ADMINISTRATIVE PROCEEDING
FILE NO. 3-5244

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

OPPENHEIMER & COMPANY, Inc.:

INITIAL DECISION

Washington, D.C.
January 3, 1979

Irving Schiller
Administrative Law Judge

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APPERANCES: Richard T. Sharp, Kenneth C. Lay, F. Adams and Robert M. Laprade for the Division of Enforcement

Alfred Berman and Jeffrey Rubin of Guggenheimer & Untermyer for Respondent Oppenheimer & Co., Inc.

BEFORE: Irving Schiller
Administrative Law Judge

These are consolidated proceedings instituted by companion Orders for Public Proceedings (Order or Orders) issued by the Securities & Exchange Commission (Commission) dated June 3, 1977, pursuant to Sections 15(b) and (c) of the Securities Exchange Act of 1934 (the Act). The Order under Section 15(b) of the Act seeks to determine whether Oppenheimer & Co., Inc. (respondent) wilfully violated specified provisions of the Act and Rules thereunder and , if so, whether any remedial action is appropriate in the public interest. Specifically the Order, in substance, charges that respondent wilfully violated Section 13(d) of the Act and Rule 13d-1 thereunder by failing to send to Medcom, Inc. (Medcom) and to file with the Commission, within 10 days after its acquisition on May 17, 1974 of more than five percent of the outstanding stock of Medcom, a statement containing the information required by Schedule 13D; that respondent materially increased its percentage of beneficial ownership of Medcom during the period from May 17, 1974 through March 13, 1975 without filing the above mentioned statement or any amendment thereto and that when respondent filed its 13D Schedule on or about March 14, 1975 it contained untrue statements of material facts and omitted to state material facts to reflect its true purpose(s) in acquiring Medcom. The Order further charges that from on or about May 17, 1974 through on or about March 13, 1975 respondent wilfully violated Section 10(b) of the Act and Rule 10b-6 thereunder in that respondent while participating or otherwise engaging in a distribution of Medcom common stock,

bid for and purchased for its own account shares of Medcom common stock, before having completed its participation in such distribution.

The Order under Section 15(c) of the Act alleges, in essence, the facts, noted above, relating to respondent's acquisition of more than five percent of Medcom's outstanding common stock on May 17, 1974, its failure to file with the Commission and send Medcom a statement containing the information required by Schedule 13D within 10 days after such acquisition, its failure to file any amendment to reflect purchases of Medcom stock by respondent from May 17,1974 to February 28, 1975 which materially increased its beneficial ownership of Medcom stock and that when respondent filed its Schedule 13D on or about March 14, 1975 it contained untrue statements of material facts and omitted to state necessary material facts. An Order is sought under Section 15(c)(4) of the Act requiring respondent to correct the alleged false and misleading statement presently on file with the Commission.

After appropriate notice, hearings were held in New York, New York. Proposed findings of fact, conclusions of law and briefs were filed by the Division of Enforcement (Division) and the respondent. Concurrently with the filing of its brief the Division filed separately a motion, pursuant to Rule 6(d) of the Commission's Rules of Practice 17 CFR 201.6(d), to amend

the Order under Section 15(b) of the Act to conform to the evidence. The Division sought to add allegations of wilfull violations of Section 10(b) and Rule 10b-5. The motion was denied.[1/]

The findings and conclusions herein are based upon the evidence as determined from the record and upon observation of the demeanor of the various witnesses. The standard of proof applied with respect to the charges of fraud under Section 10b and Rule 10b-6 is that requiring proof of the allegations by clear and convincing evidence.[2/]

1/ Accordingly, the Division's arguments in its brief relating to alleged violations of Section 10(b) of the Act and Rule 10b-5 will not be considered herein.

2/ The clear and convincing standard was applied by the Court of Appeals for the District of Columbia Circuit in Collins Securities Corporation v. S.E.C., 562 F.2d 820 (1977) as amended on denial of request for rehearing September 23,1977. The Court of Appeals remanded the case to the Commission, which found violations including Section 10(b) and Rule 10b-6, for reconsideration of the record with instructions to determine whether the allegations were proved by clear and convincing evidence. See also Nassar & Co. v. S.E.C., 566 F 2d 790 (D.C. Cir. 1977 where the D.C. Circuit reiterated the Collins standard. In its brief the Division urges that the D.C. Circuit in laying down the new standard in fraud cases does not appear to be requiring anything substantially greater than "a conviction" that the weight of the evidence consistently supports the finding of fraud. The Division concludes the "Court thereby recognizes that attempted distinction between" preponderance of the evidence" and "clear and convincing evidence" are merely semantic hair splittings. (Emphasis added). The argument is rejected. The Court, after agreeing with the Commission that reliance on inferences from the evidence that illegal manipulation had occurred may be necessary to prove a securities law violation, specifically stated:

> "... it will require the SEC to reach a degree of persuasion much higher than "mere preponderance of the evidence ..."

The standard of proof regarding the other charges in the Orders which are not based upon fraud are determined upon proof of the allegations by a preponderance of the evidence standard.

Introduction

As noted above the charges against respondent arise out of and relate to its activities with respect to Medcom's common stock. A brief description of the nature of respondent's business as well as that of Medcom will aid in shedding light on such activities.

The Respondent

Respondent is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Act. Its principal place of business is in New York City. It was incorporated in 1969 in Delaware. On February 28, 1975 respondent succeeded to the broker-dealer business of Oppenheimer & Co., a New York partnership. At all relevant times noted below Respondent was a member firm of the New York Stock Exchange, (NYSE) the American

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CONTINUED Foot note 2/

Such precision in enunciating the degree of proof required in a fraud case is certainly not "semantic hair splitting". In the instant, as in Collins the charges relate to alleged violations of Section 10b and Rule 10b -6.

In a recent decision in the U.S. District Court for the Eastern District of New York Judge Weinstein, upon remand from the U.S. Court of Appeals for the Second Circuit, considered the varying factors for determining probability of guilt, degree of proof and the qualitative value of evidence. U.S. v. Daniel Fatico, 76 CR-81 __F. Supp. __ 1978 Judge Weinstein, after noting that phrases such as "preponderance of the evidence" and " beyond a reasonable doubt" are quantitatively imprecise, undertook nevertheless to quantify the probabilities of the existence

Stock Exchange (Amex) and all principal regional stock exchanges in the United States. As of July 31, 1974 respondent's capital was $37,000,000 and its net worth (Partners' Equity) was $28,200,000. During 1974 respondent accounted for upwards of 17.3 million shares per month, equal to 2.89% of the monthly volume of shares traded on the NYSE, involving more than 500 million dollars per month of securities. In 1974 and prior thereto respondent was a major block positioner engaged principally in the institutional brokerage business dealing primarily in securities of interest to mutual funds, insurance companies, bank trust departments and other large customers. During 1974 it accounted for more than 11% of the shares traded in block transactions on the NYSE.[3/] In the

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2/ (Continued)
of a fact than its nonexistence. He conlcuded that "Quantified, the preponderance standard would be 50 percent or more probable". The Judge next considered the clear and convincing standard, noting that Collins supra was an example of securities fraud where that standard is applied. The Court considered that in such cases "Quantified, the probabilities might be in the order of above 70 percent under a clear and convincing evidence burden." For a clear, unequivocal and convincing standard the Court determined that the probabilities might be in the order of above 80 percent and for the beyond a reasonable doubt standard, if quantified, in the range of 95 percent probable. In evaluating the evidence relating to the fraud charges in the instant case the quantitative percentage range noted by Judge Weinstein will be used as a guide in determining whether such evidence meets the Collins standard.

3/ The record reflects that the NYSE defines a block transaction as a trade of 10,000 or more shares. See also Institutional Investor Study Report of the SEC (1971) H.R. Doc. No. 92-64, 92 Cong., 1st Sess., Vol. 4 at 1537. (Hereinafter referred to as Institutional Investor's Report).

second quarter of 1974 such transactions involved securities aggregating $350 million. On the Amex respondent, in 1974, accounted for executions averaging 1.4 million shares per month. As a dealer in the over-the-counter market, respondent accounted for 6.9 million shares per month. In 1974 respondent was a major market-maker and in June 1974 it was registered in the National Association of Securities Dealers Automated Quotation System (NASDAQ) as a market-maker in 112 over-the-counter securities. It was respondents' usual and normal practice to keep all such securities in its trading department accounts, not in investment accounts.

Medcom

Medcom was incorporated under Massachusetts law in 1969. Its principal place of business is in New York City. At all relevant times herein Medcom was engaged in the development and marketing of coordinated audiovisual health and medical programs designed for educational use by medical personnel and the general public.

In 1971 Medcom made a public offering, pursuant to the Securities Act of 1933 of 331,058 shares of its common stock at $15 per share. Of the gross revenues of about $5 million obtained from the offering Medcom received approximately $2.76 million and the balance was received by selling stockholders. Between April 1, 1974 and December 1975 Medcom had outstanding 2,157,000 shares of its common stock. Medcom's common stock has been registered with the Commission pursuant to Section

12(g) of the Act and traded over-the-counter in NASDAQ. In early 1972 Medcom's common stock reached a high of $37 per share. Following a 3 for 2 stock split in the latter part of May of that year Medcom's stock traded in the $26-$28 per share range. Since then, the price of Medcom's stock declined to about a $1 range in early November 1977. Medcom's annual earnings ranged from approximately $1 million in 1969 to $11 million in 1973, $8 million in 1974 and $9 million in 1975 and 1976. The record reflects that Medcom suffered a substantial financial loss in 1974 of about $1 million. Its per share earnings fluctuated from a high of $.40 per share in 1973 to the above noted loss in 1974 and small earnings in 1975 and 1976.

Background of Acquisition

Although the focus of the charges relating to the alleged violations of Section 10(b) and Rule 10b-6 is directed primarily at respondent's actions following its acquisition of Medcom's common stock, a review of the facts and circumstances surrounding such acquisition is deemed essential to evaluate the nature of respondent's activities.

Prior to May 17, 1974 Keystone Custodian Fund, Series S-4 (Keystone S-4) was the beneficial owner of 125,000 shares of Medcom common stock, having acquired the stock in open market purchases between October 9, 1972 and June 8, 1973 for $2,564,132.10 or at an average price of $20.51 per share. Keystone S-4 in an investment company registered under the

Investment Company Act of 1940. Keystone S-4 was described as a "mutual fund made-up of speculative common stocks" and officially called the "S-4 Lower Priced Common Stock Fund." The associate portfolio manager of the Fund testified that the key characteristic, generally, of the securities held in the S-4 fund would be "Extremely volatile securities."

On May 15, 1974 the Dow Jones ticker reported results of Medcom's operations for the 1st quarter ending March 1974. Medcom reported revenues of $1.44 million versus $2.18 in the prior year (a 34% decline) and a net loss of $178,417 as compared with a net income of $183,496. On the same date the associate portfolio manager determined to sell all Keystone's shares of Medcom and, following the firm's practice, prepared instructions to the trading department to sell the Medcom stock and included an elimination recommendation. At the time of the preparation of the elimination recommendation, the associate portfolio manager had acquired knowledge of Medcom's disappointing 1st quarter results, included therein substantially the information appearing in the Dow Jones report and concluded that "In view of the deterioration of earnings and lack of earnings visibility over the forseeable future, sale is recommended". The instruction to sell was forwarded to Mr. Ruppert M. Richards, the vice-president in charge of portfolio trading at Keystone. Richards ascertained the then current market price of Medcom and the volume of trading to determine whether he could scale

the stock into the market or use some other strategy. Noting that Medcom had declined in price Richards decided to trade Medcom as a block. Because of the magnitude of the block (a fact called to his attention in the selling instructions) he considered the market makers listed for Medcom, concluded they were not in a position to handle such a block or did not have the capability to do so, and not wanting to further erode the declining market in Medcom decided to call respondent, a firm he regarded as one of the ten top brokerage houses Keystone had been doing business with for many years.

Mr. Gerald J. Simmons, a securities trader for respondent, when informed by Richards that Keystone was seeking to sell the Medcom block, consulted a partner in the trading room and was told that respondent would either find a buyer for the block or suggest an alternative. Charles Howley, respondents' partner in charge of over-the-counter trading, testified that when he learned of Keystone's desire to sell Medcom, he followed his usual procedure of requesting his traders to inquire from their institutional accounts whether they had any interest in acquiring the block. He was informed there was no such interest. Howley instructed Simmons to tell Keystone that respondent would purchase the block at $2 3/4 per share, a discount of 35% from the prevailing market price on May 16. The following day the offer was communicated to Keystone and accepted by it. Keystone incurred a loss of $2.2 million.

The record reflects that prior to the time respondent purchased the Medcom block, the stock market in general had been continually declining. There is testimony in the record that the market decline was probably the worst decline since 1929. In the six months prior to the respondent's acquisition of the Medcom block, the stock market in general declined about 35%. For the same period the Medcom stock dropped about 67%. Between May 15, the day the Keystone sell recommendation was prepared and Dow Jones released the Medcom earnings, the market price of Medcom dropped from about 6 1/8 to about 3 3/8 at the close on May 17, the day respondent purchased the Keystone block at 2 3/4. In its confirmation of purchase to Keystone, respondent stated "We make a market in this security." On May 17, the purchase date, respondent notified NASDAQ of its intention to become a market-maker in Medcom.

Alleged Violations of Section 10(b) and Rule 10b-6

The Order alleges respondent wilfully violated Section 10(b) of the Act and Rule 10b-6 thereunder in that respondent while participating or otherwise engaging in a distribution of Medcom common stock, bid for and purchased for its own account shares of Medcom stock before having completed its participation in such distribution. The Division vigorously asserts that respondent engaged in a distribution of Medcom stock within the meaning of Rule 10b-6, that such distribution commenced on May 17, 1974, after efforts to sell the said block on May 16, 1974 were unsuccessful, and continued until February 28, 1975.

The respondent, just as vigorously, asserts it never made any distribution of the 125,000 shares it purchased from Keystone, and that, in fact, it informed NASDAQ on May 17, 1974 it made a market in Medcom stock. During the period May 20, 1974, through February 28, 1975, when it ceased its market making activities, respondent purchased 124,537 additional shares of Medcom stock, resold 46,115 such shares and on February 28, 1975 it owned a total of 203,422 shares of Medcom stock including the 125,000 shares originally purchased from Keystone. Thus, from the date of respondent's purchase (May 17, 1974) to the date it ceased making a market, (February 28, 1975) the net increase in the amount of Medcom stock owned by respondent was 78,422 shares.

The record clearly establishes and there is no dispute that respondent bid for and purchased shares of Medcom stock during the period, from May 17, 1974 through February 28, 1975. The crucial issue to be determined is whether during the period in question respondent engaged or participated in a distribution of Medcom stock within the meaning of Rule 10b-6.

The term distribution is not defined in the Rule. The interpretation of the word distribution in the context of the objective sought to be achieved by the Rule was considered in a number of varying situations and differing circumstances and has been articulated in decisions by the Commission and the

Courts. In promulgating Rule 10b-6 it is evident the Commission intended to interdict brokers and dealers from bidding for or purchasing securities while participating in a distribution. Such a practice it felt could have a manipulative effect upon the market.

A brief review of the nature of the evidence in cases in which the Commission and the Courts considered whether a distribution was effected, is essential to an evaluation of respondent's conduct and activities with respect to its acquisition of Medcom. In Bruns, Nordeman & Company, 40 SEC 652, 660 (1961) the Commission set forth certain criteria for determining whether the activities of a broker or dealer are deemed to constitute participation in a distribution. It held:

> "The term "distribution" as used in Rule 10b-6 is to be interpreted in light of the rule's purposes as covering offerings of such a nature or magnitude as to require restrictions upon open market purchases by participants in order to prevent manipulative practice 11/ For these purposes a distribution is to be distinguished from ordinary trading transactions and other normal conduct of a securities business upon the basis of the magnitude of the offering and particularly upon the basis of selling efforts and selling methods utilized" (Emphasis added)

In n.11 the Commission expanded its concept of manipulative practice stating:

> 11/ "A person contemplating or making a distribution has an obvious incentive to artifically influence the market price of the securities in order to facilitate the distribution or to increase its profitability. We have accordingly held that where a person who has a substantial interest in the success of a distribution takes active steps to increase the price of the security, a prima facie case of manipulative purpose exists." (Citations omitted; emphasis added)

The Commission reasserted its views concerning the distinction between ordinary trading transactions and other normal conduct of the securities business upon the basis of the magnitude of the offering and particularly upon the basis of selling efforts and selling methods utilized. Billings Associates, Inc., et al. 43 SEC 641, 648 (1967). In Collins Securities Corp., 8 SEC Docket 250, 256 (1975)[4/], the Commission referred to its Bruns decision and further elaborated its approach to Rule 10b-6. It held:

> "Rule 10b-6, on the other hand is designed to prevent manipulation in the markets. To that end it precludes a person from buying stock in the market when he is at the same time participating in an offering of securities which is of such nature as to give rise to a temptation on the part of that person to purchase for manipulative purposes."

It is evident from these decisions that the Commission and the Courts have, for good reason, consistently declined to enunciate a precise definition of distribution but have pursued a pragmatic and functional approach to the concept of distribution, depending upon the specific facts in a given case. Such flexibility enables an analysis of the conduct of a broker in an effort to ascertain whether his activities have impaired the maintenance of a free and competitive market and whether such broker engaged in manipulative practices.

4/ Reversed on other grounds sub nom Collins Securities Corp. v.S.E.C. 562 F 2d 820 (D.C. Cir 1977)

The Division's initial premise is that respondent's alleged violation, in essence, commenced at the time it purchased the Medcom block of securities. It argues that having acquired the Medcom block at a substantial discount in a declining illiquid market in order to accommodate a major customer, respondent was cast in the type of predicament or situation in which it had a temptation or incentive to manipulate the market. The Division further argues that respondents' transactions were a departure from normal trading activities and were of such substantial magnitude as to give rise to a significant temptation to support the market in Medcom. In support of its position the Division relies on Collins supra and Bruns supra. The Division's approach appears to give greater significance to the temptation factor, in terms of determining whether manipulation in fact was effected, than does the Commission. In the Collins case the Commission made clear the context in which the temptation factor is to be considered. It held:

> "The term distribution in Rule 10b-6 should therefore be interpreted to identify situations where that temptation may be present. Our opinion in Bruns Nordman attempted to define distribution so as to identify such circumstances." (emphasis added)

Having identified the circumstance, the Commission stated it was convinced that Collins entered quotations in the sheets "for one purpose and one purpose only - to drive the price of the stock up . . . . to provide a basis for registrants' (Collins) resales at a profit". It further held "Considering

the activity, or rather lack of it, ... and the fact that the offering amounted to more than 30% of the outstanding stock, the sales effort was of such magnitude that there was unquestionably a distribution for purposes of Rule 10b-6. Registrant (Collins) appears to have been an underwriter and certainly was, at least, a participant in that distribution." Thus in the application of the functional approach, noted earlier it is evident the Commission's determination that a distribution occured is not based on merely identifying situations where temptation may have or did exist but primarily upon whether under all of the facts and circumstances relating to the offering and particularly the selling efforts and selling methods utilized a manipulation resulted. Respondent disputes any temptation existed contending that its trading partner, aware of the declining market conditions, decided to buy Medcom at so substantial a discount that he could afford to wait until the market turned around.

Accepting arguendo the Division's thesis that the record supports a finding that respondent's purchase of the Medcom block created an environment for substantial temptation it can not, by itself, support a finding that respondent engaged in a distribution or was involved in manipulative practices within the meaning of Rule 10b-6. The resolution of those issues must, under the cited cases, be premised upon respondent's activities subsequent to its acquisition. Within the established

principles, noted above, an analysis of the evidence is undertaken.

The record shows that on May 16, 1974 shortly after the Keystone trader offered the Medcom stock to respondents' trader, the latter informed the traders in the trading room about the offer in an effort to ascertain if any of their institutional customers would be interested in acquiring the block at or close to the market price which was in the range of 4-4 1/2. The response was negative. On May 17, 1974 after respondent's trader reviewed some historical and financial information, respondent purchased the block at a discount bid of 2 3/4 per share for a total of $343,750. On that date respondent informed NASDAQ it had become a market maker in Medcom although it did not enter quotations for the stock[5/] until June 7, 1974. In its confirmation to Keystone respondent stated it made a market in the stock. The purchase represented approximately 5.8% of the outstanding shares of Medcom and about 10% of the float.[6/] The stock market in general was declining and had been declining for six months prior to the date of purchase.

5/ Under the rules of NASDAQ there was a two day waiting period before becoming eligible to enter quotations.

6/ Float was defined in the record as only those shares freely available for trading in the open market. Excluded are shares owned by management or otherwise restricted for sale absent registration or exemption.

The first of the factors to be considered, in connection with determining whether a distribution was effected, is whether the nature of the offering was of such magnitude as to require restrictions upon open market purchases to prevent manipulation. The guideline for this determination is to distinguish distribution from ordinary trading transactions and other normal conduct of a securities business. (Brurs supra) Since such terms as "ordinary transactions" and "normal conduct" are not easily susceptible to explicit definition, consideration must be given to the facts and circumstances in each case. Factors such as the number of shares involved, the nature of the business of the particular broker and the impact of the broker's transaction in the market place in which the security is traded require attention. To start with, the 125,000 shares of Medcom purchased by respondent represented approximately 6% of the outstanding shares. From the date of acquisition respondent purchased and sold Medcom stock in the open market and increased its holdings by 78,422. As at February 28, 1975, when it ceased its market making activities, respondent owned 203,422 shares or 9.43% of Medcom's outstanding shares. To its original investment of $343,750 respondent invested an additional net amount of $161,000.

The Division urges that respondent's position in terms of the number of shares and dollar amount were highly unusual when compared with respondent's ordinary block positioning

and trading activities and that its Medcom position was "enormous by any measure of magnitude." The record reflects that in the 2nd quarter of 1974 respondent was a registered NASDAQ market maker in 112 securities. It purchased for its own account 271 blocks of over-the-counter securities, of which 52 blocks, excluding Medcom, were purchased each in an amount in excess of $300,000: and about 32 blocks each of which were between $200,000 and $300,000. Thus about 30% of the block purchases were in excess of $200,000 and slightly less than 20% in excess of $300,000. Eighteen of the 52 blocks each had a market value in excess of $500,000 and four blocks each had a market value of between $1,000,000 and $3,500,000. Consideration is given hereunder to the extent of respondent's market making activities, the volume of securities transactions and the dollar amount of its trading on the various exchanges and the over-the-counter market which has been detailed earlier.7/ The record further reflects that of the 82 blocks of securities for which respondent made a market during the period June 7, 1974 to February 28, 1975 the average monthly overnight position was approximately $7 million. Excluding Medcom, the average monthly position of 12 of such securities was in excess of $300,000 and an additional 6 in excess of $1 million. Thus the average monthly overnight position of 23% of the said 82 securities was in excess of $300,000. Thus, viewing the Medcom

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7/ See "The Respondent" supra.

acquisition in light of the nature of respondent's business, its substantial capital position, the total dollar amount of its investments as a market maker, the average of its overnight position in connection with such activities, the Medcom purchase while in the upper range of investments in the over-the-counter securities, does not appear to be so far out of such range as to be deemed "highly unusual", as claimed by the Division.

One of respondent's partners and vice president in charge of the over-the-counter trading, Charles Howley, characterized the Medcom purchase in light of respondent's 4 to 6 million dollars of aggregate market making inventory in 1974, as routine for the respondent's type of securities business. Howley testified, without refutation, that respondent, unlike smaller brokerage firms which generally conduct their operations by trying to keep their inventory low or flat and do not invest anything in the market, conducts its business similar to a dozen or more large brokerage firms which make markets in securities by daily committing capital to trading their securities, consistently provide liquidity to the market and frequently carry overnight positions in substantial amounts. In so far as trading operations are concerned, Howley further testified that the significant factor in determining whether to invest and make a market in a particular security is the activity of the market rather than the percentage of outstanding stock of the security. The determination to buy Medcom in the declining market was acceptable to Howley since he felt comfortable in being able to purchase the stock at a substantial discount and that this factor afforded him the opportunity of carrying the inventory over a period of time while awaiting a turn for the better in the general market.

The Division asserts that in cases such as F.S. Johns & Co., 43 SEC 125 (1966) aff'd sub nom. Dlugash v. S.E.C., 373 F.2d (2d Cir. 1967);

C.A. Benson, 41 SEC 427 (1963) and Bruns, supra, in which the Commission decided that sales or attempts to sell securities for less than those involved in this case, both in terms of the number of shares involved and percentage of outstanding shares, were of such magnitude as to constitute a Rule 10b-6 distribution. A perusal of the cases does not support such reliance. It is apparent from these cases that the emphasis in the opinion is not "on the absolute number of shares being offered for sale", as asserted by the Division, but rather the conduct of the broker in the market place as indicative of whether such conduct was manipulative. Thus, in Johns, the Commission found that the broker induced other brokers to place fictitious quotations in the sheets, which quotations were "advancing substantially and rapidly despite an absence of any demand", in order to facilitate a retail distribution. In C.A. Benson the Commission found the broker after making a public distribution at 3 cents per share placed shares in its investment account, transferred such shares to its trading account within 2 weeks after completion of the public offering and started publishing in the sheets at 4.5 cents bid and 6 cents asked and thereafter raised its bid and ask prices from time to time and sold about 2,000,000 shares between 6 cents and 10 cents per share. In Bruns, the Commission found that the broker appeared in the sheets with increasing bids with respect to Gob Shop's stock from 5/8 to 1 3/16 and with corresponding offers up to 1 7/16. In addition the Commission

found the market was further stimulated by the declaration of a stock dividend and use of sales literature which "together with the increasing bids and trading at increasing prices were component elements of a manipulative scheme to raise the price of the stock."

Within the ambit of the cases cited above, consideration is given to the nature of the selling efforts and selling methods used by respondent to determine whether it engaged in the type of manipulative practices which Rule 10b-6 was designed to proscribe. It is noted at the outset that respondent, the day before actually buying Medcom made efforts to arrange a block placement of the shares. These efforts, the record shows, were confined to following respondent's usual practice of announcing to the traders in the trading room that it had an interest in Medcom and asked them to ascertain whether any of their institutional clients had any interest in a block placement of Medcom. A publication called Spectrum which lists institutional holders of specific securities, was consulted to aid in locating any other potential interested buyers. Traders were not required by respondent or Howley to make any calls and the record does not reflect the number of calls actually made other than one call to an institutional holder, David L. Babson & Co. (Babson), which had no such interest. After the acquisition, the record

shows, respondent sold 2,500 shares to 6 other market makers. Howley testified that at this point he became acutely aware that the Medcom market was thin, and that further selling efforts would have an adverse affect on the market. He halted sales to allow the already declining market to "cool down". On June 7, 1974 respondent commenced entering quotations in NASQAD and on June 13 entered quotations in the "pink sheets" as a market maker. Although quotations were inserted on a daily basis, transactions were not effected daily. The record shows that during the trading period respondent effected purchase or sale transactions on only 70 of the 150 trading days for which trading data was available. During this same period there were at least six other market makers listed in NASDAQ, five of which were in the system for the same period as respondent.

The Division urges that respondents selling efforts and methods demonstrates it was engaged in a distribution as evidenced by its involvement in retail sales during the course of which it "utilized its retail sales department in its distributive efforts" and "sold thousands of Medcom shares to retail customers". As proof of respondent's activities and conduct throughout the market making period, the Division relies primarily on evidence disclosing retail

sales by respondent to four customers, efforts by respondent's counsel and Finneran to sell Medcom stock to the company itself and Finneran's contact with two other persons, neither of whom was interested in buying Medcom. Finneran also requested another institutional salesman Robin Prince, who handled the Alpha Fund account, to find out if that fund had any interest. Prince apparently made one phone call and reported the fund had no interest.

An examination of the record relating to the evidence of the retail sales to customers is essential to a determination of whether the selling efforts used by respondents, were of such a nature as to require a finding of distribution under the Bruns supra, doctrine. Of the four retail customers who purchased Medcom, the evidence shows three were directly or indirectly connected with Medcom and the fourth a former employee of respondent. The former employee testified she determined to purchase Medcom after a conversation with a friend who was a security analyst at Kuhn, Loeb and Co. Upon his recommendation she asked her superior in respondent's firm to purchase 100 shares of the stock for her. He placed her order with respondent on June 7, 1974. In August or September 1974 the second purchaser, who had known Finneran for about 20 years, called him and told him that his daughter,

who was employed by one of the divisions of Medcom, had told him that division was doing extremely well and he wanted to invest $3,000 in Medcom.[8/] Finneran executed the order. The third purchaser was Roger Samet a member of the Board of Directors of Medcom and, since 1968 a substantial stockholder of Medcom. He testified he thought the Medcom stock was undervalued in November 1974. Samet knew that respondent owned a large block of Medcom. He called Finneran, whose name he had heard from Medcom's management, and purchased 20,000 additional Medcom shares in the latter part of November. The fourth retail customer had purchased 1,000 shares of Medcom in January 1974 at about $10 1/2 per share. In December 1974, after speaking with Samet on several occasions, the customer determined to make an additional purchase of 6,000 shares to reduce his average cost. He phoned Bill Needham, one of respondent's registered representatives, who was a friend of long standing and placed the order to purchase at 1 7/8 with him.

8/ There is a sharp conflict of testimony as to whether the conversation took place in August or September. However, whether the calls were in August or September 1974 does not appear significant here. But the salesman's efforts to sell do merit consideration.

A further aspect of respondent's selling efforts which the Division contends is "very signficant" is respondent's attempts to sell Medcom to the company itself. The Division claims that from August 15, 1974 through at least March 19, 1975 respondent "conducted an intensive solicitation of the company . . . .", and that on March 17, 1975 Arnold Weinberg, respondent's in-house attorney began soliciting Medcom on behalf of respondent. A close analysis of the evidence does not support the "intensive solicitation" assertion. The evidence of the solicitation of Medcom is reflected in the testimony of Finneran, Stanley Kramer, Medcom's Vice President and Weinberg.

Kramer testified he received a call from Finneran, about August 15, 1975, who requested financial information on Medcom and offered to sell him a large block of Medcom, or to anyone Kramer would recommend. Kramer testified he was somewhat surprised by the call and in trying to "smoke out" the reason for Finneran's call told him he might have buyers if Finneran could find out how many shares were available and the price. Kramer also testified that Finneran called back and said he had a block of 75,000 shares to sell at the market. Finneran's testimony though somewhat different in some of the details does not differ substantially

from Kramer's except he placed the call in September.[9/] Finneran also testified his income is derived solely from commissions and that after he received the request to purchase $3,000 worth of Medcom from his client, whose daughter was employed by Medcom, he thought Medcom could provide such an opportunity. On his own initiative and without authority from Howley or anyone else at respondent's office Finneran determined to call Medcom. He further testified that Kramer told him he had some Europeans who may be interested in buying Medcom and that prior to telling Kramer he had a block of 75,000 shares of Medcom which could be made available to the Europeans, he checked with Howley who, though not pleased with selling, nevertheless fixed the number of shares and price. Finneran also testified he received some names from Kramer but none were interested in Medcom, nor was Medcom. The record discloses that the next contact between Finneran and Kramer occurred on February 19, 1975 when Kramer called Finneran who returned the call on March 3, 1975.

Finneran testified he asked Kramer for a copy of Medcom's financial statement so he could determine whether Medcom had "turn around" possibilities. Kramer testified

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9/ In seeking to determine the nature of respondent's selling efforts and methods, the discrepancy in the dates is not markedly important.

Finneran again offered stock to Medcom. No further conversations were had between the two. This evidence reflects at best three or four conversations between Finneran and Kramer in August or September 1974 and one or two in February, 1975 during which the evidence discloses Finneran offered Medcom stock to Medcom.

The facts relating to the Weinberg offer to sell Medcom to the company were as follows. A staff member of the Commission called Weinberg on March 11, 1975 and told him the staff had been informed that respondent owned more than 5% of Medcom's stock and that the statement required to be filed pursuant to Section 13(d) of the Act had not been filed. Weinberg communicated with Alfred Berman of Guggenheimer and Untermyer, outside counsel for respondent, who instructed him to file the statement promptly. Weinberg then called Steven Silverman, one of Medcom's attorneys who informed him that Medcom was concerned that perhaps respondent had acquired Medcom with the view to a takeover of the company. Weinberg told Silverman that respondent was strictly a broker and investment banker, had "never gone after control of a company," and had no intention to take over Medcom. When Weinberg reported this conversation to Berman he was told that to allay Medcom's fears about takeover he should offer to sell respondent's holdings to Medcom at respondent's cost of 2 3/4.

Weinberg after clearing the matter with Howley and Mr. Nash, respondent's managing partner called Silverman and made the offer. Silverman asked if respondent would accept terms and was told that respondent would accept cash and a 90-day note. However, Medcom's board of directors rejected the offer and Weinberg was so informed.

Conceding that Finneran was trying to sell Medcom or its management personnel or others suggested by Kramer and recognizing that a period of at least 5 or 6 months elapsed before Weinberg's offer, during which period there is no evidence of any contact between respondent and Medcom and taking into consideration the facts and circumstances of Weinberg's offer to Medcom, it is concluded that the record does not establish that from August 1974 to March 1975 respondent conducted an intensive solicitation of Medcom.

There are two additional areas relating to respondent's trading activities which the Division urges demonstrate respondent's selling efforts. The first is respondent's efforts to sell Medcom to two institutional purchasers. In its brief the Division states that respondent "continued to solicit Babson on an almost daily basis for the next three months . . . "and that Oppenheimer's attempt to solicit Babson was even more unusual in that Babson did not deal in OTC stocks or in blocks of stocks averaging more than 900 shares". The record does not support the Division's views.

The evidence fails to demonstrate that respondent, after the original contact with Babson on May 16, 1974 continued almost daily to solicit the fund. Babson's trader testified that in about May 1974 Babson owned 50,000 shares of Medcom in a fund and possibly 20,000 or 30,000 shares in scattered accounts. According to the record, Babson's last purchase of Medcom was 1,000 shares and was made in April 1974 at 7 1/4. Babson's trader further testified that Babson had a direct line to respondent, that in the course of a day he spoke to respondent's traders on the phone 25 or 30 times a day about any number of stocks, including Medcom, in which one or both firms had an interest and that such conversations, which took place several times a week, were in the usual course of its daily business of checking markets in various stocks. He also testified that during any such call any mention of Medcom was in the nature of a general inquiry, the purpose of which was to keep informed "on what's going on in the stock". He "welcomed" such talks stating "without that it would be difficult to trade large pieces of stock". The trader testified, without refutation, that he was never "badgered" or solicited to buy Medcom. Most significantly he described respondent's phone calls as "It was not a selling job. I had a lot of selling jobs put on me. This was not a selling job". The inference to be drawn from the numerous calls between Babson and respondent is far short

of being clear and convincing that respondent continued to solicit Babson on an almost daily basis for a three-month period.

The only other material evidence relating to respondent's selling efforts directed to institutional purchasers relates to the purchase by the Dreyfus Third Century Fund on August 4, 1975, five months after respondent ceased its market marking activities. Kenneth Oberman, Manager of Dreyfus Fund and Vice President and Associate Director of Research of Dreyfus Corporation testified he knew Stephen Fischer, Medcom's Vice President for Finance for many years and had talked with him about Medcom many times. Fischer tried to interest Oberman in purchasing Medcom. Fischer who owned 10,000 shares of Medcom, testified he informed Oberman that respondent owned a substantial amount of Medcom. Oberman testified that on August 4, 1975 he placed an order to purchase 100,000 shares of Medcom for the Third Century Fund with his trading room and told his trader that respondent owned Medcom stock. The order was given to respondent's trader who sold the stock to the fund at 2 1/2 per share.

It is concluded that the record relating to respondent's selling efforts and selling methods does not contain clear and convincing evidence that respondent engaged in the type of selling efforts or methods which form the essential ingredients for determining that respondent engaged in a

Rule 10b-6 distribution. Respondent had a sales force of about 40 retail salesmen and an additional 14 institutional sales representatives. Other than Finneran who offered Medcom its own stock and who made the retail sales noted above, Prince who made one phone call to a fund, which had no interest in purchasing, and Weinberg who communicated with Medcom through the latter's attorney there is no evidence that other personnel engaged in any selling or promotional program during respondent's market making period. One possible exception could be said to relate to the general announcement to the traders the day preceding the Medcom purchase to ascertain if there existed any institutional interest in a block placement. However, as stated above, there is no evidence, other than one call to Babson, that other calls were made to institutions or the nature of any calls or number of traders who may have made any such calls. At any rate, the record contains no evidence of any similar announcements to traders concerning Medcom.

It is significant to note that the evidence with respect to the retail sales and the sale to Dreyfus, reveals that such persons and the fund were not solicited by respondent or its sales force but the sales were made by respondent's traders upon the request and initiative of the respective purchasers. They were unsolicited sales. Of even greater significance is the fact that there is no evidence that the sales force was requested to make a concerted attempt to sell Medcom, no evidence that memoranda were prepared or furnished to sales persons concerning Medcom, no evidence of any type of campaign or program or meeting of respondent's sales force conducted by either the trading or sales departments of respondent aimed at selling the Medcom block, no evidence of any special compensation

offered or paid to salesmen to sell the said stock and no evidence of the preparation or distribution of any sales literature, circulars or memos concerning Medcom which were to be or could be utilized in selling the said stock.

The Commission in its opinions placed emphasis upon evidence of such nature in concluding that a Rule 10b-6 distribution was engaged in as distinguished from ordinary trading transactions. Thus in Bruns supra the Commission in concluding a distribution was effected, noted that, in addition to evidence that large amounts of stock were distributed through 35 salesmen to 136 customers and that shares were sold to two dealers for retail distribution to their customers, there was also evidence that the broker increased his bids and traded at increasing prices, that partners of the broker on the board of directors of the issuer urged the declaration of a stock dividend when no surplus existed against which the dividends could be charged and that sales literature and circulars were used which were found to be false and misleading. Similarly, in J.H. Goddard & Co., Inc., 42 SEC 638, 640, 642 (1965) the Commission held that the size of the blocks and the extent of the selling efforts constituted a distribution. It found that the broker in that case was the the primary wholesale purchaser and primary retail seller of the stock in question, that the market in the stock was dependent upon the broker's continued sales efforts and that such selling efforts were made by means of market letters as well as telegrams which referred to the market letter. One such letter sent to customers and investment advisory clients recommending the stock was false and misleading. The conduct and activities noted in these cases are typical and characteristic of the component element which the Commission takes into consideration in determining whether the selling efforts and selling methods constitute a distribution. In the instant case the absence

of such material elements leads to the conclusion that the evidence is not clear and convincing that respondent, by reason of its selling efforts and methods engaged in a distribution within the meaning of Rule 10b-6.

In light of the Commission's decision in Collins supra, that Rule 10b-6 is designed to prevent manipulation, consideration is next given to asertaining whether respondent's trading activities were manipulative. The Division asserts that respondent's manipulative conduct was characterized by techniques such as persistently entering bids in NASDAQ that were higher than any other market maker; repeatedly effecting upward quotation changes and maintaining high quotations; purchasing more shares than it sold thereby enhancing an artificial demand created by its inflated quotations and that its purchases were accompanied by entering successively higher quotations which raised the market price. In support of its contention the Division relies on the amount of time respondent was in a shared or exclusive high position in NASDAQ.[10/]

10/ The record discloses that the NASD, as a part of its market surveillance program, maintains information reflecting the bid and asked quotations of the market-makers registered in a particular stock and the number of shares purchased and sold by each such market maker. From such basic information it prepared a High Bid and Low Bid Analysis for Medcom for each day in which quotation data was available during the respondent's marking making period. Each analysis reflects the amount and percentage of the time the market was open that each market-maker was in a high bid position alone or shared with other market makers, or in a low bid position. The analyses also reflect the amount and percentage of total trading attributable to each market maker for the entire market making period or for the particular period a market maker was in the market, if less than the entire period. The trading period during which respondent made a market was 185 days. The above mentioned analyses reflect information for a period of 150 days. The information for the missing 35 days was unavailable because of some mechanical or other problems experienced by the NASD.

The Division urges that the record reveals that the time respondent spent in the exclusive or shared high position in the market for Medcom is indicative of market manipulation. The evidence shows that during its market making period for Medcom, respondent was in the exclusive high position 17% of the time as compared with 7 other market makers who were in such position 5% or less of the time. One of such other market makers was in the market only between January 22 and February 28, 1975. While the accuracy of the percentage figure for the entire market making period was not challenged, it does not accurately reflect the market trading activity on a weekly basis, which affords a better appraisal of respondent's conduct, since it portrays the time respondent spent in that category each week as compared with the activities of other market makers during respondent's market making period. Thus a breakdown of the time spent in the exclusive high bid category indicates that during 12 of the 38 weekly market making periods or ever 30% of the entire period, respondent occupied no time in the said category. It was in the exclusive high category 5% or less time in 20 of the 38 weeks of trading and more than 5% in that category in the remaining 19 weekly periods.

The evidence further shows that respondent shared the high bid position 60% of the time it made a market in Medcom, as compared with 3 other market makers who shared the position 47%, 45% and 43% respectively, and 4 others who shared the high position between 20% and 32% of the time. Accepting the accuracy

of the figures, two observations are pertinent. First, though respondent shared the high bid position with the other 7 market makers during the market making period it appears that 3 such market makers also spent substantial periods of time in that category. Second, a breakdown of the over-all percentage figures on a weekly basis would more meaningfully measure respondent's trading activities, since it would reflect the time respondent shared high bid position as compared with that of the other 7 market makers. The evidence divulges that, of the 38 weeks of respondent's market making period in Medcom, there were 19 weekly periods during which other market makers exceeded the time spent by respondent in the shared high bid position and only 13 weekly periods when respondent spent a greater amount of time in the shared high positions than the other 7 market makers.

A further study shows, that during 2 weekly periods respondent and 2 other market makers shared the high bid position 100% of the time; that during 4 other weekly periods when respondent was in the shared high bid position between 60% and 100% of the time, there was one week in which the 4 other market makers exceeded the percentage of time respondent spent in that position and one equaled it, 2 weekly periods when 3 other market makers either exceeded the time respondent spent in that position or equaled it and one other week during which another market maker shared the high bid position with respondent and finally during 9 other weekly periods when respondent

spent between 40% and 60% of the time in the shared high position, at least one other market maker in each of the 9 weekly periods exceeded the time spent by respondent in the shared high bid position.

It is found that although the record reflects that respondent was in an exclusive or shared high bid position with other market makers during certain weekly periods throughout the market making period, the evidence fails to demonstrate a perceptible pattern of consistently being in such position. For example, as noted above, during half of the 38 weeks of respondent's market making activities one or more of the other market makers exceeded the time spent by respondent in the high bid position and in only 35% of the market making period did the respondent spend a greater amount of time in that category than the other 7 market makers. The evidence also shows that respondent increased its bids in the shared high position on 44 occasions during the market making period as compared with 2 of 4 other market makers who had 57 and 67 such bid increases respectively. Respondent increased its bid into the exclusive high category on 30 occasions as compared with another market maker who increased its bid on 26 occasions. It is therefore concluded that the evidence is not clear and convincing that, as claimed by the Division, the respondent "persistently entered bids for Medcom stock that were high or higher than those of any other market maker in the stock".

Additionally, consideration was also given to the time spent by the respondent in the exclusive and shared low bid position in evaluating respondent's market activities in Medcom. The record shows that of the time spent in the exclusive low bid position during respondent's market making period respondent was in that category 6% of the time along with another market maker, that a third spent 10% in the said category and 4 other market makers between 2% and 4%. The evidence also shows respondent shared the low bid position with other market makers 29% of the time as compared with 2 other market makers who spent about 50% in that category, 4 other market makers spent between 32% and 42% and one other market maker spent 23% in the said category. A breakdown of these statistics, made for reasons indicated earlier, reveals that during 26 weekly periods, or 70% of respondent's time in NASDAQ, was spent sharing the low bid position with one or more other market makers and during 12 weekly periods, or 30% of the time spent no time in the said category. During 21 weekly periods (56%) respondent spent no time in the exclusive low position and in 17 weekly periods (45%) it shared the time with other market makers in the said category. The evidence also shows that on 22 occasions respondent reduced its bid into the exclusive low bid position compared with another market maker who reduced its bid on 24 occasions, a third who reduced on 8 occasions and the remaining 5 even less. The evidence relating to time spent by respondent in

the low bid category reflects that during its weekly market making period in Medcom, the time respondent spent in the low bid category shared or exclusive was not so substantially different than that of other market makers as to form the basis for finding manipulative conduct. It is concluded that the evidence relating to respondent's time spent in the said low bid category in Medcom does not establish in clear and convincing fashion that respondent's market activities were manipulative.

The Division further asserts that the evidence shows that respondent's upward quotation changes and stock purchases raised the price of the Medcom stock. The Division points out that immediately after purchasing the Medcom stock respondent began the first of a series of aggresive purchases and successive bid increases which drove up the market price of Medcom. However, the evidence shows that as a result of respondent's sales immediately following its purchases, the market price of Medcom dropped. In its brief the Division admits that fact stating "... after having lowered the price of Medcom on Friday, May 17, 1974, as a result of the sale ... of Medcom ...." To illustrate its successive bid increase contention the Division relies primarily on respondent's trading on September 20, 1974 and February 28, 1975, claiming they demonstrate that respondent's trading drove up the price of Medcom. The evidence shows that on September 20 respondent purchased some 1,600 shares of Medcom at ascending prices

ranging from 2 5/8 to 3 bid and that the inside bid in Medcom increased from 2 3/8 to 2 7/8. The NASDAQ High Bid Analysis for that day reflects that respondent made 3 upward bid changes, two other market makers made 4 such changes and two others made 5 changes.

To comprehend the nature of respondent's purported successively higher bid increases a detailed review is made of respondent's bids and those of other market makers on February 28, 1975, the other date selected by the Division as an example of respondent's activities which drove up the price of Medcom. The record discloses that on the last day of respondents market making activity respondent raised its bid 1/4 at 10:43 and reduced it 1/8 some 19 seconds later sharing the high with 2 other market makers, raised it 2 minutes later by 1/8; raised it 1/4 at 11:06 and reduced 1/4 three minutes later sharing the high bid with 2 other market makers. At 11:22 another market maker increased its bid by 3/8 which was 1/8 higher than respondent's bid. At 12:35 respondent raised its bid 1/4 which was 1/8 higher than another market maker and a minute later another market maker increased its bid to that of respondent. For about the next 3 hours respondent shared the high position with 2 other market makers. At 3:17 another market maker increased its bid by 3/8 which was 1/8 higher than respondent's bid and some thirteen seconds later reduced its bid 1/8. Thirty seconds later another market maker increased

its bid 3/8 which again was 1/8 higher than respondent's bid. At 3:19 respondent raised its bid to meet the prior increase and by 3:20 four market makers, including respondent shared the high bid. Finally at 3:22 another market maker raised its price by 1/8 which was 1/8 higher than respondent's bid and that of 2 other market makers. No clear picture emerges from the foregoing which distinctly demonstrates that respondent made successive bid increases which drove up the price of Medcom. Assuming arguendo, that on the two dates in question a reasonable inference may be drawn that respondent's increased bids may have caused a rise in the market price of Medcom, it does not follow that during the entire period in which respondent was making a market in Medcom it successively increased its bids and artifically inflated the price of Medcom, as contended by the Division, nor does the evidence show any pattern of frequent particular periods during which it followed such practice. 11/ Moreover, if the Division's successively increased bid argument were carried to a logical conclusion the evidence should demonstrate, at the very least, an overall increase in the price of Medcom during the alleged manipulative period. The evidence is to the contrary.

11/ This is not intended to mean that a broker or dealer who, during a particular period or for that matter even on one day, continuously raises his bids in the sheets and artifically raises prices may not be found to have manipulated the market. However, the charges here are that respondent from May 17, 1974 through about March 13, 1975 engaged in manipulative conduct proscribed by Rule 10b-6.

The record shows that on the day respondent purchased the Medcom block the market price was 4 1/4 bid and 2 3/8 bid on February 28, 1975. The evidence further indicates that throughout respondent's market making period the bid price, after respondent's purchase, declined until the week ending June 14, 1974, when it rose from 3 3/4 to 4 5/8 and thereafter dropped to 1 1/2 at the end of the year and as indicated closed on February 28, 1975 at 2 3/4. 12/

The Division argues that another aspect of respondents manipulative conduct is that by its continuous failure to enter quotations reflecting true supply and demand it supported the market, that whereas other market makers consistently adjusted their quotations to reflect excesses of supply and demand,respondent did not reduce its bid after purchasing Medcom stock. In support of its claim the Division stated that in 76 out of 101 transactions in which respondent purchased Medcom stock it made no quotation change following the purchase and actually raised its quotation following 7 of the remaining 25 transactions. The evidence shows that other

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12/ As an indicator of whether the price of Medcom was manipulated by respondent's trading in Medcom it is of interest to compare the movement of the Dow Jones Industrial Average with that of Medcom. From the day prior to the purchase (May 16, 1974) to the end of 1974,the Dow Jones Industrial Average declined about 26% and Medcom declined from the range of 4 bid to 1 3/8 bid at the close on December 31, 1974, a drop of 65%. Since the end of 1974 the Dow Jones rose about 16% as of February 27, 1975 and Medcom rose about 1/8 to 1 1/2 bid. It is also of interest to note that on September 20, 1974 when respondent was buying at increasing prices from 2 5/8 to 3 bid the Dow Jones advanced that week. Starting on Monday, September 16 the Dow Jones rose each day of the week closing on Thursday, September 19 about 47 points higher. On September 20, the Dow Jones rose some 22 points.

market makers did not consistently reduce their quotations after purchasing stock. One such market maker on 59 of the 91 occasions when it purchased Medcom did not reduce its bid. Another did not reduce its bid on 31 of 79 occasions it purchased Medcom. A third market maker did not reduce its bid on 16 of 39 occasions. Thus it appears that though respondent did not reduce its quotations on 75% of the occasions following its purchases of Medcom, another market-maker in similar fashion on 65% of the occasions following purchases and two other market makers acted in similar fashion on 40% and 43% of the occasions following purchases. 13/ It appears that even though respondent did not reduce its quotations following purchase a greater number of times than the other Medcom market makers, there is a lack of evidence establishing respondent was alone in such practice in the over-the-counter market nor does the evidence indicate that respondent's conduct was so significantly out of range or different from other market makers as to sustain a finding that it is clear and convincing evidence of manipulation.

13/ The evidence does not reveal whether, in additional instances, the market makers may have reduced their quotations preceding the purchase.

Still another aspect of respondent's manipulative conduct, urges the Division, is that in light of respondent's excess of purchases over sales a reasonable inference can be drawn that such purchases were intended to raise or support the market price of Medcom. With respect to the inference that respondent's purchases were intended to raise the price of Medcom it has previously been noted that such evidence does not clearly establish that respondent raised the prices of Medcom throughout the market making period. With respect to the inference relating to supporting the price of Medcom respondent states it does not dispute that, to the extent that its purchases as market maker exceeded its sales, with the resultant infusion of additional capital, there might have resulted a pro tanto modicum of support or momentary cushioning for the declining market. Respondent's primary contention however, is that as a market-maker its function and duty was to make an orderly market which includes adjusting its inventories in such a manner as to respond to trading pressures. Thus, when supply exceeds demand, as indicated by falling prices, market-makers normally buy stock and conversely when there is a greater demand over supply, as dictated by rising prices, market-makers normally sell stock.

Accepting respondent's admission that its purchases might have on occasion supported the market in Medcom the question to be determined is whether such support resulted in manipulation. In this connection the focus is directed toward an examination of the functions and indeed the duties and obligations of a market-maker to determine whether his conduct in the market place was manipulative or consonant with normal market making. It is noted that the Commission's Institutional Investor Report recognized the similarities in certain respects of three types of market-makers, to wit, New York Stock Exchange Specialists, regional stock exchange specialists and registered third market-makers. The report states:

> "All three regularly hold inventories in all stocks in which they make markets..... All three types of market-makers tend to adjust their inventories in such a manner as to respond to the trading pressures of their customers. That is, when there is an imbalance of supply over demand, as indicated by falling prices, all three types of market-makers sell stock. In this very important sense all these market-makers normally tend to behave in a stabilizing manner and thus reduce the size of the price fluctuations that would otherwise occur". (Vol 4 at 1956)

In Collins supra, the Commission took cognizance of the function of market-makers who acquire a block of securities in the course of their normal activities. It held:

> "It would obviously make no sense to conclude that a specialist, who happens to acquire some registered stock in the course of normal

> activities, has to get out of the market until after he has disposed of that stock. No one has ever thought that such a result was required, even though specialists might well purchase registered stock being sold under a so-called shelf registration."

An analysis of the evidence of respondent's excess purchases over sales is essential to determine if it establishes that respondent's support of the market was manipulative. The evidence relied upon by the Division reflects that during the entire period respondent was making a market in Medcom, its purchases constituted 39% of the total purchases of all market makers. The evidence also shows that 4 other market makers purchased between 13% and 17% and three other market makers purchased less than 10% of the total purchases of all market makers. However, the total percentage figure for the entire period does not adequately depict the nature of respondent's trading activities during each weekly period, which would appear to be a better barometer for determining whether respondent's purchases were manipulative throughout the period as charged. The evidence reveals that of the 38 weeks of respondent's market making activities, it made no purchases during 6 weekly periods or roughly 17% of the period. During 17 other weekly periods or 50% of the entire period, the purchases of other market makers exceeded the amount of Medcom stock purchased by respondent. In only 8 weekly periods or 21% of the entire period, respondent's purchases represented between 50% and 79% of the total weekly purchases. The overall 39% figure for the

entire period as noted above, though seemingly on the high side appears to have resulted primarily from large purchases during three separate weeks in the months of October and December 1974 and February 1975. There appears to be no consistency in respondent's weekly purchases nor any discernable pattern of purchases indicating that respondent's support of the market was not that of a market-maker reacting to supply and demand.

Since it has been shown that respondent's purchases of Medcom did not result in price increases nor create an inflated price of the stock, it is evident that any demonstration that respondent's price support was manipulative would necessitate a showing that a reasonable inference can be drawn that respondent's purchases prevented an even greater decline than the record shows Medcom suffered during respondent's market making period. The evidence indicates that the declining pattern of price movement in Medcom, during such period, was greater than the decline in the general market as reflected in the Dow Jones Industrial Index. There appears to be no substantial evidence from which a reasonable inference may be drawn that ,absent respondent's purchases,the market drop in Medcom would have been even greater than shown by the record. Moreover, the market support argument would have been more pursuasive if the evidence demonstrated that after respondent ceased its market-making activities and no longer

supported the market, the market price dropped substantially or even significantly. The evidence shows that during March 1975 the market price rose from 2 3/8 to 3 1/4, dropped for the next several months, rose again to the 3-3 1/4 range during September through the early part of November and dropped again at the year end. The reasonable inference to be drawn is that the evidence does not establish in clear and convincing fashion that respondent's excess purchases over sales of Medcom during respondent's market-making period, supported the market in a manipulative manner.

In light of all the foregoing it is concluded that the evidence is not clear and convincing that respondent engaged in a distribution of Medcom within the meaning of Section 10(b) of the Act and Rule 10b-6 thereunder, nor by applying the same standard does the evidence establish that respondent engaged in manipulative conduct in trading Medcom during its market-making period. Accordingly the charges of wilfull violation of the foregoing Section and Rule will be dismissed.

Alleged violations of Section 13(d) and Rule 13d-1

The Order alleges respondent wilfully violated Section 13(d) of the Act and Rule 13d-1 thereunder. That Section requires any person, who acquires more than 5% of the outstanding shares of a class of securities registered under Section 12 of the Act, to file with the issuer and the Commission, within 10 days of the acquisition, a statement containing information prescribed by the Commission as necessary in the public interest or for the protection of investors. The Commission promulgated Rule 13d-1 thereunder, which requires the filing of certain information as set forth in Schedule 13D. Respondent does not dispute that it did not timely furnish Medcom nor file with the Commission the statement required by Schedule 13D. Respondent concedes the Schedule 13 D statement was, in fact, filed on March 14, 1975 some 9 1/2 months after its acquisition of more than 5% of Medcom. Respondent asserts that the cause for the delay was twofold; first it claims it did not realize until some date in September that the modest $340,000 Medcom block it had purchased constituted more than 5% of Medcom's outstanding stock and second, that as a result of misunderstanding and blunder on the part of its house counsel Arnold Weinberg who believed that Bernard Garil, assistant to the managing partner, after being alerted that respondent failed to file the required statement, and had given instructions for assembling the data required,

would furnish it to Weinberg for the preparation of the 13D statement. The first claim is not sufficient to withstand a finding of wilfull violation[14/] and the blunder factor merely reinforces such finding. The record discloses that on June 4, 1971, three years prior to respondent's acquisition of Medcom, Garil circulated to respondent's supervisory personnel in the trading department and respondent's Executive Committee an "inter-office" memorandum discussing the Williams Act. In essence the memo stated that when 5% or more of a class of securities was acquired an amendment to the Act required a report be sent to the issuer, the SEC and the stock exchange and that subsequent transactions must also be reported. Accompanying the Garil memorandum was another memo from respondent's outside counsel explaining the requirements of the Williams Act (Section 13(d) of the Act) to broker-dealers and the applicability of the filing requirements to market-makers. The records also reflects that between 1972 and 1975 respondents and its affiliates filed appropriate reports of acquisition of more than 5% of an issuer's shares

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14/ Wilfull in this context has been interpreted by the Commission and the Courts as intentionally committing the Act which constitutes violation. There is no requirement that the actor also be aware that he is violating one of the Rules or the Acts. Tager v. S.E.C, 344 F.2d. 5,8 (2d Cir. 1965). This standard has also been applied to an ommission or failure to act. Marketliner 42 SEC 267 (1967).

outstanding in 14 instances, 12 of which were not filed within the required 10 day period.[15/] In its answer and during the hearing respondent claimed its failure to file was inadvertent and not wilfull. Weinberg's and Garil's conduct in September 1974 is of particular significance in determining that respondent's failure timely to file a 13 D Schedule was wilfull. Garil testified that in September he became aware of the respondent's failure to file the Schedule 13 D as a result of a conversation with Howley, and immediately conferred with Weinberg, house counsel, with respect to the means of complying with the filing requirements. Wienberg testified he believed Garil was to obtain the necessary information and Garil testified he was under the impression that Weinberg was taking care of the filing requirements. As a consequence of this comedy of errors nothing was done. Respondent's argument, that it was not until September that it realized it had purchased in excess of 5% of Medcom and its tortured explanation that since it had no takeover aspiration of Medcom, the technical, routine filing requirement was overlooked, defies credulity. The implied inferences that respondent may

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15/ The affiliates referred to are Oppenheimer Fund, Inc., and Oppenheimer Time Fund Inc. registered investment companies managed by the Oppenheimer partnership.

determine which statutory requirements are substantive and require compliance and which are merely techinical or routine and may be ignored or delayed until called to its attention is wholly unwarranted. Weinberg's further testimony that he became involved during the following several months in complicated legal matters concerning a reorganization of respondent and failed to remember to file the required statement is insufficient to exculpate respondent. None of the explanations or excuses proffered by respondent are adequate to relieve it of the responsibility for complying with the statutory requirements. [16] Respondent's conduct in this regard demonstrates a reckless disregard of its responsibilities under the Act. It is concluded that the respondent wilfully violated Section 13(d) of the Act and Rule 13d-1.

The Order also charges that the 13(d) statement when filed in March 1975 was false and misleading in that it reported in response to Item 4 of Schedule 13D that the Medcom securities "were purchased as market makers with no intention to acquire control of the business of Medcom Inc., the sole purpose being to engage in trading and act as market-maker with respect to Medcom shares".

The Division contends the record establishes the falsity of the statement that respondent purchased Medcom as a market-maker, since when it acquired the Medcom block on

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[16] Respondent's arguments relating to the impact of certain amendments to Rule 13d-1 which were adopted in April 1978 effective on May 29, 1978, do not absolve respondent from violations found in May 1974. They will, however, be considered infra under Public Interest.

May 17, 1974 it was not a market-maker as evidenced by a form filed with the Commission on June 20, 1974 entitled "Notification by OTC Market Makers in OTC Margin Securities, in which it stated that respondent "commenced making a market" in Medcom on June 7, 1974. The Division further contends that the response in item 4 that the "sole purpose" of its Medcom purchase was to engage in trading and act as market-maker was also false because the primary purpose of the acqusition was to accommodate Keystone. Proof of the falsity says the Division, is contained in an affidavit in the record executed by Weinberg in which he states "... the reason for the purchase of the Medcom stock by OPP Partnership was to facilitate a sale desired by a good customer".

The instructions to Item 4 of Schedule 13 D, at the time respondent filed its statement, stated:

> "State the purpose or purposes of the purchase or proposed purchase of securities of the issuer. If the purpose or one of the purposes is to acquire control of the business of the issuer, describe any plan or proposal which the purchaser may have".

The instructions leave no doubt as to what is required to be filed, namely, the purpose of the acquisition. If such purpose is acquisition of control, additional information must be disclosed. The correctness of respondent's answer to the item that its purpose in purchasing Medcom was as a market maker is supported by the record. An employee of the NASD testified that on the day respondent acquired Medcom the

NASDAQ tape, at 12:16 P.M., reported that respondent was registered as a market-maker in Medcom. The evidence also shows that the confirmation sent to Keystone, on that same purchase date, bore the following statement, "We make a market in this security". Though the record reflects that it was not until on June 7, 1974 that respondent entered quotations in the NASDAQ system and thereby formally commenced its active market-making activities, that fact does not render the above noted response to Item 4, that Medcom was purchased as a market-maker, false. The response was not incorrect even though it could be argued that the use of the word "as" was not the most precise word to convey the meaning, which appears quite apparent, that respondent intended to become, or was registered as, a market-maker in Medcom stock. To characterize the statement as false would be akin to exalting form over substance.

The Division's argument that respondent misrepresented both the circumstances under which it acquired the Medcom stock and the purpose of its acquisition is rejected.

Item 4 does not require disclosure of the circumstance under which an acquisition is acquired, nor does it require a reason to be stated for an acquisition; only the purpose of the acquisition is required to be stated. The distinction makes manifest the intent of the Commission when it published the instructions to Item 4. It is quite apparent that a

person may have any number of reasons for deciding to purchase securities. If the Commission wanted such reasons disclosed, it would have clearly stated that the reason for the acquisition should be furnished and it would not have started the next sentence by repeating "If the purpose...." It is evident that the information the Commission considered material to disclose to investors and others in the public interest, in addition to the fact of acquisition, is what the purchaser intended or contemplated doing with an acquisition of 5% or more of an issuers stock. "Purpose" is defined in Webster's Dictionary as "something that one sets before himself as an object to be attained." It is precisely in that sense that the word is used in the Instructions.

Respondent's disclosure that it intended to engage in trading Medcom, whether that was its sole purpose or one of its purposes, is not false and is supported by the evidence of its trading in Medcom. There is no evidence in the record that respondents attempted to seek control of Medcom.

The Division also urges that the response to Item 5 of Schedule 13 D is inadequate in failing to disclose respondent's initial acquisition of more than 5% of Medcom in May 1974. In its response to Item 5 respondent stated that

as of March 14, 1975 it beneficially owned 203,422 shares of Medcom, and as required, listed its transactions in Medcom within a 60 day period preceding the above date. The information furnished is correct as of the date if was made. However, with knowledge of the fact that it was filing the required information some 9 months late respondent should have, in the interest of making complete disclosure, furnished information regarding its initial acquisition.

In accordance with the provisions of Section 15(c)(4) of the Act respondent will be required to file, within 10 days of the effectiveness of the order herein, an amendment to correct Item 5 of Schedule 13 D to include appropriate information reflecting its acquisition of the 125,000 shares of Medcom on May 17, 1974. Pursuant to the authority in the same Section respondent will be required to file an appropriate amendment to Schedule 13 D to reflect material changes in beneficial ownership effected between May 17, 1978 and March 1, 1975. [17/]

17/ In that connection it is noted that Rule 13d-2 requires the filing of an appropriate amendment to reflect material changes in beneficial ownership of Medcom which were effected during the market-making period. To the extent respondent increased and decreased its ownership between 5% and 9.3% during its' market making period, it was required to file appropriate amendments to reflect material changes, defined in the Rule to include acquisition or dispositions equal to one percent or more or even less depending upon the facts and circumstances. Since no charge is made in the Order of the Commission of any violation of Section 13(d)(2) it would be inappropriate to make findings of violations not alleged.

Public Interest

The remaining question is whether any remedial action is in the public interest. Respondent's violation of Section 13(d) and the Rule thereunder was found to be wilfull. Respondent urges that a recent amendment to Rule 13d-1, should be considered in determining remedial measures. As pertinent here, the new Rule permits a registered broker or dealer, who would otherwise be required to file a Schedule 13D statement of beneficial ownership of more than 5% of a class of securities within 10 days after acquisition, to file in lieu thereof, a short form statement on Schedule 13G within 45 days after the end of the calendar year in which the 5% ownership was acquired, if he still owns more than the 5% at the end of the calendar year. The requirement is subject to the proviso, and, in fact Item 10 of the new Schedule 13G requires a certification, that the person who acquired the securities did so in the regular course of its business and not for the purpose of nor with the effect of changing or influencing the control of the issuer and the securities were not acquired in connection with or as a participant in any transaction having such purpose. 18/ Respondent pleads that had the new Rule been in effect in February 1975, when its market making activities closed, it

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18/ 14 SEC Docket 861 (May 9, 1978).

would have satisfied the filing requirements by filing a short form on Schedule 13G on or before February 16, 1975 and its actual filing on March 14, 1975 would have been only one month late. The argument, at best, is purely hypothetical. What respondent says it would have done had the law been different does not comport with what it did, or rather what it failed to do in 1974 as evidenced by respondent's conduct in September 1974, when admittedly it became aware of its obligation with the filing requirement only after it was alerted by the staff of the Commission to file the statement. Brokers have a responsibility not only to be informed of the requirements of the law but to adopt procedures to assure compliance. The characterization of certain provisions as merely technical and the notion that delay in compliance therewith until either time permits or notification to comply is received from the staff of the Commission, is unwarranted.

The recent amendments to Rule 13d in 1978 do not exculpate respondent's wilfull violation in 1974. Respondent's explanations for its failure to file are utterly inadequate to justify its omissions to comply with the statutory requirements. 19/

19/ For example when Weinberg and Garil met in September to discuss the 13d filing requirements neither took the trouble to make certain that compliance was effected.

In assessing whether it is in the public interest to invoke a sanction, consideration has been given to respondent's 25-year history in the securities industry, including the activities of the predecessor firm, its one "consent order" to a Commission action alleging violations by respondent, the evidence that between 1973 and 1975 respondent or its affiliate filed 14 Schedule 13D statements, twelve of which were filed late for periods ranging between 45 days and 20 months and the evidence indicating that respondent has currently instituted corrective internal procedures, relating to acquisitions of 5% of an issuer's stock, which are designed to alert its traders when any purchase would bring respondent's holdings to 4% of the outstanding shares of an issuer and restricting further purchases without prior consent by Howley.

It is concluded that in light of all of the foregoing it is in the public interest to censure respondent.[20/]

20/ Respondent suggest in its brief that it should not be held responsible for any violation which may be found to have been committed by its predecessor firm, contending that British interests, never affiliated with the predecessor firm, are now substantial stockholders of respondent having acquired 10% equity interest, and respondent as the successor firm assumed only certain financial liabilities, not non-financial liabilities resulting from infractions of regulations or laws on the part of the predecessor. The contention is without substance. The record discloses that the predecessor firm, in partnership form was reorganized in 1975. The respondent as successor, in corporate form assumed all the assets and liabilities of its predecessor partnership. The reorganization involved no change in management personnel or control. In a circular published by respondent, it stated, as pertinent

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IT IS ORDERED that Oppenheimer & Co., Inc. be and it hereby is censured.

IT IS FURTHER ORDERED that pursuant to Section 15(c)(4) of the Securities Exchange Act of 1934 Oppenheimer & Co., Inc., within 10 days after the effectiveness of this order, amend Item 5 of Schedule 13D filed on March 14, 1975 to reflect the acquisition on May 17, 1974 of 125,000 shares of the common stock of Medcom, Inc.

IT IS FURTHER ORDERED that pursuant to Section 15(c)(4) of the above mentioned Act Oppenheimer & Co., Inc. file an appropriate amendment to Schedule 13D within 10 days after this Order, to reflect material changes in its beneficial ownership of the common stock of Medcom, Inc. effected between May 17, 1974 and March 1, 1975.

IT IS FURTHER ORDERED that the charges relating to the alleged violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder are hereby dismissed. This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice,

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20/ (Continued)
here, "The affairs of Opco Inc. (respondent) will be managed by those persons who presently manage these activities of the Firm (predecessor partnership). The members of the Firm's Executive Committee will be principal executive officers and directors of Opco Inc." Respondent is liable for any violations of its predecessor where the successor entity is under the same management personnel and there is no change in control of the new entity. See e.g. S.E.C. v. Manor Nursing Centers Inc., 340 F. Supp. 913 (S.D.N.Y. 1971), aff'd 458 F.2d 1082 (2d Cir. 1972).

17 CFR §201.17(f).

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party that has not, within fifteen (15) days after service of this initial decision upon it, 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 it. If a party timely files a petition for review, or the Commission takes action to review as to a party, this initial decision shall not become final with respect to that party.[21/]

Irving Schiller
Administrative Law Judge

Washington, D.C.
January 3, 1979

21/ All proposed findings, conclusions and briefs of the parties have been considered. 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 stated herein they have been accepted, to the extent they are inconsistent therewith they have been rejected and to the extent they are not relevant or necessary to a proper determination of the material issues presented they have been omitted.