No. 22-____

In the
Supreme Court of the United States

JOCELYN M. MURPHY, MICHAEL S. MURPHY, AND RICHARD C. GOUNAUD,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-55178, 21-55180

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOCELYN M. MURPHY; MICHAEL S. MURPHY,

Defendants-Appellants,

and

RICHARD C. GOUNAUD; RMR ASSET MANAGEMENT COMPANY; BRUCE A. BROEKHUIZEN; DOUGLAS J. DERRYBERRY; DAVID R. FROST; NEIL P. KELLY; JOHN M. KIRSCHENBAUM; DAVID S. LUTTBEG; TIMOTHY J. MCALOON; RALPH M. RICCARDI; DEWEY T. TRAN; PHILIP A. WEINER,

Defendants.

Before: LEE and BRESS, Circuit Judges, and FITZWATER,[1*] District Judge.

[*] The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

ORDER

Judges Bress and Lee voted to deny Richard Gounaud's petition for rehearing en banc [Dkt. 62]. Judge Fitzwater recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

Filed

Jan 25, 2023

Molly C. Dwyer, Clerk

U.S. Court of Appeals

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55178, 21-55180

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOCELYN M. MURPHY; MICHAEL S. MURPHY,

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and

RICHARD C. GOUNAUD; RMR ASSET MANAGEMENT COMPANY; BRUCE A. BROEKHUIZEN; DOUGLAS J. DERRYBERRY; DAVID R. FROST; NEIL P. KELLY; JOHN M. KIRSCHENBAUM; DAVID S. LUTTBEG; TIMOTHY J. MCALOON; RALPH M. RICCARDI; DEWEY T. TRAN; PHILIP A. WEINER,

Defendants.

Before: LEE and BRESS, Circuit Judges, and FITZWATER,[2*] District Judge.

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[*] The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

ORDER

Judges Bress and Lee voted to deny Jocelyn and Michael Murphy's petition for rehearing en banc [Dkt. 61]. Judge Fitzwater recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

Filed

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Molly C. Dwyer, Clerk

U.S. Court of Appeals

Appendix C

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-55178

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOCELYN M. MURPHY; MICHAEL S. MURPHY,

Defendants-Appellants,

and

RICHARD C. GOUNAUD; RMR ASSET MANAGEMENT COMPANY; BRUCE A. BROEKHUIZEN; DOUGLAS J. DERRYBERRY; DAVID R. FROST; NEIL P. KELLY; JOHN M. KIRSCHENBAUM; DAVID S. LUTTBEG; TIMOTHY J. MCALOON; RALPH M. RICCARDI; DEWEY T. TRAN; PHILIP A. WEINER,

Defendants.

No. 21-55180

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

RICHARD C. GOUNAUD,

Defendant-Appellant,

and

JOCELYN M. MURPHY; MICHAEL S. MURPHY; RMR ASSET MANAGEMENT COMPANY; BRUCE A. BROEKHUIZEN; DOUGLAS J. DERRYBERRY; DAVID R. FROST; NEIL P. KELLY; JOHN M. KIRSCHENBAUM; DAVID S. LUTTBEG; TIMOTHY J. MCALOON; RALPH M. RICCARDI; DEWEY T. TRAN; PHILIP A. WEINER,

Defendants.

Appeal from the United States District Court
for the Southern District of California

Anthony J. Battaglia, District Court Judge,
Presiding

Argued and Submitted May 20, 2022

Pasadena, California

Filed October 4, 2022

Before: Kenneth K. Lee and Daniel A. Bress, Circuit Judges, and Sidney A. Fitzwater,* District Judge.

OPINION

LEE, Circuit Judge:

In popular culture, the word "broker" may evoke images of the likes of Leonardo DiCaprio in *The Wolf of Wall Street*: smooth-talking brokers pressuring uninformed clients into buying and selling worthless penny stocks so that they can bank massive commissions. Appellants Sean Murphy, Jocelyn Murphy, and Richard Gounaud insist that they are not "brokers"—and thus did not have to register with the Securities and Exchange Commission (SEC)—because they did not engage in such boiler-room tactics. Rather, their "client," Ralph Riccardi, called the shots. He provided them with capital to trade securities in exchange for a share of the profits and losses, and at times directed them to purchase certain municipal bonds.

But under the Securities Exchange Act of 1934, the term "broker" encompasses much broader conduct: it includes any person trading securities "for the account of others." 15 U.S.C. § 78c(a)(4)(A). Because Appellants put Riccardi's capital at risk on their trades and acted as his agents, they behaved as "brokers" under the Exchange Act. And by not registering as brokers with the SEC, Appellants appeared as if they were merely retail investors (who

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* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

receive priority for municipal bonds), allowing them to circumvent municipal bond purchasing order priority. Appellants thus violated Section 15, the broker-registration provision, of the Exchange Act. Jocelyn Murphy also made material misrepresentations in violation of § 10(b) and Rule 10b-5 when she lied about her zip code to obtain high priority municipal bond allocations. We thus affirm the district court's liability order.

We also affirm the substantial civil penalties imposed against Appellants. Though it appears no individual investor suffered financial harm, Appellants' conduct undermined the SEC's system of broker-dealer oversight and circumvented retail priority regulations allowing municipalities to raise capital at the lowest possible price. We also affirm the injunctive relief imposed against the Murphys, and therefore affirm the district court in full.

BACKGROUND

I. Factual History

a. A primer on the municipal bond market.

To understand how Appellants sidestepped the Exchange Act, we need to explain how the municipal bond market works. Municipalities issue bonds to raise capital for local projects such as roads, hospitals, and schools. Municipal bonds are usually issued through a "negotiated underwriting." Under this model, underwriting firms release a "pricing wire" to potential investors, who then commit to purchasing bonds. The pricing wire provides key terms about the bond offering, including the "order priority." The order priority defines how bonds will be allocated between various classes of investors. The order priority is significant because demand for municipal bond offerings usually outpaces supply. Investors with low priority may not receive bonds even if they place an order.

Historically, "retail investors" (*i.e.*, individual, non-professional investors) were crowded out of bond offerings by large, institutional investors such as mutual funds, hedge funds, and insurance companies. Underwriters gave institutional clients high priority because they comprised the largest share of the underwriters' profitability. Retail investors, as a result, were often not allocated any bonds despite their interest.

This crowding out of retail investors hurts municipal bond issuers. Retail investors are often willing to purchase bonds at lower interest rates, while institutional investors usually demand a higher yield. Retail investors also rarely resell their bonds on the secondary market, which reduces supply and thus increases the issuer's initial pricing leverage. As a result, many issuers reserve the initial order period exclusively for retail investors. Within the retail order period, issuers often gave the highest priority to investors residing within the issuer's jurisdiction. To verify that an investor is a resident of the jurisdiction, issuers require purchasers to submit their residential zip code.

b. RMR's bond-flipping scheme.

Sean and Jocelyn Murphy (who are husband and wife)[1], as well as Richard Gounaud, have decades of experience in the securities trading industry. In the late 2000s, they associated with Ralph Riccardi and his company, RMR Asset Management, to trade securities.

Riccardi gave Appellants his capital to trade via a prime brokerage arrangement. A prime brokerage provides a centralized way for clearing trades and settling funds across multiple accounts held with many executing brokers who process buy and sell orders of securities. *See Prime Broker Committee Request, SEC No-Action Letter*, 1994 WL 808441, at *1–2 (Jan. 25, 1994). Put differently, Riccardi provided the necessary capital to trade, and Appellants each opened many accounts with executing brokers to gain access to many different municipal bond offerings. These accounts were in Appellants' own names but were linked to Riccardi's prime brokerage account because the trading names were registered to RMR. When Appellants bought and sold securities in their individual accounts, the transaction was reported to the prime brokerage's clearing agent. RMR would then affirm the trade, and the funds would settle.

Each trader orally agreed with Riccardi to split a percentage of the profits and losses resulting from

[1] To avoid confusion, we will use their first names to identify them in this opinion.

their trades.[2] But this arrangement went one way only: Riccardi did not share profits and losses from his own trades with Appellants. None of the traders was paid a salary.

Riccardi and Appellants were so-called "bond flippers." They would purchase new-issue municipal bonds and immediately resell those bonds on the secondary market at a profit. Generally, Riccardi would try to buy the allotment himself so that he would not have to share any trade profits with Appellants. But if demand for the bond was greater than what Riccardi was allowed to buy through his own accounts, he would ask that Jocelyn—and sometimes Sean or Gounaud—seek an allotment through their own accounts. This is why Riccardi allowed Appellants to trade with his capital: more traders meant more accounts, which in turn meant that RMR could "[i]ncrease the amount of bonds that we could get on any given issue."

While associated with Riccardi and RMR, Appellants executed thousands of transactions. According to Riccardi's prime brokerage trade blotter, Sean executed 10,179 trades, including 399 involving new-issue municipal bonds; Jocelyn made 6,407 trades, including 2,410 involving new-issue municipal bonds; and Gounaud conducted 2,250 trades, including 360 involving new-issue municipal bonds. And on at least 21 occasions, Jocelyn Murphy provided underwriters with false zip codes within the

[2] Typically, Appellants received between 50% and 60% of profits (or losses) but received 33% when another RMR-affiliated trader was involved in the transaction.

issuer's jurisdiction, despite residing elsewhere, to obtain the highest priority during the retail order period.

c. The SEC files an enforcement action against Appellants.

In August 2018, the SEC sued RMR, Riccardi, the Murphys, Gounaud, and nine other traders. Though bond flipping is not itself illegal, the SEC alleged that Riccardi, through RMR, ran a "long-running fraudulent scheme" to circumvent municipal bond order priority by "operating as unregistered brokers" to appear as retail investors and fill orders on behalf of institutional customers in exchange for a "pre-arranged commission, usually one dollar per bond."

The SEC alleged that Appellants violated § 15(a) of the Securities Exchange Act of 1934, which prohibits any "broker" from "effect[ing] any transactions in ... any security ... unless such broker ... is registered." 15 U.S.C. § 78o(a)(1). Section 15(a)'s broker registration requirement "serves as the 'keystone of the entire system of broker-dealer regulation' " because a registered broker must "abide by numerous regulations designed to protect prospective purchasers of securities." *Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994) (quoting *Frank W. Leonesio*, Exchange Act Release No. 23,524, 36 SEC Docket 457, 464 (Aug. 11, 1986)). The SEC argued that Appellants violated § 15(a) by "plac[ing] orders for and purchas[ing] new issue bonds from underwriters at Riccardi's direction and under his supervision," using Riccardi's capital, without "register[ing] with the Commission as a broker-dealer or associated person of a registered broker-dealer."

The SEC separately alleged that Jocelyn Murphy violated § 10(b) of the Exchange Act and Rule 10b-5. Section 10(b) prohibits the use "in connection with the purchase or sale" of a security of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe ...." 15 U.S.C. § 78j(b). The SEC promulgated Rule 10b-5, which makes it unlawful "[t]o make any untrue statement of a material fact" in connection with a securities transaction. 17 C.F.R. § 240.10b-5(b). The SEC contended that Jocelyn violated § 10(b) and Rule 10b-5 by providing fraudulent zip codes in connection with the purchase and sale of municipal bonds.

d. The district court grants summary judgment for the SEC, finding that Appellants violated § 15(a) and § 10(b).

All RMR trader-defendants besides the Murphys and Gounaud settled with the SEC. The SEC then moved for summary judgment on liability against Appellants, which the district court granted.

The district court held that Appellants, based on the totality of circumstances, were "brokers" under § 15(a) of the Exchange Act and thus violated the law by failing to register as brokers. The district court relied on the so-called *Hansen* factors, which examine whether the defendant

> (1) is an employee of the issuer of the security; (2) received transaction-based income such as commissions rather than a salary; (3) sells or sold securities from other issuers; (4) was involved in negotiations between issuers and investors; (5) advertised for clients; (6)

> gave advice or made valuations regarding the investment; (7) was an active finder of investors; and (8) regularly participates in securities transactions.

SEC v. Feng, 935 F.3d 721, 732 (9th Cir. 2019) (alteration in original) (citation omitted) (applying *SEC v. Hansen*, No. 83 Civ. 3692, 1984 WL 2413 at *–——, 1984 U.S. Dist. LEXIS 17835, at *25 (S.D.N.Y. Apr. 6, 1984)).

First, the court noted that Appellants "engaged in regularity of participation in securities transactions" for Riccardi. Each Appellant linked his or her executing broker accounts with Riccardi's prime brokerage account and used his capital to purchase securities. While the Appellants technically controlled their accounts, there were "several exhibits that contain emails establishing that Riccardi and RMR directed [Appellants] to purchase securities."

Second, Appellants "received transaction-based compensation for their trading activities." Though Appellants shared profits *and losses* with Riccardi and received no compensation if the trade was unprofitable, the district court was not persuaded that "this form of compensation is different."

The district court then held that Jocelyn Murphy violated § 10(b) and Rule 10b-5 by providing fraudulent zip codes when buying new-issue municipal bonds. Jocelyn "admitted that without providing these false zip codes, she would not have ... received the highest priority," and the SEC "provided unrebutted expert testimony that local zip codes are important to issuers of new municipal bonds." Jocelyn also acted with the requisite scienter—knowledge—because she knew (1) "that she did not reside in these zip codes," and (2) that "failing to provide a zip code from these jurisdictions would not place her in the highest priority period."

e. The district court imposes substantial civil penalties against all Appellants and injunctive relief against the Murphys.

The SEC requested civil monetary penalties and injunctive relief against Appellants. For each "violation" of the Exchange Act, a penalty may be imposed up to the greater of either (1) a fixed statutory amount, or (2) the gross pecuniary gain to the defendant. *See* 15 U.S.C. § 78u(d)(3)(B)(ii). District courts may also impose injunctions against any person who "is engaged or is about to engage in acts or practices" that violate the Exchange Act. *See* 15 U.S.C. § 78u(d)(1).

The SEC requested fixed Tier 1 civil penalties for each month that Sean Murphy (65 months) and Richard Gounaud (46 months) traded securities as unregistered brokers, for total requested penalties of $523,863 and $385,641, respectively. For Jocelyn Murphy, the SEC requested fixed Tier 2 civil penalties for her 21 § 10(b) violations—each instance in which Jocelyn provided fraudulent zip codes—for a total penalty of $1,761,920. The SEC did not request additional penalties for Jocelyn's § 15(a) violations.

The SEC also requested that (1) each Appellant be specifically enjoined for ten years "from opening or maintaining any brokerage account without providing the brokerage firm a copy of the Complaint and Final Judgment in this case," (2) each Appellant be permanently enjoined against "future violations of Section 15(a)," and (3) Jocelyn individually be enjoined against "further violations of ... Section 10(b) and Rule 10b-5."

The district court then addressed the nature of each Appellant's conduct to determine the proper penalties, applying the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). Under *Murphy*, "a court must assess the totality of the circumstances surrounding the defendant and his violations," considering factors such as (1) the degree of scienter, (2) the isolated or recurrent nature of the infraction, (3) the defendant's recognition of the wrongful nature of his conduct, (4) the likelihood, because of the defendant's occupation, that future violations might occur, and (5) the sincerity of his assurances against future violations. 626 F.2d at 655.

i. Sean Murphy

The district court applied "a modest twenty percent reduction" to the SEC's requested civil penalty leading to a total penalty of $414,090.40 against Sean Murphy. The district court also granted the requested injunctive relief but reduced the duration of the specific injunction from ten to five years given the substantial civil penalties imposed.

ii. Richard Gounaud

Gounaud's conduct under the *Murphy* framework was identical to Sean Murphy's, except that Gounaud presented a lower risk of future securities violations because he no longer trades securities. The district court likewise applied a twenty percent reduction, resulting in a civil penalty of $308,512.80. But the district court declined to impose any injunctions because Gounaud "is approaching 70 years old" and "has no intention of trading securities in the future."

iii. Jocelyn Murphy

The district court imposed the full requested civil penalty—$1,761,920—against Jocelyn Murphy. The district court also granted the requested injunctions, but as with Sean, exercised its discretion to reduce the duration of the specific injunction from ten to five years considering the significant civil penalties imposed. Most of the *Murphy* factors favored a full penalty. Jocelyn "knowingly" provided false zip codes—a high degree of scienter. Her violations were recurrent. And her admission of wrongdoing was less than convincing. And Jocelyn equivocated "regarding her future in the securities business," and her husband still trades securities, signaling to the court that Jocelyn "may renew her professional trading and that future violations might occur."

Appellants then appealed the district court's liability and remedies orders.

STANDARD OF REVIEW

We review a district court's grant of summary judgment on § 15(a) and § 10(b) liability de novo, *see Feng*, 935 F.3d at 728, and the district court's remedies decision for an abuse of discretion. *See Murphy*, 626 F.2d at 657. But we evaluate legal issues, such as whether a remedy violates a statute or the Constitution, de novo. *See United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004) (reviewing de novo whether civil penalty violates the Eighth Amendment); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1030, 1047–48 (9th Cir. 2013) (reviewing de novo whether permanent injunction violates Federal Rule of Civil Procedure 65(d)'s "specificity" requirement).

DISCUSSION

I. We affirm the district court's summary judgment for SEC on Exchange Act § 15(a) and § 10(b) liability.

a. Appellants violated § 15(a) by acting as unregistered "brokers."

Section 15(a) of the Exchange Act bars any "broker" from trading securities without registering with the SEC. 15 U.S.C. § 78o(a)(1). The Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The SEC has not issued regulations further clarifying this definition. But in evaluating whether someone is a "broker," the SEC and courts (including the district court here) have generally employed a "totality-of-the-circumstances approach," relying on the non-exclusive *Hansen* factors. *See, e.g.*, *Feng*, 935 F.3d at 731–32. An SEC official has noted that this approach is "fairly fact intensive" and creates a "broad" test for broker-dealer registration. *See* David W. Blass, *A Few Observations in the Private Fund Space*, U.S. Securities and Exchange Commission (Apr. 5, 2013), https://www.sec.gov/news/speech/2013-spch040513dwghtm#P42_12529.

We find it more straightforward to begin our analysis with the statutory text rather than the

Hansen factors. Those factors are simply a judicial effort to provide meaning to the statutory text, and they are more directly applicable in cases involving more traditional brokerage arrangements, where the broker is not bearing any risk of loss. *See, e.g.*, *Feng*, 935 F.3d at 732 (receiving an upfront fee and commission for completing transaction). Indeed, we have made clear that the *Hansen* factors are "non-exclusive." *Feng*, 935 F.3d at 732 (quoting *SEC v. Collyard*, 861 F.3d 760, 766 (8th Cir. 2017)). And the text of the Exchange Act itself provides considerable guidance on its own. *See Feng*, 935 F.3d at 731–33 (conducting, but not requiring, analysis under the *Hansen* factors); *see also Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute.").

Under the statute, a "broker" is anyone who trades securities "for the account of others." 15 U.S.C. § 78c(a)(4)(A). Appellants, however, contend that they did not trade "for the account of others" because they (1) shared profits *and losses* with Riccardi on each trade, (2) had complete discretion over which trades to make, and (3) traded in "partnership" with Riccardi and so were "principals," not "agents." We reject these arguments.

First, Appellants made trades for "the account of [Riccardi]" because they put Riccardi's capital at risk on every trade they made. *Id.* If the trade was unprofitable, Riccardi would bear a portion of the loss. When someone acts "on one's own account," he or she acts "at one's own risk." *Account*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/account. Conversely, if someone acts "on the account of *others*," another person assumes the risk for the actions. So when Appellants traded securities and shared a portion of the profits and losses with Riccardi, they traded for his account because another person—Riccardi—bore some risk of a loss.

We find support for this interpretation of "account" in an analogous provision of the Exchange Act—§ 11(a). Section 11(a) prohibits a stock exchange floor broker from making transactions on the exchange "for its own account." 15 U.S.C. § 78k(a)(1). The Third Circuit agreed with the SEC that a floor broker trades for his/her own account when he/she "shares in the economic risks of trades," or, in other words, has a "compensation arrangement that results in [the broker] sharing in the trading performance." *See Levine v. SEC*, 407 F.3d 178, 183–84 (3d Cir. 2005); *accord In re New York Stock Exchange*, Exchange Act Release No. 41574. 70 SEC Docket No. 106 (June 29, 1999). Section 11(a) and § 15(a) are both part of the Exchange Act, so we presume "account" as used in both provisions has the same meaning. *SeeUnited States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021). And because Riccardi "share[d] in the economic risk[s] of [Appellants'] trades," Appellants traded for his account.

Of course, Appellants also bore a portion of the risk on each trade. So they also made trades for their own accounts, so to speak. But there is no requirement in § 15(a) that a "broker" must trade *exclusively* for the account of others. Though it is atypical for brokers to assume a portion of the trading risk, this does not remove Appellants' conduct from the ambit of § 15(a). Because Appellants made trades for the account of one other person besides themselves—here, Riccardi—they fall within the statutory definition of "broker" under § 15(a).[3]

Second, Appellants traded "for" Riccardi because they acted as his "agents." An "agent" is "one who is authorized to act *for* ... another." *Agent*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/agent (emphasis added); *see also United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) ("An agent is one who '[a]cts on the principal's behalf and subject to the principal's control.' " (quoting Restatement (Third) of Agency § 1.01)). And brokers are typically equated with agents. *See Sec. Indus. Ass'n v. Bd. of Governors of Fed. Rsrv. Sys.*, 468 U.S. 207, 218 (1984) ("[A] broker executes orders for the purchase or sale of securities solely as agent.").

Riccardi authorized Appellants to trade securities on his behalf and with his capital, subject only to volume limits. The record brims with examples of Riccardi directing Appellants to buy certain bonds and Appellants complying. In short, considerable evidence shows that Appellants acted on Riccardi's behalf and subject to his control. *Bonds*, 608 F.3d at 506.

[3] The Murphys argue that § 15(a) requires a broker to transact for at least two other persons because the statute uses the plural "others." But under the Dictionary Act, "words importing the plural include the singular" unless context suggests otherwise. 1 U.S.C. § 1. There is no evidence that Congress intended to exclude the singular "other" from § 15(a)'s use of "others."

To be sure, Appellants and Riccardi testified that Appellants had complete discretion to trade as they pleased and were "never obligated to buy" the bonds requested by Riccardi. But Appellants have provided no evidence that they ever declined to purchase a bond requested by Riccardi, which belies their claim of complete discretion. Although Appellants made some trades independent of Riccardi, this does not negate that when Riccardi directed Appellants to place a trade, they complied.

Still, Appellants argue that they were not Riccardi's "agents," but were his "partners." And because they were partners, Appellants say they acted as principals instead of agents when they bought securities. Even if a partnership existed, that would not alter our conclusion that Appellants acted as agents. In a partnership, "[e]ach partner is an agent of the partnership for the purpose of its business." Cal. Corp. Code § 16301(1); *see also Karrick v. Hannaman*, 168 U.S. 328, 334 (1897) (A partnership "is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner."). And "[a] partnership is an entity distinct from its partners." Cal. Corp. Code § 16201. Assuming a partnership existed, Appellants traded securities as agents of the partnership—an entity distinct from Appellants—and thus traded "for the account of [the partnership]." *See* 15 U.S.C. § 78c(a)(4)(A).

In any event, Appellants have not proved that a partnership in fact existed. They claim that a partnership is presumed because they shared profits and losses with Riccardi. *See* Cal. Corp. Code § 16202(c)(3)(B). But Appellants neglect an important qualification: profit sharing creates a partnership presumption *unless* "profits were received ... [in] payment for services as an *independent contractor*." *Id.* (emphasis added). When the Murphys were first deposed by the SEC in 2016, they testified that they were "independent contracto[rs]" for RMR. (Jocelyn: "I'm an independent contractor ... [f]or RMR Group."); (Sean states three times: "I'm an independent contractor for RMR."). And in Gounaud's response to an SEC questionnaire, he claimed to be self-employed and "associated with Ralph Riccardi," but did not claim to be in a partnership.

Despite these prior statements under oath, all three Appellants changed tune at their 2019 depositions and testified that they were partners with Riccardi. But a "party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of the facts." *Block v. City of Los Angeles*, 253 F.3d 410, 419 n.2 (9th Cir. 2001). Moreover, Riccardi at his 2019 deposition maintained that he "never perceived [Appellants] as anything other than independent contractors." And Appellants have offered no objective evidence, such as a written partnership agreement or Schedule K-1 reporting partnership income, to prove the existence of a partnership.[4] Thus, the district court correctly

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[4] Gounaud says the district court erred by focusing on the lack of a Schedule K-1 because partnerships are eligible to elect out of Subchapter K-1 in their first year of existence. If they make such an election, then each partner reports his or her share of partnership income on their individual tax returns. *See* 26 C.F.R. § 1.761-2(b)(2)(ii). But there is no evidence that the partnership elected out of Subchapter K.

held that the defendants provided no evidence that a partnership existed "other than self-serving declarations."

In sum, we hold that when someone places another's capital at risk by trading securities as his or her agent, he or she is trading securities "for the account of others," and is a "broker" subject to § 15(a)'s registration requirements.[5] 15 U.S.C. § 78c(a)(4)(A). Because Appellants bought municipal bonds at Riccardi's direction, with Riccardi's capital, and shared a portion of the trading risk with Riccardi, they traded for Riccardi's account as brokers. The defendants violated § 15(a) by failing to register with the SEC. We thus affirm the district court's summary judgment order finding Appellants liable under § 15(a).[6]

[5] The Murphys argue that the "rule of lenity" should be applied to their conduct. But even assuming it applies with equal force in a civil case such as this, the rule of lenity applies only if the statute contains "grievous ambiguity" after using all traditional tools of statutory interpretation. *See Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016). For the reasons explained, § 15(a) is not ambiguous.

[6] Gounaud separately argues that § 15(a) is unconstitutionally vague because neither the statute nor any SEC regulation or guidance provided fair notice that his trading arrangement with Riccardi required him to register as a broker. This argument is foreclosed by our recent decision in *Feng* where we rejected a vagueness challenge to § 15(a) because the statute was "enacted 80 years ago, and it has been applied countless times by the courts," which provides guidance to regulated parties. *Feng*, 935 F.3d at 734 n.8. Though we are unaware of any case that has applied § 15(a) to directly analogous conduct, Gounaud's conduct falls within the text of the statute. If

* * * * *

Though our holding does not rely on the *Hansen* factors, we note that several factors support our decision. First, Appellants were compensated from trading profits, so they received transaction-based compensation. *See Persons Deemed Not To Be Brokers*, Exchange Act Release No. 22172, 33 SEC Docket 652 (June 27, 1985) (transaction-based compensation is a key indicator of broker activity). Transaction-based compensation can encourage "high pressure sales tactics" by the broker that conflicts with the interests of his or her client. *Id.* at *4. Although the risk of abusive sales tactics is somewhat diminished here because Appellants had skin in the game, Riccardi still bore risk himself. One SEC official has explained that the SEC takes a broad view of transaction-based compensation: "compensation that depends on the *outcome* or size of the securities transaction" suggests broker status. Blass, *A Few Observations in the Private Fund Space* (emphasis added). In sum, even though Appellants shared risk,

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Gounaud had concerns about the legality of his business arrangement, he could have requested clarification from the SEC in the form of a "No-Action Letter." SEC, *Division of Trading and Markets No-Action, Exemptive, and Interpretive Letters*, (Apr. 13, 2022), https://www.sec.gov/divisions/marketreg/mr-noaction.shtml; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (When a regulated party may "clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process," the law is subject to a "less strict vagueness test.").

their compensation structure suggests broker activity.

Second, Appellants regularly participated "in securities transactions at key points in the chain of distribution." *SEC v. Holcom*, No. 12-cv-1623-H (JMA), 2015 WL 11233426 at *4, 2015 U.S. Dist. LEXIS 189380, at *4 (S.D. Cal. Jan. 8, 2015) (citation omitted). As "flippers," they were often conduits between the primary and secondary bond markets. As the SEC's expert explained, the supply of municipal bonds available on the secondary market is limited because retail investors are given priority and such investors generally hold the bonds until maturity.

Lastly, Jocelyn actively solicited investors. *See Hansen*, 1984 WL 2413, at *11, 1984 U.S. Dist. LEXIS 17835, at *10 ("Hansen was an active and aggressive finder of investors."). Jocelyn e-mailed institutional investors to solicit interest in municipal bond offerings to determine whether certain bonds were likely to trade higher on the secondary market. This further supports that Jocelyn acted as a broker.

b. By providing false zip codes, Jocelyn made "material misrepresentations" in violation of § 10(b) and Rule 10b-5.

Section 10(b) and Rule 10b-5 prohibit making a "material" misrepresentation in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5(b); *see also* 15 U.S.C. § 78j(b). Jocelyn admits that she knowingly provided false zip codes to underwriters to obtain the highest retail priority, but she still claims that such misrepresentations were not material.[7]

A misrepresentation is "material" if there is a "substantial likelihood" that a "reasonable investor" would view it "as having significantly altered the 'total mix' of information." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). In other words, a misrepresentation is material if "under all the circumstances, the [misrepresented] fact would have assumed actual significance in the deliberations" of a reasonable investor. *TSC Indus.*, 426 U.S. at 449. But the misrepresented fact need not change the investor's plan. *Id.*

The SEC's expert explained, and Jocelyn agrees, that municipal bond issuers mainly rely on zip codes to determine retail order priority. Jocelyn's misrepresented zip codes were thus "actual[ly] significa[nt] in the deliberations" of reasonable investors—here, the municipal bond issuers—when allocating retail order priority. *Id.* at 449. Still, Jocelyn maintains that the misrepresentations were not material because (1) the bond underwriters had actual knowledge of her real zip code, as she provided her real zip code on her account registration forms,

[7] A Rule 10b-5 violation has four elements: (1) a material misrepresentation or omission (2) in connection with the purchase or sale of a security (3) with scienter (4) in interstate commerce. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010). Jocelyn only disputes the "materiality" element.

and (2) there is no evidence that the underwriters submitted the false zip codes to the issuers.

Jocelyn presents no evidence that the underwriters examined her account registration forms to cross-check the false zip codes she submitted. But even if we assume they had examined Jocelyn's forms, her argument fares no better. The underwriters would then be left with two zip codes—one real, and one fraudulent—with no apparent basis to discern truth from fraud. Jocelyn's misrepresentation would not "lose its deceptive edge simply by joinder with [a zip code] that [is] true." *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

Additionally, Jocelyn's misrepresentations were material even if they were not communicated to the issuers. Essentially, Jocelyn argues that the SEC has failed to prove that the issuers relied on her misrepresentations. But the SEC, unlike private parties, need not prove reliance when bringing a § 10(b) enforcement action. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993) ("[R]eliance is not an element of a Rule 10b-5 violation by misrepresentation; rather, it is an element of a private cause of action for damages."); *see also Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019) (The SEC may "bring suit against certain securities defendants based on undisclosed deceptions."). It is enough that Jocelyn's misrepresentations *would be* significant if communicated to issuers and the misrepresentations were made in connection with the purchase of securities. We affirm the district court's order finding Jocelyn liable under § 10(b) and Rule 10b-5.

II. We affirm the civil penalties against Appellants.

A district court has discretion to impose civil penalties so long as the amount is within the statutory maximum. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975); *SEC v. Loomis*, 17 F. Supp. 3d 1026, 1032 (E.D. Cal. 2014). "[C]ivil penalties are designed to deter the wrongdoer from similar violations in the future," and courts "apply the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980)" to determine the proper penalty. *SEC v. mUrgent Corp.*, SACV 11-0626 DOC (SSx), 2012 WL 630219 at *2, 2012 U.S. Dist. LEXIS 25626, at *6–7 (C.D. Cal. Feb. 28, 2012).

Appellants do not quarrel with the district court's analysis of any *Murphy* factors specifically. But they still insist that the district court abused its discretion and argue that their civil penalties are grossly excessive such that they violate the Eighth Amendment's Excessive Fines Clause. We disagree.

a. The district court did not abuse its discretion in determining Appellants' civil penalties.

i. The record supports the district court's finding that Jocelyn committed 21 § 10(b) violations.

The district court found that Jocelyn committed 21 § 10(b) violations, equivalent to the number of times she provided false zip codes. Jocelyn argues that the record does not support the finding that she committed 21 violations because her § 10(b) liability turned on only three fraudulent transactions.

But at the remedies stage, the district court was not limited to the evidence considered in its liability order. Rather, the district court could consider more evidence to assess the full extent of Jocelyn's misconduct so long as the new evidence did not conflict with its liability findings. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781–82 (5th Cir. 2017) ("At the remedies stage, trial judges may make factual findings ... in assessing the amount of civil penalties so long as the court's findings do not conflict with the jury's findings as to liability.").

To support its remedies motion, the SEC submitted evidence of 21 conversations in which Jocelyn provided underwriters with false zip codes. In her response to the SEC's motion, she even admits to communicating 21 false zip codes. The district court properly considered this other evidence at the remedies stage to gauge the full magnitude of Jocelyn's offense.

ii. The district court permissibly used the number of months Gounaud traded as an unregistered broker to calculate his total § 15(a) violations.

Gounaud committed 46 § 15(a) violations, according to the district court, because he traded as an unregistered broker for forty-six months. Gounaud claims that it was an abuse of discretion to define "each violation" as "each month" he traded as an unregistered broker because "[e]lapsed time is not a violation." Alternatively, Gounaud argues that the record does not support the district court's conclusion that he traded as an unregistered broker for 46 months.

The civil-penalty provision of the Exchange Act sets maximum penalties "for each violation," but does not define "violation." *See* 15 U.S.C. § 78u(d)(3)(B); *Life Partners*, 854 F.3d at 783. District courts have discretion to determine what constitutes a "violation" and have relied on various proxies. *See, e.g.*, *SEC v. StratoComm Corp.*, 89 F. Supp. 3d 357, 372 (N.D.N.Y. 2015) (Some courts "look to the number of investors defrauded or the number of fraudulent transactions," while others "consider the number of statutes ... violated." (citations omitted)); *SEC v. Murray*, No. 12-cv-01288-EMC, 2016 WL 6893880 at *9, 2016 U.S. Dist. LEXIS 162799, at *25 (N.D. Cal. Nov. 23, 2016) (Courts have looked to "the number of schemes in which the defendant was involved" or "the number of victims.").

The district court properly exercised its discretion in determining Gounaud's violations based on the number of months he engaged in unregistered broker activity. This decision was especially reasonable—and favorable to Gounaud—because the district court could have found thousands of violations if it had relied on the number of transactions Gounaud made as an unregistered broker. *See SEC v. Pentagon Cap. Mgmt. PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) (finding "no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation").

The record also supports the district court's finding that Gounaud traded as an unregistered broker for 46 months. Gounaud says that the record contains just 12 months of trading data, so no evidence supports the district court's finding. But

Gounaud's trading logs, which were submitted to the district court, confirm 46 months of trading activity.

iii. The district court did not abuse its discretion by declining to consider the Murphys' gross pecuniary gain or penalties imposed on other defendants.

The Murphys argue that the district abused its discretion by refusing to compare the size of their penalties to (1) the gross pecuniary gain from their violations, and (2) the penalties imposed on the other RMR defendants and defendants in separate enforcement actions accused of similar violations. The district court did not have to conduct either comparison.

The civil penalty provision of the Exchange Act authorizes per violation penalties based on *either* a fixed statutory amount *or* gross pecuniary gain. 15 U.S.C. § 78u(d)(3)(B)(i), (ii). Because the penalty provision is disjunctive, the district court permissibly calculated the penalty based solely on the fixed statutory value without reference to gross pecuniary gain.

The district court also did not have to compare the Murphys' penalties to those imposed against other defendants. A comparison to penalties imposed on other RMR defendants would be apples to oranges—these defendants all entered consent decrees with the SEC, so their penalties resulted from bargained-for exchange. *See Vernazza v. SEC*, 327 F.3d 851, 862 (9th Cir. 2003) (comparison between defendants that litigated liability and defendants that settled is inapt). And these defendants admitted wrongdoing while the Murphys continue to dispute the wrongfulness of their conduct and have provided less-than-convincing assurances against future violations. *See id.* at 863 (noting that the defendants' "failure to grasp" the wrongful nature of their conduct and "occupations [that] present opportunities for similar future violations" distinguished them from settling defendants).

In any event, a comparison to defendants in separate actions would be inappropriate because "the circumstances vary so widely." *See Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001). The district court needed to "assess the totality of the circumstances" surrounding the Murphys' violations, *see Murphy*, 626 F.2d at 655, which requires an individualized inquiry. The district court did just that.

b. Appellants' civil penalties do not violate the Eighth Amendment's Excessive Fines Clause

We "review the district court's determination of excessiveness de novo." *United States Currency*, 354 F.3d at 1121. A civil penalty violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The Supreme Court has emphasized that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336. 2028. In other words, we should "grant substantial deference" to the trial court in fashioning a penalty if it is within the bounds set by the penalty statute. *Id.*

We generally consider these four factors to determine whether a penalty is grossly disproportional: "(1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020). We hold that the civil penalties are not excessive.

First, the penalties are well within the statutory maximum under the Exchange Act. Congress authorized the district court to impose a fixed penalty "[f]or each violation." 15 U.S.C. § 78u(d)(3)(B)(i). As explained, "violation" is undefined, so the district court could have imposed a fixed § 15(a) penalty for each transaction that Appellants made as unregistered brokers. *See, e.g.*, *Pentagon Cap.*, 725 F.3d at 288 n.7. Appellants each made thousands of trades while associated with RMR, which would have led to multimillion-dollar penalties. *See Pimentel*, 974 F.3d at 923 (holding that court can consider "whether other penalties may be imposed for the offense" to determine excessiveness). But the district court declined to impose § 15(a) penalties against Jocelyn altogether, and calculated Sean and Gounaud's penalties based on the number of months they traded as unregistered brokers, leading to substantially lower penalties.

Second, contrary to Appellants' assertions, the violations were serious enough to warrant the penalties imposed. *Id.* at 922–23 (assessing "the nature and extent of the underlying offense" and "the extent of the harm caused by the violation"). According to Appellants, their violations did not harm any investors, and Riccardi was not harmed because he consented to the arrangement.

True, the § 15(a) violations may not have caused direct financial harm to any individuals. But § 15(a)'s registration requirement is "the keystone of the entire system of broker-dealer regulation." *Roth*, 22 F.3d at 1109. Registered brokers must abide by many regulations that ensure "requisite professional training," fair treatment of investors, and "adequate disclosure." *See Persons Deemed Not To Be Brokers*, 33 SEC Docket 652. By failing to register, Appellants undermined this important system of government oversight in the securities industry, as they embarked undetected in their bond-flipping scheme. *See Vasudeva v. United States*, 214 F.3d 1155, 1161 (9th Cir. 2000) (Violations are serious if they "undermine[ ] the viability of an important government program."). If every broker were to do as Appellants did, the oversight system would become unstable.

Likewise, Jocelyn's § 10(b) violations caused systemic harm. As the SEC's expert explained, circumventing retail priority and flipping bonds on the secondary market decreases issuers' initial pricing leverage and raises the cost of capital. Though the municipal bond issuers received their asking price on Jocelyn's 21 fraudulent transactions, her actions in the aggregate undermined the retail bond market, which relies on retail priority. *See id.* And Jocelyn's fraud, committed with a "knowing" degree of scienter, further shows that the nature and extent of her violations matches her penalty. *See Pimentel*, 974

F.3d at 922 ("Courts typically look to the violator's culpability" in determining excessiveness.).[8]

III. We affirm the injunctions.

District courts may impose injunctions against any person that "is engaged or is about to engage in any acts" that violate the Exchange Act. 15 U.S.C. § 78u(d)(1). The SEC "had the burden of showing there was a reasonable likelihood of future violations of the securities laws." *SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) (quoting *Murphy*, 626 F.2d at 655). Like with civil penalties, the district court must "assess the totality of circumstances surrounding the defendant and his violations" using the same *Murphy* factors. *Id.* (quoting *Murphy*, 626 F.2d at 655). "The existence of past violations may give rise to an inference that there will be future violations." *Murphy*, 626 F.2d at 655.

In fashioning injunctive relief, the district court incorporated the *Murphy* factor analysis it used to determine the Murphys' civil penalties, "afford[ing] special consideration and weight to the likelihood of future violations factor." Sean "is a sophisticated investor and securities trader, who continues to operate a securities trading business." And Jocelyn's "equivocation regarding whether she will return to the securities business coupled with her family's

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[8] The Murphys also argue that their penalties are grossly disproportional when compared to their actual pecuniary gain. The parties dispute the Murphys' pecuniary gain, but the Murphys' violations—which caused systemic harm to securities markets—are serious enough to justify the penalties even if their pecuniary gain were minimal. *Id.*

continued involvement in it" suggested "that she may renew her professional trading and that future violations might occur." The district court thus required the Murphys to furnish for five years "a Copy of the Complaint and Final Judgment in this case" to any brokerage firm that they open or maintain an account with. Sean was also permanently enjoined "from future violations of Section 15(a)," and Jocelyn "from further violations of Section 15(a), Section 10(b), and Rule 10b-5."

The Murphys offer two arguments for vacating the injunctions in their entirety. First, they claim that the SEC failed to prove that the Murphys are "engaged or about to engage" in conduct that violates federal securities laws because they terminated their business relationship with Riccardi and are complying with securities laws. *See* 15 U.S.C. § 78u(d)(1). Second, they say the district court impermissibly weighed credibility at the summary judgment stage by discounting their assurances against future violations. We reject both arguments.

The Murphys' current compliance with the law does not render injunctive relief unavailable. *See Murphy*, 626 F.2d at 655 ("[T]he fact that the defendant is currently complying with the securities laws does not preclude an injunction."). The reason is obvious: violators generally stop their illegal activities when under judicial scrutiny. But just because defendants may refrain from illegal activity during litigation does not mean they are unlikely to violate the securities laws again. Though the Murphys have ended their relationship with Riccardi, they remain engaged in the securities industry and the district court found that they have failed to fully appreciate the wrongfulness of their conduct. The district court thus reasonably determined that the Murphys were likely to commit future violations.

Nor did the district court make an impermissible credibility determination when it discredited the Murphys' assurances against future violations because of their "failure to completely recognize the wrongfulness of their past conduct." In *Murphy*, we rejected a similar argument. There, the defendant "violated the [registration] requirements ... when he did not intend to do so." *Murphy*, 626 F.2d at 656. And throughout litigation, he continued to insist that he had done nothing wrong. *Id.* We held the district court was within its discretion to impose injunctive relief despite the defendant's assurances against future wrongdoing. *Id.*

The Murphys rely on *SEC v. Koracorp Industries, Inc.*, 575 F.2d 692 (9th Cir. 1978), where we reversed summary judgment on injunctive relief because the "nature and extent of the culpability of the several defendants" was "hotly disputed." *Id.* at 697. In *Koracorp*, multiple defendants were implicated in a fraudulent scheme, and there was a dispute over the "allocation of responsibility" between the defendants that depended "heavily upon the credibility" of their testimony. *Id.* at 699. We thus held that the district court could resolve these credibility issues only after an evidentiary hearing or trial. *Id.*

But unlike *Koracorp*, there is no dispute here over the Murphys' role in the RMR scheme, and their culpability is not at issue. *See Murphy*, 626 F.2d at 657 (distinguishing *Koracorp* "because there was tremendous dispute about the culpability of each of the defendants, in addition to the question of the bona fides of their statements of intent to comply"). Instead, the Murphys try to thwart injunctive relief by submitting declarations assuring the court against future violations. But "statements of reformation [are] [in]sufficient to preclude summary judgment." *Id.* at 656. Because the Murphys' assurances are contradicted by their current involvement in the securities industry and apparent failure to appreciate the wrongfulness of their past conduct, the district court acted within its discretion by imposing injunctive relief.[9]

[9] Sean Murphy (though not Jocelyn Murphy) also challenges his injunction on the ground that by ordering him to comply with Section 15(a), the injunction is insufficiently specific and merely directs him to comply with the law. We reject this argument on the facts presented. We have "not adopted a rule against 'obey the law' injunctions per se." *F.T.C. v. EDebitPay, LLC*, 695 F.3d 938, 944 (9th Cir. 2012). Rather, we have recognized that "the mere fact that the injunction is framed in language almost identical to the statutory mandate does not make the language vague" so long as "the statutory terms adequately describe the impermissible conduct." *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978). In this case, the statutory terms are not impermissibly vague, and the injunction also references the district court's summary judgment decision, which provides Sean Murphy, a sophisticated actor, with additional guidance for his future conduct. To the extent Sean complains of a technical violation of Rule 65(d) because the injunction referenced materials outside the four corners of the injunction itself, Sean has not shown that he lacks access to the referenced materials or that any further relief would be warranted. *See Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126 (9th Cir. 2006) ("Ultimately, there are no magic words that automatically run afoul of Rule 65(d), and the inquiry is context specific. The fair notice requirement of Rule 65(d) must be applied in the light of

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

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the circumstances surrounding the order's entry.") (alterations and internal quotation marks omitted).

LEE, Circuit Judge, with whom FITZWATER, District Judge, joins, concurring:

Multifactor tests—such as the *Hansen* factors for determining who may be a "broker"—may appear alluring: It gives judges flexibility to decide cases based on their unique facts. And perhaps it is inevitable to rely on such factors when courts develop the details and contours of common law. Yet we have imposed multifactor tests even when the statutory language provides sufficient guidance (as in our case here): The Securities Exchange Act defines a "broker," but courts have concocted a malleable and mushy multifactor test that provides little predictability and ultimately erodes the rule of law.[1] I thus write separately to highlight the perils of relying on multifactor tests and recommend jettisoning the *Hansen* factors in a future case.

To start, multifactor tests "suppl[y] notoriously little guidance" to regulated parties. *See Wooden v. United States*, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J., concurring). It is often murky which factors are more important or how courts will balance them. Lawyers thus often will say "it depends" or "it depends on which judge we get" when advising their clients on what the law is. But "[r]udimentary justice

[1] *Compare* 15 U.S.C. § 78c(a)(4)(A) (defining "broker" as "any person engaged in the business of effecting transactions in securities for the account of others" *with SEC v. Feng*, 935 F.3d 721, 731–32 (9th Cir. 2019) (applying *SEC v. Hansen*, No. 83 Civ. 3692, 1984 U.S. Dist. LEXIS 17835, at *25 (S.D.N.Y. Apr. 6, 1984) (establishing seven nonexclusive factors to determine who is a "broker")).

requires that those subject to the law must have the means of knowing what it prescribes.... As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean." Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179 (1989). Predictability is particularly paramount when stakes are high as here—millions of dollars in fines and loss of livelihood.

Multifactor tests are even less useful when they involve non-exclusive factors because they cede even more discretion to judges. Under the *Hansen* factors, it is unclear which of the seven factors should be considered or which are more important because different courts have emphasized different factors. *Compare EdgePoint Cap. Holdings, LLC v. Apothecare Pharm., LLC*, 6 F.4th 50, 57 n.5 (1st Cir. 2021) (receipt of "transaction-based compensation" is the "hallmark indication" of broker activity), *with SEC v. Holcom*, No. 12-cv-1623-H (JMA), 2015 WL 11233426 at *4, 2015 U.S. Dist. LEXIS 189380 at *4 (S.D. Cal. Jan. 8 2015) ("The most important factor ... is the regularity of participation in securities transactions."), *and SEC v. M&A West, Inc.*, No. C-01-3376 VRW, 2005 WL 8157319 at *——, 2005 U.S. Dist. LEXIS 22452 at *27 (N.D. Cal. June 20, 2005) (entrustment with investor assets and authorization to transact for others are key factors).

And because the factors are non-exclusive, courts can ignore some factors altogether if they cut against their decisions. It is also uncertain how many factors are enough for someone to be considered a broker under *Hansen*. Are half enough? Or maybe a third? What if the most important factor (assuming there is one) is implicated but the rest of the factors are not? We often struggle to apply such a test consistently in a way that provides meaningful guidance to regulated parties. *See Exacto Spring Corp. v. CIR*, 196 F.3d 833, 835–38 (7th Cir. 1999) (Posner, C.J.) (lodging the same arguments against multifactor tests).

A non-exclusive multifactor test raises the same problem that Justice Scalia famously identified with legislative history: It is the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (Scalia, J., concurring) (crediting Judge Harold Leventhal for the analogy). When a multifactor test allows judges to pick the factors they prefer and discard or ignore the ones they don't, it may seem more like a Fantasy Football draft than the rule of law.

In short, a non-exclusive multifactor test too often allows judges to decide based largely on their gut feelings—it is a fancy and dressed-up version of an "I know it when I see it" test. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). We should avert our gaze from the temptations of a non-exclusive multifactor test when, as here, the statute provides enough guidance.

Appendix D

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

RMR ASSET MANAGEMENT COMPANY, et al.,
Defendants.

Case No.: 18-CV-1895-AJB-LL

ORDER GRANTING IN PART AND DENYING IN PART THE SEC's MOTION FOR REMEDIES

Before the Court is a motion for remedies filed by the Security Exchange Commission ("SEC"). (Doc. No. 138.) In its motion, the SEC requests remedies in the form of civil penalties and an injunction against Sean Murphy ("Mr. Murphy"), Jocelyn Murphy ("Ms. Murphy") (collectively, "the Murphys"), and Richard Gounaud ("Mr. Gounaud") (collectively, "Defendants"). For the reasons set forth, the Court **GRANTS IN PART AND DENIES IN PART** the SEC's motion for remedies.

I. BACKGROUND

The SEC commenced this action, alleging that for several years, Defendants violated Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") by acting as unregistered brokers when they bought and sold securities transactions, including new-issue municipal bonds, on behalf of RMR Asset Management Company ("RMR"). The SEC also alleged that Ms. Murphy violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder when she provided false information regarding her residence, while seeking to purchase new-issue municipal bonds, in order to obtain the highest priority for her orders.

On August 14, 2020, the Court granted the SEC's motion for summary judgment. (Doc. No. 137.) Specifically, the Court held that upon consideration of the relevant factors, Defendants were brokers as defined by Section 3(a)(4)(A) of the Exchange Act, and that there is no dispute that they did not register as brokers as required by Section 15(a) of the same. (*Id.* at 7.) The Court also held that there is no genuine issue of material fact that Ms. Murphy fraudulently obtained new issue bonds in violation of Section 10(b) and Rule 10b-5 by knowingly providing false zip codes to brokers to secure priority in obtaining bonds. (*Id.* at 8–10.) The Court thereafter directed the SEC to file a motion regarding the remedies sought in this matter. The instant motion followed.

II. <u>LEGAL STANDARD</u>

The Exchange Act authorizes the SEC to seek penalties and injunctive relief for violations of the Act. 15 U.S.C. § 78u(d). Civil penalties are "determined by the court in light of the facts and circumstances." *Id.* § 78u(d)(3) (B). The purposes of civil penalties are to punish the violator and deter future violations of the securities laws. *SEC v. Indigenous Global Development Corp.*, 2008 WL 8853722, at *17 (N.D. Cal. June 30, 2008); *SEC v. CMKM Diamonds, Inc.*, 635 F. Supp. 2d 1185, 1192 (D. Nev. 2009). These, in turn, "further the goals of 'encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry.' " *SEC v. Spyglass*

Equity Sys., Inc., 2012 WL 13008422, at *3 (C.D. Cal. Apr. 5, 2012) (quoting *SEC v. Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998)). Injunctions are appropriate where the SEC has shown a "reasonable likelihood of future violations of the securities laws." *SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996). "The granting or denying of injunctive relief rests within the sound discretion of the trial court." *Id.* at 1295.

To determine whether to impose civil penalties or an injunction, courts evaluate the totality of the circumstances surrounding the defendant and his or her violations and consider several factors. *See SEC v. Loomis*, 17 F. Supp. 3d 1026, 1029–30 (E.D. Cal. 2014) (citing *SEC v. Fehn*, 97 F.3d 1276, 1295–96 (9th Cir. 1996) and *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980)). Factors to consider are: "(1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; (5) and the sincerity of his assurances against future violations." *Fehn*, 97 F.3d at 1295–96 (quoting *Murphy*, 626 F.2d at 655).

III. DISCUSSION

In its motion, the SEC requests civil penalties and injunctions against Defendants for their respective violations of the Exchange Act. (Doc. No. 138-1.) The Court discusses the appropriateness of the remedies sought against each defendant in turn.

A. Mr. Gounaud's and Mr. Murphy's Section 15(a) Violations

i. <u>Civil Penalties</u>

The Exchange Act authorizes the Court to impose a monetary penalty against Defendants based upon either (i) specific statutory amounts multiplied by the number of violations committed, or (ii) the gross amount of his or her pecuniary gain. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3). In this case, the SEC seeks Tier 1 penalties against Mr. Gounaud and Mr. Murphy. The statute provides for Tier 1 penalties in an amount that "shall not exceed the greater of" $7,500 per violation (or $9,639 for acts occurring after November 2, 2015) or the gross amount of pecuniary gain to a defendant as a result of the violation. 15 U.S.C. § 78u(d)(3)(b)(i); 17 C.F.R. § 201.1001; 17 C.F.R. § 201.1001, Tbl. I.[1] Of these two statutory alternatives, the SEC requests penalties of $7,500 for each month during which Mr. Gounaud and Mr. Murphy violated Section 15(a).

Because Mr. Gounaud engaged in securities transactions as an unregistered broker from August 14, 2013 to May 4, 2017, a period of forty-six months, the SEC seeks $385,641 in civil penalties against Mr. Gounaud. And because Mr. Murphy engaged in securities transactions as an unregistered broker from November 28, 2011 to March 10, 2017, a period of sixty-five months, the SEC seeks $523,863 against Mr. Murphy. Contesting the appropriateness of the SEC's request, Defendants argue that the penalty amounts are unjust and inequitable when compared

[1] This refers to "Table I to 201.1001—Civil Monetary Penalty Inflation Adjustments for Violations From December 10, 1996, Through November 2, 2015."

to their gross pecuniary gain and the sanctions imposed on other defendants in this action, and violative of the Excessive Fines Clause of the Eight Amendment to the U.S. Constitution. The Court disagrees.

First, there is no requirement that the Court consider the amount of penalties requested against the defendant's gross pecuniary gain. *See SEC v. Brookstreet Sec. Corp.*, 664 F. App'x 654, 656 n.2 (9th Cir. 2016) ("Nothing in the Act requires courts to impose penalties based on a wrongdoer's illicit gain or ability to pay."). The statute itself authorizes the Court to impose *either* a fixed dollar amount for each violation *or* the gross amount pecuniary gain. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3). As the SEC seeks civil penalties based on the fixed statutory amounts, the Court does not find it necessary to have, or consider evidence of, gross pecuniary gain.[2] *See, e.g., SEC v. Wu*, 2017 WL 11518453, at *4 (N.D. Cal. Sept. 20, 2017) ("Because the SEC seeks only the fixed amount in this case, no evidence of [the defendant's] pecuniary gain is required.").

Second, the SEC seeks the same type of sanctions for Mr. Gounaud and Mr. Murphy, similarly situated defendants whom the Court has found to have violated Section 15(a). The Court is not persuaded that Mr. Gounaud's and Mr. Murphy's civil penalties should be measured against those of the other defendants in this action because those defendants entered into a pre-litigation settlement with the SEC,

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[2] In any event, the record does not contain sufficient information to ascertain each defendant's gross pecuniary gain.

and thus, are not comparable to Mr. Gounaud and Mr. Murphy. Here, the requested penalties result from a judgment on the merits of the case. In contrast, the settling defendants consented to a final judgment without any finding of liability, and their penalties resulted from a bargained-for exchange. *See also Brookstreet Sec. Corp.*, 664 Fed. App'x at 656 n.2 ("[W]e eschew evaluating penalties in light of awards against other defendants because doing so inappropriately pushes the decision toward a mathematical bright-line.") (citation omitted). The Court further notes that although Defendants are entitled to litigate their case, they did so by presenting arguments without credible evidentiary support. (*See, e.g.*, Doc. No. 137 at 5 ("Defendants also argue that they were in a "partnership" with Riccardi. [ ] However, Defendants provide no evidence of this other than self-serving declarations.").) As such, the Court does not find that the settling defendants' civil penalty amounts are an appropriate benchmark for ascertaining the penalties appropriate here.

Third, the Court declines to find that the SEC's requested penalties violate the Excessive Fines Clause of the Eight Amendment. Other than conclusory asserting that the requested penalties are grossly disproportional to their violations, Defendants offered no explanation to support their position. (Doc. No. 160 at 24.)[3] As stated in the Court's summary judgment order, Mr. Gounaud and Mr. Murphy engaged in unregistered broker activity for

[3] The pinpoint page citations refer to the ECF-generated page numbers at the top of each filing.

nearly four and six years, respectively. (Doc. No. 137 at 2.) The SEC explains that instead of counting each unlawful transaction that Mr. Gounaud and Mr. Murphy engaged in during those years, it proposes a "per month" calculation. Had the SEC elected a "per violation" calculation, Mr. Gounaud and Mr. Murphy would have been subjected to millions of dollars in penalties as a result of their partaking in thousands of unlawful trades on behalf of RMR. *See, e.g., SEC v. Pattison*, 2011 WL 723600, at *5 (N.D. Cal. Feb. 23, 2011) ("The Court may assess a penalty for each distinct violation[.]"); *SEC v. AmeriFirst Funding, Inc.*, 2008 WL 1959843, at *9 (N.D. Tex. May 5, 2008) ("[T]he court concludes that it should impose a $2,000 penalty for each investment that defendants received, because each such payment constitutes a separate violation of the securities laws."); *SEC v. Coates*, 137 F. Supp. 2d 413, 428-30 (S.D.N.Y. 2001) (assessing a $10,000 penalty for each of four separate, misleading statements to investors.).

Given the number of securities transactions Mr. Gounaud and Mr. Murphy performed as an unregistered broker and the maximum amount of penalties contemplated by statute and case law, the Court does not find that the SEC's request is excessive. Rather, the Court finds that a "per month" calculation is a reasonable starting place and sufficiently accounts for the long-term nature of Mr. Gounaud's and Mr. Murphy's violations. Having considered Defendants' arguments against the proposed Section 15(a) penalties, the Court applies the aforementioned factor-based test to determine whether to impose the full amount of civil penalties requested or a lesser portion thereof.

a. First Factor

As to the first factor, "the degree of scienter involved," *Murphy*, 626 F.2d at 655, the Court acknowledges that a Section 15(a) violation does not require proof of scienter. This factor therefore weighs in favor of a reduced penalty.

b. Second Factor

Turning to the second factor, "the isolated or recurrent nature of the infraction," *id.*, Other than the Section 15(a) violation, Mr. Gounaud and Mr. Murphy have no prior history of violating the Exchange Act. Thus, the Court finds that this factor weighs in favor of a reduced penalty.

c. Third Factor

The third factor, "the defendant's recognition of the wrongful nature of his conduct," *id.*, Mr. Gounaud has not admitted any wrongdoing. In fact, he states, "I do not believe that I intentionally, wilfully [sic] or negligently violate[d] the Exchange Act 1934 or any Securities and Exchange Commission Rules." (Doc. No. 157 at 1.) Mr. Murphy also has not recognized the wrongful nature of his conduct and continues to dispute any wrongdoing. (Doc. No. 160-2 at 5 ("... I do not understand why my business arrangement with Mr. Ricardi and RMR required me to register as a broker-dealer[.]").) As such, the Court finds that Mr. Gounaud's and Mr. Murphy's failure to recognize the wrongfulness of their conduct and accept responsibility weighs in favor of a full penalty. *SEC v. Gowrish*, 2011 WL 2790482, *5 (N.D. Cal. Jul. 14, 2011) ("A person's 'lack of remorse' can be 'apparent in' the person's 'continued insistence on the validity of his' conduct that has been found to be a violation of the Securities and Exchange Act.") (citing *Fehn*, 97 F.3d at 1296).

d. Fourth Factor

Next, the Court turns to the fourth factor, "the likelihood, because of defendant's professional occupation, that future violations might occur." *Murphy*, 626 F.2d at 655. Although Mr. Gounaud is a sophisticated investor and securities trader, he states that since ceasing his business with RMR in 2017, "[h]e has had no activity at all in the securities market since then" and "has no intention of trading securities in the future." (Doc. No. 157 at 14.) On balance, the Court finds this factor weighs in favor of a reduced penalty against Mr. Gounaud.

As to Mr. Murphy, he is also a sophisticated investor and securities trader, and he states in his declaration that he continues to have a securities trading business, funded by capital from his wife's family and trading profits. (Doc. No. 160-2 at 5.) Thus, this factor weighs in favor of a full penalty against Mr. Murphy.

e. Fifth Factor

Moving to the fifth and last factor set forth in *Murphy*, "the sincerity of [the defendant's] assurances against future violations," 626 F.2d at 655, Mr. Gounaud states, "of course the defendant will never violate this or any securities rule again, nor does he intend to be in any position to violate any rule." (Doc. No. 157 at 4.) Similarly, Mr. Murphy attests that "he never intended to violate any provision of the federal securities laws and will do everything possible to make sure no one can ever accuse me of such a violation again." (Doc. No. 160-2 at 6.) The sincerity of their assurances, however, are weakened in part by their failure to completely recognize the wrongfulness of their past conduct. *See SEC v. Sabrdaran*, 252 F. Supp. 3d 866, 909 (N.D. Cal. 2017) ("Promising to stop doing wrong while denying any wrongdoing is the wrong way to establish that wrongdoing will not reoccur."). However, as the Court has already considered the defendants' equivocation as to the nature of their conduct, the Court considers this factor to be neutral.

Lastly, Defendants assert that in determining the amount of civil penalties to impose, the Court should consider their ability to pay. (Doc. Nos. 157 at 15; 160 at 25.) However, other than self-prepared charts and declarations, Defendants have not submitted any objective supporting documentation to evidence their financial situation.[4] *See, e.g., SEC v. Universal Exp. Inc.*, 646 F. Supp. 2d 552, 565 (S.D.N.Y. 2009) (even if the court considered "ability to pay" in determining remedies, defendant's "self-serving and conclusory assertions" were insufficient to support his claim of financial hardship). *See also Brookstreet Sec. Corp.*, 664 F. App'x at 656 n.2 ("Nothing in the Act requires courts to impose penalties based on a wrongdoer's illicit gain or ability to pay."). Accordingly, the Court

[4] During the January 21, 2021 motion hearing, the Court raised concerns over the sufficiency of Defendants' financial hardship evidence. None of them explained the deficiency or offered to supplement the record.

does not find this factor influential in its overall analysis.

Based on the foregoing, the Court finds that the balance of factors tips slightly in favor of a reduced penalty for Mr. Gounaud and Mr. Murphy. Thus, the Court exercises its discretion to reduce the SEC's requested civil penalties.[5] Accordingly, the Court finds that $308,512.80 in civil penalties against Mr. Gounaud is appropriate, and that $419,090.40 in civil penalties against Mr. Murphy is appropriate.

ii. Injunction

In addition, the SEC requests injunctions against Mr. Gounaud and Mr. Murphy, enjoining them from future violations of Section 15(a). (Doc. No. 138-1 at 12.) The SEC also seeks to enjoin them for a period of ten years, from opening or maintaining any brokerage account without providing the brokerage firm a copy of the Complaint and Final Judgment in this case. (*Id.* at 19.) Because whether an injunction is appropriate entails the same factor analysis previously analyzed in the civil penalties section, the Court incorporates its prior analysis herein. However, as the determinative question for purposes on an injunction is whether the SEC has demonstrated a "reasonable likelihood of future violations of the securities laws," *Fehn*, 97 F.3d at 1295, the Court affords special

[5] The Court notes that it offered the parties an opportunity to present how much the requested penalties should be reduced by, should the Court be inclined to reduce the amount. None of the parties took a specific position on the issue. As the balance of factors do not overwhelmingly favor a reduction, the Court finds that a modest twenty percent reduction is reasonable.

consideration and weight to the likelihood of future violations factor.

Focusing then on the factor of “the likelihood, because of defendant’s professional occupation, that future violations might occur,” *Murphy*, 626 F.2d at 655, the Court reiterates that Mr. Murphy is a sophisticated investor and securities trader, who continues to operate a securities trading business. *See supra* § III.A.i.d; *see also* (Doc. No. 160-2 at 5). This factor therefore weighs overwhelmingly in favor of an injunction. Consequently, considering the previously analyzed factors and giving due weight to the likelihood of future violations, the Court finds that the SEC has shown a “reasonable likelihood of future violations of the securities laws,” *Fehn*, 97 F.3d at 1295. As such, imposing an injunction against Mr. Murphy is appropriate in this case.[6]

For the same reasons, the Court finds that the SEC’s request to enjoin Mr. Murphy, for a period of ten years, from opening or maintaining any brokerage account without providing the brokerage firm a copy of the Complaint and Final Judgment in this case, is

[6] The Court disagrees with Defendants’ position that the proposed injunction against future Section 15(a) violations is not sufficiently specific to put Defendants on notice of what is prohibited. The Court explained in its summary judgment decision the reasons for how their conduct of engaging in securities transactions on behalf of others without being registered placed them in violation of Section 15(a). This therefore puts Defendants on notice against unregistered trading for others in the future.

also appropriate.[7] Given the imposition of civil penalties against Mr. Murphy, however, the Court exercises its discretion to reduce the duration of this injunction to five years. The Court finds this period of time is reasonable under the circumstances and sufficient for the SEC to effectively police future misconduct.[8]

Accordingly, an injunction from future Section 15(a) violations, and the injunction relating to disclosure of this litigation for a period of five years is warranted against Mr. Murphy. *See, e.g., SEC v. Mogler*, 2020 WL 1065865, at *11 (D. Ariz. Mar. 5, 2020) (granting "an injunction against [the defendant] to permanently enjoin him from violating Section 15(a) of the Exchange Act and Section 5 of the Securities Act is appropriate in this case.") As to Mr. Gounaud, he is approaching 70 years old, has no intention of trading securities in the future. Thus, the Court finds that an injunction is not warranted against Mr. Gounaud.

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[7] Moreover, to the extent that Mr. Murphy argues that the SEC's earlier press releases regarding its civil enforcement action against him caused his brokerage firms to believe that he engaged in fraud, as opposed to the failure to register as a broker-dealer, the Court notes that his furnishing of the Complaint and Final Judgment to his current and future broker firms would make the latter clear. (Doc. No. 160-2 at 4–5.)

[8] Contrary to the Defendants' position, the disclosure requirement is not unprecedented or unreasonable, as evidenced by the other defendants in this action consenting to the same injunction. (Doc. No. 138-1 at 14 n.5.)

B. Ms. Murphy's Section 15(a), Section 10(b), and Rule 10b-5 Violations

Turning to Ms. Murphy, the SEC seeks $1,761,920 in Tier 2 fraud civil penalties against her for violating Section 10(b) and Rule 10b-5 thereunder. (Doc. No. 138-1 at 11.) Although Ms. Murphy also violated Section 15(a), the SEC does not seek separate monetary penalties for those violations, believing that the requested fraud penalties sufficiently encompass the entirety of her misconduct. (*Id.* at 12.) For violations involving fraud, the statute provides for Tier 2 penalties in an amount that shall not exceed the greater of $80,000 per violation (or $96,384 for acts occurring after November 2, 2015) or the gross pecuniary gain to the defendant. 15 U.S.C. § 78u(d)(3)(b)(ii). Because the Court found that Ms. Murphy "fraudulently obtained new issue bonds in violation of Section 10(b) and Rule 10b-5," the SEC is within its right to request Tier 2 "per violation" fraud penalties for the twenty-one municipal securities offerings in which she fraudulently provided false zip codes. (Doc. No. 137 at 10.) And as the Court previously found, Defendants' arguments that the penalty requested should be measured against the gross pecuniary gain, creates disparity in judgments among the former defendants in this action, and violates the Eight Amendment are unavailing. *See supra* § III.A.i.

Considering the relevant factors in Ms. Murphy's case, *see Murphy*, 626 F.2d at 655, the Court finds that the first factor—degree of scienter—weighs in favor of the SEC's requested penalties. Ms. Murphy knowingly provided false zip codes in municipal offerings, knowing that doing so would secure the highest priority for her orders. (Doc. No. 137 at 9–10.) Knowing is a high degree of scienter.

As to the second factor, "the isolated or recurrent nature of the infraction," *Murphy*, 626 F.2d at 655, Ms. Murphy's material misrepresentation was not an isolated incident. She provided false zip codes in connection with at least twenty-one municipal securities offerings. (Doc. No. 138-3.) She also engaged in unregistered broker activity for nearly six years, performing thousands of securities transactions. Given the number of Ms. Murphy's infractions, the Court finds that this factor weighs in favor of imposing the penalties requested.

Regarding the third factor, the defendant's recognition of the wrongful nature of her conduct, Ms. Murphy wrote in her declaration that she "now fully understand[s] that even misrepresentations that seem small at the time can never be justified." (Doc. No. 160-8 at 4.) However, it is not lost on the Court that throughout this litigation, Ms. Murphy maintained the position that there was nothing wrong about her lying about her zip code to gain priority for municipal bonds. (*Id.* at 3; Doc. No. 137 at 9.) The Court therefore finds this factor to be neutral.

Next is the fourth factor, "the likelihood, because of defendant's professional occupation, that future violations might occur." *Murphy*, 626 F.2d at 655. While Ms. Murphy claims that she has no intention of opening securities trading accounts in the future, she also indicates that she may change her mind depending on whether her "personal circumstances change in the future" and whether "it makes financial sense for [her] to attempt to open a securities brokerage account. (Doc. No. 160-8 at 4.) Moreover, the Murphys have not completely stepped out of the securities business as Mr. Murphy continues to engage in securities transactions using capital from Ms. Murphy's family. Ms. Murphy's equivocation regarding her future in the securities business coupled with her family's continued involvement in it, signals to the Court a likelihood that Ms. Murphy may renew her professional trading and that future violations might occur. As such, the Court finds that this factor weighs in favor of the requested penalties.

Moving to the final factor set forth in *Murphy*, "the sincerity of [the defendant's] assurances against future violations," 626 F.2d at 655, Ms. Murphy states in her declaration that she will never again provide false information to anyone in connection with any future securities transactions and will ensure that no one can accuse her of violating federal securities law. (Doc. No. 160-8 at 5.) However, given Ms. Murphy's less-than-full appreciation of the wrongfulness of her conduct, the Court finds this factor to be neutral.

Lastly, the Court reiterates that because Defendants have not substantiated their claims of financial hardship with any objective evidence, the Court does not find their bald assertions of inability to pay to be consequential to its analysis. The relevant factors therefore weigh in favor of imposing the full penalty. Thus, in light of the foregoing and the seriousness of Ms. Murphy's violation, the Court finds that imposing the SEC's requested $1,761,920 in civil fraud penalties against Ms. Murphy is appropriate in this case. *See Sec. & Exch. Comm'n v. Spyglass Equity Sys., Inc.*, 2012 WL 13008422, at *3 (C.D. Cal. Apr. 5, 2012) ("The purposes of civil penalties are to punish the individual violator as well as deter future violations and thereby further the goals of "encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry.")

Next, as with Mr. Gounaud and Mr. Murphy, the SEC also requests the Court to enjoin Ms. Murphy for a period of ten years, from opening or maintaining any brokerage account without providing the brokerage firm a copy of the Complaint and Final Judgment in this case. The SEC also seeks to enjoin her from further violations of Section 15(a), and violations of Section 10(b) and Rule 10b-5.

Considering the factors previously analyzed and incorporated herein, the Court finds that there is a "reasonable likelihood of future violations of the securities laws" *Fehn*, 97 F.3d at 1295, and injunctions are therefore warranted. Again, the Court notes that Ms. Murphy's equivocation regarding whether she will return to the securities business coupled with her family's continued involvement in it, suggests that she may renew her professional trading and that future violations might occur. The Court thus finds it appropriate to impose injunctions against Ms. Murphy, enjoining her from further violations of Section 15(a), Section 10(b), and Rule 10b-5. However, given the amount of civil penalties imposed against her, the Court will, as it did with Mr. Murphy, exercise its discretion to reduce the duration of the injunction requiring disclosure of the Complaint and Final Judgment in this litigation to five years.

IV. CONCLUSION

Accordingly, based on the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** the SEC's motion for remedies. (Doc. No. 138.) In sum, as to Mr. Gounaud, the Court reduces the SEC's requested civil penalties amount to $308,512.80 and declines to impose an injunction against him. As to Mr. Murphy, the Court reduces the SEC's requested civil penalties amount to $419,090.40 and imposes a permanent injunction against future Section 15(a) violations and a five-year injunction to disclose a copy of the Complaint and Final Judgment in this case to brokerage firms with which he engages. As to Ms. Murphy, the Court imposes the full amount of the SEC's requested civil fraud penalties, $1,761,920.00, and imposes a permanent injunction against future violations of Section 15(a), Section 10(b), and Rule 10b-5, and a five-year injunction to disclose a copy of the Complaint and Final Judgment in this case to brokerage firms with which she engages.

IT IS ORDERED that no later than February 16, 2021, the SEC submit a revised proposed final judgment against each defendant, incorporating the remedies found to be appropriate and reasonable for each, as discussed in this Order.

IT IS SO ORDERED.

Dated: February 3, 2021
Hon. Anthony J. Battaglia
United States District Judge

Appendix E

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

RMR ASSET MANAGEMENT COMPANY, et al.,
Defendants.

Case No.: 18-CV-1895-AJB-LL

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST RICHARD GOUNAUD, MICHAEL SEAN MURPHY, AND JOCELYN MURPHY

Presently before the Court is Plaintiff's motion for summary judgment against Richard Gounaud, Michael Sean Murphy, and Jocelyn Murphy. (Doc. No. 115.) Defendant Richard Gounaud opposes this motion. (Doc. No. 122.) Defendants Michael Sean Murphy and Jocelyn Murphy also oppose this motion. (Doc. No. 123.) The Court held a hearing on Plaintiffs motion for summary judgment on July 23, 2020. For the reasons set forth more clearly below, the Court **GRANTS** Plaintiff's motion for summary judgment.

<u>BACKGROUND</u>

Ralph Riccardi founded RMR in 1995 and its primary business was to buy and re-sell municipal bonds and other securities. (Doc. No. 115-1 at 10.) Defendants were enlisted by Riccardi to open new brokerage accounts to help RMR increase the number of orders it could place for new issue municipal bonds and other securities. (*Id.*) Riccardi directed Defendants to trade for RMR. (*Id.*)

Jocelyn Murphy engaged in 6,407 securities transactions for RMR, including 2,410 transactions involving new issue municipal bonds, between November 28, 2011 and June 29, 2017. (*Id.* at 14.) Michael Murphy engaged in 10,179 securities transactions for RMR, including 399 transactions involving new issue bonds, between November 28, 2011 and March 10, 2017. (*Id.*) Richard Gounaud engaged in 2,250 securities transactions for RMR, including 360 transactions involving new issue municipal bonds, between August 14, 2013 and May 4, 2017. (*Id.*) Each Defendant received a percentage of the profits and losses. (Doc. No. 122 at 4; Doc. No. 123 at 15, 17.)

Furthermore, Jocelyn Murphy provided brokers with a zip code to submit to the underwriters with her orders. (Doc. No. 115-1 at 15.) Ms. Murphy understood that retail orders, as listed in priority of orders, were reserved for individual investors with zip codes in the issuer's jurisdiction. (*Id.*) Ms. Murphy also understood that if she submitted her Colorado zip code with an order for bonds issued outside of Colorado where the issuer had reserved the highest priority for in-state residents, her order would not qualify for the highest retail priority. (*Id.*) Therefore, Ms. Murphy would provide zip code corresponding to the jurisdictions she was seeking an order of bonds from, despite the fact that she did not reside in these jurisdictions. (*Id.* at 16.)

LEGAL STANDARD

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Id.*

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proving at trial. *Id.* at 322–23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth facts showing a genuine issue of a disputed fact remains. *Celotex Corp.*, 477 U.S. at 330. When ruling on a summary judgment motion, a court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

Plaintiff bases its motion for summary judgment on two main arguments. The first argument is that Defendants acted as unregistered broker-dealers in violation of Section 15(a) of the Exchange Act. The second argument is that Jocelyn Murphy fraudulently obtained new issue bonds in violation of Section 10(b) and Rule 10b-5. The Court will address each argument in turn.

A. Section 15(a) of the Exchange Act

Section 15(a) of the Exchange Act makes it unlawful for a broker or dealer "to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless the broker or dealer is registered with the SEC in accordance with Section 15(b). Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A).

The Ninth Circuit applies conduct-based factors and a "totality of the circumstances approach" to determine whether a person has engaged in the business of being a broker. *See SEC v. Feng*, 935 F.3d 721, 731 (9th Cir. 2019). The *Hansen* court identified the following six factors as relevant to determining whether a person met the definition of "broker": (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, 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 investment or gives advice; and (6) is an active rather than passive finder of investors. *See SEC v. Hansen*, No. 83 Civ. 3692 (LPG), 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984).

First, Plaintiff argues that Defendants acted as unregistered brokers because they effected securities transactions for RMR in return for transaction-based compensation. (Doc. No. 115-1 at 20.) " 'The most important factor in determining whether an individual or entity is a broker' is the 'regularity of participation in securities transactions at key points in the chain of distribution.' " *SEC v. Holcom*, No. 12-cv-1623, 2015 WL 11233426, at *4 (S.D. Cal. Jan. 8, 2012) (quoting *SEC v. Bravata*, No. 09-12950, 2009 WL 2245649, at *2 (E.D. Mich. July 27, 2009)). Defendants admit that Riccardi and RMR directed Defendants to link their brokerage accounts to RMR's prime broker account so Defendants could use RMR's capital to purchase new issue municipal bonds and other securities. (*See* Riccardi Depo. at 32:8–33:10; 160:10–11; J. Murphy Depo. at 17:11–18:15; 41:19–42:12; 112:8–113:11; M. Murphy Depo. at 50:1–17; 65:21–66:1; Gounaud Depo. at 64:17–23; 82:2–12; 100:25–101:19.) Defendants controlled their accounts; however, they conducted their trading activity on behalf of RMR through RMR's prime brokerage account. (*See id.*) Riccardi and RMR funded the prime broker account. (Riccardi Depo. at 164:2–6.)

Defendants Michael Murphy and Jocelyn Murphy argue that they did not engage in securities transactions "for" Riccardi. (Doc. No. 123 at 25.) They assert that simply because Riccardi provided the capital does not transform those transactions into trades "for" Riccardi. (*Id.*) Defendant Gounaud argues that a portion of the capital of RMR's prime brokerage account belonged to him. (Doc. No. 122 at 4.) However, there are several exhibits that contain emails establishing that Riccardi and RMR directed Defendants to purchase securities. (Doc. Nos. 125-9; 125-10; 125-11; 125-12.) Further, Defendant Jocelyn Murphy admitted in her deposition that she had never traded municipal securities before working with RMR, and Riccardi trained her at his office on how to trade for RMR. (J. Murphy Depo. at 44–46.) Furthermore, Defendant Gounaud provides no evidence that a portion of the capital of RMR's prime brokerage account belonged to him, and he admitted that he received compensation via RMR's prime brokerage account only if trades created profits in a given time period. (Gounaud Depo. at 190:19–23.) It is undisputed that Defendants engaged in a large amount of frequent transactions. Accordingly, it is undisputed that Defendants engaged in regularity of participation in securities transactions and, based on the above, it was for RMR.

Defendants also argue that they were in a "partnership" with Riccardi. (Doc. No. 122 at 4; Doc. No. 123 at 12, 14–17.) However, Defendants provide no evidence of this other than self-serving declarations. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.")

In 2016, Defendant Gounaud provided responses to an SEC investigative questionnaire. Defendant Gounaud stated that he worked for himself and was associated with Riccardi, but did not identify any partnership with Riccardi or RMR. (Doc. No. 125-3 at 7.) Further, Defendant Gounaud admitted that RMR gave him an IRS Form 1099, which is for self-employed independent contractors. (Gounaud Depo. at 219:10–21.) During the hearing on this matter, the Court permitted Defendant Gounaud to supply the Court with the IRS Form 1099. Defendant Gounaud provided the IRS Form 1099 to the Court along with a supplemental motion. (Doc. No. 134.) Defendant Gounaud should have sought leave of the Court prior to filing a supplemental motion that is essentially a sur-reply. *See* Judge Battaglia Civil Case Procedures II.E. However, Defendant Gounaud was given the opportunity to present these arguments at the hearing on this matter, so the Court will briefly address these arguments. The IRS Form 1099 issued to Defendant Gounaud states that the income he received is miscellaneous income. However, this does not change the Court's analysis. Defendant Gounaud was not issued an IRS Schedule K-1 or any other record to establish a partnership. Defendant Gounaud argues that RMR elected out of Subchapter K, but there is no evidence that his relationship with RMR was an investment partnership under 26 CFR § 1.761-2(a)(2). Defendant Gounaud further admits that his partnership with RMR never filed a Form 1065 electing out of a Subchapter K, and does not offer any evidence of an agreement among the members that the organization would be excluded from Subchapter K. Defendant Gounaud also argues that he did not identify his relationship with Riccardi and RMR in response to SEC investigative questionnaire because it was the focus of the investigation. However, again, Defendant Gounaud has not provided anything to rebut the evidence that his relationship with Riccardi and RMR was as an independent contractor. Lastly, Defendant Gounaud argues that an eight-factor test in *Holdner v. Com'r*, 100 T.C.M. (CCH) 108 (T.C. 2010), *aff'd*, 483 F. App'x 383 (9th Cir. 2012) (quoting *Luna v. Commissioner*, 42 T.C. 1067, 1077–78, 1964 WL 1259 (1964)) establishes the existence of a partnership. However, Defendant Gounaud presents no evidence or argument as to how these factors establish a partnership in this case.

Defendants Jocelyn and Michael Murphy also responded to the 2016 SEC questionnaire as self-employed and failed to identify any partnership with Riccardi or RMR in their responses to an SEC investigative questionnaire. (Doc. No. 125-5 at 5; Doc.

No. 125-6 at 5.) Defendant Jocelyn Murphy also testified that she nor Defendant Michael Murphy received an IRS Schedule K-1 from Riccardi or RMR. (J. Murphy Depo. at 56:11–13; 79:10–80:14.) Furthermore, Riccardi testified that he never "perceived [Defendants] as anything other than independent contractors." (Riccardi Depo. at 167:6–8.) Thus, there is overwhelming evidence that Defendants' relationship with RMR was not a partnership, and there is no evidence other than self-serving declarations of Defendants to support that this relationship was a partnership.

Second, Plaintiff argues that each of the Defendants received transaction-based compensation for their trading activities on behalf of RMR. (Doc. No. 115-1 at 22.) Defendants argue that they did not receive transaction-based compensation, but rather were paid based on a percentage of net profits. (Doc. No. 122 at 10–13; Doc. No. 123 at 26–27.) Further, Defendants admitted that if they failed to complete a profitable trade in a measuring time period, they received no payments for this activity. (Doc. No. 125 at 8; J. Murphy Depo. at 186:9–25; M. Murphy Depo. at 139:10–14; Gounaud Depo. at 190:19–23.) The Court is not persuaded by Defendants' argument that this form of compensation is different than transaction-based compensation.

The parties briefly mention the other factors. Plaintiff asserts that Defendants' conduct satisfies several of these additional *Hansen* factors, as none of the Defendants were employed by any issuer, they all sold securities of issuers, and Defendant Jocelyn Murphy actively located investors to purchase securities sold by RMR. (Doc. No. 115-1 at 18.) Defendants do not dispute that were not employed by an issuer. (Doc. No. 122 at 9; Doc. No. 123 at 23.) However, Defendants do dispute selling securities of issuers and that Defendant Jocelyn Murphy actively located investors to purchase securities sold by RMR. (Doc. No. 122 at 10; Doc. No. 123 at 24.) There are at least two emails where Defendant Jocelyn Murphy is actively locating investors to purchase securities sold by RMR. (Doc. Nos. 115-17; 115-35.) Based on the totality of the circumstances, there is no question of material fact and as a matter of law Defendants were brokers as defined by Section 3(a)(4)(A) of the Exchange Act. There is no dispute that Defendants did not register as brokers as required by Section 15(a) of the Exchange Act.

B. Section 10(b) of the Exchange Act and Rule 10b-5

Section 10(b) of the Exchange Act and Rule 10b-5 prohibits fraud in connection with the purchase or sale of any security. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855 (9th Cir. 2001). To prove a violation of Section 10(b) and Rule 10b-5, the SEC must show: (1) a material misstatement or deceptive conduct; (2) in connection with the purchase or sale of security; (3) using interstate commerce; and (4) with scienter. *See SEC v. Phan*, 500 F.3d 895, 907–08 (9th Cir. 2007); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993).

First, Plaintiff argues that Defendant Jocelyn Murphy made material misrepresentations when providing false zip codes to brokers. (Doc. No. 115-1 at 24.) The Supreme Court has held that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Defendant Jocelyn Murphy falsely provided Oregon, Puerto Rico, and California zip codes when she sought to obtain bonds from those jurisdictions. She submitted more than one false zip code via different brokers for the bonds being offered by issuers in Oregon and California.

MSRB Rules G-11 and G-17 require underwriters to allocate the new issue bonds in accordance with the priorities set by the issuer, and to make sure any orders submitted during a retail order period meet the issuer's conditions. Defendant Jocelyn Murphy admitted that the first priority bonds that she sought and obtained from California and Oregon were "California Retail" and "Oregon Retail." (Doc. No. 123 at 17.) Defendant Jocelyn Murphy also admitted that without providing these false zip codes, she would not have been in the retail order period, and thus, would not have received the highest priority. (J. Murphy Depo. at 99:23–100:5; 128:3–17; 159:18–160:3; 163:18–164:3.) Furthermore, Plaintiff has provided unrebutted expert testimony that local zip codes are important to issuers of new municipal bonds. (Doc. No. 115-4 at 17.)

Defendant Jocelyn Murphy asserts that there is no evidence that any other investor who sought to purchase those bonds did not receive an allocation for the relevant bonds. (Doc. No. 123 at 29.) Defendant Jocelyn Murphy further argues that there is no evidence that the SEC-registered broker-dealers who received the false zip code information communicated that information to anyone else. (*Id.* at 28.) However, as explained above, Defendant Jocelyn Murphy herself stated that she would not have been in the retail order period without providing these false zip codes. Accordingly, based on Defendant Jocelyn Murphy's own admissions and Plaintiff's expert testimony, providing false zip codes was a material misrepresentation in order to obtain priority in obtaining bonds.

Section 10(b) and Rule 10b-5 require a showing of scienter, which courts define as a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). In the Ninth Circuit, the SEC may establish scienter by a showing of either actual knowledge or recklessness. *Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th Cir. 2010).

Plaintiff asserts that Defendant Jocelyn Murphy acted with scienter when she submitted materially false zip codes with her orders for bonds offered by issuers located in Oregon, California, and elsewhere. (Doc. No. 115-1 at 26.) Defendant Jocelyn Murphy argues that she did not provide false zip codes with the intent to deceive because the persons whom she communicated that information knew it was erroneous, and she did not know for a fact whether the erroneous zip code would make a difference as to whether or not she received an allocation of new issue bonds. (Doc. No. 123 at 30.) She also asserts that the SEC has offered no evidence that any issuer was deceived by the false zip codes or that any investor was actually harmed. (*Id.* at 28.)

Defendant Jocelyn Murphy knew that she did not reside in these zip codes. (J. Murphy Depo. at 97:13–98:11; 125:5–13; 130:21–131:4; 158:9–23.) Defendant Jocelyn Murphy also admitted she knew failing to provide a zip code from these jurisdictions would not place her in the highest priority period, the retail order period. (J. Murphy Depo. at 99:23–100:5; 128:3–17; 159:18–160:3; 163:18–164:3.) For example, Defendant Jocelyn Murphy specifically testified in her deposition:

> Q: So if you want to be first in line based on the priority of orders and the definition of retail order for this California bond deal, you had to submit a zip code; correct?
> A: Correct.
> Q: And that would be a California zip code; correct?
> A: Yes. Correct.
> Q: If you submitted a Denver zip code, do you believe you would be considered California retail?

A: No.

(J. Murphy Depo. at 155:16–156:5 (objections omitted)).

Defendant Jocelyn Murphy also provides no evidence that the brokers knew her correct zip code. However, based on her own testimony, Defendant Jocelyn Murphy knew when she provided these brokers with false zip codes her order could be considered in the local retail allocation in jurisdictions where she did not reside. Furthermore, the SEC is not required to prove reliance or actual harm to the issuers or investors. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993) (SEC not required to prove reliance); *Graham v. SEC*, 222 F.3d 994, 1002 (D.C. Cir. 2000) (SEC not required to prove actual harm to investors) (citing *United States v. Naftalin*, 441 U.S. 786 (1979)); *SEC v. Zouvas*, No. 16-cv-0998-CAB-DHB, 2016 WL 6834028, at *10 (S.D. Cal. Nov. 21, 2016) (same) (citing *Naftalin*). The evidence presented clearly establishes scienter.

Accordingly, Plaintiff has established that there is no genuine issue of material fact and as a matter of law Defendant Jocelyn Murphy fraudulently obtained new issue bonds in violation of Section 10(b) and Rule 10b-5.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Plaintiff's motion for summary judgment. **Within 45 days** of the date of this Order, Plaintiff's must file a motion regarding the remedies sought in this matter and must call the Court's Chambers to obtain a hearing date upon filing of such motion.

IT IS SO ORDERED.

Dated: August 14, 2020
Hon. Anthony J. Battaglia
United States District Judge

Appendix F

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Appendix G

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 78c. Definitions and application

(a) Definitions

When used in this chapter, unless the context otherwise requires—

*   *   *

(4) BROKER. —

(A) IN GENERAL.—The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.

*   *   *

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

*   *   *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement1 any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

15 U.S.C. § 78*o*. Registration and regulation of brokers and dealers

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

* * *

15 U.S.C. § 78u. Investigations and actions

* * *

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

* * *

(3) CIVIL MONEY PENALTIES AND AUTHORITY TO SEEK DISGORGEMENT—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—

(i) impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and

(ii) require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of a civil penalty imposed under subparagraph (A)(i) shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of a civil penalty imposed under subparagraph (A)(i) for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

*   *   *

Appendix H

RELEVANT REGULATORY PROVISIONS

17 C.F.R. § 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Appendix G

RELEVANT PROCEDURAL PROVISIONS

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.