INITIAL DECISION RELEASE NO. 242
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11169

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
ROGER M. DETRANO	:	December 4, 2003
	:	

APPEARANCES: Linda B. Bridgman and Tesha L. Chavier for the Division of Enforcement, Securities and Exchange Commission.

Roger M. Detrano, pro se.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) instituted this proceeding on July 1, 2003, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (Exchange Act).

The Order Instituting Proceedings (OIP) alleged that Roger M. DeTrano (DeTrano) pled guilty to conspiracy to commit securities fraud and that, on September 20, 2002, the United States District Court for the Southern District of New York entered a criminal judgment of conviction and sentenced him to seventy months of imprisonment, three years of supervised release, and a criminal penalty of $200.

The OIP further alleged that the Commission filed a civil injunctive complaint against DeTrano and others, charging DeTrano with engaging in a fraudulent scheme to manipulate a penny stock. The OIP also claimed that, on January 22, 2003, the United States District Court for the Southern District of New York entered a final judgment of default against DeTrano, permanently enjoining him from violating the securities registration, reporting, and antifraud provisions of the Securities Act of 1933 (Securities Act), the Exchange Act, and various rules thereunder. Finally, the OIP asserted that the district court ordered DeTrano to disgorge ill-gotten gains plus prejudgment interest.

The Commission issued the OIP to determine whether these allegations are true and, if so, to determine what remedial action is appropriate in the public interest. The Commission's Division of Enforcement (Division) seeks to bar DeTrano from participating in the offering of any penny stock (OIP ¶ III.B; Prehearing Conference of August 12, 2003, at 11).

Procedural History Of The Case

DeTrano filed a timely Answer to the OIP. The Division then notified DeTrano of the size and location of its investigative files, and informed him when those files would be available for inspection and copying (Order of July 24, 2003; letter of August 1, 2003, from Division attorney LeeAnn G. Gaunt to DeTrano). The Division also identified the materials it proposed to withhold on the grounds of privilege (Order of July 24, 2003; Privilege Log dated August 20, 2003). DeTrano elected not to inspect and copy the Division's investigative files (Prehearing Conference of August 12, 2003, at 7).

At a telephonic prehearing conference with the parties, I noted that Commission decision makers must follow Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1980), when considering if sanctions are appropriate in the public interest, and I reviewed the Steadman opinion with the parties (Prehearing Conference of September 11, 2002, at 50-57). DeTrano indicated that he did not intend to call witnesses on his behalf and did not want an in-person public hearing (Prehearing Conference of September 11, 2003, at 57, 63). At that juncture, I granted the Division leave to file a motion for summary disposition (Order of September 11, 2003).

The Division filed its motion for summary disposition on October 23, 2003. DeTrano filed his opposition on November 24, 2003. The Division filed its reply on December 2, 2003.

The Standards For Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer promptly to grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the

summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

FINDINGS OF FACT

The documents attached to the Division's motion for summary disposition involve matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on those documents, the Division has established, and DeTrano has not contested, the following material facts.

Criminal Case Conviction

On January 25, 2002, DeTrano pled guilty to one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and one count of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff (Answer ¶ 5; Declaration of Tesha L. Chavier, dated October 21, 2003, Tabs 2-3) (hereafter, "Chavier Decl., Tab ___ at ___").[1] United States v. DeTrano, 00 Crim. 1098 (WHP) (S.D.N.Y.).

The criminal indictment alleged that, from approximately November 1999 through approximately June 2000, DeTrano conspired with others to manipulate the market price and trading volume of the common stock of WAMEX Holdings, Inc. (WAMEX). The indictment also charged that DeTrano issued false and misleading statements to the public concerning the development of WAMEX (Chavier Decl., Tab 1 at 5-6). In entering a guilty plea, DeTrano stated under oath:

> I conspired with others to manipulate the market price of WAMEX stock from approximately November of '99 to June of 2000 in Manhattan. WAMEX I knew was a publicly traded stock. I agreed with others, who are my co-defendants, to have issued to me 19-and-a-half million shares of the company and to an entity that I controlled. . . . I understood that the shares would be used approximately to manipulate the market price of the stock, and I agreed with others to issue false and misleading press releases concerning the development of WAMEX. Certain of these press releases were disseminated through e-mail blasts, by public relations firms associated with Mr. Simmons.

(Chavier Decl., Tab 3 at 21).

At all relevant times, prices for WAMEX common stock were posted on the National Association of Securities Dealers' Over-The-Counter Bulletin Board (OTC Bulletin Board) (Chavier Decl., Tab 1 at 1, Tab 11). From December 1, 1999, to January 12, 2000, and from April 7, 2000, to June 30, 2000, WAMEX common stock traded below $5.00 per share (Chavier

[1] OIP ¶ II.5 erroneously refers to two counts of conspiracy to commit securities fraud. In fact, the indictment and the guilty plea involved one count of conspiracy to commit securities fraud and one count of securities fraud.

Decl., Tab 11). WAMEX also had net tangible assets below $5 million and its average revenue for the preceding three years was below $6 million (Chavier Decl. ¶ 10). WAMEX was therefore penny stock within the meaning of Section 3(a)(51)(A)(iv) of the Exchange Act and Exchange Act Rule 3a51-1.

On September 20, 2002, the court entered a judgment of criminal conviction against DeTrano and sentenced him to seventy months of imprisonment, followed by three years of supervised release (Chavier Decl., Tabs 4-5). The court also assessed a criminal penalty of $200 (Chavier Decl., Tab 5 at 45-46). DeTrano is currently incarcerated at the Federal Correctional Institution, Otisville, New York (Answer).

Default Civil Injunction

On October 11, 2001, the Commission filed a civil complaint against DeTrano and others, alleging a fraudulent scheme to manipulate the common stock of AbsoluteFuture.com (AFTI) from December 1999 through April 2000 (Chavier Decl., Tab 6). SEC v. AbsoluteFuture.com, 01 Civ. 9058 (AGS) (S.D.N.Y.). When DeTrano failed to respond to the complaint within the time allowed, the Commission moved for the entry of judgment by default.

The Commission's complaint alleged that, as part of the fraudulent scheme, AFTI made false statements in a filing with the Commission in order to register 4.1 million shares of stock that it issued to five entities controlled by DeTrano and a business associate (Chavier Decl., Tab 6 at 3). The complaint also alleged that, once the shares were issued, DeTrano failed to report his holdings of more than ten percent of AFTI's shares (Chavier Decl., Tab 6 at 27-28). It further asserted that DeTrano and his business associate sold the improperly registered shares to the public to manipulate the price of AFTI stock, and that DeTrano caused AFTI to issue a false press release timed to coincide with manipulative trading conducted by his business associate (Chavier Decl., Tab 6 at 16-17). The Commission's complaint charged that DeTrano's actions violated the registration, reporting, and antifraud provisions of the securities laws (Chavier Decl., Tab 6 at 5).

At the relevant times, the price of AFTI common stock was posted on the OTC Bulletin Board (Chavier Decl., Tab 12). With the exception of one day, AFTI traded at less than $5.00 per share from December 1, 1999, to April 1, 2000 (Chavier Decl., Tab 12). In addition, AFTI's net tangible assets were below $5 million and the company's average revenue for the preceding three years was below $6 million (Chavier Decl. ¶ 11). AFTI common stock was thus penny stock within the meaning of Section 3(a)(51)(A)(iv) of the Exchange Act and Exchange Act Rule 3a51-1 (OIP ¶ II.3; Answer ¶ 3).

On January 22, 2003, the court entered a Final Judgment of Default against DeTrano and others (Chavier Decl., Tab 7). The Final Judgment permanently enjoined DeTrano from violating Sections 5(a), 5(c), and 17(a) of the Securities Act; Sections 10(b), 13(d), and 16(a) of the Exchange Act; and Exchange Act Rules 10b-5, 12a-1, 13d-1, and 16a-3 (Chavier Decl., Tab

7 at 6-9).[2] It also ordered DeTrano to pay $494,694.82, representing the disgorgement of ill-gotten gains ($401,111.61) plus prejudgment interest through December 2002 ($93,583.21) (Chavier Decl., Tab 7 at 10-11).

On January 27, 2003, DeTrano wrote a letter to the court, objecting to the calculation of disgorgement and prejudgment interest (Chavier Decl., Tab 8). DeTrano asked the court to consider his letter as a notice of appeal if the court did not reduce the amount to be disgorged. On February 25, 2003, the court denied DeTrano's application for a reduction of the judgment of disgorgement against him. It also directed the Clerk to treat DeTrano's January 27, 2003, letter as a notice of appeal (Chavier Decl., Tab 10).

On September 9, 2003, the U.S. Court of Appeals for the Second Circuit docketed DeTrano's appeal as No. 03-6179. The appeal is still pending.

DeTrano's Opposition

Criminal convictions cannot be collaterally attacked in a follow-on administrative proceeding, such as this one. See William F. Lincoln, 53 S.E.C. 452, 455-56 & n.7 (1998) (collecting cases). Furthermore, findings of fact and conclusions of law made in a prior injunctive action are also immune from attack in a subsequent administrative proceeding. Ted Harold Westerfield, 69 SEC Docket 722, 729 n.22 (Mar. 1, 1999) (collecting cases). To the extent that DeTrano's opposition raises such challenges, it provides no basis for denying the Division's motion for summary disposition.

CONCLUSIONS OF LAW

As here relevant, Section 15(b)(6)(A) of the Exchange Act provides two separate avenues for imposing a penny stock bar after notice and opportunity for hearing. First, the Commission may impose a penny stock bar if (1) the person was participating in a penny stock offering at the time of the alleged misconduct and has been convicted of an offense specified in Section 15(b)(4)(B) of the Exchange Act within ten years; and (2) a bar is in the public interest. See Benjamin G. Sprecher, 52 S.E.C. 1296, 1297 n.2 (1997). Second, the Commission may bar a person from participating in an offering of penny stock if (1) the person has been enjoined in connection with the purchase or sale of a security and, at the time of the misconduct alleged in

[2] DeTrano was never accused of, and the court did not enjoin him from, violations of Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20 and 13a-1. To the extent that OIP ¶ II.4 alleges otherwise, it is in error.

DeTrano now argues that he should not be deemed to be in default and thus to have admitted the facts of the AFTI scheme alleged in the civil injunctive action because he sent letters to the district court on December 9, 2002, and January 27, 2003. However, those letters related only to DeTrano's efforts to have the district court reduce the amount of disgorgement sought by the Commission. The letters did not dispute DeTrano's liability for participating in the AFTI scheme, nor the entry of injunctive relief.

the injunctive action, was participating in a penny stock offering; and (2) a bar is in the public interest. Ralph W. LeBlanc, 80 SEC Docket 2750, 2755-56 (July 30, 2003).

Penny stock. Under Section 15(b)(6)(C) of the Exchange Act, the term "person participating in an offering of penny stock" includes any person acting as any 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 penny stock. At the relevant times, both WAMEX and AFTI were penny stocks and DeTrano was a "person participating in an offering of penny stock."

Bar based on criminal conviction. Under Sections 15(b)(6)(A)(ii) and 15(b)(4)(B) of the Exchange Act, the Commission has authority to bar any person from participating in an offering of penny stock if such person has been convicted of a crime involving the purchase or sale of any security within the past ten years and if, at the time of the alleged misconduct, the person was participating in an offering of any penny stock.

It is undisputed that on September 20, 2002, DeTrano was convicted of participating in a fraudulent scheme to manipulate the price and volume of WAMEX penny stock from November 1999 through June 2000. Based on this misconduct, DeTrano was convicted of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff. Thus, DeTrano's conviction, within ten years of this proceeding, satisfies the requirements of Sections 15(b)(6)(A)(ii) and 15(b)(4)(B) of the Exchange Act for issuance of a penny stock bar.

Bar based on civil injunction. As relevant here, Section 15(b)(6)(A)(iii) of the Exchange Act authorizes the Commission to bar any person from participating in an offering of penny stock if the person has been enjoined by a court from engaging in conduct in connection with the purchase or sale of securities and if, at the time of the misconduct alleged in the injunctive proceeding, the person was participating in an offering of penny stock. See LeBlanc, 80 SEC Docket at 2755-56; Nolan Wayne Wade, 80 SEC Docket 2683, 2683-84 (July 29, 2003).

It is undisputed that on January 22, 2003, DeTrano was found liable for participating in a fraudulent scheme to manipulate AFTI penny stock and, based on such conduct, enjoined from violating the antifraud, registration, and reporting provisions of the federal securities laws. DeTrano's pending appeal has no effect on the resolution of this matter. See Joseph G. Galluzzi, 78 SEC Docket 1125, 1130 n.21 (Aug. 23, 2002); Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994). DeTrano's appeal is limited to the district court's order of disgorgement; it does not challenge the underlying injunction (Prehearing Conferences of August 12, 2003, at 22; September 11, 2003, at 56-57). The amount of disgorgement that DeTrano must make in the AFTI civil action is not determinative of the need for a penny stock bar in this proceeding.

Public interest. To determine whether a penny stock bar against DeTrano is in the public interest, the Commission considers six factors: (1) the egregiousness of Respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of Respondent's assurances against future violations; (5) Respondent's recognition of the

wrongful nature of his conduct; and (6) the likelihood that Respondent's occupation will present opportunities for future violations. See Steadman, 603 F.2d at 1140.

DeTrano acknowledges that price manipulation is an extremely serious violation and involves a high degree of scienter (Prehearing Conference of September 11, 2003, at 53, 55). The other violations for which DeTrano has been enjoined involve the registration and reporting provisions of the federal securities laws. The Commission did not have to demonstrate scienter to establish such violations. The provisions are nonetheless an important part of the overall federal regulatory scheme. Even as to such non-scienter violations, DeTrano does not suggest that his state of mind was innocent.

DeTrano's misconduct was not isolated. The criminal conviction and the injunction show that he engaged in two stock manipulations from November 1999 through June 2000. The schemes were overlapping in time, but they were separate and distinct. The violations stopped only when the Department of Justice and the Commission intervened to make them stop.

DeTrano is in his late fifties and has spent his entire career in the financial services industry. There is a genuine possibility that DeTrano will return to that industry following his release from prison and be presented with opportunities to engage in future penny stock offerings and misconduct similar to the violations evidenced by this record. His past misconduct thus provides a basis for inferring a risk of probable future misconduct. DeTrano speculates that he is unlikely to find future employment in the securities field because of his criminal conviction, but that does not minimize the public interest in imposing a penny stock bar. There is also a valid regulatory purpose to be served by deterring others from engaging in similar misconduct.

I have considered DeTrano's claim that the Division is attempting to portray him as the mastermind of the two manipulation schemes, with almost no focus on his business associate, whom he characterizes as the real architect of the schemes. However, the Commission has previously imposed a penny stock bar against the individual identified by DeTrano. See Edward A. Durante, 80 SEC Docket 2971 (Aug. 7, 2003) (settlement order). DeTrano may not escape a sanction in this proceeding by asserting that his business associate is even more culpable. Finally, DeTrano has stated that he is remorseful and recognizes the wrongfulness of his conduct. While this is some evidence of rehabilitation, it is not sufficient to p resent a genuine issue for resolution at a hearing. This is particularly so when much of DeTrano's opposition involves collateral attacks on issues resolved against him in the underlying criminal and injunctive proceedings. After considering the Steadman factors, I conclude that the public interest requires the imposition of a penny stock bar.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic prehearing conference scheduled for December 9, 2003, is cancelled; and

3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Roger M. DeTrano is barred from participating in the offering of any penny stock. The bar includes acting as any 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.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a petition for review of this initial decision may be filed within twenty-one days after service of the decision. It shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 360(d)(1) within twenty-one days after service of the initial decision upon him, unless the Commission, pursuant to Rule 360(b)(1), determines on its own initiative to review this initial decision as to any party. If a party timely files a petition for review, or the Commission acts to review as to a party, the initial decision shall not become final as to that party.

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James T. Kelly
Administrative Law Judge