

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 52358 / August 30, 2005

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2301 / August 30, 2005

ADMINISTRATIVE PROCEEDING
File No. 3-12022

In the Matter of

Barry S. Berlin,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Barry S. Berlin (“Berlin” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Berlin has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Berlin consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

On the basis of this Order and Berlin's Offer, the Commission finds¹ that:

A. RELEVANT ENTITIES

1. Kmart

Kmart Corporation ("Kmart" or the "company") was a Michigan Corporation headquartered in Troy, Michigan, during the relevant period. On January 22, 2002, Kmart filed a voluntary petition for reorganization relief under Chapter 11 of the Bankruptcy Code. The company's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange until December 19, 2002, when trading was suspended. Kmart's fiscal year ends the last Wednesday in January.

2. Newell Rubbermaid

Newell Rubbermaid Inc. is a Delaware corporation headquartered in Atlanta, Georgia. Newell Rubbermaid Inc. is a Fortune 500 corporation and a major Kmart vendor. Subdivisions include Rubbermaid Home Products which manufactures and distributes plastic products for home storage and organization. Newell Rubbermaid's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

B. RESPONDENT

Barry S. Berlin ("Berlin") was Director of Sales at Newell Rubbermaid Inc. for the Kmart account during the relevant period.

C. FACTS

1. Kmart Improperly Recognized Vendor Allowances

Kmart improperly recognized millions of dollars worth of vendor "allowances" prior to bankruptcy. Kmart obtained allowances from its vendors for various promotional and marketing activities. A significant number of allowances were recognized prematurely – or "pulled forward" – on the basis of false information provided to Kmart's accounting department, while the true terms of the payments were set forth in undisclosed agreements. As a result of these accounting irregularities, Kmart's cost of goods sold was understated, and earnings were

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

materially overstated, for the fourth quarter of fiscal year ended January 31, 2001 (“fiscal year 2000”).

2. Kmart’s Vendor Allowance Tracking System (“VATS”) Forms

The principal document involved in the pulling forward of vendor allowances was Kmart’s Vendor Allowance Tracking System (“VATS”) form. VATS forms summarized the basic terms of vendor allowances for the company’s accounting department. Bookkeepers inputted information from the VATS form into the company’s computerized accounting system, where it was eventually posted to the general ledger. To ensure proper accounting for an allowance, the VATS form should have reflected the true purpose of, and effective dates for, the payment. To pull forward an allowance, this information was misrepresented on the VATS form to make it look like the payment was for past performance, when in truth it related to future obligations. Kmart had a number of safeguards designed to ensure the accuracy of the VATS forms and proper recognition of vendor allowances. These included the requirement that vendors co-sign VATS forms.

3. Berlin Helped Execute Three Misstated VATS Forms

Towards the end of Kmart’s fiscal year 2000, Berlin learned that Kmart needed Newell Rubbermaid Inc.’s help in overcoming a shortfall in allowances in the home storage division. With Berlin’s knowledge and assistance, Newell Rubbermaid Inc. agreed to advance allowances against future shipments of goods. Berlin understood that some of the advances related to sales and promotional activity that had not occurred during Kmart’s fiscal year 2000. On or about January 25, 2001, one of Berlin’s subordinates executed VATS form Nos. 227901 and 227902 covering a \$2.2 million portion of the advance. On or about January 31, 2001, Berlin executed VATS form No. 227910 covering a \$600 thousand portion of the advance. Each of these three VATS forms misrepresented the effective dates of the allowances as falling within Kmart’s fiscal year 2000. On or about February 20, 2001, Berlin received a letter drafted by a subordinate in which the subordinate made clear that “we did not identify the correct reasons for the VATS.” Kmart’s accounting personnel entered the false or misleading VATS information into the company’s computerized accounting system, where it was eventually posted to the general ledger. As a result, Kmart’s cost of goods sold was understated by \$2.8 million in fiscal year 2000.

4. Kmart’s Earnings Were Overstated

On March 13, 2001 Kmart filed its Form 10-K for fiscal year 2000. According to the financial statements incorporated into the Form 10-K, Kmart reported net income for the fourth quarter of \$249 million or \$0.48 per share, exceeding Wall Street analyst expectations of \$0.47 by a penny. Berlin’s accounting irregularities caused net income for the quarter to be overstated by slightly more than 1 percent.

D. CONCLUSION

As a result of the foregoing, Berlin committed violations of Rule 13b2-1 of the Exchange Act and caused Kmart's violations of Sections 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 promulgated thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Berlin's Offer.²

Accordingly, it is hereby ordered that Respondent Berlin cease and desist from committing or causing any violations and any future violations Rule 13b2-1 of the Exchange Act and causing any violations and any future violations of Sections 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 promulgated thereunder.

By the Commission.

Jonathan G. Katz
Secretary

² Berlin has agreed to pay a \$30,000 civil penalty in connection with a parallel civil action.