ADMINISTRATIVE PROCEEDING
FILE NO. 3-329

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

D. H. BLAIR & CO. (8-8239)
ROBERT W. MILLER
CHARLES J. MILLER
RALPH J. TRAPANI
RONALD NEUMARK
SEYMOUR KATZ
CARL M. LOEB RHOADES & CO. (8-279)
GOODBODY & CO. (8-301)
RICHARD V. MILLER
TROSTER, SINGER & CO. (8-1219)
SIDNEY WOOLWICH

INITIAL DECISION

(Private Proceedings)

Irving Schiller
Hearing Examiner

Washington, D. C.

May 23, 1969

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APPEARANCES: George Rosier and Victor Brudney, Esqs.
of Hellerstein, Rosier & Brudney
for D. H. Blair & Co. and Charles J. Miller

Milton V. Freeman, Harry Huge and
Werner J. Kronstein, Esqs. of Arnold & Porter,
for Robert W. Miller

Bernard D. Cahn, Esq., for Ralph J. Trapani

Mortimer Goodman and Joseph Cosgrove, Esqs.
of Grandefeld & Goodman, for Ronald Neumark

Arthur Lawler, Peter Landau and Richard B. Redman, Esqs.,
of Lawler, Sterling & Kent, for Seymour Katz

Alvin Hellerstein and Richard Savitt, Esqs.,
of Stroock & Stroock & Lavan and Sam Harris and
Arthur Fleischer, Jr., Esqs. of Strasser,
Spiegelberg, Fried & Frank, for Carl M. Loeb,
Rhoades & Co.

William F. Clare, Leonard B. Boehner and Henry Poole, Esqs.,
of Clare & Whitehead, for Goodbody & Co. and
Richard V. Miller

APPEARANCES (Continued)

George Adams and J. F. Dwyer, Esqs.
of Satterlee, Warfield & Stephens,
for Troster, Singer & Co.

George A. Dean, Jr. and Joseph A. Tracy, Esqs.
for Sidney Woolwich

Joseph C. Daley, Roberta S. Karmel, Robert Berson
and Howard Bernstein, Esqs. and John Steinert,
Securities Investigator, for the Division of
Trading and Markets

Raymond Burger, Esq., for Larry Gulihur

BEFORE: Irving Schiller, Hearing Examiner

These are private consolidated proceedings instituted by the Securities and Exchange Commission (Commission) pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 (Exchange Act) to determine whether D. H. Blair & Co. (Blair), Robert W. Miller (Robert Miller), Charles J. Miller (Charles Miller), Ralph J. (erroneously stated as "I" in order) Trapani (Trapani), Ronald Neumark (Neumark), Seymour Katz (Katz), Carl M. Loeb Rhoades & Co. (Loeb), Goodbody & Co. (Goodbody), Richard V. Miller (R. V. Miller), Troster Singer & Co. (Troster) and Sidney Woolwich (Woolwich) willfully violated specified provisions of the Securities Act of 1933 (Securities Act), the Exchange Act and certain Rules thereunder; whether certain of the named respondents willfully aided and abetted such violations; whether through lack of suitable control and supervision certain of the named respondents willfully violated and willfully aided and abetted violation of the Securities Act and the Exchange Act and whether any remedial action is appropriate in the public interest pursuant to the above-mentioned Sections of the Exchange Act.

The order for proceedings alleges in substance that during the period from about November 1, 1960 to September 1, 1961, Blair Robert Miller, Charles Miller, Trapani, Katz and Neumark, singly and in concert, willfully violated Sections 5(a) and (c) of the Securities Act in connection with the offer and sale of the common stock of American States Oil Company (ASO) and that Loeb through lack of

suitable control and supervision and through negligence and the lack of necessary procedures intended to prevent conduct prejudicial to the interests of customers and to prevent violations of the statutes, rules and regulations administered by the Commission willfully violated and willfully aided and abetted violations of the aforementioned two sections of the Securities Act. The order also alleges that Blair, Robert Miller, Charles Miller, Trapani, Katz, Neumark, R. V. Miller and Woolwich, singly and in concert, willfully violated and willfully aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5, 10b-6 and 15c1-2 thereunder in connection with the offer, sale, purchase and trading of ASO stock and that Goodbody and Troster through lack of suitable control and supervision of their traders and through negligence and the lack of necessary procedures intended to prevent conduct prejudicial to the interests of customers and to prevent violations of the statutes, rules and regulations administered by the Commission willfully violated and willfully aided and abetted violations of the foregoing Sections and Rules. The order further alleges that from about November 1, 1960 to September 1, 1961, Blair and Loeb willfully aided and abetted by Robert Miller, Charles Miller, Trapani,[1/] Neumark and Katz willfully violated violated

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1/ At the hearing the Division stipulated that it would not offer proof of this alleged violation against Trapani.

Section 7(c)(2) of the Exchange Act and Section 12 CF 220.4(c) of Regulation T promulgated thereunder in connection with the offer, sale, purchase and trading activities of ASO stock.

After appropriate notice, hearings were held before the undersigned hearing examiner. Following the conclusion of the hearings notice was served on the hearing examiner that respondents Blair, Robert Miller, Charles Miller, Trapani, Loeb and Goodbody and the Division of Trading and Markets (Division) waived the filing of an initial decision by the hearing examiner as to the said respondents. Accordingly, the hearing examiner does not intend and makes no findings of fact or conclusions of law with respect to the aforementioned respondents who waived this decision. However, as noted above, some of the allegations in the order for proceedings charge that the remaining respondents singly and in concert, with one or more of the respondents who have waived this initial decision, willfully violated and willfully aided and abetted violations of both the above-mentioned acts. Hence, to evaluate such charges properly and to comprehend the myriad of events which involved all of the named respondents reference herein to those respondents who waived this decision will be unavoidable.

Proposed findings of fact and conclusions of law and briefs were filed by the Division of Trading and Markets (Division) and by the remaining respondents Neumark, Katz, R. V. Miller, Troster and Woolwich.

The following findings and conclusions are based on the record, the documents and exhibits therein and the hearing examiner's observation of the various witnesses.

Violations of Section 5(a) and (c)

The order for proceedings charges in substance that, during the period November 1960 through September 1961, Katz and Neumark, singly and in concert with some of the above-named respondents, willfully violated Sections 5(a) and (c) of the Securities Act in connection with the offer and sale of the common stock of ASO by one Larry Gulihur (Gulihur) through a special cash account maintained in his name at Blair[2/] when no registration statement was filed with the Commission. The gist of the above violations is that at the time Gulihur was selling ASO stock he was part of a group in common control with, or under the control of, ASO, thus making Gulihur an "issuer" under Section 2(11) of the Securities Act for the purpose of concluding that other respondents became statutory underwriters with respect to their activities in connection with the sales of ASO stock for the Gulihur account. It is thus vital to determine at the outset whether the record establishes that Gulihur was in a control relationship with ASO. A review of the evidence relating to the organization and activities of ASO, the relationship of Gulihur to the said company,

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2/ During the period in question Loeb, pursuant to an agreement dated February 5, 1960, acted as clearing agent for Blair on a fully disclosed basis.

Katz and Neumark's knowledge of such relationship, the facts and circumstances surrounding the sale of the stock of ASO as well as the involvement of both said respondents in such sales is essential in arriving at any conclusion with respect to the alleged violations.

Control of ASO

ASO was incorporated on May 6, 1952 under the laws of the State of Illinois for the primary purpose of dealing in real property, and prospecting, developing and dealing in oil, gas and minerals. It was authorized to issue 6,000,000 shares of 10¢ par value common stock. J. Tom Grimmett (Grimmett), who was Gulihur's father-in-law, was one of its three incorporators, its first president and became its principal stockholder. After he became president Grimmett caused ASO to issue 2,000,000 shares of its common stock to him in exchange for oil and gas interests. Toward the end of 1954, ASO issued an additional 3,200,000 shares to Grimmett who took them in exchange for certain claims that he then had against the company. From its inception ASO was financed by Grimmett who loaned it funds which he obtained by sales and pledges of stock of ASO which he owned.[3/] He resigned as

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3/ In May 1952 ASO sold 575,000 shares of its common stock at $.50 per share under a Regulation A exemption. In August 1954 ASO and Grimmett filed with the Commission a notification under Regulation A covering an undeterminate number of shares of ASO common stock with a par value of 10¢ per share to be sold by Grimmett at a price not to exceed $50,000. In June 1956 the Commission filed a complaint in the United States District Court for the Southern District of New York and alleged in affidavits in support of its complaint that

- footnote continued

president in 1954 but continued to serve as a director until June 30, 1959 when he was re-elected president, serving in that capacity until his death in 1964.

When Grimmett again became president of ASO he effected a recapitalization of the company. As a result of a reverse split of 20 for 1 on June 30, 1959 the 5,996,666 issued and outstanding shares 10¢ par value common stock was reduced to 299,833 6/20 shares of new $2 par value stock. On the same date ASO authorized the issuance of 650,000 shares, $2 par value, to the Pauls Valley National Bank (PVNB), as escrow agent and trustee for Grimmett, which at the time of the hearing in these proceedings were still being held by the bank. On September 25, 1959 ASO authorized the issuance of 550,000 shares of $2 par value common stock to Grimmett or his nominee and in October and November 1959 and January 1960 these shares were issued to Mid-State Drilling Co. (Mid-State) a nominee of Grimmett. At that time Gulihur was president of Mid-State. Thus, as of January 1960 ASO had issued and outstanding 1,499,833 6/20 shares of its $2 par value

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(Continuation of Footnote 3)
Grimmett had received 5,391,666 of the 6,000,000 authorized shares of ASO and had sold or otherwise disposed of about 4,000,000 shares of his personally owned stock when no registration statement was in effect with the Commission. In July 1956 a final judgment was entered in the case enjoining Grimmett from further violating the registration provisions of the Securities Act in the sales of ASO stock. In November 1956 the Commission temporarily suspended the above-mentioned Regulation A exemption because Grimmett had failed to disclose the sale of a substantial number of unregistered shares of ASO stock within one year prior to the filing of the notification and because of the District Court's injunction. No registration statement was ever filed with the Commission by ASO.

common stock.

During the period November 1960 to September 1961 ASO had little income, sustained taxable losses and had a mounting earned surplus deficit. The record shows that for the fiscal year ended April 30, 1960 ASO received $178 from oil sales, $301 from transfer fees, sustained a taxable loss of $15,588 and had an earned surplus deficit of $1,071,164. For the fiscal year ended April 30, 1961 ASO received $700 from oil sales, $600 from transfer fees, sustained a taxable loss of $19,016 and its earned surplus deficit amounted to $1,090,180. For the fiscal year ended April 30, 1962 ASO has a total income of $1,368, there being no evidence of the breakdown, a taxable loss of $116,997 and its earned surplus deficit had increased $1,207,000. In addition, the record shows that from October 26, 1960 through August 1961 ASO's bank balance at PVNB never exceeded $1,000 except for 2 days in June 1961 when its balance was $1,118.21 and $1,141.40.

The hearing examiner finds that, upon the basis of the foregoing, Grimmett directly and indirectly was a person in control of ASO from the inception of the company and continuing during the period stated in the order for proceedings when the alleged violations occurred. In that connection it is noted that after the recapitalization of ASO in June 1959, Grimmett through his nominees acquired a total of 1,200,000 shares of ASO stock (650,000 shares to PVNB, as escrow agent and trustee and 550,000 shares to Mid-State as nominee) constituting in excess of 90% of the stock of the company's issued and outstanding as of January 1960.

Mid-State which, as noted above, acquired 550,000 shares of ASO stock was also controlled by Grimmett and in common control of ASO. In January 1956 ASO acquired Mid-State for $7,500 and 20,000 shares of ASO (old) stock. In March 1957 Grimmett acquired all the stock of Mid-State from ASO for $15,000, which was apparently paid by reducing ASO's purported indebtedness to Grimmett. The latter immediately designated his son-in-law Gulihur as president of the company.[4/] Mid-State's only asset at the time was a 1/16 override on certain oil leases in Oklahoma which were of no value since all the leases on the property had expired. The working interest in such leases was owned by Grimmett. In late 1957 Grimmett sold 1/2 of his interest in the leases to a company in exchange for their agreement to operate the leases. Because the property was nonproductive Grimmett, in 1959, reacquired the 1/2 interest for $50,000 which he then assigned to Mid-State for $1. Mid-State then assigned this 1/2 interest together with the 1/16 override it had retained, to ASO for the 550,000 shares of ASO stock mentioned above as having been acquired in October and November 1960 and January 1961. At the same time Grimmett assigned his remaining 1/2 interest in the said oil leases to ASO for the 650,000 shares of its stock which, as noted above, was issued to FVNB as escrow agent and trustee for Grimmett.

4/ When Gulihur was appointed president of Mid-State he was given 4,000 shares, his wife 8,000 shares, his mother-in-law 4,000 shares out of the 20,000 shares of Mid-State issued and outstanding. He paid nothing for his stock.

From 1957 through 1961 Mid-State's only books or records consisted of a checkbook, kept by Gulihur, and bank statements related to the check book. All other records and books relating to Mid-State were combined with the personal books and records of Grimmett. The evidence discloses that for the calendar year ended December 31, 1960 Mid-State sustained a net loss of $1,093.01 from its sales of ASO stock. For the year ended December 31, 1961 its net loss, sustained as a result of sales of ASO stock, amounted to $176,407.19 including a write-off of 45,000 shares as worthless. From January 1960 to March 1961 Mid-State's bank balance never exceeded $12. From March to June 8, 1961 such balance never exceeded $1,237 and while Mid-State's balance reached a high of $4,143 in June 1961 checks were drawn against such deposits in the following two months reducing the balance to several hundred dollars.

Gulihur along with Grimmett controlled Mid-State and was a person in common control of ASO. He began working for Grimmett immediately prior to his being made president of Mid-State. His duties included general office work, typing, answering the telephone, keeping Grimmett's personal books as well as the books and records of ASO and Mid-State. He was paid by Grimmett from the latter's personal funds. Early in 1958 Gulihur left Grimmett's employ and for the next year worked as an investigator for a law firm, owned a service station and "went back to school." In 1959, when Grimmett again became president of ASO, Gulihur returned to work for him and ASO doing the same things

he did before he left. From 1959 until sometime in 1961 Gulihur was paid $450 a month by ASO. He received no income from Mid-State. He was never an officer or director of ASO.

Upon the basis of the foregoing, the hearing examiner finds that during the period stated in the order for proceedings, Grimmett and Gulihur were persons in common control of Mid-State and that Grimmett, Gulihur and Mid-State were in common control of ASO.

Sales of ASO Stock

Having found Gulihur and others were in common control of ASO we next examine the sales of the company's stock effected by Gulihur through his special cash account at Blair and the extent and nature of the involvement of Katz and Neumark in all of the activities surrounding such sales to determine whether they willfully violated the Securities Act. Prior to the opening of the Gulihur account at Blair, Katz and Neumark had been employed as registered representatives at Brand, Grumet & Siegel (Brand) where they jointly pooled commissions on certain accounts and where, as a result of transactions in ASO stock in two such accounts, Katz learned that Gulihur was president of Mid-State, that Grimmett was his father-in-law and

president of ASO.[5/]

The Gulihur account was brought to Blair and opened by Katz on or about November 10, 1960, and he and Neumark jointly were the registered representatives of the account until the end of 1960. Commencing January 1, 1961 Neumark became a general partner, remaining as such until he left in September 1961. Katz remained as a registered representative until June or July 1961 when he also left Blair. At the time Katz and Neumark joined Blair each of them brought with them accounts they had previously serviced at Brand. An arrangement was made whereby they and a third registered representative, who also came to Blair from Brand about the same time as Katz and Neumark, pooled the commissions earned on all of their individual accounts. The Gulihur account was one of the pooled accounts.[6/] Under the

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5/ One of the accounts was in the name of Gulihur, the other in the name of Equity Factors Corp. (Equity). Katz, who effected all transactions in both accounts, was informed that Equity, for whose account he sold 4,000 shares of ASO stock, had delivered in the account a 25,000 share certificate of ASO stock in the name of Mid-State which was, in fact, one originally issued to Mid-State on November 3, 1959 as part of the 550,000 shares obtained by Mid-State as noted above. Brand questioned whether "controlled stock" had been sold. Equity ultimately assured Brand it was not "controlled or restricted" stock. Katz was kept informed of the "control" problem relating to the certificate. With respect to the Gulihur account Katz learned that Grimmett's checks were being used to pay for purchases in the account. From these transactions Katz learned of the relationships between Gulihur, Grimmett and ASO. Neumark though he did not effect transactions knew of the ASO transactions from his discussion with Katz concerning their pooled accounts.

6/ The new account report, in addition to stating Gulihur's name, listed his occupation as oil engineer and the address as Box 199, Pauls Valley, Oklahoma which was the address of ASO.

arrangement all commissions were credited to an account designated as No. 10 and each of the registered representatives received 1/3 of the commissions from this account. The arrangement continued until January 1, 1961 when Neumark became a partner of Blair. Thereafter, Katz continued to draw his 1/3 of the pooled commissions and Neumark's share was paid into the general partnership account.

Within two or three days prior to the opening of the account, Gulihur and Grimmett phoned Katz at Blair and spoke about the market in general and ASO stock in particular. Katz was asked for a quote on ASO stock and after furnishing it solicited their business. Katz was asked if Blair would go into the pink sheets[7/] on ASO and he stated he would use his best efforts to make the necessary arrangements. During this conversation Katz was given discretion to buy or sell 500 shares of ASO on any given day at a price fixed by Grimmett or Gulihur and was instructed that if orders were received exceeding these limits Katz was to obtain approval from either of them before executing a transaction in excess of the limitation.[8/] An arrangement was made for Katz to speak

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7/ National Daily Quotation Service.

8/ Such discretionary arrangement was not novel to Katz. When he was at Brand and before opening the Gulihur account at that firm Katz talked with Gulihur and Grimmett and was told that Grimmett and Gulihur desired to purchase a certain amount of ASO stock at particular prices and that Grimmett or Gulihur would furnish Katz with the requisite information when they wanted to buy. Katz was given discretionary authority to purchase or sell a limited amount of ASO stock and was told to send all confirmations to Gulihur in whose name the account was carried. These instructions he carried out to their satisfaction.

to Grimmett or Gulihur each morning and obtain the price at which ASO would be quoted. To ascertain if Blair would go in the pink sheets for Gulihur, Katz spoke with Trapani who was Blair's trader, Neumark and Charles Miller. When Miller inquired about ASO he was told Gulihur was familiar with the company because his father-in-law was president of the company. Katz received permission to go into the sheets and so informed Gulihur.

After the account was opened and from approximately November 1960 to about April 1961 Katz spoke to Gulihur by telephone about once a day and on some days more frequently. At least half of the calls were placed by Katz to Gulihur at Grimmett's office in Oklahoma, the other half by Gulihur to Katz at Blair. During the daily conversations Katz told Gulihur (or both Gulihur and Grimmett) the amount of stock offered to him, who offered the stock, the prices quoted in the pink sheets, the names of the brokers appearing in the sheets and the prices at which he had purchased or sold ASO stock. It is undisputed that each day they spoke Gulihur gave Katz the prices which he wanted inserted in the pink sheets the following day and in addition to Katz' discretionary authority, Gulihur also instructed him at times to buy or sell a specific number of shares of ASO stock at a particular price. At times Katz was told to expect an order from a particular broker and to execute it. Katz followed instructions and purchased or sold ASO stock as directed. The daily orders which Gulihur or Grimmett gave Katz were day limit orders at a particular price. Execution tickets for the transactions were prepared in whole or in part by Katz.

Shortly after the account was opened and before the end of 1960 Katz and Neumark learned that certain problems had arisen in connection with the Gulihur account.[9/] In January 1961 they were told that concern was being expressed by Blair as to whether "controlled" stock was in fact being sold. For an understanding of the nature of the information which Katz and Neumark obtained, a detailed account of the events from November on would be helpful since it has a direct bearing on Katz and Neumark's knowledge of and involvement in the alleged violations of Sections 5(a) and (c) of the Securities Act.

Soon after the account commenced operations, Loeb became aware that Grimmett's checks were being used to pay for purchases and repeated requests for extensions of time to pay had been obtained. Loeb obtained a credit report on Gulihur on December 22, 1960 which reflected among other things that Gulihur was president of Mid-State, that his wife and mother-in-law were the other officers, that Gulihur worked for Grimmett in various capacities and that Grimmett was the "owner and president" of ASO. Realizing from the report that Grimmett was in control of ASO Hans A. Weidenman (Weidenman), a general partner

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9/ Some time in the latter part of November a check drawn by Gulihur on Grimmett's account was received into the account and Loeb raised questions about the use of Grimmett's checks to pay for Gulihur's purchases. Following Loeb's usual procedures at the time, a letter was obtained from Grimmett authorizing Loeb to receive his checks in payment for Gulihur's obligations. At about the same time Loeb became aware of other problems which had arisen such as late payments, a number of extensions for payment which had been requested and that the proceeds of sales were being used to pay for purchases, a practice contrary to Loeb's house rules.

of Loeb, consulted his counsel and thereafter talked to either Neumark or Robert or Charles Miller specifically raising the question as to the relationship between Gulihur and Grimmett and requested assurances that the Gulihur account was not under Grimmett's control. At the suggestion of Loeb's counsel an affidavit was obtained from Gulihur stating merely that Gulihur was not an officer or director of ASO and that his purchasing and trading in ASO stock was for his own benefit and he was the sole owner of the shares.[10/] Loeb and Blair were thus satisfied. Neumark testified he talked with Katz and learned from him that Loeb required a letter or affidavit authorizing Grimmett to pay for Gulihur's transactions.

On January 19, 1961 Weidenman was informed that a Grimmett check for $6,200 paid into the Gulihur account "had bounced." Weidenman spoke to Neumark, whom he found to be familiar with the account, about the check and told him, in light of all the problems in the account, operations should be suspended. Neumark agreed[11/] and trading in the Gulihur account was suspended from January 20 through January 24, 1961. Loeb received the Gulihur affidavit mentioned above

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10/ Gulihur testified he was called by Grimmett from New York City and told an affidavit was needed for Loeb and that Gulihur should go to Grimmett's lawyer's office to sign an affidavit which Grimmett had dictated to the attorney.

11/ The documentary evidence discloses that the Loeb transfer posting sheets contains the following handwritten notation "1/20 61 HAW told Neumark no more business in view of $6200 check bounced." ("HAW" are Weidenman's initials.)

on January 23, 1961 and on the following day Loeb was informed the "bounced" check had been paid. Weidenman received oral assurances, in addition to the said affidavit, from either Neumark or Robert Miller or both that Grimmett had nothing to do with the account and before agreeing to resume trading he obtained agreement from Robert Miller and Neumark that certain rules would be imposed as a condition to resumption of trading.[12/] Katz knew of the $6,200 check incident and the suspension. Trading in the account resumed on January 25, 1961.

However, trading in the Gulihur account was again suspended between March 14, 1961 and April 3, 1961 precipitated apparently by two events. Between February 28 and March 3, 1961 Gulihur sold 16,380 shares of ASO stock with the result that the account was short about 13,084 shares by the latter date. On March 6, 1961, in order to cover the short position, Gulihur purchased 21,500 shares from Honnold & Co. (Honnold) which trade was prearranged or "made away" from the trading desk. When the shares to cover ASO stock sold were not timely delivered into the account[13/] and the shares purchased from

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12/ The conditions imposed were as follows: (1) no further checks from Grimmett would be received into the account; (2) no stock other than that purchased in the open market was to be received into the account; (3) no stock in the name of Grimmett or ASO could be received into the account even if purchased in the open market; and (4) Blair had to supervise and watch the trading.

13/ On March 3, 1961 in excess of 10,000 shares of ASO stock were sold. Delivery of such shares had to be made on or prior to March 9. Gulihur failed to deliver ASO stock into the account and the sale was carried on Loeb's books as undelivered stock until March 22, 1961.

Honnold were not timely received,[14/] the Gulihur account was again suspended. Robert Miller instructed either Katz or Neumark to have Gulihur and Grimmett come to the Blair office to discuss among other things whether Gulihur was a control person. A meeting was held at Blair attended by Gulihur, Grimmett, the two Millers, Katz, Neumark and Blair's counsel who raised "the Section 5 problem." Gulihur in response to questions stated he was trading in the account as nominee for Mid-State and the account was his, not Grimmett's. Immediately following the Blair meeting another meeting was held at Loeb with Gulihur, Grimmett, Katz, Robert Miller, Weidenman and an oil specialist employee of Loeb. Among other things, those present were told that Gulihur was Grimmett's son-in-law, that Gulihur was president of the Mid-State which owned 550,000 shares of ASO, that Grimmett was president of ASO, that Gulihur was trading ASO as nominee for Mid-State, that he was giving Katz orders to buy and then sell ASO stock and that Gulihur had a net worth of $20,000. Notwithstanding knowledge of the relationship between Gulihur, Grimmett, Mid-State and ASO, no further investigation was made but several days later Loeb apparently concluded that it could see no reason for not continuing the account and so informed Blair. Trading was resumed on April 3, 1961.

After April 3, 1961 Gulihur continued to give instructions to Katz on a daily basis concerning purchases and sales as he had previously.

14/ The settlement date for the Honnold purchase was March 10, 1961. Delivery of the 21,500 shares against payment was made to Loeb on March 13 by PVNB.

During the period April 3 to April 28, 1961, activity in the Gulihur account increased substantially with purchases far exceeding sales, resulting in a debit balance in the account on April 28 of $94,815.98. On that date Grimmett handed Katz a check for $50,000, dated April 27, 1961 which Katz gave to Blair who transmitted it to Loeb the same day. Loeb credited it to the Gulihur account the following day. On May 3, Loeb wired Gulihur demanding a certified check for $97,502.23 by May 5, 1961, threatening liquidation if payment was not received. On or shortly prior to May 4, 1961 Loeb was advised by its correspondent bank that payment on the $50,000 check dated April 27, 1961 had been stopped.[15/] Blair wired Gulihur demanding a certified check by May 9, 1961 of $147,502.23 having added $50,000 to the debit balance for the stopped check and again threatening liquidation of the account. Charles Miller called Katz and Neumark and told them that in view of the condition of the account there should be no further trading and instructed them to bring Grimmett and Gulihur to the office. Within a period of the following six weeks in an attempt to liquidate the hugh indebtedness there were a series of meetings at Blair's office between the Miller brothers and Katz and Neumark and between the Miller brothers and Gulihur and Grimmett and several meetings at Loeb between some or all of the persons involved. Katz and Neumark did

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15/ When Loeb received the $50,000 check it was apparently apprehensive as to whether the check would be honored. It sent the check to its bank with a special request that it be notified immediately if payment was not made.

not attend all of the meetings and were not directly involved in the events with respect to the manner in which Grimmett obtained the funds to pay Gulihur's debt.[16/]

There is no dispute in the record that in connection with the sales of ASO stock in the Gulihur account at Blair and Loeb the mails and other facilities of interestate commerce were used.

16/ It was apparent from the first meeting that Gulihur had no means to pay off the debit balance. Grimmett offered to help. At one of the meetings at Loeb's office Gulihur signed two promissory notes, one for $147,502.23, the other for $21,909.50, both of which were dated May 3, 1960 and endorsed by Grimmett. In addition, Gulihur delivered to Loeb 100,000 shares of ASO stock as collateral which stock was in the name of Mid-State and were part of the 550,000 shares received by Mid-State in the fall of 1959. The shares were credited to the Gulihur account on May 4, 1960. To reduce the indebtedness Blair made an attempt to sell the 36,000 shares long in the account but its effort was unsuccessful. On May 19, 1961 the $147,502.23 note was presented for payment but refused by the bank because of "insufficient funds."

Commencing on May 19, 1961 Grimmett entered into a series of transactions with Morris S. Gerber (Gerber) of the former brokerage firm of M. S. Gerber, Inc. which resulted in the sale of ASO stock which emanated from the 550,000 shares of ASO stock issued to Mid-State. As a result of some of these transactions $40,000 was forwarded to Loeb and credited to the Gulihur account on June 1, 1961 and another $5,767.09 credited to the account on July 12, 1961. On the latter date Loeb also received a cashiers check from a bank in California in the amount of $100,000 which it credited to the Gulihur account. This latter amount came as a result of another series of transactions arranged by Grimmett which involved the sale of ASO stock, the certificates of which were originally in Mid-State's name. On or about July 12, 1961 the Gulihur account was finally closed and Loeb delivered to Gulihur 134,788 shares of ASO stock held in the account together with a general release for all monies owed. There is no evidence in the record that Katz or Neumark had any knowledge of the transactions resulting in the sales of ASO stock by Grimmett during the period from May 19 to July 12, 1961, the proceeds of which were used to pay the Gulihur indebtedness.

The hearing examiner finds that during the period from approximately November 1960 through at least July 1961 Katz and Neumark willfully violated Sections 5(a) and (c) of the Securities Act in the offer, sale and delivery after sale of the common stock of ASO. In general, Section 5 of the Securities Act makes unlawful the use of the mails or facilities of interstate commerce for the purpose of selling a security unless a registration statement, with respect to such security, has been filed with the Commission and is in effect. No such registration has ever been filed with the Commission. However, although Section 4 of the Securities Act excludes from the registration requirements of Section 5 certain transactions by any person other than an issuer, underwriter or dealer, such exemption is not available to Katz or Neumark since it exempts only "transactions" and not a class of persons, S.E.C. v. Culpepper (270 F. 2d 241, 247 (C.A. 2, 1959)), and ignores Section 2(11) of the Securities Act which defines an "underwriter" to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." For purposes of this section the term "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

The hearing examiner previously found that Gulihur, Grimmett and Mid-State were in common control of ASO. The hearing examiner

further finds that within the framework of the above-mentioned sections of the Securities Act Gulihur was an issuer of the ASO stock (as a person under direct and indirect common control with ASO) and Katz and Neumark became statutory underwriters with respect to the sales of ASO stock by Gulihur. Katz, in fact, does not contend that he has available any possible exemption from Section 5 of the Securities Act. In defense to the alleged violation of Section 5 Katz first contends that he was nothing more than "an innocent pawn" of the alleged unlawful distribution of ASO stock by Grimmett and Gulihur and that the record fails to establish that he knowingly and willfully sold unregistered securities. Katz' second argument is that the entire case against him was based upon the uncorroborated testimony, given by Gulihur, which was neither competent nor have any probative value. Both these contentions are rejected by the hearing examiner as contrary to the evidence.

With respect to Katz' argument that he did not knowingly sell unregistered securities and his alleged violation was thus not willful the Commission and the Courts have consistently held that a finding of willful violation does not require a showing of intent to violate the law, it is sufficient that a person charged with a duty intends to do the act which is violative of the statute. Hughes v. Securities and Exchange Commission 174 F. 2d 969, 977 (D.C.Cir.1949); Gilligan, Will & Co. v. Securities and Exchange Commission 267 F. 2d 461, 468 (2d Cir.) cert. denied 361 U. S. 896 (1959). The record clearly establishes and

the hearing examiner finds that Katz intended to and did exactly what he was instructed to do by Gulihur and Grimmett, namely, buy and sell ASO stock. Katz was undoubtedly aware of the control relationship between Gulihur, Grimmett and ASO and knew or should have known that the ASO stock being sold by Gulihur was control stock. Prior to opening the Gulihur account at Blair, Katz knew by reason of servicing a Gulihur account at Brand that Grimmett was president of ASO, that Grimmett was Gulihur's father-in-law and that checks drawn on Grimmett's bank account at PVNB were being used to pay for purchases. With such knowledge Katz, as a registered representative, knew or should have known that absent an available exemption under the Securities Act Gulihur was not free to sell unregistered ASO stock. Under the circumstances Katz had a duty to make further inquiry concerning the control relationship before effecting the first sale of ASO stock and the hearing examiner finds that his failure to make such inquiry reflected either an utter lack of knowledge of the registration requirements of the Securities Act or a total indifference or negligent disregard of such requirements.[17/] Moreover, the record discloses that had any inquiry been made by Katz concerning either Grimmett or ASO he would have learned at the very least from the Commission's public files that on July 18, 1956 a default judgment of Permanent Injunction was entered against Grimmett, in an action by this Commission in the United states District Court for the Southern District enjoining him from

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17/ Cf. United States v. Dardi 330 F. 2d 316 (2d Cir.) cert. denied 379 U.S. 845 (1964).

further violations of Section 5 of the Securities Act of 1933 in connection with the offer and sale of ASO stock and on July 24, 1956 the Commission issued a public release stating that such injunction had been issued. The latter release moreover stated that Grimmett was president of ASO, that he had received 5,391,000 shares of the authorized 6,000,000 shares of ASO and had sold 4,000,000 of such shares when no registration was in effect with the Commission. Katz would also have learned from publicly filed documents at the Commission that on November 21, 1956 the Commission issued an order temporarily suspending a Regulation A offering by ASO and Grimmett because of the failure to disclose the sale of a substantial number of unregistered shares by Grimmett within a year prior to the filing of the notification and that a public release was issued on November 23, 1956 reciting the foregoing facts and that the injunction mentioned above had been issued on July 18, 1956.

The hearing examiner finds that wholly apart from the knowledge Katz possessed at the opening of the account, the events which occurred in December 1960, January and March 1961 clearly should have made Katz aware that the ASO stock he was selling came from controlled sources. Through November and December 1960 Katz knew that Grimmett's checks were being used to pay for purchases and that instructions with respect to both purchases and sales were being given by Gulihur or Grimmett. In January 1961 Katz was advised that trading was temporarily suspended in the account and he attended meetings at Blair and Loeb at which one of the problems discussed was the sale of control stock. Katz

knew nothing of ASO when the Gulihur account first started trading and made no effort thereafter to ascertain information concerning that company, Mid-State or the relationship between them and Gulihur and Grimmett. In March 1961 trading was again suspended in the Gulihur account and another series of meetings took place between Loeb and Blair, at which Katz was present on at least one occasion in each of such offices. At these meetings Gulihur, with Grimmett present, informed everyone he was trading as a nominee for Mid-State, and considerable discussion took place concerning the matter of control stock concerning which Robert Miller testified "the Section 5 problem could arise." When trading was resumed 11,950 shares of ASO stock was sold in the Gulihur account.

The Commission has pointed out that the standards expected of a broker-dealer who offers to sell or is asked to sell a substantial amount of a little known security, where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, are such that a searching inquiry is called for. Securities Act Release 4445 (February 2, 1962) "Distribution by Broker-Dealers of Unregistered Securities." It is not sufficient for a dealer merely to accept "self serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts." Ibid. Similar responsibilities also devolve upon a salesman. The Commission has held that a salesman is required to make certain basic inquiries concerning the sellers and the sources of their stock when he is asked by

unknown persons to sell substantial amounts of little known securities. Strathmore Securities Inc., Securities Exchange Act Release No. 8207 (December 13, 1967). In the instant case the hearing examiner finds the record overwhelmingly establishes Katz not only made no reasonable inquiry concerning his sellers at the time he opened the account but more importantly ignored facts he learned or carelessly or deliberately disregarded facts he had duty to see. Katz may not exculpate himself because he carelessly disregarded his duties to make inquiry as to Gulihur's relationship to Grimmett and ASO. Where a registered representative sells for a control person under circumstances which indicate he knew or reasonably should have known of the control relationship, he is chargeable with knowledge of that control relationship. SEC v. Mono-Kearsarge et al. 167 F. Supp. 248 (D. Utah 1958).

Katz also urges that he had a right to rely upon the opinions of the Blair partners and Loeb who determined that trading may continue since they had far greater expertise concerning the legal implications of the relationship between Gulihur and Grimmett that he, as a salesman, had. The argument is rejected since it provides no exculpation for a violation of the Securities Acts. Katz was not a passive participant but the person primarily active in the day-to-day activity in the account. He took orders for sales from Gulihur and instructions from Grimmett with full knowledge that Grimmett was president of ASO. He made no effort to investigate anything relating to any of the persons

or firms involved. He testified the period when the transactions took place was a most active one in the market and that he handled more than 100 calls a day. In essence he had no time, thought or desire to concern himself with such matters as whether the stock was or was not legally saleable. A plea of ignorance, inexperience or reliance on superiors is not sufficient to alleviate a registered representative from the responsibility to make inquiry. Cf. John T. Pollard & Co., Inc., 38 S.E.C. 594, 598 (1958). Finally, Katz urges that his conduct did not constitute a willful violation and the Commission failed to comply with Section 558 of the Administrative Procedure Act (Title 5 USCA Sec. 558(c)). The argument is rejected. The order for proceeding in the first instance alleges "wilful" violations obviating the necessity for prior notice. Moreover, the hearing examiner has found that Katz' conduct constituted a willful violation of the Act. The statute by its own term does not apply "in cases of willfulness. . ." Dlugach v. Securities & Exchange Commission 373 F. 2d 107 (2d in 1967).

Though the record shows that Neumark was not as directly involved on a day-to-day basis with the Gulihur account as was Katz he cannot avoid responsibility for his willful violation of the Securities Act. Neumark does not contend he had available any exemption from the provisions of Section 5 of the Securities Act, rather that the Division failed to establish his involvement with the alleged violation since he personally did not execute any of the purchases or sales of ASO stock for the Gulihur account. The argument is not accepted since

the evidence establishes not only that he had knowledge of the 'control' problem concerning sales of ASO stock by Gulihur, the commissions for which he shared as a joint venture with Katz, but that in fact he was directly responsible for the first suspension of trading in the account in January 1961. This latter fact is of utmost significance in concluding that Neumark was without doubt intimately knowledgeable of the transactions in the Gulihur account and exercised some authority over it.

There is no dispute by Neumark that from November 1960 through at least July 1961 he, Katz and Gross shared commissions on the Gulihur account except that Neumark's share, after January 1, 1961, when he became a partner in Blair, was included in the partnership account. During this period Neumark made no independent inquiry concerning the Gulihur account or Grimmett or ASO. Notwithstanding the fact that he knew that certain problems had arisen in the account, particularly with respect to the question relating to the control relationship between Gulihur, Grimmett, ASO and Mid-State, Neumark made no effort to disassociate himself from the account but continued to accept commissions along with Katz. Neumark first heard of Gulihur, Grimmett and ASO when he and Katz were employed at Brand and shared commissions of that account. There is no evidence that he accepted orders on the account from Gulihur. At the time Katz and Neumark were employed by Blair both were registered representatives and Neumark's primary function was that of production. There is a sharp dispute in the record as to whether during the period November through December 1960 Neumark had supervisory responsibility over the registered representatives including

Katz. Neumark vigorously denies such responsibility. However, the record contains evidence that Neumark talked to Weidenman at Loeb before he became a partner as well as afterward concerning new accounts, delayed payments and deliveries. Moreover, the documentary evidence reflects that Neumark had some responsibility for the Gulihur account shortly after its inception. The first page of Loeb's transfer posting sheets contains the name "Neumark" which the evidence shows was placed thereon within the first two or three weeks after the account was opened to indicate to Loeb's employees that Neumark had been contacted with respect to a problem which had arisen and was the person who was familiar with the account. What is relevant during this period relating to the alleged Section 5 violation is not so much whether Neumark effected purchases or sales of ASO stock but rather the knowledge he acquired concerning the relationship of Grimmett to Gulihur and ASO as evidenced by his talks with Katz during this period concerning the activity in the account, his knowledge that calls were coming in daily from Gulihur about ASO, his knowledge that Grimmett's checks had been received in the account and the knowledge he acquired from his contacts with Loeb with respect to problems in the account. All of these factors should have alerted Neumark that a searching inquiry was called for concerning ASO and the relationship between Gulihur and Grimmett with the company. In any event the activities of Neumark after he became a partner abundantly establish his culpability. Though Neumark testified his functions did not materially change after he became a partner, except that he took on the training of future registered

representatives, the hearing examiner finds that the record establishes by a preponderance of the evidence that Neumark assumed greater responsibilities and acquired definite knowledge of the problem relating to the relationship between Gulihur, Grimmett and ASO. Neumark admits that partners' meetings were held periodically at Blair which he attended. In addition to the testimony of Robert Miller and Katz that Neumark was present at the January meeting at Blair with Gulihur and Grimmett at which the Section 5 problem was discussed, the conclusion that Neumark was knowledgeable about the Gulihur account and exercised some responsibility with respect to it finds support from an independent source and is evidenced in writing. When it was determined to suspend the Gulihur account in January it was Neumark who made the decision for Blair. Loeb's transfer posting sheets contain the following notation, in writing, "1/20 61 HAW told Neumark no more business in view of $6,200 check bounced" ("HAW" refers to Weidenman). Neumark admits discussing with Weidenman the $6,200 check and does not deny the agreement reached with Loeb to suspend trading was made by him on behalf of Blair. His responsibility over the account is clearly established.

The record further shows that immediately preceding the March suspension of trading in the Gulihur account, Neumark learned of the Honnold transaction, talked about it with Robert Miller and Katz because of the size of the transaction and Gulihur's ability to pay, attended partners' meetings in March at which the Gulihur account was discussed and knew that Blair was attempting to get information concerning Gulihur, Grimmett and ASO. The record contains no evidence that Neumark himself

made any effort to obtain facts concerning the account.

Throughout his proposed findings and brief Neumark repeatedly asserts he had no responsibility for the Gulihur account even after he became a Blair partner. The hearing examiner finds the record does not support such assertion. Certainly after Neumark became a partner he shared the partner's responsibilities for the operations of the business. There was testimony that each of the various partners had certain areas of responsibilities and that the Miller brothers, as senior partners, shouldered prime responsibility for all activities. Both the Millers and Trapani testified that after January 1, 1961 Neumark had responsibility for and supervised the registered representatives. Neumark, on the other hand, testified that except for the training program and his running back and forth to get quotes for the registered representatives he was "not in charge of anything." The hearing examiner does not accept Neumark's unconvincing oversimplification of his partnership responsibilities.

It is manifest from the evidence concerning the meetings of the partners after January 1, 1961 that all the partners shared responsibility for the operations of the firm and were all involved in making decisions or approving actions taken concerning the various activities of the firm even though the degree of responsibility for particular types of activities may have varied among the partners. The finding by the hearing examiner, on the basis of the record, that Neumark bore some responsibility for the Gulihur account is cogently evidenced by his ability to make the agreement in January 1961 to suspend the account,

which decision would not have been made without both ostensible authority and knowledge of facts and circumstances which would afford a basis for such decision. The hearing examiner is of the further opinion that the arrangement between Neumark, Katz and Gross to share or pool commissions on common accounts in effect resulted in a joint venture in which the participants, absent a clear showing of exclusion of knowledge of, or participation in, decisions concerning particular securities, may not avoid responsibility for a violation in one of the accounts. In the instant case the evidence shows not only Neumark's knowledge of the activity in Gulihur's account but the making of decisions with respect thereto when such action was deemed necessary. The Commission has held that a partner was not absolved from responsibility for violations of Sections 5(a) and (c) of the Securities Act where he claimed he was a principal in name only, served as a salesman on a commission basis and performed other duties of a clerical nature. The Commission stated in Century Securities Company, Securities Exchange Act Release No. 8123 (July 14, 1967):

> "However, absent evidence establishing a specific dichotomy of duties between the partners excluding Fleischman from knowledge of or participation in decisions as to the securities to be sold by registrant, he cannot avoid his responsibility for keeping himself informed by the nature and source of the shares being sold by his firm."

In the instant case the record is clear that there was not the type of specific delegation of duties to each of the partners of Blair from January 1 through July 1961 which excluded Neumark from knowledge or participation in decisions as to the transactions in the Gulihur

account. In fact the preponderance of evidence is that Neumark, in fact, had knowledge of the Gulihur account and directly and indirectly participated in decisions relating thereto. The hearing examiner finds that Neumark willfully violated Sections 5(a) and (c) of the Securities Act.

Violation of Anti-Fraud Provisions

The order for proceedings alleges that during the period from about November 1, 1960 to September 1, 1961 Katz, Neumark, R. V. Miller, Woolwich and other named respondents, singly and in concert, willfully violated and willfully aided and abetted violations of the anti-fraud provisions of the Securities Act and the Exchange Act and specified rules thereunder 18/ and through lack of suitable control and supervision Troster and another named respondent willfully violated and willfully aided and abetted violations of the foregoing Acts and Rules. The order in nine separate paragraphs sets forth the particular acts, practices, activities and course of business which purportedly constitute the alleged devices, schemes and artifices to defraud which operated as a fraud and deceit upon purchasers of ASO stock and the manipulative acts and practices in connection with the offer, sale, purchase and trading of ASO stock. The alleged fraudulent course of conduct engaged in by the above-named respondents commenced with the opening of the Gulihur account on or about November 10, 1960 when Blair began making a market

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18/ The particular Acts and Rules set forth in the order are Section 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, (hereafter sometimes referred to as the anti-fraud provisions).

in ASO stock by inserting quotations in the pink sheets. The gravamen of the fraud is that Blair, from the outset, bid for, offered, purchased and sold ASO shares at arbitrarily determined prices which were dictated by Gulihur and Grimmett and that in January and February an agreement and understanding was entered into between Goodbody, Troster and Blair and, in effect, Gulihur and Grimmett, whereby Goodbody and Troster: (a) entered quotations in the pink sheets for ASO stock at prices which were prearranged and arbitrarily determined; (b) offered, sold and purchased ASO stock for their own accounts; and (c) received a prearranged profit on each purchase and sale of ASO stock effected.

It is first essential to determine whether Blair through Katz and Neumark bid for, offered, purchased and sold ASO stock at prices arbitrarily determined and dictated by Gulihur and Grimmett. In that connection it will be recalled that immediately prior to the opening of the Gulihur account Grimmett and Gulihur gave Katz discretionary authority to buy or sell 500 shares on any given day at a price to be determined by them and Katz in keeping with his promise spoke to Trapani about the pink sheet quotations. **Trapani at first refused to** go into the sheets. Katz then told Neumark about Trapani's refusal and Neumark suggested they talk to Charles Miller which they did. Charles Miller asked them about the customer and ASO and was told (though which of the two volunteered the information is not clear in the record) that the account was one they had at Brand, that the customer wanted to buy ASO stock because it was depressed due to year-end tax selling, that the customer wanted the best possible prices and was familiar with the

company because his father-in-law is president of the company. Charles Miller later that same day gave permission to insert the pink sheet quotations. Trapani corroborated that he was told by a partner he would have to go into the sheets. Katz informed Gulihur of Blair's consent to insert the quotations and the first quotation appeared in the pink sheets dated November 10, 1960. Neumark vigorously denies he was either present or involved in the request concerning the pink sheets. He admitted however that he knew from his many conversations with Katz that quotations were being inserted in the pink sheets for the Gulihur account and that the quotations were based on orders received by Katz from Gulihur.

Thereafter there were daily conversations between Katz and Gulihur and/or Grimmett in which Katz reported to either or both of them the prices and transactions which had been effected in the account the prior day, the identities of the brokers in addition to Blair who appeared in the sheets, the prices of their quotations and any offers made to Blair as to ASO stock. Katz after receiving instructions primarily from Gulihur and less frequently from Grimmett, prepared order tickets for the purchase or sale of ASO stock in accordance with such instructions and transmitted them to Trapani who executed the orders as requested by Katz. From November through April 1961 Katz ordinarily gave Trapani more than one open order a day for ASO stock which the latter did not change unless instructed to do so by Katz. These written orders were received from Katz each morning before 11:00 o'clock and were used as a basis for the quotations prepared by Trapani for insertion in the pink sheets the following

day. Although Trapani had authority to determine whether to appear in the pink sheets and trade a particular stock for Blair he never inserted quotations in ASO except on instructions from Katz. If Trapani received a bid or offer which differed from the prices given him by Katz he contacted Katz who instructed him to tie up the stock and within five or ten minutes thereafter would give him appropriate instructions. Similarly if the bid or offer received by Trapani exceeded the number of shares for which he had orders he would execute the order up to the amount on the order ticket and request Katz for further instructions.

Blair inserted its first two-sided quotation in the pink sheets dated November 10, 1960 at 1-3/4 - 2-1/4 which was the highest for the day. It continued with the highest bid for the next three business days raising such bid to 2-1/2. For the remaining 10 business days Blair's quotations were among the highest in the pink sheets. By the end of the month the bid rose to 3-1/4 an increase of 1-1/2 points and its asked quotation rose from 2-1/4 to 3-3/4. In December 1960 Blair appeared in the pink sheets on one day with a quotation of 3-1/2 - 4. The bid was 1/8 higher than any other bid that day and 1/8 higher than any bid appearing the entire month. On the day Blair's asked price of 4 appeared it was the highest for the day, except for another broker who had a similar ask for 100 shares, and the highest of any broker appearing in the sheets for the entire month. During the period, of course, Gulihur purchased and sold ASO stock. It is clear from the evidence that from the very inception of the account,

ASO stock was purchased and sold at arbitrarily determined prices dictated by Gulihur and Grimmett.

To determine whether during January 1961 and thereafter an agreement or understanding was reached between Blair and Goodbody and between Blair and Troster concerning the insertions of quotations in the pink sheets and receipt of prearranged profit by the latter two firms requires detailed analysis of the testimony and documentary evidence. Some time after the Gulihur account began trading in ASO stock Grimmett asked Katz if he could get other brokers to appear in the pink sheets. Katz testified he then asked Trapani if this could be accomplished and Trapani said he would let him know. Within several days thereafter Trapani told Katz that Goodbody and Troster would go in the sheets but they wanted 1/8 of a point. Katz relayed this information to Gulihur who told him to ask the brokers if they would do it for 1/16. Katz relayed the information to Trapani who later told Katz they refused to do it for 1/16 and wanted 1/8. When Katz told this to Gulihur he agreed to the higher figure and Trapani was so informed.

Though Trapani testified he never asked other brokers to go into the pink sheets on ASO and did not tell Katz they would go in at a price, this portion of his testimony is not credited because of the nature of the evidence as to the manner in which each of them determined to enter quotations in the pink sheets and the manner in which Goodbody and Troster effected trades in ASO, Trapani admitted that he did, in fact, talk to R. V. Miller who was the trader for Goodbody and

Woolwich who was the trader for Troster about ASO stock before each of of them began inserting quotations in the pink sheets. Trapani testified candidly that most every evening the three of them travelled home together by train and since they were all employed as traders the primary topic of conversation among them related to securities which were an "interesting medium" to trade. Trapani informed them he not only had activity in ASO stock but that he actually had orders for such stock. R. V. Miller's testimony concerning the origin of his interest in ASO was substantially similar to Trapani's. He admitted talking to Trapani on the nocturnal rides and learned from him that Trapani had been receiving orders on ASO stock, that he had buy orders and in response to his questions Trapani told him "the price of the stock, who was in the sheets on it and who traded it." R. V. Miller further testified he asked Trapani if he had objection to his (R. V. Miller) going in the sheets and trading the stock and was told there was no objection. The record shows Goodbody started inserting bid and ask quotations in the pink sheets on January 17, 1961 and remained therein until March 14, 1961.

Woolwich's version of his interest in ASO was slightly different. He admitted travelling home with Trapani and R. V. Miller in January 1961 and discussing markets and securities in general but could not recall talking with them about ASO and could not recall any understanding to trade ASO at 1/8 with Trapani or R. V. Miller. He admits however that in February he received a phone call from Trapani in which Trapani suggested he "get into the sheets" on ASO and "make a market" in the stock "as a trading medium." He admitted Trapani told him at the time that he had orders in the stock. Troster first appeared

in the pink sheets dated February 8, 1961 with a bid and ask quotation and remained in the sheets until March 14, 1961.

The testimony of all three traders narrating the circumstances which prompted them to start inserting quotations in the pink sheets on both sides of the market and to trade ASO stock is substantially similar and credited.[19/] The existence of an agreement or understanding between R. V. Miller, Woolwich and Trapani with respect to both inserting quotations in the pink sheets and trading ASO stock is further evidenced by a comparison of the similarity of such quotations among the three traders and the fact that **most all of the trades effected by Goodbody and Troster were with Blair and they received a profit of 1/8 of a point on nearly all of such trades.**

An analysis of the quotations inserted in the pink sheets by Blair, Goodbody and Troster during the period January through April 1961 reveals a pattern of rising prices and identical quotations which in general were either the highest for a given day or as high as any other broker in the sheets. Goodbody's bid and ask, from the time it entered the sheets, increased from 3 - 3-1/2 to 5-1/4 - 6 and Troster's from 3-5/8 - 4-1/8 to 5-1/4 - 6. Thus the documentary evidence discloses that from November 10, 1960 through June 9, 1961 the bids in the sheets increased from a low of 1-3/4 to a high of 5-1/4 and the asks increased from a low of 2-1/4 to a high of 6. Such evidence further shows that

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19/ Whether Woolwich received the information from Trapani during the homeward train rides or by telephone is not in the final analysis material. It is crucial, however, that the substance of the information he did receive is almost exactly similar to the information Trapani gave R. V. Miller.

the greater portion of the increase occurred after Goodbody and Troster started their quotations in the pink sheets.[20/] The three traders testified that on each of the days when Blair, Goodbody and Troster inserted quotations in the pink sheets R. V. Miller and Woolwich talked with Trapani at least once during the day for the purpose of checking the market or effecting trades with him. On January 17, 1961 Goodbody entered its first bid identical to that of Blair and both firms continued to enter identical bids for the remainder of the month which bids were 1/8 higher than those of any other broker on five of the eleven days. At all other times their bids were as high as any other broker in the sheets. In February Blair and Goodbody and Troster increased their prices in the sheets. Blair and Goodbody inserted identical bids in the sheets on 12 of 18 business days and after Troster entered the sheets its bid was identical to that of Blair on eight of fourteen business days. In the first 10 business days in March 1961 Blair, Goodbody and Troster appeared in the pink sheets with the bids of Blair and Troster rising from 4 to 5-1/4 and Goodbody's bids rising from 4 to 5. On 5 of such days the three firms had identical bids. On fourteen of the nineteen days in April Goodbody appeared in the sheets and fourteen of twenty days that Blair appeared they entered identical asks of 6 which was the highest price on eleven of those fourteen days. The hearing examiner finds that the record establishes that on each day

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20/ R. V. Miller was solely responsible for inserting quotations in the pink sheets for Goodbody and Woolwich was solely responsible for such quotations for Troster.

Blair, Goodbody and Troster inserted bids in the pink sheets, such bids were as high or higher than the bids of any other brokers.[21/]

An analysis of the trading between Blair on the one hand and Goodbody and Troster on the other furnishes additional insight that there was an understanding among the traders for the three firms as to the ASO stock. From November 10, 1960 through April 28, 1961 Blair purchased 93,567 shares of ASO stock for the Gulihur account and sold for it 60,805 shares in 207 separate transactions with 52 different brokers. About 41% or 38,452 shares of the 93,567 shares purchased were acquired by Blair from Goodbody and Troster in 62 or 42% of Blair's purchase transactions. Of the sales made by Blair 7,275 shares or about 12% were made to Goodbody and Troster in 6 transactions or about 10% of Blair's sales transactions. An examination of Goodbody's trading reveals that between January 18 and April 28, 1961 the firm purchased and

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21/ In addition to suggesting ASO to Goodbody and Troster that ASO was a good number to trade, the record discloses that Trapani also suggested ASO to J. B. Maguire & Co., Inc. (Maguire) and May and Gannon, Inc. (May & Gannon), both of which firms were located in Boston, Mass. Maguire first appeared in the sheets on February 16, 1961 with a bid and ask quotation identical to that of Goodbody and Troster. Blair on that date inserted only a bid quotation which was 1/8 higher. Two business days later the bids of Blair, Goodbody, Troster and Maguire were identical and the ask quotations of Goodbody Troster and Maguire were identical. Blair had no ask quotation. Maguire's last quotations appeared on March 15, the day trading was suspended in the Gulihur account. May & Gannon appeared in the sheets for the first time on April 4, 1961 and continued its quotations until April 27, 1961. During this period its quotations on both sides were identical to those of Blair and Goodbody on each day but one even to the extent of lowering its quotations on the same dates Blair and Goodbody lowered theirs.

sold approximately 42,219 shares of ASO stock for its own trading account on 42 business days. Ninety-five per cent of all the shares of ASO which Goodbody traded in the above period were purchased from and sold to Blair. Goodbody purchased 5,775 shares from Blair in 4 transactions and made 1/8 of a point on each transaction. Goodbody sold to Blair 34,169 shares, or over 80% of its total sales, in 49 transactions making 1/8 of a point on 46 trades involving 31,894 shares and in 4 of these trades its profit exceeded 1/8 on portions of its sales as follows: 1/4 on 350 shares, 3/8 on 800 shares and 1/2 on 300 shares. Goodbody lost 1/8 on 25 shares[22/] was even on one sale of 300 shares and made 1/4 on 400 shares and 3/8 on 100 shares of one sale to Blair of 500 shares. The documentary evidence also shows that in 43 of the 53 trades between Goodbody and Blair, the ASO stock was held in position by Goodbody for less than 15 minutes. Goodbody carried an overnight position on approximately half of the 42 days it had transactions.[23/]

22/ This transaction was not for the Gulihur account as were all other transactions but for Blair's trading account.

23/ R. V. Miller and the Division differs on the number of days in which an overnight position was carried by Goodbody. Their differences arise because of two sales, one of 100 shares, the other 1,000 shares the first of which was cancelled a week later and the second cancelled 20 days later. **Goodbody argues these sales should be** included in its position until cancelled. The Division does not dispute the cancellations but urges that since the trades were cancelled they should be completely omitted from any calculations of position. The hearing examiner is of the view that the small amount of shares involved does not create substantially different results regarding Goodbody's position. The hearing examiner accepts Goodbody's version that it carried a "short" position overnight on several occasions and also accepts R. V. Miller's testimony but anything less than 1,000 shares was not substantial.

During the period February 10 to March 14, 1961 which Troster traded ASO stock, it purchased and sold 5,208 shares for the firm trading account in 48 separate transactions. It purchased 1,105 of such shares from Blair and sold 3,308 to Blair. The number of shares purchased and sold to or from Blair amounted to 85% of all the shares traded in the 15 business days and Troster realized a profit of 1/8 on all its purchases. Of the shares Troster sold to Blair it realized a profit of 1/8 on 2,135 shares; 1/4 on 573 shares, 3/8 on 300 shares; 5/8 on 200 shares and 7/8 on 100 shares. On 3 transactions between Troster and Blair, Troster held a position of 10 minutes or less and on 6 transactions in which Troster effected purchases and sales of ASO stock with Blair on the same day the record does not reflect the length of time Troster held a position. At any rate Troster carried no overnight position on 5 of the 15 days it effected trades in ASO. Its largest overnight position was 540 shares long on one night.

On the basis of the foregoing fact, the hearing examiner is led to conclude that an agreement or at the very least an understanding existed among the three traders with respect to the ASO stock, the implementation of which constituted a scheme violative of the anti-fraud provisions of the Acts. In arriving at this conclusion the hearing examiner has given particular consideration to the circumstances surrounding the commencement of insertions in the pink sheets by Trapani, R. V. Miller and Woolwich beginning with the desire of Grimmett and Gulihur, expressed to Katz to get other brokers in the sheets. Katz sought assistance from Trapani, who succeeded in interesting R. V. Miller

and Woolwich to enter quotations in the pink sheets by telling them he had orders for ASO stock. Consideration was also given in this connection to the identity of the quotations in the sheets by Blair, Goodbody and Troster, the similarity of the increasing prices in the sheets by the said firms and the ultimate fact that each of the firms realized at least a profit of 1/8 of a point on most of their transactions with Trapani. The hearing examiner finds that there was no written agreement among the respondents concerning their activities. Notwithstanding, an understanding can be inferred and is established by a preponderance of the evidence founded upon not only a reasonable conclusion derived from an evaluation of the testimony of such traders, Katz and Gulihur, but also upon the documentary proof in the record of the quotations in the pink sheets and the trading profits realized.

It is well settled that no written document or express contract is required to indicate the adherence of a party to a combination of two or more to accomplish an unlawful purpose. Montgomery Ward & Co. v. Northern Pacific Term Co., 128 Fed. Supp. 475, 509 (D. Oregon 1953). It is also well settled that an agreement or understanding like a conspiracy may be inferred from evidence of relationships and other probative circumstances. U. S. v. Bucur 194 F. 2d 297, 301 (7th Cir. 1952). An examination of the relationships between Katz, Gulihur and Grimmett reveals clearly that Katz from the very opening of the Gulihur account agreed to take instructions from Gulihur and Grimmett concerning both the prices which were to be placed in the pink sheets and the

prices at which the trades were to be executed for ASO stock. Trapani obviously became a party to this arrangement and acted in accordance therewith. Trapani admitted that both the prices he inserted in the pink sheets and the orders to purchase and sell ASO stock were, in the first instance determined by Katz and in the event any questions arose concerning a specific price or the amount of stock to be bought or sold, he exercised no discretion but sought and obtained authority from Katz who would first obtain approval from Gulihur and Grimmett. The method by which this was accomplished was for Trapani to "tie up" the stock for a short time until he could get authorization from Katz who he must have known was obtaining approval from Gulihur. The hearing examiner finds that the record clearly establishes and no inference is necessary to form the conclusion that Katz and Trapani entered into an arrangement, agreement or understanding that the quotations to be entered in the pink sheets were at prices prearranged and arbitrarily determined by Gulihur and Grimmett. The hearing examiner further finds that as a result of such arrangement Katz' activities were in violation of the anti-fraud provisions of the Acts.

An examination of the relationships among the three traders and other probative circumstances also leads to the conclusion that an understanding existed among the traders for R. V. Miller and Woolwich to join Trapani in his activities by inserting quotations in the pink sheets with the knowledge that by reason of the orders he had for ASO stock they would make a profit in trading the stock with him. In arriving at this conclusion consideration was given to the undisputed fact that R. V. Miller became interested in ASO in January 1961 when Trapani told

him that he had orders in the stock and in response to his questions Trapani furnished him the price of the stock, the names of the brokers appearing in the sheets and said he had no objection to R. V. Miller's "going in the sheets and trading" ASO. R. V. Miller readily admitted that his primary reason for going into the sheets was that Trapani had orders for the stock and "this meant he (R. V. Miller) could possibly sell stock to him." R. V. Miller, a sophisticated trader with approximately twenty years of prior experience, knew he did not need Trapani's consent to enter quotations in the sheets if, in fact, he independently determined to do so. The reasonable inference from his testimony is that he was keenly aware of the significance of having a source willing to buy and sell a particular security and that he was assured of a profit for his efforts. More cogent proof of the existence of an understanding about ASO stock between the two traders is found in the events immediately preceding the March suspension of trading in the Gulihur account. Again, there is no dispute in the record that in the early part of March, Trapani discussed with R. V. Miller a conviction he has that there were prearranged trades in ASO stock which he had to execute because Katz on several occasions told him to expect a call from a particular broker and that Trapani should do whatever the broker requested of him, mentioning that one of such brokers with whom he executed such a prearranged trade was P. Michaels. R. V. Miller and Trapani came to the conclusion there was something "about it they did not like" and agreed that Trapani should "go to somebody at Blair and talk about the situation." Thus, it is evident that R. V. Miller knew at this time that Katz was the registered representative for the account which he and Trapani were discussing and

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knew or should have known that Trapani's prices in the sheets and the prices at which the securities were being traded by Blair were being fixed by Katz' customer about whom Trapani was complaining. Trapani did, in fact, speak to Robert Miller about his suspicions and it is of the utmost significance that when Blair determined to stop trading, Trapani immediately informed R. V. Miller of that fact and they simultaneously dropped out of the sheets. When Blair determined to resume trading Trapani again immediately informed R. V. Miller that he was told by "Bob" Miller it was all right to go back in the sheets and start trading ASO. Both firms reappeared in the sheets on the same day with exactly similar quotations. Finally in April when Trapani informed him he had no further orders R. V. Miller dropped out of the sheets.

The foregoing, when considered along with the fact that approximately 80% of Goodbody's bids in the pink sheets, inserted by R. V. Miller, were identical to the bids inserted by Trapani, the fact that both firms increased their prices in the sheets with Goodbody raising its bid on eleven separate occasions and the fact that Goodbody traded 42,219 shares of ASO stock with Blair either the buyer or seller of 95% of these shares making a profit of 1/8 on each of the 4 transactions in which it purchased stock from Blair and 1/8 on 46 trades involving sales of 31,894 shares to Blair leads the hearing examiner to conclude that R. V. Miller knew that all of Trapani's transactions were based on orders received from Katz and knew or should have known that Trapani's prices inserted in the pink sheets were prearranged and arbitrarily determined by Katz who was receiving instructions from his customer and that an arrangement existed to trade ASO stock for a 1/8 of a point profit.

Though the evidence relating to Woolwich is less compelling than that relating to R. V. Miller it nevertheless establishes that the relationships and other probative circumstances fall within the pattern of conduct similar to that of R. V. Miller. Woolwich admittedly entered the pink sheets and commenced trading only after his interest in ASO was generated by his conversation with Trapani informing him of his orders for ASO stock. Woolwich testified that, though he could not specifically recall, it was possible he and Trapani had an arrangement for Trapani to take ASO stock from him so he could even out his position. Troster never had a "short position" in ASO stock and his largest overnight long position was 540 shares which was reduced the next morning. In concluding that an understanding or agreement existed between Trapani and Woolwich consideration was also given to the fact that Woolwich's bids in the sheets on virtually each day he inserted quotations were as high or higher than the bids of other brokers, that such bids continually increased and that the number of shares he purchased and sold to or from Blair amounted to 85% of all ASO shares which Troster traded and Troster made a profit of 1/8 or more on every trade with Blair. Woolwich's disappearance from the sheets on March 15, 1961 appears to have been occasioned by his admission to a hospital although he dropped out of the sheets exactly the same date as Blair and Goodbody. The hearing examiner concludes that Woolwich had an understanding with Trapani whereby he would insert quotations in the pink sheets on ASO and was assured he would receive at least 1/8 of a point on all his trades with Trapani which the record shows he, in fact, received.

Upon the basis of the foregoing the hearing examiner finds that Katz, Neumark, R. V. Miller and Woolwich willfully violated and willfully aided and abetted violations of the anti-fraud provisions of the Securities Act and the Exchange Act as alleged.

Troster, charged with having willfully violated and willfully aided and abetted violations of the anti-fraud provisions by failing to supervise, argues its supervision of Woolwich and the latter's activities was not inadequate, that it had no knowledge of any irregularities concerning ASO stock and that its appearance in the sheets and the trading activities by Woolwich were not unusual nor irregular and were consistent with normal over-the-counter trading in the 1961 market. These arguments are not supported by the record and are rejected. At the time Troster inserted quotations its research file contained information which among other things showed Grimmett was in control of ASO, that Mid-State was a subsidiary of ASO, that the primary source of funds of ASO emanated from loans by Grimmett which came from sales and pledges of ASO stock and that Grimmett had been enjoined from further violations of the registration provisions of the Securities Act in the offer and sale of ASO stock. If, as Troster claims, it has no knowledge it was because it made no effort to avail itself of information in its possession or carelessly and negligently ignored it. It is no answer to say, as Troster contends, that information about the injunction "was buried deep in the middle of a ten-page letter to stockholders dated March 31, 1958, that even if it had looked it would have seen that the injunction was over five years old and since there had been a market in the stock for several years there was no reason to suspect a continuation of any violation

which formed the basis of the injunction. The circumstances under which Woolwich determined to enter the sheets should have caused Troster to at least make efforts to check into ASO. Troster admittedly made no such effort and its lack of knowledge of the circumstances under which Woolwich determined to enter the sheets and trade ASO makes it apparent it exercised no supervision over Woolwich. Moreover, the record discloses the area in which Troster exercised supervision over its traders was directed toward protection of the firm's capital rather than protecting the public. Though the evidence shows that a partner reviewed Woolwich's transactions at the end of each day or every other day, the partner testified he could not detect anything unusual in Woolwich's trading. With respect to the quotations it is evident that Woolwich had complete authority to insert such quotations in the sheets and such quotations were not reviewed by the firm. Thus the fact that Troster's quotations of ASO in the sheets were, as shown above, similar to those of Blair and Goodbody and constantly rising and the fact that Woolwich was consistently selling to Blair at a 1/8 profit were not the types of matters which were being scrutinized by the firm and no supervision was exercised over Woolwich in these respects. The Commission has held that a broker has a duty to maintain and enforce adequate standards of supervision. Shearson Hammill & Co., Securities Exchange Act Release No. 7743 (November 12, 1965); F. S. Johns & Co., supra. Accordingly, the hearing examiner finds that Troster failed adequately to supervise Woolwich with a view to preventing the violations set forth above. See Paine Webber Jackson and Curtis, Securities Exchange Act Release No. 8500 (January 22, 1969).

R. V. Miller, Woolwich and Troster urge in their defense that the testimony of Katz and Gulihur is totally unreliable, that such testimony is based on hearsay and should be excluded from the record. In support of such argument these respondents state that Katz was an evasive witness, that he and Gulihur gave inconsistent testimony concerning Katz' claim that he was responsible for Goodbody being in the sheets whereas Gulihur testified Grimmett said "he had gotten Goodbody in the sheets," that Gulihur gave untruthful answers and that Gulihur admitted he gave a false affidavit to Loeb that the account at Blair was his alone when in fact he testified at the hearing he was merely a nominee for Mid-State. In essence, each of the respondents urge the hearing examiner to accept his testimony and certain of Trapani's testimony insofar as it agrees with that of each particular respondent and reject the balance of testimony to the extent it differs therewith.

The hearing examiner has given due consideration to these arguments and upon the entire record including the testimony of all of the witnesses and the documentary evidence finds that there is no basis for rejecting all of the testimony of Katz and Gulihur. The contention that the testimony of Katz and Gulihur is based on hearsay is not supported by the record and is rejected. Most of Katz' testimony related to conversations with Gulihur and with some of the respondents who testified at the instant hearing and all were subject to cross-examination.

Similarly, Gulihur's testimony for the most part related to conversation with Katz and some respondents who testified and all were subject to cross-examination. In addition, to the extent that both of them were charged with having committed violations in concert with other respondents their testimony would be similar to those of one conspirator made in furtherance of the conspiracy and admissible against other members of a conspiracy. Coplin v. United States, 88 F. 2d 552, 660-1 (9th Cir. 1937). In any event, it is well settled that administrative agencies are not strictly bound by common law rules concerning the admission of hearsay evidence and may make findings based on hearsay if corroborated by competent evidence. See Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 230 (1938); F.T.C. v. Cement Institute, 333 U.S. 683, 705-6 (1948).

The hearing examiner finds that the testimony of Katz and Gulihur was not inconsistent in all respects and that, in fact, Gulihur's testimony in most respects corroborated that of Katz. In addition, Katz' testimony is supported by other witnesses and by documentary evidence. Inconsistency in testimony between two witnesses is in itself no reason to reject the entire testimony of both witnesses particularly where there is documentary support for accepting such evidence. In United States v. O'Rourke 125 F. Supp. 769 (USDC Missouri, Western Div. 1954), the Court stated:

> "It is also the law that where the triers of the facts cannot reconcile errors and inconsistencies in the testimony of a witness they may accept that part of his testimony which they believe worthy of credit and reject the balance, having regard to all the facts and circumstances tending to show the witness's credibility or want thereof."

In the instant case the hearing examiner has found that Katz had an understanding with Grimmett and Gulihur to accept their instructions and to execute the orders to buy and sell ASO stock in accordance with such instructions. The testimony relating to the understanding is supported by documentary evidence in the form of the execution tickets in Katz' handwriting and constitutes proof of the manner in which the understanding was, in fact, accomplished. The hearing examiner has also found that Trapani's knowledge of the type of activity that was being carried on in the Gulihur account was, to a great extent, imparted by Trapani to R. V. Miller who in essence joined Trapani thereby helping to implement the latter's operations. Thus, the hearing examiner credits portions of the testimony of all of the witnesses and rejects other portions after taking all of the facts and circumstances into consideration particularly since the credited portions are supported by other witnesses and documentary evidence. The hearing examiner finds that the statements of Katz, Gulihur, Grimmett, Trepani, R. V. Miller and Woolwich are properly admissible against all the respondents.

R. V. Miller and Woolwich also urge that the manner in which they traded ASO was normal and consistent with the customary industry practice citing various portions of Part II of the Report of Special Study of the Securities Markets of the Securities and Exchange Commission ("Special Study").24/ They call particular attention to the

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24/ H.R. Doc. No. 95, Pt. 2, 88th Cong., 1st Sess. pp. 548, 551, 554, 563, 564, 570 (1963).

portion of the Special Study which in essence states that a trader hopes that retail houses which have buy and sell orders will execute them with him and permit him to make a profit of 1/8's and 1/4's on high volume; that market makers, in buying and selling for their own account, will acquire long and short positions, and that the size of inventories is ordinarily adjusted by the wholesaler changing his prices - lowering his bid and offer if he is long and raising them if he is short and awaiting calls from firms with retail customers. These portions are clearly distinguishable from the facts in the instant case. They relate primarily to the type of activity in which traders operate in a free, open and competitive market where supply and demand determines the market price. However, the market for ASO was controlled by the activities in the Gulihur account at Blair, a fact which R. V. Miller and Woolwich knew or should have known from their conversations with Trapani. They further urge their increasing prices in the sheets were justified by the demand for ASO stock by brokers other than Blair as evidenced by their transactions with such brokers. The argument is rejected since it is not supported by the record. As noted earlier Blair was either a buyer or seller of 95% of the ASO shares traded by Goodbody. Blair was either the buyer or seller of 85% of the shares traded by Troster. Goodbody concedes that 80% of the sales it made were to Blair and that other brokers purchased less than 20%. Moreover, of the 8,050 shares purchased by other brokers from Goodbody the record shows that 5,800 of such shares were simultaneously purchased by Goodbody from Blair at a 1/8 profit and R. V. Miller admitted he waited for Trapani to supply him

with the stock since any attempt to buy them in the open market would have moved the price up 1/8 or 1/4. Similarly, "other" brokers purchase less than 37% of the ASO shares sold by Troster and approximately 55% of such shares were simultaneously purchased by Troster from Blair at a 1/8 profit. The constantly increasing bids in the sheets by Goodbody and Troster were not based on supply and demand by "other" brokers but by the activity generated by Blair and both R. V. Miller and Woolwich admit they were told by Trapani that he (Trapani) had orders for the stock. R. V. Miller also admits he knew that since Trapani had orders he could lay off stock when necessary and could receive, as the record shows he did, at least a 1/8 profit. Woolwich though denying any agreement existed admitted it was possible he and Trapani had an arrangement whereby Trapani would take ASO stock from him so that Woolwich would even out his position.

R. V. Miller and Woolwich further contend that they were "trading numbers," a practice which the record shows was common in 1961, recognized by the Special Study and not deemed violative of the Acts. While such practice may have been considered common industry practice the anti-fraud provisions of the Acts were and are, nevertheless, applicable to such activity and where the evidence shows that such activity results in manipulation of the market it is no defense to say it was merely "numbers trading." 25/ In addition, in the instant case the

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25/ The hearing examiner does not intend to indicate the "numbers trading" is *per se* violative of the anti-fraud provisions or that such trading always results in a manipulation of the market.

facts are illustrative of another practice mentioned in the Special Study, namely, "friendly accommodation" or "hand-holding" which the Special Study criticized as "non-competitive," pointing out that "hand holding" may result "in an appearance of competition that may not always accord with reality." Special Study, pp. 576-77; 661-62. The hearing examiner finds that Katz, R. V. Miller, Woolwich and others manipulated or aided and abetted manipulations of the market in that they effected a series of transactions 26/ which created a false appearance of activity in ASO stock in the market by entering the quotations in the pink sheets and raising the price of such security for the ostensible purpose of inducing the purchase or sale of the security by others. Masland, Fernon & Anderson, 9 S.E.C. 338, 344 (1941).

The Commission has pointed out that an agreement to insert daily quotations in the pink sheets at increasingly higher bids is often the key element of a manipulation, the effect of which is to create a false appearance of activity in the market. Gob Shops of America, Inc., 39 S.E.C. 92, 101 (1959). The entire scheme to manipulate the market in ASO stock was commenced by Katz who elicited the aid of Trapani who in turn arranged with R. V. Miller and Woolwich to enter the pink sheets and trade the stock. As noted above, both R. V. Miller and Woolwich knew that Trapani had orders in the stock and they would realize a profit on their trading.

26/ The purchases and sales of ASO stock by Katz, the trading of the stock by R. V. Miller and Woolwich and the insertions in the pink sheets by the three firms by whom these three traders were employed were "a series of transactions" within the meaning of the anti-manipulative provisions. Halsey Stuart & Co., Inc., 30 S.E.C. 106, 126-7.

In addition R. V. Miller knew that Katz was receiving instructions concerning the ASO stock from his customer which instructions were being carried out by Trapani. In this connection it is of particular significance that R. V. Miller, after talking to Trapani and concluding that something was wrong, stopped his quotations precisely when Trapani did and without further inquiry or investigation re-entered the sheets and continued trading when Trapani told him it was all right to do so. In F. S. Johns & Co., Inc., S.E.A. Release No. 7972 (October 10, 1960) aff'd 373 F. 2d 107 (2d Cir. 1967) and Civ. No. 30940, 2d Cir. (May 26, 1967), the Commission in finding that all the dealers who went into the sheets at the request of the primary manipulator were participants in a fraudulent and manipulative scheme, stated "Those dealers must have or at least should have realized that they were cogs in such a scheme. They were obviously aware that the quotations were advancing substantially and rapidly despite the absence of any demand for Diversified stock." An intent to manipulate the market in a stock can be based upon objective market activity where there is no subjective evidence of such intent, and where, in fact, manipulative purpose is denied. Halsey Stuart & Co., supra, at 112-123-4.

Respondents R. V. Miller and Woolwich further maintain that with respect to the alleged violation of Rule 10b-6 such charges are defective since there is no allegation in the order for proceedings that these respondents participated in a distribution of ASO stock. The argument is without merit. As noted above, these respondents along with others are charged singly and in concert with having willfully violated

and willfully aided and abetted violations of the anti-fraud provisions of the Acts including Section 10(b) of the Exchange Act and Rule 10b-6 thereunder. Section 10(b) in pertinent part makes it unlawful, in connection with the purchase or sale of a security, to employ any manipulative or deceptive device in contravention of the Commission's rules and Rule 10(b)(6) promulgated thereunder, as applicable here, prohibits a broker, dealer or other person who is participating in a distribution from bidding for or purchasing for any account in which he has a beneficial interest, any security which is the subject of such distribution or attempt to induce any person to purchase such security until after he has completed his participation in such distribution. The respondents were thus on notice of the specific acts which are proscribed under the Act and the Rule. The hearing examiner finds that the absence of words stating that the respondents "participated in a distribution" is not fatal to the order for proceedings since the order clearly sets forth the facts which synthesized the participation in a distribution by the respondents. N.L.R.B. v. Sunbeam Electric Mfg. Co., 133 F. 2d 856, 858 (7th Cir. 1943). The further contention that the failure to allege a distribution constituted a denial of due process is equally without merit.

Respondents also urge in the same connection that the record establishes that neither R. V. Miller nor Woolwich had any knowledge of or was a "participant" in any distribution and none of them effected any distribution. In support of such argument respondents state they engaged in no selling methods whatsoever except perhaps inserting quotations in the sheets which they maintain was nothing more than trading in ASO stock

which was being distributed by another dealer and they did not engage in a "major selling effort" on their own behalf or of anyone else.[27/] However, the gravamen of the charges here is that R. V. Miller, Troster, Woolwich and others joined with Blair in activities designed to stimulate the market and increase the price of ASO stock at a time when they knew or should have known that a distribution was taking place. The evidence discloses and the hearing examiner has found that during the period from November 1960 through April 1961 a distribution of controlled stock of ASO was being effected by Grimmett and Gulihur through the Gulihur account at Blair. While such distribution was taking place the trader at Blair had an understanding with R. V. Miller and Woolwich to insert quotations in the sheets and to trade ASO stock at profit to them of 1/8 of a point. Such activity can not be described as respondents claim ordinary trading transactions or normal activities. Their activities commenced after talks among the three traders during which R. V. Miller and Woolwich were informed that Trapani had orders for ASO stock. It is a far cry from normal trading activities, in which a broker or dealer independently determines to trade a security, to when a broker or dealer is informed that there is a ready market and an assured profit. Goodbody and Troster determined to insert quotations in the pink sheets and trade ASO because they foresaw an opportunity for profit without making any effort to ascertain information concerning ASO or its management. With the information the experienced traders such as R. V. Miller and Woolwich had they should have satisfied themselves that there were no inhibitions to their trading.

27/ Cf. Gob Shops of America Inc., 39 S.E.C. 92 (1959)

At the very least R. V. Miller and Woolwich could be expected to do was look into their office files. Goodbody and Troster maintained research files in their respective firms, an examination of which would have alerted R. V. Miller and Woolwich who the principals were in ASO and that it was a highly speculative security with questionable assets. In this connection the record shows that Goodbody's files had information that Grimmett was president of ASO, that the company had insufficient capital to carry out its planned programs, that Mid-States was a subsidiary of ASO and that as of June 30, and May 2, 1960 ASO was planning to file a registration statement. Troster's file contained even more extensive information than that contained in Goodbody's files including that Grimmett financed and controlled ASO and that he was enjoined by this Commission in 1956 for violations of the registration requirements of the Securities Act. The record also reveals that though the common financial sources contained no information on ASO in 1961 this Commission's public files contained information relating to ASO of an adverse nature which would have alerted a reasonably prudent broker to, at least, investigate. By their conduct these respondents became participants in the distribution. Particularly is this true in the case of R. V. Miller who, in March, admittedly determined "something was wrong" at Blair with respect to the manner in which transactions were being effected by Trapani. Certainly at the time R. V. Miller dropped out of the sheets in March he knew or should have known that the ASO stock being sold at Blair was controlled stock and that a distribution of such stock was taking place. He closed his eyes to obvious danger signals and made no effort to investigate the activities he

believed wrong so as to satisfy himself that no manipulative activities were being carried on, which raised the doubts in his mind in the first instance, but willingly went along with Trapani when told "everything was all right."

In the context of Rule 10b-6 R. V. Miller and Woolwich thus participated in or aided and abetted in the distribution of ASO stock. The Commission held in the F. S. Johns case, supra, that the respondent firms which inserted quotations for the security involved in that case, aided and abetted that firm's violations of Rule 10b-6 during the period of F. S. Johns' distributions. The hearing examiner finds that under the circumstances present here R. V. Miller and Woolwich, by inserting quotations in the sheets and trading ASO stock, joined with Trapani in activities designed to create an appearance of market activity and to raise the price of ASO stock and that they knew or should have known that a distribution of ASO stock was taking place. Sidney Tager, Securities Exchange Act Release No. 7368 (July 14, 1964), aff'd 344 F. 2d 5 (C.A. 2, 1965). The hearing examiner further finds that within the meaning of Rule 10b-6 which, as pertinent here, provides that it is a manipulative or deceptive device for an underwriter of securities, or a broker-dealer or other person participating in such distribution, to bid for or purchase such securities until they have completed this participation in the distribution, R. V. Miller and Woolwich participated in or aided and abetted in violating Section 10(b) of the Exchange Act and and Rule 10b-6 thereunder.

Respondents also urge that these proceedings should be dismissed because of the failure of the Commission to comply with

Section 9(b) of the Administrative Procedure Act [5 USCA 558(c)].[28/] The hearing examiner finds the section provides no basis for dismissal of these proceedings. Section 9(b) as here pertinent states "Except in cases of willfulness or those in which public. . .interest. . . requires otherwise, no withdrawal, suspension, revocation or annulment of any license shall be lawful unless prior to institution of agency proceedings therefore, facts or conduct which warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." These proceedings are within the exceptions expressly provided in the above section. The order charges that respondents with having willfully violated the Securities Act and the Exchange Act and alleges that these proceedings have been instituted in the public interest. It is well settled that where proceedings are instituted in the public interest and willful violations are charged there is no requirement for the Commission to give notice of the violations and an opportunity tc comply prior to the issuance of the order for such proceedings. Dlugash v. Securities and Exchange Commission 373 F. 2d 107 (2d Cir. 1967). The order for proceedings was sufficient notice to satisfy the substantive requirements of Section 9(b) Schweibel v. Orrick 153 F. Supp. 701 (D.C.C. 1957) aff'd 251 F. 2d 919 (D.C. Cir.), cert denied 356 US 927 (1958). Also rejected is the argument that "willfulness" as used in the Administrative Procedure Act should be interpreted more narrowly than under the Exchange Act. Sterling Securities Co. 37 S.E.C. 837 (1957).

28/ A similar motion was made during the course of the hearings and denied by the hearing examiner.

Respondents further argue that their conduct was not "willful" under the Acts. In support of such contention they urge that R. V. Miller had no knowledge or reason to know of any manipulation or distribution or that Blair was acting for control stockholders of ASO or that Katz and Gulihur were arbitrarily determining the price for ASO. The hearing examiner rejects the argument. The Courts and the Commission have clearly stated that "willful" under the Securities Acts means intentionally committing the act which constitutes the violation even though the person who acts is not aware that he is violating the law. It is sufficient if the person charged with a duty knows what he is doing. Tager v. Securities and Exchange Commission 344 F. 2d 5, 8 (2d Cir. 1965); Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 468 (2d Cir.), cert denied 361 U.S. 899 (1959); Sutro Bros. & Co., 41 S.E.C. 443, 479 (April 10, 1963). The record leaves little doubt and the hearing examiner finds that the respondents intended to do the acts they are charged with doing and each of them knew exactly what he was doing. Lack of knowledge, good faith or due diligence, even if established, are insufficient defenses to a finding of willfulness under the Acts where the evidence shows that the person intended to do the act which resulted in the violation.

Violation of Section 7(c)(2) of the Exchange Act and Regulation T Thereunder

The order for proceedings, as pertinent here, alleges that from about November 1, 1960 to September 1, 1961 Katz, Neumark and others willfully aided and abetted violations of Section 7(c)(2)[29/] of the Exchange Act and Section 12 CFR 220.4(c) of Regulation T[30/] thereunder. The gravamen of the alleged violations is that Blair and Loeb, in connection with the activities referred to above, extended to and maintained credit for Gulihur when they knew or had reason to know the following: that such extensions violated Regulation T, that Gulihur and Grimmett did not intend to pay for their purchases of ASO stock, that ASO stock purchased by Gulihur was sold out of his account prior to payment for such securities, that ASO stock in the account was not promptly liquidated when payments were not received within the time specified by Regulation T, that Grimmett and Gulihur did not intend to deliver promptly stock to cover sales of ASO stock made for the Gulihur account at a time when the account had no securities on hand and that all of the activities were being conducted in the account of a person who was distributing a substantial number of ASO shares and was acting for and in concert with the controlling person of ASO.

Since Blair and Loeb were members of a national securities exchange and the Gulihur account was a special cash account it might be helpful to an understanding of the nature of the alleged violations to review briefly the provisions of Regulation T which are involved in

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29/ Section 7(c)(2) of the Exchange Act, as applicable here, in general makes it unlawful for any member of a national securities exchange to extend or maintain credit to or for any customer except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe.

30/ Regulation T was adopted under Section 7 of the Exchange Act by the Federal Reserve Board.

the instant case. Section 3(a), (12 CFR 220.3(a)) provides among other things that since no loan value can be ascribed to over-the-counter securities, all purchases of such securities other than a purchase to reduce or close out a short position must be effected in a special cash account and Section 4(a)(3) states that a special cash account shall not be used in any way for the purpose of evading or circumventing the general provisions. Section 4(c)(1)(i) permits a broker to effect bona fide cash transactions involving the purchase of any security by a customer in a special cash account which does not have sufficient funds for the purpose only if he does so in reliance upon an agreement accepted by him in good faith that the customer will promptly make full cash payment for the security and that he does not contemplate selling the security prior to making such payment. With respect to sales Section 4(c)(1)(ii) provides the broker in a special cash account may sell a security for a customer provided the security is held in the account or the broker is informed that the customer owns the security and the sale is in reliance upon an agreement accepted by the creditor in good faith that the security is to be promptly deposited in the account. Section 4(c)(2) provides that a broker or dealer shall promptly cancel or otherwise liquidate the transaction where a customer purchases a security in a special cash account and does not make full cash payment within 7 business days. An extension of the 7-day period may be granted by a national securities exchange,[31/] where a good faith

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31/ In the instant case the exchange involved was the New York Stock Exchange (NYSE).

application is made with respect to a bona fide cash transaction and "exceptional circumstances warrant such action" (Section 4(c)(6)). Section 4(c)(8) provides that unless funds sufficient for the purpose are already in the account, no security shall be purchased for or sold to a customer in a special cash account if during the preceding 90 days the customer had purchased another security in that account and for any reason whatever sold it before he paid for it in full. The sale of a security before it has been paid for has been referred to as a "free ride."

The alleged violations of Regulation T relating to the Gulihur account fall into three categories namely, **purchases for which payments were "late," effecting purchases of ASO stock without** sufficient funds deposited at a time when the account was "blocked" and the transactions in the account were not bona fide cash transactions within the meaning of Section 4(c)(1). Each of these categories will be separately considered.

Late Payments - Section 4(c)(2) of Regulation T.

The record disclosed that purchases of ASO stock were made in the Gulihur account on November 22, 23, 28, 29 and 30, 1960. Payment for the November 22 purchase was extended to December 8, 1960 and payments for the purchases of the following four dates were extended to December 12, 1960.[32/] Full payment for these transactions was made

32/ With respect to each of the dates of purchases at least one or more extensions of time was obtained as follows:
November 22 - Two extensions totalling 6 business days
November 23 - Two extensions totalling 5 business days
November 28 - Two extensions totalling 3 business days
November 29 - One extension for 2 business days
November 30 - One extension for 1 business day

by check drawn by Gulihur on Grimmett's bank account and credited to the account on December 13, 1960. Notwithstanding the documentary evidence reflecting receipt of the check on December 13, 1960 there was testimony that Loeb received the check on December 12, 1960. However, it is unnecessary to resolve whether the check was in fact received on the earlier date for an examination of the check reveals clearly it was dated December 15, 1960.[33/] Since the earliest date the check could have been presented for payment was December 15, 1960 the claim made during the hearing that the check received either on December 12 or 13, 1960 was payment for the purchases between November 22 and 30 must be rejected. Moreover Loeb, which was primarily responsible for crediting payments, admitted that according to its internal procedures in 1960 post-dated checks were not deemed payment under Regulation T until the date of the check. Accordingly, the hearing examiner finds that payment for the purchase of November 22, which was due on December 8 was at least seven days late and payment for the purchases of November 23, 28, 29 and 30 was received at least 3 days late and each day's purchases for which payment was received late[34/] constituted a willful violation of Section 4(c)(2) of Regulation T.

33/ In addition, the record shows that the check issued in payment for these purchases was in the amount of $12,142.64. Grimmett's bank account on December 15, 1960 reflected a balance of $2,201.88. The check which was deposited by Loeb reached PVNB on December 16, 1960 where it was stamped "insufficient funds." The bank held the check until sufficient funds were deposited in Grimmett's account and was finally paid on December 20, 1960. Loeb was not informed that the check was stamped as indicated.

34/ Coburn and Middlebrook Inc., 37 S.E.C. 583, 587 note 11 (1957).

Additional purchases of ASO stock in the Gulihur account were made on December 20 and 22, 1960. Payment for the first was due on December 30 and for the latter on January 11, 1961 after two extensions had been granted by the NYSE totalling 5 business days. Loeb attempted to establish at the hearing that the time for payment of the December 20, 1960 purchase was twice extended, the last to January 11, 1961. However its own record fails to support this requested extension and the hearing examiner finds there is no evidence in the record that such extensions were requested or obtained. Full payment for the foregoing purchases was made by check in the amount of $6,200 dated January 11, 1961. Although the check was credited to the Gulihur account on Loeb's books on January 13, 1961 there was testimony which indicated that the check was received by Loeb on January 12, 1961. Loeb apparently deposited the check on January 13, 1961. When the check was first presented for payment on January 17, 1961[35/] it was stamped "insufficient funds" by the PVNB and returned by the bank to the Federal Reserve Bank of Oklahoma City which received it on January 19, 1961. On that date, the record shows, Loeb was notified that the check was being returned because it had been drawn against insufficient funds. However, the check was never physically returned to Loeb and on January 23, 1961 the check was recalled by PVNB and paid. The hearing examiner finds that, on January 19, 1961, when Loeb received notice that the check

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35/ The documentary evidence shows that Grimmett's bank account on January 11, 1961 at the PVNB had a balance of $9.58. On January 17, 1961 Grimmett's bank account reflected a balance of $30.78.

dated January 11, 1961 was not paid and was being returned for insufficient funds, Loeb could not consider such check as cash payment within the meaning of Section 6(f) of Regulation T (CFR 220.6 (f)) and that pursuant to that Section and Section 4(c)(2) of Regulation T prompt cancellation or liquidation of the December 20 and 22, 1960 purchases was required. The hearing examiner further finds that the failure to cancel or liquidate on January 19, 1961 constituted a willful violation of the foregoing Sections of Regulation T. In addition, accepting the testimony that the check in question was received by Loeb on January 12, such check was nevertheless a late payment for the purchases of December 20 and 22, 1960 and constituted a willful violation of Section 4(c)(2) on January 12 since no cancellation or liquidation was promptly taken.

The record further shows that purchases of ASO were made on April 11, 1961 for which payment was due on April 20, 1961. The records show that partial payment for such purchases was made by sales of ASO stock on April 17, 1961 and that full payment was made by a check credited to the Gulihur account on April 21, 1961, which check was late by one day. The Gulihur account also made purchases of ASO stock on April 17, 1961, payment for which was due on April 26, 1961. Payment for a portion of the purchase was purportedly made by sales of ASO stock on April 25 and the balance by additional sales on April 28, 1961. Loeb's records thus reflect that full payment was not made for the purchases made on April 17, 1961 until at least April 28, 1961. The record leaves no doubt and the hearing examiner finds that full payment for the April 17

purchases of stock was not made until April 28, 1961 and such late payment constituted a violation of Section 4(c)(2) of Regulation T.

On April 20, 1968 purchases of ASO stock were again made in the Gulihur account, payment for which was due on May 1, 1961. A check for $50,000 in an amount sufficient to pay for these purchases, was credited to the Gulihur account, on Loeb's records, on April 29, 1961 and "value dated"[36/] as of April 28, 1961. However, the record shows that when the check was received by Loeb on April 28, 1961 the firm was concerned whether it would be paid and sent to their bank as a special item requesting that it be advised immediately if the check was not paid. On or immediately prior to May 4, 1961 Loeb's bank notified the firm by telephone that payment on the check had been stopped. Loeb took no action promptly to cancel or otherwise liquidate the purchases of April 20, 1961 as required by Section 6(f) of Regulation T and such failure constituted a willful violation of Section 4(c)(2) of Regulation T. The hearing examiner finds additionally that under the circumstances uttered above Loeb could not treat the check received on April 28, 1961 as cash payment for the April 20, 1961 purchases in the special cash account in light of the provisions of Section 6(f) of Regulation T.

36/ The practice of value dating a check was used by Loeb to indicate receipt of a check prior to the date it posted receipt of the check on the customer's ledger or monthly statement. The stated purposes of such practice was not only to reflect the actual date of receipt of the check but to avoid interest charges to the customer.

Thereafter, purchases were made of ASO stock on April 21, 24, 25, 26, 27 and 28, 1961, payment for which was due respectively on May 2, 3, 4, 5, 15 and 16, 1961. With respect to the April 25 purchase, payment due May 5, the record reflects that a 3-day extension was requested from the NYSE on May 8 but does not reflect any extension for the intervening period between May 4 and May 8. With respect to the shares purchased on April 26, 1961 (payment due on May 5, 1961) Loeb requested a 3-day extension on May 9 and another 4-day extension from NYSE on May 12, 1961. The record shows that Loeb's files did not contain an extension request for the period between May 5 and May 9, 1961. With respect to the shares purchased on April 27, 1961 Loeb obtained 2 appropriate extensions to May 15, 1961. Payment for the shares purchased on April 28, 1961 was appropriately extended to May 16, 1961.

Full payment for all of the foregoing purchases beginning with April 21, 1961 was not made until July 12, 1961. As noted earlier, during April 1961 the purchases made in the Gulihur account far exceeded sales in the account resulting in a debit balance by April 28, 1961 of $94,815.98. When Loeb was informed that payment of the $50,000 check value dated April 28, 1961 had been stopped it added that amount to the debit balance increasing it to $144,815.98. On May 3 and 4, 1961 sell-out telegrams were sent to Gulihur, the latest of which advised that if the foregoing amount was not paid by May 9, 1961 securities in his account would be sold. No such threatened action was taken. As a result of meetings between Blair, Loeb, Gulihur and Grimmett in May, 1961 Gulihur signed two promissory notes dated May 3, 1961, one for $147,502.23, the other for $21,904.50, both of which were endorsed by

Grimmett. Grimmett also agreed to deliver to Loeb 100,000 shares of ASO stock. The shares in the name of Mid-State were delivered and credited to the account on May 4, 1961. As noted earlier, the promissory note in the amount of $147,502.23 was presented for payment on May 19, 1961 and dishonored. Between May 26 and June 1, 1961 a check of M. S. Gerber drawn on a Canadian bank in the amount of $40,000 was credited to the account. On July 12, 1961 checks in the amount of $100,000 and $5,767.09 were received into the account constituting full payment of the entire debit balance inclusive of interest in the amount of $951.11 and on the same date Gulihur acknowledged receipt from Loeb of 134,788 shares of ASO stock from his account. Upon the basis of the foregoing facts the hearing examiner finds that payment in full for the purchases of ASO stock on April 21, 24, 25, 26, 27 and 28, 1961 was not finally made until July 12, 1961. Under Section 6(f) of Regulation T Loeb could not, as of at least May 4, 1961 when it was informed payment of the $50,000 check had been stopped, treat the receipt of the said check nor the promissory notes in good faith as payment of the foregoing purchases and was required promptly to cancel or liquidate the said purchases.[37/] The hearing examiner further finds that the failure by Loeb

37/ While Section 6(f) of Regulation T (CFR 220.6(f)) permits a broker to treat a check as cash it does not apply, by its terms, to situations where the broker is notified of nonpayment on the date of presentation. Under such circumstances the broker is required to "promptly take action as he would have been required to take by the appropriate provisions of this part if the provisions of this paragraph had not been utilized." It follows that payment of the check in question could not have been considered as having been made until the check was actually paid. Cf. Federal Reserve Bulletin 399, 12 CFR 220.117. The broker was therefore required to promptly liquidate or otherwise cancel the transaction.

and Blair to cancel or liquidate the above-mentioned purchases constituted a violation of Section 4(c)(2) of Regulation T.

Purchases Effected Without Sufficient Funds Deposited at a Time When the Account was "Blocked"

An examination of the Gulihur account reveals that on more than one occasion ASO stock was purchased and prior to the time the stock was paid for, ASO stock was sold in the account and the account thus became "blocked" within the meaning of Section 4(c)(8) of Regulation T. The evidence discloses that there were purchases of ASO stock in the Gulihur account totalling 2,425 shares on November 10, 11 and 16, 1960. Within 5 business days after the first purchase, to wit, on November 17, 1960, a sale of 500 shares of ASO stock was made in the account. There is no dispute in the record that on the date of the sale no payment for the prior purchases had been received. Under Section 4(c)(8) of Regulation T where a security has been purchased in a special cash account and that "for any reason whatever, without having been previously paid for in full by the customer, the security has been sold in the account. . ." no further purchases are permitted unless funds sufficient to pay for the purchases are already in the account. Under such circumstances the account is generally referred to as "blocked" or "frozen." Hence, on November 17, 1960 the Gulihur account, having effected a sale without paying for its previous purchases, became "blocked" and the purchases effected on November 22 and 23, 1960, prior to payment of funds into the account, were not permissible. The supervisor of the Gulihur account at Loeb testified that, though he could not recall the specific transactions

under Loeb's practices at the time, the Gulihur account should have been "frozen." He further testified the account would become "unfrozen" upon receipt of timely payment. Since the record shows that payment for the purchases on November 10 and 11, 1960 was extended by the NYSE to November 25, 1960 and the purchase of November 16, 1960 extended to November 28, 1960, the payment received in the account on November 25 and 28, 1960 were not late. Though the account was therefore no longer frozen on the dates payment was received, such payment did not purge the purchases on November 22 and 23, 1960. Accordingly the hearing examiner finds that the purchases on November 22 and 23, 1960 were in violation of Section 4(c)(8) of Regulation T.

An analysis of the Gulihur account demonstrates a continuation of the "free ride" practice during the period between December 1960 and April 1961. The record shows that the proceeds of sales of ASO stock were applied partially or in full to purchases effected on the same day as the sales of ASO stock and to purchases effected on days prior to such sales and that such practice manifested an intent to either circumvent or evade compliance with Regulation T. Thus, the evidence reflects that on December 16, 1960 the Gulihur account purchased ASO stock in the amount of $3,982.48 which was paid for by the application of the proceeds of the sales of ASO stock effected on December 19, 1960. On that date Gulihur also purchased ASO stock in the amount of $1,080 and after applying the proceeds of the sale to the purchase of that day, used the small balance to apply to the December 19, 1960 purchase. The balance of the purchase price of the December 16, 1960 purchase was paid for by the application

of the proceeds of sales of ASO stock on December 20, 1960 in the amount of $3,633.52. On this latter date Gulihur also purchased ASO stock in the amount of $4,680. There is no doubt that the record discloses that no funds had been deposited in the Gulihur account either on December 19 or 20, 1960. The hearing examiner finds that at least as of December 19, 1960 and certainly on December 20, 1960 the Gulihur account should have been "blocked" for a period of 90 days pursuant to Section 4(c)(8) of Regulation T. Thereafter, on December 22, 1960 Gulihur again purchased ASO stock without having previously had sufficient funds in the account. Again on January 11, 12 and 13, 1961 Gulihur purchased ASO stock without having sufficient funds in the account at the time of such purchases.[38/] Thereafter, from January 16, 1961 and until the conclusion of trading on March 3, 1961 there was a credit balance in the Gulihur account sufficient to cover purchases made during the said period. On March 6, 1961, the Gulihur account had a credit balance of $83,704.71. On that day the account purchased ASO stock amounting to $93,816.28, a sum exceeding the funds held in the account. Though ASO stock was also sold on that day for $4,858, such amount was still insufficient to create

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38/ Though there is evidence in the record that a check, drawn on Grimmett's bank account, in the amount of $6,200 dated January 13, 1961 was received by Loeb on or about January 11, 1961 which Loeb contended resulted in a credit balance on that day, the record further shows that the check was marked "insufficient funds" by Grimmett's bank when first presented for payment. On or about January 19, 1961 Loeb was advised the check had "bounced." From at least that date liquidation or cancellation action should have been taken. See Footnote 33, *supra*.

a credit balance in the account and the purchases on March 6, 1961 when the account was "blocked" were in violation of Section 4(c)(8) of Regulation T. Upon the conclusion of trading on April 5, 1961 the Gulihur account had a credit balance. On April 6 Gulihur purchased ASO stock in an amount in excess of the funds in the account and the purchases on that day resulted in a debit balance and such purchases were impermissible under the above-mentioned section of Regulation T. Similarly purchases were made in the Gulihur account on April 7, 11, 14, 17, 19, 20, 21, 24, 25, 26, 27 and 28, 1961 when there was a debit balance in the account and since funds in the account were not sufficient to pay for such purchases the hearing examiner finds such purchases in violation of the above-mentioned section of Regulation T.

During the course of the hearings it was urged that on each of the days when purchases were made commencing at least on December 19, 1960, notwithstanding that there may have been insufficient funds in the account at the time of such purchases, there were shares of ASO stock which were long and fully paid for in the account and the sales which were effected were of securities long in the account rather than sales of securities purchased and the account should not have been deemed "blocked." The acceptance of such contention would emasculate the essential objectives of Regulation T. The clear purpose of Section 4(c)(8) of Regulation T, as stated by the Board of Governors of the Federal Reserve System ("Board") in 1962 Federal Reserve Bulletin 399, 12 CFR 220.17, is "to prevent the use of the proceeds of sale of a stock by a customer to pay for its purchase - i.e. to prevent

him from trading on the creditor's funds. . ." In this connection it is noted that the Board as early as 1938 in considering whether, in a special cash account, securities could be purchased and then paid for by use of the proceeds from the sale of other securities stated such transactions could be effected if there was "in fact, no attempt to evade or circumvent the regulation" and that any such combination of transactions should be "carefully scrutinized." The Board further stated that this would require, among other things, that "the proposed purchase be, in fact, a 'bona fide cash transaction' as that term is ordinarily used in the trade. . ." Federal Reserve Bulletin, December 1938 at 1043. The Commission considered the question whether there was a violation of Section 4(c)(2) of Regulation T in a case where the customers within 7 business days sold, in the same amount, another security in payment for the security they had purchased. In each case the security sold was deposited in the account after the expiration of the 7 days. The Commission held that in 12 instances the record did not show that the method of payment was employed as a means of evasion but that in another instance there was a repetition of this method of making payment and in addition there were 2 other previous transactions by the same customer which admittedly were in violation of Section 4(c)(2) all of which was deemed sufficient evidence of an attempt to evade Regulation T and violated Section 4(c)(2) thereof. Coburn and Middlebrook, Inc., 37 S.E.C. 583, 586 (1957). Similarly, in the instant case the record shows that prior to the purchase on December 16 and sale on December 19, 1960 of ASO stock the Gulihur account had become a matter of concern at Loeb and Blair

because of the numerous extensions which had been requested,[39/] payments which had been received late and the apparent development of a pattern of using the proceeds of sales to pay for purchases, all of which should have alerted the appropriate persons at Blair and Loeb to have "carefully scrutinized" the account to ascertain if the purchases were "bona fide cash transactions." The hearing examiner finds that in light of the foregoing circumstances persons handling the Gulihur account should have known that there was an intent to evade the requirements of Regulation T and that as, at least, of December 19, 1960, the account should have been "blocked." If by the mere expediency of maintaining a "long" position in an account, a broker establishes a practice of using the proceeds of sales to pay for purchases, without making cash payments into the account for such purchases or depositing securities in the account, the requirements of Regulation T would become meaningless. Such practice would permit the very acts which the Regulation was designed to prevent, namely, permit a customer to trade on the broker's funds. In the instant case an examination of the Gulihur account shows that on each of the 15 business days between November 10, 1960 and January 13, 1961 when purchases were made there were never funds already in the account to pay for such

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39/ The documentary evidence discloses that on 7 out of 8 business days on which the Gulihur account purchased ASO stock, beginning with the first purchase on November 10, 1960, at least one request for extension was made to the NYSE. Since there were two requests for extensions with respect to purchases made on three separate days there were a total of ten requests made prior to December 16, 1960.

purchases but, in fact, a debit balance existed. The "long" position of ASO stock in the account was not the result of securities deposited in the account but purchases made between November 10 and 28, 1960 totalling 6,525 shares and the sale of only 500 shares on November 17, 1960. Similarly, the purchase on March 6 and the purchases made between April 6 and 28, 1961 noted above were all made when there was a debit balance in the account.

Transactions in Account Not Bona Fide Cash Transactions Under Section 4(c)(1) of Regulation T

The facts and circumstances relating to the violations of Sections 4(c)(2) and 4(c)(8) noted above furnish probative evidence that the transactions effected in the Gulihur special cash account were not bona fide cash transactions, as required by Section 4(c)(1)(i) (CFR 220.4(c)) (CFR 220.4(c)(1)(i)). We note in the margin the statements of the Board 40/

40/ In 26 Federal Reserve Bulletin 1173 the Board, November 1940, stated:

"The customer should have the necessary means of payment readily available when he purchases a security in the special cash account. He should expect to pay for it immediately or in any event within the period (of not more than a very few days) that is as long as is usually required to carry through the ordinary securities transaction.

Such an undertaking is a necessary part of the customer's agreement, under section 4(c)(1)(A), that he 'will promptly make full cash payment'. Furthermore, any delay by the customer may cast doubt on the original status of the transaction and should be explainable by exceptional circumstances that justify the delay. Repetition of delays by the customer would be especially hard to justify. Such repetition would almost conclusively label his transactions as unable to qualify as bona fide cash transactions and would almost conclusively disqualify them for inclusion in the special cash account."

interpreting the foregoing section, particularly those concerning the ability of the customer to have means of payment readily available and that repetition of delay in making full cash payment "would almost conclusively label his transactions as unable to qualify as bona fide cash transactions and would almost conclusively disqualify them for inclusion in the special cash account." As noted above, from the very outset of the account Loeb was beset with problems which arose such as repeated requests for extensions of payment, receipt into the account of third party checks, receipt of late payments and the use of proceeds of sales to pay for purchases. In addition, in December 1960 Loeb felt it necessary to obtain a credit report on Gulihur which they concede they obtain in cases where the customer's ability to pay is questionable. The credit report stated Gulihur's income from all sources was $950 a month, that he worked for his father-in-law in various capacities and that his payments to trade creditors was very slow or delinquent. All of these factors were known by Loeb, Blair, Katz and Neumark (except the latter two may not have known of the existence of the credit report) by January of 1961 when trading in the Gulihur account was suspended for the first time and should have conclusively established, at the very least at that time, that the transactions could not qualify for inclusion in a special cash account under Regulation T. Moreover, soon after trading was resumed additional evidence appeared that should have convinced Loeb, Blair, Katz and Neumark that they could not rely on Gulihur to make prompt payment and that he contemplated selling before making payment. The facts con-

cerning the sales in the Gulihur from February 28 through March 3, 1961 which resulted in a "short" position of ASO stock in the account, followed by the acquisition of the 21,500 shares on March 6, 1961 for an amount in excess of the credit in the account have been detailed above. Trading was suspended again in March but the Gulihur special cash account continued to be maintained at Loeb and Blair. On the basis of all of the foregoing the hearing examiner finds that Blair, Loeb, Katz and Neumark could not have relied upon nor accepted in good faith an agreement by Gulihur that he would promptly make full cash payment. The hearing examiner further finds that by the end of December 1960 the above-named persons knew or should have known that Gulihur contemplated selling ASO prior to making full cash payment.[41/] Accordingly, the hearing examiner finds that from December 1960 or at the very least in January 1961 when the Gulihur account was first suspended all of the transactions in the Gulihur account were improperly included in the special cash account maintained by Blair and Loeb in violation of Section 4(c)(1)(i) of Regulation T.

Both Katz and Neumark assert that the record fails to establist that they aided and abetted the violations of Regulation T set forth above. The hearing examiner rejects such argument. Katz' involvement with the Gulihur account and his daily conversations with Gulihur have been detailed above. In addition, the record clearly shows that all of the requests for payment were made by the back office employees of Loeb directly to Katz who would communicate with Gulihur asking the reason

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41/ Cf. Coburn and Middlebrook Incorporated, supra; see also 26 Fed. Res. Bulletin 1173, November 1940, supra.

payment was not made and then furnish such employees with the explanation to be given the NYSE for requesting an extension.[42/] It is evident that Katz was well aware of the problems concerning delayed payments. The record also shows that Katz received copies of the execution tickets on transactions he effected in the account and copies of the monthly statements of account. The hearing examiner finds Katz knew or should have known that the proceeds of sales were being used to pay for purchases and knew or should have known that such activities were designed to avoid compliance with the requirements of Regulation T. The hearing examiner finds that Katz aided and abetted violations mentioned above of Section 7(c) of the Exchange Act and Section 12 CFR 220.4(c) of Regulation T promulgated thereunder.

Neumark, though not preoccupied with the Gulihur account on a daily basis as was Katz, nevertheless became involved in the problems that arose in the account. Neumark's protestation of innocence concerning any knowledge of credit problems in the Gulihur account is not established by the record. The evidence shows that some time between November 23 and 30, 1960 when problems arose in the Gulihur account the back office personnel of Loeb responsible for the account talked to Neumark about the matter. It was Loeb's practice to write the name of

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42/ Section 4(c)(6) of Regulation T permits the NYSE to extend the time when cancellation or liquidation is required (7 days after purchase) if it is satisfied that the broker is acting in good faith in making the application, that it relates to a *bona fide* cash transaction and that exceptional circumstances warrant such action.

the person at Blair familiar with the account and having some authority in connection therewith on the posting sheets. Neumark's name was written on such sheets along with the name of the registered representative, Katz. In January, after Neumark had become a partner at Blair, he continued not only to share in the commissions generated in the Gulihur account but the record establishes he acted as liaison between Blair and Loeb and had responsibility for clearing up problems and procedures which arose in customers' accounts at Blair including the Gulihur account. There is no doubt in the record that between January 11 and 13, 1961 a partner of Loeb spoke to Neumark about the $6,200 check which had been received in the Gulihur account and which Loeb had been informed was being returned by the bank because of insufficient funds in the account. Neumark on behalf of Blair agreed at that time that the account should be suspended and it was. It is inconceivable that Neumark would have agreed to such action absent any knowledge of the account, or the problems which had already appeared in the account or that the proceeds of sales were being used to pay for purchases. Neumark testified that he learned in 1961 that Grimmett's checks were being used to pay for transactions in the Gulihur account, that he learned from and discussed with Katz the letter or affidavit which was received by Loeb regarding the use of Grimmett's checks to pay for Gulihur's purchases and that on March 6, 1961 when word of the large purchase of 21,500 shares of ASO stock became known in Blair's board room Neumark shared such knowledge. While each of these by itself may not be sufficient to establish knowledge of the credit problems in the

Gulihur account, when viewed collectively with the factors mentioned above lead to the conclusion that Neumark, as a partner bearing general responsibilities as such, knew or should have known of the failure to make prompt payments into the account, that the account followed a practice of using the proceeds of sales to pay for purchases and that there was a failure to cancel or liquidate transactions when required under Regulation T. The hearing examiner finds that Neumark aided and abetted violations of Section 7(c) of the Exchange Act and Regulation T issued by the Board.

Other Matters

Katz asserts that there has been an inordinately long and unexplained delay in commencing the instant proceeding which has deprived him of his constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States and has severely prejudiced him in presenting adequate defense to the allegations made. In support of such contention Katz states that the events and transactions which form the basis of the allegations in the order for proceedings occurred between November 1, 1960 and September 1, 1961, that representatives of this Commission first interrogated him in February 1963 and thereafter in August 1963 on both of which occasions he voluntarily appeared and answered questions, that it was not until more than two years later that he was served with the instant order for proceedings and that the actual hearing commenced in May 1966. Katz further states that the delay of almost six years after the alleged events was prejudicial to him not only by reason of

the fact that the government's case was based primarily on hearsay evidence given by Gulihur but, more importantly, because it was impossible for him "to counter, refute and explain the alleged hearsay statements made by Grimmett because of his intervening death which occurred more than four years after the alleged wrongful acts took place." The hearing examiner is of the opinion that after considering the nature of the events and numerous transactions in which Katz was directly involved as a co-conspirator with Grimmett, Gulihur and a number of persons and firms directly and indirectly allegedly implicated, the voluminous documentary material required to be examined and evaluated prior to determining that proceedings should be instituted in the public interest and the complexity of all of the circumstances and dealings which resulted in the violations found above, the delay was not unreasonable nor was Katz seriously prejudiced. Katz' claim of a six-year delay is inaccurate even if judged from the first transaction to the institution of these proceedings. While the investigation by this Commission may have been somewhat lengthy there is nothing in the record to establish it was unreasonable. As the court stated in Deering Milliken v. Johnston, 295 F. 2d 856, 867 (C.A.4, 1961):

> "There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What is reasonable can be decided only in light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and duties."

The record is barren of any proof that there was unreasonable delay

in commencing these proceedings. An examination of the record reveals that an investigation of the matters involved in this proceeding was begun by the Commission staff in 1961 and continued through at least October 1964. In light of the complex nature of the allegations relating to violations of three separate sections of the Securities Act, three separate sections of the Exchange Act involving three rules promulgated thereunder and several provisions of Regulation T which were charged as violations and considering the number of persons alleged in the order for proceeding as having conspired to violate one or more of the foregoing sections it seems apparent that the Commission staff made efforts to thoroughly explore all matters and circumstances before recommending that proceedings be instituted. To the extent the record does not reflect a chronology of the investigation there is no showing that any delay was "purposeful or oppressive."[43/] These proceedings were instituted by order dated October 11, 1965, Katz was served on October 15, 1965 and filed an answer on November 19, 1965 after receiving an extension of time for such purpose. The first hearing was convened on January 17, 1966 for the purpose of conducting pre-trial proceedings. Thereafter Katz either requested or consented to postponements of hearing dates. In addition Katz failed to establish that the delay, even if lengthy, was prejudical. Katz asserts in

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43/ See U. S. v. Kane 243 F. Supp. 746 (S.D.N.Y.) where the Court refused to dismiss an indictment charging violations of the securities laws which had not been returned until shortly before the five-year statute of limitations had expired.

support of claimed prejudice that the record is replete with statements allegedly made by Grimmett which were incriminating to him, that Gulihur was permitted to give hearsay statements without affording Katz an opportunity to refute or explain the statements made by Grimmett, that Katz had no opportunity to confront or cross-examine Grimmett and if Grimmett had testified it would have been favorable to Katz. These claims, other than his inability to cross-examine Grimmett, are not supported by the record and are rejected by the hearing examiner. The record clearly demonstrates Katz was afforded ample opportunity to testify as to his conversations with Grimmett and, in fact, testified giving his version of such conversations. In that respect Katz was helped, certainly not prejudiced, by Grimmett's demise since he was free to and gave his own recollection of his conversations with Grimmett without fear of any possible contrary version by Grimmett. The subject matter of numerous conversations between Grimmett and Katz were also reflected in Gulihur's testimony who testified he and Grimmett were on one end of many three-way conversations with Katz at the other end. Gulihur was vigorously cross-examined by counsel for several respondents including counsel for Katz. In addition, all the important witnesses with whom Katz was involved in the numerous transactions, except Grimmett and one or two margin clerks at Loeb, testified at the instant hearings and were available for cross-examination by Katz. Finally, it appears that the case against Katz is in good part documentary and many of the events and most of the transactions were confirmed and supported by such documentary evidence and oral testimony of other persons involved.

The above findings of violation by Katz are not, as claimed by Katz, based substantially upon hearsay concerning Grimmett's alleged statements. The cases cited by Katz, to wit, U. S. v. Dillon 183 F. Supp. 541 (S.D.N.Y. 1960) and U. S. v. Delman 253 F. Supp. 383 (S.D.N.Y. 1966) are distinguishable from the instant case. The court in the Dillon case in granting a motion for acquittal pointed out the indictment had been returned eight years prior to the trial, that on numerous occasions when the case was on the calendar the dependents were ready to proceed to trial but that the Government repeatedly requested postponement without any satisfactory explanation being offered for what the court termed "inordinate or shocking delay," all of which prompted the court to conclude that the defendants had been deprived of their right to a speedy trial and prejudiced them in meeting the charges against them. In the Delman case there were approximately fifty adjournments of the preliminary hearing under a complaint until the return of an indictment during which period the defendants alleged one codefendant died, material records were lost and their recollections and those of potential witnesses dimmed. The court denied a motion to dismiss the indictment stating that it could be renewed upon trial where a more realistic appraisal could be made of all the circumstances to determine if the long delay "has been so prejudicial as to deprive defendants of a fair trial." In the instant case the record, at best, shows the investigation may have taken a long time but there has been no showing that the staff of the Commission was not diligent in conducting such investigation and in the opinion of the hearing examiner Katz

has been unable to demonstrate that records were lost or that he has been prejudiced or that he has been prevented from presenting his defense. In U. S. v. Bradford the Court, in declining to dismiss an indictment for conspiracy to violate the Securities Act which was returned shortly before the statute of limitation expired, held that absent a showing of prejudice, such as loss of documents, disappearance of witnesses, death of witnesses or loss of faculties by the defendant there was no basis for dismissal under the Fifth or Sixth Amendments to the Constitution. U. S. v. Bradford, 231 F. Supp. 187 (S.D.N.Y. 1964). As noted earlier, nearly all of the persons with whom Katz was involved in the numerous transactions forming the basis of the charges were produced and testified at the hearing and subjected to rigorous cross-examination by Katz' counsel as well as counsel for other respondents. The hearing examiner concludes the delay in instituting these proceedings was not so prejudicial as to deprive Katz of his ability to present an adequate defense, that he was confronted with the witnesses against him, that under all of the circumstances, he received a fair hearing and was not deprived of his constitutional rights under the Fifth and Sixth Amendments.

During the course of the hearing each of the respondents on numerous occasions objected to the receipt in evidence of testimony and documents on the ground that the matter was not relevant and was not "connected" to a particular respondent. Such objections were overruled at the time with the right of each of the respondents preserved to move to strike such matter if at the end of the proceeding no such connection

was established. At the conclusion of the hearing each of the respondents moved to strike essentially the testimony of the other respondents which in essence differed with the movant's version and to strike all of the documentary evidence other than that produced by the particular respondent or his employer on the grounds that there was a failure to connect the matter in question to the particular respondent. Decision on such motions to strike was reserved. All such motions are herewith denied. The essential elements underlying the charges against each of the respondents is that they singly and in concert are alleged to have violated the various provisions of the Securities Act and the Exchange Act as set forth in the order for proceedings. The hearing examiner finds that the evidence establishes that these respondents acted in concert and that the testimony of each of them should be admitted as against all of them. It is well settled that where two or more parties have been found to have joined in a common scheme the acts and statements of any one of the participants therein, while engaged in carrying into effect the common purpose, is against the other. In U. S. v. Bernard, 287 F. 2d 715, 719 (7th Cir. 1961), the Court upheld the admission of evidence against all of the defendants where a common plan was found on the principle of "vicarious responsibility of all joint venturers for all acts done and statements made in furtherance of the object of the joint scheme or undertaking." In U. S. v. Coplin 88 F. 2d 652 (C.A. 9, 1937) the Court, quoting from Cossack v. U. S. 82 F. 2d 214,

216 (9th Cir., 1955), cert. den. 298 U. S. 654 (1936) held:

> "When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. . . The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of these concerned in the furtherance of the original enterprise and with reference to the common object is, in contemplation of the law, the act of declaration of all." (Underlining added).

With respect to Katz the evidence as indicated above shows that during the period in question he entered into an arrangement or agreement with Gulihur and Grimmett to insert prices in the pink sheets and to purchase and sell ASC at prices predetermined by them. To carry out the scheme which included raising the price of ASO and distribute the stock he arranged to have one or more other brokers enter the pink sheets and trade the stock at a predetermined profit to such brokers. Neumark, to the extent indicated hereinabove, directly and indirectly joined in such scheme.

At a later time R. V. Miller, Woolwich and Troster joined with Trapani, Katz and Neumark in the scheme. In furtherance of such scheme the hearing examiner has found that they effected a series of transactions which created a false appearance of activity in ASO stock and the market by entering the pink sheets and raising the price of such security for the ostensible purpose of inducing the purchase or sale of the security by others and engaged in acts found to constitute a manipulative or deceptive device as used in the Exchange Act. In connection

with all of the foregoing activities the declaration and statements by any one of the above-mentioned individuals uttered in furtherance of the scheme are admissible against all other members of the scheme. It is also well established that participation in a scheme need not be proved by direct evidence and that a common purpose and plan may be inferred from a "development and collocation of circumstances." Glasser v. U. S. 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680. In addition, it is not necessary to support a finding of the existence of an overall scheme that each participant knew others involved therein or the precise part each was playing. Isaac v. U. S. 301 F. 2d 706 (C. A. 8, 1962). In the instant case the evidence shows that R. V. Miller knew from his conversations with Trapani that 'something was wrong' with respect to the purchases and sales being effected by Trapani but, nevertheless, joined in the scheme to manipulate the market in ASO stock.[44/] Whether he or Woolwich knew the names of Grimmett, Gulihur or even Katz or the precise part that each was playing does not in and of itself negate the existence of a scheme or their participation in it. In a case involving fraud in the sale of securities the Commission has held that the respondents participated in a scheme to defraud. Alfred Miller, Securities Exchange Act Release No. 8012 (December 22, 1966).

44/ Cf. U. S. v. Dorr 321 F. 2d 61 (2nd Cir. 1963) where a salesman who had been employed for seven days by a broker-dealer engaged in a fraudulent sales operation was held criminally liable on the basis of a telephone call he made five days after starting work. Judge Friendly commented that the five days should have sufficed to teach "anyone" exactly what was going on.

Public Interest

The remaining question is what, if any, sanction is appropriate in the public interest as to each of the respondents. Wholly apart from the defenses urged by Katz concerning each of the charges against him which have been considered above, he steadfastly maintains he was not a knowing participant in the alleged unlawful distribution, that he relied upon other respondents with greater expertise and knowledge in the securities field and when they "investigated" and told him it was proper to continue to handle the Gulihur account he had a right to rely upon their collective judgment. None of these matters are sufficient to exculpate Katz from the serious and willful violations of the Securities Act and the Exchange Act which he committed. His activities and conduct with respect to the operation of the Gulihur account have been detailed above and need no repetition here. Clearly Katz was the focal and operational point of the entire scheme by which Gulihur and Grimmett illegally distributed shares of ASO and manipulated the market in the stock. Here was not a salesman who was innocently executing orders for a customer without knowledge of what was transpiring. Rather, a shrewd and calculating salesman concerned primarily with the commissions he would be earning by the obvious promises from Grimmett and Gulihur which he was conscious of at the very opening of the account when he was asked to get the firm to go into the pink sheets and agreed to accept prices to be used in the sheets from the two individuals who intended to trade the stock. Where a broker or dealer determines independently to trade a security

it is neither an objectionable practice nor violative of the Securities Acts to advertise through the media of the pink sheets that he is willing to buy and sell but it is violative of the said acts for a salesman to arrange with a customer, whom he knows or can early ascertain is in control of the company whose stock is involved, to insert such prices as the customer may dictate and thereby eliminate the competitive factors which are essential to a free and open market. The steadily increasing prices which Katz was being furnished should have immediately alerted him that a manipulation may have been in progress and that a searching inquiry was called for. Katz has demonstrated he lacks the ability to comprehend the duties and responsibilities or the principles governing the conduct of a registered representative.

In determining an appropriate sanction consideration was also given to the fact that in July 1962 Katz was censured by the NYSE for the manner in which he handled the Gulihur account and he was informed that the basis of the action taken was his failure to obtain sufficient information from Gulihur when the account was opened and his failure to carefully follow "given express instructions to watch the Gulihur account closely after January 1961." In January 1963 the NYSE admonished Katz for failure to follow specific instructions from his then employer with respect to acceptance of orders in an account. In July 1964 the NYSE again admonished Katz for having borrowed money from a known factor after his employer had suspended him for one week. In February 1967 the NYSE suspended Katz for six months for his activities in connection with opening of new accounts.

Katz' arguments that he relied on either his superiors or other knowledgeable persons and that he was inexperienced has been considered by the hearing examiner but they are insufficient to exculpate him. The Commission has held in a number of cases that where activities of a salesman violated the anti-fraud provisions of the Acts it is no defense to plead inexperience or reliance on others and that such defense is indicative of an abrogation of the duties of a registered representative. Sutro Bros. & Co., Securities Exchange Act Release No. 7052 (April 10, 1953); V. Lester Yuritch, Securities Exchange Release No. 7875 (April 29, 1966); Cf. Alfred Miller, Securities Exchange Act Release No. 8012 (December 28, 1966) aff'd sub nom Freimark v. S.E.C. Civ No. 31270, 2nd Cir. January 4, 1968. Moreover, with respect to all the charges against Katz and the violations found the record amply supports a finding that he was actively involved. Thus, the evidence shows his agreement with Grimmett and Gulihur to do their bidding, his carrying out of their instructions with respect to the manipulation of the market in ASO, his knowledge of the prearranged trades and his activities related above with respect to the maintenance of credit in the account and the resultant violations of Regulation T. It is the opinion of the hearing examiner, after consideration of all of the facts and circumstances that Katz be barred from association with any broker or dealer.

The primary defense offered by Neumark is that the record fails to establish that he knowingly violated any of the Acts as charged and that he should not be held responsible for the activities in the Gulihur account since he never bought or sold any of the ASO stock for Gulihur. In addition he urges in essence that all the testimony implicating him in any manner with any alleged violation be disregarded as either incompetent or biased and that his own testimony which establishes his innocence of the charges be accepted. All of these defenses are rejected. It has been noted earlier and the hearing examiner has found that Neumark, unlike Katz, was not involved with the Gulihur account on a day-to-day basis and that there is no evidence he bought or sold ASO stock for the Gulihur account. However, such findings by no means establishes that Neumark was not directly and indirectly involved in the activities in the Gulihur account and should not be held responsible for violations which have been found. We have attempted to indicate above the manner in which Neumark participated in the various violations for which he was found a violator and all such matters will not be repeated here. The outstanding basis for requiring, in the public interest, the imposition of a sanction are briefly summarized. There is no dispute, to start with, that when the Gulihur account was opened Neumark was one of the registered representatives thereof and shared in commissions generated therefrom even after he became a partner at Blair. However, wholly apart from responsibility which could attach because he was in a sense a partner of Katz or

certainly in a joint venture with him, the evidence shows a more direct involvement in the charges for which he is responsible. Between January and December 1960 Neumark's name was placed on Loeb's records as one of the persons knowledgeable and familiar with the Gulihur account and with whom problems had been discussed. Accepting arguendo Neumark's contention these factors alone do not amount to liability under the Acts for violations during this period, it is clear that after he became a partner in January 1961 his responsibilities increased as evidence by his ability to make an agreement with a Loeb partner to suspend the Gulihur account. Such act alone sufficiently establishes an area of responsibility under the circumstances here to warrant liability for violations under the Acts. However, the evidence of his activities thereafter, as detailed above, relating to his attendance at partners' meetings and attendance at various meetings specifically those dealing with participation in firm decisions relating to ASO are amply adequate to sustain the findings made that he participated in the scheme to defraud. Neumark's activities were not confined to those of a mere "producer" as Neumark characterized himself. His knowledge of and activities with respect to the operation of the Gulihur account from at least the first suspension of the account are described above together with the basis for finding him as a willful violator. The hearing examiner accordingly denies Neumark's motion to dismiss these proceedings against him. Upon the basis of all of the foregoing and taking into consideration the fact that there is no evidence of any other instance that Neumark's conduct as either a registered representative or a partner in a brokerage firm has been questioned it is

concluded that the public interest would be served by suspending Neumark from association with any broker or dealer for a period of twenty business days.

In determining what, if any, sanction is appropriate in the public interest in connection with the findings that R. V. Miller participated in the manipulation of the market in ASO and that he had an agreement or understanding with Trapani to trade the stock at a 1/8 point profit it will serve no useful purpose to repeat the activities already detailed which led to the conclusions reached. Suffice it to say that the record establishes that R. V. Miller originally determined to enter quotations in the pink sheets because Trapani had orders in the stock which meant there was a ready market where he "could possibly sell stock to him," and that he was aware from his conversations with Trapani that "something was wrong," or as R. V. Miller testified candidly "he and Trapani did not like what was going on." Assuming arguendo that R. V. Miller's original determination to insert quotations and trade was well intentioned the evidence is convincing that notwithstanding the red flag warnings which he had that something was amiss he nevertheless continued his activities without himself making any effort to ascertain information concerning ASO or its management which was available to him in Goodbody's research files. His participation in the entire scheme, even though he may not have known all of the facets involved, was nevertheless established by a preponderance of the evidence.

However, consideration is given to factors urged by R. V. Miller

that no sanction is warranted. R. V. Miller has been in the securities business for over 40 years and his record is unblemished. The ASO stock he traded represented only 2% of his trading in 1961 and his income was not tied to trading profits which he may have realized. R. V. Miller contends he had no knowledge of the Grimmett - Gulihur scheme and had no knowledge that an illegal distribution was in progress. He further urges he did not intentionally or willfully violate any of the Acts. No finding was made that R. V. Miller deliberately intended to violate any of the Acts. The hearing examiner has found R. V. Miller willfully violated certain provisions of the Acts and that the Commission and the Courts have defined willful to mean intentionally committing the acts which constitute the violation. Gilligan, Will & Co. vs. S.E.C., supra; Hughes v. S.E.C., supra. The evidence is clear that R. V. Miller's acts were intentionally committed and with knowledge of what he was doing.

R. V. Miller's reputation in the community for honesty, integrity and veracity was attested to by his associates, his parish priest and a prominent member of the bar.

Consideration was also given to the changes effected by Goodbody since 1963 and particularly since 1966 with respect to the supervisory procedures concerning activities of its traders and the installation of new computer equipment designed to facilitate meaningful review of the firm's trading. Under all of the circumstances the public interest will be served by suspending R. V. Miller from association with any broker or dealer for 10 business days.

Woolwich was also found to have participated in the violations and of aiding and abetting violations of the anti-fraud provisions of the Acts. Without again detailing Woolwich's activities in that connection, it will be recalled that he also was persuaded to enter the pink sheets and trade ASO after Trapani "suggested" it and with knowledge that Trapani "would have orders in the stock." Woolwich, as an experienced trader, was aware that Trapani's orders meant he had a ready market available and understood the significance of adding his firm's name in the pink sheets in terms of giving an appearance of an active market. He knew nothing of ASO when he accepted Trapani's suggestion and must be held accountable for having willfully joined in what Trapani was accomplishing. In determining what, if any, sanction is appropriate in the public interest consideration is given to the fact that Woolwich, as compared to Blair and Goodbody, appeared in the pink sheets a comparatively short time having started its quotations February 8, and remained in the sheets for 23 days, and traded the least amount of stock, such trades having been effected on 15 business days. The total from profit in his transactions amounted to $1,441. In addition Woolwich after dropping out of the sheets did not thereafter re-enter quotations or trade the stock. Under all of the circumstances it is in the public interest to suspend Woolwich from association with any broker or dealer for five business days.

Troster was found to have willfully violated and willfully aided and abetted violations of the anti-fraud provisions of the Acts because of lack of suitable control and supervision of their traders

and through lack of necessary procedures intended to prevent violations of the various provisions of the statutes. Troster urges that none of its partners ever agreed or had an understanding with Blair, Goodbody, Grimmett or Gulihur to enter quotations at prices prearranged or received a prearranged profit, that the closest scrutiny of Woolwich's trading would not have indicated anything unusual and that its supervision was not inadequate. The short answer is that the evidence establishes that in 1961 the market was unusually hectic, the volume of trading was high, that Troster's traders had complete freedom to select the securities they wished to trade in addition to those given them by the firm and there was little or no supervision of their conduct or activities. While there is evidence that Woolwich prepared a trading sheet at the end of the day of all his executions it was primarily for the purpose of computing the profit or loss from his trades. He testified he could not recall ever reviewing his trading sheets with any partner of the firm. Had any of the responsible partners looked in their own research files they would have found more than sufficient information to have alerted them that inquiry was called for under the circumstances.

In determining what, if any, sanction is appropriate in the public interest consideration has been given to the same factors mentioned above concerning Woolwich relating to the length of time the firm appeared in the sheets, the number of days it traded, the shares involved and the gross profit realized. In view of all the circumstances the public interest will be served by a censure of Troster. Accordingly,

IT IS ORDERED that Seymour Katz be, and he hereby is, barred from being associated with any broker or dealer;

IT IS FURTHER ORDERED that Ronald Neumark be, and he hereby is, suspended from association with any broker or dealer for 20 business days;

IT IS FURTHER ORDERED that R. V. Miller be, and he hereby is, suspended from association with any broker or dealer for 10 business days;

IT IS FURTHER ORDERED that Sidney Woolwich be, and he hereby is, suspended from association with any broker or dealer for 5 business days;

IT IS FURTHER ORDERED that Troster, Singer & Co. be, and it hereby is, censured.[45/]

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

Pursuant to Rule 17(b) of the Commission's Rules of Practice a party may file a petition for review of this initial decision by the Commission within 15 days after service of such decision on him. In accordance with the provisions of Rule 17(f) this initial

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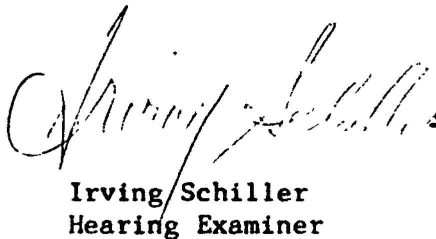
45/ To the extent that the proposed findings and conclusions submitted to the hearing examiner are in accord with the views set forth herein they are accepted and to the extent they are inconsistent therewith they are expressly rejected.

decision shall become the final decision of the Commission as to each of the parties to which this decision relates unless such parties file a petition for review pursuant to Rule 17(b) or the Commission pursuant to Rule 17(c) determines on its own initiative to order review as to each such party. If a party timely files a petition to review or the Commission takes action to review as to a party, this initial decision shall not become final as to that party.



Irving Schiller
Hearing Examiner

Washington, D. C.
May 23, 1969