ADMINISTRATIVE PROCEEDING
FILE NO. 3-7402

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)
	)
GEORGE SALLOUM	)
	)

INITIAL DECISION

December 10, 1992
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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APPEARANCES: **William H. Kuehnle, Stephen J. Crimmins and Lawrence W. Pisto, for the Division of Enforcement**

Mari-Anne Pisarri (Pickard and Djinis), for respondent

BEFORE: **Jerome K. Soffer, Administrative Law Judge**

George Salloum

On September 28, 1990, the Commission issued an Order Instituting Public Proceedings ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act"), naming George Salloum as respondent.

The Order is based upon allegations of the Division of Enforcement ("Division") that during 1989 Solloum, as head trader of Thomas James Associates, Inc. ("TJA" or "registrant"), willfully violated, and aided and abetted violations of, Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rules 10b-5 and 10b-6 promulgated thereunder and Section 15(c)(1) of the Exchange Act and Rule 15c1-8 promulgated thereunder, in connection with the purchase or sale of the securities of Sunrise Technologies, Inc. ("Sunrise"), Phoenix Laser Systems, Inc., ("Phoenix"), Megamation, Inc. ("Megamation"), and International Superconductor Corp. ("Superconductor") arising out of initial public offerings ("IPO's") of these four corporations; and engaged in certain practices, made untrue statements of material facts, or omitted to state material facts relating thereto, specifically by charging excessive undisclosed mark-ups.

Finally, the Order alleges as a ground for sanctioning respondent that he has been permanently enjoined from violating in the future pertinent anti-fraud provisions of the securities laws.

The Order directed that a public hearing be held before an Administrative Law Judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors. Hearings were held in Washington, D.C. on May 21, 22, 23 and 28, 1991. Following the close of the hearing, the Division filed Proposed Findings of Facts and Conclusions of Law, together with a

supporting Brief; respondent filed his response thereto, and proposed his own Findings of Fact and Conclusions of Law, to which the Division filed a reply brief. Thereafter, respondent was permitted to file a supplemental post-hearing brief based upon the Division's introduction of several new exhibits into the record in this case.

The findings and conclusions herein are based upon the evidence as determined from the record and from observing the demeanor of the witnesses. The preponderance of evidence is the standard of proof that has been applied. 1/

TJA has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since in or about September, 1984, and is a member of the National Association of Security Dealers ("NASD"). 2/ During the relevant period herein, Brian S. Thomas ("Thomas") and James A. Villa ("Villa") were its executive officers and sole shareholders.

Following his graduation from Clarkson University with a degree in industrial engineering, respondent has been employed in the securities field since 1981, first as a registered representative for other broker-dealers and thence by TJA in or about 1984. At that time and for the next two years, Thomas served as the firms's sole trader. In 1986, respondent became the assistant in the trading room to Thomas who also trained him in that function. After several months as assistant trader, respondent took over primary responsibility for trading at TJA in or around late 1986 or early 1987. He assumed the title of "head trader". His compensation shifted from a commission basis to a straight salary. He supervised a staff consisting of 2 clerical assistants and, as of 1990, a trading assistant.

1/ See Steadman v. SEC 450 U.S. 91 (1981).

2/ The NASD is the self-regulatory organization for the over-the-counter market.

Thus, during the relevant period herein, he was TJA's only trader. In the spring of 1989, respondent became TJA's syndicate manager and remained so during the four IPOs involved in this case. As such, he was responsible for keeping track of all inquiries or indications of interest from other brokers and private parties. Respondent has continued in the employ of TJA in its Corporate Finance Department but not as a trader.

The parties recognize that as a result of the issuance of a permanent injunction by the United States District Court for the Western District of New York on May 14, 1990, in an action entitled SEC v. Thomas James Associates, Inc., et al., Civ.-90-0316T, enjoining respondent herein from violating the anti-fraud provisions of the securities laws and from aiding and abetting such violations, there is a sufficient basis for the imposition of a sanction against respondent. 3/

The civil proceeding named as defendants TJA, Thomas, Villa, respondent Salloum and Joseph Gianni, TJA's sales manager. The complaint therein charged that TJA, during 1989, while acting as the sole underwriter for the initial public offerings of each of the four companies heretofore named charged customers excessive undisclosed markups, manipulated the markets for the stock of those companies, made material misrepresentations and omissions in connections with the offer and sale of the stock, and

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3/ Exchange Act § 15(b)(6) provides that where the Commission finds that any person who is associated at the time of alleged misconduct with a broker or dealer is enjoined from any action, conduct, or practice as therein specified, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer (or, as additionally provided in Section 19(h)(3), a national securities exchange or registered securities association) if the Commission finds, on the record after notice and opportunity for a hearing, that such sanction is required in the public interest.

bid for and effected purchases of the stock prior to the termination of its participation in the offerings in violation of Section 10(b) of the Exchange Act and rule 10(b)-6 thereunder. Respondent was charged with having engaged in some of the improper conduct and to have aided and abetted violations by other defendants.

In accordance with a settlement agreed upon in the civil action, respondent consented to the entry of the permanent injunction, without, however, admitting or denying, the allegations of the complaint. 4/ The Division urges that respondent be barred from association with a broker-dealer; respondent argues that no such severe a sanction is warranted. In any event, respondent's liability for a sanction has been established by virtue of, if nothing else, the injunction against him, and is so conceded.

TJA's Marketing of the Four IPO's during 1989

The usual steps in doing an initial public offering involve first, the development and filing of a registration statement with the Commission followed by the marketing process which would include the distribution of preliminary prospectuses (so called "red herrings") to prospective purchasers. Simultaneously with the syndication of the transaction other

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4/ TJA, Thomas and Villa also consented to entry of judgment against them, subject to a hearing on the issue of disgorgement of TJA's profits. After the hearing, the Court ordered these defendants to disgorge $1.5 million, with $300,000 to be paid by TJA, $800,000 by Thomas, and $400,000 by Villa. (The court recognized TJA's gross profits amounted to $3 million but offset one-half thereof to allow for certain business expenses). All charges against Gianni were dismissed. Thomas, TJA's president, resigned from the firm and Villa assumed the presidency. Pursuant to the consent judgment, the District Court appointed an independent counsel, Paul Yesawich, III, Esq., as its special agent to oversee the firm's future operations and to monitor its compliance with the securities laws.

underwriting firms would be invited to participate in a percentage of the transaction. 5/ In connection with the marketing process both retail and institutional customers are invited to submit indications of interest as to how many shares of the offering they would take against which the underwriter will then allocate to each participant an amount of the offering.

Once the Commission has declared the issue effective, trading in the after-market may begin. There is no trading permitted prior thereto. Hence, the underwriter may not take orders prior to the distribution and cannot accept payment for transactions which have not as yet taken place. (Exchange Act Rule 10b-6; 17 C.F.R. 240, 10b-6).

In each of the offerings herein TJA permitted a day to elapse between the effective date and the commencement of trading in the after-market in order to use this delay to solicit after-market orders from the customers.

In three of the offerings, TJA was a market-maker as well as the sole underwriter. With respect to the fourth (Sunrise) the firms's involvement was only that of underwriter and not that of market-maker. All four of them were firm commitment offerings.

In this proceeding, the ultimate issue for determination is the involvement of respondent, as the head trader for TJA, in the prices at which TJA bought and sold each of the securities involved during the first three days of trading in the after market and in the lawfulness of the mark-ups obtained by TJA in the transactions. 6/

5/ While in the IPOs involved herein there were no formal syndication agreements, there were some institutions seeking to participate in the underwriting and designated as "selling groups".

6/ A mark-up is the profit that is generated from principal transactions when the broker dealer sells a security to a customer. (A "mark down" is the term used for the purchase from a customer). It represents the difference between the price charged (continued...)

It has long been held by the Commission as early as 1939, and sustained by the courts, that dealers who, without proper disclosure, charge a customer excessive mark-ups, generally 10% or more over the prevailing market price for a security, violates the antifraud provisions of the securities laws. See Ettinger v. Merrill, Lynch, Pierce, Fenner & Smith, 835 F.2d 1031, (CA3-1987); Powell and Associates, Inc., 47 SEC 746, 748, (1982);, even in the sale of low priced securities or "penny stocks". James E. Ryan, 47 SEC 759, 762-763 (1982). 7/

In addition, a broker-dealer that is a member of the NASD is bound by its Rules of Fair Practice, which prescribe just and equitable principles of trade for the brokerage industry and generally limit markups to 5%.

Markups are calculated based upon the "prevailing" or "current" market price for the stock in question. See Peter J. Kisch, et al., 47 SEC 802, 808-9 (1982). Generally, where a dealer is not a market maker, 8/ the best evidence of the current market, absent countervailing evidence, is the dealer's contemporaneous cost for up to five business days from the date of the dealer's purchase (LSCO Securities, et al, SEA Release No. 28994, March 31, 1991, 48 SEC Docket 759, 761.), that is, what it paid for the security. Where the

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6/(...continued)
to the customer and the prevailing wholesale, or inter-dealer, market price for the security. This is in contrast to the remuneration received by a broker when buying a security as agent for a customer, where the broker's remuneration generally is referred to as a "commission".

7/ A "penny stock" is a low-priced security, sometimes valued up to $5.00 per share. Rule 3a51-1, 17 CFR 240.3a51-1.

8/ A "Market Maker" is defined in Section 3(a)(38) of the Exchange Act to include "any dealer who, with respect to a security holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis."

retail dealer is also a market maker, however, its contemporaneous cost would not be an appropriate basis for calculating its markups. 9/ A market maker generally purchases stock from other dealers at or around its bid, and sells to other dealers at or around its asked or offering price. The use of contemporaneous cost as a base for calculating mark-ups might compel a market maker to charge retail prices that are less than its wholesale offering prices, a result which would deter market makers from taking the risk of maintaining a market or a position in a security. General Investing Corp. et al., 41 SEC 952, 954 (1964).

However, where the firm in question dominates and controls the market, its own inside offer cannot be used as the basis for computing mark-ups, since that would give the firm unrestricted latitude in setting its inside offer and therefore its retail prices. In such instances, contemporaneous prices charged by the firm or other market makers in actual sales to other dealers, or the contemporaneous offering prices, rather than contemporaneous costs which reflect a market maker's bids, should be used as the basis for computing markups. See Peter J. Kisch et al, supra, and Alstead Dempsey and Company, Inc , 47 SEC 1034, 1036-1037 (1984).

With this background, consideration is now given to the particular facts at issue in this proceeding.

The Phoenix Offering

During August of 1989, TJA was the sole underwriter for the IPO of Phoenix, a laser technology firm in Livermore California. The initial public offering of 500,000 units (each unit consisting of 6 shares and 3 warrants giving the owner thereof the right to buy one share of stock for $1.50) at a cost of $6.00 a unit was declared effective by the Commission

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9/ A broker-dealer that conducts a retail business at the same time that it is a market maker is known as an "integrated market maker."

on August 10, 1989.

The handling of the Phoenix offering as an example of the trading done during the first three days of the after-market of each of the offerings involved herein, we find that such trading was bunched within the first several hours of the first day, with very little traded thereafter into the second and third days. Thus, the Phoenix offering was declared effective on August 10, 1990 but the stock did not start to trade in the after-market until one day later on August 11. During the first hours, TJA sold almost 1,400,000 shares of stock to its retail customers.

Prior to the commencement of after-market trading, TJA and its sales force had solicited its customers for indications of interest in the IPO. Although Phoenix was a very young, immature, speculative and high-risk investment (as were the other 3 offerings), the sales force followed hard sell scripts pointing up the favorable side, but down-playing the negative side, as prepared for them by TJA management.

TJA received indications of interest to participate in the underwriting from 25 dealers seeking a total of over 500,000 shares. In making its Phoenix allocations, however, TJA allocated a total of only 4,000 shares, or less than 1% of the total, among but 3 market-makers.

Included in the allocations amounting to some 20% of the total, was an extra incremental distribution to a select group of clients who were very particular customers of the officers of TJA (Thomas, Villa and Gianni) whose accounts were referred to by management as the "sprinkle accounts". These special accounts had an understanding with TJA's management that they would provide TJA a needed supply of stock for the after-market by arranging to acquire stock in the IPO at $1.00 per share, and which, immediately upon the opening of trade in the after-market they sold back to TJA at $1.125 per share,

thereby earning a guaranteed profit of 1/8 of a point for these special customers within a few hours. This "parking" arrangement was quite satisfactory to these accounts holders. 10/

All of the trade tickets for the sprinkle group and related transactions were timed on the order tickets manually (there being no mechanical time stamps in TJA's trading room for some unexplained reason) starting at precisely 9:30 a.m. of August 11, the day after the opening of the after-market. At approximately 9:45 a.m., after all the shares had been acquired from its customers including the sprinkle accounts at $1.125 per share, TJA began selling its shares thus acquired to other retail customers at $3.00 and ultimately to $3.25 per share. During the 15-minute period that elapsed between the purchase from the sprinkle accounts and the sale back to its other retail customers, TJA and one other market-maker, V.P. Securities, raised their NASDAQ quotations from the level of $1.00 to $3.00 per share in a series of quotation exchanges during that brief period. There were no inter-dealer trades during that time to justify the raising of the quotations. There were other market makers in this stock but again, no inter-dealer trades were made throughout the 15-minute period. In fact, V.P. Securities had only one customer looking to buy at the bid price during the entire day. The only inter-dealer transaction on the first day of after market trading occurred at 10:00 A.M. when TJA purchased 6,000 Phoenix shares from a

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10/ It would appear that the "sprinkle accounts" made this profit without any investment since the transactions were completed within the 5 days allowed for settlement. This raises the question as to whether the parties were engaging in "free riding", a prohibited trading practice. This type of arrangement was intended as a regular course by the participating investors who anticipated doing it ten or twelve times per year at a total profit to them of several hundreds of thousand of dollars without any apparent investment on their part.

dealer at $2.4375. 11/

When trading opened on the morning of August 11, under respondent's guidance, he was faced with a substantial number of buy order tickets, stacked on his desk in the trading room and segregated according to the originating branch office. In addition, there was also another stack of sell orders on respondent's desk. When trading in the after-market began at 9:30 a.m. all of the order tickets for sales from the preferred retail accounts back to TJA at $1.125 were executed at the same time, which was so handwritten on each ticket. At precisely 9:45 a.m., after all of the order tickets for the sale to TJA were executed, respondent began executing the sales tickets from TJA to its regular retail customers (other than the sprinkle and related accounts) at a price of at $3.00 to 3.25 per share with the time of trade being entered manually. By the end of the first day in the after-market, virtually all of the transactions had been completed and all of the stock that had been bought in at $1.125 per share by TJA had been sold to the retail customers of TJA at $3.00 (or more) per share.

The sales practices engaged in by TJA and its staff involved over-selling the stock together with making initial allocations of only a portion of the shares requested by retail customers, thereby leaving a significant demand which TJA was then in a position to meet at the onset of trading. It already had a significant number of after-market orders in hand, some with payment received, leaving the customers with an unfulfilled demand that was

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11/ TJA's initial quotation in NASDAQ was $1.125 bid and $2.125 offer. At 9:30 A.M. V.P. raised the bid to $1.375. Over the next 18 minutes, the bid was raised to $2.375. TJA was responsible for raising the high bid three times during this period while VP raised the high bid twice. Two other dealers raised the high bid once each during this period. Yet by 10:00 A.M. there was no other interdealer transaction than TJA's purchase of 6,000 shares which would reflect any cause for the quotations to increase at the rate they increased, and it did not reflect any significant trading activity once the higher after-market price was established.

filled from the shares purchased from the sprinkle and other preferred accounts and gave the TJA salesmen the opportunity to execute a purchase by the customer irrespective of price. It is clear from the scripts that were used in promoting the sales of the Phoenix shares 12/ that the arrangement that existed with respect to the four offerings embraced assigning units to certain accounts (including the sprinkle) and then as the market opened, for TJA to buy a large portion of them at 1/8 of a point over the offering price of $1.00. Any such prearrangement amounted to the prohibited solicitation of orders prior to the distribution being completed. 13/

The record indicates that there were a substantial number of order tickets generated in the TJA branch offices for customers to buy the stock before trading in the after-market began and before TJA started buying in from the preferred accounts which were sitting in the trading room on respondent's desk before the after-market even opened and before TJA started buying in $1.125 per share.

It is noted that TJA, as sole underwriter, gave little, if any, shares to any other dealer seeking allocations as part of the selling group or syndication. In addition to the allocations

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12/ Although the initial public offerings consisted of units made up of shares and warrants, the shares and warrants were sold separately in the after-market.

13/ Typical of the kind of solicitation utilized by TJA's sales force, is the following quotation from one of the sales scripts:

> "You initially had me put in an order for $10,000. Because of the fact that so many investors want a piece of this offering, due to the nature of the company, due to the profitability of the company, due to the explosive nature of the telecommunications market and most of all, due to tremendous upside potential, we were not able to get the entire amount that we wanted. However, we will get approximately 50%, and what I'm going to do, is put the rest in common stock when it opens. I will put you in for the balance of investment when the stock opens to insure the lowest possible price. What I need you to do right now is put the check in the mail to me for the $10,000 that we originally spoke about and I'll take care of the rest."

to three dealers of less than one percent of Phoenix, as heretofore noted, there were indications from some 22 dealers seeking allocation of a total of 294,000 shares of Superconductor for which TJA only allocated only 4,000 shares, an amount slightly over one percent, to four dealers; there were 23 dealers seeking allocations of 231,000 Megamation shares to whom TJA allocated only 5 of them, a total 5,500 shares, or slightly over two percent of the request; and twenty-two outside dealers who expressed interest, seeking 207,000 shares of Sunrise, to whom TJA allocated only 2,500 shares among three dealers, or about one percent of the total. 14/ Thus, TJA was able to keep almost all of the available market under its total control leaving precious little for other market-makers to trade.

It should be noted further that in all of the four IPOs TJA purchases and sales accounted for between 90 and 100 percent of the over all trading volume. Only an insignificant portion of the securities that were underwritten were not sold by TJA.

During the three-day business period betwteen Friday, August 11, and Tuesday, August 15, 1989, TJA purchased 822,600 and sold 1,373,000 Phoenix common shares, accounting for 93.2% of the purchases and 95.3% of the sales almost all to its own retail customers. As a group, other market makers purchased only the small remaining portion. Even then 63.5 percent of the shares sold by market makers were sold back to TJA. The trading records do not reflect any retail interest in Phoenix during these 3 days except at TJA.

14/ It would have been highly desirable for TJA to have made allocations in order to provide liquidity with respect to the stock, considering that these securities were in a high risk category, so as to spread the risk among many dealers.

During the same period TJA purchased over 488,000 Phoenix warrants and sold to its retail customers over 289,000 warrants. At the end of the 3-day period TJA was long almost 200,000 warrants. TJA's volume accounted for 93.6% of the purchases and 89.2% of the sales of the total Phoenix warrants trading volume. As a group, other market makers purchased only 33,500 and sold only 35,000 Phoenix warrants during this period whereas TJA's customers were sold more than 1,500,000 Phoenix warrants (including the IPO and the aftermarket).

It is quite clear that with respect to the underwriting by TJA of the Phoenix IPO, TJA was a market maker (an integrated dealer) who so dominated and controlled virtually all the trading in the offering that there was no independent market for the stocks and warrants embraced therein. The overwhelming volume of the transactions in which TJA was involved as a principal, the ability of TJA to buy in from the sprinkle and related accounts and hold off selling the securities until it was able to boost the quotation to a price guaranteeing a substantial gain to itself, the setting and changing of quotations without accompanying bona fide transactions, the absence of any meaningful and independent market other than the one created by TJA, and the ability of TJA to fix prices and quotations at will, all demonstrate the extent to which TJA not only dominated but also controlled the distribution of the Phoenix stocks and warrants. One needs only to picture the accumulation in separate stacks of order tickets in the trading room at the outset of the after-market with the methodical buying in from one stack at the price of $1.125, the holding off of filling the sell order tickets from another stack until the quotation reached $3.00 and $3.25 per share, and the last buy order ticket having been completed before the first sell, all point out the extent to which TJA dominated and controlled the after-market of the Phoenix IPO. That being so, it follows that unlike the market-maker trading in a

free and competitive market, TJA was required to compute its mark-up from its contemporaneous cost, normally the price at which the most recent inter-dealer transaction occurred. Alstead Dempsey & Co., supra; Joseph I. Goldstein and L. Delane Cox, Penny Stock Markups and Markdowns, 85 Northwestern Univ. L.R. 676, 687 (1991).

Based upon the fact that TJA bought from its retail customers at least 95 percent of the allocation of Phoenix shares at the price of $1.125, a significant portion of which represented the shares purchased from the group of preferred customers, and there being hardly any meaningful inter-dealer transactions, it is appropriate to use TJA's contemporaneous cost as reflected in the price paid to its retail customers rather than the few inter-dealer transactions, as the best evidence of the prevailing market price.

TJA executed most of its aftermarket sale to its retail customers between 9:45 A.M. and 11:45 A.M. on the first day, August 11, after which it had virtually no retail customer demand. It purchased 546,900 shares from a small group of customers many of whom were preferred customers of Thomas, Villa and Gianni, at 9:30 A.M. on August 11, for $1.125 per share. As seen, the overwhelming majority of purchases by TJA during the early minutes of the first day of after-market trading was from its preferred customers at this price. During the entire 3-day period TJA sold 1,410,320 Phoenix shares to at least 1,238 other customers at prices ranging from $1.25 to $3.25 per share. 15/ The basis for computing TJA's markup should have been the price it paid its retail customers (contemporaneous cost of $1.125), adjusted for a ten percent markdown. On this basis, out of 1,239 sales to its customers, only 3 sales were at markups of less than ten percent. The markups on the remaining sales ranged from ten percent to as much as 150 percent or

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15/ Some 97 percent (1,373,245) of the sales occurred on the first day.

more, with the great preponderance, representing some 97 percent of the transactions, being marked up at least 100 percent. 16/ These transactions generated revenues to TJA totaling $2,400,317.

What is apparent for the Phoenix shares is also reflected in the IPO and after-market trading of the Phoenix warrants. The market for Phoenix warrants was tied to the market for the Phoenix common stock. Once the price of the common stock ($1.50 per share) rose sufficiently, the warrants had value. 17/

TJA used the delay in opening between the effective date of the IPO and the initiation of quotations to solicit the aftermarket orders waiting to be executed when the market opened. The heaviest retail demand occurred during the first day of trading. TJA's volume accounted for almost 97% (purchases) and more than 89% (sales) of the total Phoenix warrant trading volume.

For the same reasons set forth above for the common stock transactions, TJA dominated and controlled the after market trading in the warrants. During the 3-day period initiating the after-market, these were a total of 199 sales embracing some 315,575 shares to retail customers at prices ranging form $.50 to $1.625 per warrant. It had purchased these warrants from other customers, including the sprinkle account preferred customers, at a price of $.125. The mark ups in all cases amounted to 150% or more of TJA's contemporaneous cost, reflecting a total dollar amount of markups of $415,854.

16/ Thus, sales to customers had markups as follows:
150% or more - 484
100% to 150% - 712
10% to 100% - 40

17/ Therefore, if the price of the stock rose to $3.00 per share, the value of the warrant would be about $1.50.

The pattern of trading in the remaining underwritings was very similar to that for the Phoenix shares and warrants. In summary, we have TJA keeping control of the IPO by retaining virtually all of the units, in the preferred accounts and elsewhere, and at the same time denying allocations,except for a relatively few shares, to members of the selling group (i.e., the syndicate). This, and the simultaneous stimulation of demand from its retail customers by using a hard-sell technique and then allocating them only a portion of their, indications thereby, left a significant demand which TJA then filled at mark-ups as determined and set by TJA's trader (i.e., the respondent).

Megamation

During September of 1989, TJA was the sole underwriter for the IPO of Megamation, a robotics firm. This IPO of 600,000 units (each consisting of 5 shares and 4 warrants) was declared effective by the Commission on September 21, 1989. The first after-market sale occurred the following day at about 1:10 P.M., with the interval being used to solicit aftermarket orders resulting in stacks of order tickets piled on respondent's desk prior to the actual opening of trade. Eleven market makers plus TJA entered opening quotations, only four of whom were responsible for raising the bid, which started at $1.125 bid and $1.875 offered. Only 2 market makers reported volume for the entire day. (TJA purchased 10,600 shares from one of them at $1.9375 and sold 1,350 shares to the other at $1.625, thereby reversing the usual situation where a market maker buys at its bid and sells at its offer.

TJA executed about 90 percent of its Megamation trades with customers between 1:09 P.M. and 2:15 P.M. on September 22. The great majority of these sales to customers were at $1.875, $2.00 and $2.125 per share, whereas TJA had purchased these shares from

other customers at a cost, adjusted for mark-downs of $.138, of $1.238 per share.

During the period September 22 through 26 TJA's Megamation volume accounted for over 84 percent (purchases) and 92 percent (sales) of the total trading volume. As a group, market markers purchased and sold relatively insignificant amounts of Megamation shares, a substantial portion of which these amounts were executed with TJA. Under all of the circumstances it is clear that from the beginning of the after-market in Megamation, TJA dominated the trading and had virtual control thereof. Using as the basis for computing markups the prices paid for the purchases from customers at the beginning of the after-market, adjusted for mark-downs, it is concluded that the markups imposed by TJA on 399 of the 405 transactions involving Megamation shares ranged form ten percent to as much as 100 percent, with the excessive markups amounting to a total of $454,620 based upon 726,191 shares sold.

The market for Megamation warrants was tied to the market for Megamation stocks. The same factors leading to the conclusion that TJA dominated and controlled the after-market in Megamation shares of stock (i.e., that TJA, during the first three days of trading, purchased 96.3 percent of all warrants purchased and sold 98.6% of all sales) also lead to the conclusion that the trading in warrants was similarly dominated and controlled.

Consequently, it is further concluded that although TJA was a market-maker, contemporaneous cost was the best evidence of the prevailing market price. In turn, since TJA did not have any purchases from dealers on September 22, 1989, when most of the first day trading took place, it was appropriate to use contemporaneous purchases from customers. TJA sold Megamation warrants to at least 255 customers at prices ranging from at least 150 percent mark up above its cost, amounting in total to $506,172.

Superconductor

During December, 1989, TJA was the sole underwriter of the IPO of Superconductor, a firm engaged in research and development in temperature conductivity. The IPO of 500,000 units, each consisting of 5 shares and 3 warrants, was declared effective by the Commission on December 14, 1989.

As indicated hereinabove, the pattern of trading for this issue followed pretty much the steps and transactions heretofore found with respect to the other issues, particularly with Phoenix, starting with the acquisition by TJA of virtually all of the securities (shares and warrants) involved in the IPO, including those from the friendly accounts, the solicitation of indications of interest by TJA's sales force and the overselling which created an artificial demand for the securities in the after-market, and the sale to retail customers of the shares and warrant at mark-ups far beyond 10 percent over the cost to TJA of their acquisition (based upon a finding that TJA dominated and controlled the after-market trading and hence was in no position to use its own inside offer as a basis for computing mark-ups.)

By following the methodology outlined for the other offerings, it is found that during the 3-day sales period, TJA sold 675,025 Superconductor shares to at least 581 customers, of which 564 sales were at a mark-up of 10 percent or more, amounting to a total profit of $297,791. Similarly, during this same period, TJA sold 742,899 warrants to at least 409 customers of which all but 2 were at markups of more than 10 percent (in fact, 50 percent or more) and which amounted to total markup revenues of $242,846, above the cost of contemporaneous purchases from customers.

In contrast, for the entire first day of trading, TJA executed only 6 trades with other broker dealers. During the 3-day period, TJA purchased 173,315 shares, or 76.8 percent of all purchases, and sold 797,280 shares, or 94 percent of total sales. TJA purchases from

market makers accounted for 80 percent of the market makers' sales volume. These purchases represent but a small fraction of the shares TJA purchased and controlled. In sum, TJA dominated the market to such a degree that it controlled the wholesale price of the security. 18/

Sunrise

Sunrise was a firm commitment offering, the first of the four underwritten by TJA in 1989. The Commission declared the registration of 500,000 Sunrise units effective on May 12, 1989. The units, which were offered at $5.00 each, consisted of 5 common shares and one warrant.

The salient feature of the after-market trading during the first 3 days is that TJA was not a market-maker in the Sunrise securities. As seen, where a broker-dealer is not a market maker, the best evidence of the current market for calculating markups, absent countervailing evidence, is the dealer's contemporaneous cost. This would be irrespective of the question of the effect of domination and control of the issue, although there is adequate evidence in this record that TJA did so.

TJA initially sold customers a net of 546,000 units. The syndicate group sold only an additional 2,500 Sunrise units. The initial quotations for the shares and warrants were entered in to NASDAQ on the afternoon of the first day of trading by 7 market makers. The high quotation for the day was $1.25 bid and $1.75 asked. The majority of the market makers' purchases were from TJA. TJA sales to market-makers accounted for 100 percent

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18/ Trading in Superconductor warrants followed a similar pattern. TJA's purchases accounted for 88.6 percent, and its sales for 98.9 percent of the total trading volume. The market makers, as a group purchased 10,700 warrants and sold 8,311 warrants of the total trading volume. All of the market makers' sales were to TJA.

of the market makers' purchase volume for the first day and 83 percent of their purchases during the 3-day period.

Using the contemporary sales price to market makers, almost all at $1.25 bid, as a basis for computing TJA's markups, (almost all at the asked price of $1.75) it is found that TJA charged markups in excess of 10 percent on 534 of the 602 Sunrise shares transactions producing total revenues based thereon of $186,915.

In the same fashion, it is concluded that in 24 transactions in the sale of Sunrise warrants, each involved excessive markups of 150 percent or more producing excessive revenues of $7,696.

Discussion and Conclusions

The arguments and contentions advanced by respondent urging contrary findings to those set forth above have not been overlooked. In essence, respondent urges that markups were properly computed but even if not, the public interest does not require the imposition of any sanction against him.

Respondent presents himself as a neophyte trader and, with respect to the 4 IPO's herein, that they represented the first underwriting with which he was ever involved and for which he was the sole trader at TJA. His duties included the execution of client orders as his primary responsibility. He was also the firm's syndicate manager with respect to these offerings.

However, because of his alleged lack of experience with the after marketing of IPO's, he relied to a considerable extent on the instructions and guidance of his employers, principally on Brian Thomas, the chief executive officer and shareholder of TJA who preceded him in the trading room. Although he was the syndicate manager responsible for

keeping track of all inquiries or indications of interest from other broker dealers as well as private individuals, Thomas would instruct him as to how to allocate the available units. Respondent had no role in making such allocations, particularly to the sprinkle accounts. 19/

Respondent was also aware when he opened the aftermarket that TJA already had buy orders on hand and had piles of sale order tickets on his desk.

He also claims, as part of his duties during the first 3 days of trading in the aftermarket, to have determined the prices that TJA would bid and ask for the respective security and to enter corresponding quotations into the NASDAQ terminal.

Respondent claims to have had no part in putting any of the 4 IPO's together nor in the sales areas. In fact, he denies any knowledge of what the sales personnel were telling the TJA customers.

Respondent asserts that he complied, without questioning, with the allocations determined by Thomas, including his determinations as to when the IPO was complete and when trading in the aftermarket would begin. 20/

While claiming that he was unaware of any pre-arrangement with the sprinkle group customers to buy their shares at the opening at a fixed price, he admits that he did execute such orders and that Brian Thomas brought him sales tickets to execute at the beginning of trading in the aftermarket.

19/ As noted previously, only about 1% of the available securities were allocated to other broker dealers with the rest allocated to in-house retail customers of TJA.

20/ In this regard, he made the following observation (which seemed to permeate his entire dealings in these 4 IPO's): "you don't question the guy who is telling you what to do and who signed your paycheck", referring, of course, to Thomas.

Respondent asserts that he learned the functions of a trader for a broker dealer solely by being tutored by Brian Thomas plus whatever else he learned on the job from performing these activities. 21/ As a result he claims to have learned that in handling a retail customer purchase he was supposed to take the lowest ask price on the NASDAQ terminal and mark its up by 5% (the NASD guideline) but no more than 10% (this Commission's quideline), and that an integrated market maker was entitled to both a, spread (the difference between the bid and ask) and a markup.

Respondent alleges that he had never heard of the phrase "domination and control" nor of the term "contemporaneous cost" until the onset of these proceedings in 1990. He further asserts that during the time he was a trader he never came across a publication distributed by the NASD to its members entitled Regulatory and Compliance Alert, in October, 1988, in which it reviewed proper markup policies in the light of the Alstead, Dempsey decision, supra, specifically pointing out that:

> "In those instances where there is no independent market, or where there is a market dominated and controlled by a market maker, the NASD has long held that the contemporaneous prices paid by the market maker are the only reliable evidence of the prevailing market price and, thus, cost must be used as the basis for the mark-up".

Respondent further contends that he never came across discussion of numerous Commission decisions appearing in the Wall Street Journal, and elsewhere, expounding on the Alstead, Dempsey doctrine, and the markup policies enunciated therein.

Additionally, Respondent asserts that the NASD had conducted on-site examinations of TJA and did not report any violations of the securities laws with respect to their trading activities. In any event, he assumed that TJA's compliance officer had spot checked the

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21/ Respondent claims that even though he was designated as the "syndicate manager", he never managed any syndication for the account of TJA.

trading records from time to time and found no evidence of improper markups.

Respondent further testified that although he had assumed he was responsible for executing all trading activity at TJA he learned subsequently there were some order tickets that were prepared and executed without his knowledge outside the trading room by the officers and others at TJA.

It is respondent's additional contentions that in effecting customer trades in the retail market he always looked at the lowest asked price on his computer and added a markup of not more than 5%, as taught to him by Brian Thomas and others, as being the only way to compute the basis for adding a markup. In connection with a principal trade, a commission was exacted.

The Phoenix underwriting was the first time that respondent entered a quotation into the NASDAQ terminal. He states that in his determination of what price to open the market in Phoenix, he relied upon, among other things a "gut feeling" based upon information in the Wall Street Journal and elsewhere about the rising popularity of laser stocks and the fact that so many dealers had expressed indications of interest in the security. 22/

Respondent admits that with reference to the Phoenix shares, he had stacks of order tickets before the opening of the aftermarket, but specifically denies that he intentionally held off executing the buy order tickets to let the market price run up, blaming his failure to take advantage of the rising market before it reached its high point on hectic activity in the trading room. He finally argues that if he were, in fact, not effecting a fair and orderly market in the handling of the buy and sell tickets this was entirely unintentional. He

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22/ Apparently, respondent ignored the fact that TJA, through Thomas, was not allowing these other dealers any allocations so that they had no units to trade. As syndicate manager he had to know this.

asserts that with respect to the other IPO's, (Megamation, Superconductor, and Sunrise) he determined the opening price by just throwing "a bunch of variables into my head". He blames the one-day delay in the start of the aftermarket trading in each of these securities on Brian Thomas who instructed him to hold off on trading to make sure there was a full distribution in the IPO. He further states that although each of the corporations involved herein was in dire financial circumstances, they were not "blind pools", are still in business today and their securities are still trading.

Respondent acknowledges that markups in excess of 10% over the current market price are fraudulent and violate Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10(b)-5 thereunder. He also agrees that there is an NASD guideline suggesting that markups should not exceed 5% above the prevailing market price.

As seen previously, where a broker dealer is selling a security in a principal transaction, its markup must be based upon the contemporaneous cost of that security to the dealer with the exception that if the dealer is also a market maker in the security it may then compute its quotation in the manner utilized by respondent herein. (This admittedly eliminates the trading done in Sunrise for which TJA was not a market maker and hence TJA had to utilize the contemporaneous cost of the security as the only basis for computing the markup).

However, as seen, in order for the integrated dealer to compute the base in that manner, there must exist in a free and competitive market. Otherwise, the markup must be based on the contemporaneous cost to the dealer of those securities. 23/

23/ Alstead, Dempsey & Co., Inc., supra. See, also, Matter of Meyer Blinder, et al., SEA Release No. 31095, 52 SEC Docket 1436 (August 26, 1992).

There is no question from the record herein, that TJA both dominated and controlled the trading in the four securities being underwritten and hence and that the proper basis for computing the markup would be contemporaneous cost. Domination is found to have resulted from the fact that TJA purchases and sales accounted for between 90 and 100 percent of the overall after-market trading volume and from the meager allocations to broker dealers in the IPO. Control is demonstrated by the quotations that were made by TJA and others not based upon any logical sequence of trades. 24/

Perhaps the quintessential example of control was demonstrated when respondent entered into his trading room where there already were stacks of buy tickets and sell tickets, none of which were timed by time clocks, and respondent, ignoring the customers' tickets proceeded first to execute all of the sales tickets at a low price to TJA while waiting until the stocks and warrants could be sold to other retail these customers at the highest price quotations for these securities. As a result, in a very brief period of a day or so TJA was able to sell, through respondent as its trader, the securities previously acquired in the retail market, including those from the sprinkle accounts, at a profit to TJA in the millions of dollars. There can be no greater demonstration of control then the way in which TJA and its trader thus manipulated the customers.

Respondent argues that the market was not being controlled since there were a number of market makers offering quotations in the securities at issue herein which, at times were contrary to the direction of the quotations by TJA, and because these were some

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24/ One need only to recall the situation heretofore described where TJA and another market maker, V.P. Securities, raised their NASDQ quotations from the level of $1.00 to $3.00 per share in a series of quotation exchanges during a brief 15 minute period without there being any inter-dealer trades during that time to justify the raising of quotations, even including the fact that there were other market makers in the stocks.

interdealer transactions away from TJA.

Respondent asserts that since, in the first 3 days of after market trading in Phoenix, dealers other than TJA engaged in 21 different purchase and sale transactions at or near the inside bid and asked prices then quoted in the NASDAQ system, 24 such transactions in Magamation, 14 in Superconductor shares and warrants, there thus existed a meaningful interdealer market away from TJA. However, when considering that in the first 3 days of trading in each of the securities at issue herein (and actually during the first few hours of the first day or so of trading) TJA in its after market sales to its customers overcharged in 3,573 of 3,717 transactions, generating markups totaling over $4,500,000. The number of transactions away from TJA that respondent has pointed to was so small in number as not only to fail to support respondent's contentions, but in fact to fortify the conclusion that there was no meaningful inter-dealer transactions of even minimal significance as to permit the respondent and TJA to avoid using contemporaneous cost in computing markups in each of the securities. 25/

In so far as respondent's relying upon the number of dealers offering quotations in NASDAQ as proof of the existence of meaningful inter-dealer transactions, it has long been

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25/ It has not been overlooked and as highlighted by respondent that the District Court in the injunction action had ordered disgorgement of only $1,500,000 by the TJA principals. However, it had found illegal markups of 3 million dollars but permitted those individuals to deduct the costs involved in buying and selling these securities. Moreover, as for the remaining difference between the findings of the District Court and the conclusions herein as to the amount of unlawful markups, it must be remembered that the District Court was relying upon written offerings whereas this proceeding has had the benefit of an oral hearing where the calculations and computations by the staff of the Commission were subject to oral testimony and cross examination.

held that:

> "The use of quotations as the basis for computing markups is more problematic. By their very nature, quotations only propose a transaction; they do not reflect the actual result of a completed arms-length sale. Thus, we have frequently pointed out, quotations for obscure securities with limited inter-dealer trader activity may have little value as evidence of the current market (citing, Powell and Associates, 47 S.E.C. 746, 747 (1982); Charles Michael West, 47 S.E.C. 39, 42 (1979). They often show wide spreads between the bid and asked prices and are likely to be subject to negotiation. (citing Gateway Stock and Bond Inc., 43 S.E.C. 191, 193 (1966)" (Emphasis added). 26/
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> Alstead, Dempsey, supra, at p. 1036.

From the record herein, it is concluded that there were no meaningful independent markets for these issues. Hence, any markups should have been computed on the basis of the contemporaneous cost of the securities to the dealer, TJA.

The record herein establishes conclusively that TJA and its principal officers and owners had violated the anti-fraud provisions of the securities laws and rules as a result of improper and illegal markups in connection with the sale of the four securities at issue herein. 27/ With respect to this proceeding, the question remains as to the extent in which respondent as the only trader for the registrant has either violated the markup policies of the Commission directly or was an aider and abetter, both of which are alleged in the Order instituting this proceeding. It is clear that at the very least respondent was an aider and abetter.

The general requirements for establishing aiding and abetting liability are well settled. There must be shown (1) a security law violation by a primary wrongdoer, (2)

26/ See also LSCO Securities, Inc., SEA Rel.#28994, 48 S.E..C. Docket 759, 763 and Naftalin Company Inc. 41 SEC 823, 828.

27/ Although there is some evidence pointing to violations of Rule 10-b(6), it is not sufficient to sustain such a finding.

knowledge of the violation by the person sought to be charged, and (3) proof that the person sought to be charge substantially assisted in the primary wrongdoing. Armstrong v. McAplin, 699 F.2d 79 (1983).

It has already been found in this proceeding that TJA and its officers committed securities law violations and respondent, as the head trader for TJA, who executed each and every transaction embraced in this proceeding, thereby substantially assisted in the wrongdoing. There remains the question of guilty knowledge on the part of respondent. Although he denies having any involvement in the making of allocations in the IPO to TJA's retail customers and to other dealers, or having any responsibility in the area of sales, or any role in putting the four IPO's together, or having any knowledge of allocations to other dealers and retail customers, it is difficult to believe that respondent, as head trader and syndicate manager, had no knowledge of the facts about which he did nothing. (see Armstrong v. McAlpin, 699 F. 2nd 79, 91 (1983).

In his brief, respondent acknowledges the fact that a broker has a duty to deal with its customers fairly, honestly and in accordance with industry standards. He also agrees that a dealer has a duty to charge its customer prices which are reasonably related to the current market price for the security in question. With respect to the scienter requirement it has frequently been held that where, as here, the alleged aider and abetter owes a fiduciary duty to the defrauded party, recklessness satisfies the scienter requirement. See IIT, and International Investment Trust V. Cornfeld, 619 F. 2nd 909, 923 (1980).

In deciding the extent of respondent's knowledge of the violations being perpetrated by TJA and its principals, one need only to picture the situation heretofore portrayed wherein at the opening of the aftermarket, which was already delayed for one full day by the underwriters, respondent walked into his trading room and faced two separate stacks,

one of buy tickets and one of sell tickets. Without any determination or concern as to the order in which these tickets were received and, following the instructions of Brian Thomas, respondent proceeded to execute the sell orders from one group of clients at a price of $1.125, holding back any execution of the buy orders even as the quotations kept increasing. Respondent then proceeded to execute these trades at $3.00 and $3.25 a share in the fashion heretofore indicated. With the domination of almost the entire market in these securities, respondent as trader and syndicate manager had to be aware of what was going on. It is not sufficient for him to have closed his eyes nor to have obeyed blindly the direction of the man signing his paycheck.

Scienter has been defined as "a mental state embracing intent to deceive, manipulate, or defraud". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n. 12 (1976). That scienter may be established by reckless conduct, see Nelson D. Serwold, 576 F. 2nd 1332, 1337-8 (9th Cir.), cert. den. 439 US 970 (1978). Courts recognize that scienter may be inferred from circumstantial evidence which "can be more than sufficient". Herman and McLean v. Huddleston, 103 S.Ct. 683, 692, note 30 (1983).

It is difficult to accept respondent's submissions of innocence on his part with respect to every aspect of the transactions involving these four IPO's. These protestations do not withstand the apparent lack of credibility on his part as to just what was going on. His scienter having been proven, it is concluded that respondent was in aider and abetter of TJA and its principals in their violations of the securities laws as heretofore outlined.

Public Interest

It having been found that respondent had willfully 28/ aided and abetted violations of the anti-fraud provision of the securities laws by TJA and its officers, and having been permanently enjoined from further violations thereof, it becomes necessary to consider what sanctions, if any, would be in the public interest.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v, S.E.C., 316 F.2d, 137, 141 (2d Cir. 1963) and Leo Glassman, 46 SEC 209, 211 (1975). Sanctions should also serve as a deterrent to others. Richard C. Spangler, Inc., 46 SEC, 238, 254 n.67 (1976).

In imposing administrative sanctions, the Commission may take into account such factors as:

> " ... the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations."
>
> See Steadman v. S.E.C., 603 F.2d 1126, 1140 (5th Cir., 1979), affirmed on other grounds, 450 U.S. 91 (1981).

In his defense, respondent points outs that he had been a trader for only 2 1/2 years, that he had never previously made a market in any security until the Phoenix offering, and that his methodology employed in setting markups was consistent with NASD's markup policy as he knew it and had learned from Brian Thomas. He further states that he had

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28/ It is well established that a finding of wilfulness does not require an intent to violate the law. It is sufficient that the ones charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C., F.2d 5, 8, (C.A. 2, 1965); and Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (1976).

never heard of the terms "domination and control" and "contemporaneous cost" until this proceeding despite the numerous articles and Commission decisions discussing the concepts behind these terms. 29/

It is difficult to believe that the absence of a specific definition of these terms in a rule or other publication by the Commission justifies the position taken by respondent that he was not responsible for trading in accordance with the numerous decisions, articles and literature spelling out what was to be expected of an integrated market-maker in a dominated or controlled situation. At the very least, from the manner that the Phoenix and other underwritings were executed (i.e., the two piles of order tickets collected prior to the opening of the aftermarket) should have alerted some interest in respondent to the fact that manipulations might be taking place.

Respondent has offered the testimony of experts to the effect that despite their many years in the securities field, they never heard or read, until the Alstead, Dempsey decision, any discussion or reference to the terms "domination and control" or "contemporaneous cost". But it is not the wording of the decisions so much as the content of these holdings and the effect of their existence that determines their applicability to the manner in which

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29/ Thus, in the early case of Duker & Duker, 6 SEC 386, 389 (1939), the Commission found it was a fraud for a broker to charge a profit through the sale or purchase of securities at a price which bears no reasonable relationship to the prevailing price. At least as early as 1964 the term "contemporaneous cost" was discussed at length in Naftalin & Co., Inc., 41 SEC 823, 826 - 7. Finally, the concept of an issue being dominated and controlled is fully discussed in Alstead, Dempsey, & Co. Inc., (supra), decided in 1984. See, also, General Investing Corp. 41 SEC 952, 955, which discusses "a market maintained, controlled or dominated" by a firm and its "domination of the market" (decided in 1964). See also, Rooney, Pace, Inc., 48 SEC 891, 899-900 (1987), and Pagel, Inc., 48 SEC 223 (1965) affirmed 803 F 2d 942 (8th Cir. 1985).

he had computed markups. 30/

In urging that he not be sanctioned, respondent offered the testimony of several individuals presently associated with TJA that he is an honest and trustworthy person. Little weight can be assigned to such interested witnesses.

It is further urged that the recent changes in procedures at TJA as approved by the District Court in the civil injunction action would guarantee that if respondent were to remain in the company in some capacity, he would be subject to very strict supervision and thus that he could never become a menace to the investing public, particularly since he is also under a District Court injunction not to again violate the securities laws. The difficulty with this argument is that it contains no assurances that respondent would continue solely in the employ of TJA. It offers no assurance that respondent would not be able again to commit the same or other violations while in the employ of another broker-

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30/ In this regard, the testimony of Philip McMorrow, the attorney appointed by the District Court to oversee the activities of TJA and called as an expert witness by respondent is noteworthy. (Transcript pp. 713-714)

> "JUDGE SOFFER: We have been talking about the expression domination and control and you said as far as you know, in your experience, until the decision in the Alstead-Dempsey case that that was an unknown term.
> THE WITNESS: Yes, Your Honor.
> JUDGE SOFFER: Do you understand what the concept was?
> THE WITNESS: Yes, I do, Your Honor.
> JUDGE SOFFER: All right. Disregarding the name, did the problem exist under any other name of a firm acquiring domination and control?
> THE WITNESS: Yes, Your Honor.
> JUDGE SOFFER: Since 1985 anyway.
> THE WITNESS: I think forever it's been around, your Honor.
> JUDGE SOFFER: And it should have been known to a trader.
> THE WITNESS: Yes.
> JUDGE SOFFER: A market maker.
> THE WINTESS: Possibly, Your Honor, yes"

dealer.

Respondent has given a belated and somewhat reluctant recognition that in his trading activities, which he characterized as merely "trading inefficiencies", he was not effecting a fair and orderly market. (Transcript, page 411). This admission has been elaborated in his post-hearing brief, at pages 37-38, as follows:

"Respondent candidly acknowledge that he did not run an efficient trading room in 1989. During the first day of aftermarket trading in Phoenix, in particular, the wrong execution times were written on tickets; tickets were executed out of order; and orders executed at the same time were done at different prices. [Tr. at 418-19, 564-66] * * * As a result of these problems, some TJA customers admittedly may have may have paid more for Phoenix stock and warrants than they would have if respondent had been doing his job more effectively".

This admission is hardly a recognition by respondent as to the egregiousness of his actions.

Respondent asserts that whatever his shortcomings as a trader, there never was an intent or desire on his part to defraud. He further offers that he has already suffered enough "professionally, financially and emotionally". He states that he was deprived of a usual $10,000 bonus, lost his positions as head trader and syndicate manager at TJA, and has had the "unbearable burden" to work under an injunction.

These contentions are not entitled to much weight. They do not show a recognition of the principles enunciated in Alstead, Dempsey, supra. Nor is it enough for respondent to have admitted that illegal markups amounting to several millions of dollars were mere "overpayments" caused by respondent's "inefficiencies". It is difficult to assess the burden caused by the injunction especially since respondent was unable at the hearing to recall what its contents required of him. His loss of the title of "syndicate manager" seems an empty gesture involving the loss of duties he never excercised. The question of his scienter has been discussed heretofore.

The failure of respondent to recognize the magnitude of his misconduct becomes a strong indication that he could very well repeat such conduct in the future. Arthur Lipper Corp., et al. 46 S.E.C. 78, 101 (1975), rev. on o.g., 547 F.2nd 171, 184 (2nd Cir. 1976) cert. den., 434 U.S.1009 (1978).

While asserting that he has a "virtually spotless" prior disciplinary record, he recognizes that he had consented to an order dated April 19, 1991, in a proceeding brought by the Division of Securities and Investment Protection of the State of Florida in which he agreed not to re-apply for registration as a registered representative in Florida and that if he did so, he would be subject to two years of supervision.

In a proceeding before the NASD concerning respondent's association with TJA, it was determined that he be allowed to remain associated as a registered representative with registrant.

In the last analysis it must be concluded that although respondent was a lesser actor in the scheme to defraud as perpetrated by Brian Thomas, he nevertheless was an important one without whom the scheme could not have been carried out. What he terms "trading inefficiencies" either were deliberate acts or reflected gross carelessness and indifference to his proper function as the only trader involved. It may well have been that respondent was obeying the orders of a strong and determined employer. But this hardly constitutes a satisfactory defense.

Based upon all of the factors stated, it is concluded that a sanction barring respondent form association with any broker or dealer, with the right to apply after nine months to become so associated in a non-proprietary and non-supervisory capacity, upon a satisfactory showing that he would be adequately supervised, would comport with requirements that a sanction should not be a punishment, should tend to ensure that

respondent will not repeat such conduct, and should serve as a deterrent to others in the industry who may be inclined to act in a similar fashion. 31/

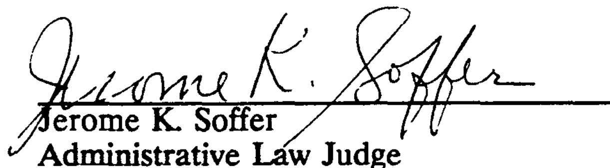
ORDER

Under all of the circumstances herein:

IT IS ORDERED that, from the effective date hereof, respondent George Salloum be barred from association with any broker or dealer, provided that after nine months he may apply to become so associated in a non-proprietary and non-supervisory capacity upon a satisfactory showing to the Commission that he will be adequately supervised.

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



Jerome K. Soffer
Administrative Law Judge

Washington, D.C.
December 10, 1992

31/ In their briefs and arguments,the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments have been considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.