

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20950

In the Matter of

MICHELLE MACCIO

Respondent.

DIVISION OF ENFORCEMENT'S MOTION
FOR ENTRY OF DEFAULT JUDGMENT AND REMEDIAL SANCTIONS

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Pursuant to the April 26, 2023 Order Directing Submission from the Division of Enforcement (“Division”) in this matter, (Advisers Act Release No. 6293 (April 26, 2023)), the Division submits this motion for default judgment and remedial sanctions against Respondent Michelle Maccio (“Respondent” or “Maccio”).

I. INTRODUCTION

This administrative action against Maccio pursuant to Section 203(f) of the Investment Advisers Act of 1940 was instituted on August 9, 2022. Advisers Act Rel. No. 6081 (August 9, 2022). This proceeding is based on an Order issued by the California Department of Financial Protection and Innovation (“DFPI”) (the “California Order”) after a hearing in *The Commissioner of Financial Protection and Innovation, v. Maccio Financial, LLC and Michelle Maccio*, Agency Case Number 169793. The California Order barred Maccio from, among other things, holding “any position of employment, management, or control of any investment adviser.” The California Order also found that Maccio violated California Corporations Code Section 25235(b), which provides that it is unlawful for an investment adviser “to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client.”

Pursuant to SEC Rule of Practice 141(a)(2)(iii), the Order Instituting Proceedings (“OIP”) was served on Respondent. Maccio did not file an answer, and thus is in default. Accordingly, the Division moves, pursuant to Rules 155(a)(2) and 220(f) of the SEC’s Rules of Practice, for a finding that Maccio is in default and for the imposition of remedial sanctions. The Division specifically requests that the Commission issue an order barring Maccio from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

II. FACTS

A. Respondent

Respondent was the manager, chief compliance officer, control person, and sole investment adviser representative of Maccio Financial, LLC, (“MFL”) during the period of time

in which she engaged in the conduct underlying the state regulatory action described below. MFL was an investment adviser that was previously registered in a number of jurisdictions, including, most recently, California from December 2018 through January 2022. Declaration of Lynn M. Dean (“Dean Decl.”), Ex. 1 (OIP at ¶ A.1).

B. Maccio Has Been Barred By the State of California

On December 14, 2021, the DFPI issued the California Order after a hearing in the matter entitled *The Commissioner of Financial Protection and Innovation, v. Maccio Financial, LLC and Michelle Maccio*, Agency Case Number 169793. *Id.* at ¶ B.2. Among other things, the California Order barred Maccio from holding “any position of employment, management, or control of any investment adviser.” *Id.* The DFPI also found that Maccio had violated California Corporations Code Section 25235(b), which provides that it is unlawful for an investment adviser “to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client.” *Id.*

The California Order found that Maccio withdrew more than \$1,300,000 from a private fund managed by MFL to cover her personal expenses. *Id.* at ¶ B.3. According to the California Order, after Maccio started withdrawing money from the fund, she issued the fund a \$500,000 promissory note, but did not make repayments to the fund as required by the promissory note. *Id.* at ¶ B.2; Ex. 2 at pp. 16-19. The California Order also found that Maccio never increased the amount of the promissory note to reflect the larger amount she withdrew from the fund. *Id.* The California Order further determined that Maccio did not disclose to investors that she could borrow money from the fund or issue a promissory note to cover her borrowings. *Id.* at ¶ B.2; Ex. 2 at p. 19. Finally, the California Order found that Maccio failed to disclose in MFL’s Forms ADV, filed on October 10, 2018, January 11, 2019, and May 30, 2019, a U.S. Virgin Islands order issued in September 2018 that, among other things, required Maccio to cease and desist from engaging in any activity as an investment adviser in the U.S. Virgin Islands. *Id.* Ex. 1 at ¶ B.2; Ex. 2 at pp. 6-10.

C. Maccio is in Default

As set forth above, this administrative action against Maccio pursuant to Section 203(f) of the Investment Advisers Act of 1940 was instituted on August 9, 2022. Advisers Act Rel. No. 6081 (August 9, 2022). Service of the OIP was made on Maccio on August 19, 2022, pursuant to Rule 141(a)(2)(i) of the Commission's Rules of Practice. Advisers Act Rel. No. 6293 (April 26, 2023).

On September 14, 2022, the Division reported these facts to the Commission. *Id.* Maccio did not appear or respond to the OIP. *Id.*

On November 29, 2022, the Commission issued an Order to Show Cause ordering Maccio, by December 13, 2022, to show cause why she should not be deemed to be in default and this proceeding be determined against her due to his failure to file an answer and to otherwise defend. Advisers Act Release No. 6691 (Nov. 29, 2022). Maccio did not appear or respond to the OSC. Advisers Act Rel. No. 6293 (April 26, 2023).

Accordingly, Maccio is in default and the Commission moves for default judgment and remedial sanctions against her.

III. ARGUMENT

A. Maccio Is In Default and the Allegations of the OIP May Be Deemed To Be True

Because Maccio has not responded to the OIP, she is in default. Rule 155(a) of the SEC'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 the 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: . . .

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

17 CFR § 201.155(a). Moreover, the OIP itself provides: “If 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” Dean Decl. Ex. 1 (OIP at p. 3).

The Commission has already made findings that Maccio was properly served with the OIP, and has failed to answer. *See* Order to Show Cause, Advisers Act Release No. 6691 (Nov. 29, 2022). Under Rule 155(a), the allegations of the OIP may thus be deemed to be true and the Commission may determine the proceedings against the party upon consideration of the record, including the OIP. 17 CFR § 201.155(a).

B. The Findings in the Underlying Case Are Binding on Respondent

Where, as here, facts have been litigated and determined in an earlier judicial proceeding, those facts may not be revisited in a subsequent administrative proceeding. *See Gary M. Kornman*, Securities Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14257 (finding criminal conviction based on guilty plea has collateral estoppel effect precluding relitigation of issues in Commission proceedings), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007); *Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016) (It is well-established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent, whether resolved by summary judgment, by consent, or after a trial) (collecting cases); *accord Robert Burton*, Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, *petition for review denied*, 285 F. App’x 761 (D.C. Cir. 2008); *In the Matter of Gunderson*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 *15-16 (Dec. 23, 2009).

C. Imposition of a Permanent Bar Is Warranted

1. Maccio Has Been Previously Barred By the State of California for Defrauding Her Clients

Based on the record here and in the underlying action, the Division respectfully requests that sanctions be imposed on Maccio under Section 203(f) of the Advisers Act.

Section 203(f) of the Advisers Act, which references Sections 203(e)(2) of the Advisers Act, provides that the Commission shall censure, place limitations on, suspend, or bar from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, any person who, within the previous ten years, has been convicted of, among other offenses, a felony or misdemeanor which arises out of the conduct of the business of a broker, dealer, or investment adviser, or which involves larceny, theft, embezzlement, misappropriation of funds, or fraudulent conversion, if that person was associated with an investment adviser at the time of the alleged misconduct and if the Commission finds that such a sanction is in the public interest. Section 202(a)(17) provides that the term “person associated with an investment adviser” includes “any employee of such investment adviser.”

Respondent was a registered representative and the principal of an investment adviser registered with the Commission, and she was found by the California DFPI to have engaged in conduct that defrauded her clients and barred as a result. The Commission regularly issues bars under these circumstances. *See, e.g., Hector J. Garcia*, Exch. Act Rel. No. 54116, (July 10, 2006); *James Joseph Conway*, Exch. Act Rel. No. 53722 (Apr. 25, 2006).

2. A Bar Is In the Public Interest

Finally, the record establishes that a bar is in the public interest. In determining whether an administrative sanction is in the public interest, the Commission considers a number of factors, including (1) the egregiousness of the respondent’s actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (3) the sincerity of the respondent’s assurances against future violations; (4) recognition of wrongful conduct; and (5) the likelihood

that the respondent's occupation will present future opportunities for violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 81 (1981); *Lonny S. Bernath*, Initial Dec. Rel. No. 993 at 4, 2016 SEC LEXIS 1222 *10-11 (Apr. 4, 2016) (*Steadman* factors used to determine whether a bar is in the public interest).

a. Respondent's violations were egregious, intentional and recurrent

As previously noted, in the underlying state regulatory action, Maccio was found to have violated the law and her conduct involved fraud, deceit, and manipulative conduct and it resulted in losses to her clients. Dean Decl. Ex. 2 at pp. 28-32. The fact finder in the California DFPI proceeding found that Maccio's violations were numerous and extremely serious in nature. Specifically, he found that Maccio "willfully failed to disclose the Virgin Islands Order in Part 1 of the Form ADV," "borrowed money from clients by entering into the Promissory Note, withdrew funds greatly in excess of the \$500,000 limit on the Promissory Note, and failed to pay the principal and interest after the Promissory Note matured," and "did not disclose to potential investors of MFL that respondent Maccio could borrow money from the fund." *Id.* Ex. 2 at p. 35. This conduct constituted a breach of Maccio's fiduciary duties to her clients and operated as a fraud or deceit on them. *Id.* In all, Maccio misappropriated over \$1,300,000 of the client funds under her management, and she did so in withdrawals over a period of at least a year. Dean Decl. Ex. 1 at ¶¶ B.2-3; Ex. 2 at p. 18. In sum, the egregiousness and extent of Respondent's fraud clearly favor a permanent bar under *Steadman*.

b. The remaining *Steadman* factors also favor a permanent bar

The remaining *Steadman* factors also favor a permanent bar. To begin, Respondent has failed to appear in this proceeding and provide any assurance against future violations and he lacks any apparent recognition of his wrongful conduct. Moreover, at the hearing in the underlying California DFPI hearing, the fact finder determined that Maccio "expressed no remorse for her actions," denied that she failed to disclose the Virgin Islands Order, and blamed others for her record-keeping failures. *Id.* Ex. 2 at p. 36. The "absence of recognition by [a

respondent] of the wrongful nature of his conduct” favors a permanent bar. *Jonathan D. Havey, CPA*, Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522, at *11 (Feb. 11, 2016) (granting permanent bar on motion for summary disposition in follow-on proceeding to criminal conviction); *Siming Yang*, Initial Dec. Rel. No. 788, 2015 SEC LEXIS 1735, at *10 (May 6, 2015) (noting, as part of grant of summary disposition and imposing of permanent bar in follow on proceeding to civil injunction, that, “[c]onsistent with a vigorous defense of the charges, [respondent] ha[d] not recognized the wrongful nature of his conduct”); *Delsa U. Thomas and The D. Christopher Capital Management Group, LLC*, Initial Dec. Rel. No. 205, 2014 SEC LEXIS 4181, at 24 (Nov. 4, 2014) (imposing permanent bar and revoking adviser’s registration on summary disposition following civil fraud injunction, noting that “Respondents do not recognize the wrongful nature of their conduct. Instead, they deny any culpability, insist that none of their conduct was inappropriate, and accuse the Commission and the Commission’s witnesses of bias or lying”); *Terrence O’Donnell*, Initial Dec. Rel. No. 334, 2007 SEC LEXIS 2148, at *14 (Sept. 20, 2007) (weighing in favor of bar respondent’s “protest” that the securities laws were not sufficiently clear, finding this “evidence that [respondent] still seeks to minimize his misconduct”); *Steadman*, 603 F.2d at 1140.

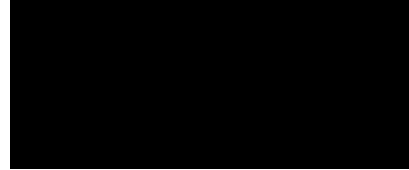
In addition, the final *Steadman* factor considers “the likelihood that the respondent’s occupation will present future opportunities for violations.” This factor is at best neutral, because the Division has no evidence of Maccio’s current occupation. However, Maccio abused her position as a fiduciary of her clients, failed to disclose that she was borrowing client funds to pay her personal expenses, and failed to disclose in three separate Forms ADV, filed on October 10, 2018, January 11, 2019, and May 30, 2019, the existence of a U.S Virgin Islands order that, among other things, required Maccio to cease and desist from engaging in any activity as an investment adviser in the U.S. Virgin Islands. Dean Decl. Ex. 1 at ¶¶ B. 2-3; Ex. 2 at pp. 7-10; 16-20; 27-32; 35; Ex. 3 at p. 8. These actions all strongly indicate intent to deceive. In short, all of the *Steadman* factors favor the imposition of a bar, which is strongly in the public’s interest.

IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that Respondent be barred from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

May 24, 2023

Respectfully submitted,



Lynn M. Dean (323) 965-3245
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CERTIFICATE OF SERVICE

I certify that on May 24, 2023, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by U.S. Postal Service Express Mail as stated:


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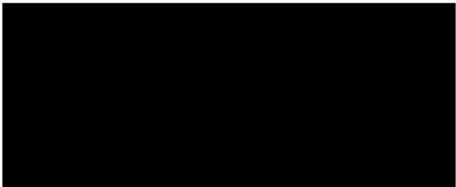
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Michelle Maccio



Lynn M. Dean

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DIVISION OF ENFORCEMENT'S INDEX OF EXHIBITS TO

MOTION FOR DEFAULT

Exhibit	Description
EX 1	Order Instituting Administrative Proceedings
EX 2	Order issued by the California Department of Financial Protection and Innovation after a hearing in <i>The Commissioner of Financial Protection and Innovation, v. Maccio Financial, LLC and Michelle Maccio</i> , Agency Case Number 169793
EX 3	U.S Virgin Islands Order dated September 21, 2018 <i>In the Matter of Michelle Maccio and Maccio Financial</i> , No. 07-2018