

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16175

In the Matter of

**KENNETH C. MEISSNER, JAMES
DOUG SCOTT, and MARK S. “MIKE”
TOMICH,**

Respondents.

PLAN OF DISTRIBUTION

I. OVERVIEW

1. The Division of Enforcement (“Division”) has prepared the following plan of distribution (“Distribution Plan”) to the Securities and Exchange Commission (“Commission”) pursuant to Rule 1101 of the Commission’s Rules on Fair Fund and Disgorgement Plans (“Rules”), 17 C.F.R. § 201.1101. The Distribution Plan, pursuant to Rule 1102(a) of the Rules, 17 C.F.R. § 201.1102(a),¹ provides for the payment of the disgorgement, prejudgment interest, and penalties, collected by the Commission thus far or in the future, from Kenneth C. Meissner (“Meissner”), James Doug Scott (“Scott”), and Mark S. “Mike” Tomich (“Tomich”) (collectively, the “Respondents”) into the Court Registry Investment System (“CRIS”) account established in the related criminal action, *United States v. Snisky*, No. 13-cr-00473-RM (D. Colo.) (the “Criminal Action”), for distribution to harmed investors in accordance with the

¹ Rule 1102(a) provides that “a plan for the administration of a Fair Fund . . . may provide for payment of funds into a court registry . . . in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission’s order instituting proceedings.”

restitution process in the Criminal Action. As explained below, the Division has concluded that distributing the funds collected in the Commission’s administrative proceeding to investors harmed as a result of the Respondents’ misconduct through the Criminal Action’s restitution process is fair and reasonable and is a more efficient use of resources than would two separate distribution processes.²

2. On August 21, 2017, the Commission published a Notice of Proposed Plan of Distribution and Opportunity for Comment³ pursuant to Rule 1103 of the Commission’s Rules on Fair Fund and Disgorgement Plans.⁴ The Commission received no comments on the Distribution Plan.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Criminal Action

3. On November 19, 2013, the United States Attorney for the District of Colorado (“USAO”) obtained an indictment against Gary C. Snisky (“Snisky”), charging him in an eighteen count indictment with mail fraud (18 U.S.C. § 1341) and money laundering (18 U.S.C. §§ 1957 and 2(b)), and alleged forfeiture of property derived from these offenses pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and 18 U.S.C. § 982(a)(1) (the “Indictment”). In the Indictment, the USAO alleged, among other things, that between July 2011 and January 2013, Snisky defrauded investors of more than \$4 million by falsely promising to invest their money in bonds, backed by the full faith and credit of the United States Government, with a guaranteed

² Consistent with the approach used by district courts when considering whether to approve a distribution plan, the Commission’s objective is to distribute Fair Funds in a fair and reasonable manner, taking into account relevant facts and circumstances. *See Credit Suisse Securities USA (LLC)*, Admin. Proc. No. 3-15098, Rel. No. 34-75877, 2015 SEC LEXIS 3745, *13, n.13 (Sept. 10, 2015), *citing Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006); *SEC v. Wang*, 944 F.2d 80, 88 (2d Cir. 1991).

³ Exchange Act Rel. No. 81449 (Aug. 21, 2017).

⁴ 17 C.F.R. § 201.1103.

annual return of 6-7% and a 10% up front bonus.⁵ The USAO further alleged that Snisky did not purchase any bonds and did not invest the funds as promised.

4. On February 5, 2015, Snisky pled guilty to one count of each violation. The criminal court sentenced him to eighty-four (84) months in prison followed by a three (3) year term of supervised release, and ordered him to pay restitution of \$2,531,032.22.⁶

B. The Parallel Civil Action

5. On November 21, 2013, the Commission filed a parallel civil injunctive action against Snisky for his fraudulent bond investment offering.⁷ The Commission charged Snisky with violations of Sections 5(a) and (c) and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, Sections 206(1), (2) and (4) of the Investment Advisers Act of 1940 (“Advisers Act”) and Rule 206(4)-8 thereunder, and for aiding and abetting Section 7(a) of the Investment Company Act of 1940 (“Investment Company Act”). On August 12, 2016, the Court entered default judgment against Snisky, permanently enjoining him from future violations of the referenced securities laws, and ordering him to pay \$2,531,032.00 in disgorgement and \$244,122.00 in prejudgment interest, to be offset by restitution paid in the Criminal Action.⁸

C. This Administrative Proceeding

6. The above-captioned administrative proceeding involves three of the individuals through whom Snisky sold his fraudulent bond investment: Meissner, Scott, and Tomich (the “Administrative Proceeding”). On September 25, 2014, the Commission issued the order

⁵ The Indictment also includes allegations of an earlier fraud including an additional three (3) investors and losses of approximately \$300,000.

⁶ According to his plea agreement, Snisky was responsible for more than \$5.2 million in losses. The restitution amount reflects this loss amount less approximately \$2.7 million obtained by the government through asset forfeiture proceedings and distributed to victims..

⁷ *SEC v. Snisky*, Civ. Act. No. 13-cv-03149 (LTB) (D. Colo.).

⁸ *SEC v. Snisky*, Civ. Act. No. 13-cv-03149 (LTB) (D. Colo.) (Dkt. No. 31).

instituting proceedings (the “Administrative Order”)⁹ against the Respondents, in which the Division alleged that from August 2011 to January 2013, Snisky fraudulently raised approximately \$4.3 million from at least 40 investors across at least eight states through the sale of membership interests in companies that he controlled. The Division alleged that Snisky recruited the Respondents to solicit prospective investors with false promises of no-risk, profitable alternatives to traditional annuities, when in fact, Snisky made no legitimate investments with investor funds. The Division alleged that the Respondents collectively raised more than \$1.47 million from investors and received commissions exceeding \$87,000.00. None of the Respondents was registered with the Commission as a broker or associated with a registered broker-dealer during this time and the Division alleged the Respondents violated Section 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”) by effecting transactions as unregistered brokers.

7. On December 23, 2014, the Commission accepted Tomich’s settlement offer and issued an Order Making Findings and Imposing Remedial Sanctions and a Cease-And-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940 as to Mark S. “Mike” Tomich (the “Settled Order”)¹⁰ to which Tomich consented to without admitting or denying the findings, except as to jurisdiction and for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523. In the Settled Order, the Commission found that Tomich willfully violated Section 15(a) of the Exchange Act. The Commission ordered Tomich to pay

⁹ Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940 (Exchange Act Rel. No. 73226 (Sept. 25, 2014)).

¹⁰ Exchange Act Rel. No. 73925 (Dec. 23, 2014).

disgorgement of \$48,327.00, prejudgment interest of \$2,976.87, and a civil penalty of \$48,000.00.

8. By Initial Decisions filed on April 7, 2015 and August 4, 2015, respectively,¹¹ an Administrative Law Judge (“ALJ”) adjudicated the allegations against Meissner and Scott on motions for summary disposition filed by the Division. In both, the ALJ found the respondent willfully violated Section 15(a)(1) of the Exchange Act. The ALJ ordered Meissner to disgorge \$19,268.70, and Scott to disgorge \$26,297.84 and pay prejudgment interest of \$2,294.22, and a civil penalty of \$15,000.00. By orders issued on May 20, 2015 (“Meissner Finality Order”) and September 28, 2015 (“Scott Finality Order”), respectively, the Initial Decisions became final and effective.¹²

III. THE FAIR FUND

9. By Order dated December 9, 2016, the Commission appointed Damasco & Associates LLP, a certified public accounting firm, as Tax Administrator to administer tax-related obligations that funds collected in the Administrative Proceeding may incur as a Qualified Settlement Fund under the Department of the Treasury Regulation § 1.468B-1.¹³

10. By Order dated August 14, 2017, the Commission established a Fair Fund in the Administrative Proceeding pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, to distribute the funds paid by the Respondents to date and collected from the Respondents in the future.¹⁴

¹¹ Initial Decision Rel. Nos. 768 (Apr. 7, 2015) and 850 (Aug. 4, 2015), respectively.

¹² Exchange Act Rel. Nos. 75005 (May 20, 2015) and 76001 (Sept. 28, 2015), respectively.

¹³ Exchange Act Rel. No. 79522 (Dec. 9, 2016). Damasco & Associates LLP is now part of Miller Kaplan Arase LLP. See Notice of Name Change of Appointed Tax Administrator, Exchange Act Rel. No. 81064 (June 30, 2017).

¹⁴ Exchange Act Rel. No. 81385 (Aug. 14, 2017).

11. As of July 24, 2017, the Fair Fund holds approximately \$101,000 in disgorgement, prejudgment interest, and penalties paid by or collected from the Respondents, less administrative expenses and taxes. Tomich has paid \$99,303.87, satisfying his monetary obligations, and Meissner has paid \$5,041.35. Collection activities continue on the obligations imposed by the Meissner Finality Order and Scott Finality Order.

12. Catherine E. Pappas, a Senior Adviser in the Commission's Division of Enforcement, will act as the administrator of the Distribution Plan (the "Administrator"). As a Commission employee, the Administrator shall receive no compensation from the Distribution Fund for her services in administering the Distribution Plan. In accordance with Rule 1105(c) of the Rules, 17 C.F.R. § 201.1105(c), no bond is required because the Administrator is a Commission employee. The Administrator will, among other things, oversee the administration of the Plan and cooperate with the Tax Administrator in providing the information necessary to accomplish income tax compliance. In carrying out her duties, the Administrator may be assisted by other Commission staff acting under her supervision.

IV. JOINT DISTRIBUTION OF THE FAIR FUND AND CRIMINAL RESTITUTION FUND

13. In accordance with Rule 1102(a) of the Rules, 17 C.F.R. § 201.1102(a), the allegations in the Criminal Action arise from the same or substantially similar facts as those alleged in the Administrative Order. Both actions address the fraud perpetuated by Snisky through his bond offering – the Criminal Action directly against Snisky and the Administrative Proceeding against those through whom Snisky operated. The harm addressed and the investors harmed in both actions are substantially the same. The Division concludes that distributing funds paid in the Administrative Proceeding through the Criminal Action's restitution process is

fair and reasonable, and employs a more efficient use of resources to benefit investors harmed as a result of the Respondents' misconduct than would two separate distribution processes.

14. The Administrator will take necessary steps to transfer all funds currently in the Fair Fund, less any outstanding taxes and expenses, to the CRIS account established in the Criminal Action. Upon issuance of orders authorizing disbursements, the Administrator will take necessary steps to effect transfers of additional funds collected from Respondents, less any outstanding taxes and expenses, to the CRIS account established in the Criminal Action until collections cease for a period of six (6) months or more, or the Criminal Action is closed.

15. Upon completion of the final distribution to the CRIS account pursuant to paragraph 14, above, the Administrator shall make arrangements for the final payment of taxes and expenses. The Fair Fund shall be eligible for termination and the Administrator discharged after all of the following have occurred: (1) a final accounting, in a Commission standard accounting format, has been submitted by the Administrator for approval of, and has been approved by, the Commission; (2) all taxes and expenses have been paid; and (3) any amount remaining in the Fair Fund has been received by the Commission. When the Commission has approved the final accounting, the Commission staff shall seek an order from the Commission: (1) authorizing the transfer to the U.S. Treasury of any remaining funds in the Fair Fund and any funds returned to the Fair Fund in the future; (2) discharging the Administrator; (3) terminating the Fair Fund; and (4) directing the payment of any future collections to the U.S. Treasury.