INITIAL DECISION NO. 74

ADMINISTRATIVE PROCEEDING
FILE NO. 3-8510

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	INITIAL DECISION
	)	AUGUST 31, 1995
ADRIAN C. HAVILL	)	
	)	

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

Adrian C. Havill, pro se

BEFORE: Glenn Robert Lawrence, Administrative Law Judge

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

In substance, the Division alleged that the Respondent was a registered representative employed by Scott and Stringfellow since August 1989. From that date, Havill was the account representative of John G. Broumas, former chairman of the board of Madison Bank of Virginia(Madison of Virginia) and a former director of James Madison, LTD, ("JML") a bank holding company for Madison of Virginia. The Respondent, during the last noted period, executed for Broumas 7 wash trades and matched orders and 30 marking-the-close trades in JML stock. The order further alleges that in executing these trades Havill aided and abetted the violations of Broumas of 9(a)(1) and 9(a)(2) as well as 10(b) and Rule 10 (b) - 5 of the Exchange Act in connection with fraudulent conduct in the sale and purchase of JML stock. By answer dated October 19, 1994, Havill pleaded that he did not aid Broumas and that Broumas did not commit a primary violation.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon my observation of the various witnesses that testified at the hearing that was held in Washington, D.C. from December 12 through December 14, 1994, and April 19th 1995, as well as the briefs, arguments and proposals of facts and law of the parties and the relevant statutes and regulations.

Findings of Fact and Conclusions of Law

The Commission filed a complaint in the U.S. District Court for the District of Columbia against Broumas on September 27, 1991.1/ It was alleged that from January 1989 through July 1990, Broumas violated the federal securities laws by marking-the-close and executing wash trades and matched orders in JML stock. At the same time, Broumas consented, without admitting or denying the allegations, to the entry of a permanent injunction prohibiting him from future violations of Sections 9(a)(1), 9(a)(2), 10(b) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5 and 16a-3 thereunder. Ex. 830.2/

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

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1/ SEC v. John G. Broumas, Civil Action No. 91-2449 (L.R. No. 12999).

2/ References to the page numbers of the transcript of the hearing held in these matters on December 12, 13 and 14, 1994 are noted as "Dec. Tr. __ (__)." References to the page numbers of the transcript of the hearing held April 19, 1995 are noted as "Apr. Tr. __ (__)." All references to the Division's Exhibits admitted into evidence at the hearing are indicated as "Ex. __."

remained below $5 per share again. Ex. 306.

On December 31, 1986, JML became owner of the McLean Bank, which changed its name to Madison National Bank of Virginia. Dec. Tr. 120-121 (Broumas). Broumas, a substantial stockholder in the McLean Bank, received a combination of stock and cash for his 6 million dollar interest. Dec. Tr. 121-122 (Broumas). He stayed on as chairman of the board of Madison of Virginia until May 24, 1990, and a member of the board of JML, the holding company, until May 24, 1990. Dec. Tr. 122 (Broumas). Broumas obtained equal shares of both JML Class A and common stock. Dec. Tr. 122-123 (Broumas). Broumas owned approximately 198,000 shares of JML Class A common stock on January 31, 1989 [Ex. 808], and on March 13, 1989, Broumas owned 193,268 shares or 2.98% of the total amount outstanding. Ex. 300 (8/17/90 Memo, p. 6); Ex. 807. He was very wealthy, but suffered severe financial reverses early in 1989. Ex. 120 (pp. 19, 34-36), 807 (p.3). In October 1987, when the market crashed, Broumas held mostly on margin 225,000 shares of a stock called Syntec. After the crash, Syntec dropped from $16 to $4 per share, resulting in Broumas receiving margin calls on the stock. To meet those calls, he borrowed approximately $300,000 from Madison of Virginia. Dec. Tr. 123-125.

Broumas on May 1, 1989 was personally liable on notes owed to banks in the amount of $2,733,064, and owed $904,000 in mortgages with payments of $128,008 per quarter. Ex. 801; Dec. Tr. 168-173 (Broumas). Many of his liquid assets were in the form of JML stock, both Class A and common, which were held in margin accounts. Dec. Tr. 173-174 (Broumas); Ex. 801. As of May 1, 1990, Broumas's bank loans totaled $2,621,981, with quarterly payment requirements of at least $104,500. Broumas was having difficulty meeting

those interest and loan payments. In addition, the value of his real estate holdings was dropping. Ex. 801,802; Dec. Tr. 175-176 (Broumas). As a result of these liabilities, among others which he could not repay, Broumas eventually filed for personal bankruptcy, pursuant to Chapter 7, in February 1991. Dec. Tr. 214-215 (Broumas); Ex. 800. In November 1994, the United States Attorney for the District of Columbia filed an Information against Broumas charging him with one count of misapplication by a bank officer in violation of 18 U.S.C. § 656 (United States v. Broumas, Crim. No. 94-442 (D.D.C.)). Ex. 706. The Information alleged a check-kiting scheme conducted by Broumas, using six separate bank accounts at three banks, including Madison of Virginia and Madison of Washington. The purpose of the scheme was to use the float generated by writing checks against accounts for which insufficient funds existed, and using the checks to meet stock margin calls for JML stock from April through June, 1990. On November 23, 1994, Broumas pled guilty to this Information and admitted to the conduct charged. Ex. 720; Dec. Tr. 209-212 (Broumas).

During 1989 and 1990, Broumas controlled approximately 25 different brokerage accounts, in his own name and others, located at 14 different broker-dealers, through which he placed his wash trades, matched orders, and marking-the-close trades in JML Class A stock. Ex. 1. During 1989 and 1990, Broumas held three accounts at H. Beck--a joint account, and accounts in the name of Les Girls and BC Theatres. He held two brokerage accounts at Lara Millard, one in joint name with his wife and one in the name of BC Theatres. He had two accounts at Scott & Stringfellow, one held in the name of John Broumas and the other a joint account with his wife. He had two accounts at Voss & Company, one in a joint name and the other in the name of Les Girls. He had three accounts at First Potomac--one in joint name, one

in the name of Les Girls, and one in the name of BC Theatres. Broumas had one account at Capitol Securities in joint name with his wife, and another at City Securities Corporation. He had a joint account at Investors Group, Ltd. Broumas had two accounts at Johnston Lemon each held in the name of John Broumas. He had one account at Koonce Securities in a joint name, and one in his name at Staib Roberts. He had three accounts at Swan Securities--one in joint name, one as BC Theatres, and one as Les Girls. He had a joint account at Titan Value Equities Group. Broumas had an account in his name at Washington Investment Corp. He had three accounts at Carey Jamison Securities--in joint name, BC Theatres, and Les Girls. Dec. Tr. 126-142 (Broumas).

Broumas had sole authority to place trades, and he was the only person who traded in these accounts; he paid for them out of funds he controlled; and when shares were sold, he received payment. He had the power to control or direct the voting of the shares of JML stock in these accounts during 1989 and 1990. Dec. Tr. 126-142 (Broumas). In 1989 and 1990, Broumas held his JML Class A stock in margin accounts, and he received margin calls that he had to meet or risk sale of the stock. Dec. Tr. 186-189 (Broumas). Broumas believed that broker-dealers required that stock must have a value of $5 or more to be held on margin. Dec. Tr. 192 (Broumas). Eventually, Broumas received margin calls from his brokers that he could not meet, and all of his accounts that held JML Class A stock were sold out by the brokers. Dec. Tr. 212-213 (Broumas).

In order to meet margin calls in 1989 and 1990, Broumas admitted that he sold JML stock to himself many times. He called brokers during that time period and asked them whether he had any equity in his margin accounts. Dec. Tr. 193 (Broumas). Then he would

direct that shares be bought or sold from one account controlled by him into other accounts controlled by him. Dec. Tr. 193-194 (Broumas); Ex. 1.

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

Broumas could not go to the JML banks and borrow cash because he had reached his limit. Dec. Tr. 201 (Broumas). He therefore arranged wash trades and matched orders for the purpose of obtaining a float in a scheme similar to check-kiting. Under this scheme, Broumas orchestrated trades between accounts he held at different brokerage firms by calling registered representatives on each side of his trades and giving them instructions to call each other and to trade a specific amount of his JML Class A stock at a specified price. Broumas knew that by calling both sides of the trades, the trades would be executed on the over-the-counter market. Once the trades were completed, Broumas obtained the proceeds from the sale side one day later, but waited until the settlement date at least one week later to pay for the corresponding buy side of the trade. When the settlement date arrived, he sometimes executed another set of wash trades or matched orders and repeated the process. By engaging in this activity, Broumas could, in effect, obtain a "loan" from the brokerage firms where he traded his JML stock. Similarly, Broumas arranged a smaller number of matched orders by following the same procedure, except that he solicited third parties, nominees, to call in one side of the trade.

Dec. Tr. 195-201 (Broumas).

Broumas was able to borrow cash by this method of selling shares to himself, and did this instead of selling JML stock to a buyer in the open market because he wanted to maintain his large holdings of JML stock "at that price." It was important to him to maintain the same general level of JML stock ownership. Dec. Tr. 199-200 (Broumas). For each of the 203 transactions [Ex. 2]., Broumas made two phone calls, one to each broker on either side of each trade. In instances where stock was moved to or from accounts that he controlled (John Broumas, John and Ruth Broumas, Les Girls or BC Theatres) to or from nominee accounts, the mechanics of how the calls were made and how the trade was executed was the same as when he moved stock between his own accounts. Dec. Tr. 202-203 (Broumas).

In addition to his own accounts, Broumas also traded JML Class A stock through the accounts of four nominees: a business associate as well as three former Madison employees, one of whom was his grandson--Respondent L. Lawton Rogers, Matthew Johnson, Michael Connolly, and Kevin Lemmon. Ex. 2, 6. Broumas initiated this arrangement with each nominee. During the Trading Period, L. Lawton Rogers ("Rogers") maintained accounts at H. Beck, Voss & Co., and First Potomac which Broumas controlled. Ex. 120 (pp. 14-15), 280, 281. Rogers ordered, at Broumas's request, 21 trades of JML stock through the above-mentioned accounts. The value of Rogers's trades in JML stock totaled approximately $1,060,000. Seventeen of the trades amounted to matched orders, and the other four were two sets of trades that washed between Rogers's accounts. Ex. 2, 6.

Broumas directed Rogers to call specific registered representatives and place a buy or sell order at a specific price for JML stock. Rogers then called in the trade, giving the

registered representative the price, amount of shares, and to whom it was to be traded. Ex. 120 (pp. 24-26, 30, 37-38); 282. On two occasions, Rogers placed wash trades between his own accounts. On January 25, 1990, Rogers sold 12,000 shares of JML stock at $6.375 per share from his H. Beck account, and bought 12,000 shares of JML stock at $6.375 per share for his First Potomac account. Similarly, on February 12, 1990, Rogers sold 12,000 shares of JML stock at $5.625 per share from his First Potomac account, and bought 12,000 shares of JML stock at $5.625 per share for his Voss & Co. account. Ex. 2. Broumas also traded JML stock through nominee accounts in the names of Matthew Johnson, Michael Connolly, and Kevin Lemmon. During the period from November 1989 to May 1990, Broumas placed 12 matched orders through Johnson's account at H. Beck. Ex. 2, 6. During the period from February 1989 to April 1989, Broumas placed four matched orders through an account Johnson maintained at Swan Securities. Ex. 2, 6; Dec. Tr. 252-253 (Johnson).

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

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

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

With regard to only the volume of Broumas's wash trades and matched orders reported, from January 1, 1989 to June 30, 1990, all of Broumas's reported wash trades and matched orders constituted 36.55% of the total reported market volume for JML Class A stock. From July 1, 1989 to December 31, 1989, all of Broumas's reported wash trades and matched orders constituted 53.45% of the total reported market volume for JML Class A stock during that time period. From July 1, 1989 to June 30, 1990, all of Broumas's reported wash trades and matched orders constituted 44.07% of the total reported market volume for JML Class A

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

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

purchases on either the AMEX or the Midwest Stock Exchange. Broumas typically bought 100-200 shares of JML stock at or near the close of the trading day. These purchases characteristically occurred within the final ten minutes of the trading day, generally constituted the last trade of the day, and were usually executed on an uptick. On a number of occasions, Broumas's trades raised the closing price of JML stock by 1/8. Ex. 3, 7. During this time period, he followed the price of JML Class A stock in the newspaper daily. Dec. Tr. 207 (Broumas).

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

At some point, Respondent Havill told Broumas that his office said that Havill could not take these uptick trades any longer. Havill told him the trading was not proper, and that it might affect the market. Dec. Tr. 207-208 (Broumas). By way of background, it should be noted that Broumas conducted some of his marking-the-close trades through two accounts at Scott & Stringfellow, which he opened in late August 1989. Ex. 7; Dec. Tr. 288-289 (Havill).

Broumas's purpose in conducting these marking-the-close trades was to create interest in the stock. He knew that if nobody bought the stock on a certain day, it would not show up in the newspaper listings the next day. Dec. Tr. 292-294 (Havill). At Scott & Stringfellow, in particular, Broumas would often call and execute trades near the end of the day. If the stock had not traded that day, Broumas bought some shares just to make sure it traded. Dec. Tr. 295-296 (Havill). Broumas would call many times between 3:00 and 4:00 p.m. and instruct Havill, his registered representative at Scott & Stringfellow, to buy at or near the close. Dec. Tr. 300 (Havill).

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

on a 1/8 uptick on 27 occasions. Ex. 300 (8/17/90 memo). In September 1989, Broumas ordered 15 wash trade transactions, and 11 marking-the-close trades, 9 of which were on the same days as the wash trades. In December 1989, Broumas ordered 11 wash trades or matched order transactions, and 9 marking-the-close trades, 4 of which were on the same days as the wash trades. The pattern continued throughout the Trading Period. Ex. 2, 3.

Market manipulation refers generally to practices--such as wash sales, matched orders or rigged prices--that are intended to mislead investors by artificially affecting market activity. Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6 (1985). Manipulation subverts the objectives of the Exchange Act which, among other things, are intended to "insure the maintenance of fair and honest markets,"--that is, "markets where prices may be established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73d Cong., 2nd Sess. (1934) at 11. Section 9(a)(2) of the Exchange Act, which prohibits the manipulation of securities listed for trading on a national exchange, makes it unlawful for a person to engage in a series of transactions that create actual or apparent activity or raise or depress the stock's price when done for the purpose of inducing others to buy or sell the security. Section 9(a)(2) was considered by Congress to be "the very heart" of the Exchange Act, and "its purpose was to 'outlaw every device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage.'" Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2d Cir. 1969) (quoting 3 L. Loss, Securities Regulation 1549-55 (2d ed. 1961)), cert. denied, 400 U.S. 822 (1970).

Section 9(a)(2) violations are established by a showing that an individual: 1) effected a series of transactions in a security registered on a national securities exchange; 2)

which created actual or apparent active trading in such security, or raised or depressed the price of the security; 3) for the purpose of inducing the purchase or sale of the security by others. Crane at 794-795; Section 9(a)(2) of the Exchange Act. Section 9(a)(1) prohibits certain manipulative practices, including wash trades and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. To establish a violation of Section 9(a)(1), it must be shown that one or more individuals effected a transaction in a security registered on a national securities exchange which involved no change in beneficial ownership, or with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, have been or will be entered by or for the same or different parties. It also must be established that the transaction was done for the purpose of creating a false or misleading appearance of active trading in such security, or a false or misleading appearance with respect to the market in such security. Michael Batterman, 46 S.E.C. 304, 305 (1976); Section 9(a)(1) of the Exchange Act.

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

Co., Inc., 10 S.E.C. 332, 347-49 (1941).

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

"Rule 10b-5 . . . require[s] no additional proof of facts creating a higher burden of proof when compared to subsection 9(a)(1), (2) and (6). In fact, Rule 10b-5 create[s] a lower burden of proof." Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1165 (5th Cir. 1982), reh'g denied, 689 F.2d 190 (5th Cir. 1982), vacated, remanded, 460 U.S. 1007 (1983), on remand, 718 F.2d 725, cert. denied, 460 U.S. 1013 (1983).

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

From January 1, 1989 to June 30, 1990, Broumas repeatedly placed orders for wash trades and matched orders in JML Class A stock, which constituted manipulative practices in violation of Sections 9(a)(1) and 9(a)(2) of the Exchange Act. Furthermore, this pattern of conduct violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because, by

creating a false or misleading appearance of active trading in JML Class A stock, it operated as a fraud or deceit upon the marketplace.

Broumas's wash trades and matched orders violated Sections 9(a)(1) and 9(a)(2) of the Exchange Act. Sections 9(a)(1) and 9(a)(2) require that the proscribed activities be engaged in with the requisite manipulative intent. Transactions which violate Section 9(a)(1) can serve as the basis for a violation of Section 9(a)(2). Michael J. Meehan, 2 S.E.C. 588, 615-618 (1937). Transactions such as wash sales and matched orders, which constitute violations of Section 9(a)(1), have been held to be per se manipulative. Mawod & Co., 591 F.2d at 595-96.

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

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

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

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

Broumas's pattern of placing wash trades and matched orders in JML Class A

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

parties who loaned money on margin were defrauded as Broumas engaged in a charade pretending that there were genuine trades at a price set competitively.

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

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

Broumas's pattern of placing orders for wash trades and matched orders in JML Class A stock clearly operated as a fraud or deceit upon the investing public by creating the false and misleading appearance of activity in the stock. The investing public is led to believe that

the volume in a given stock--as reported in the newspaper--reflects genuine supply and demand for that security. The investing public is deceived when, as here, during an eighteen month trading period, at least 36.55% of the total reported volume in a particular security represents a complete fiction in that there is absolutely no change in beneficial ownership of that stock. The use of nominee accounts in which to conduct such manipulative trading--especially when third party trading authority was lacking--is not genuine demand. United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972); SEC v. Commonwealth Securities, Inc., 410 F. Supp. 1002, 1009-1012 (S.D.N.Y. 1976), aff'd in part, modified in part, and remanded, 574 F.2d 90 (2d Cir. 1978); Mawod & Co., 46 S.E.C. at 871-72. That practice in and of itself is deceptive. To establish a violation of Section 10(b) of the Exchange Act, it must be proved that Broumas acted with scienter. Scienter has been defined by the Supreme Court as a "mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

The Commission and most circuit courts, however, have held that recklessness will suffice. See e.g., Mawod & Co., 591 F.2d at 595-96; Michael Joseph Boylan, 47 S.E.C. 680, 687 (1981). The usual formulation of recklessness cited by the courts is set forth in Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977):

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

Id. at 1045.

Proof of scienter in manipulation cases need not be direct, but rather may be inferred from circumstantial evidence, including evidence of price movement, trading activity, and other factors. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983); Santa Fe Industries v. Green, 430 U.S. 462, 475 (1977); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir 1986); Mawod & Co., 591 F.2d at 596. Proof of a manipulation is generally not based on a single activity, but rather on a course of conduct showing an intentional interference with the normal functioning of the market for a security. Indeed, manipulation is usually the result of acts, practices, and courses of conduct that deceive the marketplace. "Proof of a manipulation almost always depends on inferences drawn from a mass of factual data. Findings must be gleaned from **patterns of behavior**, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces." Pagel, Inc., 48 S.E.C. 223, 226 (1985) (emphasis added). Moreover, the Division need not rely on direct evidence that Broumas willfully manipulated the market. Instead, the Division may rely on inferences drawn from the evidence adduced at the hearing to reach the conclusion that an illegal manipulation occurred. Collins Securities Corp. v. SEC, 562 F.2d 820, 822-23 (D.C. Cir. 1977).

Broumas had a pecuniary interest in the manipulation for several reasons: he was a director of JML and chairman of the board of Madison of Virginia; he held JML Class A stock on margin in numerous accounts, including nominee accounts; and he was heavily in debt. In addition, by placing wash trades and matched orders, Broumas engaged in a pattern of trading which is clearly proscribed by Sections 9(a)(1) and 9(a)(2), and which operated as a fraud or deceit on the marketplace by creating the false and misleading appearance of active trading in

JML stock. Broumas engaged in this conduct either intentionally or recklessly.

Broumas repeatedly engaged in a pattern of activity designed to mark-the-close in JML Class A stock. By placing a series of transactions in JML Class A stock which marked-the-close, Broumas violated Section 9(a)(2) of the Exchange Act because this pattern of trading artificially raised or supported the market price of JML Class A stock at the close. Furthermore, this pattern of conduct violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because the repeated purchases--executed on an uptick, or a zero plus tick--at or near the end of the day had the effect of increasing or supporting the closing price of JML Class A stock on those days.

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

The Commission has held that the practice of placing orders at or near the end of the day in order to cause the stock to close at an uptick violates Section 9(a)(2) of the Exchange Act. Jacob Schaefer, 12 SEC Docket 1128, 1129 (1977). As stated above, in order to prove that Broumas violated Section 9(a)(2) by placing marking-the-close trades, it must be proved that he did so for the purpose of inducing the purchase or sale of the security by others.

Absent an admission, manipulative intent may be inferred from circumstantial evidence. Although there is plentiful evidence of record from which such intent might be inferred, I do not have to rely on inference; Broumas clearly stated to Mr. Havill that at least one of his motives for placing the late day trades was "to create some interest in the stock because if nobody buys it on a certain day, it doesn't show up in the listing in the paper." He went on to tell Mr. Havill that he didn't want investors to forget that the bank was around, "so he was just trying to stir up a little interest in the stock." Dec. Tr. 293 (Havill).

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

From August 1989 to the present, Respondent Adrian C. Havill has been employed as a registered representative by Scott & Stringfellow Investment Corp. ("Scott & Stringfellow"), a registered broker-dealer located in Richmond, Virginia, in the firm's Vienna, Virginia office. He has been licensed by the National Association of Securities Dealers ("NASD") since 1985. Answer ¶¶ II.E., II.F.

In 1984, Havill entered the securities industry, and from 1984 to 1989, he was employed by Johnston, Lemon & Co. ("Johnston Lemon"), a registered broker-dealer. Initially, he was hired as a trainee and in March 1985, he became licensed as a registered representative for the firm. Apr. Tr. 33-34 (Havill). In August 1989, Havill left Johnston Lemon to work for Scott & Stringfellow. Apr. Tr. 44-45 (Havill). Prior to the present matter, Havill has had no disciplinary proceedings brought against him by any agency regulating security matters. Apr. Tr. 16 (Havill). Havill asserts that he had "a pristine conduct of life", a successful 31-year marriage, and has raised two achieving children. He states on his behalf that he has also been involved with philanthropic organizations and is strongly involved in his community. Respondent's Brief at 5.

In approximately January 1986, Broumas opened a brokerage account with Havill at Johnston Lemon. Apr. Tr. 40-41 (Havill). After Havill left Johnston Lemon and went to work for Scott & Stringfellow in August 1989, Broumas transferred his accounts to Scott & Stringfellow. Broumas opened two accounts at Scott & Stringfellow, one in his own name and one in joint name with his wife. Both accounts were margin accounts. Apr. Tr. 44-51 (Havill); Ex. 462. The new account form for the Broumas account at Scott & Stringfellow, which was signed by Havill, reflected that Broumas was Chairman of "James Madison" located in "McLean, VA." In addition, it indicated that Havill had known Broumas for 20 years. Apr. Ex. 462. The new account form for the joint account at Scott & Stringfellow, which was also signed by Havill, reflected that Broumas was Chairman of "Madison Bank of VA." Apr. Ex. 462. Havill knew in 1989 that Broumas owned a significant amount of JML Class A stock, and was a major shareholder. Apr. Tr. 72 (Havill); Ex. 464, p. BS0274.

At Scott & Stringfellow, Havill maintained "posting sheets" on which he recorded trades made through the Broumas accounts. It was Havill's normal practice to make an entry in the posting sheets within a day or two after a trade was executed. Apr. Tr. 52-58 (Havill); Ex. 464, pp. Bates Stamp ("BS") 0275-BS0276. The posting sheets indicate that most of the trades through the Broumas accounts were in JML Class A stock. Apr. Ex. 464, pp. BS0275-BS0276.

Between August 30, 1989 and January 17, 1990, Havill executed approximately 42 trades for Broumas at Scott & Stringfellow. Dec. Tr. 299 (Havill). Of these 42 trades, 31 represent purchases by Broumas of JML Class A stock during the last ten minutes of the trading day. Each of these 31 purchases was unsolicited, each was executed on the American Stock Exchange ("AMEX"), and, with one exception, each purchase was for 100 shares. Ex. 7; Apr. Tr. 59-61 (Havill). Of these 31 late trades, 29 represented the last JML Class A stock trade of the day; 25 of the 31 trades were executed at an uptick from the previous trade, the other 6 at a zero plus tick. In addition, 24 of the 31 trades were both the last trade of the day and were executed on an uptick. Ex. 3, 7.

For each of these 31 trades, either Broumas or his secretary called Havill in the afternoon, or Broumas called Havill earlier in the day and asked Havill to call him back later in the afternoon, to tell Broumas the trading price of JML Class A stock. Apr. Tr. 61-62 (Havill). Havill knew that, because of his significant holdings in JML stock, Broumas had a financial interest in maintaining the price of the stock. Apr. Tr. 90-91 (Havill). On several occasions, Havill called Broumas or his secretary to tell Broumas that the price of JML stock had gone up that day because Havill knew that it would make Broumas happy to hear the news.

Apr. Tr. 89-90 (Havill). For each of the 31 trades, Broumas instructed Havill to purchase the specific number of shares at either the market price, or at a specific price set by Broumas. For each trade, Havill completed an order ticket and gave it to the wire operator who would see that the trade was executed. Apr. Tr. 65-67 (Havill).

Broumas often called Havill between 3:00 and 4:00 p.m. and instructed him to: "Buy toward the close; buy at the close; buy near the close; . . . ." Apr. Tr. 64-65 (Havill); Dec. Tr. 299-300 (Havill). When Broumas called and instructed Havill to make these small purchases on the AMEX, Havill immediately ordered the trade and it was executed within minutes. Apr. Tr. 62-63 (Havill). In approximately September or October 1989, Havill asked Broumas why he was trading in JML stock; as indicated, Broumas told Havill that he wanted to create interest in the stock, and to make sure that the stock appeared in the newspaper the next day. Apr. Tr. 69-73 (Havill); Dec. Tr. 292-293 (Havill); Ex. 464, p. BS0274. Between November 9, 1989 and January 11, 1990, in addition to the 31 at-the-close trades, Broumas directed Havill to execute seven over-the-counter trades of JML Class A stock in large blocks (8,000 to 13,552 shares), through his two accounts at Scott & Stringfellow. In these seven trades, accurately reflected on Government Exhibit 1105, 64,352 shares of JML Class A stock were traded. Apr. Tr. 75-76 (Havill); Ex. 1105. Each of these seven trades washed with trades Broumas arranged through his accounts at other broker-dealers. Ex. 2, 6, 1105. On these third market trades, Havill never went into the market to find the other side of the trade. Havill received a call from a firm telling him that they were selling (or buying) stock on behalf of Broumas. Havill then obtained information from the caller, or from Broumas, about the number of shares that were being bought or sold. Havill then wrote the information, including a

reference to the firm on the other side of the trade, onto the trade ticket. When Havill received a call from a third market trader, he would then confirm the information with Broumas before executing the trade. Apr. Tr. 76-80 (Havill).

In some instances, Havill first received a call from Broumas, in which he would tell Havill to buy a certain quantity of JML Class A stock from a specific firm. Havill did not always recognize the names of the firms, but Broumas told Havill that he was either going to receive a call from a firm or, if no call was received, that Havill should call the firm. Apr. Tr. 81-82 (Havill). Havill executed four of the seven trades with Lara, Millard & Associates, Ltd. ("Lara Millard"), a registered broker-dealer. Ex. 1105.

With regard to at least several of these seven directed trades, Broumas told Havill that Broumas was buying the JML Class A stock from another of Broumas's own accounts at the other broker-dealer -- that Broumas controlled the other side of the trade. As a result, Havill knew that he was buying JML Class A stock, at Broumas's direction, from another of Broumas's accounts. Apr. Tr. 83-84, 144-145 (Havill). On each order ticket for the seven directed third market trades, Havill entered the name of the contra side. He received this information either from Broumas or the contra broker itself. Apr. Tr. 77, 86-88 (Havill); Ex. 1032, 1036, 1045, 1046, 1048, 1050, 1052 and 1105.

The volume on six of the seven wash trades was reported to the AMEX, and on each date represented a large percentage of that day's trading volume: On November 9, 1989, 8,000 out of the 18,100 shares of JML Class A stock reported (44%) represented a wash trade executed by Havill; on November 27, 1989, 8,500 out of 18,900 (45%); on December 19, 1989, 8,300 out of 14,600 (57%); on December 22, 1989, 8,000 out of 19,000 (42%); on December

28, 1989, 13,552 out of 17,800 (76%); and on January 5, 1990, 9,000 out of 13,100 (69%). Ex. 4, 306.

From September 1989 through early 1990, Havill never executed a trade in JML stock for any customer other than Broumas. Apr. Tr. 91 (Havill). Havill received a total of $1,500 commission for all the Broumas trades he handled. Apr. Tr. 17 (Havill). Havill argues that this is actually a factor in his favor because the amount received was "trivial". Respondent's Reply Brief at 8. Scott and Stringfellow earned commissions between $.04 and $.05 per share on the seven directed trades which Havill executed for Broumas. Apr. Tr. 88-89 (Havill). Sometime in early 1990, Havill became aware that the AMEX was investigating Broumas's series of trades in JML stock executed at the end of the trading day. Apr. Tr. 91-92 (Havill).

In order to establish liability for aiding and abetting, the Division must establish (1) the existence of a primary violation, (2) a "knowledge" requirement, i.e., that the aider and abetter had general awareness that his role was part of an overall activity that was improper, and (3) that the aider and abetter substantially assisted the principal violation. Kevin Upton, 58 SEC Docket, 1993, 2001 (1995). Dominick & Dominick, Inc., 50 S.E.C. 571, 577 (1991). In applying these elements, all three should be examined collectively, and no single element should be considered in isolation. See ITT, International Investment Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980).

This Office in its March 24, 1995 Order, found that Broumas manipulated the market for JML Class A stock, and in doing so violated Sections 9(a)(1), 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division has shown that the Respondent had

an "awareness of the underlying facts, not the labels the law places on those facts . . . . A knowledge of what one is doing and the consequences of those actions suffices." SEC v. Falstaff Brewing Corp., 629 F.2d 62, 77 (D.C.Cir.), cert. denied, 449 U.S. 1012 (1980). The Commission has found a broker to have willfully aided and abetted violations of Section 10(b) and Rule 10b-5 for supplying market information during the trading day and for executing trades at the end of the trading day which frequently resulted in upticks. The record reflects that Havill knew that he was assisting Broumas in carrying out his manipulative scheme. Havill had known Broumas for many years and he possessed a significant amount of actual knowledge concerning Broumas's activities.

In 1989, Havill knew that Broumas was the chairman of the board and an officer of one of the James Madison, Ltd. banks. He knew that Broumas owned a significant amount of JML Class A stock and was a major JML stockholder. He knew that, because of his holdings in JML stock, Broumas had a financial interest in maintaining or increasing the price of the stock. He knew that most of the trades through the Broumas accounts were in JML Class A stock, and that, during the relevant time period, Broumas was his only customer who traded the stock.

With regard to the marking-the-close trades, Havill knew that Broumas was calling toward the end of the day on each of the 31 trades; and that Broumas often instructed him to buy at or near the close. Broumas admitted to Havill his reason for trading at the close -- he wanted to create interest in the stock, which was thinly traded, and to make sure that JML Class A appeared in the newspaper the next day. He therefore knew Broumas's motivation for upticking the price of the stock at the end of the trading day.

With regard to the seven wash trades, Havill knew that they were directed, over-the-counter trades; and that Broumas determined all the details of the trades. Broumas told him that he controlled the other side of these trades -- that he was in effect trading with himself -- and yet Havill allowed the trades to take place.

The Commission has found recklessness to be sufficient for purposes of aiding and abetting liability. Raymond L. Dirks, 47 S.E.C. 434, 447 (1981), reversed on other grounds, Dirks v. SEC, 463 U.S. 646 (1983). In addition to the Sundstrand definition of recklessness cited above, another formulation cited for the concept of recklessness is set forth in Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n.98 (2d Cir. 1973) (en banc) (emphasis added):

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

The concept of duty to inquire runs throughout the federal securities laws. In the context of supervision, the Commission has said that "[r]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review." Frederick H. Joseph, 54 SEC Docket 283, 291 (1993); see Edwin Kantor, 54 SEC Docket 293 (1993). In the context of market manipulation, the Commission has stated that "[t]he totality of [the] circumstances at the least placed [the broker] on notice that a searching inquiry was called for as to the nature of the [primary violator's] activity and interest, yet [the broker] made no meaningful investigation. Instead, [the broker] closed his eyes to circumstances indicative of a scheme to create the false appearance of an independent market." Alessandrini & Co., Inc., 45 S.E.C. 399, 404 (1973).

Havill's conduct demonstrated extreme recklessness. In light of all of the things that Havill knew, including his knowledge that Broumas was trying to create interest in JML

stock by trading at the close, and that Broumas was trading with himself, Havill was reckless in allowing these trades to take place. "The importance of a broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation, as here, on the activities of broker-dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in the security." Alessandrini & Co., 45 S.E.C. at 406 (broker-dealer held to have willfully violated or willfully aided and abetted the violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Exchange Act). Havill argues that he was not reckless and that at the first sign of an unusual pattern of trading, he asked Broumas for an explanation, and his supervisor indicated that the trading was all right. Respondent's Brief at 27. In the face of direct knowledge of Broumas's motivations for his marking-the-close trades, and the actual fact of his wash trades, Havill should have stopped these trades with or without his supervisor's agreement. He continued to execute them and therefore violated his duties as a registered representative.

At a bare minimum, Havill was also extremely reckless in not realizing that what he was doing was part of something improper. On the six days that the volume of Havill's wash trades for Broumas was reported, the market was completely defrauded. Much of the volume in the newspaper the next day was Broumas trading with himself. The effect was obviously substantial and material. The very harm that wash trades can cause existed in this case. Anyone looking in the market the next day and seeing that JML was an active stock would have been defrauded.

Havill "failed or refused, after being put on notice of a possible material failure

of disclosure, to apprise [himself] of the facts where [he] could have done so without any extraordinary effort." Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n.98 (2d Cir. 1973)(en banc). Such recklessness "presents a danger of misleading buyers and sellers," Sundstrand Corp., 533 F.2d at 1047, cert. denied, 434 U.S. 875 (1977), who rely on the market information reported to the AMEX and fed into the marketplace. Havill continued to accept Broumas's orders and cause them to be executed. Despite the clear pattern that had emerged, he shut his eyes to what was taking place.

To constitute substantial assistance, the broker's actions must be a causal factor in bringing about the primary violation. See, e.g., Index Fund, Inc. v. Hagopian, 609 F. Supp. 499, 510 (S.D.N.Y. 1985).

"Although the philosophic 'but for' test is not sufficient for liability, the substantial assistance rendered by the aider and abettor need not be the sole cause or the principal cause; it need only be one of the causes." W. Kuehnle, Secondary Liability Under the Federal Securities Laws -- Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common Law Principles and the Statutory Scheme, 14 J. Corp. L. 313, 340 (1989). "[C]onsideration should be given to [a] number and effect of other factors, and to whether the conduct was harmless until acted upon . . . ." Id. The amount and type of assistance required may vary with the broker's degree of knowledge of the impropriety. See Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975). "The manipulative [scheme]...as so often is the case[,] could not have succeeded without the active or passive assistance of broker-dealers." Alessandrini & Co., 45 S.E.C. at 410. The Commission has found brokers liable as aiders and abettors for executing orders placed at the end of the day to cause the stock to close on an

uptick. See Jacob Schaefer and Evans & Co., Inc., 12 SEC Docket 1128 (1977). See Bruce B. Bowen, 55 SEC Docket 1976 (Initial Decision 1993).

Broumas could not have conducted his manipulation without the willing assistance of several securities professionals. Havill's conduct, combined with his actual knowledge and recklessness, substantially assisted Broumas's underlying violation. Courts have recognized a duty to the marketplace on the part of securities participants as necessary to instill integrity and confidence in the markets. For example, the Second Circuit, in finding fraud in connection with insider trading, stated: "As an employee of a broker-dealer, [the broker] had violated [his] obligations to the SEC and to the public **completely independent** of any [other] 'obligations he acquired' as a result of receiving the information." Dirks v. SEC, 681 F.2d 824, 840 (D.C. Cir. 1983) (emphasis added), quoted with approval by the Supreme Court, 463 U.S. 646, 652 (1983).

The Commission and the courts have insisted on the highest possible professional and ethical standards on the part of those who desire to participate in the securities industry. "Brokers are required to meet relatively strict requirements in entering their profession and they thereby gain the advantage and exclusive privilege of trading in the national securities market on behalf of a wide range of investors. (citation omitted.) The Court finds a stock exchange broker acting in that capacity owes a duty to the investing public commensurate with professional responsibilities and privileges growing out of this position." Piper, Jaffray & Hopwood, Inc. v. Ladin, 399 F. Supp. 292, 298-299 (S.D. Iowa 1975). Havill did not meet such standards.

Section 21C of the Exchange Act provides that:

> If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any

> rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, **and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation,** to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

15 U.S.C. §78u-3 (emphasis added).

A finding that the respondent aided and abetted a violation will also constitute a finding that the "[respondent's] conduct was necessarily a 'cause' under Section 21C of the Exchange Act of a violation of the securities laws." Dominick & Dominick, Inc., 50 S.E.C. 571, 578 n.11 (1991). Because Havill aided and abetted Broumas's violations of Sections 9(a)(1), 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5 thereunder, he also caused the manipulation in violation of Section 21C. Even if Havill had not aided and abetted Broumas's violations, he would still have violated Section 21C. The "cause" language of this provision includes a "should have known" standard --classic negligence language. Knippen v. Ford Motor Co., 546 F.2d 993, 1003 (D.C. Cir. 1976); see also Heit v. Weitzen, 402 F.2d 909, 914 (2d Cir. 1968), cert. denied 395 U.S. 903 (1969) (The charge that defendants knew or should have known of the falsity of certain statements alleged both scienter--"knew"--and negligence--"should have known."); Levine v. CMP Publications, Inc., 738 F.2d 660, 674 (5th Cir. 1984). Section 15(b)(6)(A) of the Exchange Act empowers the Commission to "censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer" if the Commission finds, after notice and opportunity for hearing, that such sanction is in the public interest and such person has, among other things, willfully violated any provisions of the Exchange Act or the rules and regulations thereunder. See Sections 15(b)(6)(A)(i) and 15(b)(4)(D) [15 U.S.C.

§§ 78b(6)(A)(i) and 78b(4)(D)].

In this context "it is well [settled] that a finding of willfulness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing." Billings Assoc., Inc., 43 S.E.C. 641, 649 (1967); see Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). "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 our discretion leads us to consider it appropriate, we must do so if the legislative aim is to be attained." Arthur Lipper Corporation, 46 S.E.C. 78, 101 (1975). (citations omitted.)

Imposition of administrative sanctions requires consideration of:

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

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir., 1979), aff'd on other grounds, 450 U.S. 91 (1981). The amount of a sanctions depends on the facts of each case and the value of the sanction in preventing a recurrence. Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); Leo Glassman, 46 S.E.C. 209, 211 (1975); Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n. 67 (1976).

The trading in question and Havill's role in getting Broumas's trades executed did not occur just once, but a number of times. His motivation was clear. For each trade, Havill received a commission. He did what Broumas asked and he rationalized his behavior based on

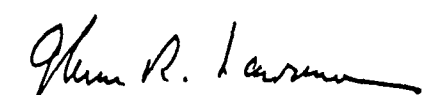
the fact that his manager and his compliance officer did not object to marking the close trades. Havill acknowledges no wrongdoing on his part. Since Havill shows no appreciation for the meaning and significance of his illegal activities, there is a real danger that he could engage in similar such conduct in the future. Havill obviously did and does not appreciate the high standards of conduct to which he is subject as a registered securities professional.

The Division seeks a 6 to 9 month suspension which I consider too severe considering his otherwise clean record and his community activities. Havill admits that Broumas was involved in serious fraud. He, however, maintains that he had no general awareness at the time that he did anything improper or knowingly or recklessly aided or abetted Broumas. Respondent's Reply Brief at 19. Havill goes on to point out, in mitigation, that he ran by the Broumas orders with his supervisor and with the head of compliance and that they said it was all right to execute the trades. Respondent's Brief at 20. Further, the amount that he received from the illegal trades made by Broumas was very small. However, it is noted that Havill is still employed in the securities industry as a registered representative and, accordingly, will have ample opportunity to engage in similar misconduct in the future. It is concluded that it is in the public interest that Havill be sanctioned as follows:

ORDER

IT IS ORDERED that Adrian C. Havill be suspended from association with any broker or dealer under Section 15(b)(6) of the Exchange Act for a period of two months. Havill is ordered under Section 21C of the Exchange Act to permanently cease and desist from committing or causing any violation and committing or causing any future violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

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



Glenn Robert Lawrence
Administrative Law Judge

Washington, D.C.
August 31, 1995