INITIAL DECISION RELEASE NO. 768
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16175

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of KENNETH C. MEISSNER, JAMES DOUG SCOTT, and MARK S. "MIKE" TOMICH	INITIAL DECISION AS TO RESPONDENT KENNETH C. MEISSNER April 7, 2015

APPEARANCES: Leslie J. Hughes for the Division of Enforcement, Securities and Exchange Commission

Kenneth C. Meissner, *pro se*

BEFORE: Cameron Elliot, Administrative Law Judge

This Initial Decision: grants the Motion for Summary Disposition (Motion) filed by the Division of Enforcement (Division) as to Respondent Kenneth C. Meissner (Meissner); finds that he willfully violated Section 15(a)(1) of the Securities Exchange Act of 1934 (Exchange Act); orders him to cease and desist from violating Exchange Act Section 15(a)(1); permanently bars him from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization, and registered investment company, and from participating in an offering of penny stock; prohibits him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or a principal underwriter for, a registered investment company, or affiliated person of such investment adviser, depositor, or principal underwriter; and orders him to disgorge $19,268.70.

Procedural Background

The Securities and Exchange Commission (Commission) commenced this proceeding on September 25, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act). The OIP alleges, in summary, that between 2011 and 2013, Meissner directly and indirectly sold membership interests in Arete, LLC (Arete), among other investments, and willfully acted as an unregistered broker in violation of Section 15(a) of the Exchange Act. OIP at 1-2.

Meissner filed his Answer (Meissner Answer) on November 13, 2014, in the form of the first four pages of a larger filing. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2041, 2014 SEC LEXIS 4434, at *2 (Nov. 21, 2014). At a prehearing conference held on November 3, 2014, the Division confirmed that it had made the investigative file available to the Respondents. *See* Nov. 3, 2014 Tr. at 5.

On November 20, 2014, I held a telephonic settlement conference attended by Division counsel and Meissner, which involved an extensive discussion of Meissner's financial status. *See Kenneth C. Meissner*, 2014 SEC LEXIS 4434. Meissner had previously filed a Statement of Financial Condition (Statement), executed under oath and notarized on November 6, 2014, to which were attached various account statements. *Id.*

On January 30, 2015, the Division filed its Motion, to which were attached the Kerry Matticks Declaration (Matticks Decl.) and fifty-two exhibits (Exs. 1-52). Meissner did not timely file an opposition, and on March 2, 2015, the Division filed a reply brief, to which was attached one exhibit (Ex. 53).

On March 3, 2015, I issued an order finding that there was no genuine issue of material fact regarding Meissner's liability or "most issues pertinent to sanctions." *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2376, 2015 SEC LEXIS 791, at *5 . The only genuinely disputed issue was whether Meissner was unable to pay a monetary sanction. *Id.* at *6. On March 4, 2015, Meissner submitted a letter which I construed as his (untimely) opposition brief, and which was substantively indistinguishable from his Answer, and I gave the Division the opportunity to file a second reply brief. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2387, 2015 SEC LEXIS 874 (Mar. 9, 2015). The Division filed its second Reply brief (Second Reply) on March 30, 2015, to which were attached the Kerry Matticks' Second Declaration (Matticks Second Decl.) and six exhibits (Exs. 54-59).

Summary Disposition Standard

After a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. *See* 17 C.F.R. § 201.250(a). A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014). However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing. *See id.* Thus, summary disposition may be appropriate in non-follow-on proceedings, and indeed, even in proceedings alleging anti-fraud violations. *E.g., S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *9 (Dec. 5, 2014); *Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 WL 896757, at *7-8 (Mar. 7, 2014); *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013).

Meissner's Answer has been taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, and by facts officially noticed pursuant to Rule 323. *See* 17 C.F.R. § 201.250(a). Meissner made numerous admissions in the investigative testimony he gave on November 14, 2013. Ex. 2; *see Wheat, First Sec., Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *12 (Aug. 20, 2003) (sworn testimony may contain admissions within the meaning of Rule 17 C.F.R. § 201.250(a)). Meissner also made admissions in certain exhibits, in the form of, for instance, his own statement, the statement of his agent, or a statement that he agreed is true. *See Wheat, First Sec., Inc.*, 2003 WL 21990950, at *12 & n.55 (citing Federal Rule of Evidence 801(d)(2)). There are no stipulations, and Meissner, by his silence, does not contest the declarations in the record, which are equivalent to affidavits. *See Allen v. Potter*, 152 F. App'x 379, 382 (5th Cir. 2005). I have taken official notice of NASD's August 2000 associational bar against Meissner, to which he consented without admitting or denying the charges, and of the U.S. District Court documents in the record. Exs. 11, 53; *see* 17 C.F.R. § 201.323; *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at *1 n.1, *3 n.12 (Apr. 17, 2014) (official notice may be taken of public records of discipline by FINRA, NASD's successor).

The parties' filings and all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

Findings of Fact

A. Gary Snisky and Arete

Gary Snisky (Snisky) founded Arete, which purported to be a private equity firm offering investment opportunities in bonds, futures trading, and other offerings, in Longmont, Colorado, in 2011. Ex. 53 at 7-8. Richard Greeott (Greeott) performed information technology services for Arete, which included work on a trading algorithm that was never operational. *Id.* at 8.

Between approximately July 2011 and January 2013, Snisky offered investors, potential investors, and financial advisors the purported opportunity to invest money in Arete's so-called "proprietary value model," which he claimed was based on using investor money to purchase Ginnie Mae bonds.[1] Ex. 53 at 11. Snisky falsely described this model as safe, because Ginnie Mae bonds were backed by the full faith and credit of the United States; in fact, he never purchased any Ginnie Mae bonds. *Id.* By April 2012, Snisky was offering two programs: a five-year program, which promised an annual return of six percent; and a ten-year program, which promised a ten percent upfront bonus and an annual return of seven percent. *Id.*

[1] Bonds issued by the Government National Mortgage Association are referred to as "Ginnie Maes" or "agency bonds." *E.g.*, Div. Ex. 15 at 1.

When Snisky met with investors, potential investors, and financial advisers, he falsely described himself as an "institutional trader" who was "on Bloomberg," and who had access to lucrative opportunities not afforded to ordinary investors. Ex. 53 at 11-12. In fact, he was not an institutional trader and never used his Bloomberg terminal to trade anything. *Id.* at 12. Snisky also falsely told investors, potential investors, and financial advisers that he could make additional money for Arete through an "overnight lending program," which paid interest on bank-to-bank overnight loans. *Id.* In fact, Snisky did not participate in the overnight lending program and did not have the ability to do so. *Id.*

Between approximately August 2011 and January 2013, Snisky received approximately $4.2 million in investor money that was supposed to be invested in Ginnie Mae bonds. Ex. 53 at 12. Snisky did not use any of this money to purchase Ginnie Mae bonds. *Id.*

B. Meissner's Background and Recruitment

Meissner is seventy-four years old, lives in Texas, and specializes in "presenting" fixed income products to clients at or near retirement age. Meissner Answer at 1, 3. He denies selling securities, but admits that he "present[s]" life insurance, annuities, and in-force structured annuities to his clients. *Id.* at 3. He "stay[s] abreast" of the financial markets and of other associates in financial services "for the most recent competitive products to safely increase income" for his clients. *Id.* He has always avoided selling securities because he is not "security licensed." *Id.* He possessed a Series 7 license until 2000, when the children of a former client filed an action against him. Ex. 2 at 32, 34-35. In connection with that action, and as a sanction for failure to notify his firm that he participated in a private securities transaction, he consented to a bar from association with any NASD member firm in any capacity. *Id.*; Ex. 11. Meissner has been sued by clients multiple times. Ex. 10 at 7; *see also* Ex. 2 at 18-31.

Meissner has between 150 and 200 clients to whom he has sold insurance and annuities. Ex. 2 at 42, 47. Meissner met Respondent James Doug Scott (Scott) about ten years before he gave his investigative testimony. *Id.* at 54. Scott was employed by Summit Trust, and Meissner contacted Summit Trust for a client who was interested in setting up a trust for estate planning purposes. *Id.* Although Meissner ended up not doing business with Scott at that time, they kept in touch because Meissner tried to stay up to date on new products. *Id.* at 55. Meissner believed that Scott operated a company called Cromarty. *Id.* at 53, 57.

Bill Sparkman (Sparkman) "recruited" Meissner and informed him about Arete and its "platform of Ginnie Mae investments." Meissner Answer at 3. Sparkman had "looked into" Arete and visited Snisky in Colorado, and Sparkman told Meissner that Arete looked like a good investment. Ex. 2 at 59-61. At the time Summit Trust was the trustee and custodian of the "Summit Managed Account (SMA) offering Asset Management Services responsible" for Arete, and Sparkman referred Meissner to Scott. Meissner Answer at 3; Ex. 2 at 60. Scott explained that Arete "was a Ginnie Mae type investment," and that Scott felt comfortable with it, and "probably" mentioned that "Ginnie Mae's could – could offer an opportunity of 6 – a 6 percent rate of return." Ex. 2 at 62-63. Meissner assumed that Summit Trust had done some due diligence on Arete, and he felt that Summit Trust's involvement added credibility to Arete. *Id.* at 62; Meissner Answer at 3. In early March 2012, Snisky emailed Meissner "the platform," and

Meissner, Scott, and Snisky then had a conference call to discuss it. Ex. 2 at 82-83. Meissner ultimately had numerous conference calls with Snisky and Scott, among others. Meissner Answer at 3. During one such conference call Meissner reviewed screenshots he had received from Snisky on March 1, 2012. Ex. 24.

Eventually, Meissner told Scott that he wanted to visit Arete and talk to Snisky. Ex. 2 at 60, 62. Scott scheduled a March 2012 flight to Colorado for Meissner, which was paid for by Meissner. *Id.* at 62. Meissner met with Snisky, Greeott, Scott, and two other men over a two day period at Arete's offices in Longmont. Ex. 2 at 64, 67; Meissner Answer at 3. Meissner learned about "how this all work[ed]," including looking at screenshots of Ginnie Mae products on Bloomberg terminals. Ex. 2 at 67, 69-70; Meissner Answer at 3. Snisky told Meissner that he was a "Bloomberg authorized person," which allowed him to participate in an "overnight banking" lending rate, which made him able to earn an even larger return on the six percent paid by Ginnie Mae. Ex. 2 at 65, 71-72, 102-03. Meissner understood that Meissner's fee would come out of the return on the overnight lending rate. *Id.* at 72. Snisky said that investors would receive a 5.68% return, and that Snisky would make up the difference at the end of twelve months, so as to make the investors' return six or seven percent overall. *Id.* at 73, 104. Snisky said that if investors committed to a ten year investment, he could "give a 10 percent bonus on the front end, because of the holding period." *Id.* at 73-74.

Meissner understood that investor money would go from Summit Trust to Snisky, and Snisky would then buy "agency bonds," although he was not surprised that no bonds were actually purchased, because the program shut down only about three months after Meissner got involved. Ex. 2 at 89-90. Meissner understood that Snisky would receive a one percent fee. *Id.* at 88, 95; Ex. 5 at 2. Meissner was "vehemently" told not to solicit or advertise. Ex. 2 at 81-82. He understood that investors' money would go to an account with Summit Trust, and accumulated to buy tranches of Ginnie Mae bonds. *Id.* at 75-77. Summit would then charge an administrative fee and issue statements. *Id.* at 77. Meissner met Snisky's wife, and felt strongly that Snisky was being truthful. *Id.* at 78.

Meissner reviewed the "Reg D filing" associated with Arete. Ex. 2 at 75-76. Snisky sent him a private placement document (PPM) later, which Meissner passed on to investors if they asked about it. *Id.* at 79-80, 98. The information Meissner gave investors was the same information he received from Snisky. *Id.* at 81. He performed other due diligence, including research on Ginnie Mae, "REG D offerings," the "Security Act of [1933]," "publications 504, 505, and 506," and accredited investors under the Securities Act. Meissner Answer at 3-4. He claimed he was assured that "[Arete] was not a Security, which was accepted by the [Commission] of Denver, Colorado." *Id.* at 3.

C. Meissner's Sales

Meissner admits that he "sold a total of four (4) Ginnie Mae Investments to Accredited Investors." Meissner Answer at 4 (emphasis omitted). He denies that he advertised or directly and regularly solicited current and prospective insurance clients for investments in Arete. *Id.* Meissner testified he did not "solicit" anyone for Arete because he only dealt with people he knew, including current clients. Ex. 2 at 38. One of the persons who purchased Arete was a

friend of Meissner, who had not previously been Meissner's client. *Id.* at 39. Meissner was told not to discuss Arete, but to instead tell people that if they were interested in an attractive fixed return, Meissner would "get some information" for them. *Id.* Meissner claimed he "never mentioned Arete, actually." *Id.*

One of Meissner's clients was Jack Chadwick (Chadwick). Ex. 2 at 92; Ex. 5 at 6. Meissner filled out Chadwick's Arete application in Chadwick's presence. Ex. 2 at 92. Chadwick reviewed the PPM, and Meissner went over it with him. *Id.* at 98, 106-07. The PPM stated that Arete was "a like-kind annuity but is not an annuity," which Meissner claimed was his understanding. *Id.* at 99; Ex. 5 at 8. Another client was Eleanor Weems (Weems). Ex. 2 at 106. Meissner went over the application with Weems and her daughter, similar to the way he went over Chadwick's application, and answered the daughter's questions. *Id.* at 106-07; Ex. 6. Mary Hall (Hall) was another client, who invested her IRA in Arete. Ex. 2 at 108; Ex. 7. Although Hall's application references another of Snisky's investment vehicles, Meissner believed all his clients invested in Arete. Ex. 2 at 108-09; Ex. 7. Snisky sent the Hall application to Meissner. Ex. 2 at 109. Meissner filled out Hall's application for her, and discussed it with her and her husband. *Id.* at 110. Another customer was Mark Hart (Hart). *Id.* at 110, 116. Meissner told Scott about Hart's investment by email on June 25, 2012. Ex. 37.

Meissner went over the Arete PPM with his clients. *E.g.*, Ex. 5; Ex. 2 at 80, 92. He physically handed the PPM to his clients, and after it was executed, he forwarded it to Summit Trust, along with each investor's check "and all that you had to have." Ex. 2 at 117-18. Meissner filled out all of his clients' applications for Summit Trust, but had them review the applications to make sure they were correct. *Id.* at 120-21. To Meissner's knowledge, none of his clients received anything directly from Arete. *Id.* at 131-32. Meissner believed that all four clients qualified as accredited investors. *Id.* at 112, 114. Meissner found mistakes in the PPM, and he pointed these out to Snisky. *Id.* at 80-81.

Meissner has not spoken to Snisky since before January 2013. Ex. 2 at 135. None of his clients have had their money returned. *Id.* at 134. None of Meissner's clients asked him his commission rate, and he "probably" did not tell them. *Id.* at 124. He raised over $355,000 from investors and was paid, via Cromarty, Scott's company, a commission of approximately five percent for each sale. *Id.* at 124-27; Matticks Decl. at 4. Meissner does not dispute that Scott paid him $17,737, and that prejudgment interest on that amount, up to March 31, 2015, is $1,531.70. Matticks Decl. at 5-7.

Discussion

A. Section 15(a)(1)

Section 15(a)(1) of the Exchange Act makes it illegal for a broker 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 such broker is registered with the Commission or associated with a registered entity. 15 U.S.C. § 78*o*(a)(1). Section 3(a)(4) 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). Scienter is not

required to prove a violation of Exchange Act Section 15(a)(1). *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

The activities of a broker are characterized by "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976). Actions indicating that a person is "effecting" securities transactions include: soliciting investors; providing either advice or a valuation as to the merit of an investment; actively finding investors; handling customer funds and securities; and participating in the order-taking or order-routing process. *See Martino*, 255 F. Supp. 2d at 283; *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); *SEC v Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010). Other factors include the dollar amount of securities sold and the extent to which advertisements and investor solicitation were used. *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). Transaction-based compensation, in particular, is strongly indicative of brokering. *Kramer*, 778 F. Supp. 2d at 1334. Transaction-based compensation means "compensation tied to the successful completion of a securities transaction." *Order Exempting the Fed. Reserve Bank of NY, Maiden Lane LLC and the Maiden Lane Commercial Mortg. Backed Sec. Trust 2008-1 from Broker-Dealer Registration*, Exchange Act Release No. 61884, 2010 WL 1419216, at *2 (Apr. 9, 2010). "Compensation based on transactions in securities can induce high pressure sales tactics and other problems of investor protection," which necessitate broker registration under the Exchange Act. *Pers. Deemed Not To Be Brokers*, Exchange Act Release No. 22172, 1985 WL 634795, at *4 (June 27, 1985).

It is undisputed that Meissner was not registered as a broker-dealer or associated with a registered broker-dealer at any relevant time. Nor does he dispute that he traveled to Colorado from Texas, used email to communicate, and caused or facilitated the transfer of funds across state lines, all in aid of investments in Arete. The Arete interests plainly purported to be investment contracts, and therefore securities. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 301 (1946) (defining an investment contract as a contract, transaction, or scheme involving: 1) an investment of money; 2) in a common enterprise; 3) with a reasonable expectation of profits to be derived solely from the efforts of others); *Johnny Clifton*, Securities Act of 1933 (Securities Act) Release No. 9417, 2013 SEC LEXIS 2022, at *32 & n.55 (July 12, 2013). Indeed, the only disputed issue, for liability purposes, is whether he acted as a broker. *See* Meissner Answer at 3-4.

Meissner's dispute is not genuine, however. To be sure, there is no evidence of advertising and the dollar amounts are relatively low. But he participated in the order-taking and order-routing process by submitting orders to Summit Trust, which he knew were forwarded to Snisky. He actively found and solicited investors by informing his current clients and friends about Arete, and handled customer funds and applications. He disseminated the Arete PPM to clients and sent their investment funds to Summit Trust. But most significantly, he received transaction-based compensation for selling securities – "one of the hallmarks of broker status." *Landegger v. Cohen*, No. 11-cv-01760-WJM-CBS, 2013 WL 5444052, at *5 (D. Colo. Sept. 30, 2013). Meissner's protestations that he did not act as a broker are nothing more than bare denials, and in view of his many specific admissions they do not establish a genuine issue of

material fact. *See* Meissner Answer at 3-4; *Jay T. Comeaux*, 2014 WL 4160054, at *2 (a party opposing summary disposition "may not rely on bare allegations or denials").

In short, the evidence that may be considered under Rule 250(a) establishes that there is no genuine issue of material fact, and Meissner violated Section 15(a)(1).

B. Sanctions

The Division requests a cease-and-desist order, disgorgement, a second-tier civil penalty of $75,000, and a full associational bar, including a penny stock bar and an investment company bar. Motion at 24-34; Second Reply at 16.

1. Willfulness and the Public Interest

Some of the requested sanctions are only appropriate if Meissner's violations were willful. *See* 15 U.S.C. §§ 78*o*(b)(4)(D), (6)(A)(i), 78u-2(a)(1)(A), 80a-9(b)(2), (d)(1)(A)(i). A finding of willfulness does not require intent to violate the law, but merely intent to do the act which constitutes a violation of the law. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976). Meissner's actions were unquestionably willful because he affirmatively acted as a broker by, for example, submitting orders, finding investors, and handling investor funds.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (*Steadman* factors). *See Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). Other factors the Commission has considered include the age of the violation (*Marshall E. Melton*, 56 S.E.C. 695, 698 (2003)), the degree of harm to investors and the marketplace resulting from the violation (*id.*), the extent to which the sanction will have a deterrent effect (*see Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 & n.46 (2006)), whether there is a reasonable likelihood of violations in the future (*KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185 (2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002)), and the combination of sanctions against the respondent (*id.* at 1192). *See also WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *KPMG Peat Marwick LLP*, 54 S.E.C. at 1192; *see Gary M. Kornman*, 2009 SEC LEXIS 367, at *22.

Meissner committed multiple violations in 2012, involving at least four clients and multiple distinct violative acts of brokering; the violations were plainly recurrent. Although his customers lost a considerable amount of money – Meissner alone raised over $355,000 from investors, that Snisky never repaid – his own ill-gotten gains were relatively small, and his violations were based on strict liability; the egregiousness of the violations was neither great nor small. Matticks Decl. at 4. Meissner continues to sell insurance, and will continue to have the

same opportunities to sell securities as he did when he sold Arete; his occupation clearly presents opportunities for future violations. He has neither offered assurances against future violations nor recognized the wrongful nature of his conduct, and sold securities while subject to a bar from association with a NASD/FINRA member firm, which suggests a likelihood of violations in the future. The violations are relatively recent, there is considerable evidence of harm to investors directly resulting from the violations, and any sanction will have a considerable deterrent effect.

As to his state of mind, Meissner concedes that he formerly held a Series 7 license, that he researched Reg D and investor accreditation as part of his due diligence on Arete, and that he read, and suggested changes to, the PPM. The PPM clearly stated that the Arete interests were "Securities" and were used to purchase "Agency Bonds." *E.g.*, Ex. 5 at 1, 3. The evidence demonstrates that Meissner was at best willfully blind to the nature of what he sold, that is, that he must have known that he was selling securities. *See John P. Flannery*, Securities Act Release No. 9689, 2014 WL 7145625, at *10 n.24 (Dec. 15, 2014) (defining "extreme recklessness" in the context of securities fraud as including highly unreasonable conduct where the danger of a violation was so obvious that the respondent must have known of it). As with his brokering, Meissner's protestations to the contrary are nothing more than bare denials. *See* Meissner Answer at 3-4; *Jay T. Comeaux*, 2014 WL 4160054, at *2. Accordingly, Meissner acted in reckless disregard of a regulatory requirement; although not technically scienter, his state of mind was sufficiently culpable that it weighs in favor of a heavy sanction.

Thus, every public interest factor except egregiousness weighs in favor of a heavy sanction.

2. Cease-and-Desist

Exchange Act Section 21C authorizes the Commission to impose cease-and-desist orders for violations of that Act. *See* 15 U.S.C. §§ 78u-3(a). The Commission requires some likelihood of future violation before imposing such an order. *KPMG Peat Marwick LLP*, 54 S.E.C. at 1185. However, "a finding of [a past] violation raises a sufficient risk of future violation," because "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease-and-desist." *Id.*

The relevant factors (except egregiousness) all weigh in favor of a cease-and-desist order, and three of them are particularly significant: (1) the recurrent nature of Meissner's violations; (2) his commission of the violations while subject to an associational bar; and (3) his utter lack of recognition of the wrongful nature of his conduct. The incremental prejudice to Meissner arising from a cease-and-desist order, compared to the other sanctions, is minimal. A cease-and-desist order will therefore be imposed.

3. Disgorgement

Disgorgement is authorized in this case by Exchange Act Sections 21B(e) and 21C(e) and Investment Company Act Section 9(e). *See* 15 U.S.C. §§ 78u-2(e), 78u-3(e), 80a-9(e). Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *See SEC v. First City Fin. Corp.*, 890 F.2d

1215, 1230-32 (D.C. Cir. 1989). The amount of the disgorgement need only be a reasonable approximation of profits causally connected to the violation. *See Laurie Jones Canady*, 54 S.E.C. 65, 84 n.35 (1999) (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to Respondent to demonstrate that the Division's disgorgement figure is not a reasonable approximation. *Guy P. Riordan*, Securities Act Release No. 9085, 2009 WL 4731397, at *20 (Dec. 11, 2009), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). The standard for disgorgement is but-for causation and has nothing to do with the public interest; in essence, disgorgement is always in the public interest. *Jay T. Comeaux*, 2014 WL 4160054, at *3 & n.18, *5. The combination of sanctions also does not affect disgorgement. *Id.* at *4 n.32.

Meissner's ill-gotten gains are, practically speaking, liquidated: $17,737. Matticks Decl. at 5-6. The same is true for prejudgment interest up to March 31, 2015: $1,531.70. *Id.* at 6-7 Accordingly, Meissner is presumptively liable for disgorgement and prejudgment interest of $19,268.70.

4. Civil Penalties

Under Section 21B(a)(1) of the Exchange Act and Section 9(d)(1) of the Investment Company Act, the Commission may impose a civil money penalty if a respondent willfully violated any provision of the Exchange Act, and if such penalty is in the public interest. 15 U.S.C. §§ 78u-2(a)(1), 80a-9(d)(1). Under Exchange Act Section 21B(a)(2), the Commission may impose a civil money penalty if a respondent violated any provision of the Exchange Act. 15 U.S.C. § 78u-2(a)(2). A three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. 15 U.S.C. §§ 78u-2(b), 80a-9(d)(2). Where a respondent's misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, the Commission may impose a "Second-Tier" penalty of up to $75,000 for each act or omission by an individual for violations occurring, as pertinent here, after March 3, 2009. 15 U.S.C. §§ 78u-2(b)(2), 80a-9(d)(2)(B); 17 C.F.R. §§ 201.1004, Subpt. E, Table 4.

The Division seeks a second-tier penalty. Motion at 31-32. The record supports such a penalty against Meissner, because he acted in deliberate disregard of a regulatory requirement. However, I decline to impose civil penalties because, as explained *infra*, Meissner lacks the financial means to pay them.

5. Associational Bar

Section 15(b) of the Exchange Act authorizes the Commission to bar or suspend a person from association with various segments of the securities industry, including participation in an offering of penny stock, for willful violations of the Exchange Act, if it is in the public interest. 15 U.S.C. § 78*o*(b)(4)(D), (b)(6)(A)(i). Section 9(b)(2) of the Investment Company Act authorizes the Commission to bar a person from association with a registered investment company for willful violations of the Exchange Act, if it is in the public interest. 15 U.S.C. §

80a-9(b)(2). As with a cease-and-desist order, the public interest factors weigh overall in favor of a permanent direct and collateral associational bar, and a penny stock bar.

6. Inability to Pay

Meissner asserts that he is unable to pay any monetary sanction, and has submitted a Statement of Financial Condition in support of his assertion. *See Kenneth C. Meissner*, 2014 SEC LEXIS 4434. In view of the additional evidence submitted by the Division in connection with its Second Reply – specifically, the analysis of Meissner's bank statements – the record shows that Meissner possesses the ability to pay disgorgement. Meissner apparently receives intermittent commissions from insurance sales, which have totaled a substantial amount over approximately the past three years, but which have been markedly reduced recently, especially since April 2013. *See generally* Ex. 57; Second Reply at 8. It is not clear that he will continue to receive such commissions in the future, or that any such commissions will be of any particular size. Nonetheless, his total income from all sources in the most recent twelve month period documented in the record, namely, November 2013 to October 2014, would seem to be sufficient to pay disgorgement and prejudgment interest of $19,268.70.

However, the record does not show that he has the ability to pay more than that. I have considered all of the Division's arguments on this point and I remain unpersuaded. For example, Meissner's error in calculating his total assets is immaterial. *See* Second Reply at 8. Meissner provided an explanation for omitting one life settlement contract as an asset in his November 2014 Statement of Financial Condition: "terminated could not pay premium." Statement at 1; *see* Second Reply at 9. The Division's evidence that Meissner purportedly undervalued his residence actually shows that he overvalued it; the "Est." value of his home is less than he claimed in his Statement of Financial Condition, and he clearly was unable to sell it at his initial asking price of $499,000, or even after reducing the asking price twice in four months. *See* Ex. 55; Second Reply at 9.

Under the totality of the record, and placing particular weight on his massive credit card debt, there is no genuine issue of material fact that Meissner is unable to pay a civil penalty. Accordingly, he will be ordered to disgorge his ill-gotten gains and prejudgment interest, but no civil penalty will be imposed.

Order

IT IS ORDERED, pursuant to Rule 250 of the Commission's Rules of Practice, that the Division of Enforcement's Motion for Summary Disposition is GRANTED.

It is FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that Respondent Kenneth C. Meissner shall CEASE AND DESIST from committing any violations or future violations of Sections 15(a)(1) of the Securities Exchange Act of 1934.

It is FURTHER ORDERED, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that Respondent Kenneth C. Meissner is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent,

or nationally recognized statistical rating organization, and is permanently BARRED from participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

It is FURTHER ORDERED, pursuant to Section 9(b) of the Investment Company Act of 1940, that Respondent Kenneth C. Meissner is permanently PROHIBITED from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company, or affiliated person of such investment adviser, depositor, or principal underwriter.

It is FURTHER ORDERED, pursuant to Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, and Section 9(e) of the Investment Company Act of 1940, that Respondent Kenneth C. Meissner shall DISGORGE $19,268.70.

Payment of disgorgement and prejudgment interest shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission.

Any payment by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order shall include a cover letter identifying the Respondent and Administrative Proceeding No. 3-16175, and shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge