

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

Administrative Proceedings Rulings
Release No. 5632 / February 27, 2018

Administrative Proceeding
File No. 3-18271

In the Matter of

**Jeffrey D. Smith,
Joseph Carswell, and
Michael W. Fullard**

**Order Denying Motion
for Default and Sanctions
Without Prejudice,
Finding Service
on Jeffrey D. Smith, and
Directing Him to Show Cause**

On February 26, 2018, the Division of Enforcement submitted a motion for default and sanctions against Joseph Carswell and Michael W. Fullard. In support of the motion, the Division attached only a copy of the civil complaint, a copy of the civil default judgment, and a short summary declaration by Division senior counsel. But I cannot rely on the complaint or default judgment to evidence the factual allegations in the order instituting proceedings (OIP). *See Gary L. McDuff*, Securities Exchange Act of 1934 Release No. 74803, 2015 SEC LEXIS 1657, at *6-14 (Apr. 23, 2015). And although the declaration constitutes some evidence, it does not provide the necessary support for those allegations. *See Jeffrey D. Smith*, Admin. Proc. Rulings Release No. 5523, 2018 SEC LEXIS 225, at *2 (ALJ Jan. 24, 2018) (citing *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012), and *Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-9 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 SEC LEXIS 1886 (May 26, 2016)). The motion is therefore DENIED WITHOUT PREJUDICE.

The Division may renew its motion against Carswell and Fullard by March 23, 2018. The renewed motion should include particularized evidence establishing that each Respondent committed the securities violations alleged and that the requested sanctions are appropriate under the multi-factor analysis in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Such additional evidence may include, for example, sworn testimony from each Respondent and from any alleged

victims, business records of the alleged transactions, and correspondence or other records of the alleged misrepresentations by each Respondent.

In addition, on February 22, 2018, the Division submitted two declarations regarding service of the OIP on Jeffrey D. Smith. Based on the declaration of a process server, I find that Smith was served with the OIP by “leaving a copy at [his] dwelling house . . . with some person of suitable age and discretion then residing therein.” 17 C.F.R. § 201.141(a)(2)(i). Smith had twenty days to file an answer, but has not done so. *See* OIP at 3; 17 C.F.R. §§ 201.160(a), .220(b).

Accordingly, I ORDER Smith to SHOW CAUSE by March 9, 2018, why he should not be found in default and this proceeding determined against him due to his failure to file an answer or otherwise defend the proceeding. OIP at 3; 17 C.F.R. §§ 201.155(a)(2), .220(f).

If Smith does not respond to this order to show cause, the Division shall submit a motion for default and sanctions against him by March 23, 2018. The motion against Smith should conform to the requirements discussed above with respect to a renewed motion against Carswell and Fullard. If Smith is found in default, I may deem the OIP’s allegations true and decide the proceeding against him. *See* OIP at 3; 17 C.F.R. § 201.155(a).

An electronic courtesy copy of the each filing should be emailed to ALJ@sec.gov in PDF text-searchable format. Exhibits should be emailed as separate attachments, not as a combined PDF file.

Cameron Elliot
Administrative Law Judge