UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **THOMAS D. MELVIN, CPA,** **Respondent**	**Administrative Proceeding** **File No. 3-15659**

REPLY IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST THOMAS D. MELVIN, CPA

In opposition to the Division of Enforcement's Motion for Summary Disposition, Melvin does not challenge any of the material facts supporting his suspension from practice under Rule 102(e)(3). Instead, Melvin contends that a suspension is inappropriate for two reasons: (1) that the OIP was untimely under the Commission's Rules of Practice and (2) that there is a material dispute of fact about whether the Commission has entered into a "binding agreement" with Melvin that he would not be suspended in excess of three years. Neither of Melvin's contentions provides a valid basis for lifting the suspension and he should continue to be barred from practicing accounting before the Commission.

I. ARGUMENT

A. The OIP was Timely.

In his opposition, Melvin argued first that the OIP was untimely. As a matter of law, Melvin's contention is without merit. Rule 102(e)(3) states that an order of temporary suspension predicated on an injunction must be entered within 90 days of the date the order or final judgment has become effective "whether upon completion of review or appeal procedures *or because further review or appeal procedures are no longer available*." SEC Rule of Practice 102(e)(3) (emphasis added).

In this case, the Final Judgment containing Melvin's injunction was entered by the United States District Court for the Northern District of Georgia on August 14, 2013. Under Federal Rule of Appellate Procedure 4(a)(1)(B) the time to appeal from the judgment expired 60 days later, on October 13, 2013. Under Rule 102(e)(3), the temporary suspension order needed to issue within 90 days from that date, or by January 10, 2014.

Melvin contends, without citing any relevant legal authority, that because he contractually agreed not to appeal when he consented to the entry of judgment against him, that the time for instituting a 102(e)(3) proceeding actually commenced immediately upon entry of the consent judgment. That contention is

contradicted by the language of the rule and is incorrect as a matter of law. *See Gibraltar Cas. Co. v. Walters*, 185 F.3d 1103, 1105-06 (10th Cir. 1999) ("[W]e interpret the Colorado statute as permitting a contribution action within one year of the underlying judgment becoming final by lapse of the time for appeal, regardless of whether the parties have agreed to forego appellate proceedings."). Were Melvin's view of the rule correct, the time for filing OIP's would vary depending on whether an injunction was litigated or settled, and, if settled, depending on the specific terms of the consent to judgment. The plain language of the rule requires no such absurd result, and the Court should not impose one on Melvin's behalf. Because the OIP issued on December 20, 2013, fewer than 90 days after appeal procedures became unavailable under the Federal Rules of Appellate Procedure, the OIP was timely.

B. As a Matter of Law, the Commission Did Not Reach A Binding Agreement with Melvin Regarding the Duration of his 102(e) Suspension.

Melvin also asserted in his opposition that there was a dispute of material fact regarding whether the Commission had entered into a "binding agreement" with him that the duration of his 102(e) suspension would not exceed 3 years. The source of this contention is a supposed oral agreement with counsel for the

Commission.[1] As a matter of law, Melvin cannot have reached an agreement to settle this proceeding as part of the settlement of the Injunctive Action.

It is well established that the Commission cannot be estopped from enforcing the securities laws by the statements of its agents. *See Graham v. SEC*, 222 F.3d 994, 1006-08 (D.C. Cir. 2000) ("[T]he SEC's failure to prosecute at an earlier stage does not estop the agency from proceeding once it finally accumulated sufficient evidence to do so."); *Capital Funds, Inc. v. Securities and Exchange Commission*, 348 F.2d 582 (8th Cir. 1965) ("[I]t may be taken as settled that the Commission and its agents may not 'waive' violations of federal law, nor may estoppel be raised against the Commission.").

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[1] Although irrelevant and immaterial for purposes of this motion, counsel for the Commission vigorously disputes the accuracy of the content of Mr. Jarrard's affidavit. In truth, counsel for the Commission expressly told Mr. Jarrard that he had no authority to even recommend a settlement without approval by senior management and that ultimately any settlement recommendation would need to be approved by the Commission. Indeed, the email correspondence between the two on the dates during which the supposed oral agreement was allegedly reached makes clear that Commission approval of any settlement recommendation is required. Finally, counsel for the Commission *never* indicated to Mr. Jarrard that he would send papers regarding a recommended settlement of follow-on administrative proceedings because no such settlement recommendation was ever approved by management. Because, as discussed in the text, these factual disputes are immaterial (*i.e.,* even if Mr. Jarrard's affidavit were entirely accurate, the Commission cannot be bound by unauthorized statements of its agents) the Commission has not submitted an affidavit attesting to the foregoing facts, but the undersigned is more than willing to submit an affidavit Should the court desire.

Similarly, "[i]t is well settled that a settlement on behalf of the United States may be enforced only if the person who entered into the settlement had actual authority to settle the litigation." *Commodity Futures Trading Comm'n v. Field*, 249 F.3d 592, 594 (7th Cir. 2001). "That stands in contrast to settlement of cases by private parties, where apparent authority may be sufficient to bind a litigant." *Id.* Thus, even if attorneys representing a governmental agency purport to settle a claim, if they lack the actual authority to enter into the settlement, "no agreement reached with them . . . is binding on the government." *Id.*

Here, it is beyond dispute that the Commission never actually authorized the Division of Enforcement to settle any potential 102(e) proceeding with Melvin on the terms he alleges in his opposition, and Melvin makes no allegation that it did so. Therefore, even if the undersigned had actually promised Melvin's counsel that the Commission would impose no more than a three-year suspension under Rule 102(e), which he did not, that promise would not be binding on the Commission. *Id.* Consequently, there is no genuine dispute of fact as to any agreement about the duration of Melvin's 102(e) suspension, and summary disposition is appropriate.

IV. CONCLUSION

Accordingly, for the foregoing reasons, the Division respectfully requests that its motion for summary disposition of this action be granted against Melvin pursuant to Rule 250 of the Commission's Rules of Practice, and that an order be issued barring him from practicing before the Commission.

Respectfully submitted,

DIVISION OF ENFORCEMENT

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