SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 6348 / July 13, 2023

Admin. Proc. File No. 3-20264

In the Matter of

DEAN MUSTAPHALLI

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Conviction

Respondent was permanently enjoined from engaging in securities-related business within New York and convicted of multiple offenses in violation of state law for misconduct that occurred while he was an investment adviser. *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.

APPEARANCES:

Todd D. Brody and *Sheldon Mui* for the Division of Enforcement.

On April 19, 2021, we instituted an administrative proceeding against Dean Mustaphalli pursuant to Section 203(f) of the Investment Advisers Act of 1940.[1] We now find Mustaphalli to be in default, deem the allegations against him to be true, and bar him from associating in the securities industry in any capacity.

I. Background

A. The Commission instituted the proceeding against Mustaphalli.

The order instituting proceedings ("OIP") alleged that, between June 2014 and March 2017, Mustaphalli acted as an investment adviser, purporting to advise clients on their investments in securities in exchange for compensation. According to the OIP, Mustaphalli "engaged in a fraudulent scheme to invest his clients' funds in a high-risk hedge fund without their permission or knowledge" and, after incurring significant financial losses, Mustaphalli "diverted $100,000 of his clients' money to pay for his personal expenses." The OIP alleged that, on December 12, 2019, Mustaphalli pleaded guilty to multiple counts of violations of the New York Penal Law ("NYPL")—including 18 counts of grand larceny in the second degree, one count of forgery in the second degree, one count of criminal possession of a forged instrument in the second degree, two counts of scheme to defraud in the first degree, and one count of falsifying business records—and pleaded guilty to one count of violating the New York General Business Law § 352-C-6 (the "Martin Act").[2] The OIP further alleged that, on October 16, 2020, Mustaphalli was sentenced to three to nine years of imprisonment. The OIP also alleged that, on July 8, 2020, a New York state court permanently enjoined Mustaphalli, with his consent, "from engaging in securities related business within New York" and further ordered him to pay $6 million in restitution.[3]

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 Mustaphalli to file an answer to the allegations within 20 days after service, as provided by Rule of Practice 220(b).[4] The OIP informed Mustaphalli that if he failed to answer, he could be deemed in default, the allegations in the OIP could 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.[5]

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[1] *Dean Mustaphalli*, Advisers Act Release No. 5724, 2021 WL 1534734 (Apr. 19, 2021).

[2] *Id.* at *1; *see also* New York Penal Law §§ 155.40-1, 170.10-1, 170.25, 175.10-0, 190.65; New York General Business Law § 352-C-6. The OIP and Division's motion both mistakenly state that Mustaphalli pleaded guilty to "one count of falsifying business records in violation of NYPL 170.10-0." *Mustaphalli*, 2021 WL 1534734, at *1. But the record before us reflects that Mustaphalli pleaded guilty to falsifying business records in the first degree in violation of NYPL § 175.10-0.

[3] *Mustaphalli*, 2021 WL 1534734, at *1.

[4] 17 C.F.R. § 201.220(b).

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

B. Mustaphalli 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.

Mustaphalli was properly served with the OIP on April 26, 2021, pursuant to Rule of Practice 141(a)(2)(i),[6] but did not answer it. On August 9, 2021, the Division of Enforcement filed a motion requesting that the Commission find Mustaphalli in default and bar him from the securities industry. The Division supported the motion with the allegations of the OIP and with filings from both the criminal proceeding and the civil action against Mustaphalli. These filings included the plea hearing transcript, the sentencing hearing transcript, the civil complaint, and the judgment on consent in the civil action.

On August 19, 2021, more than 20 days after service and after the Division filed its default motion, the Commission ordered Mustaphalli to show cause, by October 4, 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.[7] Mustaphalli was warned that, if he was 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. Mustaphalli did not respond to the Division's motion or the order to show cause.

II. Analysis

A. We hold Mustaphalli 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."[8] Because Mustaphalli has failed to answer or respond to the order to show cause or the Division's motion, we find it appropriate to deem him in default and to deem the OIP's allegations 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 default motion.

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

Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from the securities industry if it finds, on the record after notice and opportunity for hearing, that (1) the person was (a) enjoined from engaging in or continuing any conduct or practice in

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[6] 17 C.F.R. § 201.141(a)(2)(i) (providing that service of an OIP on an individual may be made by "sending a copy . . . addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt").

[7] *Dean Mustaphalli*, Advisers Act Release No. 5827, 2021 WL 3682020 (Aug. 19, 2021).

[8] 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 acting as an investment adviser or in connection with the purchase or sale of any security, or (b) convicted, within ten years of the commencement of the proceeding, of an offense involving the purchase or sale of any security, or was convicted of an offense that arises out of the conduct of the business of an investment adviser; (2) the person was associated with an investment adviser at the time of the alleged misconduct; and (3) such a sanction is in the public interest.[9]

The record establishes the first two of these elements. Mustaphalli was enjoined from conduct in connection with acting as an investment adviser and in connection with the purchase or sale of securities. The state court judgment—which Mustaphalli consented to—ordered that Mustaphalli be permanently enjoined from "directly or indirectly attempting to engage in any manner in the issuance, exchange, sale, offer to sell, purchase, offer to purchase, . . . provision of investment advice, investment management, or distribution of" securities within New York. Mustaphalli also consented to be permanently enjoined from "directly or indirectly engaging or attempting to engage in any manner" in securities-related business in New York as an investment adviser, investment manager, or person associated with an investment adviser or manager. Mustaphalli also was, within ten years of the commencement of this proceeding, convicted of multiple offenses involving the purchase or sale of any security and arising out of the conduct of an investment adviser.[10] The allegations of the OIP deemed true establish that, between June 2014 and March 2017, Mustaphalli acted as an investment adviser by purporting to advise clients on their investments in securities in exchange for compensation.[11] Because Mustaphalli acted as an investment adviser, he necessarily also was a person associated with an investment adviser.[12]

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[9] 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e)(2) and (4), 15 U.S.C. § 80b-3(e)(2) and (4)); *see also id.* § 80b-3(e)(2)(A)-(B) (discussing convictions); *id.* § 80b-3(e)(4) (discussing injunctions).

[10] *See supra* note 2 and accompanying text; *see also* Advisers Act Section 202(a)(6), 15 U.S.C. § 80b-2(a)(6) (defining "[c]onvicted" to include a "plea of guilty" if it "has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed").

[11] *See, e.g.*, 15 U.S.C. § 80b-3(a)(11)(defining "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities"); *see also Koch v. SEC*, 793 F.3d 147, 157 (D.C. Cir. 2015) ("The definition of investment adviser does not include whether one is registered or not with the SEC. Hence, Koch could be primarily liable for violating the Advisers Act irrespective of registration with the Commission.") (citations omitted).

[12] *Shreyans Desai*, Advisers Act Release No. 4656, 2017 WL 782152, at *3 (Mar. 1, 2017) ("[T]he finding that Desai acted as an unregistered investment adviser establishes that he was associated with an investment adviser for purposes of Advisers Act Section 203(f).") (citing *Anthony J. Benincasa*, Advisers Act Release No. 1923, 2001 WL 99813, at *2 (Feb. 7, 2001) (explaining that a person who acts "as an investment adviser in an individual capacity" is "in a position of control with respect to the investment adviser" and thus "meets the definition of a 'person associated with an investment adviser'")).

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 the conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[13] Our public interest inquiry is flexible, and no one factor is dispositive.[14] The remedy is intended to protect the trading public from further harm, not to punish the respondent.[15]

We have weighed all these factors and find an industry bar is warranted to protect the investing public. Mustaphalli's misconduct was egregious and recurrent. The OIP's allegations, which we deem true, establish that while acting as an investment adviser, Mustaphalli defrauded his clients by investing their funds in a high-risk hedge fund without their permission or knowledge. Mustaphalli told his clients that he was investing their money in low-risk investments—often for retirement accounts—but was instead investing their money in a high-risk hedge fund. But after incurring substantial losses, Mustaphalli diverted $100,000 in his clients' funds to pay his personal expenses. The court's $6 million restitution order against Mustaphalli indicates that his misconduct caused substantial financial losses for his clients. The record therefore establishes that Mustaphalli repeatedly abused the position of trust he occupied as an investment adviser.[16]

Mustaphalli also acted with a high degree of scienter.[17] He demonstrated this by knowingly forging his clients' initials, submitting false documentation, falsifying business records, and making false representations to his clients about their investments.[18] Given that he

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

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

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

16 *See James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . as egregious."); *cf. James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (finding misconduct egregious where individual "violated the fiduciary duties he owed his clients as an investment adviser by failing to disclose the conflict of interest inherent in receiving kickbacks for investing client funds in [certain] securities" and caused ten to fifty victims to lose millions of dollars).

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

18 *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 65 (1st Cir. 2008) ("[T]he fact that a defendant knowingly made a false statement is 'classic evidence' of scienter.") (citation omitted); *see also SEC v. Weintraub*, No. 11-21549-civ, 2011 WL 6935280, at *7 (S.D. Fla. Dec. 30, 2011) ("A defendant engages in knowing misconduct when he creates documents he knows

repeated this fraudulent misconduct for years, his behavior cannot be explained away as the product of mere negligence or innocent mistake.[19] Mustaphalli was also convicted of 24 counts of criminal offenses for which a specific intent is a required element in connection with this conduct.[20] And during his plea hearing, Mustaphalli repeatedly affirmed that he acted with the intent to defraud and stole property by false pretenses.

Because Mustaphalli failed to answer the OIP, or respond to the order to show cause, or to the Division's motion for a default and sanctions, 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 Mustaphalli's occupation presents opportunities for future violations because he acted as an investment adviser during the nearly three-year period of his misconduct, and he offers no evidence of his current occupation or assurances about his future plans.[21] Although Mustaphalli is currently incarcerated, absent a bar, he would have the opportunity to re-enter the securities industry and commit further violations upon his release.[22]

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are false."); *see also Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *5, *10 (Nov. 21, 2008) (concluding that the wrongfulness of preparing and submitting multiple invoices, "knowing that some invoices were marked up or completely falsified," was "obvious and manifested a high degree of scienter").

[19] *See, e.g.*, *SEC v. Merkin*, No. 11-23585-civ, 2012 WL 5245561, at *8 (S.D. Fla. Oct. 3, 2012) (finding that the defendant's conduct was "intentional and that he acted with scienter" because, among other things, he "repeated the false statements on at least four occasions"), *aff'd*, 628 F. App'x 741 (11th Cir. 2016); *Se. Indus. Loan Co.*, Securities Act Release No. 2726, 1941 WL 40736, at *10 (Nov. 29, 1941) (explaining that "innocent mistakes of a false and misleading character" are less probable where the falsity has been repeated in multiple instances).

[20] *See, e.g.*, NYPL § 155.40-1 (grand larceny in the second degree requires intent to steal property); *id.* § 170.10 (forgery in the second degree requires "intent to defraud, deceive or injure another"); *id.* § 170.25 (possession of a forged instrument in the second degree requires "knowledge that it is forged and with intent to defraud, deceive or injure another"); *id.* § 175.10 (falsifying business records in the first degree requires "intent to defraud"); *id.* § 190.65 (scheme to defraud in the first degree requires "intent to defraud" or use of "false or fraudulent pretenses, representations or promises"); New York General Business Law § 352-C-6 (violation requires that the person "intentionally engages" in fraud or "makes a material false representation or statement with intent to deceive or defraud").

[21] *See George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *3 (Jan. 30, 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); *cf. Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *41 (May 29, 2015) (explaining that respondent offered "no assurance against future violations other than to assert that he has left the industry voluntarily, which provides no guarantee that he will not seek to return at some point in the future," and concluding that "[a]bsent a bar, nothing would prevent [respondent] from reentering the industry").

[22] *See, e.g.*, *Martin A. Armstrong*, Advisers Act Release No. 2926, 2009 WL 2972498, at *4 (Sept. 17, 2009) (finding that "there is a likelihood that Armstrong would, after his release from prison, be able and inclined to re-enter the securities industry where he would confront

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 Mustaphalli is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.[23] Given that Mustaphalli has defaulted in this proceeding, he has not opposed the imposition of any associational bar. Because Mustaphalli poses a continuing threat to investors, we conclude that it is in the public interest to bar him from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.[24]

An appropriate order will issue.

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

Vanessa A. Countryman
Secretary

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opportunities to violate the law again"); *see also, e.g.*, *SEC v. Monarch Funding Corp.*, No. 85 Civ. 7072, 1996 WL 348209, at *9 & n.12 (S.D.N.Y. June 24, 1996) (noting that defendant had "not ceased his involvement with the securities industry" "while incarcerated, [and] has managed to remain involved in questionable ventures that have resulted in violation of the securities laws").

[23] *Tagliaferri*, 2017 WL 632134, at *6 (finding that the misconduct underlying the respondent's conviction demonstrated that respondent was unfit to participate in the securities industry and posed a risk to investors).

[24] *Id.* (imposing associational bars where they were necessary to protect the public).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6348 / July 13, 2023

Admin. Proc. File No. 3-20264

In the Matter of

DEAN MUSTAPHALLI

ORDER IMPOSING REMEDIAL SANCTIONS

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

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

By the Commission.

Vanessa A. Countryman
Secretary