Initial Decision Release No. 1345
Administrative Proceeding
File No. 3-18252

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of **Joseph Vitale**	**Initial Decision of Default** February 4, 2019

Appearance: Amie Riggle Berlin for the Division of Enforcement, Securities and Exchange Commission

Before: Cameron Elliot, Administrative Law Judge

Summary

While helping to raise nearly $5 million for a purported investment, Respondent Joseph Vitale told investors that he received no commissions, when in fact roughly a third of their funds were siphoned to his personal benefit. This initial decision bars Vitale from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock.

Procedural Background

On October 16, 2017, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Vitale, pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIP alleges that on June 6, 2017, Vitale pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 in *United States v. Vitale*, No. 17-cr-60102 (S.D. Fla.). OIP at 2. Judgment was entered against Vitale on August 22, 2017. *Id.*

A different administrative law judge was originally assigned to this proceeding and issued an initial decision of default against Vitale. The Commission vacated that decision following the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2-3 (Aug. 22,

2018). The matter was then reassigned to me to provide Vitale with the opportunity for a new hearing. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2-3 (ALJ Sept. 12, 2018). Vitale was directed to submit a proposal for the conduct of further proceedings. *Joseph Vitale*, Admin. Proc. Rulings Release No. 6033, 2018 SEC LEXIS 2496, at *1 (ALJ Sept. 20, 2018). He did not. I have therefore proceeded under the Commission's instruction not to give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued by the prior administrative law judge. *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4.

Previously, I independently reviewed the evidence submitted by the Division and determined that Vitale was served with the OIP on October 27, 2017. *Joseph Vitale*, Admin. Proc. Rulings Release No. 6166, 2018 SEC LEXIS 2795, at *1 (ALJ Oct. 11, 2018). Because Vitale failed to answer, I ordered him to show cause by October 22, 2018, why he should not be found in default. *Id.* at *2. To date, Vitale has failed to answer, submit a proposal for the conduct of further proceedings, respond to the show cause order, or otherwise defend this proceeding.

The Division of Enforcement submitted a motion for sanctions and supporting evidence on February 2, 2018, while the proceeding was assigned to the previous administrative law judge. Because Vitale has not appeared to request that that evidence be disregarded and the Division has not sought to supplement its filing, I have relied on the prior record. *See id.* (putting Vitale on notice that if he failed to respond to the order to show cause or otherwise participate, I would rely on the Division's previously filed motion for sanctions).

Because Vitale has not filed an answer, responded to the order to show cause, or otherwise defended this proceeding, I find him to be in default and deem the allegations in the OIP to be true. *See* OIP at 3; 17 C.F.R. §§ 201.155(a)(2), .220(f); *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4. This proceeding will be determined upon consideration of the record, including the deemed-true facts in the OIP, the Division's submissions, and the underlying documents from the criminal action and filings with government regulators, officially noticed pursuant to Rule of Practice 323. *See* 17 C.F.R. §§ 201.155(a), .323; *Robert Bruce Lohmann*, 56 S.E.C. 573, 583 n.20 (2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions"). I also take official notice of the United States magistrate judge's report and recommendation, as adopted by the district judge in *SEC v. LottoNet Operating Corp.*, a related civil enforcement action. *See SEC v. LottoNet Operating Corp.*, No. 17-cv-21033,

2017 U.S. Dist. LEXIS 51390 (S.D. Fla. Mar. 31, 2017) ("R & R"), *adopted by* 2017 U.S. Dist. LEXIS 53840 (S.D. Fla. Apr. 5, 2017).

Findings of Fact

From 2015 to 2017, Vitale, acting as a broker, solicited investments in LottoNet, Inc. Ex. 2 (factual proffer) at 1.[1] He often used the alias "Donovan Kelly" during this time to conceal his previous run-ins with securities industry regulators, R & R at *23, which include the following incidents. In 2009, the Financial Industry Regulatory Authority (FINRA) opened an investigation into Vitale, which Vitale obstructed. *Id.* at *22-23. At the conclusion of the investigation, FINRA barred Vitale from associating with FINRA members in any capacity. *Id.* at *23; *see Dep't of Enforcement v. Vitale*, No. 2009017585202 (OHO Sept. 21, 2011), https://www.finra.org/sites/default/files/fda_documents/2009017585202_FDA_VC24455.pdf. In 2010, the Pennsylvania Securities Commission found that Vitale violated the Pennsylvania Securities Act by selling unregistered securities as an unregistered broker-dealer and issued a cease-and-desist order. R & R at *21-22. And in 2013, Vitale was convicted of the unlawful operation of a boiler room, similar to the one that Vitale helped operate to sell LottoNet securities. *Id.* at *9-10, *21; Ex. 2 (factual proffer) at 1.

The LottoNet private placement memorandum that Vitale sent to prospective investors stated that no commissions were paid on sales of the investment. Ex. 2 (factual proffer) at 1. On a conference call, Vitale also instructed an FBI cooperating witness to tell a potential investor (who was actually an undercover agent) that the witness would not receive a commission for the sale. *Id.* These representations were false—Vitale told the cooperating witness that he received a commission of 35%. *Id.*

LottoNet received $4.8 million from investors from June 2015 through February 2017, with less than $4,000 returned to investors. *Id.* at 2. Instead, LottoNet paid approximately $700,000 to Vitale or his companies. *Id.* Vitale was responsible for soliciting at least ten investors. *Id.* In fact, LottoNet's own "sale agent report" credits Vitale with roping in ninety-two investors. R & R at *12.

On March 27, 2017, a criminal complaint was filed against Vitale alleging that he conspired to commit mail and wire fraud in violation of 18

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[1] Exhibit 2 to the Division's motion for sanctions contains the factual proffer and plea agreement from the criminal case against Vitale.

U.S.C. § 1349. Ex. 1 (criminal complaint) at 1.[2] On June 6, 2017, Vitale pleaded guilty to mail fraud, 18 U.S.C. § 1341. Ex. 2 (plea agreement) at 1. He was sentenced to 57 months in prison and ordered to pay $2 million in restitution. Ex. 3 at 2, 5.[3]

Conclusions of Law

Exchange Act Section 15(b)(6) authorizes the Commission to impose an associational bar against Vitale if: (1) he was convicted of an offense specified in Section 15(b)(4)(B), which includes mail fraud, within ten years of the commencement of the proceeding; (2) he was associated with a broker or dealer, whether registered or unregistered, at the time of the misconduct; and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B), (b)(6)(A)(ii); *see Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) (recognizing that it is "well established that [the Commission is] authorized to sanction an associated person of an unregistered broker-dealer . . . in a follow-on administrative proceeding").

The statutory bases to impose an associational bar—including a penny stock bar—against Vitale have been satisfied. During the time of his misconduct, he was acting as unregistered broker. *See* OIP at 1; Ex. 2 (factual proffer) at 1-2.[4] "A person who acts as an unregistered broker-dealer is 'associated' with a broker-dealer for the purposes of Section 15(b)." *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657, at *2 n.2 (Apr. 23, 2015). That association with a broker-dealer provides sufficient grounds to also bar Vitale from participating in an offering of penny stock because Exchange Act Section 15(b)(6) contemplates that such a bar may follow from *either* prior participation in a penny stock offering *or* association with a broker-dealer. *See* 15 U.S.C. § 78*o*(b)(6); *accord Loughrin v. United States*, 573 U.S. 351, 357 (2014) (recognizing that the words that "or" connects are normally alternative options). Vitale did not file an answer or oppose the Division's motion and therefore has not offered any evidence to refute the conclusion that the statutory bases for a sanction have been

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[2] Exhibit 1 contains the criminal complaint and supporting affidavit.

[3] Exhibit 3 is the judgment against Vitale.

[4] Per the OIP and the FINRA BrokerCheck website, Vitale held Series 7 and 63 licenses until 2009. OIP at 1; Joseph Alphonse Vitale, CRD No. 5223467, BrokerCheck Report, https://brokercheck.finra.org/individual/summary/5223467 (last visited Jan. 30, 2019).

satisfied. Accordingly, a sanction will be imposed if it is in the public interest.

Sanctions

The appropriateness of any remedial sanction is guided by the public interest factors set forth in *Steadman v. SEC*, namely: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 (2006); *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003). This is a flexible inquiry, and no one factor is dispositive. *Kornman*, 2009 SEC LEXIS 367, at *22.

Egregiousness and recurrence

Vitale's misconduct was egregious. In statements to prospective investors, through directions to the cooperating witness, and in the private placement memorandum, Vitale represented that no commissions would be received for sales of investments in LottoNet. Not only was this false, but the commission was 35%. Ex. 2 (factual proffer) at 1; *see* R & R at *17-18. In total, LottoNet raised close to $5 million from investors, with approximately $700,000 going to Vitale or his companies. Ex. 2 (factual proffer) at 2. His conduct was also recurrent in that he defrauded at least ten—but as many as ninety-two—investors over two years. *Id.* at 1-2; R & R at *12. Because Vitale drafted the scripts used by other sales agents, R & R at *9, he was indirectly responsible for defrauding even more investors. The length of Vitale's sentence and amount of his restitution are measures of the egregiousness of his conduct. Ex. 3 at 2, 5.

Scienter

Vitale acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). Indeed, in pleading guilty to mail fraud, an element of which is that the defendant

"devised or intend[ed] to devise any scheme or artifice to defraud," 18 U.S.C. § 1341, Vitale demonstrated a high degree of scienter.

His conduct bears this out. As a formerly-licensed member of the securities industry, he would have known the importance investors place on truthful information about the commission taken on an investment, yet he misrepresented that information anyway. His use of an alias during this time to avoid disclosure of his disciplinary history further underscores his intent to deceive.

Assurances against future violations, recognition of wrongful conduct, and likelihood of future violations

Although "the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Korem*, 2013 SEC LEXIS 2155, at *23 n.50 (alteration in internal quotation omitted) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)); *see Gann v. SEC*, 361 F. App'x 556, 560 (5th Cir. 2010) (affirming permanent associational bar and reasoning "if [respondent] doesn't know right from wrong in this industry, how can he avoid wrongdoing in the future?"). By defaulting here, Vitale has not rebutted that inference or otherwise acknowledged his misconduct. The fact that he had a lengthy criminal and disciplinary record of securities violations and still proceeded to get involved in LottoNet demonstrates what little regard he has for the securities laws. He will not even be forty years old upon his release from prison, leaving him many opportunities for future violations.

* * *

Weighing all the factors, there is a substantial need to protect investors from Vitale and deter others from engaging in similar conduct. Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Securities Act Release No. 9085, 2009 SEC LEXIS 4166, at *81, *81 n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010), *abrogated on other grounds by Kokesh v. SEC*, 137 S. Ct. 1635 (2017). That deterrent effect may be lessened here because those who, like Vitale, operate outside the bounds of the securities laws are less likely to be concerned they may not be able to register in the future. But the mere fact that the Commission is enforcing the law has some effect. A collateral bar "will prevent [Vitale] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford & Co.*, Investment Advisers Act of 1940 Release No. 3829, 2014 SEC LEXIS 1529, at *86-87 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

Order

It is ORDERED that the Division of Enforcement's Motion for Sanctions is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Joseph Vitale is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Under that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then any party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occurs, the initial decision shall not become final as to that party.

Respondent may move to set aside the default in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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Cameron Elliot
Administrative Law Judge