UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.
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RESPONDENT JOHN CHRISTOPHER POLIT'S REPLY TO DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S PARTIAL JOINDER WITH DIVISION'S MOTION TO DISMISS, AND REQUEST FOR OTHER RELIEF

In the interest of a complete and accurate record, Respondent John Christopher Polit submits this reply to the Division's Response, filed on February 17, 2021, to Mr. Polit's Partial Joinder with Division's Motion to Dismiss, and Request for Other Relief, which was filed on February 12, 2021.[1]

Both the Division and Mr. Polit agree that the Ecuadorian National Court of Justice's reversal of the trial court's guilty verdict necessitates the dismissal of this proceeding. The issue that divides the parties is whether to dismiss this proceeding "with prejudice."

The Division opposes a dismissal with prejudice on three grounds. First, it reiterates the fact that the Commission's Rules of Practice do not distinguish between dismissals with or

[1] Mr. Polit recognizes that the Partial Joinder was filed about two months after the Division moved to dismiss. The reason was that the decision of the National Court of Justice of Ecuador reversing the guilty verdict of the trial court was not issued until January 29, 2021, and counsel could not ask an expert on Ecuadorian law to opine on the finality of that court's decision until the decision was issued. Moreover, the Division does not argue that the timing of the Partial Joinder has caused the Division any prejudice, nor could it make that argument, since the underlying motion to dismiss has not been ruled upon and the timing of the Partial Joinder could not have imposed any particular hardship on the Division or its personnel.

without prejudice, which is itself undeniable but is little practical significance because the Commission has, on occasion, done just that: dismiss some cases expressly "with prejudice" and dismiss others expressly "without prejudice."[2] Response at 2.

Second, it quotes one sentence from a 2001 Commission Opinion stating that "[i]t is not our practice, nor do we consider it necessary, to add the words 'with prejudice' to final orders of dismissal," but fails to inform the Commission that that Opinion was reversed by the D.C. Circuit precisely because it did not state whether the dismissal was with or without prejudice, which we will discuss below. *Id.* We will discuss that case below at 4-7.

Third, it states that we have not "cited to any case law that supports requiring the Commission to take the extra step of conducting an analysis on the finality of the Ecuadorian proceedings in order to determine whether to designate a dismissal as one 'with' or 'without prejudice.'" *Id*. That argument is dealt with below at 7-8.

The Division does not dispute Mr. Polit's showing that the courts in Ecuador will not be permitted, under the law of that nation, reinstitute the criminal case, nor does it dispute that if, as both parties agree it must, the Commission dismisses this proceeding because of the decision of the Ecuador National Court of Justice, the Commission would be barred from raising the same

[2] "Without prejudice" dismissals include *William J. Bosso*, Release No. 34-43779, 2000 WL 1879160 at *1 (Nov. 28, 2000) (dismissal without prejudice where parties agreed proceeding "may be reinstituted at a future date"); *Asset Equity Group, Inc.*, Release No. 34-51562 (Apr. 15, 2005) (dismissal without prejudice; no explanation of rationale); and *Anthony Chiasson*, Exchange Act Release No. 4085, 2015 WL 2328706 at *1 n.7 (May 15, 2015) (dismissal of follow-on proceeding without prejudice where criminal conviction vacated and injunction lifted; "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, citing cases). "With prejudice" dismissals include *K-2 Logistics.com, Inc.*, Release No. 34-59256, 2009 WL 103295 (Jan. 15, 2009) (dismissing with prejudice "for good cause shown); and *Andain, Inc.*, Release No. 34-64015, 2011 WL 761767 (Mar. 2, 2011) (same). *See also Timbervest, LLC*, Release No. IA-5093, 2018 WL 6722760 (Dec. 21, 2018) (dismissing with prejudice on basis of settlement agreement); *Edith C. Alter*, Release No. IS-657, 1983 WL 400823 (May 4, 1983) (same). We pointed out in our Partial Joinder the fact that dismissals have been issued "without prejudice." Since we have now cited several cases in which dismissals were expressly "with prejudice," we would have no objection to a sur-reply by the Division if it feels a need to respond to those citations.

claim again in a new action. Thus, the Division cannot dispute that if the Commission, as it sometimes does, decides to add to this dismissal order either "with prejudice" or "without prejudice," as appropriate, it obviously would have to say that the proceeding was being dismissed "with prejudice."

The Division also does not contend that there is no difference between a dismissal "with prejudice" and one "without prejudice." Obviously there is.[3] And it does not dispute our showing that Mr. Polit, like any respondent whose case were dismissed under these circumstances, would benefit by the clarity of a dismissal with prejudice, because it would go a long way towards eliminating third parties' reluctance to do business with him out of fear that this case could be reinstituted. This benefit of clarity to a respondent would be important to a respondent that was located in the United States, and would unquestionably be even more significant to a respondent, like Mr. Polit, who might seek to do business with an Ecuadorian individual or entity. In this kind of run-on proceeding, given the disparity in size and international power between two countries like the U.S. and Ecuador, Ecuadorians' uncertainty whether the United States Government could bring the same case again would necessarily be more difficult for Mr. Polit to allay.

It being clear and undisputed that the Commission can and does, on occasion, dismiss with prejudice, why, then, should the Commission do so here? The reasons are clarity and fairness. Indeed, the very lack of clarity of a dismissal with no "with prejudice" or "without prejudice" language was one of the reasons for the D.C. Circuit's reversal of the 2001 Opinion.

[3] "With prejudice" means that "claim preclusion attaches: if the same claims are raised in another action against the same party, that action must itself be dismissed with prejudice," while "without prejudice" means "without claim preclusion, leaving the plaintiff free to raise the same claims again in a new action." Aaron R. Petty, *Matters in Abatement*, 11 J. App. Prac. & Process 137, 157 (2010).

The case in question is *Richard J. Adams*, Rel. No. 34-44205, 2001 WL 396428 (Apr. 19, 2001) (denying respondent's application for attorneys' fees under Equal Access to Justice Act, 5 U.S.C. § 504, for untimely filing), *rev'd in part and remanded*, *Adams v. S.E.C.*, 287 F.3d 183, 184 (D.C. Cir. 2002) (reversing denial of EAJA application and remanding to determine eligibility for fees), *on remand*, Rel. No. 34-48416, 2003 WL 21539570 (July 9, 2003) (denying application for fees on substantive grounds). In the 2001 Opinion, the Commission did state that it is "not our practice" to dismiss with prejudice and, in that case, it was "unnecessary" to do so. But reciting that single statement does not do full justice to the *Adams* proceeding, because, as noted in our citation to the case, the Opinion from which the Division quotes was reversed on appeal, and for reasons directly related to the fact that the Opinion did not state whether the dismissal was with prejudice or without prejudice.[4]

In *Adams*, an ALJ dismissed an administrative proceeding on the basis that the proceeding was time barred and that the Division had failed to prove a violation of law.[5] The Commission dismissed the proceeding without intimating any views on the merits. No appeal was taken. 86 days after the dismissal, the respondent filed an application for attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504. The ALJ granted the application. On appeal by the Division, the Commission reversed. It held that the fee application was untimely because it was filed more than thirty days after the "final disposition" of the proceedings, and EAJA applications must be filed within that time period.

[4] As noted, the Division cited to the 2001 Opinion in *Adams* without informing the Commission that the Opinion it cited had been reversed, thus violating a basic rule of legal citation. *See The Bluebook* Rule 10.7 ("Whenever a decision is cited in full, give the entire *subsequent* history of the case").

[5] The recitation in the text of the history of the *Adams* proceeding is taken from the Court of Appeal's opinion in *Adams*, except where reference is made to the Commission's 2001 Opinion.

In so ruling, the Commission rejected the respondent's argument that the dismissal was appealable by him because he was "aggrieved"—a requisite, under § 25(a)(1) of the Securities Exchange Act, 15 U.S.C. § 78y(a)(1) to appeal from a Commission proceeding to a U.S. Court of Appeals—by the Commission's not actually saying so. According to the respondent, the appealability of the Commission's dismissal would add the 60-day deadline for noticing an appeal to the 30 days provided under the EAJA, and his application would have been timely. The Commission did not agree, stating:

> We did not grant the Division's request to dismiss without prejudice, and our reference to the pending injunctive action did not evidence an intent to do so. *Our order terminated once and for all any administrative action against Adams based on the allegations of willful violations of the securities acts then pending before us*. It is not our practice, nor do we consider it necessary, to add the words 'with prejudice' to final orders of dismissal. We note that Adams never requested us to clarify our order, or to amend it by adding those words.

Adams, *supra*, 2001 WL 396428 at *2 (footnote omitted; emphasis added). Therefore, the Commission reasoned, the respondent was not "aggrieved" by the decision not to dismiss with prejudice, and, therefore he lacked "standing to appeal." *Id.* We need not stress the fact that, in this case, we obviously are asking that the dismissal be expressly with prejudice, thus distinguishing this case in that respect from *Adams*.

The D.C. Circuit reversed, holding that the 30-day rule under section 504(a)(2) of the EAJA "creat[es] a bright-line rule, discernible by looking at the category of order in question and the applicable law of appealability. When a potential appeal exists under the relevant statute, the time for appeal must lapse, or the appeal be completed, before the 30-day deadline begins to run." 287 F.3d at 191.

The court rejected the Commission's approach, which it said "involves the awkward practice of requiring a case-by-case examination of appealability contrary to the purposes of

EAJA" *id.* at 184. The court stressed that the purpose of the EAJA "requires an interpretation of the procedural requirements of EAJA in a manner that is not unduly confusing or misleading so that they are not a trap for the unwary." *Id.* at 191 (citations and quotation marks omitted). "As the instant case illustrates, the case-specific approach adopted by the Commission constitutes such a trap." *Id.*

The court proceeds to explain why the Commission's approach constitutes a "trap":

> The lack of clarity as to the "appealability" of the Commission's order dismissing the administrative proceedings against Adams arises at several levels: the basis of the Commission's order of dismissal is ambiguous because it is unclear whether the dismissal was with or without prejudice, and, even if the dismissal were without prejudice, it is not obvious whether Adams would nonetheless have been "aggrieved" under § 25(a)(1) of the Securities Exchange Act.

Id.

It is highly significant and instructive that the D.C. Court of Appeals nevertheless found the Opinion to be fatally "ambiguous" and "unclear," even though the Commission, in the 2001 Opinion, went out of its way to state that "[o]ur order terminated once and for all any administrative action against Adams based on the allegations of willful violations of the securities acts then pending before us," and that "we [do not] consider it necessary … to add the words 'with prejudice.' " In other words, the Commission may not have felt it "necessary" to add the words "with prejudice," but the D.C. Circuit surely did; otherwise it would not have found the opinion of the Commission to be "ambiguous" and "unclear" for this very reason. This means that even if the Commission were to include that same language in the dismissal of this proceeding, but did not state that the dismissal was with prejudice, it would still, at least in the D.C. Circuit's view, be ambiguous and lack clarity, and would leave Mr. Polit "aggrieved."

There is no need to go down that path again and it would be manifestly unfair to Mr. Polit to do so. The D.C. Circuit's opinion stands, therefore, as a clear refutation to the Division's notion that the issue is resolved by referring to notions of the Commission's "practice" or its view of the "necess[ity]" of specifying whether the dismissal was with or without prejudice.

This leaves the the Division's argument that we have not "cited to any case law that supports requiring the Commission to take the extra step of conducting an analysis on the finality of the Ecuadorian proceedings in order to determine whether to designate dismissal as one 'with' or 'without prejudice.'" True, we have not cited to any such authority. Whether there is any such authority, we have not found it. The issue, however, is not for lack of authority; it is whether there is any basis to argue that the Commission should not be required to determine whether a particular dismissal should be dismissed with prejudice. This, of course, has special significance in a follow-on "foreign conviction" proceeding: the question would be whether the foreign country, under its law, could reinstitute a criminal proceeding. That issue could easily be decided: the Commission could solicit the parties' views on the subject (which means each would submit admissible proof of the law of the foreign state on the subject) or could appoint its own expert to research and report on the issue. Presumably, of course, the Commission, before instituting such a proceeding, will have looked into whether the foreign criminal proceeding had led to a "conviction" under the laws of that country.[6] It is, therefore, no

[6] In our motion to dismiss, we demonstrated to the Commission that the Ecuadorian trial verdict was not a "conviction" under the laws of Ecuador. In response, the Division did not contest that showing and instead chose to avoid the issue by taking the untenable position that whether there was a conviction in the courts of Ecuador was a matter of U.S. law, not Ecuadorian law. That motion is undecided and is now moot.

great burden on the Commission, once it decides it wants to proceed in a follow-on proceeding in the case of a foreign conviction, to learn and follow the law of the particular foreign nation on whose law the Commission's authority to proceed depends.[7]

For the reasons stated in this Reply and the Partial Joinder, therefore, Respondent John Christopher Polit respectfully requests that if, as the Division and he agree it must, the Commission dismisses this proceeding, it expressly state that the dismissal is "with prejudice" and orders the amendment to the web page containing the OIP be appropriately legended.

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

[7] On a final issue, the Division expresses puzzlement over our request that the Commission amend the 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. We thought our Partial Joinder was clear. It stated that "[t]he 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." As we concluded, "[t]here 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." Partial Joinder at 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing to be served by email on the following this 19th day of February 2021:

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

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Richard E. Brodsky