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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No.3-17645

In the Matter of

GARY C. SNISKY

Respondent.

REPLY CONCERNING
REMAND ORDER

The Division of Enforcement hereby responds to the recent submission by respondent Gary Snisky.

I. PROCEDURAL BACKGROUND

The Order Instituting Proceedings was issued in this case on October 27, 2016.

Respondent answered and, after some limited motion practice, the Division of Enforcement filed its Motion for Summary Disposition on February 13, 2017. Although Respondent was granted additional time to respond to the Division's Motion, he did not do so. No initial decision has issued.

On May 22, 2017, the Commission stayed all administrative proceedings. On November 30, 2017, the Commission lifted the stay imposed by its May 22, 2017 order and ratified the agency's prior appointment of Chief Administrative Law Judge Brenda Murray. In addition, the Commission ordered that administrative law judges in pending cases: (1) reconsider the record in the proceeding, including all substantive and procedural rulings; (2) allow the parties to file any new evidence that they deem relevant to the reexamination of the record; and (3) determine whether to revise or ratify prior rulings. *See Rel. No. 5393, Dec. 15, 2017 Order. Judge Murray*

granted an extension of time for Snisky to respond to the Commission's November 7, 2017 Order and Snisky has responded.

The following Orders were issued in this matter prior to November 7, 2017:

1. Order Scheduling Hearing: Rel. No. 4306, October 28, 2016;
2. Order Postponing Hearing: Rel. No. 4377, November 21, 2016;
3. Order Following Prehearing Conference: Rel. No. 4478, December 27, 2016;

This Order contained the following rulings:

- a. Denied motion to stay based on appeal of injunction (that appeal is now complete);
- b. Entered protective order, subject to which documents were provided;
- c. Set summary disposition briefing schedule;
4. Order granting extension of time to respond to Motion for Summary Disposition: Rel. No. 4711, March 27, 2017.

II. RATIFICATION OF PRIOR RULINGS

In his brief, Respondent Snisky does not provide any additional evidence relevant to reconsideration of any specific ruling or order made in this case. In fact, the rulings made in this case are largely procedural, and the events which they concern have already occurred.

Instead, Respondent attacks the authority of this Court. Respondent's challenge based on the Appointments Clause is meritless, however, because the Commission's November 30, 2017 Order "ratifie[d] the agency's prior appointment" of its ALJs. Subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996).

The November 30, 2017 Order also forecloses Respondent's apparent challenge to the Commission's ratification of the appointment of its ALJs. *See* Resp. Br. at 1, 6 (suggesting that the alleged Appointments Clause violation persists and requires dismissal of the proceeding). It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. *See* U.S. Const. Art. II, § 2, Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. Nat'l Labor Relations Bd.*, 857 F.3d 364, 370-71 (D.C. Cir. 2017). The Commission's order exercising that authority and ratifying the appointment of its ALJs is, moreover, binding on those ALJs. The scope of the inquiry before *this* Court is therefore limited to whether—having had her appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect her prior actions in this proceeding.

Respondent Snisky does not provide any evidence or rational for modification of any specific order or ruling in this case. And, for the reasons set forth in the Division's January 5, 2018 motion, the Division submits that those actions should be ratified.

III. MOTION FOR SUMMARY DISPOSITION

Finally, Respondent Snisky raises three arguments in his submission that may be relevant to the Division's Motion for Summary Disposition. Those arguments are whether there is jurisdiction over Snisky under Section 15(b)(6) of the Securities Exchange Act of 1934,¹ whether Snisky's guilty plea is admissible against him, and whether the Division has provided sufficient evidence of scienter under Section 206(1) of the Investment Advisers Act of 1940.

¹ While Mr. Snisky denies that he was associated with a broker, he does not contest that he was associated with an investment adviser at the time of the relevant conduct or that there is jurisdiction over him pursuant to Section 203(f) of the Advisers Act.

A. There is Jurisdiction Under Section 15(b)(6).

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). 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. *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D. N.Y. 2003); *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010); *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).

Citing Mr. Snisky’s plea agreement as evidence, in its Motion for Summary Disposition, the Division demonstrated that during the relevant time period, Snisky solicited investments in a purported Bond Program, Snisky advised investors and potential investors that the Bond Program was safe and promised them certain bonuses and returns on the investment, and Snisky held himself out to investors and potential investors as an “institutional trader” who could “make markets” and access lucrative opportunities to which ordinary investors did not have access. See Motion for Summary Disposition at p. 6. These actions demonstrate that Snisky was acting as a broker-dealer.

B. Snisky's Guilty Plea is Admissible.

Respondent Snisky is collaterally estopped from contesting the Plea Agreement and Criminal Judgment. *See Roe v. City of Waterbury*, 542 F.3d 31, 41 (2d Cir. 2008); *see also Don Warner Reinhard*, Rel. No. 34-63720, 2011 SEC LEXIS 158, at *26 & nn.32-33 (Jan. 14, 2011).

Respondent Snisky's argument that Federal Rule of Criminal Procedure 11(e)(6) precludes use of his plea agreement is wrong.² Federal Rule of Evidence 410 excludes only withdrawn (or vacated) plea agreements and discussions concerning plea agreements that are not included in the plea agreements themselves. It is well settled that plea agreements are admissions against interest and, so, are admissible against those that enter into them. *See, e.g., SEC v. Hilsenrath*, 2010 WL 5135340 at **2 (9th Cir Dec. 17, 2010); *SEC v. Sekhri*, 333 F.Supp.2d 222, 228 n. 8 (S.D. N.Y. 2004).

Mr. Snisky's plea agreement is admissible against him and should be considered in assessing the appropriateness of industry bars against him.

C. There is Sufficient Evidence of Scienter.

Mr. Snisky asserts that Section 206(1) of the Advisers Act requires scienter. Because the Division is not seeking any finding that Mr. Snisky violated Section 206(1) of the Advisers Act, this argument is irrelevant. Nonetheless, scienter is a factor that courts can consider in determining whether to impose bars against a respondent. In its Motion for Summary Disposition, the Division addressed this factor at page 9. As noted there, Snisky's representations were affirmative lies. Because Snisky knowingly and intentionally provided false information to investors and misappropriated investor funds, he acted with a high degree of scienter. *See, e.g., Toby G. Scammell*, Rel. No. 3961, 2014 WL 5493265 at *6 (March 17, 2014).

² Federal Rule of Criminal Procedure 11(e)(6) no longer says what Mr. Snisky says it does.

IV. EXTRANEous ARGUMENTS

Respondent Snisky makes a number of arguments unrelated to the ratification of the previous rulings in this case, many of which are wholly unrelated to this matter.

In his Section A, Mr. Snisky attacks the conclusions and findings of the SEC, including those related to “his mail fraud liability.” *See* Resp. Br. at 1. In addition, Mr. Snisky argues that “the Opinion and Order made findings without fair notice and in violation of the SEC’s Rules of Practice, applied incorrect legal standards, were not supported by substantial evidence, and were arbitrary and capricious.” *See* Resp. Br. at 6. The Commission, however, has made no conclusions or findings concerning Mr. Snisky, his mail fraud liability is not at issue in this proceeding, and there is no “Opinion and Order” in this case. These arguments are inapplicable.

Mr. Snisky also argues that there is no statutory basis of a civil penalty. *See* Resp. Br. at 4. The Division is not seeking a civil penalty in this matter. Accordingly, this argument is also inapplicable.

V. CONCLUSION

For the reasons stated above and in its Motion for Summary Disposition, the Division respectfully requests the prior rulings and orders in this matter be ratified, that summary disposition be granted, and that collateral bars be entered against Respondent Gary Snisky.

Respectfully submitted this 16th day of March, 2018.



Polly Atkinson
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294

SERVICE LIST

On March 16, 2018, the foregoing **RESPONSE TO SUBMISSION** was sent to the following parties and other persons entitled to notice:

Office of the Secretary
Brent Fields, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, DC 20549-2557
(By Facsimile and original and three copies by UPS)

Honorable Brenda Murray, Chief Judge
100 F Street, N.E.
Mail Stop 2580
Washington, D.C. 20549
(By Email and UPS)

Gary C. Snisky
Inmate No. [REDACTED]
[REDACTED]
PO Box [REDACTED]
Joint Base MDL, NJ [REDACTED]

s/ Scott Wesley
Scott Wesley, Contract Paralegal