

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
ADMINISTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

_____ /

**RESPONDENT JOHN CHRISTOPHER POLIT'S
PARTIAL JOINDER WITH ENFORCEMENT'S MOTION TO DISMISS,
AND REQUEST FOR OTHER RELIEF**

The National Court of Justice of Ecuador has reversed both the decision of the Ecuadorian trial court finding Respondent John Christopher Polit guilty of the crime of being an accessory to extortion and the decision of the intermediate appellate court upholding that verdict. In light of that decision, the Division of Enforcement has moved to dismiss this proceeding “[b]ecause the basis for this proceeding was Respondent being convicted of a crime in Ecuador and the conviction has now been reversed by the highest court of appeal.” Motion at 2.¹

Respondent John Christopher Polit, through his undersigned attorney, partially joins the Division of Enforcement’s Motion to Dismiss. He agrees that the proceeding must be dismissed, but he requests that the Commission expressly dismiss “with prejudice.” In addition, as discussed below at 6, Mr. Polit also requests that, assuming the Commission dismisses this proceeding, it

¹ The Division moved to dismiss before a written order was entered by the National Court of Justice. The Court has since entered a written order. Spanish is the official language of Ecuador. *CIA World Factbook*, available at <https://www.cia.gov/the-world-factbook/static/4e04a704fe05af84d3b5eed9c2c21fca/EC-summary.pdf>. There is no official or authorized English translation of a judicial decision in Ecuador. A copy of the order issued by the court in Spanish, which in a PDF file of over 24 MB, is too bulky to be served by email. We will contact the Office of the Secretary to determine how it should be served on it and on the Division’s attorneys. Mr. Polit is arranging for an authoritative English translation of the order and we will file it when it is received.

also amend its webpage showing the institution of this proceeding with an appropriate legend indicating that the proceeding has been dismissed because the verdict of guilty was annulled or reversed, and containing a link to the order of dismissal.

DISCUSSION

This “follow-on” proceeding stems from Respondent John Christopher Polit’s purported “conviction” in Ecuador of the crime, under the law of that nation, of being an accessory to extortion. Order Instituting Proceedings (June 22, 2020). Mr. Polit has previously moved to dismiss this proceeding on the basis that, under Ecuadorian law, there was no “conviction.” Motion (filed Sept. 28, 2020). The Division opposed that motion, arguing that U.S. law, not Ecuadorian law, governs whether there was a conviction. Response to Motion (filed Oct. 9, 2020). Though fully briefed, that motion should be deemed moot if, as it must, the Commission dismisses this proceeding.²

The National Court of Justice in Ecuador has reversed the decision of the Ecuadorian trial court and of the intermediate appellate court upholding that decision, and has recognized Mr. Polit’s innocence of those charges. Consequently, the Division of Enforcement has moved for dismissal of the proceeding. The Commission’s case law requires dismissal. *See, e.g., Michael S. Steinberg*, Exchange Act Release No. 4281, 2015 WL 7566254 (Nov. 24, 2015) (citing cases).

² For the record, however, for the reasons stated in his motion to dismiss, Mr. Polit does not agree that he was “convicted” as that term is used in the Exchange and Advisers Acts. Given the mootness of Mr. Polit’s earlier motion, the Commission need not address this issue in ruling on the Division’s instant motion.

It should also be noted that Mr. Polit’s having earlier moved for dismissal “without prejudice” does not mean that he should be held to that position now. He asked that the proceeding be dismissed without prejudice because he recognized the possibility, which has now been eliminated, that his appeal of the guilty verdict and the intermediate appellate decision might prove unsuccessful. Obviously, the circumstances are now different.

Mr. Polit agrees with the Division of Enforcement that this proceeding should be dismissed. The Division's Motion, however, does not specify whether the dismissal should be with or without prejudice. Mr. Polit asserts that the dismissal must be *with prejudice*. He also seeks the relief of amending the webpage containing the OIP as discussed below.

Admittedly, the Commission's Rules of Practice do not distinguish between dismissing proceedings with or without prejudice. Nevertheless, nothing in the Rules *prohibits* dismissals expressly with or without prejudice or *mandates* dismissal without an express statement whether the dismissal is with or without prejudice.

Thus, the Commission has dismissed administrative proceedings "without prejudice." *E.g., Anthony Chiasson*, Exchange Act Release No. 4085, 2015 WL 2328706 (May 15, 2015). In the Order Dismissing Proceeding in that case the Commission noted that "we have on occasion exercised our discretion to dismiss proceedings without prejudice where, as here, both parties have agreed to this disposition, and neither party claims any prejudice," *id.* at n. 7 (citing cases). In one such case, *William J. Bosso*, Exchange Act Release No. 43779, , 2000 WL 1879160 (Nov. 28, 2000), the Commission dismissed an administrative proceeding "without prejudice" and explained the rationale—"The parties have agreed that this proceeding may be reinstated at a future date and that this dismissal will not be used against either of the parties for any purpose in this matter, including the application of any limitations period." Accordingly, since the Commission asserts the discretion to dismiss proceedings "without prejudice," and has done so, then it follows as a matter of logic and fundamental fairness that it also has the discretion to dismiss "with prejudice" in appropriate circumstances.

This case presents just such "appropriate circumstances." The only basis for this proceeding was what the Commission characterized Mr. Polit's criminal "conviction" in an

Ecuadorian court. That guilty verdict at the trial level and the affirmance of that verdict at the first appellate level have now been declared annulled (“casar”³) and Mr. Polit has been declared “innocent.”⁴ This case is over and done with and cannot be brought back to life because, as we now show, the case against Mr. Polit in Ecuador is also over and done with and cannot be brought back to life.

We attach as Exhibit I the Declaration of a distinguished and experienced Ecuadorian lawyer, Maria Del Mar Gallegos Ortiz.⁵ This Declaration was executed in support of Mr. Polit’s request that dismissal be with prejudice. Decl. at 1. Ms. Gallegos states, *id.* at 2, that she has reviewed the decision of the National Court of Justice and notes that that decision “reversed the initial appeal decision and declared Mr. Polit to be innocent of the charges.” *Id.* She goes on to state that, “under Ecuadorian law, Mr. Polit may not be charged or tried again for the conduct giving rise to the above-referenced criminal proceeding against him.” *Id.* at 3. She further states that she bases this opinion on the fact that both the Constitution of the Republic of Ecuador and

³ The Court declared (“declara”) that the decision (“sentencia”) of the trial and first-level appellate court be annulled (“marar”). These definitions are from *McGraw-Hill’s Spanish and English Legal Dictionary, Diccionario Juridico Ingles-Espanol* (ed. Henry Saint Dahl) (2004). A lengthier version of this dictionary has been relied on by the First and Sixth Circuits, Saint Dahl, *Dahl’s Law Dictionary* 215 (3d ed.1999), see *Cruz v. Melecio*, 204 F.3d 14, 20 (1st Cir. 2000) and *Martinez v. United States*, 828 F.3d 451, United States Court of Appeals, Sixth Circuit. July 07, 2016 828 F.3d 451, 459 (6th Cir. 2016), and has been highly praised in a book review by a Colombian attorney, see Marco G. Monroy, *Dahl’s Law Dictionary/diccionario Juridico Dahl. Spanish-English/english-Spanish by Henry Saint Dahl. William Hein & Co., Inc., 2nd Ed. 1996, Pp. Xx, 801 (Including Appendices), Us \$75.00. Dahl’s Law Dictionary/dictionai*, 31 Int’l Law. 1135, 1136 (1997) “(Dahl’s dictionaries are a breath of fresh air in the rarified environment of bilingual legal dictionaries. Dahl’s dictionaries are à la *Black*, with substantial definitions ending with a precise indication of the source. Since they rely heavily on the law itself, Dahl’s dictionaries are authoritative. . . [T]hese dictionaries are tools that can be used in court, for example, to prove a point of foreign law, or in a university, to teach a foreign legal system.”).

⁴ In its recent order, the National Court of Justice actually held that Mr. Polit’s innocence was “ratified” (ratificar”). As a matter of Ecuadorian law, the earlier decision of the trial court that Mr. Polit was guilty as charged did not disturb the principle of law that preserved the presumption of his innocence as long as an appeal was pending. See Declaration of Maria Del Mar Gallegos Ortiz, Exhibit I to Mr. Polit’s Motion for Dismissal Without Prejudice, or, in the Alternative, for Extension of Time to Respond to Order Instituting Proceedings (filed Sept. 28, 2020), at 3.

⁵ Ms. Gallegos discusses her background in her declaration and it is further described in her CV attached to the Declaration.

its Comprehensive Criminal Organic Code expressly proscribe prosecutions that constitute double jeopardy—the Constitution states “No one may be judged more than once for the same cause and matter,” while the Code states “No person may be tried or punished more than once for the same facts.” *Id.*

Since the only basis for reinstating this proceeding would be a later criminal conviction on the same factual predicate, the fact that such is prohibited under Ecuadorian law means that this case could not be reinstated. This means that the dismissal should be with prejudice.

First, the Commission loses nothing and risks no harm to the public interest were it to dismiss this case with prejudice. It will not be giving Mr. Polit any rights that have not already been created by the favorable termination of his criminal case in Ecuador, which, as Ms. Gallegos’ declaration shows, means that the criminal case is over there.

Second, when a case against a respondent is dismissed under the circumstances prevailing in this instance, the respondent deserves the clarity that a dismissal with prejudice provides. It is understood that under the laws of the United States “with prejudice” means “[w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim.” *With Prejudice*, BLACK’S LAW DICTIONARY (11th ed. 2019). But, if the dismissal does not state whether it is with or without prejudice, then potential employers, regulators or business partners might be uncertain whether this proceeding could be revived. The natural inclination of those without knowledge of the Commission’s Rules of Practice, the applicable provisions of the Exchange Act and the Advisers Act or the niceties of Ecuadorian law will be to wonder why the dismissal does not say “with prejudice” or “without prejudice.” They will ask, “Can this case come back to life?”—and they may not even give Mr. Polit an opportunity to answer that question. They cannot be expected to consult with securities law specialists or even

experts in Ecuadorian law to determine their own answer to that question. Mr. Polit should be able to point to the order of dismissal to show that the basis for the institution of this proceeding ceased to exist and that this proceeding will not be reinstated. This will be achieved by the addition of the words “with prejudice.”

Where there is a reasonable possibility that (or even bona fide doubt whether) a proceeding, once dismissed, may lawfully be reinstated, then by all means the dismissal should be without prejudice. But where, as here, there is no reasonable doubt but that it may not lawfully be reinstated, the public interest is served by a forthright statement that a dismissal is with prejudice. Otherwise, the adverse effects of the criminal proceeding and of the commencement of the follow-on proceeding will be permitted to exist. This is not only unfair to the respondent but unnecessary to achieve the Commission’s purposes.

As a final matter, Mr. Polit, in order to avoid the opprobrium of a lingering web page that has lost its validity, also requests that, assuming the Commission dismisses this proceeding, it amend its webpage showing the institution of this proceeding with an appropriate legend indicating that the proceeding has been dismissed because the verdict of guilty was annulled or reversed, and containing a link to the order of dismissal. The rationale for this request is that, standing alone, the Order Instituting Proceeding establishes a presumption that Mr. Polit was “convicted” of a serious crime in Ecuador, when, in fact, even if there ever was a “conviction,” which he contests, that decision was annulled on appeal and his innocence recognized. There would be no injury to the public interest in granting this specific relief any more than there would be in dismissing this proceeding with prejudice.

WHEREFORE, Respondent John Christopher Polit joins the Division’s request that the Commission dismiss this case and further requests that the dismissal be *with prejudice*.

Mr. Polit also requests that, assuming the Commission dismisses this proceeding, it amend its webpage showing the institution of this proceeding with an appropriate legend indicating that the proceeding has been dismissed because the verdict of guilty was annulled or reversed, and containing a link to the order of dismissal.

Respectfully submitted,

The Brodsky Law Firm
1600 Ponce de Leon Blvd.
Suite 1057
Coral Gables, Florida 33134
Tel.: 786-350-1186
Cell: 305-962-7497
Fax: 786-350-1202
rbrodsky@thebrodskylawfirm.com

/s/ Richard E. Brodsky

By: _____
Richard E. Brodsky
Florida Bar No. 322520

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing to be served by email on the following this 12th day of February 2020:

Office of the Secretary: apfilings@sec.gov
Alice K. Sum, Division of Enforcement, sumal@sec.gov
Andrew Schiff, Division of Enforcement: schiffa@sec.gov

/s/ Richard E. Brodsky

Richard E. Brodsky

File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

EXHIBIT I

to

Respondent John Christopher Polit's
Partial Joinder with Enforcement's Motion to Dismiss,
and Request for other Relief

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
ADMINISTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

**DECLARATION OF MARIA DEL MAR GALLEGOS ORTIZ
PURSUANT TO 28 U.S.C. § 1746**

1. I, Maria Del Mar Gallegos Ortiz, give this Declaration in support of the Respondent's Motion for Dismissal Without Prejudice, or, on the Alternative, for Extension of Time to Respond to Order Instituting Proceedings. This declaration is made pursuant to 28 U.S.C. § 1746.

2. I reside in Quito, Ecuador. I prepared this Declaration in English, which I read, write and speak at an advanced level.

3. I am a lawyer of the Courts and Tribunals of the Republic of Ecuador. I specialize in the area of criminal law and procedure.

4. Attached hereto as Exhibit "A" is a copy of my curriculum vitae. The information therein is true and accurate.

5. I provide this Declaration in support of the request by Respondent John Christopher Polit that the Commission grant the Division of Enforcement's Motion to Dismiss and that the dismissal be with prejudice.

6. I base this Declaration on my experience in studying, teaching and practicing criminal law and procedure in Ecuador, including pertinent provisions of the Constitution of the Republic of Ecuador and Ecuador's Comprehensive Criminal Organic Code.

7. I have had no involvement in, and have no personal knowledge of, John Christopher Polit's criminal proceeding in Ecuador, which I understand forms the basis of this proceeding. I have previously issued a Declaration, which I understand was filed with the Commission in support of Mr. Polit's Motion for Dismissal Without Prejudice, or, in the Alternative, for Extension of Time to Respond to Order Instituting Proceedings.

8. I have been informed that on January 26, 2021, a judgment of Casación was issued by the Specialized Chamber of Criminal, Military Criminal, Police Criminal, Transit, Corruption and Organized Crime of the National Court of Justice of Ecuador (in short form, the "Court"), in connection with an appeal to the Court maintained by John Christopher Polit, the Respondent herein. His initial appeal from the guilty verdict at the trial level had been denied by the court handling that appeal. In its judgment of Casación, the Court reversed the initial appeal decision and declared Mr. Polit to be innocent of the charges.

9. In its judgment of Casación, the Court reversed the initial appeal decision and declared Mr. Polit to be innocent of the charges.

10. I have read the decision of the Court in Spanish. There is no official translation of Court decisions to other languages.

11. I have been asked by counsel for the Respondent in this proceeding to provide my opinion as to whether, under Ecuadorian law, Respondent John Christopher Polit may be charged or tried again for the conduct giving rise to the above-referenced criminal proceeding against him.

12. I am of the opinion that, under Ecuadorian law, Mr. Polit may not be charged or tried again for the conduct giving rise to the above-referenced criminal proceeding against him.

13. My opinion is based on the clear and unambiguous wording of both the Constitution of the Republic of Ecuador and Ecuador's Comprehensive Criminal Organic Code.

14. In pertinent part, the Constitution of the Republic of Ecuador provides, in Article 76 for the *Basic Guarantees of the Right to Due Process*, as follows:

Article 76.- In any process in which rights and obligations of any order are determined, the right to due process shall be ensured which shall include the following basic guarantees:

7.- The right of persons to the defence shall include the following guarantees:

(i) No one may be judged more than once for the same cause and matter.

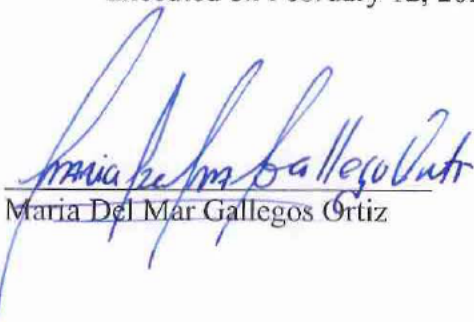
2. In addition, in pertinent part, the Comprehensive Criminal Organic Code states:

Article 5.- Procedural principles.- the right to due criminal proceedings, without prejudice to others established in the Constitution of the Republic, international instruments ratified by the State or other legal rules, shall be governed by the following principles:

9. Prohibition of double judgement.- No person may be tried or punished more than once for the same facts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 12, 2021.


Maria Del Mar Gallegos Ortiz