

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 51115 / February 1, 2005

Admin. Proc. File No. 3-11537

In the Matter of  
RICHARD KERN

and

CHARLES WILKINS

c/o Eric W. Berry, Esq.  
509 Madison Avenue, Suite 2004  
New York, New York 10022

ORDER DENYING MOTION FOR SUMMARY AFFIRMANCE, SETTING ASIDE  
DEFAULT, AND REMANDING FOR FURTHER PROCEEDINGS

On July 7, 2004, we issued an Order Instituting Proceedings ("OIP") regarding, among others, Richard Kern and Charles Wilkens ("Respondents"). The Office of the Secretary subsequently received confirmations, dated July 13, 2004, that the Respondents had received the OIP. The OIP stated that Respondents had twenty days within which to answer the OIP or risk being found in default.

By August 5, 2004, the Commission had not received Answers from either Respondent, and on that day, the administrative law judge issued his Order Making Findings and Imposing Sanctions by Default ("August 5 Order"). <sup>1/</sup> On August 19, 2004, Respondents filed their Motion to Vacate Default and For Leave to File Answer, to which Respondents attached a supporting affidavit and a proposed answer. On September 14, 2004, the law judge denied Respondents' Motion to Vacate ("September 14 Order"). On October 12, 2004, the Commission granted Respondents' Petition for Review of the August 5 and September 14 Orders.

On October 26, 2004, the Division of Enforcement moved for summary affirmance of the law judge's orders. Rule of Practice 411(e)(2) provides that the Commission may summarily affirm an initial decision if the Commission determines that no issue raised in the proceeding warrants further consideration. <sup>2/</sup> The Rules of Practice provide further that the Commission

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<sup>1/</sup> Richard Kern, Securities Exchange Act Rel. No. 50151 (Aug. 5, 2004), \_\_\_ SEC Docket \_\_\_. Twenty days from July 13 was August 2. Respondents, however, were served with the OIP by mail, and so were entitled to three extra days in which to file their answer pursuant to Rule of Practice 160(b), 17 C.F.R. § 201.160(b). Therefore, their answer was due to the Commission on August 5, 2004, the day the default was entered.

<sup>2/</sup> Rule of Practice 411(e)(2), 17 C.F.R. § 201.411(e)(2).

may deny a motion for summary affirmance upon a reasonable showing that, among other reasons, the initial decision embodies an exercise of discretion that is important and that the Commission should review. <sup>3/</sup> We have noted previously that "summary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest, and the parties have a right to full consideration of those matters." <sup>4/</sup>

In their brief opposing the Division's motion for summary affirmance, Respondents argued that they should be allowed to present their case that they were less culpable than other respondents despite the implicit finding of the law judge that all the Respondents were equally culpable. We previously have considered the relative culpability of a respondent in our consideration of the public interest. <sup>5/</sup> We have determined that it is appropriate to consider Respondents' evidence, as well as any evidence they wish to adduce with respect to the public interest. In accordance with these views, the motion for summary affirmance is denied.

Rule of Practice 155(b) provides that "the Commission, at any time, may for good cause shown set aside a default." <sup>6/</sup> Rule of Practice 155(b) states that a request to set aside a default must be made within a reasonable time, state the reasons for the failure to defend, and specify the nature of the proposed defense in the proceeding. <sup>7/</sup> The Commission grants motions to set aside a default when to do so would prevent injustice, and under such conditions as seem appropriate. In this matter the Respondents promptly requested that the default be set aside, filing a motion supported by an explanatory affidavit and a proposed answer to the OIP within fourteen days of the issuance of the August 5 Order.

We note that it 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. <sup>8/</sup> In the event a respondent fails to demonstrate that he or she should not be found in default (or fails to respond at all) the law judge enters a default and determines the case against the respondents on the basis of the allegations in the OIP and other record evidence, if any. <sup>9/</sup>

Here, the law judge departed from the customary practice and did not issue an order to show cause. Instead, he immediately imposed a default on Respondents and determined the case

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<sup>3/</sup> Id.

<sup>4/</sup> Christopher A. Lowry, Securities Exchange Act Rel. No. 45131 (Dec. 5, 2001), 76 SEC Docket 1134, 1136 n.8 (quoting Richard Cannistraro, Exchange Act Rel. No. 39521 (Jan. 7, 1998), 66 SEC Docket 790, 791 n.3).

<sup>5/</sup> John S. Brownson, Exchange Act Rel. No. 46161 (July 3, 2002), 77 SEC Docket 3636 3640 n.12.

<sup>6/</sup> 17 C.F.R. § 201.155(b).

<sup>7/</sup> Id.

<sup>8/</sup> See e.g., Gregg Baker, Exchange Act Rel. No. 49244 (Feb. 13, 2004), 82 SEC Docket 677.

<sup>9/</sup> Id.

against them. We believe that an order to show cause would have served to confirm whether Respondents were in default and perhaps have conserved time. We have determined to deem the law judge's August 5 Order to be the equivalent of the show cause order customarily entered in similar circumstances. In this context, we treat Respondents' motion to vacate default and accept the proposed answer as an appropriate response and accept the answer attached thereto as the Respondents' answer in this matter curing the default. 10/

Accordingly, IT IS ORDERED that the order of default be, and it hereby is, set aside; and ORDERED that Respondents' answer be, and it hereby is, accepted and deemed filed; and;

ORDERED that this matter is remanded to the law judge for further proceedings consistent with this order. 11/

By the Commission.

Jonathan G. Katz  
Secretary

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10/ Law judges have accepted answers filed in response to orders to show cause as a cure for what would otherwise have been a default. Nano World Projects Corp., Initial Decision Rel. No. 228 (May 20, 2003), 80 SEC Docket 1035.

11/ We also direct 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 period between August 5, 2004, and the date of this order.