INITIAL DECISION RELEASE NO. 276
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11765

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

In the Matter of	:	
	:	INITIAL DECISION
DANIEL E. CHARBONEAU	:	February 28, 2005

APPEARANCES: William P. Hicks for the Division of Enforcement, Securities and Exchange Commission

Respondent Daniel E. Charboneau, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Daniel E. Charboneau (Charboneau) from participating in an offering of penny stock. He was previously enjoined from violating the antifraud provisions of the securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) against Charboneau on December 6, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that Charboneau was enjoined in 2004 from violating the antifraud provisions of the federal securities laws, based on his wrongdoing while participating in an offering of stock of FoneCash, Inc. (FoneCash), a penny stock. Charboneau was served with the OIP on December 10, 2004, and timely filed an Answer and Motion for More Definite Statement, dated December 22, 2004 (Answer). The Division of Enforcement (Division) filed a Motion for Summary Disposition on January 28, 2005.[1] Charboneau did not file an opposition. The administrative law judge is required by 17 C.F.R. § 201.250(b) to act "promptly" on a motion for summary disposition. Charboneau's

[1] Leave to file the Motion for Summary Disposition was granted pursuant to 17 C.F.R. § 201.250(a). Daniel E. Charboneau, Admin. Proc. No. 3-11765 (A.L.J. Jan. 21, 2005) (unpublished).

request, entitled "Relief from Order," dated January 31, 2005, for reconsideration of the denial of his request for a stay of this proceeding is addressed below as a procedural issue.

This Initial Decision is based on (1) the Division's Motion for Summary Disposition and (2) Charboneau's Answer. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Charboneau was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Charboneau was enjoined in 2004 from violating the antifraud provisions of the federal securities laws, based on his wrongdoing while participating in an offering of FoneCash stock, a penny stock. The Division urges that he be barred from participating in an offering of penny stock. Charboneau's filings make procedural arguments but do not address the allegation that he has been enjoined.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items, of which official notice is taken, included in the Division's Appendix to Motion for Summary Disposition, at Exhibits 2, 3, and 7, are admitted into evidence as Division Exhibits 2, 3, and 7:

> Memorandum Opinion, SEC v. FoneCash, Inc. Civil Action No. 02-0651 (SEC v. FoneCash) (D.D.C. Nov. 15, 2004) (Div. Ex. 2);
>
> Order, SEC v. FoneCash (D.D.C. Nov. 15, 2004) (Div. Ex. 3); and
>
> Revised Order, SEC v. FoneCash (D.D.C. Dec. 20, 2004) (Div. Ex. 7).

2. Collateral Estoppel

Charboneau's filings have not addressed the substance of the allegations in the OIP: that he was enjoined from violating the antifraud provisions. Instead, he has raised procedural issues, such as requesting a stay of the proceeding because of logistical constraints imposed by his current incarceration, and moving for a more definite statement. These requests were previously denied. Daniel E. Charboneau, Admin. Proc. No. 3-11765 (A.L.J. Jan. 21, 2005) (unpublished). His January 31, 2005, request for reconsideration of the denial of his stay request will also be denied. In that pleading, he reiterates his arguments as to the logistical constraints imposed by his incarceration and additionally states that he has not been given the Division's investigative file, referencing 17 C.F.R. § 201.230. That rule, however, does not require the Division to deliver its investigative file to a respondent; it requires the Division to allow a respondent or his

representative to inspect and copy documents in its file.[2] Further, as the Division notes in its February 9, 2005, response to Charboneau's request, he conducted discovery in the underlying injunctive case and was provided with documents in response to his request to produce. Also, the Division states that it would produce any additional non-privileged material that he requested. Finally, it is noted that the disposition of this proceeding is based on Charboneau's injunction, not on material that can be discovered from the Division's file.

As found below in the Findings of Fact, Charboneau has been permanently enjoined from violating the antifraud provisions of the securities laws. He is foreclosed from arguing that the facts concerning his involvement in the underlying wrongdoing are not proved. It is well established that the Commission does not permit a respondent to re-litigate issues that were addressed in a previous civil proceeding against him. See Michael J. Markowski, 74 SEC Docket 1537, 1542 (Mar. 20, 2001), pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn. 6, 7 (1997). Even if Charboneau is appealing his injunction, the pendency of an appeal does not preclude "follow-up" action. Joseph P. Galluzi, 78 SEC Docket 1125, 1130 n.21 (Aug. 23, 2002).

II. FINDINGS OF FACT

Charboneau, of White Plains, New York, has been permanently enjoined from violating the antifraud provisions of the federal securities laws – Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[3] Div. Ex. 2 at 25-27, Div. Ex. 3 at 1-2, Div. Ex. 7. Charboneau is currently serving a twenty-four-month prison sentence, having been convicted of securities fraud for attempting to bribe an undercover FBI agent posing as a representative of a mutual fund, to purchase FoneCash shares for the fund. Div. Ex. 2 at 9-10. As set forth in detail in Division Exhibit 2, the wrongdoing that underlies Charboneau's injunction occurred during 2001 and 2002, when, as chief executive officer of FoneCash, he participated in an offering of FoneCash stock, a penny stock. Specifically, FoneCash filed with the Commission various registration statements, post-effective amendments, and annual and periodic reports on Forms 10-K and 10-Q, all signed by Charboneau, which contained material misrepresentations and omissions that were known to him. Some of the filings claimed that FoneCash manufactured credit card terminals under a specified patent that would run until 2004. In fact, the patent lapsed in 1993. Certain amendments to a registration statement filed in December 2001 grossly understated the number of outstanding shares. FoneCash also maintained a website that grossly misrepresented its business, stating that it had

[2] Specifically, the rule requires the Division to "make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings in connection with the investigation leading to the Division's recommendation to institute proceedings."

[3] He was also enjoined from violating Exchange Act Section 16(a) and Rules 16a-2 and 16a-3. Div. Ex. 7 at 1, 3.

an active business processing credit card transactions and received two-thirds of its revenues from that activity. In fact, FoneCash had no such business.

III. CONCLUSIONS OF LAW

Charboneau has been permanently enjoined "from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act. Further, FoneCash stock was a penny stock within the meaning of Exchange Act Section 3(a)(51) and Rule 3a51-1, and in the wrongdoing that underlay his injunction, Charboneau was a "person participating in an offering of penny stock" within the meaning of Exchange Act Section 15(b)(6)(C).

IV. SANCTION

Charboneau will be barred from participating in an offering of penny stock. Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging 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. This sanction will serve the public interest and the protection of investors, pursuant to Section 15(b) of the Exchange Act. It accords with Commission precedent and the sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Charboneau's unlawful conduct was recurring and egregious, extending over a lengthy period. His conviction for related misconduct is an aggravating factor. There are no mitigating circumstances.

V. PROCEDURAL ORDER

IT IS ORDERED that Charboneau's request for reconsideration of the denial of his stay request IS DENIED.

VI. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, DANIEL E. CHARBONEAU IS BARRED from participating in an offering of penny stock.

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 that 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 a motion to correct a 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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Carol Fox Foelak
Administrative Law Judge