ADMINISTRATIVE PROCEEDING
FILE NO. 3-16354
UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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In the Matter of
David B. Havanich, Jr.,
Carmine A. DellaSala,
Matthew D. Welch,
Richard Hampton Scurlock, III,
RTAG Inc. d/b/a Retirement
Tax Advisory Group,
Jose F. Carrio,
Karasik & Associates, LLP
Michael J. Salovay

Respondents,
_______________________________/

RESPONDENTS RICHARD H. SCURLOCK, III, and RTAG Inc.'s PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Introduction

This matter came before the Court for a hearing on July 6, 2015. This case involved one simple charge that Richard H. Scurlock, III ("Scurlock") and RTAG, Inc. violated Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") and were unregistered brokers related to the sale of bonds of Diversified Energy Group, Inc. ("DEG"). The Division did not allege that Scurlock and RTAG made any material misrepresentations or omissions to any investors in the DEG bonds.

Scurlock and RTAG raised two defenses to the allegations of the Division. The first defense is that RTAG is a registered investment advisor in the Commonwealth of Kentucky regulated by the Kentucky Department of Financial Institutions. Scurlock is an associated person with RTAG and at all times Scurlock was acting within the scope of a Registered Investment Advisor. The second defense raised by Scurlock is that he was acting as a Finder for DEG and therefore not required to register as a broker.

The government had the burden of proof to show that RTAG and Scurlock acted as unregistered brokers by the preponderance of the evidence and the Division has failed to meet its burden. Furthermore, if Scurlock had not been a registered investment advisor then the Finder's exception as established in *Kramer* would apply in this case and Scurlock did not violate the broker registration requirements. This case is indicative of overreaching by the Division and the Division should be ordered to pay the legal costs of Defendants Scurlock and RTAG for doing nothing more than acting within the scope of their licenses.

Finding of Facts

The Division only witnesses were Scurlock and Anna Dennis, a representative of the Kentucky Department of Financial Institutions ("DFI"), during the hearing. Based on the testimony of Scurlock and Dennis, the Court makes the following findings:

1. RTAG is a registered investment advisors regulated by the Kentucky DFI and Scurlock is an associated person. JX1 ¶¶1-6.
2. Scurlock acted in the same exact way when he made recommendations to his clients to purchase the Diversified Bonds as he did when he made recommendations to purchase mutual funds, stocks, and insurance products. The evidence showed that there was absolutely no deviation in how Scurlock performed his duties. 74:24-75:15; 88:21-89:25; 90:15-22; 101:10-23.
3. Scurlock testified that he did not act as a broker related to the DEG bonds. T.78:4-79:10.
4. On December 15, 2009, Scurlock entered into a written agreement with DEG, which contemplated that Scurlock would introduce investors to DEG in exchange for compensation, labeled a "finder's fee," of 5% of the invested amount. At some point the fee percentage was increased to 10%. (DX14; JX1 ¶ 11.
5. Scurlock acted as a finder pursuant to the December 15, 2009 agreement at all times. T.92:16-94:13.
6. Scurlock told his clients about the commissions and finders fees that he received from Diversified. 75:16-76:5; 125:17-20.
7. At Scurlock's request (made in April 2010), TD Ameritrade was asked to add DEG's bonds to its platform. After conducting a review which included reviewing DEG's

Private Placement Memoranda, Subscription Agreements, Confidential Information Memorandum, and Diversified-supplied financial statements, on May 5, 2010, TD Ameritrade approved the Diversified bonds for retirement accounts and added the Diversified bonds to its platform. Some of the investors that Scurlock introduced to Diversified made their investments through TD Ameritrade. With respect to those investors, TD Ameritrade handled the purchase transaction, forwarding the customer's funds to Diversified, providing the customer with a confirmation of the transaction, acting as custodian of the bonds, and receiving the interest payments on the customer's behalf. (JXI 18;RX D 101-03, 106-08).

8. Scurlock relied on advice from the Kentucky DFI as to whether or not he had to be licensed as a broker and also on the advice of TD Ameritrade. 112:19-113:01; 114:12-114:17.

Interaction with the Kentucky DFI

9. Scurlock contacted the Kentucky DFI in 2009 to ask about policies and procedures related to recommending the DEG bonds to his clients. T. 22:20-23:23; 82:19-83:10; 84:24-85:3.[1]

10. During the examination exit interview conducted in February 2011 by the Kentucky DFI, Scurlock was not advised to stop recommending the Diversified bonds. T. 165:1-19.[2]

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[1] Anna Dennis, the only witness produced by the Division and the current director of compliance of the Kentucky DFI did not refute Scurlock's testimony that he called the DFI in 2009 to discuss Diversified. She merely stated that she did not remember. T:165:21-166:6. Stating a lack of memory is not an affirmative answer and it amounts to nothing because it does not mean that it did not happen. Furthermore, Dennis stated she did not recall any discussions that she had with Scurlock about the Diversified bonds. T:182-3-6.

[2] The Kentucky DFI did not provide a response to Scurlock until June 2, 2011.

11. The Kentucky DFI did not have any open issues related to Scurlock and Diversified as of May 2013. T. 170:6-171:18. Specifically there were no open issues related to the 2011 compliance examination performed by the Kentucky DFI. T.184:17-19.

12. Anna Dennis, the only witness of the Division, had no knowledge of anything that the Kentucky DFI did to follow up with Scurlock related to Diversified after February 2011 examination. T. 166:7-11; 171:24-172:6; 183:16-24. Dennis is not aware of any cease and desist letters sent to Scurlock. T. 173:4-14. Dennis was not at any meetings between Scurlock and Carmen Bishop in 2011. T. 179:17-23. She did not recall any conversations with Scurlock about the Diversified bonds. T. 182:3-6.

13. Dennis was not aware of any legal referrals made to the legal department related to Scurlock. T.190:20-24.

14. The Kentucky DFI never ordered Scurlock to cease and desist his actions related to the sale of the Diversified bonds. T. 98:9-11; 173:9-14.

15. Scurlock disclosed his commission on his ADV after discussing this with the Kentucky DFI. 125:5-16; 126:16-128:18; RX G-1, G-2, H.

16. Scurlock received an email on June 2, 2011 and acted in accordance with the email.[3] T. 50:7-16. This email was a result of Scurlock asking for an opinion after his annual examination. 97:6-98:11.

17. DEG filed Notices with the Kentucky DFI for their bond offerings. T.95:7-96:22; RX B.

The government failed to present any evidence related to the following:

[3] Dennis said Scurlock stated he did not receive the email. Scurlock says he did. Scurlock actually changed his ADV so his actions show that he did receive the email. T.128:7-14. Furthermore, 168:24-169:1 states that the IT department only gets delivery receipts for internal emails.

1. Distinguishing the duties of a registered investment advisor from the duties of a broker.
2. That Scurlock acted outside of his role as a registered investment advisor.
3. That Scurlock performed any functions intrinsically related to the activities of a broker, such as negotiating the price of a security or making a market for a security.
4. The actual losses suffered by the clients of Scurlock if he was in fact determined to be acting as a broker, which he was not.
5. Any evidence of loss causation related to the clients of Scurlock and the DEG bonds.

Conclusions of Law

Under the Investment Advisor Act of 1940 ("IAA"), at the time of the events hereunder, all Registered Investment Advisors under $25,000,000 are regulated by the state securities commission. They are prohibited from registering with the SEC and the state securities commissions have primary regulatory authority over these investment advisors.[4]

RTAG and Scurlock are registered investment advisors with the Commonwealth of Kentucky as required under the IAA. An investment advisor is a person or a firm who is paid to advise others as to the value of a security or as to the advisability of investing in, purchasing, or selling securities.[5] This is exactly what Scurlock did in this case. Scurlock, acting as an investment advisor, researched the DEG bonds and advised his clients as to the availability and suitability of the DEG bonds for them to purchase and was paid for his recommendation. The extensive interplay between the Exchange Act of 1934 (the "Exchange Act") and the "IAA contemplates the exact type of activity that happened here. Scurlock conducted due diligence on the DEG Bonds because he had a fiduciary duty to do so prior to making any recommendations

[4] Investment Advisors Act of 1940, Section 203A. The Division pressed Scurlock on why didn't he call the SEC for advice and he properly stated that he was a registered investment advisor with the state. T:28:3-8.
[5] Investment Advisors Act of 1940, Section 202(a)(11)

as to their value and the advisability of investing in or purchasing them. As part of that due diligence he did talk to DEG officials. He assisted clients in completing paperwork, just as he does when clients purchase publically traded securities and mutual funds. Scurlock and RTAG did receive transaction based compensation, which is specifically allowed under the IAA[6]. None of this makes Scurlock liable for acting as a broker. Furthermore, Scurlock had discussions with the Kentucky DFI about his recommendations of the DEG Bonds and they told him to have an agreement in place and to disclose the compensation to his clients. Scurlock complied with both of these requirements.

A. Scurlock's activities are appropriate for a Registered Investment Advisor

The IAA defines an ''Investment adviser'' as "any person who, *for compensation*, engages in the business of *advising others*, either directly or through publications or writings, as to the value of securities or as to the *advisability of investing in, purchasing, or selling securities*, ..."[7] As previously discussed, in this case that is exactly what Scurlock did. Acting in a fiduciary duty, Scurlock did due diligence on the DEG bonds and DEG, he reviewed the offering materials, he meet with clients and advised some of them that the DEG Bond may be suitable for them, and he was paid for those services. Scurlock was not a broker. He did not negotiate the price of the DEG bonds and he did not affect the actual purchase and sale, which was done through direct paperwork between DEG and the client.

Furthermore, in Kentucky a registered investment advisor can place an order to purchase or sell a security.[8] Under Kentucky law, an investment advisor provides advice for securities and receives compensation for providing advice.[9] Transaction based compensation is not prohibited

[6] Investment Advisors Act of 1940, Section 211(g)(16)
[7] Investment Advisors Act, Section 202(11)
[8] T. 175:4-12. KAR 808 10.450(2)(4).
[9] KRS 292.310, T. 176:2-10.

under Kentucky law.[10] RTAG and Scurlock were registered under Kentucky law as required by the IAA and were regulated by the Kentucky DFI.

B. Compensation based on commissions or fees is acceptable for an Investment Advisor

The IAA Standard of Conduct specifically states: "*The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser.*"[11] Furthermore, the IAA Sec. 205 (dealing with Investment Advisory Contracts) does not state any bar to commissions or fees. Additionally Sec. 206 (Prohibited Acts) does not bar transaction based compensation. The Division took a position that is directly contrary to the applicable statutes and regulations. Therefore, Scurlock cannot be found to be a broker merely because he received commission based fees.

The *Kramer*[12] decision is noteworthy for its rejection of "the SEC's transaction-based compensation approach as well as the SEC's attempt to impose on the courts its own no-action letters as interpretative guidance on the broker-dealer registration requirements."[13]

C. Scurlock did not act as a Broker

Scurlock did not act as a broker. One of the more recent seminal cases is *SEC v. Kramer*[14]. In that case, the Commission argued that Kramer acted as an unregistered broker when he solicited customers to purchase Skyway securities. The court first pointed out that Section 15(a)(1) of the Exchange Act provides that it is unlawful for any broker or dealer to make use of the mails, or any means or instrumentality of interstate commerce, to effect any transactions in, or to

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[10] 808 KAR 10.450 specifically contemplates an investment advisor receiving transaction based compensation.
[11] Investment Advisor Act of 1940, Section 211(g)(16)
[12] 778 F. Supp. 2d 1320 (M.D. Fla. 2011)
[13] *See generally* Ernest E. Badway & Daniel A. Schnapp, Is the Tide Turning Against the SEC in Favor of Finders? (Am. Bar Ass'n Securities Litig. Sec. Nov. 17, 2011).
[14] 778 F. Supp. 2d 1320 (M.D. Fla. 2011)

induce or attempt to induce the purchase or sale of, any security unless the broker or dealer is registered as such.[15]

"Broker" is defined in the Act as "any person engaged in the business of effecting transactions in securities for the accounts of others."[16] Because the Exchange Act does not define "effecting transactions" or "engag[ing] in the business," a variety of factors have been applied to determine whether a person qualifies as a broker under Section 15(a).[17] The most frequently cited factors were identified in *SEC v. Hansen,*[18] *These factors* include

> whether a person (1) works as an employee of the issuer, (2) receives a commission rather than a salary, (3) sells or earlier sold the securities of another issuer, (4) participates in negotiations between the issuer and an investor, (5) provides either advice or a valuation as to the merit of an investment, and (6) actively (rather than passively) finds investors. [19]

The *Kramer* court further pointed out, however, that "[t]he factors articulated in *Hansen* . . . [a]re not designed to be exclusive."[20] *Moreover, so*me factors are deemed more indicative of broker conduct than others, such as the "regularity of participation in securities transactions at key points in the chain of distribution."[21]

[15] *Id.* at 1333 (citing *15 U.S.C. § 78o (2015)).*

[16] *Id.* (quoting *15 U.S.C. § 78c).*

[17] Id. at 1334 (citing *DeHuff v. Digital Ally, Inc., 2009 U.S. Dist. LEXIS 116328, 2009 WL 4908581, *3 (S.D. Miss. Dec. 11, 2009)).*

[18] *Fed. Sec. L. Rep. (CCH) P91, 426, 1984 U.S. Dist. LEXIS 17835, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984). Id. (citing Hansen, 1984 WL 2413 at *10).*

[19] *Kramer*, 778 F. Supp. 2d at 1334 (citing *Hansen*, 1984 WL 2413 at *10; *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, 2006 U.S. Dist. LEXIS 68959, 2006 WL 2620985 (D. Neb. Sept. 12, 2006)* (identifying as evidence of broker activity a person's "analyzing the financial needs of an issuer," "recommending or designing financing methods," discussing "details of securities transactions," and recommending an investment); *S.E.C. v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003), aff'd and remanded,* 94 Fed. App. 871, 2004 U.S. App. LEXIS 7956 (2d Cir. Apr. 22, 2004); *S.E.C. v. Margolin, 1992 U.S. Dist. LEXIS 14872, 1992 WL 279735 (S.D.N.Y. Sept. 30, 1992)* (finding evidence of "brokerage activity" based on the defendant's "receiving transaction-based compensation, advertising for clients, and possessing client funds and securities")).

[20] Id. (quoting *S.E.C. v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010)).

[21] Id. In *SEC v. Bravata*, 2009 U.S. Dist. LEXIS 64609, 2009 WL 2245649 (E.D. Mich. July 27, 2009), for instance, the court described "[t]he most important factor in determining whether an individual or entity is a broker" as the

Granted, some courts, such as Nebraska federal district court in *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, 2006 WL 2620985 (D. Neb. Sept. 12, 2006),* describe "transaction-based compensation" as "one of the hallmarks of being a broker-dealer."[22] In other words, transaction-based compensation is the hallmark of a salesperson. *Id.* However, as previously discussed, the IIA specifically allows for commissions to be paid to investment advisors.[23] Therefore, the mere fact that commissions were received by Scurlock is not enough to find that he acted as a broker.

The *Hansen* case—long considered the seminal decision on this issue and still perhaps the most often cited—is noteworthy here because the defendant promoted and sold to the public fractional, undivided interests in various oil wells and received a fifteen percent commission for each interest that he sold.[24] The evidence in *Hansen* established that the defendant:

> (1) prepared letters that "extolled the virtues" of the investment;
> (2) advertised in newspapers;
> (3) sponsored seminars and social events;
> (4) distributed gifts, bumper stickers, and "other promotional items";
> (5) participated in a financial symposium called "The Money Show" at the New York Coliseum; and
> (6) hired employees and provided prepared scripts for the employees' telephone calls to prospective investors.[25]

The defendant in *Hansen* engaged in these promotional activities despite a permanent injunction against violating the anti-fraud provisions of the securities laws (obtained by the SEC over fifteen years earlier), the defendant's earlier and unsuccessful application for broker registration, and an explicit prohibition by several states against the defendant's engaging in the sale of securities

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"regularity of participation in securities transactions at key points in the chain of distribution." Kramer, 778 F. Supp. 2d at 1334

[22] *Kramer*, 778 F. Supp. 2d at 1334 (explaining that "[t]he underlying concern has been that transaction-based compensation represents a potential incentive for abusive sales practices that registration is intended to regulate and prevent.").

[23] Investment Advisors Act of 1940, Section 211(g)(16)

[24] *See Kramer*, 778 F. Supp. 2d at 1335 (discussing *Hansen*).

[25] *Id*

without registering as a broker.[26] Citing the lack of "extensive judicial interpretation," the *Hansen* court concluded that the defendant violated Section 15(a) because he (1) worked as a consultant rather than an employee of the issuer; (2) received a commission based on his sale of each oil well interest; (3) actively and aggressively sought investors; (4) provided frequent and extensive advice on the merit of the investment; (5) sold the securities of another issuer in the past; and (6) sought and failed to obtain broker registration because of securities law violations.[27]

The instant case is totally different. In this case Scurlock is a register investment advisor. **This is the single most important fact.** He did not work for DEG. He does not solicit and aggressively seek investors, he has never been involved in prior sales of private placements, he was not previously barred.

In another key decision cited by the *Kramer* court, *SEC v. Corporate Relations Group, Inc.*[28], the Commission alleged that a "stock promotion firm" violated Section 15(a) because it "published investment-related material ranging from one-page faxes to the monthly full-color magazine, Money World," and agreed, for a fee, to (1) promote a security in one of the firm's publications, (2) forward an investor inquiry about the security to a registered broker, and (3) direct the firm's "broker relations executives" ("BREs") to contact the registered broker and encourage the broker to sell the security. [29]According to two former BREs, the BREs in *Corporate Relations* also counseled inquiring investors to purchase a security featured in the firm's publications. If a BRE submitted proof that the investor purchased the security from a broker, the BRE received a commission from the firm based on the sale. The court held that the stock promotion firm (not the individual BREs) acted as an unregistered broker in violation of Section 15(a), because the firm "actively sought investors, . . .

[26] *Id.*
[27] *Id.*
[28] *2003 U.S. Dist. LEXIS 24925, 2003 WL 25570113 (M.D. Fla. Mar. 28, 2003)*
[29] *Id.*

recommended securities to investors through registered [brokers], and . . . [paid] transaction-based compensation for stock sales."[30] This case does not control the actions of Scurlock because, as an investment advisor, he is allowed to recommend securities and get transaction-based compensation. Furthermore, there was no evidence that Scurlock actively sought investors.

In yet another case discussed by the *Kramer* court, *S.E.C. v. M & A West, Inc.*[31], by contrast, the court granted summary judgment in favor of the defendant on the SEC's Section 15(a) claim, where the facts established that the defendant facilitated and participated in reverse mergers. *Id.* at 1335-36. Specifically, the defendant worked with the shareholders of a private company to (1) identify "suitable public shell companies," (2) prepare documents for the reverse merger, and (3) coordinate the parties to the reverse merger. Upon successful completion of a reverse merger, the defendant received compensation in cash and securities. The court rejected the Commission's argument that the defendant's conduct amounted to broker activity, finding that the Commission's factual recitation shed no light on why the defendant's activities—which were commonly associated with paralegals (who draft documents), lawyers (who draft documents and orchestrate transactions), businesspersons (who identify potential merger partners), and opportunists (who like to take a small cut of a big transaction), none of whom is commonly regarded as a broker—added up to the defendant's being a broker in the *M & A West* case. Of particular note were the facts that no assets were entrusted to the defendant, and that there was no evidence that the defendant was authorized to transact business "for the account of others"; that is, although the defendant was in the business of facilitating securities transactions among other persons, the Commission cited no authority for the proposition that this equated to "effecting transactions in securities for the account of others."[32]

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[30] *Id.*
[31] *2005 U.S. Dist. LEXIS 22452, 2005 WL 1514101 (N.D. Cal. June 20, 2005*
[32] *Id.* at 1336

This case is important because Scurlock, as an investment advisor, did perform the jobs that he is normally associated with, such as conducting due diligence, evaluating the bond, advising clients about the bond, and being compensated on a commission basis. Therefore, Scurlock is not a broker, he is an investment advisor.

In the last few years, the inquiry has remained fact-intensive, and courts continue to apply essentially the same tests as set out in earlier precedent. In *SEC v. Offill*,[33] for instance, the court noted that "[t]he distinction drawn between the broker and the finder or middleman is that the latter bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction."[34] The court further noted "A finder, however, will be performing the functions of a broker-dealer, triggering registration requirements, if activities include: analyzing the financial needs of an issuer, recommending or designing financing methods, involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities."[35] As previously discussed, Scurlock performs many of these acts as an investment advisor. **Scurlock did not analyze the financial needs of DEG, recommend or design financing methods for DEG, or was involved in negotiations related to the DEG Bonds.**

Courts, in considering whether a violation of the broker registration requirements had occurred, also observed that some courts have considered the meaning of the term "broker" by looking to whether a person regularly participates in securities transactions at key points in the

[33] Fed. Sec. L. Rep. (CCH) P96,723, 2012 U.S. Dist. LEXIS 9369, 2012 WL 246061 (N.D. Tex. Jan. 26, 2012)
[34] *Id* at 2012 WL 246061 at *31 (quoting *Salamon v. Teleplus Enters., 2008 WL 2277094 at *13*).
[35] *Id.* (quoting *Cornhusker, 2006 WL 2620985 at *6*); *see also Couldock & Bohan, Inc. v. Societe Generale Sec. Corp., 93 F. Supp. 2d 220, 229 (D. Conn. 2000)* (holding that the plaintiff was a dealer because it was "not merely matching buyers and sellers, but rather was placing itself squarely in the middle of each transaction in order to reap the profits from . . . the price difference between the buy and sell sides of the transactions, for its own account")).

distribution scheme.[36] In other words, some courts have held that regularity of participation "is the primary indicia of being 'engaged in the business'" for the purposes of the broker definition.[37]

The *Landegger* court did not focus on that element alone, however, and found the *Hansen* factors useful in determining whether a person's activities give rise to broker status.[38] The court did note that the factors of transaction-based compensation and regularity of participation should be afforded heightened weight in the calculus. These two factors must not be weighted so heavily so as to subsume the others in the analysis; that is, they "should not swallow what is ultimately a fact-intensive definition—and one as to which the SEC Commission has been unwilling to create the necessary guidance in order to provide clarity."[39] **Under this analysis, Scurlock did not act as a broker.**

D. The Finder's Fee exception also applies to Scurlock in this case

Following the decision in *M & A West*, a series of later cases identified a limited "finder's exception" to the broker-dealer registration requirement that permits a person or entity to "'perform a narrow scope of activities without triggering the b[r]oker/dealer registration requirements.'" [40] A "'finder' may perform a narrow scope of activities without triggering broker/dealer registration requirements."[41] To the extent that this Court may believe that Scurlock was acting outside of his scope then the Finder's Fee exception applies.

[36] *Landegger v. Cohen*, 2013 U.S. Dist. LEXIS 140634, 2013 WL 5444052 (D. Colo. Sept. 30, 2013), 2013 WL 5444052 at *13
[37] *Id.* at *17
[38] *Id.* at *19.
[39] *Id.*
[40] *Id.*
[41] *DeHuff v. Digital Ally, Inc.*, 2009 U.S. Dist. LEXIS 116328, *12-13 (S.D. Miss. Dec. 11, 2009); "The distinction drawn between the broker and the finder or middleman is that the latter 'bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction."

"Merely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to trigger the broker registration requirement under Section 15(a).[42] Instead, the evidence must demonstrate involvement at "key points in the chain of distribution," like participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment.[43] Even when the "finder" receives a fee "in proportion to the amount of the sale"—i.e., a percentage of the total payment rather than a flat fee—the SEC (in a series of "no-action" letters) has found that there was no need for registration.[44]

Despite the number of cases reviewed by the *Kramer* court, the court still observed that the distinction between a finder and a broker remained largely unexplored at the time of its 2011 decision.[45] Both the case law and the Commission's informal "no-action" letters were (and indeed still are) highly dependent on the facts of a particular arrangement.[46] Turning to the facts in that case, the Commission argued that Kramer's conduct qualified as broker activity subject to Section 15(a) because Kramer:

> (1) received transaction-based compensation,
> (2) actively solicited investors (by distributing promotional material and directing people to Skyway's [the issuer's] web site),
> (3) advised investors about Skyway (by telling people that Skyway was a good company and suggesting that people read Skyway's press releases),
> (4) used a "network" of associates to promote Skyway,
> (5) demonstrated a regularity of participation (through the money that Kramer earned and the two years over which the conduct occurred),
> (6) promoted the shares of other issuers, and
> (7) earned commissions rather than a salary as a Skyway employee.[47]

In response, Kramer countered that he (1) never *sold* a share of stock; (2) never "engaged in the business of effecting securities transactions for the accounts of others"; (3) merely talked about

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[42] *Id.*
[43] *Id.* (quoting *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, 2006 WL 2620985 (D. Neb. Sept. 12, 2006)*
[44] *Id.* (citing David A. Lipton, 15 Broker-Dealer Regulation § 1:18 (further explaining, however, that payment of a flat fee "does not *insure* that the payment will be regarded as non[-]commission compensation") (emphasis added).
[45] *See id.*
[46] *See id.* at 1336-37
[47] *Id.* at 1337.

investments the same way that people talk about sports or politics; (4) talked to only some of his relatives and close friends about Skyway; (5) acted as a finder by introducing an investor to Skyway; and (6) reported purchases of Skyway shares to Baker because Baker requested the information, and because Baker agreed to pay Kramer (with Baker's Skyway shares) for collecting the information.[48]

The court agreed that the evidence showed that Kramer had told a small but close group about Skyway and opined that Skyway seemed like a good investment.[49] According to the Commission, the nature of Kramer's relationship with each person was irrelevant to the broker analysis under Section 15(a). However, the court explained, the broker analysis under Section 15(a) (as developed in *Hansen*, *Martino*, and other cases) permits examination of a wide array of factors. The nature of a person's relationship with another, although not determinative, may support either the absence or the presence of broker activity. **Ultimately**, the court sided with the defendant in *Kramer* and determined that the Commission failed to show by a preponderance of the evidence that Kramer "engaged in the business of effecting transactions in securities for the accounts of others."[50]

In this case, Scurlock while acting appropriately as an investment advisor, similar to Kramer, was not engaged in the business of effecting transactions in securities for the accounts of others.

Conclusion

Just because and investment fails does not mean that the law has been broken by everyone involved. If the actions of Scurlock are determined to be the actions of a broker then all registered investment advisors, whenever they assist in the completion of paperwork and make a recommendation to a client, would be acting as a broker-dealer. That is simply not the law. In this case it is clear the Division fails to make the case that Scurlock is a broker. Scurlock is an investment advisor. He did not negotiate the purchase price of the DEG bonds. Scurlock

[48] *Id.* at 1337-38
[49] *Id.* at 1339.
[50] *Id.* at 1341.

merely told his clients what was available, his recommendation on the suitability of the bond, and assisted his clients with the same ministerial functions that investment advisors do every day for clients.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served in the manner provided upon the following persons on this 4th day of September, 2015:

The Honorable Carol Fox Foelak
Administrative Law Judge
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Washington, D.C. 20549-9303
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AND NON-FACSIMILE ORIGINAL
WITH MANUAL SIGNATURE
CONTEMPORANEOUSLY
VIA US MAIL

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September 4, 2015

Via Facsimile No. (703)-813-9793 & (202)-777-1031 on 9/4/2015
And United States Mail

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OFFICE OF THE SECRETARY

The Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-9303

Re: File No. 3-16354
In the Matter of: David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay

Dear Judge Foelak,

Please find the attached Proposed Findings of Facts and Conclusions of Law for Defendants Richard H. Scurlock, III and RTAG, Inc. A copy of this document was sent via fax for filing and the original plus three copies were concurrently sent via US Mail in connection with the above-captioned matter on September 4, 2015.

Thank you for your attention to this matter. Please contact me with any questions or should you require further information.

Sincerely,

Andre F. Regard

AFR/mt