INITIAL DECISION RELEASE NO. 491
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15045

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

In the Matter of	:	INITIAL DECISION
	:	June 14, 2013
DAVID MURA	:	

APPEARANCES: Aaron P. Arnzen and Joseph P. Ceglio for the Division of Enforcement, Securities and Exchange Commission

David Mura, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on September 24, 2012, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). Pending before me is the Motion for Initial Decision Making Findings and Determining Sanctions Based on Entry of Default Against Respondent David Mura (Motion for ID), filed by the Division of Enforcement (Division) on April 22, 2013.[1] Also pending before me is the Amended Motion to Set Aside Default (Set Aside Motion),[2] filed by Respondent David Mura (Mura) on April 26, 2013. I grant the Motion for ID and deny the Set Aside Motion.

PROCEDURAL HISTORY

On October 14, 2012, Mura filed an Answer, and on October 24, 2012, filed an Amended Answer, both denying the allegations against him. Oppo., Exs. 1-2. On November 6, 2012, I held a telephonic prehearing conference, attended by Mura and the Division of Enforcement, at which time I found that Mura was served with the OIP no later than October 14, 2012. During the prehearing conference, I set the hearing date for March 4, 2013, and I established a

[1] In support of the Motion for ID, the Division attached a Declaration of Aaron P. Arnzen (Arnzen Decl.), which includes six exhibits (Arnzen Decl. Ex.__), a Declaration of James Scalise (Scalise) (Scalise Decl.), which includes three exhibits (Scalise Decl. Ex. __), and a Declaration of David Weaver (Weaver) (Weaver Decl.), which includes one exhibit (Weaver Decl. Ex.).

[2] The Division filed an Opposition to the Set Aside Motion (Oppo.) on May 6, 2013, although it was received by this Office, and served by email on Respondent David Mura, on May 3, 2013. The Opposition includes eighteen exhibits (Oppo. Ex. __). Mura did not file a timely reply.

prehearing schedule. The prehearing schedule included a due date of February 4, 2013, for exchanging witness lists and a due date of February 11, 2013, for exchanging exhibits and exhibit lists. Oppo., Ex. 3. I also encouraged the parties to serve each other electronically, and thereafter Mura agreed to electronic service of filings. Oppo., Ex. 4, at 20:16-22; Oppo., Ex. 5.

On January 21, 2013, Mura requested a postponement of the March 4, 2013, hearing, citing medical problems. Oppo., Ex. 6. The Division requested a telephonic prehearing conference to address the issue, which I ordered to take place on January 29, 2013, at 12:30 pm. Id.; Oppo., Ex. 7. The Order scheduling the prehearing conference was sent to Mura by mail and email, and on January 23, 2013, Mura informed counsel for the Division by email that the date and time of the conference was acceptable. Oppo. Ex. 7.

Mura failed to appear at the January 29, 2013, prehearing conference, so I issued an order that same day, requiring Mura to show cause by no later than February 8, 2013, why he should not be deemed in default and have the proceeding determined against him. See 17 C.F.R. §§ 201.155(a)(2), .221(f); Oppo. Ex. 8. I also reminded the parties that their witness lists were due on February 4, 2013. Oppo., Ex. 8. The Division timely filed its witness list.

Mura failed to respond to the show cause order, and he also failed to file and serve his witness list by February 4, 2013, per the November 6, 2012, scheduling order. Oppo., Ex. 9. On February 8, 2013, the Division submitted its exhibit list, as well as a set of proposed exhibits. On February 11, 2013, the same day that exhibit lists were due to be filed, I issued an order deeming Mura in default, postponing the hearing sine die, and directing the Division to file a motion requesting relief supported by sufficient evidence consistent with Rapoport v. SEC, 682 F.3d 98 (D.C. Cir. 2012). Id. Mura did not timely file an exhibit list.

On February 21 and 28, 2013, this Office received two emails from Mura, which I liberally construed as motions to set aside default pursuant to Rule 155(b) of the Commission's Rules of Practice (Commission Rule). Oppo., Ex. 11. I issued an order on March 1, 2013, directing Mura, if he chose, to file a written motion to set aside default, served upon each party and filed with the Secretary of the Commission. Id. The order notified Mura that any such motion should include the nature of his proposed defense to the proceeding, and should be supported by evidence and points and authorities. Id. (citing 17 C.F.R. §§ 201.155(b), .150-.154). On April 9, 2013, Mura filed a one-paragraph letter, captioned as a motion to set aside default. Oppo., Ex. 12. The letter failed to include the nature of his proposed defense, and it lacked any support by evidence or points and authorities, and on April 10, 2013, I denied Mura's motion without prejudice. Oppo., Ex. 13 (citing 17 C.F.R. § 201.155(b)). On April 26, 2013, Mura filed the pending Set Aside Motion.

After reviewing the Motion for ID, on May 13, 2013, I issued an Order Proposing a Supplement to the Administrative Record, in which I noted problems with some of the evidence pertaining to certain allegations, and suggested the Division supplement the record accordingly.

On May 31, 2013, the Division submitted a Supplemental Brief (Supplemental Brief) in support of the Motion for ID.[3]

On May 31, 2013, Mura filed a collection of documents without an attached brief, which I have liberally construed as an Opposition to the Motion for ID (Mura Opposition).[4] Because of his default, Mura normally would not be permitted to participate in the resolution of the Motion for ID. However, I have carefully reviewed the Mura Opposition, and, even taking all properly supported factual assertions and reasonable inferences from it as true, and construing it in the light most favorable to Mura, it would neither raise a genuine issue of material fact nor change the outcome of this proceeding. Accordingly, I have fully considered it in resolving the Motion for ID.

SET ASIDE MOTION

Mura avers that he failed to appear at the January 29, 2013, telephonic prehearing conference because he did not receive timely notice of it. Set Aside Motion, p. 2. Mura states that he received the order scheduling the January 29, 2013, telephonic prehearing conference on January 29, 2013, after the call had taken place. Id. According to Mura, the order was sent to an address from which Mura had been evicted in 2012, and he received it only after it was forwarded to his temporary residence. Id. Mura also asserts that at any hearing, in addition to discrediting the witnesses against him, he intends to call his own witnesses and introduce evidence to refute the allegations of the OIP. Id.

Commission Rule 155(b) states that "[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

[3] In support of the Supplemental Brief, the Division attached a Supplemental Declaration of Aaron P. Arnzen (Supp. Arnzen Decl.), which includes five exhibits (Supp. Arnzen Decl. Ex.__), another Declaration of David Weaver (Supp. Weaver Decl.), a Declaration of Michael Faggiano (Faggiano) (Faggiano Decl.), and a Declaration of Michael D. Flanigan (Flanigan) (Flanigan Decl.), which includes one exhibit (Flanigan Decl. Ex.).

[4] The Mura Opposition appears to consist of twelve documents, some accompanied by handwritten notes. The twelve documents are as follows: an Affirmation of Todd Gustafson (Mura Opposition, Ex. 1), an Affidavit executed by John W. Stehler (Mura Opposition, Ex. 2), the first page of an apparently multi-page Affidavit executed by Richard M. Popovic (Popovic) (Mura Opposition, Ex. 3), a report of the Monroe County, New York, Sheriff's Office, dated April 14, 2009 (Mura Opposition, Ex. 4), an Affidavit of David J. Weaver (Mura Opposition, Ex. 5), an Ownership Interest Transfer Agreement dated November 6, 2008 (Mura Opposition, Ex. 6), a letter from Robert L. Brenna, Jr., Esq., evidently Mura's attorney, dated June 29, 2010 (Mura Opposition, Ex. 7), a two-page memorandum, which handwritten notations indicate was written by Popovic about Faggiano (Mura Opposition, Ex. 8), an Affidavit executed by Faggiano (Mura Opposition, Ex. 9), an Ownership Interest Transfer Agreement dated October 28, 2008 (Mura Opposition, Ex. 10), an undated resume of Popovic (Mura Opposition, Ex. 11), and a letter from Robert L. Brenna, Jr., Esq., dated June 3, 2010. The majority of these documents pertain to accusations that Mura engaged in violence and threats of violence, as discussed infra.

nature of the proposed defense in the proceeding." 17 C.F.R. § 201.155(b). A default may be set aside "in order to prevent injustice" and for "good cause shown." Id.; see Robert E. Ainbinder, Exchange Act Release No. 39177 (Oct. 1, 1997), 65 SEC Docket 1966 (good cause must be shown as to the reasons for failing to defend); James M. Russen, Jr., Exchange Act Release No. 32895 (Sept. 14, 1993), 51 S.E.C. 675, 677 (same). Good cause has not been shown, because the Set Aside Motion articulates neither a sufficient reason for Mura's failure to appear, nor a sufficient proposed defense.

Mura's explanation of his inability to attend the January 29, 2013, prehearing conference misses the point, because he had actual notice of the conference. He had agreed to electronic service of papers, at least from the Division, and was therefore on notice that he should check his email account from time to time. Oppo., Ex. 5. He was notified on January 23, 2013, by email directly from this Office, that the January 29 conference had been scheduled, both by an attached copy of the order and by a reference in the text of the email to a "call-in number for the judge to use on Tuesday at 12:30 pm." Oppo., Ex. 7. Less than two hours after transmission of this Office's email, Mura replied to an email from Division counsel, stating that he was "fine" with a conference on January 29, 2013, at 12:30 pm; the email from this Office was part of the email string to which he replied. Id. He also replied on January 28, 2013, to an email from Division counsel sent the same day; the email from this Office was, again, part of the email string to which he replied. Oppo., Ex. 6. There can be no doubt that Mura had actual notice of the January 29 conference.

Even assuming that electronic notification is legally insufficient, any delay in receipt of U.S. mail notification was invited by Mura. The order scheduling the January 29 conference was mailed to the record address on file for Mura, which was not his current address, as Mura concedes. Set Aside Motion, p. 2. Mura's failure to notify this Office or the Office of the Secretary of any change in address is not a valid excuse. Knowing that he would be receiving items from this Office and the Division, Mura had an obligation to maintain a current address on file. See 17 C.F.R. § 201.102(d)(1). In sum, Mura's explanation for his failure to appear does not establish good cause.

Additionally, and in the alternative, Mura's proposed defense is insufficient to establish good cause. He predicts that he will "call [his] own witnesses and introduce evidence" to refute the OIP's allegations. Set Aside Motion, p. 2. But because he filed no witness list or exhibit list, he will not be permitted (absent extraordinary circumstances) to present any witnesses or evidence. Thus, his only realistic proposed defense is that he will discredit the testimony of "[a]ll or nearly all of the witnesses" against him, because they are claimants in a Financial Industry Regulatory Authority (FINRA) arbitration against him and thus have a financial interest in this proceeding's outcome. Id., pp. 1-2. There are two problems with this proposed defense. First, it is simply inadequate to warrant a finding of good cause. Evidence of bias is plainly material and in some instances powerful, but it is unlikely to be dispositive by itself, and it is even more unlikely that it would discredit the 246 exhibits the Division proposed to introduce against Mura. Second, of the thirty-four witnesses the Division has identified, by my count no more than fourteen of them, or less than half, are identified as limited liability company (LLC) investors; the remaining twenty witnesses are surely not FINRA claimants. Indeed, one particularly percipient non-investor witness, Edward Tackaberry, has settled his own

Commission administrative proceeding and would presumably testify consistently with the allegations of the OIP. Edward Tackaberry, Exchange Act Release No. 68990 (Feb. 26, 2013).

The Set Aside Motion is accordingly denied, the allegations in the OIP are deemed true, and this proceeding is determined against Mura by default.

MOTION FOR INITIAL DECISION

The Division has requested that I issue an initial decision. It is not clear that I have the authority to issue an initial decision, nor is that the usual practice of the Office of Administrative Law Judges in cases of default. Alchemy Ventures, Inc., Administrative Proceedings Rulings Release No. 732 (Nov. 27, 2012), 105 SEC Docket 61198, 61199-200; Hector Gallardo, Administrative Proceedings Rulings Release No. 750 (Feb. 11, 2013), 105 SEC Docket 64272. There is at least one precedent for issuing an initial decision after issuing a default order. Alchemy Ventures, Inc., Initial Decision Release No. 473 (Nov. 28, 2012), 105 SEC Docket 61204. However, on January 28, 2013, the Commission requested briefing in Alchemy Ventures, Inc., specifically on the question of the propriety of initial decisions after default. Alchemy Ventures, Inc., Admin. Proc. File No. 3-14720, Order Directing the Filing of Briefs (Jan. 28, 2013) (unpublished). Thus, whether an initial decision is appropriate in this proceeding is uncertain.

Nonetheless, I find that it is in the interest of justice to issue an initial decision in this case. The due date for an initial decision has not yet passed, and the evidence presented by the Division in support of the Motion for ID comports with Rapoport. This case is thus distinguishable from Gallardo, in which I declined to issue an initial decision, in part on those two grounds. Additionally, and most importantly, in my view the fair course of action is to allow Mura an opportunity to be heard on appeal, should he desire such a hearing. An initial decision provides a greater quantum of due process on appeal than does a default order, and thus Mura will be prejudiced less by an initial decision than by a default order. Admittedly, an initial decision will ease any enforcement action the Division may file, but presumably no enforcement action will be permissible until either the Commission has heard this matter, or the present Initial Decision becomes final. See Alchemy Ventures, Inc., 105 SEC Docket at 61199-200 (noting that an initial decision will further the Division's efforts to enforce sanctions). Accordingly, an initial decision is warranted.

FINDINGS OF FACT

Mura, as of the date the OIP was issued, was 62 years old and a resident of Pittsford, New York. OIP, p. 2. From September 2002 through April 2011, Mura was a registered representative and branch office manager of J.P. Turner & Co., LLC (J.P. Turner), a registered broker-dealer headquartered in Atlanta, Georgia. Id. From in or around mid-2007 through in or around 2012, Mura led a team of individuals that managed the LLCs, and he directed and participated in an effort to solicit investors in the sale of unregistered promissory notes issued by the LLCs (LLC Promissory Notes). Id.

Rising Storm Technologies LLC ("Rising Storm"), a predecessor to the LLCs, was formed in 2006 to pursue various business ideas. OIP, p. 2; Weaver Decl., p. 1. Mura invested in Rising Storm and, in or around 2008, caused the LLCs to take over some or all of Rising Storm's business ideas. OIP, p. 2; Weaver Decl., p. 1.

The LLCs consist of, inter alia, Charge-On Demand LLC (COD), Innovations Group Enterprises LLC (IGE), and Stucco LLC, all of which were registered with the New York Secretary of State in 2008. OIP, p. 2; Weaver Decl., p. 1. The LLCs were formed to pursue several supposedly entrepreneurial business ideas. Id.; Weaver Decl., p. 1. The LLCs, which were all managed by the same small management team led by Mura, issued the LLC Promissory Notes to a number of investors from in or around January 2008 through in or around September 2009. OIP, p. 2; Weaver Decl., pp. 1-2.

Edward Tackaberry (Tackaberry), age 61, is a resident of Fairport, New York. OIP, p. 2. From 1981 through 2006, Tackaberry was a registered representative of various broker-dealers. Id. In September 2007, Tackaberry was barred from association with any broker or dealer based on permanent injunctions imposed by a federal district court upon finding, in a case brought by the Commission, that he committed securities fraud in a scheme that did not involve the LLCs. Mark Palazzo, Exchange Act Release No. 56550A (Sept. 27, 2007), 91 SEC Docket 2204 (based upon SEC v. Pittsford Capital Income Partners, LLC, No. 06-CV-6353 (W.D.N.Y. Aug. 30, 2007)).[5] Tackaberry began working for Rising Storm in 2006 as a product salesman, and at Mura's direction, thereafter became involved in the solicitation of investors and otherwise participated in the offering of the LLC Promissory Notes. OIP, p. 2. Tackaberry's involvement in the solicitation of investors violated the injunction and the associational bar, and resulted in a settled civil action in which he was enjoined from further violations of Sections 15(a) and 15(b)(6)(B)(i) of the Exchange Act. SEC v. Tackaberry, Civil Action No. 12-CV-6512 T (W.D.N.Y. Sept. 25, 2012) (Tackaberry Injunction).

In or around 2006, Mura became familiar with Rising Storm when he leased to Rising Storm office space that was adjacent to Mura's J.P. Turner office. OIP, p. 3. Mura and two or more of his retail broker-dealer customers at J.P. Turner invested in Rising Storm. Id.

In 2008, Mura formed the LLCs for the purpose of commercializing several of Rising Storm's most promising business ideas and to pursue various entrepreneurial business ideas on their own. OIP, p. 3; Weaver Decl., p. 1. Shortly thereafter, Mura ousted Weaver, a consultant to Rising Storm who also participated in the management of the LLCs, and, subsequently, Mura installed his own management team to run the LLCs. OIP, p. 3; Weaver Decl., p. 3. Mura oversaw all important decisions and exercised ultimate managerial control over the LLCs from approximately 2008 through 2012. OIP, p. 3; Scalise Decl., pp. 1-2.

From in or around January 2008 through September 2009, Mura solicited a number of individuals to invest in the LLCs. OIP, p. 3; Arnzen Decl., pp. 3-4. More specifically, Mura led meetings with potential investors in the LLCs during which he made many oral representations

[5] Pursuant to Commission Rule 323, I have taken official notice of these two documents, as well as of the filings in SEC v. Tackaberry, infra.

regarding the LLCs and their operations, what an investment in the LLCs would involve and how it would be documented, and encouraged potential investors to invest in the LLCs by executing the LLC Promissory Notes. OIP, p. 3.; Weaver Decl., p. 2; Scalise Decl., p. 2.

Mura also directed others to solicit potential investors in the LLC Promissory Notes. OIP, p. 3; Scalise Decl., p. 2. For example, Mura encouraged investor James Scalise[6] to solicit other investors, and Mura agreed that the LLCs would pay Scalise a finder's fee of 7.5 percent of all investments made by Scalise's friends and family. OIP, p. 3; Scalise Decl., p. 2, Weaver Decl., p. 3. Several individuals identified by Scalise invested in the LLC Promissory Notes after discussing the potential investment with Scalise. OIP, p. 3; Scalise Decl., p 2. Mura also directed Tackaberry to become involved in the solicitation of investors in the LLCs. OIP, p. 3; Tackaberry Injunction. Tackaberry did so by serving as several prospective investors' first contact at the LLCs, describing the investments and how they would be documented, arranging meetings with Mura and other members of the LLCs' management team to discuss the LLCs and the potential investment, negotiating terms with some of the investors, and documenting several investment transactions. OIP, p. 3; Tackaberry Injunction.

Between in or around January 2008 and in or around September 2009, in exchange for their investments, investors received LLC Promissory Notes, the offering of which was not registered with the Commission. OIP, p. 3; Scalise Decl., p. 2. The LLC Promissory Notes obligated the issuing LLC to repay the principal in twenty-four months plus eight percent interest per annum. OIP, pp. 3-4; Scalise Decl., p. 2; Weaver Decl., p. 2. The LLC Promissory Notes also entitled the investors to further consideration consisting of a stated percentage of the issuing LLC's profits. OIP, pp. 3-4; Scalise Decl., p. 2; Weaver Decl., p. 2. In almost all cases, the LLC Promissory Notes were issued by just one of the LLCs, although the specific LLC issuing a given promissory note changed over time. OIP, p. 4. The LLCs did not make interest payments to the investors, contrary to the terms of the LLC Promissory Notes. Id.

In or around 2010, Mura persuaded most investors to exchange their purported interests in the LLCs for an interest in Worldwide Medical LLC (Worldwide Medical). Id.; Scalise Decl., p. 3. Worldwide Medical does not have significant assets or revenues, and the investors' interests in Worldwide Medical are essentially worthless. OIP, p. 4; Scalise Decl., p. 3.

In the aggregate, at least seventeen individuals invested over $850,000 in Rising Storm and the LLCs between July 2007 and September 2009. OIP, p. 4. Mura played an active role in soliciting $761,000 from twelve investors after he took over the LLCs. Id.; Arnzen Decl., pp. 3-4. Some of the investors invested all, or a significant portion of, their qualified retirement accounts in the LLCs. OIP, p. 4; Scalise Decl., pp. 2-4.

Mura caused investor funds to be deposited into the LLCs' bank accounts, over which he and his wife had authority, and against which he and his wife regularly issued checks. OIP, p. 4. Mura caused the LLCs to pay him more than $50,000 from June 2008 through December 2009. Id. These payments were made with funds that had been received from investors. Id.

[6] Scalise was identified as "Investor 1" in the OIP. Motion for ID, p. 4 n.5.

Mura conducted the LLC Promissory Note offerings outside the scope of his employment with J.P. Turner, and did not disclose to J.P. Turner his solicitation of these investments or the scope of his managerial role over the LLCs. Id.; Arnzen Decl., Ex. 3. Nor did Mura separately register as a broker-dealer for purposes of offering and selling the LLC Promissory Notes. OIP, p. 4. Moreover, Mura repeatedly misled J.P. Turner about his outside business activities. Id.; Arnzen Decl., Ex. 3.

CONCLUSIONS OF LAW

A. Primary Liability

Section 15(a)(1) of the Exchange Act makes it unlawful:

> for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection [15(b) of the Exchange Act].

15 U.S.C. § 78o(a)(1).

Section 3(a)(4) of the Exchange Act defines a broker as any person "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(a). Actions indicating that a person is "effecting" securities transactions include soliciting investors; providing either advice or a valuation as to the merit of an investment; actively finding investors; handling customer funds and securities; and participating in the order-taking or order-routing process. See, e.g., SEC v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); SEC v Benger, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010); SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

A security includes "any note" or "evidence of indebtedness," and there is a rebuttable presumption that every note is a security. 15 U.S.C. § 78c(a)(10); Reves v. Ernst & Young, 494 U.S. 56, 65 (1990). The required interstate nexus is de minimis and is satisfied "by intrastate telephone calls, and by even the most ancillary mailings." SEC v. Softpoint, Inc., 958 F. Supp. 846, 865 (S.D.N.Y. 1997); see also SEC v. North American Finance Co., 214 F. Supp. 197, 202 (D. Ariz. 1959) (collection of installment payments by mail, and mailing stock certificates after payment, held to satisfy interstate nexus under Exchange Act Section 15(a)). Scienter is not an element of a Section 15(a) violation. Martino, 255 F. Supp. 2d at 283; SEC v. Nat'l Exec. Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

Mura acted as a broker of the LLC Promissory Notes. Mura led meetings with prospective investors in the LLCs and made representations regarding their operations,

encouraging those prospective investors to invest. He distributed materials to prospective investors and convinced them to invest in exchange for promissory notes. Supp. Weaver Decl., p. 2. He advised potential investors as to the suitability of the investments as well as the investors' ability to shift retirement funds to make the investments. After investors wrote checks for the LLC Promissory Notes, Mura handled client funds by taking possession of them and depositing them into the LLCs' bank accounts. Mura also used his position as a registered representative with J.P. Turner to present himself as a broker to prospective investors. Scalise Decl., p. 2.

Although associated with a registered broker, Mura's brokering activity was outside the scope of his employment. Individuals who act outside the scope of their association with a broker-dealer may violate Section 15(a). See Roth v. SEC, 22 F.3d 1108, 1109-10 (D.C. Cir. 1994); SEC v. Ridenour, 913 F.2d 515, 517 (8th Cir. 1990). Mura never accurately disclosed to J.P. Turner his activity in the LLCs or his role in the sale of the LLC Promissory Notes. Arnzen Decl., Ex. 3.

The LLC Promissory notes offered interest rate returns and potential profit sharing, and the presumption that they were securities is unrebutted. OIP, p. 3; Weaver Decl., p. 2; Scalise Decl., p. 2.

Mura communicated with investors by mail in furtherance of his brokering activities. Scalise Decl., pp. 2-3 and Ex. 2 (letter to investors sent at Mura's direction). He also used the telephone to "conduct business related to . . . the LLCs." Arnzen Decl., Ex. 1, at 208:3-25. This included keeping investors informed about money problems at the LLCs. Supp. Arnzen Decl., Ex. 1, at 93:19-94:4.

In short, the Division has established that Mura violated Section 15(a)(1) of the Exchange Act.

B. Secondary Liability

Additionally, and alternatively, Mura aided, abetted, and caused at least Scalise's violations of Section 15(a)(1) of the Exchange Act. In order to establish an aiding and abetting violation, there must be a showing that (1) a primary securities law violation by another occurred, (2) the aider and abettor was generally aware that his or her role was part of the overall activity that was improper or illegal, and (3) the aider and abettor provided substantial assistance in the conduct that constituted the violation. See Howard v. SEC, 376 F.3d 1136, 1142-43 (D.C. Cir. 2004). A person causes a securities violation, permitting sanctions under Exchange Act Section 21C, where there is (1) a primary violation, (2) to which an act or omission of the person contributed, and (3) the person knew or should have known that his or her conduct would contribute to the violation. See Robert M. Fuller, Exchange Act Release No. 48406 (Aug. 25, 2003), 80 SEC Docket 3539, 3545. Because lower state-of-mind standards apply to causing violations, a finding that a person aided and abetted a violation necessarily makes the person a cause of that violation. See Zion Capital Mgmt. LLC, Exchange Act Release No. 48904A (Dec. 11, 2003), 57 S.E.C. 99, 116.

Scalise committed primary violations of Section 15(a)(1) of the Exchange Act by soliciting investments in the LLCs and selling LLC Promissory Notes to his friends and family members without being registered as a broker-dealer. OIP, p. 3; Scalise Decl., p. 2. Scalise accomplished this in part by mailing letters and emailing messages to out-of-state prospective investors. Scalise Decl., p. 2 and Ex. 1; Supp. Arnzen Decl., Ex. 1, pp. 137-141. Mura was the leader of the LLCs and made all important decisions regarding them, and unquestionably provided substantial assistance to Scalise in connection with Scalise's primary violation. Scalise Decl., p. 1. For example, at Mura's urging, Scalise encouraged and secured investments, and arranged for his friends and family members to discuss the investment opportunities with Mura. OIP, p. 3; Scalise Decl., p. 2. Mura agreed that the LLCs would pay Scalise a finder's fee of 7.5 percent of all investments made by Scalise's friends and family. OIP, p. 3; Scalise Decl., p. 2, Weaver Decl., p. 3. Mura was a signatory on the bank account for at least one of the LLCs. Supp. Arnzen Decl., Ex. 1, pp. 82-83. Also, Mura knew that what he and Scalise were doing was illegal, as demonstrated by his instructions to Scalise to offer evasive responses to questions asked by Commission staff during the Commission's first examination, and by obstructing the Commission's efforts to enforce a civil judgment against Tackaberry. Scalise Decl., p. 3. Clearly, Mura both aided and abetted and caused Scalise's primary violation.

SANCTIONS

The Division requests that I: (1) order second-tier civil penalties against Mura pursuant to Section 21B of the Exchange Act; (2) order Mura to cease and desist from violating Section 15(a) of the Exchange Act; (3) permanently bar Mura from participation in the securities industry; and (4) censure Mura pursuant to Section 15(b)(4) of the Exchange Act. Motion, pp. 10-14.

A. Willfulness and the Public Interest Factors

Some of the requested sanctions are only appropriate if Mura's violation was willful. See 15 U.S.C. §§ 78u-2(a), 78o(b)(4). A finding of willfulness does not require intent to violate the law, but merely intent to do the act which constitutes a violation of the law. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976). Mura's actions were plainly willful: he personally solicited investments, directed others to solicit investments for him, oversaw the transactions, and collected and deposited the funds. Mura also deceived his employer, J.P. Turner, so that he could devote substantial time and resources toward soliciting investors for the LLCs without scrutiny.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): 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 (Steadman factors). Gary M. Kornman, Investment Advisers Act of 1940 (Advisers Act) Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010). The Commission's inquiry

into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Id.

Mura's conduct was egregious. Mura solicited numerous individuals to invest in what are now worthless securities, causing them to lose large portions of, in some cases, their savings and retirement funds. The total investment induced by Mura was at least $761,000, of which Mura received $50,000.

Particularly egregious was Mura's use of violence and threats of violence on multiple occasions. In 2007 and 2008, Mura made several threatening telephone calls to Flanigan, which culminated in Flanigan selling Rising Storm to Weaver for $1.00, because of Mura's threats to Flanigan and Flanigan's family. Flanigan Decl., pp. 2-3; Supp. Weaver Decl., p. 2; OIP, p. 3.[7] In February 2009, Flanigan executed a promissory note in the amount of $84,000 in favor of IGE because Mura called Flanigan and threatened his life. Flanigan Decl., p. 3 and Ex. 1. In late 2009, Mura threatened Flanigan over payment of the promissory note, telling him that Flanigan "better find the money or [he] won't be able to breathe." Id., p. 3. In the summer of 2010, during a meeting between Mura and a FINRA investigator, Mura excused himself from the meeting and confronted Faggiano about keeping Faggiano's presence unknown to the FINRA investigator. Faggiano Decl., p. 4. After verbally abusing Faggiano, Mura punched him in the face four times. Id. Faggiano had just had arm surgery, and believes that as a result of Mura's attack, his arm never healed properly. Id. Faggiano has not been able to reenter the work force, and now relies on Social Security disability benefits for income. Id. On various occasions between 2008 and 2010, Mura used Faggiano as his "thug" to intimidate opposing attorneys and debtors,[8] although not always in connection with Mura's unregistered brokering.[9] Faggiano Decl., pp. 2-3.

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[7] Mura apparently contends that he did not take control of Rising Storm. His evidence, though, shows that Flanigan purchased Rising Storm on November 6, 2008, from Michael Ryan Flanigan, and that Weaver purchased a twenty percent interest in COD from Flanigan on October 28, 2008. Mura Opposition, Exs. 6, 10. Mura identified Michael Ryan Flanigan as Flanigan's son during his investigative testimony. Supp. Arnzen Decl., Ex. 1, at 37:17-25. Nothing in the Mura Opposition is inconsistent with, or even relevant to, the finding that Mura caused Flanigan to sell Rising Storm to Weaver by threats of violence.

[8] One incident is especially noteworthy. At some point, COD invested in Image Express, a company owned by John Zankowski. Supp. Weaver Decl., p. 2; Arnzen Decl., Ex. 1, at 167:9-168:7. When Mura became displeased with how Image Express was handling the LLC's investment, he called Kevin Zankowski, John Zankowski's son, to demand repayment of at least some of the investment. Supp. Weaver Decl., p. 2; see also Faggiano Decl., p. 3. Kevin Zankowski recorded a portion of the call; I have listened to it, and it is alarming, to say the least. Supp. Arnzen Decl., p. 1. Among other threats, Mura stated: "trust me when I tell you, you don't want to fuck with me . . . I promise you the last thing you see on this Earth will be my fucking face if you continue to fuck with me . . . you better figure out a way to get my $25,000 that you fucking stole from me." Supp. Arnzen Decl., Ex. 5. Multiple percipient witnesses, including Mura's wife, have stated under oath either that Mura made the telephone call or that it sounds like Mura's voice on the call. Supp. Weaver Decl., p. 2; Faggiano Decl., p. 3; Supp. Arnzen

Although not necessary to prove a Section 15(a) violation, the evidence amply demonstrates that Mura acted with scienter. As a registered representative for nearly two decades, Mura was well aware of the requirements imposed upon brokers, and even bragged about his knowledge of the rules during his deposition. Arnzen Decl., Ex. 2, at 36:18-22. He acknowledged in his investigative testimony that he was not allowed to solicit investors in the LLCs: "because of my job . . . [t]hat is selling in a way and that's not something that I can do." Supp. Arnzen Decl., Ex. 1, at 106:1-3; see also Supp. Arnzen Decl., Ex. 1, at 118-119, 155. He misled J.P. Turner about his outside activities on his "Outside Employment Disclosure" forms, stating on the forms that he worked ten hours per week after normal trading hours on two businesses, but testifying that he spent "thousands if not tens of thousands" of hours on all of the LLCs. Arnzen Decl., Ex. 3; Supp. Arnzen Decl., Ex. 1, at 207:15-208:2. He instructed Weaver to falsely tell two potential investors that the LLCs had signed "multi-million dollar contracts." Weaver Decl., p. 2 and Ex. 1. He instructed Scalise to mislead the Commission's examiners regarding Tackaberry's role in the LLCs. Scalise Decl., p. 3. He instructed his wife to write a letter to investors discouraging them from cooperating with the Commission's investigation; the letter falsely stated that the investors were represented by the same attorney representing Mura. Scalise Decl., p. 3 and Ex. 2; Arnzen Decl., Ex. 2. He attempted to stymie the Commission's investigation by telling Division counsel that investigative subpoenas to be served on the LLCs should be sent to Weaver, even though Weaver was no longer affiliated with the LLCs at that time. Arnzen Decl., p. 2; Supp. Arnzen Decl., Ex. 1, at 96:8-97:1. He falsely told a business associate that Commission attorneys had told him that the associate's conduct was unethical and

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Decl., Ex. 2, at 101:6-103:8; Supp. Arnzen Decl., Ex. 3, at 105:9-21. Mura has submitted a letter from his attorney, Robert L. Brenna, Jr., in which Mr. Brenna avers that "I have reason to believe that my client is not even speaking" on the recording. Mura Opposition, Ex. 7. Such an unsworn statement is not sufficient to raise a genuine issue of material fact about the identity of the caller on the recording. Mura testified that Faggiano made the call, although he admitted that he was standing right next to Faggiano at the time and that the call was an attempt to collect payment on a business debt owed by Image Express to COD. Supp. Arnzen Decl., Ex. 1, at 161:12-162:23, 167:20-168:22. Mura also testified that "[w]ithin 15 minutes, Mike Faggiano met Mr. Zankowski out in the parking lot and received a $5,000 check from him." Id., at 164:24-165:1. Such misconduct is very serious. Indeed, it appears to be sufficient to establish at least probable cause to believe that Mura committed Hobbs Act extortion, or, if Mura's version of the telephone call is accepted, conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. § 1951. See U.S. v. Clemente, 22 F.3d 477, 480-81 (2d Cir. 1994) (comparing elements of Hobbs Act extortion and Hobbs Act conspiracy).

[9] Mura disputes this, and has offered an affidavit tending to show that one such intimidating incident did not happen as stated in Faggiano's Declaration. Compare Mura Opposition, Ex. 1 with Faggiano Decl., p. 2. Except as noted, supra, in footnote 8, I have not considered alleged instances of Faggiano's "thuggery" in resolving this proceeding. I have also not considered the April 10, 2009, incident, where Mura allegedly choked Weaver until Weaver fell unconscious, after Weaver confronted Mura about his management of the LLCs. Supp. Weaver Decl., p. 2. Mura vigorously disputes Weaver's version of events, and has offered several documents tending to rebut it. Mura Opposition, Exs. 2-4, 12.

fraudulent. Arnzen Decl., p. 2 and Ex. 5. He was contumacious and obstructive on multiple occasions during his deposition and investigative testimony, stating "this is a witch hunt," "I'm not answering any more of your questions," "[d]id you look for the moon this morning when you got up?"[10] and "[l]ady, if you think you can badger me, you're out of your mind . . . are you having problems hearing me still?" Arnzen Decl., Ex. 1, at 212:4-14; Arnzen Decl., Ex. 2, at 7:7-14, 13:8-24, 34:4-25.

Mura has shown no recognition of the wrongfulness of his actions. For example, he told a local television reporter that the Division's allegations are "blatantly untrue." Arnzen Decl., Ex. 6. Mura's unlawful conduct recurred over a nearly two-year period. During that time, he directly and indirectly effected sales of LLC Promissory Notes to at least twelve individuals. He has offered no assurances, sincere or otherwise, against future violations. His occupation of registered representative presents obvious opportunities for future violations. Indeed, Mura has indicated a desire to continue managing the LLCs to, according to Mura, recoup the lost investments. Arnzen Decl., Ex. 6. Clearly, every Steadman factor weighs in favor of a heavy sanction.

B. Cease and Desist

Section 21C of the Exchange Act provides that the Commission may order a person found to be violating or to have violated a provision of the Exchange Act to cease and desist from such violations. 15 U.S.C. § 78u-3. While some likelihood of future violation must be present, the required showing is "significantly less than that required for an injunction." KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1183-91. Indeed, absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1191. In evaluating the propriety of a cease-and-desist order, the Commission considers the Steadman factors, as well as the recency of the violation, the resulting harm to investors in the marketplace, and the effect of other sanctions. Id. at 1192.

As noted, the Steadman factors weigh in favor of a heavy sanction. Mura's unlawful conduct was relatively recent and caused significant investor losses. Though the other sanctions are serious, a cease-and-desist order is warranted under the totality of the circumstances. Accordingly, Mura will be ordered to cease and desist from violating Section 15(a) of the Exchange Act and from aiding and abetting or causing violations of Section 15(a).

C. Associational Bar

Section 15(b)(6) of the Exchange Act authorizes the Commission to bar a person from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, if the person has willfully violated any provision of the Exchange Act and it is in the public interest. 15 U.S.C. § 78o(b)(6)(A). Mura clearly has no business associating with the securities industry in any capacity, and will be permanently barred from associating with any broker or dealer.

[10] This was Mura's answer to a question about whether he looked for documents responsive to the Division's investigative subpoena.

Additionally, the Commission has held that the requested collateral bar is not impermissibly retroactive, and it will be imposed as well. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61737.

D. Censure

Section 15(b)(4) of the Exchange Act provides that the Commission may censure a broker if the broker has willfully violated any provision of the Exchange Act and it is in the public interest. 15 U.S.C. § 78o(b)(4)(D). Both registered and unregistered brokers are subject to Section 15(b)(4). See Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2627, recon. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584. Although the statutory language suggests that this provision applies to entities, but not necessarily to individuals, it is well established that individuals may be subject to both a censure and an associational bar or suspension for the same violative conduct. See vFinance Investments, Inc., Exchange Act Release No. 62448 (July 2, 2010), 98 SEC Docket 29918, 29941; Clarence Z. Wurts, Exchange Act Release No. 43842 (Jan. 16, 2001), 54 S.E.C. 1121, 1134; see also Charles K. Seavey, Advisers Act Release No. 2119 (Mar. 27, 2003), 79 SEC Docket 3455, 3465 (imposing a censure and suspension pursuant to Section 203(f) of the Advisers Act). In this case, based on the Steadman factors, a censure is appropriate and adds no more burden on Mura than that already imposed by the associational bar.

E. Civil Penalties

Section 21B of the Exchange Act provides that the Commission may impose a civil penalty in a cease-and-desist proceeding if a respondent willfully violated any provision of the Exchange Act and such penalty is in the public interest. 15 U.S.C. § 78u-2(a)(2). Where a respondent's misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, the Commission may impose a "Second Tier" penalty of up to $75,000 for a natural person. 15 U.S.C. § 78u-2(b)(2) (as modified for inflation by the Civil Monetary Penalty Inflation Adjustments-2009, Rule 1004, Table IV, 17 C.F.R. § 201.1004).

In determining whether a penalty is in the public interest, the Commission may consider (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c). "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." See Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2671. "To impose second-tier penalties, the Commission must determine how many violations occurred and how many violations are attributable to each person." Rapoport v. SEC, at 108.

Mura's violations involved brokering securities, that is, "effect[ing] any transactions in, or [inducing] or attempt[ing] to induce the purchase or sale of, any security," without being registered. 15 U.S.C. § 78o(a)(1). As a matter of statutory interpretation, the unit of violation is the individual transaction or attempted transaction. The Division has offered evidence of

nineteen specific violative transactions. Arnzen Decl., pp. 3-4. However, it seeks civil penalties on an investor basis rather than a transaction basis. Because there were only twelve investors involved in the nineteen transactions, using individual investors as the unit of violation prejudices Mura less than using total transactions as the unit of violation. Accordingly, I find that there were twelve violations. Because Mura acted with scienter, each violation involved at least deliberate or reckless disregard of a regulatory requirement. Mura shall therefore be assessed second-tier penalties for each of the twelve violations.[11]

Although the tier determines the maximum penalty, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed" within the tier. SEC v. Murray, No. OS-CV-4643 (MKB), 2013 WL 839840, at *3 (E.D.N.Y. Mar. 6, 2013) (quotation omitted); see also SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005). In addition to the statutory factors cited above, courts consider:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

SEC v. Lybrand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), aff'd on other grounds, 425 F.3d 143 (2d Cir. 2005) (Lybrand factors).

Except for the fact that Mura has no prior regulatory record, every statutory factor and every Lybrand factor weighs in favor of a heavy penalty. I place particular weight on three factors which are present in this case to an unusual degree. First, the level of scienter involved was striking, especially for a case where the violations themselves do not require proof of scienter. Second, the egregiousness of the violations is notable, primarily because they involve violence and threats of violence. Third, Mura's dishonesty and lack of cooperation with authorities, as demonstrated by, among other things, his uncivil and obstructive conduct toward Division counsel, was extreme. Mura's contemptuous behavior was essentially a bluff intended to misdirect an investigation, and a stiff civil penalty will deter others who may also be tempted to obstruct justice so shamelessly. I note that despite Mura's pleas of poverty, there is no demonstrated evidence of his financial condition.

Mura violated the Exchange Act, and it is in the public interest to severely penalize his misconduct. For each of the six investors from whom Mura solicited investments prior to March 3, 2009, Mura shall be assessed a civil penalty of $65,000, and for each of the six investors from

[11] Six of Mura's victims purchased LLC Promissory Notes prior to March 3, 2009, and six purchased after that date. The amount of maximum second-tier penalties allowed per act prior to March 3, 2009, was $65,000. That maximum amount was increased to $75,000 for acts occurring after March 3, 2009. 15 U.S.C. § 78u-2(b)(2) (as modified by 17 C.F.R. §§ 201.1003, .1004).

whom Mura solicited investment after March 3, 2009, Mura shall be assessed a civil penalty of $75,000, for a total of $840,000. I note that this sum is roughly comparable to $761,000, the investor losses caused by his conduct. OIP, p. 4; Arnzen Decl., p. 4; see U.S. v. Bajakajian, 524 U.S. 321, 337 (1998) (fines and penalties should not be "grossly disproportional to the gravity of the . . . offense").

ORDER

IT IS ORDERED that Mura's Amended Motion to Set Aside Default is DENIED;

IT IS FURTHER ORDERED that the Division's Motion for Initial Decision Making Findings and Determining Sanctions Based on Entry of Default Against Respondent David Mura is GRANTED;

IT IS FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that David Mura shall CEASE AND DESIST from committing, aiding and abetting, or causing any violations or future violations of Section 15(a) of the Exchange Act;

IT IS FURTHER ORDERED, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, that David Mura is BARRED from association with brokers, dealers, investment advisers, municipal securities dealers, transfer agents, municipal advisors, and nationally recognized statistical rating organizations;

IT IS FURTHER ORDERED, pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934, that David Mura is CENSURED;

IT IS FURTHER ORDERED, pursuant to Section 21B of the Securities Exchange Act of 1934, that David Mura shall pay a CIVIL MONETARY PENALTY in the amount of $840,000.

Payment of the civil monetary penalty shall be made no later than twenty-one days after the date of this Order. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and Administrative Proceeding No. 3-15045, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, OK 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 17 C.F.R. § 201.360. Pursuant to 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 of the Commission's Rules of Practice. 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that 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 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 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 occur, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge