

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
ROBERT BERKSON :
MAURICE RIND :
JAMES GALLENLINE :

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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

Washington, D.C.
October 2, 1978

Irving Sommer
Administrative Law Judge

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APPEARANCES:

Douglas P. Jacobs and Andrew E. Goldstein of the New York Regional Office of the Commission, for the Division of Enforcement.

Jacob W. Heller and Howard L. Mann, of Weiss, Rosenthal, Heller & Schwartzman, for Robert Berkson.

Benjamin Lewis of Lapatin, Lewis, Green, Kitzes & Blatteis, for Maurice Rind.

BEFORE:

Irving Sommer, Administrative Law Judge

These public proceedings were instituted pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 10(b) of the Securities Investors Protection Act of 1970 ("SIPA") by order of the Commission dated April 13, 1977, later amended by order dated July 26, 1977. The order as amended ("Order") directed that a determination be made whether the respondents named therein ^{1/} had been convicted of certain crimes and had engaged in other misconduct as alleged by the Division of Enforcement, and what, if any, remedial action pursuant to the Exchange Act and SIPA is appropriate in the public interest.

In substance, the Division alleges that:

1) Berkson and Rind were preliminarily enjoined, by order of the U.S. District Court for the Southern District of New York, from violating and aiding and abetting violations of Sections 10(b), 15(c)(3), and 17(a) of the Exchange Act and Rules 10b-5, 15c3-1, 17a-3 and 17a-5 thereunder.^{2/}

2) On June 21, 1977, a decree was entered in the U.S. District Court for the Southern District of New York adjudicating the customers of Packer, Wilbur & Co. Inc. ("Registrant")

^{1/} James Gallentine failed to file an answer to the Order of Proceedings and, on December 9, 1977, the Commission issued an Order holding him in default and barring him from association with any broker or dealer. Exchange Act Release No. 14240/December 9, 1977, 13 SEC Docket 1094 (December 27, 1977).

^{2/} SEC v Packer, Wilbur & Co. Inc., 71 Civil 1385, (S.D.N.Y.)

to be in need of the protection of SIPA, and appointing a Trustee for the Registrant.^{3/} Berkson and Rind each was an officer, director and shareholder of Registrant when the decree was entered.

3) Berkson and Rind were convicted of eight counts of an indictment charging securities-related crimes on June 9, 1976 in the U.S. District Court for the Southern District of New York.^{4/}

4) Between August 1, 1970 and March 25, 1971 Berkson and Rind wilfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

5) Between February 19, 1971 and March 25, 1971 Berkson and Rind wilfully aided and abetted violations of Section 15(c) (3) of the Exchange Act and Rule 15c3-1 thereunder.

6) From February 19, 1971 to March 25, 1971 Berkson and Rind wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

7) Since February 14, 1971 Berkson and Rind have wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder.

8) On November 1, 1976 Berkson was convicted, upon his plea of guilty of filing a false federal income tax return.^{5/}

^{3/} SEC v Packer, Wilbur & Co. Inc., 71 Civil 1385.

^{4/} United States v Berkson, et al., 75 Crim 608 (S.D.N.Y.)

^{5/} United States v Robert Berkson, 76 Crim 499 (S.D.N.Y.)

9) On June 3, 1977 Rind was convicted, upon his plea of guilty, to securities-related crimes. ^{6/}

Respondent Rind appeared through counsel at which time he withdrew the denials contained in his answer and admitted all the allegations contained in both the Commission's Order for Proceedings, dated April 13, 1977, and the amended Order, dated July 26, 1977. Respondent Berkson appeared through counsel who participated throughout the hearing. As part of the post-hearing procedures, successive filings of proposed findings, conclusions and supporting briefs were specified. Respondent Rind did not make any post-hearing filings. The remaining parties made timely filings.

The findings and conclusions herein are based on the record, including the post-hearing documents, and on observation of the demeanor of the witnesses.

Respondents

At the time of his conviction for the criminal offenses listed previously, Maurice Rind was vice-president, a director and a shareholder of Parker, Wilbur & Co. Inc., a New York corporation which had been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since June 22, 1961. Registrant ceased operations as a broker-dealer on March 25, 1971.

^{6/} United States v Arnold Nelson Mahler, et al., 76 Crim 1047 (S.D.N.Y.)

Robert Berkson has been a registered representative employed in the securities filed since 1962 or 1963. He is 39 years of age, and was graduated from Hofstra College in 1960 with a Bachelor of Science degree in Economics. At the time of his conviction for the criminal offenses listed previously, he was an officer, director and shareholder of registrant.

Criminal Convictions and Other Securities Violations by Rind

Counsel for Rind appeared at the hearing on his behalf and admitted all the allegations in the Order for Proceedings dated April 13, 1977 and the amended Order for Proceedings dated July 26, 1977. No evidence or witnesses were presented on behalf of Rind, and counsel directed his defense towards mitigation of any sanctions to be imposed. The Division entered Exhibits 1-11 in evidence as referring solely to Rind herein, and further filed a brief including proposed findings of fact and conclusions of law.

On the basis of the Order for Proceedings and the amended Order for Proceedings, it is found that Rind wilfully violated Sections 10(b), 15(c)(3), and 17(a) of the Exchange Act and Rules 10b-5, 15c3-1, 17a-3, and 17a-5 thereunder. On the basis of the Order for Proceedings and the amended Order for Proceedings it is further found that Rind was preliminarily enjoined by an order of the United States District Court for the Southern District of New York from violating and aiding

and abetting violations of Sections 10(b), 15(c)(3), and 17(a) of the Exchange Act and Rules 10b-5, 15c3-1, 17a-3, and 17a-5 thereunder; that Rind was convicted of eight counts of an indictment charging securities-related crimes on June 9, 1976 in the United States District Court for the Southern District of New York, and that Rind was convicted on his plea of guilty to securities-related crimes on June 3, 1977 in the United States District Court for the Southern District of New York.

Criminal Convictions and Other Securities Violations by Berkson

Berkson does not dispute and entered into a written stipulation with the Division admitting the following facts as charged:

1) That he was convicted of eight counts of an indictment in the United States District Court for the Southern District of New York ^{7/} which (a) involved the purchase and sale of a security; (b) arose out of the conduct of the business of a broker-dealer; (c) involved the fraudulent conversion of funds and securities; and (d) involved the violation of Sections 1341 and 1342 of Title 18, U.S. Code.

2) On November 1, 1976 Berkson was convicted, upon his plea of guilty, to one count of an indictment in the United States District Court for the Southern District of New York, ^{8/}

^{7/} See note 4, supra.

^{8/} See note 5, supra.

which involved the filing of a false federal income tax return which had been verified under penalties of perjury and which respondent Berkson did not believe to be true and correct as to every material matter.

3) On April 7, 1971 Berkson was preliminarily enjoined on default by a federal court from violating and aiding and abetting violations of Sections 10(b), 15(c)(3), and 17(a) of the Exchange Act, and Rules 10b-5, 15c3-1, 17a-3, and 17a-5 thereunder. ^{9/}

4) On June 21, 1971 Berkson was an officer, director and shareholder of registrant at a time when a trustee was appointed pursuant to Section 5(b) of SIPA. ^{10/} Said trustee has been required to make unreimbursed charges against the fund established by the Securities Investors Protection Corporation an order to satisfy administrative and other expenses.

5) From on or about September 30, 1970 to on or about February 23, 1971 registrant wilfully violated Section 15(c) (3) of the Exchange Act and Rule 15c3-1 thereunder. ^{11/}

^{9/} See note 2, supra.

^{10/} See note 3, supra.

^{11/} Section 15(c)(3) of the Exchange Act, as here pertinent prohibits securities transactions by a broker-dealer in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c3-1 provides, subject to certain exemptions not applicable here, that no broker or dealer shall permit his aggregate indebtedness to all persons to exceed 2000% of his net capital computed as specified in the rule or to have a net capital of less than \$5,000.

6) As of February 23, 1971, registrant was in violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder because of its failure to accurately make and keep current certain of its books and records. 12/

7) Since February 14, 1971, registrant has been in violation of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that the required financial report due on or about February 14, 1971 was not filed. 13/

Criminal Conduct

Berkson was convicted after trial by Jury of the offenses of "unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud, mail matter, and did transport forged securities in interstate commerce, and conspiracy to do so." 14/ As part of the conspiracy Berkson's

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

13/ Rule 17a-5 as pertinent here, promulgated under Section 17(a) of the Exchange Act provides generally that a registered broker or dealer shall file annually with the Commission a report of its financial condition within 45 days of the "as of" day of the report.

14/ Certified copy of Judgment U.S. Dist. Cont.- Div. Exh. 12.

conduct, among others included forging of documents or directing others to do so, sale and pledge of securities which did not belong to registrant and which were being held in trust for customers of registrant or directing others to do so, making false and misleading representations to customers as to the status of their stock or directing others to do so, and use of the proceeds of such illegal acts for the benefit of registrant and Berkson, all without informing customers of the firm that this was being done.

As to his conviction on plea of guilty of the offense of subscribing a false federal income tax return, the facts show that between February 1, 1970 and April 10, 1970 Berkson donated a total of 3,000 shares to different charities, and thereafter subscribed and filed a federal income tax return for the year 1969 falsely claiming that such contributions were made in 1969. Berkson pleaded guilty to one count of the indictment and admits his conviction for conduct "which involved the filing of a false federal income tax return which had been verified under penalties of perjury and which respondent Berkson did not believe to be true and correct as to every material matter."

Rule 17a-3 and Rule 17a-5

During the period in question registrant was required by Rule 17a-3 under the Exchange Act to make and keep current certain books and records specified in that rule. Additionally, under Rule 17a-5 an annual report of financial condition was required. The record shows, and Berkson admits that the registrant's books "including, but not limited to, ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of registrant, all purchases, sales receipts, and deliveries of securities for such account and the debits and credits to such account" were kept in violation of the provisions of that rule. The Division alleges that Berkson knew of this record keeping violation for at least six months prior to a letter he wrote on February 11, 1971 to the Commission asking for an extension of time to file form X-17a-5. The request indicated that the records were "thrown hodge podge into various cartons" following a move and were being associated, correlated and filed preparatory to permitting the auditors to prepare the report. Berkson testified that he wrote the letter at the request of the registrant's accountant, that he had no responsibility in the record keeping function at the registrant. The evidence demonstrates that Hyman, president of the registrant was a certified public accountant, that either he or his accounting firm kept and maintained the records, and that Berkson had no authority, responsibility, or knowledge

in this part of the business. The record does not support a conclusion that Berkson as Secretary had any operational or supervisory responsibility in record keeping or financial reporting functions of the registrant. In short, the record does not establish by a preponderance of the evidence that Berkson aided or abetted registrant's violations of Rules 17a-3 or 17a-5. Accordingly, these charges are dismissed.

Net Capital Violations

The record shows, and Berkson admits that during the period in question registrant wilfully violated Section 15(c) (3) of the Exchange Act and Rule 15c3-1 thereunder. On February 19, 1971, registrant had a total net capital deficiency of \$51,475.96. ^{15/}

Respondent argues that he is not chargeable for any net capital violations since he had no responsibilities at the firm in the financial field, and that Hyman, the president was solely in charge. This allegation is without merit under the circumstances herein. The picture that emerges shows Berkson was aware of the net capital rule through his years of brokerage experience, that he knew the firm was suffering from a serious liquidity problem, and was in fact in severe financial straits. Armed with this knowledge of the serious financial difficulties engulfing the firm of which he was an

officer, second longest stockholder and director, Berkson was required to determine the registrant's net capital position forthrightly from Hyman, and to see to it that the firm was not in violation thereof. He abstained from this responsibility and the violations continued to run on. "The net capital rule is one of the most important weapons in the Commission's arsenal." ^{16/} As befitting his position in the firm, he was under "a duty to keep himself informed of the registrant's financial condition and to take those steps necessary to insure compliance with the Exchange Act." ^{17/} Instead with clear knowledge of the financial problems rampant he did nothing. Under the circumstances, I think that he can fairly be held to have wilfully aided and abetted the net capital violations.

Other Matters

On March 2, 1978 at pre-trial proceedings I granted the Division's Motion that the doctrine of collateral estoppel be invoked as to the charges in paragraph G 1-2-3 of the Order for Proceedings dated April 13, 1977. These charges were litigated and a valid and final judgment was issued by the United States District Court in United States v Robert Berkson, et al. 75 Crim 608 (S.D.N.Y.).

^{16/} Blaise D'Antoni Associates, Inc. v SEC, 289 F 2d 276, 277 (C.A.S. 1961)

^{17/} Cf. In the Matter of Aldrich, Scott & Co. Inc., 40 S.E.C. 775, 778 (1961)

Under paragraph II G-4 of the Order for Proceedings dated April 13, 1977, the Division alleges that registrant fraudulently sold misappropriated stock to an account maintained by Berkson at the Sterling National Bank, receiving a credit of \$40,000 immediately to its account, and that at the time of such transaction Berkson had no intention of paying for the securities, and in fact never did pay for them. Berkson testified that Hyman approached him to find a customer for these shares, and knowing the company needed money, volunteered that his father would buy them. A day later, Hyman stated that the trade was not needed, and Berkson alleges he forgot about it. He never heard from the bank as regards approval of this large transaction, nor did he receive a request for funds to cover the transaction. All of this lends credence to his allegation that he was unaware that the transaction had gone forward after being told it was not needed, nor does it demonstrate his fraudulent activity with regards to this transfer. The record does not demonstrate by clear and convincing evidence that Berkson was engaged in fraudulent conduct with respect to the Robotguard transaction involving R. G. Berkson & Co., and this charge is dismissed.

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest with respect to respondents. The Division recommends that Rind and Berkson be barred from association with any broker-dealers. Rind admitted all the charges, and offered no evidence in mitigation, merely asking leniency. He committed serious violations of the securities laws which involved the defrauding of investors. He does not have the character and integrity to be a part of the securities industry, and he should not be associated in any way therein.

Berkson was convicted by a jury of criminal conspiracy involving forgery, mail fraud and securities fraud. Furthermore he pleaded guilty to filing a false income tax return, and was previously enjoined from violating the securities laws. The record demonstrates that he aided and abetted the registrant in its violation of the net capital rule.

Berkson's criminal conviction and the injunction issued against him provides the statutory basis for remedial action against him, if it is found that such action is in the public interest. ^{18/} Berkson asserts, among other things, that Hyman, the registrant's president was the prime culprit, that he never forged any documents, never hypothecated any stock, and

^{18/} Sections 15(b)(4)(B) and 15(b)(6) of the Securities Exchange Act.

that he had little or no responsibility at the firm. Berkson admitted his guilt to the criminal charges, and a jury found him guilty beyond a reasonable doubt of conspiracy to commit these various offenses. I do not accept his self serving and incredible testimony that he had nothing to do with the pervasive fraud taking place at registrant, nor did he know of it. He was found guilty of serious criminal offenses and the administrative hearing was no forum to relitigate the previous conviction. Berkson presented the testimony of a psychotherapist who first treated him in 1973 (about two years after the misconduct herein), who testified that Berkson suffered from an "adult adjustment reaction", a personality disorder which caused him to close his eyes to the chicanery going on at the firm.

This personality problem does not excuse the criminal conduct, and the other securities violations of Berkson. There is no evidence of any serious mental problems herein, no neurosis or psychosis, nor that Berkson's ability to think, reason and understand was in any way significantly affected. His mental problems, if any, were never brought before the Court in the criminal or civil matters, and are no more than a smokescreen herein to detract from the egregious nature of his violations. Berkson further urges that the violations occurred more than seven years ago, and that since that time

he has married, has a family and has engaged in the securities business without any problems. But the record shows that in October 1974 while president of A. J. Carno & Co. Inc., a brokerage house, both the company and Berkson were the subject of a censure and fine of \$1,750 for violations of net capital, customers protection, and bookkeeping requirements.

Moreover, a "lapse of time following the misconduct at issue is necessarily involved in all broker-dealer proceedings that come before us." 19/

As has been seen Berkson committed serious fraud violations, and was convicted of securities-related crimes. His misconduct cannot be condoned. However, we are here not to punish him but "to protect the public interest from future harm at his hands." I have considered all the evidence of record, the testimony of all the witnesses, my impression of Berkson as he testified, and conclude that an unqualified bar is not required. I believe he should be barred from association with a broker-dealer, but that after eighteen months he can apply to the Commission for permission to return to the securities business in a non-proprietary, non-supervisory capacity upon showing of adequate supervision. 20/

19/ See Haight & Company, 44 S.E.C. 481, 513 (1971), aff'd without opinion (C.A.D.C. June 30, 1971).

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

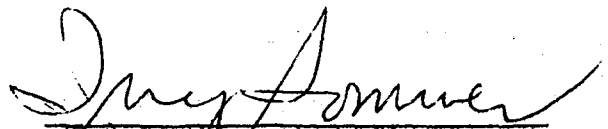
All pending motions not specifically responded to herein are denied.

Accordingly, IT IS ORDERED

- 1) Maurice Rind be, and hereby is barred from association with any broker or dealer.
- 2) Robert Berkson is barred from association with a broker-dealer, except that after a period of eighteen months from the effective date of this order, he may become associated with a registered broker-dealer in a non-proprietary and non-supervisory capacity upon an appropriate showing to the Commission that he will be adequately supervised.

This order shall become effective in accordance with and subject to the provisions of 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 fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c), determines on its own initiative to review the 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 as to him.


Irving Sommer
Administrative Law Judge

Washington, D.C.
October 2, 1978