

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

SECURITIES EXCHANGE COMMISSION))	
("SEC"))	
)	
Vs)	No. 07-1031
)	D.C. No. 97-cv-02257
)	
JOHN GARDNER BLACK, Pro Se)	
("Appellant"))	

APPELLANT BRIEF

On September 26, 1997, the SEC, following multiple ex parte proceedings, filed its Complaint in the United States District Court for the Western District of Pennsylvania in the courtroom of Judge William Standish. In addition to filing the Complaint, the SEC requested and Judge Standish granted what this Court has termed unprecedented powers of an asset freeze, a temporary restraining order and the appointment of a receiver for Black's two corporations.

These actions, all conducted in secret without notification to Black, resulted in the loss of tens of millions of dollars to the owners of the Collateralized Investment Agreements ("CIA"), a security issued in conformance with and whose value was determined under regulations issued by the Internal Revenue Service ("IRS") and published in the Federal Register.

While neither Black nor his attorney was notified or was present in the courtroom of Judge Standish on September 26, 1997, or in prior proceedings conducted before Judge Smith, a fair reading of the SEC's Complaint is that they considered the value of the CIA to be equal to the forced liquidation of a portion of the enterprise's assets. Stated another way, the SEC alleged in its Complaint that it is a violation of the securities laws of the United States for an enterprise to sell its security or for the market to value such security in excess of the book value of the enterprise. Such a novel interpretation of market value is contrary to the SEC's own regulations and court filings. The interpretation is unsupported by conventional financial methods, is contrary to opinions of this Court, contrary to opinions of the United States Supreme Court and is in violation of IRS regulations for valuation methodology

required of municipalities for investments obtained with the proceeds from tax exempt bonds. Further, no other court has granted such extensive "relief" to any federal agency ex parte while that agency was operating in violation of published federal regulations. [Note: This Court's opinion in *Bald Eagle School District v Keystone Financial* 189 F.3d 321 (3rd Cir. 1999) held that the CIA was worth less than market value because the partial liquidation value of the enterprise was less than the market value of the CIAs. As stated in the criminal appeal, this opinion is contrary to prior opinions of this Court, the United States Supreme Court, regulations of the SEC itself, regulations issued by the Internal Revenue Service and the rules of the Financial Accounting Standards Board.]

Facts Omitted from the Complaint

Attached to this brief is a copy of the Complaint filed by the SEC on September 26, 1997 in the above referenced ex parte proceeding. In addition to the Complaint not stating that the SEC considered the CIA an investment contract, that the CIA's value was to be

determined by a "reasonable expectation of profits", and that the CIA was never offered, purchased or sold at non-market values, the Complaint fails to state the following facts:

- a.) The fair market value of the CIA, determined by a standard earnings discount model with an appropriate growth rate of 8.50%, a future growth decay rate of 8% and a discount rate of 9.05%, 3% higher than comparable investments in Treasuries, results in a valuation of \$269 million for the CIAs outstanding on September 26, 1997.
- b.) The CIA's market value, determined pursuant to regulations issued by the IRS, [26 CFR § 1.148-5(d)], was \$233 million.
- c.) The fair market value of the assets not disclosed in the Complaint, determined in accordance with the rules of the Financial Accounting Standards Board, was in excess of \$107 million.
- d.) The regulated market value of the assets not disclosed in the Complaint, determined pursuant

to regulations issued by the IRS, was \$71 million.

- e.) All of the CIAs outstanding were offered, purchased or sold at federally regulated market values. The Complaint does not allege that any transaction in the CIA was conducted at non-market values. Therefore, there was no violation of either 15 USC §77q (a) or §78j (b).
- f.) The market value of investment contracts, either regulated by IRS regulations as the CIAs were, or conventionally regulated by the SEC, must be determined by a reasonable expectation of profits to be derived by the managerial or entrepreneurial efforts of others. [*SEC v Howey*, 328 U.S. 293, also *SEC v Infinity Group*, 212 F.3d 180 (3rd Cir, 2000)] [NOTE: see *Bald Eagle School District v Keystone Financial*, 189 F.3d 321 (3rd Cir 1999) in which this Court upholds the SEC's valuation method of forced liquidation, which is contrary to established precedent in this Court, the United States Supreme Court and the regulations issued by the IRS.]
- g.) Valuation of any investment owned by municipalities with funds derived from the

proceeds of municipal bond issues may only be conducted by an IRS approved method. Those methods are: (1) amortized cost; (2) fixed rate investment present value; or (3) fair market value. Black and his corporations were reporting utilizing the amortized cost method. Forced liquidation of part of the enterprise's assets is not an approved method. [26 CFR § 1.148-5(d)]

h.) The Complaint fails to state that the CIA was a security, what type of security it was or how its value should have been determined. This Court and the district court subsequently held that the CIA was a security, an investment contract, and that it evidenced ownership of an enterprise. However, those opinions were issued four years after the introduction of the Complaint and without litigation, to Black's knowledge. (If the CIA were not a security, the SEC lacked the jurisdiction to file and the district court lacked the jurisdiction to adjudicate the Complaint.)

i.) The CIA security evidenced ownership of an enterprise and not a debt of either Black or his corporations. [The SEC would later file a brief

in district court in which they state that the security in question represented ownership of an enterprise and not an obligation of either corporation owned by Black. The consequence of such a position is that two solvent, debt free corporations were placed into receivership.]

Subsequent Facts

On December 13, 2005 Judge Donetta Ambrose of the United States District Court for the Western District of Pennsylvania informed Black that the market value of the CIA, the security owned by the customers of Black, had been "...previously litigated and resolved." [Exhibit 1] While neither Black nor his attorney was present or even had knowledge of the proceedings [Exhibit 2], it is reasonable to assume that the litigation between two knowledgeable adversaries would have developed the preceding facts which the SEC failed to state in its Complaint. The transcript of the litigation is not and was not made available to Black.

Attached as Exhibit 3 is a copy of a brief filed by Black in this Court in the corresponding criminal appeal detailing the lack of jurisdiction the government, the district court and this Court have in this case. In the criminal case, the government does not dispute the facts that the market value of the CIA was \$269 million on September 26, 1997 versus a \$233 million representation in monthly statements. Also, the CIA's market value was litigated by the district court in the criminal case also. Therefore, this Court had knowledge of the litigation because the entire district court's record is transmitted to the Court of Appeals and made available for the Court of Appeal's review, pursuant to court rules. Therefore, the district court had knowledge of various disputed facts when it sat in judgment of Black and this Court had the same knowledge when it denied various appeals filed by Black in the criminal case and this civil case.

Summary

The SEC did not have the jurisdiction to file its complaint against Black nor does the district court have

the jurisdiction to adjudicate a complaint against Black for following regulations issued by the IRS, the SEC, legal opinions of this Court and the United States Supreme Court as well as rules of the Financial Accounting Standards Board.

Likewise, this Court has the jurisdiction only to either dismiss the Complaint filed by the SEC or remand the appeal back to the district court with an order that the Complaint be dismissed, pursuant to 28 USC § 2106.

February 27, 2007

Respectfully Submitted,

John G. Black, Pro Se