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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**

(Doc. Nos. 115, 133)

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 Plaintiff’s 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.

1 **BACKGROUND**

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

7 Jocelyn Murphy engaged in 6,407 securities transactions for RMR, including 2,410
8 transactions involving new issue municipal bonds, between November 28, 2011 and June
9 29, 2017. (*Id.* at 14.) Michael Murphy engaged in 10,179 securities transactions for RMR,
10 including 399 transactions involving new issue bonds, between November 28, 2011 and
11 March 10, 2017. (*Id.*) Richard Gounaud engaged in 2,250 securities transactions for RMR,
12 including 360 transactions involving new issue municipal bonds, between August 14, 2013
13 and May 4, 2017. (*Id.*) Each Defendant received a percentage of the profits and losses.
14 (Doc. No. 122 at 4; Doc. No. 123 at 15, 17.)

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

24 **LEGAL STANDARD**

25 Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the
26 moving party demonstrates the absence of a genuine issue of material fact and entitlement
27 to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact
28 is material when, under the governing substantive law, it could affect the outcome of the

1 case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a
2 reasonable jury could return a verdict for the nonmoving party. *Id.*

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

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

17 **DISCUSSION**

18 Plaintiff bases its motion for summary judgment on two main arguments. The first
19 argument is that Defendants acted as unregistered broker-dealers in violation of Section
20 15(a) of the Exchange Act. The second argument is that Jocelyn Murphy fraudulently
21 obtained new issue bonds in violation of Section 10(b) and Rule 10b-5. The Court will
22 address each argument in turn.

23 A. **Section 15(a) of the Exchange Act**

24 Section 15(a) of the Exchange Act makes it unlawful for a broker or dealer “to make
25 use of the mails or any means or instrumentality of interstate commerce to effect any
26 transactions in, or to induce or attempt to induce the purchase or sale of, any security”
27 unless the broker or dealer is registered with the SEC in accordance with Section 15(b).
28 Section 3(a)(4)(A) of the Exchange Act defines a “broker” as “any person engaged in the

1 business of effecting transactions in securities for the account of others.” 15 U.S.C. §
2 78c(a)(4)(A).

3 The Ninth Circuit applies conduct-based factors and a “totality of the circumstances
4 approach” to determine whether a person has engaged in the business of being a broker.
5 See *SEC v. Feng*, 935 F.3d 721, 731 (9th Cir. 2019). The *Hansen* court identified the
6 following six factors as relevant to determining whether a person met the definition of
7 “broker”: (1) is an employee of the issuer; (2) received commissions as opposed to a salary;
8 (3) is selling, previously sold, the securities of other issuers; (4) is involved in negotiations
9 between the issuer and the investor; (5) makes valuations as to the merits of investment or
10 gives advice; and (6) is an active rather than passive finder of investors. See *SEC v. Hansen*,
11 No. 83 Civ. 3692 (LPG), 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984).

12 First, Plaintiff argues that Defendants acted as unregistered brokers because they
13 effected securities transactions for RMR in return for transaction-based compensation.
14 (Doc. No. 115-1 at 20.) “‘The most important factor in determining whether an individual
15 or entity is a broker’ is the ‘regularity of participation in securities transactions at key points
16 in the chain of distribution.’” *SEC v. Holcom*, No. 12-cv-1623, 2015 WL 11233426, at *4
17 (S.D. Cal. Jan. 8, 2012) (quoting *SEC v. Bravata*, No. 09-12950, 2009 WL 2245649, at *2
18 (E.D. Mich. July 27, 2009)). Defendants admit that Riccardi and RMR directed Defendants
19 to link their brokerage accounts to RMR’s prime broker account so Defendants could use
20 RMR’s capital to purchase new issue municipal bonds and other securities. (See Riccardi
21 Depo. at 32:8–33:10; 160:10–11; J. Murphy Depo. at 17:11–18:15; 41:19–42:12; 112:8–
22 113:11; M. Murphy Depo. at 50:1–17; 65:21–66:1; Gounaud Depo. at 64:17–23; 82:2–12;
23 100:25–101:19.) Defendants controlled their accounts; however, they conducted their
24 trading activity on behalf of RMR through RMR’s prime brokerage account. (See *id.*)
25 Riccardi and RMR funded the prime broker account. (Riccardi Depo. at 164:2–6.)

26 Defendants Michael Murphy and Jocelyn Murphy argue that they did not engage in
27 securities transactions “for” Riccardi. (Doc. No. 123 at 25.) They assert that simply
28 because Riccardi provided the capital does not transform those transactions into trades

1 “for” Riccardi. (*Id.*) Defendant Gounaud argues that a portion of the capital of RMR’s
2 prime brokerage account belonged to him. (Doc. No. 122 at 4.) However, there are several
3 exhibits that contain emails establishing that Riccardi and RMR directed Defendants to
4 purchase securities. (Doc. Nos. 125-9; 125-10; 125-11; 125-12.) Further, Defendant
5 Jocelyn Murphy admitted in her deposition that she had never traded municipal securities
6 before working with RMR, and Riccardi trained her at his office on how to trade for RMR.
7 (J. Murphy Depo. at 44–46.) Furthermore, Defendant Gounaud provides no evidence that
8 a portion of the capital of RMR’s prime brokerage account belonged to him, and he
9 admitted that he received compensation via RMR’s prime brokerage account only if trades
10 created profits in a given time period. (Gounaud Depo. at 190:19–23.) It is undisputed that
11 Defendants engaged in a large amount of frequent transactions. Accordingly, it is
12 undisputed that Defendants engaged in regularity of participation in securities transactions
13 and, based on the above, it was for RMR.

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

20 In 2016, Defendant Gounaud provided responses to an SEC investigative
21 questionnaire. Defendant Gounaud stated that he worked for himself and was associated
22 with Riccardi, but did not identify any partnership with Riccardi or RMR. (Doc. No. 125-
23 3 at 7.) Further, Defendant Gounaud admitted that RMR gave him an IRS Form 1099,
24 which is for self-employed independent contractors. (Gounaud Depo. at 219:10–21.)
25 During the hearing on this matter, the Court permitted Defendant Gounaud to supply the
26 Court with the IRS Form 1099. Defendant Gounaud provided the IRS Form 1099 to the
27 Court along with a supplemental motion. (Doc. No. 134.) Defendant Gounaud should have
28 sought leave of the Court prior to filing a supplemental motion that is essentially a sur-

1 reply. *See* Judge Battaglia Civil Case Procedures II.E. However, Defendant Gounaud was
2 given the opportunity to present these arguments at the hearing on this matter, so the Court
3 will briefly address these arguments. The IRS Form 1099 issued to Defendant Gounaud
4 states that the income he received is miscellaneous income. However, this does not change
5 the Court’s analysis. Defendant Gounaud was not issued an IRS Schedule K-1 or any other
6 record to establish a partnership. Defendant Gounaud argues that RMR elected out of
7 Subchapter K, but there is no evidence that his relationship with RMR was an investment
8 partnership under 26 CFR § 1.761-2(a)(2). Defendant Gounaud further admits that his
9 partnership with RMR never filed a Form 1065 electing out of a Subchapter K, and does
10 not offer any evidence of an agreement among the members that the organization would
11 be excluded from Subchapter K. Defendant Gounaud also argues that he did not identify
12 his relationship with Riccardi and RMR in response to SEC investigative questionnaire
13 because it was the focus of the investigation. However, again, Defendant Gounaud has not
14 provided anything to rebut the evidence that his relationship with Riccardi and RMR was
15 as an independent contractor. Lastly, Defendant Gounaud argues that an eight-factor test
16 in *Holdner v. Com’r*, 100 T.C.M. (CCH) 108 (T.C. 2010), *aff’d*, 483 F. App’x 383 (9th
17 Cir. 2012) (quoting *Luna v. Commissioner*, 42 T.C. 1067, 1077–78, 1964 WL 1259 (1964))
18 establishes the existence of a partnership. However, Defendant Gounaud presents no
19 evidence or argument as to how these factors establish a partnership in this case.

20 Defendants Jocelyn and Michael Murphy also responded to the 2016 SEC
21 questionnaire as self-employed and failed to identify any partnership with Riccardi or RMR
22 in their responses to an SEC investigative questionnaire. (Doc. No. 125-5 at 5; Doc. No.
23 125-6 at 5.) Defendant Jocelyn Murphy also testified that she nor Defendant Michael
24 Murphy received an IRS Schedule K-1 from Riccardi or RMR. (J. Murphy Depo. at 56:11–
25 13; 79:10–80:14.) Furthermore, Riccardi testified that he never “perceived [Defendants] as
26 anything other than independent contractors.” (Riccardi Depo. at 167:6–8.) Thus, there is
27 overwhelming evidence that Defendants’ relationship with RMR was not a partnership,
28 and there is no evidence other than self-serving declarations of Defendants to support that

1 this relationship was a partnership.

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

11 The parties briefly mention the other factors. Plaintiff asserts that Defendants’
12 conduct satisfies several of these additional *Hansen* factors, as none of the Defendants were
13 employed by any issuer, they all sold securities of issuers, and Defendant Jocelyn Murphy
14 actively located investors to purchase securities sold by RMR. (Doc. No. 115-1 at 18.)
15 Defendants do not dispute that were not employed by an issuer. (Doc. No. 122 at 9; Doc.
16 No. 123 at 23.) However, Defendants do dispute selling securities of issuers and that
17 Defendant Jocelyn Murphy actively located investors to purchase securities sold by RMR.
18 (Doc. No. 122 at 10; Doc. No. 123 at 24.) There are at least two emails where Defendant
19 Jocelyn Murphy is actively locating investors to purchase securities sold by RMR. (Doc.
20 Nos. 115-17; 115-35.) Based on the totality of the circumstances, there is no question of
21 material fact and as a matter of law Defendants were brokers as defined by Section
22 3(a)(4)(A) of the Exchange Act. There is no dispute that Defendants did not register as
23 brokers as required by Section 15(a) of the Exchange Act.

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

25 Section 10(b) of the Exchange Act and Rule 10b-5 prohibits fraud in connection with
26 the purchase or sale of any security. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *SEC v.*
27 *Dain Rauscher, Inc.*, 254 F.3d 852, 855 (9th Cir. 2001). To prove a violation of Section
28 10(b) and Rule 10b-5, the SEC must show: (1) a material misstatement or deceptive

1 conduct; (2) in connection with the purchase or sale of security; (3) using interstate
2 commerce; and (4) with scienter. *See SEC v. Phan*, 500 F.3d 895, 907–08 (9th Cir. 2007);
3 *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC*
4 *v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993).

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

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

23 Defendant Jocelyn Murphy asserts that there is no evidence that any other investor
24 who sought to purchase those bonds did not receive an allocation for the relevant bonds.
25 (Doc. No. 123 at 29.) Defendant Jocelyn Murphy further argues that there is no evidence
26 that the SEC-registered broker-dealers who received the false zip code information
27 communicated that information to anyone else. (*Id.* at 28.) However, as explained above,
28 Defendant Jocelyn Murphy herself stated that she would not have been in the retail order

1 period without providing these false zip codes. Accordingly, based on Defendant Jocelyn
2 Murphy’s own admissions and Plaintiff’s expert testimony, providing false zip codes was
3 a material misrepresentation in order to obtain priority in obtaining bonds.

4 Section 10(b) and Rule 10b-5 require a showing of scienter, which courts define as
5 a “mental state embracing intent to deceive, manipulate or defraud.” *Ernst & Ernst v.*
6 *Hochfelder*, 425 U.S. 185, 193 n.12 (1976). In the Ninth Circuit, the SEC may establish
7 scienter by a showing of either actual knowledge or recklessness. *Gebhart v. SEC*, 595 F.3d
8 1034, 1040 (9th Cir. 2010).

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

18 Defendant Jocelyn Murphy knew that she did not reside in these zip codes. (J.
19 Murphy Depo. at 97:13–98:11; 125:5–13; 130:21–131:4; 158:9–23.) Defendant Jocelyn
20 Murphy also admitted she knew failing to provide a zip code from these jurisdictions would
21 not place her in the highest priority period, the retail order period. (J. Murphy Depo. at
22 99:23–100:5; 128:3–17; 159:18–160:3; 163:18–164:3.) For example, Defendant Jocelyn
23 Murphy specifically testified in her deposition:

24 Q: So if you want to be first in line based on the priority of orders
25 and the definition of retail order for this California bond deal,
26 you had to submit a zip code; correct?

26 A: Correct.

27 Q: And that would be a California zip code; correct?

27 A: Yes. Correct.

28 Q: If you submitted a Denver zip code, do you believe you would

1 be considered California retail?

2 A: No.

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

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


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

17 **CONCLUSION**

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

22
23 **IT IS SO ORDERED.**

24 Dated: August 14, 2020

25 
26 Hon. Anthony J. Battaglia
27 United States District Judge
28