

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FILED
DEC 30 1974

SECURITIES & EXCHANGE COMMISSION

In the Matter of
E. F. HENDERSON & CO., INC.
et al.

(8-7439)

U.S. SECURITIES & EXCHANGE COMMISSION
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INITIAL DECISION

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Edward B. Wagner
Administrative Law Judge

Washington, D.C.
December 30, 1974

THE PROCEEDINGS

This public proceeding was instituted by an order of the Commission, dated April 11, 1973 pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act) to determine whether respondents willfully violated and willfully aided and abetted violations of the Securities laws and rules thereunder as alleged by the Division of Enforcement (Division) and the remedial action, if any, that might be appropriate in the public interest.

At the time of the evidentiary hearing in November, 1973 there were only 3 respondents who contested the proceedings. ^{1/} These three respondents were Richard Greenberg, E.F. Henderson & Co., Inc. (Henderson) and Melvin Schneiderman.

Greenberg represented himself at the hearing, and Henderson and Schneiderman were represented by Neal J. Hurwitz. After the hearing had been concluded and the Division's Proposed Findings of Fact, Conclusions of Law and Brief had been filed, Henderson and Schneiderman submitted an offer of settlement which was accepted (Commission Release 34-10923, July 23, 1974).

Thus the sole remaining contesting respondent is Greenberg. The order for proceeding charged Greenberg with the following:

- (a) a criminal conviction in United States v. Soldano, 71 Cr. 499 (D.C. S.D.N.Y.), of conspiracy to violate the anti-fraud provisions of the Securities Act of 1933 (Securities Act) and of the Exchange Act (and of mail fraud) in connection with transactions in the common stock of Belmont Franchising Corp. (Belmont).

^{1/} The other 12 respondents had either defaulted or submitted offers of settlement.

- (b) violations of the antifraud provisions of the Exchange Act and of the Securities Act in connection with an alleged manipulation of the price of Belmont common stock.
- (c) willfully aiding and abetting violations of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that Lincoln Securities, a firm at which Greenberg was listed as a limited partner, failed to file reports of financial condition for the calendar years 1970 and 1971.

The Division and Greenberg filed Proposed Findings, Conclusions and Briefs. The Division filed a reply.

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

Background

Lincoln Securities (Lincoln), a partnership with offices formerly at 156 Franklin Street, Hempstead, New York, has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since April 1, 1970.

Richard Greenberg was a partner in Lincoln.

Criminal Conviction

Greenberg was convicted on October 19, 1972 of conspiracy to violate Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with the alleged

manipulation of stock of Belmont Franchising Corp. The conviction^{2/} clearly falls within the class of offenses specified in the Exchange Act as grounds for disciplinary action. Greenberg was unsuccessful in appealing his conviction. He received a 30 day jail sentence which he has served and a two year period of probation.

Greenberg contends that he has consistently been the recipient of bad legal advice.^{3/} He argues that his conviction is accounted for by the fact that he never had an adequate opportunity to explain the facts and circumstances regarding his transactions in the Belmont account. Thus, he testified that he had spoken to one of the jurors, whose name he volunteered he could not remember, after the trial and that he had been told that the jurors had concluded he was guilty because he did not take the stand and state his innocence. Such testimony is, of course, hearsay and largely speculative. For all

2/ Section 15(b)(7) of the Exchange Act provides: "The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any persons from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such persons ... has been convicted of any offense specified in clause (B) of ... paragraph (5) within ten years of the commencement of the proceedings under this paragraph..."

Clause (B) of paragraph (5) specifies, insofar as pertinent here, felonies or misdemeanors which the Commission finds involve the purchase or sale of any securities or arise out of the conduct of a business of a broker or dealer.

3/ He complained both of his first legal representation where he was advised to take the Fifth Amendment before the Grand Jury and of his trial representation by a second attorney who advised him not to testify at his trial.

anyone knows he might still have been convicted and might even have received a more severe sentence had he testified. Further, although he attributes all his difficulties to not having told his story, when he was given an opportunity to do so in this proceeding he was evasive in replying to questions concerning prior purportedly untruthful testimony in the investigation and the use of nominee accounts.

The overriding facts are that Greenberg has had his day in court, has unsuccessfully pursued an appeal, and stands convicted of serious offenses.

Violations of Antifraud Provisions

The only proof offered against Greenberg on the charges of violation of the antifraud provisions in the Belmont stock manipulation was a certified copy of his indictment and conviction in U.S. v. Soldano, 71 Cr. 499 (D.C. S.D.N.Y.) (Tr. 10). Greenberg was convicted of conspiracy to violate the antifraud provisions and of mail and wire fraud, but was not convicted of direct violation of the antifraud provisions. It is noted that the Division is no longer pursuing its original contention that the conviction established its charges. No proposed conclusion of law is offered by the Division in this area, and it is not argued in the Division's brief.

The undersigned concludes that there is no evidence in the record supporting this charge against Greenberg and, accordingly it is dismissed.

Violations of the Reporting Requirement

Lincoln did not file its 17A-5 Reports with the Commission for the calendar years 1970 and 1971. Official notice is taken of the findings in my initial decision in Lincoln Securities (Administrative Proceeding File No. 3-2848) that Greenberg was in fact a general partner of the firm, who took an active role in its management with ^{4/} general responsibility for its accounting work. As such a general partner he was responsible for the filing of the reports despite the fact that Abe Camhi, another general partner, had signed such reports in the past and, by failing to act, Greenberg aided and abetted the failure to file.

The Division and Greenberg stipulated to the filing of a withdrawal application at some time prior to the date on which the 1970 Report was due. It was further stipulated that no action was taken by the Commission on the withdrawal application. Rule 15b6-1 provides in such instances that the application becomes effective on the 60th day after filing. Greenberg has not established that the application was in fact filed at such time that the obligation to file these reports would no longer have obtained, and he makes no such contention. He does however, argue that, in view of the fact that a withdrawal application had been filed, the failure to file the reports was not willful. He states, "The intent of filing a withdrawal was that the firm was out of business and could not afford the cost of a certified report". (Respondent's Proposed Findings, etc. p. 4).

^{4/} Greenberg incorporates in his filing in this proceeding his argument in the Lincoln Securities case that he is a mere limited partner. (Respondent's Proposed Findings of Fact, conclusions of Law and Brief in Support thereof, p. 1).

How possession of such an intent or its communication to the staff of the Commission could have excused the firm from the reporting requirement is not explained. Presumably, his contention is that the failure to file was not "willful" because there was no evil motive. But evil motive, an intent to violate the law or knowledge that the law is being violated are not required before it may be concluded that a willful violation has occurred. Hughes v. S.E.C. 174 F. 2d 969, 977 (D.C. Cir. 1940).

Accordingly, it is concluded that Greenberg willfully aided and abetted the willful violations of Lincoln in failing to file 17A-5 Reports for 1970 and 1971.

Public Interest

Greenberg argues that it is not in the public interest to bar him from the securities business. He points to the factors previously referred to as "unusual mitigating circumstances surrounding my conviction" and pleads for leniency and a right to remain in the business under strict supervision. He states that he and his family have suffered "quite sufficiently" as a result of his criminal conviction and that if the jury had been apprised of his "college background" and that he was a "solid citizen in the community", he would not have been convicted. Greenberg cites Allport, 7 S.E.C. 580 (1940), as precedent for the proposition that a criminal conviction should not lead to a substantial sanction. However, the case is not applicable since doubt as to respondent's guilt led the trial judge to suspend the sentence. This is not the case here.

As indicated earlier, whether Greenberg's testimony and facts concerning his background would have elicited a different verdict from the jury is purely speculative. What we are faced with is a serious criminal conviction and additional violations involving annual reports for the firm. Failure to file annual reports of financial condition are not mere technical violations.

As the Commission has stated:

"The requirement that annual financial reports be filed on time and in proper form is a keystone of the surveillance of registered broker-dealers with which we are charged in the interest of affording protection to investors, and full compliance with it is essential".
W. E. Leonard & Co., 39 S.E.C. 726, 727
(1960).

In addition, official notice is taken of the decision of the undersigned in Lincoln Securities in which Greenberg was found to have failed to supervise with respect to a number of Regulation T violations by the firm and to have willfully aided and abetted net capital violations by the firm, which subsequently went into bankruptcy owing large amounts to other broker-dealers.

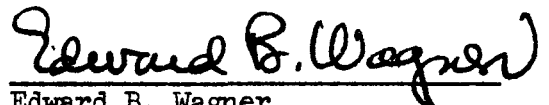
Based upon all these considerations it has been determined that nothing less than a permanent bar from the securities business is warranted.

5/ It should be noted that such a bar does not preclude the person barred from making such application to the Commission in the future as may be warranted by the existing facts. Fink v. S.E.C., 417 F. 2d, 1058, 1060, (2nd Cir. 1969).

Accordingly, IT IS ORDERED that Richard Greenberg is barred from association with any broker or dealer.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within (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.^{6/}


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✓ All proposed findings and conclusions submitted by the parties have been considered, as to have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.