INITIAL DECISION RELEASE NO. 850
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 JAMES DOUG SCOTT August 4, 2015

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

James Doug Scott, *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 James Doug Scott (Scott); finds that Scott 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; and orders him to pay disgorgement and prejudgment interest of $28,592.06 and a civil penalty of $15,000.

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, Scott 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.

Scott filed his Answer on November 19, 2014. At a prehearing conference held on November 3, 2014, the Division confirmed that it had made the investigative file available to the

Respondents.[1] *See Kenneth C. Meissner* (Nov. 3, 2014), transcript at 5. 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). Scott 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 Scott's liability, but that there were such issues regarding sanctions, and ordering Scott to show cause why he should not be found in default. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2376, 2015 SEC LEXIS 791, at *5-8. On March 6, 2015, I held a prehearing conference at which I found Scott had shown cause why he should not be found in default, and gave him until March 20, 2015, to file an opposition to the Motion. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2387, 2015 SEC LEXIS 874 (Mar. 9, 2015). Scott filed his opposition (Opp'n) on March 24, 2015, and the Division filed its second Reply brief (Second Reply) on March 30, 2015, to which was attached Kerry Matticks' Second Declaration (Matticks Second Decl.), attaching six exhibits (Exs. 54-59).

On April 7, 2015, I held a prehearing conference, at which I permitted Scott to file documents supporting his contention that he is unable to pay any monetary sanction. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2508, 2015 SEC LEXIS 1276 (Apr. 7, 2015). Scott filed a Statement of Financial Condition with supporting documents (Statement) on April 27, 2015, and on May 15, 2015, the Division filed a third Reply brief thereto (Third Reply), to which was attached Kerry Matticks' Third Declaration (Matticks Third Decl.), attaching nine exhibits (Exs. 60-68).

On May 22, 2015, I issued an order stating that "there remains one issue of material fact regarding [Scott's] state of mind, and therefore any appropriate sanction." *Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2716, 2015 SEC LEXIS 2075. On June 3, 2015, after a prehearing conference, I ordered a hearing to take place beginning July 9, 2015, in Philadelphia, Pennsylvania. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2765, 2015 SEC LEXIS 2234. However, on June 23, 2015, the Division and Scott notified this Office that they had agreed to "waive the hearing and proceed on the pleadings and evidence submitted with the Division's motion for summary disposition and Mr. Scott's responses." Joint Stipulation at 1. Accordingly, the hearing was canceled, and this proceeding will be resolved on the papers, including the Division's Brief on Sanctions (Sanctions Brief), filed July 10, 2015, and Scott's Response to the Brief on Sanctions and the State of Mind of James Doug Scott (Response), submitted July 24, 2015. *See Kenneth C. Meissner*, Admin. Proc. Rulings Release No. 2860, 2015 SEC LEXIS 2589 (June 24, 2015)

[1] Scott complains that the investigative file, contained on a thumb drive the Division sent him, was not searchable, such that he could find particular documents. Response at 4. But the Division is not required to provide a "roadmap" of the investigative file, and in any event Scott did not even request access to the investigative file until June 3, 2015. Prehearing Conference Tr. 28-29 (June 3, 2015); *see John Thomas Capital Mgmt. Grp. LLC*, Securities Act of 1933 Release No. 9492, 2013 SEC LEXIS 3860, at *26 (Dec. 6, 2013). Scott has accordingly suffered no undue prejudice in connection with the investigative file.

Legal Standard

Because the parties waived their right to a hearing, the parties' filings have been treated as a case stated. *See Jewelers Mut. Ins. Co. v. N. Barquet, Inc.*, 410 F.3d 2, 9 (1st Cir. 2005); *Kavanaugh v. City of Phoenix*, 25 Fed. Appx. 516, 517-18 (9th Cir. 2001). Although unusual, such a procedure is not without precedent. *See Gordon Brent Pierce*, Initial Decision Release No. 425, 2011 WL 3159088, at *2 n.1 (Jul. 27, 2011), *aff'd in part*, Exchange Act Release No. 71664, 2014 WL 896757 (Mar. 7, 2014), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015). In accordance with this procedure, to the extent the evidence presents genuine issues of material fact, I have resolved them. *Kavanaugh*, 25 Fed. Appx. at 517. As explained below, however, the only genuine issue of material fact is whether or not Scott acted with reckless or deliberate disregard of regulatory requirements.

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.

I may take official notice of any material fact which might be judicially noticed by a district court of the United States, any matter in the official public records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. 17 C.F.R. § 201.323. I have accordingly taken official notice of the U.S. District Court documents in the record. *See id.*; Ex. 53. The Commission has apparently taken official notice of state court criminal records in at least two follow-on administrative proceedings, and I accordingly take official notice of the Pennsylvania Securities Commission (PSC) documents in the record. *See Charles Trento*, Exchange Act Release No. 49296, 2004 WL 329040, at *1 n.2 (Feb. 23, 2004); *Stuart E. Winkler*, Exchange Act Release No. 48940, 2003 WL 22971038, at *1 n.2 (Dec. 17, 2003).

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, which was never operational. *Id.* at 8.

Between approximately July 2011 and January 2013, Snisky offered investors, potential investors, and financial advisers 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.[2] Ex. 53 at 11. Snisky described this model as safe, because Ginnie Mae

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

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.*

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. As noted, Snisky did not use any of this money to purchase Ginnie Mae bonds. *Id.*

B. Scott's Background and Recruitment

Scott was sixty-two years old at the time the OIP was issued and lives in Pennsylvania. OIP at 2; Answer at 1. He has held an insurance producer license in Pennsylvania since 1978, and has held insurance producer licenses in at least two other states. OIP at 2; Answer at 1. He was previously employed by Brown Investment Advisors, Inc. (BIA), a Pennsylvania and New Jersey registered investment adviser, from 2005 through January 1, 2012. OIP at 2; Answer at 1; Ex. 1 at 29, 48, 124-25. During that same period, he performed consulting services for Summit Trust Company (Summit Trust), a Nevada entity founded in 2003 that offered and administered life insurance trusts, asset protection trusts, and "dynasty" trusts. OIP at 2; Answer at 1; Ex. 1 at 48-49, 53. The president of both BIA and Summit Trust was Kevin Brown (Brown). Answer at 2.

Scott controlled the Cromarty Group (Cromarty), a Nevada limited liability company formed in 2012, of which his wife is the managing member, and through which Scott operated a consulting business. OIP at 2 & n.1; Answer at 1. Cromarty's only business relationship was with Summit Trust, and involved an independent consulting arrangement, although Scott was never able to successfully engage any consulting work under the arrangement. Ex. 1 at 19, 124-25, 137-38. Scott founded Cromarty after he left Summit Trust, and after he had first heard of Arete, but not in contemplation of his relationship with Arete. *Id.* at 19, 127. Scott has considered himself unemployed since January 1, 2012. *Id.* at 28-30.

Scott has never held any securities licenses, and was not registered with the Commission as a broker, or associated with a registered broker-dealer, at any relevant time. OIP at 2, 6; Answer at 1-2. In 1999, the PSC found that he had unlawfully "engaged in the business of offering and selling" securities by selling promissory notes in 1998 and 1999, and ordered him to cease and desist from selling them. Ex. 9 at 5-8 of 27. In 2005, he settled a second administrative proceeding brought against him by the PSC. Ex. 9 at 11-24 of 27. The second administrative proceeding found that Scott had unlawfully sold securities by selling seven different securities, mainly promissory notes, in 1997 and 1998. *Id.* The PSC permanently barred him from "representing an issuer offering or selling securities in Pennsylvania," among other prohibitions. *Id.* at 23 of 27. Both PSC actions arose from the same "issue," which Scott voluntarily brought to the PSC's attention. Answer at 1.

Scott was introduced to Snisky in July or August of 2011 via a phone call from someone Scott knew in Colorado. Answer at 2; Ex. 1 at 145. Scott and Snisky then had three or four telephone conversations, during which Snisky described his purported background, including that he was a "licensee of Bloomberg," that he "could potentially go into the overnight Fed Lending Program or something like that," that he had already purchased Ginnie Mae bonds, and that he had a webinar presentation. Ex. 1 at 145-46, 149-51, 157-58. Scott took notes of his first conversations with Snisky. *See generally* Ex. 13. Snisky wanted accredited investors having "mature" relationships with insurance agents "or whomever." Ex. 1 at 132-33. Snisky thought his program might be valuable to trusts that used fixed investments to generate income, and Scott referred Snisky to Brown. Answer at 2; Ex. 1 at 145-46, 154, 158-59; *see generally* Ex. 12. Brown then attended one of Snisky's webinars in late 2011, and Brown agreed to Summit Trust's participation sometime in early 2012. Ex. 1 at 159-60, 164.

C. Scott's Involvement

Snisky asked Scott if Scott knew advisers who worked with accredited investors; Scott did, and agreed to introduce them to Snisky. Answer at 2. Scott and Snisky had no formal agreement regarding recruitment or introduction of agents. *Id.* However, Snisky agreed to pay Cromarty seven percent of invested funds, with five percent going to the adviser, "50 basis points" going to Summit Trust, and Cromarty retaining the remaining 1.5%. Ex. 1 at 135-36; *see* Answer at 2. Scott understood that the seven percent fee paid to Cromarty came from Arete assets. Ex. 1 at 136-37.

Snisky's presentation of Arete included showing Bloomberg screenshots to the participating advisers. OIP at 4; Answer at 1. Snisky referenced banking sweeps, but Scott is not certain that Snisky referred to himself as an institutional trader. Answer at 1. Snisky instructed advisers to describe Arete as one of several "fixed investments." *Id.* at 2. If an accredited investor wanted specific information, he had to sign a form requesting such information. *Id.* Snisky instructed advisers not to recommend Arete specifically, but to allow an accredited investor to decide if Arete was "appropriate for a percentage of their investments," after being "educate[d]" about "the various fixed investments that were available in the marketplace." *Id.*

Snisky and Summit Trust wanted a minimum investment of $50,000. Ex. 1 at 177. Scott understood that this requirement was imposed because Arete was making a "Reg D" offering. *Id.* at 133. The adviser was to furnish the offering document to the investor, and the investor was to make the choice to invest. *Id.* at 133, 135, 186-87. The investor was then to fill out custodial forms for Summit, open a trust account, transfer funds, and instruct Summit Trust what to do with the money. *Id.* at 135. Scott understood that the investor in Arete was actually Summit Trust, which aggregated the individual investors' funds. *Id.* at 177-78.

While still working at Summit Trust, Scott initiated a conversation with Respondent Mark S. "Mike" Tomich (Tomich) regarding Snisky. Answer at 1. Scott provided an introduction between Tomich and Snisky via a phone call. *Id.*; Ex. 12 at 1. Snisky insisted that anyone interested in his program come to Longmont, Colorado, and spend two days learning about the program. Answer at 1. Bill Sparkman (Sparkman) and Respondent Kenneth C. Meissner (Meissner) called Scott and asked him to introduce them to Snisky, which Scott did. *Id.*; Ex. 12 at 1. Scott did not know whether either Meissner or Sparkman had securities licenses, but Snisky insisted that no license was required to discuss his program with accredited investors. Answer at 1.

Scott first met Snisky in person in January or February 2012, along with four other persons Scott knew, including Sparkman. Ex. 1 at 169-71. Scott's role at this meeting was to explain Summit Trust's involvement to the other participants. *Id.* Sparkman successfully offered Arete to a husband and wife, and both Scott and Sparkman were compensated accordingly, through Cromarty. *Id.* at 171-72.

Scott next visited Colorado in February or March 2012, along with Meissner and Tomich. Ex. 1 at 172-73. Meissner and Tomich both sold Arete to multiple clients, and Meissner, Tomich, and Scott were compensated accordingly, except that Sparkman, who introduced Meissner to the program, received .5%, which came out of Scott's compensation. *Id.* at 173-75. Snisky wired all funds to the Cromarty bank account, and Scott forwarded the advisers their compensation in the form of checks, except for Tomich, who had his money wired. *Id.* at 175-76. Sparkman, Meissner, and Tomich were the only advisers who successfully sold Arete. *Id.* at 178.

Scott was on a conference call with David Sorrells (Sorrells) in the summer of 2012. Ex. 1 at 42-43. Sorrells "had a group of agents" who wanted to do business with Snisky, and Snisky wanted their business to go through the Summit Trust custodial account. *Id.* at 42. Scott explained to them how that account worked. *Id.* at 43-44. At Snisky's request, Scott had a call with two investment advisers, Charlotte and Matt, who had been introduced to Snisky, and Scott directed them to Summit Trust "to explain things maybe more thoroughly," although their account ultimately did not invest in Arete. *Id.* at 140-44. Although Scott denies soliciting any investors, he tried to interest U.S. Bank and Colorado school districts in Arete, and tried to arrange a meeting between U.S. Bank and Brown, because U.S. Bank had expressed interest in starting a program similar to Arete. *Id.* at 182-85; Exs. 29, 30; *see* Answer at 2.

Summit Trust started receiving investor funds in March or April 2012. Ex. 1 at 164. Scott forwarded to the recruited advisers documents Snisky said were needed to permit accredited investors to participate in the program, and directed the agents' questions to Snisky and Greeott. Answer at 1-2. Tomich was already familiar with Summit Trust's custodial role, but Scott did explain that function to Meissner. *Id.* at 2. Although Scott was not aware of Tomich's specific strategies or seminar system, he knew that Meissner and Tomich otherwise solicited clients and advised them on the merits of Arete, sold Arete to investors, and received a 5% commission on invested funds via Cromarty. *Id.*

Although he did not sell any interests in Arete directly, Scott acted as a facilitator for those who did. Scott worked with a Summit Trust employee to send investors letters confirming their investments. Exs. 20, 34, 39. He told one adviser about due diligence Sparkman had conducted on Snisky. Ex. 21. He arranged conference calls between Snisky and advisers. Exs. 22, 25, 28. He forwarded screenshots from Snisky to advisers. Ex. 23. He provided guidance to advisers on the procedure for submitting funds and applications, forwarded their paperwork to Summit Trust, and arranged for Meissner to receive Summit Trust brochures. Exs. 26, 32, 33, 36. Scott also fielded questions from advisers directed to Summit Trust, and checked up on wire transfers of investor funds, and communicated changes in wiring procedures and forms to Brown and Summit Trust. Exs. 35, 38, 41, 42, 43.

Scott did not believe that the "Arete platform" was a security, or that he was acting as a broker. Answer at 2. Neither Snisky nor Brown ever indicated that the Arete platform was a security. *Id.* Snisky knew that Scott did not hold any securities licenses. *Id.* The "value" paid to the advisers and to Scott (via Cromarty) "was almost identical" to the compensation paid on the sale of annuities. *Id.*

Scott first became aware that there might be a problem with Arete when Summit Trust said that it had not received a profit payment. Ex. 1 at 196. Scott may have called Snisky the same day, but Snisky did not answer. *Id.* Scott reached Snisky four days later, and Snisky described how federal officers were at his office. *Id.* at 196-98.

In total, Arete sent to Cromarty approximately $96,000, of which approximately $70,000 was paid to advisers, and of which Scott received $26,297.84. Matticks Decl. at 6-7; *see* Ex. 1 at 199-200. Scott paid Tomich $48,327.40 in commissions based on $969,848 in funds received from seven investors. Matticks Decl. at 5. Scott paid Meissner $17,737 in commissions based on $355,242 in funds received from four investors. *Id.* at 5-6. Scott paid $1776.20 to Sparkman, representing 0.5% of the funds Meissner raised. *Id.* at 6.

D. Scott's State of Mind

In his Answer, Scott denied knowing that Arete was a security. Answer at 2. However, Scott read the Arete offering documents, and reviewed the form used to determine if someone was an accredited investor. Ex. 1 at 193-94, 204. The forms Scott saw indicated that the investors were accredited. *Id.* at 205. Scott sent the Arete PPM to an adviser on January 27, 2012. Ex. 14. He forwarded Arete's Reg D filings to multiple advisers on May 7, 2012. Ex. 18.

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 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. *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 advertisement 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 Scott 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 Pennsylvania, 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 were therefore securities. *See* 15 U.S.C. § 77b(a)(1) (investment contracts fall within the definition of a security under the Securities Act); *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). Although Scott contends that he did not know that interests in Arete were securities, he does not explicitly dispute that they were in fact securities. *See generally* Answer. Indeed, the only disputed issue, for liability purposes, is whether he acted as a broker. *See* Answer at 2-3.

Scott's dispute is not genuine, however. To be sure, there is no evidence of advertising. But Scott participated in the order-taking and order-routing process by facilitating the submission of orders to Summit Trust, which he knew were forwarded to Snisky. He actively sought out two institutional investors and handled customer applications and forms. He disseminated the Arete PPM and Reg D filing to advisers. He arranged conference calls between Snisky and advisers, forwarded screenshots from Snisky to advisers, provided guidance to advisers on the procedure for submitting funds and applications, and forwarded their paperwork to Summit

Trust. He arranged for Meissner to receive Summit Trust brochures, fielded questions from advisers directed to Summit Trust, checked up on wire transfers of investor funds, and communicated changes in wiring procedures and forms to Brown and Summit Trust. The results of Scott's efforts were significant: over $1.2 million in investor funds transmitted to Summit Trust and then to Snisky. But most importantly, for facilitating the sale of securities he received transaction-based compensation – "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). .

In short, the record evidence establishes that there is no genuine issue of material fact that Scott violated Section 15(a)(1).

B. Sanctions

The Division requests a cease-and-desist order, disgorgement, either first or second-tier civil penalties, and a full associational bar, including a penny stock bar and an investment company bar. Motion at 24-34; Second Reply at 16; Sanctions Brief at 8-10.

1. Willfulness and the Public Interest

Some of the requested sanctions are only appropriate if Scott'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). Scott's actions were unquestionably willful because he affirmatively acted as a broker by, for example, forwarding applications, soliciting investors, and handling commissions.

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.

Scott committed multiple violations in 2011 and 2012, involving at least thirteen investors and multiple distinct violative acts of brokering; the violations were plainly recurrent. Although investors lost over $1.2 million, Scott's 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 4-6. Scott continues to possess an insurance license, and will continue to have the same opportunities to sell securities as he did when he brokered Arete interests; his occupation clearly presents opportunities for future violations.[3] He has recognized the wrongful nature of his conduct. Response at 3. However, he sold securities while subject to a bar from representing an issuer (such as Arete purported to be), which suggests both a likelihood of violations in the future and that any assurances against future violations are not sincere. The violations are relatively recent, investors lost over $1 million as a result of the violations, and any sanction will have a significant deterrent effect.

Scott's denial of awareness that Arete was a security, combined with his lack of prior securities licensure, would be sufficient to raise a genuine issue of material fact as to his state of mind, were summary disposition procedures applicable. However, the parties have agreed that the case may be resolved entirely on the written record, and the preponderance of the evidence shows that Scott was at least reckless as to Arete's status. Scott read the Arete PPM, forwarded the Arete Reg D filing, and reviewed investor paperwork and concluded that the investors were, in fact, accredited. 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 Arete Reg D filing stated plainly that it was a "Notice of Exempt Offering of Securities." *E.g.*, Ex. 19 at 1. Scott knew that Arete paid interest regularly, like the bonds that Snisky was supposedly buying. *See* Ex. 17. Although I credit Scott's assertion that he did not subjectively believe that Arete interests were securities, and that he would have "ceased any involvement in the program" if he had known they were securities, the evidence as a whole demonstrates that Scott was at minimum willfully blind to the nature of what was sold, that is, that he "must have known" that he was brokering securities. Response at 3; *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). Accordingly, Scott 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 and recognition of the wrongful nature of his conduct weighs in favor of a heavy sanction.

2. Cease-and-Desist Order

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

[3] Scott contends that he will lose his insurance license in Pennsylvania if he is sanctioned in this proceeding. *See* Ex. 61 at 9; Response at 3-4. This may be so, but the collateral consequences of a Commission sanction are not a mitigating factor. *See Anthony Fields, CPA*, Exchange Act Release No. 74344, 2015 WL 728005, at *22 (Feb. 20, 2015).

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.* at 1185.

The relevant factors (except egregiousness and recognition of the wrongful nature of his conduct) all weigh in favor of a cease-and-desist order, and two of them are particularly significant: (1) the recurrent nature of Scott's violations and (2) that he engaged in violations while subject to a bar. The incremental prejudice to Scott 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

Exchange Act Sections 21B(e) and 21C(e) and Investment Company Act Section 9(e) authorize disgorgement here. *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 between violations and profits, and 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.

Scott's ill-gotten gains are, practically speaking, liquidated: $26,297.84. Matticks Decl. at 6. The same is true for prejudgment interest up to March 31, 2015: $2,294.22. *Id*. at 7. Accordingly, Scott is presumptively liable for disgorgement and prejudgment interest of $28,592.06.[4]

The Division seeks to hold Scott jointly and severally liable for Meissner's ill-gotten gains. Motion at 29-30. To be sure, Scott received Meissner's commissions and then forwarded them to Meissner, after taking his own share, and thereby benefited from Meissner's misconduct. *See id.* However, Scott was not a "controlling person" of Arete or Meissner's supervisor, and his collaboration with Meissner was limited to what one would expect between otherwise independent brokers. *See First Jersey Sec.*, 101 F.3d at 1475 (affirming a finding of joint and several liability between a corporation and its "controlling person"). The record plainly shows

[4] Prejudgment interest will continue to accrue on the disgorgement owed through the last day of the month preceding the month in which payment of disgorgement is made. 17 C.F.R. § 201.600(a).

that Scott did not work with Meissner closely enough to justify joint and several liability, and Scott will not be held liable for Meissner's ill-gotten gains.

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 in a cease-and-desist proceeding 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)(1)(A). The Commission may impose a first-tier penalty of up to $7,500 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)(1), 80a-9(d)(2)(A); 17 C.F.R. § 201.1004, Subpt. E, Table 4. Where a respondent's misconduct additionally 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 either thirteen first-tier penalties or one second-tier penalty. Motion at 31-32; Sanctions Brief at 9. The record supports either a first- or second-tier penalty, because Scott acted in reckless disregard of a regulatory requirement. However, imposing one penalty is more appropriate than thirteen penalties, because Scott had no practical control over the number of investors in Arete. Scott did not directly contact the investors who lost money, and his own brokering activity consisted essentially of facilitating other brokers, who actually spoke to the investors and closed each investment.

In determining whether a penalty is in the public interest, six factors may be considered: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3); *Anthony Fields, CPA*, 2015 WL 728005, at *24. Within any particular tier, the Commission has discretion to set the amount of the penalty. *See Brendan E. Murray*, Advisers Act Release No. 2809, 2008 SEC LEXIS 2924, at *42 (Nov. 21, 2008); *Rockies Fund, Inc.*, Exchange Act Release No. 54892 2006 SEC LEXIS 2846, at *25 (Dec. 7, 2006). "[E]ach case has its own particular facts and circumstances which determine the appropriate penalty to be imposed" within the tier. *SEC v. Murray*, No. OS-CV-4643, 2013 WL 839840, at *3 (E.D.N.Y. Mar. 6, 2013) (quotation omitted); *see also SEC v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005).

While a penalty may be imposed for "each act or omission," the statutes leave the precise unit of violation undefined. 15 U.S.C. §§ 78u-2(b), 80a-9(d)(2). Here, because I have imposed only a single second-tier penalty, the unit of violation need not be precisely established. Scott acted with reckless disregard for a regulatory requirement, the resulting harm to others was substantial, he has a record of discipline for similar misconduct, and there is a need to deter both Scott and others. On the other hand, Scott was clearly fooled by Snisky into believing that Arete was legitimate, and he received a relatively small amount of unjust enrichment. Ex. 1 at 196-200. On balance, a civil penalty of $15,000 is appropriate.

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.[5]

6. Inability to Pay

Scott submitted a considerable amount of financial information in support of his contention that he is unable to pay a monetary sanction. *See generally* Statement. However, the Division has demonstrated persuasively that Scott has the ability to pay a monetary sanction totaling approximately $44,000. *See* Kerry Matticks Third Decl.; Third Reply at 8-12. Two considerations merit particular attention. First, even accepting Scott's contention regarding the value of his house, his home equity is substantial. *See* Ketty Matticks Third Decl. at 3-4. Second, although the bank deposits of Scott and his wife varied widely from month to month, during the past year (April 2014 to April 2015) the size of those deposits suggest an income sufficient to pay disgorgement, prejudgment interest, and civil penalties of approximately $44,000. *See* Ex. 67; Kerry Matticks Third Decl. at 4-5. Accordingly, Scott has failed to demonstrate an inability to pay.

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 James Doug Scott shall CEASE AND DESIST from committing any violations or future violations of Section 15(a)(1) of the Securities Exchange Act of 1934.

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[5] Under Exchange Act Section 15(b)(6), the Commission is authorized to impose the full range of permanent bars, including a penny-stock bar, if Scott was associated with a broker or dealer at the time of the alleged misconduct. 15 U.S.C. § 78*o*(b)(6)(A); *see, e.g., Herbert Steven Fouke*, Initial Decision Release No. 660, 2014 SEC LEXIS 3095, at *21 n.10 (Aug. 29, 2014), *finality order*, Exchange Act Release No. 73492, 2014 SEC LEXIS 4118 (Oct. 31, 2014); *George Louis Theodule*, Initial Decision Release No. 607, 2014 SEC LEXIS 1866, at *15 n.6 (June 2, 2014), *finality order*, Exchange Act Release No. 72604, 2014 SEC LEXIS 2501 (July 14, 2014).

It is FURTHER ORDERED, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that Respondent James Doug Scott 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 James Doug Scott 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 and 21C of the Securities Exchange Act of 1934, and Section 9(e) of the Investment Company Act of 1940, that Respondent James Doug Scott shall DISGORGE ill-gotten gains of $26,297.84 and prejudgment interest of $2,294.22. Prejudgment interest shall accrue on all funds owed from March 31, 2015, until they are paid.

It is FURTHER ORDERED, pursuant to Section 21B of the Securities Exchange Act of 1934 and Section 9(d) of the Investment Company Act of 1940, that Respondent James Doug Scott shall pay a CIVIL PENALTY of $15,000.

Payment of disgorgement, prejudgment interest, and civil penalties 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.

Cameron Elliot
Administrative Law Judge