

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF FLORIDA  
ORLANDO DIVISION

FILED  
2006 APR 21 PM 12:18  
U.S. DISTRICT COURT  
DISTRICT OF FLORIDA  
ORLANDO, FLORIDA

SECURITIES AND EXCHANGE \*  
COMMISSION \*

v. \*

CIVIL ACTION FILE NO:  
6:06-cv-137-Orl-19 KRS

EDWARD S. DIGGES, JR., ET AL. \*

\* \* \* \* \*

**MEMORANDUM IN SUPPORT OF DEFENDANT, EDWARD S. DIGGES, JR.’S, PRO SE MOTION TO SET ASIDE ENTRY OF DEFAULT AND REQUEST FOR HEARING**

Defendant, Edward S. Digges, Jr., proceeding pro se, pursuant to Federal Rule Civil Procedure 55(c) submits the following Memorandum in Support of his Motion to Set Aside Entry of Default, and in support thereof, states as follows:

**I. Factual Background**

On February 2, 2006, Plaintiff, Securities and Exchange Commission (“SEC”), filed a four-count Complaint against Defendant and various entities alleging violations of the Securities Act; specifically, violation of 15 U.S.C. §§ 77(e)(a) and 77(e)(c) regarding the sale of unregistered securities (Count I); violations of 15 U.S.C. §77(q)(a) alleging a scheme to defraud in the sale of securities (Count II); violations of 15 U.S.C. §78(j)(b) and Rule 10b-5, alleging a scheme to defraud through allege misstatements and other conduct in the sale of securities (Count III); and aiding and abetting violations of the Securities and Exchange Act (Count IV).

In essence, the Complaint alleges that the Defendant fraudulently sold alleged “securities” through the sale of credit card terminals, which are then used by various retail establishments for registering sales of products and services. The terminals allegedly were sold

to investors for a fixed price and then leased back from the investors at a monthly lease price for a term of years.

In conjunction with the filing of the Complaint, Plaintiff also moved for the entry of an injunction freezing all of the Defendant's assets and appointing a Receiver to take control of the entity defendants. In order to avoid a protracted hearing, the Defendant consented to this injunction on February 15, 2006.

Since the entry of the Injunction, Defendant has attempted to negotiate with the SEC and the Receiver for the release of funds to allow him to pay for basic living expenses, as well as retain counsel to represent him in this matter. To date, those negotiations have proven unsuccessful. Plaintiff has insisted that Defendant turn over all of his assets, including real and personal property and funds in bank accounts, which he either owns or his wife owns, and permit their sale with the proceeds to be distributed to the Receiver as he sees fit. Obviously, this arrangement has prevented Defendant from meeting his basic needs and expenses and retaining counsel to defend him in this litigation. The inability to have any funds available has consumed Defendant and his family who have struggled to meet their basic needs, much less devote any attention to this litigation. See Memorandum Exhibit 1, Affidavit of Edward S. Digges, Jr., attached hereto and incorporated herein by this reference.

On March 30, 2006, Plaintiff moved for the entry of default pursuant to Fed. R. Civ. Proc. 55(a) based upon Defendant's failure to plead to the initial Complaint. Defendant did not receive a copy of this motion, but learned about it for the first time on April 4, 2006 when an attorney whom Defendant had been consulting with in negotiating with Plaintiff received a copy. Exhibit 1.

On April 6, 2006, Defendant wrote to the Clerk of the Court advising the Clerk that Defendant was without funds to retain counsel to advise him as to how to proceed with regard to responding to the Complaint. Exhibit 2 attached hereto and incorporated herein by this reference. On April 5, 2006, the Clerk entered default against all Defendants. Defendant learned that the Clerk had entered a default on April 14.

## II. Argument

Federal Rule of Civil Procedure 55(c) permits a court to set aside an entry of default “for good cause shown.” In this Circuit, “there is a strong policy of determining cases on their merits, and we therefore view defaults with disfavor.” Florida Physicians Insurance Company v. Ehlers, 8 F.3d 780, 783 (11<sup>th</sup> Cir. 1993). In determining whether the defendant has established good cause, only a “bare minimum” is needed to obtain relief under Rule 55(c) from the entry of default, Jones v. Harrell, 858 F.2d 667, 669 (11<sup>th</sup> Cir. 1988), which is to be contrasted with the more stringent standard for setting aside a default judgment under Federal Rule Civil Procedure 60(b). E.E.O.C. v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 527-28 (11<sup>th</sup> Cir. 1990) (“The importance of distinguishing between an entry of default and a default judgment lies in the standard to be applied in determining whether or not to set aside the default. The excusable neglect standard that courts apply in setting aside a default judgment is more rigorous than the good cause standard that is utilized in setting aside an entry of default.”).

In determining whether the minimal standard of good cause is met, courts have looked at a number of factors:

“Good cause” [under Rule 55(c)] is a mutable standard, varying from situation to situation. It is also a liberal one-but not so elastic as to be devoid of substance. . . . We recognize that “good cause” is not susceptible to a precise formula, but some general guidelines are commonly applied. . . . Courts have considered whether the default was **culpable or willful**, whether setting it aside would **prejudice the adversary**, and whether the defaulting party presents a **meritorious defense**. . . . We note, however, that these factors are not “talismanic,” and that courts have

examined other factors including whether the **public interest** was implicated, whether there was **significant financial loss** to the defaulting party, and whether the defaulting party **acted promptly** to correct the default.

Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion, 88 F.3d 948, 951-52 (11<sup>th</sup> Cir. 1996) (emphasis added) (citations omitted).

In the instant case, any one of these factors would support a finding of good cause to set aside the entry of default. First, Defendant's failure to plead was neither culpable nor willful. Defendant has been unable to retain counsel or pay for basic living expenses for himself and his family as a result of the entry of the injunction. Defendant has been completely preoccupied with providing for his family in some manner and has been unable to completely focus his attention on this action. Despite numerous requests, Plaintiff has refused to provide any opportunity to Defendant to obtain funds to retain counsel to represent him in this matter. If Plaintiff continues to refuse to afford any relief to Defendant, he will have no alternative but to proceed pro se, which he is prepared to do if necessary in order to present his defenses.

Second, there will be no prejudice to Plaintiff if the entry of default is set aside and this case is allowed to proceed. The litigation only recently was filed, and there has been very little discovery to date,<sup>1</sup> nor any findings of fact. Setting aside the entry of default would be consistent with the Court's strong policy in deciding cases on the merits.

Third, the Defendant has meritorious defenses to the allegations in the complaint, including: (1) whether the terminals at issue, in fact, constituted the sale of unregistered securities; and (2) whether the Defendant, acting on behalf of various entities, engaged in a

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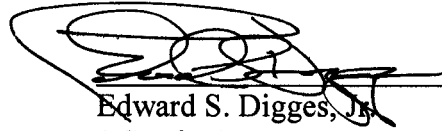
<sup>1</sup> Indeed, the Receiver already has taken one deposition without providing notice to Defendant, a party. Although clearly an inadvertent mistake on the part of the Receiver, setting aside the entry of default, and permitting Defendant to plead to the Complaint, will avoid future failures to provide notice of pleadings and other actions taken in the case.

scheme to defraud investors or legitimately believed that a legitimate product was being sold that was designed to provide a benefit to purchasers.<sup>2</sup>

Fourth, the Defendant is potentially exposed to complete financial loss if the entry of default is allowed to remain in effect. At present, the Defendant is subject to an injunction freezing all of his assets. Plaintiff has indicated it is seeking a disgorgement order that will leave Defendant virtually penniless. Given these stakes, Defendant should be permitted to defend himself in this matter.

Finally, Defendant has acted promptly in seeking this relief. He was not notified of the Clerk's entry of default until last week, and moved expeditiously to file this motion.

WHEREFORE, for the foregoing reasons, the Defendant prays that the Court set aside the entry of default in this case.

  
Edward S. Digges, Jr.  
1 Sandy Acres  
Cambridge, MD 21613

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<sup>2</sup> Issues of scienter and intent are based on the Defendant's state of mind, and in this regard, a decision on the merits cannot be obtained without exploring the Defendant's intent and determining his motives and actions during the period alleged in the Complaint through the sale of these devices.

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EDWARD S. DIGGES, JR., ET AL. \*

\* \* \* \* \*

**AFFIDAVIT OF EDWARD S. DIGGES, JR.**

I, Edward S. Digges, Jr., being of lawful age and competent to testify to the matters herein, state as follows:

1. I am a Defendant in the action captioned Securities and Exchange Commission v. Edward S. Digges, Jr., et al., Civil Action No. 6:06-cv-137-Orl-19 KRS, pending in the United States District Court for the District of Florida, Orlando Division. I was served with a copy of the Complaint on or about February 2, 2006. Pursuant to the relief sought in the Complaint, I consented to an injunction, which was entered on February 15, 2006, thereby freezing all of my assets. I did not consent to the entry of any injunction freezing any assets owned or controlled by wife who is not a defendant in this action.


2. Since the entry of the Injunction, I have attempted to negotiate with the SEC and the Receiver for the release of funds to allow me to pay for basic living expenses, as well as retain counsel to represent me in this matter. To date, those negotiations have proven unsuccessful. Plaintiff has insisted that I turn over all of my assets, including real and personal property and funds in bank accounts, which I either own or my wife owns, and permit their sale with the proceeds to be distributed to the Receiver as he sees fit.

2. On or about April 4, 2006, I learned that the Plaintiff had filed a Motion for Entry of Default pursuant to Fed. R. Civ. Proc. 55(a). On April 6, 2006, I wrote to the Clerk of the Court advising the Clerk that I was without funds to retain counsel to advise me as to how to proceed with regard to responding to the Complaint. On April 14, I learned that the Clerk had entered a default against me.

3. I believe that I have several meritorious defenses to the allegations complained in the Complaint. For example, I believe an issue exists as to whether the terminals that were sold to investors are properly characterized as unregistered securities. Further, I deny that I engaged in any scheme to defraud investors or made any misrepresentations.

4. If the entry of default is removed, and I am permitted to answer the Complaint, it is my intention to defend myself in this case on the merits, hopefully with counsel, but if not, by proceeding pro se.

I HEREBY DECLARE AND AFFIRM UNDER THE PENALTY OF PERJURY THAT THE CONTENTS OF THE FOREGOING ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

  
Edward S. Digges, Jr.

Edward S. Digges, Jr.

303B New Street

Beaufort, South Carolina 29902

April 6, 2006

Clerk

United States District Court

for the Middle District of Florida

80 North Hughey Avenue  
Orlando, Florida 32801

Re: SEC v. Edward Digges, et al.

Case No.: 6:06-CV-137-ORL-19-KRS

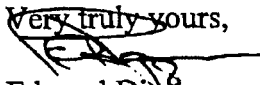
Dear Clerk:

I am one of the defendants in the above-entitled proceeding.

On April 4, 2006, I received notice that plaintiff, the Securities & Exchange Commission, had filed an "Application for Entry of Default" against myself and the other entity defendants pursuant to Federal Rule Civil Procedure 55(a), based upon a failure to file an initial response to the Complaint. At the time the Complaint was filed, plaintiff also moved for a Temporary Restraining Order and other Equitable Relief that resulted in my consent to the entry of a permanent injunction freezing all of my assets and appointing a Receiver to take control of the assets of the remaining defendants and manage their affairs. Counsel representing the other defendant entities at that time also consented to the entry of this injunction on their behalf. The Order granting this relief was signed by the Court on February 15, 2006.

Since then, I have attempted to obtain the release of certain assets and/or funds for the purpose of paying my living expenses, as well as retain counsel to represent me in this litigation. I am still attempting to negotiate with plaintiff in order to obtain the release of funds for these purposes, and I hope plaintiff will ultimately consent to this relief in order to allow me to defend myself. Until then, however, I am without any funds to retain counsel to advise me as to how to proceed with regard to responding to the complaint. I would also note that, inasmuch as the Receiver has taken control of the entity defendants, I would assume it would be his responsibility to respond to the complaint and this motion on their behalf.

~~Very truly yours,~~

  
Edward Digges

cc: William P. Hicks, SEC District Trial Counsel

M. Graham Loomis, SEC Senior Trial Counsel

James Silver, Receiver