SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 98700 / October 6, 2023

Admin. Proc. File No. 3-20817

In the Matter of

CHARLES K. TOPPING

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Conviction

Respondent was convicted of mail and wire fraud, and conspiracy to commit mail and wire fraud. *Held*, it is in the public interest to bar respondent from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

APPEARANCES:

Andrew Schiff and *Stephanie Moot* for the Division of Enforcement.

On April 8, 2022, the Securities and Exchange Commission issued an order instituting administrative proceedings ("OIP") against Charles K. Topping pursuant to Section 15(b) of the Securities Exchange Act of 1934.[1] We now find Topping to be in default, deem the allegations against him to be true, and bar him from associating in the securities industry in any capacity and from participating in the offering of penny stock.

I. Background

A. The Commission instituted the proceeding against Topping.

The OIP alleged that in 2017, Respondent was convicted in federal court of one count of wire fraud and two counts of conspiracy to commit mail and wire fraud. Respondent was also convicted of seven counts of mail fraud.[2] The OIP alleged that the court sentenced Topping to a prison term of 113 months followed by three years of supervised release and ordered him to pay restitution of $22,456,000. The OIP also alleged that Topping acted as an unregistered broker by soliciting investors to purchase shares of two penny stock issuers, Sanomedics International Holdings Inc. ("Sanomedics") and Fun Cool Free, Inc. ("FCF") (collectively, the "Companies"). Finally, the OIP alleged that Topping made false and fraudulent statements to investors to induce them to purchase shares of the Companies and received $1,207,000 in undisclosed commissions from those sales. According to the OIP, Topping's misconduct took place between April 2009 and August 2015 (as to Sanomedics) and between August 2014 and December 2015 (as to FCF).

The OIP initiated proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest. It directed Topping to file an answer to the allegations within 20 days after service, as provided by Commission Rule of Practice 220(b).[3] The OIP informed Topping that if he failed to answer, he may be deemed in default, the allegations in the OIP may be deemed to be true as provided in the Rules of Practice, and the proceeding could be determined against him upon consideration of the OIP.[4]

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1 *Charles K. Topping*, Exchange Act Release No. 94661, 2022 WL 1058706 (Apr. 8, 2022).

2 The OIP alleged that Topping was convicted of nine counts of mail fraud, but the district court's amended judgment, which the Division attached as an exhibit to its motion for default and sanctions, reflects that he was convicted of seven such counts. *See United States v. Sizer, et al.*, No. 16-cr-20715, Dkt. No. 731 (S.D. Fla. Dec. 1, 2017).

3 17 C.F.R. § 201.220(b).

4 *See* Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), .220(f).

B. Topping failed to answer the OIP, respond to an order to show cause why he should not be found in default, or respond to a motion for a default and sanctions.

On March 17, 2023, the Commission deemed service complete and directed Topping to file an answer to the allegations contained in the OIP by April 6, 2023.[5] On April 12, 2023, after Topping did not file an answer, the Division filed a motion for default and sanctions. The Division supported its motion with copies of the indictment, verdict form, and amended judgment filed in Topping's criminal proceeding. Topping did not respond to the Division's motion.

On April 25, 2023, the Commission ordered Topping to show cause by May 9, 2023, why it should not find him in default due to his failure to file an answer, to respond to the Division's motion, or to otherwise defend this proceeding.[6] The show cause order directed Topping to address his reasons for not timely filing an answer or responding to the Division's motion, as well the merits of the proceeding, specifically including why the Commission should not, pursuant to Exchange Act Section 15(b)(6), bar him from associating in the securities industry in any capacity and bar him from participating in any offering of a penny stock. The show cause order also warned Topping that, if the Commission found him to be 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. Topping did not respond to the show cause order.

II. Analysis

A. We hold Topping 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."[7] Because Topping has failed to answer or respond to the show cause order or to the Division's motion, we find it appropriate to hold him in default and to deem the allegations of the OIP to be true. We base the findings that follow on the record, including the OIP and the evidentiary materials that the Division submitted with its motion for default and sanctions.

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[5] *Charles K. Topping*, Exchange Act Release No. 97157, 2023 WL 2559846 (Mar. 17, 2023).

[6] *Charles K. Topping*, Exchange Act Release No. 97377, 2023 WL 3090019 (Apr. 25, 2023).

[7] 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 section within the time provided, such respondent may be deemed in default pursuant to" Rule of Practice 155(a)).

B. We find associational and penny stock bars to be in the public interest.

Exchange Act Section 15(b)(6)(A) authorizes the Commission to suspend or bar a person from associating in the securities industry and from participating in an offering of penny stock if it finds, on the record after notice and opportunity for hearing, that (1) the person was convicted of violating the federal mail or wire fraud statutes within ten years of the commencement of the proceeding; (2) the person was associated with a broker or dealer or was participating in an offering of penny stock at the time of the misconduct; and (3) such a sanction is in the public interest.[8]

The record establishes the first two of these elements. Topping was convicted of seven counts of violating the federal mail fraud statute and one count of violating the federal wire fraud statute within the applicable period.[9] The OIP, taken as true, establishes that Topping acted as an unregistered broker from April 2009 through December 2015, the period of the misconduct at issue, as he directly solicited investors to purchase securities and received commissions for those transactions.[10] Because Topping acted as a broker at the time of the misconduct, he was a person "controlling . . . such broker" and therefore was a person associated with a broker.[11]

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.[12] Our

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8 15 U.S.C. § 78o(b)(6)(A) (cross-referencing Exchange Act Section 15(b)(4), 15 U.S.C. § 78o(b)(4)); *see also id.* § 78o(b)(4)(B)(4) (discussing convictions for violating 18 U.S.C. §§ 1341, 1343).

9 18 U.S.C. §§ 1341, 1343.

10 *See, e.g.*, *Saul Daniel Suster*, Exchange Act Release No. 90401, 2020 WL 6680445, at *3 (Nov. 12, 2020) (finding respondent acted as a broker by soliciting investors and receiving transaction-based compensation).

11 15 U.S.C. § 78c(a)(18) (defining a "person associated with a broker or dealer" or "associated person of a broker or dealer" to include "any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer"); *see, e.g.*, *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)), *petition denied*, 695 F. App'x 980 (7th Cir. 2017).

12 *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.[13] The remedy is intended to protect the trading public from further harm, not to punish the respondent.[14]

We have weighed all these factors and find associational and penny stock bars are warranted to protect the investing public. The allegations of the OIP, deemed true, establish that Topping participated in a criminal scheme to defraud investors for six years. During this period, Topping repeatedly made fraudulent statements to individual investors to induce them to purchase the Companies' penny stocks. Some of his misrepresentations were common to both Companies: Using an alias, he falsely stated that he was a wealthy employee or executive of the Companies who could sell stock at a discount; no commissions or fees would be charged to investors; the Companies would soon be trading publicly; the Companies' largest shareholder and board member was Apple, Inc.'s former CEO and the president of PepsiCo; and the Companies were safe and profitable investments. Some of his other misrepresentations were specific to inducing purchases of shares in Sanomedics (*e.g.*, Sanomedics was purchasing emergency rooms and preparing sales contracts with healthcare providers, the military, and the Transportation Security Administration) or FCF (*e.g.*, FCF would conduct an IPO within weeks). Topping also failed to disclose resale restrictions on the Companies' shares. Through his participation in the fraudulent scheme, Topping received $1,207,000 in undisclosed commissions and was sentenced to 113 months in prison following his criminal convictions. We conclude that Topping's misconduct was egregious and recurrent.[15] Additionally, Topping's convictions for mail and wire fraud, as well as conspiracy to commit the same, require a specific intent to defraud.[16] Topping thus acted with a high degree of scienter.[17]

Because Topping failed to answer the OIP or respond to the show cause order or to the Division's motion, he has made no assurances in this proceeding that he will not commit future violations.[18] It also appears that Topping's occupation presents opportunities for future

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[13] *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (July 26, 2013).

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

[15] *See, e.g.*, *Suster*, 2020 WL 6680445, at *3 (finding conduct egregious and recurrent where, over seven years, respondent raised money from investors by falsely claiming no commissions or fees would apply to penny stock purchases and that the relevant companies were "safe" and "profitable").

[16] *See, e.g.*, *United States v. Stergios*, 659 F.3d 127, 132 (1st Cir. 2011) (stating that elements of mail fraud include "knowing and willful participation in [a] scheme [to defraud] with the specific intent to defraud"); *United States v. Miller*, 953 F.3d 1095, 1098-99, 1101-03 (9th Cir. 2020) (holding that wire fraud requires specific intent to deceive and cheat); *Suster*, 2020 WL 6680445, at *4 n.26 (collecting cases stating that conspiracy to commit mail and wire fraud requires specific intent to defraud).

[17] *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (scienter is an "intent to deceive, manipulate, or defraud").

[18] *See Aaron v. SEC*, 446 U.S. 680, 701 (1980) (the "degree of intentional wrongdoing evident in a defendant's past conduct" is an "important factor" indicating a risk of future harm).

violations because he acted as an unregistered broker during the period of his misconduct and offers no assurances about his future plans. Although Topping is still serving his criminal sentence, absent a bar, he would have the opportunity to re-enter the securities industry and commit further violations upon his release, which is currently due to occur on January 16, 2024.[19]

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, the record establishes that Topping is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.[20] The misconduct underlying Topping's convictions included making false and fraudulent statements to induce investors to purchase penny stocks. And given that Topping has defaulted in this proceeding, he has not opposed the imposition of any particular associational bar or a bar from participating in an offering of penny stock. We thus conclude that it is in the public interest to bar Topping from association with any

[19] *See, e.g.*, *Anthony Vassallo*, Advisers Act Release No. 6042, 2022 WL 2063310, at *4 (June 6, 2022) (finding respondent likely to commit future violations because he acted as an investment adviser during the period of his misconduct and offered no assurances concerning his plans following incarceration); *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *8 (Oct. 12, 2007) (finding a penny stock bar "necessary to protect the public interest because, absent a bar, there would be no obstacle to [respondent's] participation in a penny stock offering in the future").

[20] *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (finding that the misconduct underlying the respondent's conviction demonstrated that respondent was unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors).

investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in any offering of penny stock.[21]

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

[21] *Id.* (imposing associational and penny stock bars where necessary to protect the public).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98700 / October 6, 2023

Admin. Proc. File No. 3-20817

In the Matter of

CHARLES K. TOPPING

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Charles K. Topping is barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Charles K. Topping is barred from participating in any offering of a penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Vanessa A. Countryman
Secretary