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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16354

In the Matter of

David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay,

Respondents.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION AGAINST RESPONDENTS RICHARD HAMPTON SCURLOCK, III AND RTAG, INC.

The Division of Enforcement submits the following Reply in Support of its Motion for Partial Summary Disposition Against Respondents Richard Hampton Scurlock, III and RTAG, Inc.

I. NO DISPUTED MATERIAL FACTS PRECLUDE SUMMARY DISPOSITION

Scurlock's affidavit filed in response to the Division's motion for summary disposition confirms this matter should be resolved on the Division's motion. In the affidavit, Scurlock admits (a) entering into the agreement with Diversified, (b) conducting significant due diligence on Diversifed, (c) "recommend[ing] [Diversified] bonds" to certain clients, (d) disclosing the bonds' risks to the clients, and (e) declining to recommend the bonds to certain clients because the bonds were unsuitable for the clients' objectives. Moreover, Scurlock does not dispute the accuracy of any of the documentation attached to the Division's motion relating to the amount of commissions he received or the number of people he solicited. Summary disposition is therefore

appropriate. *See Kenneth C. Meissner,* AP File No. 3-16175, AP Rulings Release No. 2376, at 2-3, 2015 SEC LEXIS 791 (Mar. 3, 2015) (Law Judge's Order) (determining Exchange Act Section 15(a)(1) broker registration liability on summary disposition); *OX Trading, LLC*, AP File No. 3-14853, 2012 WL 8718373, *8 (Sept. 5, 2012) (Law Judge's Order) (determining dealer registration liability on summary disposition); *Legacy Resources, Inc. v. Liberty Pioneer Energy Source, Inc.*, 322 P.3d 683, 691 (Utah 2013) ("Where undisputed facts support the determination that a person acted as a broker, summary judgment is not only appropriate but required.") (citing federal cases).

II. THE ADVISERS ACT DOES NOT EXCUSE RESPONDENTS FROM COMPLYING WITH THE REGISTRATION REQUIREMENTS OF EXCHANGE ACT SECTION 15(a)(1)

Respondents argue that because their conduct did not violate the Investment Advisers Act of 1940 ("Advisers Act"), they cannot be held liable for violating Exchange Act Section 15(a)(1). (Response at Part III.A-D) However, Respondents cite no statute, regulation, or decisional law supporting their claim that investment advisers are somehow exempt from the Exchange Act's registration requirements. To the contrary, Exchange Act Section 15(a)(1) makes it unlawful "for *any* broker" to "induce or attempt to induce the purchase or sale" of securities "unless such broker . . . is registered" in accordance with Exchange Act Section 15(b). 15 U.S.C. § 78o(a)(1) (emphasis added). Exchange Act Section 15(a)(2) authorizes the Commission, by "rule or order," to exempt from the registration requirement "any broker or dealer or class of brokers or dealers . . . ." 15 U.S.C. § 78o(a)(2). However, Respondents have

the burden of establishing such an exemption,[1] they identify none, and the only exemption pertaining to investment advisers is not even remotely applicable here.[2]

Respondents assert that investment advisers may permissibly receive transaction based compensation. However, the fact that receipt of such compensation might not violate the Advisers Act in no way exempts an investment adviser who acts as a broker from having to comply with the Exchange Act's registration requirements. *See Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949) ("[A] registered broker-dealer [cannot] immunize himself [from Exchange Act violations] merely by acquiring registration under the Investment Advisers Act. It is perfectly obvious that Congress contemplated no such result when it enacted that Act.").

Respondents' reliance on Advisers Act Section 211(g)(1), 15 U.S.C. § 80b-11(g)(1), is misplaced. That provision, added by the Dodd-Frank Act, Pub. L. No. 111-203, § 913(g)(2), authorizes the Commission to issue rules imposing upon brokers a standard of conduct no less stringent than the standard applicable to investment advisers under Advisers Act Sections 206(1) and 206(2) when providing personalized investment advice about securities. In a request for data relating to that potential rulemaking, the Commission noted

> that nothing in Section 206(1) and 206(2) of the Advisers Act prohibits the receipt of transaction-based compensation, such as commissions. A person engaged in the business of effecting transactions in securities for the account of others, would however, absent an available exemption, be required to register as a broker-dealer.

Release No. 34-69013, at 26 n.34 (Mar. 1, 2013), 78 Fed. Reg. 14848, 14855 n.34 (Mar. 7, 2013). Thus, the statutory scheme is clear: an investment adviser may permissibly engage in broker conduct, but if he does, he subjects himself to the Exchange Act's regulatory scheme,

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[1] *See UBS Asset Management (New York) Inc. v. Wood Gundy Corp.*, 914 F. Supp. 66, 70 (S.D.N.Y. 1996).

[2] *See* Exchange Rule 3a4-1(c)(1)(iv) [17 C.F.R. § 240.3a4-1(c)(1)(iv)] (exempting registered investment adviser affiliated with registered investment company that is issuing a security); *see also* C. Kirsch, *Broker-Dealer Regulation*, § 2:2.7 (2014) ("There is no general exemption for investment advisers from federal broker-dealer registration.").

including Section 15(a)(1)'s registration requirement. *See Hughes*, 174 F.3d at 977 ("[W]hen a person is registered under both the Securities Exchange Act and the Investment Advisers Act he or she is amenable to regulation under both statutes.").[3] Accordingly, nothing in the Advisers Act gives Respondents a "pass" from the duty to register.[4]

III. RESPONDENTS ACTED AS BROKERS REQUIRING REGISTRATION

Respondents argue that that their conduct did not require broker registration, relying as expected on *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011). The Division anticipated and addressed this argument in our Motion. Three brief replies:

1. Respondents' argument is infected by the same flaw as their "Advisers Act" argument—they assume incorrectly that any conduct the Advisers Act permits falls outside the calculus in determining whether they acted as brokers. *See* Response at 6, 8, 12 (distinguishing unfavorable district court cases because (a) the Advisers Act "specifically allows for commissions" and "allowed [Respondents] to recommend securities and get transaction-based compensation," and (b) Respondents performed "many of the acts [that would trigger registration requirements] as an investment advisor"). For the reasons detailed above, this is an 'ingenious but fruitless argument." *Hughes*, 174 F.2d at 977.

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[3]The *Hughes* court stated that "[t]he situation would be otherwise if the Commission had sought to have revoked petitioner's investment adviser registration because of violations of the Securities and Securities Exchange Acts . . . ." *Id.* However, the Dodd-Frank Act authorized an investment adviser associational bar as a permissible sanction for a willful violation of the Exchange Act. *See* Pub. L. No. 111-203, § 925(a)(1) (amending Exchange Act Section 15(b)(6)).

[4]Respondents represent they could find no cases finding that an investment adviser violated the Exchange Act's broker registration requirements. (Response at 1) However, *Anthony Fields*, AP File No. 3-14684, 2015 WL 728005, *17-18 (Feb. 20, 2015) (Commission Opinion), cited in the Division's Motion, found such a violation by an investment adviser. *See also Larry C. Grossman*, AP File No. 3-15617, 2014 WL 7330327, *35 (Dec. 23, 2014) (Initial Decision) (principal of registered investment adviser "knowingly acted as a broker when he recommended the Battoo Funds to [the investment advisory firm's] clients and received referral fees and a portion of the investment management fee for making those recommendations").

2. Respondents totally ignore the Commission's recent opinion in *Fields* and the Law Judge's decision in *Gualario*,[5] both of which found registration was required for persons who received far less in commissions than Respondents, commenting only that "ultimately the judicial precedent will control." (Response at 13) While the Division understands the need to preserve arguments for appellate review, the precedent guiding this stage of the proceeding clearly requires a finding that Respondents acted as brokers.

3. With respect to the various district court decisions Respondent cite, all but one either find registration was required,[6] or find only that summary judgment could not be granted.[7] Other than *Kramer*, only *SEC v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005), actually held that the person in question was not a broker. The *M&A West* court found that the activities of an individual who arranged reverse mergers between public "shell" companies and privately held operating companies fell outside the scope of "effecting transactions." *See* 2005 WL 1514101, *9-10. Here, by contrast, Respondents' activities—conducting due diligence, obtaining retail investors, determining with them the investment's suitability, and receiving

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[5]*Anthony Fields*, AP File No. 3-14684, 2015 WL 728005, *18 (Feb. 20, 2015) (Commission Opinion); *Gualario & Co., LLC*, AP File No. 3-14340, 2012 WL 627198, *14 (Feb. 14, 2012) (Initial Decision).

[6]*See SEC v. Offill*, 2012 WL 246061, *6-9 (N.D. Tex. Jan. 26, 2012); *SEC v. Martino*, 255 F. Supp. 2d 268, 283-84 (S.D.N.Y. 2003), *remanded on other grounds*, 94 F. App'x 871 (2d Cir. Apr. 22, 2004) (summary order); *SEC v. Corporate Relations Group, Inc.*, 2003 WL 25570113, *17-19 (M.D. Fla. Mar. 28, 2003); *SEC v. Hansen*, 1984 WL 2413, *4-6 (S.D.N.Y. Apr. 6, 1984); *see also SEC v. Benger*, 697 F. Supp. 2d 932, 943-45 (N.D. Ill. 2010) (denying defendants' motion to dismiss registration violation claim); *SEC v. Bravata*, 2009 WL 2245649, *2-3 (E.D. Mich. July 27, 2009) (SEC had established likelihood of success Exchange Act Section 15(a)(1) claim); *SEC v. Margolin*, 1992 WL 279735, *5 (S.D.N.Y. Sept. 30, 1992) (same).

[7]*See Landegger v. Young*, 2013 WL 5444052, *4-8 (D. Colo. Sept. 30, 2013); *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, *3-4 (S.D. Miss. Dec. 11, 2009); *Salamon v. Teleplus Enterprises, Inc.*, 2008 WL 2277094, *8-9 (D.N.J. June 2, 2008); *see also Couldock & Bohan, Inc. v. Societe Generale Securities Corp.*, 93 F. Supp. 2d 220, 229-30 (D. Conn. 2000) (court found party acted as unregistered dealer and did not determine broker status). Here, Respondents dispute none of the material facts, and therefore summary disposition is appropriate. *See supra* Part I.

commissions from the issuer—fall squarely within the core of broker conduct, and registration was required.

CONCLUSION

For the reasons set forth above and in our Motion, the Division requests that its Motion for Partial Summary Disposition Against Respondents Richard Hampton Scurlock, III and RTAG be granted.

June 5, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by U.S. Mail, on this 5th day of June 2015, on the following persons entitled to notice:

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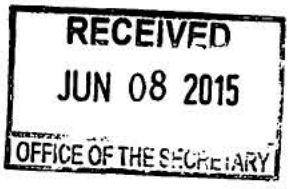
Office Memorandum

SECURITIES AND EXCHANGE COMMISSION



Miami Regional Office

DATE: June 5, 2015

TO: OFFICE OF THE SECRETARY

FROM: Andrew O. Schiff, Regional Trial Counsel
By: Phil Pierrot, Paralegal

RE: **In the Matter of: David B. Havanich, et al**
Adm. Proceeding No. 3-16354

Enclosed, please find the original and three copies of the Division of Enforcement's Reply In Support of its Motion for Partial Summary Disposition Against Respondents, Richard Hampton Scurlock, III and RTAG, Inc.

Thank you.