

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 702/April 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14720

In the Matter of	:	
	:	
ALCHEMY VENTURES, INC.,	:	
KM CAPITAL MANAGEMENT, LLC,	:	ORDER DIRECTING SERVICE
ZANSHIN ENTERPRISES, LLC,	:	AS TO RESPONDENT
MARK H. ROGERS,	:	YISROEL M. WACHS
STEVEN D. HOTOVEC,	:	
JOSHUA A. KLEIN,	:	
YISROEL M. WACHS,	:	
FRANK K. MCDONALD, and	:	
DOUGLAS G. FREDERICK	:	

On January 26, 2012, the Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), pursuant to Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934.¹ Currently at issue is service of the OIP upon Respondent Yisroel M. Wachs (Wachs). For the following reasons, I order service on Wachs's counsel, Richard A. Levan.

I. Background

I held a prehearing conference on March 5, 2012, at which Wachs's counsel was permitted to make a special appearance for the purpose of contesting service, and at which I ordered the parties to brief the issue of service. On April 4, 2012, I denied Wachs's request to dismiss this proceeding as to him, and deferred decision on the propriety of service pending further efforts by the Division of Enforcement (Division). On April 19, 2012, the Division filed a Status Report

¹ The proceeding was stayed as to Respondents Douglas G. Frederick, Frank K. McDonald, and Zanshin Enterprises, LLC, on February 22, 2012, and as to Respondents Alchemy Ventures, Inc., Mark H. Rogers, and Steven D. Hotovec on April 10, 2012, pending the Commission's consideration of their offers of settlement. On April 12, 2012, I found Respondents KM Capital Management, LLC, and Joshua A. Klein to be in default and imposed sanctions against them.

Regarding Service of the OIP on Respondent Yisroel M. Wachs (Status Report), and on April 26, 2012, Wachs filed a responsive letter (April 26 Letter). Briefing is now complete.²

The Federal Rules of Civil Procedure (FRCP) provide several avenues to dismiss a case before the filing of an Answer. Grounds for dismissal include lack of personal jurisdiction (FRCP 12(b)(2)), improper venue (FRCP 12(b)(3)), insufficient service (FRCP 12(b)(4)), and insufficient service of process (FRCP 12(b)(5)). Additionally, FRCP 4(m) establishes a presumptive time limit of 120 days within which to serve a defendant.

No analogous provisions appear to apply in Commission administrative proceedings. The Commission's Rules of Practice (Rules) permit a motion for more definite statement, similar to FRCP 12(e), but the party's Answer must be filed contemporaneously. 17 C.F.R. § 201.220(d). They also permit the Chief Administrative Law Judge to discontinue a proceeding, upon motion by the Division. 17 C.F.R. § 200.30-10(a)(8). I have found no other provisions in the Rules even remotely analogous to FRCP 12(b), and the parties have not identified any. Nor is there any time limit on service of the OIP, as there would be if FRCP 4(m) applied. Of course, until service is effected, a respondent need not file an Answer. Otherwise, and in sharp contrast to practice in the District Courts, there is apparently no remedy for failure to properly serve a respondent in an administrative proceeding – the Division just has to keep trying to serve him.

The Division has documented several attempts to serve the OIP on Wachs:

- a. No later than February 1, 2012, Wachs's counsel, Richard Levan, received the OIP by mail. Mr. Levan thereafter notified the Division that he was not authorized to accept service of the OIP. Buchholz Decl., Ex. J.
- b. On February 8, 2012, a process server delivered the OIP to Wachs's father at 7841 Langdon Street, Philadelphia, Pennsylvania (the "7841 Address"), a residence. Submission, Ex. B. In September 2010, Wachs identified the 7841 Address as his "U.S. address," and was served with an investigative subpoena there. Buchholz Decl., pp. 3-4 & Ex. H.
- c. On April 17, 2012, the OIP was delivered by UPS to Ohr Somayach, a university or yeshiva located at 22 Shimon Hatzadik Street, Jerusalem, Israel. Status Report, Ex. A; Buchholz Decl., Ex. I. In September 2010, Wachs identified 22 Shimon Hatzadik Street in Jerusalem as his address in Israel. Buchholz Decl., p. 4.
- d. Also on April 17, 2012, the Division sent the OIP by email to two addresses, one listed as Wachs's email address in applications for brokerage accounts (although Wachs

² I have considered the following papers in deciding this issue: the Division's Submission of Records of Service of OIP on Certain Respondents (Submission), filed February 10, 2012; the Division's Memorandum of Law Regarding Service of the OIP on Respondent Wachs (Division MOL) and Declaration of Steven D. Buchholz in Support thereof (Buchholz Decl.), both filed March 16, 2012; Wachs's Memorandum of Law in Support of the Dismissal of the OIP on the Grounds of Lack of Valid Service and Lack of Jurisdiction (Wachs MOL), filed March 26, 2012; the Division's Reply Regarding Service of the OIP on Respondent Wachs, filed April 2, 2012; Wachs's letter responding to the Reply, filed April 2, 2012; the Status Report; and the April 26 Letter.

alleges that he did not fill out the applications), and one provided by Wachs to Division staff during the investigation. Status Report, p. 2. Wachs concedes that he received an investigative subpoena by email. Wachs MOL, Ex. B, para. 8.

Wachs vigorously disputes the propriety of each of these service attempts. I need not resolve this dispute, for two reasons: Wachs has actual notice of this proceeding as a result of these service attempts, and Wachs's (admittedly limited) efforts to evade service warrant directed service.

II. Discussion

The point of service is to provide actual notice of a proceeding; nonetheless, actual notice is not required to satisfy due process. E.g., Jones v. Flowers, 547 U.S. 220, 226 (2006) (“Due process does not require that a property owner receive actual notice before the government may take his property.”). Where there has been actual notice, however, due process has been satisfied, at least in Commission administrative proceedings. See Dan Rapoport, Exchange Act Release No. 63744, 100 SEC Docket 37050, 37056-58 (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); see also Hector Gallardo, Administrative Proceedings Rulings Release No. 694 (Mar. 6, 2012) (denying motion to set aside default because respondent had received actual notice of proceeding). Wachs argues that actual notice is insufficient, and that jurisdiction is lacking if service is lacking, but cites only to cases which originated in the District Courts. As explained above, there is no provision for dismissing this proceeding for lack of jurisdiction.

In view of his affidavit, executed on March 26, 2012, it is undeniable that Wachs has had actual notice of this proceeding for more than one month. Wachs MOL, Ex. B. Arguably, therefore, requiring service in compliance with Rule 141 would constitute an empty formality. I will nonetheless require it, out of an abundance of caution.

The Division has had some difficulty in serving Wachs in an uncontestably proper manner, in part because of Wachs’s own actions. The record demonstrates two actions which have made service more difficult: a possibly misleading statement regarding his residence in Jerusalem, and at least one apparently false statement regarding the 7841 Address.

The Division states that Wachs “provided an address in Israel, 22 Shimon HaTzadik Street, Jerusalem, Israel, and he told Division staff that he was studying religion in Jerusalem.” Buchholz Decl., p. 4. Although the exact question asked by the Division in September 2010 regarding Wachs’s residence is not in the record, a reasonable inference is that the Division requested an address for, among other things, service of process. The Division later learned that the address Wachs provided was the address of Ohr Somayach, an academic institution which includes “residence halls,” but is not clearly a residential building. Division MOL, p. 3; Buchholz Decl., Ex. I. When the Division later sent the OIP by UPS to the address provided, it became clear that the address was for the “office” of Ohr Somayach, and not specifically Wachs’s actual residence. Status Report, Ex. A. It is possible, of course, that the most specific mailing address available to an Ohr Somayach resident student is the address Wachs provided, and that mail gets routed through one central office at the institution to the resident students. If so, and assuming that service by UPS in Israel is lawful, service at the Ohr Somayach office address might be effective. Wachs, however,

points out that the UPS delivery went “to some unidentified ‘office’ and is signed for by one ‘Brury Asinor’ [with] no information provided as to who Brury Asinor is, and what, if any, relationship this person has with either the University or Mr. Wachs.” April 26 Letter, p. 2.

Wachs’s complaints are disingenuous. He provided a Jerusalem address during the investigation; if it is not a proper service address, which is the implication of his argument, then he misled the Division. Indeed, he may even have committed a crime. 18 U.S.C. § 1001(a)(2) (criminalizing any materially false statement or representation within the jurisdiction of the executive branch). Notably, he does not provide his Jerusalem address in his affidavit. Wachs MOL, Ex. B.

I have greater concern about Wachs’s second evasive action. Pennsylvania issued Wachs a renewed driver’s license on August 22, 2006, with the 7841 Address as his listed residence. Buchholz Decl., Exs. A & D. Wachs renewed his license again on May 11, 2010. *Id.*, Ex. D. I take official notice that Pennsylvania law apparently requires that an original Pennsylvania driver’s license may only be issued to a resident of Pennsylvania, and that a renewal of a Pennsylvania driver’s license requires the applicant to certify under oath any address changes. See http://www.dmv.state.pa.us/pdotforms/dl_forms/dl-143.pdf; http://www.dmv.state.pa.us/pdotforms/dl_forms/dl-180.pdf (last visited April 27, 2012).

Wachs has affirmed under oath that he moved to Maryland in May 2003, and that he “[has] been a full-time resident of the city of Jerusalem in Israel since February 2008.” Wachs MOL, Ex. B, p. 2. Wachs therefore renewed his driver’s license in 2006 by claiming Pennsylvania residency under oath, when he was actually residing in Maryland, and renewed his license again in 2010, again by claiming Pennsylvania residency under oath, when he was actually residing in Jerusalem. Although Wachs downplays the significance of his driver’s license, these sworn statements are apparently irreconcilable and possibly perjurious. Wachs MOL, p. 7. More to the point, they suggest multiple and even longstanding efforts to deceive the government regarding his residency, and, as applicable in this case, an intent to evade service.

Although the Rules do not specify when alternate service or directed service are appropriate, they have been found warranted when a respondent has evaded service. See Grant Ivan Grieve, Investment Advisers Act of 1940 Release No. 3061, 98 SEC Docket 30795, 30795 n.1 (July 29, 2010); Grant Ivan Grieve, Administrative Proceedings Rulings Release No. 650 (Apr. 8, 2010). Admittedly, Wachs’s efforts to evade service have not been strenuous, and indeed, prior to issuance of the OIP he was apparently cooperative with the Division. However, in view of his possibly false and misleading statements regarding his residency, and his disingenuous efforts to distance himself from those statements, his efforts at evasion cross the threshold needed to warrant directed service.

I am authorized to direct service upon Respondent’s counsel, even when counsel is not authorized to accept service. See Rapoport, 100 SEC Docket at 37056 n.23 (finding such directed service appropriate under Rule 141(a)(2)(iv) of the Commission’s Rules, as other courts have found appropriate under FRCP 4(f)(3)). The cases on which Wachs relies in opposition are not to the contrary; all deal with service on an attorney as agent, in a manner comparable to Rule 141(a)(2)(i), but none deal with service on an attorney as the result of a judicial order directing service, in a manner comparable to Rule 141(a)(2)(iv). Wachs has been on notice since my April 4, 2012 Order that I have the authority to direct service even on an attorney who is not authorized to accept it, and

has had an opportunity to oppose the Division's request for directed service. That Wachs has not authorized Mr. Levan to accept service is simply irrelevant.

Wachs further argues in opposition to directed service that it is not necessitated by the circumstances and that the Division has not made a sufficient showing that other forms of service would be ineffective. However, directed service does not require proof that other forms of service are impossible, or that personal service has been attempted, or that other methods of service have been exhausted. See Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002) (citing Forum Fin. Group, LLC v. President & Fellows of Harvard College, 199 F.R.D. 22, 23 (D. Me. 2001)). Here, the Division has gone to considerable lengths to serve Wachs, at addresses provided by Wachs, yet he still disputes and even belittles the Division's efforts. Such efforts provide a second rationale for ordering directed service, in that personal service has been attempted, arguably unsuccessfully. Wachs also apparently argues that the Division must make a showing that directed service is "not prohibited by the law" of Israel. April 26 Letter; 17 C.F.R. § 201.141(a)(2)(iv). But there "is nothing in [the Rules] that places the burden of such showing on the Division." Rapoport, 100 SEC Docket at 37058 n.29. Wachs makes no effort to show that service on his U.S. counsel, in the U.S., in a proceeding before a U.S. administrative agency, would violate the law of Israel. Accordingly, I find that service on his counsel is reasonably calculated to give notice of this proceeding, and is not prohibited by the law of Israel, and therefore complies with Rule 141(a)(2)(iv).

The exact method of service on Mr. Levan – who, notably, has had a copy of the OIP for approximately three months – is left to the Division's discretion. Because service will occur expeditiously, Wachs will be required to file an Answer within 20 days of today's date. The Answer should include a statement regarding waiver of the 30-day and 60-day limits for cease-and-desist orders. The parties shall confer regarding an appropriate date for a prehearing scheduling conference and so inform this Office.

III. Ruling

I DIRECT service of the OIP on Wachs's counsel, Richard A. Levan of Wiggin and Dana LLP, to be completed no later than May 4, 2012.

I further ORDER that Respondent Yisroel M. Wachs file an Answer no later than May 17, 2012.

I further ORDER the parties to confer regarding an appropriate date for a prehearing scheduling conference and so inform this Office.

SO ORDERED.

Cameron Elliot
Administrative Law Judge