

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13408

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 20, 2009

In the Matter of :
: ORDER FOLLOWING PREHEARING
RAYMOND THOMAS : CONFERENCE
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:
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The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on March 12, 2009. The Commission delivered the OIP to Respondent Raymond Thomas (Thomas) on March 24, 2009 (Postal Service Form 3811). Respondent filed an Answer to the OIP on April 22, 2009.

This is a so-called “follow-on” administrative proceeding, in which the Division of Enforcement (Division) seeks to bar Thomas from association with any investment adviser pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The proceeding is based on the entry of a default final judgment of permanent injunction by the United States District Court for the Northern District of Ohio on February 23, 2009. SEC v. Thomas, Civ. No. 1:08-cv-02503 (N.D. Ohio). The default final judgment permanently enjoins Thomas from violating Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Advisers Act. It also orders payment of disgorgement, prejudgment interest, and a civil monetary penalty.

In his Answer to the OIP, Thomas challenges the validity of the underlying default final judgment of permanent injunction on the grounds that the Commission never properly served him with its summons and complaint. He also denies any violation of the federal securities laws. Thomas has filed a motion to vacate the default judgment with the district court, see Federal Rules of Civil Procedure 55(c) and 60(b), and his motion is pending in that forum. The Division, which represents the Commission in the federal district court proceeding, urges the federal district court: (1) to leave the default final judgment of permanent injunction in place; and (2) to reopen the underlying civil action for the limited purpose of reconsidering the financial sanctions imposed (disgorgement, prejudgment interest, and civil monetary penalty). Under the Division’s

proposal, the federal district court would apparently avoid entirely the question of whether service of the summons and complaint was proper.

I have held telephonic prehearing conferences with the parties on April 23, May 11, and May 19, 2009. I have denied the Division's request for leave to file a motion for summary disposition in this administrative proceeding because the underlying injunction is based on a default. In the circumstances presented, the underlying injunction was not "actually litigated." It is not entitled to collateral estoppel effect here. Cf. Harold F. Harris, 87 SEC Docket 362, 370 n.21 (Jan. 13, 2006) (citing Tutt v. Doby, 459 F.2d 1195, 1199-1200 (D.C. Cir. 1972)).

The federal district court will receive pleadings from Thomas on May 29, 2009, and from the Division on June 5, 2009. If the federal district court later decides to vacate the default judgment and require the Commission to proceed to trial on the merits in the injunctive action, there will be no basis for continuing with this "follow-on" proceeding. In those circumstances, I expect the Division to move for dismissal of this administrative proceeding, just as it did in John M. Lucarelli, 91 SEC Docket 240 (July 13, 2007). If the federal district court decides to leave the default final judgment of permanent injunction in place, the parties should be prepared to proceed to a hearing in this administrative proceeding on dates to be determined during the week of July 13-17 or the week of July 20-24, 2009.¹ If the parties approach the federal district court about the possibility of changing the default final judgment of permanent injunction to a consent permanent injunction, and if the federal district court then enters a consent permanent injunction, the Division may thereafter renew its request for leave to file a motion for summary disposition in this administrative proceeding.²

IT IS ORDERED THAT the Division shall file and serve its list of prospective witnesses and its list of proposed hearing exhibits by June 9, 2009, and that Respondent shall file and serve his list of prospective witnesses and his list of proposed hearing exhibits by June 16, 2009; and

IT IS FURTHER ORDERED THAT a fourth telephonic prehearing conference will be held on Thursday, June 11, 2009, at 12:00 noon, E.D.T.³

¹ The Division has represented that most of its prospective witnesses live in the Cleveland, Ohio, area. Based on that representation, the hearing will be held in Cleveland, at a location to be determined. However, if the Division's witness list shows that only a few witnesses live in the Cleveland area, or if the parties are unable to arrange for a suitable hearing facility in Cleveland, the hearing will be held at the Commission's headquarters in Washington, D.C.

² The Commission will not accept, in any enforcement action, any settlement in which the defendant denies committing the violation. See 17 C.F.R. § 202.5(e); Marshall E. Melton, 56 S.E.C. 695, 711-12 (2003). Here, Thomas denies committing the violations.

³ At our May 19, 2009, conference, we agreed that the next conference would be on June 12, 2009. However, that date conflicts with another conference I have already scheduled in an unrelated proceeding. If June 11 presents difficulties for the parties, they should notify this Office as soon as possible, and we will select another date.

James T. Kelly
Administrative Law Judge