ADMINISTRATIVE PROCEEDING
FILE NO. 3-17070

COPY

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **3C ADVISORS & ASSOCIATES, INC., STEPHEN JONES, AND DAVID PROLMAN,** **Respondents.**	**Judge Cameron Elliot**

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DIVISION OF ENFORCEMENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

May 31, 2016

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I. INTRODUCTION

To defeat the Division of Enforcement's ("Division") Motion for Summary Disposition, 3C Advisors & Associates, Inc. ("3C") and Stephen Jones ("Jones") ("Respondents"),[1] must establish that there is a dispute about genuine material fact. 17 C.F .R. § 20 l .250(b). They have failed to do so. Although Respondents argue that they did not operate as unlicensed brokers, the facts establish that they did. Respondents admit that 3C was not licensed or affiliated with a licensed broker. *Id.* Ex. 43 ¶ 21; Ex. 44 ¶ 21. Respondents admit that 3C assisted and advised its clients in raising capital. Jones Declaration ¶ 61. They also admit that 3C provided other services including analyzing its customers' financial needs and recommending financing methods (*id.* ¶¶ 66-67, 73-74), and provided marketing services and negotiation assistance. *Id.* ¶¶ 61-62. Moreover, they admit that 3C's engagement letters contemplated that 3C would receive transaction based compensation. *Id.* ¶¶ 61, 63, 64. Finally, they do not deny that 3C actual received transaction based compensation for one engagement. Dean Declaration Exs. 22-25; Ex. 49 at pp. 142:21-145:8; Ex. 43 ¶ 14.; Opp. at 5.

By engaging in this conduct, 3C violated Section 15(a) of the Exchange Act, and Jones aided and abetted and caused that violation. Thus it is appropriate for the Hearing Officer to grant the Division's motion and (1) order them to cease-and-desist their violations; (2) bar them from the securities industry; (3) order them to disgorge with prejudgment interest amounts collected through their capital advisory services engagements; and (4) order them to pay civil monetary penalties.

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[1] After the Division filed its motion on May 6, 2016, it reach a tentative settlement with the third Respondent, David Prolman ("Prolman"). Thus, the Division no longer seeks summary disposition as to Prolman, although his conduct as an agent of 3C is discussed herein.

II. ARGUMENT

A. 3C Acted As a Broker

The undisputed record establishes that 3C willfully violated Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a). It was "engaged in the business of effecting transactions in securities for the account of others," but was not registered as a broker. *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003), *aff'd*, 94 F. App'x 871 (2d Cir. 2004). "[A]ctivities that indicate a person may be a 'broker' are: (1) solicitation of investors to purchase securities, (2) involvement in negotiations between the issuer and the investor, and (3) receipt of transaction-related compensation." *SEC v. Earthly Mineral Solutions, Inc.*, 07-CV-1057, 2011 WL 1103349, at *3 (D. Nev. Mar. 23, 2011). Notably, Respondents spend two pages of their brief distinguishing *SEC v. Hansen*, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984). Opp. at 11-12. But the Division is not relying on the definition of brokering in *Hansen*, which is directed at more traditional brokering activity, but looks to the more recent definition set forth in *Earthly Mineral*, 2011 WL 1103349, at *3.

Respondents cite to a series of inapposite cases in their defense. First, they cite to *SEC v. M&A West, Inc.*, 2005 U.S. Dist. LEXIS 22452 (N.D. Cal. 2005), for the proposition that merely "facilitating transactions" does not equate to "effecting transactions in securities for the account of others." Opp. at 5-6. But their argument misstates the holding in that case. In that 2005 case, the district court held against Section 15(a) liability because, at the time, there was a paucity of authority for the proposition that the defendant's conduct constituted brokering activity. *Id.* at *27. More recent decisions, however, make it clear that Respondents' activities did, in fact, constitute brokering activity. *Earthly Mineral*, 2011 WL 1103349, at *3; *see also Apex Global Partners, Inc. v. Kaye/Bassman Int'l Corp.*, No. 3:09-CV-637-M, 2009 WL 2777869, at *3 (N.D. Tex. Aug. 31, 2009); *In re Havanich, et al.*, Initial Decision Release No. 935, 2016 SEC

LEXIS 4, at *18 (January 4, 2016) (finding clients, advising them on the merits, and assisting them in the steps necessary to execute the transaction reflects regularity of participation in securities transactions at key points in the chain of distribution).

Second, Respondents cite to *Spicer v. Chicago Board Options Exch., Inc.*, 1990 U.S. Dist. LEXIS 14469 (N.D. Ill. 1990), for the proposition that "permitting others to effect transactions" does not qualify as "effecting transactions." Opp. at 8. This argument seriously misstates the facts of the case. Private plaintiffs there sued the Chicago Board Options Exchange ("CBOE") for violating Section 9(a)(2) of the Exchange Act. Their theory was that merely by operating the exchange and allowing trading in index options in the aftermath of Black Monday, the CBOE "effected a series of transactions in a security." *Spicer,* 1990 U.S. Dist. LEXIS 14469, *7. The court found that the CBOE's conduct could not constitute market manipulation under Section 9(a)(2) because it had not bought, sold, or placed bids on any security. *Id.* This is a far cry from a holding that one must "buy, sell, or place bids" to be involved in brokering activity. Opp. at 8. Finally, Respondents cite *Apex Global Partners*, 2009 WL 2777869, for the unremarkable proposition that "merely bringing together parties to [securities] transactions" does not constitute brokering activity. Opp. at 8. While that is true, 3C did much more than simply introduce the parties here.

Indeed, there can be no question here that 3C effected and participated in securities transactions. Its conduct meets all three of the factors set forth in *Earthly Mineral,* 2011 WL 1103349. First, Respondents do not deny that 3C marketed itself as providing capital advisory services, including "private placement of debt and equity securities;" assistance in "acquisition financing, growth capital, recapitalizations, and restructuring;" and helping clients "structure debt and issue opinions regarding the commercial reasonableness of debt." *Id.* Ex. 4; Ex. 26; Ex.

27 at SEC-LA-04471-E-0021111; Ex. 30 at p. 11; Ex. 43 ¶ 8. Jones argues these services were provided by personnel by the advisory services and valuation services divisions at 3C, but he cannot and does not deny that 3C provided them. Jones Declaration ¶ 61. Respondents admit the firm had a "rolodex" of potential capital sources who could invest with the customers developed by Prolman based on his "marketing or capital sources" or "through an intermediary such as an attorney or other people." Opp. at 8-9; Dean Decl. Ex. 46 at 20:12-21. Respondents admit that 3C assisted in preparing at least one marketing book and teaser summary with details about the customer that it sent to potential funding sources. Jones Declaration ¶ 62. But as set forth in the motion, there were others, and Respondents only rebuttal is to state that a single one of these, Exhibit 9, was prepared by the customer. Jones Decl. ¶ 81-82; Dean Decl. Ex. 9; Ex. 17; Ex. 45 at pp. 84:6-10; Ex. 46 at pp. 30:6-11; Ex. 47 at pp. 160:20-162:7; Ex. 48 at pp. 135:13-136:10; Ex. 36. Respondents thus do not rebut Jones' testimony that "teasers" were prepared by 3C, nor can they rebut Denny's testimony that Jones and Prolman worked "on any book that came through the office." Dean Decl. Ex. 45 at pp. 84:6-10; Ex. 47 162:8-12.

Second, Respondents admit that 3C assisted in negotiations; they simply argue that such assistance was provided by "non-capital advisory service components of the company." Jones Decl. ¶61; Opp. at 10. In addition, they proffer the testimony of a single client who states that they did not provide negotiation assistance to him. Opp. at 7-8. Such an argument does nothing to rebut the Division's contention that 3C, through Jones and Prolman, assisted in negotiations and opined about the merits of transactions for other customers. Dean Decl. Ex. 11; Ex. 12; Ex. 13; Ex. 35; Ex. 48 at pp. 33:19-34:1 112:4-114:22; Ex. 49 at pp. 27:7-28:8. Prolman, on behalf of 3C, was present during meetings between customers and capital sources, and included in correspondence between them. *Id.* Ex. 15; Ex. 16; Ex. 42; Ex. 19; Ex. 20; Ex. 21; Ex. 46 at pp.

32:24-33:14. Ex. 48 at pp. 59:21-60:2; 62:9-20; 130:8-18; 131:15-133:4; 134:18-135:7; Ex. 49 at pp. 56:10-57:13. Prolman and Jones advised the customers about to advisability of terms being offered by the capital sources during those negotiations. *Id.* Ex. 49 at pp. 56:10-57:13; *see also* Ex. 20 (Pollo West CFO and CEO corresponding about input received from Prolman during negotiations). One customer testified that 3C gave him "validation on the commercial reasonableness of various terms and conditions of the proposal" that the funding source was offering. *Id.* Ex. 48 at pp. 130:8-18. Another testified that 3C "gave me their opinions on . . . the attractiveness of the offer. . . . And they would give me their advice on strategy, on how to go back to—how to approach JMC and how to—how to negotiate." Ex. 48 at pp. 59:21-60:2; 62:9-20; *see also Id.* Ex. 42, SEC-SEAPINE-E000905 (client forwarding proposed term sheet to Prolman). 3C also communicated with capital sources separately from the customer during the course of negotiations. *Id.* Ex. 48 at pp. 67:7-20.; Ex. 43 ¶ 19.

Finally, 3C earned transaction-based compensation of $90,000 in one engagement, based on a percentage of the financing that 3C had arranged. *Id.* Ex. 43 ¶ 14. Other engagements had at least the possibility of transaction based compensation, which is the "hallmark" of a broker. *See In re Havanich*, 2016 SEC LEXIS 4 at *16-17 (fees determined as percentage of amount invested in customer were "plainly 'transaction-based'"); Dean Decl. Ex. 5 at p. 3; Ex. 8 at p. 3; Ex. 7 at p. 2; Ex. 18 at p. 4; Exs. 22-25; Ex. 49 at pp. 142:1-145:8; Ex. 43 ¶ 14.

B. Respondents Were Not "Finders"

Respondents rely on an argument that they were "finders" rather than "brokers." Opp. at 13-14. In doing so, they completely ignore the authorities cited by the Division that establish no such finder exemption to the Exchange Act registration provisions exists. *In re Havanich*, 2016 SEC LEXIS 4, at *22 ("the concept of a finder exempt from the Exchange Act's registration requirement does not exist in any decision of the Commission, the Supreme Court, or any federal

court of appeals"). Moreover, Respondents activities went far beyond merely making introductions. Broker registration is required where, as here, the broker provides services such as "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." *Id. citing SEC v. Kramer*, 778 F. Supp. 2d 1320, 1336 (M.D. Fla. 2011); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 04-586, 2006 WL 2620985, at *6 (D. Neb. Sep. 12, 2006) (denying summary judgment on claim contract was voidable as prohibited transaction involving unregistered broker conduct).

Here, 3C engaged in all of these activities. Through Jones and Prolman, 3C analyzed and provided input regarding the fundraising needs of 3C's customers, recommended and designed financing options, participated in negotiations, conferred with 3C's customers and the potential capital sources regarding the advisability of the transactions, and made recommendations to the customers about deal terms. Moreover, 3C structured all of its capital advisory engagements to provide for success fees, with higher fees in the event of equity financing—and 3C collected such a fee where its customer ultimately obtained financing. *See In re Havanich*, 2016 SEC LEXIS 4, at *22 (rejecting defense that respondent was a finder, not a broker, where respondent had signed a "Finder's Fee Agreement," because he did not just "find" investors, he also gave advice, negotiated terms, facilitated transactions, and received transaction-based fees).

3C acted as a broker, and did so without registering or associating with a registered broker-dealer. Thus, it is liable under Section 15(a).

C. Jones Aided and Abetted 3C's Violation of Section 15(a)

The undisputed record also establishes that Jones willfully aided and abetted 3C's violations of Section 15(a). Jones is 3C's senior managing director. Dean Decl. Ex. 43 ¶ 2. 3C

acted through him and Prolman, whom Jones hired, to market and provide capital advisory services. Opp. at 2. Respondents argue that the Division only evidence as to Jones is that he drafted a business plan. Opp. at 15-16. This is clearly not correct. As set forth in the Division's motion and above, Jones and Prolman entered into contracts on behalf of 3C to perform brokering services, including analyzing funding needs for customers, disseminating customer information to potential capital sources, and assisting customers with negotiating funding terms. Dean Decl. Ex. 5 at p. 3; Ex. 8 at p. 3; Ex. 7 at p. 2; Ex. 18 at p. 4; Exs. 22-25; Ex. 49 at pp. 142:1-145:8; Ex. 43 ¶ 14. Moreover, Jones arranged for and obtained transaction-based compensation for the firm. *Id.* Without his actions, there could have been no primary violation by 3C. Thus, Jones substantially assisted 3C's violation.

And Jones knew, or was reckless in not knowing, that the services 3C provided violated Section 15(a). *In re Havanich*, 2016 SEC LEXIS 4 at *26 (noting that respondents who engaged in finding clients, advised them on transactions, and received transaction based compensation without registering were "at least reckless"). Not only is Jones an experienced industry professional (Dean Decl. Ex. 34; *see also* Ex. 29; Ex. 45 at pp. 20:23-43:21) he admits that he knew registration was required. Opp. at 2. Jones' recklessness is also established by his use of a form engagement letter that obligated 3C to perform services without consulting with a lawyer,[2] and by the fact that they took on a new advisory services client after being o notice of the SEC's investigation. Dean Decl. Ex. 45 at pp. 90:12-91:4, 109:3-112:14; Ex. 43 ¶ 8, 20.

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[2] Respondents argue that the Division has misrepresented the facts around this engagement letter, but the testimony they cite only reinforces the Division's argument – Prolman brought the letter from a prior firm, and Jones and 3C adopted it without having it reviewed by an attorney in the context of the services that 3C, not Prolman's prior employer, was providing. Jones Decl. ¶¶ 57-58.

Finally, after being on notice that they were under investigation by the Division, Jones and Prolman removed all references to capital advisory services from 3C's website, indicating awareness of an issue with the firm's provision of those services. *Id.* Ex. 4; Ex. 45 at pp. 111:18-112:14. But after taking that step, 3C took on another capital advisory engagement, continuing its violative conduct. *Id.* Ex. 45 at pp. 109:3-112:14; Ex. 43 ¶ 20.

D. Jones Caused 3C's Violation of Section 15(a)

In addition to aiding and abetting 3C's Section 15(a) violations, the undisputed record also establishes that Jones also caused those violations. "Causing liability" requires that: (1) a primary violation occurred; (2) an act or omission by the respondent contributed to that violation; and (3) the respondent knew or should have known that his or her conduct would contribute to the violation. *See In re Gateway Int'l Holdings, Inc.*, S.E.C. Release No. 53907, 2006 WL 1506286, at *8 (May 31, 2006) (Commission Op.). Because scienter is not required for proving a primary violation of Section 15(a), negligence suffices for establishing liability for "causing" a violation of that section. *See, e.g., In re Ambassador Capital Mgmt., LLC*, Initial Decision Release No. 672, 2014 WL 4656408, at *42 (Sept. 19, 2014) (citation omitted).

Respondents argue that there is insufficient evidence to establish that Jones negligently caused 3C's violation, and instead blame Prolman. Opp. at 16-17. But they fail to rebut the evidence cited above that proves Jones aided and abetted 3C's primary violation of Section 15(a) establishes. That evidence is more than sufficient to establish that Jones is liable for causing that violation. *In re Clarke T. Blizzard*, Advisers Act Rel. No. 2253, 2004 WL 1416184, at *5 n.10 (Comm. Op. June 23, 2004). Jones is therefore liable for causing 3C's violation.

III. RELIEF REQUESTED

The Division seeks the following relief in this case: cease-and-desist orders, permanent bars pursuant to Section 15(b)(6); orders that Respondents disgorge their ill-gotten gains of

$160,000, and imposition of civil penalties.

A. Cease-and-Desist Orders Are Appropriate

Cease-and-desist orders are appropriate against Respondents. As discussed above, they each have violated, or aided and abetted or caused violations of, Section 15(a) of the Exchange Act. Respondents are likely to commit or cause future violations, because they intend to remain in the business of providing capital advisory services, and they have shown contempt for the registration requirements in the past. Opp. at 17; Mtn at 9.

B. Permanent Bars are Appropriate

In addition, Respondents clearly meet the *Steadman* factors for imposition of a bar. *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979). 3C willfully violated Section 15(a) of the Exchange Act by acting as a broker despite its failure to register, and Jones aided and abetted and caused 3C's violation. Their actions were egregious and involved at least recklessness, given that they knew or should have known that registration was required to provide the broker services they were providing, and they simply failed to do so, even after being on notice that the Division was investigating their conduct. Dean Decl. Ex. 4; Ex. 45 at pp. 111:18-112:14;109:3-112:14; Ex. 43 ¶ 20. The violation was recurring, and Jones refuses to recognize the wrongfulness of his conduct, or make any assurances that he will not violate the law in the future.

C. Disgorgement

Finally, Respondents should disgorge, with prejudgment interest, the amounts that they were unjustly enriched through their violations. 3C received $160,000 in revenue from the activity that constituted unregistered broker activity, and Respondents should be ordered, jointly and severally, to disgorge that money.

D. Penalties

Respondents willfully violated or willfully aided and abetted a violation of the federal securities laws. A penalty is needed to deter others from doing the same. First tier penalties should be ordered against the Respondents for each of the five capital advisory engagements they undertook, for a total of $375,000 for 3C and $37,500 for Jones. *See In re Mark David Anderson*, 56 S.E.C. 840, 863 (Comm. Op., Aug. 15, 2003) (imposing a civil penalty for each of the respondent's ninety-six violations); Rule 201.1004 and Table V to Subpart E, Adjustment of civil monetary penalties – 2009, 17 C.F.R. Part 201.1004 and Table V.

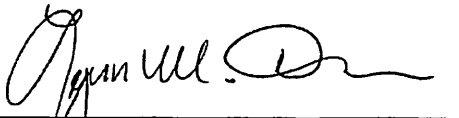
IV. CONCLUSION

For all the reasons stated, the Division requests that the Hearing Officer find Respondents liable and order them to (1) cease-and-desist their violations; (2) be permanently barred pursuant to Section 15(b)(6); (3) disgorge with prejudgment interest amounts collected through their capital advisory services engagements; and (4) pay civil monetary penalties.

Dated: May 31, 2016

Respectfully submitted,

DIVISION OF ENFORCEMENT



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In the Matter of 3C Advisors & Associates, Inc., Stephen Jones, and David Prolman
Administrative Proceeding File No. [3-17070]

Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

DIVISION OF ENFORCEMENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

was served on May 31, 2016, upon the following parties as follows:

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Dated: May 31, 2016

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