SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56649 / October 12, 2007

Admin. Proc. File No. 3-12228

In the Matter of

JAMES E. FRANKLIN

OPINION OF THE COMMISSION

PENNY STOCK BAR PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the federal securities laws. Held, it is in the public interest to bar respondent from participating in any penny stock offering.

APPEARANCES:

James E. Franklin, pro se.

Kenneth J. Guido and Brian J.M. Sano, for the Division of Enforcement.

Appeal filed: December 5, 2006
Last brief received: March 26, 2007

I.

James E. Franklin appeals from the November 15, 2006 decision of an administrative law judge. The law judge found that, on December 15, 2005, the United States District Court for the Southern District of California had permanently enjoined Franklin from violating certain provisions of the federal securities laws and required him to pay a third-tier civil money

penalty. 1/ The law judge barred Franklin from participating in any penny stock offering. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

On December 15, 2005, following a jury trial, the United States District Court for the Southern District of California permanently enjoined Franklin from violating Sections 5(a), 5(c), 17(a), and 17(b) of the Securities Act of 1933, 2/ Section 10(b) of the Securities Exchange Act of 1934, 3/ and Rule 10b-5 thereunder (the "Franklin Injunctive Action"). 4/ The district court also imposed a third-tier penalty of $770,000 against Franklin.

The Franklin district court based its injunction on the jury's unanimous verdict. The jury found that Franklin had knowingly violated the antifraud provisions of the federal securities laws in connection with the offer, purchase, or sale of seven stocks. 5/ The jury further found that Franklin violated the anti-touting provisions of Securities Act Section 17(b) with respect to two stocks and the registration provisions of Securities Act Sections 5(a) and 5(c) with respect to one stock. The jury also found that Franklin was liable as a control person of two entity defendants in the injunctive action, which had previously defaulted, for their violations of Exchange Act Section 10(b) and Exchange Act Rule 10b-5.

In its complaint in the Franklin Injunctive Action, the Commission alleged that Franklin and two other individuals, Dieter Raabe and Samuel Wolanyk, acting through entity defendants Avalon Trust, Initial Public Offering Consultants, Net Income, and Victor Keel, engaged in a fraudulent "pump-and-dump" scheme. As part of the scheme, Franklin acquired the stock of certain companies at low or nominal cost and "pumped" that stock by touting the companies using the Internet, thereby inducing or attempting to induce investors to purchase the touted stocks. After the price of the stock rose in response to Franklin's efforts, he "dumped" or sold

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1/ SEC v. Franklin, No. 3:02CV0084 DMS (S.D. Cal. Dec. 15, 2005). The other defendants were Dieter Raabe, Samuel Wolanyk, Avalon Trust, Initial Public Offering Consultants, Inc. ("IPO Consultants"), Net Income, and Victor Keel Ltd. ("Victor Keel"). The court entered default judgments against Avalon Trust, IPO Consultants, Net Income, and Victor Keel in 2003. Franklin also was found liable as a control person for the antifraud violations of Net Income and Victor Keel, and he stipulated to being a control person of IPO Consultants and Avalon Trust.

2/ 15 U.S.C. §§ 77e(a), (c), and 77q(a), (b).

3/ 15 U.S.C. § 78j(b).

4/ 17 C.F.R. § 240.10b-5.

5/ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

his stock for considerable profit. The complaint alleged that the fraudulent scheme generated over $4 million in profits. The complaint set forth in detail the allegations with respect to Franklin's role in the fraudulent scheme as follows.

Beginning in 1997 and continuing into 1998, Franklin "orchestrated" a "fraudulent scheme to tout companies" on an Internet website known as "Red Hot Stocks," 6/ and then "sell the stocks of the companies profiled" on the website. The Red Hot Stocks website "claimed to be a market analysis and stock profile newsletter that 'searches for undiscovered growth companies with strong upside potential.'" According to the complaint, Red Hot Stocks "profiled largely unknown companies that were not traded on major stock exchanges and made recommendations regarding the purchase of stock in these companies." Franklin touted at least seven stocks on the Red Hot Stocks website, including one, Easy Cellular, Inc. ("EZCL"), which he acquired at prices substantially below $1 per share and which he admitted in his answer to the Order Instituting Proceedings was a penny stock within the meaning of Exchange Act Section 3(a)(51) and Exchange Act Rule 3a51-1. 7/ Pursuant to the scheme, Franklin acquired the touted stocks at low or nominal cost through private offerings, consulting agreements, and open market purchases. He held the stock in various accounts including a brokerage account at Union Securities in Canada in the name of Victor Keel, a corporation registered and located in the Turks & Caicos, British West Indies, that was controlled by Franklin and Raabe.

Franklin sold the touted stocks after their prices increased following false and misleading profiles which appeared on the Red Hot Stocks website. According to the complaint, the profiles recommended that investors purchase the stocks, but "contained unreasonable price predictions," did not disclose that Franklin, through various accounts, "owned, beneficially owned, or controlled stock in the profiled companies" and that, in at least one instance, Franklin negotiated Red Hot Stocks's fee for profiling one of the companies. Moreover, the profiles did not disclose that Franklin had acquired the "stocks of companies to be profiled on Red Hot [Stocks] with the intent to sell in coordination with the tout, while Red Hot [Stocks] recommended that others purchase the stock." As the complaint alleged, "[t]he pattern and timing of [Franklin's] sales were contrary to the stated belief in [Red Hot Stocks's] reports that the stocks were good investments." 8/

6/ The Red Hot Stocks website was operated by Net Income, a Nevada corporation that Franklin had organized through a third party to operate Red Hot Stocks in furtherance of the scheme.

7/ 15 U.S.C. § 78c(a)(51), 17 C.F.R. § 240.3a51-1. The other touted stocks were Amalgamated Explorations, Inc., American Technologies Group, LCA-Vision, Inc., Neotherapeutics, Inc., NetUSA, Inc., and Waterpur International.

8/ The complaint also alleged that Franklin violated Securities Act Section 5(a) and 5(c) by "offering to sell and/or selling" Amalgamated Explorations, Inc. stock at a time when "no

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Following the jury's verdict, on December 15, 2005, the district court held a remedies hearing during which it entered the permanent injunction against Franklin and imposed a third-tier civil money penalty. During that hearing, the court stated that, with respect to the jury's findings of violation by Franklin, "the jury's verdict is supported by all of the evidence." The court stated that Franklin was "the most culpable" participant. The court stated further that "Mr. Franklin was orchestrating this activity . . . and did make a lot of money . . . approximately $831,799 in profits from the fraudulent scheme."

On March 6, 2006, we authorized the institution of administrative proceedings against Franklin to determine whether he had participated in a "penny stock offering" and had been enjoined and, if so, what remedial action would be appropriate in the public interest. On November 15, 2006, the law judge granted the Division of Enforcement's (the "Division") motion for summary disposition, and barred Franklin from participating in an offering of penny stock. This appeal followed.

III.

Exchange Act Section 15(b)(6)(A) authorizes us to bar a person from participating in the offering of any "penny stock" if the person has been, among other things, enjoined from any conduct or practice in connection with the purchase or sale of a security and if, at the time of the misconduct alleged in the injunctive proceeding, was participating in an offering of penny stock. 9/ We find that Franklin was enjoined from violating the antifraud, anti-touting, and registration provisions of the federal securities laws, which involved conduct in connection with the purchase or sale of a security. We also find that the record establishes that, during the time of the misconduct, Franklin participated in an offering of penny stock. 10/

8/ (...continued)
registration statement was filed or in effect . . . for the securities offered and sold . . . nor were those offerings or sales exempt from registration."

9/ Exchange Act Section 15(b)(6)(C) defines a person participating in an offering of a penny stock as "any person acting as any promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer, or issuer for purpose of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock . . . ." 15 U.S.C. § 78o(b)(6)(C).

10/ As is pertinent here, Exchange Act Section 3(a)(51)(A) defines a "penny stock" as "any equity security other than a security that is . . . excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph . . . ." In general, under Exchange Act Rule 3a51-1, certain equity securities -- including securities priced at five dollars or more, securities subject to
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Franklin does not contest that the jury found him liable for his role in devising and executing a fraudulent "pump-and-dump" scheme with respect to seven stocks, including EZCL, which Franklin admits was a penny stock. Franklin concedes that he was enjoined based on the jury's findings of violation. He is appealing the district court's judgment and concedes that he cannot challenge those findings in this proceeding. 11/

We turn first to certain procedural objections Franklin makes regarding these proceedings. These objections relate to (A) evidentiary rulings by the district court and a finding by the jury in the injunctive action, (B) allegations of Commission staff misconduct, and (C) an allegation that the law judge acted improperly in rejecting Franklin's request to stay this proceeding.

A.

While Franklin concedes that he cannot challenge the injunctive proceedings before us, he nevertheless complains about certain evidentiary rulings made by the district court and one of the jury's verdict findings in the injunctive action. Franklin objects to the district court's order that permitted his co-defendant Raabe to testify under a grant of immunity, and permitted the Commission to introduce into evidence documents that corroborated Raabe's immunized testimony. He objects to the district court's order that permitted the Commission to adduce testimony regarding additional stocks not listed in the Commission's complaint. He objects to the district court's decision to allow the Commission to introduce registers of stock transactions and telephone records from the Canadian brokerage firm where the Victor Keel account was located. 12/ Franklin made each of these objections to the district court, and each time the court

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10/ (...continued)
last sale reporting and listed on a national securities exchange or quoted on NASDAQ, and securities of an issuer that meets either a minimum net tangible assets or revenues test -- are excluded from the definition of "penny stock." 17 C.F.R. § 240.3a51-1; see Nolan Wayne Wade, Securities Exchange Act Rel. No. 48245 (July 29, 2003), 80 SEC Docket 2683, 2684. Franklin does not allege, and the record contains no evidence, that EZCL, which was unregistered, unlisted, and traded at less than one dollar, satisfied any of the exceptions.

11/ SEC v. Franklin, No. 06-55357 (9th Cir. filed Mar. 14, 2006).

12/ Franklin claims that Division staff acted improperly by conducting a "massive document dump at the last moment in Franklin's trial so that he could/would not have the opportunity to discover exculpatory evidence." Franklin does not indicate how the register of stock transactions was exculpatory, but he claims that the phone records show that Raabe received "a very large number of phone calls; hence he must have been the party in control [of the Victor Keel account]." However, the fact that Raabe received a large number of phone calls from Union Securities does not establish that he was a
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ruled against him, finding that Franklin was not unfairly prejudiced and that his due process rights were not violated. In addition to these evidentiary rulings, Franklin alleges that the evidence adduced in the district court proceeding does not support the jury's verdict finding that he controlled the Victor Keel account through which the touted stocks were traded.

It is well established that Franklin is collaterally estopped from challenging in this administrative proceeding the decisions of the district court in the injunctive proceeding. 13/ The doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction. 14/ The appropriate forum for Franklin's challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals, which, as mentioned, Franklin is pursuing and in which he is raising some of these same issues. 15/

12/ (...continued)
control person of the Victor Keel account.

13/ Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1109-11 (D.C. Cir. 1988) (finding that collateral estoppel precluded the relitigation of the factual question as to whether there was reliance on counsel because that issue had been decided by a federal district court in the underlying injunctive action); see also Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (rejecting a collateral attack on criminal conviction on which the administrative sanction was based); Joseph P. Galluzzi, 55 S.E.C. 1110, 1115-16 (2002) (finding that a party cannot challenge his injunction or criminal conviction in a subsequent administrative proceeding); Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (same); Demitrius Julius Shiva, 52 S.E.C. 1247, 1249 (1997) (stating that the doctrine of collateral estoppel precludes the Commission from reconsidering an injunction as well as factual issues that were actually litigated and necessary to the court's decision to issue the injunction).

14/ Blinder, Robinson, 837 F.2d at 1109-11; Shiva, 52 S.E.C. at 1249 (citations omitted). As the Supreme Court has stated, collateral estoppel "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153-54 (1979).

15/ See supra note 11 and accompanying text. Franklin seeks a Commission stay of this proceeding pending his appeal to the United States Court of Appeals. However, it is well established that a pending appeal does not affect the injunction's status as a basis for this administrative proceeding. Blinder Robinson, 837 F.2d at 1104 n.6 ("[T]he fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation."); see also Michael Batterman,
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B.

Franklin also argues that Division staff engaged in misconduct in the investigation and prosecution of the injunctive action in federal district court. Franklin contends that, because of the alleged misconduct by the Division, "the government has forfeited its right to seek the relief sought." As with his challenges to the evidentiary rulings made by the district court, this is not the appropriate forum for challenging the propriety of the Division's conduct in the injunctive action; such a challenge should have been brought before the district court and, if necessary, appealed. 16/ Moreover, the doctrine of unclean hands may not generally be invoked against a government agency "which is attempting to enforce a congressional mandate in the public

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15/ (...continued)
Investment Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1354 n.10 (holding that a pending appeal does not affect the injunction's status as a basis for an administrative proceeding), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished); Joseph P. Galluzzi, 55 S.E.C. at 1116 n.21 (holding that the pendency of an appeal does not preclude the Commission from acting to protect the public interest). Accordingly, we are not precluded from taking action here. See Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992) (finding no need to delay proceeding until outcome of respondent's appeal), aff'd, 36 F.3d 86 (11th Cir. 1994) (per curiam).

To the extent that Franklin prevails in his appeal, he would be entitled to file a motion to vacate the opinion and order in this matter. See Jimmy Dale Swink Jr., 52 S.E.C. 379 (1995) (order granting motion to vacate bar, where respondent's underlying conviction, which was the basis for the Commission's bar order, was reversed by the court of appeals and remanded to the district court).

16/ Harold F. Harris, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 87 SEC Docket 350, 359.

interest." 17/ While courts recognize "the need to deter governmental abuses," 18/ in order to raise an equitable defense such as unclean hands against a government agency, courts "have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level." 19/

Franklin has not demonstrated how any of his allegations of misconduct, even if true, might have prejudiced him in his defense of either the injunctive action or the administrative proceeding. Nothing the Division or its staff is alleged to have done prevented Franklin from putting forth his defenses to the injunctive action or to this proceeding. In view of the fact that the misconduct, if any, did not amount to a violation of Franklin's constitutional rights or similarly egregious conduct, the defense of unclean hands is not available here.

For example, Franklin alleges that a Division staff member improperly disclosed the existence of a staff investigation into Red Hot Stocks. Franklin asserts that he became aware of this alleged disclosure during a June 16, 1998 judgment debtors examination in an unrelated private civil lawsuit (the "June 16, 1998 examination") when he was asked a series of questions about the Red Hot Stocks website. Franklin claims that a staff attorney disclosed the investigation to the attorney conducting the June 16, 1998 examination in order to circumvent his assertion of the Fifth Amendment privilege against self incrimination so that "an ordinary debtor examination would be turned into an SEC investigatory deposition." In support of this allegation, Franklin points to a portion of the transcript of the June 16, 1998 examination and a document he describes as an attorney billing record. Nothing in these documents, however,

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17/ SEC v. KPMG LLP, 2003 WL 21976733, at *3 (S.D.N.Y. 2003); SEC v. Rosenfeld, 1997 WL 400131, at *2 (S.D.N.Y. 1997) (quoting SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980)) (citations omitted); see also SEC v. Lorin, 1991 WL 576895, at *1 (S.D.N.Y. 1991) ("Generally, an unclean hands defense is not available in a SEC enforcement action."); SEC v. Condrin, 1985 WL 2054, at *1 (D. Conn. 1985) ("Unclean hands is not a defense against an action sought by the SEC."); see generally Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51, 60 (1984) (stating that the government may not be estopped on the same terms as any other litigant because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined").

18/ SEC v. Lorin, 1991 WL 576895, at *1 (S.D.N.Y. June 18, 1991) ("Recognizing the need to deter governmental abuses, courts do allow the defense of government misconduct to be invoked where it appears that the government may have engaged in outrageous or unconstitutional activity.").

19/ SEC v. Follick, 2002 WL 31833868, at *8 (S.D.N.Y. 2002) (quoting SEC v. Elecs. Warehouse, Inc., 689 F. Supp. 53, 73 (D. Conn. 1988), aff'd, 891 F.2d 457 (2d Cir. 1989)).

establishes that Division staff disclosed the existence of an ongoing investigation. The Division denies that this disclosure occurred. 20/

Franklin also contends that the Division staff engaged in misconduct in SEC v. Cavanagh, 21/ an unrelated "pump-and-dump" case in which Franklin was permanently enjoined for violations of Securities Act Sections 5(a) and 5(c). Franklin claims that Division staff made false statements to the district and appellate courts in Cavanagh indicating that Franklin had instructed another defendant, Thomas R. Brooksbank, "to send subpoenaed records out of the country with the intention of blocking Brooksbank's compliance with the subpoena duces tecum served on him." In essence, Franklin claims that Division staff indicated that Brooksbank was subject to a subpoena for the documents at issue when in fact he was not. Franklin further argues that Commission staff ignored Brooksbank's efforts to recant or explain his deposition testimony in Cavanagh.

Franklin is correct that Brooksbank was not sent a subpoena for documents. In fact, the subpoena for documents was directed to a third person. However, whether Brooksbank was subject to a subpoena for documents is irrelevant. The Cavanagh court found that "during the course of the SEC investigation into the [Red Hot Stocks] website, Franklin instructed Brooksbank to send abroad documents pertaining to [a related] company and Brooksbank complied." The Cavanagh decision makes no mention of a subpoena. Thus, there is no support

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20/ For the same reasons, we reject Franklin's contention that the disclosure of the existence of a Commission investigation is unlawful pursuant to 18 U.S.C. § 1905 which governs the disclosure of confidential information by, among others, "an officer or employee of the United States or of any department or agency thereof."

As a general matter, we note that the Commission permits certain disclosures about pending investigations. Securities Act Section 8(e) and Exchange Act Section 21(a) authorize the Commission to investigate violations of the federal securities laws and to adopt regulations directing the staff's conduct during such investigations. 15 U.S.C. §§ 77h(e) and 78u(a). The Privacy Act of 1974, 5 U.S.C. § 552a, authorizes the Commission to determine the appropriate uses of information gathered in the course of an investigation, and we have published a list of permissible routine uses of such information by Commission staff. Privacy Act of 1974; Modification of Systems and Records, Release No. PA-11, 1989 SEC LEXIS 934. One of the routine uses permitted is disclosure "[t]o any person during the course of any inquiry or investigation conducted by Commission's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry." Id. at *10.

21/ 2004 U.S. Dist. LEXIS 13372 (S.D.N.Y. July 27, 2004), aff'd, 175 Fed. Appx. 467 (2d Cir. 2006) (unpublished).

for Franklin's argument that the district court's finding in Cavanagh was erroneous or that it was the result of alleged misstatements by the Division. 22/ We agree with the law judge that Franklin's instructing Brooksbank to send documents related to the Division's investigation of Red Hot Stocks out of the country provides further support for imposition of a penny stock bar in this proceeding.

Franklin next alleges that Commission staff acted improperly by questioning him about "key issues" relating to the Franklin Injunctive Action during a deposition in Cavanagh. Franklin claims that in so doing, Commission staff were able to circumvent the discovery deadline in the Franklin Injunctive Action which had expired. However, Franklin has offered no evidence to support this assertion. There is no evidence that Franklin's deposition testimony in Cavanagh was used in the Franklin Injunctive Action in district court or in this administrative proceeding. The questions asked in the Cavanagh deposition about events underlying the Franklin Injunctive Action related to whether the Division could establish a likelihood of future violation in the Cavanagh case, one of the considerations relevant to the imposition of an injunction.

22/ Franklin proffers Brooksbank's testimony in the Franklin Injunctive Action in which Brooksbank stated that Commission staff had taken the position that he sent documents out of the country "in violation of a subpoena served upon [Brooksbank], when that is not true." However, in the Franklin Injunctive Action, Brooksbank's testimony continues:

Q. Okay. Now, in either case, isn't it true that Mr. Franklin contacted you after Mr. Rowley had received a subpoena?
A. No, I contacted Franklin.
Q. You contacted Franklin, and notified him that Mr. Rowley had received a subpoena for documents.
A. Correct.
Q. And that Mr. Franklin, in response to that, instructed you to send any documents that you had to the Turks & Caicos.
A. The truth is that I asked Jim [Franklin] where he wanted me to send the documents. He didn't take the affirmative.
I said, I don't want to be involved in whatever dispute you have with the S.E.C., where do you want me to send your documents? I don't want anything to do with them.
Q. And he told you to send them out of the country.
A. Yes.
Q. And you did so.
A. And I did so.

This testimony further supports the conclusion that Franklin instructed Brooksbank to send documents related to the Division's investigation of Red Hot Stocks out of the country.

Franklin further contends that, during the Franklin Injunctive Action, Division staff questioned the accuracy of Franklin's testimony in the June 16, 1998 examination and that this constituted an "implied threat to possibly have me prosecuted for perjury." Franklin argues that Division staff used the threat of criminal prosecution to pressure him to waive his Fifth Amendment privilege against self incrimination or to force a settlement of the civil injunctive action. The declaration by Franklin's trial counsel in the injunctive action that Franklin offers in support of this assertion only states that during a telephone conversation on or about March 31, 2004, Division staff "stated in words or in substance that there was an issue about the possibility of perjury by Mr. Franklin due to his testimony in his judgment debtor exam." Nothing in the declaration gives any indication of an improper motive on behalf of Division staff in alerting Franklin's trial counsel to the presence of potentially untruthful testimony. 23/

C.

Franklin claims that the law judge prejudged this case and, therefore, should have recused herself from the proceeding. Franklin asserts that, during a telephone conference prior to the parties' submissions of their motions for summary disposition, the law judge rejected his request to stay this proceeding pending his appeal of the injunctive action. The law judge stated that the Commission has never held that an appeal of an injunctive action prevents the Commission from exercising its jurisdiction in a follow-on administrative proceeding. Rather than prejudging his request for a stay pending appeal, the law judge's comments were accurate statements of Commission precedent. 24/ We find that Franklin's claim that the law judge prejudged the case is not supported by the record.

IV.

The Division asks that we bar Franklin from participation in any offering of penny stock. As an initial matter, Franklin argues that, because the district court did not impose a penny stock bar in the injunctive action, the imposition of a penny stock bar here is not in the public interest. However, the Commission did not seek a penny stock bar in the district court proceeding. Thus, the district court never considered whether a penny stock bar should be imposed upon Franklin. Nor did the court conclude, as Franklin suggests, that the remedies it imposed were the only ones that were necessary. Rather, the court concluded that Franklin's participation in the illegal scheme posed "a substantial risk of loss to others" and warranted the imposition of serious

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23/ Franklin claims that he "did not have the benefit of an impartial enforcement agency prosecutor." However, as we previously have stated, "[d]ue process does not require a neutral prosecutor." Jean-Paul Bolduc, 54 S.E.C. 1195, 1202 n.25 (2001) (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)). The Division is a party to this proceeding and is entitled to pursue vigorously its claims. In any event, our findings and conclusions here are based on an independent review of the record.

24/ See supra note 15.

sanctions, including a third-tier civil money penalty, the most severe penalty provided in the applicable federal securities laws.

Franklin also accuses the Division of "forum shopping" and argues that the Commission "should fully defer to [the district court's] decision." However, the district court does not have sole jurisdiction over this matter as Franklin suggests. Exchange Act Section 15(b)(6) expressly authorizes the Commission to institute administrative proceedings against any person to determine the need for a penny stock bar in the public interest where the respondent has been, among other things, enjoined from "engaging in any conduct or practice . . . in connection with the purchase or sale of any security." 25/ Thus, as we have stated previously, "the district court proceeding and this proceeding are independent, although this proceeding necessarily follows from the injunctive proceeding." 26/

In evaluating whether an administrative sanction serves the public interest, we consider, among other things, 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 conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. 27/ We also consider the extent to which the sanction will have a deterrent effect. 28/ The appropriate sanction depends on the facts and circumstances of each case. 29/ In proceedings brought based upon the entry of an injunction, we examine the facts and

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25/ 15 U.S.C. § 78o(b)(6).

26/ Vladislav Steven Zubkis, Exchange Act Rel. No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2626.

27/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (citation omitted), aff'd on other grounds, 450 U.S. 91 (1981).

28/ See, e.g., Ahmed Mohamed Soliman, 52 S.E.C. 227, 231 n.12 (1995) (stating that the selection of an appropriate sanction involves consideration of several elements, including deterrence); Lester Kuznetz, 48 S.E.C. 551, 555 (1986) (noting that the sanction of a bar "serves the purpose of general deterrence"); see also McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005) (noting that deterrent value is a relevant factor to consider in deciding sanctions).

29/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Michael Batterman, 84 SEC Docket at 1358.

circumstances underlying the entry of the injunction in determining the public interest. 30/ As we have held, "ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions." 31/

Franklin's violations were egregious. He participated in a fraudulent scheme to tout seven stocks that he had acquired cheaply and then sold those shares after their price increased following false and misleading statements placed on the Red Hot Stocks website. The record establishes -- and Franklin concedes -- that one of those seven stocks, EZCL, was a penny stock. In addition to his fraudulent conduct with respect to the seven stocks, Franklin also violated the registration provisions of Securities Act Sections 5(a) and 5(c) with respect to one of those seven stocks. The egregiousness of Franklin's conduct is supported further by the district court's imposition of a third-tier penalty of $770,000.

Franklin acted with a high degree of scienter. The district court stated in its post-trial remedies hearing that "Franklin was orchestrating" the fraudulent scheme and was "the most culpable" participant. Moreover, he took steps to conceal his participation in the scheme. He traded in the touted stocks primarily through a Canadian brokerage account in the name of Victor Keel, a foreign corporation registered and located in the Turks & Caicos, British West Indies, and Red Hot Stocks was operated by Net Income, a Nevada corporation that Franklin directed through a third party.

Franklin's misconduct was not an isolated occurrence but extended over many months, between 1997 and 1998, and involved at least seven stocks. Moreover, during 1996 through 1998, Franklin engaged in conduct that resulted in the entry of a permanent injunction for violations of Securities Act Sections 5(a) and 5(c) as part of an unrelated "pump-and-dump" scheme in Cavanagh. In that case, the district court, in evaluating the likelihood of future violations, concluded that Franklin was "at the very least reckless as to whether . . . [his] personal profits were earned through fraud." 32/ In addition to the injunction, the district court ordered Franklin to pay a civil money penalty of $125,000, individual disgorgement in the amount of $50,926.50, and disgorgement jointly and severally with two other defendants in the

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30/ Marshall E. Melton, 56 S.E.C. 695, 713 (2003). As we noted in Melton, "[i]n considering the [public interest] factors, we recognize that conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws." Id.

31/ Id.

32/ Cavanagh, 2004 U.S. Dist. LEXIS 13372, at * 93.

amount of $889,275, plus interest. In light of his past misconduct, it is likely future violations will occur if Franklin is permitted to engage in additional penny stock offerings. 33/

Franklin claims that he presently intends to comply with the securities laws, describing the injunction imposed by the district court as a "sword hanging over my head," that, should he "violate any security law will most assuredly result in severe sanctions including incarceration." However, we find this assurance against future violations is outweighed by the fact that Franklin makes this representation after he has been the subject of two separate injunctive actions.

Franklin asserts, without dispute, that, in 1987, he testified against a person who "had been indicted for securities fraud," despite threats that Franklin alleges the promoter made against him and the prosecutor, and that his doing so should mitigate the sanctions imposed in this proceeding. He also claims that he has "acted in ways that have been beneficial to the community and the public in general" and helped "small legitimate businesses" to "expand . . . by gaining access to the capital markets." Franklin's testimony and his efforts to assist small businesses, however laudable, do not outweigh the need to protect the public given Franklin's more recent and repeated misconduct.

Franklin claims that the public interest does not justify a bar because his reputation, "which is his livelihood," already has been ruined, and he can no longer work in the "broker-dealer community." Franklin does not support this claim and, in any event, we are not persuaded that, absent a bar, his inability to participate in penny stock offerings is permanent. A bar is necessary to protect the public interest because, absent a bar, there would be no obstacle to Franklin's participation in a penny stock offering in the future. 34/

A penny stock bar will deter Franklin and others from violating the provisions of the federal securities laws in the course of participating in a penny stock offering. Moreover, we believe a penny stock bar is necessary to protect investors given Franklin's long history of employment in the securities industry. Although Franklin states that he has no intention of "working in any way in the broker-dealer community," he hopes to "make a modest living by

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33/ See Steadman, 603 F.2d at 1140 (stating that "past misconduct gives rise to an inference of probable future misconduct").

34/ Cf. Schield Mgmt. Co., Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848 at 865 (finding that, despite steps taken by the firm to limit the scope of the respondent's employment to exclude advisory activities, "absent a bar, there would be no obstacle to his being an investment adviser in the future").

writing business plans." As indicated, we believe that the public interest requires that such activities cannot be carried out in connection with any penny stock offering. Accordingly, we find that the public interest warrants barring Franklin from participating in any penny stock offering.

An appropriate order will issue. 35/

By the Commission (Chairman COX and Commissioners ATKINS and CASEY); Commissioner NAZARETH not participating.

Nancy M. Morris
Secretary

35/ We have considered all of the parties' contentions. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56649 / October 12, 2007

Admin. Proc. File No. 3-12228

In the Matter of

JAMES E. FRANKLIN

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day it is

ORDERED that James E. Franklin be, and he hereby is, barred from participating in any offering of penny stock, including acting as a promoter, finder, consultant, 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.

By the Commission.

Nancy M. Morris
Secretary