ADMINISTRATIVE PROCEEDING
FILE NO. 3-6691

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
GEORGE INSERRA JOHN INSERRA NICHOLAS J. GENTILE
(JOHN GIURA)

INITIAL DECISION

September 30, 1988
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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Appearances: Barbara Brooke Manning, of the New York Regional Office, counsel for the Division of Enforcement of the Securities and Exchange Commission

Neal M. Goldman (Squadron, Ellenoff, Plesent & Lehrer), counsel for respondents George Inserra and John Inserra

Daniel E. McIntyre, counsel for respondent Nicholas J. Gentile

BEFORE: Jerome K. Soffer
Administrative Law Judge

On July 14, 1986, the Commission issued an order, as amended by subsequent orders adopted, respectively, on September 12, 1986 and January 21, 1987 ("Order"), instituting public proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), naming as respondents John Giura, George Inserra, John Inserra and Nicholas J. Gentile.

The Order alleges that Giura, formerly a partner in Stein, Roe and Farnham ("Stein Roe"), a registered investment adviser, willfully aided and abetted violations of Sections 206(1) and (2) of the Advisers Act and willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Order further charges all of the respondents jointly with violations of the same Statutes and Rule by a scheme to defraud certain union pension and welfare funds; and that John Inserra willfully violated, and Gentile willfully aided and abetted violations of said Section 10(b) and Rule 10b-5 by "churning" the account of one William P. Hettinger.

The Order directed that a public hearing be held before an administrative law judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors. The hearing was commenced on

March 17, 1987 and concluded on August 13, 1987 in the City of New York and various other cities. All of the parties were represented by counsel.

Although Giura was represented by counsel during the pre-hearing stage including conferences thereon, he defaulted in filing his answer to the amended Order when due, and also defaulted in failing to appear at the commencement of the hearing on March 17, 1987. As a result, the administrative law judge deemed Giura in default and, upon motion by the remaining respondents, severed the allegations solely charged against Giura from the proceeding. 1/ By order dated May 6, 1987, the Commission affirmed the default of Giura and the severance of the issues relating to him only. 2/

Following the close of the hearing, the respective parties filed successive proposed findings of fact and conclusions of law together with supporting briefs. The Division of Enforcement also served a reply brief.

The findings and conclusions herein are based upon the evidence as determined from the record and from

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1/ Specifically, these would be paragraphs 3 thru 34, 62 and 63 of the amended order.

2/ Thereafter, on November 13, 1987, the Commission issued an order imposing remedial sanctions by default as to Giura and stating that the findings therein are not binding on any other person named as a respondent in these proceedings.

observing the demeanor of the witnesses. The preponderance of the evidence is the standard of proof that has been applied. 3/

INTRODUCTION

Shearson Lehman Bros., Inc. ("Shearson"), and/or its predecessors, have been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act, since March 2, 1965. It is headquartered in New York City. During the relevant period herein, Shearson acted through its Utica, New York, branch as primary broker and custodian for several upstate New York Teamster Union and Pension and Welfare funds (collectively, "the Teamster funds"). 4/

Nicholas J. Gentile ("Gentile"), who was the manager of Shearson's Utica branch office during the relevant period herein, entered the securities industry in 1961 as a registered representative of Bache & Company and became the manager of its Utica branch in 1966. He continued in this role until he joined Loeb Rhodes in January, 1974,

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3/ See Steadman v. S.E.C., 450 U.S. 91 (1981).

4/ Specifically, New York State Teamsters Conference Pension and Retirement Fund (the "Pension Fund"), the Upstate Teamsters Conference Pension and Retirement Fund (the "Upstate Fund") and the New York State Teamsters Council Health and Hospital Fund (the "Welfare Fund").

as its Utica branch manager, and retained that position after a merger with Shearson. From about April 1974 to about September 1981, Gentile was a vice-president and later a first vice-president of Shearson. He is currently employed by Shearson but not in a managerial capacity.

George Inserra ("G. Inserra") was employed as a registered representative in the Utica Branch Office of Loeb Rhodes, a position he continued to hold after the merger with Shearson, from 1965 to October 1985. Since that time he has been employed by First Albany Corporation, a registered broker-dealer, as a registered representative, where his wife also works in the same capacity.

John Inserra ("J. Inserra"), younger brother of G. Inserra, was employed by Shearson or its predecessors as a registered representative in the Utica Branch from in or about 1975 to October 4, 1985. Since that time he has been employed by the First Albany Corporation in the same capacity.

Both Inserras shared a single representative's account numbered 002 at the Utica branch. The account's share of commissions was 40% which was split 60% for G. Inserra and 40% for J. Inserra. The brothers operated under an arrangement whereby G. Inserra would service institutional accounts and J. Inserra would handle the retail accounts of individual investors.

Stein Roe has been registered with the Commission as an investment adviser since November 1, 1940 and is headquartered in Chicago, Illinois. During 1982, it had under management between 7 and 9 billion dollars. Stein Roe's investment activities are divided into teams, varying from four to seven in number, each team having from three to seven portfolio managers and support personnel. The senior partner in the team is designated the leader. 5/

Giura was a senior partner at Stein Roe and as such headed one of the teams of portfolio managers. Moreover, all of the other portfolio managers reported to him. During the 1982 and 1983 period Giura's team had under its management from 1 billion to 2 billion dollars for investment clients who included mutual funds, pension plans and endowment funds.

5/ The records of the Commission show that an administrative proceeding (File No. 3-6733) had been instituted against Shearson and Stein Roe arising out of the same facts and circumstances involved in this proceeding. Based upon an offer of settlement submitted by respondents the Commission adopted findings, opinion and an order imposing remedial sanctions upon Shearson and Stein Roe. See Securities Exchange Act Release No. 23640, September 24, 1986 and Investment Advisers Act Release No. 1038, of the same date. The Commission's order specifically states that any findings therein are not binding on any other persons named as a repondent in any other proceedings, including the instant one against the individual respondents.

The Scheme to Defraud

As charged in Paragraphs 36 and 37 of the Order, the respondents are alleged to have "engaged in a scheme whereby securities which rose in value were tranferred to accounts of confederates of the Inserras and securities which have declined or did not rise in value were transferred to the Teamster Funds' accounts (the "TFAs").[6/]

The TFAs

In 1965, G. Inserra began to receive commission credit on some of the Teamster funds which he obtained as clients for the Utica branch through the intercession of Rocco Deperno and Thomas Blando, both of whom were life-long friends of G. Inserra and his father. Deperno and Blando were two of the trustees of the Teamster funds and Deperno was Chairman of the Board of Trustees of the funds.

At first, the sizes of the funds were relatively small and George's participation therein was not very great. However, the funds continued to grow in size as contributions continued to be received.

6/ As noted, the order also charges J. Inserra with unauthorized transactions in the Hettinger account, aided and abetted by Gentile.

Giura and G. Inserra met in 1977 and Giura, who was attempting to obtain the Teamster funds as clients of Stein Roe, prevailed upon Inserra to introduce him to the trustees. As a result, by June of 1981, the Teamster funds entered into advisory contracts with Stein Roe. At the same time, the Inserras were designated by Stein Roe (i.e., Giura) as the brokers for these accounts and Shearson became the custodian of the funds' assets. By this time, the funds had grown rapidly, so that by June of 1983 there were some $500,000,000 in assets therein, of which Stein Roe managed about half.

G. Inserra assumed that Giura continued to direct the increasing brokerage to him because he had been instrumental in obtaining, through Deperno, Blando and other trustees, the Teamster funds for Stein Roe to manage. The brokerage commissions generated by the funds were credited to Inserras' account 002, which, in 1982, amounted to approximately $1,193,000 and to $1,341,000 in 1983.

Thus, the relationship that developed resulting from the introduction of the Teamster funds trustees to Giura was apparently quite profitable to Stein Roe, to Giura, to Shearson, to the Utica branch, and of course, to the Inserras.

At the insistance of G. Inserra, Shearson gave him a $10,000 expense account ostensibly to cover expenses

involved with maintaining the Teamster funds as customers, although its policy was not to give its brokers expense accounts. Nevertheless, G. Inserra continued to complain that his unreimbursed expenses for "entertainment" of the Teamsters trustees in order to retain existing business and to acquire new business was much too high. This alleged "need" for additional expense money was recognized by the parties by their setting up of the "001 account".

The 001 Account

G. Inserra approached his superiors, Gentile and Henry Cauceglia, the Shearson Regional Manager, with a proposition that Stein Roe would direct additional brokerage to Shearson and to him as broker to be derived from other, non-Teamster, funds that Stein Roe was managing, although not introduced or obtained by Inserra.

As a result, a meeting was arranged and attended by, among others, G. Inserra, Gentile, Giura, and the head of Shearson's syndicate division. At this meeting Giura put forth the plan as outlined above by G. Inserra, and discussed his desire to direct credit to G. Inserra for these additional non-teamster transactions that would normally have gone to the credit of Shearson's institutional department. In return, Shearson was to become the custodian, without charge, of the Teamster funds in the accounts. Other than execution, Shearson was to provide

no services to Stein Roe for the directed brokerage. G. Inserra was to have no duties or responsibilities with respect to this added business.

Consequently, Shearson set up a special account designated "001" where the commissions earned on these additional transactions were deposited and split between Shearson and G. Inserra on a 50/50 basis. 7/

During the 33-month period from about October 1, 1982 to June 2, 1985, a total of more than $1,400,000 was earned in this account, or the sum of $509,090 per year on an annualized basis, of which G. Inserra received half.

It becomes quite clear that, despite denials by G. Inserra, the 001 account resulted from pressure by Giura, not-too-strongly resisted by Shearson anxious for the added revenues, in order to provide G. Inserra with his additional "expenses". He, in turn, asserts he was entitled to these non-Teamster derived commissions in return for having originally brought together the funds' trustees with Giura.

What remained in place was a mutually agreeable arrangement whereby Stein Roe was profiting as advisor to the Teamster funds, Shearson was the recipient of the Giura directed brokerage, but also gratis custodian of the

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7/ Usually, salesmen receive no more than a 40 percent split of commissions with their broker-employer.

funds, Gentile enjoyed the benefits (including increased income) of being manager of a highly profitable branch, and the Inserras, particularly G. Inserra, enjoying large commissions for having brought the parties together, and doing little else except to attend trustee's meetings, spend about 20 percent of his time in the Utica branch office, disburse funds for the "entertainment" of the trustees, and making a number of substantial cash contributions from time to time at the behest of Giura to various charities and institutions in which Giura was interested.[8/]

8/ The record does not disclose why G. Inserra needed more than a quarter of a million dollars a year to cover his "expenses" in handling the Teamster funds accounts in addition to donations to Giura-designated charities. However, the testimony of William D. Andrews, Giura's immediate assistant at Stein Roe, about a conversation with G. Inserra in June, 1985, shortly after Giura's leaving Stein Roe, was as follows: (Transcript pp. 2509-2510):

> " . . . George was interested in making certain that the relationships we had had in the past with him regarding brokerage were continued . . . And he also mentioned to me that in the past John Giura had been passing envelopes to Rocco DePerno and that now that John was gone, he was going to need to do that, and consequently he'd need brokerage commissions to be be able to do that.
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> Q. What was in these envelopes, did Mr. Inserra say?
> A. He characterized it as not much money."

During that conversation, Inserra mentioned to Andrews some other expenses (Transcript, P. 2513): "Lunches, dinners. He made some comment about going on a cruise with some women."

When the arrangement broke up with the firing of Giura in June, 1985, G. Inserra wrote to Stein Roe seeking reinstatement of the 001 account, pointing out the "favors" he had done for Stein Roe, such as getting Shearson to become custodian without compensation of the approximately one-half billion dollars in Teamster funds assets, and his alleged incurring of other expenses for equipment, personnel, travel and educational conferences. In the letter he also reminds Stein Roe that it was through his individual efforts that their management fees for the Teamster funds were increased from a permanent 1/7 of one percent to 1/4 of one percent. (Yet, G. Inserra insisted in his testimony that this almost doubling of management fees was a benefit to the Teamster funds!)

Shearson's Business Records - The PK Form

Shearson's record-keeping procedures embracing purchases and sales of securities in customer accounts, similar in most respects to those of broker-dealers generally, are materially involved with the issues in this proceeding.

"Order tickets" are records initiating transactions to either buy or sell a security. They are made virtually contemporaneously with the transaction either by the individual broker or the broker's sales assistant under the former's direction. The completed ticket is promptly given

to a "wire" operator to be entered into the Shearson record system at which point it is time and date stamped. Order tickets have first priority in going over the wire. "Confirmations" are generated as a result of a trade and give the details of the transaction as shown on the order ticket. They are printed in the branch office overnight, and copies are mailed to the customer by the back office.[9/]

Shearson renders to its customers "monthly account statements" containing all of the transactions occurring in the account during that month, including trades, transfers, cash receipts, cash payments, dividends and interest received.

When a new account is opened, the broker fills out a new account application form and the customer is required to sign an account opening agreement. The account opening form contains the name, address and financial data concerning the customer as well as a required social security or tax identification number.

As related to this proceeding, one of the most significant of Shearson's forms is the "trade error correction request" commonly known at Shearson as a "PK". The PK is

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9/ However, Gentile permitted an exception for the Inserras by allowing them to handle the confirms of their Teamster transactions as they saw fit.

used, for example, for adjusting trades from one account to another (as when a trade has been allocated through error to the wrong account), to report corrections or changes in commissions or changes in the type of transactions from margin to cash and vice versa.

The significant aspect of the PK as it relates to this proceeding is that since it is being used to correct an error in a pre-existing transaction, whatever change is accomplished is effective as of the time of the original trade rather than when the PK itself is executed later. Thus, if a buy order had been assigned to the wrong account, the PK correcting it would carry over all of the terms of the transactions, including price, effective as of the date of the buy order and not when the correction is accomplished.

The issues in this proceeding involve PKs that transfer a transactions from one account to another, not to correct an error, but to accomplish the substitution of accounts on the original terms of the order.

Requests for a PK could be made by anybody on the staff, depending upon the type of correction being made. The transfer of a transaction from one account to another would normally originate with the broker who made up the order ticket or by a sales assistant for the broker. The necessary information would be conveyed by a notation on

a broker's copy of the confirmation of the order and given to one of the individuals at the Utica branch assigned with the duty of preparing PKs. The request form would then be presented to the office manager, in this case Gentile, for his signature and approval, after which it would be given to the wire operator to enter into the records of Shearson. The PK form would be time and date stamped when it is sent over the wire. This would then generate two additional confirmations, one cancelling the transaction from the initial account and the second entering the transaction on the same terms in the substituted account. If the office manager were not available to sign the PK, it would frequently be entered over the wire anyway, and then presented at a later time for signature.

Although the executed PK did not have first priority for input to the Shearson records (this was a place occupied by order tickets), the wire operator would invariably have entered the PK by the end of business on the day it was presented to her. Thus, the typical PK form relating to the involved transactions would contain the name of the security, the number of shares purchased, the purchase price at the time of trade, the number of the account to which it was originally assigned, the number of the

account to which the transaction is to be transferred, the trade date, the settlement date (usually 7 or 8 calendar days after the trade date), the stamp showing the date and time the correction was put over the wire, and the dated signature of the office manager, Gentile.[10/] The fact that the PK had to be approved by him indicates the relative importance attached to that document by Shearson.[11/]

The Opening of the Stein, Roe, Farnham General Account

On June 4, 1982, an account was opened in the Shearson Utica Branch Office in the name of "Stein, Roe and Farnham General Account" ("SRGA"), showing a Chicago address "Attn: John Giura". The account opening form bears the purported signature of George Inserra as account executive and the acknowledged signature of Gentile approving it. The form contained additional information relating, apparently, to Giura (surely not to Stein Roe), i.e. business connnections, bank reference and estimated income. It did not contain a social security number or a tax identification

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10/ The form also called for the giving of a reason for the change sought by the PK. All of the PKs relevant to this proceeding omitted this statement.

11/ This was especially applicable to Gentile who was out of the office almost half the time.

number, as required by the form and by Shearson's rules, nor was it accompanied by the required customer's agreement.

A short time prior to the June 4, 1982 date, G. Inserra had complained to Gentile about problems that arose during the previous 5 or 6 months resulting from the alleged practice of Giura giving him orders to purchase large blocks of stock for the TFAs without immediately designating to which of them the securities were to be allocated, but would advise him within a day or so later of the distribution desired. The problems about which he assertedly told Gentile (and also to his brother and to their sales assistants) had to do with the Shearson block trading desk in New York City, which, he stated, formerly would hold a purchase where the account number was not as yet known for a day or so pending the receipt of the account number. He stated that he was advised by the trader in charge of the desk, Frederick Borusiewicz ("Freddie B"), that because of an alleged computer change he would have to be furnished an account number at the time the order was placed. When G. Inserra supposedly explained to Freddie B Giura's alleged practice of not giving the account number until the next day, G. Inserra

claims he was advised by Freddie B to use a "house account" or "holding account" in which to place the order and later to PK it to the correct account once Giura advised which of the three TFAs was to receive the securities.[12/]

Based upon what G. Inserra told him, and without checking the facts given him by Inserra, and professing a dislike of holding accounts, Gentile agreed to let the Inserras open one provided it would not be available to any other salesmen in the Utica branch.

Thereupon, G. Inserra instructed his sales assistant, Rhonda Yagey, to confer with Gentile and to arrange for the opening of the account.

12/ There is nothing in the record to suppport the allegation that up to this point Giura ever called either of the Inserras with an order for the Teamster funds to be held until he designated an account.

Freddie B testified that it was always the practice for salesmen to furnish an account number the same day an order was executed by the trading desk, although occasionally in the case of a new account it might have to be carried over to the next day. He further testified (contrary to G. Inserra) that this practice did not change when a new computer was installed. Infrequently, the Inserras failed to provide an account number on the same day. He denies ever telling G. Inserra to open a branch holding account since he was not concerned with where the salesmen got a number. Finally, a study of all the Teamster transactions with Stein Roe between January and May 31, 1982, shows that of 65 trades, all but a few either went through the Stein Roe trading desk or were syndicate transactions, but not placed with the Inserras.

She returned in about an half hour to advise that the situation was taken care of. G. Inserra claims that Yagey never told him what the account name was to be. 13/

Transactions Prior to SRGA

In the weeks prior to opening the SRGA, the Inserras made several attempts to stockpile securities in various ways, including parking them in the personal accounts of friends and in an orphan account numbered 11875 for which Shearson's records show no customer name, new account form or any of the required account documents. Although respondents question whether this account ever existed, it had had been assigned to the Inserras as brokers, but there is no way of determining who else, if anyone, belonged to this account. The Inserras denial of any information about it is not credible.

13/ Yagey testified that she obtained the information to fill out the account opening form from G. Inserra and from Gentile. She does not know which of them gave the account its name. Gentile testified that he does not know who gave the account the name "Stein Roe Farnham General Account", and that it was on the form when presented to him. J. Inserra stated that he did not participate in the opening of the SRGA nor knew much about it nor who decided to give it that name. Thus, there was in place a new account which, at the request of the Inserras, was to function as their exclusive "house account" or "holding account", and which bore a name for which no one involved seems to want to take credit, (although G. Inserra gave testimony during the preliminary investigation that he believes he made up the name or something like it).

Between May 7 and June 4, 1982, the latter date being the one when the SRGA was opened, there were four instances in which large blocks of Cities Service stock were bought, two for the "no-name" account, [14/] and once each for the respective accounts of Ramza Murad, a long time customer of G. Inserra, and one Bernard Turi, a man who used to be found hanging around the Utica branch almost on a daily basis. In each instance, the securities were PK'd from these accounts to the TFAs just prior to settlement date, when it became clear that the market price of the shares had declined since the trade date. Consequently, the Teamster funds were charged the higher trade-date prices, rather than the lower market price on PK dates resulting in overpayments totaling $9,375.

Another similar pre-SRGA maneuver occurred with the purchase of 5,000 shares of Cities Service on April 23, 1982, at a price of about 33-1/8 into the no-name account 11875. On April 29, one day prior to settlement date, the shares were PK'd to one of the TFAs but thereafter, on May 7, when the price began to rise, the Inserras, or someone acting under their direction, caused the shares

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14/ The order ticket for one of these two purchases also has the name of "John Giura" in addition to account number "11875". No one can explain why this occurred, but it is some indication that this account may have been Giura's.

to be PK'd out of the Teamster account and into the account of Robert Sfeir, a close friend of G. Inserra's. At that time Sfeir had already sold 3,000 of the shares at 35, making a quick profit totaling $5,625. He sold the remaining 2,000 shares on May 25 at 36-3/8 for an additional profit of $6,500.

Finally, the shares were sold ex-dividend and by virtue of being a record owner of these shares as of May 10, Sfeir received $2,000 in dividends, monies which the TFAs would have received if the stock had not been PK'd to Sfeir just one business day before.

All in all, Sfeir profited on this one transaction in the total sum (before commissions) of $14,125 at the expense of the Teamster funds which would have earned this sum if the shares had not been PK'd out of their accounts in the manner described.

The Inserras could offer no explanation as to who ordered the purchase of the shares into the no-name account, or out of that account into the TFAs, or who was responsible for them being transferred out of the TFAs to Sfeir, (although presumably only Giura could have ordered the movement of stock in and out of the Teamster's accounts). No reason is given for any of these account transfers, either on the PK form or by any witness.

In any event, the treatment given the Sfeir move, as well as the four transactions involving the Cities Service stock, indicate actions designed to place securities in some account with the intent to move them out prior to settlement date depending upon market direction. However, it became apparent that the way these moves were handled had obvious disadvantages for future similar maneuvers, particularly where they would involve the Teamsters. Thus, the use of a bare number for an account with no named principal, or of one belonging to Giura, would eventually draw attention to what was going on; and to park securities in the accounts of friends and relatives creates other problems, such as assignment of income tax liability, and whether these individuals would have sufficient account balances to cover large purchases so as to avoid the appearance of "free-loading". 15/

In their brief, the Inserras argue that the evidence did not connect them to the Cities Services transactions described above. Respondents intimate that Sally Arcuri, the then operations manager, was having private dealings with both Turi and Maryann Breitenstein, who managed the Murad account, and most likey set up these transactions

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15/ That the balances in these friendly accounts were a problem is hereinafter shown, requiring that J. Inserra lend substantial sums of money to these individuals' accounts to handle such deals.

on her own. However, these prior-to-SRGA activities in the TFAs could only have occurred with the involvement of Giura, the money manager, and/or the Inserras, the assigned account executives. There is no proof to the contrary. Besides, J. Inserra admits to a number of trades in Cities Service stock during this period.

It soon became apparent that if such activities were to continue - and they did - some other mechanism would have to be utilized. Hence, a holding account exclusively under the control of the Inserras was created, preceded by the unsubstantiated story by G. Inserra as to the alleged need for one.

Transactions Involving the SRGA

During the relevant period from June 4, 1982 and continuing until the commencement of the Commission's investigation, some 12 months later, approximately 72 purchases of large blocks of stock occurred in the SRGA. Of these, there were some 28 instances where the securities were then transferred out of SRGA by PK several days later to one of the TFAs at Shearson. In the remaining 44 instances the securities were transferred via PK to the accounts of individuals who were relatives, customers, business associates or long-time friends of one or both of the Inserras. These transactions have been assembled in Schedules I and II herewith (see Appendix), which

provide significant guidance for an understanding of whether respondents were involved in a scheme to defraud the Teamster funds in the manner alleged in the Order.

For this purpose, each Schedule compares the prices of the respective securities when they were initially purchased for the SRGA with their market prices when they were PK'd some days later either to the TFAs (Schudule I) or the private Inserra customers (Schedule II).

Schedule I

Transaction No. 1 in Schedule I, for example, shows a combined purchase of 1,000 shares of Cities Service at prices of 36-3/4 and 36-7/8 for the SRGA on June 3, 1982,[16/] which should have settled by June 10. One day prior to settlement, by which time the market price had declined to 35-1/2,[17/] they were PK'd to one of the TFAs at the

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16/ The record does not explain how this transaction was placed in the SRGA on June 3, when the account was not opened until June 4.

17/ Since the market price at the moment of the PK is not precisely ascertainable, for the purpose of uniformity the closing price of the stock on the day prior to the PK date has been deemed close enough for comparison purposes. However, daily price studies as in respondents' Exhibit I-HH, may alter the figures somewhat but not so as to affect the conclusions drawn. Similarly, where use is made of a different base, such as the average of the highest and lowest prices on PK date as the selling price, (as was done in Division's Exhibit 62), observable differences do not change in any meaningful way the conclusions reached with respect to trading patterns.

trade-date price, so that the TFA paid $1,325 [18/] more for these shares than if they had been purchased at market on the PK date.

Schedule I shows that of the 28 stocks purchased in the SRGA and then PK'd to the TFAs, in some 23 instances, the PK was entered at a time when the market price of the stock was lower than the trade-date purchase price with which the TFAs were charged and one stock traded even (but adding commissions make it a loser). Thus, in only four of the transactions PK'd to the TFAs do they appear to have "profited" price-wise, i.e., to have paid less for the securities when PK'd to them than the going market price. [19/]

18/ All amounts quoted for the purchase or sale of securities do not include the commissions charged, which would, of course, create increased trade costs.

19/ Even the four "profitable" trades do not disturb the discernable pattern. Thus, in Transactions Nos. 5, 16 and 17 of Schedule I the market prices were actually falling until a day or so before settlement, as shown in respondents' Exhibit I-HH but suddenly jumped on the last day and thus PK'd at a small profit. In Transaction 17 (Amerada Hess), the "profit" of $250 was offset by commissions totaling $407, and while the market prices were fractionally higher at all times prior to closing, they were always lower than when the commissions were factored in. Moreover, the large "profit" of over $12,000 in Transaction No. 9 (Paine Webber) resulted from a last minute surge in market price on settlement date, although it was a "loser" the day before. Thus, it appears that these profitable transactions to the Teamsters resulted from the respondents' inability to fine tune the market.

The 24 "losing" trades constituted about 86 percent of the total trades with the overpayments amounting to approximately $155,871, exclusive of commissions. The four underpayments, or "profitable" trades, amounted to $15,250, for a ratio of losses to gains of about 10 to 1.

Schedule II

This schedule contains the same information as Schedule I with respect to transfers to individual customers to whom the shares were PK'd out of the SRGA. Since in most cases these securities were sold virtually immediately out of the customers' accounts with the filing of the PK the actual sales prices are shown. In the few instances where the stock was held by the customer accounts beyond the PK date, the market price at the close of the day prior to the PK date is used as the selling price. Finally, Schedule II shows the money difference between the purchase price on trade-date and the selling price, actual or presumed.

As an example, Transaction No. 3 of Schedule II shows that 3,000 shares of Cities Services were purchased in the SRGA on August 19, 1982 at a price of 43 with settlement by August 26. On the latter date, the price having risen to 46-7/8, the shares were transferred via PK to the account of Ramza Murad, and were sold the same day for an immediate profit to Murad of $11,625. Thanks to the use of the PK, no actual purchase money had to be advanced by

Murad, who had sufficient account balance to cover the trade.

Transaction No. 2 of Schedule II shows a purchase into the SRGA of 5,000 shares of NLT at 37-1/8 on July 1, 1983 with settlement due by July 8. On July 6, when the closing price the day before had risen to 38-1/2, the stock was PK'd to John Corvino. Had Corvino sold the shares then, he would have realized a profit of $6,875. However, the stock was held for later sale. In fact, of the 44 transfers involved in the 40 transactions on Schedule II, 37 (or 84%) of them were resold to market on the same day or within one day of the PK transfer.

Moreover, of the 44 transfers involving Inserras' personal customers, 35 showed profits on the PK date, 8 showed losses, and one traded even. However, 3 of the 8 "losers", Transaction Nos. 15, 16 and 17 on Schedule II, were PK'd on December 31, 1982, to Matthew Lomanaco who was seeking an end-of-year tax loss, and was able to be accommodated by the Inserras via the PK route. In other words, the Lomanaco "losses" were intended, not the result of random market action. 20/

20/ Other questionable "losses" involve Transaction Nos. 28, 31 and 32, which were PK'd at a loss to William Hettinger, the grandfather of J. Inserra's wife, over whose account at Shearson J. Inserra exercised de facto discretionary authority. As will be discussed
(FOOTNOTE CONTINUED NEXT PAGE)

In sum, Schedule II shows that almost 80 per cent of the individual customers profited from these transactions to the extent of $233,538, for the most part simultaneously with the PK of the securities to them. The total losses amounted to $39,562, (including the Lomanaco tax losses) for a ratio of gains to losses of 6 to 1. Excluding the 6 Lomanaco and Hettinger "losses" would make this ratio much higher.

The pattern that emerges from these Schedules, standing alone, would support a finding that the Inserras had been using the SRGA to provide profits for their friends, etc., at the expense of the Teamster funds. Under normal trading conditions, there would be no logical way that the TFAs could have wound up with so many losing trades out of the SRGA while at the same time the friends, clients, associates and relatives of the Inserras could have had so phenomenal a success ratio, but for the intervention of deliberate munipulative action.

20/ (FOOTNOTE CONTINUED)
later with respect to the charge against J. Inserra of "churning" the Hettinger account, he had used it to dump losing securities on some occasions and, in three instances, to remove via PK a profitable trade from Hettinger and give it to another Inserra customer. The 2 remaining losing trades were in the account of "CHAG Anastasia" (Transaction Nos. 25 and 26 of Schedule II), a pension fund for a group of dentists and managed by J. Inserra.

The Inserra's Use of the SRGA

The initial question that emerges is why, in an account alleged by G. Inserra to be used solely as a holding account for Giura's purchases for the Teamster funds do we find that the large majority of tranfers of securities from the SRGA were to the Inserras' individual customers.

J. Inserra has opted to take responsibility for these transactions. First, he professes not to have participated in the opening of the SRGA nor know much about it. In actuality, he learned about it rather quickly. Within 12 days after the account was opened, he began ordering large blocks of stock through the Shearson trading desk in New York City which he "inventoried" (to use his words) in the SRGA allegedly without having any particular customer in mind, but hoping to be able to sell the securities to the "heavy hitters" among his customers at the same price for which they were purchased. 21/

Obviously, if this were his purpose, no customer would agree to accept the stock at the trade date price if it could be purchased for less at the market price. It follows that, where the price had declined, J. Inserra would have

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21/ He likens this practice to that of a broker-dealer who sells out of inventory in principal transactions. This comparison is, of course, absurd.

had to unload the securities at his purchase price to avoid becoming responsible for the loss. It was then that, according to him, he would go to brother George to help him find a customer for these losing securities, including soliciting help from Giura. Whom did they expect to buy a sure loser? The answer is found in Scheduled I - dump it on the TFAs.

As an example, J. Inserra, testified about Transaction No. 25 on Schedule I, involving the purchase of 15,000 shares of Petrolane on March 21, 1983 which were PK'd to the TFAs on March 29 (one day after settlement date) when the price decline showed a total loss to the funds of $19,500. He stated that he had inventoried the stock to be sold to his personal customers, but that the stock wound up in the TFAs because he "must have" asked his brother George to help him move the securities. He professes not to know who his brother called to help him, or who ordered the PK transfer to the TFAs. He gave the opinion that the transfer "might have" been done by the Shearson block trading desk in New York, or by the office manager, Gentile, "who might have" been walking by Inserra's office when the phone rang and the order to transfer to the TFAs was placed. Other than that, he asserts that he had no knowledge as to how the shares could have moved to the TFAs unless it was done by

brother George. 22/

It is clear that the SRGA could not have been opened, nor the Teamster funds saddled with the "losing" stocks without the approval of Giura. Since the amounts involved in the securities traded through the SRGA were relatively small vis-a-vis the half a billion dollars in funds assets under management, apparently Giura, because of his over-all relationship with G. Inserra, willingly assented to the manner in which SRGA was being operated.

Yet, no where in this record does it appear that Giura ever ordered the purchase or sale of stock for the TFAs through the Inserras. In fact, the evidence affirms that he did not do so. 23/

22/ This wandering and inconsistent story is typical of the answers given by J. Inserra when testifying about the transactions shown in Schedules I and II.

23/ Despite the fact that, if their story were true, Giura was the only one who could have ordered securities in the SRGA transferred to the TFAs and J. Inserra the only one who could have ordered securities to be transferred to his individual customers, the typical testimony by both Inserras with respect to their knowledge of who ordered the transfers was replete with such testimony as: "I can't recall", "I don't remember", "I don't know", Giura "possibly might have placed the order", "anything is possible", etc. Even allowing for the passage of time since these events took place, it is inconceivable that these respondents are suffering from so total a claimed memory lapse about such unique trading. Rather, their so-called forgetfulness appears to be a form of stonewalling. In any event, this results in an absence of information to refute the conclusions to be drawn from the trading patterns which have clearly emerged in Schedules I and II.

J. Inserra claims that brother George did not know he was "inventorying" securities in the SRGA for later sale to his individual customers until about a month or two after the practice had begun, in contradiction to G. Inserra's testimony that he did not know until the very end what brother John was doing.

Both Inserras admit that John's alleged practice of "stockpiling" securities in the SRGA and then selling them to others was highly unusual. In fact, they know of no salesman in Shearson or anywhere else who would sell stock out of his own private inventory. 24/

The Timing Factors

As appears from Schedules I and II, the time interval between trade dates and the dates when the stocks were PK'd either to the TFAs or to the Inserras' individual customers ranged from one to seven business days. The average time that the securities remained in the SRGA was 3.8 business days from trade date to PK date. Considering that settlement is required within five business days from trade date, it would appear that there was a wait almost until the end

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24/ Not only is it clear that the reasons advanced by the Inserras for the need to open the SRGA totally unsupported by the record, logic and customary trading practices, but the reason advanced by J. Inserra for his alleged stockpiling - that this gave him greater incentive to "work the stock" - is preposterous.

of the settlement period to decide where the trade would go. In fact, in eight instances the wait went beyond settlement date, [25/] a practice forbidden by Shearson as having obvious disadvantages to the firm (such as, delayed billing, payments to other-side brokers without having been paid by its customer), especially since the SRGA being a purported holding account, was not expected to pay by settlement date.

Another "time" aspect has to do with the fact that whereas trades PK'd to TFAs frequently remained in those accounts for days, months and sometimes years, in 83 percent of transfers to private customer accounts the stock was sold almost simultaneously with the issuance of the PK. Thus, in many instances, the initial losses to the TFAs were absorbed thereafter in the rising stock market

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25/ Sally Arcuri, the Utica branch operations manager until October 28, 1982 stated that she had received a number of complaints from the Compliance Department about these post-settlement transfers and that G. Inserra had told her to give excuses, such as that the sales assistant was on vacation, or the salesmen were out of town. She further testified that she had complained to Gentile about having to lie to Compliance, although he denies she ever did so. Thereupon, she stated, she told Gentile she was not going to do any more trade changes, an action which she blames for her having been fired shortly thereafter. Gentile along with some of the back office employees, testified that Arcuri was fired because of numerous complaints by staff about her conduct as manager severe enough to cause them to want to seek employment elsewhere.

of that period and many even became profitable. 26/ The private customers, on the other hand, made immediate profits without risk to their capital.

Respondents have recognized the importance of timing in these transactions, and argue that enough uncertainties exist with respect to time factors as to cast serious doubt on inferences that they were trading according to the scheme described in the Order for Proceedings.

Specifically, respondents contend that contrary to what greater intervals may appear on the transaction documents (i.e., trade tickets, initial confirms, PK date stamps, correcting confirms, monthly customers account statments, etc.), as to when the various steps would occur, J. Inserra would immediately start to sell his "inventoried" stocks and have them sold no later than the day following purchase, so that they should not have been held in the SRGA more than one day. The same is said with respect to the transfers to the TFAs supposedly to have been ordered by Giura - they should have been transferred out of the SRGA by the next day. Hence, it is

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26/ For this reason, respondents argue that the funds suffered no actual losses in these transactions. This is a specious argument since, as seen, the TFAs would have profited even more had their purchase price been at the lower PK date price rather than the higher trade date price they had to pay.

argued, there would have been no time to study quotations and manipulate transfers of stock.

If the documentary evidence shows otherwise, say the respondents, then any delays in the execution of the transfers were not due to their watching price changes but rather were caused by problems in the back office, overburdened personnel, or other factors beyond their control.

Specifically, respondents charge that those who testified that the PKs were promptly prepared (Candie Newman, Ellen Geiersbach and Sally Arcuri) did so out of self-interest since they, as the PK preparers, would not admit to their derelictions. They further accused Arcuri of prejudice. 27/ Respondents further assert that PKs had a "low" priority for transmission over the wire which would engender additional delays. They say that some times there would be paper jams in the transmission machines, that Gentile was frequently (about half the time) out of the office and the entry of the PKs would be held up to await his signature, and that during the months of

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27/ Of the three named, Arcuri had reason to be prejudiced against the Utica branch for her summary firing after many years of service, and due allowance has been made in evaluating her testimony. To the extent that the other evidence and exhibits corroborates her, she will be believed.

December 1982 and January 1983 the office was handling a local stock offering which required a great deal of added work on the office staff.

While the PKs did not have the highest priority for transmission over the wire (this was reserved for trade tickets), the changes they were making required prompt entry for reasons already stated. They were important enough to be among the few documents which required written approval of the branch manager. As for the other items mentioned by respondents, they were, for the most part, normal interruptions, and there is no proof that they prevented the PKs from being entered in a timely fashion.

In any event, even allowing that there were delays of the type described, they do not show this requires changes in the trading patterns developed in Schedules I and II and the conclusions drawn therefrom. As noted, these patterns portray an inventorying by the Inserras, the waiting of several or more days for price changes, and the transfer by PK of the winners to private clients for immediate profitable resale, and of the losses to the TFAs.

The Inserras' Private Customers

Customer Ramza Murad has been involved in ten of the 40 transactions shown on Schedule II. She is a woman in

her 80's, whose account was managed exclusively by her daughter, Maryann Breitenstein.

Breitenstein has known both of the Inserras socially and professionally for 15 years or more. She had been maintaining both a cash and margin account in her mother's name [28/] at the Utica office of Shearson and its predecessors. These were rather large accounts which frequently had equity balances in excess of one half a million dollars. Breitenstein declined to state whose monies were in these accounts or who was the beneficial owner thereof, asserting her Fifth Amendment rights. However, she states that none of the monies belonged to any of the respondents (and, apparently, not to Breitenstein or her mother).

From time to time, G. Inserra and Breitenstein had entered into arrangements whereby the Murad account would purchase a security on his recommendation and he and Breitenstein would share the profits and losses between them. As a result of losing transactions, G. Inserra had become indebted to the Murad account.

At the instance of G. Inserra, Breitenstein had caused the Murad account to purchase stock on several occasions jointly with James Hammond, a broker in the

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28/ The use of Ramza Murad as the nominal account holder was at the suggestion of G. Inserra.

Shearson Syracuse office, which resulted in Hammond's becoming indebted to the Murad account in the sum of $27,000. Breitenstein, in turn, looked to G. Inserra to cover Hammond's losses since she felt he was responsible for bringing the two of them together. 29/

G. Inserra suggested to Breitenstein a way that he might repay the Murad account by entering into an arrangement involving himself, Giura and Breitenstein, in which the securities would be bought through a "holding account" for the benefit of the Murad account, and that profits therefrom would be divided equally among the three of them. G. Inserra, however, was to leave his share of the profits in the account against his indebtedness.

Thereafter, Breitenstein began receiving confirmations for purchases and sales of securities in the Murad account, for transactions directed by G. Inserra without her knowledge. She asserts that she never understood how the "holding account" would work nor did she ever ask. (It is noted that every stock PK'd to the Murad account was sold out at a profit the very same day).

29/ Apparently Breitenstein was using the money in the Murad account (the source being concealed) to support purchases by others (G. Inserra and Hammond included) for which they paid her interest or a share of the profits.

After a number of the transactions, Breitenstein told G. Inserra to end the arrangements allegedly because she feared the monies involved were too great for the return to be made. She also claims the transactions were becoming "too sordid".

Breitenstein has no records showing how much money G. Inserra might have owed her. Neither he nor Giura ever put any money into the Ramza Murad accounts for the purchases made therein.

At the time Breitenstein broke off the arrangements, the transactions that G. Inserra transferred out of the SRGA to Murad generated profits of almost $47,000.[30/] She does not recall giving any of the profits at any time to G. Inserra or to Giura.

Breitenstein admits that she had become very angry towards the Inserra brothers when J. Inserra invested a portion of her and her husband's IRA accounts in a security which produced losses for which she expected G. Inserra to make good. He refused to do so. She also agreed to testify as a witness for the Division in this case in the hope that in return for her cooperation she would be

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30/ Additionally, a further trade in the Murad account by G. Inserra followed the notice to discontinue the arrangements, specifically Transaction No. 24 on Schedule II, generated a gross profit of $6,250.

helped in an investigation by the Internal Revenue Service into her affairs. However, no promises to this effect were made to her by Commission personnel. 31/

Edward Petronio maintained and managed his own and two satellite accounts, one in the name of his mother, Lena, and the other for his wholly owned business, Central New York Banana. These 3 accounts engaged in ten transactions, as shown on Schedule II, and participated in an eleventh, (Transaction No. 40). Petronio has been a life-long friend of both of the Inserras, and their respective families had business dealings with each other and mixed socially. These SRGA transactions resulted in gross profits to him of $63,287. Petronio declined to testify at the hearing asserting his Fifth Amendment privileges. 32/

The Petronio accounts frequently did not have enough equity to complete the transactions PK'd from the SRGA. Consequently, in six of the purchases, J. Inserra loaned the Petronio accounts funds to support them, moneys which

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31/ In view of her anger towards the Inserras for alleged claims for money due, and her hope for help with possible federal tax matters, there is reason to suspect her testimony. However, many of the details thereof are supported by the evidentiary record and the testimony of Hammond. To that extent, at least, her testimony is deemed credible.

32/ However, he did testify during the course of the preliminary investigation by the Commission and this testimony has been received in evidence.

were promptly repaid upon the sale of the security out of the Petronio accounts (which was always on the PK date). These loans ranged in amount from $24,000 to as much as $100,000, and in order to effect them, J. Inserra withdrew funds from his own margin account thus having to pay margin interest.

There is nothing in the record to show that either of the Inserras received any part of the profits on these Petronio transactions or even a refund of the interest J. Inserra had to pay on his margin loans. Petronio testified that he needed the loans to complete the securities transactions, thereby contradicting Inserra who insisted that the monies loaned to Petronio had nothing to do with stock purchases.

Thus, more than half the SRGA transfers to individual customers involved 2 persons, Breitenstein and Petronio.

Matthew Lomanaco, long-time customer of J. Inserra, was involved with seven of the transactions on Schedule II. When he needed a tax loss at the end of 1982, J. Inserra was able to accommodate him on three transactions (Nos. 15, 16, and 17) by use of the PK transfer from the SRGA of "losing securities". Three of the four remaining transactions were profitable to Lomanaco. The last (Transaction No. 27) would have resulted in a large loss if sold on the PK date. However, the stock was held for 3 months and then sold at a profit.

John Corvino, a resident of Chicago, became a customer of the Inserras at the suggestion and request of Giura, his long-time friend for some 20 years. He opened his account on July 6, 1982 and on the same day the Inserras PK'd into it some 5,000 shares of "NLT" which had been acquired by SRGA on July 1 at a price of 37-1/8, and had risen to 38-1/2 on the PK date, for a total increase of $6,875 in the value of the shares (See Transaction No. 2, Schedule II. 33/

According to Corvino, he had met G. Inserra briefly while on a vacation trip in Florida where he was introduced by Giura. Some time thereafter he received a call from G. Inserra recommending the purchase of the NLT shares at a total price in excess of $187.000. Although in his years of stock trading he never made a purchase exceeding $25,000, Corvino proceeded to borrow the entire purchase price from a "friend". He repaid the loan a week later, plus interest of $5,000. He denies that he was ever guaranteed a sure profit on the NTL stock.

On the other hand, G. Inserra tells a different story. He claims that the first time he had heard from Corvino was the result of a call he made to Giura to

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33/ Actually, Corvino held these shares for several weeks beyond the PK date and sold the shares at an even greater profit.

help him with selling some NLT shares that J. Inserra had inventoried, followed by a call from Corvino asking about the stock. 34/

J. Inserra testified that he first knew of Corvino when the Shearson trading desk in New York sent to Utica "a whole bunch of new accounts" including among them one for Corvino.

Corvino testified that he gave G. Inserra unrestricted verbal authority to make purchases at his discretion.

The next transaction occurred with the purchase in the SRGA of 10,000 shares of "Walter E. Heller" on February 18, 1983, 2,000 shares of which were PK'd to Corvino on February 28 and sold the very next day at a gross profit of $5,125. 35/ (Transactions No. 36, 37A and 37B Schedule II). Finally, the Inserras, having acquired 5,000 shares of "Deluxe Check" (Transactions Nos. 40A and 40B) on May 5, 1983, PK'd 2,000 shares to

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34/ It is hard to understand why Giura was called since from the day J. Inserra "inventoried" it the price of the stock was up. More likely, Giura was the moving party in order to benefit his long-time friend Corvino since there was already a guaranteed profit.

35/ The remaining 8,000 shares were split between Robert Sfeir and Petronio and promptly sold at considerable profits to both of them.

Corvino on May 10 and promptly sold at a profit of $2,250. (The remaining 3, 000 shares were PK'd to Petronio and sold at the same time at a substantial profit to Petronio). Corvino was unaware of either of these transactions when they occurred. The record does not show who was calling the shots.

The testimony of Corvino to the effect that he first authorized the purchase of NLT for a price far in excess of what he ever invested before, using funds borrowed at a highly usrious rate of interest (139 percent), and then gave unlimited discretion to G. Inserra, a person whom he met casually once before, without being assured in advance of guaranteed profits, is deemed totally incredible.

Rather, it appears that Giura knew from the start the use that the Inserras were making of the SRGA and wanted, for whatever reason, that Corvino get a piece of the pie. The Inserras, apparently, were only too glad to help.

Nancy Breitbach, the wife of G. Inserra, maintained an account in the Utica branch. She was involved in the very first SRGA transaction on Schedule II, the purchase of 5,000 shares of Cities Service on June 16, 1982, at a price of 37-1/2. Two days later, the price having risen sharply, the shares were PK'd to the Breitbach account, 3,000 shares of which were sold the same day for a quick

profit of $46,000.[36] (The remaining 2,000 shares were sold about a month later at an even higher price).[37]

Later, the SRGA purchased 10,000 shares of Mapco (Transaction Nos. 5 and 6, Schedule II) on August 27, 1982, at a price of 25-7/8 of which 5,000 shares were PK'd on September 7 (past settlement date) into the Murad account and the remaining 5,000 shares into the Breitbach account. Since the price had increased, there was a presumed profit of $1,250 to each of them. (In actuality, the Breitbach account held the shares for several more months and then sold them for an even greater profit.)[38]

36/ Since there were insufficient funds or credit in the Breitbach account for this purchase, brother John Inserra loaned it $100,000 which was repaid immediately after the sale.

37/ According to Rhonda Yagey, the Inserras' sales assistant, she had been contacted by the Shearson block trading desk seeking an account number for these 5,000 shares, that she had assumed they were intended for the Teamster funds, so she placed the stock in the SRGA, that she later was told by G. Inserra that the stock should have gone into his wife's account in the first place, whereupon she had the purchase PK'd to Breitbach,

38/ G. Inserra testified that it was intended that all 10,000 shares should have been transferred to the Murad account, but through a mistake which he could not explain, half of them were PK'd into his wife's account. (The PK issued indicated that all 10,000 shares were to be transferred to Murad.) In any event, as a result of this and the Yagey "mistake", G. Inserra's wife profited quite handsomely.

Ralph Squillace and the Inserras knew each other all their lives. He was involved in three transactions (Nos. 29, 34 and 35, Schedule II). Prior to February 1983, the Squillace account did not engage in very heavy trading, its equity never went above $16,000, and by November of 1982 it had dropped to $2,732. During this period, J. Inserra advanced to Squillace $69,000 to trade options. The account lost about $28,000 and the balance of the money was returned to J. Inserra.

On January 27, 1983, the Inserras purchased 10,000 shares of FMNA in the SRGA for total cost of approximately $212,000. On February 1, the shares were PK'd to Squillace and sold the same day for a $10,000 profit before commissions. On February 2, J. Inserra gave Squillace $106,000, the exact amount needed to cover for the FMNA on margin. Squillace did not know he had purchased or sold the FMNA until that day. On Feburary 8, 1983 Squillace withdrew the net proceeds of the sale of FMNA and gave two personal checks to J. Inserra, one for $106,000 and one for $7,000, the net profit on the transaction.

On February 10 and 11, 1983, the Inserras purchased 7,000 shares of Datapoint in the SRGA at a price of 22-1/2. On February 15, the price having risen to 25-1/8, the shares were PK'd to Squillace's account, at a total purchase price of $163,00, and promptly sold at a net profit of

$4,000. Also on the same day, J. Inserra "gave" Squillace $82,000 the amount necessary to meet the margin requirements on the purchase. A later transaction on February 18, involved the PK transfer from the Hettinger account to the Squillace account, and the simultaneous sale at a net profit of $3,500. Squillace repaid J. Inserra not only the $82,000 he advanced for the Datapoint purchase but also gave him the profits on both transactions. It appears that these were J. Inserra's transactions using the account of a friend who owed him money to reap some of the SRGA profits for his own benefit.

Squillace declined to testify on any aspect of this proceeding, asserting Fifth Amendment privileges.

Robert Sfeir had known G. Inserra intimately almost all his life. On one occasion, Sfeir, G. Inserra and James Hammond bought options in Sfeir's account on a joint basis.

As shown in transaction numbers 33 and 37A on Schedule II, securities were PK'd to Sfeir out of the SRGA and sold the same day at a profit in one case of $8,125 and in another of $11,500. In fact, transaction 37A appears to be a joint effort involving 10,000 shares of "Walter E. Heller" bought on February 18, of which Petronio, Sfeir and Corvino all had a piece of the action, having been PK'd to them and sold the same day profitably to each of them.

Sfeir refused to testify on any aspect of these proceedings, asserting his Fifth Amendment rights.

CHAG Anesthesia, a brokerage customer of J. Inserra, is a pension plan for a group of New York doctors. The account was involved in 2 losing transactions in January, 1983, arising from the PK of IBM stock out of the SRGA. The record does not disclose whether Inserra had verbal or other authority to trade this account or who would have ordered the purchase of the stock. In any event, the securities were kept in this account for about another month by which time they rose in value and were sold at a profit.

Comments concerning the relationship of William Hettinger, to the SRGA activities will be discussed later in connection with the allegations of churning against J. Inserra.

Gentile and the SRGA

While he was the office manager, Gentile supervised some 25 salesmen and about 20 support staff personnel. His compensation was based on salary, production income from his own personal accounts, and a percentage of the gross profits of the Utica branch. His income depended in large part on his override, and on a performance bonus when the branch met certain quotas. For 1981, his salary was $37,000 and his total income from Shearson was over $88,000. For 1982, his salary was again $37,000 but his

total earnings increased to over $100,000. He estimates that about 10% of his total income was a result of business the Inserras brought in.

In addition to his general managerial and supervisory duties, Gentile was responsible for seeing that the branch complied with and carried out the policies of the various stock exchanges and the appropriate regulatory laws and regulations. He was required to sign off on certain documents including new accounts, cash blotters, securities blotters and, in particular, PKs.

At the hearing, Gentile's testimony was generally in accord with the Inserra's testimony as to their preliminary discussions concerning the need for a holding account to meet Giura's alleged practice of not always knowing which TFA was to receive the trade. 39/

39/ However, Gentile did not always tell this story. During the investigatory stages of this proceeding, he testified, on August 8, 1983 (but one year after the events involved herein) that he first became aware of the existence of the SRGA some several months after the account was opened. He further testified that he did not know whether the new account form was signed by himself (it was), and that he did not recall G. Inserra ever discussing with him the need for the SRGA, especially prior to the opening of the account. At a later investigatory questioning, he then admitted that he had become aware of the SRGA when it was first opened, that he had, in fact, signed the new account form, but that he did not know why it was opened except that it was at the request of Stein Roe. This was, again, a departure from his most recent story as told at the hearing herein.

After he was contacted by G. Inserra, Gentile claims to have checked with the new accounts section of Shearson and was told that a holding account for the purposes outlined was possible, and that transfers from that account to the TFA's could be done through the use of the PK, the error correction form. However, he did not check with the block trading desk to verify G. Inserra's complaint that the new computer prevented orders from being held over night. 40/

Gentile testified that when the Inserras' sales assistant, Rhonda Yagey, came to him with questions as to how to complete the new account form for the holding account, the name "Stein, Roe, Farnham, General Account" was already on it. He signed the form without first making any inquiries as to the accuracy of the information contained thereon because he was satisfied that this was the house account that G. Inserra had requested of him.

Gentile claims to have signed prior to their transmission over the wire all PKs that were presented to him. If he were out of the office (about half the time) the information was still to go out over the wire and he would sign the PKs upon his return. For this purpose,

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40/ Apparently, he did not even verify whether there were orders that Giura had placed with the Inserras and whether they involved delays for lack of account numbers.

they would be placed on a pass-through ledge at his office to await his signature. Gentile's signature appears on only 44 of the 65 PKs transferring securities from the SRGA to other accounts. He professes no knowledge with respect to the remaining PKs, all of which were unsigned by him or by anyone else in his absence. 41/

Gentile became familiar with the SRGA account number, 16744, and he recalls seeing it on the PKs. He claims not to have been familiar with any other account numbers, including the TFAs or those of the individual customers. (PKs do not show account names, only account numbers). He states that before signing PKs, his practice was to glance at the form, notice that the SRGA account number was there, and whether all the blanks were filled. He did not note to or from which named account they were being transferred, the number of elapsed days between the trade and PK dates, nor the fact that in some instances

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41/ Sally Arcuri, the then operations manager, testified that some of the PKs remained unsigned and that she had filed them away without a signature. Gentile notes that virtually all of the unsigned PKs had been prepared by Arcuri and intimates that these may have been deliberately withheld from him (by Arcuri?). It is noted that after Arcuri turned over the duties of preparing PKs, most of them do show approval by Gentile. In any event, this aspect has no significant impact on the conclusions herein, since there were 8 PKs prepared by Ellen Geirsbach which also were not signed by Gentile, and 3 PKs prepared by Arcuri which were initialed by him.

PKs were executed after settlement date.

There were a number of red flags to which, if he had paid attention, would have alerted Gentile to the fact that the SRGA was not being used for its professed purpose of holding Giura purchases, but rather as a place for J. Inserra to inventory stock. For example, margin accounts were designated by a "2" in the account number, whereas cash accounts were designated by a "1". The TFAs were all cash accounts. That securities were being PK'd into customers' margin accounts rather than the TFAs should have been readily discernible. Yet, Gentile signed 25 PKs transferring securities to retail customers of which 22 were number "2" margin accounts, without his (allegedly) taking notice that these were not going to the TFAs.

Additionally, none of the PKs involving the SRGA contained information as to the reason for the PK or for the account change error being corrected, as required of him by Shearson and N.Y. Stock Exchange Rules. Gentile never inquired as to why that information was left out, or why securities were moving from one account to another. He professes no recollection as to any of the circumstances involved in the SRGA-related PKs. Although he states that he does not recall PKs being executed after settlement date, he admits that on one or two occasions Sally Arcuri had advised him that she had been called upon by the

Shearson's Compliance Department to explain certain post-settlement transfers in the Inserra accounts. At one time, Gentile received complaints from his operations manager as to large numbers of PKs being generated out of the Inserras' account. Gentile claims to have spoken to J. Inserra about it and was told that the Inserras would "clean up their act". He also compared the number of PKs being generated by the Utica branch with other branches of Shearson and he was convinced that the number in his branch was not out of line with the general averages.

Basically, the position of Gentile is that the only function he performed when signing the PKs was to certify that they were what they represented themselves to be and to see that all the blanks were filled in. Other then that, he professes no recollection as to conversations with any of the personnel involved, or to having made inquiry concerning the details contained in or omitted from these forms. Such lack of memory leaves unexplained by Gentile the many questions raised by the manner in which the PKs were being used in the SRGA and signed off by him.

The Hettinger Account and J. Inserra

William P. Hettinger, now 88 years of age, retired as a self-employed electrical contractor in 1970, after being in business for 30 years. J. Inserra is married to Hettinger's grand-daughter. Hettinger's present sources

of income include social security, a union pension and and dividends and interest from investments.

In 1975, Hettinger opened a brokerage account with J. Inserra, because he was a relative, into which he transferred from another account certain securities that he already owned. At that time, he explained to Inserra that he was interested in income, for the most part, but does not recall talking to Inserra about what specific types of investments he wished to engage in. He does not recall signing an account opening form, although it bears what purports to be a signature which he denies is his own. Hettinger had a limited background in securities dealings. His other investments included some real estate.

Hettinger intended to rely on Inserra to handle the trading for him, although he never by writing authorized discretionary authority, trading in options or on margin. Nor does he recall ever suggesting that a particular stock be traded. J. Inserra bought or sold securities in the brokerage account without prior discussions with Hettinger except for one silver purchase. Occasionally, Inserra would call and advise him after a trade had been made.

When J. Inserra first opened the account he understood that Hettinger wanted securities that were of quality, paid dividends and had a "decent rating". He claims that he

tried to stay away from lower-grade stocks or the over-the-counter market.

During the early years, J. Inserra claims that he made trading profits for Hettinger amounting to almost $250,000. He felt that whatever losses were sustained thereafter came out of the profits and hence that Hettinger was not really losing any money. Early on, Hettinger withdrew $70,000 and another $10,000 from the account to obtain needed funds to pay income tax on the profits made. In June of 1982, the account profited to the extent of over $112,000 in the purchase and sale of Cities Service. J. Inserra felt that so long as he was not in his trading losing Hettinger's original investment he need not have been concerned. As he testified about Hettinger (Transcript pages 1204-5): ". . . he got all his money back that he started with . . . I just made sure he got his principals back so he didn't risk - he was well heeled. His pockets are deep back home, believe me."

J. Inserra states that he spoke to Hettinger about the account at family reunions and similar meetings. He claims to have discussed the account with Hettinger at intervals of from several weeks to monthly, that "sometimes" he would call him after putting in a trade or before placing an order for securities. Hettinger, on

the other hand, does not recall too many conversations having been held and that for long periods he was unaware of what was going on in his account until he received confirmations from Shearson.

On three occasions, J. Inserra, without authorization, transferred securities purchased in the SRGA to Hettinger in the same way they transferred securities to the TFAs, i.e., when the security declined in value soon after they were purchased. (See Transaction Nos. 28, 31 and 32, Schedule II). Specifically, the first involved a transfer of 5,000 shares of Great Western Financial purchased for the SRGA on January 19, 1983 at 21-1/4, and when the price declined to 19-7/8 were PKd one day before settlement date to Hettinger, with a net loss to the account of $6,875.[42/]

On February 4, 1983, 3,000 shares of Philips Petroleum were purchased in the SRGA at 33-1/4, and when the price declined to 30-5/8 prior to settlement they were PK'd from the SRGA to Hettinger on February 10, and sold the next day, resulting in a loss of $3,375.

Finally, 2,000 shares of Superior Oil were also purchased on February 4 and PK'd on February 9 and then

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42/ However, these securities were held in the account and sold one week past the PK date at a profit to the account of $10,000. This is considered a loss to Hettinger since on PK date, he could have bought the shares at market for the lower price.

sold on the same day at a loss to Hettinger of $250.[43/]

On five occasions between September 1, 1982 and February 24, 1983, J. Inserra purchased securities in the Hettinger account and then, as the price of the security increased with the approach of settlement day, PK'd them out of the Hettinger account into the accounts of his friends who immediately sold the shares at a profit, thereby depriving Hettinger of the gain that he would have made if the stock had been sold directly to market out of his account.

Thus, on September 1, 1982, J. Inserra purchased 5,000 shares of Control Data in Hettinger's account at 29-1/2. Two days later, on September 3, J. Inserra transferred those shares to the account of Central New York Banana (i.e., his good friend Petronio) and then sold on the same day at prices of 30-3/4 and 31 for a profit to

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43/ The question might well be asked why, if there were a plan to dump losing SRGA purchases on the TFAs, these three transactions went to Hettinger instead. Evidently, there was some reason - such as that these securities were not on Stein Roe's approved list -why the stock could not appear in the Teamster funds portfolio without attracting attention. Hence, given the relationship between J. Inserra and Hettinger, it would have been more propitious for the former to place the stock in the latter's account. In any event no satisfactory explanation has been given by J. Inserra for dropping these losing transactions into Hettinger's account.

Petronio of $5,300.[44/] J. Inserra's explanation that leaving the purchase in Hettinger's account would have caused it to be over-extended is contradicted by the fact that the Hettinger account did have sufficient equity to handle the purchase whereas J. Inserra had to lend Petronio $100,000 to cover the transaction.[45/] Needless to say, he did not clear this trade with Hettinger prior to its execution and Inserra's testimony that he bought these shares under verbal authorization from Hettinger and even discussed the purchase with him after the transaction, is not believable.

44/ In its proposed findings of facts number 516, the Division sets the sale date as of September 6. However, that was Labor Day, a holiday, and since the transaction was settled on September 13, the trade date some five business days prior had to be September 3.

45/ Coincidentally with this transaction, Inserra also bought another, 5,000 shares of Control Data on September 2, half of which he placed in the account of Lomanaco and the other 2,500 shares in the account of one of his customers whom he knew would be out of the country for several months. These additional, 5,000 shares were also transferred by PK to Petronio on September 3 and sold, along with the Hettinger shares, the same day at a profit to Petronio. Hence, it is clear that J. Inserra not only used the SRGA to stockpile shares, but where he could get away with it, the accounts of his friends and relatives in the same manner. (The overseas customer had no advance knowledge of the purchase, and J. Inserra claims to have had some general verbal authority from this client).

On October 15, 1982 Inserra purchased, 3,500 shares of Paine Webber in Hettinger's account at 34-1/3. On October 21, the price of the stock having risen to 36-3/8, Inserra caused these shares to be PK'd from Hettinger's account to the account of CNYB (Petronio) and immediately sold at a profit to Petronio of $4,300. 46/

The rest of the trades follow the same pattern. On October 19, 1982 J. Inserra purchased 1,000 shares of MAPCO at 26 in Hettinger's account and on October 21, the shares having risen in price to 29-1/8, transferred them to CNYB (Petronio's) account from whence they were sold the same day at a profit of about $2,600.

On February 24, 1983, J. Inserra bought 5,000 shares of GWF in Hettinger's account at 20-3/4. By the next day, the stock having risen one full point J. Inserra had the stock transferred by PK to CNYB and sold the same day for a profit to Petronio of $5,000.

Finally, on February 18, 1983, J. Inserra brought 5,000 shares of FNMA in Hettinger's account at a price of

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46/ J. Inserra claims that he caused this transfer to be made because Hettinger did not want to trade any more. If so, why did he not sell the Hettinger shares at market at a profit rather than PK them to his friend Petronio to whom he loaned $40,000 on October 21 to support the transaction? This is unexplained.

21-1/2. On February 23, he caused the shares to be transferred to the account of his friend Squillace who had them already sold at a price of 22-1/2 for a net profit of approximately $3,500. J. Inserra had even loaned Squillace monies to help pay for the stock.

Day Trading

In addition to the foregoing, J. Inserra, after having the account for a number of years, began to engage in unauthorized active day-trading in the Hettinger account as follows:

On October 11, 1982 the account day traded 4,000 shares of Control Data with a loss of approximately $2,950.

On October 29, 1982, the account bought and sold, 1,500 shares of Teledyne with a loss of about $2,950.

On November 5, 1982 J. Inserra caused the Hettinger account to day trade 5,000 shares of GWF with a loss of approximately $970.

Additional day trades occurred on November 8, 11, and 14, 1982 in each of which the account suffered losses ranging from $970 to $5,800.

All of these day trades generated commissions to J. Inserra's credit of $10,425 and losses to Hettinger totalling $20,300. Hettinger does not know what day trading is and does not recall discussing it nor authorizing these transactions in his account.

Options Trading

In April or May of 1983, J. Inserra caused Hettinger to buy and sell put and call options on 12 occasions, the transactions ranging in size from 10 to 100 options. Hettinger does not remember discussing options with J. Inserra and never authorized their purchase in his account.

The options transactions in Hettinger's account ranged from $2,894 to $19,079 at a time when the equity in the account was about $66,000. The purchases by J. Inserra caused Hettinger to lose over $14,000 on these option trades or about 20% of his equity.

J. Inserra testified that he engaged in the day-trades and in the options transactions in an effort to get back some of Hettinger's other trading losses.

Dividends, Interest and Commissions

J. Inserra knew that Hettinger was interested in dividends to supplement his other retirement income. During the 3-1/2 year period from January 1, 1980 through June 30, 1983, the Hettinger account, on the investments made by J. Inserra, earned total dividends of $15,025. However, during the same period he was charged with interest payments on margin debit balances amounting to $29,705, exceeding dividends received by $14,680.

During the same 3-1/2 year period, the Hettinger account generated commissions for the Inserras amounting to $65,688. The Division has computed that the commissions, as a percent of the average monthly equity during this period, ranged between 22.5% and 27.0%. It further estimates that the annualized turnover rate for the period May 1982 through April 1983 amounted to 1,480%. Respondents have not submitted contrary figures.

Hettinger was never aware of the amount of commissions earned and never discussed the matter with J. Inserra.[47/] Despite his professed awareness that Hettinger was interested in income producing and quality grade securities, J. Inserra claims that when he transferred the 2,000 shares of Superior Oil on February 4, 1983 to the Hettinger account (and then promptly sold at a loss) he was doing a "technical trade" for Hettinger which he defines, as follows (Transcript pp. 913-4):

THE WITNESS: There's no fundamentals behind

47/ Some time after June of 1983 Hettinger filed for arbitration of claims against Shearson and J. Inserra resulting from the manner in which the account was traded over the years with particular reference to the unauthorized transactions described herein. The arbitration was settled by the payment to Hettinger by Shearson and Inserra of $125,000. For the purposes of this proceeding, no inference, adverse or otherwise, will be taken from the fact that J. Inserra settled the claim and paid half of the settlement amount.

my trading. I am not looking at earnings and interest and manufacturing facilities. I am using rumors and whims and moods. Very technical. Is the president going to sneeze today? Is something going to go wrong?

JUDGE SOFFER: It is a rough way to trade in the market.

THE WITNESS: I agree with you, but that's what technical is.

Gentile and the Hettinger Transactions

Shearson's Compliance Department had in place during the relevant period procedures designed to ensure that trade and sales practices were in accordance with pertinent law, rules and regulations, including certain audit procedures to detect possible violations thereof. To this end, Shearson's Account Analysis Section would prepare a "monthly activity run" for each branch indicating accounts that generated $1,000 or more in monthly commissions or that had 10 or more trades in one month. Where the account had generated $10,000 or more in commissions, year-to-date, it was highlighted with an asterisk.

The purpose of the activity run was to bring those accounts to the attention of branch managers for them to take steps to insure that the trading was in accordance with the customers' stated objectives, wishes, desires

and prior knowledge. The managers were required to review these accounts in accordance with those objectives, and to satisfy themselves that they were being traded properly by communicating, either verbally or in writing, with the clients. In turn, the managers were required to report to the Compliance Department what action they had taken with respect to these active accounts.

Shearson had four form letters which were recommended for use by the branch managers in contacting active accounts. Letter Number 1, a form of "thank you for your business" letter, invited inquiry by the customer as to any problems. Letter Number 2 is a follow up in the same vein. Letter Number 3, on the other hand, is a form that was sent to the customer in which the customer is asked to reply directly to the Compliance Director and to indicate his awareness (a) of all transactions in the account, (b) that these transactions resulted in the payment of significant commissions to the account executive, and (c) that they were made with the consent and prior full knowledge of the customer as to the nature of the speculative risk involved in these investments. Letter Number 4 is a more detailed version of Letter Number 3. Letter Number 3 was the one recommended for use with those accounts generating $10,000 or more in commissions in one year. This Letter required affirmative action by the

customer while number 1 and 2 would be deemed passive in tone.

Hettinger's account generated $1,000 or more in monthly commissions 24 times between December 1979 and December 1983, and $10,000 or more in annual commissions during the years 1980 ($18,000), 1982 ($27,000), and 6 months of 1983 ($10,000). 48/

In addition to the monthly activity runs, the Compliance Division audited each of the branches annually and reported to the branch managers as to the deficiencies found and remedies required. The audit report included a list of active accounts and recommended action with respect thereto. Thus, in the Utica Branch audit report dated October 16, 1981 which was sent to Gentile, the Hettinger account was listed as an active account and directed that "The Manager should utilize sample Letter #3" to get information verifying that these accounts were being properly traded. It was further directed that, if in the Branch Manager's opinion he deems it not feasible to obtain the letter, a memorandum to that effect stating the reason was to be sent to the Compliance Division by him.

In its audit report for the following year, dated

48/ The omitted year 1981 showed annual commissions of $9,600, slightly less than the target amount of $10,000.

September 7, 1982, Compliance again singled out the Hettinger account for its activity and instructed the investment executive (i.e., J. Inserra) to obtain activity Letter No. 3 from the client.

Despite the requirements concerning active accounts resulting from the monthly activity runs as they related to Hettinger, and the specific instructions contained in the annual audit reports, Gentile never required the sending of Letter No. 3 to Hettinger. Instead, on several occasions, he sent him No. 1 - the "thank you for your business" Letter - which merely invited communication from Hettinger.

Gentile's stated reason for not sending Letter No. 3 was that the obligations and directions to send it were not mandatory and that from his experience its language and tone would create a negative reaction from the customer and probably result in a loss of business. 49/ However, he did not explain this in a memorandum to the Compliance Department as required by the 1981 audit report.

The 1982 audit report showed that the Hettinger account generated more commissions ($12,740 for 8 months) than any other customer at the Branch closely followed by the Ramza Murad account. Hettinger's monthly account

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49/ It is quite likely that Shearson took this into consideration before drawing up this letter and directing its use.

statement for November 1982 reflected year-to-date commissions of $27,243, equity of $88,452, interest charges of $6,903, dividends of $6,162, and a debit balance of $30,347. By that time, the account had only one position, concentrated in 12,800 shares of "Weatherford Industries".

Gentile claims to have spoken with J. Inserra about the Hettinger account on several occasions, particularly once in January 1983. He claims to have been satisified with Inserra's oral explanation that Hettinger was "family", that he was formerly a business man and financially sound who had been in the stock market before, that they spoke frequently, specifically referring to a Thanksgiving family reunion when he supposedly went over Hettinger's account with him in the presence of other relatives. Based on J. Inserra's assurances, Gentile concluded that there was nothing unusual going on in this account. He claims not to remember having discussed Hettinger with Inserra when the audit reports were first handed down. He did not check any of the other information on file, such as account statements, to determine whether there was written discretionary authority, whether there were any changes in trading patterns, or to examine the amount of commissions generated, whether the account was profitable, whether there was day-trading or option trading in the account, and, if so, whether it was authorized,

and whether J. Inserra complied with the instructions in the September 7, 1982 audit to obtain activity Letter Number 3 from the client. In other words, according to Gentile, he accepted whatever explanation he got from J. Inserra as to what was going on in the Hettinger account, without any other inquiry as to why this account was constantly showing such high commissions month after month, year after year.

Discussion and Conclusions

Section 10(b) of the Exchange Act makes it unlawful for any person in connection with the purchase or sale of any security to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 promulgated thereunder makes it unlawful for any person, directly or indirectly:

> "(1) to employ any device, scheme or artifice to defraud, or
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Section 206 of the Adviser's Act makes it unlawful for any investment adviser, directly or indirectly:

> "(1) to employ any device, scheme or artifice to defraud any client or prospective client;

> (2) to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client;"

The Fraudulent Conduct

At noted heretofore, the pattern of trading in the SRGA, as depicted in Schedules I and II herein, demonstrates that whereas the overwhelming preponderance of PK transfers to the TFAs occurred at a time when the market price of the securities had dropped from their trade date prices, the overwhelming majority of those trades transferred by PK to the individual customers showed a price increase over the original trade date price. Additionally, in a great majority of the transfers to the individuals, the securities were sold virtually simultaneously with the transfer, to their immediate profit further justifying the conclusions that the trading patterns resulted from a conscious and deliberate plan rather than the taking of a "random walk".

Other facts developed in this lengthy record support the conclusions drawn from the trading patterns.

First, as the record shows, the professed need for the establishment of a holding account was never substantiated, neither by proof that Giura ever gave an order to the Inserras in which he did not specify to which of the TFAs the securities were to go, nor by proof that other means did not exist. Thus, if securities had to be parked

for a day or so, anyone of the three TFAs was readily available from which securities could have been later PK'd to the proper accounts. Hence, there must have been some other motivation for the opening of the SRGA.

We have seen the several attempts prior to the SRGA at inventorying securities, as in the "no-name" account and in the individual customers' accounts from where Cities Services stock was dumped on the TFAs when they began to decline in price. It has also been noted that J. Inserra, very soon after the SRGA was created, began to use the account for purposes inconsistent with the alleged reasons for its creation and supported by a totally unbelievable story. 50/ Although it is not necessary to show that respondents directly profited, the extent to which they did plus the close relationship between the Inserras and their customers lends sufficient support for the conclusion that the fraud existed.

Finally, the "I'll scratch your back - you scratch mine" relationship shown to have existed among the

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50/ These stories plus the generally unsatisfactory testimony by the Inserras as to their alleged lack of memory about transactions in the SRGA amount to concealment of what was truly intended. Personal observation of the demeanor of the respondents and the obfuscatory nature of their testimony lends further support to the conclusion that the Inserras were engaged in a scheme to defraud as outlined in the Order.

Inserras, Giura, Gentile, Shearson and Stein Roe tends to account for the fact that the Inserras were permitted to engage in the SRGA transactions without objection, interference or supervision by Giura, Gentile or Shearson.

The substantial loans made by J. Inserra in order to enable his customers to make unusually large (for them) purchases would indicate that he, at least, had a greater interest in these transactions than appears in the record at this time.

The question remains as to what motivated the Inserras, who were profiting handsomely from the Teamster business (particularly G. Inserra with his 001 account), to seek additional gains for themselves, their friends and relatives. Concedely, in many instances there is an absence of direct proof that the Inserras were personally profiting from the transactions except for commissions. However, G. Inserra's wife, Nancy Breitbach, netted at least $47,250, Squillace turned over his profits on transactions to J. Inserra, Breitenstein applied profits against money said to be owed to the Murad account by G. Inserra, and Corvino was given a chance to profit at the behest of his long-time friend Giura. These transactions directly or indirectly were of benefit to the Inserras and point the way to the motive behind the other transactions.

Respondents Inserras' defense to the fraud allegations is based in large part upon a challenge to the reliability of the time records in the SRGA transactions. It is their contention that in all instances no more than 24 hours elapsed between the time securities were purchased for the SRGA and the request that they be PK'd either to the TFAs for those transactions supposedly directed by Giura or to the retail customer accounts for those securities "inventoried" by J. Inserra. Hence, they deny they had the time to study price quotations before deciding where to place the securities. They attribute the longer intervals shown by the time stamped on the PKs as being caused not by themselves but by delays arising out of the operations in the Utica branch office resulting from volume of work, incompetence of personnel, Gentile's absence from the office and internal jealousies and equipment breakdowns. Thus they attack one of the principal foundations of the Division's case.

Looking at this timing we find the following:

The testimony of Rhonda Yagey, the Inserra's assistant, is that when she received instructions as to where securities would be transferred out of SRGA, she would promptly submit the information to the back office for the issuance of a PK. It is also clear that once the PK was prepared and delivered to the wire operator, it went out the same

day. Thus, if there were any delays they had to have occurred between these two events and involve the preparers of the PKs.

The testimony is conflicting among the different office personnel involved with preparing and recording PKs. On the one hand, several of them insist that PKs were processed promptly while others said intervals of 2 to 4 days would occur. Respondents charge the former group with bias and prejudice against them and in some instances there is merit to these charges. Nevertheless, the objective facts do not justify the position taken by respondents.

In the first place, the number of PKs involved with the SRGA, averaging a little more than one a week over the 12-month relevant period would hardly be enough to have been affected adversely by problems in the back office. The PK form itself requires information which can well be completed in about 5 minutes. Nor should their lower-than-first priority have prevented them from prompt attention especially since promptness in processing PKs was required for orderly record-keeping.

Secondly, in most instances the PKs were date-stamped on the same day that the securities were sold out of the individual customer accounts. This, then, would indicate that instead of random and fortuitous treatment, there

was a deliberate plan of correlating when the securities were transferred to these accounts and when they were sold on the market at a profit.

Finally, the observed pattern of transfers to the TFAs of losing trades and to the individual customers of profitable ones is consistent with the testimony that there was no undue delay in the processing of PKs. Even if there were delays, they do not alter the observable pattern nor the conclusion that it was the result of deliberate conduct.

One of the required elements to show a violation of Section 10(b) and Rule 10b-5 is that respondents acted with "scienter", defined as "a mental state embracing intent to deceive, manipulate, or defraud". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, n.12 (1976). Scienter is established by knowing or intentional conduct. Aaron v. SEC, 446 U.S. 680, 690 (1980). It may also be established by reckless conduct. Nelson v. Serwold, 576 F.2d 1332, 1337-8, (9th Cir.), cert. den., 439, U.S. 970 (1978). Courts recognize that absent an admission by defendant, scienter may be inferred from circumstantial evidence which "can be more than sufficient". Herman & McLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983).

There can be no doubt that respondents acted with scienter. The scheme and plan demonstrated by the

circumstances in this case could only have come about with a deliberate and planned intent to manipulate the SRGA and to defraud the TFAs accordingly.

It is concluded from the record herein that respondents Inserras willfully [51/] violated Section 10(b) and Rule 10b-5 thereunder in that they were engaged in a scheme to defraud the TFAs by purchasing securities in the SRGA which, if they rose in value were transferred to accounts of their friends, relatives and business acquaintances, who profited from the differences in price, but which if they declined in value, or did not rise in value, were transferred to the TFAs which suffered the losses resulting from the difference in price.[52/]

The Hettinger Churning

The Order charges that between 1980 and June, 1983, J. Inserra violated the anti-fraud provisions of the

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51/ It is well established that a finding of willfulness does not require an intent to violate the law; it is sufficient that the one charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C, 344 F.2d 5, 8, (C.A. 2, 1965); and Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (1976).

52/ Respondents have also been charged with failure to disclose to the TFAs that they were engaged in the scheme described. There has been no proof of this failure to disclose. In fact, they might very well have told the TFAs trustees, their lifelong friends, what they were doing. However, there is no proof of that, either.

Exchange Act with respect to the Hettinger account by engaging in unauthorized transactions and excessive and unsuitable trading (i.e., "churning").

In order to establish churning, it must appear: (1) that the broker exercised control over the trading in the account; (2) that the trading in the customer's account was excessive in light of his investment objectives; and (3) that the broker acted with the intent to defraud, or with wilful and reckless disregard for the interests of his client. Rolf v. Blythe, Eastman, Dillon & Company, Inc., 424 F.Supp. 1021, 1029-1040 (S.D.N.Y. 1977), 570 F.2d 38 (1978), cert. den., 439 U.S. 1039, and Mihara v. Dean Witter & Co., 619 F.2d 814, 821 (C.A. 9, 1980).

Churning essentially involves improper purpose on the part of the broker to derive profits for himself with little regard for the interests of his customer. Stevens v. Abbott, Proctor & Paine, 288 F.Supp. 836, 845 (E.D. Va. 1968).

With respect to the question of control, evidence that the client routinely follows the recommendations of the broker is an important consideration. Mihara, supra, at page 821. Equally important are considerations of the investors' sophistication in securities transactions and independent evaluations about the handling of his account.

Tiernan v. Blythe, Eastman, Dillon & Co., [1983-4 Transfer Binder] Fed. Sec. L. Rep. (CCH). ¶99,517 (C.A. 1, 1983). The latter would include for consideration the customer's age, education, investment and business experience, the relationship between the customer and the broker, regularity of discussions between the customer and the broker and whether trades were authorized or rejected by the customer.

The record establishes sufficient degree of control in J. Inserra over the Hettinger account considering the age of Hettinger, his employment background, the family relationship between them and the manner in which transactions occurred. When he opened the account, he intended to and did allow J. Inserra to execute transactions in the account without prior discussions. Occasional discussions at family meetings between J. Inserra and Hettinger were no substitute for the fact that for long periods, Hettinger was unaware of what was going on in his account until he received confirmations or monthly statements from Shearson. However, he paid no attention to them, choosing to rely upon his faith in J. Inserra to look out for his interests. It is clear that not only did Hettinger routinely follow the recommendations of Inserra, but at no time did he suggest trades nor object to trades made by Inserra. Having observed Hettinger's demeanor, it is concluded that Hettinger had neither sufficient education nor financial

acumen to independently evaluate Inserra's recommendations and the way he played fast and loose with the account.

With respect to the question of whether trading in Hettinger's account was excessive in light of his investment objective, the following must be considered. His age, prior business experience, and the limited nature of his investment experience showed a need for investments that would produce dividends and interest to supplement his pension and social security income, which was known to J. Inserra when the account was first opened.

As noted heretofore, these investment objectives were not met when Inserra on three different occasions transferred securities from the SRGA to Hettinger for losses totaling $10,270, nor when on five occasions Inserra purchased securities in the Hettinger account and then, as the price of the security increased, PK'd them into the accounts of his friends and immediately resold the stock at a profit, for all of which Inserra offers the weak and inaccurate excuse that in each instance the Hettinger account became over-extended.

Further, the investment objectives were not being met when, without notice to or approval of Hettinger, on six different occasions in about a one-month period, Inserra caused day trades to be made in the Hettinger

account with losses to Hettinger totaling $23,300 and Inserra earned commissions of $10,425. Nor were investment objectives being met when Inserra caused Hettinger to buy and sell put and call options on 12 occasions at substantial losses.[53/] In fact, there is nothing in the record to show that Hettinger even understood or was advised of the nature of day trading, margin trading or options trading.[54/]

It is also clear that J. Inserra was engaging in unsuitable trading on the part of Hettinger. These transactions are in violation of Article III, Section 2, of the N.A.S.D. Rules of Fair Practice, the so-called "know your customer" rule providing that, in making a recommendation to a customer, a salesman must have "reasonable grounds" for believing it suitable for that customer.

53/ Day trading is commission-intensive since there is both an in and out charge in a one-day period. Options trading is commission-intensive, since they are written for no more than 90 days during which there are either one or two commissions earned.

54/ As stated at the outset of the Report of the Special Study of the Options Markets to the Securities and Exchange Commission, H.R., Com. Print IFC3, 96th Cong., 1st Sess. 451 (1978), transactions in listed options involve:

> "a high degree of financial risk. Only investors who are able to sustain the costs and the financial losses that may be associated with options trading should participate in the listed options markets. Too often, public investors have been encouraged to use listed options without regard to the suitability of options for their investment needs."

With respect to the third element of churning, "scienter", it is evident that the "totality of the circumstances", as described in Stevens, supra, p. 847, clearly spells out a deliberate intent to defraud Hettinger.

It was shown heretofore that the interest payments on Hettinger's margin indebtedness was almost twice as much as the dividends earned, that the commissions of $65,600 earned during a 3-1/2 year period showed a very high percent of the average monthly equity in the account. The annualized turn-over rate was also extremely high.[55/]

Having the right to exercise de facto control over the Hettinger account gave J. Inserra the kind of freedom he needed in manipulating the purchases in and out of the SRGA, and another account in which to carry out the fraudulent practices similar to those shown in the SRGA, without regard to the effect on Hettinger's interests.

It is concluded from the foregoing that J. Inserra wilfully violated Section 10(b) and Rule 10b-5 thereunder

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55/ J. Inserra argues that Hettinger was kept aware of the activities in his account when he received trade confirmations and monthly statements. He did not object at that time to the transactions. However, in Hecht v. Harris, Upham and Co., 430 F.2d 1202 (CA 9- 1970), the Court affirmed a finding of excessive trading where the customer, a 77-year old woman with no advanced education, did not appreciate the excessive nature of the trading in her account. The Court further rejected the argument that the customer was precluded from asserting her claim because she had received confirmation slips and monthly statements.

by his excessive and unsuitable trading and the other acts in the Hettinger account. 56/

The Aiding and Abetting Violations

Because Section 206 of the Advisers Act is aimed at fraudulent conduct engaged in by an investment adviser (in this case the registrant Stein Roe), others alleged to be participating in the fraud may be charged only as aiders and abetters. All respondents herein, the Inserras, Gentile and including the Stein Roe partner, Giura (who has already been sanctioned), are so charged in paragraph 36 of the Order as to the scheme to defraud the TFAs under Section 206.

Based upon the same allegations and specifications of fraudulent conduct, the Inserras are also charged as, and have hereinabove been found to be, primary violators of Section 10(b) of the Exchange Act and Rule 10b-5. Hence, it would serve no useful purpose to go through the motions of also finding a separate aiding and abetting violation against them on the same facts under Section 206. Gentile is also charged as an aider and abetter of the Section 10(b) violations.

56/ Moreover, the churning violation is itself a scheme or artifice to defraud and a fraudulent and deceptive device within the meaning of Rule 10b-5. Mihara, supra, at page 821.

Finally, J. Inserra has been charged with and has been found hereinabove to have violated the antifraud sections of the Exchange Act by churning the Hettinger account. Gentile is again charged as an aider and abetter of this violation.

Consequently, the only remaining unresolved charges herein are those against Gentile as an aider and abetter of both the fraud and the churning violations.

In order for one to be found an aider and abetter of a securities law violation, it has generally been held that three elements must be present:

(1) another party has committed a securities law violation;

(2) the accused aider and abetter has a general awareness that his role was part of an overall activity that was improper or illegal;

(3) the accused aider and abetter knowingly and substantially assisted the principal violation. 57/

That the Inserras have committed securities law violations has heretofore been shown. Stein Roe, as an investment adviser and, hence, a fiduciary to the Teamster funds, was a primary violator through the actions of one of

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57/ Investors Research Corp., et al. v. Securities and Exchange Commission, 628 F.2d 168, 177 (D.C. Cir.), cert. den., 449 U.S. 919 (1980); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-97 (5th Cir. 1975).

its senior partners, Giura. Hence, the first ingredient has been established.

The second and third constituents of aiding and abetting, involving "general awareness" and knowing and substantial assistance embrace an element of scienter to be shown on the part of the accused aider and abetter.[58/] The parties hereto are in sharp disagreement as to whether the acts of Gentile with respect to the SRGA and churning violations demonstrated a sufficient degree of scienter as to establish his liability as an aider and abetter. His acts and failures to act, can be summarized as follows:

(1) Gentile approved the opening of the SRGA without making an effort to verify the accuracy of G. Inserra's story as to the need for a holding account to accommodate Giura's orders. For example, he failed to check to see whether Giura was, in fact, placing orders for securities with Inserra in the manner described.

(2) He failed to check with the New York trading desk to verify that Inserra was having difficulties caused by changes in computers.

(3) With particular regard to the PKs, Gentile failed in many instances to sign the PKs promptly or even to sign at all.

58/ The ingredients of scienter have heretofore been set forth at page 73.

(4) He failed to observe that the PKs transferring trades out of the SRGA were going to margin accounts (and, hence, not to the TFAs).

(5) He failed to seek the reasons for the numerous transfers of securities by use of the PK from the SRGA, or to note the unusual size of the trades going to individual customers of the Inserras.

(6) He further failed to give more than purfunctory attention as to the number of PKs being generated by the Inserras, or to the reporting to him of the fact that some of the PKs were being issued post settlement, or, for that matter, to the length of time that elapsed between the trade dates and the PK dates. Generally, he failed to note that the executed PKs did not contain the reasons for their issuance although required by company policy and the form itself.

(7) Although the Hettinger account was one of the most active individual accounts in the branch, Gentile failed to make independent inquiry as to whether such activity was authorized and suitable, or the result of being churned. Specifically, when the activity was called to his attention as a result of company audits, he failed to comply with the auditors' requests that he send Letter No. 3 to Hettinger, nor did he advise the Compliance Department, as he was required to do, as to the reasons

for his failure to send that Letter. He did send the rather bland Letter No. 1. Another "red flag" which he ignored was the Hettinger trading volumes shown in the monthly activities reports, except to have had a conversation with J. Inserra about the account and to have accepted without further inquiry the explanations given.

The Division contends that as result of the conduct cited above, Gentile did not comply with his duties as branch manager and his related obligations under appropriate Stock Exchange rules and of Shearson. It is further argued the Gentile violated a fiduciary duty owed to the Utica branch customers, including the TFAs and Hettinger, so that even if not evidence of scienter directly, his conduct showed a reckless disregard of obligations amounting to scienter.

Gentile, on the other hand, while recognizing that where there is a fiduciary duty owed by an alleged aider and abetter to a defrauded party recklessness may satisfy the scienter requirements, argues that he was not a fiduciary either of the TFAs or of Hettinger. He further contends that his conduct was one of inactivity, that he did not engage in any affirmative acts to aid and abet the frauds allegedly being perpetrated, and that his only liability might be a violation of the statute pertaining

to failure to supervise the Inserras. 59/

It is noted that virtually all of the proof relating to Gentile's aiding and abetting liability embraces inaction: a failure to carry out his duties as branch manager with respect to activities in SRGA and in the Hettinger account which might have disclosed and further prevented the primary violations. 60/

In this connection, the following statement by the Commission in Fox Securities Company, Inc., et al., 45 S.E.C. 377, 383 (1973) is noteworthy:

> "In some situations the difference between aiding and abetting and failure of supervision may be somewhat shadowy, with aiding and abetting connoting more of an active participation in or awareness of improprieties, and failure to supervise connoting more an inattention to supervisory responsibilities when more diligent attention would have uncovered improprieties."

The question arises herein as to whether Gentile's failures to act can support a charge that he was thereby aiding and abetting the frauds perpetrated by the Inserras.

59/ Section 15(b)(4) of the Exchange Act imposes upon a broker-dealer or any of its associated persons, a duty reasonably to supervise their employees with a view to preventing violations of the various securities statutes, rules and regulations. Violation of this Section may result in sanctions.

60/ While it would appear that Gentile's conduct does amount to a failure to supervise, such a violation for some reason has not been charged. Hence, it cannot be the basis for a finding under Section 15(b)(4).

The cases on this issue seem to agree that mere inaction or failure to carry out the duties of one's position is not sufficient to sustain a charge of aiding and abetting unless the inaction was done with a conscious intent to aid the fraud, or where the alleged aider and abetter owes a fiduciary duty to the one defrauded. In the latter case, a showing of recklessness could substitute for a showing of scienter.

It was recently held that unless there were a fiduciary duty between the alleged victim and the perpetrator of the fraud, a failure to act would lead to liability "only if the inaction was knowing and with conscious intent to aid the fraud" and that awareness and approval, standing alone, do not constitute substantial assistance. Armstrong v. McAlpin, 699 F.2d 79, 91-92 (2nd Cir. 1983).

Although the requirements for an aiding and abetting violation require that there be scienter on the part of the one charged, where the alleged aider and abetter owes a fiduciary duty to the one defrauded, recklessness is enough. If there is no fiduciary duty, the scienter requirement scales upward when activity is more remote; therefore, the assistance rendered must be knowing and substantial. See Armstrong, supra, p. 91; Edward & Hanly v. Wells Fargo Securities Clearance Corp., 608 F.2d 478,

484 (2nd Cir. 1979), cert. den., 444 U.S. 1045 (1980); and Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975).

Inaction on the part of the alleged aider and abetter ordinarily should not be treated as substantial assistance, except when it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act. See IIT, An International Investment Trust v. Cornfeld, 619 F.2d 909, 925-7 (2d Cir. 1980).

Other than where the silence is a part of the scheme and intended to advance its purposes, where there is a fiduciary duty to the defrauded party by the alleged aider and abetter, the showing of recklessness rather than a stricter standard involving proof of intent to defraud, would suffice. Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it. Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 44-47 (2d. Cir.), cert. den., 439 U.S. 1039 (1978).

In Woodward v. Metro Bank of Dallas, supra, at p. 97, it is stated that:

> "When it is impossible to find any duty of disclosure, an alleged aider-abetter should be found liable only if scienter of the highest 'conscious

intent' variety can be proved. Where some special duty of disclosure exists, then liability should be possible with a lesser degree of scienter".

Finally, the IIT decision refers to cases in other than the Second Circuit some of which refuse to impose aiding and abetting liability for inaction except when there existed an independent duty to disclose and others which have taken the view that mere inaction can constitute substantial assistance even in the absence of an independent duty to disclose but only if there was a "conscious intention" to forward the violation of Rule 10b-5. Moreover, the Court in IIT, cites Ruder, Multiple Defendants in Securities Law Fraud Cases, etc., 120 U.PA. L. Rev. 597, 644 (1972), that inaction can create aider and abetter liability only when there is a conscious or reckless violation of an independent duty to act.

The first question with respect to the alleged aiding and abetting by Gentile is whether his inaction was a "conscious intent" on his part to assist the carrying out of the frauds. There is no direct evidence in this record that he was aware of or a participant in the frauds through deliberate inactivity, or even that he knew of their existence.

The position of the Division is that Gentile must have known what was going on in the SRGA and the Hettinger

account, or should have known had he but paid attention to the "red flags" placed before him. It is further argued that Gentile's inaction amounted to recklessness which can be a substitute for scienter.

The Division has the burden of proving the elements of aiding and abetting against Gentile, including that he had been an active participant in the frauds. Yet, since his inactivity would be equally consistent with the finding of a lack of supervision as with one of conscious intent to aid and abet (it cannot be both),[61/] it must be concluded that the Division has not sustained its burden of proving active participation with conscious intent on Gentile's part arising out of his inactivity.

As seen, the cases would impose a lesser standard of scienter, say, recklessness, where the accused aider and abetter owes a fiduciary duty to the one defrauded. The Division contends that Gentile's duties and responsibilities as branch manager for Shearson to supervise activities and to prevent violations somehow created a duty to every customer of the branch, including the SRGA and Hettinger,

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61/ See Adolph D. Silverman, et al., 45 S.E.C. 328, 331 (1973) wherein the Commission said:

> With respect to the same misconduct one cannot be a substantive wrongdoer and a deficient supervisor.

See, also, Anthony J. Amato, 45 S.E.C. 282, 286-7 (1973).

with whom he normally had no contact, either as an adviser or as an account executive. In Trustman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., [1984-1985 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 91,936, at page 90,671, (U.S.D.C. C.D. Cal. 1985), it was stated that:

> A fiduciary relationship between a broker and a customer does not arise as a matter of law. (Citing cases)

and further that (at p. 90670):

> * * * neither a brokerage firm nor a manager of a branch office has a duty to supervise each transaction that is made in every acccount.

Hence, it is concluded that no fiduciary relationship existed on Gentile's part by virtue of his position as branch manager and of his duties as such.

Finally, there is the question of whether "special circumstances" existed from which one could find that a fiduciary duty was created. See Brennan v. Midwestern United Life Insurance Co., 259 F.Supp. 673, 681-2 (U.S.D.C., N.D. Ind.), aff'd 417 F.2d 147 (7th Cir.), cert. den., 397 U.S. 989 (1970); and Lanza v. Drexel & Co., 479 F.2d 1277, 1303 (2nd Cir. 1973). The only other special circumstances which might have given Gentile a fiduciary status is the fact that he apparently did not want to antagonize the Inserras by interfering with their activities since they were the largest producers in the Utica branch, contributing to the overall financial position and to his personal

income. However, this closing of the eyes to the Inserras' conduct is more properly associated with a supervisory failure than with the aiding and abetting of fraud.[62/]

Under all of the circumstances, it is concluded that the Division has failed to sustain its burden of proving that Gentile's actions and inactions made him an aider and abetter of the Inserras' frauds. At best, his conduct amounted to a failure of supervision, a violation with which he is not charged. Accordingly, the proceedings against him should be dismissed.[63/]

62/ As stated by the Commission interpreting failures to supervise over "good salesmen", in Smith, Barney, Harris Upham, & Co., Inc., S.E.A. Rel. No. 21813, March 5, 1985, 32 S.E.C. Docket 999, 1011:

> The Commission also is concerned about the inherent tension between productivity and adequate supervision in light of the competitive conditions presently confronting the securities industry. A production-oriented policy raises the concern that some broker-dealers may overlook compliance related difficulties by employees who are top salesmen.

63/ Following the filing of the respective briefs by the parties herein, counsel both for the Division and for respondent Gentile have called my attention to some recent decisions.

The Division has cited the Commission's opinion, particularly the concurring opinion of Chairman Ruder, in E.F. Hutton & Company, Inc., SEA Rel. No. 25887, July 6, 1988, 41 S.E.C. Docket 473, 483, to support its contention that a fiduciary relationship existed between Gentile and the TFAs. However, the Hutton opinion merely stands for the proposition that when a customer gives a specific order to his broker to purchase a security, a relationship of principal and agent is created between the two of them solely for the execution of the order given, a question which is not involved in this proceeding.

(FOOTNOTE CONTINUED NEXT PAGE)

Public Interest

In its brief, the Division urges that as a result of their violations of pertinent laws and regulation the Inserras should be excluded from the securities industry. Their counsel, on the other hand, argues that a lesser sanction would be in order contending that the TFAs did not suffer any losses as a result of the activities

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63/ (Foonote Continued)
Similarly, Gentile's counsel directed my attention to a hearing on motions to dismiss the complaint in a civil action entitled The New York State Teamsters Counsel Health and Hospital Fund, et al. v. Stein Roe and Farnham, Inc., et al. in the U.S.D.C., N.D.N.Y., 87 Civ. 718, an action embracing the same individuals, plus others, who are parties to this proceeding and involving the use of the SRGA. Gentile's counsel furnished me with a transcript of the hearing on the motions held May 25, 1988 in which it appears that the greatest portion of the hearing was taken up with whether the SRGA transactions were subject to the provision of the "RICO" statutes, a matter which is not involved in this proceeding. In addition, the District Court dismissed with a right to replead a claim for civil damages under Section 10(b) and Rule 10b-5 apparently because he felt that the transactions in and out of the SRGA constituted transfers of securities and not acts done "in connection with" the purchase or sale of securities. This is a contention that has not previously been raised by the respondents either at the hearings or in their briefs, but whether it has been waived need not be determinative. While I do not have before me the particular cause of action that was dismissed, the District Court Judge did not have before him the benefit of the evidence adduced at the extensive hearings that have been held in this proceeding showing that transfers of securities were not involved herein but rather a substitution of the TFAs as the actual purchaser or seller by use of the error correction form "PK". Hence, the fraud against the TFAs was clearly "in connection with" purchases or sales by them. Finally, as correctly observed by Gentile's counsel, the ruling in the District Court is not binding upon me.

described, that respondents have already suffered "setbacks" by being suspended by Shearson for two months at a loss of an alleged estimate of $150,000 in commissions, that they no longer service the Teamster accounts, and that they have been employed for the past 4-1/2 years by another broker-dealer during which time their conduct has been exemplary.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v. S.E.C., 316 F.2d, 137, 141 (2d Cir. 1963); Leo Glassman, 46 S.E.C. 209, 211 (1975); Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975); and Collins Securities Corp., 46 S.E.C. 20, 42 (1975). Sanctions shoud also serve as a deterrent to others. Richard C. Spangler, Inc., 46 SEC, 238, 254 n.67 (1976).

The Inserras have been found to have committed a highly egregious fraud. Through their misuse of the SRGA, they have caused the TFAs to expend substantial sums of money in paying higher than market prices for the securities transferred to them by the Inserras. Not satisfied with the high commissions they were earning for very little effort other than to bring certain parties together, their greed impelled them to obtain additional funds through the fraudulent devices hereinbefore outlined.

The total extent to which the Inserrras may have profited from the use of the SRGA is not revealed in this record. However, G. Inserra used this account to help repay some of his obligations to Breitenstein. His wife, Nancy Breitbach, derived profits of $53,250. The Inserras were able to accommodate Giura's friend Corvino to share in some of the profitable transactions. J. Inserra also received the profits earned by his friend Squillace to repay for monies owed to him.

Finally, there is the way that J. Inserra played fast and loose with the funds of his wife's grandfather, Hettinger, the "old man" with the "deep pockets".

One of the significant factors to be concerned with in assessing a sanction is the likelihood of the Inserras committing further violations in the future. Based upon the deliberate manner in which they set up and later misused the SRGA and their observable demeanor and attitude while testifying as witnesses in this proceeding, it is concluded that they would be likely to commit such acts again.

Their story to Gentile and others as to the necessity for the SRGA was apparently made up out of the whole cloth. There never was any proof in this reord that Giura was, in fact, giving orders for securities without designating the account that was to receive them. In truth, Giura gave very

few, if any, orders directly to the Inserras for execution. J. Inserra's explanation that he was "inventorying" securities in order to encourage him to work his accounts is ridiculous on its face.

The continued insistence upon these stories during their testimony, their obvious attempt to cover up facts through a convenient "loss of memory", and the conflicting and obfuscatory nature of their testimony, all lead to the conclusion that they would be likely to commit similar acts in the future. The fact that during the pendency of these proceedings they have apparently behaved themselves while continuing in employment is not unusual. On the other hand, it has not been overlooked that J. Inserra did attempt to make some restitution to Hettinger.

What stands out in the record herein is the failure on the part of respondents to recognize the magnitude of their misconduct, which becomes a strong indication that they could very well repeat such conduct in the future. As the Commission observed in Arthur Lipper Corporation, et al., 46 S.EC. 78, 101 (1975):

> "Congress, in writing Section 15(b) of the Exchange Act, viewed past misconduct as the basis for an inference that the risk of probable future misconduct was sufficient to require exclusion from the securities business. Having been directed by the Act to draw that inference whenever that discretion leads us to consider it appropriate, we must do so if the legislative aim is to be obtained". (Footnote omitted)

Accordingly, it is concluded that in order to protect the investing public from future harm and to deter respondents and all others who may be tempted to engage in similar misconduct, nothing less than a bar from association with a broker or a dealer or with an investment adviser would satisfy these requirements. 64/

ORDER

Under all of the circumstances herein,

IT IS ORDERED that respondents George Inserra and John Inserra, respectively, be barred from association with a broker, dealer or investment adviser; and

IT IS FURTHER ORDERED that the proceedings against respondent Nicholas J. Gentile be dismissed.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of

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64/ A permanent bar order is not necessarily an irrevocable sanction; upon application the Commission, if it finds that the public interest no longer requires applicant's exclusion from the securities business, may permit his return. Hanly v. S.E.C., 415 F.2d 589, 598 (2d. Cir. 1969).

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. 65/

Jerome K. Soffer
Adminstrative Law Judge

September 30, 1988
Washington, D.C.

65/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments herein have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.

SCHEDULE I
Transactions Involving Transfers of Securities from SRGA to the Teamster Funds Accounts

Trans. No.*	Security and No. of Shares	Trade Date 1982	PK Date 1982	Purch. Price	Closing Price (a)	Money Diff.
1A	CS- 600	6/3	6/9	36-3/4	35-1/2	($ 750)
1B	CS- 400	6/3	6/9	36-7/8	35-1/2	(575)
2A	CS- 1,000	6/4	6/9	37-7/8	35-1/2	(2,375)
2B	CS- 3,000	6/4	6/9	38	35-1/2	(7,500)
3	IBM- 1,000	8/17	8/19	65-7/8	65-3/4	(125)
4A	DGS- 500	8/25	9/1	12-1/2	12-1/2	-------
4B	DGS- 700	8/25	9/1	12-5/8	12-1/2	(87)
4C	DGS- 8,800	8/25	9/1	12-3/4	12-1/2	(2,200)
5A	DGS- 1,000	9/1	9/10(b)	12-3/8	12-7/8	500
5B	DGS- 1,500	9/1	9/10(b)	12-1/2	12-7/8	562
5C	DGS- 2,000	9/1	9/10(b)	12-5/8	12-7/8	500
5D	DGS- 2,500	9/1	9/10(b)	12-3/4	12-7/8	313
5E	DGS- 3,000	9/1	9/10(b)	12-7/8	12-7/8	------
6A	MDA- 300	9/8	9/14	26-1/8	25-3/4	(112)
6B	MDA- 500	9/8	9/14	25-3/4	25-3/4	-------
6C	MDA- 2,000	9/8	9/14	25-7/8	25-3/4	(250)
6D	MDA- 2,700	9/8	9/14	26-1/4	25-3/4	(1,350)
6E	MDA- 4,500	9/8	9/14	26	25-3/4	(1,125)
7A	HON- 1,400	9/21	9/27	83-7/8	81-7/8	(2,800)
7B	HON- 600	9/21	9/27	84	81-7/8	(1,275)
8A	ESY- 500	10/11	10/12	44-1/4	43-3/4(c)	(250)
8B	ESY- 500	10/11	10/12	44-1/2	43-3/4(c)	(375)
8C	ESY- 1,200	10/11	10/12	44-3/8	43-3/4(c)	(750)
8D	ESY- 1,100	10/11	10/12	44-3/4	43-3/4(c)	(1,100)
8E	ESY- 700	10/11	10/12	44-5/8	43-3/4(c)	(612)
9A	PW- 3,000	10/13	10/21(b)	34-3/8	35-1/2	3,375
9B	PW- 7,000	10/13	10/21(b)	34-1/4	35-1/2	8,750
10A	FNMA- 1,500	11/18	11/26	24-3/8	24-1/8	(375)
10B	FNMA- 3,500	11/18	11/26	24-1/2	24-1/8	(1,312)
10C	FNMA- 2,000	11/18	11/26	24-1/8	24-1/8	------
10D	FNMA- 3,000	11/18	11/26	24-1/4	24-1/3	(375)

NOTES TO SCHEDULE

* Since several transactions were frequently combined on one trade ticket, they are grouped accordingly.

(a) Price at closing, day before PK date.
(b) PK'd after settlement date
(c) Closing price on PK date

SCHEDULE I
Transactions Involving Transfers of Securities
from SRGA to the Teamster Funds Accounts

Trans. No.	Security and No. of Shares	Trade Date	PK Date	Purch. Price	Closing Price (a)	Money Diff.
11	FNMA- 2,000	11/22	12/1	24-1/2	23-1/4	($ 2,500)
12A	FNMA- 300	12/6	12/15(b)	24-3/4	23-1/4	(450)
12B	FNMA- 1,000	12/6	12/15(b)	24-7/8	23-1/4	(1,625)
12C	FNMA- 3,700	12/6	12/15(b)	25	23-1/4	(6,475)
13	IBM- 2,000	12/7	12/15(b)	95	91	(8,000)
14	IBM- 2,000	12/8	12/15	95-1/4	91	(8,500)
15	FNMA- 5,000	12/22	12/30	24-5/8	25	1,875
16	IBM- 2,000	12/22	12/30	96-1/8	96-5/8	1,000
17	AHS- 2,000	1983 1/7	1983 11/1	28-3/8	28-1/2	250
18	MDA- 1,000	1/10	1/17	26	25-7/8	(125)
19	AHS- 1,000	1/10	1/17	28-1/4	26-1/8	(2,125)
20	ALOG-3,000	1/11	1/18	42-1/2	42-1/2	------
21A	HON- 400	1/17	1/24	97-1/4	88-1/8	(3,650)
21B	HON- 600	1/17	1/24	97-1/2	88-1/8	(5,625)
22	HON- 1,000	1/18	1/24	93	88-1/8	(4,875)
23	RON- 10,000	1/26	2/1	13-1/8	11-5/8	(15,000)
24A	DTP- 3,500	2/7	2/10	22-3/8	21-3/4	(2,187)
24B	DTP- 6,500	2/7	2/10	22-1/2	21-3/4	(4,875)
25A	PTR- 1,000	3/21	3/29(b)	14-3/8	12-7/8	(1,500)
25B	PTR- 5,000	3/21	3/29(b)	14	12-7/8	(5,265)
25C	PTR- 9,000	3/21	3/29(b)	14-1/4	12-7/8	(12,375)
26	MCI- 3,500	4/29	5/5	45	43-5/8	(4,812)
27A	Getty- 1,200	5/18	5/24	72	67	(6,000)
27B	Getty- 2,000	5/18	5/24	72-1/8	67	(10,250)
27C	Getty- 700	5/18	5/24	72-1/4	67	(3,675)
27D	Getty- 1,100	5/18	5/24	72-3/8	67	(5,912)
28A	Gulf Stream- 500	5/26	5/31	23	21-7/8(c)	(562)
28B	Gulf Stream-6,100	5/26	5/31	23-1/8	21-7/8(c)	(7,625)
28C	Gulf Stream-3,400	5/26	5/31	23-1/4	21-7/8(c)	(4,675)

SCHEDULE II
Transactions Involving Transfers of Securities
From SRGA to Individual Customers

Trans. No.	Customer to Whom Transferred	Security and Number of Shares	Trade Date	PK Date	Date Sold	Purch. Price	Selling Price (a)	Money Diff.
			1982	1982	1982		(b)	
1	Breitbach	CS-5,000	6/16	6/18	6/18	37-1/2	53	$46,500
					7/20		*(c)	
2	Corvino	NLT-5,000	7/1	7/6	8/17	37-1/8	38-1/2	6,875
3	Murad	CS-3,000	8/19	8/26	8/26	43	46-7/8	11,625
	(e)							
4	E. Petronio	CS-2,000	8/20	8/26	8/26	43-3/4	46-7/8	6,250
		(d)		(b)			*	
5	Murad	MDA-5,000	8/27	9/7	9/20	25-7/8	26-1/8	1,250
		(d)		(f)			*	
6	Breitbach	MDA-5,000	8/27	9/7	11/12	25-7/8	26-1/8	1,250
7A	Murad	HON-3,500	10/7	10/11	10/11	82-1/2	85-5/8	10,938
	(e)							
7B	Cen. NY Banana	HON-1,500	10/7	10/11	10/11	82-1/4	88-5/8	9,562
				(f)				
8	Murad	MDA-4,000	10/13	10/21	10/21	26-3/8	28-1/2	8,500
9	Murad	CVN-5,000	10/26	10/28	10/28	31	31-3/4	3,750

Notes to Schedule II

(a) Where stock was sold on or within one day of PK date, then actual selling price is shown. Otherwise, closing price the day before the PK date is used, and marked "*".

(b) 3,300 shares were sold at this price on PK date. Balance were sold 8/4/82 at 46-5/8, adding $18,250 to the profits.

(c) 2,000 shares were sold on 7/20 at 39.0, and the remaining 3,000 shares were sold on 8/17 at 41-1/8, for a much greater profit than shown.

(d) Actually purchased in two lots: 1 of 9,900 and the other of 100 shares.

(e) Edward Petronio, in addition to his own account, wholly owns Central N.Y. Banana and controls the account of Lena Petronio.

(f) PK'd after settlement date.

(g) By holding the stock for 3 months, Lomanaco actually sold at a substantial profit.

(h) 6,000 shares sold at 24 and 1,000 shares sold at 25.

(i) 1,400 shares sold at 29-5/8 and 2,600 shares sold at 29-1/2.

SCHEDULE II
Transactions Involving Transfers of Securities
From SRGA to Individual Customers

Trans. No.	Customer to Whom Transferred	Security and Number of Shares	Trade Date	PK Date	Date Sold	Purch. Price	Selling Price	(a) Money Diff.
10	Murad	PRM-5,000	10/26	10/28	10/28	30-13/16	32	$ 5,313
11	Murad	CVN-6,000	11/2	11/4	11/4	31-1/2	33-5/8	12,750
12	Murad	PRM-6,000	11/2	11/4	11/4	32-1/2	33-5/8	6,750
13A	Murad	GWF-4,000	11/3	11/4	11/4	28-1/4	28-1/2	1,000
13B	Pullano	GWF-500	11/3	11/4	?	28-1/4	?	———
14	(e) CNYB	IBM-2,000	12/16	12/17	12/20	90-5/8	93-5/8	6,000
15	Lomanaco	IBM-2,000	12/27	12/31	12/31	96-3/8	96-3/8	- 0 -
16	Lomanaco	MMM-3,000	12/28	12/31	12/31	77-3/8	75	(7,125)
17	Lamanaco	IBM-2,000	12/30	12/31	12/31	97-7/8	96-3/8	(3,000)
18	(e) L. Petronio	ALOG-400	1983 1/6	1983 1/11	1983 1/10	40-3/4	43	900
19	(e) L. Petronio	ALOG-1,300	1/7	1/11	1/10	41-1/4	43	2,275
20	(e) L. Petronio	HON- 2,000	1/7	1/11	1/10	86	89-7/8	7,750
21	Lomanaco	HON -1,000	1/10	1/17	1/14	92-7/8	96-1/2	3,625
22	Lomanaco	IBM -3,000	1/10	1/17	1/14	98-1/2	98-7/8	1,125
23	Lomanaco	IBM -1,000	1/11	1/17	1/14	98-3/8	98-7/8	500
24	Murad	ROW-10,000	1/13	1/19	1/19	12-1/8	12-3/4	6,250
25	CHAG	IBM-1,000	1-14	1-20	2/25	99-1/2	98-1/2 *	(1,000)
26	CHAG	IBM-1,000	1/17	1/24	2/25	99-3/4	94-5/8 *	(5,125)
27	Lomanaco	IBM-2,500	1/17	1/24	4/15 4/29	99-3/4	94-5/8 *(g)	(a) (12,812)
28	Hettinger	GNF-5,000	1/19	1/25	2/1	21-1/4	19-7/8 *	($ 6,875)
29	Squillace	FNMA-10,000	1/27	2/1	2/1	21	22	10,000

SCHEDULE II
Transactions Involving Transfers of Securities
From SRGA to Individual Customers

Trans. No.	Customer to Whom Transferred	Security and Number of Shares	Trade Date	PK Date	Date Sold	Purch. Price	Selling Price (a)	Money Diff.
30	CNYB (e)	PRM-2,500	2/2	2/7	2/4	40-7/8	42-5/8	4,375
31	Hettinger	PRM-3,000	2/4	2/10	2/11	32-1/4	31-1/8	(3,375)
32	Hettinger	SUP-2,000	2/4	2/9	2/9	31-3/8	31-1/4	(250)
33	Sfeir	DPT-5,000	2/10	2/15	2/15	22-1/2	24-1/8	8,125
34	Squillace	DPT-5,000	2/10	2/15	2/15	22-1/2	25 (h)	6,750 #
35	Squillace	DPT-2,000	2/11	2/15	2/15	24-7/8	24 (h)	
36	CNYB (e)	HLR -4,000	2/18	2/28	2/28	27	29-5/8 29-1/2	(i) 10,175
37A	Sfeir	HLR -4,000	2/18	2/28	2/28	26-7/8	29-3/4	11,500
37B	Corvino	HLR -2,000	2/18	2/28	3/1	26-15/16	29-1/2	5,125
38	CNYB (e)	HLR- 5,000	3/7	3/15 (f)	3/14	30	31-1/2	7,500
39	CNYB (e)	MCI- 6,500	5/2	5/6	5/6	45	45-1/2	3,250
40A	CNYB	DLX-3,000	5/5	5/10	5/6	45-7/8	47-5/8	5,150
40B	Corvino	DLX-2,000	5/5	5/10	5-12	45-7/8	47	2,250

- This is the profit for transactions 34 and 35 combined.