

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 750 / February 11, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14139

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| In the Matter of | : | |
| | : | ORDER DENYING MOTION |
| HECTOR GALLARDO, | : | FOR ENTRY OF INITIAL |
| MICHAEL ZURITA, and | : | DECISION |
| ORION TRADING, LLC | : | |

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Respondents on November 24, 2010, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).¹ On September 28, 2011, I issued an Order Making Findings and Imposing Remedial Sanctions by Default as to Respondent Hector Gallardo (Gallardo) (Default Order). See Hector Gallardo, Exchange Act Release No. 65422 (Sep. 28, 2011).

Pending before me is the Motion by the Division of Enforcement (Division) for Entry of an Initial Decision as to Gallardo (Motion for ID), filed on January 15, 2013. Gallardo filed no response.

I deny the Motion for ID without prejudice, for three reasons. First, it is not clear that I have authority to issue an initial decision in this case. Alchemy Ventures, Inc., Administrative Proceedings Rulings Release No. 732 (Nov. 27, 2012), 105 SEC Docket 61198, 61199-200. There is at least one precedent for issuing an initial decision after issuing a default order. Alchemy Ventures, Inc., Initial Decision Release No. 473 (Nov. 28, 2012), 105 SEC Docket 61204. However, on January 28, 2013, after the Motion for ID was filed, the Commission requested briefing in Alchemy Ventures, Inc., specifically on the question of the propriety of initial decisions after default. Alchemy Ventures, Inc., Admin. Proc. File No. 3-14720, Order Directing the Filing of Briefs (Jan. 28, 2013) (unpublished). There appears to be little or no urgency to the Division's requested relief, because Gallardo is in custody, nor does the Division allege any urgency. In the absence of any pressing need for an initial decision, it is prudent to wait for a decision in Alchemy Ventures, Inc. before issuing an initial decision in the present case.

¹ This proceeding has ended as to Respondents Michael Zurita and Orion Trading, LLC. See Hector Gallardo, Exchange Act Release No. 65658 (Oct. 31, 2011).

Second, based on a service date of August 21, 2011, the due date for issuing an initial decision passed in June 2012. Admittedly, this Office's position has been that no initial decision should issue in case of default, and so, technically, there can be no initial decision due date. Alchemy Ventures, Inc., 105 SEC Docket at 61200; Brian M. Campbell, Administrative Proceedings Rulings Release No. 734 (Nov. 30, 2012). However, issuing an initial decision more than seven months after one would have been due plainly does not comport with the spirit of Commission Rule of Practice 360. See 17 C.F.R. § 201.360(a)(2) (setting maximum initial decision due date of 300 days after service of the OIP).

Third, and most important, the evidence supporting the issuance of the Default Order may not comply with Rapoport v. SEC, 682 F.3d 98 (D.C. Cir. 2012). Rapoport, a decision handed down after the Default Order issued in this proceeding, was also a default case. 682 F.3d at 108. The administrative law judge deemed the allegations of the OIP to be true, and imposed second-tier civil penalties based solely on those allegations. Id. Civil penalties are authorized only in the case of willful violations, and the OIP contained only a conclusory allegation of willfulness. Id. (citing 15 U.S.C. § 78u-2(a)). The Court of Appeals held that the OIP's "conclusory allegations that [respondent] willfully committed these violations are not enough to justify imposing maximum second-tier penalties without further explanation." Id.

Construed broadly, Rapoport requires either detailed and specific allegations in the OIP, or extrinsic evidence supporting the OIP's allegations (such as might support a motion for summary disposition, for example), or both, and as to every category of sanction, including civil penalties. The OIP in the instant case may well be detailed enough to meet this standard without the need for such extrinsic evidence. Clearly, though, in light of Rapoport, the better practice is to support a request for sanctions after default with extrinsic evidence, and that was not done here. See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997) ("While the District Court may not have been obligated to hold an evidentiary hearing, it could not just accept [plaintiff's] statement of the damages."); Oberstar v. FDIC, 987 F.2d 494, 505 n.10 (8th Cir. 1993) ("a party entitled to judgment by default is required to prove the amount of damages that should be awarded").

Accordingly, the Division's Motion for Entry of an Initial Decision as to Respondent Hector Gallardo is DENIED WITHOUT PREJUDICE. Any such future motion should be supported by sufficient evidence in accordance with Rapoport v. SEC, 682 F.3d 98 (D.C. Cir. 2012).

Cameron Elliot
Administrative Law Judge