

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4478/December 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17645

In the Matter of

GARY C. SNISKY

ORDER FOLLOWING
PREHEARING CONFERENCE

On October 27, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondent pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. This proceeding is a follow-on based on *SEC v. Snisky*, No. 13-cv-3149 (D. Colo. Aug. 12, 2016), in which Respondent was permanently enjoined from violating the registration and antifraud provisions of the federal securities laws. The Division of Enforcement seeks a full collateral bar against Respondent under the statutes listed above.

On November 16, 2016, the Division filed a motion for protective order requesting that Respondent be ordered to keep the documents that will be provided to him by the Division under Commission Rule of Practice 230(a) confidential. Respondent answered the OIP on November 21, denying its allegations. On December 12, Respondent filed two motions, one apparently asking the district court in the underlying civil action to set aside the default final judgment against him, and the other apparently asking the district court to extend an earlier stay imposed in the civil case because of his motion to vacate his conviction in a criminal proceeding that arose out of the same circumstances and alleged scheme. In his motion to extend the stay, Respondent noted that any "Administrative Hearing" was "premature." The Division opposed Respondent's motion to extend the stay to the extent it was directed toward this proceeding.

I held a telephonic prehearing conference on December 14, at which the Division and the *pro se* Respondent appeared. Respondent's pending motions and the Division's proposed protective order were discussed, and I set a schedule for this proceeding. I address each of these matters below.

Respondent's Motions

At the prehearing conference, Respondent advised me that his December 12 motions were not directed toward me, but to the district court. Indeed, his motions are exact copies of ones filed on the same day in the civil district court case. See *Snisky*, No. 13-cv-3149 (D. Colo. Dec. 12, 2016), ECF No. 32. Nevertheless, to the extent that Respondent seeks to stay this proceeding as

premature, I DENIED his motion. The case law is clear that this administrative proceeding may continue despite any appeal or potential reconsideration of an underlying civil or criminal matter. *See Jon Edelman*, File No. 3-8950, 1996 SEC LEXIS 3560, at *2 (May 6, 1996); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 n.15 (Sept. 17, 1992). If Respondent is successful in reversing the underlying judgment, he can petition to have any bar or other sanction that may be imposed in this proceeding lifted (or to have this proceeding dismissed, if it is still pending). *See Charles Phillip Elliott*, 1992 SEC LEXIS 2334, at *11 n.17; *Gary L. Jackson*, Accounting and Auditing Enforcement Release No. 85, 1986 SEC LEXIS 2230, at *7 n.3 (Jan. 21, 1986).

Many of Respondent's arguments in this administrative proceeding challenge the underlying civil judgment. I noted at the prehearing conference that the doctrine of collateral estoppel prohibited Respondent from challenging the facts in the civil complaint. However, my comments were incorrect because the underlying civil judgment referred to in the OIP was entered on default, and in such a situation, collateral estoppel usually does not apply. *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657, at *3, *6, *11 (Apr. 23, 2015); *Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 SEC LEXIS 1010, at *14 (Feb. 4, 2010). Nonetheless, in the related criminal proceeding *United States v. Snisky*, No. 13-cr-473 (D. Colo. Feb. 5, 2015), which was based on the same alleged scheme and similar facts as those alleged in the civil proceeding, Respondent pled guilty to one count of mail fraud and one count of engaging in monetary transactions in property derived from mail fraud. Collateral estoppel would prevent Respondent from challenging the issues and facts to which he pled guilty. *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *26 & nn.32-33 (Jan. 14, 2011).

Because the OIP did not allege the criminal proceeding, I will need to take official notice of the criminal docket, and in particular, Respondent's plea agreement and statement of facts, the district court's amended judgment, and the transcript of the change of plea hearing to make the factual findings in this proceeding. 17 C.F.R. § 201.323; *see Don Warner Reinhard*, 2011 SEC LEXIS 158, at *15-17 & n.21 (taking official notice of the facts from a criminal proceeding in determining whether a sanction is in the public interest in a follow-on proceeding based on an underlying default injunction, without requiring amendment of the OIP). Official notice is the counterpart of judicial notice, and according to Federal Rule of Evidence 201(b)(2), a judge can take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see* 17 C.F.R. § 201.323 ("Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States."). Since the criminal docket is a matter of public record, and Respondent cannot contest the facts he pled guilty to, official notice is appropriate and does not prejudice Respondent.

Protective Order

At the prehearing conference, Respondent assured me that he would be able to comply with the terms of the Division's proposed protective order and keep the contents of the investigative file confidential, and the Division did not object to a slight modification. I have modified the proposed order to allow Respondent to make use of the investigative file and share it with counsel in other court proceedings arising from the conduct at issue here.

I find that:

1. Rule 230(a) of the Commission’s Rules of Practice requires the Division to make available for inspection and copying any party documents obtained by the Division prior to the institution of these proceedings (party documents).

2. In this case, the party documents include confidential account information, personally identifiable information, and other sensitive information such as that addressed in Fed. R. Civ. P. 5.2(a). Because the majority of the party documents include this information, redaction of the documents is not practicable.

3. Respondent is currently incarcerated, meaning disclosure of confidential, personal, or sensitive information may result in enhanced risk.

As a result, I find that good cause exists for issuance of a protective order. Accordingly,

I GRANT the Division’s motion and ORDER the following:

1. Respondent shall keep the party documents confidential and shall in no way disclose them or divulge their contents to any person, except to counsel, to whom the records and their contents shall be disclosed solely for the purpose of properly preparing for and trying this matter or any related court proceeding.

2. The terms of this protective order do not preclude, limit, restrict, or otherwise apply to the use of documents at any hearing, pre-hearing conference, or submission to my office.

Procedural Schedule

At the prehearing conference, I set the following briefing schedule:

February 13, 2017: The Division will file a motion for summary disposition.

March 20, 2017: Respondent will file an opposition.

April 10, 2017: The Division will file a reply.

In its motion, the Division should certify whether it has made documents available to Respondent in accordance with Rule 230. *See* 17 C.F.R. § 201.250(b) (providing that a party may make a motion for summary disposition “after . . . documents have been made available to th[e] respondent for inspection and copying pursuant to § 201.230”). I would appreciate electronic courtesy copies of the Division’s filings emailed to alj@sec.gov in PDF text-searchable format. Electronic copies of exhibits should not be combined into a single PDF file, but submitted as separate attachments.

Brenda P. Murray
Chief Administrative Law Judge