UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63744 / January 20, 2011

Admin. Proc. File No. 3-13304

In the Matter of DAN RAPOPORT	ORDER DENYING MOTION TO SET ASIDE DEFAULT ORDER

Dan Rapoport, formerly a managing director of OOO Centreinvest Securities ("CI-Moscow"),[1] asks us to set aside an administrative law judge's decision making findings of violation and imposing sanctions by default.[2] The law judge found that Rapoport, a resident of Russia, willfully violated Section 15(a) of the Securities Exchange Act of 1934[3] by illegally effecting transactions in securities without being registered with the Commission as a broker or being associated with a registered broker-dealer. He based this finding on the allegations made in the Commission's order instituting proceedings ("OIP"), which, because of Rapoport's default, he deemed to be true. The law judge barred Rapoport and ordered him to cease and desist from

[1] CI-Moscow is a Moscow-based securities firm that apparently has never been registered with the Commission as a broker or dealer.

[2] Order Making Findings and Imposing Sanctions by Default as to Centreinvest, Inc., Dan Rapoport, and Svyatoslav Yenin, Securities Exchange Act Rel. No. 60413 (July 31, 2009), 96 SEC Docket 19387 (the "Default Order"). The law judge subsequently denied Rapoport's motion to set aside the Default Order, but modified the sanctions imposed to correct a mathematical error in the calculation of civil penalties. Order Denying Motion to Set Aside Default Order and Correcting Sanction, Exchange Act Rel. No. 61751 (Mar. 22, 2010), 98 SEC Docket 26614.

[3] 15 U.S.C. § 78*o*(a).

further violations of Section 15(a), to pay a civil penalty,[4] and to provide an accounting regarding the income he received in connection with the misconduct at issue.

I.

A. The Order Instituting Proceedings

The OIP was issued on December 8, 2008, pursuant to Exchange Act Sections 15(b) and 21C.[5] It named as respondents CI-Moscow; CentreInvest, Inc. ("CI-New York"), a New-York based registered broker-dealer affiliated with CI-Moscow; and four individuals: Rapoport, Svyatolslav Yenin, Vladimir Chekholko, and William Herlyn.[6] The OIP alleged, among other things, that "[f]rom about 2003 through November 2007, CI-Moscow and its executive director Rapoport [and other respondents] solicited institutional investors in the United States to purchase and sell thinly-traded stocks of Russian companies, without registering as a broker-dealer as required by Section 15(a) of the Exchange Act . . . [and that Rapoport] failed to qualify for any exemption from registration."[7] The OIP explicitly required each respondent to file an answer to

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[4] The law judge imposed a second-tier civil penalty, based on his finding that Rapoport's actions demonstrated a deliberate or reckless disregard of regulatory requirements. *See* Exchange Act Section 21B(b)(2), 15 U.S.C. § 78u-2(b)(2) (setting forth requirements for imposition of second-tier penalty). The penalty, a total of $315,000, consists of penalties of $60,000 per year for conduct in 2003 and 2004, and $65,000 per year for conduct in 2005, 2006, and 2007. *See* 17 C.F.R. §§ 201.1002, 201.1003 (setting forth maximum civil penalty amounts for conduct after February 2, 2001 and February 14, 2005 respectively).

[5] 15 U.S.C. §§ 78*o*(b), 78u-3.

[6] The proceeding has concluded with respect to all respondents other than Rapoport. *See OOO CentreInvest Sec.*, Exchange Act Rel. No. 61448 (Jan. 29, 2010), 97 SEC Docket 25072 (order dismissing petition for review and giving notice that initial decision granting unopposed motion for summary disposition as to CI-Moscow has become final decision of Commission); *CentreInvest, Inc.*, Exchange Act Rel. No. 60485 (Aug. 12, 2009), 96 SEC Docket 19739, 19739 (accepting offer of settlement as to Herlyn); *CentreInvest, Inc.*, Exchange Act Rel. No. 60450 (Aug. 5, 2009), 96 SEC Docket 19569, 19569 (accepting offer of settlement as to Chekholko); *CentreInvest, Inc.*, Exchange Act Rel. No. 60413 (July 31, 2009), 96 SEC Docket 19387, 19388 (making findings by default and imposing sanctions as to CI-New York and Yenin).

[7] The OIP further stated that, "[w]hile at CI-Moscow [from 2003 to February 2008], Rapoport was responsible for the brokerage operations at both CI-Moscow and CI-New York," that under Rapoport's direction, employees of CI-New York "regularly solicited U.S. institutional investors for the purchase and sale of Russian securities," that "[i]nvestors who expressed interest

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the allegations contained in the OIP within twenty days after service of the OIP and stated that if any respondent failed to file such an answer, the respondent "may be deemed in default and the proceedings may be determined against the [r]espondent upon consideration of [the OIP], the allegations of which may be deemed to be true."

B. Service of the OIP

In September 2008, Richard Kraut notified the Division of Enforcement that he represented Rapoport. On December 9, 2008, the day after the OIP was issued, the Office of the Secretary mailed a copy to Kraut. Kraut did not accept service of the OIP. A week later, on December 16, 2008, the Division asked the law judge to authorize service on Rapoport by service on Kraut. Having received no opposition to the Division's motion (the "Motion to Serve"),[8] the law judge issued an Order Directing Service as to Foreign Respondents (the "Order Directing Service") on December 31, 2008, allowing service on Rapoport to be directed through Kraut. The law judge acted pursuant to Rule of Practice 141(a)(2)(iv),[9] which provides, in relevant part, that "[n]otice of a proceeding to a person in a foreign country may be made by any method . . . reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country."

Although a copy of the OIP had already been mailed to Kraut, the Office of the Secretary sent the OIP again, on December 31, 2008, with the Order Directing Service. A return receipt (U.S. Postal Service Form 3811) for that mailing showed that it was received by Kraut's office on January 6, 2009. The Office of the Secretary received the return receipt on January 8, 2009.

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[7] (...continued)
in a transaction were referred to CI-Moscow to complete the transaction," that "[i]n some cases, Rapoport and other employees of CI-Moscow, who were not licensed to sell securities under U.S. law or registered as brokers or dealers under U.S. Law and were not exempt from such licensing and registration requirements, solicited U.S. investors directly," and that "Rapoport knew that any representative of CI-Moscow who solicited a U.S. investor would have to be licensed and registered with the Commission or an appropriate U.S. self-regulatory organization." The OIP specified that the proceedings instituted by the OIP were to determine, among other things, "[w]hat, if any remedial action is appropriate in the public interest against [Rapoport] . . . including, but not limited to, an accounting, disgorgement and civil penalties . . . ; [and w]hether . . . [Rapoport] should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act."

[8] Commission Rule of Practice 154(b), 17 C.F.R. § 201.154(b), provides that briefs in opposition to a motion "shall be filed within five days after service of the motion."

[9] 17 C.F.R. § 201.141(a)(2)(iv).

In the meantime, on January 5, 2009, the Office of the Secretary received a memorandum in opposition to the Division's Motion to Serve, filed by Kraut on behalf of Rapoport and dated December 23, 2008.[10] The Division, having already received Rapoport's opposition, filed a reply, dated January 2, 2009, which the Office of the Secretary also received on January 5. The law judge held a prehearing conference on January 9, 2009 to discuss the service of the OIP. Kraut represented Rapoport at the conference.[11] Because the law judge had not received Rapoport's opposition and the Division's reply before issuing the Order Directing Service, he offered the parties the opportunity to make additional filings. Rapoport filed a supplemental memorandum in opposition to the Division's Motion to Serve, which he alternatively styled as a motion for reconsideration of the Order Directing Service, and the Division filed a memorandum opposing reconsideration.

On February 5, 2009, the law judge issued an Order Denying Motions for Reconsideration (the "Order Denying Reconsideration"), affirming the December 31 Order Directing Service and declaring service on Rapoport effective as of January 8, 2009. Later in the day on February 5, the law judge held a prehearing conference, at which Kraut represented Rapoport. At the conference, Kraut told the law judge that he "need[ed] to discuss the service issue with [his] clients,"[12] because "[l]ast I heard from them, service was ordered, my representation was terminated upon the issuance of the order," and that he "really need[ed] to bring the [Order Denying Reconsideration] to their attention" before committing to a hearing date.

On February 6, Kraut filed a change of address notice in which he identified himself as counsel for Rapoport. By notice dated February 12, Kraut withdrew as counsel for Rapoport.

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[10] The memorandum was also filed on behalf of Yenin. It stated that "[c]ounsel for [Rapoport and Yenin] appears solely for the purpose of opposing the Division's motion. By submitting this Memorandum, [Rapoport and Yenin] do not admit to the Commission's jurisdiction over them."

[11] Kraut stated that his representation of Rapoport was "for limited purposes." The Rules of Practice make no provision for such limited appearances. As discussed below, Kraut's representation of Rapoport continued until after the law judge entered a further order regarding service on February 5, 2009, and Kraut withdrew as counsel for Rapoport by notice dated February 12.

[12] Kraut represented both Rapoport and Yenin.

C. The Default Order

The Order Denying Reconsideration required Rapoport to file his Answer to the OIP by March 2, 2009.[13] Rapoport did not file an answer. On April 9, 2009, more than a month after the filing deadline had passed, the Division filed a Motion for Default Judgments as to Rapoport and several other respondents (the "Default Motion"). For reasons that are not apparent from the record, it appears that the Default Motion was served on Kraut by Federal Express; there is no indication that the Division attempted to serve Rapoport directly. Rapoport filed no opposition to the Default Motion.

The law judge held prehearing conferences on April 28 and May 19, 2009. Copies of the orders scheduling these conferences were sent to Rapoport at his Moscow business address.[14] Rapoport did not participate in either conference. On July 31, 2009, finding that Rapoport had failed to file an answer, appear at prehearing conferences, or otherwise defend the proceeding, the law judge granted the Default Motion and issued an Order Making Findings and Imposing Sanctions by Default as to Rapoport (the "Default Order"). On the same day it was issued, a copy of the Default Order was sent to Rapoport at his Moscow business address.[15]

On October 23, 2009, Rapoport arrived in New York on a flight from Moscow via Helsinki.[16] A U.S. Customs and Border Patrol officer, while processing Rapoport's entry into the United States, determined that the Commission was trying to locate Rapoport. The officer alerted Commission staff to Rapoport's presence in the United States. Commission staff thereupon sent the officer a copy of the Default Order by facsimile transmission, and the officer personally served Rapoport by handing him the copy.

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[13] Additionally, the law judge issued an order establishing a procedural schedule on February 18, 2009. The order was not sent to Kraut, who, as noted above, had withdrawn from representing Rapoport. A copy of the scheduling order was, however, sent to Rapoport at BrokerCredit Service, Prospect Mira, 69, Bldg. 1, Moscow 129110, Russia, by U.S. Postal Service International Registered Mail. No return receipt was received for this mailing, or for subsequent mailings to the same address, which included copies of orders setting dates for prehearing conferences and the Default Order. In a subsequently filed declaration, Rapoport stated that he was employed by BrokerCredit Service between February 2, 2008 and September 2009.

[14] *See supra* note 13.

[15] *See id.*

[16] Although a resident of Russia, Rapoport presented a United States passport.

Two months later, on December 23, 2009, Rapoport filed a motion seeking to set aside the Default Order as to Rapoport ("Motion to Set Aside I").[17] The law judge denied the motion. Applying Rule of Practice 155(b),[18] he found that Rapoport did not file his motion to set aside within a reasonable time and that the reasons for his failure to defend the proceeding did not justify setting aside the Default Order.[19] Rapoport then filed the Motion to Set Aside that we now consider ("Motion to Set Aside II").[20]

II.

Rule of Practice 155(b) provides, in relevant part, that "[a] motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate . . . the Commission, at any time, may for good cause shown set aside a default."

A. Reasons for Rapoport's Failure to Defend the Proceeding

Rapoport asserts that he failed to defend the proceeding because he reasonably believed that he could wait until he was personally served to file his answer to the OIP. We find, however, that Rapoport could not reasonably have believed that he could wait to respond until he was personally served. Rule 141(a)(2) permits, but in no way requires, service by handing a copy of an OIP to an individual.[21] The rule permits many other forms of service, including service authorized by a law judge pursuant to Rule 141(a)(2)(iv).

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[17] With Motion to Set Aside I, Rapoport filed a memorandum and five exhibits, including a proposed answer to the OIP, and a Declaration of Rapoport. The Division filed a memorandum in opposition that included similarly a declaration and ten attached exhibits. The Division also cited to three exhibits that are part of the record in these proceedings because they were submitted in connection with the Division's Motion for Summary Disposition against CI-Moscow. *See supra* note 6. Rapoport filed a second declaration with his reply to the Division's opposition to Motion to Set Aside I.

[18] 17 C.F.R. § 201.155(b).

[19] Rapoport asserts that the law judge misapplied the relevant standard for setting aside a default order. We find no error in the law judge's action, and, in any event, our own consideration of Rapoport's motion reaches the same conclusion.

[20] Rapoport styled his motion, in the alternative, as a petition for review of the law judge's denial of Motion to Set Aside I. Our consideration and disposition of Motion to Set Aside II make it unnecessary to address separately Rapoport's petition for review.

[21] Rule 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i).

Rapoport knew that the Division was seeking to serve him by service on Kraut; he retained Kraut to argue on his behalf that such service should not be allowed. The question of directed service was vigorously disputed, with multiple filings and a conference devoted to the matter. The law judge ruled against Rapoport, and Kraut represented to the law judge that he would bring the order to Rapoport's attention.[22] We conclude that Rapoport received notice of the order.

Rapoport makes several narrowly worded assertions related to his dealings with Kraut, his receipt of legal documents, and his awareness of the Order Denying Reconsideration. None of these assertions persuades us that Rapoport did not know that the law judge had ruled that Rapoport could be served through Kraut.

First, in a declaration filed before the law judge, Rapoport stated, among other things, that he "never authorized Kraut to accept service of legal documents on [his] behalf." However, by the Order Directing Service, the law judge authorized service on Rapoport through Kraut. Thereafter, service on Kraut constituted service on Rapoport, whether or not Rapoport had authorized Kraut to accept service.[23]

Second, Rapoport stated that he "communicated with Kraut as [his] attorney for the last time on or about January 17, 2009, when Kraut informed me that he would be withdrawing as my counsel after filing the necessary papers with the Court." However, Kraut continued to act as Rapoport's attorney for nearly a month after January 17: he filed a supplemental memorandum opposing the Motion to Serve on January 27; he filed a change of address notice on February 6; and he did not file a notice withdrawing as Rapoport's counsel until February 12. At the February 5 prehearing conference, a week before he submitted the withdrawal notice, Kraut said he would bring the Order Denying Reconsideration to Rapoport's attention. These facts cast

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[22] Rapoport has not tendered a declaration from Kraut.

[23] Under Federal Rule of Civil Procedure 4(f)(3), which permits service on individuals not within any judicial district of the United States by means ordered by the court, service of process on a litigant through an attorney has been allowed even when the attorney was not authorized to accept service or declined to accept service. *See, e.g., Rio Props., Inc.*, 284 F.3d 1007, 1016-17 (9th Cir. 2002) (approving court-authorized service on attorney who "had been specifically consulted" regarding the matter at issue by the litigant even though the attorney had declined to accept service); *RSM Prod. Corp.*, 2007 US Dist. LEXIS 58194, at *17- *18 (S.D.N.Y. 2007) (rejecting argument that court-ordered service on U.S. attorney of resident of Russia would be improper because attorney was not the litigant's designated agent to receive service of process: "Court-ordered service on counsel made under Rule 4(f)(3) serves as effective authorization 'by law' for counsel to receive service."); *Forum Fin. Grp.*, 199 F.R.D. 22, 24-25 (D. Me. 2001) (authorizing service on resident of Russia by certified mail to U.S. attorney even though attorney was not authorized to accept service). We find a similar result appropriate under Rule of Practice 141(a)(2)(iv).

doubt on Rapoport's assertion that he did not "communicate with Kraut as [his] attorney" after January 17. In any event, Rapoport's narrowly worded statement that he did not "communicat[e] with Kraut as [his] attorney" does not preclude Rapoport's having learned about the Order Denying Reconsideration from Kraut. For example, Kraut could have told Rapoport about the Order Denying Reconsideration after February 12, at a time when Rapoport may not have regarded Kraut as his attorney.[24] As noted, Rapoport has not provided an affidavit from Kraut about the timing or content of their discussions.[25]

Finally, Rapoport stated that he "never received any legal documents" from Kraut after January 17, 2009 and stated that he "was not personally served with any legal papers until approximately October 2009." "Accordingly," Rapoport contends, "I was unaware of the Court's February 5, 2009 Order regarding service."

Even if Rapoport did not receive a copy of the Order Denying Reconsideration from Kraut, and even if Rapoport was not personally served until October 2009, those factual premises do not lead to the conclusion that Rapoport was "unaware" of the crucial aspects of the Order Denying Reconsideration. Kraut told the law judge that he would bring the order to Rapoport's attention. Whether Rapoport received a copy of that order, as opposed to learning about it in some other manner, is not dispositive. The crucial question is whether Rapoport knew about the law judge's ruling as to directed service. We find that he did.[26]

Having found that Rapoport knew that the law judge had authorized service on him through Kraut, we conclude that Rapoport could not have reasonably believed that he could disregard the ruling and ignore the service effected on him through service on Kraut. Rapoport's active engagement in arguing against directed service is inconsistent with his asserted belief that he did not have to respond unless personally served: if Rapoport believed that only personal service was effective, it would have made no sense for him to retain Kraut to argue against

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[24] The withdrawal notice stated that Kraut's withdrawal as counsel for Rapoport was "effective February 5, 2009." However, under Rule of Practice 102(d)(4), a notice of withdrawal must be filed "at least five days before the proposed effective date of the withdrawal." 17 C.F.R. § 201.102(d)(4). Thus, a withdrawal notice filed on February 12 could not be effective before February 17 at the earliest.

[25] In denying Motion to Set Aside I, the law judge pointed out that Rapoport "has not provided any evidence or an affidavit from Kraut that would substantiate his claim . . . that he last spoke with Kraut in January 2009." Despite having had his attention called to this gap in the evidence, Rapoport has still not provided such an affidavit.

[26] Moreover, as noted above, copies of the scheduling order, orders setting dates for prehearing conferences, and the Default Order were sent to Rapoport as the proceeding continued. *See supra* note 13.

directed service.[27] We have previously refused to set aside default orders where respondents failed to make defense of a proceeding a priority.[28] For these reasons, we find that Rapoport's reason for failing to defend the proceeding does not support setting aside the Default Order.[29]

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[27] In the declaration filed with Motion to Set Aside I, Rapoport stated, among other things, that "[i]t was my understanding that under United States law, I had no legal obligation to respond to the OIP until I was personally served." He also stated: "Without revealing my specific communications with Kraut, I understood that there were valid legal bases for me to contest the Division's attempt to serve me with the OIP and other legal documents by providing them to Kraut. I also understood that I could contest the service issue without subjecting myself to the jurisdiction of the U.S. courts." We understand Rapoport to be implying that discussions with counsel informed his view that he could wait to respond to the OIP until he was personally served.

Rapoport did not, however, indicate what he told counsel about his situation, nor did he identify specific advice that he received. Such vague allusions to legal advice are not sufficient to establish that Rapoport was relying on the advice of counsel in waiting to respond to the OIP until he was personally served. *See, e.g.*, *Howard Brett Berger*, Exchange Act Rel. No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11632-33 (rejecting argument that reliance on advice of counsel should be mitigating factor in sanctions analysis where respondent did not provide information about the disclosures he made to counsel or the advice he received from counsel), *petition denied*, 2009 WL 3160620 (2d Cir. 2009) (summary order); *Eugene T. Ichinose*, 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not "show with any specificity what advice he may have received" from counsel). Rapoport was free to decline to reveal his "specific communications" with Kraut, but he cannot simultaneously refuse to reveal them and benefit from their alleged or implied contents. *Cf. Berger*, 94 SEC Docket at 11631 n.65 (finding that attorney-client privilege "'cannot at once be used as a shield and a sword'" (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)(citations omitted)).

[28] *See George T. Hellen*, Exchange Act Rel. No. 44536 (July 11, 2001), 75 SEC Docket 1126, 1128 (finding that participation in divorce proceedings and inability to retain counsel are not adequate reasons for failure to defend); *cf. James M. Russen*, 51 S.E.C. 675, 677 & n.9 (1993) (finding that respondent's asserted inability to remember signing receipt for or receiving complaint in NASD disciplinary proceeding did not constitute good cause for failure to participate in hearing and citing analogous cases applying Federal Rule of Civil Procedure 60(b)).

[29] Rapoport contends that service on him through Kraut was not in accordance with Rule 141(a)(2)(iv) because the Division failed to show that such service was consistent with Russian law. There is nothing in our rules that places the burden of such a showing on the Division. Rapoport also contends that service on him through Kraut failed to satisfy basic

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B. Acting within a Reasonable Time

Rapoport contends that, by filing Motion to Set Aside I on December 23, 2009, he satisfied the Rule 155(b) requirement that he act "within a reasonable time." He argues that he acted reasonably by filing his motion two months after October 23, 2009, the date he was personally served with the Default Order.

We disagree. In determining whether Rapoport acted within a reasonable time, we look at more than just the date that he was personally served with the Default Order. The OIP put Rapoport on notice of the possibility of default on January 8, 2009, when service on Rapoport through his counsel, Kraut, was effective.[30] The OIP stated explicitly that the respondents could be deemed to be in default if they failed to file an answer to the allegations contained in the OIP. Thus, Rapoport was on notice that a default order could be entered against him at any time after March 2, when he failed to file a timely answer.[31]

The Division filed the Default Motion on April 9, 2009. The law judge held one prehearing conference in April and another in May; Rapoport did not participate in either one, although copies of the orders scheduling the conferences had been sent to him at his Moscow business address. The judge waited more than three months after the Division filed the Default Motion to issue the Default Order, doing so on July 31, 2009. On the same day it was issued, a copy of the Default Order was mailed to Rapoport at his Moscow business address. Thus, Rapoport filed his Motion to Set Aside almost five months after the Default Order was issued and mailed to him. By that time, Rapoport had been on notice of the possibility of default for more than eleven months (since the OIP was served on Kraut on January 8), and had been in default for more than nine months (since he failed to file his answer by March 2). Under these circumstances, we find that Rapoport did not move to set aside the Default Order within a reasonable time when he filed Motion to Set Aside I two months after he was personally served with the Default Order.

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[29] (...continued)
notions of due process. Due process requires that Rapoport had notice of the pendency of the proceeding and an opportunity to respond. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). These requirements were satisfied. Under all the circumstances, we find nothing unfair or inconsistent with due process in the manner in which Rapoport was served.

[30] In its opposition to Motion to Set Aside I, the Division asserted that "Rapoport does not dispute that he received actual notice of the issuance of the OIP." Rapoport has not taken issue with this statement.

[31] Rapoport does not claim that he was unaware that the February 5, 2009 Order Denying Reconsideration required him to file his answer by March 2.

C. Rapoport's Proposed Defenses

In the memorandum in support of Motion to Set Aside I, Rapoport contended that he did not violate Exchange Act Section 15(a) because he did not solicit United States investors directly or indirectly. He also contended that his conduct fit within one of the enumerated exceptions to the requirements of Section 15(a). In the proposed answer he attached to Motion to Set Aside I, Rapoport asserted more than a dozen additional defenses, and he "expressly reserve[d]" the right to assert additional affirmative defenses "as they become known or available to him."

In addition to requiring that a motion to set aside a default order state the reasons for the failure to appear or defend and be made within a reasonable time, Rule of Practice 155(b) also requires that a motion to set aside a default should "specify the nature of the proposed defense in the proceeding." If Rapoport had established that his reasons for the failure to defend the proceeding supported setting aside the Default Order, and that Motion to Set Aside I was filed within a reasonable time, then we would consider whether his proposed defenses had potential merit. Here, however, Rapoport's reasons for failing to defend do not support setting aside the Default Order, and he did not file Motion to Set Aside I within a reasonable time. Evaluating the merits of his defenses would in effect grant him the hearing that he chose to forego by failing to defend the proceeding.

The prospect that a default order could be entered based on the allegations in an OIP should motivate respondents who have meritorious defenses to engage in the proceeding. Considering whether proposed defenses are meritorious after a default order has been entered would remove or weaken the incentive to so engage. We therefore do not consider whether Rapoport's defenses might have had merit if asserted at the proper time and if supported by evidence.

D. Alleged Injustice

Rapoport contends that the Default Order should be set aside in order to prevent injustice. In support, he contends that the OIP made no allegations against Rapoport with respect to the years 2003-05 and that the civil penalties imposed are "legally impermissible and factually unwarranted."

Rapoport's contentions of injustice do not support setting aside the Default Order. The OIP charged Rapoport with violating Section 15(a) "from about 2003 through November 2007"; it specified that remedial action "including, but not limited to," an accounting, disgorgement, and civil penalties could be taken, and that cease-and-desist orders could be imposed; and it alleged facts sufficient to support the imposition of second-tier penalties.[32] It was not unjust for the law

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[32] *See supra* note 7 (quoting excerpts from OIP).

judge to issue the Default Order, which did not go beyond the allegations in the OIP, or to impose sanctions accordingly, when Rapoport failed to file a timely answer to the OIP.[33]

* * *

Accordingly, IT IS ORDERED that the motion to set aside the Default Order filed by Dan Rapoport be, and it hereby is, DENIED.

By the Commission.

Elizabeth M. Murphy
Secretary

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[33] Rapoport's contentions that the Default Order should be set aside because the law judge "erroneously concluded" that his proposed defenses have no likelihood of success and "erred by denying Rapoport the opportunity to argue that his conduct fit within a Rule 15a-6 exemption to [Section] 15(a)" do not establish good cause for setting aside the Default Order. As discussed above, we do not reach the merits of Rapoport's proposed defenses and thus do not review the law judge's findings regarding them. Rapoport denied himself the opportunity to present these defenses when he failed to file a timely answer to the OIP.