UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18943

In the Matter of

MARK J. MOSKOWITZ

Respondent.

## DIVISION OF ENFORCEMENT'S MOTION FOR DEFAULT JUDGMENT AND IMPOSITION OF SANCTIONS AGAINST RESPONDENT

The Division of Enforcement ("Division"), pursuant to Rules 155(a) and 220(f) of the Securities and Exchange Commission's Rules of Practice (codified at 17 C.F.R. Part 201, Subpart D), respectfully moves the Commission for the entry of default judgment and the imposition of sanctions against Respondent Mark J. Moskowitz. In support of this motion, the Division submits the memorandum below and the Declaration of Fuad Rana ("Rana Decl.").[1]

## MEMORANDUM IN SUPPORT

During March 2017, in the United States District Court for the District of New Jersey, Respondent pled guilty to one count of wire fraud in violation of Title 18, United States Code, Section 1343. Rana Decl. ¶ 6, Ex. 4. Subsequently, the court entered judgment and sentenced Respondent to 33 months of imprisonment. *Id.* ¶ 7, Ex. 6. As a result of Respondent's criminal conviction, on December 20, 2018, the Commission issued an *Order*

[1] This filing contains the status report on service ordered on April 16, 2019. Rana Decl. ¶ 2, Ex. 1.

*Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing* (the "OIP").[2]

## I. PROCEDURAL HISTORY

The Commission's Office of the Secretary served the OIP upon Respondent by certified mail under Rule 141(a)(2)(i). Rana Decl. ¶ 2, Ex. 1. On December 27, 2018, Respondent sent the Division staff attorney who investigated this case an email stating that Respondent would be unable to defend the OIP and informally requesting that the proceeding be delayed until his term of imprisonment ended. Rana Decl. ¶ 8, Ex. 7. Also on that day, the Commission experienced a lapse of appropriations that lasted through January 25, 2018.

Respondent acknowledged in his December 27 email that his answer to the OIP was due in 20 days. *Id.* Excluding the shutdown period, Respondent's answer was therefore due no later than February 11, 2019 (twenty days from the first business day following the re-opening of the Commission). Rule 220(b). However, as of the filing of this Motion and Memorandum, Respondent has not filed an Answer, nor has he otherwise defended this proceeding. Rana Decl. ¶¶ 3-4.

## II. FACTUAL BACKGROUND

Because Respondent has not timely answered, the Commission may deem true the allegations in the OIP. Rule 155(a). Moreover, the Commission should accept as true the facts and legal conclusions underlying Respondent's guilty plea and conviction. *See Kornman v. SEC*, 592 F.3d 173, 187 (DC Cir. 2010) (affirming the Commission's reliance on the respondent's guilty plea when assessing sanctions).

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[2] The Commission also instituted proceedings pursuant to the March 28, 2017 Summary Penalty and Cease and Desist Order entered by the Bureau of Securities for the State of New Jersey in the action entitled *In the Matter of Mark J. Moskowitz (CRD #2187277) and Edge Trading, LLC.* OIP ¶ 4.

As set forth in the OIP, from June 2004 to October 2007, Respondent was a registered representative with a broker-dealer registered with the Commission. OIP, ¶ A.1.; Rana Decl. ¶ 5, Ex. 2. In addition, from May 2006 to October 2007, Respondent was associated with an investment adviser registered with the Commission. OIP ¶ A.1.; Rana Decl. ¶ 5, Ex. 3.

On March 28, 2017, Respondent pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. Rana Decl. ¶ 6, Ex. 4. As Respondent admitted during his plea hearing, he engaged in an egregious securities fraud while acting as an investment adviser over the course of approximately three and a half years beginning in March 2012. Specifically, the transcript of Respondent's plea hearing states the following:

> THE COURT: From in or about March 2012 through in or about October 2015, did you operate a purported hedge fund in New Jersey known as Edge Trading Partners, LP?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Was the general partner of Edge Trading Partners, L.P. a company known as Edge Trading LLC?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you own and operate Edge Trading LLC?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Was Edge Trading LLC formed to purportedly make investments in U.S. and foreign equities, futures, contracts and options contracts?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Did you induce prospective investors to invest in Edge Trading LLC by telling them you were a successful and profitable investor?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you induce prospective investors to invest in Edge Trading LLC by telling them that, in any given 24 calendar year, you would only be paid 30 percent of any 25 profit generated by Edge Trading LLC?
>
> THE COURT: And did you induce prospective investors to invest in Edge Trading LLC by telling them that, from March 2012 through in or around October 2015, Edge Trading LLC was profitable in each quarter of its operation?

THE DEFENDANT: Yes, your Honor.

THE COURT: Was each of these representations to prospective investors false?

THE DEFENDANT: Yes.

THE COURT: Specifically, did you fail to inform victim investors that the entirety of the investors' principal contributions would not be invested but instead would be diverted to pay your personal expenses?

THE DEFENDANT: Yes.

THE COURT: Did you also email account statements that falsely represented that investors' principal contributions had been fully invested and had appreciated substantially in value?

THE DEFENDANT: Yes.

THE COURT: Based on your misrepresentations, did investors provide you money, by wire transfer and by check, to be deposited in a bank account in the name of Edge Trading LLC?

THE DEFENDANT: Yes, your Honor.

THE COURT: Specifically, on or about September 20, 2013, did you cause Victim 1, an investor living in or around Byron, Georgia, to send a wire transmission of $100,000 from Victim 1's bank account to a bank account controlled by you?

THE DEFENDANT: Yes.

THE COURT: Did you divert money from that Edge Trading LLC bank account to personal use instead of investing in U.S. and foreign equities, futures contracts, and options contracts?

THE DEFENDANT: Yes.

THE COURT: Did you take all of these actions knowingly and with the intent to defraud victim investors?

THE DEFENDANT: Yes.

THE COURT: And as a result of this scheme, did you cause victim investors to suffer a loss of approximately $694,576.71?

THE DEFENDANT: Yes.

Rana Decl. ¶ 6, Ex. 5 at 23-25.

On July 27, 2017, the court sentenced Respondent to 33 months in prison and ordered him to pay restitution totaling $694,576.71. Rana Decl. ¶ 7, Ex. 6 at 7.

## III. ARGUMENT

Moskowitz has not filed an Answer to the Commission's OIP, despite the passage ofe over two months since the due date. The Commission should find him in default and should enter judgment accordingly. In addition, because the conduct described in the OIP and to which Moskowitz has pleaded guilty is egregious, sanctions are appropriate.

### A. The Entry of a Default Judgment Is Appropriate.

As noted, Respondent has failed to file an answer despite knowing his obligation to do so. Respondent's informal request to the staff attorney to delay this proceeding until after his term of incarceration has ended, which he estimated as eight or nine months away, was not properly directed to the Commission and is not a proper request for delay. Moreover, the request is unreasonable on its face. *See, e.g.*, Rule 161(c)(1) (extensions beyond 21 days require statement in the record or written order); Rule 360(a)(2) (timeline for initial decision normally is not to exceed 120 days); *see also In the Matter of Lynn Tilton*, Advisers Act Release No. 4735, 2017 SEC LEXIS 2296 (July 28, 2017) (denying request for stay of proceedings and noting the "strong public interest in the prompt enforcement of the federal securities laws").

Commission Rule of Practice 155(a) provides that "[a] party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails ... [t]o answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding." Here, because Respondent has failed to "answer ... or otherwise to defend the proceeding," entry of judgment by default is warranted. Rules 155(a), 220(f).

### B. Sanctions Under Section 203(f) Are Appropriate.

Section 203(f) of the Investment Advisers Act authorizes the Commission to bar an individual "associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser . . . from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such . . . bar is in the public interest and that such person has committed or omitted any act or omission enumerated in [the statute] within ten years of the commencement of the proceedings." 15 U.S.C § 80b-3(f). Here, Respondent admitted that he formed a hedge fund and then induced persons to invest in, among other things, domestic and foreign equities. Rana Decl. ¶ 6, Ex. 5 at 23. Therefore, Respondent both acted as and was associated with an investment adviser. 15 U.S.C. § 80b-2(a)(11) (defining an "investment adviser" as "[a]ny person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities"); 15 U.S.C. § 80b-2(a)(17) (defining "person associated with an investment adviser" as including "any person ... controlling ... such investment adviser"); *see also In the Matter of John J. Kenny*, 56 S.E.C. 448, 484-85 & n.54 (May 14, 2003) (associated person may be liable as primary violator where his or her activities meet broad definition of investment adviser).

Instead of using investor funds, as promised, to purchase equities or other financial instruments, Respondent diverted investor money from his hedge fund's bank account to his

personal use. Rana Decl. ¶ 6, Ex. 5 at 25. Such misappropriation of investor funds warrants sanctions.[3]

To determine the duration of a bar, the Commission considers the public interest factors discussed in *Steadman*, which 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.

*Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (quoting *SEC v. Blatt*, 583 F.2d 1325 at 1334 n.29 (5th Cir. 1978)). The Commission also considers the deterrent effect of administrative sanctions. *In the Matter of David R. Wulff*, Exchange Act Release No. 77411, 2016 WL 1077411, at *4 (Mar. 21, 2016) (applying *Steadman* factors). The public interest inquiry is "flexible, and no one factor is dispositive." *Id.; see also In the Matter of Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080 (Jan. 23, 2017), *petition denied*, 695 F. App'x 980 (7th Cir. 2017); *In the Matter of David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam), *cert. denied*, 559 U.S. 1008 (2010).

Here, a permanent bar is in the public interest. Respondent's plea colloquy shows the egregiousness of his conduct and his high degree of scienter. Moskowitz stole almost $700,000 from clients who thought he was running a hedge fund. The duration of Respondent's scheme for over three years and his flagrant breach of trust to his clients show that investors are at risk that he will engage in similar future misconduct. Pursuant to Investment Advisers Act Section 203(f), the public interest is therefore served by barring Respondent Moskowitz from association with an investment adviser, broker, dealer,

[3] The statute specifically lists criminal convictions involving "theft" or "misappropriation of funds" as grounds for proceeding under Section 203(f). 15 U.S.C. § 80b-3(e)(2)(C), (f).

municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

## IV. CONCLUSION

For the reasons set forth above, the Division requests that the Commission find Moskowitz in default and impose sanctions pursuant to Section 203(f) of the Investment Advisers Act.

Dated: April 30, 2019

Respectfully submitted,

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*Counsel for Division of Enforcement*

## CERTIFICATION OF COMPLIANCE WITH RULE 154(c)

I hereby certify that the foregoing brief is fewer than fifteen (15) pages and that the Division therefore has complied with Rule 154(c) of the Commission's Rules of Practice.

Kevin C. Lombardi

*Counsel for Division of Enforcement*

## CERTIFICATE OF SERVICE

I hereby certify that, on April 30, 2019, a true copy of the foregoing *Division of Enforcement's Motion for Default Judgment and Imposition of Sanctions Against Respondent* was served on Respondent as follows:

**By U.S. mail:**

Mark Moskowitz, Register No. [redacted]
[redacted]
[redacted]
P.O. Box [redacted]
Otisville, NY [redacted]

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