

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-18831**

**In the Matter of**

**SHAWN K. DICKEN,**

**Respondent.**

**SUPPLEMENTAL BRIEF OF THE DIVISION OF ENFORCEMENT**

The Division of Enforcement hereby files its supplemental brief as directed by the Commission's Order dated August 12, 2020. In support of its brief, the Division also files the accompanying Declaration of John E. Birkenheier. As ordered by the Commission, this brief addresses three questions: 1) the facts underlying Respondent's conviction; 2) the reasons for the dismissal of the final count against her; and 3) the appropriateness of the sanctions sought.

**The Facts Underlying Respondent's Conviction**

In response to the Commission's August 12, 2020, Order the Division obtained a copy of the transcript of the jury trial and sentencing hearings in the Michigan State criminal prosecution of *People v. Shawn Kristi Dicken*, Case No. 2013-005531-FH (Cir. Ct., Midland County, Michigan). The Division was able to obtain a paper copy of the transcript through the cooperation of the Circuit Court for Midland County, Michigan. Counsel for the Division reviewed the transcript and submits the accompanying declaration based on that review. (Exhibit A, Declaration of John E. Birkenheier, dated September 10, 2020, at ¶ 2.)

### The Trial

The trial of the case lasted eight days. Between them, the prosecution and defense called nineteen witnesses. The witnesses included investor-victims, employees of Diversified, investigators, an expert, and the defendant. The parties also introduced approximately eighty-one exhibits, including checks, bank statements, offering documents, subscription agreements, and summary exhibits. (*Id.*, ¶ 3.)

### Victim Testimony

The victims who testified at the trial testified to several facts: The victims were almost all senior citizens and retired or nearing retirement. One victim was an [REDACTED] adult for whom a relative had been given a power of attorney. The victims almost all had known Dicken for several years, because she had previously served as their financial advisor at a local branch of a national bank. In her position with that bank, Dicken assisted almost all the victims with their retirement accounts. They trusted Dicken. At least one considered Dicken to be a friend. (*Id.*, ¶ 4.)

Prior to the Diversified offering, Dicken was terminated by the bank because of what the Court, at the sentencing, labelled churning of customer accounts to increase her income. After her termination by the bank, Dicken began her association with Diversified. (*Id.*, ¶ 5.)

The victims testified that after leaving the bank and joining Diversified, Dicken contacted them and solicited them to invest in Diversified. As part of her solicitation Dicken visited each of the victims on more than one occasion at their homes. At the time Dicken solicited one victim, the victim was undergoing [REDACTED] and suffering [REDACTED], for which she was taking [REDACTED]. Dicken also solicited the [REDACTED] adult victim without notifying the relative who held that victim's power of attorney. (*Id.*, ¶ 6.)

The victims were elderly and unsophisticated and did not understand the investments Dicken offered and sold to them. The investments involved bonds, limited partnerships, and/or stock. Dicken described the business of Diversified as buying old houses, rehabbing the properties, and then either reselling or renting them. (*Id.*, ¶ 7.)

According to the victims, several told Dicken that they did not want to put their principle at risk. (*Id.*, ¶ 8.) Dicken told victims that there was no risk to principle, the investment would earn ten percent annually, and the principle could be withdrawn on demand. (*Id.*) Dicken told at least one of the victims that the Diversified investments were as safe as U.S. savings bonds. (*Id.*) The victims also testified that Dicken did not disclose to them that their principle would be tied up for a long period of time and that the principle could be lost. (*Id.*, ¶ 9.) Victims testified that Dicken did not give them offering documents, but instead drew graphs, purporting to show expected returns, on a pad of paper. (*Id.*, ¶ 10.)

Dicken's fraud against one of the victim-witnesses ("Investor A") formed the basis for Count Ten of the Indictment—fraudulent sale of securities. (*Id.*, ¶ 11.) Investor A testified that he was 66 years old and had known Dicken from when she worked for the bank. (*Id.*, ¶ 12.) Dicken had advised Investor A about retirement investments. (*Id.*) A year or two later, Dicken contacted Investor A "out of the blue" and said she wanted to come to Investor A's house to talk about investments. (*Id.*) Dicken did come to his house "numerous times" and discussed a single investment opportunity. (*Id.*) She brought a big pad of paper and drew lines to illustrate the returns Investor A would receive. (*Id.*) Investor A's [REDACTED], and his [REDACTED] [REDACTED] (*Id.*) He could not say what he had invested in, but he did recall that his investment related to real estate and Diversified. (*Id.*) Dicken told Investor A his investment was safe. (*Id.*) She did not tell him there was a risk of losing all his money. (*Id.*) Dicken said the return on the

investment would be ten percent. (*Id.*) Investor A decided to invest \$30,000 in a Diversified limited partnership. (*Id.*) Dicken would bring Investor A papers to sign. (*Id.*) He does not recall going over the papers, just Dicken indicating where he should sign. (*Id.*) He did not remember whether Dicken showed him Diversified offering documents. (*Id.*) While Dicken worked at Diversified, she also sold Investor A a \$100,000 Jackson National Life variable annuity. (*Id.*, ¶ 13.) Dicken sold this investment to Investor A before she solicited him to invest in Diversified. (*Id.*) The final time Dicken came to Investor A's house was in February 2012, when she wanted him to move \$100,000 from his annuity into Diversified. (*Id.*)

The victims who testified said they invested amounts ranging from \$25,000 to \$100,000. These funds comprised all or some of each victim's retirement savings. At least one victim, a retiree, liquidated shares of stock from his former employer, to invest in Diversified through Dicken. (*Id.*, ¶ 14.)

The victims testified about offers and sales of Diversified investments in approximately 2010 and 2011 and at least one offer as late as February 2012. (*Id.*, ¶ 15.)

#### Expert and Investigator Testimony

The expert called by the prosecution explained the definition of securities and the regulation and duties of associated persons such as Dicken. The expert opined that Dicken had not performed any due diligence on the investments she offered and sold to the investors. The expert also opined that Dicken had sold investments that were unsuitable for her elderly, unsophisticated victims who, at Dicken's suggestion, liquidated safer holdings in order to invest in Diversified. The expert testified that the enterprise was a Ponzi scheme. (*Id.*, ¶ 16.)

The expert also explained that Dicken received a ten percent commission from her sale of Diversified investments. (*Id.*, ¶ 17.)

An investigator called by the State testified that the money invested by Dicken's victims was commingled with money received from other sources by Diversified. No track was kept of the specific limited partnership in which any given victim was purportedly investing. Commingled funds were then paid out for various purposes, without regard to the source of the money, or the particular limited partnership for which the investor's money was purportedly received. The investigator described the enterprise as a Ponzi scheme. (*Id.*, ¶ 18.)

#### The Investigator Interview Report

During the prosecution's case in chief, it came to light that a few weeks before the trial a prosecution investigator interviewed a defense witness and the prosecution had not turned the report of the interview over to the defense counsel. (*Id.*, ¶ 19.) The prosecution's position on the issue was that the interview was related to different criminal charges than those at issue in the trial. (*Id.*) The prosecution turned over the interview report to the defense and the Court when the issue arose during the trial. (*Id.*) The Defense moved for a mistrial. (*Id.*, ¶ 20.) After reviewing the report, the Court asked for briefs on the motion for the mistrial and decided to proceed with the trial in the meantime. (*Id.*, ¶ 21.)

#### Jury Instructions

At the conclusion of the evidence, the Court instructed the jury. (*Id.*, ¶ 22.) In his instructions, the Court stated that Count Ten of the indictment charged Dicken with the fraudulent sale of securities to Investor A. With regard to this Count, the Court instructed the jury, among other things, that before the trial the prosecution had failed to promptly turn over to the defense an investigator's report regarding the alteration of documents related to Diversified. The Court stated that the failure did not appear to bear on the question of guilt or innocence, but instructed the jury that if they thought it appropriate, they could consider possible harm to the

defense in preparing its case caused by the delay in deciding whether the prosecution had proved Count Ten—the fraudulent sale of securities—beyond a reasonable doubt. (*Id.*, ¶ 23.)

### The Verdict

The jury convicted Dicken on Count One (conducting a criminal enterprise), Counts Two through Eight (obtaining more than \$1,000 through false pretenses), and Count Nine (embezzling more than \$50,000 from a vulnerable adult). (*Id.*, ¶ 24.) The jury, however, found Dicken not guilty under Count Ten (fraudulent sale of securities). (*Id.*, ¶ 25.) The record provides no explanation for this verdict of not guilty. (*Id.*, ¶ 25.)

### The Court’s Findings at the Sentencing Hearing

After the trial, the Court received victim impact statements from additional victims. In total, the Court received trial testimony or victim impact statements from over twenty victims. (*Id.*, ¶ 26.) At the sentencing hearing, the Court heard argument from counsel and testimony from several victims. (*Id.*, ¶ 27.)

The Court made the following findings:

- a. Dicken was terminated by her previous employer because she had “churned” customer accounts for her benefit; as part of her termination, Dicken agreed not to contact her clients; this term was intended to protect Dicken’s clients; but Dicken disregarded her promise and contacted her clients anyway;
- b. Her conduct showed that Dicken cannot be trusted to follow orders not to return to this line of work;
- c. Dicken exploited her position of trust as a licensed financial advisor;
- d. Dicken exploited the trust her clients placed in her;

- e. Dicken showed no real remorse; she claimed she believed the Diversified investments were legitimate; but if she really believed that, she would not have lied to her clients about what was being done with their money;
- f. The Diversified investments were not legitimate; the enterprise was in fact a Ponzi scheme;
- g. Dicken lied to her victims, repeatedly and face-to-face, about the risks and safety of the Diversified investments, for the purpose of getting them to invest;
- h. The evidence showed the Diversified investments were not appropriate for senior citizens;
- i. Dickens's victims lost their life savings, suffered substantially lowered standards of living, and some no longer could afford to live in their own homes;
- j. Restitution against Dicken should be set at \$780,700; and
- k. An upward departure from the sentencing guidelines was appropriate because some victims suffered psychological injury as a result of Dicken's fraud, because of her past violations, and because she took her victims' life savings.

(*Id.*, ¶ 28.)

Based on his findings, the Court sentenced Dicken to 140 months to 20 years on Count One, 23 months to 5 years on Counts Two to Eight, and 71 months to 15 years on Count Nine, to be served concurrently. (*Id.*, ¶ 29.)

### **The Reasons for the Dismissal of the Final Count against the Respondent**

The record indicates that rather than being dismissed by the Court, Count Ten (fraudulent sale of securities) was put to the jury, who returned a verdict of not guilty. The record provides no explanation for the jury's verdict.

## **Appropriateness of the Sanctions Sought against the Respondent**

### **Dicken was Associated with a Broker-Dealer**

When she committed the crimes for which she was convicted, Dicken was a registered representative with registered broker-dealers W.R. Rice and G-W Brokerage. (OIP at II.A.1.)

### **Dicken Was Convicted of Embezzlement and Obtaining Money through False Pretenses**

Among the possible bases for the imposition of collateral associational bars and penny stock bars against Dicken, under Sections 15(b)(4)(B) and 15(b)(6)(A) of the Exchange Act, are convictions for offenses . . . involving “fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds . . . or substantially equivalent activity . . .” See 15 U.S.C. §§ 78o(b)(4)(B)(iii) and 78o(b)(6)(A).

On March 13, 2014, Dicken was convicted of embezzlement and of making or using false pretenses to obtain money with the intent to defraud or cheat, both felony crimes which arose out of the conduct of the business of a broker dealer. (OIP at II.B.2; Ex. A and Ex. B to Division of Enforcement’s Motion for Order Finding Respondent in Default and Imposing Sanctions and Brief in Support, April 4, 2019.) Specifically, Dicken was charged with, and convicted of, soliciting senior citizens to invest in a Ponzi scheme; making material misrepresentations; and failing to disclose material facts about the nature and risks of the investment. (*Id.*)

### **Collateral Associational and Penny Stock Bars are in the Public Interest**

To determine whether a sanction is in the public interest, the Commission should look to the six factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) *aff’d on other grounds*, 450 U.S. 91 (1981): (a) the egregiousness of the defendant's actions; (b) the isolated or recurrent nature of the infraction; (c) the degree of scienter involved; (d) the sincerity of the defendant's assurances against future violations; (e) the defendant's



recognition of the wrongful nature of his conduct; and (f) the likelihood that the defendant's occupation will present opportunities for future violations. *See Bryan Lee Addington*, Initial Dec. Rel. No. 1339 (Dec. 20, 2018). The "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive." *David Henry Disraeli and Lifeplan Associates, Inc.*, Exchange Act Rel. No. 57027, 2007 SEC LEXIS 3015, at \*61 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam). "Absent extraordinary mitigating circumstances, an individual who has been convicted cannot be permitted to remain in the securities industry." *Frederick W. Wall*, Exchange Act Rel. No. 52467, at 8, 2005 WL 2291407 (Sept. 19, 2005) (quotation omitted); *accord Shreyans Desai*, Exchange Act Rel. No. 80129, at 6, 2017 WL 782152 (Mar. 1, 2017).

Dicken's conduct was egregious. The trial testimony from several of her victims and the findings of the Court, made in connection with her sentencing, establish that Dicken exploited her position of trust as a financial adviser; exploited the trust her clients placed in her; repeatedly lied to her victims, face-to-face, about the risks and safety of the Diversified investments, for the purpose of getting them to invest; and showed no real remorse. (Ex. A hereto, Birkenheier Dec., ¶¶ 4-15, 16-18, 27-28.) The trial evidence and the Court's findings also establish that the Diversified investments were not legitimate; the enterprise was in fact a Ponzi scheme; and the Diversified investments were not appropriate for senior citizens. (*Id.*) Dickens's victims lost their life savings, suffered substantially lowered standards of living, and some no longer could afford to live in their own homes. (*Id.*) Some of Dickens's victims suffered psychological injury as a result of her fraud. (*Id.*)

Dicken's violations were recurrent. They continued over two years and affected more than twenty victims. (*Id.*, ¶¶ 15, 27.) Moreover, this was not the first time Dicken had

committed fraud. In sentencing Dicken, the Court considered her prior misconduct when departing from sentencing guidelines and imposing a longer sentence for her conviction of operating a criminal enterprise. (*Id.* ¶¶ 28.a, 28.b; *People v. Dicken*, No. 322998, 2018 WL 632986, at \*1 (Mich. Ct. App. Jan. 30, 2018), appeal denied, 502 Mich. 904, 913 N.W.2d 325 (2018).

Dicken's degree of scienter was high. She exploited her position of trust as a licensed financial adviser; she exploited the trust her clients placed in her; and she repeatedly lied to her victims, face-to-face, about the risks and safety of the Diversified investments for the purpose of getting them to invest. (Ex. A hereto, Birkenheier Dec., ¶¶ 4-15, 27-28.)

As Dicken has not participated in this proceeding, she has given no assurances that she will avoid future violations of the law. The existence of a violation raises an inference that the violation will be repeated. *Rockies Fund, Inc., et al.*, Exchange Act Rel. No. 27593 (Dec. 7, 2006) (citing *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)). Moreover, in sentencing Dicken, the Court specifically found that she showed no remorse (Ex. A hereto, Birkenheier Dec., ¶28.e) and considered her failure to abide by the terms of a prior termination agreement, which would have protected the very same persons she defrauded in this case. (*Id.*, ¶¶ 28.a, 28.b)

Although Dicken is serving a lengthy sentence, she will eventually be released; and unless she is barred from the securities industry she will have the chance to again harm investors. Dicken was employed in the securities industry for ten years, from 2002 to 2012. It is a business which she knows and in which she is experienced.

Based on a weighing of the *Steadman* factors, industry and penny stock bars against Dicken are both appropriate and in the public interest.

## **Conclusion**

For the reasons set forth above, the Division respectfully requests, pursuant to Rule 155 of the Rules of Practice, that the Commission grant the Division's Motion finding Dicken in default and enter an order barring her from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO and from participating in any offering of a penny stock.

Dated: September 11, 2020

Respectfully submitted,

*s/John E. Birkenheier*

John E. Birkenheier

Steven L. Klawans

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused true copies of the Division of Enforcement's Supplemental Brief and Declaration of John E. Birkenheier were served on the following on this 11th day of September 2020, in the manner indicated below:

CERTIFIED MAIL  
Ms. Shawn K. Dicken  
Women's Huron Valley Correctional Facility  
[REDACTED]  
Ypsilanti, MI [REDACTED]

Dated: September 11, 2020

*s/John E. Birkenheier*  
John E. Birkenheier