ADMINISTRATIVE PROCEEDING
FILE NO. 3-5225

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U.S. SECURITIES AND EXCHANGE COMMISSION

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

M. KIMELMAN & CO. :
(812-4070) :

FILED
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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

January 30, 1978
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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FILE NO. 3-5225

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In the Matter of	:	
M. KIMELMAN & CO.	:	INITIAL DECISION
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APPEARANCES: Kenneth Gerstein, Gregor B. McCurdy and Anne Flannery, for the Division of Investment Management.

Robert P. Patterson, Jr. and Russel Deyo, of Patterson, Belknap, Webb and Tyler, for applicant.

Roger W. Kapp, of Donovan, Leisure, Newton and Irvine, for Talley Industries, Inc.

BEFORE: Jerome K. Soffer, Administrative Law Judge

By order dated May 24, 1977, the Commission directed that a hearing be held based upon an application by M. Kimelman & Co. (applicant), filed pursuant to Section 6(c) of the Investment Company Act of 1940 (Act), for an Order exempting from the provisions of Section 17(e) of the Act a proposed receipt by applicant of a finders fee in the sum of $750,000 from Talley Industries, Inc. (Industries).

The evidentiary hearing was held in New York City on September 6, 7, 8 and 9, 1977 at which applicant and the Division of Investment Management (Division) appeared by counsel. In addition, Industries also appeared by counsel, having been granted leave to be heard pursuant to Rule 9(c) of the Commission's Rules of Practice. Following the conclusion of the hearing, applicant and the Division submitted respective proposed findings of fact and conclusions of law together with supporting brief, including a reply brief by applicant. Industries, pursuant to permission granted at the hearing, submitted its brief supporting the application.

The subject finders fee was allegedly earned by applicant in connection with a merger in May 1970 of Industries and General Time (General Time). The Order for hearing recites that at all time relevant hereto, American Investors Fund, Inc. (Fund) a company registered under the Act as a diversified, open-end management investment company, was an affiliated person of Industries, one of whose directors was a limited partner of applicant, and that the staff of the Commission raised a question

as to whether receipt by applicant of the proposed fee would violate Section 17(e)(1) of the Act which makes it unlawful for an affiliated person of an affiliated person of a registered investment company, acting as agent, to accept from any source any compensation for the sale of property to or for such registered company.[1/]

As involved in this proceeding, Section 6(c) of the Act authorizes the Commission to grant an exemption from any provision of the Act to the extent that such exemption "is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act." The Order instituting this proceeding asked that consideration be given to the stated statutory objectives, and to further consider in connection therewith the role of applicant as broker for both the Fund and Industries in their 1968 acquisition of General Time stock, and

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1/ Section 17(e) of the Act provides as follows:

> It shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such person --
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> (1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or
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> (2) acting as broker, in connection with the sale of securities to or by such registered company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds (A) the usual and customary broker's commission if the sale is effected on a securities exchange, or (B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities, or (C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected unless the Commission shall, by rules and regulations or order in the public interest and consistent with the protection of investors, permit a larger commission.

the fact that such acquisition had previously been determined to have violated Section 17(d) of the Act.[2/]

The Applicant

The applicant was organized as a limited partnership under the laws of the State of New York in the fall of 1966 and since that time has conducted an investment banking and general securities business. Since November 11, 1966 it has been both a registered broker-dealer under Section 15(b) of the Securities Exchange Act of 1934 and a member of the National Association of Securities Dealers, Inc. At all times relevant hereto, applicant has been a member of the New York Stock Exchange. Michael Kimelman, Sheila Baird and Joseph Giattino have been applicant's general partners since its organization. Robert Euler, who entered the employ of applicant in October of 1967, became a general partner in 1970. There is one limited partner, Oscar Kimelman, father of Michael Kimelman. He is a certified public accountant who had operated a public accounting firm in New York City until March 16, 1968 when his firm dissolved. He acquired a 20% interest when the partnership was organized for an investment of $250,000. Michael Kimelman contributed $250,000 to the partnership and holds a 55% interest in the firm. The funds for this capital contribution was loaned to him by his father. The loan is still outstanding and bears interest at the rate of 6% per annum. Thus, Oscar Kimelman is

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2/ Talley Industries, Inc., et al., 43 S.E.C. 773 (1968); and see S.E.C. v. Talley Industries, Inc., 399 F.2d 396 (2d Cir. 1968), cert. den. sub nom General Time Corp. v. S.E.C., 393 U.S. 1015 (1969).

the source for all of the capital contributed to the partnership. However, the evidence is uncontradicted that he exercises and has exercised no control nor has rendered any services for the firm (except at its inception when he did some accounting work for it).

Talley Industries

Industries is a Delaware corporation with its principal offices in Arizona. Mr. Franz G. Talley, its president, has been a long-time acquaintance both socially and in business matters with Oscar and Michael Kimelman. Oscar Kimelman was a director and an assistant secretary of Industries from 1961 to August of 1969. His accounting firm did business with the corporation until its dissolution and thereafter, Oscar Kimelman acted as a consultant to Industries.

American Investors Fund, Inc.

The Fund is an open-end, diversified, management investment company registered under the Act. Mr. George A. Chestnutt is and has been president of the Fund, as well as of Chestnutt Corporation, an investment adviser to Fund. At all times relevant hereto the Fund owned more than 5 per cent of the outstanding common stock of Industries.

General Time Corporation

General Time is a Delaware corporation which eventually merged into Industries on May 14, 1970. It is this merger and

the facts involved leading up to it that are the subject matter of this proceeding.

The Involved Transactions

Prior to his employment with applicant in October, 1967, Robert Euler had done some research on General Time as a possible investment for his then employer. After joining applicant, he continued his research in General Time by examining its financial reports, visiting its corporate headquarters, studying its distribution and marketing procedures, and preparing analyses of projected sales earnings, etc. This information was conveyed to Michael Kimelman and Sheila Baird. They concluded that General Time would be an attractive investment for applicant's customers who, at that time, comprised a number of discretionary accounts and a few non-discretionary accounts. Euler was instructed to prepare an analysis of General Time for distribution, and purchases of stock of General Time were commenced on behalf of the firm's accounts.

It was in the nature of applicant's operations to research intensively a limited number of companies from which to select a few for investment by its customers. This approach also disclosed on occasion those corporations that were in a position favorable for acquisition by another. Applicant would, when opportune, recommend such situations to others with a view toward the possible earning of a finders fee.

Some time in December 1967, Michael Kimelman mentioned the stock of General Time to Mr. Talley as a favorable investment

possibility. He also recommended that consideration be given by Industries to the acquisition of General Time. He had Euler prepare and deliver to Talley a report and analysis of General Time which included the matter previously prepared for general distribution and contained additional information which would be suitable to someone interested in a possible acquisition. Prior thereto, neither Talley nor Industries had ever considered General Time either as an investment opportunity or as a candidate for acquisition.

Shortly thereafter, Talley advised applicant that Industries had decided to acquire General Time's stock and on December 26 and 27, applicant, acting as broker, received and executed orders from Industries for 24,800 shares,and by February 23, 1968 Industries purchased through applicant a net amount of 191,500 shares of General Time common stock.

Mr. Talley had brought the attention of the Fund to the General Time stock and on or a about January 3, 1968, arranged a meeting at the Fund's offices wherein Michael Kimelman and his associates presented a copy of Euler's report on General Time to Mr. Chestnutt. A day or two later the Fund began placing orders with applicant to purchase General Time's stock on its behalf. This was the first time that the Fund had done business with applicant. By February 23, 1968, the Fund had acquired through applicant some 210,000 shares of General Time.

On February 19, 1968, Industries made a special bid through Smith, Barney & Company, Inc. for General Time shares as a

result of which it acquired some 66,437 additional shares of General Time. During this period, applicant, acting as broker, also purchased and sold shares of General Time for its own capital account, for its partners individually, and for other persons including its discretionary and non-discretionary accounts. Oscar Kimelman, and friends and employees of the applicant's partners also purchased General Time shares during this period. The total volume of shares purchased by applicant as a broker for other than Industries and the Fund totalled 180,000.

All of the foregoing purchases were made on the New York Stock Exchange and applicant received the standard brokerage commissions, of which 35 per cent were shares with its clearing broker.

On February 19, 1968, Mr. Talley proposed a merger of General Time and Industries to the former's management, which proposal was rejected. Thereafter, Industries financed an "Independent Stockholders Committee" which proposed a slate of nominees as directors of General Time who would be in favor of such a merger. On April 22, 1968, the Independent Stockholders Committee slate of nominees was elected but did not take office until about 8 months later due to intervening litigation delays.[3/] This was followed by negotiation between representatives

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3/ Applicant and its partners supported the Independent Stockholders Committee and solicited proxies in favor of its slate of nominees for directors of General Time. On or about March 8, 1968, pursuant to Rule 14a-11(c) under the Securities Exchange Act of 1934, Michael Kimelman, Sheila Baird, Joseph Giattino and Oscar Kimelman filed statements of information required under Schedule 14B in relation to the solicitation of General Time proxies.

of the two corporations which resulted in the respective boards of directors of General Time and of Industries approving the terms of merger subject to approval by their respective shareholders and by the Commission (because of Fund's purchases of General Time shares, it like Industries, had become an "affiliated person" of Fund).

It is noted that on April 19, 1968, the Commission had issued a memorandum and opinion concluding that Industries and the Fund had entered into and carried out a joint arrangement for the purchase of General Time stock within the meaning of Section 17(d) of the Act without having obtained prior Commission approval (Talley Industries, footnote 2, supra). On July 31, 1968, the United States Court of Appeals for the Second Circuit, reversing an order of the United States District Court for the Southern District of New York, sustained a complaint by the Commission asserting violations of Section 17(d) of the Act and Rule 17d-1 thereunder by Industries and the Fund (S.E.C. v. Talley Industries, Inc., footnote 2, supra).

After approval of a merger by the respective corporations, the Commission, on January 9, 1970 issued its findings and opinion conditionally approving an application filed by Industries for an order of exemption under Section 17(a) of the Act for the proposed merger of General Time into Industries (Talley Industries Inc., 44 S.E.C. 165) and on February 10, 1970, the Commission issued an order granting said application by Industries (Investment Company Act Release No. 5977).

The Finders Fee

Prior to December, 1967, Mr. Talley and Michael Kimelman had discussed the fact that Industries desired to acquire other companies, and both parties understood that a finders fee would be payable to applicant if a company suggested by applicant were acquired by Industries. Applicant presented several companies to Industries, but no interest therein was generated. Applicant did receive a finders fee of $110,000 from Industries in April, 1969, in connection with the acquisition by Industries of Sherayne Blouse Co., Inc. This is the only finders fee applicant has ever received.

In a proxy statement dated July 26, 1968, Industries acknowledged that it expected to pay applicant a finders fee should a merger with General Time eventuate, although the amount of the fee was not then discussed. At a meeting held in or about February or March of 1969 at the request of Mr. Talley, he and Michael Kimelman agreed that a finders fee of $750,000 would be paid applicant. At that time, the average value of share of General Time common stock was about $45, and the planned merger had a market value of approximately $100,000,000. On March 24, 1969, the board of directors of Industries approved the payment of a fee in this amount to applicant, after having been advised that Oscar Kimelman was a limited partner of applicant (a fact which has also been stated in the proxy statement of July 26, 1968). The board also had the opinion of special outside counsel that the proposed fee was fair and reasonable.

The agreement to pay that amount to applicant was reported to the stockholders of Industries and General Time in subsequent joint proxy statements dated April 16, 1969 and April 16, 1970 relating to the proposed merger. These proxy statements also set forth the fact that Oscar Kimelman was a limtied partner of applicant. The proxy statement of April 16, 1970 further advised that a question had been raised as to whether or not the receipt by applicant of the finders fee would violate Section 17(e) of the Act, and that applicant had indicated it would not accept payment unless the question were resolved in its favor by an appropriate tribunal. To date, the fee has not been paid.

Discussions and Conclusions

In its motion to dismiss its application, applicant presents a threshold issue as to whether Section 17(e) of the Act is applicable to its situation. The motion contends that applicant has never had the requisite degree of affiliation with the Fund, not being an "affiliated person", or "any affiliated person of such person" of the Fund. Applicant points out that the affiliated person to the fund would be Industries and the affiliated person of such person is Oscar Kimelman, and hence, the statutory restriction would be applicable to them. However, it argues applicant is a partnership and separate person having no direct or indirect affiliation with or control over the Fund other than the fact that Oscar Kimelman is a

limited partner in applicant; and that Oscar Kimelman, as a limited partner has no right to participate and, in fact, has never participated, in any way in the management of applicant or its affairs.

Moreover, Oscar Kimelman has renounced any claim or entitlement to any portion of the finders fee which might otherwise be due to him by virtue of his 20% share in the net profits.[4/]

Applicant argues that since it is not one of the class of persons mentioned in Section 17(e) and since Oscar Kimelman, who is an affiliated person of an affiliated person, has renounced his interest in the fee, the proscriptions of Section 17(e) do not apply. In a sense, therefore, the argument appears to be that there is no subject matter involving this section over which the Commission could grant a Section 6(c) exemption.

However, the argument for dismissal by applicant is not well taken. Section 17(e) makes it unlawful for an affiliated person of an affiliated person "to accept from any source any compensation *** for the purchase or sale of any property to or for such registered company ***" (emphasis added). The Commission has heretofore held, in its decision of January 9, 1970 approving the merger of General Time into Tally Industries, Inc. (*Talley Industries, Inc.* — *supra*, at p. 168), that the

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4/ In an action for a declaratory judgment filed in November 1975 in the U.S. District Court for the Southern District of New York, *M. Kimelman & Co.* v. *Talley Industries*, Inc. - 75 Civ. 5482), wherein applicant seeks an adjudication that the payment to it of a finders fee would not violate Section 17(e) of the Act, a second count is set forth based on the renunciation by Oscar Kimelman of his share of the fee reducing the amount demanded by applicant to $600,000. No such reduced amount has been (CONTINUED)

acquisition of General Time stock by Industries, a statutory affiliate to the Fund was a "purchase", and that the exchange of its own securities for General Time stock to be a "sale" within the ambit of Section 17(e). A similar conclusion is warranted herein. The only remaining question is whether, despite the renunciation by Oscar Kimelman, he is to receive "any compensation" from the purchase and sale. It is concluded that he will.

The payments to applicant of the proposed finders fee will have a beneficial effect upon its financial position. Since applicant has offered no plan of distribution of the fee, the use to be made can only be inferred. The funds could be retained for additional capital, outstanding debts might be paid, etc. This increase of income to applicant could only have a beneficial effect upon Oscar Kimelman's limited partnership interest. The finders fee would make its financial condition that much more secure, and if distributed to the general partners, might make it possible, for example, for Michael Kimelman to repay all or part of the loan advanced to him by his father.

In other words, the benefit that is conferred upon applicant becomes a benefit to Oscar Kimelman, and clearly falls

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4/ (CONTINUED)
mentioned by applicant as part of its case herein. This complaint was dismissed in the District Court for lack of jurisdiction and applicant has filed an appeal with the United States Court of Appeals for the Second Circuit. Because a favorable determination of the application herein would render the lawsuit moot, the Circuit Court has granted an extension of time for the processing of this appeal.

within the term "any compensation" to him. Thus, in Steadman Security Corporation, Securities Exchange Act Release No. 13695 (June 29, 1977), 12 SEC Docket 1041, fn. 38, it was held that the making of a standard commercial loan at prevailing interest rates in accordance with standard banking practices to a related person of an investment company, is "compensation" within the meaning of Section 17(e), because loans are of economic benefit to those who received them.

Since the finders fee derives from a purchase or sale of property affecting an investment company, the Fund, and since the benefits to be derived by applicant constitutes "compensation" to Oscar Kimelman, an "affiliated person of an affiliated person", the provisions of Section 17(e) would apply, and there is jurisdiction in the Commission over the transaction.[5/] Consequently, the initial motion to dismiss the applicant must be denied.

There next remains for consideration the application under Section 6(c) of the Act seeking to exempt payment of the finders fee from the provisions of Section 17(e). The Division asserts that it would be inappropriate "in the public interest" to grant such an exemption for several reasons.

First, the Division points to the applicant's "crucial role"

5/ This conclusion also disposes of applicant's arguments concerning the effect of Oscar Kimelman's renunciation of a share of the finders fee, his resignation as a director of the Industries prior to the consummation of the merger, his lack of participation in the merger transactions, his lack of ability to direct in any way the affairs of applicant, and the fact that applicant was not using a "front" to cloak otherwise inappropriate activities, insofar as they are urged to support a finding that the provisions of Section 17(e) do not apply.

in the acquisition by Industries and Fund of General Time stock, an acquisition which the Commission previously had held to have been in violation of Section 17(d).[6] It charges that in order to assure the earning of a finders fee, applicant assisted in coordinating these purchases made in violation of Section 17(d). It is urged that applicant, as an abettor of the violation, should not be "rewarded" for such activities.

The Division further asserts that the applicant, as the possessor of material nonpublic information (i.e., the contemplation of an acquisition by Industries of General Time), was under a duty to have made such information public before it engaged in purchasing General Time shares for any of its accounts — other than perhaps for Industries itself. Again, it argues that applicant should not be "rewarded" for violating this obligation.

Finally, the Division charges that the claimed amount of the fee is unreasonable and not warranted by the nature and amount of the services performed by applicant as a finder in the transaction.

None of the arguments advanced by the Division is well taken when considered in the light of the standards set forth in Section 6(c), the purposes of the statute, and the conclusions inherent in the decisions and actions of the Commission

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6/ Footnote 2 above.

with respect to the General Time/Industries merger transactions.

The first significant factor is that throughout all of the proceedings before this Commission and the Courts concerning the acquisition by Industries of General Time the role being played by applicant was always made known. Specifically, it was always disclosed that: applicant was the broker executing the acquisiton by the Fund and Industries of the General Time shares; Industries had committed itself to pay applicant a finders fee; that Oscar Kimelman, a director in Industries was also a partner in applicant; that a fee of $750,000 had been agreed upon; and that there was a question under Section 17(e) concerning the right of applicant to the fee. Such information was disclosed in proxy materials and in other filings to the Commission and the courts. Thus, applicant's role as a broker for Fund and Industries, is clearly spelled out in the Commission's Memorandum Opinion of April 19, 1968 in which it found that these companies had violated Section 17(d) in the manner in which they effected purchases of General Time stock.[7/] Yet, at no point is applicant's conduct even hinted at as abetting this violation, nor has it ever been cited in any way for improper activities. While we cannot infer total absence of wrongdoing from the fact that the Commission did not see fit to attempt to sanction in one way or another the applicant

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7/ 43 S.E.C. at page 775.

for allegedly aiding and abetting a violation of Section 17(d), it is nevertheless of some significance in a determination of the public interest questions embraced in the Section 6(c) application.

Moreover, despite its finding that statutory violations were involved in the acquisition of the General Time stock, the Commission thereafter granted its approval to the merger of General Time into Industries, pursuant to an application filed under to Section 17(b) of the Act, for an order exempting the merger from the provisions of Section 17(a).[8/] The language of the granting order[9/] states, insofar as Fund was affiliated with both corporations:

> *** it is found that terms of the proposed transactions, including the consideration to be paid and received, are reasonable and fair, and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the general purposes of the Act. (Emphasis added)

It thus appears that despite the Commission's previous finding of a Section 17(d) violation by Industries and the Fund, and despite its knowledge of applicant's involvement in the acquisition of the stock and other activities in support of the merger, it found the transaction to be fair and reasonable and not involving overreaching by any person concerned with respect to the very investment company whose protection

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8/ Talley Industries, Inc., supra.

9/ Investment Company Act Release No. 5977 (February 10, 1970)

is embraced in this proceeding. As conceded by the Division in its Brief (at page 20), the underlying transaction for which applicant seek its finders fee is the merger of General Time into Industries in 1970. Thus, the finders fee is not something arising out of the acquisition of General Time stock but out of the merger (although the stock acquisition activities were preliminary to the merger process). Consequently, it would be anomalous and inconsistent to have the Commission find the merger to be fair and reasonable and a fit subject for the Commission's discretionary approval, despite the prior Section 17(d) violations, and then to find that a finders fee associated therewith is not because of applicant's participation therein. In other words, the subsequent approval of the merger in the face of the known violation of Section 17(d), points to a corresponding approval of the payment of the finders fee to applicant whose activities in connection with the prohibited stock acquisition was well known.

The next argument advanced by the Division is based upon the premise that applicant had violated a duty to disclose to the public, during the period it was acquiring shares of General Time for its account, itself, and its principals, that it had reason to believe Industries was contemplating a possible merger with or acquisition of General Time. In other words, it is urged that applicant was in possession of material, non-public information, and that the appropriate course

of conduct would have been for it to have refrained from purchasing these shares unless it first made such information public.[10/]

The cases cited by the Division in support of this contention all deal with "insider" information, that is, situations wherein a securities purchaser or seller has acquired private information by virtue of an insider relationship with the issuer of the shares. In this case, however, applicant had no insider or fiduciary relationship with General Time whose stock was being acquired. In fact, in one of the cases related to this merger, the Second Circuit expressly found that applicant's purchasing activities did not violate Rule 10b-5 (under Section 10(b) of the Securities Exchange Act of 1934). General Time Corp. v. Talley Industries, Inc., 403 F.2d 159 (C.C.A. 2, 1968); cert. den. 393 U.S. 1026 (1969). Although recognizing the effect of this decision, the Division urges that a later holding by the same Court in Crane Co. v. Westinghouse Air Brake Co. 419 F.2d 787; cert. den. 400 U.S. 822 (1970) renders the former decision "less persuasive". However, in Crane there was found to be an insider relation, in part, with respect to the issuer. Whatever the effect of Crane,[11/] the finding of the Second Circuit in General Time Corp., supra, is of great significance in considering applicant's

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10/ The Division's brief dwells at length on trying to "prove" that applicant must have known early that Industries had intended to acquire General Time. For the purpose of the decision herein, it is assumed that applicant had such knowledge.

11/ Not even the Division suggests that Crane overrules the General Time holding.

activities as they are relevant to the "public interest" factors involved in the relief sought herein. Under the existing circumstances, it is concluded that no duty has been shown on the part of applicant to make the disclosures asserted. But, even if there were such a duty, no authority has been shown that this should operate as a form of "sanction" barring the applicant from its finders fee.

Although the Division does not seriously dispute that there was a mutual understanding that a finders fee be paid by Industries to applicant, it does question whether the amount agreed upon is fair and reasonable. It charges that applicant performed only minimal service for Industries as a finder, that such services were incidental to its brokerage business for which it already has earned its brokers fees, and that, therefore, to permit it to receive more than those fees would not be warranted.

The testimony of applicant's expert, Reed, has not been controverted. In his opinion, the usual and customary finders fee warranted under the circumstances herein should be computed on "5-4-3-2-1" formula, based upon five percent of the first million of the amount involved in the transaction, four percent on the second million dollars, and so on, reducing to one percent on the fifth million and for each million thereafter. In this expert's opinion, the services performed by applicant in bringing General Time to the attention of

Industries justifies the payment of a full finders fee which under the "5-4-3-2-1" formula would have amounted to $1,100,000, or much more than agreed upon. Although the Division has offered no contrary testimony, it attacks the weight to be assigned Reed's testimony by attacking his expertise on the ground that he has never heretofore rendered an opinion under Section 17 of the Act. This is a rather weak argument. It is more reasonable to infer, absent other factors not present that the finders fee should be the same for all purposes.[12/]

It is true that, as urged by the Division, in making an inquiry under Section 6(c), we may consider whether the maximum, a lesser, or no commission is warranted by the services actually performed (Bankers Securities Corp., 25 SEC 364, 402; Transit Investment Corp., 28 SEC 10, 21).[13/] But in this case, there is a serious question as to whether, in the face of full disclosure of the surrounding circumstances, this Commission is at all concerned with the amount of finders fee that Industries and its Board of Directors is willing to pay to applicant. The only concern of the Commission under the provisions of Section 17 is with the registered investment company, i.e., Fund, and the protection of its investors and stockholders from unfair dealing. As stated by Judge Friendly

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12/ In fact, the described formula was found to be satisfactory in computing a finders fee to be paid by a registered investment company to an affiliated person in A.V.C. Corp., Investment Company Act Release No. 6122 (July 21, 1970). 44 S.E.C 389.

13/ It should be noted that there is no allegation by the Division of "overreaching".

in the S.E.C. v. Talley Industries, Inc. (CCA-2), 399 F.2d 396, 405:

> The objective of Section 17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate "on a basis different from or less advantageous than that of such other participant." (Emphasis supplied)

This approach had previously been enunciated by the Commission in Transit Investment Corp., supra, wherein it stated, at p. 16:

> Section 17, which has been referred to as the "self-dealing" section, was intended to prevent the abuses by insiders, primarily unfair sales to and purchases of securities and other property from and improper loans from investment companies by officers, directors, and similar persons associated with such companies, which were shown to exist by the report of this Commission to Congress and by the testimony at the Congressional hearings. (Emphasis added).

In this case, applicant has had no fiduciary or insider status vis-a-vis the Fund, nor with its stockholders or investors. It seeks no moneys or payment from the Fund; the investment company is not at all concerned with, a party to, or affected by, a voluntary payment of the subject fee by Industries to applicant long after it has disposed of its Industries holdings. Consequently, there really is no concern arising under the statutory protections of Section 17 with respect to the amount of the finders fee agreed upon.

As urged by the Division, regard must be given, in determining whether the standards of Section 6(c) have been met in the context of an application for exemption from the provisions

of Section 17(e), to "the nature and all the surrounding circumstances" of the transaction of the services in connection therewith. Transit Investment Corp., supra at p. 18. But Transit also goes on to tell us, at pp. 15-16, that the propriety of granting the relief sought largely depends upon the purposes of the section from which an exemption is requested, the evils against which it is directed, and the end which it seeks to accomplish. Accord: Variable Annuity Life Ins. Co. America, 43 SEC 61, 64 (1966). As stated hereinbefore, Judge Friendly expressed the view that the objective of Section 17 is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies,[14/] a view also expressed previously by the Commission in Transit Investment Corp., supra.

In this case, the relevant registered investment company is not involved with the agreement between applicant and Industries for the payment of the finders fee for finding General Time as an acquisition. Whether the fee has been earned, the amount agreed upon, and all of the circumstances embraced within the transaction have no effect, one way or another, directly or indirectly, on the stockholders of Fund. Nor is there that kind of affiliation between the parties which requires that the Commission prevent the payment of the fee. As a matter of fact, if applicant is in any way an affiliated person (through

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14/ S.E.C. v. Talley, supra.

Oscar Kimelman) of an affiliated person (Industries), it is wholly involuntary on the part of either company.

In American Bakeries Company, Investment Company Act Release No. 9924 (September 13, 1977), 13 SEC Docket 88, the Commission granted retroactive exemption from the proscriptions of Section 17(a)(2) of the Act for the repurchase by Bakeries, as an affiliated person, of its own stock from a registered investment company which had taken a substantial position some years earlier. The investment fund objected to the granting of the exemption. However, the Commission noted that the framers of Section 17 fashioned a "shield against overreaching", but that the Fund was seeking to convert that shield into a sword. In a relevant (to these proceedings) comment contained in footnote 16 of the Bakeries case, the Commission observed that:

> True, Bakeries was an affiliated person of the Fund. That is why the case is here. But the affiliation was wholly involuntary *** the Fund had acquired its Bakeries holdings in the open market. (Emphasis added).

After consideration of "the nature and all of the surrounding circumstances" of the transaction, it is concluded that the requested exemption should be granted. The time has long since arrived at which a disposition should be finally be made of the remaining bits and pieces of the merger of General Time into Industries. There is no reason under the

statute or in the interest of investors to deny what has been openly arrived at in the exercise of business judgment by Talley Industries in its dealing with applicant.

Upon consideration of all the circumstances, it is found that applicant has established by a preponderance of the evidence [15/] that the exemption of the payment to it of a finders fee in the sum of $750,000 by Industries is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. [16/]

ORDER

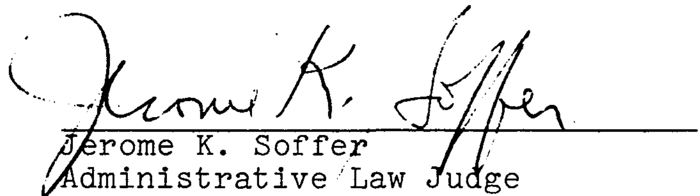
Accordingly, IT IS ORDERED, pursuant to Section 6(c) of the Act, that the proposed payment of a finders fee in the sum of $750,000 by Talley Industries, Inc., to M. Kimelman & Co., as set forth in the application, be exempted from the provisions of Section 17(e) of the Act.

15/ The standard of proof applied herein. Consideration has also been given to the demeanor of witnesses.

16/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments and expressions of position not specifically discussed herein have been fully considered and the Judge concludes they are without merit, or that further discussion is unnecessary in view of the findings herein.

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

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



Jerome K. Soffer
Administrative Law Judge

January 30, 1978
Washington, D.C.