UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96855 / February 9, 2023

Admin. Proc. File No. 3-19734

In the Matter of

ANTHONY B. BRANDEL and
M.Y. CONSULTANTS, INC.

ORDER REQUESTING ADDITIONAL BRIEFING AND MATERIALS

On March 24, 2020, the Securities and Exchange Commission issued an order instituting administrative proceedings ("OIP") against Anthony B. Brandel and M.Y. Consultants, Inc. ("Respondents"), pursuant to Section 15(b) of the Securities Exchange Act of 1934.[1] Respondents were subsequently served with the OIP but failed to file an answer to it. On July 22, 2021, the Commission issued an order requiring Respondents to show cause by September 7, 2021, why they should not be deemed to be in default and why this proceeding should not be determined against them due to their failures to file an answer or otherwise defend the proceeding.[2] Respondents failed to respond to the show cause order.

On October 5, 2021, the Division of Enforcement filed a motion for summary disposition requesting that the Commission bar Respondents from the securities industry and from participating in any penny stock offering. Respondents failed to respond to the Division's motion. Given Respondents' repeated failures to defend the proceeding, we construe the Division's motion for summary disposition as a motion for the entry of an order of default and the imposition of remedial sanctions. But we believe that additional briefing and materials are needed in support of the Division's motion.

When determining whether remedial action, such as an industry or penny stock bar, is in the public interest under Exchange Act Section 15(b), the Commission must consider the

---

[1] *Anthony B. Brandel and M.Y. Consultants, Inc.*, Exchange Act Release No. 88463, 2020 WL 1433032 (Mar. 24, 2020).

[2] *Anthony B. Brandel and M.Y. Consultants, Inc.*, Exchange Act Release No. 92465, 2021 WL 3110033 (July 22, 2021).

question with reference to the underlying facts and circumstances of the case.[3] The factors that the Commission considers are 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[4] Such analysis must do more than "recite[], in general terms, the reasons why [a respondent's] conduct is illegal," but rather "devote individual attention to the unique facts and circumstances of th[e] case."[5]

The Division supports its motion with documents from two federal district court cases against Respondents that involved the same underlying conduct. From a criminal proceeding against Brandel, the Division provides the indictment and a jury verdict form finding Brandel guilty of 18 counts in the indictment—1 count of conspiracy; 9 counts of wire fraud; and 8 counts of securities fraud.[6] These documents may permit the Commission to find that Brandel was convicted of 18 counts charged in the indictment, and that the elements for each of those offenses had been established beyond a reasonable doubt.[7] But the factual "allegations in an indictment" do not "automatically have preclusive effect" simply because a jury convicted respondent in a "general verdict" that finds the respondent guilty of the counts in the indictment.[8] Here, the jury verdict form does not reflect that the jury made specific findings regarding *how* Brandel committed the violations at issue. Therefore, on the present record, we are uncertain what "facts the jury necessarily determined in returning [Brandel's] conviction"—

---

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

4 *See id.*; *see also Lawrence Allen Deshetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *2-3 (Nov. 21, 2019) (applying *Steadman* factors in follow-on proceeding).

5 *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (vacating and remanding suspension for failing to meet this standard).

6 *U.S. v. Brandel, et al.*, No. 2:13-cr-439-KJD-VCF (D. Nev. Dec. 11, 2013 and Dec. 7, 2015, respectively).

7 *See, e.g., Gary McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *3 (Apr. 23, 2015); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *8-9 (July 25, 2003); *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 658791, at *3 (Sept. 15, 1998).

8 *McDuff*, 2015 WL 1873119, at *3.

in other words, the facts "'distinctly put in issue and directly determined' in the criminal prosecution."[9]

From a civil proceeding against Respondents, the Division provided (i) the Commission's complaint; (ii) a default judgment against M.Y. Consultants permanently enjoining it from violating certain registration and antifraud provisions of the securities laws; (iii) a summary judgment against Brandel permanently enjoining him from violating certain registration and antifraud provisions of the securities laws; and (iv) a Statement of Undisputed Facts filed by the Division in support of its summary judgment motion against Brandel.[10] Although we now construe the Division's motion as one for the entry of default, it does not appear that finding Respondents to be in default would allow the Commission to establish the facts alleged in the Commission's civil complaint. Finding Respondents to be in default would allow the Commission to deem the *OIP's* allegations to be true.[11] But the OIP recounts only the allegations of the Commission's complaint. The OIP does not independently allege that Respondents engaged in particular misconduct.[12]

Nor does the default judgment against M.Y. Consultants, Inc. have preclusive effect as to facts alleged in the Commission's complaint, because it was based on the entry of default judgment.[13] And although collateral estoppel applies to the summary judgment against

---

[9] *Hemphill v. Schott*, 141 F.3d 412, 416 (2d Cir. 1998) (quoting *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1961)).

[10] *SEC v. Malom Group AG, et al.*, No. 2:13-cv-2280-GMN-PAL (D. Nev. Dec. 16, 2013, Oct. 9, 2014, June 20, 2017, and Sept. 29, 2017, respectively).

[11] *See* Commission Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), 201.220(f).

[12] *Brandel*, 2020 WL 1433032, at *1 (stating, for example, that the "Commission's complaint alleged that from at least August 2009 until the fall 2011, the Respondents participated in an investment scheme that defrauded more than 30 investors out of approximately $11 million"; that Respondents misrepresented to investors "that their funds would be used in trading programs from which investors were guaranteed to earn astronomical profits"; and that Respondents "misappropriated the investors' funds").

[13] *See Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 WL 421305, at *4 (Feb. 4, 2010); *see also Jaswant Gill*, Advisers Act Release No. 5858, 2021 WL 4131427, at *2 n.7 (Sept. 10, 2021) ("Because Gill's injunction in the civil action was entered by default, we do not rely on any findings made in that action in determining whether Gill's conduct warrants remedial sanctions.").

Brandel,[14] the district court made no factual findings in its judgment about Brandel's fraud violations and made only some broad factual findings about Brandel's unregistered broker and unregistered securities sales violations.[15] And while the district court stated that it based its summary judgment decision on the evidence that the Division provided in support of its motion, the Division has not submitted the evidence on which it relied before the district court aside from the indictment and jury verdict form.[16]

Under the circumstances, the Commission would benefit from further briefing regarding the factual predicate for Respondents' injunctions, as well as the Division's arguments as to why these facts establish that industry and penny stock bars are warranted.[17] The Commission would also benefit from any further materials relevant to such matters or otherwise relevant to its public interest analysis, including, but not limited to, evidence cited in the Statement of Undisputed Materials Facts, the jury instructions from the criminal proceeding, transcripts, or any materials

---

[14] *See In re Keaty*, 397 F.3d 264, 271-72 (5th Cir. 2005) (stating that "[c]ourts also apply the doctrine of issue preclusion to issues decided on summary judgment"); 18 Moore's Federal Practice – Civil § 132.03 ("Issue preclusion generally applies when the prior determination is based on a motion for summary judgment.").

[15] *See Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581, 1584 (11th Cir. 1991) (finding that because a previous state court decision did not make findings of fact or "specify the reasons for its decision," collateral estoppel did not apply based on a purported reason underlying that decision to preclude a subsequent suit in federal court).

[16] *See supra* notes 8 and 9 and accompanying text. The Statement of Undisputed Material Facts appears to primarily cite the indictment as evidentiary support for the facts underlying Brandel's fraud violations.

[17] *See generally Shawn K. Dicken*, Exchange Act Release No. 90215, 2020 WL 6117716 (Oct. 16, 2020).

supporting findings made by the district court in connection with sentencing or the disposition of any relevant pre- or post-trial motions.[18]

Accordingly, it is ORDERED that the Division shall submit, as it deems necessary, any additional evidentiary materials that are relevant to its motion and determination of the public interest by March 13, 2023, as well as a brief not to exceed 5,000 words, explaining the relevance of those materials to its request and the public interest and containing specific citations to the evidence relied upon.

It is further ORDERED that Respondents may file a brief by April 25, 2023, not to exceed 5,000 words, addressing the same matters to be addressed by the Division. Respondents' brief should also address why they have failed to file an answer previously or to otherwise defend this proceeding, and why the Commission should not find them in default as a result.[19] Respondents are reminded that when a party defaults, the allegations in the OIP will be deemed to be true and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.[20] If Respondents file a response to this order, the Division may file a reply within 14 days after its service, not to exceed 2,500 words.

---

[18] *See Emich Motors Corp.*, 340 U.S. at 569 (explaining that the facts actually decided by general jury verdict of guilty can be determined by reviewing the record in the criminal proceeding, "including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court"); *Chisholm v. DLA*, 656 F.2d 42, 48-49 (3d Cir. 1981) (allowing agency to establish "which issues were litigated" by a conviction culminating in a general jury verdict by "introduction of the record of the criminal proceeding"); *Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *3 n.23 (Aug. 26, 2011) (relying on the indictment, together with jury instructions and findings made by the court in the criminal proceeding, to "establish the factual framework for [the Commission's] analysis" of sanctions); Restatement (Second) of Judgments § 27 cmt. f (stating that the determination of "what issues, if any, were litigated and determined by the verdict and judgment" should in the first instance be based on the "pleadings and other materials of record in the prior action").

[19] *See supra* note 2 (show cause order warning Respondents that failure to respond may cause the Commission to find them in default, and noting that the OIP did the same).

[20] Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180.

The parties' attention is directed to the e-filing requirements in the Rules of Practice.[21]

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

---

[21] *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-30/pdf/2020-25747.pdf; *see also Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, https://www.sec.gov/efapdocs/instructions.pdf. The amendments also impose other obligations on parties to administrative proceedings such as a redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.