

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-2017

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

**FILED**

MAY 20 1971

SECURITIES & EXCHANGE COMMISSION

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In the Matter of :  
MANN AND COMPANY, INC. :  
HERMAN M. SOLOMON :  
BURTON J. ROSENBLATT :  
(8-12902) :  
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INITIAL DECISION  
(Private Proceedings)

May 21, 1971  
Washington, D.C.

Ralph H. Tracy  
Hearing Examiner

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APPEARANCES: Edward P. Delaney and Willis H. Riccio, Attorneys  
of the Boston Regional Office of the Commission  
for the Division of Trading and Markets.

Fred B. Wilcon for Mann and Company, Inc., Herman M.  
Solomon and Burton J. Rosenblatt.

BEFORE: Ralph H. Tracy, Hearing Examiner

## THE PROCEEDING

This is a private proceeding instituted by an order of the Commission ("Order") dated June 12, 1969, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether, as charged by the Division of Trading and Markets ("Division") Mann and Company, Inc. ("registrant") willfully violated sections 17(a), 15c(3) and 7(c) of the Exchange Act and Rules 17a-3, 15c3-2 and Regulation T thereunder for the period from on or about January 31, 1969 to on or about June 12, 1969, and whether Herman M. Solomon ("Solomon") and Burton J. Rosenblatt ("Rosenblatt") failed reasonably to supervise persons under their supervision with a view to preventing such violations, and the remedial action, if any, that might be appropriate in the public interest.

At the commencement of the hearing on December 15, 1970 the charges were broadened, without objection, by amending the order to include allegations that for the period on or about May 31, 1970 to on or about December 15, 1970, registrant aided and abetted by Solomon and Rosenblatt, willfully violated Sections 17(a), 15c(3) and 10(b) of the Exchange Act and Rules 17a-3, 15c3-1 and 10b-5 thereunder. The amendment included an allegation that on November 12, 1970 the U.S. District Court for the District of Massachusetts had entered a consent decree permanently enjoining respondents from further violations of the foregoing counts set forth in the amended order.

The Commission's order provided, initially, that the hearing first consider the question whether, pending final determination of the issues set forth in said order, "it is necessary or appropriate in the public interest or for the protection of investors to suspend

the registration of registrant." However, in view of the fact that registrant had announced suspension of operations as of September 1, 1970, the hearing on the question of suspension was dispensed with and only the remaining issues were considered at the hearing herein.

Respondents were represented by counsel throughout the proceedings. Proposed findings of fact and conclusions of law and briefs were filed by the parties.

The findings and conclusions herein are based upon the record and upon observation of the witnesses.

#### Findings of Fact and Law

At the commencement of the evidentiary hearing the respondents admitted to the violations alleged in the order as amended, except as to Section 10(b) and Rule 10b-5, but denied the charge of willfulness with respect to all allegations.

#### The Respondents

Respondent Mann and Company, Inc. ("registrant") was originally organized as an equal partnership by Solomon and Rosenblatt and registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934 on July 10, 1966. On December 29, 1969 it changed to a corporation and re-registered as such on January 28, 1970. It has its offices in Medford, Massachusetts and is a member of the National Association of Securities Dealers ("NASD"). On September 8, 1970 registrant filed Form BWD Notice of Withdrawal From Registration as Broker-Dealer Pursuant to Rule 17 CFR 240.15b6-1. This has not been acted on pending resolution of these proceedings.

Respondent Herman M. Solomon is president and a director and has had a fifty percent interest in registrant since its inception. Solomon has been engaged in the brokerage business since 1961.

Burton J. Rosenblatt is treasurer and a director and has been the other fifty percent owner of registrant since its formation. He shares the operational responsibilities equally with Solomon.

Injunctions Chargeable to Respondents

Section 15(b)(5)(C) of the Exchange Act provides that one of the bases for revocation of a broker-dealer's registration or the imposition of lesser sanctions is the existence of a described permanent injunction issued by a court of competent jurisdiction.<sup>1/</sup>

The order for proceeding alleges, and the record establishes, that on November 12, 1970, the U.S. District Court for the District of Massachusetts entered a consent judgment permanently enjoining

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1/ Section 15(b)(5)(C) provides as follows:

"(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated --

\* \* \* \*

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security."

registrant from further violations of Sections 10(b), 15c(3) and 17(a) of the Exchange Act and Rules 10b-5, 15c3-1 and 17a-3 thereunder. The court, also, permanently enjoined Solomon and Rosenblatt from further aiding and abetting registrant in such violations. Respondents, also, were enjoined from violation of the Commission's anti-fraud rules as being unable to consummate promptly orders for the purchase and sale of securities and in failing to make prompt deliveries on securities ordered and purchased.

#### Bookkeeping Violations

The order for proceeding, as amended, contains allegations that registrant willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by failing to accurately make and keep current various books and records <sup>2/</sup> during the periods from on or about January 31, 1969 to June 12, 1969 and from on or about May 31, 1970 to December 15, 1970, the relevant periods herein, and that for the first such period Solomon and Rosenblatt failed reasonably to supervise persons under their supervision with a view to preventing such violations, and that during the later period Solomon and Rosenblatt willfully aided and abetted such violations.

The record abundantly establishes, and the respondents concede, that during the relevant periods registrant failed to make and keep current its general ledger and customers' ledger as required by Rule 17a-3. As of April 8, 1969, entries had not been made in registrant's

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<sup>2/</sup> Section 17(a) of the Exchange Act, as pertinent here, requires brokers and dealers to make and keep current such books and records as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records which must be maintained and kept current.

general and customers' ledger for several months and no trial balances and net capital computations had been prepared since January 31, 1969.<sup>3/</sup>

On September 1, 1970, as a result of complaints received from two customers that they were having difficulty obtaining funds on orders executed for them by registrant a Commission investigator made another inspection visit to registrant's office. At that time the general ledger had not been posted since June 30, 1970, the customer's ledger had not been posted since July 31, 1970 and no trial balances or net capital computations had been made since April 30, 1970. The Commission investigator informed Solomon and Rosenblatt that in his opinion continued operation of registrant would be at their own peril. Solomon testified that thereupon registrant suspended operations effective September 1, 1970.

While admitting that the registrant's books and records were not kept accurate and current during the relevant periods respondents argue that such violations on the part of registrant cannot be construed as willfull because the inadequacies in its bookkeeping procedures were not due to neglect or reckless disregard of Commission rules but to widespread adverse conditions in the securities market which forced a severe restriction in office staff.

Respondents' arguments that any violation arising out of the failure to make and keep current registrant's books and records cannot be considered to be "willfull" are rejected. Willfullness for purposes of Section 15(b) of the Exchange Act does not require that a person

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<sup>3/</sup> Rule 17a-3(a)(11) requires that "such trial balances and computations shall be prepared currently at least once a month."

know that he is breaking the law, but only that he intended to do the act that resulted in the violation.<sup>4/</sup> Accordingly, it is found that for the period from about January 31, 1969 to June 12, 1969 registrant wilfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder and that Solomon and Rosenblatt failed reasonably to supervise with a view to preventing such violation. In addition, the registrant, Solomon and Rosenblatt admit and the Hearing Examiner finds that for the period from about May 31, 1970 to December 15, 1970, registrant, aided and abetted by Solomon and Rosenblatt, willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

#### Failure to Notify Customers

The order for proceeding charges that during the period from about January 31, 1969 to about June 12, 1969 registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-2<sup>5/</sup> thereunder.

The respondents admit, and the record substantiates, that registrant violated Section 15(c)(3) of the Exchange Act and Rule 15c3-2 thereunder by failing to notify customers as required by said rule.

Respondents do not address themselves to this particular violation but choose to argue that there is insufficient evidence on the whole record to support findings which require sanctions. In respect to the admitted violations for the period from about January 31, 1969 to about June 12, 1969, registrant states that they all related primarily to

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<sup>4/</sup> Hughes v. SEC, 174 F.2d 969, 977 (C.A.D.C. 1949); Churchill Securities Corp., 38 SEC 856, 859 (1959).

<sup>5/</sup> Rule 15c3-2, as pertinent here, provides that a broker-dealer must notify customers at least once every three months by a written statement informing said customers of the amount due them by said broker-dealer on the date of such statement and containing a written notice that (1) such funds are not segregated and may be used in the operation of the business of such broker-dealer and (2) such funds are payable on demand of the customer.



record keeping and office procedures and that respondents took measures to bring registrant's operations into compliance with the rules and the fact that the Commission did not seek an injunction indicates the violations for this period were not serious and, indeed, had been cured. Even if earlier violations had been cured, a point which the record does not support, such fact would not condone the resumption or ameliorate the seriousness of any subsequent violations. On the contrary, it would indicate that the respondents, once having been put on notice as to violations had chosen to disregard such warnings and to recklessly engage in the same or additional violations. In view of all the circumstances, including the bookkeeping violations discussed above, it is concluded that registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-2 thereunder and that Solomon and Rosenblatt failed reasonably to supervise with a view to preventing such violation.

#### Regulation T Violations

The order for proceeding alleges that during the period from about January 31, 1969 to about June 12, 1969 the registrant violated Section 7(c)<sup>6/</sup> of the Exchange Act and Section 4(c)(2) of Regulation T in that registrant, directly and indirectly, extended, maintained and arranged for credit to and for customers on securities (other than exempted securities) in contravention of such rules and regulations. This violation is admitted by respondents and substantiated by the record. Accordingly, it is found that registrant willfully violated Section 7 of the Exchange Act and Section 4 of Regulation T and that

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<sup>6/</sup> Section 7, in effect, prohibits extension of credit to customers in violation of regulations prescribed by the Federal Reserve Board under Section 7 of the Exchange Act. Section 4(c)(2) of Regulation T (12 CFR 220.4(c)(2)), promulgated by the Board of Governors of the Federal Reserve System, requires that a broker or dealer promptly cancel or otherwise liquidate a transaction where a customer purchases a security in a cash account and does not make full cash payment within seven full business days.

Solomon and Rosenblatt failed reasonably to supervise with a view to preventing such violation.

Failure to Supervise.

The order for proceeding alleges and respondents admit, that during the period from about January 31, 1969 to about June 1, 1969, Solomon and Rosenblatt failed reasonably to supervise persons subject to their supervision with a view to preventing the violations committed by registrant.<sup>7/</sup>

During the relevant time period concerned here the registrant was a partnership with Solomon and Rosenblatt as equal partners with equal responsibility for the conduct of the firm. The head bookkeeper in charge of the back office operations, and all other employees, were under the direct control and supervision of Solomon and Rosenblatt. Solomon testified that he and Rosenblatt were equally responsible for the affairs of the company and were familiar with the securities regulations. In these circumstances they were under a duty to use reasonable care to see to it that the everyday operations of the firm's business were properly performed.<sup>8/</sup> It is concluded that Solomon and Rosenblatt failed reasonably to supervise persons subject to their supervision with a view to preventing the violations committed by registrant.

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<sup>7/</sup> Section 15(b)(5)(E) of the Exchange Act, as added by the 1964 amendments, provides an independent ground for the imposition of a sanction against a broker or dealer or a person associated with a broker or dealer who ". . . has failed reasonably to supervise, with a view to preventing violations of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision."

<sup>8/</sup> Madison Management Corp., Securities Exchange Act Release No. 7453, p. 3 (Oct. 30, 1964); General Investing Corporation, Securities Exchange Act Release No. 7316, p. 6 (May 15, 1964).

Net Capital Violations

The order for proceeding charges that during the period May 31, 1970, until about December 15, 1970, registrant willfully violated and Solomon and Rosenblatt willfully aided and abetted violations of the net-capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.<sup>9/</sup>

The record clearly establishes and the respondents admit that during the relevant period the registrant was in violation of the Commission's net capital requirements and that the additional capital required in order to bring it into compliance on the dates indicated was as follows:

| <u>5-31-70</u> | <u>6-30-70</u> | <u>7-31-70</u> | <u>8-31-70</u> | <u>9-30-70</u> |
|----------------|----------------|----------------|----------------|----------------|
| \$25,572.40    | \$54,911.11    | \$61,053.30    | \$67,189.47    | \$68,519.49    |

Respondents contend that these net capital violations were not willfull on the ground, among others, that they did not know they had insufficient net capital or were financially unable to carry on business. However, this is refuted by the testimony of registrant's president that, at the very least, registrant continued to operate while no one knew what condition it was in.

As noted above, the inability to determine its financial condition flows from registrant's failure to comply with Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-3(a)(11) thereunder and

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<sup>9/</sup> Section 15(c)(3) of the Exchange Act, insofar as here pertinent, prohibits securities transactions by a broker-dealer in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c3-1 provides, subject to certain exemptions not applicable here, that no broker or dealer shall permit his aggregate indebtedness to all persons to exceed 2,000% of his net capital computed as specified in the rule or have a net capital of less than \$5,000.

well illustrates the Commission's repeated emphasis on the requirement that books and records be kept current and accurate as being at the heart of the regulatory scheme, particularly as it bears significantly on the ability to determine whether other types of violations have occurred. <sup>10/</sup> It is found that registrant aided and abetted by Solomon and Rosenblatt willfully violated the net capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

Violation of Anti-Fraud Provisions

The order as amended charges that during the period from about May 31, 1970 to about December 15, 1970, registrant aided and abetted by Solomon and Rosenblatt, willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in connection with the sale and purchase of securities when neither registrant's financial condition nor its ability to meet its obligations as they arose could be ascertained.

Respondents did not admit that their actions in continuing operations while in financial jeopardy constituted a fraud within the contemplation of Section 10 of the Exchange Act.

The record clearly establishes through the testimony of customers and officers and employees of registrant that respondents effected securities transactions while in serious financial difficulty without disclosing that registrant was in fact in violation of bookkeeping and records as well as net capital requirements of the Commission's

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<sup>10/</sup> Pennaluna & Company, Inc., et al., Securities Exchange Act Release No. 8063 (April 27, 1967); Palombi Securities Co., Inc., et al., 41 SEC 266, 276 (1962); Midland Securities, Inc., et al., 40 SEC 333, 339-340 (1960); Olds & Company, 37 SEC 23, 26-27 (1956).

rules. The record discloses, further, that several customers lost money when registrant accepted funds to purchase securities and was unable to deliver and, also, when registrant sold securities but did not make payment to the customer. Subsequent to its closing on September 1, 1970 registrant filed a petition in bankruptcy. At that time the total amount owed to customers was approximately \$28,000.

By engaging in the securities business, registrant made an implied representation to the public and to its customers that it was ready and able to meet its obligations in the ordinary course of business.<sup>11/</sup> The representation is misleading when the broker-dealer is unable to ascertain its financial condition and does not affirmatively disclose that inability to customers before accepting their funds or securities. It is only by adequate disclosure of the true circumstances concerning the broker-dealer that a customer can judge for himself, as he is entitled to do, whether to assume the additional risk of relying upon an assurance of financial responsibility that is not founded upon books and records kept in the ordinary course of business in compliance with regulatory requirements. That the risk of doing business with a broker-dealer whose financial condition cannot be ascertained is considerably increased is well illustrated by the experience of registrant's customers who were refused delivery of shares or payment of their credit balances and who found registrant's doors closed and registrant in bankruptcy. As the Commission stated in a very early case:

"Customers do not open accounts with a broker relying on suit, judgment

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<sup>11/</sup> Ferris & Co., 39 SEC 116, 119 (1959).

and execution to collect their claims -- they are opened in the belief that a customer can, on reasonable demand, liquidate his cash or securities position."<sup>12/</sup>

It is found that registrant willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and that Solomon and Rosenblatt aided and abetted such violation.

Public Interest

The violations disclosed by this record are numerous and varied and have persisted over a relatively long period of time. Each violation has been previously discussed in detail but the cumulative effect must be taken into account in considering the appropriate sanctions to be applied for the protection of investors. As previously indicated Solomon and Rosenblatt were at all times equally responsible for the conduct of all aspects of registrant's business. Respondents contend in mitigation of the violations found herein that efforts were made to make restitution to customers who suffered losses as a result of registrant's improper conduct. However, except for a self-serving statement to that effect by respondents there is no evidence in the record of any such efforts nor is there evidence that restitution was, in fact, made to any customer.

Another mitigating factor advanced by respondents is the claim that their activities were not willfull. This, too, has previously

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<sup>12/</sup> Guy D. Marianne, 11 SEC 967, 970 (1942).

been dealt with in this decision. <sup>13/</sup> It is well established that a finding of willfulness under Section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engage in conduct which constitutes <sup>14/</sup> a violation.

In view of all of the circumstances it is concluded that the number and character of the violations is such that the public interest requires revocation of the registrant's registration as a broker-dealer. <sup>15/</sup> With respect to respondents Solomon and Rosenblatt it is concluded that the public interest requires that each of them be barred from being associated with a broker or dealer. <sup>16/</sup>

#### ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of Mann and Company, Inc. is revoked, and the company is expelled from membership in the National Association of Securities Dealers, Inc.; and that Herman M. Solomon and Burton J. Rosenblatt, and each of them, is barred from association with a broker-dealer.

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

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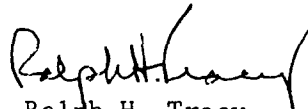
<sup>13/</sup> See pages 5, 6 and footnote 4 above.

<sup>14/</sup> Dunhill Securities Corporation, Securities Exchange Act Release No. 8653, p. 5 (July 14, 1969); Tager v. SEC, 344 F.2d 5, 8 (C.A. 2, 1965).

<sup>15/</sup> Registrants' application to withdraw its registration Form BWD Notice of Withdrawal From Registration as a Broker-Dealer is rejected.

<sup>16/</sup> At the close of Division's case respondents moved to dismiss the order for proceeding. The Hearing Examiner reserved decision since, under Rule 11(e) of the Commission's Rules of Practice, a ruling by a Hearing Examiner which disposes of the proceeding may be made only in his initial decision. In view of the findings made herein the motion is denied.

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

  
Ralph H. Tracy  
Hearing Examiner

May 21, 1971  
Washington, D.C.

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<sup>17/</sup> To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected.