

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 646/ December 11, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12918

In the Matter of	:	
	:	
vFINANCE INVESTMENTS, INC.,	:	ORDER ON MOTION TO
NICHOLAS THOMPSON AND	:	CORRECT MANIFEST ERRORS
RICHARD CAMPANELLA	:	OF FACT

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings on January 3, 2008, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934. On November 7, 2008, I issued an Initial Decision ordering Respondents vFinance Investments, Inc. (vFinance), and Richard Campanella (Campanella) (collectively, Respondents), to cease-and-desist from violating the federal securities laws, censuring Campanella, and ordering civil penalties be paid by both Respondents. Initial Decision Rel. No. 360. On November 17, 2008, Respondents filed a Motion to Correct Manifest Errors of Fact in the Initial Decision (motion), pursuant to 17 C.F.R. § 201.111(h). Respondents listed eight purported manifest errors of fact in the Initial Decision. The Division of Enforcement (Division) filed an opposition to Respondents’ motion on November 24, 2008.

In their motion, Respondents take issue with factual and legal conclusions applied in the Initial Decision. Items 1-4 and 6-7 of eight address what Respondents contend are misstatements of fact. Items 5 and 8 address legal standards applied and conclusions reached, and as such, are improper for a motion to correct manifest error and will not be addressed. See 17 C.F.R. § 201.111(h). A motion to correct a manifest error of fact in an Initial Decision is correctly made “only if the basis for the motion is a patent misstatement of fact in the initial decision.” Id. To support changing a factual finding in an Initial Decision, Respondents must show that the patent misstatement is something that is “readily visible or intelligible: obvious.” Merriam-Webster’s Collegiate Dictionary, 849 (10th ed. 2001).

In Item 1, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, “He [Pat Hayes] did not check to see if anyone used a web-based email account.” Initial Decision Rel. No. 360 at 5. Respondents cite to Hayes’ testimony, in which he stated that he looked for icons, such as America Online. But in the same exchange, Hayes is asked directly, “Did you take any steps to check whether or not they had been using the Internet, Internet-type email programs, that wouldn’t result in icons?” (Tr. 423.) Hayes supplies a negative answer, saying, “No. You know, I would look for an icon primarily, or you know, a

program saying they had it.” (Tr. 423.) Hayes testified he was looking for icons, not usage, of Internet-based email accounts. Based on Hayes’ testimony, Respondents do not demonstrate a patent misstatement of fact in Item 1.

In Item 2, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, “Thompson sent another email to Campanella on the blast.net account on March 8, 2004, and one of the items mentioned by Thompson was that he was liquidating a client’s position in Lexington.” Initial Decision Rel. No. 360 at 5. The exhibit cited provides incontrovertible evidence that the email sent by Thompson to Campanella was from his blast.net account. (Division’s Ex. 87.) Respondents contend that the statement is a patent misstatement of fact because Campanella did not know that he was receiving emails from Thompson’s blast.net account. Respondents do not point to any testimony by Campanella to support their contention. They refer instead to an exhibit of a screen shot of a Thompson email to Campanella from October 2, 2003, in which the signature line shows Thompson’s name and not his email address. (Respondents’ Ex. 75 at vFinance-SEC 345.) But Respondents provide no evidence that this was the case for the email sent on March 8, 2004. Indeed, Respondents’ assertion is contradicted by the fact that Campanella rebuked Thompson for his use of his blast.net email on two occasions earlier in 2004. (Respondents’ Ex. 5-6.) Thus, there is no patent misstatement of fact asserted in Item 2.

In Item 3, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, “On January 18, 2006, Thompson replied to Campanella that his attorney had not had any contact with the Division, and that as far as Thompson knew, he was in compliance.” Initial Decision Rel. No. 360 at 11. To attempt to bootstrap this statement into a patent misstatement of fact, Respondents remove the statement from its context as part of the factual findings made about the ongoing communications between the Division, representatives at vFinance, Thompson’s counsel, and Thompson, claiming that the statement means Thompson’s attorney never had any contact with the Division. This contention is rebutted throughout the factual findings, as Thompson’s attorney’s correspondence with the Division is noted numerous times. See Initial Decision Rel. No. 360 at 9-11. Thus, there is no patent misstatement of fact asserted in Item 3.

In Item 4, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, “Also on January 31, 2007, Campanella emailed vFinance staff and said, ‘[t]his request must be completed ASAP, even if it means using people from other departments or using temps.’ Therefore, any additional production by Campanella was unjustifiably delayed about eighteen months after the Division’s initial request.” Initial Decision Rel. No. 360 at 14. Respondents claim this is a patent misstatement of fact because it ignores all of Campanella’s prior production efforts. However, Respondents are arguing with an inference drawn from the facts as a whole, weighed by the finder of fact. Thus, Item 4 does not constitute a patent misstatement of fact.

In Item 6, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, “It was obvious to Campanella that cooperation by Thompson to produce the required documentation was not forthcoming. Campanella waited almost six months after the Division’s request in July 2005 to threaten Thompson with termination. On January 5, 2006,

Campanella emailed Thompson that he would be terminated for cause for failure to produce documents and make his computer available to the Division action in dealing promptly with Thompson's stalling on document production substantially furthered the delay by vFinance in complying with the Division's requests." (sic) Initial Decision Rel. No. 360 at 16. Again, Respondents are arguing with an inference drawn from the facts as a whole, weighed by the finder of fact. Thus, Item 6 does not constitute a patent misstatement of fact.

In Item 7, Respondents claim the Initial Decision contains a patent misstatement of fact because it states, "Campanella's inaction substantially assisted Thompson's improper use of his personal email account for business purposes and it substantially assisted the destruction by Thompson of documents that vFinance was required to retain." Initial Decision Rel. No. 360 at 16. Once again, Respondents are arguing with an inference drawn from the facts as a whole, weighed by the finder of fact. Thus, Item 7 does not constitute a patent misstatement of fact.

For the forgoing reasons, Respondents' Motion to Correct Manifest Errors of Fact in Initial Decision is DENIED.

SO ORDERED.

Robert G. Mahony
Administrative Law Judge