

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1574/June 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15799

In the Matter of

MICHAEL D. MONTGOMERY

ORDER FOR SUMMARY
DISPOSITION MOTION

On March 18, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, alleging that Michael D. Montgomery (Montgomery) was convicted of wire fraud and filing a false tax return in United States v. Montgomery, No. 3:11-CR-5156-RJB (W.D. Wash. Dec. 27, 2012) (Montgomery). The OIP further alleges that Montgomery was sentenced to a prison term of 60 months followed by three years of supervised release, and ordered to make restitution in the amount of \$995,811. Montgomery was served with the OIP on or about April 3, 2014.

I held a telephonic prehearing conference on April 10, 2014. Montgomery was present but did not participate because he claimed he had suffered a traumatic brain injury and did not understand what was happening. Tr. 7-8, 11. The Division of Enforcement (Division) made an oral motion for summary disposition and stated that it was requesting a collateral bar against Montgomery. Tr. 9-10. On April 14, 2014, I issued an Order Following Prehearing Conference, stating that Montgomery's answer was due April 28, 2014; if he did not file an answer, I would find him in default; and if Montgomery did file an answer, I would issue a procedural schedule for a written motion for summary disposition from the Division. Michael D. Montgomery, Admin. Proc. Rulings Release No. 1373, 2014 SEC LEXIS 1297. Following Montgomery's failure to file a timely answer, I issued an Order to Show Cause, stating that I would issue an Initial Decision on Default granting the relief the Division requested unless Montgomery showed good cause by June 16, 2014, why he should not be held in default for failing to file an answer within the time provided and not otherwise defending the proceeding. Michael D. Montgomery, Admin. Proc. Rulings Release No. 1443, 2014 SEC LEXIS 1702 (May 20, 2014).

On June 23, 2014, I received a four-page letter from Montgomery, entitled a "Motion to Show Cause" (Letter), with Exhibit A, a Neuropsychological Evaluation prepared June 5, 2011,

by Colorado Neuropsychological Associates, P.C.¹ I construe the Letter as an Answer to the OIP. Montgomery's Letter argues that it is a violation of his due process rights for this administrative proceeding to proceed given his mental condition and the "appeal" of his conviction pending before the Ninth Circuit Court of Appeals.² Letter at 1-3. Montgomery requests that the administrative proceeding be stayed until his mental condition improves to when he is able to defend himself or hire counsel.³ Id. at 3.

I reject Montgomery's request for a stay for three reasons. First, Montgomery's Letter—as well as his litigious behavior and recent filings in the district court and Ninth Circuit, of which I take official notice—call into question his contention that he does not understand what is happening in this proceeding. 17 C.F.R. § 201.323. Second, the district court in Montgomery rejected Montgomery's claim that the Neuropsychological Evaluation casts doubt on his competency. District Court Judge Robert J. Bryan ruled in an Order on Motion Under 28 U.S.C. § 2255 (Order on Motion), filed February 6, 2014, in Montgomery, that at Montgomery's June 2012 plea hearing, Montgomery's attorney stated that Montgomery was making a knowing and intelligent decision to plead guilty, Montgomery confirmed that he understood the charges and the rights he was giving up, and Montgomery admitted to each and every line of the stipulated facts. Order on Motion at 3, 8, Montgomery, ECF No. 100. Judge Bryan found that Montgomery had not shown that he was not competent to enter his plea, and that Montgomery's demeanor at motion hearings and at sentencing gave no indication that he was not competent.⁴ Id. Judge Bryan's personal assessment of Montgomery was that "he was knowledgeable, understood his situation, articulated his position, conferred appropriately with counsel, and was wholly competent." Id. Third, a respondent's appeal of, or collateral challenge to, his conviction is not grounds to defer decision in an administrative proceeding; if Montgomery's conviction is overturned, the remedy is to petition the Commission for reconsideration of any sanction assessed based on the conviction. See Jon Edelman, 52 S.E.C.

¹ The Neuropsychological Evaluation mentions a bicycle accident in August 2010 after which Montgomery was treated in a hospital emergency room and released. Letter, Ex. A at 1-2.

² No direct appeal of Montgomery's conviction is pending before the Ninth Circuit; rather, he has filed applications for leave to file a second or successive 28 U.S.C. § 2255 motion to vacate his sentence, one of which has been denied and another remains pending. See Order, Montgomery v. United States, No. 14-71183 (9th Cir. May 24, 2014); Application, Montgomery v. United States, No. 14-71407 (9th Cir. May 15, 2014).

³ Montgomery also requests a copy of the prehearing transcript. Letter at 4. On May 23, 2014, I sent Montgomery a letter, informing him that I forwarded his request to the Office of the Secretary, which handles such requests.

⁴ The Order on Motion also notes that as the criminal case proceeded, Montgomery received permission to travel outside Colorado to compete in triathlons and, in fact, he "trained, traveled (at times internationally), and successfully competed in several ironman triathlon competitions"; and "maintained a driver's license and worked for a hotel as a courtesy van driver." Order on Motion at 3, 9.

789, 790 (1996); Charles Phillip Elliott, 50 S.E.C. 1273, 1277 n.17 (1992), aff'd, 36 F.3d 86 (11th Cir. 1994).

It would be reasonable to find Montgomery to be in default because he did not file a timely answer, his Letter does not show good cause for why he should not be held in default, and he failed to defend the proceeding at the prehearing conference because of an unpersuasive claim of mental injury. See 17 C.F.R. § 201.155(a). However, a default finding would not be prudent given Commission decisions setting aside defaults,⁵ and anticipating Montgomery's argument that he cured the default by filing the Letter. Therefore, out of an abundance of caution it is necessary to set a procedural schedule for a motion for summary disposition. See 17 C.F.R. § 201.250.

Order

July 18, 2014:	Division's Motion for Summary Disposition is due;
August 8, 2014:	Montgomery's Brief in Opposition is due; and
August 22, 2014:	Division's Reply Brief, if any, is due.

Brenda P. Murray
Chief Administrative Law Judge

⁵ David Mura, Exchange Act Release No. 72080, 2014 SEC LEXIS 1530 (May 2, 2014) (setting aside default that was based on respondent's failure to appear at prehearing conference); Richard Kern, Exchange Act Release No. 51115 (Feb. 1, 2005), 84 SEC Docket 2923, 2924-25 & n.10 (setting aside default and accepting respondents' answer as cure to default).