UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
KAMEN & COMPANY ABRAHAM KAMEN	:
File No. 8-4175	:
FREDERICK CIRLIN ASSOCIATES, INC. FREDERICK CIRLIN BRIAN FREDERICK BARRABEE	:
File No. 8-11319	:
LAURENCE H. ROSS	:
File No. 8-11033	:

FILED
NOV 17 1965
SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

Sidney Gross
Hearing Examiner

Washington, D. C.
November 15, 1965

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
KAMEN & COMPANY ABRAHAM KAMEN	:
File No. 8-4175	:
FREDERICK CIRLIN ASSOCIATES, INC. FREDERICK CIRLIN BRIAN FREDERICK BARRABEE	:
File No. 8-11319	:
LAURENCE H. ROSS	:
File No. 8-11033	:

INITIAL DECISION

ERRATA

Page 16 - line 1 - eliminate "the" preceding word "late".

Page 16 - line 4 - change "would" to "could".

Page 19 - line 6 - eliminate word "omitting" and substitute "constituting an omission".

Page 60 - line 12 - change "enjoining" to "enjoined".

Sidney Gross
Hearing Examiner

Washington, D.C.
November 18, 1965

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
KAMEN & COMPANY ABRAHAM KAMEN	:	
File No. 8-4175	:	
FREDERICK CIRLIN ASSOCIATES, INC. FREDERICK CIRLIN BRIAN FREDERICK BARRABEE	:	INITIAL DECISION
File No. 8-11319	:	
LAURENCE H. ROSS	:	
File No. 8-11033	:	

BEFORE: Sidney Gross, Hearing Examiner

APPEARANCES: Geoffrey M. Kalmus of Skadden, Arps, Slate, Meagher & Flom for Kamen & Company and Abraham Kamen.

Andrew E. Kuchinsky and Louis Jacobus for Frederick Cirlin Associates, Inc. and Frederick Cirlin.

Charles Snow, Bert L. Gusrae and Gomer W. Krise for the Division of Trading and Markets.

These are consolidated proceedings brought pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act").[1/] They were instituted by (a) the order for proceedings issued by the Securities and Exchange Commission ("the Commission") on September 3, 1963, against Jerome, Richard & Co., Inc.

1/ As applicable here:

Section 15(b) of the Exchange Act provides that the Commission shall censure, suspend for a period not exceeding twelve months or revoke the registration of any broker or dealer or censure, bar or suspend for not more than twelve months any person from being associated with a broker or dealer, if it finds that such sanction is in the public interest and that the broker or dealer or any person associated with him has wilfully violated any provision of that Act or of the Securities Act of 1933 ("Securities Act"), or any rule thereunder or has aided and abetted in such violation or is permanently or temporarily enjoined by a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase and sale of any security or has failed reasonably to supervise persons subject to his supervision.

Section 19(a)(3) of the Exchange Act provides that the Commission may, for the protection of investors, suspend for not more than twelve months or expel from a national securities exchange any member or officer thereof who it finds has violated any provision of the Exchange Act or the rules thereunder.

Under Section 15A(b)(4) of the Exchange Act, in the absence of the Commission's approval or direction, no broker or dealer may be admitted to or continued in membership in a national securities association, if the registration of such broker or dealer has been suspended or revoked by the Commission or if the broker and dealer has been and is suspended or expelled from membership in such association or in a national securities exchange or has been barred or suspended from being associated with a broker or dealer or was the cause of any suspension or expulsion of a broker-dealer as described above or if the broker and dealer has associated with him any person who is known or should be known to him to be ineligible as a broker and dealer for admission or continuance in such association or exchange under the provisions set forth above.

("JR") and which named as "causes" Richard Venticinque ("Venticinque") its President, Treasurer, a director and beneficial owner of 10% or more of JR's voting stock, and Jerome Perlongo ("Perlongo") its Vice President, Secretary, a director and beneficial owner of 10% or more of JR's voting common stock and (b) the Commission's order for consolidated proceedings dated September 14, 1964, against the three respondents named in the order of September 3, 1963 and, in addition, Kamen & Company ("Kamen Co"); Abraham Kamen ("Kamen"), a general partner of Kamen Co; Frances Ginsburg ("Ginsburg"), Anthony Perotta ("Perotta"), Jerome Melvin Grossinger ("Grossinger") and Laurence H. Ross ("Ross"), employees of Kamen Co; George Herman ("Herman"), allegedly "a de facto supervisory employee of Kamen Co."; Frederick Cirlin Associates, Inc. ("Cirlin Inc."), Frederick Cirlin ("Cirlin"), President, a director and beneficial owner of more than 10% of Cirlin Inc.'s common stock, and Brian Frederick Barrabee ("Barrabee"), Vice President, Secretary and a director of Cirlin Inc.

1/ (Cont'd from p. 1)

Section 15A(1)(2) of the Exchange Act provides that the Commission may suspend for not more than twelve months or expel from a registered securities association, or suspend for not more than twelve months or bar any person from being association with a member thereof if such member or person who has willfully violated any provision of the Exchange Act or the Securities Act or any rule thereunder.

Under Section 3(a) of the Securities Act the term "person associated with a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, including any employee of such broker or dealer.

The order of September 14, 1934 alleges, in substance, that during the period May 1962 through approximately August 5, 1963 all respondents, acting singly and in concert, wilfully violated the anti-fraud provisions of the Securities Act and the Exchange Act in the offer and sale of the stock of JR.[2/] The order also alleges that preliminary injunctions had been entered in the United States District Court for the Southern District of New York against Ginsberg, Perotta, Venticinque, Perlongo and JR, and permanent injunctions had been entered in the same court against Ross, Herman, Cirlin Inc., Cirlin and Grossinger. It is further alleged that all respondents, singly and in concert, wilfully violated sections 5(a) and (c) of the Securities Act in the offer and sale of the stock of JR[3/] and section 15(b) of the Exchange Act and Rule 15b-2 thereunder in that Jerome Richard Co., a partnership and the predecessor of JR, and JR made untrue statements of material fact in their applications for registration as a broker and dealer and in supplements thereto and failed to file promptly corrective amendments to such

---

2/ The anti-fraud provisions alleged to have been violated are Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 10b-6 thereunder. The composite effect of these provisions, as applicable to this case, is to make unlawful the use of the mails or means of interstate commerce in connection with the purchase or sale of any security by the use of a device to defraud, an untrue or misleading statement 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 the use of any other manipulative, deceptive or fraudulent device.

3/ In substance, this section makes it unlawful to use the mails or interstate facilities to sell a security unless a registration statement is in effect as to such security or the security is exempted from registration.

applications.[4] The order also alleges that Kamen Co, aided and abetted by Kamen, Herman, Ross, Grossinger, Perotta and Ginsburg failed to make, keep and preserve certain records in violation of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder[5] and that Cirlin Inc. aided and abetted by Cirlin and Barrabbee wilfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in failing to file timely reports of its financial condition with the Commission.[6] The order seeks a determination as to the nature of the remedial action, if any, which is appropriate in the public interest in respect of all respondents. It also provides for consolidation with the order of September 3, 1963 as to common questions of law and fact.

4/ Rule 15b-2 provides that if information contained in an application for registration is or becomes inaccurate a corrective amendment shall be filed promptly.

5/ Section 17(a) of the Exchange Act requires registered brokers and dealers to make, keep and preserve such books and records as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records which must be maintained and kept current. Rule 17a-4 specifies the records to be preserved.

6/ Section 17(a) also requires the registered broker or dealer to "make such reports" as the Commission may require. Rule 17a-5 requires the filing of a report of financial condition as of a date not less than one nor more than five months after the date on which the broker or dealer's registration became effective.

Although JR, Venticinque and Perlongo filed answers to the order of September 3, 1963, neither appeared at the hearing.[7/] Under the Commission's Rules of Practice in effect prior to August 20, 1964, the mere filing of the answer required that a hearing be held despite the respondents' failure to appear at the hearing. However, under Rule 6(e) of the Rules of Practice, which is effective as to proceedings instituted subsequent to August 20, 1964, a party who fails to appear at a hearing of which he has been duly notified shall be deemed in default and the proceeding may be determined against him upon consideration of the order, the allegations of which may be deemed to be true. Accordingly, failure of respondents JR, Venticinque and Perlongo to appear at the hearing constituted their default of the order of September 14, 1964. By its order of August 27, 1965,[8/] the Commission found said respondents in default and, on the basis of the allegations of the order, revoked JR's registration as a broker-dealer and barred Venticinque and Perlongo from being associated with any broker or dealer. Since the allegations of the orders of September 3, 1963 and September 14, 1964 are substantially similar as to these respondents, no useful purpose would be served by further consideration of the order

---

7/ Venticinque and Perlongo were present as witnesses only.

8/ Securities Exchange Act Release No. 7688.

of September 3, 1963. Future references to the "order" or "order for proceedings" will relate, therefore, only to the order of September 14, 1964.

The Commission's order of August 27, 1965, also noted the defaults of Herman, Grossinger, Perotta and Ginsburg either for failure to answer or to appear at the hearing or both and barred each of them from being associated with any broker or dealer.

Barrabee filed an answer and appeared by counsel at the opening of the hearing. However, at the outset of the second day counsel announced he had received advice from Barrabee "withdrawing us as counsel" and stated that his withdrawal was not to be deemed a withdrawal or "waiver to appear" on Barrabee's part. The Hearing Examiner directed counsel's attention to Rule 6(e) of the Commission's Rules of Practice. Counsel withdrew after urging that his withdrawal should not result in a default by Barrabee. The latter had not been present on the first day of the hearing and was not present at the time his counsel withdrew or at any time thereafter. Nor has he filed any document or participated in the proceeding in any way subsequent to his counsel's withdrawal. Under these circumstances it is concluded that Barrabee is in default for failure to appear at the hearing under Rule 6(e).

Ross was not served either with the order for proceedings or with the notice of hearing. Although under these circumstances sanctions may not be imposed against him, findings may nevertheless be made with respect to the issues here involved, but without prejudice

to an application by him to reopen the record for the purpose of contesting such findings.[10/]

Kamen Co and Kamen ("the Kamens") and Cirlin Inc. and Cirlin ("the Cirlins") appeared by counsel and participated throughout the entire proceeding. Proposed findings of fact and conclusions of law and briefs have been filed by the Division of Trading and Markets ("Division") and on behalf of the Kamens. The Cirlins have not filed such papers. However, they have filed a motion to exclude all evidence pertaining to acts alleged to have occurred prior to August 13, 1963, the date of the permanent injunction entered on consent against them, on the ground that the issues presented in this proceeding are merged in the final judgment of August 13, 1963 and are res judicata.

The record in this case presents a massive fraud, carefully and astutely planned and executed by a group led by Herman and Ross. It had its inception in the original distribution of the JR stock and culminated in the swindling of 34 over-the-counter brokers and dealers out of almost one-half million dollars.

The pertinent facts commence with the organization of Jerome Richards Co., a partnership, by Venticinque and Perlongo who had been employed by a broker-dealer firm of which Herman was a partner until about April 1962 and May 1962, respectively. The partnership was soon succeeded by JR, a New York corporation. Herman and Ross supplied JR

9/ Valley State Brokerage, Inc., 39 S.E.C. 596, 599-600 (1959); Market Values, Inc., Securities Exchange Act Release No. 7498 (Dec. 31, 1964).

with $12,000, named its directors other than Venticinque and Perlongo and, in fact controlled JR.

On August 30, 1962, JR simultaneously filed with the Commission its application for registration as a broker-dealer, which became effective on September 28, 1962, and the necessary documents preparatory to a public offering of its stock. The notification and offering circular related to an offering of 50,000 shares of JR's 10¢ par value (non-voting) common stock and was filed for the purpose of obtaining an exemption from the registration requirements of the Securities Act pursuant to the provisions of Section 3(b) thereof and Regulation A promulgated thereunder. The offering commenced on November 5, 1962. JR's Form 2A, filed on May 9, 1963, stated that 25,025 shares had been sold as of December 3, 1962, that the balance of the original offering was withdrawn and that the offering had terminated.

Substantially all the 25,025 shares were sold by Herman and Ross in November 1962 at $4 per share and one broker-dealer purchased 5,000 shares through its nominees with a guarantee by Ross that the latter would repurchase the shares at $4.50 per share.

The testimony of numerous witnesses who had purchased the JR stock on the original distribution establishes that the mails were utilized in the offer and sale of these shares and that Ross made false representations regarding the stock including statements that the stock would rise in price, that it would probably go to $20 or more, that the stock would make money, that there was no chance of losing and that the investor

was guaranteed against loss. The offering circular contained no reference to the $12,000 contribution of Herman and Ross or their control of JR, and Ross omitted to advise investors of these material facts.[10/]

The extravagant predictions of price rises clearly had no reasonable basis in fact and were unjustified.[11/] The statements by Ross regarding guarantees against loss were the rankest type of fraudulent misrepresentation. The financial interest of Ross and Herman in JR, and their relationship to the issuer constitute material information which purchasers should have had to enable them to reach a sound investment judgment. Failure to make these facts known to investors represents an omission to reveal material information inconsistent with the industry's standards relating to the fair treatment of customers and with the requirement for the disclosure of known facts bearing upon the justification of the broker's recommendation.[12/] Moreover, the omissions from the offering circular constituted a failure of compliance with the provisions of Regulation A. Further, the purported 5,000 share

---

10/ Misrepresentations and omission were also made by Herman. However, since the Commission's order of August 27, 1965 disposes of his case, references to Herman and other respondents who defaulted will be made only when necessary to a determination of the remaining issues.

11/ Alexander Reid & Co., 40 S.E.C. 986, 991 (1962); Underhill Securities Corp., Securities Exchange Act Release No. 7668 (Aug. 3, 1965).

12/ Leonard Burton Corp., 39 S.E.C. 211 (1959); Pinsker & Co., Inc., 40 S.E.C. 285 (1960).

transaction, in which Ross guaranteed to repurchase the shares at an increased price was not, in fact, a sale. Accordingly, the Form 2A Report of Sales, required to be filed under Rule 260 of Regulation A, which reported the sale of 25,025 shares including the aforesaid 5,000 shares, was false and represented an additional lack of compliance with Regulation A.

It is concluded, therefore, that in the offer and sale of the JR stock during distribution Ross wilfully violated and aided and abetted in JR's wilfull violation of the anti-fraud provisions of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2. In addition, the exemption from registration offered by Regulation A became unavailable,[13/] resulting in willful violation by Ross of the registration provisions of Sections 5(a) and 5(c) of the Securities Act.

Herman and Ross had sold all the JR stock to their friends, relatives, neighbors and associates. In December 1962, Herman and Ross began advising many of these customers to sell the stock, which was traded over the counter, and succeeded in repurchasing the entire outstanding amount,[14/]

13/ The exemption under Regulation A is a conditional one based upon compliance with the express provisions and standards of the regulation. Antilles Electronics Corporation, Securities Act Release No. 4676 (March 10, 1964); Utah-Wyoming Atomic Corporation, 36 S.E.C. 454 (1950).

14/ These repurchases continued through the spring of 1963 with one or two occurring in early summer. However, 10,000 shares, repurchased on November 26, 1962, enabled the operation to begin.

usually at the original sale price, in order to make the stock available for utilization in the so-called "reciprocal business" transactions which ultimately led to the losses sustained by 34 over-the-counter brokers totaling $475,963. These transactions were initiated while Ross, Herman, Grossinger, Ginsburg and Perotta were all employed in the broker-dealer department of Reuben Rose ("Rose"), a member firm of the New York Stock Exchange ("NYSE"). Herman was manager of the department from about July 1962 to January 1963.

Only members of the NYSE may effect transactions over or through the exchange in securities listed on the exchange. Consequently, a nonmember over-the-counter dealer seeking to sell or purchase a listed security selects an exchange member firm to effect the transaction on his behalf. The commission for the transaction goes to the member firm which may not, under the NYSE Constitution and Rules, Paragraph 1708, share the commission with a nonmember. Obviously, doing a nonmember firm's listed business represents a fertile field of revenue to the member firm.

Herman and Ross, employees of a member firm, set out to exploit this situation by contacting over-the-counter dealers and offering them over-the-counter business in reciprocation for their business in securities listed on the NYSE ("listed business"). Herman supplied the broker-dealer department at Rose with a book containing the names of broker-dealers throughout the United States. The department's personnel, and later the department at Kamen Co, would solicit the over-the-counter broker-dealer by

telephone, advising him that they were prepared to give him over-the-counter business in return for his listed business, that he could telephone his orders collect and that the firm's research facilities were at his disposal. The over-the-counter broker-dealers were offered a ratio of $1.00 profit on over-the-counter business for every $4.00 in commissions on listed business realized by the firm. In general, this ratio was accepted although in some instances these dealers insisted on and received a larger return. Approximately 100 over-the-counter dealers throughout the United States were solicited and agreed to this arrangement. Apparently it represented a windfall to them since, as disclosed by the record, they theretofore had rarely, if ever, received little more than services in return for listed business. However, they were not informed that the reciprocal business would take the form, almost exclusively, of transactions in JR stock. 15/ In actual operation the reciprocal transactions in JR stock took the following pattern:

The broker-dealer department would telephone dealer A and instruct him to purchase a stated number of shares of JR stock from dealer B at a designated price. In the same conversation dealer A would also be furnished the name of dealer C to whom he was directed to sell

---

15/ A stipulation by the parties discloses that at least 11 dealers received reciprocation through the purchase of listed securities from JR at a price fixed by JR and the resale of the same securities to JR at a dictate price 1/8 to 1/4 in excess of the purchase price.

the same shares[16/] at a price usually representing an increase of 1/8 over his purchase price.[17/] Dealer B had received similar instructions as a result of which he sold to A at a profit of 1/8. Dealer C had also received instructions to buy the same shares from dealer B at the designated price together with the name of dealer D to whom he would sell at a stated price which also represented a profit of 1/8 to dealer C. Thus, the broker-dealer beneficiary of these transactions always received both sides of the trade including the names of the seller to him and purchaser from him, the number of shares involved and the prices at which the shares were to be bought and sold, thereby insuring his profit.

Throughout December 1962 the reciprocal transactions in JR stock were consummated at prices not exceeding 4-5/8 per share. In January 1963 the trades were consummated at prices not lower than 10-1/4 and climbed steadily until in July, 1963 the JR stock reached a high of about 20-3/8. It is pertinent that at various times during this period six broker-dealers testified that they maintained quotations in the "pink sheets" at the request of Herman and Ross, and, with one exception, at prices suggested by Herman and Ross. At least two of these broker-dealers,

---

16/ In a few cases dealer A would be instructed to split his purchase and sell the same number of shares to more than one designated dealer at stipulated prices.

17/ On rare occasions the increase was slightly greater.

including one enlisted by Ross, were guaranteed a profit on any transactions they effected in JR stock. Moreover, in the same period 11 dealers most of whom engaged in reciprocal transactions in JR stock, maintained quotes in the pink sheets at the request of Herman, Ross and Grossinger. However, the record discloses no trading in JR stock other than that resulting from the transactions representing reciprocal business directed by Herman and Ross.

Ross left Rose in December 1962 to take employment as a registered representative with Cowen & Co., another broker-dealer. In January 1963 he left Cowen and was employed as a registered representative by Kamen Co. Early in February 1963 Grossinger, Ginsburg and Perotta were also employed by Kamen Co. and together with Ross forthwith formed the broker-dealer department at Kamen Co. ("the department") with Ross as its manager. The department remained in operation until about July 22, 1963.

Through late April 1963, the reciprocal transactions in JR stock directed by the department to its broker-dealer customers operated in cycles. Each cycle began with a sale by JR to a broker-dealer beneficiary of reciprocal business and ultimately terminated with the purchase of the same shares by JR.[18/] From December 1962 through January 1963 JR

18/ In some instances the number of shares sold by JR to begin the cycle were split during the intermediate transactions and eventually repurchased by JR in more than one block.

started 9 cycles of transactions, each of 1,000 to 4,000 shares, and each of which terminated with JR. The number of intermediate transactions between sale and repurchase by JR in these cycles varied from two to thirty-one.[19/]

The department at Kamen Co began its operations on February 11, 1963. Solicitation of new broker-dealer accounts continued at Kamen Co in the same manner as described above at Rose. Commencing on February 14, 1963 a new series of about 60 cycles began and continued through the latter part of April 1963. Each of these cycles involved 500 to 1,000 shares and with few exceptions included either 1 or 2 intermediate transactions. Except for the last 13, each cycle opened with a sale by JR and closed with a purchase of the same shares by JR. Thus, JR sold to A who sold to B who sold to JR. Or, JR sold to A who sold to B who sold to C who sold to JR. Of the last 13 cycles, 2 terminated with Cirlin Inc. and 11 with TLH Investors, Inc., a corporation formed and controlled by Herman and Ross.[20/] However, TLH remained in the picture only long enough to dispose of its JR shares through its own series of cycles which terminated with Cirlin Inc. In early May 1963, Cirlin Inc. became the medium for the distribution of reciprocal business in JR stock. From May through the middle of July 1963 Cirlin Inc. initiated over 100 cycles in JR stock involving over 120,000 shares at the direction

---

19/ The 31 transaction cycle originated with a 4,000-share sale by JR. In the directed intermediate transactions the 4,000-share block was split and some of the same broker-dealers appeared more than once as purchasers and sellers of the same shares in this cycle.

20/ On April 30, 1963 JR was long 375 shares of JR's stock which it transferred to TLH on June 21, 1963.

of Herman and Ross.[21/] In the late June and early July the number of shares available for the cycles were augmented by 7400 shares of JR stock which Herman and Ross had caused to be placed for sale with four Swiss banks with instructions to the banks that the stock would be sold through Cirlin Inc.[22/] The latter purchased these shares and fed them into the cycles. Cirlin Inc. ended all the cycles it began except the last 34. Sixteen of the 34 ended with Fenli & Co., Inc. ("Fenli") and 18 with Rybyl Inc. ("Rybyl"). Fenli and Rybyl were dummy corporations, organized by Herman and Ross in North Dakota and Wyoming, respectively, in June 1963. The directed trades in the 16 cycles which were to end with Fenli involved 11,800 shares for which the 16 broker-dealers who were to sell to Fenli paid a total of $227,010. The directed trades in

---

21/ The Division's computations, which are unchallenged, indicate that although only 25,025 shares of JR stock were originally issued approximately 600,000 shares were eventually bought and sold in the cycles.

22/ Herman and Ross had caused the following 4 corporations to be organized in New York in June 1963: Buongiorno, Napoli & Reilly, Inc. ("Napoli"); Michael C. Kalvin & Co., Inc. ("Kalvin"); Harvey Jaxson & Co., Inc. ("Jaxson") and Gauson & Co., Inc. ("Gauson"). In June 1963 their attorney travelled to Switzerland carrying 7400 shares of JR furnished him by Herman and Ross with instructions to open various accounts in Swiss banks and deposit these shares to the credit of the above-named New York corporations. Accordingly the following accounts were opened: at the International Credit Bank of Geneva in Kalvin's name with a deposit of 2,000 shares and with instructions to the bank to sell 1500 of the shares at 16-3/4 or better and 500 at 17-7/8 or better; at Union Bank of Switzerland in Gauson's name with a deposit of 1900 shares and with instructions to the bank to sell the shares at 17-7/8 or better; at Swiss Bank Corp. in Napoli's name with a deposit of 1900 shares and with instructions to sell them at 17-7/8 or better and at Banque Populaire Suisse in Jaxson's name with a deposit of 1600 shares and with instructions to sell them at 17-7/8 or better. The first three banks sold directly to Cirlin Inc. Bank Populaire Suisse sold its 1600 shares through Dominick & Dominick, a broker-dealer, which sold the shares to Cirlin Inc.

the 18 cycles which were to end with Rybyl involved 12,950 shares for which the 18 broker-dealers who were to sell to Rybyl paid a total of $248,953. Of course, none of these 34 sales to Rybyl and Fenli could be consummated and the broker-dealer sellers suffered losses totalling the aforesaid amounts.[23/]

Cirlin Inc. rarely was called upon to pay for the stock it purchased to conclude a cycle. To avoid such payment Cirlin Inc. instructed the broker-dealers who sold to it in the cycles to deliver the stock directly to the broker-dealer to whom Cirlin Inc. would sell the same stock in the next cycle it initiated. Cirlin also instructed the purchaser of these shares to remit to Cirlin Inc. its profit on the transaction. Thus, for example, where Cirlin completed a cycle by a purchase from A of 2500 shares at 16-7/8 (a total of $42,187.50) and commenced a new cycle with the sale of those shares to B at 17 (a total of $42,500) it would issue written instructions[24/] to A to deliver to B against payment of $42,187.50, and at the same time instruct B to receive the shares from A, pay the sum of $42,187.50 and to remit to Cirlin Inc. the sum of

---

23/ In a few instances the broker-dealer A who was named in the cycle as the proposed seller to Rybyl or Fenli became suspicious and refused to confirm the sale to him from broker-dealer B who was designated in the cycle to sell to A. In that case the loss was suffered by broker B.

24/ The number of these instructions was so great that Cirlin had appropriate mimeographed forms prepared. The mails were used not only in the transmission of these instructions but also by the customers in the consummation of or attempt to consummate the reciprocal transactions in JR stock pursuant to the department's instructions.

$312.50 representing its profit on the transaction.

Neither Herman, Ross, Ginsburg nor Perotta appeared as witnesses and Grossinger disclaimed knowledge of the actual intentions of Herman and Ross. But, the scheme to defraud is abundantly evident. Only a month was allowed to elapse between the public offering in early November and repurchase of the JR shares by Herman and Ross which began in December. The first reciprocal transaction by JR in JR stock occurred on December 11, 1962. And the plan to use the JR stock as reciprocal business was disclosed to Grossinger by Herman and Ross when they enlisted his services in December 1962. The constant increase in the price of the stock commencing in January 1963 demonstrates beyond doubt that Herman and Ross never intended that JR would eventually repurchase the stock. Manifestly, the cycles could not continue indefinitely and when they thought the time ripe Herman and Ross created four New York corporations whose transactions through the Swiss banks realized about $130,000 and created Rybyl and Fenli which, on the basis of the record, could have had no other purpose than to furnish barren names to the final disastrous cycles.

From the record, including a stipulation of the parties, it is evident that the department's broker-dealer customers were not informed of the Regulation A filing and the initial sale of the stock to friends, relatives and associates of Herman and Ross; of the affiliation of Herman and Ross with JR; that the increasing prices of the JR stock were arbitrarily set by Herman and Ross in a market dominated and controlled by them; that

quotations were inserted in the pink sheets at their request; of the organization of the four New York corporations referred to above by Herman and Ross and their transactions in the JR stock; of the organization of Rybyl and Fenli by Herman and Ross and that Rybyl and Fenli were not registered as broker-dealers; and that JR and Cirlin Inc. initiated and terminated cycles in the JR stock, thus omitting to state material facts in connection with the offer and sale of the JR stock.

Kamen Co. is a partnership registered with the Commission as a broker-dealer since January 1956 and a member firm of the NYSE, an associate member of American Stock Exchange ("AMEX") and a member of the National Association of Securities Dealers, Inc. ("NASD"). During the period January 1, 1963 to July 1, 1963 Kamen Co. had two general partners, Kamen and Edward F. Liebert. Liebert was the NYSE floor partner. At all pertinent times Kamen was in charge of the management of Kamen Co.'s offices and the supervision of its employees. On July 1, 1963 two additional general partners joined in the firm which also had a number of limited partners.[25/] From January 1, 1963 to July 1, 1963 the number of Kamen Co.'s registered representatives varied between ten and twelve.

Kamen Co. maintained offices at 25 Broad Street, New York City, until May 1, 1963 when it moved to 50 Broadway, New York City. It does most of its business in securities listed on the NYSE and the AMEX. During the pertinent period, Kamen Co. "cleared" through

---

25/ Although Kamen stated there were seven limited partners at the time of the hearing, he named only six, of whom one is now deceased.

Loeb, Rhoades & Co. ("Loeb"). Loeb did all the "back office" or clerical work for Kamen Co. It transmitted confirmations of Kamen Co.'s transactions, received and transmitted certificates, paid dividends, collected interest and furnished Kamen Co. and its customers with substantial additional services including market letters, other securities analysis material and portfolio analysis. Loeb billed Kamen Co.'s customers in its (Loeb's) name and confirmations of Kamen Co.'s trades and statements to Kamen Co.'s customers were sent by Loeb bearing the legend "Carried with arrangement with Kamen & Co." Loeb was also responsible for all margin accounts after Kamen's collection of the initial margin. Kamen Co. was responsible for all cash transactions. Loeb reserved the right to reject any account or order and to terminate any account previously accepted by Kamen Co. For these services Loeb was entitled to receive 40% of the first $300,000 of gross commissions earned by Kamen & Co. on all stock transactions during its fiscal year and 35% on the excess over $300,000.

Kamen first met Herman in 1958 or 1959 when Kamen Co. "cleared" through Newborg & Company where Herman was employed as a registered representative. Some time later Herman became a partner in a broker-dealer firm. Herman solicited Kamen for Kamen Co.'s AMEX business in exchange for his business on the NYSE. A direct wire was installed between Kamen & Co. and Herman's firm and was maintained for about one year until Herman's firm went out of business in February of 1962. At that time Kamen, who had heard that Herman "had a lot of business", offered Herman a position as a registered representative at

Kamen Co. Herman did not accept.

Early in January 1963, at Herman's suggestion, Ross telephoned Kamen regarding employment at Kamen & Co. and after a personal interview by Kamen was hired as a registered representative on January 7, 1963. In that month Ross opened 15 new accounts of broker-dealers at Kamen Co., of which nine received reciprocal transactions in JR stock in January. During the three weeks of Ross' employment in January he realized $10,780.86 in gross commissions for Kamen Co, which was in excess of 1/3rd of the total gross commissions earned by the entire firm for that month.

Late in January 1963 Ross advised Kamen that Herman and Grossinger were about to leave Rose in order to start a new broker-dealer service department and wanted Ross to join them. Kamen had not yet met Grossinger. Ross told Kamen that he did not wish to leave and would prefer that Herman and Grossinger join him at Kamen Co and form a broker-dealer department there. Ross spoke to Herman and Grossinger and, at his request, Kamen agreed to meet with them to discuss the matter. Due to Herman's illness the first meeting was held at Herman's apartment during the last days of January or early in February.

Herman, Ross and Kamen were present when the meeting began. They were joined, later, by Grossinger who brought, for exhibition to Kamen, copies of orders in listed business executed that day by the broker-dealer department at Rose. Kamen was told that Herman, Ross and Grossinger would like to form a broker-dealer department at Kamen Co. They currently were doing about $300,000 a year in

gross commissions and believed they could do enough business to increase that figure to $400,000. They advised, in substance, that in order to maintain their present accounts and bring in new broker-dealer accounts they needed the financial and market literature and other incidental services that would be furnished by a firm such as Loeb. In addition they required certain facilities which would offer unlimited free telephone service to broker-dealer customers all over the country for the placement of orders, furnishing of stock quotations and other market information. Kamen was informed that such a service could be provided through the installation of a Wide Area Telephone Service ("WATS") line, which would offer free and unlimited telephone service to customers at a cost of $600 per month for the first 15 hours and an additional charge for use in excess of that time. Kamen was also told they would need a last sale quote line, a direct wire to the order room, an order clerk and a secretary. Further, they wanted 45% of the commissions on listed business they produced. Kamen offered them commissions of 40% on listed business and 50% on mutual fund business, apparently the same rates paid other registered representatives. He also offered to pay the salary of their order clerk and one-half the salary of their secretary. Agreement was not reached on the question of commissions and the meeting terminated.

But Herman and Grossinger receded from their position. After they had attempted unsuccessfully to open a broker-dealer department at Brand, Grumet & Siegel, another broker-dealer, Ross advised Kamen that they were prepared to work for Kamen Co, presumably on Kamen's terms. Accordingly a second meeting was held on Saturday, February 9, 1965, at Kamen's apartment, attended by Herman, Ross, Grossinger, Kamen and a Mr. Bjork, a limited partner of Kamen Co, since deceased. The ground covered at the first meeting regarding the facilities and personnel required by the broker-dealer department was restated for Bjork's information. It was also indicated that Herman and Grossinger knew between 75 and 85 broker-dealers and expected to have their accounts.

There is little question that Kamen considered the purpose of the meeting to be the employment of both Herman and Grossinger. Kamen met Grossinger for the first time at Herman's apartment. However, he had known Herman for some time and was aware of his reputation for having a substantial number of customers. Kamen stated he was anxious to have Herman become an employee of Kamen Co. Kamen's primary interest was the employment of Herman.

Toward the end of the meeting Grossinger gave Kamen a NYSE form of application for employment, completely prepared, and bearing the name Brand, Grumet and Siegel in the space designated "to be

employed by". But Herman told Kamen that he was not yet prepared to submit his application for employment since he could not answer certain of the questions on the form due to problems regarding the firm in which he had been a partner. Nevertheless, it may be concluded from the fact that Kamen agreed to establish the broker-dealer department without Herman's participation as an employee and from other evidence in the record,[26/] that the broker-dealer department would have Herman's accounts. That same afternoon, Kamen furnished Ross with a letter authorizing him to enter Kamen Co offices, then at 25 Broad St., in order to transfer files and records which had been maintained by the broker-dealer department at Rose. A black loose-leaf notebook containing the names of broker-dealer customers, the amounts of listed business they gave to Rose and the amounts of reciprocal business given by the broker-dealer department to them was among those records.

On Monday, February 11, 1963, Grossinger started his employment at Kamen Co and Kamen interviewed and hired Perotta as assistant and order clerk to work exclusively for the broker-dealer department. Kamen employed Ginsburg shortly thereafter and, in due course, the necessary WATS line and other equipment was installed in a separate room which thereafter housed the department and its personnel at

---

26/ I.e., Herman's numerous and continuous visits to the broker-dealer department at Kamen Co, the receipt by Kamen Co of Herman's mail and give-up checks, more fully described below and Herman's statement at Kamen's apartment that Grossinger would take care of his accounts.

25 Broad Street.

On the same day Kamen authorized a telegram signed "Broker-Dealer Service Dept. Larry Ross Jerry Grossinger" to be sent to the department's accounts stating that they had left Rose, were now associated with Kamen Co, "Members New York Stock Exchange" and that collect calls would be accepted. The broker-dealer customers' accounts were transferred to Kamen Co and their balances of listed business and reciprocal business were carried over. Solicitation of new broker-dealer accounts was followed by a short note encouraging collect calls on Kamen Co's letterhead signed by the Broker-Dealer Service Department. Between February 11 and February 18, 1963, the department obtained 41 new broker-dealer accounts and through July 1963 over 100 such accounts were opened. 27/

From January 7, 1963 through July 1963, Kamen Co earned total gross commissions of $327,044.36. Ross and the department produced $181,815.00 in gross commissions from transactions in listed business, which constituted over 55% of the total operation of Kamen Co. The department also generated over $20,000 in give-up commissions

---

27/ Exclusive of the accounts already opened by Ross.

from mutual funds.[28] 40% of the commissions on listed business was paid to the department,[29] 40% to Loeb and Kamen Co retained the remaining 20%. The department received 50% of the give-up commissions, Kamen Co retaining the remaining 50%. The broker-dealer department continued to do business at Kamen Co until Kamen was called to testify before the Commission on July 18, 1963 and was requested to have Ross and Grossinger appear for questioning. Within a day or two Kamen fired all the department's personnel.

It is pertinent at this point to discuss the credibility of Grossinger and Kamen. Grossinger was the principal witness through whom the Division sought to establish Kamen's knowledge of the fraudulent scheme. Kamen was his own principal witness and that of Kamen Co. Grossinger had appeared for examination before the Commission on July 18, 1963. Admittedly, Grossinger's testimony of that date

---

28/ The "give-up" is a device through which a nonmember of the NYSE reciprocates to a member. Where the non-member has made substantial sales of mutual fund shares to the public, the fund will honor his request or direction that a specific sum be paid to a NYSE member of his choice. The source of the payment is usually a second NYSE member who acts as the fund's prime broker and has earned commissions through the sale of the fund's portfolio securities. Upon receipt of the request from the nonmember, the fund directs its prime broker to pay the sum specified by the nonmember dealer to the member of his choice. Since, here, the splitting of commissions occurs between members, it is not prohibited by the NYSE Constitution and Rules.

29/ Out of its earnings the department paid Perotta's and Ginsburg's salaries or portions thereof, Grossinger's salary of $530 every two weeks and certain other ad hoc charges.

presented a deliberate and utter abandonment of the truth. Among other falsehoods, he purposefully denied knowledge of the relationship of Ross and Herman to JR and the JR stock; he denied he saw anyone other than Ross in connection with his employment by Kamen Co; he denied he ever solicited broker-dealer accounts; he denied he ever actually gave or directed 30/ reciprocal transactions in JR stock or heard Ross do so; he denied he ever gave reciprocal transactions in JR stock to certain specifically named broker-dealers; he denied he ever offered or sold JR stock to broker-dealer customers; he denied he knew of transactions by Ross or anyone else in JR stock; he denied anyone at Kamen Co ever offered reciprocal business in the form of the usual transactions in JR stock; he denied he had discussions with Herman in 1962 regarding JR.

After consultation with counsel Grossinger offered to correct this testimony. At an examination before the Commission on August 7, 1962, and in his testimony at the hearing Grossinger admitted that in December 1962, when Herman and Ross sought his services in the broker-dealer department at Rose, they told him that they had created and controlled the JR stock; that they intended to use the JR stock as the medium of reciprocal business to over-the-counter broker-dealers

---

30/ As used in this record, "solicitation" refers merely to seeking an agreement by the broker-dealer to the general arrangement whereby he would give the department his listed business in return for over-the-counter business. "Directing" or "giving" reciprocal transaction means advising the broker of the actual transaction in JR stock he was to consummate.

in exchange for listed business on a 4 to 1 ratio;[31/] that thereafter, at Rose, he solicited broker-dealers to engage in the reciprocal business arrangement; that he was employed by Kamen after participating in the meetings with Kamen at Herman's and Kamen's apartments; that he thereafter continued to solicit broker-dealers at Kamen Co; that he heard Ross, Herman and Fran soliciting broker-dealers and giving or directing reciprocal transactions in JR stock at Rose and at Kamen Co; that he, in addition to solicitation, also directed reciprocal transactions in JR stock to broker-dealers while at Kamen Co from the end of February 1963 to late April 1963.

Moreover, with a background which includes a Bachelor of Science degree in engineering, a Masters degree in business, and 3 to 4 years in the securities field, Grossinger's testimony during the course of the hearing presents an extremely dubious naivete. Included, among other things, are his professed lack of understanding of the nature and results of the reciprocal business transactions in JR stock and of the nature of certain lawsuits instituted against him. Taken together with his answers to questions relating to applications for employment he had signed, apparent inconsistencies between his testimony of August 7, 1963 and that given at the hearing and his general demeanor, his testimony hardly inspires credibility.

31/ Certain implausible reasons they gave Grossinger in explanation of this proposed activity are unimportant here.

Further, Grossinger's threat to "make things hard" on Kamen following Kamen's refusal to pay his final salary upon the disbanding of the department furnishes little basis for crediting any of Grossinger's testimony directed against Kamen. 32/

Kamen's credibility is also seriously suspect. He testified on several occasions before the Commission during the course of its investigation and before the NASD in connection with a proceeding instituted by that body. His testimony on those occasions and that given at the hearings in the instant proceeding are replete with inconsistencies and included admitted untruths. It is also manifest from the testimony of other witnesses who the Hearing Examiner credits that Kamen's testimony was unreliable. Thus, there are discrepancies in Kamen's testimony as to whether he spoke with Herman at any time between the latter's return from a convalescence in Florida in February and his employment at Lieberbaum in March 1963. Although Kamen testified he had not spoken to Herman between the summer of 1962, when he saw Herman at Lieberbaum's where Herman was employed,

---

32/ During the course of the hearing the Division moved to strike certain questions posed to Grossinger on cross examination together with his answers. It pursues the motion. The questions were directed toward the truthfulness of Grossinger's testimony as to the period during which he directed reciprocal business. Grossinger's credibility was under attack. Division asserts that the Hearing Examiner improperly allowed counsel, in forming his questions, to read from certain letters and affidavits of persons who were not witnesses, the contents of which purported to contradict Grossinger's testimony. Division appears concerned that by allowing the questions, the Hearing Examiner, in effect, accepted the statements contained therein as evidence. The matter needs no extended discussion. Obviously, questions are not evidence and the statements contained therein may not be, nor have they been, deemed evidence by the Hearing Examiner in his evaluation of Grossinger's credibility.

and January 1963 when he communicated with Herman about Ross' employment, Kamen's secretary testified that she had paid a bill on behalf of Kamen Co for a dinner which Kamen had had with Herman and Ross a few weeks before Ross began his employment with Kamen Co. Kamen denied Herman came to his office in December 1962 although he had so stated in earlier investigation testimony. Kamen testified he did not ask Herman what his problem was when Herman stated he would not file an application for employment with Kamen Co because he had problems regarding his old firm which had to be straightened out. However, before the NASD Kamen testified that he asked Herman what the problem was and was told "I would rather you didn't know". Kamen's explanation as to why Herman's mail was being delivered to Kamen Co - i.e. that Herman had given the Post Office a change of address notification, is patently illogical since the mail was actually addressed to Kamen Co. Moreover, there are discrepancies, inconsistencies and falsehoods in Kamen's testimony as to which persons made which statements at the meetings at Herman's and Kamen's apartments; as to whether Grossinger, in fact, had any broker-dealer accounts; as to the length of time Grossinger was present at Herman's apartment; as to whether Kamen had ever spoken to Herman about obtaining the latter's broker-dealer business; as to whether Kamen has asked Ross why he left Rose; as to the events preceding Grossinger's employment by Kamen Co and the manner in which he was employed; and as to whether all salesmen, including Ross, were charged with long distance telephone calls.

Kamen stated at the hearing that he spoke with Cowen, Ross' former employer, before hiring Ross. Kamen testified that Cowen had said he thought Ross would make a good representative and he was sorry to see him leave. On the other hand, Cowen testified he had told Kamen that "the man was honest as far as we knew. The reason we let him go, he needed too much supervision and we felt his accounts needed too much supervision." The Hearing Examiner credits Cowen's testimony. 33/

The Kamens contend that the culpability of the broker-dealer customers of the department rather than that of the Kamens made it possible for Ross, Herman and Grossinger to carry out the fraud and that these customers were, in fact, "an integral part of the unlawful scheme." The Kamens urge that the customers were on notice of the impropriety of the transactions in JR stock since they were riskless, they served only to provide a rebate, many of the trades were with JR, itself an unusual and suspicious circumstance, and it had to be evident that they were part of a stock manipulation.

There is little doubt and, in fact, the parties have stipulated, that the customers "knew or could infer" that these transactions were a form of rebate. But, even assuming this form of rebate

---

33/ It does not necessarily follow, however, that the testimony of Grossinger and Kamen must be rejected in toto. Wigmore on Evidence, Third Edition, Sec. 1008 et seq.

represented an infringement of the NYSE Constitution and Rules,[34/] it does not follow that it constituted a violation of the securities laws.

Few, if any, of the department's broker-dealer customers had ever experienced a transaction similar to that offered them as reciprocal business in JR stock. In the vast majority of the instances, the brokers who sold JR stock to them and purchased it from them were strangers to them. Further, those customers who had numerous transactions in JR stock must have been aware of the constantly increasing price of the stock. It is futile to argue, however, that this would serve to exculpate either the broker-dealer department personnel or the Kamens from violations of the anti-fraud provisions of the securities laws. Moreover, the record discloses that over forty customers who engaged in the reciprocal trades in JR stock had either one or two transactions only. To ascribe manipulation to them would be unfounded. It is also pertinent that at least three of these forty were directed to sell to either Rybyl or Fenli and were, of course, unable to complete their transactions.

Supervision by Kamen

Kamen's supervision of the order room and the day to day operations of Kamen Co in those areas where errors in the acceptance or

---

34/ Not every form of rebate violates these rules. See, for example, Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. Doc. No. 95, 88th Cong., 1st Sess. (1963), Part 4, p. 223, and Part 2, p. 302 describing an apparently acceptable form of rebate by a NYSE member to a member of a regional exchange and Part IV, p. 226, discussing the cost of the NYSE members' services to nonmembers which exceeds the cost of services to investors generally. However, the rules frown upon reciprocal business which is "generated" or "allocated", Part 2, p. 304.

execution of orders might have proven instantly costly to the firm seems to have been adequate and is not in issue. But it is readily apparent that the substantial earnings contributed by the broker-dealer department induced Kamen to adopt toward it a policy of noninterference as a result of which his overall supervision of the department and its activities left much to be desired.

Treatment of the mails at Kamen Co is one of the important areas in which supervision, if properly exercised, would have disclosed the department's scheme, in part if not in whole. The Kamens disclaim responsibility, asserting that their mail practices were the uniform procedures followed by NYSE members.

Kamen testified he customarily received the morning mail and sorted it. Later deliveries were sorted either by Kamen or his secretary. Kamen's procedure with respect to distribution of the mail was:

(1) All mail addressed to a registered representative c/o Kamen Co was delivered to the salesman unopened.

(2) All mail addressed to Kamen Co, attention of the registered representative was delivered to the latter unopened.

(3) All mail addressed to Kamen Co bearing a return address on the envelope which Kamen recognized as that of a customer of a registered representative was delivered to the latter unopened.

(4) Mail addressed to Kamen Co which did not fall into category (1), (2) or (3) was opened by Kamen.

On the basis of this record Kamen's practice described in items (1) and (2) followed the custom of the industry. But the Hearing Examiner does not agree that the record supports a finding that the procedure set forth in item (3) represents that custom.

The Kamens presented two expert witnesses on the issue of mail procedures, both with long experience in the field. Both agreed that items (1) and (2) represented customary practice. However, they presented conflicting views as to whether the handling of mail under the circumstances set forth in item (3) was in accordance with industry custom. After observing the witnesses the Hearing Examiner is constrained to accept the testimony of the expert witness who stated that if a letter was addressed to the firm "it would [customarily] be opened by whoever was opening the mail that day." The other witness provided an "economic" reason which, in his opinion, necessitated the mail customs and procedures, including item (3). The reason lacks persuasion. He stated that the salesman's customer is his only asset and if a partner of the firm were to communicate with the customer directly or read communications from the customer to the salesman, the latter would leave the firm. But the managing partner knows the name of every customer of each of his salesmen and need not examine the salesmen's correspondence with the customer in order to communicate with him, for whatever reason. Further, the firm is required by the securities laws and the rules thereunder to be cognizant of all correspondence of any significance to the firm and its operations.

The evidence relating to the direction of give-up checks to Kamen Co by its customers and Kamen Co's receipt of those checks readily establishes that Kamen failed to supervise the mails properly even under his own ground rules. In the pattern resulting in the receipt of give-ups by Kamen Co, the mutual fund involved would address a letter to its prime broker instructing the latter to send a give-up in a specific amount to Kamen Co, "courtesy of" or directed by a named over-the-counter broker who was a customer of the department. Copies of these letters were sent to Kamen Co, often to the attention of Ross, Herman, Grossinger or Ginsburg. However, about a dozen of these letters were addressed to Kamen Co alone and since the letter was sent by the funds which were not customers of the department or its personnel [category (4)], these letters should have been opened by Kamen. Additionally, pursuant to funds' instructions, give-up checks were forwarded to Kamen Co by the funds' prime brokers who, of course, were not customers of Kamen Co. The record discloses about six instances in which the letters transmitting the give-up checks were addressed to Kamen Co alone [category (4)] and should have been opened by Kamen.

Since Kamen has denied that he ever received any of those checks except through the hands of Ross or Grossinger and that he ever saw the checks before Ross or Grossinger received them, it is obvious that he neglected to perform his supervisory responsibilities.

Further, the Hearing Examiner has rejected Kamen's contention that mail in the category of item (3) should have been handed to the registered representative unopened. It follows that in addition to the letters referred to above, Kamen should also have seen two letters from a customer of the department which together disclosed the transactions in JR stock.[35/]

It is of paramount importance that twelve give-up checks totalling about $5000 were directed to Kamen Co by broker-dealers who were not the firm's customers. Receipt of these checks was preceded by the funds' usual letters of instruction to their prime brokers, copies to Kamen Co, and accompanied by the prime brokers' usual letters of transmittal. Most certainly Kamen should have seen these letters and adequate supervision would have required a thorough investigation to ascertain the reason behind the give-ups by strangers to the firm.

Kamen testified that all salesmen were furnished their own file drawers, the department had its own file system and he instructed his personnel as to the proper treatment of the mails. But he did nothing

---

35/ The first, a letter by one of the broker-dealer customers to Cirlin Inc. dated June 22, 1963, copy to Kamen Co, in which, although JR stock was not mentioned, the writer refused to accept the usual instructions of Cirlin Inc. to deliver the stock to a broker-dealer other than Cirlin. The second, a letter dated July 8, 1963, addressed to Kamen Co regarding the same transaction but now specifically referring to a transaction in JR stock in which, the customer, having acceded to Cirlin's instructions, requested the payment of $27.16 covering additional expenses he incurred in so doing. It may be noted that those expenses were paid by a cashiers check.

to assure that his instructions were carried out. By his failure to enforce compliance by the department with his instructions Kamen failed to reasonably discharge his supervisory functions. Moreover, he had reason to enter the department's room some ten to twelve times a day yet there is no evidence that he made even a single effort, over a period of about six months, to examine the files which presumably contained confirmations, correspondence and other original documents. In fact, these files were eventually removed by the department's personnel without Kamen ever having seen them. In addition, despite the comparatively huge volume of business being done by the department, Kamen states he was content to rest on the representations of Ross and Grossinger that they were not splitting commissions and that all the business they were getting resulted from the good service they were giving their customers.

Improper supervision is also demonstrated strikingly by Kamen's disregard of the plain warning served by Cowen regarding Ross' employment. He stated to Kamen: "The reason we let Ross go, he needed too much supervision and we felt his accounts needed too much supervision." It is noteworthy that Ross' tenure with Cowen was less than one month. One of the problems Cowen recognized in that short time was that his firm received "too much business in the few weeks [Ross] worked with us * * *." Kamen made no further inquiry of Cowen. Even assuming Kamen was justified in placing reliance on the clearance of Ross' application by

the NYSE,[36/] his conversation with Cowen should have caused further investigation. It is noted that unlike Kamen, Cowen was interested in meeting the customers with whom his salesmen were doing "a big business" as a part of his firm's general supervision of salesmen's accounts. When Cowen attempted to visit JR (one of Ross' accounts at Cowen and also later at Kamen Co) "there was nobody there at 3:30 in the afternoon and this immediately put me on notice that there was something I couldn't understand * * *." This careful concern and interest in the firm's customers presents a meaningful difference from Kamen's attitude. Throughout the life of the broker-dealer department at Kamen Co, Kamen did not make a single inquiry of any of the approximately 100 customers of the department regarding their business with his firm. And on the occasions when he met a few of the department's customers at his office, it is peculiar to Kamen's general performance that, as he testified, he did not engage any of them even in usual casual business conversation.

Kamen's recollection of the incident regarding the Crow firm is also pertinent. Crow, one of the department's larger customers, was present at Kamen Co's offices on a Friday in June 1963. Incidental to the purpose of his visit he stated to Kamen that Ross and Grossinger owed him $40,000. Kamen said he must be "kidding". Crow insisted

---

36/ NYSE members are either required to or customarily obtain approval of the Exchange before employing registered representatives.

that "they did and I'll get it" but cautioned Kamen against repeating the discussion to them. The following Monday morning Kamen mentioned the conversation with Crow to Ross and Grossinger who said, in effect, "He's crazy" and that they would call him. They told Kamen later that they had called Crow and that Crow was "kidding". Kamen did not insist on being present at the telephone conversation with Crow and there is no assurance that the call, in fact, was made. Although Kamen spoke to Crow on several occasions thereafter up to July 22, 1963, when the department was discontinued, he did not mention the incident again.

Although Herman was not employed by Kamen Co, he was an unusually frequent visitor to the broker-dealer department of Kamen Co's offices both at 25 Broad St. and 50 Broadway. Kamen & Co. also received mail addressed to Herman c/o Kamen & Co. or addressed to Kamen Co, Herman's attention, even after the middle of March 1963 when Kamen was informed Herman had started work at Leiberbaum.[37/] Such mail included a substantial amount of business in listed securities and give-up checks. As stated earlier, it was agreed at Kamen's apartment that

---

37/ Up to this time Kamen constantly asked Herman, on the latter's visits to Kamen Co, when Herman would give Kamen an application for employment at Kamen Co.

Herman's accounts would become part of the department's business. It is also clear from the dates of the various give-up checks received in the mail addressed to Herman or to his attention at Kamen Co, that Herman continued to conduct reciprocal business transactions through Kamen Co. It follows that a quasi employer-employee relationship existed between Herman and Kamen Co, but the record is devoid of evidence that Kamen Co attempted to exercise any control or supervision over Herman's operations on Kamen Co's behalf.

It is well settled that a firm registered as a broker-dealer and its officers (or managing partners) assume and must bear the responsibility for activities conducted by registrant's employees on its behalf.[38/] Persons dealing with a securities firm properly may rely on the principals of the firm to protect them against fraud or other misconduct in the operation of their business, ergo the rule places the responsibility for adequate supervision against violation of the securities laws on the firm's officials.[39/] A contrary rule "would encourage ethical irresponsibility by those who should be primarily responsible."[40/] Since the responsibility of the officer

---

38/ Associate Underwriters, Inc., Securities Exchange Act Release No. 7389 (August 14, 1964); Sutro Bros. & Co., Securities Exchange Act Release No. 7053 (April 10, 1963); Charles E. Bailey & Company, 35 S.E.C. 33 (1953).

39/ Bond & Goodwin, Incorporated, 15 S.E.C. 584 (1944); Thompson & Sloan, Inc., 40 S.E.C. 451 (1961); Sutro Bros. & Co., Securities Exchange Act Release No. 7052 (April 10, 1963).

40/ R. H. Johnson & Co. v. Securities and Exchange Commission, 198 F. 2d 690, 696-7 (1952); cert. den. 344 U.S. 855 (1952); John T. Pollard & Co., Inc., 38 S.E.C. 594 (1958).

would persist despite his inactivity in the business,[41] Kamen, as managing partner, of course, cannot escape his obligation to exercise adequate supervision over the firm's activities. And where willful violations have occurred by a firm's employees, failure to maintain and enforce a proper system of supervision constitutes the firm and its responsible personnel participators in such misconduct and willful violators of the securities laws.[42]

The Senate Committee on Banking and Currency has noted with approval the Commission's decisions relating to the supervisory duties and responsibilities of broker-dealers stating that "proper supervision is of cardinal importance in maintaining proper standards in the operations of a securities business."[43] The Commission's position has been codified in Section 15(b)(5)(E), added by the 1934 amendments to the Exchange Act, which authorizes the imposition of sanctions upon the broker-dealer who "has failed reasonably to supervise, with a view to preventing violations" of the securities laws by any person subject to his supervision. Although the new section makes provision for exculpation where reasonable preventive measures

---

41/ Luckhurst & Co., Inc., 40 S.E.C. 539 (1961); Aldrich, Scott & Co., Inc., 40 S.E.C. 775 (1961).

42/ Reynolds & Co., 39 S.E.C. 902, 917 (1960).

43/ S. Rep. No. 379, 88th Cong., 1st Sess. (1963), p. 45.

have been adopted,[44/] the Kamens are hardly in a position to claim its benefits. Assuming Kamen's instructions to his salesmen regarding the handling of correspondence (i.e., his instructions as to which type of mail was to be turned in to him) and the retention and maintenance of its files by the department established adequate supervisory procedures, it is manifest that he neglected to establish "procedures and a system for applying such procedures" to prevent and detect violations.

We return now to Kamen Co's mail distribution procedures. If this record accurately reflects the custom of the treatment of mail in the securities field as to items (1) and (2), the custom places within the discretion of the salesman the decision as to which mail to bring to the attention of the firm, thus making possible the concealment of complaints and improprieties of which the firm should be aware. Obviously, these customs do not constitute the type of

---

44/ Section 15(b)(5)(E) reads:

"For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if -

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with."

adequate supervision which "would reasonably be expected to prevent and detect, insofar as practicable", any violation of the securities laws by a salesman as required by Section 15(b)(5)(E)(i). Moreover, the Commission has noted its disapproval of the practice of forwarding unopened mail to a salesman, indicating that such laxity cannot be viewed as a reason to relieve the firm of responsibility for a salesman's misconduct.[45/] The Hearing Examiner concludes, therefore, that the procedures followed by Kamen Co in the distribution of the mail do not represent adequate supervision.

Accordingly, the personnel of the broker-dealer department at Kamen Co having willfully[46/] violated the registration and anti-fraud provisions of the securities laws in that they offered for sale and sold the unregistered JR stock, manipulated the JR stock, made false representations of material facts[47/] and omitted to state material

---

45/ Bond & Goodwin, Incorporated, supra.

46/ It is well settled that within the meaning of Section 15(b) of the Exchange Act a finding of willfulness does not require a finding of intention to violate the law. It is sufficient that registrant knew what it was doing. Hughes v. S.E.C., 147 F. 2d 969, 977 (D.A.D.C., 1949); Schuck v. S.E.C., 264 F. 2d, 358, 363, n. 18 (C.A.D.C., 1958); Thompson Ross Securities Co., 6 S.E.C. 1111, 1112 (1940); Henry P. Rosenfeld, 32 S.E.C., 731, 739, 740 (1951).

47/ A customer who questioned a second trade in JR stock was told by Ginsburg that "Mr. Kamen had filled a large institutional order, and this was his way of handling the reciprocal business".

facts in the offer and sale of the JR stock,[48] failure of supervision results in willful violations of those provisions[49] by Kamen Co and Kamen "who did not properly perform their duty to prevent it".[50]

The Kamens - Anti-Fraud Violations

No evidence has been adduced to indicate any knowledge by Kamen of the machinations of Herman and Ross during the early stages of the plan. The first indication of any meaningful contact between Kamen and Herman and Ross occurred about the middle of December, 1962 at the dinner, the bill for which Kamen's secretary testified she received and paid. But we are told nothing of the occurrences at that dinner. Indeed, the evidence of the efforts of Herman, Ross and Grossinger shortly before the meeting at Kamen's apartment to open their broker-dealer department with Brand, Grumet & Siegal, together with the fact that the application for employment which Grossinger furnished Kamen at that time named the Brand firm as his employer would seem to negate conclusively any relationship of Kamen to the plan at any prior time.

Grossinger, certainly not friendly to Kamen, testified at the hearing that he did not recall that the matter of reciprocal business was mentioned at either of the meetings held at Herman's

---

48/ A detailed statement of the omissions appear at pages 18 and 19, supra.

49/ The provisions violated are Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5, 10b-6 and 15c1-2 thereunder.

50/ Reynolds & Co., supra.

and Kamen's apartments. He also testified on August 7, 1963, that he did not know whether Kamen knew about the JR situation,[51/] Moreover, the record is devoid of direct evidence that Kamen was aware of the organization or existence of the four New York corporations and their transactions involving the Swiss banks; or of the organization or existence of Rybyl and Fenli; or of the arrangements pursuant to which certain broker-dealers entered quotes in the pink sheets on JR stock; or of the cycles in the transactions in JR stock instituted by and terminating with JR and Cirlin. The record contains no evidence that any of the broker-dealers communicated with Kamen or any other partners of Kamen Co prior to July 23, 1963, orally or in writing, with reference to transactions in JR stock.

Grossinger testified that he overheard a conversation between Herman and Kamen in which Herman sought a loan from Kamen to enable him to maintain control of the JR stock and thus avoid losing the listed business and that Kamen said he would see what he could do. Grossinger also testified that on one occasion Kamen placed on the table in the broker-dealer department an opened letter by one of the

---

51/ However, it is evident from the implausible story he was told by Herman and Ross at Churchill's restaurant in December 1962, from the fact that he received a fixed modest salary rather than a share in the commissions paid the department and from the refusal of Herman and Ross to accede to his request for a raise in salary, that he was not a partner of Herman and Ross and therefore not necessarily fully aware of all their activities and associates.

broker-dealer customers whose name Grossinger does not remember, confirming a trade in JR stock. He testified, further that Kamen, who admittedly entered the broker-dealer department's office many times during the day, would immediately leave the office when the name JR was mentioned, from which the Division argues that such conduct was consistent only with Kamen's attempt to shield from others his awareness of the plan. In the face of Grossinger's general unreliability and his threat against Kamen, the Hearing Examiner is constrained to reject this testimony. In addition JR was a Kamen Co account until May 1963 and it is not apparent why, at least up to that time, Kamen should have avoided the mere mention of the name JR.

But the foregoing does not necessarily preclude a finding that, as contended by the Division, Kamen was a "knowing participant" in the scheme or conspiracy. It has been held, consistently, that a fraudulent scheme and conspiracy is usually established by circumstancial evidence,[52/] and, if established, "but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient."[53/] It is also "well engrained in the law" that one who aids and abets is as responsible as if he committed the act directly.[54/] Further, acts which are legal

---

52/ Isaacs v. U.S., 301 F. 2d. 706 (C.A. 8, 1962); Esco Corporation v. U.S. 340 F. 2d. 1000 (C.A. 9, 1965).

53/ Isaacs v. U.S. supra, p. 725.

54/ Nye & Nissen v. U.S. 336 U.S. 613 (1949).

in themselves lose that character when they become constituent elements of an unlawful scheme.[55/] And having established a conspiracy "the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is part of it,"[56/] for, "generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collation of circumstances."[57/] Although awareness of the criminality of the ultimate objective need not be proven, "knowledge of the commission of the substantive offense must be brought home to them to supply the essential ingredient of intent" and such knowledge may be established thru "permissible inferences or deductions from the facts".[58/]

That the conspiracy has been established needs no extended discussion. The crucial question is whether Kamen had knowledge of the conspiracy. "Without the knowledge, the intent cannot exist".[59/]

Despite the imposing array of facts and circumstances favorable to Kamen which have been set forth above, a conclusion that Kamen was unaware of the department's reciprocal business transactions in JR stock

---

55/ Continental Co. v. Union Carbide 370 U.S. 690 (1962).

56/ Phelps v. U.S. 160 F. 2d. 858 (C.A. 8, 1947).

57/ Braatelien v. U. S., 147 F. 2d 888, 893 (C.A. 8, 1945).

58/ U. S. v. Zindeveld, 316 F. 2d 873, 878 (C.A. 7, 1963).

59/ Ingram v. U. S., 360 U. S. 672, 678 (1959).

defies credibility. Kamen has been in the securities business since 1953. His firm has always been a member of the NYSE and he has always been the managing partner in charge of supervision of the office. For about six months the department's personnel advised customers that they were "of Kamen Co". For six months Kamen Co lent its name and facilities, including the special expensive equipment it acquired for the department and the facilities and services furnished by Loeb, to the distribution of "reciprocal business" through transactions in the JR stock. The firm's total commissions of $327,044.36 [60/] realized during that time exceeded Kamen Co.'s total business for each of two of the five preceding years and,if continued at the same rate,would have exceeded by far the business Kamen Co. had done during the other three preceding years. [61/]

As shown above, even under his own practice, Kamen must have seen many letters relating to give-up checks and his denials would seem to serve no useful purpose (assuredly, it actually constitutes an admission of failure of supervision) except to remove

---

60/ Of which about $200,000 represented commissions brought in by the broker-dealer department through listed business and give-ups.

61/ From a schedule of its "Gross Commissions (after deductions of 40% paid to clearing broker)" introduced into evidence by Kamen Co, the following gross commissions are computed, in round figures:

1958 -	$459,000	1961 -	$493,000
1959 -	558,000	1962 -	284,000
1960 -	240,000		

him from the department's activities in the JR stock. Indeed, many of the inconsistencies in his testimony and the entire picture of lacklustre supervision would seem to have had the same aim. Kamen admittedly made no attempt to ascertain from his customers the reason why they were giving Kamen Co. such substantial listed business and give-ups. The inference is plain and inescapable. He was already cognizant of the reciprocal transactions in JR stock which brought the firm unprecedented business. Any doubt as to the accuracy of this inference is dispelled by the fact that the receipt of twelve give-up checks directed by four broker dealers who were not customers of Kamen Co.[62/] did not serve to create sufficient question, doubt or even curiosity to stir Kamen from his asserted inertia. Under these circumstances, Kamen's declared acceptance of Ross' and Grossinger's reassurances that their unparalleled (in Kamen's experience) success was due merely to the good service they were furnishing their customers deserves little consideration.

Kamen asserts, in support of lack of motive, that in May 1963 he began deducting some of the department's expenses of operation from the department's commissions and that the firm's total net profits from the department's business totalled only about $5,000. These contentions are not persuasive. Even accepting arguendo the computations by which Kamen attempts to show the relatively small return Kamen Co realized, they can mean only that for some reason Kamen found he had miscalculated. They cannot vary the figures which demonstrate that during the life of the department Kamen Co's gross business increased beyond anything it had achieved in the preceding five years, if not

---

62/ i.e.; had not given their listed business to Kamen Co, ergo accounts in their names had not been opened.

in its entire existence. It can be viewed only as a comprehension, after the event,which has negligible impact in the light of Kamen's obvious expectations at the time of the broker-dealer department's formation. Nor can this argument prevail in the face of the fact that not lack of profits but only the stimulus of an investigation by the Commission caused Kamen to terminate the department.

The treatment by Kamen of the JR and Cirlin Inc. accounts at Kamen Co, urged as a factor inconsistent with Kamen's knowledge of the department's misconduct, is equally unconvincing. Suffice it to say that the Cirlin account was closed because Loeb rejected it. Kamen's action relating to the JR account occurred only after Loeb complained to Kamen regarding JR's failure to take delivery of securities at an hour at which Loeb presumably was accustomed to make delivery. Kamen's action, thereafter, requiring JR to pay for all current transactions and to make a substantial deposit before Kamen would accept further orders resulted in the loss on the JR account. But this indicates only that Kamen was concerned lest Kamen Co suffer a loss through continuation of the JR account on other than a guaranteed payment basis.

In short, the entire tableau of inactivity, naivite and ineptness presented by Kamen's attempt to divorce himself from the broker-dealer department's reciprocal business transactions belies human experience. The Hearing Examiner finds that "the stick fits" to the extent that Kamen had knowledge that the department was engaging in the reciprocal business transactions in JR stock, and willful violations of the same securities laws for which the Kamens stand responsible due to failure of

supervision are also chargeable to them "singly and in concert" on the basis of such knowledge.

However, the next step necessary to a conclusion that Kamen, acting in concert with the others, participated or aided and abetted in the overall conspiracy requires a finding that he had knowledge of the plan ultimately resulting in the bilking of the department's customers and of the method by which it was accomplished.[63/] "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it;".[64/] The record is barren of any direct evidence of knowledge of the plan and, indeed, of circumstantial evidence thereof other than the permissible deductions from known facts leading to the conclusion that Kamen was aware of the reciprocal business transactions in JR stock. Utilization of the same circumstantial evidence to reach a determination that Kamen knew of the full extent of the conspiracy, including the organization of the four New York corporations and Rybyl and Fenli, all in June 1963, and their intended use, together with the part played by Cirlin Inc., is not justified by the record. It is doubtful that the whole story has been told and perhaps such knowledge is not outside the realm of possibility. But the evidence requisite to a finding that Kamen knowingly participated in the whole scheme needs more substance. It is concluded that beyond the Kamens' knowledge of and, therefore, participation in the reciprocal business transactions in the JR stock, the

---

63/ Ingram v. U.S., supra; U.S. v. Zindeveld, supra.

64/ U.S. v. Barelli, 336 F. 2d 376, 385 (C.A. 2, 1964); U.S. v. Falcone, 311 U.S. 205 (1940).

"in concert" allegations of the order have not been established as to them.

The Kamens - Maintenance of Books and Records

The books and records of Kamen Co reflect no transactions in JR stock. Nor, at the time of the hearing, could Kamen Co produce the orders, confirmations or other memoranda relating to the sale of JR stock, the department's black loose leaf note book in which the JR stock transactions and the listed business of each customer were recorded, a great many letters directed to Kamen Co by the mutual funds and their prime brokers regarding give-up checks and letters sent by its broker-dealer customers to the department. The Kamen's defense asserts, in substance, that they provided the department with its own filing facilities and did all they could to maintain and preserve the records as required by statute. They failed only because the records were stolen by members of the department. It is pertinent, however, that Kamen admitted he did nothing to preserve the give-up letters.

Removal of the files by the department's personnel occurred during a business day and in the sight of at least the two Kamen Co employees who testified they witnessed it. Even assuming the removal was effected without Kamen's knowledge, the record discloses no evi-

dence that Kamen made any effort to seize the department's files immediately upon closing the department. Moreover, the Kamens clearly failed to maintain any reasonable type of controlled central filing system. The furnishing of filing drawers to the department is of little relevance where, as here, Kamen made no attempt to ascertain the contents of those drawers during the entire existence of the department.

The Commission's bookkeeping rules "go to the very heart of enforcement provisions of the Act and [the] rules thereunder concerning the conduct of securities brokers and dealers."[65/] They are a keystone of the surveillance of broker-dealers with which the Commission is charged in affording protection to investors.[66/] Kamen Co's failure of compliance with the records requirements was the result of Kamen's failure to provide and enforce appropriate procedures and to so manage registrant as to assure compliance with the rules.[67/] His failure to do so constituted a breach of duty.

It is concluded, therefore, that Kamen Co wilfully violated Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 in failing to keep and preserve the records referred to above and that Kamen aided and abetted in said violations.

65/ Midas Management Corp., 40 S.E.C. 707 (1961).

66/ Midland Securities, Inc., 40 S.E.C. 333 (1960); Albert E. Voelkel, Securities Exchange Act Release No. 7652 (July 22, 1965).

67/ Empire Securities Corporation, 40 S.E.C. 1104 (1962).

The Cirlins' Motion to Dismiss

The Cirlins have filed a notice of motion which seeks, in substance, the exclusion of all evidence of acts or omissions by these respondents occurring prior to August 13, 1963 and dismissal of the order for proceedings as it relates to them on the defense of res judicata. The motion is predicated upon a judgment of permanent injunction entered against the Cirlins on August 13, 1963.[68/] The complaint alleged substantially the same operative facts as are alleged in the instant order for proceedings. The judgment was entered on consent. The Cirlins contend that the issues involved in both proceedings are essentially the same, that the sanctions sought against the Cirlins in this proceeding should have been requested in the injunction action, that under Section 22 of the Securities Act and Section 27 of the Exchange Act the court had jurisdiction to invoke such sanctions and that it follows that the judgment of the court constitutes a bar to the instant proceeding under the doctrine of res judicata.

Although this defense might be tenable when asserted against a second action brought on the same facts before a court of competent jurisdiction,[69/] it has no applicability to these administrative

---

68/ S.E.C. v. Kamen et al (File No. 63-2331) (USDC SDNY)

69/ Commissioner of Internal Revenue v. Sunnen 333 U.S. 591 (1948).

proceedings. In Walston & Co.[70] the Commission's decision on a related matter also spoke to this issue.

> "Section 27 grants to the district courts exclusive jurisdiction over "violations" and suits at law or in equity. When read in its context in Section 27, the word "violations" clearly refers to criminal proceedings instituted pursuant to Section 32(a), not to administrative proceeding." [71]

With the word "violations" so construed[72], it becomes readily apparent that the right to institute proceedings to revoke the registration of broker-dealers and to impose sanctions against persons associated with broker-dealers is lodged in the Commission. This conclusion finds tacit acceptance in S.E.C. v. Culpepper[73] where the court said:

> "[W]e note that consideration of the possible effects of this injunction in future revocation proceedings under Section 15(b) of the Act 15 USCA 78 o(b), are not germane to our determination here."

Moreover, the Commission has had occasion, more recently, to point out that injunctive and administrative remedies are compatible and designed to serve different purposes, and to reaffirm that:

70/ 5 S.E.C. 112 (1939).

71/ The language of Section 27 of the Exchange Act and Section 22 of the Securities Act are virtually identical except for the word "exclusive" in Section 27 which eliminates jurisdiction of the state courts in respect of the Exchange Act violations. See Wright v. S.E.C. 112 F.2d 89, 95 (C.A. 2, 1940).

72/ And it is obvious that "suits in equity and actions at law" refer to the various actions which may be brought by third parties to enforce civil liability under the statutes.

73/ 270 F.2d 241, 249 (C.A. 2, 1959).

> "An injunction not only does not preclude action by us with respect to the registration, but is expressly made a ground of revocation. Both remedies have been provided by Congress and no question of "double jeopardy" is involved". 74/

The motion also urges the Commission's acceptance of Cirlin Inc.'s application for withdrawal of its broker-dealer registration on the grounds that it has ceased doing business as a broker-dealer. The filing of a withdrawal does not restrict the Commission's authority to take disciplinary action, 75/ nor should it be utilized to allow a broker-dealer who has violated the securities laws to escape the consequences of his acts merely because he has ceased to do business. 76/

Accordingly, the motion is in all respects denied.

The Cirlins - Anti-Fraud Violations

Cirlin Inc. is a New York corporation organized on January 4, 1963. It maintained offices at 50 Broadway, New York City. Cirlin is president of Cirlin Inc. and the owner of all of its stock. Its registration with the Commission as a broker-dealer became effective

---

74/ A.G. Bellin Securities Corp. 39 S.E.C. 178, 186 (1959); See also Lile & Co. Inc. Securities Exchange Act Release No. 7644 (July 9, 1965).

75/ Henry P. Rosenfeld 32 S.E.C. 731, 741 (1951).

76/ Charles E. Bailey & Company 35 S.E.C. 33, 44 (1953).

on March 21, 1963. It is a member of the NASD.

Cirlin testified before the Commission on July 29, 1963, August 22, 1963 and February 11, 1964. The testimony of August 22, 1963 was occasioned by a voluntary appearance by Cirlin to clear up admitted and purposeful untruths in his earlier testimony.

Cirlin Inc.'s association with the personnel of the department at Kamen Co began with a conversation between Grossinger and Barrabee who had become acquainted while serving in the armed forces. Grossinger sought the usual reciprocal business arrangement with Cirlin Inc. Cirlin agreed to the suggestion and Cirlin Inc. quickly became a medium for the institution and termination of the cycles rather than an ordinary broker-dealer customer. Ross informed Cirlin of the reciprocal business arrangements with broker-dealer customers including the transactions in JR stock, the listed business and the use of the WATS line. Instructions as to the transactions in JR stock, i.e., purchasers, sellers and prices, were always furnished by Ross or Ginsburg. Ross and Herman spent considerable time in Cirlin Inc.'s offices, usually together, using the telephone, including long distance calls. Cirlin did not object since he was making money on their trades.

As stated by Cirlin, in order to avoid any adverse effect on Cirlin Inc.'s net capital position which might have resulted from

possible "fails" to receive or deliver, Ross gave Cirlin Inc. 2,500 shares of JR stock to treat as Cirlin pleased and which Cirlin decided to donate to the firm.

Cirlin Inc. opened an account at Kamen Co and executed transactions in listed business generating gross commissions totalling between $2,000 and $3,000. On the other hand,Cirlin Inc. purchased approximately 120,000 shares of JR stock and sold the same number usually receiving a profit of 1/8. At Ross' instructions Cirlin Inc. also furnished about $1300 in give-ups to broker-dealer customers of the department. Cirlin admits that, unlike the ratio of profit of 1 to 4 usually accorded the department's customers, he realized a ratio of about 2 to 1. His use of instructions to by-pass delivery to Cirlin Inc. thus avoiding the necessity of accepting delivery of stock, has been set forth above. It may be noted that Cirlin Inc. was not required to pay for the stock directed to it through the Swiss bank transactions until the stock had been resold in the cycles.

Cirlin did not testify on his own behalf nor did any other officer of Cirlin Inc. take the witness stand. Their failure to do so is deemed a factor of substantial significance warranting the inference that their testimony would have been adverse.[77/]

77/ N. Sims Organ & Co., Inc., 40 S.E.C. 573 (1961); N. Sims Organ & Co., Inc., et al v. S.E.C., 293 F. 2d 78 (C.A. 2, 1961).

The role played by Cirlin Inc. obviously constituted a necessary and integral part of the conspiracy. Cirlin admits knowledge of the activities of Herman and Ross in furnishing the transactions in JR stock and admits instituting the many cycles at the direction of Ross at ever increasing prices thereby knowingly participating in a manipulation. Moreover, the Cirlins failed to impart material facts to purchasers of JR stock. The Cirlins neglected to inform purchasers of the nature of its operation in JR stock, i.e., the cycles; that increasing prices in the stock were arbitrarily set by Herman and Ross who dominated and controlled the market in the stock; of the Swiss bank transactions; that it had received 2500 shares of JR stock gratis and obviously as consideration for its participation in the scheme; and that it was a repository for the JR stock. Moreover, on the basis of the circumstantial evidence shown by the record, the adverse inference resulting from Cirlin's failure to testify and the fact that Cirlin Inc. instituted the cycles which were to terminate with Rybyl and Fenli, the Hearing Examiner finds that the Cirlins knowingly and actively participated in the conspiracy.

Accordingly, the Hearing Examiner concludes that Cirlin Inc. and Cirlin, "singly and in concert", willfully violated Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and rules 10b-5, 10b-6 and 15c1-2 thereunder.

The Cirlins - Failure to File Reports

Cirlin Inc. has stipulated that since its registration as a broker-dealer became effective it has never filed the report of financial condition required by Section 17(a) of the Securities Exchange Act and Rule 17a-5 thereunder thereby necessitating a finding of wilful violation thereof by Cirlin Inc. and, a finding that Cirlin aided and abetted such wilful violation. It may be noted that "such reports are an important part of the scheme of regulation and surveillance of brokers and dealers under the Act."[78/]

The Cirlins - Judgment of Permanent Injunction

The judgment entered on August 13, 1963 referred to above permanently enjoining the Cirlins from, in substance, practicing any course of business which would operate as a fraud or deceit in the offer and sale of the JR stock. The Cirlins consented to entry of the judgment without admitting or denying the allegations of the complaint. The judgment may serve

---

78/ Samson, Roberts & Co., Inc., Securities Exchange Act Release No. 7593 (May 4, 1965).

as the basis for the imposition of sanctions on Cirlin Inc.[79] and on Cirlin.[80]

Ross

The record establishes that Ross was one of the prime conspirators in this scheme to defraud from its inception in the original sale of the JR stock and, thereafter, through its repurchase, the operation of the department at Rose and Kamen Co., the operation of the cycles through JR and Cirlin Inc. and the organization of the four New York corporations together with Rybyl and Fenli at his and Herman's request. Moreover, whatever their ultimate disposition, Ross received most of the commissions earned by the department at Kamen Co. It has been found that Ross violated the registration and anti-fraud provisions of the securities laws in the original offer and sale of the stock of JR. The facts occurring subsequent to the purported original distribution of the JR stock have been discussed above and need no detailed repetition here. The Hearing Examiner concludes that those facts constitute further willful violations by Ross of the same registration and anti-fraud statutes he was previously found to have violated.

79/ Balbrook Securities Corporation, Securities Exchange Act Release No. 7522 (January 28, 1965); Securities Forecaster Co., Inc., 39 S.E.C. 188 (1959) and Section 15(b)(5)(C) of the Exchange Act.

80/ Section 15(b)(7) of the Exchange Act.

Barrabee

Inasmuch as Barrabee has defaulted it follows that all of the allegations of the order for proceedings may be deemed to be true. The Hearing Examiner finds, therefore, that Barrabee "singly and in concert" willfully violated Sections 5(a), 5(c) and 17(a) of the Securities Act together with Sections 10(b), 15(b) and 15(c)(1) of the Exchange Act and Rules 10b-5, 10b-6, 15b-2 and 15c1-2 thereunder, and further, that Barrabee aided and abetted in Cirlin Inc.'s willful violation of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder.

Public Interest

Willful and serious violation of the Securities Act, the Exchange Act and the rules thereunder have been found against the Kamens, the Cirlins and Barrabee. There remains the determination of the nature of the sanction to be imposed consistent with the public interest.

It is evident that the Kamens' violations occurred as the result of Kamen's preoccupation with the profits he expected from this new venture. Other factors appear in addition to those set forth above. Thus, in his eagerness to embark on the department's enterprise, Kamen neglected to inquire further into the reasons why Ross and Grossinger left Rose - i.e., they had told him they couldn't get

along with one of the partners. He also failed to delve further into Herman's pointed response - "I would rather you didn't know" - to his question seeking more information from Herman as to the nature of the problems of Herman's former firm which prevented him from filing an application for employment with Kamen. This dubious answer did not deter Kamen from persisting in his efforts to employ Herman, a substantial producer and a key figure in the negotiations for the opening of the department at Kamen Co.

On the other hand, the broker-dealer customers[81/] had never before received both the buy and sell sides of a trade and were well aware of the unusual nature of the reciprocal business transactions in JR stock. Many, if not all, were also aware that this was a method in avoidance of the NYSE rules against splitting commissions. Of course, the customers were involved in no legal wrongdoing. Nevertheless, they were on notice of decidedly strange circumstances. Moreover, since the scheme was well under way before the broker-dealer department was formed at Kamen Co, it is apparent that injury to some of the department's customers was inevitable. Although the foregoing in no way affects the fact of the Kamens' violations of the securities laws resulting from Kamen's knowledge of the transactions in JR stock, it mitigates in some measure their responsibility for the losses eventually

---

81/ Apparently with the single exception of a Canadian broker-dealer.

suffered by the customers.

But the Kamens' violations resulting from failure of supervision are not mitigated by an factors disclosed by the record. The Kamens urge that they have never before been the subject of disciplinary proceedings and this was their first experience with a broker-dealer department. In addition to Kamen, Kamen Co has three general partners, two having joined the firm on July 1, 1963, and a number of limited partners. At all pertinent times Kamen was in sole charge of the management of the firm's office. Under the partnership agreement Kamen received about 50% of the firm's net profits. It is clear that none of the other partners are involved in any way. It is equally evident, however, that the partnership as a whole must bear the responsibility.

Under the circumstances present in this case, Kamen Co should be suspended from the NYSE, the AMEX and the NASD for 10 business days and Kamen should be suspended from becoming associated with a broker-dealer for a period of 90 days.

On the basis of this record and in the light of the nature of the Cirlins' violations, the public interest requires that the broker-dealer registration of Cirlin Inc. should be revoked and Cirlin should be barred from being associated with a broker-dealer.

In view of Barrabee's failure to defend he should be barred from being associated with a broker-dealer.[82/]

Sidney Gross
Hearing Examiner

Washington, D. C.
November 15, 1965

82/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are accepted, and to the extent they are inconsistent therewith they are expressly rejected.