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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

SIDNEY TAGER, dba THE TAGER COMPANY :
Time-Life Building :
1271 Avenue of the Americas :
New York 20, New York :
(File No. 8-6736) :

DARIUS INCORPORATED :
80 Pine Street :
New York 5, New York :
(File No. 8-6440) :

ENGLANDER & CO., INC. :
115 Broadway :
New York 6, New York :
(File No. 8-5526) :

FILED

JAN 25 1962

SECURITIES & EXCHANGE COMMISSION

RECOMMENDED DECISION
(Private Proceedings)

Washington, D. C.
January 25, 1963

Irving Schiller
Hearing Examiner

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RECOMMENDED DECISION

BEFORE:

Irving Schiller, Hearing Examiner

APPEARANCES:

David W. Smith and Robert M. Dubow, Esq.
of the New York Regional Office of the Commission
for the Division of Trading and Exchanges

Gerard J. O'Brien, Esq. of Boyle, Feller & Reeves,
for Sidney Tager, dba The Tager Co.

Harry Balterman, Esq. for Darius Incorporated

Howard Solomon, Esq. of Tenzer, Greenblatt, Fallon
& Kaplan for Englander & Co., Inc. and
Norris J. Rosenbaum

Epstein & Furman, Esqs. for Arnold Schultze

Sheldon Leighton pro se.

These are private proceedings instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to revoke or, pending final determination of the question of revocation, to suspend the registrations as brokers and dealers of Sidney Tager, dba the Tager Co. ("Tager"), Darius Incorporated ("Darius") and Englander & Co., Inc. ("Englander"); whether, under Section 15A of the Exchange Act, to suspend for a period not exceeding twelve (12) months or to expel Tager, Darius and Englander, or any of them, from membership in the National Association of Securities Dealers, Inc. ("NASD") and whether under Section 15A(b)(4) of the Exchange Act Sheldon Leighton ("Leighton"), Arnold Schultze ("Schultze") and Norris J. Rosenbaum ("Rosenbaum"), or any of them, are each a cause of any order of revocation, suspension or expulsion which may be issued.^{1/}

^{1/} Section 15(b) of the Exchange Act, as applicable here, provides that the Commission shall revoke the registration of a broker or dealer if it finds that it is in the public interest and that such broker or dealer or any officer, director, or controlling or controlled person of such broker or dealer, has willfully violated any provision of that Act or of the Securities Act of 1933 or any rule thereunder.

Section 15A(1)(2) of the Exchange Act provides for the suspension for a maximum of twelve months or the expulsion from a national securities association of any member who has violated any provision of the Exchange Act or has willfully violated any provision of the Securities Act of 1933 or any rule or regulation thereunder if the Commission finds such action to be necessary or appropriate in the public interest or for the protection of investors.

Under Section 15A(b)(4) of the Exchange Act, in the absence of Commission approval or direction, no broker or dealer may be admitted to or continued in membership in a national securities association if the broker or dealer or any partner, officer, director or controlling or controlled person of such broker or dealer was a cause of any order of revocation which is in effect.

The order for proceedings alleges in essence that during the period from about August 24, 1960 to November 25, 1960 Tager, Darius and Englander, together with or aided and abetted by Leighton, Schultze and Rosenbaum, used the mails and the facilities of interstate commerce while engaged in the offer and sale of the common stock of Diversified Collateral Corporation ("Diversified") and employed devices, schemes and artifices to defraud and engaged in acts, transactions, practices and a course of business inconsistent with their duty of fair dealing or which operated or would operate as a fraud and deceit upon certain persons and made false and misleading statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading in willful violation of the anti-fraud provisions of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5, 10b-6 and 15c1-2 thereunder.^{2/}

After appropriate notice hearings were held before the undersigned Hearing Examiner. Proposed findings of fact and conclusions of law and briefs in support thereof were filed with the Hearing Examiner by the Division of Trading and Exchanges, Tager, Englander and Rosenbaum

^{2/} The effect of these provisions as applicable here is to make unlawful the use of the mails or facilities of interstate commerce in connection with the purchase or sale of any security by means of a device to defraud an untrue or misleading statement of material fact, or a misleading omission of a material fact, or any act, practice, or course of business which operates or would operate as a fraud or deceit upon a customer, or by means of any other manipulative or fraudulent device.

and briefs were submitted by Darius and Schultze.

The following findings and conclusions are based on the record, the documents and exhibits therein and the Hearing Examiner's observation of the various witnesses:

1. Tager, a sole partnership, was registered with this Commission as a broker and dealer on August 20, 1958; Darius, a New York corporation, was so registered on March 13, 1958; and Englander, also a New York corporation, was so registered on December 29, 1956. Tager and the two corporations are members of the NASD, a national securities association registered pursuant to Section 15A of the Exchange Act. Leighton is president and owner of all of the outstanding stock of Darius and during the period in question Schultze was an employee of Darius. Rosenbaum is president, director and owner of 10% or more of the common stock of Englander.

2. Diversified, a Florida corporation, filed with the Commission, on February 24, 1960, a notification on Form 1-A for the purpose of obtaining an exemption from the registration requirements of the Securities Act pursuant to the provisions of Section 3(b) and Regulation A promulgated thereunder. The filing related to a proposed public offering of 75,000 shares of 10¢ par value common stock at \$4.00 per share for an aggregate amount of \$300,000. The offering was originally commenced on April 25, 1960 and was made through the officers and directors of the said company. Some time in May or June of 1960 Leo Greenfield, President of Diversified, approached Tager for the

purpose of having Tager act as underwriter of the said offering. Tager, the record shows, who had no prior experience as an underwriter agreed to act in that capacity and entered into an underwriting agreement on July 25, 1960. In essence, the underwriting agreement provided that Tager was bound only to use its best efforts as exclusive agent for the company to sell its securities at the aforementioned offering price. An amendment to the Form 1-A was filed with the Commission to name Tager as principal underwriter and the offering was re-commenced on August 24, 1960. Prior to the time Tager commenced the offering the company had sold approximately 7,700 shares of its common stock.

Violations of Section 10(b) of the Exchange Act
and Rule 17 CFR 240.10b-6 thereunder

3. The gravamen of the charges alleged in the Commission's order as a violation of Section 10(b) and Rule 17 CFR 240.10b-6 thereunder is that Tager, while engaged in the distribution of shares of the common stock of Diversified, purchased shares for his own account and arranged with Darius and Englander to publish bids and offers for the said stock at prices determined and stipulated by Tager and to purchase and sell said stock for their own accounts and while engaging in the aforesaid arrangements and transactions were effecting a series of transactions creating actual or apparent active trading in the stock of Diversified for the purpose of inducing the purchase of the said stock by others.

4. As previously noted, Tager commenced the offering of the Diversified common stock in August 1960. According to Tager, the issue

did not meet with public enthusiasm and was a "little sticky." After commencing the offering Tager approached Darius and Englander to join a selling group but they declined to do so. Diversified's president, who was concerned with the fact that the stock was not moving rapidly, conferred with Tager and suggested, among other things, that "it would be nice" to have brokers trade the stock. Tager testified that it was his view that it would be advantageous in distributing the Diversified stock to have other brokers and dealers in the "pink sheets."^{3/} With that thought in mind Tager contacted Darius and Englander.^{4/} Each of the firms discussed with Tager the matter of making a market in the said stock and placing quotations in the pink sheets. Since these discussions are vital to a determination of the alleged violations a detailed review of the record would be helpful.

5. Following a conversation between Leighton and Tager concerning making a market in the Diversified stock and inserting quotations in the pink sheets for such purpose, Leighton introduced Tager to Schultze, one of his employees who was acting as a trader and left it up to Schultze to decide whether to trade the Diversified stock and working out the necessary details for such purpose.

^{3/} The "pink sheets" or "sheets" referred to are the daily bid-and-ask quotations published by the National Daily Quotations Sheets.

^{4/} The record discloses that Tager had prior business dealings with Darius and Englander and had traded various securities with each of them for several years.

6. Schultze testified that shortly prior to September 14, 1960 he discussed trading the Diversified stock with Tager and informed Tager he wanted assurance that Darius would be "protected" for any trades the firm would make. Tager assured Schultze that as underwriter he knew who wanted to buy and sell the Diversified stock and if Darius needed purchasers for stock it acquired Tager would furnish him with such information and if Darius needed stock to cover sales Tager would similarly furnish such information. Schultze thereupon determined to trade the stock and asked Tager "how he would like the stock opened." Upon receiving the information Schultze inserted quotations in the pink sheets. Schultze communicated with Tager daily (except for an occasional lapse of a day), asked and received his suggestion as to the prices and inserted quotations in the said sheets in accordance with Tager's suggestions.

7. Schultze further testified that the prices quoted in the sheets and any increases or decreases were attributable to Tager since he, Schultze, knew nothing about the company and had no thoughts of his own as to what prices should be quoted in the said sheets. In addition, after each transaction Schultze effected he would report that fact to Tager and ask him for either a buyer or seller. Leighton testified he was aware that Schultze was communicating with Tager and assumed Schultze was receiving guidance from Tager as to the stock prices.

8. Tager testified that his conversations with the Englander

firm concerning making a market in the Diversified stock were carried on with Rosenbaum. The evidence shows Rosenbaum expressed a willingness to make a market in the Diversified stock and accepted Tager's word that the stock would be a good number for the Englander firm to trade. Tager informed Rosenbaum that since he (Tager) was the underwriter he knew persons who were interested in buying or selling the said stock and that he would make that information available to Rosenbaum. Though Rosenbaum denied such conversation the Hearing Examiner credits Tager's version. Tager spoke with Rosenbaum approximately three or four times a week and when Rosenbaum informed him what prices were being quoted in the sheets Tager expressed approval. In addition, Tager testified, in substance, that he told Rosenbaum that "I would like to see that stock sell at a higher price if it is possible." Rosenbaum admitted that upon being told by Tager the Diversified stock was free to trade he was prepared to begin trading the stock and making a market in the said stock but denied Tager suggested prices to him.

9. The evidence shows that, except for three days, Darius inserted quotations in the sheets every business day from September 14 through November 14, 1960 and that Englander, except for one day, inserted such quotations each business day from September 14 through October 17, 1960.

10. Some time in the latter part of October 1960 Tager informed his counsel that he had discussed inserting quotations in the pink sheets with Darius and Englander and apparently was informed

such activity was inadvisable while Tager was acting as underwriter. Tager communicated the advice to both firms and the evidence shows that Englander ceased inserting quotations on October 17, 1960 and Darius ceased on November 14, 1960.

11. The record is clear that during the period both firms were quoting the Diversified stock in the sheets Tager continued his sales activities as underwriter. Tager's records show he sold 7,167 shares of the said stock from September 14 through November 14, 1960.

12. We first consider whether the activities of Tager, Darius and Englander were in violation of Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-6 thereunder. Section 10(b) of the Exchange Act prohibits any person from using or employing any manipulative or deceptive device or contrivance, in connection with the purchase and sale of any security, in contravention of the Commission's Rules and Regulations. Rule 17 CFR 240.10-b thereunder states, in pertinent part, it shall constitute a "manipulative or deceptive device or contrivance" for any person who is an underwriter in a particular distribution of securities or who is a broker or dealer or other person who has agreed to participate or is participating in such distribution, directly or indirectly either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution or to attempt to induce any person to purchase any such security until after he has completed his participation in such distribution.

13. With respect to Tager, the record is clear that during the period between August 30 and December 24, 1960 Tager was engaged in distributing the Diversified stock under the Regulation A offering.^{5/} The evidence shows that in November of 1960 Rosenbaum informed Tager he had 100 shares of Diversified stock which he would like to sell and Tager agreed to take the stock off his hands. However, at Tager's suggestion the 100 shares were taken in the name of Tager's wife. The Hearing Examiner finds that this transaction was in willful violation of Rule 17 CFR 240.10b-6 since Tager, at a time when he was effecting a distribution of the Diversified stock, purchased shares of such stock for an account in which he had a beneficial interest.

14. We next consider whether Tager's understanding or discussions with Darius and Englander concerning the making of a market in the Diversified stock and the subsequent publication of quotations in the pink sheets by the latter two firms constituted a further violation by Tager of the above-mentioned section of the Exchange Act and the Rule thereunder. As previously noted, some time in September of 1960 Diversified's President suggested the idea to Tager that other brokers trade the stock, and Tager's own view was that it would aid the distribution to have brokers and dealers quoting the stock in the pink

^{5/} A report filed with this Commission on January 9, 1961 on Form 2-A pursuant to Rule 260 of Regulation A discloses the underwriting of the Diversified stock in which Tager was the underwriter was completed on December 24, 1960. The Commission's files further disclose that by order dated January 31, 1962 the Commission permanently suspended the exemption under Regulation A with respect to the offering of the Diversified stock (Securities Act Release No. 4446).

sheets. Obviously Tager, as underwriter, sought to induce the purchase of Diversified stock by others. It is evident that Tager, apart from believing the quotations by Darius and Englander would aid his distribution, knew or should have been aware that by requesting such firms to make a market in the Diversified stock, at a time when he was engaged in the distribution of the said stock, he was at least by such means attempting to induce persons to purchase such stock. The Hearing Examiner finds that Tager's activities in requesting that Darius and Englander make a market in the Diversified stock and insert quotations in the pink sheets at a time when he was engaged in the distribution of such stock was by any standard an attempt to induce persons to purchase the said stock and that within the meaning of Rule 17 CFR 240.10b-6 such activities constituted the use or employment of a manipulative or deceptive device or contrivance prohibited by Section 10(b) of the Act.

15. Turning to Darius and Englander we note that the above-mentioned Rule in addition to prohibiting underwriters from certain actions also prohibits any broker or dealer who has agreed to participate or is participating in a distribution to bid for or purchase any securities of the same class or to attempt to induce any persons to purchase any such security until after the broker or dealer has completed his participation in such distribution. We consider therefore whether Darius or Englander either agreed to or participated in the distribution of the Diversified stock and whether they bid for or purchased such stock or attempted to induce any persons to purchase

the said stock prior to completion of the distribution. There is no direct evidence of any agreement between Tager on the one hand and Darius and Englander on the other to participate in Tager's underwriting of the Diversified stock. However, circumstantial evidence is competent to establish the necessary agreement.^{6/} The record shows that both firms had over a period of years engaged in transactions with Tager in various securities. The evidence is clear that Tager sought out Darius and Englander to assist him in the distribution of the Diversified stock by joining the selling group and when such efforts were unsuccessful requested them or accepted their offer to aid in making a market in the said stock. The record is equally clear that both firms not only expressed an interest in making a market in the Diversified stock, but proceeded to accomplish this fact by publishing quotations in the pink sheets.

16. Darius inserted quotations for approximately two months and Englander inserted such quotations for one month notwithstanding that very little trading was being done by either firm. An analysis of the pattern followed in quoting the stock is most informative. For the first 15 trading days after September 14, 1960 the quotations in the pink sheets by Darius and Englander were exactly the same, to wit:

^{6/} S.E.C. v. Scott Taylor, Inc., 183 F. Supp. 904 (S.D.N.Y.1959)
See Matter of Halsey Stuart & Co., 30 S.E.C. 106 (1949)

3-3/4 bid, 4-1/4 asked. On October 5, 1960, both firms raised their bids to 4, Darius raised its asked to 4-1/2 and Englander to 4-3/8. These raised prices continued for the next nine trading days after which Englander dropped out of the sheets and Darius continued such raised quotations for another 14 trading days, raising its bid to 4-1/4 on three of such days and lowering its quotations on the last four trading days during which the quotations appeared. No other quotations were published in the sheets during the said period except one isolated quotation by a broker on November 11, 1960.

17. Viewing the evidence to determine whether an agreement to participate in a distribution existed between Darius and Tager it appears evident that Darius consented to trade the Diversified stock at Tager's request, that Tager agreed to protect Darius in the latter's trading operations, that Tager told Darius when to appear in the pink sheets, that Schultze, the trader for Darius, constantly consulted with and received suggestions from Tager about the prices to be quoted, received his guidance throughout in that connection and reported his transactions to Tager. The record also discloses that Tager, pursuant to his understanding with Schultze, recommended customers to Darius on at least two occasions. Darius admits that it effected seven trades in the said stock involving 306 shares at prices ranging from 3-3/4 to 4-1/4 per share. There is no dispute that the mails were used in connection with the foregoing transactions. All these factors raise a compelling inference that Darius had an understanding with Tager to make a market in and trade the Diversified stock and in accordance with

such understanding inserted quotations in the sheets at prices stipulated by Tager. The Hearing Examiner finds that Darius agreed to and participated in the distribution of the Diversified stock, that Darius bid for and purchased and sold for its own account securities which were the subject of said distribution prior to the completion of its participation in such distribution and that within the purview of Rule 17 CFR 240.10b-6 these activities constituted the use of a manipulative or deceptive device or contrivance.

18. With respect to Englander, the evidence shows that in July 1960 Rosenbaum read an advertisement of the Diversified offering, phoned Tager to inquire about it and was told the issue would shortly become effective. Rosenbaum informed Tager he would like to trade the stock when Tager was ready. Rosenbaum testified that toward the end of August or early September 1960 after he declined to join the selling group he inquired of Tager concerning the distribution, and was told it was a bit sticky but moving out. Rosenbaum further testified that shortly thereafter and within a day or two prior to September 14, 1960 he was told by Tager that the Diversified stock was free for trading that Rosenbaum could make a market in it, and insert quotations in the aforementioned sheets. Tager confirms these facts and testified that when discussing making a market in the Diversified stock he informed Rosenbaum, as he did Schultze, that he would try to find purchasers and sellers for Englander. On one occasion Tager suggested to Rosenbaum he would like to see the prices

raised. Rosenbaum denied he was given specific prices to quote in the sheets. However, of utmost significance is Rosenbaum's testimony concerning raising his bid and asked quotations and the reason he stayed in the sheets for a month. Rosenbaum testified that though there were no calls in response to his quotations and no apparent interest in the Diversified stock, he nevertheless raised his prices to see if he could bring in anything. He further testified that his reason for staying in the sheets was primarily because he was friendly with Tager and was quoting the stock as a courtesy to him.

19. The circumstantial evidence here is sufficient to establish an understanding or agreement by Englander to aid or participate in the underwriting by Tager. The Hearing Examiner finds that Englander agreed with Tager to make a market in the Diversified stock and that by inserting quotations in the pink sheets at a time when a distribution by Tager was in progress aided or participated in the distribution. The Hearing Examiner further finds that within the purview of Rule 17 CFR 240.10b-6 the quotations in the sheets by Englander constituted a bid for the securities which were the subject of a distribution or at the very least constituted an attempt to induce persons to purchase such securities prior to Englander's completion of its participation in such distribution.

20. Both Darius and Englander urge they were unaware that Tager was engaged in a distribution of the Diversified stock at the time they inserted their quotations and that Tager informed each of

them that the stock was free to trade. It is clear from the record that early in September 1960 both firms were aware that Tager was engaged in a distribution of the Diversified stock. At the time their quotations were inserted in the sheets no inquiry was made of Tager nor of any of the seven broker or dealer firms which the record shows were listed as having participated in the distribution as to whether such distribution had actually been completed or terminated. The record is barren of any effort or attempt by Darius or Englander to verify the date the distribution was either completed or terminated and whether the stock was, in fact, free to trade.^{7/}

21. Brokers and dealers who are aware that a distribution of securities under Regulation A has commenced and who within a short time thereafter are requested to make a market in such securities where no such market previously existed have a duty and responsibility to take every reasonable precaution to satisfy themselves that such distribution has been completed or terminated before actually making a market in such securities. Under the circumstances

^{7/} The record shows that Rosenbaum has been in the securities business for about ten years and Leighton about five years and both were familiar with Regulation A offerings. It is reasonable to believe that they knew that under Rule 260 of Regulation A a final report must be filed with this Commission on completion or termination of such an offering. Since no report was filed until November 25, 1960 any inquiry of the Commission would have put them on notice that Tager's distribution had not as yet been completed or terminated.

of this case, and in light of Rule 10b-6 specifying certain acts by brokers and dealers as manipulative the acceptance by Darius and Englander of a self-serving oral statement by the underwriter, who they knew had been engaged in a distribution, that the stock is free to trade and where the evidence shows that such broker or dealer made no effort or attempt to ascertain whether such distribution had, in fact, been completed or terminated does not satisfy the obligations and responsibilities of brokers or dealers to refrain from employing a manipulative or deceptive device. The Hearing Examiner finds that Tager, Darius and Englander willfully violated Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-6 thereunder and that Leighton, Schultze and Rosenbaum aided and abetted in such violation.

Violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5 and 15c1-2 thereunder

22. The order for proceedings alleges that the activities of Tager, Darius and Englander, which have been discussed above, also constitute violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and the Rules there-
under.^{8/} The antimanipulative provisions of the Exchange Act are aimed not only against defrauding investors but to assure that a free and open market exists unhampered by the imposition of artificial

^{8/} See footnote 2 supra.

9/
stimulants.

23. The basic question under these Sections is whether the activities of Tager, Darius and Englander impeded a free and open market, whether such activities created a false appearance of activity, and whether the said firms engaged in a course of business which would operate as a fraud or deceit on any person. The Hearing Examiner is of the view that the activities of each of the aforesaid firms were inimical to the existence of a free and open market, created a false appearance of market activity and that such firms engaged in a course of business which operated as a fraud on persons.

24. It is clear that at the time Tager, Darius and Englander set about to establish a market in the Diversified stock, neither Darius nor Englander had any knowledge of Diversified's activities or operations, other than possibly looking at a prospectus given them by Tager, but agreed to insert quotations in the sheets as an accommodation or courtesy to Tager with the hope at the same time of making a profit. Their primary purpose appears obvious, namely, to induce persons to purchase the securities of Diversified and profit thereby. Notwithstanding the fact that there was little trading by Darius and practically none by Englander, they not only continued their quotations but raised their bid and asked on exactly the same day. Darius offered no explanation for increasing its

quotations and it is evident that the market activity by the said firm did not appear to warrant such increase. Englander's stated purpose for raising its quotations was "to see if I could bring in anything," and to generate interest in the stock. Such purpose is hardly a sufficient reason to justify an increase in quoted market prices particularly where such increase is not dictated by supply and demand. The Commission in Masland, Fernon & Anderson supra stated "Where the purpose is to induce the purchase or sale of securities by others the Act denounces manipulation whether designed to raise or lower the market price of a security or only to create a false appearance of activity or inactivity in the market for the security." The conclusion in the instant case is inescapable that Tager, Darius and Englander made every effort to establish a market, to stimulate such market by raising the quotations in the sheets for the purpose of inducing persons to buy and create a false appearance of activity in the market for the Diversified stock.

25. The Commission in Halsey Stuart & Co., Inc., supra, in considering the impact of quotations in the pink sheets on the over-the-counter market stated

" .the listings are commonly understood to have a serious meaning and business purpose. They are steps in sales negotiations and, at the very least, invitations to negotiate the sales. . . . There is no doubt that the sheets are intended to be used as indications of trading interest and are generally so regarded."

26. The Hearing Examiner finds that Tager, Darius and Englander by their activities effected a series of transactions creating apparent active trading in the Diversified stock for the purpose of inducing others to buy. The Commission has held that the publication of quotations in the pink sheets when part of a series of similar and other acts affecting prices or creating activity are "transactions."^{10/} The quotations inserted in the sheets for the period September through November, 1960 by Darius and September through October 1960 by Englander gave knowledge to the subscribers of the sheets, that they stood ready to purchase and sell the Diversified stock and by increasing such quotations gave the appearance of activity in the said securities.

27. Englander asserts that its activities were in every respect routine, that it only increased its price on one occasion which it maintained for a period of nine trading days, and that these actions did not fall within the umbra of the Commission's decisions in such cases as R. L. Emacio & Co., Inc., 35 S.E.C. 191 (1953), Theodore A. Landau, d/b/a Landau Co., Scott Taylor & Co., Inc., Exchange Act Release 6792 (1962), M. S. Wien & Co., 23 S.E.C. 735 (1946) since in all those cases the pattern of market activity was abnormal and wholly

^{10/} Halsey Stuart & Co., Inc., supra.

inconsistent with routine trading activity. This argument fails to give adequate consideration to the underlying concepts which the Commission enunciated in the said cases. Though factually each case is different they all clearly state a basic principle that the Acts and rules seek to assure that a free, open and competitive market exists and that investors have every right to assume the existence of such a market. These cases uniformly hold that where brokers and dealers insert quotations in the pink sheets over a period of time and who increase such quotations for the purpose of inducing persons to purchase such securities they are inserting artificial stimulants into the market, are impeding a free and open market and creating an appearance of active trading in such securities. Such activities the Commission stated constitute the use of a manipulative device or contrivance and a course of business which operates or would operate as a fraud or deceit upon persons. Englander argues that the instant case also differs from the Commission's prior decisions in that in the earlier cases the increases in the quoted prices were far greater and the trades effected were more numerous. A device deemed to be manipulative does not change its character and become an acceptable practice or routine trading activity merely because it failed to reach the magnitude that similar devices achieved. In the instant case, as in the cases cited, it is evident that the activities engaged in were similar but on a smaller scale, namely, the insertion of quotations in the sheets and an increase in such quotations for the purpose of inducing others to buy and the

creation of an appearance of activity in the market.

28. Schultze contends that the acts of Darius were not sufficient to create "artificial trading activity," that there was nothing "artificial" about the little activity that took place, and that no real attempt was made "to induce others to purchase the stock." The Hearing Examiner rejects these contentions. The insertion of quotations in the sheets on 43 successive trading days during the period September 14 through November 14 and increasing such quotations from 3-3/4 bid to 4 and its asked from 4-1/4 to 4-1/2 on 18 trading dates and again increasing its bids from 4 to 4-1/4 on three trading dates without any apparent justification in the opinion of the Hearing Examiner is sufficient to create a false appearance of activity in the market and a very real attempt to induce persons to purchase the Diversified stock.

29. The record discloses and Tager, Darius and Englander admit that they did not inform the publishers of the pink sheets that the quotations were being inserted by Darius and Englander by virtue of an agreement with Tager and at prices he specified to Darius and approved for Englander. Tager informed approximately fifteen of his customers that a market existed for the Diversified stock but failed to disclose that he was responsible for creating and maintaining such market and that along with Darius and Englander sought to create apparent trading activity in the stock. Darius in addition failed to disclose to its customers that the prices it was quoting were stipulated

by Tager. It is well settled that failure of brokers and dealers to disclose material facts relating to market manipulation by them operates as a fraud and constitutes a willful violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder.^{11/}

30. The Hearing Examiner finds that Tager, Darius and Englander, aided and abetted by Leighton, Schultze and Rosenbaum, used the mails and instrumentalities of interstate commerce, while engaged in the offer and sale of Diversified stock, to employ devices, artifices to defraud, engaged in acts, transactions, procedures and a course of business which operated or would operate as a fraud and deceit upon certain persons, effected a series of transactions creating actual or apparent active trading in the Diversified stock for the purpose of inducing the purchase of said stock by others and made untrue statements of material facts and omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading, in willful violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rules 17 CFR 240.10b-5 and 15c1-2 thereunder.

Public Interest

31. The sole remaining question is whether it is in the public interest and for the protection of investors to revoke the registration

^{11/} R. L. Emacio & Co., Inc., *supra*; M. S. Wien & Co., 23 S.E.C.734 (1946); Adams & Co. et al, 33 S.E.C. 444 (1952)

of Tager, Darius and Englander or to suspend for a period not exceeding twelve months or to expel such firms from membership in the NASD. Each of the firms argues strenuously that the violations, if any, were not willful, that there was no intent to violate the law, that they had no knowledge that their actions contravened any of the Commission's rules, and that there was no intent to manipulate the market.

32. The Commission has repeatedly held that an intention to violate the law is not necessary to a finding of willfulness within the meaning of Section 15 of the Exchange Act; it is sufficient that "the person charged with a duty know what he is doing."^{12/} It is evident from the record that at least in this sense the violations by Tager, Darius and Englander were willful. It is clear from the record that each of the firms knew what it was doing but may have been unaware of the fact that its activities were in violation of the statutes.

33. Tager, in addition, urges that cognizance be given to the fact that he fully cooperated with the staff of the Commission during the course of the investigation preceding the commencement of the instant proceeding. The Hearing Examiner gives due consideration to Tager's pleas but feels that they do not outweigh the seriousness of the willful violations established against him. Tager was acting as

^{12/} Hughes v. S.E.C., 174 F.2d 969, 977 (C.A.D.C.1949); Shuck v. S.E.C. 264 F.2d 358 (C.A.D.C.1958).

an underwriter and in order to aid in his distribution of the Diversified stock he deliberately and knowingly sought to and was responsible for establishing a market when the distribution was in progress, suggested the prices to be quoted, on at least one occasion suggested an increase in the price of the said stock and made false representations to customers as to the existence of a market and failed to disclose his responsibility for creating such market and the manner in which it was maintained and on at least two occasions directed potential customers to Darius. Tager has demonstrated a lack of understanding of the responsibilities of a broker and dealer to deal fairly with customers and potential investors. The Hearing Examiner recommends that it is in the public interest and for the protection of investors to revoke the registration of Tager as a broker and dealer and that it be expelled from membership in the NASD

34. Darius further urges that apart from the fact that Leighton, its president, was never aware that the firm's activities were in violation of any of the statutes the public interest does not require revocation of its broker-dealer registration nor expulsion from the NASD in light of a small number of shares involved in the alleged violations and that since the stock at the time of the hearing was trading in excess of the price at which Darius sold, no fraud was perpetrated on investors. As previously noted, Leighton agreed to

make a market in the securities and thereafter left all of the details to his employee, Schultze. He failed to exercise any supervision over his employee who was acting as trader for the Diversified stock and though he knew that Tager was guiding Schultze in connection with the latter in quoting prices in the pink sheets and that such prices were being furnished by Tager he failed to appreciate that such actions were contrary to the maintenance of a free and open market or that absent disclosure such a course of conduct would operate as a fraud and deceit on investors. Darius omitted to disclose to its customers that its quoted prices were received from Tager. These actions demonstrate the lack of understanding of the responsibility of a broker and dealer in the maintenance of a free and open market and the requirements of disclosure to potential investors. With respect to the argument that no fraud was committed because no loss was suffered by investors the Commission has held that it is unnecessary to show damage or loss to investors of any sort to establish a violation of Section 17(a) of the Securities Act nor is it necessary to show such loss where a manipulation in violation of the Exchange Act is established. Any possible defense based on the fortuitous circumstance that supervening events, wholly extraneous to activities of a manipulator, may have happened to save investors from an overall loss is untenable. Russell Maguire & Company, Inc., 10 S.E.C. 332 (1941). The Hearing Examiner accordingly recommends that it is in the public interest and for the protection of investors to revoke the registra-

tion of Darius as a broker and dealer, expel the firm from membership in the NASD and that Leighton and Schultze by reason of their participation in the violations as found be named as causes for such order of revocation and expulsion.

35. With respect to Englander, it has been previously noted that Englander agreed to make a market in securities as a favor or courtesy to Tager. Englander, like Darius, failed to take appropriate measures to assure itself that Tager's distribution had in fact ceased or terminated. By inserting quotations in the sheets and increasing prices therein for wholly inadequate reasons approximately one-third of the time such quotations appeared in the sheets, it is the Hearing Examiner's belief that Englander failed to show an understanding of the duties and responsibilities of a broker and dealer in the maintenance of a free and open market. Englander also urges that it made no profit as a result of its activities. Such argument merits no consideration since it implies that any effort or attempt to manipulate the market should be judged by financial success. Of primary concern, however, is the protection of investors. The determination of the existence of a violation of the anti-fraud and anti-manipulative rules of the Commission designed to afford protection to potential investors can not be gauged by any consideration as to whether brokers and dealers profited. Investors are entitled to the assurance that a free and open market exists and brokers and dealers who engage in activities interfering with such a market demonstrate a lack of appreciation of their responsibilities to unwary investors and should not be permitted to continue in business. The Hearing Examiner recommends that the broker-

dealer registration of Englander be revoked, that it be expelled from the NASD and that Rosenbaum be named as a cause of such order of revocation and expulsion.

Motions to Dismiss

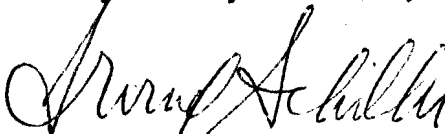
Each of the persons named in the Commission's order moved to dismiss the proceedings on the ground that the Division failed to make out a prima facie case of wrongful action within the meaning of statutes, rules and regulations specified in the aforesaid order and on the further ground that there was no proof of the violations as charged. Decision on the motions was reserved. In view of the Hearing Examiner's findings of willful violations the motions to dismiss are denied.

Recommendation

In view of the willful violations found it is respectfully recommended that the Commission enter an order finding it is in the public interest and for the protection to investors to revoke the registrations of Tager, Darius and Englander as brokers and dealers and expel them from membership in the NASD. It is further recommended that the Commission also find that Leighton, Schultze and Rosenbaum willfully participated in, or aided and abetted in the willful violations of the above designated provision of the Securities Act and the Exchange Act and the respective rules thereunder and that such

individuals were each a cause of such order of revocation and
expulsion. ^{13/}

Respectfully submitted,



Irving Schiller
Hearing Examiner

13/ To the extent that proposed findings and conclusions submitted by the Division of Trading and Exchanges, Tager, Englander and Rosenbaum and briefs submitted by Darius and Schultze are in accord with the views expressed herein they are sustained and to the extent they are inconsistent therewith they are expressly overruled.

Washington, D. C.
January 25, 1963