UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20817

In the Matter of

CHARLES K. TOPPING

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR DEFAULT AND OTHER RELIEF

I. Introduction

The Division of Enforcement (the "Division"), pursuant to Rules 155(a) and 220(f) of the Securities and Exchange Commission's ("Commission's") Rules of Practice, 17 C.F.R. §§ 201.155(a) and 201.220(f), moves for entry of an Order finding Respondent Charles K. Topping ("Topping") in default and determining this proceeding against him upon consideration of the record. The Division sets forth the grounds below.

II. History of the Case

On April 8, 2022, the Commission issued the Order Instituting Proceedings ("OIP") against Topping pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The OIP alleges that from April 2009 through December 2015, Topping acted as an unregistered broker by soliciting investors to purchase shares of Sanomedics International Holdings Inc. ("Sanomedics") and Fun Cool Free, Inc. ("FCF") and receiving commissions for the same.

OS Received 04/12/2023

On March 17, 2023, the Commission entered its Order deeming service of the OIP complete,[1] and directed Topping to file an answer to the OIP by April 6, 2023. To date, Topping has not filed an answer or any other response to the OIP.

III. Memorandum of Law

A. Topping's Criminal Case

On September 22, 2016, a federal grand jury in the United States District Court for the Southern District of Florida returned an indictment against Topping based on similar facts alleged in the OIP. *United States v. Sizer, et al*., Case No. 1:16-CR-20715 (S.D. Fla.) ("Criminal Case").[2] On June 22, 2017, after a jury trial, Topping was convicted of two counts of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349, seven counts of mail fraud in violation of 18 U.S.C. § 1341,[3] and one count of wire fraud in violation of 18 U.S.C. § 1343.[4] Topping was sentenced to a prison term of 113 months followed by three years of supervised release and ordered to make restitution.[5]

B. Facts

Based on Topping's default, the allegations of the OIP "may be deemed to be true." 17 C.F.R. § 201.155(a). The OIP establishes the following:

[1] As set forth in the Division's March 6, 2023 Status Report, on February 16, 2023, the Division mailed the OIP, Notice of Appearance of Counsel, and Notice that Documents Are Available for Inspection and Copying to Topping at the address provided by the Bureau of Prisons ("BOP"). On March 3, 2023, the BOP advised the Division that Topping refused such mail and provided a copy of the envelopes notating the same.
[2] Ex. 1 (Criminal Case, Indictment at DE 3).
[3] The OIP mistakenly indicates that Topping was convicted of nine, instead of seven, counts of mail fraud.
[4] Ex. 2 (Criminal Case, Verdict at DE 405).
[5] Ex. 3 (Criminal Case, Amended Judgment at DE 731).

From April 2009 through August 2015, Topping acted as an unregistered broker offering and selling securities in Sanomedics, a penny stock, to individual investors. *See* OIP at ¶¶ A.1 and B.4. Using the alias Charlie Kenn, Topping made false and fraudulent statements to investors regarding Sanomedics, including falsely stating that: he was an employee of Sanomedics and that for a limited time only, a "limited number" of shares of Sanomedics stock were available to them at a steep discount; no commissions or fees would be charged to investors; Sanomedics was a "safe investment," "profitable investment," and one where "you won't lose money;" Topping was an executive at Sanomedics with vast personal wealth; Sanomedics' largest shareholder and board member was the former Chief Executive Officer of Apple Inc. and president of PepsiCo; a television personality known as "the Dog Whisperer" would soon become a spokesperson for Sanomedics' pet thermometer; Sanomedics was developing contracts to sell non-contact thermometers to emergency rooms, telehealth providers, the military, and the Transportation Security Administration, and purchasing its own emergency rooms; and Sanomedics would be trading on NASDAQ within weeks. *Id*. at ¶ B.4. Topping also failed to disclose to investors resale restrictions on Sanomedics shares. *Id*.

Additionally, from August 2014 through December 2015, Topping acted as an unregistered broker offering and selling securities in FCF, a penny stock, to individual investors. *Id*. at ¶¶ A.1 and B.5. Using the alias Charlie Kenn, Topping made false and fraudulent statements to investors regarding FCF including falsely stating that: he was an employee of FCF and providing investors a unique opportunity to purchase a "limited number of shares" at a pre-IPO discount; no commissions or fees would be charged to investors; the safety of the investment was guaranteed, or investors would receive their money back; Topping was an executive at FCF with vast personal wealth who could grant investors access to newly available stock; FCF's largest investor and board

OS Received 04/12/2023

member was the former Chief Executive Officer of Apple Inc. and president of PepsiCo; and FCF would conduct an Initial Public Offering within a couple of weeks or a month. *Id*. at ¶B.5. Topping also failed to disclose to investors resale restrictions on FCF shares. *Id*. Furthermore, he received $1,207,000 in undisclosed commissions for the sale of Sanomedics and FCF stock. *Id*.

C. Entry of Default is Appropriate

Under Rule 155(a) of the Commission's Rules of Practice, a party who fails to file a timely answer "may be deemed to be in default" and the Commission "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 . . . ." 17 C.F.R. § 201.155(a). Here, Topping has not filed an answer, and therefore the proceeding should be determined against him based on the record.

The facts established by Topping's default show that the Division is entitled to the relief it seeks under Exchange Act Section 15(b)(6)(A), which provides an associational bar and a penny stock bar for a person with a qualifying conviction who at the time of the misconduct was associated with a broker or dealer:

> With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person … has been convicted of any offense specified in [Exchange Act Section 15(b)(4)(B)] within 10 years of the commencement of the proceedings under this paragraph.

See 15 U.S.C. §78o(b)(6)(A).

As discussed further below, the requirements for imposing associational and penny stock bars under Section 15(b)(6)(A)—timely issuance of the OIP, Topping's conviction under a qualifying statute, and Topping's misconduct committed while he was associated with an unregistered broker or dealer or acting as an unregistered broker by selling securities while not registered or associated with a registered broker-dealer —are satisfied here.

1. The Division Timely Filed this Action

The Division must commence a proceeding under Section 15(b) within "ten years" of the criminal conviction. *See* 15 U.S.C. §78o(b)(6)(A)(ii). Here, Topping was convicted on June 22, 2017, and the OIP was issued on April 8, 2022. Therefore, this matter was timely filed.

2. Topping Has Been Convicted of a Qualifying Offense

Under the Exchange Act, the Commission may sanction a person who has been convicted of an offense set forth in Section 15(b)(4)(B)(iv), *i.e.*, an offense which "involves the violation of section 152, 1341 [*i.e.,* mail fraud], 1342, or 1343 [*i.e.,* wire fraud] or chapter 25 or 47 of title 18, or a violation of substantially equivalent foreign statute." *See* 15 U.S.C. §78o(b)(6)(A)(ii). Here, Topping was convicted of conspiracy to commit mail and wire fraud, mail fraud, and wire fraud. Thus, he has been convicted of an offense which warrants a sanction.

3. Topping Acted as an Unregistered Broker at the Time of the Misconduct

Section 15(a)(1) of the Exchange Act makes it unlawful for a broker "to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless registered with the Commission in accordance with Section 15(b).

OS Received 04/12/2023

Exchange Act Section 3(a)(4) defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." A person engages in the business of effecting securities by "participat[ing] in purchasing and selling securities involving more than a few isolated transactions; there is no requirement that such activity be a person's principal business or the principal source of income." *Anthony Fields,* Securities Act Rel. No. 9727, at 30, 2015 WL 728005 (Feb. 20, 2015) (quotations and alternations omitted). The broker in question need not have been a registered broker. *Tzemach David Netzer Korem*, Exch. Act Rel. No. 70044, at 12 and n.68, 2013 WL 3864511 (July 26, 2013).

Factors to determine if an individual has acted as a broker include whether the individual: (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, or previously sold, the securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than passive finder of investors. *SEC v. Hansen*, 1984 WL 2413, at 10 (S.D.N.Y. Apr. 6, 1984). These factors are not exclusive, and not all of them, or any particular number of them, must be satisfied for a person to be a broker. *See SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (explaining that the *Hansen* factors "were not designed to be exclusive").

Here, Topping acted as an unregistered broker at the time of the misconduct. Deemed admitted is the OIP's allegations that from April 2009 through December 2015, Topping acted as an unregistered broker by soliciting investors to purchase shares of Sanomedics and FCF stock, both of which are penny stocks, and receiving commissions from his sale of those stocks. *See* OIP at ¶ A.1. Also deemed admitted is the OIP's allegation that Topping made false and fraudulent statements to investors regarding the merits of investing in Sanomedics and FCF, his role as an "executive" at those companies, and his compensation for selling those companies' stocks. *Id*. at

OS Received 04/12/2023

¶¶ A.4-A.5. *See Kornman v. SEC*, 592 F.3d 173, 184 (D.C. Cir. 2010) ("The Commission properly relied on the ordinary meaning of alleged 'misconduct,' which refers to allegedly 'unlawful or improper behavior.'").

4. Collateral and Penny Stock Bars Are Appropriate Sanctions

In determining whether a collateral bar or a penny stock bar is in the "public interest," the Commission considers the 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):

> 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.

Lawrence Deshetler, Advisers Act Rel. No. 5411, at 4, 2019 WL 6221492, at *2 (Nov. 21, 2019); *see also In the Matter of George Bussanich, Jr.*, Initial Decision Rel. No. 967, at 7, 2016 WL 771014, *6-7 (Feb. 29, 2016) (applying *Steadman* factors and imposing permanent collateral and penny stock bars); *In the Matter of Joseph P. Doxey and William Daniels*, Initial Decision Rel. No. 598, at 31, 2014 WL 1943919, *27 (May 15, 2014)) (applying *Steadman* factors and imposing permanent penny stock bar, among other relief). "Absent extraordinary mitigating circumstances, an individual who has been convicted cannot be permitted to remain in the securities industry." *Frederick W. Wall*, Exch. Act Rel. No. 52467, at 8, 2005 WL 2291407, at *4 (Sept. 19, 2005) (quotation omitted); *accord Shreyans Desai*, Exch. Act Rel. No. 80129, at 6, 2017 WL 782152, at *4 (Mar. 1, 2017).

These factors weigh in favor of collateral and penny stock bars. As to the first, second and third factors, Topping's actions were egregious, recurrent, and involved a high degree of scienter. For over six years, he made fraudulent statements to investors regarding Sanomedics and FCF,

OS Received 04/12/2023

including that there was a "limited number" of shares of each and that investors would not be charged commissions or fees. *See* OIP at ¶¶ B.4-B-5. As to his scienter, he was convicted of mail and wire fraud, *see United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) (holding that wire fraud requires a showing of intentional fraud), and conspiracy to commit mail and wire fraud, including that he "knew" the conspiracy existed and that he "knowingly and voluntarily joined it," *see United States v. Moran*, 778 F.3d 942, 960 (11th Cir. 2015) (setting forth elements for conspiracy to commit wire fraud). Furthermore, his conduct involved knowingly devising a scheme to defraud others and to obtain money through false representations, and transmitting mail and wire communications in furtherance of such scheme. *See* OIP at ¶ B.3.

With respect to the fourth and fifth factors, Topping has not participated in this matter, thus providing no assurances that he will avoid future violations of the law. *See Kimm Hannan*, Advisers Act Rel. No. 5906, at 4, 2021 WL 5161855, *3 (Nov. 5, 2021) ("Because [respondent] failed to answer the OIP or respond to the order to show cause or to the Division's motion, he has made no assurances to us that he will not commit future violations or that he recognizes the wrongful nature of his conduct."); *Oscar Ferrer Rivera*, Advisers Act Rel. No. 5759, at 6, 2021 WL 2593642, *4 (June 24, 2021) ("Although his guilty plea indicates that [respondent] might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that he poses a risk to the investing public."). While "[c]ourts have held that the existence of a past violation, without more, is not a sufficient basis for imposing a bar . . . the existence of a violation raises an inference that it will be repeated." *Korem*, Exchange Act Rel. No. 70044, at 10 n.50, 2013 WL 3864511, at n.50 (quotation and alternations omitted). Topping has offered no evidence to rebut that inference.

Sixth, although Topping faces imprisonment, unless he is barred from the securities industry he will have the chance to again harm investors. *See Hannan*, Advisers Act Rel. No. 5906, at 4, 2021 WL 5161855, *3 ("Although [respondent] is currently incarcerated, absent a bar, he would have the opportunity to re-enter the securities industry and commit further violations upon his release."); *In the Matter of James E. Franklin*, 2007 WL 2974200, *8 (Oct. 12, 2007) (absent a bar, there would be no obstacle to respondent's participation in a penny stock offering in the future).

IV. Conclusion

For the reasons discussed above, the Division asks the Commission to sanction Topping by barring him from (1) association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and (b) participating in any offering of a penny stock.

April 12, 2023

Respectfully submitted,

[redacted]

Stephanie N. Moot
Senior Trial Counsel
Direct Line: (305) 982-6313
MootS@sec.gov

DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1950
Miami, FL 33131
Telephone: (305) 982-6300
Facsimile: (703) 813-9526

CERTIFICATE OF SERVICE

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that the foregoing was filed using the eFAP system and that a true and correct copy of said filing has been served on the persons entitled to notice as indicated below on April 12, 2023.

Via USPS Priority Express Mail
Charles K. Topping [redacted]
Residential Reentry Management Office
[redacted]

[redacted]

Stephanie N. Moot
Senior Trial Counsel

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20817

In the Matter of

CHARLES K. TOPPING

Respondent.

INDEX OF EXHIBITS TO THE DIVISION OF ENFORCEMENT'S MOTION FOR DEFAULT

Exhibit	Description
1	Indictment (Case No. 1:16-CR-20715 (S.D. Fla.))
2	Verdict (Case No. 1:16-CR-20715 (S.D. Fla.))
3	Amended Judgment (Case No. 1:16-CR-20715 (S.D. Fla.))