

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 68974 / February 25, 2013

Admin. Proc. File No. 3-14351

In the Matter of
ROBERT DAVID BEAUCHENE

ORDER GRANTING MOTION TO AMEND ORDER INSTITUTING PROCEEDINGS

On April 22, 2011, the Commission instituted proceedings against Robert David Beauchene.¹ The Order Instituting Proceedings alleged that Beauchene, an unregistered investment adviser and former registered representative of several registered broker-dealers, who is also the president and sole officer of Rhombus Amalgamated Enterprises, Inc., a New York corporation formed by Beauchene in December 2002, willfully violated § 17(a) of the Securities Act of 1933,² § 10(b) of the Securities Exchange Act of 1934³ and Rule 10b-5 promulgated thereunder,⁴ and §§ 206(1) and 206(2) of the Investment Advisers Act of 1940.⁵ The OIP alleged that Beauchene "fraudulently raised at least \$160,000 from four investors for investment in a purported hedge fund called [Rhombus]."⁶ The OIP directed the institution of proceedings to determine what, if any, remedial action is appropriate in the public interest, including associational bars against Beauchene, the imposition of civil penalties, and disgorgement, pursuant to § 15(b) of the Exchange Act,⁷ § 203(f) of the Advisers Act,⁸ and § 9(b) of the Investment Company Act of 1940.⁹

¹ *Robert David Beauchene*, Securities Exchange Act Release No. 64323, 2011 SEC LEXIS 1429, at *8 (Apr. 22, 2011).

² 15 U.S.C. § 77q(a).

³ *Id.*, § 78j(b).

⁴ 17 C.F.R. § 240.10b-5.

⁵ 15 U.S.C. § 80b-6(1) and (2), respectively.

⁶ *Beauchene*, 2011 SEC LEXIS 1429, at *1.

⁷ 15 U.S.C. § 78o(b).

⁸ *Id.*, § 80b-3(f).

⁹ *Id.*, § 80a-9(b).

On September 27, 2011, an administrative law judge stayed the proceeding against Beauchene, at the request of the United States Attorney for the Southern District of New York, "during the pendency of a criminal investigation arising out of the same facts at issue."¹⁰ On November 29, 2011, the U.S. Attorney filed a criminal information against Beauchene, alleging misconduct virtually identical to that set out in the OIP.¹¹ On April 5, 2012, Beauchene pleaded guilty to one count of securities fraud and one count of wire fraud.¹² On October 9, 2012, the district court entered a judgment against Beauchene and sentenced him to twelve months and one day of incarceration, three years of supervised release, and ordered him to pay restitution of \$160,000.¹³

On December 11, 2012, the administrative law judge lifted her stay in the case, granted the Division's application to move for summary disposition, and stated, "The Division may wish to request the Commission to amend the OIP to add or substitute [Beauchene's] conviction as the basis for the proceeding."¹⁴ On January 11, 2013, the Division filed a motion seeking to amend the OIP to include Beauchene's criminal conviction as a separate basis for seeking the associational bars sought in the original OIP and to withdraw the Division's original request for disgorgement from Beauchene, in light of the district court's \$160,000 restitution order. Beauchene has not responded.

Under Rule of Practice 200(d)(1),¹⁵ the Commission may, at any time, upon motion by a party, amend an OIP to include new matters of fact or law. We have stated that amendments to OIPs "should be freely granted, subject only to the consideration that other parties should not be surprised nor their rights prejudiced."¹⁶ The Division's proposed amendment of the OIP to add Beauchene's criminal conviction for securities fraud and wire fraud as a basis for relief in this action can neither surprise nor prejudice Beauchene. The criminal proceeding against Beauchene

¹⁰ Ex. D to Decl. of Alexander J. Janghorbani in Support of the Division of Enforcement's Mot. to the Comm'n to Amend the Order Instituting Proceedings at 1.

¹¹ *United States v. Beauchene*, 11-cr-1016-JPO (S.D.N.Y. Nov. 29, 2011). Ex. E to Decl. of Alexander J. Janghorbani in Support of the Division of Enforcement's Mot. to the Comm'n to Amend the Order Instituting Proceedings at 1-4.

¹² 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5, respectively (securities fraud) and 18 U.S.C. § 1343 (wire fraud). Ex. F to Decl. of Alexander J. Janghorbani in Support of the Division of Enforcement's Mot. to the Comm'n to Amend the Order Instituting Proceedings at 16. Ex. G to Decl. of Alexander J. Janghorbani in Support of the Division of Enforcement's Mot. to the Comm'n to Amend the Order Instituting Proceedings at 1.

¹³ *United States v. Beauchene*, 11-cr-1016-JPO (S.D.N.Y. Oct. 9, 2012). Ex. G to Decl. of Alexander J. Janghorbani in Support of the Division of Enforcement's Mot. to the Comm'n to Amend the Order Instituting Proceedings at 2-6.

¹⁴ *Robert David Beauchene*, Admin. Proc. Release No. 735, 2012 SEC LEXIS 3801, at *1 n.1 (Dec. 11, 2012).

¹⁵ 17 C.F.R. § 201.200(d)(1).

¹⁶ *Charles K. Seavey*, Investment Advisers Act Release No. 1925A, 55 SEC 17, 2001 SEC LEXIS 501, at *4-5 n.9 (Mar. 9, 2001) (citing *Carl L. Shipley*, Exchange Act Release No. 10870, 45 SEC 589, 1974 SEC LEXIS 3113, at *14 (June 21, 1974)).

was based on the same facts as the Commission's allegations in the OIP. Further, Beauchene's criminal conviction provides an independent basis for remedial sanctions, and it is more efficient to resolve all issues related to this conduct in a single proceeding.

The Division also seeks to modify the OIP to delete its request for disgorgement. As noted above, the district court ordered Beauchene to pay restitution of \$160,000, which was the exact amount of ill-gotten gain alleged in the OIP. We have previously deemed disgorgement satisfied by a respondent's payment of criminal restitution.¹⁷ We have also granted the Division's motion to amend the OIP to withdraw a disgorgement claim where "an order of disgorgement . . . would duplicate the state court's Order of Restitution and because attempts to enforce any disgorgement order by the Commission would duplicate efforts already undertaken by a state court Special Master."¹⁸ Similar concerns apply here, where any efforts by the Commission to enforce a disgorgement order would be duplicative of efforts by the U.S. Attorney's office to enforce the court's restitution order. Under the circumstances, we believe it is appropriate to grant the Division's motion to amend the OIP by withdrawing its disgorgement request. We do not suggest any view as to the outcome of these proceedings.

Accordingly, IT IS ORDERED that the Division of Enforcement's Motion to the Commission to Amend the Order Instituting Proceedings against Respondent Robert David Beauchene is granted.

By the Commission.

Elizabeth M. Murphy
Secretary

¹⁷ See, e.g., *Melhado, Flynn & Assoc., Inc.*, Exchange Act Release No. 64469, 2011 SEC LEXIS 1664, at *16 (May 11, 2011); *Hunter Adams*, Exchange Act Release No. 63850, 2011 SEC LEXIS 454, at *6 n.3 (Feb. 7, 2011).

¹⁸ *A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 48091, 2003 SEC LEXIS 1504, at *2 (June 26, 2003).