

January 14, 2021

VIA FEDEX

Vanessa Countryman, Secretary
Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

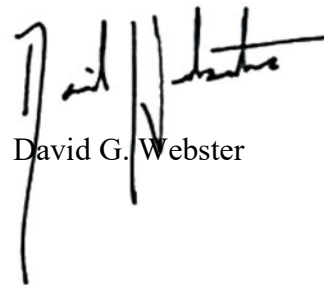
Re: Administrative Proceeding File No. 3-19775
In the Matter of Lee C. Schlesinger, Respondent

Dear Ms. Countryman:

Enclosed is an original and two copies of Respondent Lee C. Schlesinger's Response to Order to Show Cause.

If you have any questions, please do not hesitate to contact our office.

Very truly yours,



David G. Webster

DGW/reb
Enclosures
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cc: Jennifer D. Reece (w/enclosure) – *via E-Mail: reecej@sec.gov and apfilings@sec.gov*
Division of Enforcement *and CM/RRR 9414 7266 9904 21648015 80*
United States Securities and Exchange Commission
Burnett Plaza, Suite 1900
801 Cherry Street, Unit 18
Fort Worth, Texas 76102

Lee Schlesinger (via email)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	SECURITIES EXCHANGE ACT OF 1934
	:	Release No. 88773 / April 29, 2020
LEE C. SCHLESINGER,	:	
	:	ADMINISTRATIVE PROCEEDING
	:	File No. 3-19775
Respondent.	:	

RESPONDENT LEE C. SCHLESINGER'S
RESPONSE TO ORDER TO SHOW CAUSE

Respondent Lee C. Schlesinger (“Respondent” or “Mr. Schlesinger”) files this Response to the Commission’s Order to Show Cause (“Response”) as follows:

I. ARGUMENT AND AUTHORITIES

A. The Commission’s Rules of Practice Do Not Permit Default for Untimely Answers Alone.

Plain Reading of the Rules

On or around June 4, 2020, Respondent was served with the Division of Enforcement’s (the “staff”) Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing (the “OIP”). Respondent concedes that his answer to the OIP, filed on September 29, 2020, was untimely under the Securities and Exchange Commission’s (the “Commission”) Rule of Practice 220(b). Respondent disputes, however, that an untimely answer can be the basis for a default judgment, as suggested by the December 15, 2020 Order to Show Cause.

The plain-language interpretation of the Commission’s Rules of Practice, combined with applicable case law interpreting them, show that a default judgment against Respondent is not

appropriate here. First, Rule 220(f) states the general proposition that an untimely answer may be grounds for a default under Rule 155. 17 C.F.R. §§ 201.221(f) and 201.155. Rule 155 then identifies the specific conditions under which “[a] *party to a proceeding may be deemed to be in default.*” *Id.* (emphasis added). As set forth in Rule 155(a), these three conditions of possible default are limited to proceedings in which a party fails:

- (1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;
- (2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or
- (3) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to Rule 180(b).

17 C.F.R. § 201.155(a)(1)-(3).

Since the single issue presented by the Order to Show Cause is the timing of Respondent’s Answer to the OIP and, specifically, whether that timing can result in entry of a default, only Rule 155(a)(2) applies here, and, indeed, only the first two words of Rule 155(a)(2). A plain reading of Rule 155(a)(2) shows that its timeliness requirement applies *only* to a party’s response to a dispositive motion and not to the timeliness of a party’s answer. *See id.* (default may be entered for a party’s failure “to answer, to respond to a dispositive motion within the time provided,...”). The Rule’s “within the time period provided” provision clearly only modifies, and so only applies to, a party’s response to a dispositive motion – and not to a party’s answer. *See id.* Since no dispositive motions have been filed, the timeliness of responding to any such motions clearly is not at issue here. Instead, the singular issue is whether the timing of Respondent’s Answer allows for entry of default under the Rules of Practice. Rule 155(a)(2) plainly shows they do not.

Rule 155(a)(2)'s specific inclusion of a timeliness requirement for responses to dispositive motions, combined with its specific exclusion of that same timeliness requirement for answers, shows that a default cannot be entered against Respondent here. To the contrary, default may be entered only if Respondent entirely failed to file an answer (or, at a minimum, before the Division staff had moved for default, which to date it has not done), failed to timely respond to a dispositive motion (and there is not one on file here), or wholly failed to defend the proceeding. *See, generally*, 17 C.F.R. § 201.155(a)(1)-(3). None of those conditions exists here. As such, Respondent has not defaulted.

Respondent further notes that Rule 161¹ (outlining procedures for extensions of time), which the Order to Show Cause cites, is not applicable here. Specifically, there was no need for Respondent to request an answer deadline extension under Rule 161 where, as outlined above, a motion for default had not been filed and the Rules of Practice do not otherwise impose a timeliness requirement on that answer. Likewise, the Order to Show Cause suggests that Respondent is required to satisfy the standard of Rule 155(b), relating to the procedural and timing requirements for motions to set aside default judgments. *See* 17 C.F.R. § 201.155(b). For instance, the Order to Show Cause directs Respondent to explain why the Commission should accept his answer, mirroring Rule 155(b)'s requirement to "state the reasons for the failure to appear or defend."² Order to Show Case at ¶ 3, p. 1. The next sentence in the Order to Show Cause cites to Rule 155 and states, "when a party defaults, the allegations in the OIP may be deemed to be true," suggesting Respondent is already in default and must show cause for setting aside the default under Rule 155(b). Order to Show Case at ¶ 3, p. 1.

¹ 17 C.F.R. § 201.161.

² There is no such explanation requirement listed under Rule 155(a), which controls the issue here.

But as stated above, the Commission has not moved for default against Respondent as of this date or the date of the Order to Show Cause. The Order in fact acknowledges this in stating that "...the Division may file a motion for default...by February 16, 2021." Order to Show Cause at ¶ 1, p. 2. Because default against Respondent has neither been moved for nor granted, Rule 155(b)'s requirements for setting such a default aside are inapposite. Accordingly, the plain-language interpretation of the applicable Rules of Practice shows that default against Respondent is not warranted or permitted.

Case Law Supports Respondent's Position

Respondent's analysis of the applicable case law interpreting Rule 155 supports this position. That review found no instances where a late-filed answer (in the absence of a motion for default) served as the basis for entry of a default judgment. To the contrary, Respondent found in at least one case where, like here, the respondents had filed untimely answers and the staff did not move for default, after which the case proceeded as though the answers were timely. *See In the Matter of Bentley Commerce Corp., Eco2, Inc., Guideline Capital, Inc., Lapitos Acquisition Corp., Para Mas Internet, Inc., Prentice Capital, Inc., & Spa Faucet, Inc.*, Release No. 56298 (Aug. 22, 2007) (holding the proceedings should continue against respondent Bentley Commerce Corp. where it filed an untimely answer and the motion for default did not seek relief against Bentley Commerce Corp.).

In 2020, at least one case proceeded even where a respondent wholly failed to answer, failed to respond to the show-cause order, and the Division of Enforcement filed a motion for default. *See In the Matter of Mark J. Moskowitz*, Release No. 5433 (Jan. 14, 2020). In *Moskowitz*, despite respondent's failings, a default was not granted and the case proceeded because respondent sent an email saying only that he "intended to defend the proceeding." *Id.* On that basis alone,

respondent avoided default. By contrast, here, Respondent answered, responded to the show-cause order, the staff has not moved for default, and it does not oppose this Response (see below). Given Respondent's far less egregious conduct as compared to *Moskowitz*, Respondent does not believe a default is permitted or appropriate.

Given the absence of cases allowing for default under identical or similar circumstances as those presented here, and the fact that a mere email appears sufficient to avoid a default even when a respondent has not answered and a motion for default is on file, Respondent does not believe grounds exist for entry of default here. The Order to Show Cause appears to accept Respondent's interpretation of the Rules and case law, in that the order states that the Division must move for default. Order to Show Case at ¶ 1, p. 2. For the foregoing reasons and the other reasons stated below, Respondent requests that his answer not be struck, that no default be entered against him, and the proceedings be permitted to continue.

B. The Entry of a Default Judgment Would be Inequitable.

The entry of a default would be inequitable to Respondent given the timing of commencement of the OIP. Respondent concedes that he late-filed his answer. But striking this answer (without a legal basis) would deny him his right to defend this case. Even if his answer is struck, Respondent has indicated an intent to defend this case, which *Moskowitz* suggests is sufficient to avoid default. Moreover, Respondent and the staff settled the underlying enforcement proceeding approximately three years before commencement of this OIP. Finally, there is no motion for default judgment on file. As such, to ignore Respondent's answer and enter a default judgment, in the absence of a motion for default, would severely prejudice Respondent based merely on the timing of his answer in a follow-on proceeding in which that timing clearly did not prejudice the staff in any way.

For these additional reasons, Respondent requests that his answer not be struck, that no default be entered against him, and these proceedings continue.

C. The Enforcement Division Does Not Oppose this Response or the Requested Relief.

Beginning on or around June 14, 2020, and through in or about August 2020, counsel for Respondent and the staff communicated about Respondent's answer and the possibility of resolving this matter without further litigation. During those communications, counsel discussed, among other things, that the staff did not intend to seek a default at that time based on the timeliness of Respondent's answer. Counsel further discussed that Respondent's answer, as necessitated by the timing of those discussions, would be filed after the due date based on the date of service on Respondent. However, counsel did not contemplate or discuss seeking an extension because of the staff's intention, as transparently and collegially discussed with counsel, not to seek a default at that time. In short, Respondent and the staff understood that Respondent's answer would be filed subsequent to the due date for the foregoing reasons, and that it would be done without the staff moving for default.

Despite the above-described communications, the parties did not reach an agreed proposed resolution of the OIP. Consequently, when such a proposed agreement was not reached and communications between counsel slowed during COVID-19, Respondent's lead counsel assigned a new associate to this matter in September 2020. At that time, Respondent's counsel believed it prudent to get an answer on file while also attempting to restart negotiations with the staff. Accordingly, Respondent answered on September 29, 2020.

On January 4, 2021, after receiving the show-cause order, counsel for Respondent and the staff again discussed the issue of the timing of Respondent's answer. That discussion confirmed the foregoing and the joint belief that a default could not be entered given that Respondent

answered and no motion for default was on file. Accordingly, the staff stated that it does not oppose this Response or the relief requested herein.

D. Explanation for Untimely Answer

In the alternative, if Respondent must demonstrate good cause for the delay in filing his answer, which he disputes, he offers the following explanation.

Respondent did not anticipate that the OIP would be filed against him when it was or, based on its timing, at all. The OIP was served 38 months after entry of a consent final judgment against him on March 28, 2017, in *Securities and Exchange Commission v. Ronald L. Blackburn, et al.*, Civil Action Number 2:15-CV-2451-CJB, in the United States District Court for the Eastern District of Louisiana. The cost of resolving that matter, including the fine Respondent paid in full, placed Respondent under extreme financial distress which continues to this day. As a result, when presented with the OIP after agreeing to settle the underlying case, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Based on the financial, practical, and emotional strain due to the pandemic, once Respondent was able to retain counsel, he was right up against the answer deadline. In an attempt to avoid the cost of preparing a formal answer and engaging in affectively a second round of litigation on this matter, Respondent asked counsel to seek an agreed resolution before the proceeding formally advanced further, and counsel engaged with the staff and attempted to do so. Such efforts were detailed above. Based on the collective understanding of the Rules, the staff's professional and collaborative approach and agreement to forego filing a motion for default judgment, and Respondent's understanding of the Rules, he sought to avoid incurring the costs to

answer the OIP. Only when communications with the staff stalled did Respondent recognize he had to incur the cost of answering the OIP to avoid a default judgment, which would include an industry bar that might directly affect his future livelihood.

II. CONCLUSION

Accordingly, Respondent Lee C. Schlesinger respectfully requests that: (1) no default judgment be entered against him; (2) his answer filed September 29, 2020, not be struck; and (3) the proceedings against him continue to proceed.

Signed this 14th day of January 2021.

Respectfully submitted,

BELL NUNNALLY & MARTIN LLP

/s/ David G. Webster

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ATTORNEYS FOR LEE C. SCHLESINGER

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, a true and correct copy of the foregoing was sent in the manner indicated below upon the following:

Via FedEx

Vanessa Countryman, Secretary
Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Via Certified Mail, Return Receipt

Requested No. 9414 7266 9904 2164 8015 80
and via email: reecej@sec.gov and apfilings@sec.gov

Jennifer D. Reece
Division of Enforcement
United States Securities and Exchange Commission
Burnett Plaza, Suite 1900
801 Cherry Street, Unit 18
Fort Worth, Texas 76102

/s/ David G. Webster

David G. Webster