Initial Decision Release No. 1396
Administrative Proceeding
File No. 3-17693

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

Sean P. Finn and
M. Dwyer LLC

Initial Decision of Default
February 18, 2020

Appearances: Steven W. Simpson, Hemma R. Lomax, Melissa Armstrong, and Christian D.H. Schultz for the Division of Enforcement, Securities and Exchange Commission

Sean P. Finn, pro se

Before: James E. Grimes, Administrative Law Judge

I grant the Division of Enforcement's motion for summary disposition and entry of sanctions. Respondents Sean P. Finn and M. Dwyer LLC are barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in November 2016, when it issued an order instituting proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934.[1] This proceeding is a

[1] OIP § I; *see* 15 U.S.C. § 78*o*(b).

follow-on proceeding based on a permanent injunction entered against Finn and Dwyer by the United States District Court for the District of Nevada.[2]

This proceeding was previously assigned to a different administrative law judge, who issued an initial decision in April 2017.[3] In June 2018, the Commission stayed all pending cases.[4] In August 2018, following the Supreme Court's decision in *Lucia v. SEC*, the Commission allowed the stay to lapse, and remanded all cases pending before it for reassignment, with instructions for the newly assigned administrative law judge to give no weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.[5] The Commission's remand order included this case among a list of remanded cases.[6] Following the Commission's remand order, this proceeding was reassigned to me.[7]

After reassignment, I determined that Respondents were served with the OIP in January 2017.[8] Because they had not answered the OIP or otherwise participated in this proceeding, I ordered them to show cause by November 2018 why they should not be found in default.[9] Respondents did not respond to the order to show cause. In March 2019, the Division of Enforcement filed a motion for summary disposition and sanctions.

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2 *See SEC v. Malom Grp. AG*, No. 2:13-cv-2280 (D. Nev.) (the civil case); OIP § II.B.2.

3 *Sean P. Finn*, Initial Decision Release No. 1126, 2017 WL 1425434 (ALJ Apr. 21, 2017).

4 *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10510, 2018 WL 3193858 (June 21, 2018).

5 *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018); *see also Lucia v. SEC*, 138 S. Ct. 2044 (2018).

6 *Pending Admin. Proc.*, 2018 WL 4003609, at Ex. A.

7 *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2–3 (ALJ Sept. 12, 2018).

8 *Finn,* Admin. Proc. Rulings Release No. 6292, 2018 SEC LEXIS 3149, at *1 (ALJ Nov. 5, 2018).

9 *Id.* at *1–2.

On May 8, 2019, I issued an initial decision in which I found Respondents in default and granted the Division's motion.[10] In the initial decision, I found that the public interest supported barring Respondents from the securities industry and from participating in any penny stock offering.[11]

Five days later, on May 13, 2019, the Commission's Office of the Secretary received a filing styled as "Sean Finn's Response to SEC's Division of Enforcement's Motion for Summary Disposition and Imposition of Sanctions." In his two-page response, Finn asked that I stay this proceeding pending a ruling on a motion to dismiss he filed in the civil case.[12] Alternatively, he stated, in a single sentence, that he objected to the Division's motion.[13] In an attached service page, Finn, who was then in pretrial detention, "declare[d] that" his response "was deposited with the facilities mail system, to be sent, via first class mail on May 8, 2019 from Nevada Southern Detention Center, to the Commission's Secretary."[14]

On learning of Finn's filing in July 2019, I issued a notice explaining that because the Office of the Secretary did not receive Finn's filing until after I issued the initial decision, "I d[id] not have the authority to consider it."[15] In late September 2019, the Commission "determined that it is appropriate to remand th[is] proceeding to provide [me] with authority to consider Finn's filing."[16] But the Commission "express[ed] no view on how [I] should exercise that authority."[17] It thus vacated the initial decision and remanded this proceeding to me.[18]

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[10] *Sean P. Finn*, Initial Decision Release No. 1375, 2019 WL 2053576, at *1, *5 (May 8, 2019).

[11] *Id.* at *5.

[12] Resp. at 1–2.

[13] *Id.* at 2.

[14] *Id.* at 3.

[15] *Finn*, Admin. Proc. Rulings Release No. 6623, 2019 SEC LEXIS 1718 (ALJ July 10, 2019) (citing *Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 WL 6173809, at *3 & n.25 (Oct. 17, 2013), and 17 C.F.R. § 201.111).

[16] *Finn*, Exchange Act Release No. 87057, 2019 WL 4596724 (Sept. 23, 2019).

[17] *Id.*

[18] *Id.*

Following the Commission's remand order, I issued an order denying Finn's stay motion and granting him the opportunity to respond to the Division's motion for summary disposition.[19] Finn did not avail himself of this opportunity.

I now consider what effect to give Finn's May 2019 submission. Under the prison mailbox rule, which the Commission follows in its administrative proceedings,[20] Finn's submission is considered filed as of the date he placed it in the mailing system of the facility where he is detained.[21] And May 8, 2019, the date on which he placed it in the system, was the same date that I issued the initial decision. I will therefore treat Finn's submission as though it was filed before I issued the initial decision, which is now vacated. The question therefore is whether, after considering his submission and subsequent failure to respond to the Division, I should change my decision to grant the Division's motion.

In his two-page submission, Finn devotes one sentence to the Division's motion for summary disposition, stating that he "hereby objects to the unfounded summations, and assemblage of evidence, contained in the 'Motion [for] Summary Disposition' in its entirety."[22] Even construing this sentence as an opposition to the Division's motion, Finn filed it nearly six weeks after it was due without seeking leave to file it late. Moreover, Finn never answered the OIP or responded to the order to show cause. On remand, he was provided with another opportunity to respond to the Division's motion and warned that failure to respond to the motion may be grounds for a default. Finn's May 2019

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[19] *Finn*, Admin. Proc. Rulings Release No. 6691, 2019 SEC LEXIS 3480, at *1–2 (ALJ Sept. 27, 2019).

[20] *See William Harper Minor, Jr.*, Exchange Act Release No. 87531, 2019 WL 6038085, at *1 & n.4 (Nov. 13, 2019) (applying the prison mailbox rule in a case involving an imprisoned respondent).

[21] *See Houston v. Lack*, 487 U.S. 266, 270 (1988) (holding that pro se prisoners are deemed to have filed papers with a court's clerk upon delivering them to prison authorities); *Casanova v. Dubois*, 304 F.3d 75, 79 (1st Cir. 2002) ("So long as the prisoner complies with the prison's procedures for sending legal mail, the filing date for purposes of assessing compliance with the statute of limitations will be the date on which the prisoner commits the mail to the custody of prison authorities."); Fed. R. App. P. 25(a)(2)(A)(iii).

[22] Resp. at 2.

filing notwithstanding, therefore, I again find that he and Dwyer are in default.[23]

But even if Finn's filing were sufficient to save Respondents from being in default, for two reasons, the result would not change. For starters, Finn's general objection and conclusory assertion that the Division's presentation is unfounded does not suffice to demonstrate that there is a "genuine issue with regard to any material fact."[24] And absent any contrary evidence, it was appropriate for me to rely on the Division's evidence in granting summary disposition.[25]

Further, as a result of Respondents' default, in the initial decision I construed the OIP's allegations as true.[26] But I based only two material factual findings on the allegations in the OIP: (1) "[f]rom April 2010 through September 2011, which is the relevant time period charged in the Commission's injunctive complaint, Finn was Dwyer's sole owner, officer, and employee," and (2) "[d]uring that time, Finn and Dwyer acted as unregistered brokers."[27]

These findings, however, are also supported by the Division's evidence, as discussed below in findings of fact. Because the Division affirmatively showed that Finn and Dwyer acted as unregistered brokers during the relevant time period, even ignoring Respondents' default, the ultimate result does not change.

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[23] *See* 17 C.F.R. §§ 201.155(a), .220(f).

[24] 17 C.F.R. § 201.250(b); *see* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,224 n.112 (July 29, 2016) ("[A] non-moving party 'may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing.'" (quoting *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014))); *cf. Sommerfield v. City of Chicago*, 863 F.3d 645, 649 (7th Cir. 2017) ("Summary judgment is not a time to be coy: [c]onclusory statements not grounded in specific facts are not enough. The non-movant must cit[e] to particular parts of materials in the record." (internal citation and quotation marks omitted; alterations in original)).

[25] *See* 81 Fed. Reg. at 50,224 n.112.

[26] *Finn*, 2019 WL 2053576, at *1.

[27] *Id.* at *2.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323, 17 C.F.R. § 201.323.[28] Because they failed to answer the OIP or otherwise participate in this proceeding other than the late submission discussed above, Respondents are in default.[29] As a result of Respondents' default, I may accept as true the factual allegations in the OIP, although that is unnecessary to reach my decision in this case.[30] In making the findings below, I have applied preponderance of the evidence as the standard of proof.[31]

From April 2010 through September 2011, which is the relevant time period charged in the Commission's injunctive complaint, Finn was Dwyer's sole manager. The Division submitted an unrebutted declaration that Finn was Dwyer's "sole manager," Finn and Dwyer "are alter-egos of each other," and their activities took place from April 2010 through September 2011.[32] During this time, Respondents solicited investors and induced transactions in

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[28] I take official notice of the docket in the civil case and the orders the district court has issued. Finn and several other defendants were indicted in 2013 and charged in a 24-count indictment with securities fraud, wire fraud, and conspiracy to commit securities and wire fraud. *See* Indictment, *United States v. Brandel*, No. 2:13-cr-439 (D. Nev. Dec. 11, 2013) (the criminal case), ECF No. 1.

I also take notice of the docket, orders, and filings in the criminal case. Finn was extradited from Canada in 2018 and ordered detained pending trial. *See* Order of Detention Pending Trial, Criminal Case (August 2, 2018), ECF No. 390. Finn's criminal trial concluded on February 4, 2020, when a jury found him guilty of nine charges, including wire fraud, securities fraud, and conspiracy. *See* Jury Verdict, Criminal Case (Feb. 4, 2020), ECF No. 566. Finn's sentencing is set for May 12, 2020. *See* Minutes of Proceedings, Criminal Case (Feb. 4, 2020), ECF No. 562.

[29] *See* 17 C.F.R. §§ 201.155(a), .220(f); *Pending Admin. Proc.*, 2018 WL 4003609, at *1.

[30] *See* 17 C.F.R. §§ 201.155(a), .220(f).

[31] *See John Francis D'Acquisto*, Investment Advisers Act of 1940 Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

[32] Simpson Decl. at 3.

investment contracts.[33] They facilitated the signing of investment contracts, provided updates to investors, and provided advice on the merits of investments.[34] Respondents also received transaction-based compensation.[35] Tellingly, key participants regarded Finn as a broker.[36] Through their conduct, as further described below, Respondents effectively held themselves out as brokers. Respondents, however, did not register with the Commission as brokers.[37]

Respondents participated in a fraudulent scheme in which at least 14 investors lost millions of dollars. Finn introduced investors either to Malom Group AG,[38] an entity based in Switzerland, or M.Y. Consultants.[39] Although Finn's pitch to investors took a variety of forms, it typically involved hallmarks of fraud: purportedly riskless investment with guaranteed, quick, and highly

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[33] *See, e.g.*, Lomax Decl., Exs. 4 (email soliciting investors in Finn's "model" in exchange for a "success fee"); 5 (email from Finn explaining the investment strategy to a potential investor); and 6 (M. Dwyer website which presented an opportunity to obtain profits from transactions involving financial instruments and emphasizing its referral-based business model). *See also* Lomax Decl., Ex 1 (joint venture agreement and escrow instructions emailed from M.Y. Consultants director to investor Ed Glazebrook, copying Finn); Simpson Decl., Exs. 1 (spreadsheet from M.Y. Consultants showing investors by investment type, including Glazebrook) and 3 (email from Finn to the Division listing amounts he was paid by M.Y. Consultants for the investment contracts he offered, broken down by investor, including Glazebrook).

[34] *See, e.g.*, Lomax Decl., Exs. 13–15.

[35] Lomax Decl., Ex. 24A, at 141 (M.Y. Consultants director explaining that Finn and other brokers received one-quarter "of whatever was brought in" as compensation "[f]or bringing in the customer").

[36] *See* Lomax Decl., Exs. 16 (email from customer referring to Finn as "the broker") and 24A, at 123 (M.Y. Consultants director explaining that Finn was one of "three brokers" who brought in clients to M.Y. Consultants).

[37] Lomax Decl., Ex. 25.

[38] In the civil case, the SEC alleged that Malom is an acronym for "make a lot of money." Complaint at 1, Civil Case (Dec. 16, 2013), ECF No. 1.

[39] Lomax Decl., Ex. 8 at 2, Ex. 24A at 123; *see* Lomax Decl., Ex. 16 (describing Finn as a broker), Ex. 17; *see also* Simpson Decl., Ex. 3 (reflecting payments received in relation to specified investors).

unlikely returns.[40] Many investors were lured into placing large sums—between $250,000 and $550,000—in a supposedly secure escrow account, "always under your control," that would enable investors to access fantastic returns.[41] Portraying itself as a serious financial player—"at this time we do have a $10M minimum"—Dwyer's website described the sizeable funds to be placed in escrow as "modest."[42] But the promise of fantastic returns would turn out to be false and investors would eventually lose funds placed in escrow—which was the point of the scheme.

Other investors were solicited to provide $5.5 million in return for $11 million to be earned in one day.[43] Investors were purportedly allowed to "re-enter the program as many time[s] as they want."[44]

Investors were usually told that their investments were protected by a certificate of deposit or proof that Malom had large deposits "at a recognized and respected financial institution."[45] But because the scheme would fall apart if investors contacted the financial institutions that were supposedly protecting their risk-free investments, Finn took steps to dissuade investors from investigating potential problems. In an e-mail in September 2010, he told an investor that "[a]ny unscheduled calls or communications to the bank will

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[40] *See* Lomax Decl., Ex. 3, Ex. 10; *see also* Lomax Decl., Ex. 6 (Dwyer website).

[41] *See* Lomax Decl., Ex. 2, Ex. 5 at 121629; *see also* Lomax Decl., Ex. 6, Ex. 12, Ex. 13 at 409, 412; Simpson Decl., Ex. 4.

[42] *See* Lomax Decl., Ex. 6.

[43] *See* Lomax Decl., Ex. 7A, Ex. 9.

[44] Lomax Decl., Ex. 7A; *see* Lomax Decl., Ex. 9.

[45] Lomax Decl., Ex. 1 at 29 ($100 million in cash and cash equivalents "at a recognized and respected financial institution"), Ex. 3 at 7766 (certificate of deposit), 7769 ("Your participation will never be at risk as you will receive a Certificate of Deposit guaranteed by an A rated insurance company that will completely guarantee the return of your cash."), Ex. 5 at 121629 ("Our money is at UBS and Credit Suisse."), Ex. 6 (Dwyer website claiming that "[o]ur money is at UBS, Credit Suisse, Deutsche Bank and HSBC"), Ex. 12 at 42 ("[W]e are prepared to segregate $55M at Deutsche Bank, Frankfurt, Main Branch for your investment opportunity."), Ex. 13 at 410 ("cash and cash equivalents" of at least $54 million "at a recognized and respected financial institution").

result in a cease and desist. Those calls have to be scheduled."[46] A few months later, he told principals with investor LGB9 Enterprises that "communications with the bank" had to go through Joseph Micelli, an alleged co-conspirator affiliated with Malom, and that "unscheduled communications with the bank could kill the transaction."[47]

The same day Finn warned LGB9 not to investigate, Anthony Brandel from M.Y. Consultants directed the escrow agent to disperse approximately $300,000.[48] LGB9 soon demanded its money back and Martin U. Schläpfer, identified as a member of Malom's board, responded with a lengthy e-mail in which he said LGB9's demands were "extreme and outrageous" and "intended to cause … emotional distress."[49] After receiving Schläpfer's email, a

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[46] Lomax Decl., Ex. 19.

[47] Lomax Decl., Ex. 18 at 640. Micelli was a defendant in both the civil case and the criminal case. *See* Indictment, Criminal Case (Dec. 11, 2013), ECF. No. 1; Complaint, Civil Case, ECF No. 1. He pleaded guilty to conspiracy to commit wire and securities fraud in November 2015. Plea Agreement, Criminal Case (Nov. 24, 2015), ECF No. 187. Micelli was later sentenced to 60 months' imprisonment and ordered to pay $5.65 million in restitution. Judgment as to Joseph Micelli, Criminal Case (Mar. 4, 2016), ECF No. 262. In the civil case, the district court granted injunctive relief in September 2014, and found Micelli jointly and severally liable to pay disgorgement and interest in excess of $11.3 million and imposed a civil penalty of nearly $900,000. Judgment, Civil Case (Sept. 15, 2014), ECF No. 38.

[48] Simpson Decl., Ex. 4.

[49] Lomax Decl., Ex. 16 at 581. Brandel and Schläpfer were charged in Finn's indictment and were also co-defendants in the civil case. *See* Indictment, Criminal Case, ECF. No. 1; Complaint, Civil Case, ECF No. 1. Brandel was convicted in December 2015 of conspiracy to commit wire and securities fraud, nine counts of wire fraud, and eight counts of securities fraud. Jury Verdict as to Anthony B. Brandel, Criminal Case (Dec. 7, 2015), ECF No. 215. He was sentenced to 87 months' imprisonment, ordered to pay, jointly and severally, over $6.4 million in restitution, and ordered to forfeit $4.9 million. Order on Restitution and Final Order of Forfeiture, Criminal Case (May 14, 2019), ECF. No. 436; Judgment as to Anthony B. Brandel, Criminal Case (June 7, 2019), ECF No. 454. Schläpfer, who is apparently a Swiss citizen and resident, *see* Notice at 2, Civil Case (Apr. 7, 2014), ECF No. 32, has not been tried.

In the civil case, the court enjoined Schläpfer and imposed joint and several disgorgement and prejudgment interest of over $12 million and a civil penalty of about $5.5 million. Final Judgment as to Defendant Martin U.

representative of LGB9 indicated that they told counsel to prepare to file a complaint.[50]

Other investors soon began to express concerns.[51] In March 2011, Finn tried to assuage one investor's concerns by asserting that Malom's CEO had 30 years of international banking experience and claiming Malom had "made billions," was a "financial powerhouse," and had "closed deals with Wal Mart, Bank of America and the State of New York."[52] Another investor claimed Malom unilaterally removed the investor's escrowed funds without authority under the investment contract.[53]

Although he did not tell investors, Finn was compensated by Malom and M.Y. Consultants for bringing in investors.[54] Respondents received approximately $845,000 from M.Y. Consultants.[55] The 14 investors Respondents recruited eventually lost over $6 million.[56]

In November 2016, the United States District Court for the District of Nevada permanently enjoined Respondents from violating Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act, and

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Schläpfer, Civil Case (Sept. 29, 2017), ECF No. 97. It also enjoined Brandel and found him jointly and severally liable to pay disgorgement and interest of almost $6 million and imposed a civil penalty of nearly $630,000. Final Judgment as to James C. Warras and Anthony B. Brandel, Civil Case (Sept. 29, 2017), ECF No. 98.

50 Lomax Decl., Ex. 16 at 581.

51 *See* Lomax Decl., Ex. 2 (alleging that 17 investors, including LGB9, had collectively lost over $7.9 million).

52 Lomax Decl., Ex. 17.

53 Lomax Decl., Ex. 9 at 3.

54 Simpson Decl., Ex. 1, Ex. 3, Ex. 7; Lomax Decl. Ex. 22, Ex. 24A at 141–42; *see* Lomax Decl., Ex. 4 at 19760 ("We … are only paid a success fee when the project is funded."), Ex. 5 at 121629 (claiming that Respondents would only take "a small percentage" of profits and an "engagement fee" that would not be released to Respondents until the investor's attorney or banker approved).

55 Simpson Decl. at 8.

56 *Id.* at 4–5.

Exchange Act Rule 10b-5.[57] The court found Respondents and three other defendants jointly and severally liable for disgorgement of $6.5 million in profits and interest.[58] The court also imposed individual civil penalties of over $700,000 on both Dwyer and Finn.[59]

Conclusions of Law

The Exchange Act gives the Commission authority to impose a collateral bar[60] if, as is relevant here, (1) a respondent was associated with or seeking to become associated with broker or dealer at the time of the misconduct at issue; (2) the respondent was enjoined "from engaging in or continuing any conduct or practice … in connection with the purchase or sale of any security"; and (3) imposing a bar is in the public interest.[61]

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[57] Final Judgment as to Sean P. Finn and M. Dwyer LLC, Civil Case (Nov. 1, 2016), ECF No. 57.

[58] *Id.* at 5.

[59] *Id.*

[60] A collateral bar, also referred to as an industry bar, is a bar that prevents an individual from participating in the securities industry in capacities in addition to those in which the person was participating at the time of his or her misconduct. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *1 & n.1 (Oct. 29, 2014).

[61] 15 U.S.C. § 78*o*(b)(4)(C), (6)(A)(iii). Exchange Act Section 15(b)(4) authorizes sanctions, such as registration revocation, against broker-dealers. 15 U.S.C. § 78*o*(b)(4). Section 15(b)(6)(A) incorporates by reference Section 15(b)(4) and provides for sanctions against "any person who is associated … with a broker or dealer." 15 U.S.C. § 78*o*(b)(6)(A). The term *person associated with a broker or dealer* includes "any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer." 15 U.S.C. § 78c(a)(18). And "the term 'person'" includes both "a natural person" and a "company." 15 U.S.C. § 78c(a)(9); *see also* 1 U.S.C. § 1 (providing that in the United States Code, "the word[] 'person' … include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Dwyer, which is an LLC, Simpson Decl., Ex 5, is thus a person and consequently is subject to sanction under Section 15(b)(6) as a person associated with a broker or dealer. *See Winning the Money Game With Ike, Inc.*, Exchange Act Release No. 83110, 2018 WL 1960468, at *2 (Apr. 26, 2018) (settled proceeding) (imposing sanctions under Section 15(b)(6) on an entity); *see infra* note 65.

During the time of the alleged misconduct, Respondents solicited investors, induced transactions in investment contracts, received transaction-based compensation, and held themselves out as brokers.[62] Taken together, these facts show that Respondents acted as brokers.[63] Finally, the evidence demonstrates that Respondents failed to register as brokers.[64] Finn and Dwyer thus acted as unregistered brokers during the relevant time period. The first factor is met in this case.[65]

Turning to the second factor, the district court permanently enjoined Respondents from selling unregistered securities, acting as unregistered broker-dealers, committing fraud in the offer or sale of any securities, and committing fraud in connection with the purchase or sale of any securities.[66] The terms of this injunction meet the requirement that a court has enjoined Respondents from "engaging in … any conduct … in connection with the … sale of any security."[67]

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62 *See supra* notes 32–36 and accompanying text.

63 *See* 15 U.S.C. § 78c(a)(4)(A) ("The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others."); *Daniel Joseph Touzier*, Exchange Act Release No. 86420, 2019 WL 3251484, at *2 & nn.8–9 (July 19, 2019) (describing activities that are indicative of being a broker); *see also SEC v. Edwards*, 540 U.S. 389, 393 (2004) ("The test for whether a particular scheme is an investment contract," and thus a security under the federal securities laws, is "'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.'" (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946))).

64 Lomax Decl., Ex. 25.

65 *See James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *5 (Feb. 15, 2017) ("Because we find that Tagliaferri himself met the definition of a 'broker,' we also find that he met the definition of a 'person associated with a broker' for purposes of Exchange Act Section 15(b)(6)."); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *8 (July 26, 2013) ("It is well established that [the Commission is] authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding.").

66 *See* Final Judgment as to Sean P. Finn and M. Dwyer, LLC, Civil Case, ECF No. 57.

67 15 U.S.C. § 78*o*(b)(4)(C).

To determine whether imposing a collateral bar would be in the public interest, I must weigh the factors set forth in *Steadman v. SEC*.[68] These include:

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[69]

The Commission also considers the deterrent effect of administrative sanctions.[70] The public interest inquiry is "flexible" and "no one factor is dispositive."[71]

Before imposing a collateral bar, an administrative law judge must determine, based on the evidence presented, whether a bar "is necessary or appropriate to protect investors and markets."[72] I must therefore "'review [Respondents'] case on its own facts' to make findings regarding [their] fitness to participate in the industry in the barred capacities."[73] A decision to impose a collateral bar "should be grounded in specific 'findings regarding the

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[68] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Securities Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

[69] *David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016).

[70] *Id.* General deterrence is relevant but not determinative of whether the public interest weighs in favor of imposing a collateral bar. *See Peter Siris*, Advisers Act Release No. 3736, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

[71] *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

[72] *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

[73] *Id.* (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)).

protective interests to be served' by barring the respondent and the 'risk of future misconduct.'"[74]

The Commission has stated as a matter of policy that an antifraud injunction "has especially serious implications for the public interest."[75] And "'[f]idelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud."[76] The Commission has thus declared that absent contrary evidence, "it will [ordinarily] be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry, or prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions."[77]

Taking these principles into consideration, it is apparent that the public interest requires barring Respondents from the industry. The district court enjoined Respondents from violating the antifraud provisions of the Securities Act and the Exchange Act and Respondents have presented nothing to show that they do not warrant a severe sanction.

Moreover, Respondents' conduct was egregious. They were key players in a fraudulent scheme and personally recruited 14 investors who lost over $6 million.[78]

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[74] *Id.* (quoting *McCarthy*, 406 F.3d at 189–90); *see also John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012) ("[T]he Commission must consider not only past misconduct, but the broader question of the future risk the respondent poses to investors."), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016).

[75] *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

[76] *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

[77] *Melton*, 2003 WL 21729839, at *9.

[78] Simpson Decl. at 4–5, Ex. 1. Finn's actions and state of mind are attributed to Dwyer. *See Bernerd E. Young*, Exchange Act Release No. 774421, 2016 WL 1168564, at *19 n.81 (Mar. 24, 2016); *Clarke T. Blizzard*, Advisers Act Release No. 2253, 2004 WL 1416184, at *5 (June 23, 2004).

Additionally, Respondents were enjoined from selling unregistered securities and acting as unregistered brokers.[79] The registration requirements in Section 5 and Section 15 are central to the Commission's investor-protection mission.[80] By selling unregistered securities in violation of Section 5 of the Securities Act, Respondents deprived investors of information they needed to make informed investment decisions.[81] This is particularly important here because compliance with Section 5 could well have prevented the fraud that Respondents perpetrated.

Respondents' conduct was not isolated. They participated in the scheme for approximately 18 months and received at least 13 commission payments during that time period for their efforts.[82] Finn also made seven payments, totaling $143,050 to other participants in the scheme.[83]

Finn also acted with a high degree of scienter. He never mentioned that he would be compensated for bringing in investors. He promoted investment schemes that, on their face, offered highly unlikely returns. But the indicia of fraud—risk-free investments and quick, guaranteed, and fantastic returns—show that Finn knew or was reckless in not knowing that investors would not receive those returns. The steps Finn took to prevent investors from learning the truth further shows that he acted with scienter. And Finn's scienter is imputed to Dwyer.[84]

Because Respondents have not meaningfully participated in this proceeding, they have not made assurances against future misconduct or demonstrated that they understand or recognize the wrongfulness of their misconduct.

Additionally, allowing Respondents to remain in the securities industry would present them with future opportunities for further misconduct and

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79 Final Judgment as to Sean P. Finn and M. Dwyer, LLC, at 3–4, Civil Case, ECF No. 57.

80 *See Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080, at *3 (Jan. 23, 2017), *pet. denied*, 695 F. App'x 980 (7th Cir. 2017).

81 *See Id.*

82 Simpson Decl. at 8.

83 *Id.* at 9.

84 *See Blizzard*, 2004 WL 1416184, at *5.

would put the investing public at risk. This determination is supported by my finding that their conduct was egregious.[85]

Finally, imposing a collateral bar will serve the Commission's interest in deterring others from engaging in similar misconduct.

In light of the factors discussed above, I find that it is in the public interest to impose collateral and penny-stock bars against Respondents.

Order

The Division of Enforcement's motion for summary disposition and sanctions is GRANTED.

Under Section 15(b) of the Securities Exchange Act of 1934, Sean P. Finn and M. Dwyer LLC are BARRED from:

> associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[86] Under that rule, a party may file a petition for review of this initial decision within 21 days after service of the initial decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the initial decision.[87] If a motion to correct a manifest error of fact is filed by a party, then a party has 21 days to file a

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[85] *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (holding that a finding of egregiousness "justifies the inference" that misconduct will recur); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *11 (Jan. 16, 2008) ("The existence of a violation raises an inference that the violation will be repeated, and where the misconduct resulting in the violation is egregious, the inference is justified.").

[86] *See* 17 C.F.R. § 201.360.

[87] *See* 17 C.F.R. § 201.111.

petition for review from the date of the order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision will not become final as to that party.

Respondents may move the Commission to set aside the default under Rule of Practice 155(b), which permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate.[88] A motion to set aside a default must 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.[89] Such motion, if filed, should be directed to the Commission, as the hearing officer may set aside a default only "prior to the filing of the initial decision."[90]

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James E. Grimes
Administrative Law Judge

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88 17 C.F.R. § 201.155(b).

89 *Id.*

90 *Id.*