INITIAL DECISION RELEASE NO. 780
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16369

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

In the Matter of ARETE LTD.	INITIAL DECISION ON DEFAULT April 27, 2015

APPEARANCE: Polly Atkinson for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

On February 4, 2015, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist proceedings (OIP), pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), against Arete Ltd. (Arete). Arete was personally served with the OIP through its registered agent on February 11, 2015. *See* 17 C.F.R. § 201.141(a)(2)(ii). Arete's Answer was due by March 3, 2015. *See* OIP at 4; 17 C.F.R. § 201.220(a)-(b).

On March 18, 2015, at my request, the Division of Enforcement (Division) filed a Motion for Summary Disposition and Default Judgment (Motion) specifically explaining how, in the event Arete did not file an Answer, the sanctions requested were in accord with the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140, *aff'd on other grounds*, 450 U.S. 91 (1981). *See* Prehr'g Tr. 4. I take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of the following exhibits attached to the Motion: an excerpted copy of Arete's original Form ADV filed November 27, 2012 (Arete Form ADV); an excerpt of Arete's Form ADV amendment filed July 26, 2013 (Arete July 26, 2013, Form ADV); an excerpt of Arete's Form ADV amendment filed August 2, 2013 (Arete August 2, 2013, Form ADV); an excerpt of Arete's Form ADV amendment filed October 2, 2013 (Arete October 2, 2013, Form ADV); the complaint in *Joseph v. Snisky* (*Snisky*), No. 2013CV30947 (Colo. Dist. Ct. Feb. 28, 2013) (*Snisky* Complaint); the indictment in *United States v. Snisky*, No. 13-cr-00473-RM (D. Colo. Nov. 19, 2013); and the order of permanent injunction in *Snisky*, filed December 30, 2013 (*Snisky* Permanent Injunction).

Arete is in default because it has not filed an Answer, did not participate in the telephonic prehearing conference on February 26, 2015, and has not otherwise defended the proceeding. *See* OIP at 4; 17 C.F.R. §§ 201.155(a), .220(f), .221(f). I find the facts alleged in the OIP to be true. *See* C.F.R. § 201.155(a).

Findings of Fact

In September 2012, Arete d/b/a Sky Peak Capital Management, was formed as a Wyoming limited liability company. OIP at 1-2. Arete's principal office and place of business is in Irvine, California.[1] *Id.* at 1. Arete stopped conducting business in late 2013, and its last filing with the Commission was on October 2, 2013. *Id.* at 2.

On November 27, 2012, Arete filed an initial Form ADV and based its registration with the Commission on having its purported principal office and place of business in Cheyenne, Wyoming. OIP at 2; Arete Form ADV, Part 1A, Items 1F and 2A. In amendments to its Form ADV filed with the Commission on July 26, 2013, August 2, 2013, and October 2, 2013, Arete repeated representations that its principal office and place of business was in Wyoming. OIP at 2; Arete July 26, 2013, Form ADV; Arete August 2, 2013, Form ADV; Arete October 2, 2013, Form ADV. Arete never maintained a principal office and place of business in Wyoming. Instead, its principal office and place of business was located in Irvine, California. OIP at 1.

Arete's initial Form ADV and July 26, 2013, amendment listed Gary Snisky (Snisky) as its president and chief compliance officer (CCO). *See* Arete Form ADV; Arete July 26, 2013, Form ADV. An August 2, 2013, amendment replaced Snisky's name with Brenda Ridley's (Ridley) as Arete's CCO. *See* Arete August 2, 2013, Form ADV. Ridley was also listed as Arete's CCO on its October 2, 2013, Form ADV amendment. *See* Arete October 2, 2013, Form ADV.

On February 28, 2013, the Securities Commissioner for the State of Colorado filed a complaint in the District Court for the City and County of Denver against Snisky, Ridley, and others, for carrying out a scheme to defraud investors through the use of investments in a so-called "private equity fund." OIP at 2; *Snisky* Complaint. Snisky and Ridley were charged with violating Section 11-51-301, C.R.S., for the offer or sale of unregistered securities; Section 11-51-401, C.R.S., for acting as or employing unlicensed sales representatives; Section 11-51-501(1), C.R.S., for securities fraud, and Snisky was charged with violating Section 11-51-501(5), C.R.S., for investment adviser fraud. OIP at 2; *Snisky* Complaint. On December 9, 2013, Ridley entered into a stipulation, on a neither admit nor deny basis, for an order of permanent injunction and other relief in connection with that case. OIP at 2; Stip., *Snisky* (Dec. 9, 2013). On December 30, 2013, an order was entered granting the permanent injunction based on the violations alleged in the complaint. OIP at 2; *Snisky* Permanent Injunction.

Arete did not amend its Form ADV to disclose the legal actions and orders entered against Snisky or Ridley, and it has not filed a Form ADV-W required for an investment adviser to withdraw its Commission registration. OIP at 2; Arete Form ADV and amendments.

[1] Advisers Act Rule 222-1(b) states that the investment adviser's principal office and place of business means the executive office from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the investment adviser's activities. 17 C.F.R. § 275.222-1(b).

Legal Conclusions

The OIP alleges that Arete willfully violated Sections 203A, 204(a), and 207 of the Advisers Act and Advisers Act Rules 204-1(a)(1) and 204-1(a)(2).

Advisers Act Sections 203 and 203A

Advisers Act Section 203 generally requires investment advisers to register with the Commission, unless they are specifically prohibited from doing so.[2] 15 U.S.C. § 80b-3. Advisers Act Section 203A prohibits an investment adviser required to be regulated by a state in which it has its principal office and principal place of business from registering with the Commission under Section 203, unless it has assets under management above $100 million. 15 U.S.C. § 80b-3A. Wyoming does not regulate investment advisers, and thus an investment adviser with a principal office and principal place of business in Wyoming is required to register with the Commission, regardless of the amount of the adviser's assets under management. *See* Form ADV, Part 1A, Item 2.

Arete willfully violated Section 203A of the Advisers Act. Arete improperly registered as an investment adviser with the Commission, in violation of Advisers Act Section 203A, because it did not have a principal office or place of business in Wyoming and it had no other basis for Commission registration. Arete was subject to regulation by the State of California because its operations were conducted out of California and it did not have sufficient assets under management to require Commission registration.

Advisers Act Section 207

Advisers Act Section 207 makes it unlawful for any person to willfully make any untrue statement of material fact in any Form ADV, or to willfully omit in the Form ADV a material fact required to be included.[3] 15 U.S.C. § 80b-7. The Commission has held that the "Form ADV and its amendments embody 'a basic and vital part in our administration of the [Advisers] Act, and it is essential in the public interest that the information required by the application form be supplied completely and accurately.'" *Montford and Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *68 (May 2, 2014) (quoting *Justin Federman Stone*, Advisers Act Release No. 153, 1963 WL 63687, at *5 (Nov. 26, 1963)); *see SEC v. Moran*, 922 F. Supp. 867, 899-900 (Apr. 2, 1996) (agreeing with the quoted language from *Justin Federman Stone* and finding misrepresentations in the Form ADV material because, it reasoned, the Form ADV "furthers the interest of public disclosure, informed decision making, and allows the SEC to

[2] Form ADV, Part 1A, Item 2 requires disclosure of the specific category under which the adviser is registering.

[3] "Willful" means intentionally committing the act that constitutes the violation. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). There is no requirement that a person be aware that he is violating a statute or regulation. *Id.*

monitor securities transactions in order to fulfill the legislative mandate behind the establishment of the securities acts at issue.").

Arete willfully violated Advisers Act Section 207 by misrepresenting the location of its principal office and place of business in its initial Form ADV and in each of its Form ADV amendments. These misrepresentations were material because they made it appear that Arete was properly registered with, and subject to regulatory oversight by, the Commission.

Advisers Act Section 204(a) and Rules 204-1(a)(1) and 204(a)(2)

Advisers Act Section 204(a) requires investment advisers to make and disseminate reports as the Commission, by rule, may prescribe, and Rules 204-1(a)(1) and 204-1(a)(2) require advisers to update their Forms ADV at least annually, within ninety days of the end of the adviser's fiscal year, and more frequently, if required by the instructions to Form ADV. 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-1(a)(1)-(2).

The instructions require an investment adviser to amend its Form ADV if any information provided in Part 1A, Item 11 or Part 2A becomes materially inaccurate. *See* Form ADV, Part 1A, General Instruction No. 4 (requiring "prompt[]" amendment if Part 1A, Item 11 "becomes inaccurate in any way"); Form ADV, Part 2, General Instruction No. 4, Instructions for Preparing Your Form Brochure. Form ADV, Part 1A, Item 11 requires disclosure of all disciplinary history, including any orders by a state court finding violation of investment-related statutes or regulations by the adviser or advisory affiliate or orders enjoining the adviser or advisory affiliate from violations of investment-related statutes or regulations.[4] Also required for disclosure is the pendency of any domestic court action that could find the adviser or an advisory affiliate in violation of investment-related statutes or regulations and could enjoin the adviser or advisory affiliate from future violations of investment-related statutes or regulations. *Id.* Instructions to Part 2A require full disclosure of all material facts and require amendments in the case of an event responsive to Item 9 of Part 2A. Form ADV, Part 2, Item 9. Item 9 requires disclosure of any finding that the adviser or a management person of the adviser was involved in a violation of an investment-related statute or regulation, or the adviser or management person was the subject of an order, judgment, or decree permanently or temporarily enjoining the firm or management person from engaging in any investment-related activity, or from violating an investment-related statute, rule, or order.[5] *Id.*

The *Snisky* Complaint, filed on February 28, 2013, falls within the requirements for disclosure in Part 1A, Item 11 of Form ADV, as it made both Snisky and Ridley subject to

[4] The term "advisory affiliate" includes all of the adviser's current employees; all of the adviser's officers, partners, or directors; and all persons directly or indirectly controlling the adviser or controlled by the adviser. Form ADV, Part 1A, Item 11.

[5] Form ADV defines a management person as anyone with the power to exercise, directly or indirectly, a controlling influence over the firm's management or policies, or to determine the general investment advice given to clients of the firm. Form ADV Glossary. The Form ADV states that management persons generally include the firm's principal executive officers, including the chief executive officer, chief financial officer, and chief compliance officer. *Id.*

possible findings of violations of investment-related statutes under Colorado law and the possibility of injunctions from violating those statutes. Item 11 required prompt disclosure. At a minimum, Arete should have disclosed the complaint in the July 26, 2013, August 2, 2013, and October 2, 2013, Form ADV amendments.

The December 30, 2013, *Snisky* Permanent Injunction against Ridley also falls within the scope of required disclosures under Part 1A, Item 11, because it enjoins her from future violations of investment-related statutes. It should have been disclosed promptly, or at least in the annual Form ADV report required to be filed within ninety days of Arete's fiscal year end that Arete failed to file. The *Snisky* Permanent Injuction against Ridley was also required to be disclosed pursuant to Part 2A, Item 9, as it enjoined her from violating an investment-related statute. It also should have been disclosed promptly, or at least in Arete's annual Form ADV, due within ninety days of December 31, 2013, which Arete never filed.

Even if the *Snisky* proceeding and the resulting order against Ridley were not among specifically enumerated events required to be disclosed in the Form ADV, they should have been disclosed because their existence was material to Arete's current and prospective clients. *See* Form ADV, Part 2, Item 9 ("Items 9.A, 9.B, and 9.C do not contain an exclusive list of material disciplinary events."); *see also Philip A. Lehman*, Securities Exchange Act of 1934 (Exchange Act) Release No. 54660, 2006 SEC LEXIS 2498, at *8 (Oct. 27, 2006) (disclosures of involvement in antifraud proceeding "were material because a reasonable investor would want to know about recent disciplinary history involving fraud of someone managing his or her investments") (internal footnotes omitted); *Michael Batterman*, Advisers Act Release No. 2334, 2004 SEC LEXIS 2855, at *7 (Dec. 3, 2004) (stating that the respondent's "disciplinary record . . . undoubtedly would have been material to an investor") (internal quotation marks and citations omitted).

Sanctions

Public Interest

Whether sanctions are in the public interest is guided by factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), which are: the egregiousness of the respondent's actions; the isolated or recurrent nature of the violations; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of its conduct; and opportunities for future violations (*Steadman* factors). The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *5 (July 25, 2003).

Arete's actions were egregious. It was ineligible for registration with the Commission, but by claiming it was a Wyoming-based investment adviser, it misled investors into believing that it was subject to Commission oversight. *See Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024, at *18 (July 11, 2013) (egregiousness displayed in "attempt to

grossly mislead regulators – and the public" by the "filing of inaccurate Forms ADV"). Arete's illegal actions spanned over at least two years, and, absent a Form ADV-W or revocation by the Commission, will continue indefinitely. The knowledge of Arete's executives who filed the false Form ADV and subsequent amendments is attributable to the investment adviser. *See Montford & Co.*, 2014 SEC LEXIS 1529, at *56.

By failing to respond and defend the proceeding, Arete forfeited the opportunity to address whether it has made any efforts to remedy its past violations, and provide assurances against future violations.

Revocation of Registration, Cease-and-Desist Order, and Civil Money Penalty

The Division seeks revocation of Arete's investment adviser registration, pursuant to Advisers Act Section 203(e); a cease-and-desist order, pursuant to Advisers Act Section 203(k); and a first-tier civil penalty for four violations,[6] pursuant to Advisers Act Section 203(i). Motion at 11-14; *see* 15 U.S.C. § 80b-3(e), (i), (k).

Applying the *Steadman* factors and considering the need to deter others from similar misconduct, it is in the public interest to revoke Arete's investment adviser registration, order it to cease and desist committing or causing any violations or future violations, and order it to pay a civil monetary penalty.

Arete's investment adviser registration should be revoked because it was never eligible to be registered with the Commission and is registered only because of material misrepresentations in its filings with the Commission. *See* 15 U.S.C. § 80b-3(e)(1). A cease-and-desist order is in the public interest because there is no acknowledgement of wrongdoing or indication that what occurred will not be repeated. *See KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *101, *114 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). Arete's failure to participate in the proceeding is an indication that it has no interest in the outcome.

Advisers Act Section 203(i)(1) authorizes a civil money penalty in a cease-and-desist proceeding if it is in the public interest and the person or entity has violated the Advisers Act. 15 U.S.C. § 80b-3(i)(1). Advisers Act Section 203(i)(2) establishes three tiers of civil money penalties. 15 U.S.C. § 80b-3(i)(2). The first tier can be applied where there is a violation of the statute; the second and third tier penalties require a showing of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and in addition, the third tier requires actual, or risk of, substantial losses or substantial pecuniary gain to the person committing the violation. *Id.*

Arete's violations involved blatant, self-serving, unacknowledged misrepresentations and omissions on a form submitted to a government agency and deliberate or reckless disregard of a

[6] The violations are the misrepresentations in Arete's initial Form ADV and the three subsequent amendments.

regulatory requirement. There is no evidence of actual or possible financial losses or financial gains. On these facts, a civil monetary penalty of $100,000 at the second tier for each of the four documented violations is the minimum that would serve the purpose of protecting the public.[7]

Order

I REVOKE the investment adviser registration of Arete Ltd., pursuant to Section 203(e) of the Investment Advisers Act of 1940;

I ORDER Arete Ltd. to CEASE AND DESIST from committing or causing any violations, or any future violations of Sections 203A, 204(a), and 207 and Rules 204-1(a)(1) and 204-1(a)(2) of the Investment Advisers Act of 1940, pursuant to Section 203(k) of the Investment Advisers Act of 1940; and

I FURTHER ORDER that Arete Ltd. pay a civil money penalty of $400,000, pursuant to Section 203(i) of the Investment Advisers Act of 1940.

Payment of the civil penalty 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. 3-16369, 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

[7] The violations occurred on November 27, 2012, July 26, 2013, August 2, 2013, and October 2, 2013. The maximum second tier penalty for an entity was $375,000 per occurrence between March 3, 2009, and March 5, 2013, and $400,000 per occurrence thereafter. 17 C.F.R. § 201.1004 & Table IV to Subpt. E (adjusting the statutory amounts for inflation), .1005 & Table V to Subpt. E (adjusting the statutory amounts for inflation).

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 a 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 a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to that party.

In addition, a respondent has the right to file a motion to set aside a default within a reasonable time, stating the reasons for the failure to appear or defend, and specifying the nature of the proposed defense. 17 C.F.R. § 201.155(b). The Commission can set aside a default at any time for good cause. *Id.*

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Brenda P. Murray
Chief Administrative Law Judge