

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
MORTON PAUL KOMINSKY :
d/b/a MORTON KOMINSKY :
MORTON KOMINSKY :

INITIAL DECISION

David J. Markun
Administrative Law Judge

Washington, D.C.
January 29 , 1982

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APPEARANCES:

Michael T. Gregg, Deputy Regional
Administrator, Michael H. Stone,
and Venrice R. Palmer, attorneys,
New York Regional Office, for the
Division of Trading and Markets.

Morton Berger, Esq., Spring Valley,
New York, for Respondents.

BEFORE:

David J. Markun, Administrative
Law Judge.

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated July 31, 1981, to determine whether Morton Kominsky, a broker-dealer registered under the Securities Exchange Act of 1934 ("Registrant") and Morton Paul Kominsky, sole proprietor and only principal of the Registrant ("Kominsky"), within the period from approximately November, 1980, to July 31, 1981, the date of the order for proceedings, wilfully violated or wilfully aided and abetted violations of various securities laws and regulations thereunder, and the remedial action, if any, that may be appropriate in the public interest pursuant to Sections 15(b) and 19(h) of the Exchange Act.^{1/}

On September 2, 1981, the order was amended at the hearing, on motion of the Division of Enforcement and without objection, to allege the issuance of permanent injunctions against Respondents, who consented thereto without admitting or denying the allegations in the complaint, by the United States District Court for the Eastern District of New York on July 29, 1981. The District Court's order enjoins Respondents from further violating or aiding and abetting violations of various securities laws and regulations, as discussed more fully below.

The evidentiary hearing was held on September 2, 3, 9 and 10, 1981 in New York, New York, at which Respondents were represented by counsel and in person. At the conclusion of the hearing a briefing schedule for filing proposed findings of fact, conclusions of law, and supporting briefs was established. The Division filed its proposed findings, conclusions, and brief on schedule, but Respondents chose not to file any. However, counsel for the parties presented brief oral arguments at the close of the hearing.

^{1/} 15 U.S.C. §§ 78o(b), 78s.

The findings and conclusions herein are based upon the record and upon observation of the witnesses. Preponderance of the evidence is the standard of proof applied. Steadman v. SEC, 450 U.S. 91, 101 S.Ct. 999 (1981).

FINDINGS OF FACT AND LAW

The Respondents

Registrant has been registered as a broker-dealer with the Commission pursuant to Section 15 of the Exchange Act since February 13, 1970. It is a member of the National Association of Securities Dealers, Inc. ("NASD"), a national securities association registered pursuant to Section 15A of the Exchange Act. Registrant's principal place of business currently is in Great Neck, New York, though for most of the period during which the violations are alleged to have occurred it was in New Jersey.

Respondent Kominsky, 57, is and has been the sole proprietor of Registrant, its sole principal, and solely responsible for Registrant's activities. He resides in Fort Lee, New Jersey.

Permanent Injunctions Entered Against Respondents

As already noted above, the order as amended alleges as a basis for imposing possible sanctions on Respondents the entry of certain permanent injunctions against them. ^{2/}

2/ Sections 15(b)(4)(C) and 15(b)(6) of the Exchange Act provide, in pertinent part:

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period of not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated --

On June 11, 1981, the Commission filed a civil action in the United States District Court for the Eastern District of New York charging Respondents with violating and aiding and abetting violations of the broker-dealer registration, net capital, bookkeeping, customer protection, margin, financial reporting, supplemental reporting, and fingerprinting provisions of the federal securities laws and regulations issued thereunder. This action followed a broker-dealer inspection of the Registrant conducted by the Commission in January and February of 1981.

On July 29, 1981, Registrant and Kominsky were permanently enjoined by the Court, on consent without admitting or denying the allegations contained in the Commission's complaint, from further violating and aiding and abetting violations of Sections 7(c), 15(b), 15(c), 17(a), 17(e) and 17(f) of the Exchange Act, 15 U.S.C. §§78g(c), 78o(b), 78o(c), 78q(a), 78q(e) and 78q(f); Rules 15b3-1, 15c3-1, 15c3-3, 17a-3, 17a-4, 17a-5, 17a-11, and 17f-2; 17 CFR 240.15b3-1, 15c3-1, 15c3-3, 17a-3, 17a-4, 17a-5, 17a-11 and 17f-2, promulgated

2/ Continued from page 3

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from . . . continuing any conduct or practice in connection with . . . the purchase or sale of any security. [emphasis added]

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(6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to become associated with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person . . . is enjoined from any action, conduct, or practice specified in subparagraph (C) of . . . paragraph (4).

thereunder, and Regulation T, 12 CFR 220, promulgated thereunder by the Board of Governors of the Federal Reserve System ("Federal Reserve Board") in various respects, reflecting the language of the violations alleged in the complaint. The allegations in the amended order in this proceeding are in substance identical to those set forth in the civil injunctive complaint and reflected in the final judgments of permanent injunction.

Failure to File Data Required by the Broker-Dealer Registration Rule

Pursuant to Section 15(b) of the Exchange Act, 15 U.S.C. §78o(b), which imposes various registration requirements upon broker-dealers, the Commission has promulgated Rules 15b1-1 and 15b3-1, 17 CFR 240.15b1-1 and 15b3-1. The former rule provides that an application for registration as a broker-dealer shall be filed on the Commission's Form BD "in accordance with the instructions contained therein." The instructions to Form BD require that a broker-dealer set forth prescribed itemized information. Rule 17 CFR 240.15b3-1(b) requires that:

If the information contained in any application for registration as a broker or dealer, or in any amendment thereto, becomes inaccurate for any reason, the broker or dealer shall promptly file an amendment on Form BD (§249.501 of this chapter) correcting such information.

The record for this proceeding establishes that, contrary to the mentioned regulatory requirements, Registrant has failed to file required amendments to Form BD setting forth: (a) the lapse of Registrant's registration as a broker in New Jersey as of December 31, 1979 (Item 11 of Form BD); (b) the January 14, 1980 entry of a cease and desist order against Registrant by the New Jersey Bureau of Securities ("Bureau of Securities")(Form BD Item 10(a)(xi));(c) the January 16, 1981 entry of an order by the Bureau of Securities denying Registrant's reapplication to register as a broker-dealer

in New Jersey (Item 10(a)(vii)); (d) the January 20, 1981 order of the NASD District 12 Business Conduct Committee that Kominsky be barred from association with any member in a proprietary, managerial, supervisory or principal capacity for a period of two years (Item 10(a)(vi)); (e) Kominsky's arrest and indictment for alleged theft of travelers checks (Item 10(c)); (f) any of the several NASD suspensions of Kominsky since mid-1977 (Item 10(a)(vi)); and (g) a finding by the Bureau of Securities that Registrant and Kominsky had failed to state the particulars of Kominsky's arrest and indictment and the particulars of certain sanctions entered against him by regulatory authorities, in an October 30, 1980 reapplication for registration, which rendered the reapplication materially incomplete (Item 10(a)(i)). Kominsky does not deny that the Form BD was not amended, but offers as Respondents' excuse that he thought the Commission "already knew" of these material events. Needless to say there is no exemption from filing required amendments on such a theory. The requirement is clear and specific; it exists not only for the information of the Commission but also for the benefit of members of the investing public.^{3/} A notice directed to Registrants to the effect that failure to promptly amend the form constitutes a violation of the securities laws appears on every page of the form.

Despite the service on Respondents of the complaint in the civil injunctive action, the service of a motion for a preliminary

^{3/} Kominsky knew or should have known this, having been in the securities business some 10 years. Thus his "excuse" disintegrates into an argument that the Commission should have made amendments to the BD form for Registrant.

injunction, the service of the order in this administrative proceeding (all of which allege the failures to amend discussed above), Respondents have taken no action to amend the Form BD. Indeed, Kominsky failed to amend Registrant's Form BD to disclose the permanent injunctions entered on July 29, 1981.

Failure to Maintain Required Minimum Net Capital

The D i v i s i o n alleges that during the period from about January 30, 1981 to about February 13, 1981, Registrant wilfully violated and Kominsky wilfully aided and abetted violations of the net-capital requirements of Section 15(c)(3) of the Exchange Act (15 U.S.C. §78o (c)(3)) and Rule 15c3-1, 17 CFR §240.15c3-1, thereunder, in that Registrant during that period continued to transact business at a time when its net capital was below the required minimum.

The record herein establishes that during the charging period Registrant's net capital was from approximately \$6,000 to at least \$2,100, on various dates, less than the required minimum of \$25,000 that the firm was obligated to maintain, and that during such charging period Respondents continued to conduct a securities business using the mails and the facilities of interstate commerce in the course of executing at least 22 securities transactions.

The Commission's examiner Marc E. Shafran told Kominsky in or about the first week of February 1981 that he felt Registrant was below required net capital as of January 30, 1981, based upon his (Shafran's) preliminary estimate, and suggested that Kominsky have Registrant's outside accountant, Ralph Inocencio, prepare the

January month end figures. Several days later, Inocensio made a computation of Registrant's net capital as of 1-30-81 showing net capital of \$19,955.70, over \$5,000 under the required \$25,000 minimum. Shafran's computation of Registrant's net capital as of 1-30-81, which computation he completed on March 1, 1981, found a net capital of \$18,629.11. The primary reason for the disparity lies in Shafran's adjustment for "aged" fails to deliver. I find Shafran's calculation to be the correct one, but it is evident that even if Inocensio's figure were used, Registrant was substantially under the required minimum net capital as of 1-30-81.

On or about February 11, 1981, Inocensio told Kominsky that Registrant's net capital was below the minimum it required to allow it legally to do business.

On February 13, 1981, Kominsky prepared a handwritten computation of Registrant's net capital as of the close of business on 2-12-81. His calculation put the figure at \$38,762.22. However, the record shows that various adjustments to that figure must be made. Firstly, a check to Kominsky from his wife in the amount of \$6,100 deposited in the bank's "handi-teller" over the weekend on February 14th or 15th, and not credited to the Registrant's account until February 17, 1981 (the day following a holiday on February 16th) could not have been a part of Registrant's assets on February 12th. ^{4/} In

^{4/} The check shows an issuance date of February 12, 1981, but I conclude on the basis of all the circumstances, some of which will be discussed in some detail at a later point in this decision, that the check was not written or delivered to Kominsky prior to the 14th or 15th of February.

addition, various other adjustments are required, as demonstrated by the evidence, the effect of which is to reduce Kominsky's calculation of Registrant's net capital as of 2-12-81 to \$22,849.72.

There is nothing in the record to establish that at any time between 1-30-81 and 2-13-81 Registrant was in compliance with the requirement for a minimum net capital of \$25,000, and, as already found, Registrant continued to do business through use of jurisdictional means during that period.

Violations of the Customer Protection Rule

Rule 15c3-3 (Customer Protection Rule) contains various provisions designed for the protection of customer funds and securities in the possession of their brokers. The rule provides, among other things, that broker-dealers must establish and maintain funds in reserve bank accounts for the benefit of their customers. ^{5/}

^{5/} In pertinent part, Rule 15c3-3 issued under Section 15(c)(3) of the Exchange Act, 15 U.S.C. §78o(c)(3) provides:

(e)(1) Every broker or dealer shall maintain with a bank or banks at all times when deposits are required or hereinafter specified a "Special Reserve Bank Account for the Exclusive Benefit of Customers" (hereinafter referred to as the "Reserve Bank Account"), and it shall be separate from any other bank account of the broker or dealer. Such broker or dealer shall at all times maintain in such Reserve Bank Account, through deposits made therein, cash and/or qualified securities in amounts computed in accordance with the formula attached hereto as Exhibit A.

* * *

(3) Computations necessary to determine the amount required to be deposited as specified in paragraph (e)(1) shall be made weekly . . . provided, however, a broker or dealer which has aggregate indebtedness not exceeding 800 per centum of net capital . . . and which carries aggregate customer funds . . . as computed at the last required computation pursuant to this rule, not exceeding \$1,000,000, may in the alternative make the computation monthly, as of the close of the last business day of the month, and, in such event, shall deposit not less than 105 per centum of the amount so computed no later than one hour after the opening of banking business on the second following business day.

The Customer Protection Rule includes a formula for the determination of a cash reserve with respect to all customer funds which are not utilized in customer-related transactions. The Commission endeavors to prevent the misuse of customer funds by mandating that these customer funds held by broker-dealers not be used for the operating expenses of the firm.

Registrant has elected to calculate its reserve computation on a monthly basis in accordance with the Rule's alternative provision.

Registrant calculated its reserve bank account for the period ending December 31, 1980 incorrectly, in that customer fails to deliver were overstated by approximately \$1,100, a clear violation of Rule 15c3-3. Whiteside & Co. v. SEC, 557 F.2d 1118, 1121 (5th Cir.) cert. denied, 435 U.S. 942 (1978).

Registrant failed to make the required deposit to Registrant's Reserve Bank Account for the period ending December 31, 1980. Registrant's computation, prepared by its accountant from data received from Kominsky, indicated that a deposit of \$6,612 was required to be made for that period. Kominsky told his accountant on or about January 8, 1981 that he was going to make the deposit on January 9, 1981, and the accountant indicated January 9 on the computation as the date of deposit. Registrant's books and records, however, reflect no deposit in that amount being made on or near that date.

Furthermore, with one exception, the bank accounts Registrant was using did not qualify as reserve bank accounts. The reserve accounts must be segregated from all other accounts and funds of

the firm. In addition, the broker-dealer must obtain and maintain a notification from each bank at which it maintains its reserve accounts that specifies that such funds: (a) are being held in accordance with the Commission's Rule 15c3-3 for the exclusive benefit of the broker-dealer's customers; (b) are being kept separate from other funds of the broker-dealer; and (c) are not subject to any lien by the bank or anyone claiming through the bank. Rule 15c3-3(f). Registrant had only \$790 on deposit in a qualified account during the charging period.

The \$43,981 which Registrant maintained on deposit in a regular, unrestricted, ordinary checking account did not meet the requirements of a reserve account, and was therefore an unqualified deposit. In light of the erroneous calculation of Registrant's \$1,151 in customer fails to deliver, the actual amount which Registrant was required to deposit in a segregated reserve account or accounts as of December 31, 1980 was \$51,592, not the much lower figure computed by Registrant. Allowing for the \$790 Registrant did have in a qualified account, an additional \$50,802 should have been placed into a qualified account.

Registrant's calculations for the January 30, 1981 deposit were also incorrect, due to another erroneous figure for fails to deliver. Registrant calculated fails to deliver at \$17,175. Shafran calculated the figure to be \$16,075. Registrant in fact failed to make the full \$4,153 deposit its own calculations erroneously showed was necessary and deposited only \$3,000. When the correct fails to

deliver figure of \$16,075 is included in the calculation the required deposit comes to \$6,104.00. After allowance is made for the \$790 Registrant had in its only qualified account, the additionally required deposit was \$5,314, or \$2,314 more than the \$3,000 Registrant actually deposited.

In addition, Registrant failed to immediately notify the Commission by telegram of its failure to make the required deposits for December 31, 1980 and January 30, 1981, as required by the Rule.

Registrant also failed to comply with other provisions of the Customer Protection Rule by failing to maintain a current and detailed description of the possession and control procedures it utilized regarding customer securities.

Kominsky was responsible for ensuring that the reserve calculations were properly and accurately done; he personally opened and made deposits into Registrant's Reserve Bank Accounts, and he furnished his outside accountant with data necessary to the making of these computations.

Failure to File in time Annual Audited Financial Statements

The record herein establishes, as the Division alleges in the order, that Registrant twice failed to file within the prescribed time its annual financial statement, audited by an independent public accountant, thus wilfully violating Section 17(e) of the Exchange Act, 15 U.S.C. § 78q(e), and Rule 17a-5, 17 CFR §240.17a-5, promulgated thereunder.

Registrant failed to file its annual audit report for 1978 for over two years and failed to file its 1979 report for approximately one year. The circumstance that Kominsky "voluntarily" suspended operations of the Registrant from June 1978 to November 1980 at the suggestion of the NASD did not excuse Registrant and Kominsky from filing the necessary reports, since the registration of Registrant as a broker-dealer continued. Moreover, Kominsky's argument that during the period of suspension he had no access to Registrant's records is not supported by the record herein, which contains no indication that Kominsky sought and was unable to obtain access to the necessary records for the purpose of arranging for the filing of the certified annual audit reports.

Failure to Keep Accurate Books and Records

The record also establishes that Respondents in various respects failed to keep and maintain accurate books and records, thus wilfully violating, as alleged by the Division in the order, Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), and Rules 17a-3 and 17a-4, 17 CFR § 240.17a-3, 17a-4, promulgated thereunder.

During the period from about November 1980 through July 1981, Registrant's ledgers or other records reflecting all assets and liabilities were not accurate and current in that the general ledger indicated the existence of \$4,500 in Registrant's account at Hudson Savings Bank and \$1,500 in Registrant's account at Citibank when in fact the money had been expended in October 1980.

From about February 1980 through July, 1981, documents reflecting the receipt and disbursement of cash erroneously show that a check number

166 was drawn on and redeposited in Registrant's account at Midlantic National Bank ("Midlantic") in the amount of \$20,000 on February 13, 1981, when check number 166 was actually drawn on and redeposited in said account on that date in the amount of \$6,000.

Registrant's check-stub book for the Midlantic account also erroneously shows that check number 166 was drawn for \$20,000 on February 13, 1981 and redeposited.

From about November 1980 through the month of February 1981, Registrant's trial balances as well as its records of the computation of aggregate indebtedness and net capital and its general ledger were erroneous in that they included the existence of \$6,000 in assets as cash in banks which had been used up for expenses at least as far back as October 1980.

During the period from about February 11, 1981 to about February 27, 1981, ledgers or other records reflecting all assets and liabilities and Registrant's general ledger were not accurate in that the general ledger failed to reflect the existence of Registrant's bank account at the Bank of New York. Opened initially with a \$21,000 balance, the account balance was almost immediately reduced to \$1,000.

Likewise, in February 1981, Registrant's ledger or other documents reflecting the receipt and disbursement of cash failed to show the deposit by checks of \$20,000 and \$1,000 into Registrant's newly-opened account at the Bank of New York and failed to show the drawing of a check for \$20,000 on that account and its deposit into Registrant's Midlantic account.

Registrant's blotter reflecting the receipt and delivery of securities as of January 30, 1981 was noncurrent and inaccurate, and in some instances stock certificates received by Registrant were found lying about the office without having been properly reflected on the firm's books and records as securities in the firm's possession.

It is not disputed that Registrant was subject to the book-keeping requirements of the Exchange Act and of the Commission's Rules 17a-3 and 17a-4 thereunder or that Kominsky, as sole proprietor and principal of Registrant, was charged with responsibility for making certain that the firm's books and records were kept and maintained in compliance therewith.

Violations of the Credit Extension Provisions of Section 7 of the Exchange Act, 15 U.S.C. § 78g(c), and Regulation T, 12 CFR § 220 thereunder, Promulgated by the Federal Reserve Board

The record establishes, as alleged by the Division in the order, numerous Regulation T violations. Within the period November 16, 1980 to January 29, 1981, Respondents extended credit to and for customers on securities (other than exempted securities) and failed to promptly cancel or otherwise liquidate the transactions or unsettled portions thereof of customers who purchased such securities in special cash accounts and did not make full cash payment for the securities within seven business days after the date on which the security was so purchased, as the Rule required. These violations occurred in 33 of 64 cash purchase transactions executed for various customers during the period mentioned.

(Exhibit 76A).

Respondent Kominsky at first represented to Commission Investigator Shafran during the early-1981 examination that Registrant had obtained extensions of the payment due date for the purchasers referred to above. However, after Respondents were unable to produce any margin extension forms signed and approved by the NASD, in response to Shafran's request, Kominsky conceded to Shafran that Respondents had neither sought nor obtained such extensions for any of the customers referred to. No such extensions were in fact applied for to the NASD during the period in question.

Failure to Comply with Various Telegraphic Notice and Related Provisions in Violation of Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a) and Rule 17a-11, 17 CFR § 240. 17a-11 thereunder

As the Division alleged in the order, the record establishes that Respondents wilfully violated provisions of Rule 17a-11 in that they failed: (a) (1) to notify the Commission by telegram of the firm's failure to maintain current and accurate books and records and (2) to file a report stating what steps have been taken to correct the (books and records) situations; and (b) to file Form X-17A-5 within 24 hours after the firm had filed notice of failure to maintain the required net capital, as required by Rule 17a-11(a)(2).

Rule 17a-11 requires, among other things, that broker-dealers, in described circumstances:

(a)(1) Give telegraphic notice . . . that such [broker-dealer's] net capital is less than is required . . . [and] (2) Within 24 hours thereafter file Part II or Part IIA of Form X-17A-5 [FOCUS]

* * *

(c) At any time when a broker or dealer subject to Rule 17a-3 fails to make and keep current the books and records specified therein, he shall give immediate telegraphic notice of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours of the telegraphic notice file a report stating what steps have been and are being taken to correct the situation.

Respondents Exhibit A shows that at 8:39 a.m. on 2-13-81 Kominsky by telegram advised the Commission: "THE NET CAPITOL [sic] DETERMINED AS OF JANUARY 31, 1981 WAS INSUFFICIENT" ... "HAVE CEASED TRADING AS PER NET CAPITOL [sic] RULE."

As found above, the firm's net capital on 2-13-81 was indeed under the required minimum, and Registrant should have followed up its telegraphic notice by filing Part II or Part IIA of Form X-17A-5, but it never did.^{6/}

As found above, Registrant's books and records were at various times and in various respects inaccurate or incomplete or both. Notwithstanding these facts, which were known or should have been known to Respondents, they failed to give the telegraphic notice of such facts as required by Rule 17a-11(c).

Failure to Comply with Fingerprinting Requirements in Violation of Section 17(f) of the Exchange Act, 15 U.S.C. § 78q(f), Rule 17f-2 thereunder, 17 CFR § 240.17f-2

Lastly, the record establishes a further violation, as the

^{6/} Respondents' Exhibit B shows that at 8:43 a.m. on 2-13-81 Kominsky advised the Commission by telegram: "AS OF FEBRUARY 13th 1981 I AM IN FULL COMPLIANCE WITH THE NET CAPITOL [sic] RULE." In fact, as found above, the firm was not in compliance with the Rule; however, even if it had been in compliance on the 13th, that would not have excused the failure to file the required portion of Form X-17A-5 following the firm's telegraphic notice of insufficient capital as of 1-31-81.

Division alleges in the order, in that Respondents, in February, 1981, failed to comply with the fingerprinting requirements of Rule 17f-2 in two respects. Firstly, their clerical employee had not been fingerprinted, as required, and secondly, Respondents failed to maintain documentation of the taking of fingerprints of Kominsky and of a registered representative employed by the firm.

Wilfulness of the Violations; Aiding and Abetting

Each of the violations found above to have been committed by Registrant was committed wilfully.^{7/} Registrant is and was a very small firm during the period of the violations, with Kominsky being its sole proprietor and only principal. Registrant's violations were all the result of the knowing acts or failures to act, where there was an established duty to act, of Kominsky.

The Commission had occasion to restate its longheld and often stated views on the responsibility of heads of broker-dealer firms in In the Matter of the Application of G.L. Bartlett & Co., Inc., et al, Securities Exchange Act Release No. 34-18285, November 24, 1981, where it stated in pertinent part, at p. 3.:

". . . As we have often pointed out, the president of a broker-dealer firm is responsible for his firm's compliance with all applicable requirements. And he retains that responsibility unless

^{7/} "Wilfully" in the context of the securities statutes and Rules here involved means intentionally committing the act which constitutes the violation. There is no requirement that the actor also have evil motive or intent to violate the law, or knowledge that the law was being violated. Tager v. S.E.C., 344 F. 2d 5, 8 (C.A. 2, 1965); Gearhart & Otis, Inc. v. S.E.C., 348 F.2d 798, 803 (C.A.D.C., 1965); Securities Forecaster Co., Inc., 39 S.E.C. 188, 191 (1959); Lamb Brothers, Inc., Securities Exchange Act Release No. 14017 (October 3, 1977), 13 SEC DOCKET 265, 270, n. 25.

and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties.

[footnote omitted]"

Thus Kominsky was perfectly aware of his central role in the improper conduct, and in fact, does not dispute his responsibility for the violations.

Accordingly, the record clearly establishes that, as the Division charges in the order, Kominsky wilfully aided and abetted each violation found above to have been committed by Registrant. 8/

Conclusions

In general summary of the foregoing, it is concluded that within the relevant period, November 1980 through July 1981, Registrant wilfully committed violations of the following provisions of laws and regulations and that Respondent Kominsky wilfully aided and abetted the commission of each of such violations, all as more particularly found above:

(1) Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b), imposing various registration requirements upon broker-dealers, and 15b3-1, in that Registrant failed to file required amendments to Form BD setting forth; (a) the lapse of Registrant's registration as a broker in New Jersey as of December 31, 1979; (b) the January 14, 1980 entry of a cease and desist order against Registrant by the New Jersey Bureau of Securities ("Bureau of Securities"); (c) the

8/ Cf. SEC v. Resch - Cassin & Co., Inc., 362 F. Supp. 964, 979-80 (S.D.N.Y. 1973).

January 16, 1981 entry of an order by the Bureau of Securities denying Registrant's reapplication to register as a broker-dealer in New Jersey; (d) the January 20, 1981 order of the NASD District 12 Business Conduct Committee that Kominsky be barred from association with any member in a proprietary, managerial, supervisory or principal capacity for a period of two years; (e) Kominsky's arrest and indictment for alleged theft of travelers checks; (f) any of the several NASD suspensions of Kominsky since mid-1977; and (g) a finding by the Bureau of Securities that Registrant and Kominsky had failed to state the particulars of Kominsky's arrest and indictment and the particulars of certain sanctions entered against him by regulatory authorities, in an October 30, 1980 reapplication for registration, which rendered the reapplication materially incomplete.

(2) Section 15(c)(3) of the Exchange Act (15 U.S.C. §78o(c)(3) and Rule 15c3-1, 17 CFR §240.15c3-1, thereunder, in that during the period from about 1-30-81 to 2-13-81 Registrant continued to transact business at a time when its net capital was from approximately \$6,000 to at least \$2,100, on various dates, less than the required minimum of \$25,000 that the firm was obligated to maintain.

(3) Section 15(c)(3) of the Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-3 thereunder, 17 CFR 240.15c3-3, the customer protection rule, in that at various times Registrant failed to put or to keep in qualified reserve accounts for the benefit of its customers the funds required so to be kept.

(4) Section 17(e) of the Exchange Act, 15 U.S.C. § 78q(e),

and Rule 17a-5, 17 CFR § 240.17a-5, promulgated thereunder, in that Registrant twice failed to file within the prescribed time its annual financial statement, audited by an independent public accountant.

(5) Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), and Rules 17a-3 and 17a-4, 17 CFR § 240. 17a-3, 17a-4, promulgated thereunder in that Registrant in various respects failed to keep and maintain accurate books and records.

(6) Section 7 of the Exchange Act, 15 U.S.C. § 78g(c), and Regulation T, 12 CFR §220 thereunder, Promulgated by the Federal Reserve Board, in that within the period November 16, 1980 to January 29, 1981, Registrant extended credit to and for customers on securities (other than exempted securities) and failed to promptly cancel or otherwise liquidate the transactions or unsettled portions thereof of customers who purchased such securities in special cash accounts and did not make full cash payment for the securities within seven business days after the date on which the security was so purchased, as the Rule required, in 33 of 64 such cash purchase transactions.

(7) Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a) and Rule 17a-11, 17 CFR § 240. 17a-11 thereunder, in that Registrant failed: (a)(1) to notify the Commission by telegram of the firm's failure to maintain current and accurate books and records and (2) to file a report stating what steps have been taken to correct the (books and records) situations; and (b) to file Form X-17A-5 within 24 hours after the firm had filed notice of failure to maintain the required net capital, as required by Rule 17a-11(a)(2).

(8) Section 17(f) of the Exchange Act, 15 U.S.C. § 78q(f), Rule 17f-2 thereunder, 17 CFR § 240.17f-2, involving fingerprinting requirements, in that Registrant's clerical employee had not been fingerprinted, as required, and secondly, Registrant failed to maintain documentation of the taking of fingerprints of Kominsky and of a registered representative employed by the firm.

In addition, as noted above at pp. 3-5, final consent judgments of permanent injunction were entered against Registrant and Kominsky on July 29, 1981, by the United States District Court for the Eastern District of New York enjoining Respondents from violating or aiding and abetting violation of numerous securities laws and regulations on the basis of allegations in the complaint that were in substance identical to the Division's charges in the order in this proceeding. Under Section 15(b)(4)(c) and 15(b)(6) of the Exchange Act, set forth in pertinent part at pp. 3 and 4 above, such injunctions form an independent ground for the imposition of sanctions in this proceeding.

PUBLIC INTEREST

Each of the numerous violations committed or aided and abetted by Respondents is in itself serious and important. Each law and regulation involved was promulgated to protect the interests of investors, directly or indirectly. Failure of broker-dealers to comply with such requirements voluntarily and responsibly would make supervision and oversight by the Commission and by self regulatory bodies extremely difficult if not impossible.

Taken together, the cumulative weight of the numerous and

varied violations found here, along with the consent permanent injunctions in the United States District Court, lend substantial weight to the Division's contention that severe sanctions are warranted.

Still, if the violations found herein were not accompanied by certain aggravating factors, and if the Respondents' prior record were free or even relatively free of prior violations, there would be a basis for fashioning more moderate sanctions. But, unfortunately, the record here discloses a long and sorry history of numerous and recurring earlier violations by Respondents.

In 1975, Respondents were charged by the NASD, along with other broker-dealers, with aiding and abetting violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by E.L. Aaron & Co. ("Aaron"), in connection with the fraudulent purchasing by Respondents of securities offered by Aaron from its trading account, and simultaneous re-selling of the securities to Aaron. Aaron then sold the securities to its customers and falsely represented to them that the transactions were done on an agency basis and charged them a higher markup. The complaint resulted in a settlement in which Kominsky was fined \$350 and suspended for 10 days.

On at least three separate occasions since Registrant became registered as a broker-dealer in 1970, i.e., in 1977, 1978 and 1981, the NASD and/or the Commission in their examinations found Registrant to be in violation of the net capital rule. On several of those occasions, Respondents were continuing to do business.

On at least four separate occasions, the NASD and/or the Commission in their examinations found Registrant to have been in

violation of the margin provisions, i.e., in 1974, 1978, 1980 and 1981.

On at least three separate occasions, NASD and/or Commission investigations found Registrant to have been in violation of the customer protection provisions, i.e., in 1977, 1978 and 1981.

On at least four separate occasions, the NASD and/or the Commission found Registrant in their investigations to have been in violation of the bookkeeping rules, i.e., in 1971, 1974, 1978 and 1981.

On at least three separate occasions, NASD and/or Commission investigations found Registrant to have been in violation of the financial reporting rules, i.e., in 1977, 1978 and 1981.

On at least three separate occasions, the NASD and/or the Commission in their investigations found Registrant to have been in violation of the supplemental reporting rules, i.e., in 1977, 1978 and 1981.

Kominsky admitted under oath that in 1977 he continued to conduct a securities business at a time when he knew he was several thousands of dollars below the minimum net capital requirement, and only ceased doing business when the violation was uncovered by the NASD.

In 1978, the New Jersey Bureau of Securities found that Respondents were using unregistered agents to sell securities to the public, fined them, and cautioned them to avoid violations of the securities laws in the future.

During the course of a two-month examination of Registrant in 1978, the Commission found that Registrant was below its net capital

requirement, and that Respondents' books and records were so inaccurate and non-current that it was difficult to determine the precise amount of Registrant's capital deficiency.

Kominsky admitted under oath during that 1978 examination that:

(a) he had kept his records in so haphazard a manner that even he couldn't tell the amount of his capital deficiency;

(b) he had not posted Registrant's stock record for three months;

(c) he had just "sloughed off" Registrant's violations of Federal Reserve Board Regulation T and had not liquidated customer accounts that involved credit extensions in violation of Regulation T;

(d) Registrant was in violation of the bookkeeping rules 17a-3(a)(1), (3) and (5), and that he himself posted Registrant's books;

(e) Registrant's customer ledgers were non-current by three months;

(f) Registrant was in violation of Exchange Act Rule 17a-3(a)(9), in that certain of Registrant's customer account cards were missing;

(g) Registrant's general ledger was out of date by one month; and

(h) Registrant's annual financial report (FOCUS) for 1977 was filed late.

After the Commission's 1978 examination referred to above, the NASD notified the Securities Investor Protection Corporation ("SIPC") that Registrant was approaching financial difficulty, and that the

NASD was requesting Kominsky to liquidate Registrant under NASD supervision. Among other things, the NASD found that the interests of Registrant's customers required protection notwithstanding Registrant's apparent ability to honor all customer claims, because a high percentage of Registrant's assets were (a) in the form of receivables from brokers (the collectibility of which was not established) and (b) in positions and securities with shallow and volatile markets. In addition, it appeared that (a) Registrant was then insolvent and could not pay outstanding balances due creditors other than customers, including broker-dealers; (b) Registrant's books and records were poorly maintained and were of doubtful validity; and (c) without careful surveillance, there was a distinct possibility that total assets would be reduced below customer claims. Among other things, the NASD informed SIPC that it was taking steps to ensure that Kominsky could draw no checks from Registrant's bank account without an NASD staff member's signature.

As a result of these 1978 investigations and actions, Kominsky "voluntarily" caused Registrant to suspend operations during the period from June 1978 to November 1980 at the "suggestion" of the NASD.

Besides this extensive history of violations preceding the violations found as charged in this proceeding, several actions by other regulatory bodies of more current vintage also bear on the matter of appropriate sanctions.

The registration of the Kominsky firm as a broker-dealer in New Jersey lapsed as of December 31, 1979, and on January 14, 1980

the New Jersey Bureau of Securities entered a cease-and-desist order against Registrant. Notwithstanding that order, Registrant continued to do business in New Jersey; Kominsky admitted in his testimony that he continued to do business there for a time even after he admittedly learned of the cease-and-desist order. In January 1981 the New Jersey Bureau refused to allow Registrant to re-register as a broker dealer in that state, having concluded that Kominsky's violation of its cease-and-desist order and his history of failing to comply with post-registration requirements of New Jersey law were grounds for concluding that the application to re-register should not be granted. Respondents thereafter shifted operations to New York.

Since Registrant became registered as a broker-dealer in 1970, Respondents have been suspended by the NASD on at least eight separate occasions, the most recent being a two-year suspension against Kominsky from association with any member in a proprietary, managerial, supervisory or principal capacity imposed by the NASD District 12 Business Conduct Committee in January 1981, and upheld on appeal by the NASD Board of Governors on June 23, 1981, which imposed additional penalties of, among other things, a \$2,500 fine and a censure. 9/

In considering the sanctions that may be appropriate here one of the factors that must be given considerable weight is Kominsky's deliberate attempt to "cover up" and mislead as to the true net capital

9/ This suspension was based upon a finding of a variety of violative practices that were found to have occurred in 1977 and 1978.

position of Registrant in February, 1981.

About February 11, 1981, Inocensio (Registrant's outside accountant) informed Kominsky that Registrant's net capital as of January 30, 1981 was below the minimum required to do business.

On February 13, 1981, Kominsky informed Shafran (the Commission's investigator) that Registrant was under capital, and that he (Kominsky) had sent telegraphic notice to the NASD and to the Commission.

Thereafter on February 13, 1981, Kominsky falsely stated to Shafran that he had infused \$5,850 of additional capital into Registrant. When Shafran asked Kominsky for documentation of the infusion of \$5,850 in new capital, Kominsky at first replied that the deposit slip was in his car. Although Shafran repeated his request several times during February 13, Kominsky was unable to produce the deposit slip representing the alleged \$5,850 of new money supposedly infused into Registrant.

Later that day, Kominsky advised Shafran that he was infusing an additional \$6,000 in capital into Registrant. During his conversation with Kominsky, Shafran observed on a desk in Registrant's office a check drawn on one of Registrant's bank accounts, payable to Kominsky, along with a despoit slip being filled in by Registrant's clerical employee for Registrant's account at Midlantic in the amount of \$6,000. The check was signed by Kominsky.

Subsequently, still on February 13, 1981, Shafran heard Kominsky instruct this clerical employee to go to the bank to make a deposit; she left Registrant's office shortly after 3:00 p.m. Shafran suspected that Kominsky was attempting to mislead him and the Commission into

believing that new capital in the amount of \$6,000 was being infused into Registrant. He called his supervisor at the Commission's New York Regional Office and was directed to obtain verification from Kominsky of the claimed \$6,000 infusion of additional capital.

When Shafran told Kominsky that his supervisor wanted verification of the infusion of \$6,000 in additional capital, Kominsky became "excited"; he told Shafran that he wasn't going to give Shafran's office anything and that the Commission could "go f--- themselves."

Shafran thereupon reminded Kominsky that any information he gave Shafran should be true and correct. Kominsky then attempted to amend his prior statements by setting forth that the \$6,000 was not important, and that it was "going in and coming out". When Shafran inquired what Kominsky meant by "going in and coming out," Kominsky responded that Shafran should "forget it, it's not important."

Kominsky then told Shafran that on the next business day, Tuesday, February 17, 1981, Kominsky was going to obtain \$10,000 from his wife for new capital.

Shafran later that day, when Kominsky's employee returned from the bank, obtained a copy of the deposit slip mentioned above. It reflects the deposit on February 13, 1981 of a \$6,000 check in Registrant's account at Midlantic.

Kominsky in fact did not infuse \$6,000 in new capital into Registrant on February 13, 1981, since the Midlantic check, number 166, and the deposit slip mentioned above, in fact reflect the simultaneous withdrawal and re-deposit of that \$6,000 check, into the account out of which it came.

Realizing from Shafran's aroused suspicions and consequent requests for verification and documentation that his efforts to create the misimpression that \$6,000 in additional capital had been infused into the Registrant would not wash, Kominsky thereafter obtained from his wife a check for \$6,100 on the 14th or 15th of February (see page 8 above) and "deposited" it in the Midlantic bank via the "handi-teller" system. However, since the Monday was a holiday, the check was not credited to Registrant's account until Tuesday, February 17, 1981. Kominsky's testimony that he had the check, dated February 12, 1981, in his possession on the 13th is not credited; it is preposterous to suppose that in light of the "heat" he was under from Shafran concerning the net-capital situation, Kominsky on February 13th could have "forgotten" he had the check in his pocket or that he simply neglected to mention it to Shafran.

Sham transactions such as Kominsky's misrepresentations to Shafran have long been viewed by the Commission as intolerable conduct meriting the most severe sanctions available. In Douglass & Co., Inc., Securities Exchange Act Release No. 14596 (March 23, 1978), 14 SEC DOCKET 532, 536, a broker-dealer and its president and principal trader were charged with, inter alia, violating and aiding and abetting violations of the net capital rule. The Commission found that :

Douglass' misconduct is hardly less serious than that engaged in by registrant. 17/ The deliberate deception he practiced on regulatory authorities in attempting to conceal his firm's net capital deficiencies would alone justify the bar imposed on him by the administrative law judge. (footnote omitted)

14 SEC DOCKET at 536. The Commission also held that "Douglass's culpability is not lessened by the fact that he was held responsible only as an aider and abetter." Id. at n. 17. The Commission upheld the revocation of the registrant's broker-dealer registration and Douglass' bar. Accord, In the Matter of Hinkle, Lamear and Reiter, Release No. 34-17805 (May 15, 1981), 22 SEC DOCKET 1104.

Respondent Kominsky's testimony at the hearing was in a number of respects considerably less than candid and forthright. For example, when the Administrative Law Judge asked him whether he was an accountant, 10/ Kominsky responded that he had passed the CPA examinations in Washington, D.C. and was eligible to seek his license. When confronted by Division Counsel with his earlier testimony in which he had said under oath that he had continually failed the final portion of the examinations and finally gave up, Kominsky conceded that he had "just misrepresented" himself.

Respondent Kominsky urges that his registration not be revoked and that he be permitted to function as a principal and proprietor because he has plans for, among other things, acting as underwriter in low-priced "penny" stocks. He testified that in the future he would not attempt to run Registrant's "back office" personally but would instead hire a "responsible person with a financial principal's license."

This plea and professed undertaking come much too late to be taken as a credible, viable basis for determining sanctions. As

10/ Kominsky has in fact from time to time worked as an accountant for certified accountants under their supervision.

indicated above, Kominsky has demonstrated over a ten or eleven year span that he is both incapable of and unwilling to run a brokerage business in compliance with applicable laws and regulations. If engagement of a financial principal could have solved his long standing problems, that step should have been taken long, long ago. The record bears no indication that Kominsky has taken any step in that direction since the commencement of the investigation leading to this proceeding about a year ago. After more than a decade of bungling, as his counsel sought to characterize the cause of the violations charged in the order and found herein, consideration for the public interest does not permit Kominsky's being given yet a further opportunity at ownership and management. 11/

At the same time, it does not appear that the public interest requires that Kominsky be barred permanently from association with a broker dealer in any capacity, as the Division urges.

Sanctions applied must be of sufficient severity to deter misconduct of the kind found in the future, both by Respondents and by others, as well as to apply appropriate sanctions for the instant violations. 12/

Taking into account the number and nature of the violations, Kominsky's age and years in the securities business, the entire

11/ Cf. Frank DeFelice, Ph. D. & Associates, Inc., Release No. 34-18074, August 31, 1981, 23 SEC DOCKET 732.

12/ The purpose of sanctions must be to demonstrate not only to respondents but to others that the Commission will deal harshly with egregious cases. Arthur Lipper Corp. v. S.E.C., 547 F. 2d 171, 184 (1976).

record as a whole including Kominsky's demeanor as a witness, it is concluded that the sanctions ordered below both for remedial and deterrent purposes are necessary, appropriate, and adequate in the public interest.

ORDER

Accordingly, IT IS ORDERED as follows:

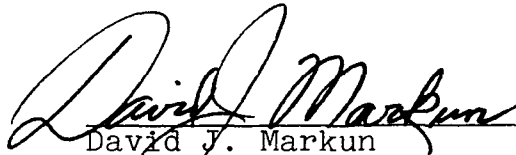
(1) the registration as a broker or dealer of Registrant Morton Kominsky is hereby revoked and the firm is hereby expelled from membership in the National Association of Securities Dealers, Inc.

(2) Respondent Morton Paul Kominsky is hereby barred from association with a broker or dealer with the proviso that after a period of sixty days he may apply to become associated with a broker-dealer in a non-proprietary, non-principal, non-supervisory and non-managerial capacity upon satisfactory showing to the Commission that he will be adequately supervised.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 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 who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him.

If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.^{13/}



David J. Markun
Administrative Law Judge

Washington, D.C.
January 29, 1982

^{13/} All proposed findings, conclusions, and supporting arguments 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 findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.