INITIAL DECISION NO. 75

ADMINISTRATIVE PROCEEDING
FILE NO. 3-8509

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	INITIAL DECISION
RICHARD M. KULAK	)	SEPTEMBER 26, 1995
	)	

APPEARANCES: David S. Horowitz and Merri Jo Gillette for the Division of Enforcement, Securities and Exchange Commission

Michael J. Chamowitz, Attorney for the Respondent

BEFORE: Glenn Robert Lawrence, Administrative Law Judge

These public proceedings were instituted by an Order of the Securities and Exchange Commission dated September 30, 1994, ("Order") issued pursuant to Sections 15(b) and 19(h) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether allegations of misconduct made by the Division of Enforcement ("Division") against Richard M. Kulak ("Kulak" or "Respondent") are true and what, if any, remedial action would be appropriate in the public interest.

In substance, the Division alleged that the Respondent was employed as a trader by Lara, Millard & Associates ("Lara Millard"), a registered broker-dealer located in Vienna, Virginia, from March 1983 through June 1989. Kulak brought in John G. Broumas ("Broumas") as a customer to Lara Millard. Broumas was chairman of the board of Madison Bank of Virginia ("Madison of Virginia") and a director of James Madison, LTD, a bank holding company for Madison of Virginia, from December 1986 until May 1990. The Respondent, during the period from January 5, 1989 through June 1989, executed for Broumas 40 wash trades. It is further alleged that Kulak in the period from January 18, 1989 to June 23, 1989 executed a series of trades at a price 1/8 to a 1/4 higher than the previous day's closing prices. During this period, the price rose in increments of $.25 from $6.00 to $7.25. Additionally, from January 18, 1989 to June 23, 1989, Kulak executed 6 "marking-the-close" purchases within the last 10 minutes of the trading day and on a plus 1/8 tick. In executing these trades, Kulak aided and abetted the violations of Broumas of 9(a)(1) and 9(a)(2) as well as 10(b) and Rule 10(b)-5 of the Exchange Act in connection with the fraudulent conduct in the sale and purchase of JML stock. By answer dated October 20, 1994, Kulak largely denied the allegations in the Order. In his post hearing

brief pages 3-6 (RPHB p.3-6), Respondent contends that he and his supervisor E. Ronald Lara[1] did not know what a wash sale was nor were they aware that Broumas was fraudulently manipulating the market. Respondent also contends they did not know, for the most part, of the NASD reporting rules. Kulak argues that he, in effect, had no obligation to question the trading activity of Broumas and that his role was as a passive order taker. I have concluded, as I will discuss further, that he misconstrues his role and that he had an affirmative obligation not to facilitate the securities fraud perpetuated by Broumas.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon my observation of the various witnesses that testified at the hearing that was held in Washington, D.C. from December 12 through December 14, 1994, and April 12th and 13th 1995, as well as the briefs, arguments and proposals of facts and law of the parties and the relevant statutes and regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission filed a complaint in the U.S. District Court for the District of Columbia against Broumas on September 27, 1991.[2] It was alleged that from January 1989 through July 1990, Broumas violated the federal securities laws by marking-the-close and executing wash trades and matched orders in JML stock. At the same time, Broumas consented, without admitting or denying the allegations, to the entry of a permanent injunction prohibiting him from future violations of Sections 9(a)(1), 9(a)(2), 10(b) and 16(a) of the Securities Exchange Act of

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[1] E. Ronald Lara, the other respondent in this proceeding, submitted an Offer of Settlement which the Commission accepted on April 12, 1995.

[2] SEC v. John G. Broumas, Civil Action No. 91-2449 (L.R. No. 12999).

1934 ("Exchange Act") and Rules 10b-5 and 16a-3 thereunder. Ex. 830.[3]

In 1989 and 1990, JML Class A common stock was listed on the American Stock Exchange ("AMEX"). As of November 7, 1989, there were 6,490,126 shares of that stock outstanding. Officers and directors owned about 32%, leaving a float of approximately 4,413,200 shares. Officers and directors of JML also owned 37% of JML common stock, which was traded over-the-counter and was convertible into the Class A stock, share for share. Ex. 300 (8/17/90 memo); Dec. Tr. 347 (Savarese). Between January 1989 and January 1990, the price of JML Class A stock traded in a range between $5 5/8 and $7 1/2 (closing price), with most closing prices higher than $6 per share. In February 1990, the price declined, and fell to $2 1/2 per share on July 20, 1990. From March 16, 1990 through May 9, 1990, the closing price was between $5 and $5 1/2 per share. After May 9, 1990, it remained below $5 per share again. Ex. 306.

On December 31, 1986, JML became owner of the McLean Bank, which changed its name to Madison National Bank of Virginia. Dec. Tr. 120-121 (Broumas). Broumas, a substantial stockholder in the McLean Bank, received a combination of stock and cash for his 6 million dollar interest. Dec. Tr. 121-122 (Broumas). He stayed on as chairman of the board of Madison of Virginia until May 24, 1990, and a member of the board of JML, the holding company, until May 24, 1990. Dec. Tr. 122 (Broumas). Broumas obtained equal shares of both JML Class A and common stock. Dec. Tr. 122-123 (Broumas). Broumas owned

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[3] References to the page numbers of the transcript of the hearing held in these matters on December 12, 13 and 14, 1994 are noted as "Dec. Tr. ___ (___)." References to the page numbers of the transcript of the hearing held April 12th and 13th, 1995 are noted as "Apr. Tr. _ (___)." All references to the Division's Exhibits admitted into evidence at the hearing are indicated as "Ex. ___."

approximately 198,000 shares of JML Class A common stock on January 31, 1989 [Ex. 808], and on March 13, 1989, Broumas owned 193,268 shares or 2.98% of the total amount outstanding. Ex. 300 (8/17/90 Memo, p. 6); Ex. 807. He was very wealthy, but suffered severe financial reverses early in 1989. Ex. 120 (pp. 19, 34-36), 807 (p.3). In October 1987, when the market crashed, Broumas held, mostly on margin, 225,000 shares of Syntec stock. After the crash, Syntec dropped from $16 to $4 per share, resulting in Broumas receiving margin calls on the stock. To meet those calls, he borrowed approximately $300,000 from Madison of Virginia. Dec. Tr. 123-125.

Broumas on May 1, 1989 was personally liable on notes owed to banks in the amount of $2,733,064, and owed $904,000 in mortgages with payments of $128,008 per quarter. Ex. 801; Dec. Tr. 168-173 (Broumas). Many of his liquid assets were in the form of JML stock, both Class A and common, which were held in margin accounts. Dec. Tr. 173-174 (Broumas); Ex. 801. As of May 1, 1990, Broumas's bank loans totaled $2,621,981, with quarterly payment requirements of at least $104,500. Broumas was having difficulty meeting those interest and loan payments. In addition, the value of his real estate holdings was dropping. Ex. 801,802; Dec. Tr. 175-176 (Broumas). As a result of these liabilities, among others which he could not repay, Broumas eventually filed for personal bankruptcy, pursuant to Chapter 7, in February 1991. Dec. Tr. 214-215 (Broumas); Ex. 800. In November 1994, the United States Attorney for the District of Columbia filed an Information against Broumas charging him with one count of misapplication of funds by a bank officer in violation of 18 U.S.C. § 656 (United States v. Broumas, Crim. No. 94-442 (D.D.C.)). Ex. 706. The Information alleged a check-kiting scheme conducted by Broumas, using six separate bank accounts at three banks, including

Madison of Virginia and Madison of Washington. The purpose of the scheme was to use the float generated by writing checks against accounts for which insufficient funds existed, and using the checks to meet stock margin calls for JML stock from April through June, 1990. On November 23, 1994, Broumas pled guilty to this Information and admitted to the conduct charged. Ex. 720; Dec. Tr. 209-212 (Broumas).

During 1989 and 1990, Broumas controlled approximately 25 different brokerage accounts, in his own name and others, located at 14 different broker-dealers, through which he placed his wash trades, matched orders, and marking-the-close trades in JML Class A stock. Ex. 1. During 1989 and 1990, Broumas held three accounts at H. Beck--a joint account, and accounts in the name of Les Girls and BC Theatres. He held two brokerage accounts at Lara Millard, one in joint name with his wife and one in the name of BC Theatres. He had two accounts at Scott & Stringfellow, one held in the name of John Broumas and the other a joint account with his wife. He had two accounts at Voss & Company, one in a joint name and the other in the name of Les Girls. He had three accounts at First Potomac--one in joint name, one in the name of Les Girls, and one in the name of BC Theatres. Broumas had one account at Capitol Securities jointly with his wife, and another at City Securities Corporation. He had a joint account at Investors Group, Ltd. Broumas had two accounts at Johnston Lemon each held in the name of John Broumas. He had one account at Koonce Securities in a joint name, and one in his name at Staib Roberts. He had three accounts at Swan Securities--one in joint name, one as BC Theatres, and one as Les Girls. He had a joint account at Titan Value Equities Group. Broumas had an account in his name at Washington Investment Corp. He had three accounts at Carey Jamison Securities--in joint name, BC Theatres, and Les Girls. Dec. Tr. 126-

142 (Broumas).

Broumas had sole authority to place trades, and he was the only person who traded in these accounts; he paid for them out of funds he controlled; and when shares were sold, he received payment. He had the power to control or direct the voting of the shares of JML stock in these accounts during 1989 and 1990. Dec. Tr. 126-142 (Broumas). In 1989 and 1990, Broumas held his JML Class A stock in margin accounts, and he received margin calls that he had to meet or risk sale of the stock. Dec. Tr. 186-189 (Broumas). Broumas believed that broker-dealers required that stock must have a value of $5 or more to be held on margin. Dec. Tr. 192 (Broumas). Eventually, Broumas received margin calls from his brokers that he could not meet, and all of his accounts that held JML Class A stock were sold out by the brokers. Dec. Tr. 212-213 (Broumas). In order to meet margin calls in 1989 and 1990, Broumas admitted that he sold JML stock to himself many times. He called brokers during that time period and asked them whether he had any equity in his margin accounts. Dec. Tr. 193 (Broumas). Then he would direct that shares be bought or sold from one account controlled by him into other accounts controlled by him. Dec. Tr. 193-194 (Broumas); Ex. 1.

Between January 1, 1989, and June 30, 1990, Broumas ordered approximately 545 trades of JML Class A stock. Ex. 1. Of this amount, 420 trades consisted of wash trades or matched orders, constituting 203 wash trade or matched order transactions. These trades typically involved the purchase and sale of between 3,000 and 12,000 shares of JML stock. Ex. 2. Broumas orchestrated these trades through at least 29 brokerage accounts that he maintained or controlled at 13 brokerage firms in the Washington, D.C. area. Ex. 2, 6.

Broumas could not go to the JML banks and borrow cash because he had reached his

limit. Dec. Tr. 201 (Broumas). He therefore arranged wash trades and matched orders for the purpose of obtaining a float in a scheme similar to check-kiting. Under this scheme, Broumas orchestrated trades between accounts he held at different brokerage firms by calling registered representatives on each side of his trades and giving them instructions to call each other and to trade a specific amount of his JML Class A stock at a specified price. Broumas knew that by calling both sides of the trades, the trades would be executed on the over-the-counter market. Once the trades were completed, Broumas obtained the proceeds from the sale side one day later, but waited until the settlement date at least one week later to pay for the corresponding buy side of the trade. When the settlement date arrived, he sometimes executed another set of wash trades or matched orders and repeated the process. By engaging in this activity, Broumas could, in effect, obtain a "loan" from the brokerage firms where he traded his JML stock. Similarly, Broumas arranged a smaller number of matched orders by following the same procedure, except that he solicited third parties, nominees, to call in one side of the trade. Dec. Tr. 195-201 (Broumas).

Broumas was able to borrow cash by this method of selling shares to himself, and did this instead of selling JML stock to a buyer in the open market because he wanted to maintain his large holdings of JML stock "at that price." It was important to him to maintain the same general level of JML stock ownership. Dec. Tr. 199-200 (Broumas). For each of the 203 transactions [Ex. 2]., Broumas made two phone calls, one to each broker on either side of each trade. In instances where stock was moved to or from accounts that he controlled (John Broumas, John and Ruth Broumas, Les Girls or BC Theatres) to or from nominee accounts, the mechanics of how the calls were made and how the trade was executed was the same as when

he moved stock between his own accounts. Dec. Tr. 202-203 (Broumas).

In addition to his own accounts, Broumas also traded JML Class A stock through the accounts of four nominees: a business associate as well as three former Madison employees, one of whom was his grandson--L. Lawton Rogers (a respondent in one of the related Commission administrative proceedings, Admin. Proc. File No. 3-8513); Matthew Johnson; Michael Connolly; and Kevin Lemmon. Ex. 2, 6. Broumas initiated this arrangement with each nominee. During the Trading Period, L. Lawton Rogers ("Rogers") maintained accounts at H. Beck, Voss & Co., and First Potomac which Broumas controlled. Ex. 120 (pp. 14-15), 280, 281. Rogers ordered, at Broumas's request, 21 trades of JML stock through the above-mentioned accounts. The value of Rogers's trades in JML stock totaled approximately $1,060,000. Seventeen of the trades amounted to matched orders, and the other four were two sets of trades that washed between Rogers's accounts. Ex. 2, 6.

Broumas directed Rogers to call specific registered representatives and place a buy or sell order at a specific price for JML stock. Rogers then called in the trade, giving the registered representative the price, amount of shares, and to whom it was to be traded. Ex. 120 (pp. 24-26, 30, 37-38); 282. On two occasions, Rogers placed wash trades between his own accounts. On January 25, 1990, Rogers sold 12,000 shares of JML stock at $6.375 per share from his H. Beck account, and bought 12,000 shares of JML stock at $6.375 per share for his First Potomac account. Similarly, on February 12, 1990, Rogers sold 12,000 shares of JML stock at $5.625 per share from his First Potomac account, and bought 12,000 shares of JML stock at $5.625 per share for his Voss & Co. account. Ex. 2. Broumas also traded JML stock through nominee accounts in the names of Matthew Johnson, Michael Connolly, and Kevin Lemmon. During the

period from November 1989 to May 1990, Broumas placed 12 matched orders through Johnson's account at H. Beck. Ex. 2, 6. During the period from February 1989 to April 1989, Broumas placed four matched orders through an account Johnson maintained at Swan Securities. Ex. 2, 6; Dec. Tr. 252-253 (Johnson).

Michael J. Connolly ("Connolly") was employed by Madison of Virginia during the relevant period as a vice president and cashier. In the fall of 1989, Broumas told Connolly that he was using these transactions to generate cash to pay maturing bank notes. Connolly understood that Broumas used these trades in his margin accounts to obtain a float, or use of the funds, for several days. Ex. 249. Connolly opened an account with Mr. Chema at H. Beck. Although Connolly agreed to allow Broumas to conduct trades through Connolly's account, he never subsequently signed any documents giving Broumas authority to trade on his behalf, or had any dealings with the broker again. Dec. Tr. 269 (Connolly); Ex. 249. Between January 1990 and May 1990, Broumas placed nine matched orders in JML Class A stock through Connolly's H. Beck account.

Kevin K. Lemmon ("Lemmon") was employed by Madison of Virginia during the trading period as a vice president in the lending department. Between December 1989 and May 1990, Lemmon maintained accounts at First Potomac and H. Beck through which he allowed Broumas to place 14 matched orders in JML Class A stock. Ex. 2, 6. None of Broumas's wash trades and matched orders placed between January 1, 1989 and July 2, 1989 were reported by the registered representatives and broker-dealers who executed Broumas's trades, in violation of the requirements of NASD Schedule G. Ex. 2, 4, 310. In addition, many trades after July 3, 1989 were not reported either, again in violation of NASD Schedule G. Ex. 2, 4.

From January 1, 1989 to June 30, 1990, the Trading Period at issue, all of Broumas's reported trades constituted 40.34% of the total reported market volume for JML Class A stock. From July 1, 1989 to December 31, 1989, all of Broumas's reported trades constituted 55.25% of the total reported market volume for JML Class A stock during that time period. From July 1, 1989 to June 30, 1990, all of Broumas's reported trades constituted 48.19% of the total reported market volume for JML Class A stock during that time period. Ex. 8, 304, 306; Dec. Tr. 61-69 (Boeggeman).

With regard to only the volume of Broumas's wash trades and matched orders reported, from January 1, 1989 to June 30, 1990, all of Broumas's reported wash trades and matched orders constituted 36.55% of the total reported market volume for JML Class A stock. From July 1, 1989 to December 31, 1989, all of Broumas's reported wash trades and matched orders constituted 53.45% of the total reported market volume for JML Class A stock during that time period. From July 1, 1989 to June 30, 1990, all of Broumas's reported wash trades and matched orders constituted 44.07% of the total reported market volume for JML Class A stock during that time period. Ex. 4, 8, 304, 306; Dec. Tr. 61-69 (Boeggeman). Finally, comparing the total volume of wash trades and matched orders reported with the total volume reported only on those days on which reported wash trades and matched orders occurred, from January 1, 1989 to June 30, 1990, Broumas's trades constituted 73.71% of the reported market volume for JML Class A stock. From July 1, 1989 to December 31, 1989, the applicable percentage is 72.43%. From July 1, 1989 to June 30, 1990, the percentage was 73.71%. Ex. 4, 8, 304, 306; Dec. Tr. 61-69 (Boeggeman).

In an attempt to support the price of JML stock, Broumas also engaged in the practice

of "marking-the-close." Marking-the-close refers to a series of transactions, at or near the close of trading, i.e., at or within minutes of 4:00 p.m., which either uptick or downtick a security. Dec. Tr. 356 (Savarese). Marking-the-close represents a possible departure from the normal forces of supply and demand that result in the fair auction price for a security, and is of concern to those who regulate the markets. Dec. Tr. 356-357 (Savarese). Between January 18, 1989 and June 25, 1990, Broumas ordered 64 purchases that occurred within the final ten minutes of the trading day; of these, 54 constituted the last trade of the day; and 47 of these purchases were executed on an uptick. Ex. 3, 7; Dec. Tr. 208 (Broumas). An uptick is a transaction in a security which is at a price that is higher than the previous transaction in that same security. Dec. Tr. 342 (Savarese). These purchases were made on the AMEX and the Midwest Stock Exchange. By using the exchanges, Broumas could assure that his closing purchases would be reported by the exchanges, the reporting services, and the newspapers. Broumas primarily placed his late-day purchases through accounts held at Scott & Stringfellow and H. Beck. Ex. 3, 7. In marking-the-close, registered representatives executed Broumas's purchases on either the AMEX or the Midwest Stock Exchange. Broumas typically bought 100-200 shares of JML stock at or near the close of the trading day. These purchases characteristically occurred within the final ten minutes of the trading day, generally constituted the last trade of the day, and were usually executed on an uptick. On a number of occasions, Broumas's trades raised the closing price of JML stock by 1/8. Ex. 3, 7. During this time period, he followed the price of JML Class A stock in the newspaper daily. Dec. Tr. 207 (Broumas).

Purchases at the close are especially significant for two reasons. First, brokerage firms use the closing price of a security to arrive at their margin calculations in determining what their

margin requirements will be for customers. Generally, many firms require maintenance of equity of 35% in margin accounts. Some firms also use $5.00 per share as a level at which they raise margin requirements. Other firms use a lower price. When the stock price reaches that level, many firms raise their requirements in margin accounts to 100% equity, essentially requiring full cash payment for the security. Second, the closing price of a security is the price reflected in the newspapers as the final price for that security for that trading session. Dec. Tr. 357-359 (Savarese). The concern about marking-the-close arises when the practice is repeated, is ongoing, and develops into a pattern. Dec. Tr. 358 (Savarese).

At some point, Adrian C. Havill ("Havill"), a respondent in a companion proceeding (Admin. Proc. File No. 3-8510), told Broumas that his office said that Havill could not take these uptick trades any longer. Havill told him the trading was not proper, and that it might affect the market. Dec. Tr. 207-208 (Broumas). Broumas conducted some of his marking-the-close trades through two accounts at Scott & Stringfellow, which he opened in late August 1989. Ex. 7; Dec. Tr. 288-289 (Havill). Broumas's purpose in conducting these marking-the-close trades was to create interest in the stock. He knew that if nobody bought the stock on a certain day, it would not show up in the newspaper listings the next day. Dec. Tr. 292-294 (Havill). At Scott & Stringfellow, in particular, Broumas would often call and execute trades near the end of the day. If the stock had not traded that day, Broumas bought some shares just to make sure it traded. Dec. Tr. 295-296 (Havill). Broumas would call many times between 3:00 and 4:00 p.m. and instruct Havill, his registered representative at Scott & Stringfellow, to buy at or near the close. Dec. Tr. 300 (Havill).

In 1990, the American Stock Exchange ("AMEX") conducted a study concerning certain

trading activity in James Madison, Limited Class A stock, which was then traded on the AMEX. Dec. Tr. 341-342 (Savarese). The study was initiated by the Equities Surveillance Department of AMEX in January 1990 when a Participant-at-the-Close Report, which highlights patterns of either upticks or downticks over a period of time in any security, showed a pattern of upticks at or near the close of trading for JML Class A stock. Dec. Tr. 341-342 (Savarese); Ex. 300. The Participant-at-the-Close Report had revealed that, on 9 out of 10 trading days from December 29, 1989 through January 12, 1990, JML closed on a plus or zero plus tick, and that Scott & Stringfellow had effected the last purchase of the day on 8 of the 9 days. Seven of the 8 were executed in the last 5 minutes of trading. All of the firm's at-the-close purchases were for 100 shares and were done on plus or zero plus ticks. Ex. 300 (8/17/90 memo). The study was extended to encompass the time period August 30, 1989 through January 17, 1990. The study concluded that, of the 39 trading sessions during which Broumas was active at Scott & Stringfellow, he executed the last trade of the day on 32 occasions and the trade was effected on a 1/8 uptick on 27 occasions. Ex. 300 (8/17/90 memo). In September 1989, Broumas ordered 15 wash trade transactions, and 11 marking-the-close trades, 9 of which were on the same days as the wash trades. In December 1989, Broumas ordered 11 wash trades or matched order transactions, and 9 marking-the-close trades, 4 of which were on the same days as the wash trades. The pattern continued throughout the Trading Period. Ex. 2, 3.

Market manipulation refers generally to practices--such as wash sales, matched orders or rigged prices--that are intended to mislead investors by artificially affecting market activity. Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6 (1985). Manipulation subverts the objectives of the Exchange Act which, among other things, are intended to "insure the

maintenance of fair and honest markets,"--that is, "markets where prices may be established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73d Cong., 2nd Sess. (1934) at 11. Section 9(a)(2) of the Exchange Act, which prohibits the manipulation of securities listed for trading on a national exchange, makes it unlawful for a person to engage in a series of transactions that create actual or apparent activity or raise or depress the stock's price when done for the purpose of inducing others to buy or sell the security. Section 9(a)(2) was considered by Congress to be "the very heart" of the Exchange Act, and "its purpose was to 'outlaw every device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage.'" Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2d Cir. 1969) (quoting 3 L. Loss, Securities Regulation 1549-55 (2d ed. 1961)), cert. denied, 400 U.S. 822 (1970).

Section 9(a)(2) violations are established by a showing that an individual: 1) effected a series of transactions in a security registered on a national securities exchange; 2) which created actual or apparent active trading in such security, or raised or depressed the price of the security, 3) for the purpose of inducing the purchase or sale of the security by others. Crane at 794-795; Section 9(a)(2) of the Exchange Act. Section 9(a)(1) prohibits certain manipulative practices, including wash trades and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. To establish a violation of Section 9(a)(1), it must be shown, as it has been in this case, that one or more individuals effected a transaction in a security registered on a national securities exchange which involved no change in beneficial ownership, or with the

knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, have been or will be entered by or for the same or different parties. It also must be established, as it has in this matter, that the transaction was done for the purpose of creating a false or misleading appearance of active trading in such security, or a false or misleading appearance with respect to the market in such security. Michael Batterman, 46 S.E.C. 304, 305 (1976); Section 9(a)(1) of the Exchange Act.

The manipulative activities expressly prohibited by Sections 9(a)(1) and 9(a)(2) of the Exchange Act with respect to a listed security constitute violations of Section 10(b) of the Exchange Act and Rule 10b-5 when such activities involve trading in the over-the-counter market. See, e.g., United States v. Charnay, 537 F.2d 341, 350-51 (9th Cir. 1976), cert. denied, 429 U.S. 1000 (1976); SEC v. Resch-Cassin & Co., Inc., 362 F. Supp. 964, 975 (S.D.N.Y. 1973); Edward J. Mawod & Co., 46 S.E.C. 865, 869-71 (1977), aff'd, Mawod & Co. v. SEC, 591 F.2d 588 (10th Cir. 1979); Batterman, 46 S.E.C. at 305; Russell Maguire & Co., Inc., 10 S.E.C. 332, 347-49 (1941).

To establish that an individual has engaged in manipulative practices in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Division must prove, as it has done here: that one or more individuals engaged in any act, practice, or course of business which operated as a fraud or deceit upon any person in connection with the purchase or sale of the security. See SEC v. Kimmes, 799 F. Supp. 852, 858 (N.D.Ill. 1992). In establishing a violation of Section 10(b) and Rule 10b-5, the Commission must show that the individual acted with scienter. Aaron v. SEC, 446 U.S. 680, 701-02 (1980).

"Rule 10b-5 . . . require[s] no additional proof of facts creating a higher burden of proof

when compared to subsection 9(a)(1), (2) and (6). In fact, Rule 10b-5 create[s] a lower burden of proof." Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1165 (5th Cir. 1982), reh'g denied, 689 F.2d 190 (5th Cir. 1982), vacated, remanded, 460 U.S. 1007 (1983), on remand, 718 F.2d 725, cert. denied, 460 U.S. 1013 (1983).

The third element required under Section 9(a)(2)--manipulative purpose-- is not required to establish a violation of Section 10(b) and Rule 10b-5. Instead, "[i]t is sufficient for the person to engage in a course of business which operates as a fraud or deceit as to the nature of the market for the security." Batterman, 46 S.E.C. at 305; see also Charnay, 537 F.2d at 350-51. Such deceit has been demonstrated in this case.

From January 1, 1989 to June 30, 1990, Broumas repeatedly placed orders for wash trades and matched orders in JML Class A stock, which constituted manipulative practices in violation of Sections 9(a)(1) and 9(a)(2) of the Exchange Act. Furthermore, this pattern of conduct violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because, by creating a false or misleading appearance of active trading in JML Class A stock, it operated as a fraud or deceit upon the marketplace.

Broumas's wash trades and matched orders violated Sections 9(a)(1) and 9(a)(2) of the Exchange Act. Sections 9(a)(1) and 9(a)(2) require that the proscribed activities be engaged in with the requisite manipulative intent. Transactions which violate Section 9(a)(1) can serve as the basis for a violation of Section 9(a)(2). Michael J. Meehan, 2 S.E.C. 588, 615-618 (1937). However, transactions such as wash sales and matched orders, as are present in this case, which constitute violations of Section 9(a)(1), have been held to be per se manipulative. Further, it has been erroneously argued that the stock manipulation must occur through a national exchange.

My reading of 9(a)(1) merely requires that the stock be listed on the national exchange (American Stock Exchange in this case), not that manipulation occur through the Exchange. See Mawod & Co., 591 F.2d at 595-96.

It has been argued, in effect, that there were no wash sales involved here inasmuch as the trades were not, for the most part, formally reported. As was pointed out at the Commission level in Mawod & Co., however, formal reporting is not a necessary ingredient in a wash sale violation:

> In the over the counter markets there was no tape. And until the National Association of Securities Dealers, Inc. developed the automated quotation system known as NASDAQ, trading volume was normally something that even an astute professional could only guess at .... But the brokers and dealers through whom orders in a particular issue funnel know whether it is active or inactive. And when it is active that information filters out to investors.

Mawod & Co., 46 S.E.C. at 870 n. 24.

In other instances, the Commission has recognized that, absent an admission, an inference of manipulative intent may be drawn, and a prima facie case shown when a person with substantial pecuniary interest in achieving a price change engages in the type of market activity proscribed by Sections 9(a)(1) and 9(a)(2). Batterman, 46 S.E.C. at 305; Halsey, Stuart & Co., Inc., 30 S.E.C. 106, 123-24 (1949); The Federal Corp., 25 S.E.C. 227, 230 (1947). This is exactly what happened in the instant case.

Broumas's pattern of placing wash trades and matched orders in JML Class A stock constituted a manipulative practice per se under Section 9(a)(1) of the Exchange Act because it created the false or misleading appearance of active trading in JML Class A stock, and a false or misleading appearance with respect to the market for JML Class A stock. This pattern of conduct also violated Section 9(a)(2) of the Exchange Act because Broumas's purchases and sales

created the false and misleading appearance of active trading in JML Class A stock. Broumas's motive can be inferred from the fact that he engaged in an extensive and repeated pattern of placing wash trades and matched orders while having a clear and substantial financial interest in raising or depressing the price of JML Class A stock. Broumas admitted that he faced margin calls if the price of JML Class A stock dropped significantly. He also admitted that he engaged in the pattern of wash trades and matched orders to take advantage of the "float," i.e., he obtained the use of the proceeds generated by a "sale" immediately while not being required to pay for the corresponding "purchase" until seven days later. During the eighteen month period in question, Broumas arranged for a total of 484 violative trades in JML Class A stock. See Thornton & Co., 28 S.E.C. 208, 222-225, 224 n.21 (1948). The respondent in Thornton used sales tickets for collateral. The Board found that the purpose of the trade was to create a false and misleading impression of active trading in violation of 9(a)1 and 9(a)2 of the Exchange Act. As Thornton indicates, "Purchasers in over-the-counter as well as the Exchange market are entitled to believe that the Exchange market price which governed the price charged them represents a price established in an independent market free of artificial devices." Id. at 224. This would by implication require that all transactions be reported and be subject to, as well as effect, the competitive market. Here the failure to report in many instances and the fixing of the prices subverted operation of a free marketplace. Further, the parties who loaned money on margin were defrauded as Broumas engaged in a charade pretending that there were genuine trades at a price set competitively.

Whatever other motives he might have had, Broumas must be deemed reasonably to have anticipated what would follow from his activity. As indicated, Broumas's wash trades and

matched orders had a significant effect on the reported volume during the relevant period. Furthermore, the sheer number of wash trades and matched orders placed by Broumas in JML Class A stock over an eighteen month period, combined with his use of numerous brokers and nominee accounts, clearly leads to the conclusion that Broumas effected a series of transactions in JML Class A stock, creating apparent active trading in that stock for the purpose of inducing others to buy the stock. See Meehan, 2 S.E.C. at 615-618. "[A]ctivities [constituting wash sales and matched orders under Section 9(a)(1)] in connection with the purchase or sale of any security operate as a fraud or deceit upon any person and are prohibited by Section 10(b) of the Exchange Act and Rule 10b-5 thereunder." Batterman, 46 S.E.C. at 305.

The Commission has held that elements of proof under Section 10(b) and Rule 10b-5 are different from those under Sections 9(a)(1) and 9(a)(2). Unlike Sections 9(a)(1) and 9(a)(2), no showing of manipulative purpose is required to establish a violation of Section 10(b) and Rule 10b-5. "It is sufficient for the person to engage in a course of business which **operates** as a fraud or deceit as to the nature of the market for the security." Id. at 305 (emphasis added).

Broumas's pattern of placing orders for wash trades and matched orders in JML Class A stock clearly operated as a fraud or deceit upon the investing public by creating the false and misleading appearance of activity in the stock. The investing public is led to believe that the volume in a given stock--as reported in the newspaper--reflects genuine supply and demand for that security. The investing public is deceived when, as here, during an eighteen month trading period, at least 36.55% of the total reported volume in a particular security represents a complete fiction in that there was absolutely no change in beneficial ownership of that stock. The use of nominee accounts in which to conduct such manipulative trading--especially when

third party trading authority was lacking--is not genuine demand. United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972); SEC v. Commonwealth Securities, Inc., 410 F. Supp. 1002, 1009-1012 (S.D.N.Y. 1976), aff'd in part, modified in part, and remanded, 574 F.2d 90 (2d Cir. 1978); Mawod & Co., 46 S.E.C. at 871-72. That practice in and of itself is deceptive.

To establish a violation of Section 10(b) of the Exchange Act, it must be proved that Broumas acted with scienter. Scienter has been defined by the Supreme Court as a "mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). The Commission and most circuit courts, however, have held that recklessness will suffice. See e.g., Mawod & Co., 591 F.2d at 595-96; Michael Joseph Boylan, 47 S.E.C. 680, 687 (1981). The usual formulation of recklessness cited by the courts is set forth in Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977):

> Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers and sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Id. at 1045.

Respondent argues that he had no actual knowledge of the fraud. However, proof of scienter in manipulation cases need not be direct, but rather may be inferred from circumstantial evidence, including evidence of price movement, trading activity, and other factors. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983); Santa Fe Industries v. Green, 430 U.S. 462, 475 (1977); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir 1986); Mawod & Co., 591 F.2d at 596. Further, proof of a manipulation is generally not based on a

single activity, but rather on a course of conduct showing an intentional interference with the normal functioning of the market for a security.[4] Indeed, manipulation is usually the result of acts, practices, and courses of conduct that deceive the marketplace. "Proof of a manipulation almost always depends on inferences drawn from a mass of factual data. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces." Pagel, Inc., 48 S.E.C. 223, 226 (1985) (emphasis added). Moreover, the Division need not rely on direct evidence that Broumas willfully manipulated the market. Instead, the Division may rely on inferences drawn from the evidence adduced at the hearing to reach the conclusion that an illegal manipulation occurred. Collins Securities Corp. v. SEC, 562 F.2d 820, 822-23 (D.C. Cir. 1977).

Broumas had a pecuniary interest in the manipulation for several reasons: he was a director of JML and chairman of the board of Madison of Virginia; he held JML Class A stock on margin in numerous accounts, including nominee accounts; and he was heavily in debt. In addition, by placing wash trades and matched orders, Broumas engaged in a pattern of trading which is clearly proscribed by Sections 9(a)(1) and 9(a)(2), and which operated as a fraud or deceit on the marketplace by creating the false and misleading appearance of active trading in JML stock. Broumas engaged in this conduct either intentionally or recklessly. Broumas repeatedly engaged in a pattern of activity designed to mark-the-close in JML Class A stock. By placing a series of transactions in JML Class A stock which marked-the-close, Broumas violated Section 9(a)(2) of the Exchange Act because this pattern of trading artificially raised or

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[4] Who can question here that a "wash sale" is not a normal activity?

supported the market price of JML Class A stock at the close. Furthermore, this pattern of conduct violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because the repeated purchases--executed on an uptick, or a zero plus tick--at or near the end of the day had the effect of increasing or supporting the closing price of JML Class A stock on those days.

"Marking-the-close" generally refers to "the practice of executing the last transaction of the day in a particular security in order to affect its closing price . . . ." Richard L. Warner, 53 SEC Docket 0377, 0379 (1992). It is a short-hand term for a practice of attempting to execute transactions at or near the close of the day in a particular security on an uptick (i.e., a purchase executed for a price higher than the previously executed trade), or a zero plus tick (i.e., a purchase executed for the same price as the previously executed trade where that trade was executed for a price higher than the immediately preceding trade), in order to artificially influence or affect its closing price.

The Commission has held that the practice of placing orders at or near the end of the day in order to cause the stock to close at an uptick violates Section 9(a)(2) of the Exchange Act. Jacob Schaefer, 12 SEC Docket 1128, 1129 (1977). As stated above, in order to prove that Broumas violated Section 9(a)(2) by placing marking-the-close trades, it must be proved that he did so for the purpose of inducing the purchase or sale of the security by others. Absent an admission, manipulative intent may be inferred from circumstantial evidence. Although there is plentiful evidence of record from which such intent might be inferred, I need not rely upon a mere inference; Broumas clearly stated to Mr. Havill that at least one of his motives for placing the late day trades was "to create some interest in the stock because if nobody buys it on a certain day, it doesn't show up in the listing in the paper." He went on to tell Mr. Havill

that he didn't want investors to forget that the bank was around, "so he was just trying to stir up a little interest in the stock." Dec. Tr. 293 (Havill).

The practice of marking-the-close also constitutes a violation of Section 10(b) and Rule 10b-5 of the Exchange Act. See e.g., Stein, 456 F.2d 844 (2d Cir. 1982) (artificial shoring up of the price through purchases of 100 share round lots, often at the end of the day, on a "plus tick" at various brokers and in the names of various nominees); Broumas's pattern of marking-the-close injected into the marketplace an artificial price for JML Class A stock, thus operating as a fraud or deceit on the investing public. Information concerning a manipulation and the artificiality of the market price is material information the public is entitled to know. Given that the Commission has specifically recognized the impropriety of the practice of marking-the- close when done to avoid or reduce margin calls, it is considered that Broumas acted with scienter. Andrew Doherty, 49 SEC Docket 0859, 0861 (1991).

As noted, from March 1983 to June 1989, Respondent Kulak was employed as a securities trader by Lara Millard. He has been licensed by the National Association of Securities Dealers ("NASD") since 1983. Kulak Answer ¶II.F. Kulak has been employed in the securities industry since 1966. From 1966 to 1970, he was employed by Dean Witter. Apr. Tr. 133 (Kulak). In 1970, Kulak left Dean Witter to form Kulak Voss & Co., a broker-dealer which became registered with the Commission in 1973. The firm was also an NASD member. Apr. Tr. 133-134 (Kulak). Kulak founded Kulak Voss & Co. with Stephen C. Voss ("Voss"), a respondent in one of the related Commission administrative proceedings (Admin. Proc. File No. 3-8511). Apr. Tr. 133 (Kulak).

In approximately 1976, Kulak sold his interest in the firm to Voss and the name was

changed to Voss & Co., Inc. ("Voss & Co."). Apr. Tr. 134 (Kulak). After selling his interest to Voss, Kulak continued to be employed by Voss & Co. as a registered representative until March 1979, at which time he left the firm as a result of the criminal proceedings set forth below. Apr. Tr. 134-136 (Kulak); Ex. 704, 705, 1106-B. In April 1979, Kulak was convicted of violating Section 5 of the Securities Act of 1933 in connection with the sale of unregistered securities. U.S. v. Richard M. Kulak, Criminal No. 79-40-A (U.S.D.C., E.D.Va. March 9, 1979). Ex. 704, 705. The conviction was based on a plea of Nolo contendere and Kulak was sentenced to two years probation. The probation was removed after one year. Ex. 704, 705. Following his conviction, the Commission suspended Kulak from association with any broker-dealer for a period of six months. Richard M. Kulak, 21 SEC Docket 1743 (1981). Ex. 702.

In 1981, the Commission affirmed a $2,500 fine imposed on Kulak by the NASD in connection with an unrelated proceeding. In its decision, the Commission found that Kulak had purchased securities with checks drawn on insufficient funds and covered the checks with proceeds from the sale of those securities. Application of Voss & Co., 23 SEC Docket 528 (1981). Ex. 703. In March 1983, Kulak re-entered the securities industry when he was hired as the securities trader at Lara Millard. Apr. Tr. 142-143 (Kulak); Apr. Tr. 25 (Lara). At the hearing in this matter, Kulak stated rather ingenuously that, at the time he re-entered the securities industry, he wanted to be a trader and had no interest in becoming a registered representative again. However, he later admitted that the Commonwealth of Virginia had refused to allow him to become licensed as a registered representative on at least two occasions. Kulak believed that this was due to his disciplinary record. Apr. Tr. 144-147, 286 (Kulak).

As the trader at Lara Millard, Kulak's duties included making a market in certain stocks,

trading the firm's stock, and executing customer orders to purchase or sell stock that he received from the registered representatives within the firm. Apr. Tr. 147-149 (Kulak); Tr. 29-30 (Lara). Kulak did not have his own customers on a regular basis. Kulak did solicit a few accounts for the firm from friends, although he was not the registered representative on those accounts. Apr. Tr. 100-101 (Lara). Kulak stated that one of the reasons he went to work for Lara Millard in March 1983 was because Carole Haynes ("Haynes"), a respondent in one of the related Commission administrative proceedings (Admin. Proc. File No. 3-8512), was working at the firm. Apr. Tr. 143 (Kulak). Kulak had first met Haynes when she was working as an examiner for the NASD and examined Kulak Voss & Co. Apr. Tr. 266-267 (Kulak).

Following her employment with the NASD, from March 1977 to 1982, Haynes was employed at Voss & Co. Her employment at Voss & Co. overlapped with Kulak's employment at the firm. Ex. 1106-B. Haynes worked for Lara Millard from June 1982 until September 1984. From November 1987 to April 1989, Haynes worked for Swan Securities. In April 1989, Haynes founded her own firm, First Potomac Investment Services ("First Potomac"). Ex. 1106-B. Kulak voluntarily left Lara Millard in the summer of 1989 to work for Koonce Securities in Bethesda, Maryland. Apr. Tr. 90 (Lara). In 1981, E. Ronald Lara ("Lara") founded the brokerage firm of Lara Millard with his then-partner, Herbert Millard ("Millard"). Apr. Tr. 21-22 (Lara). In the fall of 1988, Lara bought out Millard and became the sole owner of the firm. Apr. Tr. 23 (Lara). After Lara took over sole ownership of Lara Millard, he was responsible for and had final authority on all policies in effect at the firm. Apr. Tr. 322 (Lara). At the time Lara took over the firm, he became solely responsible for compliance at the firm and, as a usual practice, would personally review the order tickets at the end of each trading

day. Apr. Tr. 49-50 (Lara). From the fall of 1988 until Kulak left Lara Millard, Kulak reported directly to Lara. Apr. Tr. 323 (Lara).

From January 1, 1989 to May 15, 1989, Lara Millard's offices were located in a three-story townhouse. Kulak's work area was located on the ground floor, Lara's office was on the second floor, and the other registered representatives were located on the third floor. Apr. Tr. 31 (Lara). During this time period, when Lara or a registered representative at the firm would receive an order to buy or sell stock from a customer, it was the general practice for that individual to fill out an order ticket reflecting the trade instructions and to take it downstairs to Kulak, who would then execute the trade. Apr. Tr. 31-33, 106 and 120-121 (Lara).

Kulak was first introduced to Broumas approximately 20 years ago through a mutual friend. At that time, he invested in a movie theater venture (Rockville Town Center Theater Corporation) with Broumas. Kulak testified that he held this joint investment with Broumas for several years, from approximately 1975 through 1980. Apr. Tr. 150-151, 273 (Kulak); Apr. Tr. 254 (Broumas). From 1975 through 1980, Kulak occasionally visited Broumas's home to discuss their movie theater business or to pick up films. Apr. Tr. 151 (Kulak). Both Kulak and Broumas characterized their earlier relationship as one of "friends." Kulak stated that, prior to 1988, he considered Broumas to be his friend. Broumas stated that, as Kulak's friend, he has provided financial assistance to Kulak many times. Apr. Tr. 200, 275-276 (Kulak); Apr. Tr. 255 (Broumas).

While he was at Kulak Voss & Co., Kulak opened an account for Broumas and, from that time until 1979 when he left the firm, Kulak was Broumas's registered representative at Voss & Co. At the time Kulak left Voss & Co., Broumas still maintained an account at the

firm. Apr. Tr. 151-152, 303-304 (Kulak); Ex. 220. In approximately 1988, Kulak became aware that Broumas had a relationship with James Madison, Ltd. and, specifically, that he was an officer of Madison National Bank of Virginia. Apr. Tr. 153-154 (Kulak). When Kulak was first hired by Lara Millard in March 1983, Broumas had one account at the firm. At the hearing, Kulak testified that Haynes had brought Broumas's account to Lara Millard when she joined that firm; however, in previous investigative testimony, Kulak stated that "[c]ertain people followed [him] around, and that's probably the way [Broumas] happened upon Lara Millard." Apr. Tr. 157-158 (Kulak). Regardless of whether Broumas's account was brought to the firm by Kulak or had been opened previously by Haynes, almost immediately upon arriving at Lara Millard, Kulak--without being a registered representative and having just returned to the securities industry after having been suspended by the Commission--obtained a power of attorney from Broumas, which granted Kulak discretionary trading authority over Broumas's account. Apr. Tr. 158-161, 275 (Kulak); Ex. 422.

In October 1983, Kulak assisted Broumas in opening a second account at Lara Millard. This account was held in the name of "BC Theaters." Apr. Tr. 161-162 (Kulak); Ex. 260. Thus, by 1984, Broumas had two accounts at Lara Millard: one held in the name of "John and Ruth Broumas" and one in the name of "BC Theaters." Apr. Tr. 235-237 (Broumas). Although Kulak had discretionary trading authority over Broumas's account in 1983, Haynes was Broumas's registered representative. When Haynes left the firm in 1984, Millard became the registered representative for the Broumas accounts. Apr. Tr. 155-156 (Kulak).

After Lara became the sole owner of the firm in late 1988, Broumas's accounts became "house accounts." This meant that any registered representative at the firm could take orders

for these accounts; however all commissions earned on these accounts went to the firm. Apr. Tr. 37-38 (Lara). Broumas testified that it did not matter to him who his designated registered representative was; in practice, he would call and ask for Kulak because Kulak was his friend. Apr. Tr. 257 (Broumas). From January 1, 1989 through June 30, 1989, Broumas stated that he spoke with Kulak on several occasions to give him instructions to buy or sell JML Class A stock through his accounts at Lara Millard. Although Broumas did not know exactly how many times he spoke with Kulak, he stated that it was his usual practice to call Kulak when he wanted to trade his JML stock through his accounts at Lara Millard and that he talked to Kulak "about all his trades at that time." Apr. Tr. 237-238 (Broumas).

Lara corroborated that throughout Kulak's employment at Lara Millard, Kulak and Broumas talked quite often and that Kulak handled securities transactions for Broumas. Apr. Tr. 39-41, 65-66 (Lara). From late 1988 through June 30, 1989, Broumas's trading at Lara Millard was almost exclusively in JML Class A stock. Apr. Tr. 43 (Lara); Ex. 262. Between January 1, 1989 and June 30, 1989, Broumas traded JML Class A stock through his two accounts at Lara Millard on at least 41 separate occasions. Ex. 1105. Government Exhibit 1105 includes, among other things, an accurate listing of the 41 trades of JML Class A stock in Broumas's two accounts at Lara Millard during the first six months of 1989. Ex. 1105; Apr. Tr. 72-74 (Lara).

Broumas directed each of the 41 trades occurring at Lara Millard between January 1, 1989 and June 30, 1989 and reflected on Government Exhibit 1105. For each trade, Broumas made at least one telephone call to someone at Lara Millard in order to give instructions to complete the trade. Apr. Tr. 259 (Broumas). Broumas acknowledged that, on occasion during

this time period, he might have spoken to Mr. Lara, Mr. Millard, or another registered representative, Carol Gerstner ("Gerstner"), but he reiterated that he would usually ask to speak to Kulak. Apr. Tr. 238-240 (Broumas). In fact, during the first six months of 1989, there was only one occasion on which Broumas called Lara and instructed him to trade JML stock. On May 12, 1989, in accordance with the instructions given by Broumas in that telephone call, Lara bought 5,000 shares of JML Class A stock into the "John and Ruth Broumas" account at Lara Millard from an account at Voss & Co., at a price of $6.25 per share. Kulak executed this trade. Apr. Tr. 43-48 (Lara); Ex. 947, 1105.

On 40 of the 41 trades ordered by Broumas at Lara Millard between January 1, 1989 and June 30, 1989, Kulak filled out all of the critical trade information (date, quantity, security, price, customer and account number) on the order tickets. Apr. Tr. 118 (referring to Apr. Tr. 78-79) (Stipulation of the parties); Apr. Tr. 171, 173, 178 (Kulak); Ex. 1105, 900, 903, 904, 906, 907, 908, 911, 913, 914, 915, 917, 920, 921, 922, 923, 924, 926, 928, 930, 931, 933, 937, 938, 939, 943, 944, 945, 946, 949, 952, 953 and 955; Apr. Tr. 48-50, 74-90 (Lara). Kulak was aware of each of these 40 trades at the time that they occurred. Apr. Tr. 171 (Kulak). Although he could not remember specific trades, Kulak's duties included executing trades and it is likely that he both took the orders personally from Broumas and then executed each of these trades. Kulak could not specify any instance in which he had <u>not</u> executed the trade. Apr. Tr. 173-174, 177-181 (Kulak).

Of these 40 trades, Kulak executed 16 trades with Voss & Co., 12 trades with Swan Securities, and 4 trades with First Potomac. Ex. 2, 6, 1105. Of the 41 trades executed between January 1, 1989 and June 30, 1989, Kulak executed 22 trades, totalling 113,400 shares, of JML

Class A stock in the "John and Ruth Broumas" account at Lara Millard. Ex. 1105. During the same time period, the "John and Ruth Broumas" account showed a net change in ownership of only 2,600 shares of JML Class A stock. Ex. 1105. Broumas's position in JML Class A stock in the joint account was constantly "washing." For example, on January 5, 1989, Broumas bought 4,000 shares; on January 16, 1989, the next trade in the account, Broumas sold 4,200 shares. On January 30, 1989, Broumas bought 6,000 shares; on February 10, 1989, the next trade in the account, he sold 6,900 shares. On February 22 and 23, 1989, he bought a total of 7,000 shares; on March 9, 1989, the next trade in the account, Broumas sold 7,000 shares. Ex. 1105.

During the period from January 1, 1989 to June 30, 1989, Kulak also executed 19 trades, totalling 116,800 shares, of JML Class A stock in the "BC Theaters" account at Lara Millard. Ex. 1105. These 19 trades in the "BC Theaters" account resulted in a net change of only 3,400 shares of JML Class A stock. Ex. 1105.[5] As with the joint account, Broumas's net position in JML Class A stock in the "BC Theaters" account rarely changed. For example, on January 31, 1989, Broumas purchased 9,800 shares; on February 14 and 15, 1989, the next two trades in the account, Broumas sold a total of 9,000 shares. On March 13 and 14, 1989, Broumas bought a total of 8,000 shares; on March 27, 1989, the next trade, Broumas sold 7,600 shares. On May 9, 1989, Broumas bought 8,000 shares; on June 1, 1989, the next trade in the account, he sold 8,000 shares. Ex. 1105.

Every time Broumas called and gave Kulak an order, it was a directed trade, to be

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[5] The stability in the amount of shares owned compared with heavy trading activity is a "red flag" about which Kulak should have inquired.

executed over-the-counter. Apr. Tr. 183 (Kulak). According to both Broumas and Kulak, the general pattern of communications for a directed trade was as follows: Broumas would contact Kulak and tell him that he wished to buy or sell a certain quantity of JML Class A stock. Broumas would state how many shares of stock he wanted bought or sold, and ask Kulak to quote him the market price of the stock. Broumas set the price for the transaction after Kulak looked up the bid and ask price on the AMEX terminal. Broumas would then "direct" Kulak -- either directly or through others -- to the contra broker who would have the other side of the trade. Apr. Tr. 181-183, 307-309 (Kulak); Apr. Tr. 243-244 (Broumas).

When Broumas called Kulak to sell JML Class A stock, he would tell Kulak to call another broker to complete the trade. Typically, the trade was available with that broker, just as Broumas had instructed. In fact, with regard to the 41 trades he executed in the first half of 1989, Kulak could not remember a single instance in which Broumas told him to call another broker and, when he did so, the trade had not been available. Apr. Tr. 186-189, 297-298 (Kulak). In some instances, Kulak would receive a call from another broker without first placing a call. In this scenario, typically Broumas would call Kulak and say, "If 5,000 shares shows up, buy it." Subsequently, another broker would then call Kulak and say that he/she had 5,000 shares of JML Class A stock available and inquire whether Kulak was interested. Apr. Tr. 186-189, 297-298 (Kulak). Broumas decided when to do each trade; he decided which of the two accounts would actually trade JML stock; he placed each transaction order in a telephone call to Kulak; the accounts traded almost exclusively JML stock; Broumas would determine the volume of the trade: he would tell Kulak how many shares were available for a buy, and where; and where and how many shares to sell. Apr. Tr. 186-192 (Kulak). During 1988 and 1989,

neither Lara nor Kulak was aware of any other customers of Lara Millard who directed their trades in the manner that John Broumas did. This activity also constituted a "red flag." Apr. Tr. 192 (Kulak); Apr. Tr. 67 (Lara). Broumas paid for his trades in accordance with the industry requirement, i.e., five business days after a purchase transaction. On his sales, Broumas often asked to receive funds early, before the five days passed. Apr. Tr. 57-59 (Lara).

Broumas usually asked for payment on the day that he sold stock, or on the following day. Because he had margin accounts, he was not required to wait the normal five business days. Apr. Tr. 57-58 (Lara). Broumas was able to request and receive money early on his margin accounts because that is standard industry practice -- in essence, Broumas was borrowing against the equity in his margin account. Apr. Tr. 58 (Lara). It was not normal practice for Lara Millard to issue checks on proceeds of stock sales directly to its customers; however, if a customer requested it, the firm would issue such a check. Broumas had to make that request on each occasion that he sought to obtain a check. Often, Lara Millard would send a messenger to deliver the check to Broumas. Apr. Tr. 57-59 (Lara).

Broumas usually waited until the five days were up before paying for his purchases and often paid "late" -- within a two day grace period which the firm allowed. Apr. Tr. 59-60 (Lara). Broumas believed that he could have told Kulak of his desire to take advantage of the seven day float. Apr. Tr. 241 (Broumas). This use of the float was a "red flag." Broumas remembers that Lara asked him why he was directing trades from one brokerage firm to the other. He believes that he told Lara that he was taking advantage of the float and that Lara knew what Broumas was doing. Apr. Tr. 253 (Broumas). Kulak testified at the hearing that, in 1989, he was not specifically aware that Broumas maintained accounts at other firms. Apr.

Tr. 162-163 (Kulak). I do not find this testimony credible. In previous testimony given in 1991, Kulak stated that:

a) prior to January 1989, he realized that Broumas had accounts at other firms. Apr. Tr. 164, 169 (Kulak);

b) because Kulak did business for Broumas with other firms, he assumed that Broumas had accounts at those firms. Apr. Tr. 164 (Kulak);

c) he found out definitively that Broumas had accounts at other firms during the crash of 1987. Apr. Tr. 166-168 (Kulak); and

d) after the crash in 1987, Kulak had become aware that Broumas had "many, many accounts, and I mean many. He had ten, 15, 20. Every firm in town, he had a broker." Apr. Tr. 163-167 (Kulak).

Although Broumas does not have a specific recollection of telling Kulak that he was buying JML stock from and selling JML stock to his own accounts at other broker-dealers, he was not intentionally withholding any of the details of his trading from Kulak or any other brokers. Apr. Tr. 240-241 (Broumas). Most significantly, Kulak admitted that he did not care whether Broumas was buying or selling stock to or from his own accounts because Kulak viewed his responsibility as confined to simply executing the trades. Apr. Tr. 285 (Kulak). As indicated, I disagree with this "laissez faire" attitude. Kulak stated that, as a trader, he viewed his duty to the customer as simply to obtain best execution of the trade in terms of time and price. Apr. Tr. 280 (Kulak). Rather, as the cases have indicated, he had an affirmative duty to protect the integrity of the marketplace. Kulak described Broumas's pattern of trading as "idiocy" and testified that he found Broumas's trading to be "irrational." Apr. Tr. 199, 200-201

(Kulak).

Kulak claimed that he was not aware in 1989 and 1990 of the volume reporting requirements set forth in Schedule G of the NASD Rules of Practice. He first became aware of Schedule G approximately one week prior to the April hearing. Apr. Tr. 195, 294 (Kulak). In 1989, Kulak was aware that there was a volume reporting requirement for stocks listed on the over-the-counter market. Apr. Tr. 195-197, 294-295 (Kulak). Lara Millard was a member of the NASD and on May 14 or 15, 1989, it was examined by the NASD. Apr. Tr. 81 (Lara). During that examination, the NASD examiner asked Kulak if he was reporting volume on Broumas's trades. Kulak claims that he was not then aware of the requirement to report volume for over-the-counter trades of exchange listed stocks. Furthermore, he stated that the firm had just received a new NASDAQ machine and claimed that he did not yet know how to use it. Apr. Tr. 195-197, 298-299 (Kulak). Kulak did not ask the NASD examiner how to report the volume, or how to use the NASDAQ machine. Apr. Tr. 195-197 (Kulak). Kulak never asked Lara about the volume reporting requirement for Broumas's directed trades; nor did he call anyone at the NASD to inquire as to how to report volume on this type of trade. Apr. Tr. 197 (Kulak). Kulak never reported the volume for Broumas's trades. Apr. Tr. 196-197 (Kulak).

Kulak's testimony at the hearing on various issues was not credible: Kulak testified that his duties at Lara Millard were solely as a securities trader, and did not include taking orders directly from customers or direct customer contact of any kind. Apr. Tr. 147-149, 304-305 (Kulak). However, the record shows that during his employment at Lara Millard, Kulak had frequent and repetitive contact with Broumas and, specifically, that he took instructions to execute wash trades on behalf of Broumas on numerous occasions. After acknowledging his

handwriting on the order tickets for the 40 trades in question[6], Kulak testified that, while it was possible that he might have spoken to Broumas regarding some of those trades, it was also possible that he simply filled out the order ticket after having been told by a registered representative at the firm that they had received these instructions from Broumas. Kulak did not offer any evidence on this point, other than his own speculation. Apr. Tr. 178-180 (Kulak).

In contrast, Lara testified specifically that it was his personal practice, as well as the practice of other registered representatives within the firm -- as observed by Lara during the relevant time period -- personally to fill out an order ticket at the time a call was received from a customer, and then to carry the completed order ticket to Kulak to execute the trade. Apr. Tr. 31-33, 106, 120-121 (Lara). Kulak claimed that Lara had instructed him that, if Kulak received instructions to buy or sell stock directly from a customer, Kulak was not to execute such trades without first receiving approval from either Lara or Gerstner. Kulak claimed that he had been told by Lara that he would be fired if he did so without approval. Apr. Tr. 175-177 (Kulak). In fact, Kulak's testimony is directly contradicted by Lara. Lara stated that, although he expected Kulak to keep him generally informed of trading Kulak was doing for firm customers, Lara never placed any restrictions on whether Kulak could execute a trade on behalf of a customer of the firm if Kulak happened to receive a call directly from the customer. Apr. Tr. 323 (Lara).

With regard to Broumas in particular, Lara testified that he never placed any restrictions

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[6] Respondent argues in his post hearing brief (RPHB, p.11) that there was no evidence that he executed trades for Broumas. However, Kulak's handwriting on the order tickets demonstrates that the Respondent made the trades or at the least shifts the burden to Kulak to show he did not make the trades. He has not met that burden.

on whether Kulak could take orders from and execute trades for Broumas. Furthermore, he stated that he never told Kulak that he was required to obtain approval from either himself or Gerstner prior to executing a trade for Broumas. Apr. Tr. 323-324 (Lara). From his daily review of the firm's order tickets, Lara was aware that Kulak was taking orders from Broumas and executing trades on his behalf during the first six months of 1989. Yet Lara stated that he never instructed Kulak to stop the trading or told Kulak that he was to seek prior approval from himself or Gerstner. Apr. Tr. 325 (Lara). Lara credibly denied having ever told Kulak that he would be fired if he took a call directly from a customer of the firm and then executed the trade without obtaining prior approval. Apr. Tr. 325 (Lara). Rather, the evidence is that Kulak was taking orders and executing trades for Broumas frequently and repetitively in the first half of 1989. Lara did not fire Kulak. Apr. Tr. 325-326 (Lara).

Linda Iseli ("Iseli") testified that she is currently employed at Nuby & Company where she has been employed for the past five years. Prior to that time, she was employed as a securities trader for the brokerage firm of Koonce Securities. Apr. Tr. 210 (Iseli). Iseli met Kulak in the summer of 1989 when he was hired as a securities trader at Koonce Securities. Iseli testified that, at the time Broumas sought to open an account at Koonce Securities, she heard Kulak tell Calvin Koonce that handling an account for Broumas was an easy way to make commissions and bring extra money into the firm.[7] Apr. Tr. 214, 217-218 (Iseli).

The parties substantially agree and I conclude that in order to establish liability for aiding and abetting, the Division must establish (1) the existence of a primary violation, (2) a "knowledge" requirement, i.e., that the aider and abetter had general awareness that his role was

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[7] This statement suggests that Kulak knew of the "wash sale" scheme.

part of an overall activity that was improper, and (3) that the aider and abetter substantially assisted the principal violation. Kevin Upton, 58 SEC Docket 1993, 2001 (1995).

In my March 24, 1995 Order, I found that Broumas manipulated the market for JML Class A stock, and violated Sections 9(a)(1), 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder. The record reflects that the respondent had an awareness of the underlying facts. See SEC v. Falstaff Brewing Corp., 629 F.2d 62 (D.C.Cir.1980), cert. denied, 449 U.S. 1012 (1980).

Further, the record reflects that Kulak knew that he was assisting Broumas in carrying out his manipulative scheme and possessed this knowledge: Kulak had known Broumas for 20 years and had both a business and friendship relationship with him. At Kulak Voss & Co., Kulak had been Broumas's registered representative. At Lara Millard, Kulak had sought out and obtained the authority to do discretionary trading on Broumas's behalf. Kulak knew that Broumas had a relationship with James Madison, Ltd. and that he was an officer of Madison National Bank of Virginia. He knew that Broumas had two accounts at Lara Millard through which he almost exclusively was trading JML Class A stock during the first six months of 1989. Kulak knew or assumed that Broumas had accounts at other broker-dealers in the Washington, D.C. area through which Broumas traded JML stock. He knew that Broumas had an account at Voss & Co. Kulak knew that, between January 1, 1989 and June 30, 1989, Broumas directed 41 over-the-counter trades in JML Class A stock, through Broumas's two accounts, involving 230,200 shares. He knew that 16 trades were with Voss & Co. and that another 16 were with the two firms at which Carole Haynes worked. Broumas personally directed Kulak to execute at least 40 trades in JML Class A stock between January 1, 1989 and June 19, 1989. Kulak

knew that Broumas's trading in JML Class A stock served no rational business purpose.

Kulak knew that Broumas provided every detail for each of the 40 trades, and requested a specific contra broker for each trade. He knew that it was highly unusual for a customer of Lara Millard to direct his trades in the manner that Broumas directed his JML trades. Kulak knew that, of the 40 trades executed at Lara Millard, there were numerous buys and sells of JML Class A stock in both accounts, and that Broumas's net position in his accounts at Lara Millard hardly changed throughout the first six months of 1989. There is ample evidence that Kulak was clearly aware of the fraudulent trades and his role in Broumas's manipulative scheme.

Assuming for the purposes of argument that the Respondent did not possess actual knowledge, as Respondent contends, it is clear Respondent was reckless. Such recklessness is sufficient for purposes of aiding and abetting liability. See Raymond L. Dirks, 47 S.E.C. 434, 447 (1981), reversed on other grounds, Dirks v. SEC, 463 U.S. 646 (1983). One formulation cited for the concept of recklessness -- a test which fits squarely within the facts of this case because it arises in the context of failure to make inquiry -- is set forth in Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n.98 (2d Cir. 1973) (en banc).

> [T]he inquiry normally will be to determine whether the defendants knew the material facts misstated or omitted, or failed or refused, after being put on notice of a possible material failure of disclosure, to apprise themselves of the facts where they could have done so without any extraordinary effort.

Kulak failed to make adequate inquiry[8] -- "to apprise [himself] of the facts where [he] could have done so without any extraordinary effort" -- and accordingly acted recklessly under the Lanza test. The federal securities laws emphasize duty to inquire. The Commission has said

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[8] I disagree with Kulak's insubstantial argument that there is no duty to inquire.

that "[r]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review." Frederick H. Joseph, 54 SEC Docket 283, 291 (1993); see Edwin Kantor, 54 SEC Docket 293 (1993). It is not considered, as Respondent argues, that the red flags are relegated to only supervisors. Rather a trader in the position of Kulak is obliged to inquire as to red flags suggesting the market is being manipulated.

In the context of market manipulation, the Commission has stated that "[t]he totality of [the] circumstances at the least placed [the broker] on notice that a searching inquiry was called for as to the nature of the [primary violator's] activity and interest, yet [the broker] made no meaningful investigation. Instead, he closed his eyes to circumstances indicative of a scheme to create the false appearance of an independent market." Alessandrini & Co., Inc., 45 S.E.C. 399, 404 (1973). Kulak's conduct demonstrated extreme recklessness. Following are several examples. In light of all of the things that Kulak knew, including his knowledge/assumption that Broumas maintained numerous accounts at other broker-dealers, he was reckless in assuming that wash trading could not be taking place.

Considering Kulak's knowledge, he was reckless in not asking Broumas whether he controlled the other side of the trades, why the trades were directed, or why the trades were being done on the over-the-counter market. In light of all of the things that Kulak knew, he was reckless in not making inquiry of others within the brokerage community. His recklessness is demonstrated by his admission that he did not care whether Broumas was buying or selling stock to his own accounts because Kulak viewed his responsibility as confined to simply executing the trades. He was reckless in executing at least 40 trades for Broumas in JML Class A stock in less than six months when Kulak admitted that he thought Broumas's trading was "irrational,"

and that his conduct bespoke "idiocy." He was reckless in not realizing that all of the above facts led to the conclusion that Broumas's trading was improper, and manipulative.

"The importance of a broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation, as here, on the activities of broker-dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in the security." Alessandrini & Co., 45 S.E.C. at 406 (broker-dealer held to have willfully violated or willfully aided and abetted the violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Exchange Act). Kulak was not diligent. He totally failed to make the appropriate inquiries that would have disclosed the full nature of Broumas's scheme. The ironic fact is that Broumas would have answered Kulak's questions because he was not hiding his trades. In fact, Broumas assumed that Kulak knew that Broumas was buying and selling from his own accounts.

Kulak also failed to make inquiry of any kind of the contra brokers. Despite having been active in the brokerage community for more than 20 years, and having worked closely with at least some of the contra brokers in the past, he claims he did not inquire whether Broumas maintained accounts at their firms or discuss with others in the brokerage community his observations about the unusual pattern of Broumas's trading. Kulak therefore "failed or refused, after being put on notice of a possible material failure of disclosure, to apprise [himself] of the facts where [he] could have done so without any extraordinary effort." Lanza, 479 F.2d at 1306 n. 98. Such recklessness "presents a danger of misleading buyers and sellers," Sundstrand Corp. v. Sun Chemical Corp., 533 F.2d 1033, at 1047 (7th Cir. 1976), cert. denied, 434 U.S. 875

(1977), who rely on the market information reported to the AMEX and fed into the marketplace.

He continued to accept Broumas's orders and cause them to be executed. Despite the clear pattern that had emerged, Kulak claims he shut his eyes to what was taking place. Kulak's willingness to do so is perhaps best illustrated by his own words when he testified that, even though he knew Broumas's trading was irrational, he did not care whether Broumas was buying and selling to himself. Under such circumstances, he was reckless and his conduct amply satisfies the standard for aiding and abetting liability. To constitute substantial assistance, the broker's actions must be a causal factor in bringing about the primary violation. See e.g., Index Fund, Inc. v. Hagopian, 609 F. Supp. 499, 510 (S.D.N.Y. 1985). [9]

"[C]onsideration should be given to [a] number and effect of other factors, and to whether the conduct was harmless until acted upon . . . ." Id. The amount and type of assistance required may vary with the broker's degree of knowledge of the impropriety. See Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975). Broumas could not have conducted his manipulation without the willing assistance of several securities professionals. Broumas directed Kulak to execute 40 wash trades for him in less than six months. Kulak's conduct, combined with his actual knowledge and recklessness, substantially assisted Broumas's underlying violation. "The manipulative [scheme]. . . as so often is the case[,] could not have succeeded without the active or passive assistance of broker-dealers." Alessandrini & Co., 45 SEC at 410.

Courts have recognized a duty to the marketplace on the part of securities participants

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[9] Kulak's claim that he did not assist Broumas is not credible and is not supported by the record.

as necessary to instill integrity and confidence in the markets. For example, the Second Circuit, in finding fraud in connection with insider-trading, stated: "As an employee of a broker-dealer, [the broker] had violated [his] obligations to the SEC and to the public completely independent of any [other] 'obligations he acquired' as a result of receiving the information." Dirks v. SEC, 681 F.2d 824, 840 (D.C. Cir. 1983), quoted with approval by the Supreme Court, 463 U.S. 646, 652 (1983). Similarly, Kulak violated his obligations to the public in not inquiring what was behind the irrational trading of Broumas.

Courts have recognized what the alternative would be if a duty to the marketplace were not insisted upon:

> Nor, in our view, could any purported function of the scheme be considered protected given Congress' stated concern for the perception of fairness and integrity in the securities markets and the potential costs of forsaking such legislated concerns, including fewer market participants and greater reliance on fraud as a means of competing in the market.

United States v. Carpenter, 791 F.2d 1024, 1030 (2d Cir. 1986) (citing H.R. 9323, 73d Cong., 2d Sess. Rept. No. 1383, at 7865-66), aff'd by an equally divided court, 484 U.S. 19 (1987).

The Commission and the courts have insisted on the highest possible professional and ethical standards on the part of those who desire to participate in the securities industry. "Brokers are required to meet relatively strict requirements in entering their profession and they thereby gain the advantage and exclusive privilege of trading in the national securities market on behalf of a wide range of investors. [citation omitted.] The Court finds a stock exchange broker acting in that capacity owes a duty to the investing public commensurate with professional responsibilities and privileges growing out of this position." Piper, Jaffray & Hopwood, Inc. v. Ladin, 399 F. Supp. 292, 298-99 (S.D. Iowa 1975).

When brokers fail to satisfy such professional and ethical standards, liability under the antifraud provisions generally follows:

> [U]nderlying section 10(b) and the major securities laws generally is the fundamental promotion of the 'highest ethical standards . . .' in every facet of the securities industry.

United States v. Carpenter, 791 F.2d at 1031 (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186-87 (1963)).

Section 21C of the Exchange Act provides that:

> If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

15 U.S.C. §78u-3.

A finding that the respondent aided and abetted a violation will also constitute a finding that the "[respondent's] conduct was necessarily a 'cause' under Section 21C of the Exchange Act of a violation of the securities laws." Dominick & Dominick, Inc., 50 S.E.C. 571, 578 n. 11 (1991). Because Kulak aided and abetted Broumas's violations of Sections 9(a)(1), 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5 thereunder, he also caused the manipulation in violation of Section 21C. Even if Kulak had not aided and abetted Broumas's violations, Kulak would still have violated Section 21C. The "cause" language of this provision includes a "should have known" standard -- classic negligence language. Knippen v. Ford Motor Co., 546 F.2d 993, 1003 (D.C. Cir. 1976).

Section 15(b)(6)(A) of the Exchange Act empowers the Commission to "censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding

12 months, or bar such person from being associated with a broker or dealer" if the Commission finds, after notice and opportunity for hearing, that such sanction is in the public interest and such person has, among other things, willfully violated any provisions of the Exchange Act or the rules and regulations thereunder. In this context "it is well [settled] that a finding of willfulness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing." Billings Associates, Inc., 43 S.E.C. 641, 649 (1967). In imposing administrative sanctions, the Commission may take into account such factors as:

> . . . the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir., 1979), aff'd on other grounds, 450 U.S. 91 (1981).

Respondent argues that this matter is time barred by 28 U.S.C. § 2462. However, that statute applies to administrative proceedings that seek civil penalties. The instant proceeding does not seek to impose a civil penalty. Rather it is addressed to "what, if any, remedial action is appropriate in the public interest . . . ."

The Division recommends that Kulak be suspended from the securities industry for a period of twelve months. However, I consider the sanction too severe. I do take into account the level of willful and reckless continuous behavior on the part of Kulak in executing 40 wash trades. Further, there is no contrition on Kulak's part. Kulak's prior disciplinary history is also a relevant factor in determining the appropriate sanction to be imposed in this case. See Steadman v. SEC, 603 F.2d at 1140; Section 21B(C)(4) of the Exchange Act.

Section 21C(a) of the Exchange Act [15 U.S.C. §78U-3(a)] provides that, after notice and opportunity for hearing, an order may be entered requiring the person "to cease and desist" from committing or causing such violation and any future violation of the same provision, rule or regulation. It is concluded that it is in the public interest that Kulak be sanctioned as follows:

ORDER

IT IS ORDERED that Richard M. Kulak be suspended from association with any broker or dealer under Section 15(b)(6) and 19(h) of the Exchange Act for a period of five months. Kulak is ordered under Section 21C of the Exchange Act to permanently cease and desist from committing or causing any violation of, and from committing or causing any future violation of, Sections 9(a)(1), 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder.

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

Glenn Robert Lawrence
Administrative Law Judge

Washington, D.C.
September 26, 1995