

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 732 / November 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14720

In the Matter of	:	
	:	
ALCHEMY VENTURES, INC.,	:	
KM CAPITAL MANAGEMENT, LLC,	:	ORDER ON MOTION
ZANSHIN ENTERPRISES, LLC,	:	FOR ISSUANCE OF
MARK H. ROGERS,	:	INITIAL DECISION
STEVEN D. HOTOVEC,	:	
JOSHUA A. KLEIN,	:	
YISROEL M. WACHS,	:	
FRANK K. MCDONALD, and	:	
DOUGLAS G. FREDERICK	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on January 26, 2012, pursuant to Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934 (Exchange Act). I issued an Order Making Findings and Imposing Sanctions by Default as to Respondents KM Capital Management, LLC and Joshua A. Klein (Default Order) on April 12, 2012, pursuant to Rule 155(a) of the Commission's Rules of Practice (Rules).¹ Exchange Act Release No. 66801, 103 SEC Docket 53096. The Commission has not issued a final order as to KM Capital Management, LLC, or Joshua A. Klein (Defaulted Respondents). See 17 C.F.R. § 201.360(d).

On November 8, 2012, the Division of Enforcement (Division) filed a Motion for Issuance of Initial Decision as to the Defaulted Respondents (Motion), requesting that I issue an initial decision making the same findings and imposing the same sanctions as the Default Order. The Division represents that it is unable to seek judicial enforcement of the Default Order without a final order of the Commission, and the issuance of an initial decision will permit the

¹ The Commission accepted Offers of Settlement from all other Respondents. See Exchange Act Release No. 67889 (Sept. 19, 2012); Exchange Act Release No. 67206 (June 15, 2012), 103 SEC Docket 55241; Exchange Act Release No. 67029 (May 18, 2012), 103 SEC Docket 54398; Exchange Act Release No. 67028 (May 18, 2012), 103 SEC Docket 54392.

Commission to either issue a finality order or review the initial decision.² Motion, p. 1. No Respondent has responded to the Motion, and it is now ripe for decision.³

Both default orders and initial decisions, no matter how styled, contain reasoned factual findings and legal conclusions, as well as any appropriate relief. See 17 C.F.R. § 201.360(b). Both fully resolve an administrative proceeding as to particular respondents. The only apparent distinction between the two is that an initial decision includes a statement concerning, among other things, the time period within which a petition for review may be filed before the decision becomes final. See id. This statement, although informative, is not strictly necessary; the period for filing a petition for review pursuant to Rule 410 is readily ascertainable, and formal notice that an initial decision has become final is not required for the decision to take effect. See Comment (e) to Rule 360, Exchange Act Release No. 35833, 59 SEC Docket 1546, 1579 (June 23, 1995).

The Rules are not clear as to whether an initial decision is required to be issued as to the Defaulted Respondents. Rule 360(a)(1) requires an initial decision to be filed in any proceeding in which the Commission directs a hearing officer to preside at a hearing.⁴ However, such proceedings often do not advance to hearing, and Rule 155(a) provides that the hearing officer may enter a default against any respondent who fails to answer, appear at a prehearing conference, respond to a dispositive motion, or otherwise defend a proceeding.⁵ See Comment to Rule 155(a), 59 SEC Docket at 1560-61. Rule 155(a) could be read to suggest that an initial decision is not required in such cases because the hearing officer may simply determine the proceeding against the defaulting respondent upon consideration of the record, including the OIP, the allegations of which may be deemed true.

² I am not aware of any reason why the Commission could not either determine to review or issue a finality order as to the Default Order.

³ As explained further below, the Rules of Practice regarding default orders are ambiguous. For example, it may be that I lack authority to take any action without a Commission order remanding the matter to me. E.g., Roanoke Technology Corp., Exchange Act Rel. No. 57351 (Feb. 19, 2008), 92 SEC Docket 2536 (remanding default order to ALJ); Vladislav Steven Zubkis, Exchange Act Rel. No. 51364 (Feb. 18, 2005) 84 SEC Docket 4074 (directing motion to set aside default to ALJ for consideration in the first instance). However, here there is no finality order, and so technically there has been no final agency action. I interpret Rule 155(b) as providing me authority to grant the requested relief, without a remand order, because the Motion was directed to me and because I have not yet issued an initial decision that might result in a final agency action. See 17 C.F.R. § 201.155(b) (“the hearing officer, at any time prior to the filing of the initial decision . . . may for good cause shown set aside a default”).

⁴ The Commission so ordered in this proceeding. See OIP at 11.

⁵ The Defaulted Respondents failed to do any of these things in this proceeding. See Default Order at 1-2.

In contrast, Rule 155(b) provides that in certain circumstances, the hearing officer may set aside a default, but only prior to filing the initial decision. This Rule could be read to suggest that an initial decision is required in the case of a default. However, Rule 340, which provides parties with the opportunity to file written proposed findings and conclusions along with supporting briefs before an initial decision is issued, could be read to suggest that an initial decision is required only in cases where the respondent has made written filings. Additionally, proceedings in which the Commission orders a hearing often conclude without the issuance of an initial decision for other reasons, for example, when a respondent submits an offer of settlement that is accepted by the Commission. See 17 C.F.R. § 201.240(a), (c)(4)(iii).

This Office's interpretation of the Rules is that, in general, where the proceeding as to a particular respondent has not been adversarial, an initial decision is not appropriate, and thus, when a default occurs, a default order is warranted. The immediate practical effect of a default order in such a case is the same as that of an initial decision – full resolution as to a particular respondent. For initial decisions, an order of finality may then issue if no petition for review is filed. 17 C.F.R. § 201.360(d)(2). No similar provision exists for default orders, however. Under the unique circumstances of this case, where a finality order would assist the Division in enforcing the default, but no finality order is currently available, reissuing the Default Order as an initial decision is justified.

Order

Because the Rules are ambiguous as to whether an initial decision is required in this case, and the Division is unable to obtain a district court order to enforce any remedies without a final order of the Commission, it is in the interest of justice that an initial decision be issued as to the Defaulted Respondents. Therefore, for good cause shown, it is ordered that the Division's Motion is granted. The Initial Decision will issue separately.

Cameron Elliot
Administrative Law Judge