

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, DC 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 694/March 6, 2012

ADMINISTRATIVE PROCEEDING  
File No. 3-14139

---

In the Matter of	:	
	:	
HECTOR GALLARDO,	:	ORDER DENYING HECTOR
MICHAEL ZURITA, and	:	GALLARDO'S MOTION TO SET ASIDE
ORION TRADING, LLC	:	DEFAULT

---

**Introduction**

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Respondents on November 24, 2010, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).<sup>1</sup> The OIP alleged that Hector Gallardo (Gallardo) willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

This Office deemed Gallardo served by publication as of August 21, 2011. Gallardo failed to file an Answer to the OIP, due twenty days from the date of service. See OIP at 8; 17 C.F.R. § 201.220(b). Accordingly, on September 28, 2011, the undersigned found Gallardo in default and determined the proceeding against him. See 17 C.F.R. §§ 201.155(a), .220(f); OIP at 8. Gallardo was ordered to cease and desist from committing or causing any violations or any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder; was barred from association with brokers, dealers, investment advisers, municipal securities dealers, transfer agents, nationally recognized statistical rating organizations, and from participating in any penny stock offerings; and was ordered to disgorge \$876,193 in ill-gotten gains, pay \$178,682.58 of prejudgment interest, and pay a civil monetary penalty of \$260,000. Hector Gallardo, Exchange Act Release No. 65422 (Default Order).

---

<sup>1</sup> The proceeding has ended as to Respondents Michael Zurita and Orion Trading, LLC. See Hector Gallardo, Exchange Act Release No. 65658 (Oct. 31, 2011).

On January 25, 2012, Gallardo filed a Motion to Set Aside the Default Entered Against Him in this Administrative Proceeding (Motion) and Declaration in Support (Gallardo Declaration). On February 21, 2012, the Division of Enforcement (Division) filed its Opposition to Gallardo's Motion (Opposition) and Second Declaration of Matthew J. Watkins with eight exhibits (Exhibits A through H) attached thereto. Gallardo did not timely file a reply.

### **Findings and Conclusions**

Rule 155(b) of the Commission's Rules of Practice states that "[a] motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding." 17 C.F.R. § 201.155(b). Gallardo's Motion was not made within a reasonable time, and his reasons stated for failing to appear or defend himself in this proceeding are insufficient.

In his Motion, Gallardo asserts that he did not file an Answer to the OIP or otherwise defend himself in this proceeding because he was not properly served with the OIP at his marital address in Long Island City, New York. Between November 2010 and June 2011, the Division attempted service on Gallardo by various means set forth in Rule 141(a)(2)(i) of the Commission's Rules of Practice. Additionally, the Division published notices informing Gallardo of the proceeding against him in the New York Times on August 14 and August 21, 2011, and in El Diario on August 12 and August 19, 2011. Based on these efforts, this Office deemed Gallardo served with the OIP by August 21, 2011, approximately five months prior to the filing of his Motion.

Service by one of the specified means in Rule 141(a) of the Commission's Rules of Practice is not required; actual notice is sufficient. See Dan Rapoport, Exchange Act Release No. 63744, 2011 WL 19504 (Jan. 20, 2011) (finding that Respondents' actual notice of the law judge's authorized service on him was sufficient and, therefore, he could not have reasonably believed that he could disregard the ruling and ignore the service effected on him). The Division has provided evidence that Gallardo had actual notice of the OIP no later than November 2010, shortly after its issuance. The Division provided an affidavit from Gallardo's wife, submitted by Gallardo to the Court of Appeals in an attempt to secure his pretrial release, stating that Gallardo told her that he met with an attorney who "explained to him that there was an impending administrative procedure of cease and desist." Exhibit G. As a declaration against interest, this statement is highly reliable, and, in view of Gallardo's failure to affirmatively state when he received actual notice, it is accepted as true.

On November 14, 2011, the Division sent a Treasury Offset Program letter to Gallardo at the Metropolitan Detention Center in Brooklyn (TOP Letter), advising him that it intended to seek collection of the debt Gallardo owed as a result of the Default Order. Exhibit F. Although the TOP Letter provided a reply date of January 13, 2012, this date related the date by which Gallardo was required to take steps regarding the debt he owed under the Default Order; it did not postpone the time in which he needed to act to avoid the entry of a default against him. Further, the letter specifically advised Gallardo that "no attempts to reargue or collaterally attack the findings that resulted in the order [would] be considered." Id. Gallardo provided no explanation why he waited until January 13, 2012, to file his Motion.

Gallardo had actual knowledge of this administrative proceeding by November 2010, he was deemed served by August 21, 2011, a Default Order against him was issued on September 28, 2011, and he received the TOP Letter in November 2011. Accordingly, his Motion was filed fourteen months after he had actual knowledge of the proceeding, five months after he was deemed served with the OIP, four months after the issuance of the Default Order, and two months after receiving the TOP Letter. The Commission has found shorter delays to be unreasonable. Dan Rapoport, 2011 WL 19504 (finding that the filing of a motion to set aside a default order was unreasonable almost five months after having actual notice and two months after being personally served); see also Cary R. Kahn, Exchange Act Release No. 50383 (Sept. 15, 2004), 83 SEC Docket 2717 (Making a default order final less than two months after its issuance, finding that a reasonable time to set aside the default judgment passed). Based on the foregoing, Gallardo's Motion was not filed in a reasonable time as required by Rule 155(b) of the Commission's Rules of Practice. 17 C.F.R. § 201.155(b).

Gallardo's reasons for failing to file an Answer to the OIP or otherwise defend himself in this proceeding are insufficient. Gallardo places form over substance by arguing that he was not properly served with the OIP. Gallardo Declaration at 1-3. Gallardo received actual notice of the proceeding shortly after it was instituted. Because actual notice is sufficient, Gallardo's complaints about lack of service are insufficient.

Having found that Gallardo failed to file his Motion in a reasonable time and that his stated reasons for failing to file an Answer or appear in this proceeding are insufficient, I need not reach the issue, or evaluate the merits, of Gallardo's other defenses.

### **Ruling**

IT IS ORDERED that Hector Gallardo's Motion to Set Aside the Default Entered Against Him in this Administrative Proceeding be, and it hereby is, DENIED.

SO ORDERED.

---

Cameron Elliot  
Administrative Law Judge