

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 975/October 21, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of	:	
	:	ORDER AS TO RESPONDENT
DAVID F. BANDIMERE and	:	JOHN O. YOUNG
JOHN O. YOUNG	:	

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings on December 6, 2012, pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Sections 203(f) and (k) of the Investment Advisers Act of 1940. The Initial Decision (ID) as to Respondent John O. Young (Young) was issued on October 4, 2013. David F. Bandimere, Initial Decision Release No. 506 (Oct. 4, 2013).

Pending before me is Young's "Motion to Request Judicial Review His Ability to Pay Defense" (Motion), which was received by this Office on October 17, 2013. The time for a response by the Division of Enforcement (Division) has not yet expired, although Young represents in the Motion that the Division "opposes the relief sought." Motion at 2. The Motion is facially meritless, and I see no need for further briefing on it.

The Commission's Office of the Secretary issued the Record Index in this proceeding on September 24, 2013, pursuant to Commission Rule of Practice (Rule) 351. The Record Index does not reflect that Young filed a Form D-A or other substantially similar information concerning his ability to pay disgorgement, interest, or a penalty. The Affidavit (Affidavit) that Young attached as Exhibit A to his Response to Division's Motion for Sanctions (Response), dated June 24, 2013, states that Young completed a form entitled "Summary Financial Disclosure Statement," in April 2013, and that the form is "adopted herein as still providing current and accurate information." Response, Ex. A at 2. That form does not appear to have been filed with the Office of the Secretary prior to issuance of the ID.

Accordingly, on September 26, 2013, I ordered Young to file a Form D-A, "[i]f Young desires," which "shall comply with the requirements of Rule 630 of the Commission's Rules of Practice and shall be current and up to date as of the filing date." David F. Bandimere, Administrative Proceedings Rulings Release No. 920 (Sep. 26, 2013) (citing 17 C.F.R. §§ 201.630, 209.1) (Form D-A Order). The deadline for filing such form was Tuesday, October 1, 2013. Id. Young did not timely file a Form D-A, and the ID, which was issued on Friday, October 4, 2013,

found that Young had “not met his burden of proving an inability to pay the monetary sanction in this proceeding.” ID at 12.

Young now moves to “revisit the issue of ability to pay,” and has attached to his Motion a Form D-A, dated October 15, 2013, and three years of his wife’s tax returns. Motion at 2. I construe the Motion, liberally, as a timely Motion to Correct Manifest Error of Fact, pursuant to Rule 111(h). See 17 C.F.R. § 201.111(h).

In essence, Young makes three points: (1) he already submitted a Form D-A for filing at a settlement conference held on April 22, 2013; (2) he was confused by the Form D-A Order, and did not understand that failure to file a Form D-A as directed would be fatal to his claim of inability to pay; and (3) one purpose of stipulating to liability was to obtain judicial consideration of his claim that he is unable to pay the monetary sanction. Motion at 1-2. As to the first point, although Young’s counsel handed me a Form D-A for review at the settlement conference, I handed it back; I did not accept the Form D-A for filing pursuant to Rule 151(b). See 17 C.F.R. § 201.151(b). I have reviewed this Office’s records and find no evidence of Young’s Form D-A in our files, nor does the Office of the Secretary have a copy on file. The statement in the ID that Young’s Form D-A is not of record is not manifestly erroneous.

As to the second point, it is true that I did not order Young to file a Form D-A, but only to file it “[i]f Young desires.” Form D-A Order at 1. However, the ID did not find Young’s claim to be waived as a sanction for failure to file a Form D-A, pursuant to Rule 630(e). See 17 C.F.R. § 201.630(e). Instead, the ID held that Young had “not met his burden of proving an inability to pay the monetary sanction in this proceeding.” ID at 12. I find no manifest error of fact regarding this issue. The only record evidence presented by Young regarding his inability to pay was a single paragraph in his Affidavit, which contained nowhere near enough evidence to find an inability to pay. Response, Ex. A at 2. The purpose of issuing the Form D-A Order was to alert Young to the fact that if he wished consideration of a Form D-A, he needed to file one. In that respect, there is nothing confusing about the Form D-A Order.

As to the third point, Young did not argue in his Response that he lacked the ability to pay a monetary sanction, and instead affirmatively argued that any such sanction should be limited to \$315,989. Response at 6. The only actual evidence he presented, other than non-quantified medical and family expenses, was an estimate of his monthly income. Response, Ex. A at 2. Based on his Motion and its attachments, and in contrast to the evidence in his Affidavit, Young’s financial means do appear to be very limited. Unfortunately, Young slept on his rights. Had he wanted me to consider his Form D-A, he should have submitted it when I pointed out that it was not in the record. The finding that Young did not meet his burden of proving an inability to pay is not manifestly erroneous.

Accordingly, it is ORDERED that Young’s Motion to Request Judicial Review His Ability to Pay Defense is DENIED.

Cameron Elliot
Administrative Law Judge