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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6787/September 10, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-18422

In the Matter of	:	
	:	
JOSHUA D. MOSSHART	:	ORDER

The Securities and Exchange Commission instituted proceedings against Respondent Joshua D. Mosshart with an Order Instituting Proceedings, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, on April 5, 2018.[1] The proceeding is a follow-on proceeding based on *SEC v. Enviro Board Corp.*, No. 2:16-cv-6427 (C.D. Cal.), in which he was enjoined, on default, from violating the registration provisions of the federal securities laws. Under consideration are the parties' motions for summary disposition, filed pursuant to 17 C.F.R. § 201.250(b) (Rule 250(b)), and timely filed responsive pleadings.[2] The Division of Enforcement requests that Mosshart be barred from the securities industry, arguing that his conduct underlying the injunction was egregious and recurrent. Mosshart requests that the proceeding be dismissed, arguing that he did not engage in conduct that violated the registration provisions. As discussed below, neither party's request can be granted on the current record. The parties will be encouraged to agree on procedures for resolution of the proceedings, such as additional paper filings, video or audio testimony, or settlement.

Summary Disposition

Pursuant to Rule 250(b), summary disposition may be granted as to one or more issues based on "undisputed pleaded facts, declarations, affidavits, documentary evidence or facts

[1] The proceeding was reassigned on September 12, 2018, in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and again, on March 18, 2019, to the undersigned. *Joshua D. Mosshart*, Admin. Proc. Release Nos. 5955, 2018 SEC LEXIS 2264 (C.A.L.J.); 6505, 2019 SEC LEXIS 512 (C.A.L.J.).

[2] *See Joshua D. Mosshart*, Admin. Proc. Rulings Release Nos. 5716, 2018 SEC LEXIS 1084 (C.A.L.J. May 7, 2018); 6157, 2018 SEC LEXIS 2779 (A.L.J. Oct. 10, 2018) (amending briefing schedule); 6422, 2018 SEC LEXIS 3628 (A.L.J. Dec. 21, 2018) (setting supplemental briefing schedule); 6440, 2019 SEC LEXIS 82 (A.L.J. Feb. 4, 2019) (extending supplemental briefing schedule); 6700, 2019 SEC LEXIS 4245 (A.L.J. Oct. 28, 2019 (construing Mosshart's filings as a cross-motion for summary disposition seeking dismissal of the proceeding and inviting responsive pleadings). Division of Enforcement's motion was filed on May 21, 2018.

officially noticed pursuant to Rule 323 [that] show that there is no genuine issue with regard to any material fact."[3] As discussed below, there is no genuine issue as to a number of facts: Mosshart was enjoined from violating Section 5 of the Securities Act of 1933, which makes unlawful the offer or sale of securities not registered with the Commission for which no exemption is available, and from violating Section 15(a) of the Exchange Act, which makes it unlawful for a person not associated with a registered broker or dealer to effect transactions in or induce the purchase or sale of any security. Mosshart was associated with several registered broker-dealers between 1999 and 2012, most recently, LPL Financial LLC, which is also a Commission-registered investment adviser, from July 2, 2004, until November 13, 2012, and was not so associated thereafter. Enviro Board securities were not registered with the Commission and no exemption was available. Mosshart provided information concerning Enviro Board securities to several investors, referred them to the company's founders, and was compensated when at least one made an investment. These proven activities occurred in 2011 and 2012, and the proven amount of such compensation was $40,000. The loss of $400,000 by one customer is also proven. The proven activities occurred during Mosshart's association with LPL; still at issue is whether or not LPL knew of and approved them such that they were within the scope of his association with LPL during the time he was so associated. Mosshart, who was employed as president of Enviro Board as of January 1, 2012, for an annual salary of $120,000, also engaged in other activities on behalf of the company, such as public relations, lobbying, and sales. Enviro Board paid a total of $553,355 for Mosshart's services between May 2011 and May 2013.

The following legal considerations are relevant to assessing whether there is a genuine issue of material fact in this proceeding. Any sanctions imposed against Mosshart under Exchange Act Section 15(b) or under Advisers Act Section 203(f) must be in the public interest. 15 U.S.C. §§ 78*o*(b)(6), 80b-3(f). Under the Exchange Act it must be established that he was associated with a broker-dealer (or was acting as an unregistered broker-dealer); under the Advisers Act, that he was associated with an investment adviser (or was acting as an unregistered investment adviser). *Id*. Further, it must be established that he "has willfully violated any provisions of the Securities Act . . . [or the Exchange Act])" or is "enjoined . . . from engaging in or continuing any conduct or practice in connection with [acting as a broker, dealer, or investment adviser]." 15 U.S.C. §§ 78*o*(b)(6), (4)(D), 4(C); 80b-3(f), (e)(5), (e)(4). Additional facts are relevant to sanction considerations, which are as follows:

Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 78*o*(b)(6)(A), § 80b-3(f). The Commission considers factors including:

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[3] The types of evidence on which summary disposition can be based was significantly expanded (to be analogous to Rule 56 (Summary Judgment) of the Federal Rules of Civil Procedure) when Rule 250 was amended, effective September 27, 2016. *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50223-24 & n.112 (July 29, 2016). The previous version of the rule provided, "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323."

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)), *aff'd on other grounds*, 450 U.S. 91 (1981). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. *See Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

The Commission rarely imposes an industry bar in a litigated administrative proceeding for violating registration provisions absent an antifraud violation.[4] Such a sanction is found where the respondent has also violated, or aided and abetted violation of, the antifraud provisions. *See David F. Bandimere*, Securities Act Release No. 9972, 2015 SEC LEXIS 4472 (Oct. 29, 2015) (violation of antifraud, broker-dealer registration, and securities registration provisions), *set aside on other grounds*, 844 F.3d 1168 (10th Cir. 2016); *Maria T. Giesige*, Exchange Act Release No. 60000, 2009 SEC LEXIS 1756 (May 29, 2009) (violation of antifraud, broker-dealer registration, and securities registration provisions); *Paul Carroll Ferguson*, Exchange Act Release No. 6009, 1959 SEC LEXIS 549 (July 7, 1959) (violation of antifraud, broker-dealer registration, and other provisions; respondent's registration as a broker-dealer revoked); *Gregory & Co.*, Exchange Act Release No. 5680, 1958 SEC LEXIS 251 (Apr. 18, 1958) (violation of antifraud, broker-dealer registration, and other provisions; respondent's application for registration as a broker-dealer denied); *The Whitehall Corp.*, Exchange Act Release No. 5667, 1958 SEC LEXIS 246 (Apr. 2, 1958) (violation of

[4] To the extent that the Division cites to settlements to support its request for a bar, it goes without saying that a settlement is not precedent, as the Commission has stressed many times. *See Richard J. Puccio*, Exchange Act Release No. 37849, 1996 SEC LEXIS 2987, at *10-11 (Oct. 22, 1996) (citing *David A. Gingras*, Exchange Act Release No. 31206, 1992 SEC LEXIS 2537, at *20 (Sept. 21, 1992), and cases cited therein); *Robert F. Lynch*, Exchange Act Release No. 11737, 1975 SEC LEXIS 599, at *12 n.17 (Oct. 15, 1975) (citing *Samuel H. Sloan*, Exchange Act Release No. 11376, 1975 SEC LEXIS 1742, at *12 n.24 (Apr. 28, 1975); *Haight & Co.*, Exchange Act Release No. 9082, 1971 SEC LEXIS 436, at *67-69 (Feb. 19, 1971), *aff'd without opinion*, (D.C. Cir. June 30, 1971); *Security Planners Assocs., Inc.*, Exchange Act Release No. 9421, 1971 SEC LEXIS 1035, at *13-14 (Dec. 17, 1971)); *see also Mich. Dep't of Natural Res. v. FERC*, 96 F.3d 1482, 1490 (D.C. Cir. 1996), and cases cited therein (settlements are not precedent). Indeed, Commission settlement orders contain a disclaimer to this effect: "The findings herein are made pursuant to [Respondent's] Offer of Settlement and are not binding on any other person or entity in this or any other proceeding."

antifraud, broker-dealer registration, and other provisions; respondent's application for registration as a broker-dealer denied).

Even those few cases in which a respondent was suspended or barred in the absence of fraud involved conduct that was much more serious, long-running, and otherwise harmful to the markets than Mosshart's conduct as found in this Order. *See Ronald S. Bloomfield*, Securities Act Release No. 9553, 2014 SEC LEXIS 698 (Feb. 27, 2014) (registered representatives sold large amounts of unregistered penny stocks on behalf of highly questionable customers, and manager failed reasonably to supervise them with a view toward detecting and preventing their registration violations; all aided and abetted and caused broker-dealer's failure to file Suspicious Activity Reports; registered representatives barred; manager barred with a right to reapply in a non-proprietary, non-supervisory capacity after two years); *Russo Secs., Inc.*, Exchange Act Release No. 44186, 2001 SEC LEXIS 2771 (Apr. 17, 2001) (broker-dealer violated net capital and related recordkeeping and reporting provisions; chief financial officer suspended for one year; firm had included in its net capital calculations stock that it did not even have and that had no ready market; firm had negative net capital for three months).

Mosshart is estopped from relitigating the *judgment* in *SEC v. Enviro Board* in this proceeding. The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial.[5] However, an injunction entered by default, like the injunction against Mosshart in *SEC v. Enviro Board*, without more, cannot be the basis for sanctions in an administrative proceeding. *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657 (Apr. 23, 2015) (remanding proceedings to administrative law judge); *Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 SEC LEXIS 1010 (Feb. 4, 2010) (remanding proceedings to administrative law judge); *see also Gary L. McDuff*, Exchange Act Release No. 78066, 2016 SEC LEXIS 2121, at *29-30 (June 14, 2016) (noting the limited preclusive effect of an injunction entered on default; that a respondent in a follow-on proceeding may introduce evidence regarding the circumstances surrounding the underlying conduct to address whether sanctions should be imposed in the public interest; and that an administrative law judge must give careful scrutiny to any prior testimony that was not subject to cross-examination).

Findings of Fact Established on the Current Record

The Division's Motion for Summary Disposition is supported by the Declaration of Gary Y. Leung, with attached exhibits, and its Reply includes the Supplemental Declaration of Leung, with an attached exhibit, and the Second Supplemental Declaration of Leung, with attached exhibits. These will be referred to as "Leung Decl., Ex. _," "Suppl. Leung Decl., Ex.," and "Second Suppl.

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[5] *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *10 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997); *see also Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003).

Leung Decl. Ex. _," respectively. Mosshart's "Supporting Evidence & Statement" (Suppl. Opp.) includes numerous exhibits, and these will be referred to as "Resp. Ex. _." Where Bates numbers are cited, leading zeros are omitted.

Mosshart has been in the securities industry since at least 1999; he was associated with several registered broker-dealers between 1999 and 2012; and from July 2, 2004, to November 13, 2012, he was associated with LPL Financial LLC, a registered broker-dealer and Commission-registered investment adviser and has not been associated with a registrant thereafter. *See* https://brokercheck.finra.org/individual/summary/3174050 (last visited Sept. 3, 2020); https://adviserinfo.sec.gov/individual/summary/3174050 (last visited Sept. 3, 2020) (registration records of Joshua Daniel Mosshart).[6] He was permitted to resign from LPL on November 13, 2012, and was barred, on consent, from association with any FINRA member firm in any capacity. *Id*. (*see* Mosshart's December 13, 2013, Letter of Acceptance, Waiver and Consent (AWC) to being barred by FINRA, accepted by FINRA on January 7, 2014, that appears in the BrokerCheck Report).

Mosshart was enjoined against violations of Section 5 of the Securities Act and Section 15(a) of the Exchange Act and ordered to pay disgorgement of $293,655 plus prejudgment interest of $30,240.41 and a civil penalty of $293,655. Final Judgment, *SEC v. Enviro Board* (Mar. 21, 2018), ECF No. 65. The judgment was entered by default. Default by Clerk (Oct. 7, 2016), ECF No. 15; Order Denying Mosshart's Mot. to Set Aside Default & Granting SEC's Mot. for Default (May 9, 2017), ECF No. 35 at 9. Although he failed to respond to the summons, Mosshart participated in the proceeding, and the court denied his motion to set aside the default. Order Denying Mot. to Set Aside Default, ECF No. 35 at 2-3 (concluding that Mosshart failed to show a meritorious defense and failed to establish that his failure to respond was not culpable). The court noted Mosshart's arguments that he did not sell securities, that he only provided arms-length referrals, and that his conduct was approved by his then-employer, LPL. *Id*. at 2. However, the court concluded that Mosshart failed to establish that he had a meritorious defense since, to support his assertions, he provided declarations from only two investors, one of whom was his father, while the complaint alleged that he had referred at least eighteen individuals to Enviro Board. *Id*. at 3. The court found that "Mosshart was put on notice that he was being sued in early September and chose not to participate in the action for months despite conceding that he became aware of the lawsuit as early as October 8, 2016." *Id*. Mosshart appealed the court's denial of his motion to set aside the default; the court of appeals dismissed the appeal for failure to prosecute. Order, *SEC v. Mosshart*, No. 17-55838 (9th Cir. Aug. 1, 2017).

Enviro Board

The remaining defendants in *SEC v. Enviro Board* were Enviro Board, Glenn B. Camp, and William J. Peiffer. Camp and Peiffer founded and controlled Enviro Board. Leung Decl., Ex. 8 at 96. A 2010 Private Placement Memorandum represented that Enviro Board planned to develop a technology that would allow it to manufacture low-cost environmentally-friendly building panels out of straw and other agricultural waste fiber. Second Suppl. Leung Decl. Ex. 8, *passim*. The complaint

[6] Official notice pursuant to 17 C.F.R. § 201.323 is taken of the Commission's public official records and of Financial Industry Regulatory Authority, Inc. (FINRA), records. *See Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014).

alleged that the company never constructed a mill capable of commercial manufacturing production and that Camp and Peiffer made false and misleading statements about the status of commercialization efforts and financial projections to investors.[7] Complaint, *SEC v. Enviro Board* (Aug. 26, 2016), ECF No. 1.

Enviro Board securities were not, and are not, registered with the Commission. Official Notice pursuant to Rule 323.[8] Mosshart does not argue that the securities were exempt from registration, and there is no evidence in the record that an exemption was available. However, he believed that the securities were exempt from such registration. Peiffer advised Mosshart and others in June 2011 that securities counsel had advised Enviro Board that transactions in Enviro Board stock were not required to be registered, pursuant to Section 4(2) of the Securities Act, and no SEC filing was necessary. Resp. Ex. 4. While Securities Act Section 5 is a strict liability statute that does not require any form of intent to violate, Mosshart's belief that the transactions were exempt is relevant to the sanctions analysis under the *Steadman* factors.

Mosshart's Activities for Enviro Board

Camp and Mosshart initially discussed Mosshart's working for Enviro Board sometime in 2011, leading to Enviro Board's January 1, 2012, agreement with Malia Ventures, Inc.,[9] for the services of Mosshart. Leung Decl., Ex. 8 at 114-15; Suppl. Leung Decl. Ex. at 1. Mosshart was engaged as president for an annual salary of $120,000, payable in equal monthly installments, plus 10% of sales, subject to certain conditions. Suppl. Leung Decl. Ex. at 1, 7 (Bates Nos. 595, 601). Mosshart's activities for the company included public relations, lobbying, and sales. Resp. Exs. 11-17, 20-30. The January 1, 2012, agreement also provided that Enviro Board would pay Malia 10% of financing resulting from parties introduced by Mosshart who made an investment of debt or equity capital. Suppl. Leung Decl. Ex. at 1, 7 (Bates Nos. 595, 601). That agreement also awarded Mosshart a stock option to acquire 150 shares for $1 at any time ninety-one days after the date he made introductions resulting in the sale of $2,600,000. *Id*. at 1-2, 7-8 (Bates Nos. 595-96, 601-02). Likewise, the June 2013 agreement between Enviro Board on the one hand and Mosshart and Malia on the other provided for Enviro Board to pay Malia 10% of financing by parties introduced by Mosshart who made an investment of debt or equity capital. Resp. Ex. 1 at 3. Mosshart owned one share of Enviro Board stock as of April 13, 2011, and an additional 150 shares as of November 7,

[7] Enviro Board, Camp, and Peiffer settled. Stipulations, *SEC v. Enviro Board* (Nov. 30, 2017), ECF Nos. 55-57. The court enjoined all three from violations of the antifraud provisions of the securities laws and Enviro Board and Camp from violation of the registration provisions; ordered an officer and director bar against Camp and Peiffer; and ordered each of the three to pay a civil penalty and disgorgement. Final Judgments as to Peiffer, Enviro Board, and Camp, *SEC v. Enviro Board* (Dec. 5, 2017), ECF Nos. 58-60.

[8] Official notice is taken of the Commission's public official records in its EDGAR database. *See also* Leung Decl., Ex. 13 at 16 (*SEC v. Enviro Board*, ECF No. 22-2 at 16).

[9] Mosshart was the sole shareholder of Malia Ventures, Inc., f/k/a Malia Ventures LLC, of which he was the manager and sole member. Leung Decl., Ex. 13 at 31 (*SEC v. Enviro Board*, ECF No. 22-2 at 31). Mosshart and Malia received $553,355 from Enviro Board between May 11, 2011, and May 9, 2013. *Id.* at 4, 86 (ECF No. 22-2 at 4, 86).

2012.[10] Resp. Exs. 3, 6. It is found that payments to Mosshart, including the 150 shares, were payment for raising money. It is found as undisputed, based on the January 2012 agreement proferred by the Division and the June 2013 agreement proferred by Mosshart that Mosshart was to receive transaction-based compensation for investments made by parties whom he referred to Peiffer and Camp.

The Division alleges that Mosshart referred to Enviro Board at least eighteen individuals who purchased nearly $5 million of the company's securities, beginning in May 2011. The material under consideration establishes that Mosshart introduced four individuals – Tina Brodie, Ilona Chandler, Roy Christofferson, and Joseph Mavilia – for investments that totaled $430,000. Leung Decl. Ex. 14 (*SEC v. Enviro Board*, ECF No. 61-3); Resp. Exs. 7-10; Second Suppl. Leung Decl. Ex. 2[11] at 1, 2, 5 (Bates Nos. EBC 89951-52, 89954). Brodie invested $400,000 on January 10, 2012, in an Enviro Board bond; the three others invested a total of $30,000 in May and June 2011. Leung Decl. Ex. 14 at 2 & Exs. A, B; Second Suppl. Leung Decl. Ex. 2 at 1, 2, 5 (Bates Nos. EBC 89951-52, 89954). Thus, based on the January 1, 2012, agreement, it is found that Enviro Board paid Mosshart $40,000 – 10% of the Brodie investment.[12] Enviro Board paid Mosshart, via Malia, $50,000 - $40,000 plus his $10,000 monthly salary – on January 12, 2012, the same day that Brodie's $400,000 check, dated January 10, 2012, was posted. *See* Leung Decl. Exs. 13 at 86 and 14 at 14 (*SEC v. Enviro Board*, ECF Nos. 22-2 at 86 61-3; 61-3 at 14).

Brodie, recently widowed, met Mosshart in October 2011; he told her that he knew of a safe investment for the proceeds of her husband's life insurance, directed her to Enviro Board's website, and introduced her to Camp; she lost the entire $400,000 despite efforts to obtain payment, including suing Enviro Board, which defaulted. Leung Decl. Ex. 14. Chandler, Christofferson, and

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[10] Mosshart claims that each share was valued at $20,000. Suppl. Opp. at 3. He does not explain the basis for the valuation, and Enviro Board was not listed on the Pink Sheets or elsewhere or otherwise publicly quoted.

In March 2017, Mosshart reached an agreement with Enviro Board, Camp, and Peiffer regarding a lawsuit in state court and *SEC v. Enviro Board*. Resp. Ex. 2. Mosshart agreed to quitclaim all right, title, and interest in Enviro Board stock and specified Enviro Board property rights and to dismiss all claims against the other parties to the agreement. *Id*. at 2-3. Enviro Board agreed to use its best efforts to settle *SEC v. Enviro Board*, to obtain a dismissal in favor of Mosshart, and to obtain for Mosshart a dollar for dollar credit for any payments by Enviro Board, Camp, and Peiffer of disgorgement and civil penalties with the proviso that they would not indemnify Mosshart. *Id*. at 1-2. Enviro Board also agreed to execute a promissory note in favor of Mosshart in the amount of $222,655. *Id*. at 2.

[11] Chandler's name is spelled "Chanler," and Mavilia's, "Mavilla" in this Exhibit.

[12] Mosshart's comment on the payment for Brodie's investment was "Tina Brodie didn't know about my compensation for my services because we didn't have her Life Insurance monies at LPL[.] All of my clients get a consolidated monthly statements with fees and commission charges. My employment agreement with Enviro Bard was separate from LPL." Resp. Opp. (titled "Respondent's Answer," signed June 4, 2018) at 7.

Mavilia did not place securities orders with Mosshart; Mosshart referred each one to Camp and provided information about Enviro Board at his or her request. Resp. Exs. 7-10.

Mosshart was associated with LPL, a registered-broker dealer, until November 13, 2012. At issue is whether LPL knew of and approved Mosshart's activities with regard to Brodie, Chandler, Christofferson, and Mavilia. With reference to Exchange Act Section 15(a), which makes it unlawful to operate as an unregistered broker, Mosshart maintains that LPL was aware of his involvement with Enviro Board and approved it; he maintains that he informed LPL that his LPL clients were interested in investing in Enviro Board. Resp. Opp. (titled "Respondent's Answer," signed June 4, 2018) at 1. To the contrary, according to the AWC, "[i]n May 2011, Mosshart sought permission from LPL to be an Enviro Board sales representative. . . . Although LPL approved this outside business activity, it specifically advised Mosshart that he was not to solicit any individuals to invest in Enviro Board." AWC at 2. However, "[f]rom May 2011 through November 13, 2012, while associated with LPL, Mosshart referred about 20 investors . . . to Enviro Board . . . [and] received about $485,000 in referral fees." *Id.* While the conclusion of the AWC is that, as of and after May 2011, Mosshart was not acting as a registered representative associated with LPL when he solicited any clients to invest in Enviro Board, he is not estopped from arguing the contrary in this proceeding. He agreed that he "may not take any action or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. . . . [However, n]othing in this provision affects [his] . . . right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party." AWC at 4.

Conclusions

Based on the material available for summary disposition, there is no issue that Mosshart violated Securities Act Section 5 in advising Brodie concerning Enviro Board and referring her to Camp to make an investment. His receipt of transaction-based compensation for that referral makes clear that his conduct was an offer for sale of Enviro Board securities within the meaning of Section 5. Although Section 5 is a strict liability provision, his belief that the Enviro Board securities were exempt from registration is relevant to the *Steadman* factors.

Whether Mosshart also violated Exchange Act Section 15(a) may depend on the scope of his association with LPL, which is disputed on the current record. Further, even if it is established that he was not acting within the scope of that association, it must be established that he was acting as an unregistered broker to conclude that he violated Section 15(a). This involves the consideration of several factors.

"Broker" is defined in Section 3(a)(4) of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). Activities of a broker are characterized by "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc. v. Secs. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976). Other relevant factors include whether the alleged broker: "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." *SEC v. Zubkis*, No. 97-cv-8086, 2000 WL 218393, at *9 (S.D.N.Y. Feb. 23, 2000) (quoting *SEC v.*

Hansen, No. 83-cv-3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984)). However, "transaction-based compensation" is "one of the hallmarks of being a broker-dealer." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (quoting *Cornhusker Energy Lexington, LLC v. Prospect Street Ventures*, No. 8:04-cv-586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006)). Scienter is not required to establish a violation of Exchange Act Section 15(a). *SEC v. Montana*, 464 F. Supp. 2d 772, 785 (S.D. Ind. 2006).

In light of the foregoing, the parties should confer with an eye to reaching agreement on further procedures, which may include: agreeing that the undersigned may decide this proceeding, including disputed issues, based on the current record; supplementing the current record with additional filings and documentary evidence; video or audio testimony; or settlement. The parties should file a joint report concerning this by September 30, 2020. If they are unable to file a joint report, each party should file a separate report by that date.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge