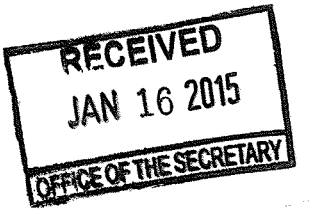
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71161 / December 20, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3521 / December 20, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15659



In the Matter of

Thomas D. Melvin, CPA

Respondent.

RESPONDENT'S INITIAL BRIEF IN SUPPORT OF COMMISSION REVIEW

The Commission should review and reverse the decision of the hearing officer because (1) the initiation of these proceedings was untimely; and (2) a three year bar of Mr. Melvin is appropriate in this case.

i. The Commission was untimely in instituting these proceedings.

Commission Rule of Practice 102(e)(3) states: "No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this rule more than 90 days after the date on which the final judgment or order entered in a judicial...proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available."

Pursuant to a consent agreement signed on April 10, 2013 and June 28, 2013[1], Mr. Melvin consented to entry of a final judgment against him by the United States District Court and agreed not to appeal from the entry of the Final Judgment. (Motion for Summary Disposition, Tab 2, ¶¶ 2 and 5). The district court entered final judgment on August 14, 2013, (Motion for Summary Disposition, Tab 3) and Mr. Melvin had no right to appeal under controlling law and per his waiver in the consent agreement. The order instituting proceedings in this case was not issued until December 20, 2013, more than 90 days after the district court's order. The 90th day for the Commission to act ran on November 12, 2013.

The hearing officer disagreed and concluded the proceedings were timely instituted, citing *Gibraltar Casualty Company v. Walters*, 183 F.3d 1103 (10th Cir. 1999). *Walters* is not controlling and should not be applied by analogy to the limitations provision of Rule of Practice 102. *Walters* involved a federal diversity jurisdiction matter wherein the federal courts were called upon to interpret and apply a specific Colorado statute governing a limitations period for a contribution action. The pertinent language of the Colorado statute read: "...any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review." *Id.* at 1104 (emphasis added); see also *Id.* at 1105 where the *Walters* majority emphasized that the specific language of the Colorado statute discussed a lapse of time for appeal. In contrast, the pertinent language of Rule of Practice 102(e)(3) ties effectiveness of a judgment to whether appeal has concluded or

[1] Respondent notes that an additional Consent Agreement was signed by Mr. Melvin in conjunction with additional negotiations with the Commission's division counsel Mr. Mayes on June 28, 2013. (Respondent's Opposition to Summary Disposition, Exhibit "A"). That additional consent contained the same pertinent provisions regarding entry of a final judgment and an agreement not to appeal. Respondent notes that the June 2013 timeframe is also when the agreement about a three year ban was discussed with Mr. Mayes as discussed in section ii below.

"because further review or appeal procedures are no longer available." Unlike the Colorado statue, the Commission's Rule of Practice does not require lapse of time for appeal.

As an initial matter and as noted by Judge Lucero in dissent in *Walters*, it is even arguably a misreading of the specific language in the Colorado statute to interpret the "lapse of time for appeal" phrase to apply when a consent judgment has been entered:

> Without citing Colorado precedent on the matter, it appears the majority effectively construes the words 'final by lapse of time for appeal' to mean something like 'final by the expiration of the time period for appeal as provided for in the applicable statute or rule, whether or not the party has any right to take such an appeal.'...Under the language of the statute, there is a strong argument that when the Superior Court of New Jersey, Law Division, sanctioned the settlement of the parties, the time for appeal lapsed, and the one-year time period began to run. *See., e.g., Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo. Ct. App. 1985)(noting that when 'a party consents to entry of an order or judgment, and such consent is regularly obtained, that party has no right to appeal from the order or judgment').

Walters, 185 F.3d at 1107. Judge Lucero goes on to state that the "time for appeal" may "lapse" by operation of law when there is a waiver of appeal. *Id.* at 1108.

Judge Lucero's interpretation in *Walters* is consistent with the general rule set out in a number of federal court opinions that a party cannot appeal from a consent judgment. *See, e.g., Van v. Barnhart*, 483 F.3d 600, 609 n. 5 (9th Cir. 2007)("'In general, a party cannot appeal a judgment entered with its consent.' There are, however, several exceptions to this general rule of non-appealability, including: (1) where there was no actual consent; (2) where the district 'court lacked subject matter jurisdiction to enter the judgment,' and (3) where a party 'intended to preserve its right of appeal,' or 'specifically preserves its right to appeal.'" *Id.* (citations omitted)); *see also Kean v. Adler*, 65 Fed. Appx. 408, 412 (3rd Cir. 2003); *Keefe v. Prudential Property and Casualty Insurance Co.*, 203 F.3d 218, 222-23 (3rd Cir. 2000); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 526 (10th Cir. 1992).

Tom Melvin consented to the entry of judgment against him and additionally expressly waived his right to appeal. Thus, there is no applicable exception to the general rule of non-appealability, and his judgment became final upon entry by the district court on August 14, 2013.

The Commission should interpret its own Rule of Practice consistent with the majority approach in the federal courts, i.e. that a consent judgment (especially one containing an express appeal waiver) becomes effective immediately upon entry by the district court of the judgment. In this case, such an interpretation means that the Commission's institution of these proceedings was untimely and the hearing officer's decision in this regard should be reversed by the Commission.

ii. **It is appropriate for the Commission to impose a three year bar as agreed to by division counsel.**

In the period from June 27, 2013 (the day before the second Consent Agreement was signed) to July 2, 2013, counsel for Mr. Melvin discussed with Division Counsel Joshua Mayes an agreement that Mr. Melvin, in conjunction with his settlement in the civil enforcement action, not be banned from practicing in front of the Commission for any period in excess of three years. (Respondent's Opposition to Summary Disposition, Affidavit of Brian Jarrard, Exhibit "B"). On July 2, 2013, Mr. Mayes conveyed his consent to this agreement to defense counsel who in turn on that day informed Mr. Melvin of the agreement. (Id.). On July 8, 2013, while discussing deposition scheduling in the civil enforcement proceeding, Mayes informed defense counsel that he would be sending defense counsel the paperwork on the resolution of the administrative matter. (Id.). Mr. Mayes' first mention of not honoring the agreement came on January 15, 2014 in a telephone call with defense counsel after the Commission issued its December 2013 order instituting proceedings. (Id.).

Pursuant to Commission Rule of Practice 411(a), the Commission "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." In the Order Granting Petition for Review and Scheduling Briefs, p. 1, the Commission states: "Pursuant to Rule of Practice 411(d), the Commission will determine what sanctions, if any, are appropriate in this matter."

In this regard, the hearing officer determined that there was no legally enforceable agreement by division counsel to a three year bar and that a permanent bar should be imposed, noting however in a footnote that Rule 102 provides an avenue for reinstatement at any time.

With respect to the enforceability of Mr. Mayes' commitments, Mr. Melvin does not contest that the applicable law says that the Commission itself is not bound by the commitments of its division counsel. However, as Rule 411(a) makes clear, the Commission is free to honor those commitments. Division counsel Mayes has never contested that, at a minimum, he agreed that a three year bar for Mr. Melvin was appropriate given all that Mr. Mayes knew of the case.

The Commission requires that the consideration of an appropriate sanction in the public interest take into account the following: the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

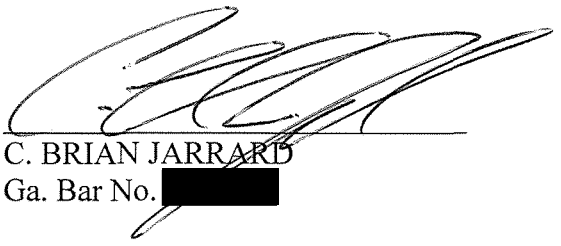
Even if taken as true in the present context, the allegations against Mr. Melvin in the civil enforcement action were that he was a non-trading tipper who did not benefit financially from any alleged conduct. Mr. Melvin's actions are not as egregious as his partner who admitted

misappropriating confidential information and then trading on that information. Even if all allegations of the consent are taken as true, the misappropriation of information by Mr. Melvin was an isolated event in an otherwise law-abiding and productive life.

Mr. Melvin has recognized the wrongful nature of what transpired and sincerely endeavored to address the matter by reaching a consent resolution with the SEC early in the civil enforcement matter. He has now made every payment of the agreement as required. He made those payments timely and in accordance with the agreement. If Mr. Melvin continues to practice in any field that allows him access to confidential information, the very nature of this process and his response to same demonstrates that, if such a scenario arises, a permanent bar from the Commission is not necessary to prevent future violations.

WHEREFORE, Mr. Melvin requests that the Commission review this matter, hold that institution of the proceedings was untimely under the Commission's rules, and (if not so ruling) modify the hearing officer's decision to impose a three year bar on Mr. Melvin.

This 15th day of January, 2015.



C. BRIAN JARRARD
Ga. Bar No. [redacted]

C. Brian Jarrard, LLC
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