

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4424

FILED

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SECURITIES & EXCHANGE COMMISSION

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
JOSEPH A. BUONGIORNO :
JAB SECURITIES CO., INC. :
(8-13252) :
:

SUPPLEMENTAL
INITIAL DECISION

April 27, 1978
Washington, D.C.

Irving Schiller
Administrative Law Judge

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| (8-13252) | : | |

APPEARANCES: Phil Gross and Charles L. Lerner for the
Division of Enforcement.

David J. Stolzar for Respondents Joseph A.
Buongiorno and JAB Securities Co., Inc.

BEFORE: Irving Schiller, Administrative Law Judge

These proceedings were remanded by the Commission for a supplemental initial decision to determine whether the evidence of manipulation found in the initial decision to be established by a preponderance of the evidence, meets the "clear and convincing" standard formulated by the Court of Appeals for the District of Columbia in Collins v. S.E.C., 562 F.2d 820 (D.C. Cir. 1977). The remanding order states that the evidence of manipulation should be reanalyzed in light of the more rigorous standard in Collins.

The parties were invited to file briefs directed to the question as to whether the evidence of manipulation meets the Collins standard. Respondents submitted a letter stating that their Brief in Support of Petition for Review and their prior Petition for Review and Brief in Support of Proposed Findings of Fact and Conclusions of Law, contain discussions of the testimonial and documentary evidence and conclude that Respondents "could not and should not be found to have violated any of the statutory provisions and rules as claimed by the Division by a preponderance of the evidence." A fortiori, says Respondent, the evidence does not meet the "clear and convincing" standard of proof required by Collins. The Division filed a brief asserting it has established by clear and convincing evidence that Respondents wilfully violated and wilfully aided and abetted violations of Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act of 1933.

I have reanalyzed the evidence relating to manipulation. A perusal of the testimonial and documentary evidence reveals a pattern of trading by respondents who, after learning when a registration statement of certain securities was scheduled to become effective, sold such securities short immediately prior to the time the registration statement became effective and then covered such short sales with securities purchased in the public offering. To ascertain whether respondents' form of trading culminated in market manipulation requires reexamining their conduct from the planning stage to completion of the transactions. First, consideration is given to whether Buongiorno and Naddeo, prior to effecting any transactions in the subject securities, discussed the short selling and covering purchases and reached an understanding of their respective roles in the entire process; second, did both men contemplate that an effort would be made to depress the market price of the subject securities so that the purchases from the public offering would be at a price lower than their short sale price and third, did the actual sales of the subject securities on the Amex and NYSE by JAB have any effect on the market prices of such securities.

The fact that Buongiorno and Naddeo discussed the modus operandi of the short selling and covering purchase activity is established by the testimony of both men and corroborated by other evidence in the record. Buongiorno testified he and Naddeo received calendars of proposed offerings from underwriters

which included the date of the offering was expected to be made and the size of the underwriter's involvement. Buongiorno further testified he talked with Naddeo several times a day ". . . about the entire secondary distribution series. That whole program." These discussions concerning secondary offerings occurred after a registration statement of a particular security was filed. In the course of such talks Buongiorno and Naddeo considered the prospects for the offering, the possible price they thought the offering would be bought at and whether VFN (Naddeo's hedge fund) would get "circled". To help Naddeo get circled, Buongiorno testified he introduced him to the registered representatives of the underwriting firms involved in the distribution of a particular security. Buongiorno testified he knew Naddeo formed a hedge fund VFN, (having sent him to his lawyer for that purpose) knew that VFN was the vehicle being used by Naddeo in his trading operations, and knew that Naddeo was a trader at Dixon Dolce.

Naddeo's testimony concerning the discussions with Buongiorno relating to the short selling and covering purchases, the calendars, and the circling was substantially similar to that of Buongiorno. However, though neither Buongiorno or Naddeo could recall a precise conversation relating to a particular security, Naddeo, whose testimony was credited, stated that where there was a trade with JAB in any of the specified securities he was certain he talked to Buongiorno about shorting that security.

That Buongiorno and Naddeo reached an understanding and intended to engage in the short selling and covering operations is corroborated by three separate sources in the record. Rowe, an employee of JAB who was present at several face-to-face meetings between both men, testified he heard the discussions concerning short selling, circling and covering of the short sales. Second, Mrozek testified he talked to Buongiorno about selling short and covering and engaged in such activity with Buongiorno.^{1/} The third source of confirmation of the activity is found in the testimony of John P. Cione, an attorney, who was Compliance Director and First Vice President of Blyth Eastman, Dillon, in which he stated that Buongiorno and Naddeo told him they were engaged in a program of selling short and covering such short sales with shares obtained in an offering. Cione testified he informed both men he believed such practice violated the securities laws and closed out the JAB account informing Buongiorno that JAB could maintain such an account only through the firm's Syndicate Department provided he represented that the syndicate items were being distributed to bona fide members of the public.

Thus, the evidence that Respondents and Naddeo had an understanding they would engage in a program to sell short particular

^{1/} Initial Decision p. 13, n. 11 contains a detailed description of such discussions.

securities for which a registration statement had been filed and cover such short sales with stock obtained in the public offering is clear and convincing.

Respondents' assertion that Buongiorno had no knowledge that the sales of the subject securities by Dixon Dolce to JAB were short sales by Naddeo notwithstanding Buongiorno's admission that he discussed the entire short selling program with Naddeo and knew that Naddeo was using his hedge fund VFN as his trading vehicle was rejected in the initial decision. Upon review of the evidence Respondents' contention is still viewed as incredulous.

Profit was one of the primary purposes of the short selling operation. Obviously this could be accomplished only if the market price of a particular security immediately prior to the time Buongiorno and Naddeo believed the registration statement would become effective would be lower than the short sale price so that VFN, which they knew had been circled, could purchase the securities at a public offering price lower than the short sale price. Analyzing the evidence relating to the market activity involves consideration of Respondents' intent as well as the manner in which the transactions were executed. The success of the short selling and covering operation depended upon two essential elements. The first factor, once it was determined to trade a specific security, was the responsibility of Naddeo to get circled for

the particular security for which a public offering was to be made. The evidence that Naddeo was successful in getting circled is demonstrated by the documents in the record reflecting VFN's purchases in the public offering of the securities in question. The evidence that Naddeo fulfilled his "circling" part of the operation is clear and convincing.

The second component was the responsibility of Buongiorno to make every effort to see to it that the market price of the agreed upon security, at the time Naddeo purchased the said security in the public offering, would be lower than the price at which the short sale was made. The success of Buongiorno's part in the operation required finesse in the market place. Buongiorno approached his task with knowledge born of experience. The evidence shows he had been carrying on the short sale and covering operation for sometime and, in fact, had been warned by the NASD that his activities may be in violation. He was thoroughly familiar with the fact that if the operation was to be profitable it was essential that the public offering price be lower than the short sale price. The documentary evidence illustrates how Buongiorno carried out his mission. He commenced his activity on the day he believed a particular registration statement would become effective.^{2/} The key to accomplishment was timing. The

^{2/} In the Riblet, Johnson and Sambo's public offerings, Buongiorno commenced his short selling activity on the Amex on the day he believed the offering would be made. They were postponed. He commenced his activities again on the postponed date.

documentary evidence demonstrates Buongiorno's skill. In the case of Sambo's the underwriters were informed by the managing underwriter that the appropriate agreements would be signed at 9:30 A.M. on May 15, 1972, that the registration statement would become effective that day and the issue would be priced after the close of that day. That such information was generally known in the investment community is not disputed. JAB began selling at 11:10 A.M. at a price of 34 1/4. Of utmost importance and perhaps the clearest and most convincing demonstration of Buongiorno's intent is his activity in the last 8 minutes of market trading. JAB sold 1500 shares (about 90% of the shares traded in that period) in 4 of the last 5 transactions and by astutely making the last trade of the day at 33 3/4 determined the public offering price. The documentary evidence is thus clear and convincing that respondents intended to and did depress the market price of Sambo's and that Buongiorno's role in the entire operation was to lend his expertise as an adroit trader in the market place.

An analysis of the documentary evidence of JAB's trades of the Riblet, Johnson and Jewelcor securities on the Amex reveals that the pattern in all cases was exactly the same. In the Riblet case respondents' sales on the Amex started on the date the registration statement become effective and in the

last 18 minutes of trading JAB sold 1000 of the 2300 shares traded in that period. In the case of Johnson, the respondents, believing the registration statement would become effective on June 1 and priced on the basis of the last sale that day, sold 900 of the 2000 shares traded in the last 25 minutes of trading. In the case of Jewelcor the registration statement was declared effective at 1:30 P.M. on May 1. Respondents sold 2200 shares between 10:53 A.M. and 12:47 P.M. at prices ranging downward from 35 1/8 33 1/4. In each case respondents' transactions were at a lower price than the preceding transaction or the next preceding transaction and respondents' transactions lowered the offering prices of such securities. Representatives of managing underwriters who testified, were unanimous in their opinions that respondents' transactions either depressed or contributed to depressing the market price of the subject securities. Their opinions are credited. Such evidence clearly and convincingly demonstrates respondents intended to and either caused, or contributed to causing, a decline in the market price of such securities.

Further evidence of respondents' manipulative designs is demonstrated by the testimony of Tobias the trader for Dishy Easton who stated that in each instance he asked JAB whether it was long in the stock and was always told the firm was long. Tobias stated that if he had been told by

JAB it was making a short sale he would not have accepted the order in a cash account but if he was told JAB was making a short sale as a principal he would have executed the transactions as a short sale on the Amex. No short sales were effected.

The Sambo's transactions also serve to demonstrate in clear and convincing terms that respondents intended to cover their short sale transactions with securities purchased in the public offering. The documentary evidence disclosed that certificates of stock in Sambo's were delivered by the broker-dealers participating in the underwriting of the public offering to VFN, which had been previously circled. VFN in turn delivered the same certificates to Dixon Dolce which delivered them to JAB and they were ultimately delivered by JAB to Dishy Easton. The documents in the record further reveal that a similar pattern was followed with respect to the other subject securities. Though the record in the securities other than Sambo's does not reflect the tracing of specific certificates, it does disclose that in all instances of Amex transactions the securities which were delivered to JAB were from the public offering and were delivered after the public offering was made.

Within the statutory framework, a determination must be made whether there is also evidence that another purpose in the techniques used to aid respondents' manipulative intent was "inducing the purchase or sale of such security by others." As

pointed out in the initial decision such evidence was inferred from the circumstances in this case. It is noted that the Court in Collins stated it recognized the Commission's need to draw inferences to support allegations of security law violations (562 F.2d at 823). Reanalyzing the evidence furnishes the basis to support the inferences drawn. Buongiorno, prior to his activities described herein, was in the securities business as an active broker-dealer for approximately eight years. During this period he traded for his own account and for customers. There is no dispute in the record that Buongiorno had knowledge of the securities markets. The evidence shows he had experience as a trader involved in the short trading and covering type of operation. Buongiorno testified that in the course of his numerous talks with Naddeo they discussed the selling pressure on a stock after a registration was filed and the reaction that could be expected to a short selling program. Rowe's testimony, as pertinent here, makes it manifest that Buongiorno and Naddeo considered such possible reaction to the type of activity they were contemplating. He testified:

"In their conversations, they would speak of their short-selling.

The price of the stock would certainly be affected by others shortselling in the street.

The discussions about the price of the stock, where it might be priced, how low it might go, you know, centered around not solely their own interests but the interests of other short sellers in the street.

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They knew of the other houses that were working along the same lines.

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Only that there were other sellers. The other sellers would be out there in . . . when a secondary was coming. . . the same people involved almost uniformly a week prior to an over-the-counter secondary."

Respondents and Naddeo were thus aware that other broker-dealers were trading in the so-called secondaries and it is evident that they must have known or been conscious of the fact that such persons would be induced to either buy or sell depending whether such persons believed the market would rise or fall. Buongiorno and Naddeo were certainly shrewd enough to realize that stockholders faced with what appears to be a declining market, would be induced to sell particularly when they were unaware that such market is not a fair and honest market but is being artificially stimulated to achieve a specific result. They were also sufficiently experienced to realize that prospective purchasers would be induced to buy believing the lower price would be to their advantage.

Such evidence when considered with other pervasive evidence in the record found to have been established in a clear and convincing manner, such as the numerous conversations between Buongiorno and Naddeo regarding the entire operation, the timing of JAB's sales on the Amex and the deliveries of stock from the public offering fully justifies drawing

the inference that one of the purposes of registrant's activities was to induce the purchase and sale of the subject securities. It is therefore determined that the evidence demonstrates that among the calculated objectives of respondents' market activity was to effect, along with Naddeo, a series of transactions in securities registered on a national securities exchange for the purpose of inducing the purchase or sale of such security by others, and that such evidence meets the Collins standard.

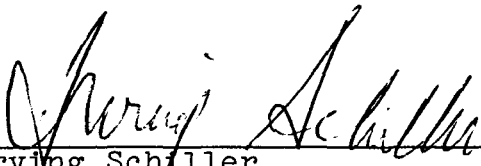
Upon a reanalysis of the evidence of manipulation, it is concluded that such evidence meets the clear and convincing standard enunciated in Collins.

Although it is evident that the reanalysis of the evidence is made in the light of the antimanipulative provisions of Section 9(a)(2) of the Exchange Act consideration was also given to whether such evidence, insofar as it impacts on the antifraud provisions of the securities laws, also meets the Collins standard. I find the evidence noted above clearly and convincingly establishes that Respondents' intended to and knowingly engaged in a series of acts, practices and activities which constituted a scheme or artifice to defraud and a fraudulent and manipulative course of business which was designed to operate as a fraud and deceit upon Dishy Easton, floor brokers and specialists on the Amex, issuers of the respective securities and their stockholders and prospective purchasers

of such securities. Since there is no evidence in the record to remotely suggest that respondents disclosed that the market prices were being artificially depressed such failure to disclose was an omission of a material fact and a fraud and deceit upon the persons mentioned above. It is concluded that the evidence that Respondents wilfully violated Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 thereunder is clear and convincing under Collins.

Upon consideration of the record it is concluded that the sanctions heretofore ordered in the Initial Decision should be imposed. Accordingly,

IT IS ORDERED that the registration of JAB Securities Co., Inc. as a broker-dealer be revoked and Joseph B. Buongiorno be barred from association with a broker-dealer.



Irving Schiller
Administrative Law Judge

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