ADMINISTRATIVE PROCEEDING
FILE NO. 3-4976

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

JOHN P. DECKER :

(The Forum Corporation) :

DEC 6 1977

INITIAL DECISION

Washington, D.C.
December 5, 1977

Max O. Regensteiner
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4976

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
JOHN P. DECKER	:	INITIAL DECISION
(The Forum Corporation)	:	
	:	

APPEARANCES: John E. Jones and Thomas E. Boyle, of the Commission's Denver Regional Office, for the Division of Enforcement.

Lester R. Woodward and James T. Bunch, of Davis, Graham & Stubbs, for John P. Decker.

BEFORE: Max O. Regensteiner, Administrative Law Judge

In these public proceedings pursuant to Section 9(b) of the Investment Company Act and Sections 203(e) and (f) of the Investment Advisers Act, the issues for consideration are whether John P. Decker ("respondent") engaged in misconduct as alleged by the Division of Enforcement and, if so, what if any remedial action is appropriate in the public interest.[1/]

The Division's allegations pertain to the two-year period beginning about September 1972, during which respondent was portfolio manager and an officer of The One Hundred Fund, Inc. ("the Fund"), a registered open-end investment company, as well as an officer of The Forum Corporation ("Forum"), the Fund's investment adviser. Respondent is charged with causing Forum and Forum Investment Counsel, Inc. ("FIC"), a wholly owned subsidiary of Forum and like Forum a registered investment adviser, to accept compensation from Jesup & Lamont International, Ltd.

1/ The order for proceedings also named as respondents The Forum Corporation, Forum Investment Counsel, Inc., John I. Dickerson, Jesup & Lamont, Inc. and Robert W. LaMorte. As to all but LaMorte, the proceedings were concluded on the basis of settlement offers accepted by the Commission. I dismissed the proceedings against LaMorte following conclusion of the Division's case. While the initial decision refers to certain of the former respondents, the findings are binding only on respondent Decker.

The proceedings were also instituted under Section 15(b) of the Securities Exchange Act. Presumably this is attributable to the fact that the original respondents included a registered broker-dealer and a person associated with it. Respondent Decker, however, was not associated with a broker or dealer at the time of the alleged violations and is not presently so associated. And the record does not show that he is seeking to become so associated. Hence the Exchange Act sanctions proposed by the Division cannot be imposed on him even if violations are found. See Section 15(b)(6) of the Exchange Act.

("J&L Int.") for the purchase and sale of Fund property, in violation of Section 17(e)(1) of the Investment Company Act. The Division further alleges that respondent willfully violated and willfully aided and abetted violations of anti-fraud provisions of the Securities Act and Securities Exchange Act by making and causing the Fund to make false and misleading statements in the Fund's propectus concerning the allocation of its brokerage business. Finally, it is alleged that respondent willfully aided and abetted violations by Forum of antifraud provisions of the Advisers Act involving Forum's activities as the Fund's investment adviser and the course of conduct described in the other allegations.

Following hearings, the parties filed proposed findings and conclusions and supporting briefs, and the Division filed a reply brief. The findings and conclusions herein are based on the record and on observation of the witnesses' demeanor.

The Respondent

Respondent, who is 39 years old, received a master's degree in finance from the University of California in 1965. During the next several years, he was employed principally as a securities analyst and portfolio manager. In August 1972, he joined the Forum organization. As noted, Forum was the Fund's investment adviser. Forum and two subsidiaries were also investment advisers to three other mutual funds. Those funds were far smaller than the Fund, which as of September 1972 had net assets

of about $43 million. FIC managed a handful of individual accounts.

Respondent's original position with Forum was as chief investment officer. On September 1, 1972, the Fund terminated an agreement with a sub-investment adviser which had been managing its portfolio, and respondent become portfolio manager of the Fund and of one other of the Forum-managed funds. In that capacity, he was responsible both for making the investment decisions and for selecting brokers and dealers to execute the funds' portfolio transactions. At about the same time, respondent also became vice-president and a director of Forum and FIC and vice-president of the Fund. One F. Wallace Gage was then president of both Forum and the Fund and board chairman of FIC, and John I. Dickerson was executive vice-president of Forum, vice-president of the Fund and president of FIC. In June 1973, respondent succeeded Gage as president and a director of the Fund, and Dickerson became Forum's president. In August 1974, the Fund switched from Forum to another adviser; thereafter respondent was no longer the Fund's portfolio manager. A short time later, Forum and FIC ceased doing business.

<u>The Relationships Between the Forum and Jesup & Lamont Organizations</u>

At all times here relevant, Jesup & Lamont, Inc. ("J&L") or its predecessor partnership was a registered broker-dealer

with its principal office in New York City and was a member of the New York Stock Exchange and other stock exchanges. J&L Int., which (under a different name) had been the London, England subsidiary of another American brokerage firm, was acquired by J&L as a subsidiary in about June 1972. Like its parent firm, J&L Int. was engaged principally in the institutional brokerage business. It dealt only in securities traded in the American markets and executed all transactions through its parent company.

In September 1972, FIC and J&L Int. entered into an agreement pursuant to which FIC would provide certain research and investment advisory services to J&L Int. for one year for a fee of $25,000.[2/] At its expiration, the agreement was extended for another year at the same fee. In each case, the fee was paid in advance. It is the relationship, if any, between the $50,000 paid by J&L Int. to FIC and the brokerage business which respondent caused the Fund to give to J&L, J&L Int.'s parent company, on which this case largely hinges.

Forum and the Fund had used J&L as a broker for several years before respondent arrived on the scene. Beginning with the Fund's fiscal year ended September 30, 1969, and in each of the ensuing three fiscal years, J&L ranked between fifth and eighth among the recipients of Fund brokerage.[3/] During

---

2/ While the agreement was not signed by J&L Int. until October 5, 1972, it appears that the parties deemed it as in effect somewhat earlier. Nothing of consequence turns on the precise dates, if indeed there were such, when the agreement was in effect.

3/ In fiscal year 1969, J&L also had some transactions with the Fund in which it acted as principal. There were no such transactions in subsequent years.

the following two years, which roughly coincided with the existence of the FIC - J&L Int. agreement, commissions received by J&L from the Fund were substantially higher, both in absolute and relative terms. In each of those years, J&L ranked first among brokers in the amount of commissions received from the Fund.

Respondent contends that consideration of those statistics in isolation does not present a fair or accurate picture of the Forum - J&L relationship. His arguments to that effect will be discussed below. It is appropriate, however, to dispose of one related matter at this point. The Division seeks to attach significance to the fact that the Fund gave no brokerage business to J&L during its 1975 fiscal year, when the FIC - J&L Int. agreement was no longer in existence.[4/] It was stipulated, however, that because the Commission's staff had started the investigation which led to the instant proceedings the Fund was advised by counsel not to place any more portfolio brokerage business with J&L. This fact removes whatever significance the withdrawal of brokerage business from J&L might otherwise have and makes it unnecessary to deal with respondent's additional contention based on the fact that Forum was no longer the Fund's investment adviser in fiscal year 1975.

The Division's position, in summary, is that the "ostensible

4/ It is not clear from the record whether, as respondent states, J&L received no brokerage business at all from the Fund in that year or whether, as the Division states, it merely dropped out of the ranks of the top ten brokers.

sale" of advisory services to J&L Int. was in fact a facade and that, in reality, the $50,000 paid to the Forum organization[5/] represented a recapture by Forum from J&L of brokerage commissions on the Fund's portfolio transactions. Accordingly, the Division argues, Forum violated Section 17(e)(1) of the Investment Company Act which, as here pertinent, makes it unlawful for an affiliated person of a registered investment company, "acting as agent, to accept from any source any compensation . . . for the purchase or sale of any property to or for such registered company. . . , " and respondent caused such violation. The Division further urges that even if Forum's services were worth every cent paid for them, Section 17(e)(1) was nonetheless violated. Its theory is that acceptance of the payments from J&L Int. created conflicts of interest and a "potential of corruption" which in themselves were violative of that provision. Finally, the Division contends that the failure to disclose the relationships between Forum and J&L to actual and prospective Fund shareholders and to the Fund itself violated the designated antifraud provisions.

Respondent, on the other hand, asserts that the placement of brokerage with J&L and the Forum - J&L Int. agreement each represented a bona fide business relationship, and that the

---

5/ For purposes of simplification, and in recognition of economic realities, the discussion that follows for the most part does not distinguish between Forum and FIC, its wholly-owned subsidiary.

two were not linked as asserted by the Division. As to the proper interpretation of Section 17(e)(1), respondent contends that since the payments by J&L Int. constituted consideration for the services rendered to it, they could not be "compensation" for Fund brokerage business placed with J&L. He urges that nothing in the statute or its interpretations supports the Division's position that a violation occurred even if those services were worth what was paid for them. Respondent further contends that whether or not a violation of Section 17(e) is found, the Division has failed to prove essential elements of a violation of the antifraud provisions.

Interpretation of Section 17(e)(1)

In deciding upon the proper interpretation of Section 17(e)(1), I take my guidance principally from the Commission's recent decision in the *Steadman* case,[6/] which represents its latest thinking on the subject and sheds considerable light on the issues presented here. *Steadman* leads to the conclusions that the broader of the Division's positions is too far-reaching and that, on the other hand, respondent's interpretation of the statute is too narrow.

The Division, as noted, argues that an affiliated person's acceptance of a payment from a person with whom he deals on behalf of an investment company, by creating a "potential

---

6/ *Steadman Security Corporation*, Securities Exchange Act Release No. 13695 (June 29, 1977), 12 SEC Docket 1041.

of corruption," is sufficient in itself to violate Section 17(e)(1). The Steadman decision, however, indicates that something more is required. In that case, Mr. Steadman, through a wholly-owned company (SSC) and its subsidiaries, managed a group of mutual funds. He and SSC received loans from banks in which the funds kept their checking accounts. And one of SSC's subsidiaries, a broker-dealer, received portfolio brokerage business from certain of the banks. The Commission held that the loans and the brokerage business received from the banks were "compensation" within the meaning of Section 17(e)(1). It went on to hold, however, that aside from a certificate of deposit which one of the mutual funds bought from one of the banks, such compensation had no nexus with the purchase or sale of any investment company property, since the checking account balances were not "property," and the brokerage commissions had nothing to do with the mutual funds' portfolios. As to the certificate of deposit, which the Commission said was "property," it went on to hold:

> "However, it is not clear that the respondents received any illicit compensation for that purchase. It is true that Steadman owned this bank a large sum. And it is also true that his loan came due before the certificate was purchased. But the loan was extended before the certificate was purchased. The two transactions may well have been related to each other. But the record is not clear enough on this point to warrant an adverse finding." 7/

7/ 12 SEC Docket at 1054.

It is true that the Second Circuit's Deutsch decision,[8/] which the Division cites and quotes in support of its argument, contains language that supports the argument. However, I do not read that decision, taken as a whole, as holding that a relationship between the compensation and the purchase or sale of investment company property need not be shown,[9/] particularly since such a construction would seem to read out of the statute one of the elements of the violation. In any event, I accept as a governing principle the requirement laid down in Steadman that a nexus or relationship between the compensation and the purchase or sale of investment company property must be established.

On the other hand, Steadman is also inconsistent with respondent's argument that payments received by an affiliated person cannot constitute Section 17(e)(1) "compensation" unless the affiliate receives a clear benefit for which no other consideration can be found. In Steadman, it was argued that a loan made at prevailing interest rates in accordance with standard banking practices could not be "compensation" to the borrower, since it gave the borrower nothing but the duty to repay the loan with interest. The Commission disagreed, stating that loans are of economic benefit to those who receive them and are therefore "compensation."[10/] In further holding that the

---

8/ U.S. v. Deutsch, 451 F.2d 98 (1971), cert. denied 404 U.S. 1019 (1972).

9/ The Steadman decision does not refer to Deutsch.

10/ 12 SEC Docket at 1052. The Commission stated (n. 38) that its earlier decision in Imperial Financial Services, Inc., 42 S.E.C. 717 (1965) and specifically note 16 (p. 728) therein, on which respondent relies, was not to the contrary. To the effect that a loan, as a "thing of value," (continued)

brokerage business received by the Steadman affiliate from the banks was also "compensation," the Commission stated that it was fully cognizant of the fact, stressed by the respondents there, that the commissions represented payment for services actually rendered in executing transactions for the banks. 11/ These holdings clearly point to the conclusion that even if the services provided by Forum to J&L Int. were worth what was paid for them, the $50,000 received from J&L Int. nonetheless constituted "compensation" to Forum.

In the discussion that follows, I deal initially with the question whether Forum's services could be deemed by any reasonable standard to have a value to J&L Int. of $25,000 a year. Subsumed within that question is the question whether, as the Division urges, J&L Int. obtained or could have obtained such research services as it needed from its parent company and thus had no need of Forum's services. My conclusion on those questions is that the evidence does not support the Division's position. On the further question, whether a nexus or relationship nevertheless existed between the compensation to Forum and the brokerage allocated to J&L, I also find that the applicable standard of proof has not been satisfied.

10/ (Continued)
constitutes compensation under Section 17(e)(1), see also U.S. v. Blitz, 533 F.2d 1329, 1344-5 (C.A. 2, 1976), cert. denied, and U.S. v. Brashier, 548 F.2d 1315, 1328-9 (C.A. 9, 1976).

11/ 12 SEC Docket at 1052.

The findings made herein reflect application of the "clear and convincing evidence" standard, pursuant to the recent decision in Collins Securities Corp. v. S.E.C. (C.A.D.C., 1977). While the Court, in its opinion as amended, stated that it did not insist on that standard in other than fraud cases, the conduct charged here involves a breach of fiduciary duty akin to, if not a species of, fraud.

Nature and Value of Services Rendered to J&L Int.

The Forum - J&L Int. relationship had its genesis in discussions which took place in July 1972 between Gage, who as noted was then president of both Forum and the Fund, and Alfred Ulmer, J&L Int.'s managing director. Contact between the two had been established, at Gage's request, by a J&L partner whom Gage had known since college days. The record reveals little about the early discussions, since Gage died in 1975 and Ulmer's testimony, which was given during the staff's investigation, is not very informative on the point. However, correspondence leading up to the agreement is in the record.

In a letter to Gage of September 5, 1972, Ulmer stated that J&L Int. had foreign clients who invested in the U.S. market and for which it did money management work and that Forum's services as outlined by Gage could be very important to J&L Int. He further stated that the research approach of J&L, the parent company, emphasized special situations and was not comprehensive

enough for J&L Int.'s purposes, and that the latter therefore wanted to explore with Forum an arrangement whereby Forum would provide "portfolio strategy and investment advice" on a fee basis. In his testimony, Ulmer explained that what he needed was research covering a broad spectrum of major companies. Respondent, then a recent arrival on the Forum scene, wrote to Ulmer on September 6 concerning Forum's "investment/research process." He discussed sources of information, both external and internal, on which Forum based its "overall policy and market strategy" and its investment research approach. A few days later, respondent, while on a trip to New York, met with Ulmer, at Gage's direction, to discuss Forum's investment procedures and capabilities. According to Ulmer, respondent convinced him that Forum had coverage of a broad range of "big name companies" and would work hard to satisfy J&L Int.'s requirements. In a letter of September 11, 1972, Gage set out the terms of a one-year agreement under which Forum, for a fee of $25,000, would construct and maintain on a current basis lists of American securities deemed appropriate for inclusion in the portfolios of J&L Int.'s clients. With the approval of J&L, Ulmer signed the agreement on October 5, 1972. At its expiration, the contract was orally renewed for a second year, again with the parent firm's approval. Renewal followed discussions in London between Dickerson and J&L Int. personnel.

While the parties differ decidedly in their positions regarding the value of Forum's services, there is little disagreement as to the nature of those services even though it

proved impossible to assemble or reconstruct a complete file of the material furnished to J&L Int. or the inquiries and other communications from J&L Int. to Forum. By the time of the staff's investigation, both Forum's and J&L Int.'s pertinent files had been discarded.[12/] A personal file maintained by respondent, which included copies of some of the material sent to J&L Int. and covering letters for part of the remaining material, was still extant and was made part of the record herein. Lists of other items furnished and actual copies of yet others were also received in evidence by way of stipulation. In addition, the testimony of respondent, Dickerson and Ulmer deals in considerable detail with the nature and extent of Forum's services.

Based on the above sources, those services may be summarized as follows:

1. Forum made itself available to respond promptly to inquiries regarding particular securities and requests for recommendations of securities. According to Dickerson, "telex" inquiries from J&L Int. averaged about one per week and telephone conversations about one per month over the two-year period. Ulmer testified that when a client had an inquiry which J&L could not answer from information at hand, it would contact Forum, usually by telex. He stated that J&L Int. considered Forum its "basic research arm."

2. During the first year of the agreement, Forum furnished to J&L four research reports on specific securities, including

---

12/ There is no basis for drawing any unfavorable inferences from this fact. (continued)

buy recommendations, which were prepared by respondent exclusively for J&L Int.'s use. Respondent's characterization of these reports as being of the type addressed to an institutional rather than a retail audience appears to be justified. He testified that each report took about one to two weeks to prepare. No reports of this nature were furnished to J&L Int. during the second year of the agreement. Respondent explained that because of the bear market which persisted throughout that year it was not feasible to recommend equity investments.

3. Four research reports authored by Dickerson and dealing with general market or economic conditions were also transmitted to J&L Int. These reports, which were copyrighted by Forum, received wide circulation in the United States. J&L Int. was given exclusive distribution rights in Europe.

4. J&L Int. also received exclusive distribution rights in Europe for "View from the Forum," a quarterly copyrighted report published by Forum based on polls of 25-30 senior analysts (designated "The Advisory Forum") associated with research - oriented brokerage firms. Forum was able to obtain responses from those analysts, who would not normally exchange research information with their competitors, by preserving their anonymity. Each issue of the publication was based on the analysts' answers to a series of questions, many of which were

---

12/ (Continued)
The disposal of the files was explained to my satisfaction as attributable to office moves and to material becoming outdated.

submitted by the analysts themselves. Those questions covered a broad range, including such matters as expectations for economic and general market developments and rankings of industries in terms of a variety of characteristics, but did not deal with individual securities. Forum compiled, organized and commented on the results of the polls.

The View from the Forum was distributed to FIC's advisory clients, but was used principally as a marketing tool, i.e., in an effort to obtain more money management business for the Forum organization, and was also furnished to newspapers and magazines with a view to obtaining publicity. The conclusions reflected in View from the Forum were reported in the financial press.

5. On a weekly basis, Forum transmitted to J&L Int. a selection, out of the large number of institutional research reports which it constantly received from brokerage firms, of those reports which it deemed of interest to J&L Int. and its clientele.

6. Finally, Forum furnished J&L Int. with relative strength lists of securities. These included the so-called Forum 300, a universe of 300 common stocks selected by Forum for which one or more brokerage firms provided computer printouts showing a variety of data.

The Division's argument to the effect that the above services were worth little and certainly not $25,000 a year

rests essentially on the testimony of its principal expert witness, Samuel S. Stewart, Jr., an Associate Professor of Finance at the University of Utah.[13/] Professor Stewart, who has a Ph.D. degree in Finance from Stanford University, was employed as chief financial analyst of the Commission's Division of Investment Management (then Investment Management Regulation) during 1974 and 1975. In addition to that experience and his considerable experience in the academic world, he has been president since 1975 of an investment management firm and has done a great deal of consulting work in the areas of investment analysis and corporate finance. During his tenure on the Commission's staff, Stewart reviewed the material furnished to J&L Int., to the extent it was then available, with a view to determining whether this type of material was worth $25,000 a year. His conclusion, to which he adhered on the stand, was that it could be obtained for substantially less. He estimated that, on the high side, material of this nature could be obtained for $5,000 - $10,000 per year. Stewart further testified, however, that those figures were predicated on a much larger volume of material than that which had been made part of the record. That material, he stated, was worth at best $50-$60.

Professor Stewart's conclusions were based, however, not on the investment worth of the materials, nor on the quality of the analysis involved, areas in which his expertise is

---

13/ Professor Stewart was the only expert witness called by the Division in its direct case. In its rebuttal case, it called as an expert witness the branch manager of a New York Stock Exchange firm, but his testimony was limited to the question whether the research reports of one firm were available to another.

indisputable. Rather, they reflected his assessment of market value based on the manner in which Forum obtained or distributed material and on his understanding of distribution practices in the industry. Thus, he pointed out that Forum paid no cash for materials obtained from others and transmitted to J&L Int., and that materials originated by Forum were either distributed for free as a marketing tool, as in the case of View from the Forum, or like the research reports of others were of a type which in his opinion was readily available without cost. However, the testimony of respondent's three independent expert witnesses, who had a far broader range of experience in the actual operation of the brokerage and money management businesses, exposed certain basic flaws in Stewart's underlying assumptions. For example, their testimony shows to my satisfaction that during the relevant period institutional research reports prepared by broker-dealers, which were designed for and made available on a regular basis to institutions and money managers in return for "soft" dollars (i.e., brokerage commissions), were not available, on a routine basis, to competing brokerage firms.[14/] Thus, the research reports to which Forum as a money manager had access would not have been routinely available to J&L Int. or to its parent firm. And the fact that Forum paid

---

14/ The record indicates that through personal contacts, a firm would be able to get such reports form another firm on an occasional basis.

nothing for these and other materials transmitted to J&L Int. is of little consequence if they were both useful to and not directly obtainable by the latter. Moreover, as far as the record shows, Stewart failed to consider the services rendered by Forum in responding to J&L Int.'s specific inquiries. And he failed to give adequate consideration to the fact that the latter was given exclusive distribution rights to certain of the Forum - generated material, including particularly the View from the Forum. In this connection, Ulmer testified that J&L Int. regularly distributed that publication to a substantial number of European institutions, and that it proved to be a valuable "door-opener" which resulted in brokerage business for J&L Int. Each of respondent's expert witnesses stated that in his opinion the services provided to J&L Int. were worth at least $25,000.

The circumstances surrounding the service contracts under consideration, including the totality of the relationships between the Forum and J&L organizations, mandate that those contracts be viewed with a skeptical eye. Moreover, the record is less than satisfactory on the question of the usefulness of Forum's services to J&L Int., including the amount of business which the latter obtained through utilization of those services. However, even disregarding entirely the necessarily self-serving testimony of respondent and Dickerson concerning the value of such services, the record as it stands does not support a finding that they could not reasonably be considered

to be worth what was paid for them.[15/]

Remaining for consideration on this phase of the case is the Division's contention that J&L Int. had no need for Forum's services because it had available to it J&L's research capabilities which far exceeded those of Forum. It is undisputed that while J&L Int. had little if any research capacity of its own, it had access to, and in fact received, J&L's research product. Moreover, J&L's business was oriented toward providing research for institutional investors, and its research staff included a number of analysts with impressive credentials. In quantitative terms, J&L at various times had about triple Forum's three or four analysts. In qualitative terms, considering experience, positions held and professional certification, J&L's research capacity was also superior. And it is apparent that J&L could have produced (and likely did produce) the type of reports, both on specific securities and on general economic topics, which Forum generated internally and transmitted to J&L Int.

Notwithstanding these considerations, I cannot make the finding that Forum's services were unneeded and hence a facade. The key to this conclusion lies in the facts that in the European context it was important for J&L Int. to have access to research covering a broad spectrum of major American corporations, and that J&L's research was inadequate in that respect. The record

---

15/ Even Prof. Stewart conceded that it was not inconceivable to him that the Forum and J&L Int. personnel could have considered the services to be worth $25,000 a year.

shows that J&L's research coverage was relatively limited both as to industries and companies, and that its research product dealt mainly with special situations and in large part with smaller companies. And unlike J&L, which did not have routine access to the research produced by its competitors, Forum did have access to a broad range of the brokerage industry's research.

Allocation of Fund Brokerage to J&L

Reference has already been made to the increase in the Fund's brokerage business allocated to J&L, both in absolute and relative terms, during the Fund's fiscal years 1973 and 1974. Focusing first on the earlier of those years, and comparing it to the preceding year, commissions paid to J&L increased from $10,840 to $72,854. While total brokerage commissions also increased, from $329,490 to $567,447, the percentage received by J&L of total commissions paid by the Fund jumped from 3 to 13 and its rank among brokers executing transactions for the Fund from 8 to 1. In 1974, when total commissions declined sharply to $291,195, J&L received 19 percent of the total, or $54,339, and maintained its rank as number one.

Respondent points out that other brokerage firms also had dramatic increases in brokerage during fiscal year 1973. For example, Firm A, 16/ which was not among the Fund's top ten

16/ The identity of the other firms referred to in the text may be found in Div. Ex. 3 and Resp. Ex. A.

brokers in 1972 and thus could have received no more than $9,717 in commissions,[17/] jumped to $61,671 in 1973. If principal transactions with the Fund are also taken into account, then not only Firm A, but Firm B as well received a larger amount of business, and possibly a greater increase in business, from the Fund than did J&L which had no principal transactions with the Fund. Respondent testified, in this connection, that Forum used a one percent figure for commission equivalent on principal transactions, which according to him was conservative under industry standards. The Division argues that there is no justification for extrapolating some sort of mark-up for principal transactions and equating it with brokerage commissions. It is true, of course, as the Division points out, that a dealer selling from inventory or buying into inventory may sustain a loss on a particular transaction. But that is beside the point. It can fairly be assumed that by the act of selling or buying, a dealer signifies that he deems the transaction economically desirable.

The question remains, however, whether there was a relationship between the compensation that Forum received from J&L Int. and the indisputably substantial amount and high percentage of Fund brokerage commissions which were allocated to J&L. Absent

---

17/ The record does not show how much in commissions, if anything, Firm A actually received. The exhibits in the record reflect data reported by the Fund in its annual reports on Form N-1R. That form requires a listing of only the ten brokers receiving the largest amount of commissions.

some other and satisfactory explanation, the juxtaposition of the two would lead to the almost inescapable inference that one was related to the other. The explanation offered by respondent is as follows: Soon after he became the Fund's portfolio manager in September 1972, he began to restructure its portfolio, a common practice for a new portfolio manager. As a result of the volume of transactions which this process entailed, brokerage commissions in the Fund's 1973 fiscal year increased greatly over those paid in the prior year. As is also customary, respondent chose a largely different group of brokers than had been used previously. In order to get the best service for the Fund, which was small as institutional investors go, he concentrated the Fund's business in a handful of brokers, thus assuring that each of them would treat the Fund's transactions as those of an important customer. His selection of particular firms was designed to obtain a good mix of the different strengths of different broker-dealers. As to J&L, which to his knowledge had an excellent reputation and had previously been used by the Fund, it excelled in executing transactions on the floor of the New York Stock Exchange. Good execution of sizeable transactions in listed stocks in which the supply was relatively thin required continuous and good communication between respondent, who acted as the Fund's trader, and the brokerage firm's trader. In the case of J&L, excellent communication developed over a period of time. Respondent also allocated Fund brokerage to J&L in return for the research

and advisory services of Robert LaMorte, an economist associated with J&L, and to some extent for other J&L research. With respect to fiscal year 1974, in which J&L received a larger percentage of a much smaller amount of total commissions, respondent's explanation is that he had anticipated that the total would be considerably higher and that J&L's percentage would not be nearly as high. But as a result both of the bear market and net redemptions of Fund shares, the number of portfolio transactions proved to be less than expected. Finally, respondent denied that the fees paid to Forum by J&L Int. were a consideration in the allocation of the Fund's brokerage business.

Respondent's explanation, and his denial of a relationship between the service agreements and brokerage allocation, do not dispel the aura of suspicion that would inevitably surround a combination of relationships and transactions such as those found here. However, the explanation offered for the brokerage business given to J&L is not inherently implausible. I do not agree with the Division's assertion that the choice of a broker for the execution of transactions on the New York Stock Exchange must be viewed as a matter of indifference. The continuous dealings of the Fund with J&L for several years preceding respondent's association with Forum bespeak satisfaction with its execution services. Moreover, the Division concedes that during the period under consideration it was

reasonable to allocate $15,000 - $20,000 of Fund brokerage per year to J&L in return for research. Also to be noted is the fact that the other brokerage firms which received dramatic increases in brokerage in 1973 were given that business notwithstanding the absence of any collateral arrangement with Forum. Under all the circumstances, I cannot find that the relationship which under Steadman must be found for a violation of Section 17(e)(1) has been proven here by clear and convincing evidence. Hence, no basis exists for finding that respondent caused or aided and abetted a violation of that Section.

Alleged Violations of Antifraud Provisions

The Fund's prospectus of November 1, 1972 stated in substance that the primary consideration in the allocation of the Fund's brokerage business was obtaining the best combination of price and execution, and that, subject to that consideration, brokerage business could also be allocated to broker-dealers who furnished statistical and research information to the Fund and Forum. The Division contends that the failure to disclose the contractual arrangement between FIC and J&L Int. and the increased brokerage allocation to J&L rendered the prospectus materially false and misleading.

In view of my earlier findings to the effect that the nexus between that arrangement and the brokerage had not been established, the omission of disclosure concerning the

arrangement cannot be found to have made the statements concerning brokerage allocation false or misleading. The Division has another theory, however, bottomed on the Commission's findings in Steadman regarding nondisclosure of Mr. Steadman's practice of borrowing from banks in which he caused the funds managed by his organization to keep large sums in non-interest bearing accounts. The Commission said that it need not determine whether or not there was a link between the funds' deposits and the benefits to Steadman. The point was that reasonable investors could reasonably have deemed the banking relationships "corrupting," because they disabled Steadman from looking at the funds' checking accounts in a wholly disinterested way. Thus, they had implications for the character of the funds' management, and the failure to disclose them in the funds' prospectuses was a material omission.

The Division urges that the rationale of Steadman is applicable here, in that the service arrangement with J&L Int. was "corrupting" in nature by disabling respondent from considering brokerage allocation with only the Fund's best interest in mind. There is no need to determine whether this case is analogous to Steadman in that respect, however, because the "Steadman approach" is in my judgment not encompassed within the alleged antifraud violations. A reasonable reading of the allegations in the order for proceedings is that the prospectus was false and misleading in failing to disclose that

brokerage business was allocated in return for the compensation received by Forum. Nothing said by Division counsel at the prehearing conference (which preceded the Steadman decision) or in the course of the hearings (which were held subsequent to that decision) can be interpreted as putting respondent on notice that the Division deemed those allegations to have a broader scope.

ORDER

On the basis of the above findings and conclusions, 18/ IT IS ORDERED that the proceedings with respect to John P. Decker are hereby dismissed.

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 that rule, this initial decision shall become the final decision of the Commission as to each party which has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon him, 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

---

18/ All proposed findings and conclusions and contentions submitted by the parties have been considered. To the extent such proposals and contentions are consistent with this initial decision they are accepted.

Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Max O. Regensteiner
Administrative Law Judge

Washington, D.C.
December 5, 1977