

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5540 / January 26, 2018

Administrative Proceeding
File No. 3-18252

In the Matter of
Joseph Vitale

**Order Following
Prehearing Conference**

I held a telephonic prehearing conference on January 24, 2018. Counsel for the Division of Enforcement appeared, but Respondent Joseph Vitale did not. Before the conference, the Division represented that it received a voicemail from a counselor at Vitale's correctional facility indicating that Vitale "refuse[d] to call in or otherwise appear" at the prehearing conference. Div. Notice Concerning Jan. 24, 2018 Telephonic Prehearing Conference. Although the Division previously reported that Vitale said he was represented by counsel—and that he would not speak to Division counsel without his attorney—no attorney has filed a notice of appearance for Vitale or otherwise participated in this proceeding.

Based on Division counsel's representations, U.S. postal service tracking information, and a legal mail log obtained by the Division from the correctional facility, I find that Vitale was served with the order instituting proceedings (OIP) on October 27, 2017. Therefore, Vitale's answer was due November 20, 2017. OIP at 3; 17 C.F.R. §§ 201.160(a)-(b), .220(b). Vitale has not filed an answer.

I deem Vitale to be in default for failing to file an answer to the OIP or appear at the prehearing conference, of which he had been notified, and at which he expressly refused to appear. 17 C.F.R. § 201.155(a)(1)-(2). In addition, I deem the allegations of the OIP to be true. *Id.* Vitale may move to set aside the default. Rule 155(b) permits the hearing officer, before the filing of an initial decision, or the Commission, at any time, to set aside a default for good cause, to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). 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. *Id.*¹

To aid my consideration of the appropriate sanction for Vitale, I ORDER the Division to file a motion for sanctions by February 2, 2018, along with the judgment in Vitale's criminal case and any other supporting documents the Division believes would assist me. The motion shall include a discussion of how that evidence dovetails with Exchange Act Section 15(b)'s prerequisites for a sanction and the public interest factors of *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Vitale may file a responsive brief by February 16, 2018. If Vitale files such a brief, the Division may file a reply by February 21, 2018.

During the conference, Division counsel mentioned that the Florida Bar advised her not to communicate with Respondent, even to serve papers on him, because he had told her he was represented by counsel. However, the commentary to Rule 4-4.2 of the Rules Regulating the Florida Bar states that the "prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person *is in fact* represented in the matter to be discussed. This means that the lawyer has *actual knowledge of the fact of the representation*." F.S.A. Bar Rule 4-4.2, cmt. (emphasis added). Here, no attorney has appeared on Vitale's behalf in this proceeding in accordance with Commission Rule of Practice 102(d)(2), 17 C.F.R. § 201.102(d)(2), nor has he provided his purported attorney's name or contact information.

Florida Bar Rule 4-4.2(a) provides that "[n]otwithstanding" the prohibition on direct communication with a represented individual, "a lawyer may, without . . . prior consent, communicate with another's client to meet the requirements of any court rule . . . requiring notice or service of process directly upon a person." Under Commission Rule of Practice 150, service shall be made upon a party unless that party is represented by counsel who has filed a notice of appearance, which has not occurred here. 17 C.F.R. § 201.150(a)-(b). In any event, to alleviate the Division's concern, I ORDER the Division to continue serving papers on Vitale in the usual manner until

¹ Ordinarily, in the absence of special circumstances presented here, I would have ordered Vitale to show cause before finding him in default. However, his actions—including claiming to have an attorney but not disclosing his or her identity and expressly refusing to participate in a prehearing conference—have sufficiently demonstrated that Vitale has no intention of defending this proceeding.

an attorney files a notice of appearance on his behalf. *See* 17 C.F.R. § 201.150(b).

Jason S. Patil
Administrative Law Judge