ADMINISTRATIVE PROCEEDING
FILE NO. 3-4536

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
RICHARD JOHN MISHLEN MORRIS COHEN d/b/a MARSHALL COMPANY et al. (8-6420)

INITIAL DECISION

Washington, D.C.
January 15, 1976

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES: Lester Green for the Division of Enforcement

Burt L. Gusrae for Morris Cohen d/b/a Marshall Company

BEFORE: Ralph Hunter Tracy, Administrative Law Judge

This is a public proceeding instituted by Commission Order (Order) dated August 13, 1974 pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act) to determine whether the above named respondents, among others,[1/] committed various charged violations of the Securities Act of 1933 (Securities Act) and the Exchange Act, and regulations thereunder, as alleged by the Division of Enforcement (Division) and the remedial action, if any, that might be appropriate in the public interest.

The only respondents remaining in this proceeding against whom findings will be made in this decision are Morris Cohen (Cohen) and Marshall Company (Marshall or registrant) a brokerage firm of which Cohen is the sole proprietor. As to these respondents the Order alleges that during the period from about January 1971 to about December 1972 Cohen and Marshall Company wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by, among other things engaging in the following schemes and courses of conduct:

(a) establishing customer accounts at Marshall Company at the direction of Mishlen and effecting securities transactions in these accounts pursuant to the instructions of Mishlen without verifying these instructions with the customers of the accounts and without receiving a power of attorney from said customers;

1/ The order also sets forth charges against the following persons whose cases have been determined by the Commission as reflected in the Commission's respective releases as noted: Sidney Bertner William Carey Kennedy, Jr., and Joseph Marvin Weiner, Exchange Act Release No. 11185/January 16, 1975; Richard John Mishlen, Exchange Act Release No. 11582/August 8, 1975. During the course of the hearing offers of settlement were submitted by Sidney Betram Weinberg, Edward Hayton and the Hayton Corporation. Inasmuch as these offers have not been acted upon post hearing procedures with respect to those respondents have been held in abeyance.

(b) issuing Marshall Company checks for the cash balances in customer accounts payable to said customers of Mishlen and approving these checks for cashing by Mishlen without having received authorization from said customers; and

(c) exchanging customers' checks with Mishlen, wherein Mishlen customers' checks representing cash balances from other securities firms were exchanged for Marshall Company checks and approved for cashing by Cohen and tendered to Mishlen.

The Order alleges, also, that during the period from about January 1971 to about December 1972 Marshall Company wilfully violated and Cohen wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that Marshall Company failed to accurately make and keep current certain of its books and records.

Respondents Cohen and registrant were represented by counsel throughout the hearing. Proposed findings of fact and conclusions of law and supporting briefs were filed by all parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondents

Morris Cohen, d/b/a as Marshall Company has been registered as a broker-dealer with the Commission pursuant to Section 15(b) of the Exchange Act since March 1958, and has also been a member of the National Association of Securities Dealers (NASD) since that time. Registrant maintained offices at 150 Broadway, New York, New York.

Violations of the Antifraud Provisions

The Order charges that during the period from about January 1971 to about December 1972 Cohen and registrant wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[2/]

Background

Richard John Mishlen (Mishlen) one of the respondents charged in the order to have engaged in fraudulent conduct has admitted that he defrauded a number of his customers by converting their cash balances and securities at registrant. Mishlen established customer accounts at Marshall Company in order to defraud his customers and opened nominee accounts at that firm through which he purchased and sold securities in order to conceal activities which were in violation of the NASD rules and to avoid paying taxes on the profits made on these accounts.

2/ Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection: "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. . ." Section 17(a) contains analogous antifraud provisions.

During the pertinent period named in the order Mishlen was employed as a registered representative at Sartorious & Co., a member of the New York Stock Exchange. During the period in or around 1970-1972 when the stock market was depressed Mishlen's earnings declined and he began to dip into the accounts of his discretionary customers and misappropriated their cash and stock balances. He was unable to do this at Sartorious & Co., which forbade registered representatives from withdrawing their customers' balances. To get around these restrictions Mishlen opened accounts in the customers' names at Marshall. Thereafter, Mishlen withdrew the cash and sold off the securities from these accounts at Marshall by soliciting the assistance of Cohen, who simultaneously issued Marshall's checks on these accounts and approved these checks for cashing after Mishlen forged the names of the respective customers. Mishlen has acknowledged that he used this procedure to loot his customers' accounts.

These fraudulent activities were being perpetrated at Marshall Co. without the interested customers knowing or being advised that their names were being signed to checks and securities delivery and receipt slips at that firm. This practice enabled Mishlen to convert their cash and securities balances and use these assets for his own benefit.

The central issue in this case as it relates to Cohen is the manner in which he and his firm assisted and cooperated with Mishlen in defrauding customers of Mishlen for whom he opened accounts at registrant, and whether in fact these practices were in violation of the antifraud and books and records provisions of the federal securities laws.

Specifically the conduct engaged in by Cohen and registrant which enabled Mishlen to defraud his customers was as follows:

(a) Cohen established customer accounts at Marshall Company at the direction of Mishlen and effected securities transactions in these accounts on the basis of Mishlen's instructions without first verifying those instructions with the customer and without receiving an appropriate power of attorney;

(b) Cohen caused Marshall Company to issue its checks for the cash balances in customer accounts payable to these customers of Mishlen and approved these checks for cashing by Mishlen without first having received authorization from these customers; and

(c) Cohen exchanged customers' checks with Mishlen, wherein Mishlen would cause checks respresenting the cash balances of his customers' accounts at Mishlen's firm (Sartorious) to be transferred to Marshall Company for the account of that customer. Cohen would then issue a Marshall Company check for a similar amount and tender it to Mishlen who would forge the customers name and return it to Cohen who approved the check for cashing, with Mishlen receiving the funds.

The Reciprocal Commission Agreement Between Cohen and Mishlen

Mishlen was employed as a securities salesman from July 1964 through February 1970 at Dishy, Easton & Co., a member of the American Stock Exchange; at Sartorius & Co., a New York and American Stock Exchange firm, from February 1970 through December 1971; and at Grenel & Co. from December 1971 until July 2, 1973.

Mishlen implemented a reciprocal commission kickback scheme which involved several over-the-counter houses, one of which was Marshall Company. The gist of the arrangement was that Mishlen would direct over-the-counter (OTC) business to these firms in exchange for listed business to his firm. If the balances from Mishlen's firm to an OTC firm became too disproportionate, the difference would be passed in cash at the end of the month. While there is evidence in the record that cash was in fact passed, Marshall Company is not shown as receiving any cash settlements from this reciprocal arrangement.

The reciprocal arrangement established with various brokers was that Mishlen would give the OTC broker 25% of the gross commission business that he received from them in listed business. During the years 1966-1972, Marshall Company participated in such an arrangement with Mishlen to share commissions, wherein OTC business would be directed to Marshall Company by Mishlen in exchange for Marshall Company's listed business.

Mishlen testified that he had conversations with Cohen about the commission kickback arrangement as early as 1966 when Cohen complained to Mishlen that he had not been paid some $4,000 which was owed to him from a brokerage firm for referred commission business. Mishlen testified that subsequently, a direct line was put in at Mishlen's firm to Marshall Company to conduct such reciprocal commission business. The reciprocal arrangement between Mishlen and Cohen was to reciprocate to Cohen 25% of

all of the listed business that Cohen referred to Mishlen, either by placing directed OTC business with Marshall Company or by paying the amount owed in cash, whichever was readily available.

Mishlen, for a time, kept records of commissions owed or owing to all brokers who particpated in this reciprocal commission agreement to determine whether or not it was profitable to remain on a cash payout basis or to engage in OTC reciprocal business only.

Subsequent to 1970, Mishlen did not maintain overall records of this reciprocal business and it became a broker-to-broker relationship. During the years, 1969-71, there was an imbalance in commission business flowing between Mishlen and Cohen, which was in Mishlen's favor, and because of this imbalance Cohen felt obligated towards Mishlen.

Mishlen opened nominee accounts at various brokerage firms in order to purchase and receive allocations of certain new issues of securities which were considered to be "hot issues". When placing orders for the purchase or sale of these new issues for his nominee accounts as well as his discretionary accounts, Mishlen would utilize those brokerage houses which were participating in the reciprocal commission arrangement. This included Marshall Company.

Nominee Accounts at Marshall Company

Mishlen testified that he used Cohen's firm to establish nominee accounts in furtherance of his stock deals. Mishlen testified about an elaborate scheme whereby he received blocks of new issues of securities from various broker-dealers and "backdoored" these issues by selling out these same securities at higher prices through nominee accounts at various firms, one of which was Marshall. The purpose of this tactic was for Mishlen to conceal his trades and his assocation with the initial purchases so that he could continue to do business with the underwriters in later offerings.

The record discloses that Mishlen opened at least five nominee accounts at Marshall Co., and that Cohen did not receive an order from any person except Mishlen for these accounts. In reviewing these accounts, there are numerous instances of instructions being given by Mishlen which resulted in securities purchases and sales, and funds being transferred. Further, Mishlen openly forged the names of several of his nominees on checks, which were drawn by Cohen at Marshall Co. pursuant to Mishlen's instructions, when Mishlen was in the offices of the firm. These checks were almost immediately endorsed by Cohen for cashing with Mishlen standing by awaiting the cash receipts. No customers appeared on the premises at any time. The record is replete with this course of conduct and the conclusion is inescapable that Cohen knew or should have known that Mishlen was forging his customers' signatures in order to obtain the funds from these accounts.

Discretionary Accounts at Marshall Company

Mishlen established several discretionary accounts at Marshall Company without Cohen contacting the customers or receiving any written powers of attorney. All transactions in these accounts were executed by Mishlen and Cohen did not question him about this practice. Perhaps the most egregious example of the violative activities by Mishlen and Cohen occurred in the Maybaum, Hollar and Casners' accounts.

Maybaum, an elderly restaurateur, who was unsophisticated in the ways of the stock market entrusted his portfolio to Mishlen and gave him discretion to manage the account. When pressed for money Mishlen transferred Maybaum's cash balances at Sartorius to Marshall so that he could funnel the cash out to meet his own expenses. In order to accomplish this Mishlen had to circumvent the back office rules at Sartorius which required that the customer receive the check by personally appearing and showing identification or that the check be made payable to the customer and sent to his address.

Mishlen got around this rule by directing the back office at Sartorius to send various checks to Marshall Company which were identified as being payable to Marshall Company for credit to Maybaum's account. When the checks were sent, usually by runner, Mishlen testified that he called Cohen to advise him of the transfer and requested that Cohen draw a Marshall Company check on Maybaum's account

for the equivalent amount sent over from Sartorius. Cohen drew the Marshall check on the account as requested and Mishlen soon after appeared at Marshall's offices alone. Mishlen took the check off to the side, endorsed Maybaum's name and moments later returned it to Cohen who endorsed "Ok to cash Morris Cohen" or simply "Morris Cohen" beneath the forged signature so that the check could be instantly cashed at Marshall's bank. Cohen gave the check to a runner or to Mishlen who cashed the check at the bank. By this method, Mishlen converted Maybaum's credit balances with Cohen's assistance. Cohen had never spoken with or met Maybaum or received his permission to make these disbursements. Nor had Cohen received a signed power of attorney from Maybaum that authorized either Cohen or Mishlen to handle his account. Maybaum testified that he did not authorize these transactions, sign the checks or have any knowledge of these disbursements.

Hollar's account was handled in the same manner as the Maybaum account at Marshall. The checks were forged and cashed by Mishlen at Marshall Company and no entries were posted by Cohen on Hollar's ledger for these transactions nor was Hollar notified of the disbursements.

In the Casner case Mishlen received an allocation of a "hot issue", Berkeley Bio-Engineering, which enabled him to receive a profit of $13,000 with no investment. The trades were placed by Mishlen through Miriam and Stanley Casner's accounts by having $5,000 transferred from their Sartorius accounts to Marshall Company for the purchase. Mishlen testified that he told Cohen to hold the confirmations and thereafter

sold the stock through Marshall Company. As was his practice, he asked Cohen for the Casner checks representing the profits. Mishlen forged the Casners' name and Cohen okayed them for cashing. Mishlen received the $13,000 profit. Subsequently Mishlen repaid the Casners by depositing $5,000 in the Casners' accounts at Marshall Company and had Cohen transfer the funds to Stanley Casner's account at Mishlen's firm, Sartorius.

Cohen takes the position that he did not knowingly aid and abet Mishlen's raiding of his customer's accounts. He argues that Marshall had no knowledge nor any indication that Mishlen was forging payees' endorsements on checks or using the proceeds for his own purposes. Cohen points out that Mishlen testified that he never told Marshall, nor did Marshall know the reason Mishlen caused credit balances to be transferred although Marshall issued checks in like amounts. Marshall accepted the Sartorious checks and issued Marshall checks in the names of Mishlen's customers with the belief that there was no subrosa or illegal activity involved. Cohen states that the record clearly indicates that Marshall's conduct was motivated by his (Cohen's) "faith" and "trust" in Mishlen; Marshall never had any knowledge that Mishlen was forging his customers' names to the receipts and checks. Whenever Mishlen came to Marshall's premises to pick up securities or checks the transfer and forgery occurred away from Cohen's presence. Cohen, in short, was never aware that such forgeries took place.

The Commission has long held that principals of a securities firm have a responsibility to exercise adequate supervision of the firm's activities so as to prevent violations of the securities laws.[3] A contrary rule "would encourage ethical irresponsibility by those who should be primarily responsible."[4]

A broker-dealer in securities, by virtue of the nature of the business, impliedly represents to all customers that he will deal with them fairly and in accordance with the standards of the profession, and that he will execute only such transactions on their behalf as are authorized. This implied representation is false where, as here, the broker-dealer effects transactions in customers accounts which were in fact not authorized.[5]

Here, where Cohen was the sole proprietor, he not only allowed transactions in customers accounts without their authority, he made no attempt to enforce the standards of the profession or the rules of practice followed in the industry. He testified that he was not aware of either the SEC or the NASD rules concerning discretionary accounts. By his indifference to his customers interests Cohen participated in their defrauding by Mishlen.

3/ Midland Securities Corp., 40 S.E.C. 635 at p. 639-40 (1958); Webb Securities, Inc., 38 S.E.C. 594, 597-98 (1958); Bond and Goodwin, Inc., 15 S.E.C. 584, 601 (1944); General Investing Corporation, 41 S.E.C. 952, 958 (1964).

4/ R. H. Johnson & Company v. S.E.C., 198 F. 2d 690, 696-97 (2nd Cir. 1952); cert. denied 344 U.S. 855 (1952).

5/ First Anchorage Corp., et al., 34 S.E.C. 299, 304 (1952); E. H. Rollins & Sons, Inc., 18 S.E.C. 347, 362 (1955).

It is found that Cohen and Marshall wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 6/

Bookkeeping Violations

The record establishes that during the period from about January 1971 to about December 1972, registrant, aided and abetted by Cohen, as charged in the Order, committed a number of violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by failing to maintain and to keep accurate and current certain books and records. 7/

In connection with the Casner account in which the transactions were really for the benefit of Mishlen and his associates, Marshall's customer account ledgers, memoranda of orders, confirmations, cash receipts and disbursement ledgers, stock position records, delivery tickets, and checks, failed to accurately record the beneficial owners. In addition, on several occasions Marshall's records incorrectly indicated that securities positions had been mailed out to customers when in fact they were picked up by Mishlen by forging their signatures.

6/ It is well established that a finding of wilfulness under Section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engaged in conduct which constituted a violation. Tager v. Securities and Exchange Commission, 344 F. 2d 5, 8 (C.A. 2, 1965); Dunhill Securities Corporation, 44 S.E.C. 472, 476.

7/ Section 17(a) of the Exchange Act, as pertinent here, requires brokers and dealers to make and keep current such books and records as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records which must be maintained and kept current.

In connection with the discretionary accounts of Casner, Maybaum and Hollar, all receipts of cash for these accounts from Sartorius, and disbursements of such cash to Mishlen from these accounts, were either not entered at all or entered falsely on Marshall's blotters and ledgers. Moreover, orders entered pursuant to the exercise of discretionary authority were not so indicated as required by Rule 17a-3(6). Hollar's and Maybaum's ledgers were not prepared for 1971 which ledgers should have reflected the receipts and disbursements of cash. In addition, no debit and credit notices were prepared for these transactions.

There is, also, evidence that the account card for one of the nominee accounts was prepared two years after the account was opened and backdated to 1966 by Mishlen and Cohen because of an NASD inspection. Additionally, no account card was on file for another nominee account.

Cohen does not seriously contend that either he or registrant did not violate the books and records provisions of the Exchange Act. In his brief he states that if it is determined that Marshall did in fact violate the securities laws, such violations, if they exist at all, must be limited to a failure to keep accurate books and records.

The Commission has repeatedly stressed the importance in the regulatory scheme for strict compliance with the requirement that books and records be kept current and in proper form.[8/] The requirement that records be kept embodies the requirement that such records be

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8/ "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": Olds & Company, 37 S.E.C. 23 (1956); Pennaluna & Company, Inc., 43 SEC 298.312 (1967).

true and correct.[9] Compliance with the rule relating to maintenance of books and records is regarded as an "unqualified statutory mandate" dictated by a broker-dealer's obligation to investors to conduct its securities business on a sound basis.[10]

It is found that Marshall wilfully violated and Cohen wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest with respect to the respondents who have been found to have committed certain violations as alleged in the Order.

The appropriate remedial action as to a particular respondent depends on the facts and circumstances applicable to him and cannot be measured precisely on the basis of action taken against other respondents,[11] particularly where, as here, the action respecting others is based on offers of settlement which the Commission deemed appropriate to accept.[12]

9/ Lowell Niebhur & Co., Inc., 18 S.E.C. 471, 475 (1945).

10/ Billings Associates, Inc., 43 S.E.C. 641, 649 (1967).

11/ See Dlugash v. SEC, 373 F. 2d 107, 110 (CA 2 1967).

12/ See Benjamin Werner, 44 S.E.C. 745, 748 (1971).

The violations found herein were serious and cannot be excused by lack of knowledge or understanding of pertinent requirements. Cohen not only placed customers funds and securities in jeopardy but disregarded important controls applicable to the conduct of the securities business. As the owner and principal officer of registrant Cohen was under a duty to use reasonable care to see to it that the everyday operations of the firm's business were properly performed.[13/] His protest that he did not know what Mishlen was doing is belied by the fact that the records he either falsified or failed to keep pertained to the very accounts in which the fraud was occurring.

Cohen has been disciplined by the NASD on 2 occasions. On February 7, 1972, he was suspended from the NASD for 5 days, censured and fined $500 for net capital deficiency. That order shows that in a previous action the NASD had censured and fined him for "free-riding" violations.

In view of the nature of the violations, the wilfull disregard of the rights of customers sought to be protected by the laws and regulations involved and the lack of any genuinely mitigating factors, it is concluded that the public interest requires that the registration of registrant be revoked and that Cohen be barred from association with a

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13/ Madison Management Corp., et al., 42 S.E.C. 390, 396, (1964); General Investing Corp., 41 S.E.C. 952, 958 (1964).

broker-dealer. However, it is believed that the public interest would not be endangered if Cohen was allowed to be employed by a broker-dealer in a supervised capacity after six (6) months.

ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of Marshall Company is revoked and the firm is expelled from membership in the NASD; and that Morris Cohen is barred from association with a broker-dealer, except that after a period of six (6) months from the effective date of this order, he may become associated with a registered broker-dealer in a non-supervisory capacity upon an appropriate showing to the staff of the Commission that he will be adequately supervised.

This order shall become effective in accordance with and subject to 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 who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own

initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 14/

Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
January 15, 1976

14/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected.