

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 725 / September 21, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14856

In the Matter of	:	
	:	ORDER AFTER PREHEARING
EGAN-JONES RATINGS COMPANY and	:	CONFERENCE REGARDING IN
SEAN EGAN	:	CAMERA REVIEW AND STRIKING
	:	AFFIRMATIVE DEFENSES 9-11

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on April 24, 2012, pursuant to Sections 15E(d) and 21C of the Securities Exchange Act of 1934. On September 14, 2012, I issued an Order (Renewed Strike Order) granting in part the Renewed Motion of the Division of Enforcement (Division) to Strike Affirmative Defenses. I then held a prehearing conference on September 19, 2012, at which time I determined to review in camera a document (Sealed Document) pertaining to defenses 9, 10, and 11, and directed the Division to furnish it to me under seal. I have completed my review and now order defenses 9, 10, and 11 stricken.

I. Procedural Background

I received two copies of the Sealed Document on September 19, 2012. Accompanying each sealed document was a cover document, also under seal. The Sealed Document contains redactions which are described in general terms in the cover document. Both the Sealed Document and the cover document have been viewed only by myself and by the attorney-adviser assigned to this proceeding. I will direct my office to file one copy of the Sealed Document and one copy of the cover document under seal with the Office of the Secretary, to preserve the record. Because I do not perceive the need to retain the remaining copy, I will return it to the Division.

II. Defense 9

I previously ruled, regarding defense 9, that the presumption of regularity accorded Commission proceedings could be rebutted by evidence of a colorable showing of impropriety by the Commission. Renewed Strike Order, p. 5. I also noted that Respondents had provided essentially no support for this defense, but that I would review the Sealed Document out of an abundance of caution, and if I found no evidence of irregularity or impropriety, defense 9 would be stricken. Id. I have found no such evidence in the Sealed Document, and defense 9 will be stricken.

III. Defenses 10 and 11

I previously ruled that defenses 10 and 11 cannot be sustained without proof of an absence of probable cause to bring this proceeding. Renewed Strike Order, p. 4. I also explained that the most judicially efficient way to establish whether there was such probable cause is to examine certain documents. Id. I established at the September 19, 2012, prehearing conference that the Sealed Document is the appropriate document for this purpose.

In the criminal context, the Third Circuit has defined probable cause as “facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.” U.S. v. Boynes, 149 F.3d 208, 211 (3rd Cir. 1998) (quotation and citation omitted). In the civil forfeiture context, probable cause means “reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion.” U.S. v. 8 Bayview Terrace, 392 F. App’x 85, 90 (3rd Cir. 2010) (quoting U.S. v. On Leong Chinese Merchants Ass’n Bldg., 918 F.2d 1289, 1292 (7th Cir. 1990)). In Chizmar v. Borough of Trafford, 454 F. App’x 100, 106 (3rd Cir. 2011), the plaintiffs alleged First Amendment retaliation and malicious prosecution. In addressing the malicious prosecution claim, the Third Circuit defined probable cause as “a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense.” Id. (quotation and citation omitted).

Under any of these three standards, I conclude that the Sealed Document establishes probable cause. I have assumed, as the Commission necessarily must in voting on whether to issue the OIP, that the factual assertions recited in the Sealed Document are supported by admissible evidence. Also, taking as true the Division’s representations regarding the nature of the redactions, I conclude that if I were to view the redacted portions of the Sealed Document, my opinion would not change.

Order

The Renewed Motion of the Division of Enforcement to Strike Affirmative Defenses 9-11, 13-18, and 24-25 is GRANTED in its entirety and affirmative defenses 9-11, 13-18, and 24-25 are STRICKEN.

It is also ORDERED that, for good cause shown, Respondents’ reply to the Division’s anticipated opposition to the Respondents’ August 6, 2012, motion for issuance of subpoenas shall be due on Friday, September 28, 2012.

Cameron Elliot
Administrative Law Judge