

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20264

In the Matter of

DEAN MUSTAPHALLI,

Respondent.

**DIVISION OF ENFORCEMENT’S MOTION FOR A FINDING
THAT RESPONDENT IS IN DEFAULT AND FOR IMPOSITION
OF REMEDIAL SANCTIONS AND SUPPORTING MEMORANDUM OF LAW**

Pursuant to Commission Rules or Practice 154, 155(a) and 220(f), 17 C.F.R. §§ 201.154, 155(a) and 201.220(f), the Division of Enforcement (“Division”) respectfully moves the Securities and Exchange Commission (the “Commission”) for an order finding Respondent Dean Mustaphalli (“Respondent” or “Mustaphalli”) in default, and imposing remedial sanctions against him, and submits this Memorandum of Law, together with the August 9, 2021 Declaration of Todd D. Brody (“Brody Dec.”) and exhibits annexed thereto, in support.

I. Background

1. Allegations in the OIP

On April 19, 2021, the Order Instituting Proceedings (“OIP”) in this matter was issued pursuant to Section 203(f) of the Investment Advisers Act of 1940. *See Dean Mustaphalli*, Investment Advisers Act Release No. 5724 (April 19, 2021). As alleged in the OIP, between

June 2014 and March 2017, Mustaphalli, age 50, acted as an investment adviser, purporting to advise clients on their investments in securities for compensation. OIP II.A.

On December 12, 2019, Mustaphalli pleaded guilty to 18 counts of grand larceny in the second degree in violation of New York Penal Law (“NYPL”) 155.40-1, one count of forgery in the second degree in violation of NYPL 170.10-1, one count of criminal possession of a forged instrument in the second degree in violation of NYPL 170.25, two counts of scheme to defraud in the first degree in violation of NYPL 190.65, one count of falsifying business records in violation of NYPL 170.10-0, and one count of violations of the Martin Act in violation of New York General Business Law 352-C-06 before the Supreme Court of the State of New York, in New York v. Mustaphalli, Indictment No. 559-2018 (the “Criminal Action”). OIP II.B.1. On October 16, 2020, Mustaphalli was sentenced to a prison term of 3 to 9 years imprisonment. OIP II.B.1. On July 8, 2020, a judgment on consent was entered against Respondent in the Supreme Court of the State of New York; Respondent was ordered to pay \$6 million in restitution and enjoined under the Martin Act (New York General Business Law §§ 352 *et seq.*) from engaging in securities related business within New York in New York v. Mustaphalli, Index No. 451705/2017 (the “Civil Action”). OIP ¶ II.B.2.

2. The Underlying Civil and Criminal Actions

On June 14, 2017, the New York State Attorney General’s Office (“NYAG”) filed a complaint against Respondent in the Civil Action. As alleged in the Civil Action, Respondent was “an unscrupulous investment adviser” who “misled and defrauded New Yorkers who depended and relied on [him] for investment advice and who entrusted [him] with all or most of

their retirement savings.” Brody Dec., Ex. A.¹ In his criminal sentencing, the court found that Mustaphalli engaged in a fraudulent scheme to invest his clients’ funds in a high-risk hedge fund without their permission or knowledge and when he incurred massive losses, he diverted \$100,000 of his clients’ money to pay for his personal expenses. OIP ¶ II.B.3.

A. The Criminal Sanctions

On December 12, 2019, Mustaphalli pleaded guilty to 18 counts of grand larceny in the second degree in violation of New York Penal Law (“NYPL”) 155.40-1, one count of forgery in the second degree in violation of NYPL 170.10-1, one count of criminal possession of a forged instrument in the second degree in violation of NYPL 170.25, two counts of scheme to defraud in the first degree in violation of NYPL 190.65, one count of falsifying business records in violation of NYPL 170.10-0, and one count of violations of the Martin Act in violation of New York General Business Law 352-C-06 before the Supreme Court of the State of New York, in the Criminal Action. *See* OIP ¶ II.B.1; Brody Dec., Ex. B. On October 16, 2020, the court sentenced Respondent to a prison term of 3 to 9 years imprisonment. OIP ¶ II.B.1.; Brody Dec., Ex. C.

B. The Civil Sanctions

On July 8, 2020, a judgment on consent was entered against Respondent in the Civil Action, and he was ordered to pay \$6 million in restitution and enjoined under the Martin Act

¹ In addition to the Complaint in the Civil Action (Brody Dec., Ex. A), the Division submits the following filings from the Criminal and Civil Actions in support of its motion, each of which the Commission may take official notice of pursuant to Commission Rules of Practice 323, 17 C.F.R. § 201.323: the Criminal Action Plea Hearing transcript held on December 12, 2019 (Brody Dec., Ex. B); the October 16, 2020 Sentencing Hearing transcript from the Criminal Action (Brody Dec., Ex. C); and the July 8, 2020 Order and Judgment on Consent from the Civil Action (Brody Dec., Ex. D).

(New York General Business Law §§ 352 *et seq.*) from engaging in securities related business within New York. OIP ¶ II.B.2; Brody Dec., Ex. D.

3. Mustaphalli Did Not Answer the OIP

Mustaphalli did not respond to the OIP. The OIP was published by the Commission's Office of the Secretary on April 19, 2021, and the Secretary's Office served Mustaphalli the OIP by U.S. Mail at his address at the Gouverneur Correctional Facility, 112 Scotch Settlement Road, P.O. Box 370, Gouverneur, NY 13642 on April 21, 2021. U.S. Mail records indicate that the OIP was delivered on April 26, 2021. *See* Declaration of Sheldon Mui, dated August 9, 2021.

The OIP directed Mustaphalli to file an Answer within twenty days after service of the OIP. *See* OIP at IV. Moreover, Rules 160(a) and 220(b) of the Commission's Rules of Practice provide that the answer to the OIP is due within 20 days of service and that a time period runs until the end of the next day that is not a Saturday or Sunday; 17 C.F.R. §§ 201.160(a) and 201.220(b). Mustaphalli's answer, therefore, was due no later than May 17, 2021.

Mustaphalli never filed an answer to the OIP with the Secretary's Office, and did not otherwise attempt to communicate with the Division. The Division has not received any response to the OIP, nor does the docket of this proceeding reflect any filing by Mustaphalli in response to it. Brody Dec. ¶ 1. Accordingly, the Division now moves for a finding that Mustaphalli is in default, and for the imposition of remedial sanctions. Specifically, the Division requests that the Commission order that Mustaphalli be barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

II. Argument

1. **Mustaphalli Should be Deemed in Default.**

Rule 155(a) of the Commission's Rules of Practice states:

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 records, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails: ...

(2) to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding ...

17 C.F.R. § 201.155(a). The OIP specifically provides that “[i]f Respondent fails to file the directed Answer ... the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true ...”. OIP ¶ IV, citing Rules 155(a), 220(f), 221(f), and 310.

Rule 141(a)(2)(i) sets forth permissible methods of service of the OIP upon individuals, which include “sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt” 17 C.F.R. § 201.141(a)(2)(i).

Here, the Secretary's Office served Mustaphalli the OIP by U.S. Mail at his address at the Gouverneur Correctional Facility, 112 Scotch Settlement Road, P.O. Box 370, Gouverneur, NY 13642 on April 21, 2021. U.S. Mail records indicate that the OIP was delivered on April 26, 2021. *See* Declaration of Sheldon Mui, dated August 9, 2021.

The Division requests that Mustaphalli be deemed in default for failing to timely respond to the OIP after having been served in compliance with Rule 141.

2. The Facts Alleged in the OIP Should be Deemed True.

As set forth above, failure to file an answer may result in the allegations of the OIP being deemed true. In this case, that includes the following:

1. Between June 2014 and March 2017, Respondent acted as an investment adviser, purporting to advise clients on their investments in securities for compensation.
2. On December 12, 2019, Respondent pled guilty to 18 counts of grand larceny in the second degree in violation of New York Penal Law (“NYPL”) 155.40-1, one count of forgery in the second degree in violation of NYPL 170.10-1, one count of criminal possession of a forged instrument in the second degree in violation of NYPL 170.25, two counts of scheme to defraud in the first degree in violation of NYPL 190.65, one count of falsifying business records in violation of NYPL 170.10-0, and one count of violations of the Martin Act in violation of New York General Business Law 352-C-06 before the Supreme Court of the State of New York, in the Criminal Action.
3. On October 16, 2020, Respondent was sentenced to a prison term of 3 to 9 years imprisonment in the Criminal Action.
4. On July 8, 2020, a judgment on consent was entered against Respondent. Respondent was ordered to pay \$6 million in restitution and enjoined under the Martin Act (New York General Business Law §§ 352 *et seq.*) from engaging in securities related business within New York in the Civil Action.
5. During the relevant time period, Mustaphalli was an investment adviser. While an investment adviser, Mustaphalli engaged in a fraudulent scheme to invest his clients’ funds in a high-risk hedge fund without their permission or knowledge and when he incurred massive losses, he diverted \$100,000 of his clients’ money to pay for his personal expenses.

The facts alleged in the OIP demonstrate that the sanctions requested against Mustaphalli are appropriate and in the public interest.

3. The Appropriate Remedial Sanctions in this Case

The Commission typically considers the factors described in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) when determining appropriate public-interest remedies. Those factors are: (1) the egregiousness of the Respondents’ actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of scienter involved; (4) the sincerity of the Respondents’ assurances

against future violations; (5) the Respondents' recognition of the wrongful nature of their conduct; and (6) the likelihood that the Respondents' occupations will present opportunities for future violations. *Id.* The Commission also considers the age of the violations, the degree of harm to investors and the marketplace resulting from the violations, and the deterrent effect of administrative sanctions. *Lonny S. Bernath*, ID Release No. 993 at 4, 2016 WL 131539 at *4 (April 4, 2016).

In this case, nearly all of the relevant factors suggest that a full collateral bar is appropriate and in the public interest. The conduct at issue was egregious and resulted in investor losses in excess of \$6 million. Mustaphalli's misconduct was repeated and exhibited a high degree of *scienter*, taking place over a three-year period from June 2014 through March 2017. During this period, Mustaphalli – an investment adviser to clients to whom he owed a fiduciary duty – made materially false and misleading statements and defrauded his clients when he diverted investor funds to pay for his own personal expenses. Moreover, Mustaphalli has not come forward to defend this lawsuit or otherwise make any assurances against future violations and presents the likelihood that he will have the opportunity to commit future violations.

III. Conclusion

For the foregoing reasons, Mustaphalli should be deemed in default, and a full associational bar is appropriate and in the public interest.

Dated: August 9, 2021

Respectfully submitted,

s/ Todd D. Brody
Todd D. Brody, Esq.
Sheldon Mui, Esq.

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CERTIFICATE OF SERVICE

I have caused the attached **Motion For A Finding That Respondent Is In Default And For Imposition Of Remedial Sanctions and Supporting Memorandum of Law, and the accompanying Declaration of Todd D. Brody dated August 9, 2021**, to be served on the following parties and other persons entitled to notice by placing the same in the United States mail or by delivery as listed below and addressed as follows:

Vanessa A. Countryman
Office of the Secretary
Securities and Exchange Commission
100 F. Street, N.S.
Washington, D.C. 20549
(Emailed to APFilings@sec.gov)

Mr. Dean Mustaphalli
Gouverneur Correctional Facility
112 Scotch Settlement Road
P.O. Box 370
Gouverneur, NY 13642

Dated: August 9, 2021
New York, New York

s/ Todd D. Brody
Todd D. Brody