IN THE MATTER OF

CENTURY SECURITIES COMPANY, ET AL.*

File No. 8-8623. Promulgated July 14, 1967

Securities Exchange Act of 1934—Sections 15(b) and 15A

BROKER-DEALER PROCEEDINGS

Grounds for Revocation of Registration

Grounds for Bar from Association with Broker-Dealer

Scheme to Defraud in Offer and Sale of Securities

Excessive Mark-Ups

Offer, Sale and Delivery of Unregistered Securities

Bids and Purchases during Distribution

Where registered broker-dealer and its partners and salesmen participated in scheme to defraud investors by means of high-pressure campaign to sell speculative security and by fraudulent representations and predictions, and where registrant and its partners effected sales of securities at excessive mark-ups, offered, sold and delivered unregistered securities, and bid for and purchased securities during distribution, *held*, in public interest to revoke broker-dealer's registration and bar partners and salesmen from association with broker-dealer.

Practice and Procedure

Salesman's contention that he did not receive fair hearing because testimony adduced at principal hearings, of which he assertedly did not have actual notice and which he did not attend, was improperly used against him, *rejected*, where, among other things, he was duly notified of hearings within meaning of Commission's Rules of Practice, hearings were reopened pursuant to his request.

APPEARANCES:

Arthur W. Fred, Richard D. Capparella, and *E. Gary Smith,* for the Division of Trading and Markets of the Commission.

Fred Colton, a partner, for Century Securities Company.

Fred Colton, David T. Fleischman, William J. Reigel, and *Pierre Pambrun, pro se.*

* Fred Colton; David T. Fleischman; William Reigel; Robert W. Nees; Pierre Pambrun: Jay B. Cook.

Richard N. Ellner, of Older, Hahn, Cazier & Hoegh, for Robert W. Nees.

Bernard I. Segal, for Jay B. Cook.

FINDINGS AND OPINION OF THE COMMISSION

Following hearings in these proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), the hearing examiner filed an initial decision in which he concluded, among other things, that the registration as a broker and dealer of Century Securities Company ("registrant"), a partnership, should be revoked; that its partners, Fred Colton and David T. Fleischman, should be barred from the association with any broker or dealer but may apply for such association in a supervised capacity after 1 year; and that as to the remaining respondents, who were salesmen, Robert W. Nees should be barred, William Reigel and Jay B. Cook suspended for 6 months, and Pierre Pambrun censured.[1] We granted petitions for review of the initial decision filed by various of the respondents and our Division of Trading and Markets ("Division"), and, pursuant to Rule 17 CFR 201.17(*c*) of our Rules of Practice, ordered review of the initial decision with respect to the issues involving all the respondents. Briefs were filed by the Division and the individual respondents. Our findings are based upon an independent review of the record.

Scheme to Defraud in Offer and Sale of Securities

In the offer and sale of stock of Jayark Films Corporation ("Jayark"), registrant, together with or aided and abetted by the individual respondents, willfully violated the anti-fraud provisions of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b–5 and 15c1–2 thereunder.

The record establishes that respondents engaged in a scheme to defraud investors by means of a persistent high-pressure campaign over the telephone to sell the speculative stock of Jayark, which involved the use of fraudulent representations and predictions. The similarity of the representations made indicates that the salesmen had a standard sales "pitch." The record contains

[1] The order for proceedings also raised the issue of whether registrant should be expelled from membership in the National Association of Securities Dealers, Inc. Registrant voluntarily resigned from the association on October 26, 1965, and that issue is no longer before us. One other salesman was suspended pursuant to an offer of settlement and another salesman was barred as a result of his failure to appear at the hearings. Securities Exchange Act Releases Nos. 7670 and 7745 (August 3 and November 15, 1965).

figures showing that between May 1963 and April 1964, registrant sold at retail a total of about 73,700 shares of Jayark stock at prices ranging generally from 5 to 7-3/4.

In June 1963 Reigel told one customer, who purchased 500 shares at 7¼, that within 2 weeks Jayark, which was engaged in the business of distributing programs and motion pictures for television presentation, was going to merge with a television company with a backlog of thousands of pictures and in that event the stock, which was "excellent" and "quite stable," would go "sky high" and at least triple in price. He advised another customer who wanted a stock that would double in price in 6 months to buy as much Jayark stock as she could. She purchased 200 shares at 7. After their purchases, Reigel urged each customer to buy more Jayark stock. He also told the second customer that, although the merger had fallen through, she should not sell her stock because Reigel himself "had sunk all his money into it" and would buy more himself if it were available.

Nees in July 1963 told one customer, to whom he offered shares at 7 ½, that he was "on top of the hot deals" and "in constant contact with the companies involved," that Jayark "was getting hotter all the time" and, according to Jayark's president who was "constantly in touch" with registrant, was going to sign a $50 million film contract in "just a matter of days," that the contract would make millions of dollars, as much as $10 million, for Jayark, that the stock would be worth at least 10 or 12 within 6 months after the contract was signed and if held for a longer term could go to 30, and that the stock was not a speculation since Jayark was making money. Three or 4 days later, Nees called the customer again and said that the "film deal" would be consummated within a week or 10 days at which time the stock would no longer be available at 7 ½. The customer thereafter received from Nees a copy of a letter dated July 19, 1963, from Jayark's president to its shareholders, which contained no financial information, but stated among other things that management anticipated acquiring important new feature film libraries in the immediate future which "should add substantially to the company's earnings." In a third call about 3 or 4 days later, after the customer had twice refused to buy the stock and "reminded" Nees that he was interested only in dividend-paying stocks and not in speculations, Nees reiterated that the stock was not a speculation and would never be worth less than 7½, and said that if the customer at any time wanted his money back, it would be available, that within 1 week "this picture contract" would be signed and announced in the Wall Street Journal, and he could "guarantee" that

within 2 or 3 weeks, the price would "probably" double. At this point, the customer bought 100 shares at 7½.

Nees told another customer in several conversations in July 1963 that Jayark stock was the "finest opportunity to make a quick buck that he had known of for a long time," that Jayark was negotiating for old movies which would be shown on television, and that the contract, which the customer was led to believe was sure to be entered into, would cause the stock to double within a year from the 6 to 7 range to at least 10 or 12, and possibly 15. The customer purchased 1,000 shares at 7-3/4.

Cook told one customer in July 1963, that the price of the stock would increase from 7-1/2 to 15 by the end of the year since Jayark owned a number of television programs that everybody wanted. The customer purchased 100 shares at 7-1/2. About 2 or 3 months later, Cook told him that the price would go to 11 or 12 by December because Jayark had an option to buy 240 films never before shown on television. Subsequently, he represented to the customer that Jayark's earnings would be about $2.50 per share. In November 1963, Cook represented to another customer that Jayark was going to close a deal with Paramount Pictures Corporation ("Paramount") in several weeks for a big block of moving pictures which would cause Jayark stock, then 7½, to rise 3 or 4 points. The customer purchased 100 shares at 7½. Thereafter, in June 1964, Cook told him Jayark was "still trying to do something" with Paramount, and the customer purchased an additional 50 shares at 5.

Pamburn stated to one customer, who purchased a total of 750 shares, that upon the completion of certain contracts, Jayark stock would rise 3 or 4 points above the current price of 7-1/2, or to 10 or more and that he "didn't have enough stock" to sell at 7½. He told another customer that the stock would appreciate in price if things worked out in connection with the film library, and that a large film company, whose name could not be disclosed, was backing Jayark. The customer was given the impression that Jayark was not in bad financial condition.

Other salesmen of registrant variously represented to customers in May 1963, that the stock would double in price in 1 or 2 weeks and that a film deal was 99.9 percent sure and the contract had not been signed because one of the parties had had a heart attack; in June 1963 that an announcement regarding an acquisition of films from Samuel Goldwyn Productions ("Goldwyn") would be made very soon, after which the price of Jayark stock would rise to 10, and that when a contract for a movie series was signed the stock would go from 7½ to 9 or 10 and the customer could double his

money in 6 months to a year; and in July 1963 that without doubt the purchase from Paramount would go through, and that the stock would go to as high as 14 or 15 in a few months and should be bought immediately.

The representations and predictions made were without a reasonable basis. We have repeatedly held that predictions of substantial price increases within relatively short periods of time with respect to a speculative security are inherently fraudulent whether expressed in terms of opinion or fact.[2] Moreover, Jayark's financial condition was materially adverse and no financial information was given to any of the customer-witnesses prior to their purchases. According to registrant's own research report on Jayark, dated June 1963, the company had sustained a net loss of $21,615 for the 5-month period ending October 31, 1962. For the year ending May 31, 1963, Jayark sustained a total loss of $60,603, and as of that date had a deficit of about $100,000.

Respondents had no adequate basis for their optimistic representations regarding the acquisition of film libraries. In the spring of 1963, Jayark commenced negotiations to lease a film library from Goldwyn for television showing. The record is not clear as to how long the negotiations continued or whether any agreement was reached. Jayark's film adviser testified that Goldwyn's principal official, after several months of negotiations, stated to Jayark's president, "We have a deal," and shook hands on it. On the other hand, Goldwyn's attorney stated in a letter to our staff which is in the record that the negotiations were initiated about the beginning of May 1963 and were terminated toward the end of the following month because the parties could not reach an agreement. It is significant that Jayark's president, who although highly optimistic as to Jayark's negotiations in the July 19, 1963 letter to stockholders and in a letter to Reigel earlier that month, which referred to Jayark's negotiations with a "major studio for the last remaining large group of important motion picture features still available for television distribution,"[3] never advised registrant that his company had a firm arrangement with Goldwyn.

The film adviser further testified that the arrangement involved a guaranteed net payment to Goldwyn of $12 million over a period of 3 years plus a percentage of any profits accruing over that figure; that the attorneys involved proceeded to work on the contracts but, at Goldwyn's request, no public announcement was made; that subsequently it advised Jayark that it would not con-

[2] See, *e.g.*, *Hamilton Waters & Co.*, 42 S.E.C. 784, 787 (1965).

[3] This letter, the only evidence in the record of information given directly to registrant by Jayark concerning its negotiations, did not refer to Goldwyn or Paramount by name.

summate the arrangement for tax reasons; and that Jayark considered taking legal action against Goldwyn, but decided against it because it was then also negotiating with Paramount and believed that such action would constitute poor business judgment.[4]

The record does not indicate how profitable the Goldwyn transaction if consummated would have been to Jayark either during the first 3 years, while the $12 million guarantee to Goldwyn was being met, or thereafter. It appears that Jayark, which was hardly in a financial position itself to carry out any such transaction, was to receive financial backing from a Chicago lending company, but the record is silent as to the terms of their arrangement. Furthermore respondents had no knowledge of the terms of any agreement with Goldwyn, of the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture.

About the time that Jayark started to negotiate with Goldwyn, it sought to lease films from Paramount. That company doubted that Jayark was large enough to handle such a transaction, and Jayark did not press its negotiations with Paramount while the Goldwyn negotiations were under way. In July or August 1963, Jayark asked the Chicago company to consider financing a possible Paramount transaction. There were further discussions in September among representatives of Jayark, Paramount and the Chicago company, and the possibility was also raised that the Chicago company might itself lease the films and distribute them through Jayark. According to the Chicago company, the negotiations were "ultimately" terminated because of failure to agree upon a price. Again, although the Chicago company spoke of total payments to Paramount of $110 million to $120 million, and Paramount mentioned a guarantee of about $50 million, no indication appears as to the extent of the profits which could be expected to accrue to Jayark, and in any event no claim is made that any firm arrangement with Paramount was reached. It is clear that respondents had no information necessary to an informed judgment as to the project of Paramount leasing its films to Jayark, and, if so, as to whether such arrangement would prove to be successful.

Colton and Fleischman, who were registrants's sole partners and were active in its business affairs, must be held responsible for the violations. We reject Fleischman's contention that he should be absolved because he assertedly was a principal of registrant in name only, served as a salesman on a commission basis,

[4] We note that the California Statute of Frauds requires that contracts for the sale of goods or choses in action in excess of $500 be evidenced by an agreement in writing, unless there is a partial acceptance of the goods or choses in action by the buyer. Calif. Civ. Code §1724(1).

and performed other duties of a clerical nature. There is no support in the record for this assertion. [5]

The record also shows that Fleischman recommended Jayark stock, on which no dividends had ever been paid, to an unemployed widow in her 60's who was supported in part by her daughter and whose investment objective was income. Her account had been handled by Fleischman for a number of years. She received social security payments, $946 annually from a trust fund, and interest on a $3,000 savings account, and had about $5,000 in securities which included corporate bonds and listed stocks and other dividend-paying securities. She looked to Fleischman for investment advice and was unable to recall any instance when she did not follow his purchase recommendations. At about the time she purchased Jayark stock, she sold another stock, on which monthly dividends had been paid, because such payments had been discontinued.

In addition, Pambrun induced a woman of about 67 to purchase Jayark stock even though she had advised him that she was interested in "capital gains and dividends, too" and did not have "money to play with," by telling her that while she would not receive any dividends, there would be a "capital gain in a short time." Pambrun had handled this woman's account since 1961, when he called her on the telephone to solicit a securities purchase without having had any prior contact with her.

The hearing examiner, in concluding that no reasonable basis had been presented for a finding that the recommendations of Fleischman and Pambrun were unsuitable, noted that Fleischman's customer had ceased investing in mutual funds because "you don't get much on mutual funds," and chose to deal in common stocks, and that Pambrun's customer had sold every stock purchased through him at a profit. However, the record shows that the securities purchased by these customers prior to their purchases of Jayark stock were dividend-paying stocks and that Pambrun's customer sold only those stocks which appreciated in price, and refused to sell those that declined. In any event, both customers wanted income-producing securities, and the fact that Fleischman's customer chose to purchase common stocks was not of course inconsistent with that objective.[6]

Since we have found that the activities of Fleischman and Pambrun were fraudulent and since, as shown below, a sufficient basis exists for barring them from association with any broker-dealer,

[5] Fleischman did not testify and did not adduce any evidence on this point through Colton who did testify or through others.

[6] See *Shearson, Hammill & Co.*, 42 S.E.C. 811, 835 (1965); *The Ramey Kelly Corporation*, 39 S.E.C. 756, 759 (1960); *Herbert R. May*, 27 S.E.C. 814, 824 (1948).

it is unnecessary for us to consider as an independent issue the further charge that the recommendations were made in complete disregard of their obvious unsuitability for the two customers discussed above. In this connection, we note that we have proposed, and have asked for comment on, a rule under Section 15(b)(10) of the Exchange Act which would spell but the responsibility of registered broker-dealers who are not members of a registered securities association (and their associated persons) to make reasonable inquiry as a basis for determining whether recommendations are suitable or unsuitable.

EXCESSIVE MARK-UPS

Between January 1963 and April 1964, registrant, together with or aided and abetted by Colton and Fleischman, willfully violated the anti-fraud provisions cited above in the sale of securities at prices not reasonably related to prevailing market prices.

The hearing examiner, on the basis of computations submitted by the Division, found that in 284 transactions with retail customers in Jayark stock at prices ranging from 5½ to 7¾, in 145 transactions in the stock of Homestead Gold Exploration Corporation ("Homestead") at 1¾ to 5, and in 54 transactions in the stock of Colorsound, Inc. ("Colorsound") at 1 to 1⅞, registrant's mark-ups ranged from 5.1 percent to 54.9 percent over contemporaneous cost or, where more than one contemporaneous purchase was made at different prices, the average cost.

We have repeatedly stated that, absent countervailing evidence, a dealer's contemporaneous cost is the best evidence of the market price for the purpose of computing mark-ups. However, we do not view the average cost as appropriate evidence of market price. The reasonableness of a mark-up must be determined for each individual transaction on the basis of the best evidence of the market price at the time of the transaction, without reference to the average cost price which may be lower or higher than such market price.[7] As we observed in rejecting a similar position, "The average daily cost basis presents practical difficulties because a broker-dealer could not determine a fair mark-up until the end of the day, and a mark-up which appeared reasonable at the time of execution might, if the market declined after the order was executed, retroactively become excessive."[8] Where several purchases are made on the same day and there is no evidence of the cost of the purchase nearest in time to the retail sale, fairness requires that the highest cost of purchase be used. Moreover, as to

[7] *Shearson, Hammill & Co.*, 42 S.E.C. 811, 837 (1965).
[8] *Ibid.*

a number of transactions in the securities involved, which registrant quoted in the sheets published by the National Quotation Bureau, Inc., the evidence shows that contemporaneous prices at which registrant effected sales to other dealers were higher than registrant's contemporaneous cost. Those sale prices constitute a more appropriate basis for computing the mark-ups in those transactions.[9]

Accordingly, we have recomputed the mark-ups in the light of the above considerations, and find that they ranged from 5.1 percent to 22.2 percent in 105 transactions in Jayark stock; from 6.1 percent to 33.3 percent in 82 transactions in Homestead stock; and from 7.7 percent to 37.5 percent in 44 transactions in Colorsound stock. Upon consideration of all relevant factors, including the price of the securities and the amount of money involved in the transactions, we conclude that the prices charged to customers bore no reasonable relationship to the prevailing market prices of the securities at least in 91 sales of Jayark stock and 71 sales of Homestead stock, where the mark-ups exceeded 7 percent, and in the 44 sales of Colorsound stock.

OFFER, SALE AND DELIVERY OF UNREGISTERED SECURITIES

Registrant, Colton, and Fleischman willfully violated Sections 5(a) and (c) of the Securities Act in the offer, sale and delivery of the stocks of Jayark and Kramer-American Corporation ("K-A") when no registration statement had been filed or was in effect with respect to such stocks, and Reigel willfully participated in such violations with respect to the Jayark stock.

1. From September 4 to 11, 1963, registrant sold short 2,320 shares of Jayark stock. This short position was covered by registrant's purchase on September 12, of 3,750 unregistered shares from Reuben R. Kaufman and his wife who were, respectively, president and secretary of Jayark. By October 23, 1963, the remaining shares had been sold by registrant to the public in small lots. It is clear that registrant was an underwriter within the meaning of Section 2(11) of the Securities Act since it purchased the shares, with a view to distribution, from persons who were controlling persons of the issuer.

Fleischman asserts that he was not responsible for the violations. 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 him-

[9] *Gateway Stock and Bond, Inc.*, 43 S.E.C. 191, 193 (1966); *Langley-Howard, Inc.*, 43 S.E.C. 155, 160 (1966).

self informed of the nature and source of the shares being sold by his firm.[10]

Nor is there any merit in the contention of registrant, Colton, and Fleischman that any violations by them were not willful. By virtue of a public offering of Jayark stock earlier in the year through registrant as underwriter, registrant and its partners must have known that the Kaufmans were officers and controlling persons.[11] And since registrant was making a market in the stock and part of the acquisition from the Kaufmans was used to cover a short position and the balance was sold to the public, it is clear that such acquisition was with a view to distribution. In these circumstances the asserted reliance by registrant and its partners upon a written statement by Kaufman that Jayark's counsel had advised that the shares were exempt from registration "under existing regulations" could not be justified and they should have made inquiry to determine the basis for any such exemption.[12] Since they knew that the stock was not registered and knew or should have known that no exemption was available, their violations of Section 5 were willful.[13]

The record also establishes that Reigel participated in the violations of Section 5, although he did not himself sell any of the shares to the public. He was active in obtaining the Kaufman shares for registrant and must have known that registrant, which was making a market in Jayark stock, was acquiring the shares with a view to distribution.[14]

2. Between January 6 and February 26, 1964, registrant purchased a total of 6,250 shares of K–A stock from three individuals who were unknown to it and sold the shares to the public. Those individuals, including two attorneys who had represented K–A and its president, respectively, had acquired 5,750 of those shares from K–A through its president, to whom K–A had issued options to purchase such shares and who directed K–A to credit the shares to such options.

The sellers did not disclose the source of the shares to regis-

[10] Cf. *Alfred Miller*, 43 S.E.C. 233, 237 (1966); *Aldrich, Scott & Co., Inc.*, 40 S.E.C. 775, 778 (1961); *Luckhurst & Company, Inc.*, 40 S.E.C. 539, 540 (1961).

[11] Registrant's research report on Jayark stated that only 85,000 of the 375,000 shares outstanding were publicly held.

[12] *S.E.C.* v. *Culpepper*, 270 F.2d 241, 251 (C.A. 2, 1959); *Assurance Investment Company*, 42 S.E.C. 989, 990 (1966); Securities Act Release No. 4445 (February 2, 1962). Registrant thereafter learned that Kaufman had relied upon an opinion of counsel that the sale would be exempt as an unsolicited broker's transaction under what is now Section 4(4) of the Securities Act. However, registrant did not sell the shares as agent for the Kaufmans, but purchased them as principal.

[13] *Morris J. Reiter*, 41 S.E.C. 137, 141 (1962); *Gilligan, Will & Co.*, 38 S.E.C. 388, 395 (1958), *aff'd* 267 F.2d 461 (C.A. 2, 1959), *cert. denied* 361 U.S. 896.

[14] Kaufman addressed his correspondence with registrant regarding those shares to Reigel and discussed the transaction with him over the telephone, and registrant's confirmation of its purchase from the Kaufmans carried Reigel's name.

trant, nor did registrant make any inquiry in that respect. The record shows that the purchases from the attorneys were effected by a salesman of registrant after consultation with Colton. No explanation appears of the circumstances surrounding the purchase from the third individual. While registrant's books show that this purchase was handled by the same salesman, he did not remember the name of the seller. Colton testified that his first knowledge of any problems with respect to the K–A stock was the issuance of an order by the State commissioner of Corporations, more than 2 months after the purchases, directing registrant not to offer or sell K–A stock. However, where as here a dealer is offered a substantial number of shares of a little known security under circumstances raising a question as to whether or not the sellers may be merely intermediaries for controlling persons or statutory underwriters, a "searching inquiry is called for." [15] As we have seen, no inquiry was made as to the source of the shares even though the sellers were not known to registrant. Under the facts of this case, registrant and its partners must be held responsible for the sale to the public of the unregistered K–A shares as to which no exemption was available.

BIDS AND PURCHASES DURING DISTRIBUTION

Registrant, aided and abetted by Colton and Fleischman, also willfully violated the anti-manipulation provisions of Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b–6 thereunder in that between September 12 and October 23, 1963, while engaged in distributing the Jayark shares acquired from the Kaufmans, registrant entered bids for that stock in the sheets and effected purchases of such stock.[16]

OTHER MATTERS

1. Fleischman and Cook contend that the hearing examiner erred in inferring from their failure to testify that their testimony would have been adverse, and stress that the examiner failed to admonish them, although they were then without counsel, that such an inference would be drawn if they did not testify.[17] They assert that they refrained from testifying in order to avoid being improperly subjected, as they claim Colton had been, to cross-examination concerning their prior association with broker-dealers whose registrations were revoked on the basis of activities in which they were not charged to have participated. Cook asserts

[15] Securities Act Release No. 4445, p. 2 (February 2, 1962); see also *Assurance Investment Company, supra*, at 990.

[16] See *F. S. Johns & Company, Inc.*, 43 S.E.C. 124, 139 (1966); *J. H. Goddard & Co., Inc.*, 42 S.E.C. 638, 642 (1965).

[17] Fleischman asserts that if he had been so admonished, "perhaps" he would have testified.

that although the examiner reserved decision on the objections to the admission of the testimony of such prior association and in his initial decision concluded in effect that no weight should be given to it because, among other things, evidence of the nature of Colton's activities while with such a firm was not adduced, the significance of the examiner's reservation of his ruling was not clear to him as a layman and he was justified in not permitting his defense to be "side-tracked by the introduction of remote and irrelevant issues." Both Fleischman and Cook request that the initial decision be vacated and that the proceedings be remanded to the hearing examiner for a new hearing affording them an opportunity to testify.

It has been specifically held that in broker-dealer proceedings, which it is well settled are remedial rather than penal in nature,[18] an adverse inference may be drawn in appropriate circumstances from the failure of a party to take the stand to rebut unfavorable testimony.[19] We cannot accept Cook's and Fleischman's excuse for not testifying, and they cannot blame their failure to exercise their right to testify upon the examiner. The question whether evidence of prior associations was admissible to show experience and knowledge or was irrelevant[20] was a matter for the examiner to rule upon, and if Cook did not understand the meaning of the examiner's reservation of decision on that question he could have requested an explanation from the examiner. In any event, in making our findings with respect to Fleischman and Cook, as well as Reigel and Pambrun who also did not testify, we have not relied on any adverse inference from their failure to testify, but based our determination solely on the evidence in the record. We accordingly deny the request that the proceedings be remanded to the examiner for a new hearing.

2. Nees did not appear at the hearings, of which he assertedly did not have actual notice, and the hearings were reopened at his request. He contends that he did not receive a fair hearing because the testimony adduced at the principal hearings was improperly used against him. There is no substance to this contention and, in any event, no prejudice has been shown.

Nees was duly served with the order for proceedings and filed an answer to the allegations in that order. He then moved from

[18] *Wright* v. *S.E.C.*, 112 F.2d 89, 94 (C.A. 2, 1940); *Pierce* v. *S.E.C.*, 239 F.2d 160, 163 (C.A. 9, 1956); *Associated Securities Corp.* v. *S.E.C.*, 283 F.2d 773, 775 (C.A. 10, 1960); *Blaise D'Antoni & Associates* v. *S.E.C.*, 289 F.2d 276, 277 (C.A. 5, 1961), *rehearing denied* 290 F.2d 688.

[19] *N. Sims Organ & Co., Inc.*, 40 S.E.C. 573, 577 (1961), *aff'd* 293 F.2d 78, 80–81 (C.A. 2, 1961), *cert. denied* 368 U.S. 968; *Barnett* v. *U.S.*, 319 F.2d 340, 344 (C.A. 8, 1963). See also *Proud* v. *C.A.B.*, 357 F.2d 221, 223 (C.A. 7, 1966).

[20] See *U.S.* v. *Ross*, 321 F.2d 61, 67 (C.A. 2, 1963), *cert. denied* 375 U.S. 894.

the area after notifying the Post Office of his new address, but he did not give the new address to our staff. Pursuant to Rule 17 CFR 201.6(b) of our Rules of Practice, notice of the hearing was duly sent to Nees by certified mail addressed to his last known address, where the order for proceedings had previously been delivered. The notice of hearing was not returned to nor a return receipt received by the Commission. Because Nees did not appear at the hearings, which were concluded on August 27, 1965, the Division filed a request for a default against him, a copy of which was mailed to his old address and came to his attention about September 5, 1965. On October 29, 1965, after the Division had filed its proposed findings and supporting brief with the hearing examiner, Nees, through counsel, objected to the default request and asked the examiner to reopen the hearings so that Nees could "present his defense." The hearing examiner on December 3, 1965, concluded that there was a failure of proof that Nees had been "duly notified" of the hearing within the meaning of Rule 6(e) of our Rules of Practice, and ordered the hearings reopened to permit Nees "to interpose a defense." Although Nees, in our opinion, was duly notified of the hearings, we think the examiner properly exercised his discretion in reopening the hearings.

Shortly before the reconvened hearing in February 1966, counsel for Nees filed a request for clarification of the record, urging that the evidence adduced at the principal hearings could not be used against him and that he was entitled to a hearing *de novo* where he would have the opportunity to be represented by counsel and to cross-examine. The examiner denied the request. He noted that his order reopening the hearings clearly contemplated that the record made at the original hearings would stand against Nees. He cited the lapse of time since that order and referred to a statement by Nees' counsel to him that he intended only to cross-examine the two customers who had testified at the principal hearings concerning their transactions with Nees and who were to be produced by the Division at the reconvened hearing. Nees' counsel, asked by the examiner whether he objected to anything specific in the prior record, replied that although he had had "an opportunity to scan the record," he had "not read it in detail" and was "not in a position to indicate that."

The two customers of Nees, after confirming that their testimony would be "substantially similar" to that given at the principal hearings, were extensively cross-examined by counsel for Nees at the reconvened hearings, and one of them was also cross-examined by counsel for Reigel, Pambrun and Cook, and by Fleischman. Nees then testified in his own defense.

It is clear that Nees was accorded all the rights of a party and that he has no basis for complaint.[21] In view of his change of address and the statement in the order for proceedings that a hearing would be held at a time and place to be fixed, he was less than diligent in failing to inquire as to the status of the proceedings at any time between November 1964, when he filed his answer to that order, and September 1965, when he claims he first learned of the hearings. Moreover, he waited almost 2 months after learning that hearings had been held before requesting that the hearings be reopened so he could present a defense. In addition, after counsel for Nees had indicated that he would be satisfied to cross-examine only the two customers who had testified against Nees, he asserted for the first time shortly before the rehearing and contrary to the terms of Nees' own request for rehearing that he wanted a *de novo* hearing.[22]

PUBLIC INTEREST

In view of the extensive violations by registrant and its partners, and the participation in the fraudulent selling activities by all the other respondents, we see no basis for the disparate sanctions ordered by the hearing examiner. Colton and Fleischman urged that the sanctions imposed upon them, by comparison with those imposed in certain other cases, were unduly severe. But, as we recently stated in rejecting a similar contention, "The remedial action which is appropriate in the public interest depends upon the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other cases." [23] Although the record contains no evidence of any prior violations of the securities laws by respondents, the gravity of the violations found, particularly the fraud violations, when measured against the absence of any other substantial mitigative factors, convinces us that it would be inappropriate to permit any of the respondents to continue in the securities business. We conclude that it is appropriate in the public interest to revoke the broker-

[21] Cf. *Freight Consolidators Cooperative, Inc.* v. *U.S.*, 230 F. Supp. 692, 699 (S.D.N.Y., 1964); *Siltronics, Inc.*, 41 S.E.C. 658, 661 (1963).

[22] We also reject Cook's claim that he was prejudiced because memoranda of previous interviews by an investigator for the Division, which were shown to customers who were to be called as witnesses in order to refresh their recollection, contained underlinings or notations made subsequent to the interviews. Cook did not seek to introduce the memoranda in the record or indicate in what way the markings, the exact nature of which does not appear, could have affected the credibility or weight of the witnesses' testimony. In our opinion a sufficient showing of prejudice has not been made.

[23] *Martin A. Fleishman*, 43 S.E.C. 185, 190 (1966). See also *Dlugash* v. *S.E.C.*, 373 F.2d 107, 110 (C.A. 2, 1967); *Tager* v. *S.E.C.*, 344 F.2d 5, 8–9 (C.A. 2, 1965).

dealer registration of registrant, and to bar each of the other respondents from being associated with any broker or dealer.[24]

IT IS ORDERED that the registration as a broker and dealer of Century Securities Company be, and it hereby is, revoked; and that Fred Colton, David T. Fleischman, William Reigel, Robert W. Nees, Pierre Pambrun, and Jay B. Cook be, and they hereby are, barred from being associated with any broker or dealer.

By the commission (Chairman COHEN and Commissioners OWENS, BUDGE and WHEAT), Commissioner SMITH not participating.

[24] The exceptions to the initial decision of the hearing examiner are overruled or sustained to the extent they are inconsistent or in accord with our decision.