

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21333

In the Matter of

GUSTAVO A. GUZMAN,

Respondent.

DIVISION OF ENFORCEMENT'S
MOTION FOR DEFAULT JUDGMENT,
SANCTIONS AND OTHER RELIEF

Pursuant to Rules 155(a) and 220(f) of the Commission's Rules of Practice, the Division of Enforcement (or "Division") respectfully requests that the Commission enter a default judgment and impose appropriate sanctions against Respondent Gustavo A. Guzman ("Respondent" or "Guzman"). More specifically, the Division requests that the Commission bar Guzman from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical ratings organization ("NRSRO").

I. Procedural History

On May 24, 2017, the Commission filed a complaint against Guzman in the United States District Court for the Western District of North Carolina alleging that for more than five years, Guzman acted as an unregistered investment adviser, raising more than \$2.1 million from twelve investors, for a purported options trading fund or closed-end real estate fund. (*See* Exhibit A, Complaint in *SEC v. Guzman*, at ¶ 1). The complaint further alleged that Guzman misappropriated a third of the amount he raised and lost the remainder through options trading. (*Id.*). According to the complaint, Guzman misrepresented to the investors that their

investments would be safe and capital preserved, and that Guzman concealed his trading losses by sending investors false account statements, tax documents, and other communications. (*Id.*) The complaint alleged that, as a result of the aforementioned conduct, Guzman violated Section 17(a) of the Securities Act of 1933 (“Securities Act”), Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) and Rule 206(4)-8 thereunder. (*Id.* at ¶¶ 49-65).

After Guzman failed to answer or otherwise respond to the complaint, the Commission subsequently moved for the entry of a default judgment against Guzman, supported by the Declaration of Ann Tushaus, an accountant within the Division (*see* Exhibit B). The District Court entered a default judgment against Guzman imposing permanent injunctive relief and other financial remedies on March 18, 2018. (*See* Exhibit C). In the interim, Guzman apparently fled the country to Australia, where he remained a fugitive until November 2022, when the U.S. Department of Justice located and extradited him. (*see* Exhibit D, DOJ Press Release, November 7, 2022).

On November 30, 2022, the Division contacted Guzman’s criminal defense attorney to inquire whether he would also represent Guzman in an SEC administrative proceeding. On March 6, 2023, the Commission instituted this proceeding. On March 16, 2023, a Deputy U.S. Marshal personally served Guzman with the Order Instituting Proceedings (“OIP”) in this matter. (Exhibit E, Proof of Service of OIP). On April 19, 2023, a deputy with the Mecklenburg County Sheriff’s Office personally served Guzman with the service list; litigated party letter; and the Division’s Motion for Extension of Time, which, among other things, sought extension of the deadline for Guzman to answer the OIP from April 5, 2023 until May

8, 2023. (See Exhibit F, Proof of Service of Division Filings). On March 31, 2023, the Commission granted the Division’s Motion for Extension of Time and ordered Guzman to answer the OIP by May 8, 2023. Guzman ultimately failed to answer or otherwise defend this proceeding. (See Exhibit G, Status Report Regarding Service of Order Instituting Proceeding). Subsequently, on July 28, 2023, Guzman pleaded guilty to criminal charges of securities fraud in the Western District of North Carolina, based on the same conduct alleged in the Division’s complaint. (see Exhibit H, United States v. Guzman, “Factual Basis”).

II. Factual Background

A. The Allegations and Evidence in District Court

On May 24, 2017, the Commission filed a district court complaint alleging that Guzman violated the securities laws by raising more than \$2.1 million from twelve investors, and misrepresenting how he would use the money and the risks associated with their investments. Case No. 17-cv-00276 (W.D.N.C.). (Exhibit A). The complaint further alleged that Guzman ultimately used a third of the money for his own personal benefit, and then concealed from investors that he lost the remainder through options trading. (*Id.* at ¶ 1). After unsuccessful efforts to serve Guzman at his last known address, the addresses of two extended family members, and a scheduled business appointment, the Division rendered service of the summons and complaint on the person in charge of Guzman’s usual mailing address at a UPS store. (Exhibit I, July 6, 2017 Return of Service Affidavit). Guzman never filed an answer or responsive pleading to the complaint.¹

¹ Under Rule of Practice 323, the Commission may take judicial notice of the record in the district court action. See 17 C.F. R. § 201.343; *In re Conrad A. Coggeshall*, Exchange Act Release No. 97474, Advisers Act Release No. 6306, 2023 WL 3433398, at *2 n.6 (May 10, 2023) (relying on Commission filings in the district court docket).

The complaint alleged that in 2009, Guzman, an options trading instructor, founded an unregistered private fund that purportedly focused on options trading. (*See* Exhibit A at ¶ 11). Throughout the existence of the fund, Guzman held complete control over its operations and investment decisions. (*Id.* at ¶ 12). Guzman provided potential investors in the fund with an operating agreement and represented to them that their investments would be safe, minimize risk, and used for options trading. (*Id.* at ¶ 13). The operating agreement represented that each investor would have a separate capital account and managers of the fund would receive a monthly fee of 1/12 or 2% of the assets under management plus 20% of any annual net profit. (*Id.* at ¶ 14). Guzman also represented that investors could invest in a program that guaranteed returns of between 4-8%, or an actively managed program that could return up to 25%, but Guzman actually commingled all the funds. (*Id.* at ¶ 15).

Between April 2010 and at least August 2015, Guzman raised more than \$2.1M from investors located in at least five different states. (*Id.* at ¶ 18). Guzman misappropriated approximately a third of the \$2.1 million, spending it on personal and unrelated business expenses. (*Id.* at ¶¶ 19-20). By the end of 2012, of the \$1.85 million that had been raised, \$1.092 million was gone, with \$235,000 used by Guzman for his personal expenses, such as rent, credit card bills, auto services, for spa services at a resort, \$36,000 used to make Ponzi payments to investors, and the remainder lost as a result of Guzman's options trading. (*Id.* at ¶ 23). Guzman raised an additional \$200,000 from two investors in 2013, of which \$65,000 was lost through Guzman's trading, with the remainder used for Ponzi payments to other investors, unrelated business expenses, and personal expenses, such as rent, credit card bills, travel expenses, and for auto expenses. (*Id.* at ¶¶ 24-25).

In 2014, Guzman solicited investors for a new purported real estate fund, represented to be a fixed rate closed-end product with an annual rate of return of 8.5%, plus an additional 2% for early investors, with investment hedges to protect against losses. (*Id.* at ¶ 27, 45-46). In 2015, Guzman received \$25,000 from an investor for the real estate fund, but never invested the money in real estate, and instead used it for personal expenses and a Ponzi payment to an investor in the other fund. (*Id.* at ¶¶ 28-29). Guzman told the investor that his investment would be safe and invested in real estate. (*Id.* at ¶ 28).

To evade detection, Guzman repeatedly made material omissions and misrepresentations to existing and prospective investors about the performance of the fund, the scope of its operations, and the status of the real estate fund. (*Id.* at ¶ 30). By the end of 2011, Guzman failed to disclose to investors that he had lost more than 80% of the \$1.05 million raised through trading, and spent roughly \$130,000 on personal expenses. (*Id.* at ¶¶ 20, 31). Instead, between at least January 2011 and February 6, 2015, Guzman sent communications to existing and prospective investors, including false IRS tax documents, misrepresenting their investment performance and inflating their account balances. (*Id.* at ¶ 32-33, 40-43). Guzman also sent false and inflated account statements to investors that failed to reflect losses, after which one investor made two additional investments totaling \$400,000. (*Id.* at ¶¶ 34-38). Division staff's analysis of bank records showed that Guzman had raised \$821,484 from at least twelve investors from May 24, 2012 through September 30, 2015, and during that period Guzman lost \$498,584 trading and misappropriated \$253,821 for personal use. (Exhibit B, ¶¶ 8-10).

On May 18, 2018, the district court granted the Commission's motion for a default judgment against Guzman with monetary and injunctive relief. (*See* Exhibit C).

B. Guzman's Administrative Proceeding

After Guzman was extradited from Australia to the United States in November 2022, the Division engaged with his criminal defense attorney to determine whether he would represent Guzman in an SEC proceeding, and whether a resolution was possible. On March 6, 2023, after those efforts were unsuccessful, the Commission instituted the OIP pursuant to Section 203(f) of the Advisers Act against Guzman. On March 16, 2023, a deputy U.S. Marshall personally served Guzman at Mecklenburg County Jail with the OIP in this proceeding. (*See Exhibit E*). On March 30, 2023, the Division moved for an extension of time until May 1, 2023, to hold a prehearing conference with Guzman, and granting Guzman until May 8, 2023, to file an answer. On March 31, 2023, the Commission granted the motion for an extension. On April 19, 2023, a deputy with the Mecklenburg County Sheriff's Office personally served Guzman with the OIP, service list, litigated party letter, and motion for extension. (*See Exhibit F*). After the Commission granted the extension, the Division again attempted to engage Guzman's criminal attorney on multiple occasions to determine whether he would represent Guzman for the purposes of this proceeding and to schedule a pre-hearing conference, however, those efforts were unsuccessful. (*See Exhibit G*). The parties never held a pre-hearing conference, and Guzman never answered or otherwise responded to the OIP.

C. Guzman's Criminal Case

On November 7, 2022, after the U.S. Department of Justice extradited Guzman from Australia to the United States, he was arraigned on criminal charges of securities fraud in Federal District Court for the Western District of North Carolina. (*See Exhibit D*). On July 28, 2023, Guzman pleaded guilty to criminal securities fraud charges in the Bill of Indictment and agreed to the factual basis of the charges. (*See Exhibit H; Exhibit J, Bill of Indictment; Exhibit K, Entry and*

Acceptance of Guilty Plea at ¶¶ 23, 29-30). The factual basis for the criminal charges that Guzman agreed to involved the same conduct that served as the basis for the Division’s action in federal court and this proceeding. For example, the factual basis stated that Guzman “made, and caused others to make, material false statements to investors and failed to disclose material information to investors about, among other things, the returns generated by his entities, his use of investors’ money for personal expenses, and his use of new investor money to make payments to other investors.” (Exhibit H at ¶ 3). The factual basis further stated that, “As part of the securities fraud scheme, Guzman induced, and caused others to induce, at least nine victims to purchase more than \$2,000,000 in various securities and caused victims to suffer more than \$1.5 million in losses. At least one of those victims suffered substantial financial hardship as a result of Guzman’s scheme.” (*Id.* at ¶ 5). The factual basis also stated that, “During the securities fraud scheme, Guzman was acting as an investment adviser and/or a person associated with an investment adviser.” (*Id.* at ¶ 6). The court has not yet sentenced Guzman, but he faces a sentence of up to 20 years and a \$5 million fine. (*See* Exhibit L, July 28, 2023 DOJ Press Release).

III. Argument

Under Section 203(f) of the Advisers Act, the Commission may impose remedial sanctions on a person associated, or at the time of the alleged conduct associated, with an investment adviser, consistent with the public interest, if the associated person has been permanently enjoined from engaging in any conduct or practice in connection with being an investment adviser or in connection with the purchase or sale of securities. *See* 15 U.S.C. § 80b-3(f).

A. Guzman Is In Default, and the Factual Allegations of the OIP Should Be Deemed True.

Under Rule 155(a) of the Commission’s Rules of Practice, “a party to a proceeding 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, if that party fails . . . to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding . . .”² See 17 C.F.R. § 201.155(a). Guzman was served with the OIP in March 2023, but has not appeared or filed a response in this proceeding.

Accordingly, Guzman is in default and all of the factual allegations against him in the OIP should be deemed true. See *In re Reginald Buddy Ringgold, III*, Advisers Act Release No. 6267, 2023 WL 2705591, at *2 (March 29, 2023) (deeming allegations of OIP as true against respondent in default). Here, the allegations in the OIP establish that: (1) Guzman was acting as an investment adviser and/or person associated with an investment adviser; (2) Guzman was enjoined by the U.S. District Court for the Western District of North Carolina from future violations of anti-fraud provisions of Securities Act, the Exchange Act and the Advisers Act; and (3) Guzman raised more than \$2,000,000 from investors, used that money for himself, and engaged in deceptive acts including creating false account statements and paying off investors. See OIP, at ¶¶ 1-3.

B. The Division Has Submitted Evidence of Guzman’s Misconduct.

The Division acknowledges that a default judgment in a district court generally lacks preclusive effect because the underlying merits of the case were not litigated. See *In re Gary*

² The OIP expressly advised Guzman of this possibility. See OIP at IV (“If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, 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...”).

L. McDuff, Exchange Act Release No. 74803, 2015 WL 1873119, at *2 (April 23, 2015) (remanding for further evidentiary proceedings). However, the Commission may consider other evidence, including findings in criminal litigation involving the same respondent, *In re Don Warner Reinhard*, Exchange Act Release No. 63720, Advisers Act Release No. 3139, 2011 WL 121451, at *3-4 (Jan. 14, 2011) (relying on plea agreement and related documents), and documents from the Division’s investigation, *In re John Sherman Jumper*, Exchange Act Release No. 96407, Advisers Act Release No. 6193, 2022 WL 1736044, at *2 (Nov 30, 2022) (relying on investigative transcript, documents prepared by the respondent and brokerage statements).

Here, the Division has submitted the same evidentiary declaration the District Court relied upon in granting the Commission a default judgment. The Tushaus declaration establishes that during the disgorgement period (May 2012 to September 2015), Guzman solicited nearly \$821,484 from twelve investors, repaying only \$67,945, while keeping \$253,821 for himself, and losing \$498,584 from trading. (*See* Exhibit B at ¶ 7). In granting the default judgment, the District Court also accepted the undenied allegations of the Division’s complaint as true (*see* Exhibit C at ¶ 7), including that between April 2010 and at least August 2015, Guzman raised more than \$2.1 million from investors located in at least five states (*see* Exhibit A at ¶ 18), and that of the \$1.85M that had been raised by the end of 2012, Guzman used \$235,000 to pay himself, made \$36,000 in Ponzi payments to another investor, and lost the remainder through trading and on business expenses. (*Id.* at ¶ 23). The District Court also accepted as true the allegations in the complaint that Guzman provided assurances to investors that their investments would be “safe, minimize risk, and focus on options trading” (*see* Exhibit A at ¶ 13, 15) but concealed losses from investors by sending them

communications, balance statements, and tax documents, that falsely inflated balances and gains. (*See Id.* at ¶¶ 32-42).

C. The Commission May Rely on the Findings Against Guzman in the Criminal Case.

Although this administrative proceeding was initiated on the basis of the district court's injunction against Guzman, the Commission may rely on the facts established in Guzman's criminal prosecution because the doctrine of collateral estoppel prevents him from attempting to re-litigate any of those findings. *See In re Allan Michael Roth*, Exchange Act Release No. 90343, 2020 WL 6488283, at *3 (Nov. 4, 2020); *In re James S. Tagliaferri*, Exchange Act Release No. 80047, Advisers Act Release No. 4650, 2017 WL 632134, at *3 (Feb. 15, 2017).

In pleading guilty to criminal securities law fraud in the District Court for the Western District of North Carolina, Guzman admitted that he held himself out as an investment advisor (*see* Exhibit H at ¶ 6; Exhibit J at ¶¶ 23, 29-30) and raised more than \$2,000,000 from investors between 2010 and 2015, and caused them to suffer more than \$1.5 million in losses. (Exhibit H at ¶¶ 1, 5; Exhibit J at ¶¶ 23, 29-30). Guzman further admitted that as part of the scheme, he “made, and caused others to make, material false statements to investors and failed to disclose material information to investors about, among other things, the returns generated by his entities, his use of investors' money for personal expenses, and his use of new investor money to make payments to other investors.” (Exhibit H at ¶ 3; Exhibit J at ¶¶ 23, 29-30).

D. Guzman Should Be Subject an Associational Bar.

This case meets all the requirements for the imposition of remedial sanctions against Guzman. Further, the public interest would be served, and investors protected, if Guzman were barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

1. Section 203(f) of the Advisers Act

Section 203(f) of the Advisers Act authorizes the Commission to impose an industry bar against a person who: (1) at the time of alleged misconduct was associated with an investment adviser; (2) who has been permanently or temporarily enjoined by a court from violating the federal securities laws; and (3) against whom the Commission finds that it is in the public interest to impose remedial sanctions. *See* 15 U.S.C. § 80b-3(f). Guzman acted as an unregistered investment adviser for at least five years, the period during which the misconduct occurred. Guzman was permanently enjoined by the federal district court from violating the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act, in the civil action brought by the Commission.

2. An Industry Bar Against Guzman Serves the Public Interest

The public interest requires the imposition of remedial sanctions against Guzman, which should include barring him from associating with an investment adviser, registered or unregistered, or with a broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO in the future. In determining whether an administrative remedy is in the public interest, the Commission considers the following factors:

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, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the extent to which the sanction will have a deterrent effect.

See In re Stanley C. Brooks, S.E.C. Rel. No. 475, 2012 WL 6132660 at *3 (Dec. 11, 2012). A severe sanction is warranted when a respondent's misconduct involved fraud "because opportunities for dishonesty recur constantly in the securities business." *In re Anthony Tyrone Jones, Jr.*, S.E.C. Rel. No. 1088, 2016 WL 7210100 at *3 (Dec. 12, 2016).

Here, each of the foregoing factors weigh heavily in favor of imposing an industry bar against Guzman. His conduct was egregious, repeated and involved a high degree of scienter. Guzman brazenly promised investors their investment would be safe and he would minimize risk, when in reality he used their investment funds for his own personal benefit, including paying his own bills. Guzman's actions were intentional, and not the product of negligence or mistake. To the contrary, Guzman kept his fraud going by continuing to lie to investors in communications and through the creation of false account statements and tax documents, falsely representing that he had invested their funds as promised, and that their investments were growing in value. Finally, Guzman made Ponzi-like payments to the detriment of other clients. This deceptive conduct allowed Guzman to avoid admitting the extent of his fraudulent and deceptive conduct with respect to other investors, and even to induce some investors to make additional investments.

Guzman has not made any meaningful assurances against future violations, and in fact tried to avoid taking responsibility for his actions by fleeing to Australia. Guzman has spent much of his career in the financial industry, either as an options trading instructor, which is where he met some of his victims, or as an unregistered investment adviser while perpetrating this scheme. As such, his future employment opportunities are likely to present him with the possibility of additional violations. Sanctioning Guzman would promote the well-being of investors in the marketplace by providing both general and specific deterrence.

IV. Conclusion

Wherefore, for all of the foregoing reasons, the Division of Enforcement respectfully requests that the Commission enter a default judgment against Gustavo Guzman pursuant to Rule 155(a) of the Rules of Practice. The Division also requests that Guzman be barred from any position in the securities industry bar pursuant to Section 203(f) of the Advisers Act.

Dated: August 28, 2023

By: /s/ Jeffrey A. Shank

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CERTIFICATE OF SERVICE

In accordance with the Commission's Rules of Practice, I hereby certify that I have caused a copy of the Division's Motion for Default Judgment, including all exhibits, to be personally served upon:

Gustavo A. Guzman
Mecklenburg County Detention Center
801 E. 4th Street
Charlotte, NC 28202

Dated: August 28, 2023

/s/ Jeffrey A. Shank
Jeffrey A. Shank

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DIVISION OF ENFORCEMENT'S
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