INITIAL DECISION RELEASE NO. 857
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16326

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

In the Matter of KHALED A. ELDAHER	INITIAL DECISION August 17, 2015

APPEARANCE: Karen Matteson for the Division of Enforcement, Securities and Exchange Commission

Jonathan C. Uretsky, Phillipson & Uretsky, LLP, for Khaled A. Eldaher

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on December 23, 2014. The OIP alleges that Khaled A. Eldaher (Eldaher) violated Section 15(a)(1) of the Securities Exchange Act of 1934 (Exchange Act). Eldaher submitted an Answer dated January 15, 2015. I held a prehearing conference on January 13, 2015, and a hearing on March 23, 2015. At the hearing, the Division of Enforcement (Division), called Eldaher as its only witness and introduced seventeen exhibits. Eldaher offered two exhibits. I accept the transcript corrections offered by the parties in the Stipulation filed April 17, 2015. The final brief was filed on May 29, 2015.[1]

Findings of Fact

Eldaher, a fifty-two-year-old resident of Austin, Texas, entered the securities industry in December 1992, and at one time held Series 7, 24, and 63 securities licenses. Tr. 7-8; Div. Ex.

[1] I will cite to the transcript of the hearing as "Tr. __." I will cite, respectively, to the Division's and Eldaher's exhibits as "Div. Ex. __." and "Eldaher Ex. __." I will cite to the Division's and Eldaher's post-hearing briefs as "Div. Br.", "Eldaher Br.", and "Div. Reply Br."

41. Those licenses are presently inactive.[2] Div. Exs. 41, 46. Eldaher was associated with ten different broker-dealer firms between December 1992 and February 2011. Div. Ex. 41. From January 1996 to May 1998, Eldaher was associated with First Financial Investment Securities, Inc. (First Financial). *Id.* The Disclosure Occurrence Composite section of Eldaher's Central Registration Depository statement (CRD)[3] describes a customer complaint on July 16, 1997, about the "excessive use of margin," and states, "compromise and settlement on behalf of Eldaher, firm paid $27,000 to customer to avoid costs of litigation. Firm intends to pursue collection of damages from Mr. Eldaher." Div. Ex. 45. Eldaher denied that he did anything wrong or that he paid any portion of the settlement. Tr. 93-95.

On May 30, 1999, Millinum.com received a $7,000 judgment against Eldaher in a Houston, Texas, Travis County, court as the result of Eldaher's day trading losses.[4] Tr. 45-47; Div. Ex. 46. Eldaher was charged on March 5, 1999, in the County Court of Collin County, Texas, with theft by check of between $500 and $1,500. He underwent deferred adjudication, was fined $150 and required to perform six months of community service, and the matter was subsequently discharged. Tr. 47-48; Div. Ex 46 at 10. Eldaher testified that the conviction was because he wrote a $1,100 or $1,200 check for car repairs that was returned for insufficient funds. Tr. 95-96.

Eldaher was associated with Salomon Grey Financial Corp. (Salomon Grey) from December 1999 to December 2002 and from December 2003 to March 2005. Div. Ex. 41. In 2005, Eldaher was held liable in an arbitration proceeding for $14,141.05, for a claim by Salomon Grey in connection with a loan agreement Eldaher had with the firm. Tr. 38, 42-43; Div. Exs. 42, 44.[5] Eldaher testified he paid the arbitration award. Tr. 38, 90.

Eldaher was registered with Barron Moore, Inc. (Barron Moore), from March 2005 to August 2006.[6] Tr. 41; Div. Ex. 41. A Form U-5 filing for Eldaher by the firm states an

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[2] I take official notice of Eldaher's BrokerCheck Report, submitted as Div. Ex. 46, also available at http://brokercheck.finra.org. 17 C.F.R. § 201.323. As of March 15, 2015, the BrokerCheck Report showed Eldaher as not currently registered. Div. Ex. 46.

[3] Web CRD is "the central licensing and registration system for the U.S. securities industry and its regulators. The system contains the registration records of more than 6,500 registered broker-dealers, and the qualification, employment and disclosure histories of more than 650,000 active registered individuals." Financial Industry Regulatory Authority, *available at* www.finra.org/industry/crd (last visited July 7, 2015).

[4] Millinum.com is the complainant named in Eldaher's CRD, but the name referred to in the hearing was "millennium.com." *See* Tr. 47; Div. Ex. 46 at 13.

[5] Division Exhibit 44 is the arbitration ruling against Eldaher in *Salomon Grey Financial. Corp. v. Eldaher*, Case No. 05-02089, 2005 NASD Arb. LEXIS 2294 (Sept. 20, 2005).

[6] Eldaher denied that he had been employed at Barron Moore at the time of an internal review conducted May 14, 2007. Tr. 39; Div. Ex. 43.

> [i]nternal review was initiated pursuant to NASD exam of branch office. Violations of firm WSP's and regulations were noted by regulators. A letter of caution was received by the firm, which included that other matters were referred to the enforcement department for possible formal disciplinary action.

Div. Ex. 43; Tr. 40. Eldaher denied that he was involved in the internal review, and claimed that he was previously unaware of it. Tr. 40.

Eldaher denied that he was terminated by PHD Capital in 2011, and testified he resigned. Tr. 35, 87-88. Eldaher's CRD file shows that he left PHD Capital in 2011 but that he owed the firm $18,024.71 at the time of his departure. Div. Ex. 41. Eldaher testified that the firm lost about $7,000 when his customer failed to pay for securities; he does not agree that he owed the firm $18,024.71. Tr. 87-88.

From February 2011 to December 2013, Eldaher was associated with ACAP Financial Inc. (ACAP), a registered broker-dealer, based in Salt Lake City, Utah. Tr. 6, 69; Div. Ex. 41. In April 2012, while he was associated with ACAP, Eldaher began communication with Efstratios "Elias" D. Argyropoulos (Argyropoulos), President of Prima Capital Group, Inc. (Prima Capital), located in Santa Barbara, California, after somebody referred Eldaher to him.[7] Tr. 14, 64; Div. Ex. 36. Argyropoulos claimed that Prima Capital, a purported venture capital, consulting, and corporate communications firm, was offering an opportunity to invest in pre-IPO Facebook shares through a secondary market created by Facebook employees, advisors, and contractors who had held an equity stake in the company and wanted to sell their shares before Facebook's upcoming IPO.[8] Div. Ex. 2. Eldaher did not check whether Argyropoulos or Prima Capital held any securities licenses or registrations. Tr. 14-15. Eldaher instructed Argyropoulos to contact him using his personal email account, not his ACAP email account. Tr. 24.

On April 14, 2012, Argyropoulos sent Eldaher an email with the subject line "Facebook 50/50%," which stated, "[t]his is an agreement . . . to split 50/50% points earned for placing Facebook in the Secondary market," and that they would work on other deals in the secondary market in the future pursuant to the same terms. Div. Ex. 37; Tr. 17-18. Eldaher testified that he

[7] Argyropoulos entered into a settlement with the Commission whereby, pursuant to Section 15(b)(6) of the Exchange Act, he was barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and was barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. *Efstratios "Elias" D. Argyropoulos,* Exchange Act Release No. 74248, 2015 SEC LEXIS 548 (Feb. 11, 2015).

[8] I take official notice of the fact that Facebook held its initial public offering on May 18, 2012. 17 C.F.R. § 201.323.

was not able to sell pre-IPO Facebook shares through ACAP. Tr. 59-60. According to Eldaher, the 50/50% arrangement was never implemented; rather, another agreement was entered into under which he would receive a 5% referral fee for every investor he introduced to Prima Capital that invested in Facebook shares. Tr. 64-65. Eldaher wrote to investigating counsel for the Division in October 2013:

> my involvement was limited to referring some investors that I thought would be interested in Facebook to Prima. For every referral that ended up investing with prima I received a 5% referral fee, the fee is evidenced in the 1099 from Prima. There is no official contract between prima and myself, but I think there was an email from Prima confirming the 5% fee, I personally do not have a copy of that email but prima does.
>
> Prima also copied me on its communication with investors that ended sending money for Facebook through my referrals.

Div. Ex. 35; Tr. 15-16. Eldaher thought Argyropoulos was going to make a 10% profit on selling the shares, and that assuming Argyropoulos made a profit, he would share some of the profit with him. Tr. 64-65. Eldaher had no other business with Prima Capital. Tr. 65-66.

Eldaher referred twelve investors to Prima Capital. Tr. 20-22, 101; Div. Ex. 38. It is not clear when the referrals were made, but on April 19, 2012, Argyropoulos sent information about Facebook to a prospective investor at Eldaher's suggestion. Div. Ex. 2. A document from Prima Capital shows payment dates to Prima Capital for shares from customers Eldaher referred from January 2, 2013, through December 17, 2013. Div. Ex. 38; Eldaher Ex. 100. Eldaher did not explicitly advise any investor to invest in Facebook shares. Tr. 85.

Eldaher agreed with the allegations in the OIP that investors he referred to Prima Capital purchased Facebook shares for $362,887.52. Tr. 22, 101. Most of the twelve investors were old customers of Eldaher and did not have an account at ACAP. Tr. 65-67, 71-74; Eldaher Ex. 100. There is no evidence that Eldaher gave the impression that ACAP endorsed his conduct.

Eldaher knew when he referred the investors that Prima Capital did not have the shares and that bidding for the shares occurred after the receipt of funds. Tr. 100-01. Eldaher testified that he was not involved in negotiating Facebook sales; however, some investors complained to him when they did not receive their Facebook shares in a timely fashion or when they received fewer shares than they expected, and Eldaher inquired of Argyropoulos as to the problems. Tr. 23, 72, 81, 85, 102. It is a fact that Prima Capital made investors whole. Tr. 74-75.

The entire amount that Eldaher received from Prima Capital was $15,478.00, paid to his wife in 2012. Tr. 19-20; Div. Ex. 36. Eldaher estimates this amount was a little less than 5% of what the investors he referred paid for Facebook shares. Tr. 65.

Eldaher was affiliated with an Oklahoma branch of ACAP, but received little supervision from it or ACAP's headquarters. Tr. 68-69. Eldaher did not tell ACAP he was referring investors to Prima Capital. Tr. 12. In November 2012, ACAP's Chief Compliance Officer and

another person contacted Eldaher and asked about Prima Capital; Eldaher told them he had referred some people to "Prima Capital's Facebook shares." Tr. 52-53. ACAP terminated Eldaher in December 2013 and submitted a Form U-5 stating that "Khaled was paid a finders fee for referring people to someone selling shares of Facebook. He did not run the business through ACAP."[9] OIP at 1; Answer at 1; Div. Ex. 40 at 5. Eldaher testified that he received a copy of a Form U-5 that did not say he was terminated because he received a finder's fee; however, he did not produce this Form U-5 to the Division in response to a subpoena.[10] Tr. 9-10.

Eldaher knew in 2012, that the following Financial Industry Regulatory Authority (FINRA) rule prohibited selling away. Tr. 14.

> (a) Applicability
>
> No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this rule.
>
> (b) Written Notice
>
> Prior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction.

FINRA Manual, NASD Rule 3040.[11] I take official notice of the FINRA Manual and the rules listed in it. *See* 17 C.F.R. § 201.323.

Eldaher testified that it was implicit that a broker-dealer would prohibit selling away, but he did not know whether ACAP had a prohibition in its manual. Tr. 54-55. Eldaher also testified that he was very nervous when he stated during his investigative testimony that he was terminated because of the investigation, "I mean, obviously I did - - I sold away, and that's what it looked like."[12] Tr. 11, 13, 60. Right after making that statement, he added as a reason why he did not think he sold away, "I made a referral, and I got paid for it." Tr. 62-63.

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[9] Eldaher contends ACAP terminated him because it did not want to fund his registration fees since ACAP knew about the Commission's investigation in November, but did not terminate him until the end of the year when his registration fees were due. Tr. 13-14.

[10] Eldaher does not offer any support for his claim that his Form U-5 was amended to state he received a finder's fee and he contends that "[i]n all likelihood, the amendment was made at the behest of the SEC itself." Eldaher Br. at 11.

[11] The FINRA Manual is available at http://finra.complinet.com/ (last visited June 17, 2015).

[12] Eldaher argues he made this statement "[k]nowing that he'd been let go by ACAP due to the SEC's investigation, and based on the preceding off the record conversation with [Division

Since September 2014, Eldaher has been employed by Measured Risk Portfolios, an investment adviser registered with the Commission, as Regional Relationship Manager, Central Division. Tr. 6, 97. Eldaher testified that he no longer has clients. His present position does not require any security licenses; he does not deal with investors but interacts with registered representatives and investment advisers and there is no possibility for selling away. Tr. 49-50, 67, 97. Eldaher receives a salary and a fraction of the sales that occur within his territory. Tr. 50.

Positions of the Parties

Division

The Division argues that Eldaher knowingly engaged in illegal conduct in violation of Section 15(a)(1) of the Exchange Act, concealed his actions from his employer, and that his past conduct shows a pattern of dishonesty "in refusing to return funds which he was not entitled to keep." Div. Br. at 2, 12. The Division maintains that Eldaher violated Exchange Act Section 15(a)(1) by "selling away" from his employer, because a representative's registration is irrelevant to their brokerage activities conducted outside the employer's knowledge and supervision. *Id.* at 12. In addition, Eldaher was acting as an unregistered broker because he received "transaction-based" compensation for soliciting Facebook investors on Prima Capital's behalf. *Id.* at 12.

In support of its position that Eldaher was acting as an unregistered broker, the Division cites *SEC v. Ridenour*, 913 F.2d 515, 516-17 (8th Cir. 1990). Div. Br. at 13. Ridenour, a successful bond dealer employed by Dean Witter, effected more than a hundred "matched transactions" over a two-year period in nominee accounts that he established for this purpose. *Ridenour*, 913 F.2d at 516-17. Neither his customers nor Dean Witter knew of his activities, which had an "extraordinary" profit rate of 94%. *Id.* at 517. The appellate court agreed that Ridenour had defrauded his clients, and that Ridenour's level of activity supported a finding that he was a broker-dealer and that his failure to register as such was a violation of Exchange Act section 15(a)(1). *Id.* Also relevant is *SEC v. Integrity Financial AZ, LLC*, No. 10-cv-782, 2012 U.S. Dist. LEXIS 6758, at *14 n.1 (N.D. Ohio Jan. 20, 2012), where the defendant's principal function was to recruit investors in a fraud that raised $8 million from fifty-eight investors; the court held the defendant's associated status provided no registration protection for work he conducted outside the scope of his position with that firm. *Id.* (citing *Roth v. SEC*, 22 F.3d 1108, 1109-10 (D.C. Cir. 1994)). The Division also cites *SEC v. Homestead Properties, L.P.*, No. 09-cv-1331, 2009 WL 5173685, at *5 (C.D. Cal. Dec. 18, 2009), in which the court held that two defendants, who were registered representatives, violated the broker-dealer registration requirements of the Exchange Act where they sold an offering without their affiliated broker-dealer's knowledge or supervision. The Division, citing *Homestead* at *5, stresses that Eldaher

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counsel]," informing him that the Commission was accusing him of "selling away." Eldaher Br. at 6.

operated by himself in Texas, and that he was largely unsupervised by the broker-dealer with which he was associated. Div. Br. at 13. *Roth* states that

> [t]he interlocking requirements of registration and supervision act to ensure that "securities are [only] sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells." *Persons Deemed Not to Be Brokers*, Exchange Act Release No. 20,943 (May 9, 1984), 49 Fed. Reg. 20,512, 20,515 (1984).

Roth at 1109 (modifications in original).

The Division notes that Eldaher is currently employed in the securities industry, and it is possible that that Eldaher will deal with investors at some future time. Div. Br. at 10. The Division recommends that it is in the public interest to impose collateral bar and cease-and-desist orders against Eldaher, and to order Eldaher to disgorge $15,478 and to pay a $24,000 civil money penalty. *Id.* at 18.

Eldaher

Eldaher maintains that the Division failed to show that he recommended and executed private securities transactions without the formal written approval of ACAP, the securities firm with which he was associated. Eldaher Br. at 8 (citing *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93 (Jan. 18, 2006)).[13] According to Eldaher, the Division failed to prove that he "executed" the transactions at issue. *Id.* at 9.

In his brief, Eldaher maintains that a misunderstanding caused what the Division views as an admission by him that he was selling away. Eldaher Br. at 1. Eldaher defines selling away as soliciting orders, being involved in the selling process, and receiving commissions for sales. Tr. 91. Eldaher sees a distinction between being engaged in the selling process and referring someone to somebody else who makes the sale. Tr. 12-13, 55-56. Eldaher contends that he did not sell away because he was not engaged in the selling process, Prima Capital was the seller, and that neither ACAP's Form U5 nor its Director of Compliance allege that he sold away. Tr. 55-56, 62-63. At the hearing, however, Eldaher acknowledged that selling away is wrong, he is beyond remorseful, and he will absolutely never sell away again. Tr. 96.

If he should be found to have violated Exchange Act Section 15(a)(1), Eldaher argues that disgorgement and a cease-and desist order would be reasonable, but a lifetime collateral bar is too extreme and punitive a consequence. Eldaher Br. at 2. Eldaher views the Division's positon regarding Eldaher's past misconduct as based on a few disputes he had with former employers more than a decade ago. *Id.* As situations more akin to his situation, Eldaher cites two NASD initiated matters: *Frank Thomas Devine*, Exchange Act Release No. 46746, 2002

[13] In *Gebhart*, the Commission found, among other things, that respondents violated NASD Conduct Rule 3040 prohibiting involvement in private securities transaction outside the regular course or scope of employment without providing written notice to their member firm. 2006 SEC LEXIS 93, at *57-58.

SEC LEXIS 3407 (Oct. 30, 2002), where respondent received a ninety-day suspension and a $34,825.42 fine for selling away nearly $900,000 worth of securities, and *Chris Dinh Hartley*, Exchange Act Release No. 50031, 2004 SEC LEXIS 1507 (July 16, 2004), where the respondent received a ninety-day suspension and a fine of $7,500, for selling away $255,000 worth of promissory notes for which he received commissions of $10,160. Eldaher Br. 18-19.

Conclusions of Law

Exchange Act Section 15(a)(1) states that

> It shall be 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 . . . 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 . . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

Exchange Act Section 3(a)(4) defines a broker, in general, as "any person engaged in the business of effecting transactions in securities in the account of others." 15 U.S.C. § 78c(a)(4). In determining whether a particular individual falls within this definition, courts consider whether the individual may be "characterized by a 'certain regularity of participation in securities transactions at key points in the chain of distribution.'" *SEC v. Hansen*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (quoting *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976)). Courts also consider whether the individual:

> 1) is an employee of the issuer; 2) received commissions as opposed to salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors.

Id. However, these factors are not designed to be exclusive, and considerations can include a "wide array" of factors, and the nature of a person's relationship with another may support either the absence or presence of broker activity. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334, 1339 (M.D. Fla. 2011). A violation of Section 15(a)(1) does not require a showing of scienter. *SEC v. Martino,* 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

I find that Eldaher's actions violated Exchange Act Section 15(a)(1) because he acted as a broker outside of his association with, or supervision by, ACAP. Eldaher admitted failing to seek permission from ACAP or informing ACAP about his dealings with Prima Capital in violation of FINRA Rule 3040, which I find on these facts to be a violation of Section 15(a)(1). Tr. 11-12, 98; *see Roth*, 22 F.3d at 1109. Though a showing of scienter is not required for a Section 15(a)(1) violation, Eldaher's actions, including his many incriminating statements, his twenty-three years in the securities industry and admitted knowledge of industry rules, the fact that he did not clear his activities in advance with the broker-dealer with which he was

associated, his direction that Argyropoulos contact him using his personal, not his ACAP, email account, and his receipt of payment indirectly through his wife, show a high level of culpability.

Eldaher acted as more than a mere "finder" in his efforts to find Facebook investors for Prima Capital. *See, e.g.*, *Kramer*, 779 F. Supp. 2d at 1337-41 (defendant was considered a finder, not a broker, because he merely introduced his broker to promoters of an issuer and discussed the business opportunity to a small but close group of friends and confidantes). Finders merely bring together parties to transactions and are not subject to the same registration requirements as brokers. *Id.* at 1339-41. Eldaher did more than act as a passive bridge between investors and Prima Capital. He recruited a dozen current and former brokerage clients to invest with Prima Capital and when these investors encountered problems, some of them informed Eldaher, and he contacted Argyropoulos. Tr. 23-24, 65-67, 72-74, 81, 102; *see also* Div. Ex. 38. Div. Exs. 2, 4, 9, 10, 11, 13, 38. Eldaher admitted his compensation depended on the number of shares purchased by his referrals. Tr. 18-19. *See Ridenour*, 913 F.2d at 515; *Integrity Fin. AZ, LLC*, 2012 SEC LEXIS 6758; *Roth*, 22 F.3d at 1109-10. In other words, Eldaher received transaction-based compensation, which is one of the "hallmark[s]" of acting as a broker. *Kramer*, 778 F. Supp. 2d at 1334 (citing *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 04-cv-586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006).

Eldaher's relationship with these ultimate investors was a broker-client one, and I find that Eldaher was acting as a broker when he agreed to receive payment for referring customers to Prima Capital for the purchase of Facebook shares.

I reject Eldaher's argument that a Section 15(a)(1) violation requires a showing that someone actually executed the transactions. An accepted definition of execute is "to carry out fully: put completely into effect." *See* Merriam-Webster's Collegiate Dictionary 405 (10th ed. 2001). I do not read *Gebhart*, the only case Eldaher cites in support of the proposition, as establishing that someone must perform what is necessary for execution to be considered as having made a sale.

Eldaher's representation that his failure to inform ACAP of his relationship with Prima Capital was based upon a "misunderst[anding] [of] the meaning of selling away" is unconvincing. *See* Tr. 12. FINRA Rule 3270 requires registered representatives to disclose to their affiliated brokers any unrelated business, even if it is not broker related.[14] Eldaher, a long-

[14] FINRA Rule 3270 provides:

> No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of NASD Rule 3040 shall be exempted from this requirement.

time broker who admitted knowing the rules for brokers, failed to disclose his extracurricular activity involving the purchase of Facebook shares with Prima Capital. Eldaher's actions to conceal his dealings with Prima Capital are evidence that he had some concerns about the relationship.

Sanctions

The OIP was issued pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act of 1940. The Division seeks: a cease-and-desist order; disgorgement of $15,478; a collateral bar; and a civil penalty in the amount of $24,000. Div. Br. at 18. Eldaher argues that these sanctions are too extreme and not tailored to the facts in this proceeding. Eldaher considers a lifetime bar punitive and grossly disproportionate to the violation alleged; he concedes that finding that he committed the alleged violation would likely mean a cease-and-desist order and disgorgement. Eldaher Br. at 2.

Collateral Bar and Cease-and-Desist Order

Exchange Act Section 15(b)(6) empowers the Commission, where a person was associated with a broker-dealer when he violated a provision of the statute, to censure, place limitations on the activities or functions, or suspend for a period not exceeding twelve months, or bar such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collateral bar) or from participating in an offering of penny stock if the person has willfully violated any provision of the Exchange Act and issuing a sanction is in the public interest.[15] 15 U.S.C. § 78*o*(b)(6). Exchange Act Section 21C empowers the Commission where, after notice and opportunity for hearing, it has found a violation of the Exchange Act or its Rules to order a person to cease and desist from committing or causing any future violations. 15 U.S.C. § 78u-3.

The criteria relevant for imposition of a sanction pursuant to Exchange Act Sections 15(b)(6) and 21C are similar. The Commission considers the *Steadman* factors in determining whether the public interest necessitates a collateral bar: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

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http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=12945&element_id=9467&highlight=Rule+3270#r12945.

[15] Willful" means intentionally committing the act that constitutes the violation. See *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). There is no requirement that a person be aware that he is violating a statute or regulation. *Id.*

The Commission evaluates similar factors to *Steadman* when deciding on whether it should impose a cease-and-desist order. One of the lead cases on the application of the Commission's cease-and desist authority is *KPMG Peat Marwick, LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, 100 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002), in which the Commission held "a finding of violation raises a sufficient risk of future violation," and

> Our decision to impose any remedial sanction is governed by certain general principles. Within the context of our statutory authority, we have broad discretion in choosing a sanction. All that is required is that the remedy we select have a "reasonable relation" to the record before us and to the violations we have found. In imposing sanctions, we traditionally have balanced a variety of mitigating and aggravating circumstances, such as the harm caused by the violations, the seriousness of the violations, the extent of the wrongdoer's unjust enrichment, and the wrongdoer's disciplinary record.
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> . . .
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> Along with the risk of future violations, we will continue to consider our traditional factors in determining whether a cease-and-desist order is an appropriate sanction based on the entire record.

2001 SEC LEXIS 98, at *100, *102,*116 (footnotes omitted).

Beginning with consideration of the *Steadman* factors, Eldaher committed serious violations because the regulatory scheme developed by the Commission requires that associated persons act within the scope of their employment to be exempt from the broker-dealer registration requirements of the statute.[16] *Roth*, 22 F.3d at 1109. The evidence is that Eldaher did not disclose what he knew to be prohibited activities to his associated broker-dealer.

I do not characterize Eldaher's violations as egregious because there is no allegation of fraud, Eldaher's conduct involved a small number of transactions for twelve customers on one security that Eldaher's associated broker-dealer did not have available, all the investors were made whole, and no investor witnesses testified as to economic loss or misrepresentations by Eldaher. [17] Tr. 75. It appears that Eldaher's conduct began around mid-April 2012, but the duration is not clear. Exs. 2, 100. Eldaher's total compensation as a result of the violations was $15,478.

Eldaher's recognition of wrongdoing is difficult to assess. He argues both that he did not understand selling away but he admitted in his investigative testimony that he "sold away." Tr.11, 13, 60-61. I observed Eldaher at the hearing and consider that he gave credible testimony

[16] Serious is defined (4b) as "having important or dangerous possible consequences." *Merriam-Webster's Collegiate Dictionary* (Tenth Ed. 2001) 1066.

[17] Egregious is defined (2) as "conspicuously bad" or "flagrant." *Merriam-Webster's Collegiate Dictionary* (Tenth Ed. 2001) 368.

under oath. He answered questions directly and did not attempt to obfuscate or deny what occurred within the framework of his defense. Eldaher expressed remorse and represented that he would "absolutely not" repeat this breach. Tr. 96. There is no question that he knows this is his last chance to remain in the industry. He testified:

> It's wrong. And I'm beyond remorseful that I have put myself through this process. And it has just been a nightmare that I can keep hoping that one day I'm going to wake up from.

Tr. 96.

Eldaher's disciplinary history is problematic. Even if you accept Eldaher's explanation that his departure from Salomon Grey and PHD Capital involved salary disputes with management, you are left with a departure from First Financial after a customer complaint about margin trading, a departure from Millinum.com after a judgment lien for $7,000 for day trading losses, a felony conviction for a bad check, and a Form U-5 filing by Barron Moore referencing the reason for his departure as an internal review based on an NASD examination.

I find that the public interest factors ultimately weigh in favor of some sanction. A collateral bar, however, is the severest of sanctions. The cases cited by the Division involved a scale of violations of Section 15(a)(1) quite different from Eldaher's violations in terms of number and duration, the number of investors affected and the harm caused to them, and the personal benefit to the wrongdoer. *Ridenour* involved more than a hundred transactions over a two-year period in nominee accounts Ridenour established for that purpose with extraordinary profits to Ridenour. *Ridenour*, 913 F.2d at 516.

In *Integrity Financial* the respondent acted as a promoter in a fraud that raised $8 million from fifty-eight investors. 2012 U.S. Dist. LEXIS 6758, at *6. The defendant in *Roth* conducted a private securities business completely separate from that of the broker-dealer with which he was associated and this arrangement allowed him to solicit clients and consummate transactions autonomously. 22 F.3d at 1109-10. The violations occurred in connection with Roth's participation in securities sales on seven separate occasions between 1985 and 1986. *See generally* 22 F.3d at 1108. In *Homestead Properties, L.P.*, two registered representatives sold shares in a fraudulent offering that raised over $9.8 million from thirty-four investors without the approval of their broker-dealer. 2009 WL 5173685, at *1.

Eldaher's conduct involved referring twelve customers on one security. Eldaher's total compensation as a result of the violations was $15,478, which compared to the wrongdoers' unjust enrichment in the cases cited above, is minimal. It is significant that Eldaher is not being charged with fraud; the violations did not harm investors; every investor received refunds, Facebook shares, or alternative securities; and no investor testified in support of the allegations in the OIP. Tr. 75-76. Finally, when questioned by his broker-dealer, Eldaher admitted what he had done. Tr. 53-54. There is no allegation that he tried to conceal, obfuscate, or lie during investigative testimony he gave without legal representation. Tr. 61-62.

Given these facts, I find that Eldaher should be: (1) suspended from association and from participating in an offering of penny stock for six months; and (2) ordered to cease and desist from committing or causing any violations of Exchange Act Section 15(a)(1).

Disgorgement

Exchange Act Section 21C(e) authorizes disgorgement, including reasonable interest, in cease-and-desist proceedings. 15 U.S.C. § 78u-3(e). Disgorgement of ill-gotten gains "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co.*, Investment Advisers Act of 1940 Release No. 3829, 2014 SEC LEXIS 1529, at *94 (May 2, 2014) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)), *petition denied*, -- F.3d --, 2015 WL 4153861 (D.C. Cir. 2015).

The unrefuted evidence is that Eldaher was compensated $15,478 as a result of his unlawful conduct. I find disgorgement of that amount an appropriate sanction based on the entire record.

Civil Penalty

Exchange Act Section 21B(a) authorizes the Commission to impose civil monetary penalties against any person where such penalties are in the public interest and the Commission has found that the person has willfully violated certain provisions of the securities laws. 15 U.S.C. § 78u-2(a). The criteria for determining whether a penalty is in the public interest are: (1) whether the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm caused to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c).

While Eldaher's conduct was deliberate, it did not involve fraud. Investors were not harmed. Eldaher was unjustly enriched in the amount of $15,478, which he is being ordered to disgorge. There is no evidence that Eldaher has been subject to discipline by a governmental regulatory body or self-regulatory organization. The disruption and expense his conduct has caused should serve as the deterrent that Eldaher testified it would be.

Record Certification

Pursuant to Commission Rule of Practice (Rule) 351(b), 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on July 29, 2015.

Order

I ORDER that, pursuant to Section 21C of the Securities Exchange Act of 1934, Khaled A. Eldaher shall CEASE AND DESIST from committing or causing violations of Section 15(a)(1) of the Securities Exchange Act of 1934;

I FURTHER ORDER that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Khaled A. Eldaher is SUSPENDED for three months from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization or from participating in an offering of penny stock, and;

I FURTHER ORDER that, pursuant to Section 21C(e) of the Securities Exchange Act of 1934, Khaled A. Eldaher shall DISGORGE $15,478 plus prejudgment interest. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), shall be compounded quarterly, and shall run from January 1, 2014, through the last day of the month preceding the month in which payment is made.[18] 17 C.F.R. § 201.600;

I FURTHER ORDER that the proposed transcript corrections in the parties' April 17, 2015, joint stipulation are adopted.

Payment of disgorgement, prejudgment interest, and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) 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.

Any payment by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order shall include a cover letter identifying the Respondent and Administrative Proceeding No. 3-16326, and shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 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, 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, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a 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 a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the

[18] Rule 600(a) states that prejudgment interest shall be due from the first day of the month following the violation. The date of each violation is unknown, but last violation occurred on December 17, 2013. Div. Ex. 38; Eldaher Ex. 100.

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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Brenda P. Murray
Chief Administrative Law Judge