ADMINISTRATIVE PROCEEDING
FILE NO. 3-4352

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
GOTHAM SECURITIES CORP.	:
PETER CAPLIN	
AURRE & CO., INC.	:
AURRE MANAGEMENT CO., INC.	
GREGORY AURRE, JR.	:
	:

INITIAL DECISION

Washington, D.C.
May 16, 1975

David J. Markun
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4352

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
GOTHAM SECURITIES CORP. PETER CAPLIN AURRE & CO., INC. AURRE MANAGEMENT CO., INC. GREGORY AURRE, JR.	:	INITIAL DECISION

APPEARANCES: Donald N. Malawsky, Associate New York Regional Administrator for Enforcement, and Allan M. Lerner and Jacob J. Graber, Attorneys, New York Regional Office, with William D. Moran, New York Regional Administrator, Franklin D. Ormsten, Associate New York Regional Administrator, and Thomas E. Boccieri and Regina C. Mysliwiec, Attorneys, New York Regional Office, on the briefs, for the Division of Enforcement.

Marc N. Epstein, associated with Stanley R. Goldstein, New York, New York, for Respondents Gotham Securities Corp. and Peter Caplin.

James B. Zane and Bradley Ian Berger of Zane and Zane, New York, New York, for Respondents Aurre & Co., Inc., Aurre Management Co., Inc., and Gregory Aurre.

BEFORE: David J. Markun, Administrative Law Judge

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated September 20, 1973, ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") [1/] to determine whether various named respondents [2/] committed charged violations of antifraud provisions contained in Section 17(a) [3/] of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 [4/] thereunder and of the antimanipulative provisions of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 thereunder, [5/] to determine further whether various respondents failed reasonably to supervise persons subject to their supervision with a view to preventing their commission of violations alleged in the Order, and, lastly, to determine

---

1/ 15 U.S.C. §78o(b); 15 U.S.C. §78o—3.

2/ The Commission has issued findings and orders imposing remedial sanctions as respects two of the named respondents based upon offers of settlement and, as to a third, upon his default: Exchange Act Release No. 10621, January 30, 1974, 3 SEC Docket 455 George C. Bergleitner, Jr. (default); Exchange Act Release No. 10953, August 7, 1974, 4 SEC Docket 695, Joseph Milana; Exchange Act Release No. 11085, November 4, 1974, 5 SEC Docket 407, Mayflower Securities Co., Inc. Accordingly, this initial decision has no application to such respondents, although they will be mentioned herein because of their involvement with matters affecting Respondents who are the subject of this decision.

3/ 15 U.S.C. §77q(a).

4/ 15 U.S.C. §78j(b); 17 C.F.R. §240.10b—5.

5/ 15 U.S.C. §78o(c)(2); 17 C.F.R. §240.15c2—11.

the remedial action, if any, that might be appropriate in the public interest. The charges arise out of allegedly fraudulent and manipulative market-making activities in the common stock of Marcon Electronics Corp. ("Marcon"), a shell, and out of allegedly fraudulent solicited sales of such stock, during the period from about September 1, 1972 to about January 23, 1973 ("the relevant period").

The evidentiary hearing was held in New York, New York in March, 1974, after which proposed findings of fact, conclusions of law, and supporting briefs were filed by counsel for the Division of Enforcement ("Division") and Respondents Gotham Securities Corp. and Peter Caplin[6/] pursuant to 17 CFR 201.16 of the Commission's Rules of Practice. Counsel for the three Aurre Respondents did not file proposed findings, conclusions, or supporting brief, and his only appearance at the hearing was in connection with the call by the Division of Respondent Gregory Aurre as a witness.[7/]

The findings and conclusions herein are based upon the record and upon observation of the demeanor of the various witnesses. Preponderance of the evidence is the standard of proof applied.

6/ Caplin personally submitted a letter dated April 15, 1975, filed April 22, which has also been considered.

7/ After Aurre invoked his 5th Amendment privilege not to testify, a transcript of testimony given by him earlier to Commission investigators (Exhibit 32) was received in evidence as admissions against the Aurre Respondents, whose subsequent motion, supported by a memorandum of law, to rescind the receipt in evidence of such transcript, was denied. The Division's exhibits are numbered; those of Respondents are lettered.

FINDINGS OF FACT AND LAW

The Respondents

Respondent Gotham Securities Corp. ("Gotham"), a Delaware corporation, has been registered as a broker-dealer with the Commission pursuant to Section 15(b) of the Exchange Act since December 7, 1969, and was formerly[8/] a member of the National Association of Securities Dealers, Inc. ("NASD"), a national securities association within the meaning of Section 15A of the Exchange Act. Gotham's principal place of business was[9/] in New York, New York.

Respondent Peter Caplin ("Caplin"), 32, was during the period relevant to this proceeding president and sole owner of Gotham. During the relevant period he had overall supervisory responsibility at Gotham, including supervision over respondent George C. Bergleitner, Jr. ("Bergleitner"),[10/] the then primary trader at Gotham. Caplin holds a bachelor's degree in business administration from the University of Connecticut (1963) and an MBA from the Harvard Business School (1965). Prior to Gotham's formation in 1969, Caplin's prior work experience included employment as a Special Assistant to the Assistant Postmaster General, as a management specialist for Eastern Airlines, and as a Vice President of Continental Travel Limited. At Continental Travel he was responsible for developing new business ventures for the company and for assisting the president generally in running the company. Apart from his

---

8/ See page 53 below for circumstances under which Gotham was expelled from membership.

9/ Caplin's letter of 4-15-75 (see footnote 6 above) indicates Gotham ceased doing business in late 1974 and that Caplin is not presently in the securities business.

10/ See footnote 2 above.

formal employment, Caplin did venture capital work for a small number of companies prior to the incorporation and registration of Gotham, assisting the companies in private placements and in locating underwriters to take the companies public.

Respondent Aurre & Company, Inc. ("Aurre & Co."), incorporated in New York in July, 1969, became registered as a broker-dealer with the Commission under its original name (Alpha Resources Corp.) on July 22, 1970, and continued to be so registered during the relevant period. Its principal place of business is New York, New York. Its withdrawal as a broker-dealer, filed July 11, 1973, became effective on the 60th day thereafter. It was formerly a member of the NASD but has been expelled from membership. 11/

Respondent Aurre Management Co., Inc. ("Aurre Management") is a holding company with real estate interests and two subsidiaries in the securities business, one of which is Aurre & Co., a wholly-owned subsidiary of Aurre Management. The two firms officed at the same location during the relevant period.

Respondent Gregory Aurre, Jr., 26, is president and during the relevant period was a registered representative of Aurre & Co. He is president of Aurre Management, and he and his wife each own approximately 30% of the stock of Aurre Management.

Background Facts Respecting Gotham

Certain background facts respecting the formation and growth of Gotham and the nature of its business need to be set forth in order to put the charges against Gotham and Caplin and the findings relating thereto into perspective.

11/ See pp. 53-4 below.

Following its registration as a broker-dealer in late 1969, Gotham was engaged almost exclusively in underwritings and "seed capital" or venture capital activities until about Spring of 1972. Its only employees during that period were Caplin, his brother Joel, and a secretary shared with another business enterprise. The firm had no active retail brokerage business during that period, only occasional transactions involving friends, and did not make a market in any securities.

As Caplin testified, the new-issues market in the Spring of 1972 was "abominable", and he concluded that Gotham would have to expand and diversify its activities or close. In light of that economic imperative, Caplin concluded that what the firm needed was an experienced trader [12/] who would make a market for the firm in a number of stocks and a sufficient number of registered representatives [13/] to develop an active retail customer business. As of the time of the hearing Gotham included two principals (Caplin and his brother Joel), one principal trader, one secretary, eight full-time registered representatives, and about 14 part-time registered representatives.[14/]

12/ Caplin wanted an experienced trader, preferably one who had been a principal, partly because of his and his brother's lack of experience in trading.

13/ Caplin hired young, relatively inexperienced registered representatives, on the theory that they wouldn't be "all burned out" as a result of prior unhappy experiences in the market. Some were sent to training school and seminars were conducted for others.

14/ Gotham has been expelled from NASD membership (p. 53 below) and, according to Caplin's letter of April 15, 1975 (see footnote 6 above) the firm is now out of business.

Caplin found the experienced trader he wanted in George C. Bergleitner, Jr.,[15/] whom he interviewed extensively in August, 1972, and whom he had known earlier for about a year based upon joint involvement in an underwriting.

Bergleitner was employed as Gotham's trader from September 5, 1972 to February 2, 1973. Caplin employed Bergleitner notwithstanding Caplin's awareness that Bergleitner had experienced or was experiencing certain regulatory problems with the Commission. Thus, Bergleitner on April 21, 1971, on behalf of himself and M.J. Manchester and Co., Inc.[16/] had consented to a permanent injunction in U.S. District Court against violations of the antifraud, net-capital, and financial reporting provisions of various federal securities laws. Further, on December 10, 1971 Bergleitner had consented to a temporary restraining order issued by a U.S. District Judge restraining Bergleitner from violation of the registration and antifraud provisions of the federal securities laws in connection with the securities of Pied Piper Yacht Charters Corp. ("Pied Piper"). After learning that Bergleitner had a "mixed" reputation on the "street" (i.e. some people thought well of him and some didn't), after hearing from Bergleitner's attorney the view that there was no basis to the Pied Piper charges against Bergleitner, after hearing Bergleitner assert that he had done no wrong in the Pied Piper matter and that the Commission was merely raising the matter in order

---

15/ See footnote 2 above respecting Bergleitner's status as an original respondent named in this proceeding. Prior to his employment by Gotham, Bergleitner had had some 15 years of experience as a trader, having been employed by Coggeshall & Hicks, F.L. Salomon, A.T. Brod & Co., Weis, Voisin & Cannon, C.B. Richard, Ellis, and having also served as principal of G.L. Equities Corp. and M.J. Manchester & Co., Inc., his own broker-dealer firms that specialized in the trading of OTC securities.

16/ See next-preceding footnote.

to harass him, after noting that to that time the Commission had not instituted any administrative proceeding against Bergleitner growing out of either the Manchester injunction or the Pied Piper TRO, Caplin decided to employ Bergleitner as his major trader, though he also decided that the firm should institute strict supervisory procedures with respect to Bergleitner's trading activities, at least partly in light of his regulatory problems. Caplin made no effort to consult Commission personnel on the advisability of engaging Bergleitner or with respect to Bergleitner's charge that they were harassing him.

Bergleitner was hired primarily as a trader and secondarily because of his substantial retail production record. Bergleitner had, or had had, "thousands" of customers; at Gotham, he opened several hundred customer accounts. During his employment at Gotham, his production represented between 25% to 50% of the firm's activity.

Bergleitner wanted to trade 50 to 60 stocks, but Caplin restricted him to 20 to 30, though he allowed Bergleitner to select the 20 to 30 that would be traded. However, before Bergleitner could submit a quotation to the National Quotation Bureau, Inc. (the "pink sheets") on any given stock for the first time, Caplin personally had to approve trading the particular stock, and he did so only after personally examining the "due-diligence" file on the company. When Bergleitner first commenced trading on behalf of Gotham, Caplin went through all the due-diligence files of the stocks he approved for trading. Through his review of trading tickets (which was not on a specific daily, weekly, or other regular basis, but as time allowed) Caplin was aware on a continuing basis of the extent of activity in each of the stocks the firm was trading.

Background Facts Respecting Marcon

The charges in this proceeding concern market-making and transactions in the stock of Marcon Electronics Corporation ("Marcon"), a New Jersey company.

Marcon went public pursuant to a Regulation A offering of 30,000 shares in June, 1961. Insiders held about 120,000 shares, or some 80% of the stock, of the corporation. O. Lew Cohen ("Cohen"), who with his family held the inside shares, was the president, treasurer, and a director of the corporation.

Marcon's transfer agent had been the Franklin National Bank, but at some point, probably after Marcon's bankruptcy, it ceased being such and Marcon shares thereafter were traded "with notarials attached."

Marcon was a going concern prior to and subsequent to going public but went bankrupt under Chapter XI of the U.S. Bankruptcy Laws in or about October of 1968. Marcon's offices had been at 199 Devon Terrace, Carney, New Jersey, in a manufacturing building of the company, which building, together with all other assets of Marcon, was sold at public auction in January of 1969. Creditors received 27¢ on the dollar. Thus, at least by January, 1969, 199 Devon Terrace ceased being Marcon's address.

Shortly before the bankruptcy, towards the end of July, 1968, Cohen and his family sold off about 35,000 shares of Marcon under an arrangement that required him to resign as president and director. It is not clear from the record that new officers and directors were ever formally appointed or designated. Cohen and his family, in any event, continued to hold the largest single block of Marcon shares.

Marcon was discharged from bankruptcy in about mid 1970. The company's certificate of incorporation was revoked for nonpayment of state taxes by proclamation of the Governor dated February 8, 1971.

Following the sale of its assets to pay creditors and other obligations, Marcon was without any assets. There is no indication in the record that at any time thereafter any shareholder of Marcon or any other person infused any money or other assets into the firm, nor does it appear that there was ever any realistic or specific prospect that anyone would do so. Cohen regarded the possible sale of the Marcon shell as a "dead issue" because he had been informed casually by an attorney for whom Cohen then was working, who himself had a potential interest in the shell, that there was no possibility for merger or sale of the shell because "certain legal steps had not been taken at the proper time." While the record is not entirely clear in this respect, it appears that the advice given Cohen had reference to the fact that Marcon's certificate of incorporation had been revoked by New Jersey.

Notwithstanding Marcon's bankruptcy in about October of 1968 and the revocation of its certificate of incorporation on February 8, 1971, its stock continued to be traded in the OTC market until August 7, 1972 by, among others, G.L. Equities, Bergleitner's then firm. On August 7, 1972 G.L. Equities was the only firm in the sheets, at 1 3/4 bid, 2 1/4 ask. From that date until September 6, 1972, when Gotham (which by then had employed Bergleitner as its trader) commenced making a market in Marcon, no broker-dealer made a market in the stock.

Fraudulent and Manipulative Violations By Gotham and Caplin

Section IIA of the Order includes the Division's charges that Gotham, Bergleitner, Caplin and others during the relevant period wilfuly violated and wilfuly aided and abetted violations of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 17/ thereunder by, among other things, initiating a market for Marcon at an artificial price, by publishing prices for Marcon in the "pink sheets" published by the National Quotation Bureau, Inc. ("N.Q.B.") and otherwise quoting prices for Marcon that were fictitious, by maintaining and manipulating the market for Marcon common stock and effecting transactions therein intended to artificially influence the market price of Marcon and to create a false and misleading appearance of an active market for the stock, by selling Marcon stock in their possession to members of the public at prices that were arbitrary, and by failing to disclose to their purchasing customers that the Marcon securities they sold represented ownership in a non-existent corporation that (1) had gone through bankruptcy proceedings, (2) had had all of its

---

17/ 15 USC 77q(a); 15 USC 78j(b); 17CFR §240.10b-5. Rule 10b-5 provides as follows:

> Rule 10b-5. Employment of Manipulative and Deceptive Devices.
>
> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange
>
> (1) to employ any device, scheme, or artifice to defraud
> (2) to make any untrue statement of a material fact or to omit to state 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,
>
> in connection with the purchase or sale of any security.

assets distributed to creditors, (3) had had its corporate charter revoked by the state of incorporation, (4) had no real, corporate or legal existence, (5) had no officers, directors, or employees, (6) had no attorney-at-law or in fact, (7) had no transfer agent or registrar, and (8) had no value.

The Order includes a further charge in Section II B, somewhat interrelated with the already-mentioned charges of stock manipulation and failure to disclose material facts to purchasers, that during the relevant period Gotham, Caplin, and Bergleitner wilfuly violated or wilfuly aided and abetted violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 [18/] thereunder in that they, among other things, ". . . would

---

18/ 15 U.S.C. §78o(c)(2); 17 CFR §240.15c2—11. Rule 15c2-11 provides in pertinent part as follows:

Rule 15c2-11. Initiation or Resumption of Quotations Without Specified Information.

(a) It shall be a fraudulent, manipulative and deceptive practice within the meaning of Section 15(c)(2) of the Act, for a broker or dealer to publish any quotation for a security or, directly or indirectly to submit any such quotation for publication, in any quotation medium (as defined in this rule) unless:

* * * *

(4) Such broker or dealer has in his records, and shall make reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker or dealer, the following information (which shall be reasonably current in relation to the day the quotation is submitted), which he has no reasonable basis for believing is not true and correct or reasonably current, and which was obtained by him from sources which he has a reasonable basis for believing are reliable: (1) the exact name of the issuer and its predecessor (if any); (2) the address of its principal executive offices; (3) the state of incorporation, if it is a corporation; (4) the exact title and class of the security; (5) the par or stated value of the security; (6) the number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year; (7) the name and address of the transfer agent; (8) the nature of the issuer's business; (9) the

(continued)

and did:

"publish, or submit for publication, bid and offer quotations in an inter-dealer quotation medium for the common stock of Marcon at a time when respondents Gotham, Caplin and Bergleitner did not fulfill the requirements of Rule 15c2-11."

18/ (continued)
nature of products or services offered; (10) the nature and extent of the issuer's facilities; (11) the name of the chief executive officer and members of the board of directors; (12) the issuer's most recent balance sheet and profit and loss and retained earnings statements; (13) similar financial information for such part of the two preceding fiscal years the issuer or its predecessor has been in existence; (14) whether the broker or dealer or any associated person is affiliated, directly or indirectly with the issuer; (15) whether the quotation is being published or submitted on behalf of any other broker or dealer, and, if so, the name of such broker or dealer; and (16) whether the quotation is being submitted or published directly or indirectly on behalf of the issuer, or any director, officer or any person, directly or indirectly the beneficial owner of more than 10 per cent of the outstanding units or shares of any equity security of the issuer, and, if so, the name of such person, and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person. If such information is made available to others upon request pursuant to this subparagraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is true and correct, but shall constitute a representation by such broker or dealer that the information is reasonably current in relation to the day the quotation is submitted, that he has no reasonable basis for believing the information is not true and correct, and that the information was obtained from sources which he has a reasonable basis for believing are reliable.

* * * *

(d) For any security of an issuer included in paragraph (a)(4), the broker or dealer submitting the quotation shall furnish to the inter-dealer-quotation-system (as defined below), in such form as such system shall prescribe, at least 2 days before the quotation is published or submitted, the information regarding the security and the issuer which such broker or dealer is required to maintain pursuant to said paragraph (a)(4).

(e) For purposes of this rule:

(continued)

The Commission had expressed concern, and taken specific regulatory action, with respect to the special problems presented in connection with trading and soliciting the purchase of shares of shell corporations, i.e. companies having essentially no operations and little or no assets, well before the occurrence of the activity that forms the basis for the charges in this proceeding. Thus, in Exchange Act Release No. 8638 of July 2, 1969, the Commission cautioned broker-dealers:

> ". . . to be particularly mindful of their obligations under the registration and anti-fraud provisions of the Federal securities laws with respect to effecting transactions in [the securities of shell companies]. In this connection, where a broker or dealer receives an order to sell securities of a little-known, inactive issuer, or one with respect to which there is no current information except possibly unfounded rumors, care must be taken to obtain sufficient information about the issuer and the person desirous of effecting the trade in order to be reasonably assured that the proposed transaction complies with the applicable requirements. Moreover, before a broker or dealer induces or solicits a transaction he should make diligent inquiry concerning the issuer, in order to form a reasonable basis for his recommendation, and fully inform his customers of the information so obtained, or in the absence of any information, of that fact."

After this general release and similar hortatory releases relating to specific shell companies in which trading had been temporarily suspended failed sufficiently to stem the tide of unlawful trading in shell companies, the Commission after hearings promulgated Rule 15c2-11, effective December 13, 1971, designed specifically, yet comprehensively, to cope with the problem. As stated in Exchange Act Release No. 9310 of September 13, 1971, ". . . in general, Rule 15c2-11 prohibits the initiation or resumption of quotations respecting a security by a broker or dealer

---

18 / (continued)

(1) "Quotation medium" shall mean any "inter-dealer quotation system" or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

who lacks specified information concerning the security and the issuer."

Both Caplin and Bergleitner were well aware of the requirements of Rule 15c2-11. Caplin, in part because he was mindful of Bergleitner's regulatory problems with the Commission, had an attorney at law brief and instruct both Bergleitner and himself on the Rule's provisions before Gotham commenced market-making activities. Moreover, Bergleitner had been actively engaged in trading while the above-mentioned releases and Rule 15c2-11 were issued and being considered and was familiar with their background and development; Caplin, too, had been with Gotham since December, 1969, though the firm did not engage in trading until September 1972, when Bergleitner was hired as trader and to develop retail accounts.

The information available on Marcon at Gotham was the file that Bergleitner had collected in the course of his earlier trading of Marcon stock, before coming to Gotham. The file was woefully inadequate to meet the requirements of Rule 15c2-11, and both Bergleitner and Caplin knew, or had numerous reasons to know, that the file material was not reasonably current and that it was in material respects no longer accurate.

Thus, Gotham's "due-diligence" file on Marcon showed the Corporation's "principal executive offices" as 199 Devon Terrace, Kearney, New Jersey. The fact is that after the firm went bankrupt in 1968 and its assets were sold in January 1969, including the manufacturing building containing its offices, as both Bergleitner and Caplin knew, Marcon had no executive office, and certainly didn't have one at 199 Devon Terrace, Kearney, New Jersey, in September of 1972.

Likewise, Gotham's file on Marcon listed a well-known bank as Marcon's transfer agent. In fact, Marcon at the relevant times had no transfer agent and its shares were traded "with notarials attached," a fact which Bergleitner knew (based on his experience in trading the stock before coming to Gotham) and which Caplin knew or should have learned by pertinent inquiry of Bergleitner or other sources. There was no reasonable basis for Caplin to assume that the erstwhile transfer agent continued as such on behalf of a corporation discharged in bankruptcy, without assets, and with no known future prospects.[19/]

In addition, Gotham's file on Marcon showed O. Lew Cohen as its president, though in fact he had resigned as officer and director in the Summer of 1968. During the relevant period, so far as the record establishes, Marcon had no officers or directors — only shareholders. Bergleitner knew this from his attendance at a meeting in 1970 in New Jersey with Cohen and others designed to sound out Cohen's receptivity to an offer for the sale of his and his family's stock on behalf of potential buyers who might be interested in acquiring a clean shell,[20/] and Caplin knew or should have learned this since the circumstances were such as to prompt further inquiry at least of Bergleitner or, preferably, other sources, in light of Bergleitner's need for close supervision.[21/]

19/ The concept that given circumstances or knowledge of given facts may impose on a broker-dealer a duty to make diligent inquiry in order to prevent violations of securities laws has been recognized by numerous decisions: Dlugash v. S.E.C., 373 F.2d 107, 109 (C.A. 2, 1967); Berko v. S.E.C., 316 F.2d 137, 142-3 (C.A. 2, 1963); Barnett v. U.S., 319 F.2d 340, 343 (C.A. 8, 1963).

20/ Nothing came of this meeting or of subsequent efforts to contact Cohen for the reason, as already noted, that Cohen considered the possibility of selling the shell a "dead issue", evidently because its certificate of incorporation had been revoked.

21/ See pp. 7-8 above.

Another deficiency of great significance in Gotham's file on Marcon was that it contained no current balance sheets, profit and loss statements, or retained earnings (or deficit) statements. Bergleitner and Caplin both knew this, yet the former recommended, and the latter specifically approved, trading in Marcon. Caplin testified that he relied upon Bergleitner's assurances that a current balance sheet and related statements were not necessary in the case of a shell having no assets or business, since the figures would all be "zeroes". But Caplin knew better -- his field of expertise was corporate finance -- and he himself testified under cross-examination that the financial statements of corporations with neither assets nor business operations can nevertheless be of value to financial analysts by disclosing information such as capitalization, possible tax liabilities, notes regarding prior business operations, and the like.

Gotham's files on Marcon contained certain historical materials indicating that Marcon had been in the business of fabricating and selling various electronic devices, but contained no indication that Marcon had no current business or facilities, produced no product, and rendered no service. Moreover, although Caplin sought to justify attributing a value to Marcon's shares predicated on the possibility that its shares could be sold to someone interested in a clean shell with shares that were publicly tradeable, Gotham's files contained no indication that any such prospects realistically existed or any indication of the value that was being attributed to the mere possibility.

Perhaps most importantly, Gotham's file on Marcon failed to reveal that its certificate of incorporation had been revoked by the Governor of New Jersey by proclamation for nonpayment of taxes under New Jersey Statutes, Title 14A, Corporations, General, Chapter 12 (Dissolution), Section 14A:12--1 (Methods of Dissolution), subsection (1)(g). The effect of such dissolution, under New Jersey Statutes 14A:12--9 (Effect of Dissolution) was that, except as a court might otherwise direct, Marcon would continue its corporate existence but was prohibited from carrying on any business except for the limited purpose of winding up its affairs. Gotham's file on Marcon contained evidence that Bergleitner in November of 1971, prior to his coming to Gotham, had written the New Jersey authorities to inquire as to the status of Marcon, but when his inquiry was answered by a form letter indicating he'd have to pay a $2 search fee to obtain a response to his inquiry, he failed to follow up on it! In view of what both Bergleitner and Caplin knew about the inadequacies of the Gotham file on Marcon, they should clearly have instituted appropriate inquiries which, under all the circumstances should have included inquiries directed to appropriate New Jersey authorities.[22/] An adequate inquiry would have disclosed the highly significant fact that Marcon's certificate of incorporation had been revoked for nonpayment of taxes.[22a/]

22/ See footnote 19 above.

22a/ Respondents urge they had a right to rely on a ten-month-old November 1, 1971 Dun & Bradstreet Report that still showed Marcon's address as 199 Devon Terrace and on the fact that the State of New Jersey as of January 18, 1973, still listed that as the firm's address and that the two sources in other respects were not up-to-date. This is grasping at straws. As already found herein, if Respondents had made the inquiry they were obliged to make they would have found the relevant facts, including the vital fact that Marcon's certificate of incorporation had been revoked.

In view of the foregoing, it is concluded that Gotham wilfuly[23] violated, and Caplin and Bergleitner wilfuly aided and abetted violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11(a)(4) as well as Rule 15c2-11(d)[24] thereunder, by failing to have in the Gotham file on Marcon all of the information required by Rule 15c2-11(a)(4) and by failing to submit such information to the N.Q.B. prior to entering the pink sheets with their quotations on Marcon.

Bergleitner had traded Marcon since the mid-1960's. When his broker-dealer firm, G.L. Equities, collapsed in early August of 1972, it was the only firm making a market in Marcon. Thereafter, as already noted, there were no quotations for Marcon in the sheets for 29 consecutive days until Gotham appeared on September 6, 1972, with a quote of 1½ bid/2¼ ask. Gotham's commencement of market-making activity in the stock of Marcon was on Bergleitner's recommendation and after Caplin's express approval. Caplin asked Bergleitner why he wanted to trade Marcon, a shell, and was advised by Bergleitner that the primary reason for doing so was to create a market for the stock on behalf of former customers of Bergleitner who had earlier purchased the stock through Bergleitner or on his recommendation. Several of these former

---

23/ All that is required to support a finding of wilfulness is proof that a respondent acted intentionally in the sense that he was aware of what he was doing and either consciously, or in careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. Hanley v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (C.A. 2d, 1969); Nees v. Securities and Exchange Commission, 414 F.2d 211, 221 (C.A. 2d. 1969); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 109-10 (C.A. 2d. 1967); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A. 2d. 1965).

24/ See footnote 18 above for pertinent text of Rule 15c2-11. The N.Q.B., (continued)

customers were relatives of Bergleitner's.[25/]

Bergleitner and Caplin both knew that the price at which they entered the sheets on Marcon bore no relationship whatever to the business of or to the financial condition of the company. The price was set simply with reference to what Bergleitner had quoted some 30 days earlier when his then firm, G.L. Equities was the last broker-dealer in the sheets and on what the stock had traded for earlier. So far as appears from this record, neither Bergleitner nor Caplin made any meaningful check to ascertain what if any changes had occurred in the interim as respects Marcon. As already found above, had either done so, he would have discovered that Marcon was not only without assets or business activity but that its certificate of incorporation had been revoked by the State of New Jersey for nonpayment of taxes and that, in short, Marcon was a non-company except for purposes incident to its liquidation. Bergleitner represented to Caplin that the reason Marcon continued to be traded subsequent to its bankruptcy and its distribution to creditors of all its assets and the reason it continued to have "value" was that there was a possibility the ostensibly

---

(footnote 24 continued)

publisher of the "pink sheets", required a form 211 to be executed for all new issues and issues that had not appeared in the pink sheets at least 12 times during the preceding 30 calendar days or which failed to be quoted on more than 4 successive days. The record indicates that this requirement was not complied with, even though Marcon had not appeared in the pink sheets for 29 straight days prior to the entry of Gotham's quotes on September 6, 1972.

25/ During the relevant period Bergleitner sold for the accounts of his wife, his son, and his father-in-law a total of 3,253 shares, and purchased 318. This amounted to over 2/3 of all the Marcon stock sold by Gotham during the period.

"clean shell" could be sold to someone desiring to acquire it as a merger or acquisition vehicle in order to obtain public financing for a business. But the record does not indicate any relationship between that possibility and the prices at which Gotham went into the sheets on Marcon.[26] And in view of the considerable lapse of time since Marcon was last listed in the pink sheets, there was no reasonable basis for assuming that the previous quotations still bore a reasonable relationship to Marcon's business or to its financial condition, even assuming that under the known circumstances (i.e. that it was a bankrupt shell without assets or a business) it could be assumed that the month-earlier quotations properly represented market value as of that time. Thus, the prices that Gotham began entering for Marcon were arbitrary and fictitious.[27]

Caplin specifically authorized Bergleitner to solicit sales of Marcon, but he instructed him that sales solicitations would not be "active", by which he meant that solicitation was not to be done on a large scale, i.e. involving numerous customers, and that careful attention should be paid to the suitability of the investment for the particular customer solicited, bearing in mind the risky, "crap-shoot" nature of the

---

26/ In light of the revocation of Marcon's certificate of incorporation, that possibility was not at all realistic.

27/ The failure by a broker-dealer to disclose that he arbitrarily fixed and maintained prices is a violation of the antifraud provisions of the federal securities laws. R.L. Emacio & Co., Inc., et al., 35 S.E.C. 191, 200 (1953). And, more basically, the fixing of such arbitrary and fictitious prices was part of an overall manipulative and fraudulent scheme or course of conduct. S.E.C. v. Management Dynamics, Inc., ___ F.2d ___ , (C.A. 2, 1975) CCH Fed. Sec. L. Rep. ¶95,017, p. 97,562, 97,569.

security. Moreover, Caplin directed that no one customer be solicited for a "large" purchase, by which he meant in excess of a $1,000 purchase.

The restrictions and caveats imposed by Caplin on Bergleitner with respect to the solicitation of retail sales of Marcon stock demonstrate, as does the rest of the record, that Caplin was well aware of the highly speculative character of an investment in Marcon. But the record demonstrates more: in fact, there was no reasonable basis known to either Bergleitner or Caplin, or evident in this record, for recommending Marcon stock to any customer. Thus Caplin's express authorization for the solicitation of retail purchases of Marcon stock in the absence of such basis involved him pro tanto affirmatively (as distinct from a failure to supervise Bergleitner, discussed elsewhere herein) in the overall manipulative and fraudulent dealings in Marcon stock.

After re-initiating a market in Marcon stock on September 6, 1972 at 1½/2¼, Gotham for over two months, i.e. through November 9, 1972, was the only broker-dealer making a market in Marcon. The quotes rose to 2 bid/2½ ask during the last week of September and the first 12 days of October, but by November 9 had dropped back to 1½/2¼. Thereafter, beginning on November 10, 1972 and continuing through January 15, 1973, three other broker-dealers — Provident Securities ("Provident"), Mayflower Securities ("Mayflower"), and Aurre & Co. — made a market in Marcon during most of the period, and two other broker-dealers appeared briefly in the sheets,[28/] in addition to Gotham, which appeared on most

28/ Cowen and Company appeared only on November 14, 1972, and Morgan Kennedy appeared from January 3, 1973 to January 15, 1973.

trading days and last appeared (alone) on January 16, 1973. (See Exhibit 1). On January 23, 1973, the Commission suspended trading in Marcon, and no firm has made a market in the stock since.

During this period, while Gotham was joined by other market-makers, the quotations on Marcon rose (briefly) to a high of 4 bid/5 ask, and Gotham's last quote, on 1-16-73, was 3¼/4.

The record establishes that three of these other market-makers, i.e. Mayflower, Aurre & Co., and Provident, commenced making their markets in Marcon at the urging of Bergleitner. And, more importantly, the record establishes that Mayflower took its cues from Bergleitner as to the quotes it inserted for Marcon in the pink sheets.

During the relevant period Pericles Constantinou ("Constantinou") was president and a principal of Provident. Bergleitner, whom he had known since 1969, called him in the early part of November, 1972, to alert him to the advisability of Provident's making a market in Marcon, since "there should be some action coming in" on the stock. Bergleitner referred to his having earlier made some money on trading Fantastic Fudge, an underwriting Provident had handled, and said he was going to "return the favor" by recommending Marcon to Constantinou. Constantinou referred Bergleitner to Provident's trader, and Provident thereafter commenced making a market in Marcon. Bergleitner did not tell Constantinou anything about Marcon's status as a bankrupt shell or its financial condition, or, indeed, anything about the company.

Constantinou testified it was not uncommon for one broker-dealer to suggest to others that they make a market in a stock in which he is

making a market, since a larger number of broker-dealers in the sheets improves liquidity or at least gives the appearance of liquidity, and that it might bring in some of the larger houses if they saw numerous smaller dealers in a stock.

Joseph Milana ("Milana") was vice president in charge of trading at Mayflower during the relevant period, and a registered principal with the NASD. He first heard of Marcon when it was recommended to him by Bergleitner in October, 1972 as a good stock, one on which he could go into the sheets and make some money. In the course of recommending Marcon, Bergleitner did not tell Milana that Marcon was a shell that had been discharged in bankruptcy and that it had no assets. Bergleitner sent Milana copies of the out-of-date materials contained in Gotham's due-diligence file on Marcon, but this was not received until after Milana had already entered Mayflower in the sheets. In any event, Milana did not look at the "due-diligence" file on Marcon even after it was received until just before Mayflower ceased trading the stock.[29/] Milana's testimony, which is credited, was that he would not have traded Marcon had he been told it was a shell that had gone through bankruptcy and that it was without assets.

Mayflower's first transaction in Marcon was an agency trade involving Milana's purchase for his sister on November 10, 1972, of 300

29/ On January 11, 1973, a Commission investigator called at Mayflower's offices to check their file on Marcon, and it was then that Milana learned that the Marcon file material was not current. Mayflower thereupon ceased trading Marcon.

shares from Gotham, at 2¼. Again, Milana would not have made this purchase had he known the facts about Marcon.

Milana's quotations in the pink sheets on behalf of Mayflower were derived from Bergleitner. Milana testified that generally at the end of the day he would call Bergleitner about his intended quotes, and then he (Milana) would go into the sheets "the same way." Actually, examination of Exhibit 1 indicates that Mayflower's quotes did not always follow precisely those of Gotham, and were frequently somewhat higher than Gotham's. Thus, out of the 29 days on which Mayflower made a two-sided market on Marcon, it was high bid on twenty-two days or just over 75% of the time. It is concluded that this resulted from Bergleitner's desire to have some broker-dealer other than Gotham display price leadership in Marcon, though the record is not entirely clear in this respect. Nevertheless it is clear that Milana took his cue on bid/ask quotes for Marcon from Bergleitner.

It is further clear that Milana looked to Bergleitner generally as his source of supply for Marcon stock when he needed it. Thus, Milana's first principal trade was on November 22, 1972, with H. Hentz & Co. of Miami, Florida, whose trader, having been directed to Mayflower by Bergleitner, bid Mayflower for 1,000 shares of Marcon.[30/] Milana held the trader on the phone while he called Bergleitner to assure himself he could get the 1,000 shares of Marcon from Gotham and then made his sale to Hentz & Co. More generally, since Bergleitner had "put [Milana] in the sheets" on Marcon, Milana looked to him for Marcon stock when he needed it, and, as Milana testified, when he bid Bergleitner for Marcon stock he (Bergleitner) gave it to him.

30/ This purchase was on behalf of a customer of Lawrence Richter, whose transaction is discussed elsewhere below.

In short, Milana looked to Bergleitner both for direction as to bid/ask quotation prices on Marcon and as a source of supply of the stock when he needed it. Milana admittedly knew nothing about the merits of Marcon as an investment and was thus aiding and abetting and participating in Bergleitner's manipulative and fraudulent activity with respect to the Marcon stock.

Aurre & Co. also entered the pink sheets quoting Marcon stock (on November 26, 1972) at the urging of someone at Gotham. The Division contends that that someone was Caplin, while Respondents Gotham and Caplin contend that the person was Bergleitner, not Caplin. The only evidence indicating it may have been Caplin rather than Bergleitner who got Aurre & Co. into the sheets on Marcon is the sworn testimony of Aurre (Exhibit 32) given to Commission investigators during the investigation preceding the institution of this proceeding. This transcript of Aurre's investigative testimony was received in evidence over the objection of all Respondents when Aurre, after being compelled by order of a United States District Court to honor the subpoena of the administrative law judge to appear to give testimony, invoked his Fifth Amendment privilege not to testify. As to Aurre and the two corporate Aurre Respondents affiliated with him, his investigative testimony was received as admissions of a party respondent, and as to the remaining Respondents, it was received as having the standing of hearsay evidence,[31/]

31/ It could be argued that consistently with Rule 804(b)(3) of the new Federal Rules of Evidence, 88 Stat. 1942, 28 U.S.C. App., enacted January 2, 1975, Aurre's investigative transcript should be treated as an exception to the hearsay rule as a statement against his interest, he being unavailable. However, it is concluded that whatever might be the appropriate conclusion had the Rules been enacted prior to the commencement of this proceeding, it would work an injustice in this particular situation to apply the concept of that Rule in the instant proceeding, which was both heard and briefed prior to enactment of (continued)

with the question of what use would be made of such prior testimony against the other Respondents being reserved pending an examination of the entire record in the course of preparing this initial decision.[32/]

The Commission has held consistently that under 5 U.S.C. §556(d) of the Administrative Procedure "Code" and its Rules of Practice hearsay evidence is admissible and may be used as the basis for a finding if corroborated by competent evidence.[33/] A recent U.S. Supreme Court decision holds that 5 U.S.C. §556(d), in particular circumstances, does not even preclude use of hearsay alone to support a conclusion required to be supported by "substantial evidence". Richardson v. Perales, 402 U.S. 389, 408-10 (1971). Hearsay, the Court there stated, at p. 410, is ". . . admissible up to the point of relevancy." What use can be made of hearsay in terms of basing findings on it, the Court went on to say, again at p. 410, ". . . comes down to the question of the procedure's integrity and fundamental fairness." However, the Court in Perales was careful to point out that there Perales had failed to subpoena the reporting physician and thereby avail himself of his right of cross-

---

(Footnote 31 continued)

the Federal Rules. (Such Rules, of course, do not apply by their terms to administrative proceedings — Rule 101, 88 Stat. 1926 — and their use in such proceedings would be by analogy only.) Moreover, even if Aurre's testimony were to be treated as non-hearsay evidence, I would conclude that Aurre was mistaken in his testimony that Caplin got him to make a market in Marcon and would conclude, instead, that Bergleitner did so. In this respect it is considered that the following testimony of Aurre in the context of his entire investigative transcript and in the context of the whole record is highly significant (Exhibit 32, p. 36):

"Q. And Peter Kaplan is the man who told you these things?
"A. Peter Kaplan has a tendency to sell [sic] me things in half sentences, and then say, well, George will tell you the rest."

32/ R. 998-1000; ALJ's order of April 10, 1974.

33/ A.G. Bellin Securities Corp., 39 S.E.C. 178, 186 (1959) and cases cited; N. Sims Organ & Co., Inc., 40 S.E.C. 573, 576 (1961); 2 Davis, Administrative Law 288-291 (1958).

examination, a factor that distinguishes Perales from the instant proceeding, where Aurre's invocation of his 5th Amendment privilege made him unavailable to Respondents for cross-examination. Accordingly, Aurre's investigative transcript (Exh. 32) will not be utilized in making the critical determination as to whether Caplin or Bergleitner got Aurre to trade Marcon. It is concluded, therefore, that Bergleitner, not Caplin, induced Aurre to have Aurre & Co. make a market in Marcon. Caplin testified that he believed that Aurre & Co. made a market in Marcon as a result of Aurre's visit with Bergleitner at Gotham's offices, and that he knew at the time that Bergleitner sent Aurre copies of Gotham's due-diligence file on Marcon.

Moreover, beyond deciding not to use Aurre's transcript on the foregoing salient point, it is concluded, after careful examination of the Aurre transcript in the light of a review of the entire record, in the interests of due process and fundamental fairness, that such transcript will not be used to base any finding herein against Respondents Gotham or Caplin. This conclusion is reached in part because of the absence of any substantial, direct, corroborating evidence and in part because the Aurre transcript itself, to the extent that it seeks to implicate Caplin, seems suspect in terms of possible bias and overall reliability.

Exhibit 1 shows that Aurre & Co. made a market in Marcon during the period from November 24, 1972 to January 2, 1973, appearing in the sheets on most trading days, though at times it appeared in "name only", i.e. without specific quotes.

Gotham and Caplin rely upon the Aurre transcript and upon Caplin's testimony to the effect that Bergleitner so told him, as establishing that Bergleitner furnished Aurre with copies of the materials available in Gotham's due-diligence file on Marcon. But that file, as already found herein, was not current and therefore inadequate and misleading in numerous respects, and should not have been utilized as a basis for inducing Aurre & Co. to make a market in Marcon. Caplin did not review the Marcon file to see if it had been updated since Gotham first commenced making a market in the stock, and he didn't even ask Bergleitner whether the file had been updated at the time that copies of its contents were sent to Aurre & Co. In light of Caplin's prior knowledge that the Marcon due-diligence file was inadequate, this constituted further knowing participation by Caplin in the violations, or, in the most charitable view, evidence of a reckless disregard on Caplin's part for determining whether the due-diligence requirements were satisfied.

In addition to inducing a number of broker-dealers to join Gotham in the pink sheets in making a fictitious market in Marcon and doing so in part by false or misleading representations, Bergleitner also furthered his manipulative and fraudulent practices respecting Marcon in various other ways.

Lawrence Richter ("Richter"), an Account Executive and Assistant Vice President of Hentz & Co ("Hentz") in Miami, Florida, between September, 1972 and January, 1973, on behalf of a client, Dr. Lloyd Moriber ("Moriber"), and at the suggestion of a friend in New York, N.Y., called

Caplin to inquire about Marcon. Caplin referred Richter to Bergleitner as the expert in Marcon. Though Richter had spoken on the phone to Caplin on previous occasions on other matters, he had not met either Caplin or Bergleitner personally.

Bergleitner told Richter that Marcon was a shell, that he had been involved with the stock for two or three years, and that there was a plan to put assets into the shell that would make it an attractive situation. In the course of this and subsequent conversations regarding Marcon, Richter indicated he was interested in Marcon as a possible investment for some good accounts of his to whom he owed favors and whom he wanted to see recoup losses they had sustained with him in other stocks. Bergleitner recommended the stock for such accounts and for Richter personally, saying there would soon be a public announcement about assets being put into Marcon and that major OTC houses would soon be making a market in the stock. Bergleitner recommended purchase strongly and further recommended that the Marcon stock be held until it reached $5 to $6 and said that at about that time Bergleitner would tell Richter when to get himself and his customers out. Bergleitner was so enthusiastic about Marcon that he "guaranteed" Richter he wouldn't sustain any losses even if Bergleitner had to make them up. Richter in turn conveyed the substance of these assurances to his customers who bought Marcon.

On November 20, 1972, Richter bought 1,000 shares of Marcon at 2 3/8 for Moriber from Mayflower.[34/] On December 20, 1972, Richter

---

34/ Richter bought the shares in his account then "journaled" them promptly into the account of Moriber. The purchase was from Mayflower rather than Gotham at Bergleitner's suggestion. Mayflower, in turn, as noted earlier herein, got the stock from Gotham.

bought an additional 500 shares for Moriber at 3½ and, on the same day, bought 500 shares for Charles and Joan Spierer at 2 7/8.

During the time period that Richter conversed with Bergleitner about purchasing Marcon, Richter also talked to Caplin once or twice and sought assurances that everything Bergleitner was telling him about the Marcon situation was reliable. Caplin, without getting into details, assured him that whatever Bergleitner was saying about Marcon had to be authentic because Bergleitner was the expert in the situation.[35/] Richter believed Bergleitner's assurances that he'd be made whole against any losses his customers sustained in Marcon because of the "buying power" that he represented in terms of the substantial accounts he had.

There was no reasonable basis for Bergleitner's predictions or assurances that Marcon would appreciate in value,[36/] let alone that it would rise to a $5 to $6 level. His assurances of guarantee against loss, which he of course had no authority to make on behalf of Gotham, were part of his fraudulent scheme to manipulate the price of Marcon.

Richter was not told by Bergleitner that Marcon's certificate of incorporation had been revoked by the State of New Jersey in February,

---

35/ To the extent that Richter's testimony could be construed as involving Caplin more directly and specifically in the "guarantees" by Bergleitner, it is not credited.

36/ While Bergleitner had attended a meeting in 1968 in which certain persons sounded out Cohen about Cohen's interest in selling his Marcon shares and those of his family, as already noted above, Bergleitner knew that nothing had come of this meeting, and he knew of no active plan on anybody's part to infuse money into Marcon, to acquire it by merger or purchase, or of any other development that would have justified his statements to Richter.

1971 for failure to pay state taxes,[37] obviously a material fact.[38]

Richard J. Santilli ("Santilli"), President since 1971 of Metroland Securities Corp. ("Metroland"), a broker-dealer located in Schenectady, New York, in a conversation with Bergleitner on November 22, 1972, was told by the latter that he had a Thanksgiving Day "gift" for him. The gift proved to be Bergleitner's recommendation that he buy Marcon shares at a price no higher than 2½. Acting on that recommendation, Santilli[39] on that date bought 200 shares from Provident, at 2½, which in turn purchased the shares from Gotham, which sold the shares from the account of Bergleitner's wife.

In soliciting Santilli's purchase of Marcon shares Bergleitner neglected to inform him that Marcon was a bankrupt shell with no assets or business. Had Santilli known these material facts he would not have purchased Marcon. Nor did Bergleitner disclose to Santilli the further critical fact that Marcon's certificate of incorporation had been revoked by New Jersey.

37/ As found above, the due-diligence file on Marcon at Gotham showed that by paying a $2 search fee Bergleitner could have learned that Marcon's certificate of incorporation had been revoked. See p. 18 above.

38/ For cases defining "material" facts within the meaning of the Securities laws see: Affiliated Ute Citizens v. U.S. 406 U.S. 128, 154 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385 (1970); Chasins v. Smith Barney & Co., 438 F. 2d 1167, 1171 (C.A. 2, 1971); Gilbert v. Nixon, 429 F. 2d 348, 356 (C.A. 10, 1970); Securities and Exchange Commission v. Great American Industries, Inc., 407 F. 2d 453, 459-60 (C.A. 2, 1968) (en banc), certiorari denied, 395 U.S. 920 (1969); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (C.A. 2d, en banc, 1968).

39/ Originally the shares were purchased for Santilli's brother-in-law, who later decided he couldn't afford the expense, so Santilli took the shares into Metroland's trading account.

Stephen Elliot Mandel ("Mandel") became a customer of Gotham's when he opened an account there in October, 1972, after having been introduced to Bergleitner earlier that year by Audrey Calin ("Calin"), a registered representative at Provident.

On the night of November 9, 1972, Mandel received a call from Calin, who told him of a situation in which he might be interested, without identifying the company, and that she'd give him more information on it later.

On the following morning, November 10, 1972, Mandel received a call from Bergleitner reporting that he had an interesting situation, i.e. Marcon, which was going to do big things, and that Mandel could purchase 500 shares at 2 1/8. Acting on that recommendation, Mandel purchased 500 shares at the price mentioned through Gotham. In the call soliciting the purchase, Bergleitner did not mention that Marcon was a shell that had gone through bankruptcy, that it was without assets, or that its certificate of registration had been revoked.

On the same date Mandel purchased an additional 500 shares through Gotham because Calin told him she could get the shares for him at $2.00, a price she had negotiated with Bergleitner.

Mandel did not learn Marcon was a shell until sometime around November 19th to the 22nd. He learned this from Bergleitner, who assured him there was nothing to worry about, because Marcon would be merged with another company that would bring in new assets and that the stock would be worth a lot of money following completion of the merger. There was no basis in fact for these statements of Bergleitner's.

The foregoing fraudulent and manipulative conduct and omissions respecting Marcon stock were all designed, first, to establish an artificial price for Marcon, a worthless "shell", and secondly, to raise that price if possible by creating an actual or apparent market and trading in the stock, or, at the least, to keep the price from falling below the artificially set price at which Gotham re-initiated trading in the stock in September, 1972. A primary motivation was so that Bergleitner's relatives could unload the stock they held, before Bergleitner came to Gotham, upon an unsuspecting public. Thus, the record shows that in the 90 business days embraced by the relevant period, during which 9,704 shares of Marcon were purchased and 9,965 shares were sold, Gotham's transactions represented 49% of all purchases and 48.4% of all sales. Of the 4,143 shares of Marcon traded by Gotham as agency sales, 2,803 shares, or 67.6%, came from accounts owned or controlled by Bergleitner.

Under the concept of respondeat superior, which holds in essence that wilful violations by an employee or officer in the scope of his employment are the violations of the employer,[40/] Gotham must be held to have committed the manipulative and antifraud violations committed by Bergleitner and Caplin. In addition, under Section 15(b)(5)(D) of the Exchange Act, sanctions may be applied, if found to be in the public interest, against Gotham on the basis of the wilful violations found herein

---

40/ Armstrong Jones & Co. v. SEC, 421 F. 2d 359, 362 (C.A. 6, 1970, cert. den. June 15, 1970; SEC v. Charles A. Morris & Associates, Inc., CCH Fed. Sec. L. Rep. Para. 93, 756 at pp. 93,305-93,306; Sutro Bros. & Co., 41 S.E.C. 470, 479 (1963); Cady Roberts & Co., 40 S.E.C. 907, 911 (1961); H.F. Schroeder & Co., 27 S.E.C. 833, 837 (1948); S.E.C. v. Management Dynamics, Inc., ___F.2d___ , (C.A. 2, 1975), CCH Fed. Sec. L. Rep. ¶95,017, p. 97,562, 97,571.

to have been committed by Bergleitner and Caplin, each of them being a "person associated with" Gotham within the meaning of the mentioned section.

Caplin's and Gotham's Failure Reasonably to Supervise

Section II C of the Order includes charges that Respondents Gotham and Caplin failed reasonably to supervise persons subject to their supervision with a view to preventing violations alleged to have been committed by such persons. 41/

Preliminarily, it must be noted that the fact that Caplin has been found in certain respects to have actively participated in certain aspects of the fraudulent and manipulative conduct respecting Marcon does not preclude a concurrent finding against him (or against Gotham) of failure reasonably to supervise where the record shows that Caplin was not aware of the overall fraudulent and manipulative scheme

41/ Section 15(b)(5)(E) of the Exchange Act, as added by the 1964 amendments to it, provides an independent ground for the imposition of a sanction against a broker or dealer or a person associated with a broker or dealer who ". . . has failed reasonably to supervise, with a view to preventing violations of such statutes, [various securities statutes, including the Securities Act and the Exchange Act], rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision." The subsection establishes a standard of supervision for the purposes of clause E by providing that:

> ". . . For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if —
>
> (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
>
> (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with."

in its full scope and detail, even though he was aware of, and participated in or aided and abetted violations arising out of, various discrete aspects or circumstances that in and of themselves gave rise to violations, as found above.

The factual situation here is unlike that which the Commission found in Anthony J. Amato, et al.,[42] where it stated in pertinent part:

> ". . . Failure of supervision — which may result in derivative responsibility for the misconduct of others — connotes an inattention to supervisory responsibilities, a failure to learn of improprieties when diligent application of supervisory procedures would have uncovered them. That is not the situation here. In view of Bills' active and central role in the whole matter, affirmance of the finding of failure to supervise would entail a confusion of concepts." (Emphasis added).

In the instant proceeding, the record indicates that Caplin did not play a central role in the formulation or execution of the fraudulent and manipulative scheme respecting Marcon, nor was he aware of its full scope, even though, as already noted, he did know and do certain things that made him an active participant or aider and abettor as respects various aspects of the fraud.

However, the record is clear that Caplin's failure[43] to uncover the full fraud and manipulation being practiced by Bergleitner with respect to Marcon was due to his failure reasonably to supervise Bergleitner.

42/ Exchange Act Release No. 10265, June 29, 1973, 2 SEC DOCKET 90, 92.

43/ It is undisputed that Caplin had overall supervisory responsibility in the firm as well as over Bergleitner in particular, though Caplin's brother Joel in practice assisted him in supervisory duties since Caplin spent considerable time in underwriting and venture-capital activities.

Respondents Gotham and Caplin concede that because of Bergleitner's prior regulatory problems with the Commission they were on notice that their supervision of him had to be especially vigilant, and they unsupportably urge that it was.

Thus, while Caplin required that the initiation of quotations on a stock to be traded be specifically approved by him, he did not thereafter on a daily, weekly, or other regular basis review the quotations on the stock, but did so only irregularly as time permitted. This failure was particularly inexcusable in the case of Marcon, a shell, which was a type of security that the Commission had specifically singled out for watchfulness by promulgation of a special rule regarding trading in such stocks. Caplin urges that he could not possibly have closely and regularly followed the quotations on all of the some 30 stocks traded by the firm. But this argument is specious because only 2 or at most 3 of the stocks traded by Gotham fell into the category of shell stocks which, as noted, had been singled out for special attention.

Secondly, even though Gotham stood alone as a market-maker in Marcon for about a month after re-instituting a market therein, Caplin never asked anyone, not even Bergleitner, how it was that thereafter up to 4 or 5 other firms commenced making a market in the stock. Specifically, he never inquired whether any of the other broker-dealers was "cooperating with" Bergleitner in improperly creating a market or the appearance of a market in Marcon, even though he was aware of Bergleitner's special interest in trading this particular stock. 43a/

43a/ Moreover, Caplin testified he suspected Bergleitner had asked other broker-dealers to go into the sheets on Marcon (R. 1113), but later changed his testimony (R. 1128) to say he didn't entertain such suspicions during the relevant period. His changed testimony is not credited.

Again, even though Caplin was aware that no reasonable basis existed for recommending Marcon as an investment,[44] he never checked with customers who had been solicited to purchase the stock what they had been told by Bergleitner to induce their purchase.[45] Not even in the case of Mandel, who was sold shares in over twice the amount of the $1,000 guideline that Caplin had established for the sale of Marcon, did Caplin follow up to inquire what representations had been made to Mandel.

While Caplin was not a trader, he was by no means naive as respects either market manipulations or fraudulent solicitations, and his failures to make suitable inquiries in these areas respecting Marcon cannot be excused, particularly in the light of his awareness of Bergleitner's regulatory problems.

Of considerable importance in this respect is that Caplin knew the due-diligence file on Marcon was not current at the time Gotham re-initiated a market therein. Nevertheless, he simply directed Bergleitner to bring it up-to-date and merely assumed he did so — he never checked whether in fact the file had been brought up-to-date or

---

44/ Caplin's assertions that Bergleitner told him that potential buyers of a clean shell existed is irrelevant, since the record shows that no likely prospects ever appeared on the scene, and the mere possibility of such a development afforded no basis for recommending the stock.

45/ Although the firm had a monitoring device installed in Joel Caplin's office by which a person there could listen in on Bergleitner's telephone conversations (of which device Bergleitner was told), it does not appear that it was effectively employed in this regard.

insisted that such be done by appropriate inquiries, which, under the circumstances, should have included authorities of the State of New Jersey.

It is concluded that while Caplin paid lip service to a system of strict supervision over Bergleitner, in practice the elementary checks and inquiries that the circumstances called for were not carried out. To argue, as Respondents do, that Bergleitner had more experience in these matters than Caplin, is to miss the entire point of the supervisory requirement.[46/]

Accordingly, it is concluded that Gotham, and Caplin, who was responsible for Gotham's supervision, failed reasonably to supervise Bergleitner in the respects found above with a view to preventing the fraudulent and manipulative violations of law and regulation committed by Bergleitner within the meaning of Section 15(b)(5)(E) of the Exchange Act.

Antifraud and Manipulative Violations by Aurre Respondents

Section IIA of the Order alleges that Respondents Aurre, Aurre & Co., and Aurre Management wilfuly violated and wilfuly aided and abetted violations of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with the maintenance of a market in Marcon and transactions in the stock during the relevant period through

46/ If the ostensible supervisor does not in fact have the capacity to supervise, then, it is clear, the firm lacks appropriate supervisory procedures in the sense that it lacks the instruments to carry out any supervisory procedures it may have prescribed, within the meaning of Section 15(b)(5)(E) of the Exchange Act. Here, however, it is concluded that the problem was not Caplin's capacity to supervise Bergleitner in the pertinent respects found above, but his lack of will and determination to do so.

acts, omissions of material facts, and a course of conduct identical to the allegations contained in Section IIA of the Order against Respondents Gotham and Caplin.

The evidence concerning the charges against the Aurre Respondents comes in large part, though not solely, from admissions made by Aurre in testimony he gave to Commission investigators during the investigation preceding this proceeding, which transcript was received in evidence as admissions of a party respondent[47/] against the Aurre Respondents after Aurre invoked his Fifth Amendment privilege not to testify.[48/]

47/ 4 Wigmore, EVIDENCE §§1048-1049, 1052-1053 (1972); McCormick, EVIDENCE §§262-263, 266 (2nd Ed. 1972). See, Community Counseling Services, Inc. v. Reilly, 317 F. 2d 239, 243 (C.A. 4, 1963); accord, Fey v. Walston & Co., Inc., 493 F. 2d 1036, 1046 (C.A. 7, 1974). The well-established rule that admissions of a party opponent are not hearsay has recently been adopted as Rule 801(d)(2)(A) of the Federal Rules of Evidence, effective July 1, 1975, P.L. 93-595, 88 Stat. 1939, January 2, 1975. The Federal Rules of Evidence treat as an admission by a party opponent and therefore not hearsay, "a statement by his agent or servant concerning a matter within the scope of his agency or employment made during the existence of the relationship." Rule 801(d)(2)(D), 88 Stat. 1939 (emphasis added). As the notes of the Advisory Committee on the adoption of these rules point out, "few principals employ agents for the purpose of making damaging statements," and "valuable and helpful evidence" is often lost as a result of excluding evidence under a strict scope-of-employement test. For this reason, the Federal Rules will follow the "substantial trend . . . admitting statements related to a matter within the scope of the agency or employment." See Proposed Federal Rules of Evidence, Supreme Court Advisory Committee's Notes 56 FRD 183, 298 (1972).

48/ See page 26 above. Various documentary exhibits and Caplin's testimony are among the items of evidence pertinent to the Aurre Respondents.

Aurre & Co. commenced making a market in Marcon on November 24, 1972, and thereafter continued to make a market in the stock on most business days through January 3, 1973.[49/] Aurre put Aurre & Co. into the sheets on Marcon at the suggestion of Bergleitner, who told him it had been a good trading stock for Gotham, that the company would do better, and that Aurre should therefore put the stock on the long-side and he'd do well with it.

Bergleitner sent Aurre copies of the outdated, non-current materials in Gotham's due-diligence file on Marcon, but this material was not received by Aurre until a day or so after he commenced making a market in Marcon. Thus, Aurre knew nothing at all about Marcon when he went into the sheets on it.

Beyond that, by his own admission, Aurre never looked at the Marcon due-diligence file even after receiving it, during all the time he traded the stock. In fact, at some point Aurre's due-diligence file on Marcon became lost or mislaid, because after the Commission had suspended trading in Marcon Aurre had to send one of his employees to Gotham to obtain another copy of the due-diligence file. Thus, the due-diligence file that Aurre & Co. produced to the Commission's investigators pursuant to their request was one that they had but recently obtained from Gotham.

Aurre testified that he didn't know Marcon was a shell until after he'd stopped trading it, and that he learned this from Milana, of Mayflower, after trading in the stock had been suspended. There is nothing

---

49/ Exhibit 1.

in the record to indicate he ever asked anyone at Gotham anything about Marcon; he testified, however, that he assumed it was a live and active company, because he'd been told at Gotham that Marcon was going to "do better" and that one Robin Baron, whom he'd known from before, was in Gotham's offices at the time Marcon was first recommended to him and that he was told by someone at Gotham that Baron had bought a substantial position in Marcon for his mutual funds.

Under the circumstances, Aurre had no reasonable basis for assuming anything about Marcon. He should have looked into it carefully before entering the pink sheets on it. Even a cursory look at his due-diligence file on Marcon would have shown him that Marcon's assets had been distributed to creditors and that it was a bankrupt shell on which the information available in his due-diligence file was totally inadequate. Another factor that should have put Aurre on notice as to the need for diligent inquiry was the fact that, as he knew, Marcon was trading by the use of notarials, since it had no transfer agent. 49a/

Aurre & Co.'s first transaction in Marcon was its purchase of 145 shares from a broker-dealer in Boston, Mass., on December 4, 1972. After a number of subsequent purchases Aurre began getting concerned about his long position and started calling Mayflower and Gotham with a view to getting rid of some of his position, but neither firm seemed to be much interested in buying Marcon. Ultimately, on January 16, 1973, Gotham bought 46 shares and on the same date 900 shares of Marcon from Aurre & Co. at 1½, although Gotham's pink sheet quotes for that day, it being the only remaining market-maker on that day, were entered at

---

49a/ See footnote 19 above.

3½ bid, 4 ask.[50/]

Aurre knew or should have known[51/] that the prices at which Aurre & Co. was making a market in Marcon bore no relationship to the company's business or financial condition. By joining Gotham in Bergleitner's fraudulent manipulation of Marcon stock in reckless disregard of the elementary duties devolving upon a broker-dealer, he himself participated in and aided and abetted such fraudulent and manipulative conduct.

Aurre & Co., in turn, must be held to have committed like violations, it being responsible for Aurre's conduct under the concept of respondeat superior[52/]. While Aurre was not a registered principal of the firm, he was a registered representative and president thereof, and, with his wife, each of whom owns about 30% of Aurre Management, effectively owns and controls Aurre & Co, which, as found above, is a wholly owned subsidiary of Aurre Management.

However, neither the order nor the record presents a basis for holding Aurre Management responsible for the violations committed by either Aurre or Aurre & Co. The record contains no indication that Aurre Management reserved to itself or in fact exercised any supervisory functions over Aurre & Co. or Aurre or any facts or circumstances such as would warrant application of the concept of respondeat superior to Aurre Management. Moreover, the Order does not charge Aurre Management with a failure reasonably to supervise under Section 15(b)(5)(E)

50/ These sales by Aurre & Co. left the firm short 61 shares of Marcon.

51/ See footnote 19 above.

52/ See footnote 40 above.

of the Exchange Act. Neither does it seek to hold Aurre Management responsible under the "control" provisions of Section 20(a) of the Exchange Act — thus it is unnecessary to consider the possible applicability of that section. Nor is it pleaded that Aurre Management failed to furnish Aurre & Co. competent management or other personnel. Accordingly, no basis is presented for the imposition of any sanctions on Aurre Management.

Contentions of Respondents Gotham and Caplin[53/]

In addition to the contentions of Respondents considered above directly or by necessary implication, Respondents Gotham and Caplin make two basic contentions of mixed law and fact that warrant particularized treatment herein.

Firstly, it is contended that, assuming arguendo that Bergleitner was guilty of the violations with which he was charged, Respondents Gotham and Caplin may not be held vicariously or derivatively liable for his conduct either under the principle of respondeat superior or under the theory of failure reasonably to supervise, which latter ground, they urge, really arises out of the employer-employee relationship and therefore is an attempt to impose vicarious liability. These contentions are so, Respondents urge, on the theory that Section 20(a) of the Exchange Act[54/] affords the sole basis for imposing vicarious liability on an employer

53/ As indicated above, see p. 3 , the Aurre Respondents did not submit proposed findings, conclusions, or supporting brief.

54/ 15 U.S.C. §78t(a). Section 20(a) of the Exchange Act provides as follows:

"Sec. 20(a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to (continued)

under the federal securities laws for the acts of its employees, citing various cases.[55/]

These contentions of the Respondents lack validity for a number of reasons. To begin with, as already noted at p. 35 above, Congress in 1964 enacted Section 15(b)(5)(E) of the Exchange Act as an additional basis for imposing administrative sanctions on a broker-dealer or a person associated with him, i.e. for a failure reasonably to supervise persons subject to the broker-dealer's or associated person's supervision who commits stated violations of the securities laws.[56/] The section on failure reasonably to supervise does not establish a species of liability without fault, but rather permits the imposition of sanctions based upon failure to meet the duty to supervise in accordance with the standards set forth expressly in Section 15(b)(5)(E). To argue, as Respondents impliedly do, that Section 20(a) nullifies or supersedes Section 15(b)(5)(E) is illogical, particularly where Section 15(b)(5)(E) was enacted after Section 20(a) to meet a particular need, and Respondents cite no authority so holding. Parenthetically, it may be noted that while enactment of Section 15(b)(5)(E) had the practical effects of requiring that charges of failure to supervise, which formerly had been charged as a type of aiding and abetting, had thereafter to be

---

54/ (continued)
whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. [emphasis added]

55/ SEC v. Lum's, Inc., 365 F. Supp. 1046, 1063-64 (S.D.N.Y. 1973); Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (C.A. 2, 1973) (en banc); Kamen v. Paul H. Aschkar & Co., 382 F.2d 689, 697 (C.A. 9, 1967), cert. granted, 390 U.S. 942, cert. dismissed, 393 U.S. 801 (1968).

56/ See footnote 41 above for pertinent text of Section 15(b)(5)(E).

charged specifically under Section 15(b)(5)(E), and, secondly, prescribed a statutory standard for measuring the adequacy of supervision, enactment of that subsection did not eliminate liability predicated upon the concept of respondeat superior.[57-58/] If enactment of Section 15(b)(5)(E) did not vitiate the concept of respondeat superior in administrative proceedings, there is no reason to conclude that Section 20(a) does so, even if the section were deemed applicable to administrative enforcement proceedings, a question discussed next.

While a U.S. District Court in the Lum's case,[59/] relied upon by Respondents, in a suit by the Commission seeking an injunction, held Section 20(a) applicable to enforcement proceedings brought by the Commission,[60/] a Court of Appeals decision in S.E.C. v. Coffey,[61/] has subsequently held to the contrary. The Court in Coffey, at p. 1318, stated in pertinent part as follows:

> ". . . we hold that section 20(a) of the 1934 Act may not be relied upon by the SEC in an injunctive enforcement action. Section 20(b) of the 1934 Act provides for the

---

57-58/ Armstrong Jones & Co. v. SEC, and other cases cited in footnote 40 above.

59/ See footnote 55 above.

60/ See a contrary conclusion reached after consideration of the Lum's decision in In re Black & Company, Inc., et al. ALJ's decision dated July 12, 1974, CCH Federal Securities Law Reporter ¶79,921, p. 84,367, 84,382-83, declared final in Exchange Act Release No. 10974, August 16, 1974, 5 SEC Docket 740.

61/ 493 F.2d 1304, 1318 (C.A. 6, 1974). Lum's is also repudiated by the Second Circuit holding in S.E.C. v. Management Dynamics, ___F.2d___, (C.A. 2d, 1975), CCH Fed. Sec. L. Rep. ¶95,017, p. 97,562, 97,570, which holds on the point as follows: ". . . We agree with the Commission that with respect to SEC enforcement actions, §20(a) was not intended as the sole measure of employee liability . . . ."

> unlawful actions of controlling persons, and the SEC may only seek injunctions against unlawful actions. See section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b); section 21(e) of the 1934 Act, 15 U.S.C. § 78u(e). Section 20(a) of the 1934 Act makes a controlling person liable "to any person to whom such controlled person is liable." As a matter of legislative interpretation, we hold that the SEC is not a person under section 20(a), since section 20(a) was meant to specify the liability of controlling persons to private persons suing to vindicate their interests. Section 20(b) sets forth the standard of lawfulness to which a controlling person must conform, on penalty of liability in injunction to the SEC or criminal prosecution."

The Lanza v. Drexel and Kamen decisions,[62/] also relied on by Respondents, are inapposite under the holding of the Court in Coffey, since those two decisions both involved litigation between private parties rather than enforcement proceedings brought by the Commission.

Still another reason for concluding that Section 20(a) is not applicable in an administrative enforcement proceeding, at least to a broker-dealer, is the fact that under Section 15(b)(5) sanctions may be imposed upon the broker-dealer, if found to be in the public interest, on the basis of findings of specified violations committed by an "associated person" of the broker-dealer. In light of such provision it would not be likely that Congress intended the "good faith" defense of Section 20(a) to be applicable to the broker-dealer.

In any event, even if Section 20(a) were applicable to the instant proceeding[63/] it would not serve to exonerate Respondents Gotham and Caplin for the reason that they could not satisfy the good faith and other requirements of the Section in view of the findings herein that

---

62/ Cited in footnote 55 above.

63/ The Commission, of course, did not bring the proceeding under Section 20(a) but under Section 15(b).

in certain respects Caplin directly participated in the manipulative and fraudulent conduct carried on by Bergleitner.

Secondly, Respondents Gotham and Caplin urge that they cannot be found to have aided and abetted Bergleitner's violations unless it can be shown that they had knowledge of falsity or a reckless disregard for ascertaining the truth[64/] or if it can be shown that they knew of the wrong being committed by Bergleitner and knowingly gave substantial assistance or encouragement to him in the commission of his fraud and manipulation.[65/]

The Division argues, on the other hand, that the cases relied on by Respondents, involving litigation between private persons and not enforcement proceedings by the Commission, are inapposite and that in an enforcement proceeding even negligence may make a defendant or respondent liable as an aider and abettor of another's securities law violation.[66/]

In a recent decision[67/] the Court of Appeals for the Sixth Circuit, in a suit by the Commission for injunction, stated as follows:

> ". . . . Without meaning to set forth an inflexible definition of aiding and abetting, we find that a person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party had general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation."

The Court went on to state in a footnote, again at p. 1316: "We view the Second Circuit's decision in SEC v. Spectrum, Ltd., 489 F.2d 535 (C.A. 2d, 1973)

64/ Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 363 (C.A. 2, 1973).

65/ Hughes v. Dempsey-Tegeler & Co., Inc., CCH Fed. Sec. L. Rep. ¶94,133, p. 94,525, 94,553 (U.S.D.C. Cent. D. Calif., 1973).

66/ S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (C.A. 2, 1973). See also footnote 68 below.

67/ S.E.C. v. Coffey, 493 F.2d 1304, 1316 (C.A. 6, 1974), cert. den. 95 S.Ct. 826, (Jan. 27, 1975).

as correct on its facts. There a lawyer was aware that his misleading opinion letter could be used to sell unregistered securities and failed to take timely steps to prevent such use."

While the Coffey decision appears to state stricter requirements for finding aiding and abetting than have traditionally applied in enforcement proceedings, it is not without significance that the Court there concurred with the negligence standard as applied in Spectrum "on its facts" and cautiously prefaced its expression of criteria on aiding and abetting by stating that it was setting them forth "[w]ithout meaning to set forth an inflexible definition of aiding and abetting. . . ."

In any event, the findings of aiding and abetting made herein against Respondents Gotham and Caplin are not based solely upon a negligence standard, and would meet even the Coffey case standards, if the standards there applied should ultimately emerge as ones generally followed in enforcement proceedings.[68/] Thus, for example, Caplin personally approved trading in Marcon knowing the due-diligence file respecting it was not up-to-date and did not meet the requirement of Rule 15c2-11; he expressly approved solicitation of potential Marcon purchasers though he knew there was no reasonable basis for recommending the stock; and he approved initial trading in the stock at a price he knew to be fictitious and arbitrary. These were affirmative, known-to-be-improper acts that made Caplin (and Gotham, by extension) a participant in and

---

68/ The negligence standard has traditionally been followed in enforcement proceedings, as contrasted with litigation involving only private parties. Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d at 541, (C.A. 2, 1973); Securities and Exchange Commission v. Shapiro, 494 F.2d 1301, 1308, (C.A. 2, 1974); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096, (C.A. 2, 1972); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 855, (C.A. 2, 1968) certiorari denied sub nom. Kline v. Securities and Exchange Commission, 394 U.S. 976. (continued)

an aider and abettor of the fraudulent and manipulative conduct. Moreover, by analogy to the Court's reasoning in Spectrum, Caplin should have realized that his affirmative acts in approving Gotham's trading in Marcon and solicitation of customers to purchase the stock could be used by Bergleitner to perpetrate the more widespread fraud and manipulation found herein.

Conclusions

In general summary of the foregoing, it is concluded that within the relevant period, extending from about September 1, 1972 to about January 23, 1973, the indicated Respondents committed violations of the following provisions of law or regulation as a result of the following acts, practices, or failures to disclose relevant facts, all as more particularly found above:

(1) Within the relevant period Gotham wilfuly violated and Caplin wilfuly aided and abetted violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11(a)(4) as well as Rule 15c2-11(d) thereunder, by failing to have in the Gotham file on Marcon all of the information required by Rule 15c2-11(a)(4) and by failing to submit such information to the National Quotation Bureau, Inc. prior to entering the pink sheets with their quotations on Marcon.

(2) Within the relevant period Respondents Gotham and Caplin wilfuly violated and wilfuly aided and abetted violations by Bergleitner of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by re-initiating a market for Marcon at an

---

68/ (Continued)
Until the apparent conflict is resolved it is considered that the negligence standard continues to apply in enforcement proceedings.

artificial and fictitious price and by authorizing solicitation and soliciting sales of Marcon in the knowledge that the stock had no ascertainable value and that no reasonable basis existed for recommending purchase of the stock.

(3) During the relevant period Respondent Gotham (through its registered respresentative, Bergleitner) wilfuly violated and wilfuly aided and abetted violations by Bergleitner of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by publishing prices for Marcon in the "pink sheets" and otherwise quoting prices for Marcon that were arbitrary and fictitious, by maintaining and manipulating the market for Marcon common stock and effecting transactions therein to artificially influence the market price for Marcon and to create a false and misleading appearance of an active market for the stock, by selling Marcon stock in its possession to membersof the public at prices that were arbitrary, and by failing to disclose to its purchasing customers that the Marcon shares it sold represented ownership in a non-existent corporation that (a) had gone through bankruptcy proceedings, (b) had had all of its assets distributed to creditors, (c) had had its corporate charter revoked by the State of incorporation for non-payment of taxes, (d) had no real, corporate or legal existence, (e) had no officers, directors, or employees, (f) had no attorney at law or in fact, (g) had no transfer agent or registrar, and (h) had no value.

(4) During the relevant period Respondents Gotham and Caplin failed reasonably to supervise Bergleitner, a person subject to their

supervision, with a view to preventing the fraudulent and manipulative violations committed by Bergleitner within the meaning of Section 15(b)(5)(E) of the Exchange Act.

(5) Respondents Aurre & Co. and Aurre wilfuly violated and wilfuly aided and abetted Bergleitner's violations of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder during the relevant period in connection with Marcon stock.

PUBLIC INTEREST

The kind of manipulative and fraudulent conduct found to have occurred here with respect to the stock of Marcon — a "shell" that was indeed not even a shell, since its certificate of incorporation had been revoked for failure to pay state taxes — is a serious threat to the integrity of the securities markets and to investors and other members of the public who have a right to repose faith in the integrity of such markets. Where broker-dealers and their officers and principals participate in or aid and abet such violative conduct as respects a shell company, after the Commission following public hearings has adopted specific regulatory provisions establishing the prerequisites for dealing in the stocks of such shell companies, violations involving such companies are especially serious since they tend to show intentional misconduct or a reckless disregard for ascertaining the facts necessary to assure that the conduct in question is not violative. The sanctions applied here must be of sufficient severity to deter such conduct in the future by Respondents and by others as well as to apply appropriate sanctions for the instant

violations.

Anyone left holding Marcon stock of course sustained a loss, as did others who sold out at prices lower than their purchase prices, though the record does not indicate the quantum of such losses.

As a matter of official notice, it is noted that Respondent Caplin has been barred by the NASD from association with any member of the Association in any capacity for failure to pay the fines and costs assessed in connection with findings of violations of the Association's Rules of Fair Practice — which violations arose out of matters unrelated to the facts on which the charges in the instant proceeding are based — and Respondent Gotham was expelled from membership in the Association, likewise for failure to pay the fine and costs assessed in connection with such findings of violations of the Association's Rules of Fair Practice.[69/]

Also as a matter of official notice, it is noted that Aurre & Company has been expelled from membership in the NASD under an offer of settlement and that Aurre has been suspended from association with any NASD member for a period of one year and barred from association with any NASD member as a principal or in any supervisory or managerial capacity.[70/] In addition, the Commission's NEWS DIGEST for April 23, 1975,

---

69/ NASD press release NSD 21274 of December 30, 1974, p. 10.

70/ NASD press release NSD 1475 of April 24, 1975, pp. 1-2. In pertinent part the release stated as follows:

> "Aurre & Company, Inc. (New York City) submitted an Offer of Settlement whereby it consented to NASD findings that it violated the Rules of Fair Practice by permitting an individual to perform the duties and functions of a registered principal prior to his effective registration with the Association; willfully distorted its books and records to cover a short position; distorted its financial statements and computations of net capital

(continued)

at p. 3, reports the substance of the Commission's Litigation Release 6849, reflecting the filing of a complaint in the United States District Court for the Southern District of New York against Aurre, Aurre & Co., and another.[71/]

70/ (continued)
and aggregate indebtedness; violated the SEC Net Capital Rule; violated the prompt payment provision of a Federal Reserve Regulation; failed to correspond with customers who had submitted complaints; and failed to comply with formal written requests for information from the Association. Without admitting or denying the NASD's allegations, the firm consented to being expelled from membership in the Association.

In connection with the expulsion of Aurre & Co., Inc., Gregory Aurre, Jr. (registered representative, New York City) and Peter Miranti (registered principal, Massapequa, N.Y.) also submitted Offers of Settlement and, without admitting or denying the allegations, agreed to be disciplined. Mr. Aurre is suspended from association with any NASD member as a registered representative for one year and is barred from association with any NASD member in the capacity of a principal or in any other supervisory or managerial capacity. Mr. Miranti is suspended from association with any NASD member as a registered representative for three months and is suspended from association with any NASD member in the capacity of a registered principal or in any other supervisory or managerial capacity for two years."

71/ The text of the NEWS DIGEST item reads as follows:

"COMPLAINT NAMES GREGORY AURRE, JR., AND OTHERS

"The New York Regional Office announced that on April 22 it filed a complaint in the U.S. District Court for the Southern District of New York, naming as defendants Gregory Aurre, Jr. (Aurre), Peter Miranti (Miranti) and Aurre & Co., Inc.

"The complaint seeks: (i) preliminary and permanent injunctions enjoining the defendants from violations of the antifraud provisions of the Securities Exchange Act of 1934 and various provisions of the Investment Company Act of 1940 including those relating to embezzlement self-dealing, breach of fiduciary duty and books and records; (ii) an order of disgorgement against Aurre; (iii) preliminary and permanent injunctions enjoining Aurre and Miranti from acting further in the capacity of officer, director, member of the advisory board, investment adviser, depositor of any registered investment company or principal underwriter of any registered open-end investment company, unit investment trust, or face-amount certificate company; and (iv) a temporary restraining order restraining Gregory Aurre, Jr. from dissipating, concealing or disposing of in any manner any of his assets and property or any assets and property within his control.

"A receiver for Falcon Fund, Inc. was previously appointed by the Honorable Lee P. Gagliardi, U.S. District Judge for the Southern District of New York, on July 25, 1974. (SEC v. Gregory Aurre, Jr., et al., S.D.N.Y.). (LR-6849)"

See 6 S.E.C. DOCKET 740 for full text of Litigation Release 6849.

While the Commission has expressed the view that an extensive arrest record [72/] or the filing of a criminal indictment [73/] may be relevant in assessing sanctions in the public interest, it is concluded that under the totality of circumstances presented in this proceeding no consideration should be given in assessing sanctions to the civil complaint filed by the Commission against Aurre and Aurre & Co.

Three incidents involving Caplin merit consideration in assessing sanctions in the public interest, since they bear on the question of his cooperation with the Commission and the NASD.[74/]

Between January 5 and 12, 1973, Mandel had requested that Gotham close out all his securities positions, including Marcon. Bergleitner called Mandel down to Gotham's offices, where he informed him that Marcon could not be sold due to some irregularities alleged by the Commission. Bergleitner also told Mandel that he (Mandel) might be called by Commission investigators as a witness and, although Mandel had indicated very positively in the course of this conversation that he had not become aware that Marcon was a shell until some 7 to 10 days after he had purchased the stock, Bergleitner kept insisting that he had so advised Mandel at the time of or prior to the purchase and that Mandel should so testify. The discussion became somewhat animated and Bergleitner called Joel Caplin in to help him "talk" to Mandel. Mandel told Joel Caplin that what Bergleitner was trying to get him to "remember" was simply untrue. In the course of this three-way conversation, Joel Caplin

---

72/ Irving Grubman & Co., 40 S.E.C. 617, 674, n. 10 (1961).

73/ J..A. Winston & Co., Inc., 42 S.E.C. 62, 70-71 (1964).

74/ The three incidents come within what the Division characterizes, not without some basis, as Caplin's "cover up" efforts. ALJ Exhibits 3 and 4, reflecting Caplin's voluntary cooperation with SEC officials in two matters not involved in the instant proceeding, have also been considered.

on at least two occasions went in to Caplin's office and reported to him the nature of the dispute and the efforts being made to work out some acceptable understanding as to how Mandel would testify on the point if called. The upshot of the conversations and consultations was an informal understanding that if called Mandel would testify that he became aware that Marcon was a shell close to the time that he purchased it but that he did not have a firm recollection of when he got the information. This approach was acquiesced in by Caplin even though his brother Joel had advised him of Mandel's position, i.e. that he clearly recalled not learning that Marcon was a shell until some 7 to 10 days following the purchase. As Mandel was leaving Gotham's offices Joel Caplin brought him in to Caplin's office, reported briefly on the understanding arrived at, to which Caplin made some affirmative response or gesture, after which Mandel left. At no time did Caplin suggest to Mandel that he simply tell the truth as he recalled it, nor did Caplin ever report the conversations with Mandel to Commission investigators, although he was fully aware that they were investigating Marcon generally. Caplin acquiesced in this even though he and his brother both believed Mandel rather than Bergleitner — the Mandel incident was in fact one of the prime reasons why Caplin decided they had to terminate Bergleitner's employment at Gotham.

The second incident involving Caplin concerns a discussion of how Milana would testify to Commission investigators. Milana became concerned about the Marcon situtation about January 11, 1973, when a Commission investigator calling at Mayflower's offices found the Marcon

due-diligence file lacking in current financial information. Later, when Milana was asked to testify before a Commission investigator, he called Bergleitner to express his concern and asked to meet with him to find out more about Marcon, since Bergleitner had "put him into the sheets" on Marcon. Bergleitner told Caplin it was Milana on the phone, and Caplin listened in on the monitoring phone that was in Joel Caplin's office. By this time Caplin was well aware of the Commission's interest in Marcon since he personally had already given testimony and Gotham's due-diligence file on Marcon had been examined, and the Mandel incident had also already occurred. Caplin decided to attend the meeting between Milana and Bergleitner, which occurred the same day or the day following the phone call, some time during the last week of January.

At the meeting, held in a restaurant-bar, Bergleitner asked Milana what he was going to tell the Commission investigators. Milana said he would tell them he heard about Marcon from his sister who overheard two men talking about it on a bus, that he later got a quote on the stock from Bergleitner, and that he could get his sister to back up his story if necessary. Bergleitner told Milana the proposal sounded good and Caplin said ". . . that sounds O.K. to me. There is no problem with that."

At this meeting Milana also indicated he did not learn Marcon was a shell until some time after he started trading it, and that he learned this from Bergleitner. Caplin testified that this fact, i.e.

that Bergleitner had not earlier told Milana that Marcon was a shell, concerned him, and that it was in fact an additional reason for discharging Bergleitner. Notwithstanding this reaction, and his further reaction that Milana's story sounded "foolish", Caplin testified that he believed that Milana's story about how he came to make a market in Marcon was genuine and not a fabrication. Under all the circumstances, it is concluded that Caplin knew or should have known that Milana's story 75/ was a fabrication. A whole assortment of facts was already known to Caplin by this time that should have put him on notice that closer inquiry was called for. There is no indication that he even asked Bergleitner for his version of how Milana started trading Marcon, and it seems incredible that he would not have done so prior to meeting with Milana. In his subsequent, second appearance before SEC investigators, Caplin never mentioned his meeting with Milana or otherwise brought it to the Commission's attention.

A third incident relevant to sanctions concerns the discharge of Bergleitner and the false representation of it by Caplin and Gotham as a voluntary resignation. After the Milana incident, Caplin and his brother Joel decided that Bergleitner would have to go. Bergleitner pleaded first that he be allowed to remain and, alternatively, that he be allowed to "resign" so that he could seek other employment. Caplin approved showing on the NASD termination form Bergleitner's

---

75/ Milana testified to Commission investigators in accordance with the fabrication and his sister "confirmed" the story in an affidavit.

termination as "voluntary resignation"rather than "discharged" or "permitted to resign." Checking either of the latter two designations would have required an explanation of the circumstances. Caplin also approved the indication on the termination form that Gotham knew of no reason why Bergleitner should not be hired, though Caplin testified he would not personally again hire Bergleitner because he had lied to him.[76/]

Taking into account the gravity of the violations, the factors urged by Respondents in mitigation, and the entire record as a whole, it is concluded that the sanctions ordered below both for remedial and deterrent purposes are necessary, appropriate, and adequate in the public interest.

ORDER

Accordingly, IT IS ORDERED as follows:

(1) the registration as a broker or dealer of Respondent Gotham Securities Corp. is hereby revoked.[77/]

(2) Respondent Peter Caplin is hereby barred from association with a broker or dealer with the proviso that after a period of 8 months he may apply to become associated with a registered broker or dealer in a non-proprietary, non-supervisory capacity upon a satisfactory showing to the Commission that he will be adequately supervised.[78/]

76/ Caplin's defense of his actions in showing the discharge of Bergleitner as a voluntary resignation on the theory that any prospective employers would be required by NASD procedures to check with the former employer before engaging Bergleitner in any event would make futile the whole process of executing termination forms.

77/ As noted herein above, Gotham has already been expelled from membership in the NASD.

78/ It should be noted that Caplin's application would not automatically be granted; at the same time, it should be noted also that the restrictions imposed by this sanction would not necessarily be permanent. See Fink v. S.E.C., 417 F.2d 1058, 1060 (C.A. 2, 1969); Vanasco v. S.E.C., 395 F.2d 349, 353 (C.A. 2d, 1968).

(3) Respondent Aurre & Co., Inc. is hereby barred from being associated with a broker or dealer.[79/]

(4) Respondent Gregory Aurre, Jr. is hereby barred from association with a broker or dealer.[80/]

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17 CFR §201.17(f).

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) 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.[81/]

David J. Markun
Administrative Law Judge

Washington, D.C.
May 16, 1975

79/ Had not the Commission previously allowed Aurre & Co.'s withdrawal of registration to become effective, as noted at p. 5 above, the appropriate sanction to have been applied here would have been to revoke its registration as a broker or dealer. As noted at pp. 43-4 above, no basis exists for the imposition of sanctions against Aurre Management Co., Inc.

80/ The Division urges that additional sanctions be imposed against Respondents under Section 9(b) of the Investment Company Act (15 U.S.C. §80a—9(b)) and Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. §80b—3(e). However, the Order made no charges pursuant to such sections, and accordingly no sanctions may be imposed under those Acts.

81/ All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.