

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 75765 / August 26, 2015

Admin. Proc. File No. 3-16525

In the Matter of

RKO RESOURCES, INC.
(a/k/a SHAMIKA 2 GOLD, INC.)

ORDER REMANDING CASE FOR FURTHER PROCEEDINGS

RKO Resources, Inc. (a/k/a Shamika 2 Gold, Inc.) requests that we vacate an administrative law judge's Initial Decision revoking the registration of its securities.¹ The law judge based the Initial Decision on her finding that RKO was in default because it did not file an answer to the order instituting proceedings ("OIP") within the time provided. For the reasons discussed below, we have determined to grant RKO's request.

I. Proceedings below

On May 5, 2015, we issued an OIP against RKO alleging that it had failed to file timely periodic reports required by Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13.² The OIP required that RKO file an answer within ten days after service of the OIP.³ RKO was served with the OIP on May 8, 2015, but did not file an answer within the specified period.

On May 26, 2015, the law judge issued the Initial Decision finding RKO in default for failing "to answer or otherwise to defend the proceeding."⁴ The law judge therefore deemed the

¹ *A.B. Watley Group, Inc.*, Initial Decision Release No. 798, 2015 WL 2457599 (May 26, 2015).

² *A.B. Watley Group, Inc.*, Exchange Act Release No. 74869, 2015 WL 2063085 (May 5, 2015). The OIP similarly alleged that three other respondents, *A.B. Watley Group, Inc.*, *Cambridge Heart, Inc.*, and *iGenii Inc.*, had failed to file timely periodic reports. The Initial Decision also found these respondents in default; none of them has filed a motion to vacate. The Initial Decision has become final as to these other respondents. *A.B. Watley Group, Inc.*, Exchange Act Release No. 75387 (July 8, 2015).

³ *A.B. Watley Group, Inc.*, 2015 WL 2063085, at *3.

⁴ *A.B. Watley Group, Inc.*, 2015 WL 2457599, at *1.

allegations in the OIP to be true and revoked the registration of RKO's registered securities.⁵ RKO then filed its motion to vacate on June 4, 2015, which the Division of Enforcement opposes.

II. Discussion

Rule of Practice 155(b) provides for the setting aside of defaults "for good cause shown."⁶ To establish good cause, a moving party, such as RKO, must (1) make its motion within a reasonable time; (2) state "a sufficient reason for the failure to appear or defend that led to the default, *i.e.*, that the respondent did not intentionally default or otherwise fail to make defense of a proceeding a priority"; and (3) "articulate a meritorious defense to the administrative proceeding."⁷ RKO contends that it satisfies the elements of Rule 155(b) because its motion was "made within a reasonable time (merely eight days)" after the law judge issued the Initial Decision, "it has a reasonable basis for the inadvertent failure to . . . respond to the [OIP]," and it "has a meritorious defense . . ." In opposing RKO's motion, the Division asserts that RKO "fails to state adequate reasons for its failure to appear or defend" and that its "proposed defense has no merit. . . ."

We find that RKO has satisfied the procedural and substantive components of the standard.⁸ First, RKO made its motion within a reasonable time after entry of default. The law judge issued the Initial Decision defaulting RKO on May 26, 2015, which was then sent to RKO by certified mail the next day. RKO filed the present motion eight days later, which is faster than other such motions we have found to have been brought within a reasonable time.⁹ Thus, RKO has satisfied the first Rule 155(b) element.

⁵ *Id.* at *1-2. Under Rule of Practice 155(a)(2), the law judge may deem a party to be in default, and determine the proceeding against it (including deeming the allegations in the OIP to be true), if the party fails to file an answer within the time provided. 17 C.F.R. § 201.155(a)(2); *see also* Rule of Practice 220(f), 17 C.F.R. § 201.220(f) (if a respondent "fails to file an answer within the time provided, such person may be deemed in default").

⁶ Rule of Practice 155(b), 17 C.F.R. § 201.155(b).

⁷ *David Mura*, Exchange Act Release No. 72080, 2014 WL 1744129, at *4-6 (May 2, 2014) (internal quotations and alterations omitted) ("Each of the three elements serves an important purpose, such that the lack of a sufficient showing on any one element provides an independent basis to deny a motion to set aside."); *see also* 17 C.F.R. § 201.155(b) ("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.").

⁸ *See Mura*, 2014 WL 1744129, at *4 ("[T]he requirements of [Rule 155(b)] are substantive, as well as procedural.").

⁹ *See id.* at *6 (finding ten days between mailing of the default order and filing of the motion to set it aside to be a reasonable time under Rule 155(b)); *Richard S. Kern*, Exchange Act Release No. 51115, 2005 WL 711681, at *1 (Feb. 1, 2005) (finding that "Respondents promptly requested that the default be set aside," where they filed a motion to set aside within fourteen days of default).

Second, RKO stated a sufficient reason for failing to file a timely answer in that it did not intentionally default or otherwise fail to make defense of the proceeding a priority. RKO stated that it went through a change in control in May 2015, with a new president and CEO acquiring his predecessor's controlling interest in RKO and being appointed by the Board of Directors. RKO stated that the turmoil surrounding its change in control resulted in confusion and inadvertent mistake about how long it had to answer. We find that this claim of inadvertence, which is supported by the speed with which RKO filed its motion to vacate after default was entered, satisfies the second Rule 155(b) element.¹⁰

Third, RKO sufficiently articulated a proposed defense.¹¹ RKO stated, in an affidavit from its current president and CEO, that before its recent change in control it "lacked the resources necessary" to prepare the periodic reports required by Exchange Act Section 13(a) and Rules 13a-1 and 13a-13, but that it is now "fully prepared to cure any deficiencies and make all requisite filings, past and present, so as to avoid having its registration permanently revoked."¹² Although RKO appears to acknowledge its violations,¹³ we find that its proposed defense to sanctions satisfies the third element of Rule 155(b).¹⁴

¹⁰ Cf. *Mura*, 2014 WL 1744129, at *7 (finding that respondent provided a sufficient reason for inadvertently missing a telephonic status conference ordered by law judge where, among other things, he received an email from the Division inquiring about his availability for the conference that was phrased in a way that "suggested that no definitive date for the conference had been established").

¹¹ See *Mura*, 2014 WL 1744129, at *7 ("[A] litigant must articulate a defense that is legally cognizable and, if proven at a hearing, would constitute a defense to the claims. But we do not require the respondent to establish that he is likely to prevail on the proposed defense or to make a detailed evidentiary showing regarding the theory underlying that defense."); cf. 10A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2697 (3d ed.) ("The underlying concern [in considering whether movant has stated a meritorious defense] is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.").

¹² The OIP alleged that RKO has "not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012." *A.B. Watley Group, Inc.*, 2015 WL 2063085, at *2.

¹³ Despite this apparent acknowledgement in the CEO's affidavit, RKO filed a proposed answer with its motion to vacate that denies the allegations in the OIP.

¹⁴ See *Mura*, 2014 WL 1744129, at *7 ("Mura also challenges the \$840,000 civil penalty imposed against him as excessive for various reasons and avers an inability to pay. We find that these averments, which we understand, at a minimum, would be supported by Mura's testimony, collectively are sufficient to identify a potentially meritorious defense."); *but see Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *6 (April 4, 2014) ("[W]e apply a strong presumption in favor of revocation whereby a 'recurrent failure to file periodic reports' is 'so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation.'").

Accordingly, we find that RKO has satisfied our standard for setting aside default.¹⁵ We further note, as we have stated in similar contexts, that "we generally consider it a prudent practice for a law judge who is considering the issuance of a default order against a respondent to first order that respondent show cause why a default is not warranted."¹⁶ That practice was not followed here. We reiterate our encouragement of such practice, which we believe furthers fairness in our administrative proceedings and efficiency by facilitating resolution of default-related issues at the hearing level, when they can be most expeditiously addressed.

Accordingly, it is ORDERED that the entry of default is set aside and the Initial Decision is vacated as to RKO Resources, Inc. (a/k/a Shamika 2 Gold, Inc.), and the matter is remanded to the law judge for further proceedings consistent with this order;¹⁷ and it is further

ORDERED that the law judge shall issue an initial decision no later than 120 days from the date of service of this order.

By the Commission.

Brent J. Fields
Secretary

¹⁵ In making this finding, we do not suggest a view as to the ultimate resolution of this proceeding.

¹⁶ *Mura*, 2014 WL 1744129, at *3 (quoting *Vladislav Steven Zubkis*, Exchange Act Release No. 51364, 2005 WL 597022, at *2 (Feb. 15, 2005)); *see also Kern*, 2005 WL 711681, at *2 ("[I]t is a long-standing and helpful—although not explicitly required—practice in cases where a Respondent is apparently in default for the law judge to order a respondent to show cause within a brief period why he or she should not be found in default.").

¹⁷ RKO filed a proposed answer with its motion to vacate which, given the circumstances, we have determined to accept as timely filed. *Cf. Kern*, 2005 WL 711681, at *2 (granting motion to vacate default and accepting the answer attached thereto as the respondents' answer curing the default).