koss's reassurances and sanguine predictions, M.S. and H.S.[45/] each bought an additional 300 shares of Spectrum.

Koss denies making many or most of the predictions and representations to customers found above. Based upon observation of the demeanor of Koss and the witnesses and upon the record as a whole, the denials by Koss are not credited.

44/ The record indicates Koss offered to give them additional shares without commission charge, but this would have been normal since the shares sold were out of the Registrant's trading account. The record is not clear whether this constituted an additional "inducement" or not in the minds of the purchasers.

45/ They purchased these additional shares jointly with their respective wives.

The Registrant's "due diligence" file on Spectrum consisted of some company reports to shareholders, containing no audited statements (Exh. 44); the Berger opinion letter of November 10, 1969 (Exh. 13 U-W); and the transfer agent's letter of November 13, 1969, to Spectrum, addressed to Marder (Ex. 13T).[46/] None of these items contained or afforded any reasonable basis for Koss's predictions regarding Spectrum, nor does the record indicate that Koss was aware of from any other source, or that there existed, any reasonable basis for the making of such predictions.

The Commission has repeatedly held that predictions of a specific and substantial increase in the price of a speculative security within a relatively short period of time are inherently fraudulent and cannot be justified, and it is not necessary that such predictions take the form of a "guarantee" to warrant a conclusion that they are fraudulent.[47/] Therefore, the argument made by Respondents that two or three of the investor witnesses who testified were relatively sophisticated investors who made determinations on their own to purchase Spectrum is without validity, even assuming, arguendo, the factual premises upon which the

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46/ Koss testified he was aware other broker-dealers were making a market in Spectrum also. He further testified that he talked to Lorin about the stock but there is no indication Koss learned anything of significance from Lorin.

47/ James De Mammos, Securities Exchange Act Release No. 8090, p. 3, June 2, 1967; Charles P. Lawrence, Securities Exchange Act Release No. 8213, p. 3, December 19, 1967; Sanford H. Beckart, Securities Exchange Act Release No. 8269, p. 3, March 8, 1968; Irving Friedman, Securities Exchange Act Release No. 8076, p. 6, May 16, 1967; Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725, p. 4, October 18, 1965.

argument is founded.[48/]

Moreover, both the Courts and the Commission have held that it is a clear violation of the antifraud provisions for a broker-dealer to represent to his customers that any security will soon appreciate in value if he does not have an adequate basis for such representations.[49/]

In a memorandum to his registered representatives Koss set forth 10 "Know Your Customer" rules, of which No. 6 provided as follows:

> "6. No stock is to be recommended until all possible information about the Company is known; a. Products; b. management; c. Financials; d. potential; e. capital structure; is brought to the Registered Reps attention and to mine."

From the record it is clear that Koss lacked any reliable "financials" on Spectrum and that he was in no position to assess its earnings "potential" or its possible price movements. In short, he violated Registrants and his own rules in recommending Spectrum without any reasonable basis for doing so.

The antifraud violations which Respondents thus committed were wilfull.[50/] The mails and telephones were utilized in the course of

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48/ Of the five customers who testified, only M.S. and H.S. senior businessmen, could be characterized as relatively sophisticated or knowledgeable investors. Yet even they, the record shows, did rely on Koss's representations and assurances regarding Spectrum.

49/ R.A. Holman & Co. v. S.E.C., 366 F. 2d, 446 (C.A. 2d 1966), at pp. 449-450; S.E.C. v. R.A. Holman & Co., 366 F. 2d 456 (C.A. 2d 1966), at p. 458, reh. den per curiam, 377 F. 2d 665 (1967); Berko v. S.E.C., 316 F. 2d, 137 (C.A. 2d 1963) at p. 143. For the Commission's holdings, see decisions cited in footnote 47 above.

50/ See footnote 37 above.

the stock sales involved in the violations.

Alleged Failure Reasonably To Supervise.

The Order alleges, and the Division seeks a finding and conclusion, that Registrant failed reasonably to supervise Koss with a view to preventing the violations charged in the Order in violation of the provisions of Section 15(b)(5)(E) of the Exchange Act.[51/]

Registrant was a relatively small firm during the relevant period and Koss was himself its only principal and its chief supervisor.[52/] The record establishes, as found above, that Koss wilfully aided and abetted violations of Section 5(a) of the Securities Act and that he personally wilfully violated Sections 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Registrant is also found herein to have wilfully violated the same provisions of the two acts. But Registrant's violations resulted not from a failure to supervise Koss or others but because under the concept of respondeat superior Registrant is responsible for the conduct of its agents, notably Koss, who acted in its behalf.[53/] In view of these circumstances and considerations it would be

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51/ Section 15(b)(5)(E) of the Exchange Act, as added by the 1964 amendments, provides an independent ground for the imposition of a sanction against a broker or dealer or a person associated with a broker or dealer who ". . . has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision."

52/ During the relevant period, roughly the first quarter of 1970, Registrant had some seven registered representatives, who were directly under Koss's supervision, and some 8 back-office employees who were under the direct supervision of the cashier. The cashier, in turn, was subject to the general supervision of Koss.

53/ Armstrong, Jones & Co. v. S.E.C. (C.A. 6, 1960), 421 F. 2d 359,362.

inappropriate and inconsistent to find Registrant guilty of a failure reasonably to supervise Koss.[54/]

Respondents' Contentions

Apart from the contentions and arguments of the Respondent that have been considered and ruled upon explicitly or implicitly in making the foregoing findings and conclusions, a number of the contentions made by the Respondents are considered separately in this part of the decision.

Respondents argue that in January of 1970 in the course of its investigation of Spectrum the Commission through its staff became possessed of knowledge, i.e. that 4,596,465 unregistered Spectrum shares had been issued incident to the merger of Westward into Spectrum, that imposed on it a statutory duty to halt trading in Spectrum or at least to warn broker-dealers not to trade such shares, and that the Commission's failure to take such action bars this proceeding against Respondents. It is unclear whether this argument is predicated upon a theory of estoppel, as some of its language suggests, or upon entrappment, which one of the inapposite cases cited in support thereof suggests, or upon some other, unarticulated theory. In any event, the argument is without merit. Firstly, the record does not support a conclusion that the

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54/ Cf. In the Matter of Fox Securities Company, Inc., Exchange Act Release No. 10475, November 1, 1973, at pp. 6-7.

Commission at any point came under a statutory duty to halt trading in Spectrum. Secondly, estoppel as a general proposition does not run against or foreclose the Government. Thirdly, there is no support in this record for any entrappment theory.

Another contention Respondents make is that they have been denied the equal protection of the laws by having been, as they assert, "singled out" for the application of severe sanctions while others charged in the Order were permitted to settle the charges against them on more favorable terms while still other firms allegedly trading Spectrum were not even charged. Respondents allege that this purportedly discriminatory "singling out" of Respondents for harsher treatment resulted from their failure to agree to a stated settlement offer proposed by the Division and from their having brought an action in the U. S. District Court in New York seeking, inter alia, to enjoin the Commission's staff from requiring disclosure of the pendency of the instant proceeding in connection with securities offerings in which Registrant was an intended underwriter.[55/]

This argument lacks merit for a number of reasons. Firstly, it is well settled that the question of what entities or individuals are to be the subject of proceedings lies in the discretion of the Commission, and a respondent cannot defeat charges against him by

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55/ The U. S. District Court rendered its decision on October 17, 1973. Theodore Koss and Koss Securities Corporation, v. S.E.C., U. S. D. C. for S.D. of N.Y., (opinion, 73 Civ. 2619).

arguing that others guilty or involved have not been charged.[56] Secondly, the record does not support Respondents' contention that the Division's requested sanctions or its conduct of this proceeding generally was motivated in any way by the factors alluded to by Respondents. Thirdly, the sanctions that may be approved by the Commission to effect settlements are not necessarily comparable to those imposed upon respondents who choose a full adjudication under the APA.[57] And, lastly, the sanctions urged by the Division are not necessarily those if any, that will be imposed by the Commission, whose judgment in this respect will necessarily be based upon the entire record, and only upon such record.[58]

A third contention Respondents make is that the Division withheld from them purportedly exculpatory material until August, 1973, the month following completion of the hearing in July. Respondents state

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56/ In the instant proceeding, a total of twelve respondents were named, and there is no evidence in the record that would permit a conclusion that other persons or entities should also have been the subject of proceedings.

57/ The appropriate remedial action as to a particular respondent depends upon the facts and circumstances applicable to him and cannot be measured precisely on the basis of action taken against other respondents, see Dlugash v. S.E.C., 373 F. 2d 107, 110 (C.A. 2, 1967), particularly where, as here, the action respecting other respondents is based on offers of settlement. See Cortland Investing Corp., Exchange Act Release No. 8678, pp. 8-9 (August 29, 1969).

58/ Nevertheless, the Division is clearly entitled to express its views as to appropriate sanctions, and there is nothing in the record and nothing in the conduct of Division counsel at the hearing to suggest any improper motivation on their part in the making of such recommendations.

that in August, 1973, Division counsel wrote Respondents' counsel to make available for their examination the transcript of the investigative testimony of Marder that the Commission staff had taken on December 9, 1970. Respondents contend that Marder's investigative transcript[59/] is exclupatory in that it would corroborate Respondent Koss's testimony that he was unaware that Central had sent Registrant 188,000 shares of Spectrum over a given period of time in addition to the 12,000 shares of Spectrum which Registrant received from Central and purchased for its own trading account. Respondents contend that the non-availability of the Marder transcript to them prior to the hearing denied them due process, relying upon the Brady v. Maryland[60/] line of cases.

The Division responds to this argument by stating that it does not consider the Marder testimony exclupatory but that, not wishing to rely on its own judgment, it made the testimony available to counsel for Respondents and indeed offered to make it a part of the record, an offer the Respondents declined.

After having learned of the Marder investigative transcript, Respondents made no motion for leave to adduce additional evidence under 17 C.F.R. 201.21(d) of the Commission's Rules of Practice. Assuming, arguendo, that Marder's investigative transcript of testimony would corroborate Koss's testimony that he had no actual knowledge that Marder had

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59/ Marder, according to Division's reply brief, had died prior to the commencement of the hearing and thus could not have been called as a witness by any of the parties.

60/ 373 U. S. 83 (1963).

sent Registrant a total of 200,000 shares of Spectrum into Central's account with Registrant during the first quarter of 1970, this would still not exonerate Respondents in view of the findings heretofore made above that the circumstances were such that Koss should have made inquiry and made himself aware of the amount of Spectrum stock that Central had for sale and intended to sell through Registrant. In short, if Koss didn't in fact know, he should have known in light of the totality of circumstances disclosed by the record. Accordingly, it is concluded that there was no failure of due process, even apart from the fact that Respondents failed to move to reopen the hearing. 61/

The last of Respondents' contentions treated in this part of this initial decision is their argument that the Order does not contain antifraud charges under which proof of Respondents' materially false statements and omissions concerning predictions that Spectrum would substantially increase in market price within a relatively short period, and related statements and omissions, could properly be received or used as a basis for findings against them. They urge, in effect, that this introduction into the proceeding of purportedly "new charges" denied them due process.

61/ In connection with the Marder-transcript argument Respondents also contend, incorrectly, that Division counsel failed to furnish Jencks Act materials respecting Berger (see R., p. 589), and complain that Division did not call as a witness Lorin, who, Respondents contend, would also have testified that the 188,000 Spectrum shares sent to Registrant into the Central account by Marder were pursuant to agreement between Marder and Lorin and not Marder and Koss. The short answer to this argument is that Respondents were themselves free to call Lorin as a witness, either at the hearing or thereafter, by making a motion to reopen the hearing.

The main thrust of Respondents' argument is, in effect, that the Division, by its response (filed November 22, 1971) to an Order For a More Definite Statement dated November 4, 1971, restricted what it could prove under the allegations in the Order for Proceeding by omitting to refer to statements and omissions regarding price rises in Spectrum and related statements or omissions.[62/]

It is clear that the Order contains allegations sufficiently comprehensive to embrace the charges of false and misleading price predictions for Spectrum stock and related statements or omissions.[63/] It is unnecessary to consider here to what extent the antifraud charges as set forth in the Order might have been restricted by the Division's response of 11-22-71 to the Order for More Definite Statement, inasmuch

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62/ The more definite statement reads, in pertinent part, at pp. 2-3:

> "***T. Koss personally violated the anti-fraud provisions ***by both making false and misleading statements and omitting to state material facts to purchasers and prospective purchasers regarding Spectrum, Ltd. These statements and omissions concerned Spectrum's financial condition, its operations, its business activities and the distribution of its stock by Marder and persons associated with him and by disseminating to purchasers and prospective purchasers several false and misleading releases containing material omissions he received from Spectrum, Ltd. and Marder.***"

63/ As already noted above, the Order includes allegations in Section II, paragraph 2, that Respondents made untrue statements of material fact and omitted to state material, necessary facts with reference to "but not limited to":

a) the financial condition of Spectrum, Ltd.;
b) the operations and business of Spectrum, Ltd.;
c) the officers and directors of Spectrum, Ltd.;
d) the market activity of Spectrum, Ltd.

as the Division, well before the hearing commenced, amplified its responses by filing, on June 18, 1973, "additional information" in response to the mentioned Order for More Definite Statement. In this "additional information" the Division expressly stated that it was charging and would attempt to prove improper price predictions etc. by the Respondents. Respondents' motion to strike such "additional information," which motion urged in part that the evidence regarding alleged price predictions was gathered by the Commission staff shortly before commencement of the hearing and long after the Order for Proceeding was issued and could therefore not be used to support the charges, was denied in advance of the hearing by Order of July 3, 1973.[64/] Thus, Respondents were apprised in advance of the hearing as to what the Division would be attempting to prove during the hearing respecting predictions of price rise in Spectrum and related statements or omissions and cannot logically urge that the Division's initial response to an Order For More Definite Statement estopped it from making a later, but still timely, response.

Moreover, from the outset of the hearing Respondents' repeated objections to the introduction of evidence concerning such allegations were overrulled.[65/] Thus, Respondents' reliance upon In the Matter

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64/ Respondents did not appeal this denial to the Commission.

65/ Respondents did not appeal these rulings to the Commission.

of Ruffalo,[66] where the court found that the respondent in an attorney-disciplinary proceeding had been improperly disbarred on the basis of a charge added after the commencement of the hearing on the basis of testimony of the accused, is misplaced, even assuming, arguendo, that the principles of Ruffalo, which the Court characterized as involving a quasi - criminal proceeding, are germane to remedial proceedings such as the instant proceeding. Here Respondents knew of the antifraud price - predictions charge before the hearing commenced after they themselves expressly challenged the Division's written intention of introducing proof on such charge and during the hearing argued the point numerous times before Koss took the stand to, among other things, deny such charges.[67]

For the same reasons, Respondents' reliance on Jaffee & Co. v. S.E.C.[68] is misplaced, since in that case the court concluded that Respondent had not received fair notice of the charge it was found by the Commission to have violated. As already noted, there was no such

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66/ 390 U.S. 544 (1968). The Court stated, at p. 551, in pertinent part:

> ". . .The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."

67/ Respondents in fact defended against the antifraud price-predictions charges not only through testimony of Koss but through cross-examination of Division's witnesses.

68/ 446 F. 2d 387, 394 (C.A. 2, 1971).

failure of notice of the charge, and of the intention of the Division to introduce proof thereon, in the instant proceeding.

Moreover, upon completion of the Division's case it was expressly pointed out by the Administrative Law Judge to counsel for the Respondents, in light of the various objections that they had raised concerning the nature of the antifraud charges and the evidence respecting such charges that was received over their objections, that Respondents under the Commission's Rules had an opportunity to request an adjournment of the hearing if it should be required in order to prepare themselves further to meet such charges. Counsel for Respondents stated they did not wish an adjournment and rested their cases.[69/]

Conclusions

In general summary of the foregoing, it is concluded that during the first quarter of 1970, in connection with the sale of the stock of Spectrum, Ltd., and by use of jurisdictional means, all as more particularly found above:

(1) Registrant wilfully violated and Respondent Koss wilfully aided and abetted violations of the registration provisions of Section 5(a) of the Securities Act; and

(2) Respondents wilfully violated and wilfully aided and abetted violations of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

69/ R., p. 1157.

PUBLIC INTEREST

The Division urges that maximum sanctions be imposed against Respondents. They rely, inter alia, upon the nature of the violations and upon the claim that Koss's testimony was in various respects self-contradictory and not truthful. Respondents urge that the record does not disclose any violations and that therefore no sanctions should be imposed.

The registration and antifraud provisions which Respondents are found to have violated are fundamental elements in the legislative protections that the Congress has enacted in the public interest for the protection of securities purchasers. While the record does not disclose any prior violations of the securities laws by Respondents, the violations they committed as shown by this record were serious. Of the five customer witnesses who testified, only two, the businessmen, could be considered to be relatively sophisticated investors.

Koss's flat denials of various statements he made to the customers, as found above, would not win him any kudos for candor. Nor would his initial denials in his testimony at the hearing that Registrant had sold the 12,000 shares of Spectrum purchased from Central.[70/] However, such initial denials may have been prompted more by a misguided pursuit of an untenable legal theory of defense than by a conscious purpose to falsify.

70/ Koss and the Registrant ultimately conceeded that such shares had indeed been sold.

During the relevant period Registrant was a relatively small firm with some 7 registered representatives and some 15 employees overall. Due to business conditions generally affecting broker dealers and in part due also to its inability to obtain underwritings because of the pending instant proceeding, Registrant now employs only Koss and his wife and a few other employees.

Respondents have been in the securities business since 1963 and should have been well aware of the requirements respecting the violations they committed.

Taking into account the gravity of the violations; the length of time Respondents have been in the securities business; the absence of prior disciplinary sanctions against Respondents; the factors urged by Respondents either in mitigation or in denial of guilt; and the entire record as a whole, it is concluded that the sanctions ordered below both for remedial and deterrent purposes are necessary, appropriate, and adequate in the public interest.

ORDER

Accordingly, IT IS ORDERED as follows:

1) The registration as a broker and dealer of Koss Securities Corporation is hereby revoked, and it is hereby expelled from membership in the National Association of Securities Dealers, Inc.

2) Respondent Theodore Koss is hereby barred from association with a broker-dealer with the proviso that after a period of 4 months from the effective date of this order he may apply to become associated

with a registered broker-dealer in a capacity other than one which is proprietary, managerial, or supervisory upon a satisfactory showing to the staff of the Commission that he will be adequately supervised and that his association with a broker dealer would not otherwise be contrary to the public interest.[71/]

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.[72/]

David J. Markun
Administrative Law Judge

Washington, D. C.
December 12, 1973

71/ In this last connection it is noted that Registrant and Koss were among 16 persons indicted by a federal grand jury in the Southern District of New York on charges of conspiracy, securities fraud, mail fraud and making false statements and submitting false documents to the Commission in connection with an alleged conspiracy to manipulate the price of Automated Information Systems, Inc. S.E.C. Litigation Release No. 6105, October 17, 1973, S.E.C. Docket, Volume 2, No. 18, October 30, 1973.

72/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented. To the extent that the testimony of Respondent Koss is not in accord with the findings herein it is not credited.