UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61751 / March 22, 2010

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13304

In the Matter of	:	
	:	
CENTREINVEST, INC.,	:	ORDER DENYING MOTION TO
OOO CENTREINVEST SECURITIES,	:	SET ASIDE DEFAULT ORDER
VLADIMIR CHEKHOLKO,	:	AND CORRECTING SANCTION
WILLIAM HERLYN,	:	
DAN RAPOPORT, AND	:	
SVYATOSLAV YENIN	:	

Respondent Dan Rapoport (Rapoport) moves to set aside a default order entered against him on July 31, 2009.[1] The Division of Enforcement (Division) opposes the motion. Applying the criteria of Rule 155(b) of the Rules of Practice (Rule 155(b)) of the Securities and Exchange Commission (Commission), 17 C.F.R. § 201.155(b), I deny Rapoport's motion to set aside the default.

History of the Proceedings

The Commission issued its Order Instituting Proceedings (OIP) on December 8, 2008, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). On December 16, 2008, because of the difficulty in serving persons in Russia due to its failure to follow its obligations under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, the Division moved, pursuant to 17 C.F.R. § 201.141(a)(2)(iv), to serve the foreign respondents, Rapoport among

[1] The default order made findings and imposed sanctions on Rapoport as well as CentreInvest, Inc. (CI-New York), and Svyatoslav Yenin (Yenin). See CentreInvest Inc., Exchange Act Release No. 60413. As to the other named respondents, the Commission accepted Offers of Settlement from Vladimir Chekholko (Chekholko) and William Herlyn (Herlyn) on August 5 and 12, 2009, respectively. See CentreInvest Inc., Exchange Act Release Nos. 60450 and 60485. An Initial Decision was issued on August 31, 2009, as to OOO CentreInvest Securities (CI-Moscow), which "bec[a]me the final decision of the Commission" on January 29, 2010, and the "sanctions imposed in that decision [were] declared effective." OOO CentreInvest Secs., Exchange Act Release No. 61448.

them, by service on the U.S. counsel that represented each in this matter prior to the Commission's institution of these proceedings. On December 31, 2008, having received no opposition briefs to the Division's motion, see 17 C.F.R. § 201.154(b), an Order Directing Service as to Foreign Respondents was issued, which allowed service for Rapoport to be directed to Richard Kraut, Esq. (Kraut), his attorney at that time.

Although the OIP had already been mailed to Kraut when originally issued, the Office of the Secretary sent another copy by U.S. Postal Service registered mail, with the December 31 Order. According to the return receipt (U.S. Postal Service Form 3811) for that mailing, the OIP was received by Kraut's office on January 6, 2009, and the return receipt was received by the Office of the Secretary on January 8, 2009.

The Office of the Secretary received an opposition from Rapoport to the Division's motion regarding service on January 5, 2009, which was dated December 23, 2008. Also on January 5, 2009, the Division filed a reply to Rapoport's opposition, dated January 2, 2009, as it had received a copy of the opposition earlier than the Office of the Secretary. The next day, an order was issued, setting a prehearing conference for January 9, 2009, to discuss the matter of service on the foreign respondents. Following that prehearing conference, an order was issued that granted time for Rapoport to file any supplement to his opposition and for the Division to respond.

Rapoport's supplement was sent to this Office by facsimile on January 27, 2009,[2] and the Division filed its opposition on February 2, 2009. On February 5, 2009, an Order Denying Motions for Reconsideration was issued, affirming the December 31 Order Directing Service as to Foreign Respondents and declaring service effective on Rapoport as of January 8, 2009. Later that same day, a prehearing conference was held with Kraut in attendance for Rapoport and Yenin. At that prehearing conference, Kraut confirmed his receipt of the Order Denying Motions for Reconsideration and stated that he would "bring the order to [his clients'] attention."[3] (Preh'g Tr. at 9-10 (Feb. 5, 2009).)

An order was issued following the February 5, 2009, prehearing conference setting the procedural schedule. It was sent to Rapoport at BrokerCredit Service, Prospect Mira, 69, Bldg. 1, Moscow 129110, Russia, by U.S. Postal Service International Registered Mail. Additional orders issued by this Office were also sent to Rapoport at BrokerCredit Service, including two orders setting dates for future prehearing conferences, which were issued on April 27 and 29, 2009. No return receipts were received from any of the mailings to Rapoport at BrokerCredit Service. In his Declaration filed December 23, 2009, Rapoport stated that after his February 2, 2008, termination by CI-Moscow he was employed by BrokerCredit Service until September 2009. (Decl. at ¶ 11.)

The February 5 Order Denying Motions for Reconsideration required Rapoport to file his Answer to the OIP by March 2, 2009. Rapoport did not file an Answer. On April 9, 2009, the

[2] The supplement was officially received by the Office of the Secretary on February 5, 2009.

[3] Kraut withdrew as counsel for Rapoport by facsimile received in this Office on February 12, 2009.

Division filed a Motion for Default Judgment against Respondents Rapoport, Yenin, and CI-New York (Default Motion).[4] Rapoport filed no opposition to the Default Motion. See 17 C.F.R. § 201.154(b). Two prehearing conferences were held on April 28 and May 19, 2009, and Rapoport did not attend either. See 17 C.F.R. § 201.221(f). Given Rapoport's failure to file an Answer, to attend prehearing conferences, or to otherwise defend these proceedings, the Default Motion was granted and an Order Making Findings and Imposing Sanctions by Default (Default Order), as to him, was issued on July 31, 2009.

On December 23, 2009, pursuant to Rule 155(b), Rapoport, through his current attorneys, Kasowitz, Benson, Torres & Friedman LLP, filed a Motion to Set Aside the Default Judgment as to Rapoport (Motion). The Division filed its Memorandum in Opposition to Rapoport's Motion (Opposition) on January 8, 2010, and Rapoport filed a Reply Memorandum (Reply) on January 25, 2010. See 17 C.F.R. § 201.154(b).[5]

Discussion and Conclusions

Rule 155(b) provides 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. 17 C.F.R. § 201.155(b). After which, "[i]n order to prevent injustice and on such conditions as may be appropriate, the [administrative law judge], at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default." Id. Similarly, courts in applying Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure, relating to the setting aside of default judgments, are guided by: (1) whether the default was willful, (2) whether the defendant has a meritorious defense, and (3) whether the nondefaulting party will be prejudiced. See SEC v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001); see also United States

[4] The Certificate of Service included with the Default Motion indicated that the Division would serve Kraut via Federal Express mailing. There is no indication in the record as to whether the Default Motion was accepted by Kraut, and if so, whether Rapoport was informed by Kraut of the Default Motion.

[5] Rapoport's Motion included a Memorandum of Law in Support (Memorandum), with five attached exhibits labeled Exhibit A through E, of note Exhibit A is a Declaration of Rapoport and Exhibit B is his Proposed Answer to the OIP. References in this Order to the Memorandum will be given as "(Mem. at __.)," references to Exhibits A and B will be given as "(Decl. at __.)" and "(Answer at __.)," respectively, references to the Division's Opposition will be given as "(Opp'n at __.)," and references to Rapoport's Reply will be given as "(Reply at __.)". The Division's Opposition also included a Declaration of Daniel R. Marcus, with ten attached exhibits labeled Exhibit A through J, which will be referenced as "(Marcus Decl. at __.)". Additionally, the Division cites to three specific affidavits already on record in these proceedings from submission in connection with the Division's Motion for Summary Disposition Against Respondent CI-Moscow. The affidavits identified are that of Katalin Osvath Gingold (Gingold), Chekholko, and Herlyn, each with attached exhibits, and will be referenced in this Order as "(Gingold Aff. at __.)," "(Chekholko Aff. at __.)," "(Herlyn Aff. at __.)," respectively. Any Exhibits contained in the various declarations or affidavits will be cited by the respective document and "(Ex. __.)".

v. Di Mucci, 879 F.2d 1488, 1495 (7th Cir. 1989) (adding requirement of "quick action to correct" default).

While an Initial Decision was issued in these proceedings, it pertained only to Respondent CI-Moscow. Further, the Commission has stated that, although Rule 155(b) authorizes both the administrative law judge and the Commission to rule on motions to set aside defaults, such motions "should be first considered by the law judge, who is most familiar with the issues, rather than by the Commission." Vladislav Steven Zubkis, Exchange Act Release No. 51364, 84 SEC Docket 4074, 4077 (Feb. 18, 2005). Accordingly, I have reviewed the Motion, Opposition, and Reply and have determined that Rapoport has failed to present "good cause" to set aside the Default Order. I have further determined that failure to grant the Motion will not result in any "injustice" to Rapoport.

Timeliness of Motion to Set Aside Default.

I conclude that Rapoport has not presented his motion to set aside the default within a reasonable time after the entry of the default. The Commission has had few occasions in the past to comment on what is deemed a "reasonable time." No definition of "reasonable time" can be found either in the Commission's 1964 release adopting Rule 12(j), which first allowed for the setting aside of default orders, or in its 1995 release adopting current Rule 155(b). See Exchange Act Release No. 7357 (June 30, 1964); Exchange Act Release No. 35833 (June 9, 1995).

In a proceeding where the Division moved for an order of finality forty-two days after the issuance of a default order, which occurred eighty-one days after service of the OIP, the Commission declared, fifteen days later, that "a reasonable time to set aside the default judgment ha[d] passed." Cary R. Kahn, Exchange Act Release No. 50383, 83 SEC Docket 2717 (Sep. 15, 2004); cf. EVTC, Inc., Exchange Act Release No. 51652, 85 SEC Docket 1341 (May 4, 2005) (a reasonable time had passed when a respondent failed to reply to the Division's motion to declare a default order, issued seven months earlier, final). Comparatively, in Richard Kern when discussing the reasonableness of the time that had passed, the Commission noted that a motion to set aside a default filed within two weeks of the default order was "promptly requested." Exchange Act Release No. 51115, 84 SEC Docket 2923, 2924 (Feb. 1, 2005).

In these proceedings, the Default Order was issued two hundred four days after service on Rapoport, one hundred thirteen days after the Division filed its Default Motion, and seventy-three days after the last prehearing conference. Rapoport had plenty of time to file his Answer or otherwise defend these proceedings, but he did not do so. Instead, he ignored the February 5 Order commanding his Answer be filed by March 2, 2009, and failed to participate in any of the proceedings after his attorney attended the February 5 prehearing conference. Rapoport then waited one hundred forty-five days after the issuance of the Default Order before filing his Motion, requesting the Default Order be set aside. This is not a reasonable time after the entry of the default.

Pursuant to the OIP and consistent with the January 8, 2009, date of service on Rapoport, these proceedings were to have concluded by November 4, 2009, and that time has passed. See OIP at 8; 17 C.F.R. § 201.360(a)(2). Without Commission intervention, a decision in these

proceedings, if reopened, could not be issued within the three hundred days directed by the Commission in the OIP. See OIP at 8; 17 C.F.R. § 201.360(a)(2); cf. Harold F. Harris, Exchange Act Release No. 51130, 84 SEC Docket 2948, 2950 n.4 (Feb. 3, 2005) (where the Commission directed "that the running of the time limits of Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2), governing the law judge's consideration of this matter be tolled" for the time period between the issuance of the default order and the Commission's order remanding the proceeding); Kern, 84 SEC Docket at 2925 n.11 (same).

Reasons for Failure to Appear or Defend.

I further conclude that Rapoport has not adequately explained why he failed to file a timely Answer or otherwise defend these proceedings following the issuance of the February 5 Order regarding directed service. Rapoport's argument that "he reasonably believed he was not legally obligated to respond until the Division served him personally," (Mem. at 11), is neither reasonable nor, in contrast to his contentions otherwise, (Reply at 3-4), adequate to show good cause for his failures. See James M. Russen, Jr., Exchange Act Release No. 32895, 51 S.E.C. 675, 677 (1993) (finding that respondent's "assertions" regarding service "do not amount to 'good cause' for failing to participate"); Perpetual Secs., Inc., Exchange Act Release No. 56613, 91 SEC Docket 2489, 2499 (Oct. 4, 2007) (upholding default where applicants "failed to establish that they had good cause for failing to appear").

The Division properly filed a request to direct service on Rapoport to his attorney. I allowed Rapoport ample opportunity to argue against such service, which he did, and I provided a lengthy legal discussion regarding my order to allow for the directed service, both in the initial Order Directing Service as to Foreign Respondents and in the Order Denying Motions for Reconsideration, which affirmed that service on Rapoport would be made on attorney Kraut and notified Rapoport that his Answer would be due by March 2, 2009. This deliberative process alone would have reasonably put Rapoport on notice that personal service may not be required of the Division.

Furthermore, to accept Rapoport's argument, one would have to agree with the implausible position that Rapoport engaged his attorney to oppose service but never inquired as to the results of that engagement nor sought confirmation of its conclusion. As noted earlier, Kraut stated at the prehearing conference following the Order Denying Motions for Reconsideration that he would bring the order and its requirements to the attention of Rapoport. (Preh'g Tr. at 9-10 (Feb. 5, 2009).) As the Division fairly points out, Rapoport has not provided any evidence or an affidavit from Kraut that would substantiate his claim that he had reasonable belief that he had to be personally served or that he last spoke with Kraut in January 2009 (Opp'n at 6-7; Decl. at ¶¶ 14-16). Cf. United States v. Cirami, 535 F.2d 736, 739-41 (2d Cir. 1976) (allowing default to stand since the record was "bereft of any indication of client diligence"); see also Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243-44 (2d Cir. 1994) (finding default willful where defendant purposely evaded service for months and then failed, for untenable reasons, to answer the complaint). Service on Rapoport through his attorney, Kraut, was effective and Rapoport did not have a reasonable basis to believe otherwise. See Perpetual Secs., 91 SEC Docket at 2501 (service on attorney was effective, "'limited' appearance of counsel" not recognized, and "filing of an application for review evidences that [the attorney]

accepted service on [the respondent's] behalf"). Rapoport's continued efforts to argue the matter of service, (Mem. at 12-14), would have been more appropriately included in a petition for review, see 17 C.F.R. §§ 201.400 and .410, as part of a defense to the original proceedings. Cf. Zubkis, Exchange Act Release No. 52876, 86 SEC Docket 2618, 2621-22 n.15, 2628 (Dec. 2, 2005) (showing how despite issues raised concerning jurisdiction, respondent answered and participated in the proceeding and filed appropriate petitions for review in order to reargue issues). I agree with the Division's assertion that to accept Rapoport's argument that he reasonably believed he had no obligation to respond and to set aside the Default Order would effectively condone Rapoport's decision to ignore my February 5 Order. (Opp'n at 7.)

Additionally, Rapoport makes the unsupportable claim that, if he had been ordered "to show cause why no default judgment should be issued against him, it is conceivable that . . . Kraut . . . would have attempted to contact Rapoport to advise him of the pending order to show cause, and that Rapoport, understanding the court's intention could have responded at that time." (Mem. at 14 & n.13.) The February 5 Order clearly commands Rapoport to file his Answer by March 2, 2009. The OIP, citing 17 C.F.R. §§ 201.155(a), .220(f), and .221(f), clearly explains that failure to file an answer or appear at a prehearing conference is grounds for default and the respondent may have the proceedings decided against him, (OIP at 8); and the Division filed a Default Motion, which was sent to Kraut, requesting exactly that. Furthermore, Kraut had already stated that he would bring the February 5 Order to Rapoport's attention. (Preh'g Tr. at 9-10 (Feb. 5, 2009).) Despite Rapoport's contentions to the contrary, it is not believable that Kraut, even in the absence of an order to show cause, did not already advise Rapoport that he was ordered to file an Answer and that a default order could be issued against him, especially after the Division moved for a default.

Unlike in Kern, cited by Rapoport, here a formal motion requesting the entry of a default order was filed by the Division, making the additional step of an order to show cause superfluous. Furthermore, an order requiring Rapoport to submit an Answer in these proceedings by March 2, 2009, had already been ignored by Rapoport, therefore there is no reason to believe another order instructing him of his obligations under the Commission's Rules of Practice and the instructions of the OIP would have had any effect.

Rapoport's actions in these proceedings are contrary to those of the respondents in Kern. The default order in Kern was issued on the same day that the respondents' answers were due, allowing no time to determine if the respondents would defend the proceeding. In these proceedings, the Division waited over one month after Rapoport's Answer was due before filing its Default Motion. While the Commission's Rules of Practice only allow five days for a respondent to file an opposition, see 17 C.F.R. § 201.154(b), almost four months elapsed before the Default Order was issued. Two prehearing conferences were also held during this time, which Rapoport did not attend. Unlike the respondents in Kern, Rapoport was given an abundance of time and several opportunities to respond to these proceedings. Also contrary to Rapoport's actions, the respondents in Kern filed their motion to set aside the default within two weeks of the issuance of the default, not almost five months.

Rapoport's Proposed Defenses.

As noted previously, a motion to set aside a default must also "specify the nature of the proposed defense in the proceeding." 17 C.F.R. § 201.155(b). The defenses set forth by Rapoport consist of a general denial of the allegations against him; an untimely-raised affirmative defense, asserting that he could have qualified for an exemption to the registration requirement he was found to have violated; and a critique of the sanctions ordered against him. (Mem. at 1, 4, 15-23.) His Motion also includes a Proposed Answer to the OIP, with sixteen other unsubstantiated and many facially dismissible affirmative defenses, which were not further argued in his Memorandum.[6]

In order to make a sufficient showing of a meritorious defense in connection with a motion to set aside a default judgment, the defaulting party need not establish his defense conclusively but must present evidence of facts that, if proven, would constitute a complete defense. See McNulty, 137 F.3d at 740 (citations omitted). Rapoport does not have a complete defense, he fails to present any evidence of facts, and his denials and assertions are contradicted by evidence and affidavits already in the record.

(1) General Denial.

The OIP alleges and the Default Order found that Rapoport willfully violated Section 15(a) of the Exchange Act, by illegally effecting transactions in securities without being registered with the Commission as a broker or being associated with a registered broker-dealer. (OIP at ¶27; Default Order at 4-6.) Rapoport denies this finding and contends generally that he

[6] For instance, Rapoport's twelfth affirmative defense argues that the claims of the OIP are barred by the statute of limitations. (Answer at 9.) The statute of limitations in an action brought by the United States is governed by 28 U.S.C. § 2462, which provides a five-year period. See Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996). The OIP in this matter was issued on December 8, 2008; therefore, the period began to run on December 8, 2003. "Section 2462 precludes . . . consideration of . . . conduct occurring before [this date] in determining whether to impose a bar or civil penalty." Gregory O. Trautman, Exchange Act Release No. 61167 (Dec. 15, 2009) (citing Terry T. Steen, Exchange Act Release No. 40055, 53 S.E.C. 618, 623-25 (1998)). The allegations of the OIP are said to have occurred between 2003 and 2007. The overwhelming majority of the activities alleged in the OIP occur after the statute of limitations began to run. Further, it is well established that conduct occurring prior to the limitations period may be considered to establish motive, intent, or knowledge regarding violations that are within the limitations period. See id. (citing Steen, 53 S.E.C. at 624; Joseph J. Barbato, Exchange Act Release No. 41034, 53 S.E.C. 1259, 1278 (1999); Sharon M. Graham, Exchange Act Release No. 40727, 53 S.E.C. 1072, 1089 n.47 (1998)). In contrast to bars and civil penalty sanctions, cease-and-desist and disgorgement orders operate prospectively, not subject to Section 2462; and, thus, the entirety of one's conduct can be considered in deciding whether to impose either of these prospective sanctions. See id. (citing Edgar B. Alacan, Exchange Act Release No. 49970, 57 S.E.C. 715, 743 (2004)). Thus, Rapoport's statute of limitations defense is without merit.

"did not violate Section 15(a) because he did not solicit U.S. investors, directly or indirectly." (Mem. at 15.)

Section 15(a)(1) of the Exchange Act states: "[i]t shall be unlawful for any broker or dealer which is . . . a natural person not associated with a broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered." 15 U.S.C. § 78o(a)(1) (emphasis added). Section 15(b) sets out the terms of such registration and authorizes the Commission to create regulatory requirements for registration. 15 U.S.C. § 78o(b). A "broker" is defined as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). A "dealer" is defined as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5). A "person associated with a broker or dealer" includes "any person . . . controlled by . . . such broker or dealer, or any employee of such broker or dealer." 15 U.S.C. § 78c(a)(18).

Rapoport claims that he did not solicit U.S. customers directly and that "the uncontested affidavits submitted . . . cite not a single specific instance of Rapoport directly soliciting a U.S. investor." (Mem. at 15.) However, there are two exhibits in evidence that clearly show Rapoport's direct contact with U.S. investors and his role in the inducement of sales of securities to these investors. (Gingold Aff. at ¶¶ 7-8, Ex. C; Marcus Decl. at ¶ 13, Ex. J.)

In June 2007, Gingold, portfolio manager for Artio Global Management LLC (Artio), was contacted through email by CI-New York employee Chekholko with research information relating to Chelyabinsk Industrial Bank (Chelindbank). (Gingold Aff. at ¶ 5, Ex. A.) The research was developed by CI-Moscow's equity research group, led by Rapoport. (Chekholko Aff. at ¶ 7; Decl. at ¶ 7.) In addition to providing research, the email advertised that "CENTREINVEST IS LOOKING TO PLACE 26 MILLION SHARES, OR 4.35% OF CHELINBANK, AT $0.39 A SHARE," and Chekholko inquired whether Gingold was interested in making a purchase for Artio. (Gingold Aff. at ¶ 5, Ex. A.) While in the process of considering the purchase, Gingold communicated with Rapoport, who provided information regarding the offering and CI-Moscow's role and gave recommendations on how long to hold the shares ("I would suggest that you wait [until] after the [Russian Stock Exchange] listing to sell . . ."). (Gingold Aff. at ¶ 8, Ex. C.) Gingold did subsequently purchase 14.1 million shares of Chelinbank for Artio; no commission was paid to CI-New York, but rather a mark-up was included in the price paid to CI-Moscow, which executed the transaction. (Gingold Aff. at ¶¶ 9-10, Ex. D; Chekholko Aff. at ¶¶ 17-20, Ex. L.)

The Division also submitted evidence of an email exchange between Rapoport and an undisclosed investor regarding a bid on shares of Gazprom Geofizka (Gazprom). (Marcus Decl. at ¶ 13, Ex. J.) The exchange occurred in February 2007 and was produced, along with other emails, by CI-New York during the course of a broker-dealer examination. (Id.) Rapoport initiated a major push of Gazprom shares in November 2006, encouraging its solicitation and requesting approval of proposed investors to target. (Chekholko Aff. at ¶¶ 25-28, Exs. N, O; Herlyn Aff. at ¶ 25; Ex. L.) At the time of this push, the offering price for Gazprom was $2,890 per share. (Chekholko Aff. at ¶ 28, Ex. O.) In the email to the undisclosed investor, Rapoport

offers a $3,070 bid price, noting the increase from the $2,890 initial price; but the investor requests $3,200, as its shares were purchased after the initial offering. (Marcus Decl. at Ex. J.)

While not specified in Exchange Act Section 15(a), the Commission focuses on "solicited" transactions in determining if a foreign broker-dealer requires registration. See Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. 30013, 30017 (July 18, 1989). "[T]he Commission generally views 'solicitation' . . . as including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates." Id. (emphasis added). The Commission has noted that where the foreign broker-dealer has established a registered U.S. affiliate broker-dealer, "absent exemptions, only the registered U.S. affiliate would be authorized to trade with any person in the U[.S.]" Id. The Commission has chosen not to define the concept of solicitation, since "[t]aking into account the expansive, fact-specific, and variable nature of this concept, the Commission believes that the question of solicitation is best addressed by the staff on a case-by-case basis." Id. at 30021.

Despite Rapoport's attempt to dismiss the emails in the record as not qualifying as a direct solicitation, (Reply at 6-7), the emails aptly demonstrate that Rapoport did communicate with U.S. investors through an instrumentality of interstate commerce in an attempt to induce the purchase or sale of securities. Additionally, these emails display Rapoport's affirmative efforts to induce transactional business for CI-Moscow. Furthermore, when successful, those purchases were effected by CI-Moscow, an unregistered broker-dealer. (Gingold Aff. at ¶¶ 9, 11, Ex. D; Chekholko Aff. at ¶¶ 17-24, 30, Exs. K-M, P-Q; Herlyn Aff. at ¶¶ 14-18, Exs. E-F). Rapoport violates Exchange Act Section 15(a)(1) through his direct contact in these emails.

Rapoport next contends that he did not direct employees of either CI-New York or CI-Moscow to solicit U.S. investors. (Mem. at 16.) As evidence of this contention, he relies on a semantic argument regarding his title at CI-Moscow and he claims that if he "became aware of potential U.S. 'client leads,' he referred those leads immediately to CI-New York" with whom he only "occasionally communicate[d]." (Mem. at 8, 16; Decl. at ¶¶ 8-10.) As evidence of his lack of control over CI-Moscow employees, Rapoport cites his dismissal from the firm. (Mem. at 16-17; Decl. at ¶ 11.)

However, the evidence in the record paints a far different picture of Rapoport's contact with and control over the CI-New York and CI-Moscow sales teams. Rapoport did more than simply "refer" the occasional lead that crossed his path; he was actively "looking for leads" and instructed the CI-New York sales team to follow-up with cold calls to these "potential clients." (Chekholko Aff. at ¶¶ 9-10, Exs. A, R; Herlyn Aff. at ¶¶ 22-23, Exs. I-J.) Additionally, Rapoport directed Chekholko and Herlyn with regard to how many calls they were required to make. (Chekholko Aff. at ¶ 11, Ex. B.) He had them complete reports on their calls and submit a business plan for developing clients, including scripts for cold calls. (Chekholko Aff. at ¶ 11, Ex. B; Herlyn Aff. at ¶ 24, Ex. K.) Rapoport also instructed Chekholko not to leave voice mail messages when making cold calls. (Chekholko Aff. at Ex. B.) These activities go well beyond an occasional referral or casual conversation with old co-workers.

While Rapoport contends that the emailing of potential customer lists evidences his claim that he was simply forwarding U.S. leads to CI-New York, (Reply at 7), when viewed in totality with his other actions and placed in context with his emails to CI-New York employees, he is not making a referral, he is directing their activity. His direction is further evidenced by his actions with regard to the solicitation efforts in the Gazprom offering, noted earlier. After informing the sales staff of the new security that would be touted, Gazprom, Rapoport required the submission of names of clients to whom solicitations would be made and he approved which clients could be contacted. (Chekholko Aff. at ¶¶ 25-27, Ex. N; Herlyn Aff. at ¶ 25, Ex. L.) Once instructed, the sales staff began the required solicitations, sending research reports to and seeking interest from Rapoport-approved clients. (Chekholko Aff. at ¶ 28, Exs. F-G, O.) The record shows other similar Rapoport directions regarding which securities should be touted and subsequent solicitation of clients with transmissions of research reports. (Chekholko Aff. at Exs. C-E; Herlyn Aff. at ¶ 21, Ex. H.) These reports would contain recommendations to buy and notice of how many shares "CentreInvest" had to offer; and the cover emails would inquire whether clients had interest to buy. (Chekholko Aff. at Exs. C-G, O; Herlyn Aff. at Ex. D.)

Furthermore, Rapoport controlled administrative functions at CI-New York including hiring and payment approvals. Prior to his hiring, Chekholko had to travel to Russia to interview with and be approved by Rapoport. (Chekholko Aff. at ¶ 4.) Not surprisingly, given the level of control Rapoport exerted over the staff's practices, Chekholko considered Rapoport to be his "boss." (Chekholko Aff. at ¶ 34, Ex. S.) CI-New York sales persons were awarded increased compensation based on successful solicitations that resulted in transactions for CI-Moscow. (Chekholko Aff. at ¶ 36; Herlyn Aff. at ¶ 15.) CI-New York's budgets were reviewed and approved by Rapoport and payments for operations of CI-New York, including bonuses to its sales staff, were made by CI-Moscow following Rapoport's authorization. (Marcus Decl. at Ex. K.)

In emphasizing his lack of control over CI-New York, Rapoport argues that he was a managing director at CI-Moscow and "never an 'Executive Director' of CI-Moscow (as stated in the Default [Order]) or a 'Deputy General Director' of CI-Moscow (as stated in the CI-Moscow [Initial] Decision)." (Mem. at 8, 16; Decl. at ¶ 8.) Regardless of what his actual title may have been, it is not dispositive evidence of either control or lack thereof and was not used as such in either the Default Order or the Initial Decision. The title of Executive Director was used in the Default Order because it was given in the OIP, which, because Rapoport chose not to file an Answer, was taken as true pursuant to 17 C.F.R. § 201.155(a). Similarly, because CI-Moscow did file an Answer, its assertion that Rapoport was a Deputy General Director was taken as true for the findings of the Initial Decision pursuant to 17 C.F.R. § 201.250(a). Notwithstanding the causes for the use of these different job titles, the fact remains that his title is irrelevant to resolving his Motion. Rapoport's defense does not address the emails showing his direction of the staff regarding their solicitations and his budget and payment approvals, nor does it address his role in the hiring process, all of which evidence his control of CI-New York and its solicitation efforts.

Rapoport claims that he never directed CI-Moscow employees and that he believed that any contact they had with U.S. investors was limited to unsolicited inquiries. (Mem. at 16; Decl. at ¶ 6.) Again, the record contradicts Rapoport's claims. An email exchange between

Chekholko and Rapoport clearly demonstrates that Rapoport was aware of CI-Moscow employees soliciting U.S. investors and that he had the ability to allow, stop, or modify the practice. (Chekholko Aff. at ¶¶ 31, 33, Ex. R.) In that exchange, Chekholko, on behalf of himself and the rest of the CI-New York sales staff, complains of CI-Moscow employees soliciting U.S. investors, to the impediment of the CI-New York staff, and he notes that the CI-Moscow employees are not properly licensed to contact U.S. investors. (Chekholko Aff. at Ex. R.) Chekholko's complaint arose in response to an emailing of one of Rapoport lists of potential U.S. clients; the email noted, however, that some of the potential clients were already being solicited by CI-Moscow. (Chekholko Aff. at ¶ 33, Ex. R.) Rapoport replies to Chekholko that such solicitations will be the "exception not the rule" and that he agrees to limit them. (Chekholko Aff. at Ex. R.) This reply shows both Rapoport's knowledge of and involvement with regard to the solicitation of U.S. investors by CI-Moscow employees, a practice that Chekholko had dealt with since his hiring in 2004 and noted by a client as occurring since 2002.[7] (Chekholko Aff. at ¶ 32.)

Rapoport further contends that his lack of control over CI-Moscow can be "demonstrated by the fact that Rapoport was fired by CI-Moscow on February 2, 2008, permanently locked out of the office, and denied access to all of his files and records." (Mem. at 16-17.) That he could be fired hardly demonstrates that, while he was employed, he did not have subordinates or other employees subject to his control. The record demonstrates that he did.

As alleged in the OIP, the evidence in the record shows that Rapoport directly and indirectly solicited U.S. investors through his own communications and through his direction of others. When these solicitations resulted in the purchase or sale of securities, the record shows that CI-Moscow not CI-New York executed the trades, received a dealer mark-up as payment, and maintained custody of the securities. (Chekholko Aff. at ¶¶ 14, 17, 19-24, 30, Exs. K-M, P-Q; Herlyn Aff. at ¶¶ 14-15, 17-18, Exs. E-F; Gingold Aff. at ¶¶ 9-11, Ex. D.)

(2) Affirmative Defenses.

Given that Rapoport did solicit U.S. investors and he was not registered to do so, his only remaining defense is that his "conduct fit within an enumerated exemption to the registration requirements." (Mem. at 17; Answer at 7.) Affirmative defenses must be raised in the Answer, 17 C.F.R. § 201.220(c), which Rapoport failed to file by the March 2, 2009, deadline set by the February 5 Order. Nevertheless, Rapoport does not meet the requirements for an exemption under Exchange Act Rule 15a-6 (Rule 15a-6).

While Section 15(a)(1) of the Exchange Act requires registration of broker-dealers, paragraph (2) allows the Commission to create exemptions if deemed to be in the public interest

[7] Chekholko stated that, when hired, he was specifically instructed not to solicit certain investors as they were already being solicited by CI-Moscow employees. (Chekholko Aff. at ¶ 32.) In the Affidavit of John T. Connor (Connor), submitted with the Division's Motion for Summary Disposition against CI-Moscow, Connor, a mutual fund manager, stated that he had engaged in forty securities transactions with CI-Moscow, all but one of which were solicited by CI-Moscow employees and all of which were executed by CI-Moscow, not CI-New York.

and for the protection of investors. 15 U.S.C. § 78o(a)(2). The Commission adopted Rule 15a-6 to "provide conditional exemptions from broker-dealer registration for foreign broker-dealers that engage in certain activities involving U.S. investors." 54 Fed. Reg. at 30013. Nondirect contact through execution of unsolicited trades or provision of research and direct contact through execution by a registered broker-dealer intermediary for solicited trades are the activities allowed under the exemption. Id. Rule 15a-6, however, lists several requirements that must be met in order for these activities to be allowed without registration by the foreign broker-dealer. 17 C.F.R. § 240.15a-6. It is Rapoport's burden to establish that an exemption under Rule 15a-6 applies. See SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Cf. UBS Asset Mgmt. (New York) Inc. v. Wood Gundy Corp., 914 F.Supp. 66, 70 (S.D.N.Y. 1996) (holding that foreign dealer could not claim exemption under Rule 15a-6 even though complaint did not allege solicitation, as dealer had burden of establishing applicability of exemption and failed to do so).

The Initial Decision against CI-Moscow discussed *arguendo* the possibility of CI-Moscow's qualification for exemption to Exchange Act Section 15(a) under Rule 15a-6 but found that its reporting and document retention requirements under the exemption were unmet. It is Rapoport's contention that this discussion is somehow a "crucial 'admission'"[8] that because Rapoport was not responsible for CI-Moscow's or CI-New York's maintenance of documents, then he should be exempt. (Mem. at 7, 18.) He interprets, incorrectly, that "had CI-New York adhered to these 'record-keeping requirements,' there would have been no violation of [Section] 15(a)." (Mem. at 7.)

As mentioned above, the text Rapoport refers to is merely a discussion *arguendo*, noting the failure of any available exemption to CI-Moscow, had CI-Moscow properly raised such a defense, which it did not. The discussion looks only at CI-Moscow and, therefore, focuses on the most obvious evidence of its failure to meet the exemption requirements. This discussion does not make any determinations with regard to Rapoport and cannot be imputed to him as proof that he was within an available exemption, notwithstanding missing documentation.

Despite his contention otherwise, (Mem. at 18), Rapoport can be held responsible for the failure to maintain documents. It is Rapoport who is attempting to seek cover from registration through an exemption, and it is he who must prove that he meets the requirements. The documentation discussed in the Initial Decision is part of those requirements and he cannot produce it. Interestingly, his argument fails completely to address a major requirement of the exemption which must be documented: the submission to the jurisdiction of Commission. Rule 15a-6(a)(3) requires that the registered broker-dealer obtain from "each foreign associated person written consent to service of process for any . . . proceeding before the Commission." 17 C.F.R. § 240.15a-6(a)(3)(iii)(D) (emphasis added). It is clear from Rapoport's initial and continued arguments regarding service in these proceedings, that he has not given such required consent.

In addition to failing to retain documents required to meet the exemption under Rule 15a-6, the activities evidenced in the record and discussed above are not among the activities

[8] Despite Rapoport's use of quotation marks here, no where in the Initial Decision's discussion of the Rule 15a-6 exemption is the word "admission" used, nor could anything discussed therein be described as an "admission."

protected by the exemption. U.S. investors were solicited; their transactions were executed through CI-Moscow, not CI-New York, the registered broker-dealer; CI-Moscow received compensation for the transactions, maintained custody of the securities, and issued confirmations of the executed transactions; and the research reports provided to U.S. investors clearly solicited investment and recommend CI-Moscow's services. All of these activities violate the requirements of the Rule 15a-6 exemption to Exchange Act Section 15(a) registration.

Rapoport's proposed defenses have no likelihood of success under the Commission's case law. Accordingly, setting aside the Default Order is not necessary to prevent injustice.

(3) Critique of Sanctions.

The Default Order imposed the following sanctions on Rapoport: 1) that he cease and desist from committing or causing any violations, or any future violations, of Section 15(a) of the Exchange Act; 2) that he be barred from association with any broker or dealer; 3) that he provide an accounting of his relevant income in order to calculate appropriate disgorgement of funds received in connection with his solicitation of securities transactions without registration under Section 15(a); and 4) that he pay a civil penalty of $555,000. Rapoport contends that these sanctions are "unwarranted, excessive, and based on faulty math." (Mem. at 18-19.)

The discussion of sanctions within the text of the Default Order explains that the civil penalty was to be calculated to reflect the assessment of maximum second-tier penalties of $60,000 each year for conduct that occurred in 2003 and 2004 and $65,000 each year for 2005, 2006, and 2007. The Default Order incorrectly states that this penalty calculation leads to a total of $555,000. The correct amount of the civil penalty to be assessed on Rapoport should have been stated as $315,000. Therefore, this civil penalty will be assessed upon Rapoport for his conduct in relation to the unregistered solicitation of U.S. investors from 2003 until 2007.

Rapoport also argues that, "[w]here there is 'evidence' to suggest there is no risk of future violations, . . . the Division cannot simply rely on past violations. . . . From mid-2008 to September 2009, Rapoport was employed by another Russian broker dealer, BrokerCredit Service, where he never solicited any U.S. investors. As of September 2009, Rapoport no longer works for BrokerCredit Service, or any other broker dealer." (Mem. at 19.) Rapoport further contends that, because he "was never personally served with the OIP, he has not yet had the opportunity to demonstrate that an associational bar is not in the 'public interest.'" (Mem. at 20.)

First, I reject Rapoport's premise that lack of personal service deprived him of the opportunity to demonstrate anything, including an argument with regard to the public interest factors. Rapoport made a calculated decision to contest service, and, when his opposition failed, he chose to ignore the remainder of the proceedings. Moreover, a fourteen-month period of claimed good behavior and lack of current employment in the securities industry hardly demonstrates "evidence to suggest there is no risk of future violations." As the Default Order amply discusses, Rapoport's actions do warrant the issuance of a cease-and-desist order and a bar from association with any broker or dealer. Nothing in Rapoport's latest argument changes my conclusions as to these sanctions.

I find equally unpersuasive Rapoport's claim that "[t]he order for an accounting . . . is both unduly broad and impossible for Rapoport to comply with." (Mem. at 20.) I concur with the Division's assessment that Rapoport misreads the Default Order as it relates to this sanction, and that Rapoport, despite lack of access to certain CI-Moscow documents, should be fully able to disclose his own income from CI-New York and CI-Moscow from December 2003 through 2007. (Opp'n at 11.)

With the exception of the civil penalty calculation, Rapoport's critique of the sanctions ordered against him have no merit or support within the record or the Commission's case law. Despite his urging to the contrary, the orders that he cease and desist, be barred from association, and provide an accounting were fair and in accordance with the Commission's precedent in the assessment of sanctions. As discussed further above, there was an error in the summation of civil penalties pursuant to the calculation formula outlined in the Default Order; it is appropriate to correct the "Order" paragraph of the Default Order to rectify this clerical error. This does not require the Default Order to be set aside, as an appropriate order correcting this civil penalty total is provided below.

ORDER

It is ORDERED that, the final paragraph of the Order Making Findings and Imposing Sanctions by Default as to CentreInvest, Inc., Dan Rapoport, and Svyatoslov Yenin, Exchange Act Release No. 60413, dated July 31, 2009, be CORRECTED to read: "IT IS FURTHER ORDERED, pursuant to Section 21B(e) of the Securities Exchange Act of 1934, that CentreInvest, Inc., shall pay a civil monetary penalty of $1,575,000 and that Dan Rapoport and Svyatoslov Yenin shall each pay a civil monetary penalty of $315,000."

Rapoport has not shown good cause for setting aside the Default Order. His Motion to Set Aside the Default Judgment as to Rapoport is DENIED.

SO ORDERED.

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Robert G. Mahony
Administrative Law Judge