

ALJ

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10648

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
January 31, 2005

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

FEB 01 2005

CTFD. NO. _____

In the Matter of	:	ORDER DENYING
	:	MOTION TO VACATE
LEE E. GAHR	:	DEFAULT ORDER
	:	AGAINST RESPONDENT
	:	LEE E. GAHR
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on December 7, 2001. The OIP alleged that a federal district court issued a default judgment permanently enjoining Lee E. Gahr (Gahr) from violating the antifraud provisions of the federal securities laws. The issue to be determined in this proceeding was whether a penny stock bar against Respondent was appropriate in the public interest.

Gahr was served with the OIP on January 3, 2002, and his counsel, Charles R. McCarthy, Jr., Esq., entered his appearance for Respondent by letter dated January 14, 2002. Mr. McCarthy requested a lengthy extension of time to file Respondent's answer to the OIP, citing his unfamiliarity with the issues and his and Gahr's preexisting travel commitments. The Division of Enforcement (Division) did not oppose the relief sought, and I enlarged the time to file Respondent's answer until March 25, 2002. Respondent's answer was not filed on March 25, 2002, in accordance with Rule 220 of the Commission's Rules of Practice. See 17 C.F.R. § 201.220.

On March 29, 2002, the Division filed a Motion for Default Judgment, Or In The Alternative, For Leave To File Motion For Summary Disposition, and Motion for Summary Disposition (Motion). The Division requested that I deem the allegations set forth in the OIP to be true and that I impose a penny stock bar against Respondent.


On April 9, 2002, Respondent opposed the Division's Motion. In essence, Respondent asserted that he might file a motion with the federal district court "within the next several weeks" to set aside the default judgment of permanent injunction; that if he prevailed on such a motion in federal district court, it would moot the present action; and that further delay in this proceeding would not prejudice the Division. After considering the pleadings, I granted the Division's Motion and imposed a penny stock bar. Lee E. Gahr, 77 SEC Docket 1079 (Apr. 10, 2002) (Default Order).

On December 14, 2004, Gahr filed a motion to vacate the Default Order pursuant to Rule 155(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.155(b). As grounds for this relief, Gahr asserts that the Division's representations in federal district court action "were at total variance with the actual realities of the case." He maintains that he defaulted in this proceeding and in the underlying judicial proceeding because he lacked the financial resources to contest the charges against him. Gahr represents that an appellate action is currently pending as to the underlying judicial proceedings, but nonetheless requests an opportunity to testify under oath in the administrative forum about his involvement in the matters that gave rise to the underlying judicial proceeding.

Gahr's motion to vacate the default is denied. First, Gahr has not offered a colorable defense. Findings of fact and conclusions of law made in prior injunctive actions are immune from attack in subsequent administrative proceedings, such as this one. See Ted Harold Westerfield, 69 SEC Docket 722, 729 n.22 (Mar. 1, 1999) (collecting cases). Second, if Gahr eventually succeeds in having the underlying district court injunction vacated on appeal, he may then petition the Commission to reconsider the sanction imposed in this administrative proceeding. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 59 SEC Docket 2877 (Aug. 1, 1995).

ORDER

Gahr has not shown good cause for setting aside the Default Order. His motion is denied. If Gahr wishes to seek review of this Order by the Commission, he must do so within twenty-one days after the service of this Order. Cf. Rule 360(b) of the Commission's Rules of Practice, as applied by analogy in Richard Cannistraro, 53 S.E.C. 388 (1998).



James T. Kelly
Administrative Law Judge