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ADMINISTRATIVE PROCEEDING  
FILE NO. 3-11537

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
August 9, 2004

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

AUG 10 2004

CTFD. NO. \_\_\_\_\_

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In the Matter of	:	
	:	ORDER DENYING MOTION
RICHARD S. KERN,	:	TO SET ASIDE DEFAULT
DONALD R. KERN,	:	
and CHARLES WILKINS	:	
	:	

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The Securities and Exchange Commission (Commission) instituted this proceeding on July 7, 2004. Donald R. Kern (D. Kern) received the Order Instituting Proceedings (OIP) on July 13, 2004. D. Kern's Answer to the OIP was due on or before August 2, 2004, and no Answer was filed.

On August 5, 2004, I issued an Order Making Findings and Imposing Sanction by Default (Default Order). I found that it was in the public interest to bar D. Kern and the other two Respondents from participating in any offering of penny stock.

On August 6, 2004, this Office received a motion from a Florida attorney representing D. Kern. Among other things, the motion sought to stay this administrative proceeding against D. Kern on the grounds that: (1) D. Kern is appealing the underlying injunction to the United States Court of Appeals for the Second Circuit; and (2) all legal proceedings against D. Kern are automatically stayed because of a pending bankruptcy proceeding. In the alternative, the motion seeks an enlargement of time to file an Answer. Because the Commission did not receive the motion until after I had issued the Default Order, I will treat it as a motion to set aside the default, pursuant to Rule 155(b) of the Commission's Rules of Practice.<sup>1</sup>

D. Kern's pending appeal of the underlying injunction is not a valid reason for setting aside the Default Order, or otherwise delaying the resolution of this matter. See Joseph G.

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<sup>1</sup> The Office of the Secretary delivered the OIP to D. Kern at his residence, at the office of a Florida attorney, and at the office of a New York attorney. D. Kern and the Florida attorney received the OIP on July 13, 2004. The New York attorney received the OIP on July 15, 2004. Even if the time for D. Kern to file an Answer were to be computed from July 15, 2004, the Answer (or motion to extend the time for filing an Answer) was due by August 4, 2004. See Rule 151(a) of the Commission's Rules of Practice ("Papers required to be filed with the Commission must be received within the time limit, if any, for such filing.").

Galluzzi, 78 SEC Docket 1125, 1130 n.21 (Aug. 23, 2002); Jon Edelman, 52 S.E.C. 789, 790 (1996); Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994). If D. Kern succeeds in having the underlying district court injunction vacated, he may then ask the Commission to reconsider the sanction imposed in this administrative proceeding. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 59 SEC Docket 2877 (Aug. 1, 1995).

Law enforcement actions, such as the present proceeding, are expressly exempt from the automatic stay provisions of the Bankruptcy Code. 11 U.S.C. § 362(b). Subsection 362(b)(4) provides an exception from the stay for Commission enforcement actions and other exercises of police or regulatory power by governmental units. The purpose of the police and regulatory power exemption for governmental units is “to prevent the bankruptcy court from becoming a haven for wrongdoers.” SEC v. Elmas Trading Corp., 620 F. Supp. 231, 240 (D. Nev. 1985), aff'd, 805 F.2d 1039 (9th Cir. 1986), quoting CFTC v. Co Petro Mktg. Group, Inc., 700 F.2d 1279, 1283 (9th Cir. 1983). D. Kern is well aware of this line of case law. See SEC v. Lybrand, 281 F. Supp. 2d 726, 732 (S.D.N.Y. 2003).

D. Kern also requests that no hearing be scheduled in this matter for at least 180 days. Movant makes no effort to harmonize this request with the Commission’s direction that the proceeding be completed within 210 days after D. Kern received the OIP (OIP ¶ IV). See Rule 161(b)(1)(iv) of the Commission’s Rules of Practice.

D. Kern has not shown good cause for setting aside the Default Order. His motion is denied in all respects. If D. Kern wishes to seek review of this Order by the Commission, he must do so within twenty-one days after the service of this Order. Cf. Rule 360(b) of the Commission’s Rules of Practice, as applied in Richard Cannistraro, 53 S.E.C. 388 (1998).

  
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James T. Kelly  
Administrative Law Judge