INITIAL DECISION RELEASE NO. 996
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16712

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

In the Matter of	:	
	:	INITIAL DECISION
GILLES T. DE CHARSONVILLE	:	April 5, 2016

APPEARANCES: Nancy A. Brown and Michael D. Birnbaum for the Division of Enforcement, Securities and Exchange Commission

Scott S. Balber, Emily Abrahams, and David W. Leimbach of Herbert Smith Freehills New York LLP for Respondent Gilles T. De Charsonville

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Gilles T. De Charsonville from the securities industry. He was previously enjoined against violations of the antifraud provisions of the federal securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on July 30, 2015, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The proceeding is a follow-on proceeding based on *SEC v. Balboa*, No. 1:11-cv-8731 (S.D.N.Y.), in which De Charsonville was enjoined against violations of the antifraud provisions of the Exchange Act and of the Investment Advisers Act of 1940 (Advisers Act). In accordance with leave granted, the Division of Enforcement (Division) filed a motion for summary disposition, pursuant to 17 C.F.R. § 201.250(a); De Charsonville filed an opposition, and the Division, a reply. *See Gilles T. De Charsonville*, Admin. Proc. Rulings Release No. 3245, 2015 SEC LEXIS 4315 (A.L.J. Oct. 21, 2015).[1]

[1] The motion for summary disposition, opposition, and reply, were timely filed on November 20, 2015, December 21, 2015, and January 8, 2016, respectively. *Id*.

This Initial Decision is based on the pleadings and De Charsonville's Answer to the OIP. 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 he 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 De Charsonville was enjoined against violations of the antifraud provisions in *SEC v. Balboa*. The Division urges that he be barred permanently from the securities industry. De Charsonville opposes this, arguing that, at most, a censure or a temporary suspension is an appropriate sanction.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in *SEC v. Balboa*.

2. Statute of Limitations

De Charsonville argues that the proceeding is barred because it was not brought within the five-year statute of limitations set forth in 28 U.S.C. § 2462.[2] This argument fails. The proceeding was initiated within five years of the July 17, 2015, injunction in *SEC v. Balboa*. De Charsonville argues that since the violative conduct ended in 2008, the proceeding is untimely because it was not brought within five years, noting that Exchange Act Section 15(b)(6)(A)(i) authorizes the Commission to bar a person who "has committed or omitted any act, or is subject to an order or finding, enumerated in [Section 15(b)(4)](A), (D), or (E)]." However, the instant proceeding is not authorized by those sections but rather by Exchange Act Sections 15(b)(6)(A)(iii) and 15(b)(4)(C). De Charsonville in effect argues that the Commission was required to institute this proceeding under Section 15(b)(6)(A)(i). This argument overlooks prosecutorial discretion. *See United States v. Batchelder*, 442 U.S. 114, 124-26 (1979) (upholding unfettered prosecutorial discretion to decide between statutes on which to charge a defendant); *see also Proffitt v. FDIC*, 200 F.3. 859, 864-65 (D.C. Cir. 2000) (holding FDIC action was within the statute of limitations set forth in 28 U.S.C. § 2462 and stating "While the FDIC might well have brought an action earlier under [another provision], its failure to do so

[2] Recently, the Commission declared its non-acquiescence to the ruling of the U.S. Court of Appeals for the D.C. Circuit in *Johnson v. SEC*, 87 F.3d 484, 488-92 (D.C. Cir. 1996), that sanctions such as associational bars are subject to the statute of limitations set forth in 28 U.S.C. § 2462. *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 SEC LEXIS 3854, at *55-56 & n.71 (Sept. 17, 2015), *appeal pending*, No. 15-1416 (D.C. Cir., filed Nov. 13, 2015).

does not render untimely, and therefore, unauthorized, its action based on the later occurring effect.").

3. Commission's Authority

De Charsonville argues that this proceeding violates due process and the Appointments Clause of the Constitution. However, the Commission has recently affirmed the constitutionality of its administrative proceedings. *See Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *76-90 (Sept. 3, 2015), *appeal pending*, No. 15-1345 (D.C. Cir., filed Oct. 5, 2015); *accord Timbervest, LLC*, Advisers Act Release No. 4197, 2015 SEC LEXIS 3854, at *89-104 (Sept. 17, 2015), *appeal pending*, No. 15-1416 (D.C. Cir., filed Nov. 13, 2015); *David F. Bandimere*, Securities Act of 1933 Release No. 9972, 2015 SEC LEXIS 4472, at *74-86 (Oct. 29, 2015).

4. Collateral Estoppel

As the parties recognize, it is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, as in *SEC v. Balboa*; by consent; or after a trial. *See John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *10 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997); *see also Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003).

II. FINDINGS OF FACT

De Charsonville was enjoined in *SEC v. Balboa* from committing violations of Exchange Act Section 10(b) and Rule 10b-5; Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-8; and FINRA Rule 5210 on July 6, 2015. *SEC v. Balboa*, ECF No. 52. He was further ordered to pay disgorgement of $297,174 plus prejudgment interest of $67,261.46 and third-tier civil penalties of $260,000; he was ordered to pay these sums to the Commission by July 31, 2015.[3] *SEC v. Balboa*, ECF Nos. 52, 55.

Facts underlying *SEC v. Balboa* are set forth in the court's July 6, 2015, Opinion and Order, ECF No. 52, and are as follows: From 2003 through December 2011, De Charsonville

[3] The court imposed the $260,000 penalty rather than possible higher amounts, in part because "he is already paying a significant disgorgement award. . . . The Court believes such a penalty is sufficient to deter future such conduct and to penalize De Charsonville for his violations, without imposing undue hardship." *SEC v. Balboa*, ECF No. 52 at 10-11. The Division represents that De Charsonville has not paid the disgorgement, prejudgment interest, and penalty.

worked for BCP Securities, LLC, a broker-dealer. In 2007-2008, he worked out of BCP's Madrid office, brokering sales and purchases of emerging market bonds. He also provided his clients with a complimentary mark-to-market service, providing valuations of securities in the clients' portfolios. At the same time, Michael Balboa, associated with Millenium Global Investments, an investment manager, managed the portfolios for several Millenium Global funds (the Funds). Investors were told that Balboa had no role in valuing assets. GlobeOp Financial Services, LLC, was the Funds' independent valuation agent. It valued the Funds' holdings and calculated their net asset values each month. For illiquid securities, GlobeOp solicited the opinions of brokers or counter-parties trading such securities regarding their value. Under Millenium's agreement with GlobeOp, if Balboa and a counter-party disagreed, the counter-party's valuation would control. Balboa suggested De Charsonville to GlobeOp as a broker who could provide valuations. Each month, De Charsonville received a list of fifteen to twenty securities from GlobeOp for which he was to provide valuations. Usually, he obtained information by consulting Bloomberg, but for the Funds' Nigerian warrants and Uruguayan warrants, he used valuations supplied by Balboa. De Charsonville agreed to this approach with Balboa in March or April 2007. In January 2008, De Charsonville began to suspect Balboa's valuations were not accurate. In May 2008, after GlobeOp questioned a valuation, De Charsonville sought the true valuation from a third party and learned that Balboa's valuations were grossly inflated. He then asked Balboa to fabricate a justification that he would provide to GlobeOp to support the inflated valuation. De Charsonville continued to participate in the scheme because he did not want to lose Balboa as a client – in 2008 De Charsonville earned $297,174 in profits from the fraud. In April 2008, De Charsonville confirmed Balboa's false valuations to Deloitte & Touche, which was auditing Millenium Global. When the Funds collapsed in October 2008, De Charsonville lied to the Funds' CEO, concealing the fact that the valuations had come from Balboa and inventing explanations for the valuations. De Charsonville also lied to Spanish and U.S. regulators about the scheme. Eventually, in January 2013, he provided the full truth after prosecutors refused to give him a deferred prosecution agreement. Thereafter, he cooperated extensively with the Commission and the Department of Justice, including testifying in the successful prosecution of Balboa.[4] De Charsonville continues to work as a broker selling emerging market securities.

Prior to the events related to Balboa, De Charsonville had an unblemished career for over twenty years. Answer at 3. He no longer provides marks and will not do so in the future. Answer at 5.

III. CONCLUSIONS OF LAW

De Charsonville has been been 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.

[4] Official notice, pursuant to 17 C.F.R. § 201.323, is taken of Balboa's conviction of securities fraud, wire fraud, and other violations. *United States v. Balboa*, No. 12-cr-196 (S.D.N.Y.). Balboa was sentenced to forty-eight months of incarceration and ordered to pay restitution of $390,243,873.92 and to forfeit $2,223,000. *Id.*, ECF Nos. 160, 162.

IV. SANCTION

As the Division requests, a collateral bar will be ordered.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 78*o*(b)(6)(A). The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)), *aff'd on other grounds*, 450 U.S. 91 (1981). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *4-5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. *See Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

B. Sanction

As described in the Findings of Fact, De Charsonville's conduct was egregious and recurrent, over a period of more than a year. His conduct involved a high degree of scienter, as shown by his continuing to participate in the scheme after realizing that Balboa's valuations were grossly inflated in order to keep Balboa as a client and by his lying to the Funds' CEO, auditors, and regulators about the scheme until January 2013. At that point, when faced with prosecution, he cooperated extensively in the successful prosecution of Balboa. His occupation, if he were allowed to continue it in the future, would present opportunities for future violations, despite his assurance that he will refrain from providing marks. Absent a bar, he could continue in the securities industry. The violations are neither recent nor distant in time. De Charsonville has recognized the wrongful nature of his conduct. Any direct financial harm to investors solely attributable to De Charsonville's conduct cannot be quantified. However, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange

Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). An injunction involving dishonesty weighs in favor of a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

De Charsonville notes that Balboa, not he, instituted the fraudulent scheme, and that he was unaware of the fraud at first. However, the fact that others were involved in the misconduct does not relieve him from responsibility. *See James J. Pasztor*, Exchange Act Release No. 42008, 1999 SEC LEXIS 2193, at *15-18, *25-29 (Oct. 14, 1999) (supervisor held liable for registered representative's execution of violative directed trades; supervisor had tried to stop the trading but was overruled by broker-dealer's owner who was friendly with the customer); *Charles K. Seavey*, Advisers Act Release No. 2119, 2003 SEC LEXIS 716, at *12-14, *19-21 (Mar. 27, 2003) (associated person found liable where investment adviser required him to sign materially misleading letter), *aff'd*, 111 F. App'x. 911 (9th Cir. 2004). De Charsonville also points to his previously unblemished record in the securities industry, but a lack of a disciplinary record is not an impediment to imposing sanctions for a respondent's first adjudicated disciplinary violation. *See Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 SEC LEXIS 3171, at *15-17 (June 26, 2003); *Martin R. Kaiden*, Exchange Act Release No. 41629, 1999 SEC LEXIS 1396, at *29-30 (July 20, 1999); *see also Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 SEC LEXIS 1621, at *42 & n.39 (May 15, 2009) ("[T]he absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws."); *accord Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *32 & n.40 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

De Charsonville argues, based on the *Steadman* factors, that any sanction should be limited to a censure or suspension. However, the Commission considers an antifraud injunction to be especially serious and to subject a respondent to the severest of sanctions. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *29-30. Indeed, from 1995 to the present, there have been over thirty-five litigated follow-on proceedings based on antifraud injunctions in which the Commission issued opinions, and all of the respondents were barred[5] – thirty-four unqualified bars and three bars with the right to reapply after five years.[6] Further, in every such case that followed the statutory provision of collateral bars, the Commission imposed a collateral bar rather than an industry specific bar, reasoning that the antifraud provisions of the securities laws apply broadly to all securities-related professionals and violations demonstrate unfitness for future participation in the securities industry, even if the disqualifying conduct is not related to

[5] The pre-Dodd-Frank cases imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation.

[6] Those three were *Richard J. Puccio*, Exchange Act Release No. 37849, 1996 SEC LEXIS 2987 (Oct. 22, 1996); *Martin B. Sloate*, Exchange Act Release No. 38373, 1997 SEC LEXIS 524 (Mar. 7, 1997); and *Robert Radano*, Advisers Act Release No. 2750, 2008 SEC LEXIS 1504 (June 30, 2008). The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."

the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. *See John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *42-43 (Dec. 13, 2012).

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, GILLES T. DE CHARSONVILLE IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent and from participating in an offering of penny stock.[7]

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 a 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

[7] Thus, De Charsonville 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, pursuant to Exchange Act Section 15(b)(6)(A), (C).