

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20086

In the Matter of

GARY EDWARD HAYNES,

Respondent.

MOTION OF THE DIVISION OF ENFORCEMENT FOR AN OPINION OF THE
COMMISSION FINDING RESPONDENT IN DEFAULT, MAKING FINDINGS , AND
IMPOSING SANCTIONS

The Division of Enforcement hereby files its Motion for an Opinion of the Commission Finding Respondent in Default, Making Findings, and Imposing Sanctions and accompanying exhibits. On December 20, 2018, after a four-day trial, a jury convicted Respondent of one count of conducting a racketeering enterprise, one count of embezzlement from a vulnerable adult - \$100,000 or more, eight counts of embezzlement from a vulnerable adult - \$1,000 or more but less than \$20,000, and four counts of filing a false or fraudulent tax return or payment. *People v. Gary Edward Haynes*, Case No. 2018-004131-FH (State of Michigan, 14th Judicial Cir. Ct., Muskegon County). On February 12, 2019, a judgment in the criminal case was entered against Respondent' and he was sentenced to serve 90 months to 20 years in prison. His conviction was placed on automatic appeal because the trial was by a jury. On August 12, 2021, the State of Michigan Court of Appeals affirmed Haynes' conviction. *People of the State of Michigan v. Gary Edward Haynes*, 338 Mich. App. 392 (2021). Haynes filed an application for leave to

appeal to the Michigan Supreme Court; that application was denied on July 28, 2022. *People of the State of Michigan v. Gary Edward Haynes*, 977 N.W.2d 533 (Mich. 2022).

As depicted below in the summary of the facts of the criminal trial, the victim was a vulnerable and trusting widow in her 90s who requested Respondent's help with paying her bills online, and Respondent cashed out her annuities and withdrew substantial amounts of money from her financial accounts by check and online transfers and spent the funds on himself. Respondent did not deny withdrawing the funds, but claimed that the victim authorized the withdrawals and that the funds were for an investment in real estate or were loans from the victim to him. Thus the major issue presented to the jury was whether the victim knowingly authorized the withdrawals. After hearing the evidence, the jury voted to convict Respondent.

HISTORY OF THIS PROCEEDING

Based on Respondent's criminal conviction, on September 28, 2020, the Commission instituted this follow-on administrative proceeding to determine what, if any, remedial action is appropriate in the public interest against Respondent. After requesting briefs, the Commission ruled on August 8, 2022 that the original Order Instituting Proceedings ("OIP") included an error. On October 21, 2022, the Commission granted the Division's motion to amend the OIP to correct the error. In accordance with Rule 141 of the Rules of Practice, the Division served Amended OIP on Respondent on October 31, 2022. To date, Respondent has not answered or otherwise responded to the Division's allegations.

FACTS

The Division obtained electronic copies in pdf format of the 7 transcripts of the jury trial and sentencing hearing in the Michigan State criminal prosecution of *People v. Gary Edward Haynes*, Case No. 2018-004131-FH (State of Michigan, 14th Judicial Cir. Ct., Muskegon

County). The Division obtained the electronic copies of the transcripts through the cooperation of the 14th Judicial Circuit Court for Muskegon County, Michigan. The transcripts total 813 pages in length.

The Division is filing pdf versions of the 7 transcripts that comprise the record of the underlying criminal trial as Exhibits 1 through 7 to this brief.¹

THE TRIAL

The trial lasted four days. Together, the prosecution and defense called sixteen witnesses. The witnesses included the sole victim in the case, a Chase Bank branch manager, investigators from the Michigan Attorney General's Office, a doctor, caretakers for the victim, experts on taxation, and the defendant. The parties also introduced several exhibits, consisting primarily of checks and bank statements.

The Victim Was a Vulnerable Adult

The victim was 97 years old at the time of the trial in December 2018, and was between 90 and 94 years old at the time of the disputed withdrawals from her financial accounts - March 2011 through September 2015². She is a widow³, has no children⁴ and lives alone, against her doctor's advice.⁵ According to a niece, the victim relies extensively on others for nearly everything, and the niece and neighbors take her for her medical appointments and grocery

¹ The exhibits are marked as follows: Exhibit 1 (*People v. Haynes*, Jury Trial Tr., vol. 1 of 4, December 17, 2018); Exhibit 2 (*People v. Haynes*, Jury Trial Tr., vol. 2 of 4, December 18, 2018); Exhibit 3 (*People v. Haynes*, Jury Trial Tr., vol. 3 of 4, December 19, 2018); Exhibit 4 (*People v. Haynes*, Jury Trial Tr., vol. 4 of 4, December 20, 2018); Exhibit 5 (*People v. Haynes*, Settlement Conference Tr., December 13, 2018); Exhibit 6 (*People v. Haynes*, Verdict Tr., December 20, 2018); Exhibit 7 (*People v. Haynes*, Sentence Tr., February 8, 2019).

² Ex. 1, 205:20

³ Ex. 1, 206:19

⁴ Ex. 3, 116:14

⁵ Ex. 2, 233:24

shopping, do her laundry, and look through her fridge for expired food items.⁶ According to her doctor, she has severe medical conditions and receives very strong medication which affects her mental acuity. Her doctor added that she went into a nursing home for a month in July 2013.⁷

Relationship between Victim and Respondent

The victim and Respondent had a relationship that was both professional and social, and indicated a strong bond of trust between them.⁸ They met initially in 2007 at a financial seminar Respondent conducted for senior citizens and, shortly thereafter, Respondent came by the victim's house to draw up an estate plan for her. Within six to eight months, at the victim's request, Respondent began helping her pay her bills online.⁹ Over time, when the victim's tax preparer died, Respondent took over that job as well.¹⁰ Along the way, Respondent offered the victim financial advice, such as converting the victim's six certificates of deposit to a tax-deferred annuity, to prevent her social security income from being taxed.¹¹ Respondent did not charge for any of these professional services.¹² At the social level, they took each other to a Mexican restaurant on their birthdays and they attended Respondent's children's school activities.¹³ According to Respondent, he did everything for the victim that needed to be done, such as changing light bulbs, installing screen doors, and installing handrails in the victim's bathroom.¹⁴

⁶ Ex. 2, 207:5 – 208:17

⁷ Ex. 2, 232:8

⁸ Ex. 3, 108:1-4

⁹ Ex. 3, 116:16-20; 208:5-9

¹⁰ Ex. 3, 104:18

¹¹ Ex. 3, 112:15

¹² Ex. 3, 105:6

¹³ Ex. 3, 108:7-21

¹⁴ Ex. 3, 106:21 – 107:17; Ex.1, 210:16-17

Respondent's Withdrawals of Funds from the Victim's Financial Accounts

In September 2016, the victim attempted to take money out of her bank account but could not. This event began an inquiry by the bank manager which revealed that the victim appeared to have endorsed an annuity check to Respondent in a suspicious manner.¹⁵ In a phone discussion between the manager and Respondent, Respondent promised to repay the amount in a few days, but never did.¹⁶

A full-blown investigation of the victim's finances by the Office of Michigan Attorney General discovered that Respondent had withdrawn substantial sums of money from the victim's accounts between March 2011 and September 2015. Respondent cancelled two annuities valued at \$107,735.10 and \$117,490.42, and deposited the proceeds in the bank account of a company he controlled. He also withdrew substantial amounts by checks and online transfers.¹⁷ The evidence showed that Respondent withdrew a total of \$303,656.34 from the victim's accounts.¹⁸

Respondent did not deny making the withdrawals but insisted that the victim knew about the withdrawals and authorized them¹⁹ and that the withdrawals were for an investment in real estate²⁰ or were personal loans²¹ from the victim to him. He pointed out that the victim signed all documents necessary to effect a transfer of funds from her account and that he never forged the victim's signature.²² He also testified that the victim kept a journal of all withdrawals from her account, and that he counter-signed journal entries that evidenced the loans to him.²³ He testified about a \$116,353.90 promissory note he created on April 5, 2011 to memorialize the

¹⁵ Ex. 2, 62:16 – 68:13

¹⁶ Ex. 2, 68:18

¹⁷ Ex. 2, 128:4-10; 138:5-116; 139:9-25

¹⁸ Ex. 3, 208:10-15

¹⁹ Ex. 3, 123:8-18

²⁰ Ex. 3, 126:8 – 127:14; 152:5 – 152:5

²¹ Ex. 3, 135:25 – 136:10; 160:4-20

²² Ex. 3, 123:1-4

²³ Ex. 3, 123:22; 141:23 – 142:4

personal loans he took from the victim, which was originally due on April 5, 2015.²⁴ He added that the note was orally modified to extend the due date to April 2019, by which time the victim would be 98 years old.²⁵ Respondent kept the promissory note to himself.²⁶

Though Respondent claimed that his reason for cashing out the victim's annuity and investing the proceeds in real estate in 2013 was because real estate was a better investment, he admitted that real estate investments have been bad investments beginning in 2008.²⁷

Respondent's claim that some of the withdrawals were for a real estate investment was not consistent with the evidence.²⁸ The Michigan Attorney General's investigation found that Respondent did not spend any part of the funds on any type of investments.²⁹ They found that Respondent spent the funds exclusively on such expenditures as car repairs, sunglasses, restaurants, hotels, air travel, retailers, payments to family members, and college expenses.³⁰

Respondent knew that the victim gave her niece a power of attorney, pursuant to an estate plan he created for the victim in 2008, but he never discussed with the niece the purported real estate investments and personal loans, all of which occurred between 2011 and 2015.³¹

On her part, the victim, who was 97 years old at the time of the trial,³² testified that she did not know about the transfers and did not authorize them.³³ She added that she never intended to loan money to Respondent or go into any type of business with him,³⁴ though she identified

²⁴ Ex .3, 147:14-22

²⁵ Ex. 3, 157:7-23

²⁶ Ex. 3, 149:19 – 150:5

²⁷ Ex .3, 176:25 – 177:25

²⁸ Ex. 2, 133:7

²⁹ Ex. 2, 145:3-12; 130:7-15; 144:7 – 145:2

³⁰ Ex. 2, 142:4-25; 150:17-21

³¹ Ex. 3, 175:9-15

³² Ex. 1, 205:20; Ex. 3, 184:1

³³ Ex. 1, 215:8 – 221:9; Ex. 2, 8:9-13

³⁴ Ex. 1, 218:18 – 219:20; 220:2 – 221:17; 214:4-25

her signature on the withdrawal documents.³⁵ She insisted that she had no reason to make any type of payments to Respondent. When her attorney showed her documentation evidencing several withdrawals from her accounts, including two annuity checks for \$107,735 and \$117,490, and several online transfers from her bank accounts to Respondent's companies, which bore her signature, she testified that she did not know about them.³⁶ She recounted that, when she needed to temporarily go into a nursing home, Respondent attempted to persuade her to liquidate an annuity and give the proceeds to him for safekeeping, to prevent the nursing home from taking her money, but she rejected the idea.³⁷

Evidence of Prior Bad Acts

The Court admitted evidence from two retirees who entrusted funds to Respondent for investments, and could not get Respondent to return their funds when they needed their money back.³⁸ Here too, investigators from the Attorney General's Office found that Respondent never invested their funds but used them for personal purposes.³⁹

Jury Instructions

With respect to the testimony about Respondent's prior bad acts, the Court told the jurors that if they believed the testimony, they may only think about whether the evidence tended to show that Respondent meant not to pay the victim her money when she asked for it, or that Respondent acted purposefully, that is, not by accident or mistake or because he misjudged the situation, or that Respondent used a plan, scheme, or characteristic scheme that he had used

³⁵ Ex. 2, 13:17 – 17:20

³⁶ Ex. 1, 218:18 – 221:9; Ex. 2, 13:17 – 17:20

³⁷ Ex. 1, 213:1 – 214:6

³⁸ Ex. 3, 36:2; 16:18 – 19:7

³⁹ Ex. 2, 125:13; 150:17-21

before.⁴⁰ The Court said they must not decide that it shows that Respondent was a bad person or was likely to commit crimes.⁴¹

With respect to the charge of conducting a racketeering enterprise, the Court said that the jurors needed to determine whether the prosecution had proved beyond a reasonable doubt that Respondent was an employee of, or was associated with, an enterprise and that Respondent knowingly conducted or participated in the affairs of the enterprise through a pattern of racketeering.⁴² The Court explained that the jurors could infer [racketeering] where Respondent served as the victim's agent, had money entrusted to his care because of the agency relationship, and failed to refund or deliver the money to the victim when requested.⁴³ The Court added that a pattern of racketeering required at least two acts of racketeering which, among other things, have the same or substantially similar purpose, result, participants, victim, or method of commission or are otherwise interrelated by distinguishing characteristics and are not isolated acts.⁴⁴

With respect to the charge of embezzlement from a vulnerable adult, the Court instructed the jurors that they needed to determine whether the prosecution had proved beyond a reasonable doubt that Respondent obtained or used the victim's money; that Respondent used fraud, deceit, or misrepresentation, coercion, or unjust enrichment to obtain or use money; that at the time, the victim was a vulnerable adult, meaning she was 18 years old or older and, because of age, developmental disability, mental illness, or physical disability, required supervision and personal care and lacked the personal and social skills required to live independently; that Respondent

⁴⁰ Ex. 3, 250:16 – 251:4

⁴¹ Ex. 3, 248:15-17

⁴² Ex. 3, 252:16-19

⁴³ Ex. 3, 256:20 – 257:5

⁴⁴ Ex. 3, 255:16 – 256:7

knew or should have known that the victim was a vulnerable adult; and the property was taken for the benefit of Respondent.⁴⁵

The Court then instructed the jury as to the crime of filing a false or fraudulent tax return or payment. The Court said to prove this charge, the prosecutor must prove that: Respondent either made or caused a tax return or payment to be made to Michigan Department of Treasury, the return or payment was false or fraudulent and, at the time of the return or payment, Respondent had the intent to defraud or evade payment of the tax or part of the tax. The Court added that Respondent is required to report income on tax returns, that income includes any gain or money or property that Respondent obtained during the reporting tax period, and that it does not matter whether the money or property was gained in a legal or illegal manner.⁴⁶

THE VERDICT

The jury convicted Respondent on all fourteen counts: count one (conducting a racketeering enterprise), count two (embezzlement from a vulnerable adult - \$100,000 or more), counts three to ten (embezzlement from a vulnerable adult - \$1000 or more but less than \$20,000), and counts eleven to fourteen (filing a false or fraudulent tax return or payment).⁴⁷

SENTENCING

The Court sentenced Respondent to 90 months to 20 years for counts one and two, and 30 months to 5 years for counts three to fourteen, to be served concurrently.⁴⁸

⁴⁵ Ex. 3, 256:6 – 258:6

⁴⁶ Ex. 3, 259:12- 260:9

⁴⁷ Ex. 6, 3:21 – 5:21

⁴⁸ Ex. 7, 34:23 – 35:9

ARGUMENT

Appropriateness of the Sanctions Sought against Respondent

Respondent was Associated with an Investment Adviser

Respondent was associated with SEC-registered investment advisers at the time he committed the crimes for which he was convicted. From November 1, 2010 through January 23, 2015, he was associated with SEC-registered Cherry Investment Advisors, Ltd. as an investment adviser representative.⁴⁹ Also, from January 2015 until October 2016, he was associated with SEC-registered investment adviser First American National Investment Advisors, LLC as an investment adviser representative.⁵⁰

Respondent Was Convicted of Crimes Satisfying Sections 203(f) and 203(e)(2)(C)

Section 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) authorizes the Commission, if it finds that it is in the public interest to do so, to censure, place limitations on the activities of, or suspend or bar from association with an investment adviser or other enumerated entities, any person associated, seeking to become associated, or at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, where, pursuant to Section 203(e)(2)(C), the person within ten years of the commencement of the proceeding has been convicted of a felony involving embezzlement, fraudulent conversion, or misappropriation of funds. Here, Respondent was convicted by a jury of conduct that constituted the embezzlement, fraudulent conversion, and misappropriation of funds, and his conviction was within ten years of the institution of this proceeding.

⁴⁹ Web CRD – U4 Employment History (Individual CRD #5861291)

⁵⁰ *Id.*

A Collateral Bar against Respondent is in the Public Interest

To determine whether a sanction is in the public interest, the Commission should look to the six factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) *aff'd on other grounds*, 450 U.S. 91 (1981): (a) the egregiousness of the defendant's actions; (b) the isolated or recurrent nature of the infraction; (c) the degree of scienter involved; (d) the sincerity of the defendant's assurances against future violations; (e) the defendant's recognition of the wrongful nature of his conduct; and (f) the likelihood that the defendant's occupation will present opportunities for future violations. See *Bryan Lee Addington*, Initial Dec. Rel. No. 1339 (Dec. 20, 2018). The "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive." *David Henry Disraeli and Lifeplan Associates, Inc.*, Exchange Act Rel. No. 57027, 2007 SEC LEXIS 3015, at *61 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam). "Absent extraordinary mitigating circumstances, an individual who has been convicted cannot be permitted to remain in the securities industry." *Frederick W. Wall*, Exchange Act Rel. No. 52467, at 8, 2005 WL 2291407 (Sept. 19, 2005) (quotation omitted); *accord Shreyans Desai*, Exchange Act Rel. No. 80129, at 6, 2017 WL 782152 (Mar. 1, 2017).

Based on a weighing of the *Steadman* factors, an industry bar against Respondent is appropriate and in the public interest. Respondent's conduct was egregious, he acted with a high degree of scienter, his misconduct was recurrent, and he has given no assurance that he will avoid future violations of the law. He acted egregiously by winning the victim's trust and confidence by doing her favors, such as running errands for her, and then betraying her trust by stealing her money. On repeated occasions over a period of more than 4 years (March 2011 to September 2015), Respondent misappropriated the victim's money. He has failed to recognize the wrongful

nature of his conduct or to give assurances that he will avoid future violations of the law. In fact, he denies any wrongdoing, despite the jury verdict. Furthermore, the existence of a violation raises an inference that the violation will be repeated. *Rockies Fund, Inc., et al.*, Exchange Act Rel. No. 27593 (Dec. 7, 2006) (citing *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)). Although Respondent is serving a lengthy sentence, he will eventually be released; and unless he is barred from the securities industry he will have the chance to again harm investors.

Finally, in order to convict Respondent of the underlying criminal charges, the jurors had to make several factual findings, as instructed by the Court. Those necessary findings dovetail with the public interest standards at issue in this proceeding. The Court instructed the jury that to convict Respondent they were required to find that the prosecution had proved beyond a reasonable doubt, among other things, that he was involved in conducting a criminal enterprise; that he was involved in committing an offense for financial gain; that he used a false pretense—a statement, writing, or other device that was false or that could mislead—to knowingly make someone else believe something that was false; that he knew the pretense was false at the time he used it; that he intended to defraud or cheat someone when he used the pretense; that another person relied on the pretense; that he obtained money by use of the pretense; and that he used fraud, deceit, or misrepresentation to obtain money from a vulnerable adult.

CONCLUSION

For the reasons set forth above, the Division respectfully requests, pursuant to Rule 155 of the Rules of Practice, that the Commission grant the Division's Motion finding Respondent in default and enter an order barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

Dated: February 21, 2023

Respectfully submitted,

s/John E. Birkenheier

John E. Birkenheier

Brian D. Fagel

Godfried B. Mensah

Division of Enforcement

Securities and Exchange Commission

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CERTIFICATE OF SERVICE

I hereby certify that I caused true copies of the Division of Enforcement's Motion for an Opinion of the Commission Finding Respondent in Default, Making Findings, and Imposing Sanctions and Exhibits 1-7 thereto, to be served on the following on this 21st day of February, 2023, in the manner indicated below:

CERTIFIED MAIL
Mr. Gary Edward Haynes 536591
Central Michigan Correctional Facility
320 Hubbard
St. Louis, MI 48880

Dated: February 21, 2023

s/John E. Birkenheier
Godfried B. Mensah

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ENFORCEMENT'S INDEX OF HEARING EXHIBITS

<u>Exhibit</u>	<u>Description</u>
ENF. Ex.1	<i>People v. Haynes</i> , Jury Trial Transcript Volume I
ENF. Ex.2	<i>People v. Haynes</i> , Jury Trial Transcript Volume II
ENF. Ex.3	<i>People v. Haynes</i> , Jury Trial Transcript Volume III
ENF. Ex.4	<i>People v. Haynes</i> , Jury Trial Transcript Volume IV
ENF. Ex.5	<i>People v. Haynes</i> , Settlement Conference Transcript
ENF. Ex.6	<i>People v. Haynes</i> , Verdict Transcript
ENF. Ex.7	<i>People v. Haynes</i> , Sentence Transcript