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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
American Mutual Funds Service, Inc. (now known as) E. H. Jansen Company Room 513, Mercantile National Bank Bldg. 420 Lincoln Road Miami Beach, Florida	:
File No. 8-7031	:

RECOMMENDED DECISION

SIDNEY L. FEILER
Hearing Examiner

Washington, D. C.

March 27, 1964.

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APPEARANCES:

For Division of Trading and Markets
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BEFORE SIDNEY L. FEILER, HEARING EXAMINER

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I. THE PROCEEDINGS

These are proceedings pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether the Commission should revoke the registration as a broker and dealer of American Mutual Funds Service, Inc., now known as E. H. Jansen Company ("the registrant"); whether, pending final determination of the question of revocation, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of the registrant; whether it is necessary or appropriate in the public interest or for the protection of investors to suspend for a period not exceeding twelve (12) months or to expel registrant from membership in the National Association of Securities Dealers, Inc.;[1/] whether the Commission should find that Louis Vernell, Gerald M. Menaker, Stanford Pierce, Benjamin J. Merkle, Edward H. Jansen, and William R. Bowman, or any of them, is a cause of any order of revocation or suspension which may be entered herein.

The matters put in issue by the order for these proceedings, as amended, are:

A. Whether the registrant, in willful violation of Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-5, promulgated by the Commission thereunder, failed to file a report of financial condition as of a date within the calendar year 1960 and Vernell, Menaker and Pierce caused, aided, abetted, counselled, commanded, induced and procured such

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1/ The registrant was a member of the N.A.S.D. during the periods when the activities mentioned in the order for the proceedings herein occurred. However, the undersigned has been advised that it was expelled from membership in March, 1963.

violation by the registrant.[2/]

B. Whether, during the period approximately January, 1959 to approximately September 14, 1961, registrant failed to make and keep current certain books and records in willful violation of Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder and Vernell, Menaker and Pierce caused, aided and abetted such violation by the registrant.[3/]

C. Whether, during the above-mentioned period, the registrant changed its place of business and failed to promptly file an amendment to its broker-dealer registration reporting its change of address in willful violation of Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-2 thereunder, and Vernell, Pierce and Menaker caused, aided and abetted such violation by the registrant.[4/]

D. It is further alleged in the order that the aforementioned amendment regulations were willfully violated by the registrant from approximately the middle of September, 1961 to approximately the middle of

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2/ Every registered broker-dealer, pursuant to the above provisions, is required to file a report of his financial condition as of a date within each calendar year.

3/ The above provisions are the so-called "bookkeeping or record-keeping rule" which prescribes in detail the blotters, ledgers, and other records to be kept by registered brokers or dealers. It is specifically provided that these records be kept current.

4/ Every registered broker-dealer, pursuant to these provisions, is required to promptly file an amendment to its broker-dealer registration if the information contained in the original application or any amendment supplemental thereto is or becomes inaccurate for any reason.

October, 1961 in that Benjamin J. Merkle performed functions for the registrant similar to those of an officer and director and directly or indirectly controlled the business of the registrant during that period, but no amendment was filed reporting this information, and Vernell and Merkle caused, aided and abetted such violations by the registrant.

E. The record-keeping requirements are also alleged to have been willfully violated by the registrant, aided and abetted by Vernell and Merkle, during the aforementioned period from mid-September, 1961 to approximately mid-October, 1961.

F. An additional issue raised is whether, during the aforementioned period the registrant willfully violated the net capital provisions of the Exchange Act and rules promulgated thereunder and Vernell and Menaker caused the violation.[5/] A related issue raised in the order is whether, during the same period registrant induced, and Vernell and Merkle caused the registrant to induce others to purchase securities from it and to sell securities to it upon the representation that it was able and ready to meet all liabilities in connection with its business when, in fact, its liabilities exceeded its assets and it was unable to meet its current

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5/ A registered broker-dealer, pursuant to the provisions of Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder is prohibited from using the means and instrumentalities of interstate commerce to effect transactions in and to induce the sale of securities, otherwise than on a national securities exchange, when the aggregate indebtedness of the registrant exceeds 2,000 per centum of its net capital.

liabilities, all in violation of the anti-fraud provisions of the Securities Acts.[6/]

G. An additional issue raised is whether there was a change in the ownership and management of the registrant, including a change of name of the company, and registrant willfully violated the amendment requirements set forth above in failing to properly file an amendment reporting this information and Edward H. Jansen and William R. Bowman caused, aided and abetted this violation.

H. It is further alleged that from the period from approximately October 15, 1961 to approximately December 18, 1961 the registrant, aided and abetted by Bowman and Jansen, violated the net capital provisions set forth above as well as the financial solvency representations also set out above.

I. The provisions requiring the filing of a financial report annually were also allegedly violated in 1961 by the registrant, aided and abetted by Bowman and Jansen.

Pursuant to notice, a hearing was held in Miami, Florida before the undersigned Hearing Examiner. The Division was represented by counsel.

6/ The anti-fraud provisions referred to in the order are Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 (17 CFR 240.10b-5 and 15c1-2) thereunder and Section 17(a) of the Securities Act. The effect of these provisions, as applicable here, is to make unlawful the use of the mails or facilities of interstate commerce in connection with the purchase or sale of any security by means of a device to defraud, an untrue or misleading statement of a material fact, or any act, practice or course of business which operates or would operate as a fraud or deceit upon a customer.

Vernell, an attorney, appeared and represented himself. Menaker and Pierce were represented by counsel. There were no other appearances.

Service was effected upon the registrant by the sending of a copy of the order for these proceedings to it in care of Vernell, who was listed as its president in the last document filed on its behalf with the Commission dealing with its registration. Service was also made by registered mail on Jansen and Merkle (Div. Exs. 1 and 2). Bowman also received notice of the proceeding as evidenced by the record of correspondence with him with reference to the proceeding (Div. Ex. 4B). The original order for the proceeding gave the persons named therein notice that a public hearing for the purpose of taking evidence would be held at a time and place to be fixed, and before a hearing examiner to be designated, by further order. While the record indicates that difficulties were encountered in serving Merkle with further orders issued in the proceeding, the undersigned concludes that effective service was made upon all the parties respondent. 7/

At the conclusion of the presentation of evidence, opportunity was afforded the parties to state their positions orally on the record. Oral argument was presented on behalf of all the parties represented at the hearing. Opportunity was then afforded the parties for filing proposed findings of fact or conclusions of law, or both, together with briefs in support thereof. Proposed findings and briefs were submitted on behalf of all the parties at the hearing. Upon the entire record and from his observation of the witnesses, the undersigned makes the following:

7/ Harwyn Securities, Inc., Exch. Act Rel. No. 7153, October 4, 1963.

II. FINDINGS OF FACT AND LAW

A. The Registrant

1. The registrant, a Florida corporation incorporated on October 27. 1958, filed its application for registration as a broker-dealer on November 24, 1958. In its application, Menaker was listed as president; Vernell as vice-president; and Pierce as secretary-treasurer. Menaker and Pierce were also named as persons who owned 10% or more of the common stock of registrant. In a note attached to a balance sheet submitted with the application it was stated that the registrant would act as a dealer in over-the-counter securities, primarily mutual funds, and would not maintain positions either for its own account or for the account of others.

2. In an amendment filed on December 15, 1958, Menaker, Vernell and Pierce were also listed as directors. The registration became effective on December 24, 1958. On February 27, 1959 an additional amendment was filed with the Commission noting a change of address from Vernell's office to 12,430 W. Dixie Highway, N. Miami, Florida.

3. During the periods covered by the order for these proceedings, changes occurred in the control and operations of the registrant. These will be dealt with in later sections of this decision.

B. Violations by the registrant during the period from January, 1959 to September 14, 1961

4. The management and control of the registrant remained unchanged from the time of its registration until September 14, 1961. It is alleged that during that period violations occurred of the record-keeping requirements, registration amendment provisions, and the financial reporting

requirements:

1. Failure to make and keep current proper books and records

5. The record indicates that the registrant did not immediately commence operations after its registration became effective. Its daily blotter indicates that its first transaction took place on April 8, 1959 and its last transaction before September, 1961 was on July 2, 1959. There was a total of 14 transactions (Tr. p. 91).

6. In May, 1959, John Olden, a securities investigator on the Commission's staff, went to the premises of the registrant on W. Dixie Highway, N. Miami, Fla. for the purpose of conducting a routine broker-dealer inspection. He met and spoke with Pierce and proceeded to attempt an examination of the registrant's books and records. He testified that he found there were no books and records available, but that he was able to determine the approximate financial position of the registrant from raw material furnished him. Olden explained the bookkeeping requirements to Pierce in detail as well as the requirements of the net capital rule and the financial reporting requirements.

7. Pierce admitted that at the time of Olden's inspection the only written record of transactions that the registrant maintained was a crude general ledger (Tr. 193). After he received advice from Olden and his accountant he set up a daily blotter. He stated that these and certain other sheets, which were maintained, accurately reflected the transactions of the registrant.

8. It is clear from the testimony that at no time during the period involved here did the registrant maintain all the books and records set

forth and described in the Commission's bookkeeping rule. It is urged that the records were sufficient and adequate in view of the business conducted by the registrant and accurately reflected its business. The Commission has held that the record-keeping requirements must be strictly followed by registrants and they cannot decide for themselves what records are necessary in their particular case. In Midland Securities, Inc., 40 S.E.C. 333 (1960), the Commission stated:

> "Applicants assert that all their transactions could be completely reconstructed from the books and records which were maintained. However, as we stated in Olds & Company, 20/ 'The requirements that books be kept current . . . and in proper form are important and are a keystone of the surveillance of registrants and NASD members with which we and the NASD are charged in the interest of affording protection to investors. It is obvious that full compliance with those requirements must be enforced, and registrants cannot be permitted to decide for themselves that in their own particular circumstances compliance with some or all is not necessary.'
>
> 20/ 37 S.E.C. 23 (1956)."
>
> (pp. 339-40)

9. The understand concludes that the registrant violated the record-keeping requirements of the Exchange Act as charged, Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder, and that these violations were willful.[8/]

2. Failure to correct information in the registration application

10. The registrant, on February 27, 1959, had filed an amendment to its registration applicating noting a change of address to 12,430 W. Dixie Highway, N. Miami, Florida. Pierce testified that the registrant

8/ Louis B. Cherry, dba Kennedy, Levy & Co., Exch. Act Rel. No. 7234 (Feb. 12, 1964).

conducted its business at this address until July, 1959 when it ceased operations. The office was then closed, but a forwarding address for the receipt of mail was left at a local post office. It is conceded that no amendment was filed notifying the Commission of the removal by the registrant from the address listed as its principal place of business nor is there any change listed in the address it furnished, its business address, as the place where notice could be sent of any proceeding before the Commission.

11. It is urged that the registrant was not under an obligation to notify the Commission of a change in its place of business since it was out of business and not transacting any broker-dealer business. It is also pointed out that the registrant maintained a post office box in Hialeah for the receipt of mail (Tr. 33). A letter sent from the Regional Office of the Commission in Atlanta further indicates that the staff was apprised by February, 1961 that no business had been transacted by the registrant for approximately a year and a half and knew of a new business address for Pierce and Menaker.

12. A registrant is required to promptly notify the Commission by an appropriate amendment if the information contained in its application for registrant or any supplement thereto becomes incorrect. The information contained in the applicant's registration did become incorrect when it no longer carried on any business at the address it listed as its principal place of business. The fact that staff members of the Commission eventually learned of the closing down of the business and the change of address did

not excuse the registrant from the obligation to file a proper amendment.[9/] The requirement for the filing of an amendment in an appropriate case is an important part of the regulatory system of control of the operations of registered broker-dealers. It is concluded that the failure of the registrant to file the necessary amendment required herein was a willful violation in that no effort was made by it for a long period of time to meet the obligations imposed on it.

3. Failure to file a report of financial condition as of the date within the calendar year 1960

13. The registrant filed a report of its financial condition in 1959 as required by the applicable statute and the rule promulgated thereunder. No such report was filed for 1960.

14. When the registrant was notified that its registration had become effective on December 24, 1958, its attention was specifically called to the requirement for the filing of annual reports of financial condition. By letter dated February 20, 1961 it was notified that it had violated Rule 17a-5 by not yet filing a report of its financial condition for the year 1960. It was requested to file this report no later than March 31, 1961. Pierce received this letter on behalf of the registrant. The registrant made no effort to comply with the request. Pierce acknowledged receiving the letter and further testified that he discussed it with Menaker and they agreed that they could not afford to spend the estimated $100 to $150 necessary to prepare a certified statement (Tr. 194-195).

9/ Louis B. Cherry, dba Kennedy, Levy & Co., supra.

He further stated that he and Menaker had decided to notify the Commission that the registrant was no longer in business but that this was never done (Tr. 183, 184).

15. It is urged that the registrant did no business in 1960 and that staff members of the Commission learned of this fact.

16. The Commission has emphasized the great importance of broker-dealer compliance with its financial reporting requirement. In W. Leonard and Company, Inc., 39 S.E.C. 726, 727 (1960), it stated "The requirement that annual financial reports be filed on time and in proper form is a keystone of the surveillance of registered broker-dealers with which we are charged in the interest of affording protection to investors, and full compliance with it is essential."[10/] Asserted inactivity of a registrant, even for a number of years, has been held no defense to a finding of willful violation of the financial reporting requirements.[11/]

17. It is concluded that the registrant violated the financial reporting requirements and that in view of its disregard of this obligation, when its attention was specifically called to the necessity of filing, the violation was willful.

4. Responsibility of the individual respondents

18. The Division contends that Menaker, Pierce, and Vernell aided and abetted the violations found above.

10/ See also Sec. Exch. Act Rel. No. 7112 (Aug. 6, 1963).

11/ Robert E. Sechler & Associates, Inc., Exch. Act Rel. 7012 (Feb. 1, 1963); Scientific Investors Corporation, Exch. Act Rel. 7126 (Aug. 27, 1963); John B. Sullivan, dba John B. Sullivan Company, 38 S.E.C. 643 (1958).

19. During the period when the above violations occurred, Menaker was president and director of the registrant and Pierce was secretary-treasurer and a director. Each owned 12 shares of the 25½ shares of stock of the registrant outstanding. They were in active control of its operations. In view of their positions in the registrant's organization and their own financial interest, they were under a direct obligation to see to it that the registrant's business was conducted in compliance with applicable statutes and rules. By their failure to carry out this responsibility, they aided and abetted in the willful violations of the registrant outlined above.

29. Vernell testified that he organized the registrant corporation as a favor to Menaker and Pierce, receiving no fee therefor and that he assumed the office of vice-president and director only to round out the number of officers and directors required for incorporation, that he never had any financial interest in the registrant as of this period and knew nothing of its business operations and was merely a dummy officer and director.[12/] The evidence does support Vernell's contentions as to his connection with the registrant during the period January 19, 1958 to September 14, 1961. He did have knowledge from his work in incorporating the registrant that its activities would be confined to the sale of mutual funds; his office was originally listed as the principal place of business of the registrant, and he did, in a general way, have knowledge of the business operations of the business carried on by Pierce and Menaker. However, he did not take an active part in the registrant's affairs.

12/ Vernell did own 1½ shares. There is no proof that these were anything but qualifying shares.

30. The Commission, in numerous decisions, has clearly indicated that with regard to responsibility under the Securities Acts, officers and directors cannot divorce themselves from the responsibility of their offices by taking no interest in the affairs of a registrant and assuming a quiescent or dummy position. It has rejected contentions of lack of knowledge of the securities business, lack of participation in the affairs of the registrant and inability to visit its offices during the time of the alleged violations.[13/] The Commission pointed out in the Aldrich case that a principal officer, director and stockholder of a registered broker-dealer has a duty to keep himself informed of the registrant's financial condition and to take those steps necessary to insure compliance with applicable regulations.

31. While many of the corporate officers, whose responsibility was adjudicated by the Commission in the cited cases, also held stock interests in a registrant, it is also clear from the Commission's decisions that it also stressed the obligation of those in a position to exercise control and supervision of the activities of a registrant to carry out their function and not to remain quiescent and rely on others. While the record does establish that Vernell was not intended to have an active voice in the affairs of the registrant, he did assume the positions of officer and director and, in effect, made no effort to see to it that the registrant adhered to its statutory obligations. In fact, he testified that he made no effort to learn the extent of these responsibilities even

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13/ Aldrich, Scott & Co., Inc., 40 S.E.C. 775, 778 (1961). See also John T. Pollard & Co., Inc., 594, 598 (1958); Alan Russell Securities, Inc., 38 S.E.C. 599, 601 (1958); Lucyle Hollander Feigin, 40 S.E.C. 594, 596 (1961).

though he was aware that the other individual participants in the registrant's activities had less knowledge than he had of this subject. Under these circumstances it is concluded that under applicable decisions it must be held that Vernell aided and abetted violations of the registrant set forth above.

C. Violations by registrant during the period September 14, 1961 to October 31, 1961

32. According to the evidence, the registrant was inactive from approximately July, 1959 until September, 1961. Vernell testified that in September, 1961 he became interested in entering the brokerage business because of the possibility of securing some underwritings and also as a result of his having discussions with Benjamin J. Merkle in which Merkle assured him that he could bring in substantial business to a brokerage firm. Vernell spoke to Menaker and Pierce and they agreed to turn over their stock in the registrant to him for no consideration in view of the fact that the registrant was a dormant company and also because of past favors Vernell had done for them.

33. Vernell stated that he was under the impression that the registration of the registrant with this Commission had lapsed just as its registration with the NASD and the Florida Securities Commission had expired. On September 11, 1961 he wrote the Commission as follows:

> "Please be advised that the above captioned corporation, having been inactive for approximately one year, is contemplating the resumption of its business in accordance with its prior registration with your commission, and, accordingly, we would appreciate your advising us as to what forms, if any, will be needed, along with instructions for the same." (Div. Ex. 8)

He also amended the charter of the registrant to permit it to deal in over-the-counter securities. Vernell further testified that he did not intend to activate the registrant until the registration with the NASD and the Florida Securities Commission, which he applied for, became effective. Nevertheless, when Merkle told him on or about September 19 that he had rented offices for the registrant, Vernell did not object and reimbursed him for various expenses as well as advances on future earnings to the extent of approximately $650. About two or three weeks later, Merkle told Vernell that he had met William R. Bowman, whom he recommended highly. Merkle introduced Vernell to Bowman and Vernell agreed that Bowman could be part of the organization. Vernell deposited $1,500 in a bank account and gave Bowman authority to issue checks.

34. According to Vernell, he only visited the new offices of the company at 855 East 41st Street, Hialeah, Florida once before October 31. On September 25, 1961, he forwarded to the Commission an application which was treated as an amendment to the original registration of the registrant. In this amendment it was stated "Applicant was previously registered, however, failed to renew its license and is presently seeking to reinstate the same and/or cause the issuance of a new license". Vernell was listed as president and director of the registrant; Menaker, as vice-president and treasurer; and Pierce as secretary-treasurer and director. Vernell testified that he in effect changed positions with Menaker although no formal record of this change is contained in the corporate minutes of the registrant. When Menaker and Pierce turned over their stock to Vernell, it was agreed that they would not take an active part in the business.

Pierce is listed as having formally resigned as of November 10, 1961 (Div. Ex. 9). There is no similar record for Menaker. The amendment also lists Vernell as the owner of 10% or more of the equity security of the registrant.

35. Vernell testified that about October 30 he learned from Bowman that brokerage transactions had been carried on from the Hialeah office of the registrant, that Bowman had been issuing checks to Merkle at the latter's request, both from business funds and customers accounts and that more money was needed. It was at that point Vernell testified that he took time from a busy law practice to take an active interest in the affairs of the registrant.

1. Failure to correct information in the application for registration

36. It is alleged in the order for this proceeding that during the period above described, Merkle performed functions for the registrant similar to those of an officer and director or person in control of a business and that the registrant failed to file an amendment to its application for broker-dealer registration reflecting this circumstance.

37. The Division presented evidence from one of its investigators who testified that Bowman told him that he had actually been hired by Merkle, who was the man who was running the company and who gave him instructions (Tr. 50-51, 60). Vernell also stated that Merkle submitted names to him of persons interested in becoming salesmen for the registrant (Tr. 127). The Division urges that Merkle was actually in control of the business of the registrant and an appropriate amendment should have been filed and that since no amendment concededly was filed, the registrant willfully violated applicable rules.

38. It is urged in opposition to this contention that Merkle was never an officer or director of the registrant nor was it ever intended that he become one but that instead, he would be a salesman (Tr. 120-121). Vernell also pointed out that not only did he not acquiesce in Merkle's taking money from the business but that he actually brought criminal proceedings against him on the charge of obtaining money under false pretenses. It is also pointed out that the right to issue checks was given not to Merkle but to Bowman. Bowman received a salary but Merkle did not (Tr. 228).

39. It is evident that Merkle had a dominant voice in the operations of the registrant at its new premises. Vernell concededly did not exercise any supervision over activities taking place there and in fact did not know, on his own testimony, until October 30 that stock transactions had taken place and that customers' funds had been misappropriated. Bowman apparently took orders from Merkle as to what checks should be issued to the latter. However, the undersigned credits Vernell's testimony that he did not place Merkle in charge of operations of the registrant. Even though it could be said that Merkle did exercise control, the undersigned concludes that the amendment provisions are applicable only where control is deliberately given to a person or there is conscious acquiescence in the assumption of control by a third person. In this case, the officers and directors did not know of Merkle's activities. Under those circumstances, there could not be an obligation to file an amendment. Even if a technical violation could be chargeable in this instance to registrant, the evidence does not establish that Vernell or Merkle, who had no official position in the management of the registrant, caused the registrant to fail to file

an appropriate amendment.

2. Failure to make and keep current proper books and records

38. On December 3, 1961, a securities investigator employed by the Commission visited the offices of the registrant which, by that time had been moved to Miami Beach, Florida (without the filing of an appropriate amendment) and proceeded to inspect the registrant's books and records. He testified that he was shown a cash receipts and disbursements journal and file folders with copies of confirmations. No other records were presented to him. The failure of the registrant to maintain a general ledger, the required special accounts, a position record, and a stock blotter, was violative of the record-keeping requirements set forth in a previous section of this decision. In addition, the investigator found that the records that did exist were not kept current and were inaccurate.

39. The investigator's testimony as to the condition of the books and records at the time of his inspection is unchallenged. There is no evidence that any other records were maintained in the September-October, 1961 period other than was shown to the investigator in December. Under these circumstances, the undersigned concludes that the weight of the evidence supports the contention of the Division as to the condition of the books and records of the registrant. It is concluded that the registrant in these respects willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3. It is further found that Merkle, who assumed a dominant role on the staff of the registrant during the period when trading commenced caused the registrant to fail to make and keep current proper books and records.

40. Vernell contends that he was charged with the responsibility only from the period September 14, 1961 to October 31, 1961 and that no inspection was made during that period but only substantially afterwards. He further points out that at the time of the inspection he was no longer in control of the registrant, as will appear subsequently, and that the investigator did not confer with him, but with his successors. He also urges that he did not at any time participate or take part in any of the transactions of the business.

41. During the period in question, Vernell had assumed the presidency of the registrant and owned all its outstanding stock. As previously pointed out, a person in such a controlling position cannot avoid responsibility for the operations of a registrant by failing to give careful attention to the conduct of its affairs. Vernell, admittedly, made only one visit to the offices of the registrant from the time it was reactivated until October 31, 1961. While he testified that he did not expect that any transactions would be effected on behalf of the registrant until its registration with the NASD and the Florida Securities Commission became effective, he nevertheless knew and was a party to the establishment of its offices, the deposit of $1,500 to the credit of the registrant on which Bowman could draw checks, and he had further knowledge that several individuals were at the offices of the registrant. The evidence establishes that he did not give clear instructions that no business whatsoever was to be conducted until further word from him nor did he take effective action to see that no business was conducted. Under these circumstances and in view of Commission's decisions heretofore cited, the undersigned concludes that Vernell caused the registrant to fail to make and keep current books and

records required by its operation.

3. Violation of the net capital requirements of the Exchange Act and effecting securities transactions while insolvent

42. It is clear from Vernell's own testimony that on October 30, 1961 he learned from Bowman that the checking account he had established to meet the obligations of the registrant had been depleted, that customers' funds had been used to meet the obligations of the registrant, and that it was insolvent and unable to meet its debts. Bowman had only told this to Vernell, he also admitted it to Commission investigators (Tr. 50-51, 128-131, 212).

43. This evidence and the admission contained therein establishes violations of the Commission's net capital rule, Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.[14/] For the reasons set forth in the prior sections herein, the undersigned also finds that Vernell and Merkle caused the registrant to commit this violation.

44. It is further found that the registrant violated the anti-fraud provisions of the Securities Acts and applicable rules thereunder by dealing with customers when it was insolvent and unable to meet its liabilities and that Vernell and Merkle caused the registrant to commit these violations.[15/]

14/ The mails were used in the registrant's transactions with customers.

15/ By engaging in the securities business a registrant represents to its customers that it is solvent and able to discharge its liabilities. A misrepresentation of its ability to do so constitutes a violation of the anti-fraud provisions of the Securities Acts. Thompson & Sloan, Inc., 40 S.E.C. 451, 454 (1961); John D. Ferris, 39 S.E.C. 116, 119 (1959); Milton R. Aronson, 39 S.E.C. 839, 841 (1960); Filosa Securities Company, 39 S.E.C. 896, 898 (1960).

D. Violations by registrant during the period October 31, 1961 through December 18, 1961

45. On October 31, 1961, Vernell went to the premises of the registrant after being informed by Bowman that it was in financial difficulties and learned in detail for the first time what had taken place in the conduct of the business.

46. Vernell testified that he told Bowman that he did not want to have anything to do with the active conduct of the business. He tendered his resignation as president at that time and appointed Bowman in his place. Vernell testified that he was anxious to see that the customers of the business were taken care of. Bowman told him that Edward H. Jansen was interested in taking over the business. Vernell agreed to sell him a majority corporate interest in the business for $5,000. Later this arrangement was modified so that Jansen received all of Vernell's stock in exchange for making a cash contribution of $3,900 to the registrant. This investment was carried on the books of the registrant as a loan (Div. Ex. 9, Tr. 215-217). Vernell was supposed to get $500 for himself but never did collect this money from Jansen.

47. From the time of this transaction, on or about November 10, 1961 Vernell's direct connection with the registrant ceased. Jansen took full charge of the registrant's operations, assisted by Bowman. Merkle, by that time, had no connection with it. Jansen became secretary-treasurer and director according to minutes of the registrant of November 10, 1961 (Div. Ex. 9). On November 24, 1961 an amendment of the registrant's certificate of incorporation was executed changing the name of the registrant

to E. H. Jansen Company. It was filed with the Secretary of State of Florida on November 27, 1961. The stockholders and directors were listed as Bowman, Jansen and Edward O. Ashton.

1. Failure to correct information in application for registration

48. The last amendment received by the Commission from the registrant was dated September 25, 1961. It was filed by Vernell on reactivation of the registrant and reflects his acquisition of a controlling interest in, as well as his assumption of, the presidency of the registrant. No amendment was ever filed with the Commission evidencing the changes which occurred when Jansen took control of the registrant. No report was ever made that Bowman and Jansen had become officers and directors of the registrant; that Jansen owned 10% or more of registrant's common stock; and that registrant changed its name to E. H. Jansen Company. Such failure constituted a willful violation of the registration amendment requirements, and Bowman and Jansen, officers and persons in control of the operations of the registrant, aided and abetted registrant in such violation.

2. Violation of the net capital requirements of the Exchange Act and effecting securities transactions while insolvent

49. A Commission investigator attempted to make an inspection of the registrant's books and records on December 3, 1961. He met with Bowman and Jansen, who told him of the changes which had been made in the organization of the registrant. The records presented to the investigator were incomplete and not up to date. However, the investigator could determine from the records submitted to him that as of the date of the inspection the company

had no capital since all the money in its accounts had been listed as loans, even funds received from customers (Tr. 53). He concluded that the company was then in violation of the net capital rule and also was insolvent and so informed Bowman and Jansen and the registrant's attorneys and accountant, with whom he conferred. His examination covered the period October 4 to November 30, 1961, the period covered by the cash receipts and disbursements journal shown him.[16/] The investigator was assured that the registrant would cease doing business until steps had been taken to correct the violations.

50. In January, 1962, Bowman submitted a new and different set of books to the investigator. It was evident from these records that the registrant had continued to do business at least until December 18. These records further reflected that the registrant had a substantial account with a member of the New York Stock Exchange and could not meet this obligation. Entries were still not up to date but the investigator determined that as of November 30, 1961 the company had a net capital deficit of $146.94. Subsequent entries in the books were not adequate to correct this deficiency.

51. An accountant on the Commission's staff examined the books and records of the registrant on December 29, 1961. From the records shown him, he made a determination of the registrant's financial position as of November 26, 1961. He determined that at that time the registrant's liabilities totaled $5,905.63 as against assets of $1,075.95 and that the

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16/ The mails were used in business transactions with customers.

registrant had, as of that date, a net capital deficiency of $4,199.68 and also was insolvent (Tr. 106-107). There were no entries in the books subsequent to November 26 which would have had the effect of correcting the insolvency.

52. It is concluded that the registrant, together with Bowman and Jansen, willfully violated the anti-fraud provisions of the Securities Acts and applicable rules thereunder by engaging in business while insolvent during the period mentioned above and that, in addition, the registrant willfully violated the net capital rule, aided and abetted by Bowman and Jansen, by effecting transactions in and inducing the sale and purchase of securities while its aggregate indebtedness exceeded 2000% of its net capital.[17/]

3. Failure to file report of financial condition as of the date within the calendar year 1961

53. On December 3, 1961 the Commission investigator, who made an inspection as of that date of the registrant's books and records, called to the attention of Bowman and Jansen the requirement for the filing of an annual report of financial condition and reminded them that no report had yet been filed for the year 1961 (Tr. 56-57). Despite this reminder no such report has ever been filed with the Commission (Div. Ex. 5).

54. It is concluded that the registrant's failure to file this report constituted a willful violation of the financial reporting requirements and it is further found that Bowman and Jansen aided and abetted

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17/ The mails were used in these transactions.

registrant in such willful violation.

III. RECOMMENDATIONS

It has been found that the registrant and the individual respondents named in the order for these proceedings violated the Securities Acts in the following respects:

A. Registrant willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-5 thereunder (the yearly financial reporting requirement), and Vernell, Menaker, Pierce, Bowman and Jansen caused, aided, abetted, counseled, commanded, induced and procured such violation by the registrant.

B. Registrant willfully violated Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-2 thereunder (the requirement to correct inaccuracies in broker-dealer registrations), and Menaker, Vernell, Pierce, Bowman and Jansen caused, aided, abetted, counseled, commanded, induced and procured such violation by the registrant.

C. Registrant willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder, (the record-keeping rule), and Vernell, Menaker, Pierce, Merkle, Bowman and Jansen caused, aided, abetted, counselled, commanded, induced and procured such violation by the registrant.

D. Registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder (the net capital requirements), and Vernell, Merkle, Bowman and Jansen caused, aided, abetted, counseled, commanded, induced and procured such violation by the registrant.

E. Registrant willfully violated Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 thereunder, and Vernell, Merkle, Bowman,

and Jansen caused, aided, abetted, counseled, commanded, induced and procured such violation by the registrant. Registrant, Vernell, Merkle, Bowman, and Jansen willfully violated Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder. Registrant, Vernell, Merkle, Bowman, and Jansen willfully violated Section 17(a) of the Securities Act of 1933, as amended (Securities Act). These are the so-called anti-fraud provisions of the Securities Acts.

All during its history the registrant was in serious violation of provisions of the Securities Acts and rules promulgated thereunder designed for the protection of investors and the public interest. It is concluded that it is in the public interest to revoke the registration of the registrant and it is recommended that the Commission issue such an order.

The record indicates that the registrant is not now conducting business operations. Under those circumstances, it is not necessary or appropriate in the public interest or for the protection of investors to suspend the registration of the registrant. However, if evidence is presented to the Commission that attempts are being made to carry on broker-dealer operations by the registrant, it is recommended that an order of suspension be issued.

Among the many violations committed by the registrant during the periods involved in the order for these proceedings, those which carried the greatest risk of loss to investors were those committed when Benjamin J. Merkle, Edward H. Jansen, and William R. Bowman were in active control of the operations of the registrant. It was during those periods that

transactions were carried on when the registrant was in violation of the net capital rule, the anti-fraud provisions of the Securities Act, and the record-keeping rule. In view of the nature and extent of the violations in which these individual respondents were the chief participants, it is recommended that within the meaning of Section 15A(b)(4) of the Exchange Act, the Commission should find that these respondents are each a cause of the order of revocation which it is recommended be entered herein.

While it was under the active control of Stanford Pierce and Gerald M. Menaker, the ~~respondents~~ registrant carried on very limited operations. It had approximately 14 transactions in mutual funds. There were no problems in connection with these sales or as to the financial stability of the registrant during that period. Without condoning the violations committed by these individuals which have been set forth in a previous section, it is recommended that under all the circumstances herein Menaker and Pierce be not found causes of the order of revocation recommended herein.

Vernell had been associated with the registrant for a longer period than Pierce and Menaker and especially during the period when operations directed by Merkle and Bowman caused the registrant to be in financial difficulties and unable to meet its obligations to customers. It is urged on his behalf that it was never intended that he have an active interest in the registrant during its early period when Pierce and Menaker were in charge of its operations and in fact he did not have a voice in the business then. It is also contended that during the period when Merkle and Bowman commenced active operations of the business of the registrant, this was done without Vernell's knowledge and that when he learned about it he immediately took

steps both to disassociate himself from its operations and to bring in new capital so that customers would not suffer any loss. In this connection, it is pointed out that not only did Vernell sacrifice his original $1,500 investment in the registrant but that when he learned from staff members of the Commission that some customers were still not made whole, he paid approximately $2,000 to these customers out of his own funds regardless of whether or not he was technically liable to them (Tr. 98-99, 140-141, 219). In view of all the circumstances of Vernell's participation in the violations committed by registrant, the undersigned recommends that Vernell not be named a cause of the order of revocation which it is recommended be issued herein. 18/

Respectfully submitted,

Sidney L. Feiler
Hearing Examiner

Washington, D. C.

March 27, 1964.

18/ Battery Securities Corporation, 38 S.E.C. 89 (1957).

All contentions and proposed findings submitted by the parties have been carefully considered. This recommended decision incorporates those which have been accepted and found necessary for incorporation herein.