

FILE COPY

Seig
R
A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

GEORGE A. BROWN, dba :
BROWN & COMPANY :

File No. 8-7953 :

MARKOFF, STERMAN & GOWELL, INCORPORATED :

File No. 8-10948 :

LEON F. MARKOFF :
MARSHAL STEPMAN :
DAVID C. GOWELL :

FILED
NOV 30 1965

SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION
(PRIVATE PROCEEDINGS)

WILLIAM W. SWIFT
Hearing Examiner

Washington, D. C.

November 30, 1965

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: " :
: :
GEORGE A. BROWN, dba :
BROWN & COMPANY :
: :
File No. 8-7953 :
: :
MARKOFF, STERMAN & GOWELL, INCORPORATED :
: :
File No. 8-10948 :
: :
LEON F. MARKOFF :
MARSHAL STERMAN :
DAVID C. GOWELL :
:

INITIAL DECISION
(PRIVATE PROCEEDINGS)

APPEARANCES:

Edward P. Delaney, Michael S. Yesley
and Willis H. Riccio, Esq.
of the Boston Regional Office
appeared for the Division of Trading and Markets.

Jesse R. Meer, Esq.
Berlack, Israels and Liberman
26 Broadway, New York, N.Y. 10044, and
Charles R. Goldstein, Esq.
79 Milk Street, Boston, Massachusetts
appeared on behalf of Markoff, Sterman &
Gowell, Incorporated, and Leon F. Markoff,
Marshal Sterman, and David C. Gowell.

George A. Brown
8 Beacon Street, Boston, Massachusetts
appeared on his own behalf, without counsel.

BEFORE: WILLIAM W. SWIFT, HEARING EXAMINER

PROCEEDINGS

The Commission, on October 15, 1964, issued an Order for Private Consolidated Proceedings and Notice of Hearing pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") which consolidated private proceedings in the Matter of George A. Brown, dba Brown & Company (File No. 7-7953) and other proceedings in the Matter of Markoff, Sterman & Gowell, Incorporated (File No. 8-10948). Leon F. Markoff, Marshal Sterman and David C. Gowell were also joined in said order as respondents.

The questions posed by the allegations of the aforesaid order are whether respondents, singularly and in concert, violated Sections 10(b), 15(c)^{1/} and 17(a) of the Exchange Act and Rules 17 CFR 240.10b-5, 15c3-1 and 17a-3 thereunder. Answers were filed by respondents to the allegations embodied in the aforesaid order for private consolidated proceedings.

After several postponements, the hearing was convened in Boston, Massachusetts on April 26, 1965 by the undersigned, as Hearing Examiner, and was finally closed on May 12, 1965, after 871 pages of testimony had been taken and numerous exhibits, many of which are quite bulky and unwieldy, were admitted in evidence.

^{1/} See correcting order of the Commission dated July 23, 1965.

An initial decision was requested by Mr. Delaney (Tr. p. 868). ^{2/} Whereupon, the Hearing Examiner, as required by Rule 16(e) of the Rules of Practice, after consulting with the parties, fixed the post-hearing procedure which required that the filing of proposed findings and conclusions and supporting briefs be done simultaneously with 45 days being allowed from May 12, 1965 for the first filings and 15 days being allowed for the filing of reply briefs (Tr. p. 869). Several extensions of time were granted for such filings and eventually proposed findings, conclusions and supporting briefs, as well as reply briefs, were duly filed on behalf of all parties. They have been given due consideration by the Hearing Examiner.

The entire record, including the transcripts of evidence, the exhibits which were admitted in evidence, and the said proposed findings, conclusions and briefs submitted by the parties, has been served upon the Hearing Examiner for preparation of this Initial Decision.

An unusually large number of corrections in the official stenographic transcripts have been agreed upon in writing by the parties (See Stipulation filed on September 15, 1965 and the order which the Hearing Examiner issued the following day correcting the said transcripts in accordance with such stipulation). The record must, therefore, be read in the light of such corrections in the various official transcripts of the hearing.

^{2/} The following designations are used in this Initial Decision: Division's Exhibits as ("DX__"); Markoff, Sterman & Gowell's Exhibits as ("MS&G Exs.__"); Brown & Company's Exhibits as ("Brown's Exs.__"); and Transcript of Testimony as ("Tr. p. __").

It appears without any dispute that George A. Brown, dba Brown & Company ("Brown"), 8 Beacon Street, Boston, is a sole proprietor, registered with the Commission since November 29, 1959 as a broker-dealer (File No. 8-7953, and that Markoff, Sterman & Gowell, Incorporated ("MS&G"), 79 Milk Street, Boston, has been registered with the Commission since August 22, 1962, as a broker-dealer, Leon F. Markoff ("Markoff") being its president, Marshal S. Sterman ("Sterman"), its treasurer, and David C. Gowell ("Gowell") its vice-president, with said respondents being directors of MS&G (File No. 8-10948).

It also appears without dispute that Brown and MS&G are members of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act. (See answers of Brown and MS&G, filed in these proceedings, respectively, on November 2, 1964 and November 16, 1964).

In addition to being directors and officials of MS&G, the three individual respondents, Markoff, Sterman & Gowell, each owned one-third of the outstanding stocks of MS&G and were registered representatives of that corporation and were active in the retailing of purchases and sales of stock for clients of MS&G (Tr. pp. 15-16).

Such was the situation confronting the Commission on October 15, 1964 when it issued its aforesaid order for private consolidated proceedings.

It is, at this point, appropriate to review and discuss the evidence relative to the allegations contained in Sections IIA, B, C and D of the said order of October 15, 1964.

It is found that Louis A. Grillon, a securities investigator for the Commission, who was assigned to conduct an inspection of Brown & Company in 1964 (Tr. p. 38) testified that his examination of the books and records of Brown showed that Brown, on May 28, 1964, had an aggregate indebtedness of \$188,692.90; that on the same date Brown had net capital, before adjustments, of \$23,940.29;^{3/} that Brown's adjusted net capital was \$6,505.04 as of May 28, 1964; that Brown's required capital on the same date, under the net capital rule, was \$9,434.65; and that additional capital was needed by Brown of \$2,929.61 as of May 28, 1964, to be in compliance with the net capital rule (Tr. pp. 46, 47; DX 9).^{4/}

On June 29, 1964 Brown had an aggregate indebtedness of \$154,290.41 (Tr. p. 51; DX 10 and 11).

On June 29, 1964 Brown had net capital, before adjustments, of \$26,573.65 (Tr. p. 52; DX 10 and 11).

On June 29, 1964 Brown had an adjusted net capital deficit of \$4,069.28 (Tr. p. 51; DX 10 and 11).

On June 29, 1964 Brown's required capital was \$7,714.53 (Tr. p. 51; DX 10 and 11).

On June 29, 1964 Brown needed additional capital of \$11,783.81 in order to do business within the purview of the net capital rule (Tr. p. 51; DX 10 and 11).

^{3/} This computation is erroneous and Brown's net capital as of May 28, 1964 was \$24,440.29 (Tr. p. 836).

^{4/} The figure of \$2,929.61 is erroneous and Brown's actual additional capital should have been computed to be \$2,579.61 (Tr. p. 837).

On June 30, 1964 Brown had an aggregate indebtedness of \$172,534.45 (Tr. p. 58; DX 12, 14 and 15).

On June 30, 1964 Brown had a net capital, before adjustments, of \$25,037.15 (Tr. p. 58; DX 12, 14 and 15).

On June 30, 1964 Brown had an adjusted net capital deficit of \$5,083.21 (Tr. p. 58, DX 12, 14 and 15)

On June 30, 1964 Brown's required capital was \$8,626.73 (Tr. p. 58; DX 12, 14 and 15).

On June 30, 1964 Brown required additional capital of \$13,709.94 in order to do business within the purview of the net capital rule (Tr. p. 58; DX 12, 14 and 15).

On July 1, 1964 Brown had an aggregate indebtedness of \$199,246.88 (Tr. p. 61; DX 16 and 17).

On July 1, 1964 Brown had net capital before adjustments, of \$25,801.98 (Tr. p. 61; DX 16 and 17);

On July 1, 1964 Brown had an adjusted net capital deficit of \$4,245.76 (Tr. p. 61; DX 16 and 17).

On July 1, 1964 Brown's required capital was \$9,962.35 (Tr. p. 61; DX 16 and 17).

On July 1, 1964 Brown required additional capital of \$14,208.11 in order to do business within the purview of the net capital rule (Tr. p. 61; DX 16 and 17).

On June 29, 1964 Brown was in a short position in securities having a book value of \$81,905.66 and a market value of \$83,775 (DX 10).

Brown was short in inventory the following securities as of June 29, 1964:

200 International Paper
100 National Steel
200 Parke Davis
100 Minnesota Mining & Mfg.
400 General Foods
100 U. S. Steel
200 Texaco

(Tr. pp. 55-58, DX 7, 8 and 10).

Brown's records reflected purchases of the following securities as of June 30, 1964 from MS&G:

200 International Paper
100 National Steel
200 Parke Davis
100 Minnesota Mining & Mfg.
400 General Foods
100 U. S. Steel
200 Texaco

(Tr. p. 32, DX 2A and 8).

Brown's records reflected the sale of the following securities as of July 1, 1964 to MS&G:

200 International Paper
100 National Steel
200 Parke Davis
100 Minnesota Mining & Mfg.
400 General Foods
100 U. S. Steel
200 Texaco

(Tr. p. 33, DX 2A and 8A).

The transactions wherein Brown reflected a purchase of the securities short on June 29, 1964 was for the purpose of having his trial balance show compliance with the net capital rule as of June 30, 1964 (Tr. pp. 57, 104). Mr. Grillon questioned Brown about his short position, and gave the following testimony, to wit:

"A. He (meaning Brown) said he knew he was short securities in his inventory. He wanted to cover the short position so that his net capital would be - he'd be in compliance with the net capital rule and his trial balance would show that fact."

(Tr. p. 57)

Further testifying, Grillon said:

"He (meaning Brown) knew he was short certain securities in inventory and that therefore his net capital condition was affected and he wanted to cover the short position."

(Tr. p. 104)

Prior to entering into these transactions, immediately under discussion, on his books showing a purchase of securities from MS&G as of June 30, 1964, Brown and MS&G entered into an agreement whereby for one-eighth of a point per one hundred shares, MS&G would effect a purported sale to Brown and Brown, in turn, would effect a purported sale of the same securities to MS&G the following day (Tr. pp. 63, 64 and 839).

MS&G received a check for \$162.50 as a service charge for effecting the purported transactions (Tr. pp. 539-540).

Brown entered the purported purchase of securities from MS&G on June 30, 1964 on his books for the purpose of creating the appearance of compliance with the net capital rule (Tr. pp. 56, 57, 308 and 309).

There was never any intention on the part of either Brown or MS&G to deliver any securities nor was there any receipt and delivery of securities relative to the transactions of June 30, 1964 and July 1, 1964 (Tr. pp. 67, 68, 536, 839).

MS&G did not have the securities in inventory that it purportedly sold to Brown on June 30, 1964 (Tr. p. 535).

Markoff and Sterman had knowledge of the transaction with Brown (Tr. p. 537).

Brown was aware of the fact that he was deficient in net capital at the time he entered the transactions of June 30, 1964 on his books (Tr. pp. 839 and 841).

If the transactions of June 30, 1964 between MS&G and Brown were bona fide, it would have placed the firm of MS&G in a net capital deficient position (Tr. p. 775).

The transactions of June 30, 1964 were not bona fide (Tr. p. 841) and the entries reflecting the transactions of June 30 and July 1, on the books of Brown with MS&G were false and fictitious (Tr. p. 841).

The entries reflecting the transactions of June 30, 1964 and July 1, 1964 on the books of MS&G with Brown and Co. were likewise false and fictitious.^{5/}

^{5/} It is argued by counsel for MS&G, in the brief of August 30, 1965, that Gowell did not know of Brown's net capital problems when he executed these transactions. While Gowell did so testify (Tr. pp. 700, 768, 805), no credence is given thereto by the Hearing Examiner in view of all the circumstances contained in this record relative to the transactions on June 30, 1964, when over \$80,000 of securities, involving 1,300 shares, were traded (Tr. p. 540), under the agreement between Brown and MS&G. It is found that Gowell was aware of Brown's net capital troubles, or that he should have realized this, because Gowell admitted that the dealings with Brown placed MS&G in a net capital deficient position (Tr. p. 775). Such being the effect of the agreement upon the fortunes of MS&G, it follows that Brown, likewise, had net capital difficulties.

Brown did business in violation of the net capital rule during the period from May 28, 1964 to July 1, 1964 and he had been in violation of the rules and regulations of the Securities and Exchange Commission in 1960, 1961, 1962 and 1963 (Tr. pp. 303-307).

Brown had conducted business in violation of the net capital rule in 1962 and 1963 (Tr. pp. 305-307, 829-830).

Brown had been advised of prior violations in 1960, 1961, 1962 and 1963 (Tr. pp. 303-307, 829-830).

During the period from August 1, 1963 to August 30, 1964, MS&G, acting as agent for its customers sold to Brown or bought from Brown securities listed on National Securities Exchanges in 187 separate transactions (DX 26, 22 and 23, Tr. pp. 18, 19, 287).

MS&G and Brown are not members of any securities exchanges.

This appears to be undisputed.

Two transactions contained in the list of 189 in DX 26, namely, transactions #170 and #171 were transactions in securities which were over-the-counter securities at the time of the trades and were dropped from consideration (Tr. pp. 285-287).

In 161 of the 187 transactions referred to above involving purchases and sales of securities listed on national securities exchanges wherein MS&G acted as agent for its customers, the securities bought by Brown from a member of an exchange on the same day

and sold to MS&G on a principal basis in the case of a purchase by customers of MS&G, or were sold by Brown to a member of an exchange on the same day they were purchased from Brown on a principal basis in the case of a sale by a customer of Brown (DX 22, 23, 26, Tr. pp. 90-92. 237).

In 28 instances of the 187 transactions referred to above involving purchases and sales of securities listed on national securities exchanges wherein MS&G acted as agent for its customers, the securities were bought by MS&G from Brown in the case of a sale by a customer of MS&G and taken in as inventory by Brown, or were sold to MS&G out of a long inventory position of Brown (DX 26, Tr. p. 253).

In 158 of the 161 transactions referred to in the last paragraph of page 10 hereof, or 98% of the cases customers of MS&G in the case of a purchase paid more for stock they purchased than Brown paid a member of an exchange for the same stock, or received less per share for stock they sold in the case of a sale, than Brown received from a member of an exchange for the same stock (DX 26, Tr. p. 253).

In only one instance was a trade effected wherein the customer of MS&G received a better price than that paid by Brown to a listed house for stock (DX 26).

In 158 instances of the 161 referred to in the last paragraph of page 10 hereof, in the purchase of listed securities for customers by MS&G from Brown, the price charged MS&G by Brown approximated the price Brown had paid member firms for the same security plus the commission paid by Brown for the execution of the transaction, whereas in the sale of listed securities for customers by MS&G to Brown, the price

received by MS&G approximated the price Brown had received from member firms for the same securities, less the commission paid by Brown for the execution of the transaction (DX 26).

In all transactions in which Brown acquired listed securities from MS&G wherein MS&G acted as agent for his customer in the sale of the security, Brown confirmed the transactions to MS&G on a principal basis (DX 22, 23 and 26).

In all transactions wherein Brown sold listed securities to MS&G and MS&G sold the same securities to his customers as an agent, Brown confirmed the transactions to MS&G as principal (DX 22, 23 and 26).

In 158 instances the interpositioning^{6/} of Brown & Co. between MS&G and a member firm resulted in the customer of MS&G paying more for stock bought for them by their agent MS&G, or receiving less for stock sold for them by their agent MS&G, than if MS&G had dealt directly with the member firm (DX 22, 23 and 26).

No disclosure was made to customers of MS&G in the 158 instances referred to above that the effect of MS&G interpositioning Brown resulted in the customer receiving less in the case of a sale by them of listed securities through their agent MS&G, or the payment of more by them to their agent MS&G in the case of a purchase than if their agent had dealt directly with the member firm (DX 22, 23, 26, 100).

6/ Counsel for MS&G on page 6 of the brief, dated August 30, 1936, criticizes the word "interposition", but the Hearing Examiner finds that the use of the term "interpositioning" or any other derivative of "interposition", such as "interpositioner", or "interpositioned" by counsel for the Division of Trading and Markets is timely, appropriate and justified under all the circumstances and evidence contained in this record.

The practice of interpositioning Brown by MS&G resulted in the customers of MS&G paying an extra undisclosed commission on both purchases and sales (DX 22, 23, 26, 100).

In all instances wherein MS&G, acting as agent for its customers, bought or sold listed securities for customers from or to Brown, the price paid or obtained was within the price range for the stock on the date of the transaction.

The necessity of remaining within the day's range resulted in Brown suffering some losses when acting as an interpositioner (Tr. pp. 291-296).

Brown realized profits of \$509.33 when acting as the interpositioned broker (Tr. p. 298).

MS&G made gross commissions of \$6,011.14^{7/} on the 187 trades referred to in the fourth paragraph of page 10 hereof (DX 23).

During the period from August 1, 1963 to August 31, 1963, Brown, acting as agent for his customers, sold to MS&G or bought from MS&G securities listed on national securities exchanges in 307 transactions (DX 25).

Four of the transactions contained in the list of 311 in DX #25, namely, transactions 214, 220, 242 and 302 are transactions in non-listed stocks and should not be considered.

In 280 instances in the 307 transactions involving purchases and sales of securities listed on national securities exchanges wherein

7/ This figure appears on the pencil memo - first page of DX 23.

Brown acted as agent for his customers, the securities were bought by MS&G from a member of an exchange on the same day and sold to Brown on a principal basis in the case of a purchase by a customer of Brown, or were sold by MS&G to a member of an exchange on the same day they were purchased from Brown on a principal basis in the case of a sale by a customer of Brown (DX 25, 24 and 21).

In 18 instances in the 307 transactions referred to above involving purchases and sales of securities listed on national securities exchanges wherein Brown acted as agent for his customers, the securities were bought by MS&G from a third market dealer on the same day and sold to Brown on a principal basis in the case of a purchase by a customer of Brown, or were sold by MS&G to a third market dealer on the same day they were purchased from Brown on a principal basis in the case of a sale by a customer of Brown (DX 25, 24 and 21).

In 8 instances in the 307 transactions referred to above involving purchases and sales of securities listed on national securities exchanges wherein Brown acted as agent for his customers, the securities were bought by MS&G and taken into its inventory or were sold by MS&G out of its inventory (DX 25, 24 and 21).

In one instance of the 307 transactions referred to above a security sold to a customer of Brown had been purchased from a retail customer of MS&G (DX 25, 24 and 21).

In 233 trades of the 280 instances referred to in the last paragraph appearing on page 13 hereof, or in 83% of the cases customers of Brown in the case of a purchase paid more per share for stock they purchased than MS&G paid a member of an exchange for the same stock or received less per share for stock they sold in the case of a sale, than MS&G received from a member of an exchange for the same stock (DX 25, 24 and 21; Tr. p. 254).

In 45 trades of the 280 transactions referred to in the last paragraph appearing on page 13 hereof, customers of Brown in the case of a purchase paid the same per share for stock they purchased as MS&G paid to acquire the stock, or received the same per share for stock they sold in the case of a sale as MS&G received from a member of an exchange for the same stock (DX 25, 24 and 21, Tr. p. 254).

In 9 instances of the 18 trades referred to in the first full paragraph appearing on page 14 hereof, customers were charged the same price per share on a purchase by them or received the same price per share on a sale by them as MS&G either paid or received from the third market (DX 25, 24 and 21).

In 9 instances of the 18 trades referred to in the first full paragraph appearing on page 14 hereof, customers were charged more per share on a purchase by them or received less per share on a sale by them than MS&G either paid or received from the third market (DX 25, 24 and 21).

In 8 instances referred to in the second full paragraph appearing on page 14 hereof, customers of Brown were charged the same price per share on a purchase as Brown had paid MS&G, or received the same price per share as Brown had received from MS&G on a sale to MS&G (DX 25, 24 and 21).

In only two instances of the 280 trades referred to in the last paragraph appearing on page 13 hereof, did customers receive a better price than that received by MS&G on a resale of their securities (DX 25, 24 and 21).

In 233 instances of the 280 referred to in the last paragraph appearing on page 13 hereof, in the purchase of listed securities for customers by Brown from MS&G the price charged Brown by MS&G approximated the price MS&G had paid member firms for the same securities, plus the commission paid by MS&G for the execution of the transaction, whereas in the sale of listed securities for customers by Brown wherein Brown dealt with MS&G, the price received by Brown approximated the price MS&G had received from member firms for the same securities, less the commission paid by MS&G for the execution of the transaction (DX 25, 24, 21 and 101).

In the purchase or sale of listed securities by MS&G to or from Brown, the transactions were all confirmed on a principal basis (DX 22 and 100).

In 233 of a total of 280 instances the interpositioning of MS&G between Brown and a member firm resulted in the customer paying more for stock bought for them by their agent, Brown, or receiving less for stock sold for them by their agent, Brown, than if Brown had dealt directly with the member firm (DX 25, Tr. p. 254).

In 45 of a total of 280 instances the interpositioning of MS&G between Brown and a member firm resulted in no detriment to the customer (DX 25, Tr. p. 254).

In 9 instances of 307 trades, the interpositioning of MS&G between Brown and a third market resulted in the customer either paying more for stock bought for them by Brown or receiving less for stock sold for them by Brown than if Brown had dealt directly with the third market (DX 25; Tr. p. 254).

In 9 instances of 307 trades the interpositioning of MS&G between Brown and the third market resulted in no detriment to the customer (DX 25; Tr. p. 254).

No disclosure was made to customers of Brown in the 233 instances referred to in the first paragraph appearing on page 15 hereof, that the effect of Brown's interpositioning MS&G resulted in the customer receiving less in the case of a sale by them of listed securities through their agent Brown or the payment of more by them in the case of a purchase to their agent Brown, than if their agent had dealt directly with the member firm (DX 21).

The practice of interpositioning MS&G by Brown resulted in the customers of Brown paying an extra undisclosed commission on both purchases and sales.

The necessity of remaining within the day's price range resulted in MS&G suffering losses in some transactions when acting as an interpositioner (Tr. p. 291-296).

MS&G realized net profits of \$973.87 when acting as the interpositioned broker (Tr. p. 298).

Brown realized gross commissions of \$9,000 when acting for his customer as agent in the 307 trades referred to in the fourth paragraph appearing on page 10 hereof.

On September 3, 1963 MS&G sold as agent for its customer 20 shares of Paddington Corp. a listed security at \$57 per share to Brown & Co. (DX 23, Trans. 114).

MS&G's order ticket indicates that the order was received at 10:15 and purportedly executed at 10:40 on September 3, 1963 (DX 23).

Paddington Corporation sold on the American Stock Exchange at the following times and prices on September 3, 1963:

10:01	57 1/2
10:05	57 3/4
10:20	57 3/4
10:26	57 3/4
10:28	57 1/2
10:32	57 3/4
10:37	57 1/2
10:45	57 3/4

(Tr. pp. 420-421)

MS&G's customers did not receive a price consistent with the market at purported time of receipt and execution of his order.

Brown & Co. sold 20 shares of Paddington Corporation on 9/3/63 to a member firm at 57 3/4 (DX 26, Trans. 114; DX 66).

MS&G failed to confirm to its customer that his stock had been sold at \$57 3/4 but did misinform its customer that his stock had been sold at \$57 (DX 23, 26 and 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 66).

On September 10, 1963 MS&G purchased as agent for its customer 50 shares of High Voltage Engineering, a listed security at \$50 1/2 per share from Brown & Co. (DX 23, 26; Trans. 115).

MS&G's order ticket indicates that the order was received at 8:30 and purportedly executed at 10:20 on September 10, 1963 (DX 23).

High Voltage Engineering sold on the New York Stock Exchange at the following times and prices on September 10, 1963:

10:04	49 1/4
10:11	49
10:13	49 1/8
10:15	49 1/8
10:17	49 1/8
10:21	49 1/8
	49 3/8
	49 1/2
	49 1/2
	49 5/8

(Tr. p. 456)

MS&G's customer did not pay a price consistent with the market at purported receipt and execution of his order.

Brown & Co. purchased 50 shares of High Voltage Engineering at \$49 7/8 per share from a member firm (DX 26; Trans. 115; DX 67).

MS&G failed to confirm to its customer that his stock had been purchased at \$49 7/8 per share but did misinform its customer that his stock had been purchased at \$50 1/2 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 67).

On September 25, 1963 MS&G sold for its customer as agent 50 shares of Loews Theatre, a listed security, to Brown & Co at \$18 per share (DX 23; 26; Trans. 117).

MS&G's order ticket indicates that the order was received at 12:45 A.M. and purportedly executed at 1:10 P.M. (DX 23).

Loews Theatre sold on the New York Stock Exchange at the following times and prices on September 25, 1963:

12:22	18 1/4
12:35	18 1/4
12:46	18 1/4
1:07	18 3/8
1:13	18 1/2
1:32	18 1/2

(Tr. p. 457)

MS&G's customer did not receive a price consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. sold 50 shares of Loews Theatre on September 25, 1963 to a member firm at \$18 3/8 per share (DX 26, Trans. 117; DX 69).

MS&G failed to inform its customer that his stock had been sold at \$18 3/8 per share but did misinform its customer that his stock had been sold at \$18 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 69).

On November 20, 1963 MS&G, acting as agent for its customer, sold 5 shares of Xerox to Brown & Co. at \$370 per share (DX 23, 26; Trans. 10).

MS&G's order ticket indicates that the order was received at 2:07 and purportedly executed at 2:25 (DX 23).

Xerox sold on the New York Stock Exchange at the following times and prices on September 25, 1963:

2:04	371 1/2
2:16	371 1/2
2:24	371 1/2
2:26	371 1/2. 371 1/4
2:33	371 and 371 1/2

(Tr. p. 459)

MS&G's customer did not receive a price consistent with market price at the purported time of receipt and execution of his order.

Brown & Co. sold 5 shares of Xerox on November 20, 1963 to a member firm at \$371 1/4 per share (DX 26, Trans. 10; DX 72).

MS&G failed to inform its customer that his stock had been sold at \$371 1/4 per share but did misinform its customer that his stock had been sold at \$370 per share.

MS&G failed to properly enter the time of execution of its customer's order (DX 72).

On January 16, 1964 MS&G bought for its customer, as agent, 100 shares of Data Control Systems from Brown & Co. at \$43 7/8 per share (DX 23, 26; Trans. 14).

MS&G's order ticket indicates the order was received at 10 A.M. and purportedly executed at 10:15 A.M. on January 16, 1964.

Data Control Systems sold on the American Stock Exchange at the following times and prices on January 16, 1964:

10:21	42 3/4 (opening sale)
10:23	42 3/4
	(Tr. p. 422)

MS&G's customer did not pay a price consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. bought 100 shares of Data Control Systems on January 16, 1964 from a member firm at \$43 1/2 per share (DX 26, Trans. 14; DX 75).

MS&G failed to inform its customer that his stock had been bought at \$43 1/2 per share but did misinform him that his stock had been bought at \$43 7/8 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 75).

On January 23, 1964 MS&G sold as agent for its customer 100 shares of Dennison Mfg. Co. to Brown & Co. at \$58 per share (DX 23, 26; Trans. 130, 131).

MS&G's order ticket indicates that the order was received at 3:00 P.M. and purportedly executed at 3:10 P.M. on January 23, 1964 (DX 23).

Dennison Mfg. Co. sold on the American Stock Exchange at the following times and prices on January 23, 1964:

2:57	59 1/2 & 59 1/8
3:00	59
3:02	59
3:03	58 3/4, 58 1/2, 58 1/4, 58 5/8, 58 3/4
3:05	58 1/2 & 58 3/4
3:08	58 1/2
3:10	58 1/4 and 58 5/8 (Tr. p. 423)

MS&G's customer did not receive a price consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. sold 100 shares of Dennison Mfg. to a member firm on January 23, 1964 for \$58 1/2 per share (DX 26; Trans. 130, 131; DX 76).

MS&G failed to inform its customer that his stock had been sold at \$58 1/2 per share but did misinform its customer that his stock had been sold at \$58 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 76).

On March 12, 1964 MS&G bought as agent for its customer 50 shares of Cerro Corp. at \$39 per share from Brown & Co. (DX 23, 26; Trans. 23).

MS&G's order ticket indicates that the order was received at 11:55 A.M. and purportedly executed at 12:10 P.M. on March 12, 1964.

Cerro Industries sold on the New York Stock Exchange at the following time and prices on March 12, 1964:

11:38	38 1/2
12:00	38 1/2
12:06	38 5/8
12:07	38 5/8
12:21	38 5/8

(Tr. p. 462)

MS&G's customer did not pay a price for his shares consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. bought 50 Cerro Corp. from a member firm on March 12, 1964 at \$38 1/2 per share (DX 26; Trans. 23; DX 79).

MS&G failed to inform its customer that his stock had been purchased at \$38 1/2 per share but did misinform its customer that his stock had been purchased at \$39 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 79).

On March 13, 1964 MS&G purchased as agent for its customer 100 shares of Seaboard Airlines RR from Brown & Co. at \$48 5/8 per share (DX 23, 26; Trans. 136).

MS&G's order ticket indicates that the order was received at 1 P. M. and purportedly executed at 1:15 P. M. on March 13, 1964 (DX 23).

Seaboard Airlines RR sold on the New York Stock Exchange at the following times and prices on March 13, 1964:

12:37	48 1/4
2:27	48 1/8

(Tr. pp. 462 and 463)

MS&G's customer did not pay a price for his shares consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. bought 100 shares of Seaboard Airlines on March 13, 1964 from a member firm at \$48 1/8 per share (DX 26; Trans. 136; DX 81).

MS&G failed to inform its customer that his stock had been purchased at \$48 1/8 per share but did misinform its customer that his stock had been bought at \$48 5/8 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 81).

On March 18, 1964 MS&G bought as agent for its customer 30 shares of Holiday Inns of America from Brown & Co. at \$20 1/2 per share (DX 23, 26; Trans. 139).

MS&G's order ticket indicates that the order was received at 1:30 P.M. and executed at 1:50 P.M. on March 18, 1964 (DX 23).

Holiday Inns of America sold on the New York Stock Exchange at the following times and prices on March 18, 1964:

1:21	20
1:35	19 7/8
1:36	19 7/8
1:37	19 7/8 and 19 3/4
1:44	19 3/4
1:46	19 3/4
1:49	19 3/4
1:51	19 5/8

(Tr. p. 463)

MS&G's customer did not pay a price consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. purchased 30 shares of Holiday Inns of America from

a member firm at \$20 per share (DX 26, Trans. 139, DX 82).

MS&G failed to inform its customer that his stock had been purchased at \$20 per share but did misinform its customer that his stock had been purchased at \$20 1/2 per share (DX 23, 26, 100).

MS&G's order ticket indicates that its execution for its customer took place after Brown had executed with the member firm (DX 23, 82).

On March 19, 1964 MS&G bought as agent for its customer 65 shares of Syntex from Brown & Co. at \$88 5/8 per share (DX 23, 26; Trans. 26).

MS&G's order ticket indicates that the order was received at 10:30 A.M. and executed at 10:35 A.M. on March 19, 1964 (DX 23).

Syntex sold on the American Stock Exchange at the following times and prices on March 19, 1964:

10:29	87 1/4
10:30	87 3/4
10:32	87 1/2 & 87 3/4
10:33	87 7/8
10:35	88 and 87 3/4
10:36	88

(Tr. p. 424)

MS&G's customer did not pay a price consistent with the market at the time of purported receipt and execution of his order.

Brown & Co. purchased 65 shares of Syntex from a member firm on March 19, 1964 at \$87 7/8 per share (DX 26; Trans. 26; DX 83).

MS&G failed to inform its customer that his stock had been purchased at \$87 7/8 per share but did misinform its customer that his stock had been purchased at \$88 5/8 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer order (DX 83).

On March 23, 1964 MS&G purchased as agent for its customer 45 shares of Syntex at \$88 1/8 per share from Brown & Co. (DX 23, 26; Trans. 27).

MS&G's order ticket indicates that the order was received at 1:40 P.M. and executed at 2 P.M. on March 23, 1964 (DX 85).

Syntex sold on the American Stock Exchange at the following times and prices on March 23, 1964:

1:21	87 1/4
1:41	87
1:42	87 1/8
1:47	87
1:49	87
1:54	87
1:55	86 3/4
1:59	86 7/8
2:04	86 5/6

(Tr.. pp. 424, 425)

MS&G's customer did not pay a price consistent with the market at purported time of receipt and execution of his order.

Brown & Co. purchased 45 shares of Syntex from a member firm on March 23, 1964 at \$87 1/2 per share (DX 26; Trans. 27; DX 85).

MS&G failed to inform its customers that his stock had been purchased at \$87 1/2 per share but did misinform its customer that his stock had been purchased at \$88 1/8 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 85).

On March 23, 1964 MS&G sold as agent for its customer 100 shares of Spiegel, Inc. to Brown & Co. at \$32 1/2 per share (DX 23, 26; Trans. 28).

MS&G's order ticket indicates that the order was received at 11:35 A.M. and executed at 11:50 A.M. (DX 23).

Spiegel Corp. sold on the New York Stock Exchange at the following times and prices on March 23, 1965:

11:38	33
11:40	33
11:43	32 7/8
11:44	33
11:46	33
11:47	33
11:53	33

(Tr. p. 463, 464)

MS&G's customer did not receive a price consistent with the market at the purported time of receipt and execution of his order.

Brown & Co. sold 100 shares of Spiegel, Inc. to a member firm at \$32 7/8 per share on March 23, 1964 (DX 26, Trans. #28, DX 86).

MS&G failed to inform its customer that his stock had been sold at \$32 7/8 per share but did misinform its customer that his stock had been sold at \$32 1/2 per share (DX 23, 26, 100).

MS&G failed to enter the proper time of execution of its customer's order (DX 86).

It is unnecessary to prolong this review and discussion of the evidence. Enough has been written to show in considerable detail how the transactions between Brown and MS&G were handled and executed, under their aforesaid agreement, wherein Brown agreed to pay MS&G 1/8 of a point, per 100 shares, and MS&G received at least one check, if not others, for \$162.50 (Tr. pp. 539, 540), as a service charge (Tr. p. 849).

"Interposition"

In the footnote appearing on page 12 hereof, the Hearing Examiner has ruled upon an objection advanced by counsel for MS&G to the word "interposition", insisting that its use is based upon a theory. The Hearing Examiner is of the opinion and finds that the use of such words as "interposition", "interpositioning", "interpositioner" or "interposed" was more than "a theory"; it was a device and scheme resorted to by the respondents which promoted disguise and concealment and provides convincing and substantial evidence that they committed the violations alleged under Section 11 of the Commission's aforesaid order dated October 15, 1964.

Fiduciary Relationship

In carrying out their nefarious device or scheme in which the customers of Brown and MS&G were misinformed, overcharged and kept in ignorance of the wrongs imposed upon them, it is well established by the evidence that a fiduciary relationship existed between the respondents and their respective customers which was ignored and grossly abused by the respondents.

It is well settled in the law that a broker-dealer, acting as an agent for a customer in the execution of a transaction, assumes the obligation of a fiduciary. As such, he has a duty to act at all times in the best interest of his client with respect to matters within the scope of his agency, and to inform his principal of all facts

affecting his rights or interests.^{8/} The Commission, in several cases, has considered this fiduciary relationship, such as In re Arleen W. Hughes, 27 S.E.C. 629, 636 (1948), aff'd 174 F. 2d 969 (85 U.S. App. D.C. 56), from which the following excerpt is quoted:

"A corollary of the fiduciary's duty of loyalty to his principal is his duty to obtain or dispose of property for his principal at the best price discoverable in the exercise of reasonable diligence. To give effect to this duty, the courts have required a fiduciary who proposes to deal on his own account with his principal to disclose the best price at which the transaction could be effected elsewhere", citing Doyen v. Bauer, *supra*, and the other authorities listed in footnote 8, including 2 Restatement of Agency, Section 390, comment a.

Use of the mails and
instrumentalities of
interstate commerce

The Hearing Examiner finds that Brown and MS&G, in executing the numerous transactions under their said agreement widely and continuously used the United States mail, as well as the means and instruments of transportation and communication in interstate commerce, such as the telephone and telegraph.

8/ See Report of Special Study of Securities Markets, Part 2, Chapter VII, pp. 623-4 (July 17, 1963); 1 Restatement of Agency, Section 13; as well as Doyen v. Bauer, 211 Minn. 136, 300 N.W. 451 (1941); see also Berkeley Sulphur Springs v. Liberty, 162 A. 191 (N.J. 1932); Van Dusen v. Bigelow, 13 N.D. 277, 100 N.W. 723 (1904); Rodman v. Manning, 53 Ore. 336, 99 Pac. 657 (1909); 2 Restatement of Agency, Section 390, comment a.

Public Interest

The Hearing Examiner finds from the evidence that Brown and MS&G, in the transactions which they conducted under their aforesaid agreement, willfully disregarded and grossly ignored the rights and best interests of their customers. This view is overwhelmingly supported by the evidence and the Hearing Examiner finds that the public interest requires that the registrations of Brown and MS&G, as broker-dealers, be revoked; that they also be expelled from membership in the National Association of Securities Dealers, Inc.; and that Leon P. Markoff, Marshal S. Sterman and David P. Gowell each be found to be causes of such revocation and expulsion of MS&G.

CONCLUSIONS OF LAW

Based upon the entire record in these proceedings, the foregoing review and discussion of the evidence, and the comments and findings of the Hearing Examiner, hereinbefore given, the following conclusions of law are reached by the Hearing Examiner:

George A. Brown d/b/a Brown & Co. during the period from May 28, 1964 to July 1, 1964 willfully violated Section 15(c) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder in that his aggregate indebtedness to all other persons exceeded more than 2000% of his net capital.

During the period from August 1, 1963 to August 30, 1964 George A. Brown d/b/a Brown & Co. and Markoff, Sterman & Gowell, Inc., singularly and in concert in connection with the purchase and sale of securities registered on National Securities Exchanges employed

manipulative and deceptive devices and contrivances and engaged in acts, practices and a course of business which operated as a fraud and deceit upon their customers in willful violation of Section 10(b) of the Exchange Act and Rule 240.10b-5 thereunder in that they directly and indirectly by use of the means and instrumentalities of interstate commerce and of the mails interposed each other on their respective customers' orders to buy and sell securities listed on National Securities Exchanges for the purpose of concealing from customers the commissions paid by the interposed dealer in executing orders with members of the National Securities Exchanges and to lead customers to believe that they were paying only a single commission.

During the period from October 1, 1963 to October 30, 1964 George A. Brown d/b/a Brown & Co. and Markoff, Sterman & Gowell, Inc., willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder in that they failed to record accurately and failed to cause to be recorded accurately the time of entry of each purchase order as required under Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder.

On June 30, 1964 and July 1, 1964 George A. Brown d/b/a Brown & Co. and Markoff, Sterman & Gowell, Inc., willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder in that they entered and caused to be entered on their respective books and records a series of fictitious transactions for the purpose of creating the appearance of compliance by George A. Brown d/b/a Brown & Co. with

Rule 240.15c3-1 under the Exchange Act.

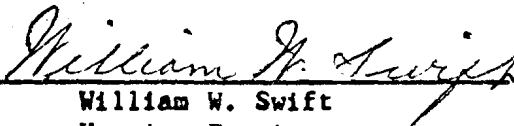
Leon F. Markoff, Marshal S. Sterman and Davis C. Gowell, as a matter of law are responsible for the aforesaid activities of Markoff, Sterman & Gowell, Inc.

It is in the public interest to revoke the registration of Markoff, Sterman & Gowell, Incorporated, as a broker-dealer; that it also be expelled from membership in the National Association of Securities Dealers, Inc.; and that Leon F. Markoff, Marshal S. Sterman and David C. Gowell each be found to be causes of such revocation and expulsion.

It is in the public interest to revoke the registration of George A. Brown, d/b/a Brown & Company as a broker-dealer and that he also be expelled from membership in the National Association of Securities Dealers, Inc.

Accordingly, effective as of the date that the Commission enters an order pursuant to this Initial Decision as provided for by Rule 17 of the Rules of Practice (17 CFR 203.17), and subject to the provisions for review afforded by that Rule, IT IS ORDERED that the registrations as broker-dealers of Markoff, Sterman & Gowell, Incorporated and George A. Brown d/b/a Brown & Company be revoked; that said respondents, Markoff, Sterman & Gowell, Incorporated and George A. Brown d/b/a Brown & Company be expelled from membership in the National Association of Securities Dealers, Inc.; and that Leon P. Markoff, Marshal S. Sterman and David

C. Gowell each be found a cause of the ordered revocation and
expulsion of respondent, Markoff, Sterman & Gowell, Incorporated. ^{2/}



William W. Swift
Hearing Examiner

Washington, D.C.

November 30, 1965.

^{2/} To the extent that the proposed findings and conclusions submitted by the parties are in accord with the views set forth herein they are sustained, and to the extent that they are inconsistent therewith they are expressly overruled.