

DIVISION OF SECURITIES
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DEPARTMENT OF COMMERCE
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BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF

DJW INVESTMENTS, LLC;
DAREN DENNIS WHITE,

RESPONDENTS

**ORDER ON MOTION TO SET ASIDE
DEFAULT JUDGMENT**

CASE NO. SD-08-0064
CASE NO. SD-08-0065

BACKGROUND

This administrative action was filed on June 6, 2008 with a notice of agency action and order to show cause. At the same time, Respondent was being prosecuted criminally (case number 081903394, Third District Court, Salt Lake County, Utah) on a related charge of attempted securities fraud. When the administrative action was initiated, there was an issue regarding the mailing address used to serve Respondent. To solve the problem and ensure that service was perfected, on June 27, 2008, a Division employee hand delivered the notice and order to show cause to Respondent at the courthouse where he was present for his initial appearance in the criminal case.

Administrative Law Judge J. Steven Eklund was assigned as the presiding officer when this case was initially filed. On August 4, 2008, Judge Eklund held a prehearing conference with the parties. Respondent attended telephonically. The meeting was recorded, with the recording retained in Judge Eklund's file and now in the possession of the current presiding officer. During the prehearing conference, Respondent expressed his desire to retain counsel before filing his response. He also expressed frustration regarding his attempts to obtain records from a law firm representing a company that was involved in the transactions on which the Division based its order to show cause. The Division agreed to give Respondent until September 9, 2008 to file his response. Judge Eklund emphasized to Respondent that, if he were not able to retain counsel to represent him by the September 9 deadline, he would have to draft and file a response on his own. In addition, Judge Eklund warned Respondent that failure to comply with the deadline for response would constitute grounds for the entry of a default order against him.

Respondent did not file a response by September 9, 2008. There is no record of any action being taken in the case by either party between August 4, 2008 and January 3, 2012.

As of January 3, 2012, the Division was represented by different counsel, who filed with Judge Eklund a motion for default judgment. The motion was also sent to Respondent at what appears to be the address of the Utah State Prison. There is no record of Respondent making contact, or attempting to make contact, with Judge Eklund or the Division after the motion for default was filed. There is no information in the record from which the presiding officer may determine whether Respondent actually received notice that the Division was seeking default.

On July 16, 2012, this administrative matter was reassigned from Judge Eklund to the current presiding officer. On July 26, 2012, the presiding officer found that Respondent's failure to file a response to the Division's order to show cause constituted grounds for default pursuant

to Utah Code § 63G-4-209(1)(c). On October 29, 2013, the Utah Securities Commission (Commission) accepted the presiding officer's finding and entered a default.

On November 20, 2012, Respondent wrote a letter to the presiding officer indicating that he was currently serving a term in prison and would like an opportunity to present documentary evidence that would serve as a defense to the allegations raised in the Division's order to show cause. Respondent emphasized that he was unwilling to allow his records out of his presence.

The presiding officer agreed to accept Respondent's November 20, 2012 letter as a *pro se* motion to set aside the default. Thereafter, the Division attempted to work with Respondent to review his evidence and asked him to provide photocopies. However, according to Respondent's representations, he is not permitted to make photocopies in prison. In these circumstances, the Division has chosen to oppose the motion to set aside the default. On March 6, 2013, the Division filed a memorandum demonstrating that Respondent was actually and personally served, that he attended the August 4, 2008 prehearing conference, and that he was aware of his responsibility and deadline for filing a response. On March 18, 2013, Respondent filed his reply.

In his final reply, Respondent admits having been served with the notice and order to show cause. However, he represents that, at the time, he had a public defender to represent him in the criminal matter. Respondent explains that he and his attorney had a telephone call with someone at the Division following the August 4, 2008 prehearing conference. Respondent represents that, during this call, the Division agreed to stay the administrative matter until the criminal case concluded. Respondent further represents that, following the call, his attorney left the public defender's office, and his case was reassigned. However, his new attorney took no further steps regarding the administrative action.

There is no record in Judge Eklund's file of a call from Respondent's criminal defense attorney at any time in the history of this case. It does not appear that an order staying the administrative matter was ever issued.

DISCUSSION

Under Utah law, a respondent who has been defaulted for failure to answer should, in order to succeed in having the default set aside, demonstrate "a reasonable justification or excuse for failing to answer." *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986).

There is no question that the Division took all necessary steps to provide Respondent with notice of this administrative action. There is no question that Respondent was given a firm deadline for filing a response, but that he never did so. It appears likely that Respondent received notice of the motion for default. However, if he did not, that alone is not a basis for setting aside the order. *See Utah Administrative Code § R151-4-710(2)*, which provides as follows: "If a basis exists for a default order, the order may enter without notice to the defaulting party or a hearing." Were these the only facts, there would be no way for the presiding officer to set aside the default order. However, the presiding officer must consider Respondent's representation to the effect that he, his first public defender, and a representative of the Division agreed informally to stay this matter through the pendency of the related criminal case.

Given the passage of time, the absence of records, and the turnover in Division personnel, including its counsel, it is impossible for the presiding officer to conclude definitively whether such an agreement was ever reached. However, there are certain clues in the record that make it appear likely.

First, Judge Eklund was very clear in his instructions to Respondent during the August 4, 2008 prehearing conference. He explicitly warned Respondent that the September 9, 2008

response deadline was firm, and that a default would be entered if Respondent failed to respond. Yet Judge Eklund never entered a default on his own initiative. Nor did the attorney who represented the Division at that time ever request a default.

Second, in January of 2012, when the Division's new counsel requested a default, Judge Eklund still declined to enter it. While there might be any number of reasons to account for this inaction, one possible reason would be Judge Eklund's understanding that the parties had informally agreed to a stay.

In addition, the recording of the August 4, 2008 prehearing conference reveals that the Division was on notice regarding Respondent's parallel criminal proceeding. The presiding officer takes note that it is the Division's common practice in these circumstances to stay the administrative action until such time as the criminal case is resolved through plea, conviction, or dismissal.

It is also notable that just over six months passed after the Division requested an order of default and before the case was reassigned to the current presiding officer. During this significant period of time, no order on the Division's motion was issued. It is likely that Respondent had notice of the request for default. In these circumstances, where no action was taken on the motion for several months, it would be reasonable for Respondent to feel assured that the matter had in fact been stayed and that no default would enter until further action were taken to revive the case.¹

Given the foregoing, the presiding officer finds it more likely than not that Respondent believed, in good faith and prior to the entry of the default order, that he was not required to respond to the Division's allegations. These circumstances constitute a reasonable justification

¹ See *Lund v. Brown*, 11 P.3d 277 (Utah 2000), where the Utah Supreme Court found that a litigant's good faith belief that a bankruptcy stay precluded further action regarding a civil judgment constituted a reasonable justification for failing to answer a complaint related to the judgment.

for his failure to answer. However, before a default order may be set aside, the presiding officer must also consider whether it is likely that a respondent has a meritorious defense. *Lund v. Brown*, 11 P.3d 277, 283 (Utah 2000).

In this case, the question of a meritorious defense is extremely difficult to address. On one hand, Respondent has pleaded guilty to a third degree felony charge of attempted securities fraud. The Commission is entitled to give that proceeding, including any admissions or affirmations Respondent made under a plea agreement, full faith and credit. The Commission has no jurisdiction to act as an appellate court, to review the criminal case for fairness, or to assess whether Respondent was adequately represented by counsel. On the other hand, the Commission has discretion to consider any mitigating circumstances and evidence that may exist, which could well include the documents that Respondent claims he has regained since the criminal case concluded, but which he is unable to duplicate in his current circumstances and unwilling to release in the original.

Where it is not readily apparent that proceeding with the administrative case would be pointless, the presiding officer finds it prudent to err on the side of allowing the case to go forward on its merits.

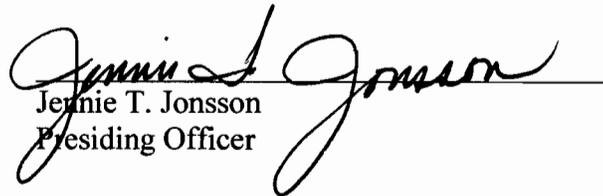
ORDER

The default order issued in this matter on October 29, 2013 is hereby set aside. The case is stayed until such time as Respondent is released from prison. Respondent shall notify the Division within five (5) business days of his release. If Respondent fails to comply with this requirement, this order shall be vacated, and the default order against Respondent shall be reinstated in full and without further notice or proceeding.

This order shall be effective on the signature date below.

DATED this 19th day of March, 2013.

UTAH DEPARTMENT OF COMMERCE


Jennie T. Jonsson
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of March, 2013, the undersigned served a true and correct copy of the foregoing ORDER ON MOTION TO SET ASIDE DEFAULT JUDGMENT on the parties in this proceeding by mailing a copy, properly addressed by first-class mail with postage prepaid, to:

DJW Investments c/o Daren Dennis White
Daren Dennis White, Inmate # 197997
Inmate Housing Wasatch B Block 107
Utah State Prison
P.O. Box 250
Draper, UT 84020-0250

and caused a copy to be hand delivered to:

D. Scott Davis, Assistant Attorney General
Office of the Attorney General of Utah
Fifth Floor, Heber M. Wells Building
Salt Lake City, Utah

Ann Skaggs
Utah Division of Securities
Second Floor, Heber M. Wells Building
Salt Lake City, Utah

