ADMINISTRATIVE PROCEEDING
FILE NO. 3-5433

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DONALD & CO. SECURITIES, INC.,
et al.
(8-20952)

INITIAL DECISION

April 17, 1979
Washington, D.C.

Edward B. Wagner
Administrative Law Judge

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APPEARANCES: Barbara S. Rowin, Michael T. Gregg and Frank Irizarry, law clerk of New York Regional Office for the Division of Enforcement.

Richard Ben-Veniste and Michael D. Golden, Melrod, Redman & Gartlan, 1801 "K" Street N.W., Washington, D.C., for respondent Barett Kobrin.

BEFORE: Edward B. Wagner, Administrative Law Judge.

The Proceeding

Barrett Kobrin is the only remaining respondent in this public administrative proceeding which was instituted by Commission order on April 17, 1978.[1/] Insofar as Kobrin is concerned, the order recites the Division allegation that he was convicted in a Federal District Court of violating anti-fraud Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder[2/] and directs that a hearing be held to determine the truth of that allegation and to determine what, if any, remedial action is appropriate in the public interest.[3/]

A hearing was held on December 5, 1978. The Division there presented the following materials which were received in evidence: a stipulation relating to a filing with the New York State authorities, copies of the judgment and amended judgment of the District Court, a copy of the indictment and an attested copy of certain broker-dealer filings of Donald & Co. Securities, Inc. (Donald & Co.), the firm which had last employed Kobrin.

Among the materials offered by respondent and received in evidence were certain Jencks Act material which had been reviewed by District Court Judge Charles M. Metzner in the

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1/ The other respondent, Donald & Co., Securities, Inc., submitted an offer of settlement which was accepted. SEA Rel. No. 15,288, 16 SEC Docket 8 (November 1, 1976).

2/ United States v. Mendlinger, et al., 75 Crim. 956 (S.D.N.Y. 1976).

3/ Section 15(b)(6) of the Securities Exchange Act of 1934 authorizes the Commission to censure or place limitations on the activities or functions of persons such as Kobrin who have been convicted of securities offenses within 10 years of commencement of the proceedings if such sanctions are found to be in the public interest. 15 U.S.C. 78o(b)(6).

criminal case and which may have affected his sentence, minutes reflecting Judge Metzner's sentencing of Kobrin, a letter from Kobrin's probation officer and 20 letters from Kobrin's clients. The transcript of his criminal trial constituting some 2900 pages was also offered and received as bearing upon the degree and quality of Kobrin's involvement in the criminal activity.

The Division and Kobrin made post-hearing filings. 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.

Kobrin

Kobrin was associated with Donald & Co., a New York broker-dealer registered with the Commission, from around August 1976 to around October 1978.[4/] He was previously employed as a registered representative at various broker-dealers from around March, 1967 to around August 1976. Kobrin received a B.S. degree in Preveterinary Medicine from Rutgers University in February 1964.

Prior to entering the securities field he was employed in biological research by a chemical company.

4/ He left Donald & Co. in order to facilitate the settlement of the charges against that firm in this proceeding.

Kobrin's wife, Jayne Ellen Kobrin, was a voting shareholder of Donald & Co. owning between 25% and 50% of the outstanding common stock. She sold her stock around May of 1978.

Criminal Conviction and Public Interest Factors

In Count 12 of an indictment filed in United States v. Mendlinger, et al., 75 Crim. 956 (S.D.N.Y. 1976), Kobrin was charged with unlawfully, wilfully and knowingly violating Section 10(b) of the Exchange Act[5/] and Rule 10b-5 thereunder[6/] from around December 1970 to around July 1971. This Count incorporated by reference Count 1, a conspiracy count covering 13 paragraphs concerning the manipulation and sale of Belair Financial Corporation common stock, as the means by which Kobrin committed the offense charged.

On April 23, 1976 after the jury trial, Kobrin was acquitted of the above conspiracy count and of two counts of perjury. He was convicted of Count 12. Imposition of sentence was suspended at the time, and he was fined $10,000.[7/] In the sentencing transcript Judge Metzner stated:

5/ 15 U.S.C. 78j(b).

6/ 17 CFR 240.10b-5.

7/ Two of the defendants who were found guilty of conspiracy, fraud and income tax evasion received 4-month jail sentences in addition to $5,000 fines and 2-year periods of probation after incarceration.

> "Mr. Kobrin was a person on the periphery in this transaction, I am not sure how much he knew or didn't know but I think that under the circumstances and the fact that he was acquitted on Count One and other counts in the indictment, except the Count 12, I will suspend imposition of sentence and impose a fine of $10,000." (Kobrin Ex. 2).

On April 30, 1976, an amended judgment was issued which reduced Kobrin's fine to $7,500 and placed him on probation for two years.

Kobrin's criminal conduct occurred in his capacity as a registered representative employed by Halle & Stieglitz, a New York broker-dealer, in its office in Maplewood, New Jersey. He was convicted of fraud in connection with a scheme in which the price of a common stock of Belair Financial Corporation (Belair), was manipulated and sold at greatly inflated prices at a cost to the public of hundreds of thousands of dollars. The manipulation, which was accomplished in part through secret pay-offs and kickbacks, caused the price of Belair stock to rise from less than $1 bid per share around December 1970 to $14 bid per share on April 30, 1971. In February 1972 the price was down to about $1 per share.

Kobrin recommended and sold shares of Belair stock to 3 of his customers. They lost about $145,000 on their purchases, or the total price they paid. One customer, Harvey Guerin, lost around $122,000.

Counsel for Kobrin argues that in submitting its case the Division has established only that the Commission had

jurisdiction to initiate the proceeding. It is argued that for the Division adequately to sustain its burden of proof it must not only show the conviction but also must show, apart from the indictment and verdict, that Kobrin represents a threat to investors (See Kobrin Brief, pp. 2, 18). Counsel argues on the basis of Thompson Ross Securities Co., 6 SEC 1111, 1123 (1940), that a conviction of violating a provision of the Securities laws does not itself justify the imposition of a sanction.

It is true that not every violation warrants imposition of a sanction, but here the Division argues that the nature of the crime committed, which they have shown through the indictment and conviction, establishes their case. There is ample precedent for this position; in a number of cases the Commission has concluded that a sanction is warranted based solely upon a conviction and indictment. See Michael James Hughes, 1 SEC 843 (1936); Collateral Bankers, 2 S.E.C. 738 (1937); Central Securities Corporation, 11 S.E.C. 98 (1942); Jack Lewis Baker, 12 S.E.C. 163, 164-5 (1942); cf. Balbrook Securities Corporation, 42 S.E.C. 496, 498 (1965) (consent injunction).

Certainly, the Division has met its burden of proof in the sense of the burden of going forward with the evidence. Whether the Division has met its burden of persuasion that a sanction should be imposed is a question to be determined after a review of the entire record, including Kobrin's evidence.

Nor is it the Division's burden to show by "clear and convincing evidence" that a sanction is warranted, as argued by counsel for Kobrin (Kobrin Brief, p. 18). The Collins[8/] decision from which this argument stems if clearly confined to first-hand proof of fraud in an administrative proceeding. As the Division argues, the Collins standard does not apply to what is involved in this case — proof of conviction of a crime and matters relating to the public interest, whether, and to what extent, a sanction is appropriate. These matters are governed by the preponderance standard.[9/]

Counsel for Kobrin refers to the criminal conviction as a "Kafkaeske episode" (Kobrin Brief, p. 3) and states as to Kobrin's principal accuser in the trial, Perry Scheer, "Franz Kafka would be hard put to invent a more insidious individual than Scheer to ensnare a neophyte such as Kobrin" (Kobrin Brief, p. 10). Counsel asserts that the trial transcript demonstrates that Kobrin was more a victim than a conspirator.

There are factors in the criminal record which are favorable to Kobrin:

1. The scheme to defraud commenced in September 1970 and involved four persons, Perry Scheer, Mendlinger, Snyder and Schiffman. The scheme at this stage included the takeover of a corporate shell and gaining control of the "float" or block

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8/ Collins Securities Corp. v. S.E.C., 562 F.2d 820 (D.C. Cir. 1977).

9/ Application of the clear and convincing standard would not, however, affect the result.

stock available for sale. The corporate shell was then renamed Belair. It was not until April, 1971 that Kobrin was brought in by Scheer to aid in the distribution of the stock.

2. As previously mentioned, Kobrin made only 3 sales in amounts respectively, of approximately $122,000, $22,000 and $1,200.[10/] Although these purchases were almost total losses, all three customers continued their accounts with Kobrin and bear him no grudge.

3. Kobrin and his customers were not in the full confidence of the others, since they were not taken out of the stock before the roof caved in. When Scheer, as part of the bail-out, or "blow off", arranged for the sale of 40,000 shares at around $15 per share of Belair to a California mutual fund, Competitive Associates, in return for a secret pay-off of $60,000 ($1 1/2 per share) to the fund manager, Kobrin was not told.

4. Scheer testified that, after Kobrin's first purchases of Belair, he offered him between a $1 and $1 1/2 per share to make sure he bought more stock. He also stated he had told Kobrin that Kobrin's customers would be able to sell Belair at between $20 and $22 in a short time and that the stock had a "thin float" (T. 1073).

10/ The Division points out in its Reply Brief that Kobrin introduced Belair to a fourth person who purchased stock from another broker, but there is no evidence in the record as to the size of this transaction nor the extent to which Kobrin was involved. The Division also states that it "may well be" that Kobrin recommended the stock to others, but there is no showing in the record of further recommendations.

Kobrin never received any payment and denies that any offer was made. Scheer concedes that no payment to Kobrin was ever made. Counsel seeks to explain Scheer's testimony concerning the pay-off on the basis that Scheer falsely told Schiffman, his principal partner in crime, in September 1971 that he had paid Kobrin in an attempt to swindle Schiffman and pocket the money himself. The theory is that Scheer became committed to this story and that the Government based its case upon it. Counsel also relies upon Jencks Act material which Judge Metzner reviewed in the criminal case from which it appears that Scheer told an Assistant U.S. Attorney, Kobrin had been "duped and hurt" and there was "no payoff" to Kobrin. Scheer explained on redirect that what he meant by this was that he had promised Kobrin money and hadn't paid him, but there is no mention in the Jencks Act material of a promise to Kobrin.

It is also noted, as counsel makes clear, that Scheer himself was indefinite as to the amount to be paid Kobrin, that there is no evidence that the latter ever asked for the money supposedly due him and that Scheer has impressive credentials as a stock swindler.

The Division in its Reply states that Scheer is not Kobrin's sole accuser as to the pay-off. Nathan Hager, who accompanied Scheer on a trip to see Kobrin, testified that Scheer told him on the ride back "that he [Scheer] would have to take care of Kobrin for introducing him to these brokers and for buying

the stock" (T. 929). Hager's testimony, however, could easily have reflected a conclusion on Scheer's part that he should compensate Kobrin and does not necessarily establish that Kobrin ever knew about it.

There are other matters in the criminal transcript that do not add up as favorably for Kobrin. A registered representative for another brokerage firm recalled a conversation with Kobrin in late July or early August of 1971 in which Kobrin asked if the other brokerage firm would continue to buy Belair and "move the stock higher" (T. 1026).

Further, Kobrin was not exactly a "neophyte" stock-broker. At the time he became involved in the Belair scheme, he had been a registered representative for 4 years.

In view of the manner in which the case was presented (See Government Summation, T. 2693-2695; Defense Summation, T. 2731-2741; Judge Metzner's charge, T.2856-2857), the jury could have based its guilty verdict as to Kobrin either upon the view that he was a promised a secret pay-off, or that he omitted to tell his

customers that the market was contrived and not free.[10/] Because of the strength of evidence discussed above which casts doubt on the Kobrin pay-off theory, it has been concluded for purposes of this proceeding that Korbin's involvement did not entail a promise from Scheer of a secret pay-off but did include a failure to disclose that the market was contrived and not free.

New York Supplemental Salesman Statement

The Division argues that Korbin's failure to disclose his criminal conviction on the above state government form and his testimony concerning it "cast doubt upon his reliability for veracity and his suitability to engage in the securities business" (Division Initial Brief, p. 10). Respondent states that there was no falsification and that his explanations were forthright.

On August 25, 1976 Kobrin was sent a letter from the Office of the Attorney General of New York requesting that he fill out the Supplemental Salesman Statement on the reverse side of the letter by reporting information concerning his change of employment. Kobrin executed and returned the form on September 8, 1976 filling in such information and also volunteering his new address. He inserted "N/A" in response to an interrogatory

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10/ See also testimony of witnesses Maiorca, Johnson and Guerin (T. 795-98; 810-812, 832-33).

concerning prior criminal convictions. A final item on the form requiring a check mark if a salesman registration was to be cancelled was left blank.

Kobrin explained that he had used the "N/A" notation because he had been taught not to leave spaces blank and had volunteered his new address to save a $5 fee which would have had to have been paid if this information were reportedly separately.

The Division contends that the explanation lacks candor and is incredible — that, for example, for his explanation to be consistent the final item should also have been marked "N/A" and he should not have volunteered his change of address. The Division also points out that there are two other blanks which should have been filled in if Kobrin were really operating pursuant to a "fill-in-all-the-blanks" principle. These two items were the date he commenced employment at Donald & Co. and the date of his change of address.

Kobrin explained that he left one of these blanks through an "error of omission", and he apparently misinterpreted the form as to the other blank. He stated that since the cancellation box was only to be checked if he wished to do so he merely left it blank.

None of this really amounts to anything. It is quite clear that the request from the Attorney General's office did not seek information concerning Kobrin's criminal conviction. Kobrin had every reason to believe that his firm had already

reported the conviction. Further, while Kobrin could have been more careful in filling out the form, his explanations are credible and do not demonstrate a lack of candor.

Kobrin's Admonishment by the New York Stock Exchange

In about 1968 or 1969 Kobrin was admonished by the New York Stock Exchange while he was a registered representative of Hirsch & Co. The admonishment was based upon Kobrin's conduct in handling the account of a customer.

The circumstances were that Kobrin accepted an order for a low-priced, over-the-counter security in a large amount — something on the order of $12,000 — over the telephone from a stranger without having a deposit check but on the strength of a promise of immediate mailing of such a check. The name the person gave was looked into and appeared to be reputable. Under the circumstances, Kobrin's supervisor approved his relying upon the promise of a deposit check. The customer, who it later developed had used a false name, did not mail in his check and failed to honor his commitment. The purchase order had to be honored by the firm, and Kobrin personally absorbed an out-of-pocket loss of some $1,600.

Character Witnesses

Kobrin's Rabbi, who has known him for about 3 years testified that Kobrin is "conscientious, meticulous, sincere, certainly

honest and a person with integrity" (R. 85). While the Rabbi has known generally about Kobrin's conviction for sometime, he learned the details from Kobrin about a week before he testified. The Division points out that the Rabbi invoked professional ethics when asked to disclose the basis for his view that Kobrin was "conscientious and meticulous." Kobrin testified later that these matters had to do with fulfilling his responsibilities with respect to his two children from a previous marriage (T. 88).

Kobrin's business associate who has worked closely with him at Donald & Co. stated that Kobrin had been "completely honest and aboveboard in all of his dealings with his clients and everyone he comes in contact with" (R. 204). The business associate stated on cross examination by the Division that Kobrin was Donald & Co.'s biggest producer and that he would like to see him back at the firm. It was also brought out that the associate is buying out a part of Mrs. Kobrin's one-third stock interest in Donald & Co.

While there is reason to discount the Rabbi's and associate's testimony somewhat on the bases developed by the Division, the evident sincerity and conviction of both witnesses were impressive.

As to the 20 letters from clients which were received in evidence, the Division contends that they are of little value because it was unable to cross-examine the authors to develop bias or lack of credibility. The letters must be discounted on this basis, but their sheer number and universally highly favorable

tenor is again impressive.[11/]

Sanction

The Division argues that the serious nature of the crime of which Kobrin was convicted requires that he be barred from association with any broker or dealer, citing Benjamin Levy Securities, Inc., SEA Rel. No. 14368, 13 SEC Docket 1348 (1978), and Collins Securities Corp., 8 SEC Docket 250, 258 (1975), rev'd. and remanded on other grounds as Collins Securities Corp. v. S.E.C., 562 F.2d 820 (1977).

These cases make clear that the Commission regards fraud and manipulation as significant factors to be considered in determining appropriate sanctions. In Richard C. Spangler, Inc., SEA Rel. 12104, 8 SEC Docket 1257, 1266 (1976),[12/] the Commission stated:

> "When the past misconduct involves fraud, fidelity to the public interest requires us to be mindful of the fact that the securities business is one in which opportunities for dishonesty recur constantly...."

In Collins Securities Corp. SEA Rel. No. 11766, 8 SEC Docket 250, 258 (1975),[13/] the Commission stated:

> "Manipulation strikes at the integrity of the pricing process on which all investors rely. Hence it runs counter to the basic objectives of the securities laws."

11/ Kobrin solicited the letters himself through a form letter after his suggestion to the Division that it solicit such opinions was rejected.

12/ Vacated and remanded on other grounds as Nassar & Co., Inc. v. S.E.C., 566 F.2d 790 (D.C. Cir., 1977); Nassar & Co., Inc., SEA Rel. No. 15347, 16 SEC Docket 222 (1978).

13/ Rev'd. and remanded on other grounds as Collins Securities Corp. v. SEC., 562 F.2d 820 (D.C. Cir. 1977).

Counsel for Kobrin argues vigorously on the basis of the Beck case[14/] that any sanction must be "remedial" solely in the limited sense of constituting a specific deterrent to further abuse by the individual involved (Kobrin Brief, p. 18). Counsel argues, in effect, that the Commission cannot properly take into account the effect any sanction may have generally upon standards of conduct in securities business. But the Commission has specifically stated that consideration is to be given to this latter factor and has declined to follow the "suggestions" of the Beck case. Thus, in Lamb Brothers, Inc., SEA Rel. No. 14,017, 13 SEC Docket 265, 274 fn. 49 (1977), the Commission stated:

> "Past misconduct is the essential predicate for liability. Once liability has been established, our concern is with the remedy. And there our orientation is to the future. Two questions are presented. The first is: What action is needed to protect investors from future harm at the particular respondent's hands? Pertinent to the inquiry is the fact that the statute is drawn on the premise that past misconduct gives rise to an inference of probable future misconduct. [Citing cases]. . . . The second question is: What effect will our action or inaction have on standards of conduct in the securities business generally? As the Court of Appeals for the Second Circuit has recently observed, 'The purpose of . . . sanctions must be to demonstrate not only to petitioners but to others that the Commission will deal harshly with egregious cases.' Arthur Lipper Corporation v. S.E.C., 547 F.2d 171, 184 (C.A. 2, 1976).

14/ Beck v. S.E.C., 430 F.2d 673, 674-675 (6th Cir. 1975).

> We are not unmindful of the Sixth Circuit's suggestions that deterrence is an impermissible objective in proceedings of this character. Beck v. S.E.C., 430 F.2d 673, 675 (C.A. 6, 1970). However, we repeat our previous announcement that 'we respectfully disagree with . . . that case and decline to follow it.' Arthur Lipper Corporation, Securities Exchange Act Release No. 11773 (October 24, 1975), 8 SEC Docket 273, 286n. 69, aff'd in part and reversed in part, 547 F.2d 171 C.A. 2, 1976). We note in this regard that Beck has not been followed by other courts, that it has been described as a 'sport' (Oakes, J., dissenting in Arthur Lipper Corporation v. S.E.C., 551 F.2d 915 (C.A. 2, 1977)), and that it is hard to square with the Supreme Court's post-Beck decision in Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973)."

In its Reply Brief the Division further demonstrates that it is the Commission's position that appropriate remedial action must take into account "the impact that the decision is likely to have on the welfare of investors as a class and on the ethical climate. . ." in the securities industry. Steadman Security Corp., SEA Rel. No. 13695, 12 SEC Docket 1041, 1061 (1977), appeal pending No. 77-2415 (5th Cir.

This decision will, of course, follow the Commission opinions in the Lamb case and other cases and take both factors into account.

Counsel also argues that many of the cases cited by the Division are those "in which the issue of fraud or other wrongdoing is tried in the first instance and in which the subject of the inquiry has not theretofore been subjected to prior criminal trial and appropriate criminal penalties" (Kobrin Brief p. 31).

The brief states: "Thus, the need for a deterrent sanction in such case is apt to be more compelling" (Ibid). However, in many instances criminal cases are those involving the more serious misconduct, and it must be proven beyond a reasonable doubt.

While the Division is correct that a lack of candor in the proceeding and past disciplinary action by the self-regulatory organizations are relevant in assessing sanctions, no lack of candor has been shown here and the admonishment by the New York Stock Exchange was over 10 years ago and did not involve fraud or dishonesty. Further, his actions were approved by his supervisor.

Counsel for Kobrin contends that the not guilty verdict on the conspiracy count "points forcefully" (Kobrin Brief, p. 33) against the view that he participated in a manipulation. It is suggested that the jury convicted him on the theory "that where there is so much smoke there must be a little fire also" (Ibid. p. 11). Counsel is also of the opinion that it was an error for Kobrin not to have appealed. The thrust of these arguments is that Kobrin was in fact innocent. This is a conclusion which is clearly beyond my jurisdiction. It is impossible on the record before us to ascertain the basis for the alleged inconsistency in the verdicts, and it serves no purpose to speculate about it. We must accept the guilty verdict and proceed from there.[15/]

15/ As stated above, it has been concluded for purposes of this proceeding that the fraudulent involvement of Kobrin was failure to disclose that the market for Belair was contrived and false.

A very favorable consideration for Kobrin is Judge Metzner's statement upon imposition of sentence. Kobrin's counsel suggests (Brief, p. 28) that the statement means that Judge Metzner believed that Kobrin did not participate in the Belair manipulation. I do not interpret the statement in this fashion. I believe the more reasonable interpretation, particularly in view of the underlying record and the sentence imposed upon Kobrin and its relationship to other sentences, 16/ is that Judge Metzner felt that Kobrin was not as guilty as other defendants. 17/ It is clear that Kobrin was brought into the picture at a later date and was not in the full confidence of the others since he was left holding the bag with his customers during the bail-out.

Counsel further argues that Judge Metzner believed that Kobrin posed no threat to investors since he did not keep him out of the business in his sentence. I would prefer to think that Judge Metzner deferred to the Commission in this respect, since the Commission has clear statutory authority to launch this proceeding for the purpose of bringing its experience and

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16/ See fn. 7 of this Initial Decision.

17/ It is clearly not as favorable as the statement by Judge Nordbye in the criminal trial underlying Roselle Benson Allport, 7 SEC 580 (1940), to the effect that he believed the defendant to have been not guilty.

perception to bear to determine whether that type of sanction is warranted.

The Division contends that a permanent bar from the business is required for Kobrin while his counsel argues that he has already suffered sufficiently and that no sanction is in order.

While Kobrin's offense was quite serious and his sales substantial, these events covered a short period of time. Further, they occurred almost 8 years ago. No other wrongdoing on Kobrin's part has been shown either before or since and the representations on his behalf are as noted, impressive. In view of this and other mitigating circumstances which have been discussed, I believe a 6-month suspension will best serve the public interest.

Order

Accordingly, IT IS ORDERED that Barett Kobrin is suspended from association with a broker or dealer for a period of six months from the effective date of this order.

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 decison shall beocme 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. 18/

Edward B. Wagner
Administrative Law Judge

April 17, 1979
Washington, D.C.

18/ All proposed findings, conclusions and contentions have been considered. They are accepted to the extent they are consistent with this decision.