

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 93844 / December 21, 2021

Admin. Proc. File No. 3-19663

In the Matter of
BRETT HAMBURGER

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the securities laws. *Held*, it is in the public interest to bar respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

APPEARANCES:

Richard M. Harper II for the Division of Enforcement.

On January 15, 2020, we instituted an administrative proceeding against Brett Hamburger, pursuant to Section 15(b) of the Securities Exchange Act of 1934, to determine whether the statutory predicate for an administrative remedy was satisfied and whether remedial action would serve the public interest. The order instituting proceedings (“OIP”) alleged that Hamburger had been permanently enjoined from violating Section 17(a) of the Securities Act of 1933 and Exchange Act Sections 10(b) and 15(a) and Exchange Act Rule 10b-5 for misconduct that occurred while Hamburger acted as an unregistered broker in the sale of Bio Defense Corporation securities.¹ Hamburger failed to file an answer to the OIP, failed to respond to the Division of Enforcement’s motion for entry of default and sanctions, and failed to respond to an order to show cause why he should not be found in default. We now find Hamburger to be in default, deem the allegations of the OIP to be true, and bar him from the securities industry.

I. Background

A. The Commission issued an OIP against Hamburger.

The OIP alleged that, in a civil action the Commission brought against Hamburger, a federal district court had entered a final judgment permanently enjoining him from future violations of Securities Act Section 17(a), Exchange Act Sections 10(b) and 15(a), and Exchange Act Rule 10b-5.² According to the OIP, Hamburger served as a consultant to Bio Defense from approximately 2003 through at least April 2010.³ While it operated, Bio Defense’s purported business was the development and sale of a machine that allegedly disinfected mail contaminated by bioterrorism pathogens.⁴ Both the OIP and the complaint the Commission filed in the civil action alleged that, from August 2008 to at least April 2010, Hamburger participated in a scheme to defraud overseas investors in the offer and sale of Bio Defense securities through international boiler room operators that collected 75% of every dollar raised by Bio Defense’s sales of securities.⁵ The OIP and Commission’s complaint also alleged that Hamburger acted as an unregistered broker in the sale of these securities.⁶ The OIP also alleged that Hamburger was barred by the NASD in October 2000 as a result of, among other things, acting as an unregistered broker and that he was convicted of conspiracy to commit securities fraud in March 2003.⁷

The OIP instituted proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest. It directed Hamburger to file an answer within 20 days of service, as provided by Commission Rule of

¹ *Brett Hamburger*, Exchange Act Release No. 87975, 2020 WL 260278 (Jan. 15, 2020).

² 15 U.S.C. §§ 77q(a), 78j(b), 78o(b); 17 C.F.R. § 240.10b-5.

³ *Hamburger*, 2020 WL 260278, at *1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Practice 220(b).⁸ The OIP informed Hamburger that, if he failed to answer, he may be deemed in default, the allegations in the OIP may be deemed to be true, and the Commission could determine the proceeding against him. Hamburger was properly served with the OIP on February 14, 2020, pursuant to Rule of Practice 141(a)(2)(i),⁹ but did not answer it.

B. The Division moved for entry of default and sanctions.

On August 7, 2020, the Division filed a motion requesting that the Commission find Hamburger in default and bar him from the securities industry. In support of its motion, the Division submitted a copy of the district court's order granting summary judgment to the Commission in its civil action against Hamburger.¹⁰

In its decision, the court found that, in 2008, Bio Defense shifted to selling stock via an overseas boiler-room scheme in response to both a cease-and-desist order issued by the Texas State Securities Board and an investigation by the Commonwealth of Massachusetts into Bio Defense's sale of securities in Massachusetts without proper registration.¹¹ In connection with these efforts, Hamburger entered into an agreement with Bio Defense in August 2008 pursuant to which it agreed to pay him weekly a 12.5% commission on funds raised for the company.¹²

Hamburger, who less than six months earlier had completed his probation for his conviction for conspiracy to commit securities fraud, learned of a company that could raise investor money quickly in Europe but charged a 75% fee for money raised.¹³ Although Hamburger had not previously encountered a fee of this magnitude, Bio Defense proceeded with the arrangement with Hamburger's assistance.¹⁴ Hamburger met with the call center operator in Spain to learn about its operations and later served as the primary point of contact between the operator and Bio Defense.¹⁵ Hamburger provided the call center a script to use to solicit investors and worked with a Bio Defense officer to prepare an investor packet that did not

⁸ 17 C.F.R. § 201.220(b).

⁹ 17 C.F.R. § 201.141(a)(2)(i) (providing that service of an OIP on an individual may be made by "leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein").

¹⁰ *SEC v. Bio Defense Corp.*, Civ. A. No. 12-11669-DPW, 2019 WL 7578525 (D. Mass. Sept. 6, 2009), *appeal dismissed for failure to prosecute*, No. 19-2043 (1st Cir. June 30, 2020). The court also granted in substantial part the Commission's motion for summary judgment with respect to other defendants. *Id.*; *see also SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021) (affirming grant of summary judgment with respect to defendants who pursued appeals).

¹¹ *Bio Defense Corp.*, 2019 WL 7578525, at *31.

¹² *Id.* at *3, *31.

¹³ *Id.* at *1, *3.

¹⁴ *Id.* at *3.

¹⁵ *Id.* at *3, *4.

disclose the fundraiser's fee.¹⁶ When potential investors offered to purchase Bio Defense securities, the call center operator would pass the investor's information on to Hamburger, who would provide it to Bio Defense and request that the company pay his own commission.¹⁷

In December 2008, Hamburger started an additional overseas call center project to be operated in much the same way as the first project, including by charging a 75% fee.¹⁸ Hamburger personally loaned at least \$30,000 to the second operator to start the call center, provided oversight by visiting the call center on multiple occasions, and again served as the intermediary between the operator and Bio Defense.¹⁹ Hamburger managed and received fees from the second project, which ran from December 2008 until October 2010.²⁰

During the course of the overseas fundraising campaign, Hamburger received multiple investor complaints forwarded to him by Bio Defense officers.²¹ Hamburger also learned that the chairman of Bio Defense's advisory board had warned that he had heard about aggressive marketing, cold-calling, and boiler-room tactics used to sell Bio Defense stock through the overseas call centers and that he had expressed great concern about these operations.²² Nonetheless, Hamburger continued to operate the overseas fundraising campaign.²³

The court found that there was no genuine dispute of fact that Hamburger had engaged in multiple violations of the federal securities laws. First, the court found that Hamburger effected transactions in the sale of Bio Defense securities without being registered with the Commission as a broker or dealer, in violation of Exchange Act Section 15(a).²⁴ The court explained that Hamburger had a continuing role in supervising investor solicitation from foreign call centers, functioned as an intermediary between those call centers and Bio Defense, and received transaction-based compensation—a 12.5% commission for total compensation of \$357,360.²⁵

Second, the court found that Hamburger was liable under the antifraud provisions of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.

¹⁶ *Id.* at *4, *19.

¹⁷ *Id.* at *4.

¹⁸ *Id.* at *5.

¹⁹ *Id.*

²⁰ *Id.*; accord *Morrone*, 997 F.3d at 57.

²¹ *Bio Defense Corp.*, 2019 WL 7578525, at *6, *24.

²² *Id.* at *6.

²³ *Id.* at *24.

²⁴ *Id.* at *20.

²⁵ *Id.*; *id.* at *2, *4–5 (amount of Hamburger's commissions).

These provisions all require scienter.²⁶ The court found that the failure to disclose the “exorbitant” commissions paid to the call centers was deceptive and that Hamburger, who “knew what the boiler-room scam really was,” had “plainly” acted with scienter.²⁷ The court also found Hamburger liable under Exchange Act Section 17(a)(3),²⁸ which does not require scienter.²⁹

Hamburger did not respond to the Division’s motion for entry of default and sanctions. On July 22, 2021, the Commission ordered Hamburger to show cause by August 5, 2021, why it should not find him in default due to his failure to file an answer, respond to the Division’s motion, or otherwise defend this proceeding.³⁰ The Commission’s order warned Hamburger that if he were found in default, the allegations in the OIP would be deemed to be true and the Commission could determine the proceeding against him upon consideration of the record. Hamburger did not subsequently answer the OIP or respond to the Division’s motion or the show cause order.

II. Analysis

A. We hold Hamburger in default and deem the OIP’s allegations to be true.

Rule of Practice 155(a) provides that if a party fails to “answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding,” we may deem the party in default and “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.”³¹ Because Hamburger has failed to answer or respond to the show cause order or the Division’s motion for entry of default and sanctions, we find it appropriate to deem him in default and deem the allegations of the OIP to be true. We base the findings that follow on the record, including the OIP and the materials submitted with the Division’s motion.

B. We find an industry bar to be in the public interest.

Exchange Act Section 15(b)(6)(A) authorizes the Commission to suspend or bar a person from the securities industry if we find, on the record after notice and opportunity for hearing, that (i) the person has been enjoined from engaging in or continuing any conduct or practice in

²⁶ See 15 U.S.C. § 77q(a)(1); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *Aaron v. SEC*, 446 U.S. 680, 695–97 (1980) (concluding that scienter is required under Securities Act Section 17(a)(1)).

²⁷ *Bio Defense Corp.*, 2019 WL 7578525, at *21, *24, *34.

²⁸ *Id.* at *25.

²⁹ *Aaron*, 446 U.S. at 689–700 (noting that a showing of scienter is not required to establish a violation of Securities Act Section 17(a)(3)).

³⁰ *Brett Hamburger*, Exchange Act Release No. 92469, 2021 WL 3110042 (July 22, 2021).

³¹ 17 C.F.R. § 201.155(a); see also Rule of Practice 220(f), 17 C.F.R. § 201.220(f) (providing that “[i]f a respondent fails to file an answer required by this [rule] within the time provided, such respondent may be deemed in default pursuant to [Rule 155(a)]”).

connection with activity as a broker or dealer, or in connection with the purchase or sale of any security; (ii) the person was associated with a broker or dealer at the time of the alleged misconduct; and (iii) such a sanction is in the public interest.³²

Hamburger has been enjoined from engaging in or continuing any conduct or practice in connection with activity as a broker because the district court enjoined him from violating Exchange Act Section 15(a) by using interstate commerce “to effect transactions in, or to induce or attempt to induce the purchase or sale of, securities without being registered as a broker or dealer or associated with a registered broker or dealer.”³³ Hamburger has also been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security because the district court enjoined him from violating Exchange Act Section 10(b) and Rule 10b-5 thereunder “in connection with the purchase or sale of any security.”³⁴

Hamburger was also associated with a broker or dealer at the time of his misconduct. The OIP alleged that Hamburger acted as an unregistered broker at the time of his misconduct,³⁵ and we have deemed that allegation to be true as a result of Hamburger’s default. We also give preclusive effect to the district court’s finding that Hamburger acted as an unregistered broker.³⁶ Because Hamburger acted as an unregistered broker, he was a person associated with a broker.³⁷

Thus, we need determine only if any remedial action is in the public interest. In doing so, we consider 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.³⁸ Our

³² 15 U.S.C. § 78o(b)(6)(A)(iii) (cross-referencing Exchange Act Section 15(b)(4)(C)); *id.* § 78o(b)(4)(C) (specifying injunctions against various actions, conduct, and practices). Exchange Act Section 15(b)(6) also authorizes a bar from participating in an offering of penny stock, but the Division did not request such a bar and we do not impose one here.

³³ Final Judgment at 3, *SEC v. Hamburger*, Civ. A. No. 12-11669-DPW (D. Mass. Sept. 6, 2019).

³⁴ *Id.* at 2–3.

³⁵ *Hamburger*, 2020 WL 260278, at *1.

³⁶ *Bio Defense Corp.*, 2019 WL 7578525, at *20; *see also, e.g., Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *3 (Mar. 1, 2017) (“We give preclusive effect in this proceeding to a district court’s summary judgment findings supporting an injunction.”).

³⁷ *Allen M. Perres*, Exchange Act Release No. 79858, 2017 WL 280080, at *3 (Jan. 23, 2017) (explaining that an individual who acts as an unregistered broker meets the definition of a “person associated with a broker” in Exchange Act Section 3(a)(18)).

³⁸ *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981).

public interest inquiry is flexible, and no one factor is dispositive.³⁹ The remedy is intended to protect the trading public from further harm, not to punish the respondent.⁴⁰

We have weighed all these factors and find an industry bar warranted to protect the investing public. Hamburger's misconduct was egregious and recurrent. As the district court found, Hamburger defrauded investors over two years by failing to disclose that well over half of their investments would go toward exorbitant commission payments for call centers.⁴¹ Hamburger profited from the fraudulent scheme, which caused millions in investor losses, by taking a 12.5% commission from the investors' money.⁴²

Hamburger also acted with scienter. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."⁴³ The district court concluded that Hamburger "plainly acted" with scienter.⁴⁴ Although he knew that the 75% commission charged by the call centers' operator was exorbitant and that investors would not invest in Bio Defense stock if they knew about it, Hamburger intentionally kept this information out of the investor documents that he prepared with another defendant and other communications the call centers used because he stood to benefit personally from increased Bio Defense investments.⁴⁵ Hamburger also continued to operate the scheme even after Bio Defense officers forwarded him investor complaints and warnings about aggressive sales tactics.⁴⁶ Accordingly, we find that Hamburger's degree of scienter weighs heavily in favor of an industry bar.

The remaining factors also support the conclusion that an industry bar is warranted. Because Hamburger failed to answer the OIP or respond to the show cause order or the Division's motion, he has made no assurances that he will not commit future violations or that he recognizes the wrongful nature of his conduct. It appears that Hamburger's occupation presents opportunities for future violations because he acted as a broker during the period of his misconduct, previously worked as a registered representative, and offers no assurances about his future plans.⁴⁷ Hamburger also appears likely to commit future violations because he is a

³⁹ *Tzernach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (July 26, 2013).

⁴⁰ *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

⁴¹ *Bio Defense Corp.*, 2019 WL 7578525, at *25.

⁴² *Id.* at *3, *4, *34.

⁴³ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976).

⁴⁴ *Bio Defense Corp.*, 2019 WL 7578525, at *24.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *3 (Jan. 20, 2017) (expressing concern that respondent's occupation would present opportunities for future violations where he did not indicate that he planned to leave the securities industry).

recidivist who was previously barred by the NASD for acting as an unregistered broker and was convicted of conspiracy to commit securities fraud.⁴⁸

The Commission may impose bars to protect the investing public from a respondent's future actions by restricting access to areas of the securities industry where a demonstrated propensity to engage in violative conduct may cause further investor harm. Here, all the factors we consider demonstrate that Hamburger is unfit to be in the securities industry and that an industry bar is necessary to remedy the continuing threat that Hamburger poses to investors.⁴⁹ Accordingly, we conclude that it is in the public interest to bar Hamburger from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.⁵⁰

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

⁴⁸ See, e.g., *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *3 (Oct. 27, 2006) (finding that because “Lehman is a recidivist whose egregious actions evidence a high degree of scienter,” and because “Lehman’s misconduct is so similar to that for which he was recently sanctioned, we can only conclude that the sanctions imposed on him in the earlier proceeding failed to imbue him with any appreciation for the wrongfulness of his actions”).

⁴⁹ See *Price*, 2017 WL 405511, at *5 (barring respondent on the ground that the misconduct underlying the respondent’s injunction demonstrated that the respondent was unfit to participate in the securities industry and posed a risk to investors).

⁵⁰ The D.C. Circuit has held that certain bars from associating in capacities beyond the capacity in which the misconduct occurred cannot be imposed based on conduct that entirely predated the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *Bartko v. SEC*, 845 F.3d 1217, 1222–24 (D.C. Cir. 2017); *Koch v. SEC*, 793 F.3d 147, 158 (D.C. Cir. 2015). Hamburger’s misconduct spanned from at least August 2008 to October 2010. We find that the entirety of Hamburger’s conduct and a balancing of the factors discussed above demonstrate that a bar from associating with a broker or dealer is necessary to protect the public. We find that the conduct that post-dated the effective date of the Dodd-Frank Act in July 2010 demonstrates that a bar from associating in the additional capacities listed above is also necessary to protect the public. See *Bennett Grp. Fin. Servs. LLC*, Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.34 (Mar. 30, 2017) (“Respondents’ misconduct spanned 2009 to 2011, and we find that the conduct that post-dates the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act by itself warrants a bar from all these associations.”).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93844 / December 21, 2021

Admin. Proc. File No. 3-19663

In the Matter of

BRETT HAMBURGER

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the Division of Enforcement's motion for default and other relief against Brett Hamburger is granted; and it is further

ORDERED that Brett Hamburger is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Vanessa A. Countryman
Secretary