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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17507

In the Matter of

JOSEPH L. PITTERA, ESQ.,

Respondent.

**OPPOSITION TO RESPONDENT'S PETITION FOR LIFT OF TEMPORARY
SUSPENSION PURSUANT TO SEC RULE 102(e)(3)(ii)**

INTRODUCTION

On August 26, 2016, the Commission found that it served the public interest to temporarily suspend Joseph L. Pittera ("Pittera") from appearing or practicing before the Commission as an attorney. *See* Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3), Release No. 78699 (August 26, 2016) (the "Order"). The suspension was based on the entry of a default judgment against Pittera by the United States District Court for the Southern District of Florida ("the Court") finding that Pittera had violated Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a) and 77e(c), and permanently enjoining him from violating those statutes and from participating in an offer of penny stock.¹

¹ While Pittera did not file the Petition for Lift of Temporary Suspension Pursuant to SEC Rule 102(e)(3)(ii) (the "Petition") with the Office of the Secretary within 30 days of the suspension, as required by Rule 151(b), Rule 102(e)(3)(ii), or the Order, he provided a copy to the Office of Litigation and Administrative Practice ("OLAP") within 30 days of the Order. On September 22,

The Petition should be denied because it will serve the public interest to continue Pittera's temporary suspension pending an administrative proceeding to determine the appropriate sanction for his misconduct. Pittera issued ten attorney opinion letters baselessly opining that certain MusclePharm Corp. ("MSLP") stock held by OTC Capital Partners LLC ("OTC"), among others, could be sold without a restrictive legend, thereby permitting OTC and others to sell unregistered MSLP stock when no exemption from registration was applicable. Pittera was therefore a necessary and substantial factor in the illegal unregistered offerings and sales of MSLP shares. Absent a temporary suspension, Pittera would remain in a position to harm investors by facilitating other unregistered offerings where no exemption from registration is applicable. Accordingly, the Commission should assign this matter to an administrative law judge to conduct an administrative proceeding to determine the appropriate sanction based on Pittera's misconduct.

BACKGROUND

Pittera has been licensed to practice law in California since 1994. He is the sole lawyer at his firm, where he practices bankruptcy, family, criminal, civil litigation and securities law.

In 2011, due to a lack of cash flow, MSLP was unable to pay several hundred thousand dollars in outstanding debt, evidenced by invoices from vendors for various goods and services. In ten transactions between February and June 2011, OTC purchased and converted approximately \$650,000 of MSLP's unpaid invoices into 23.9 million of newly-issued MSLP penny stock (the "aged-debt transactions"). In each of the ten transactions, OTC entered into Debt Purchase

2016, OLAP received a copy of Pittera's Petition. At that time, there was no record of Pittera having filed the Petition with the Office of the Secretary. On September 26, 2016, OLAP provided the Office of the Secretary with a copy of the Petition. On October 11, 2016, Pittera filed the Petition with the Office of the Secretary. OLAP does not take the position that the Petition should be deemed untimely.

Agreements with MSLP vendors who held invoices that MSLP had failed to pay. Under the terms of the agreements, OTC paid MSLP's outstanding debt for various goods and services, and the vendors assigned MSLP's debt to OTC. Each of the Debt Purchase Agreements specifically provided that the debt being purchased was "evidenced by an invoice." These agreements amended the terms of the debt instruments and allowed OTC to convert the debt to MSLP common stock. MSLP's board of directors approved the issuance of shares to OTC in the amounts set forth in the Debt Purchase Agreements and directed MSLP's transfer agent to issue the shares "free of restricted legend, effective thereafter upon opinion of counsel relating to the same." MSLP did not file a registration statement for any of these transactions.

In 2011, Pittera was hired by Adi Elfenbein, OTC's owner, as outside counsel to OTC to write opinion letters associated with the aged-debt transactions. Because no registration statement was filed and in effect for MSLP shares issued as a result of the transactions, MSLP's transfer agent would not issue the shares without a restrictive legend in the absence of attorney opinion letters stating that an exemption from registration applied. Elfenbein retained Pittera to write opinion letters that identified the invoices used in the transactions as securities and purported to explain why it was lawful to convert OTC's purchase of MSLP's debt into unrestricted penny stock. From February 2011 through June 2011, Pittera wrote and signed ten attorney opinion letters baselessly opining in each letter that MSLP stock held by OTC, among others, should be "free trading"—that is, issued to OTC without a restrictive legend. MSLP's transfer agent used Pittera's opinion letters as the basis for releasing MSLP shares for sale to the public.

On January 22, 2016, the Commission filed a complaint ("Complaint") against Pittera and others charging Pittera with issuing baseless attorney opinion letters in violation of Sections 5(a)

and 5(c) of the Securities Act. *SEC v. OTC Capital Partners, LLC*, Civ. A. No.

16-20270-Civ-Scola (S.D. Fla.). As to Pittera, the Complaint sought a permanent injunction, disgorgement of unlawful proceeds plus prejudgment interest, a financial penalty, and penny stock bar. Pittera failed to respond to the Complaint.

On April 11, 2016, the clerk of the Court entered default against Pittera, to which Pittera likewise did not respond. On May 31, 2016, the Court entered an Order Granting the SEC's Motion for Default Judgment and Permanent Injunctive Relief against him. The Court found that, by virtue of the clerk's default and Pittera's failure to respond to the Complaint, Pittera was deemed to have admitted the allegations in the Complaint and the Commission had established liability against him. The Court ordered Pittera to pay \$5,000 in disgorgement of profits plus interest thereon in the amount of \$823.29 and a \$50,000 civil penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d). The Court also enjoined Pittera from violating Sections 5(a) and 5(c), and permanently enjoined Pittera from participating in any penny stock offerings.²

On August 26, 2016, the Commission issued an Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3) (the "Order"). Based on the previously described default judgment, the Commission found that Pittera had been permanently enjoined by a court of competent jurisdiction, by reason of his own misconduct, in an action brought by the Commission, from violating the Federal securities laws, within the meaning of Rule 102(e)(3)(i)(A). The Commission also found that Pittera had been found in that court proceeding to have violated provisions of the Federal securities laws within the meaning of Rule

² On September 22, 2016, Pittera filed a Motion to Vacate Default Judgment Pursuant to Fed. R. Civ. Proc. 60(b)(1) in the U.S. District Court for the Southern District of Florida. The Commission's Division of Enforcement, Denver Regional Office, filed an opposition to the motion to vacate judgment on October 11, 2016, and the motion remains pending.

102(e)(3)(i)(B). The Commission ordered that Pittera be temporarily suspended from appearing or practicing before the Commission as an attorney, effective upon service on Pittera.

ARGUMENT

The Commission should deny Pittera's Petition to lift the temporary suspension imposed against him under Rule 102(e)(3)(iii). While Rule 102(e)(3)(iii) provides that the Commission may lift a temporary suspension pending an administrative proceeding, it does not expressly set forth the standard that the Commission should apply to determine whether to grant such interim relief. Because such relief is analogous to a stay pending appeal, the Commission should apply the traditional analysis it employs for considering requests for stays under Rule 401(d). That is, the Commission should consider whether: (1) there is a strong likelihood of success on the merits; (2) absent a stay, the movant will suffer irreparable injury; (3) there will be substantial harm to the public if a stay of the suspension is issued; and (4) a stay will serve the public interest. *See In the Matter of JD American Workwear, Inc.*, Release No. 34-43295, 73 SEC Docket 749, 2000 WL 1335348, *1 n.2 (Sept. 15, 2000) (applying this analysis to determine whether a stay was appropriate under Rule 401(d)).

OLAP is unaware of any instance where the Commission has lifted a temporary suspension imposed pursuant to Rule 102(e)(3) pending the outcome of an administrative proceeding to determine the appropriate length of the suspension to be imposed. In any event, consideration of the factors enumerated above demonstrates that Pittera is not entitled to such relief.

Pittera is Not Likely to Succeed on the Merits.

Pittera cannot show that he is likely to succeed on the merits—that is, he cannot demonstrate that the public interest demands that he not be suspended at all—under the *Steadman*

factors which the Commission applies to Rule 102(e) proceedings.³ Pittera's conduct was egregious. By his own admission, he signed ten baseless opinion letters without investigating the legal or factual bases for any of them and failed to conduct basic due diligence knowing that MSLP's transfer agent would use the opinion letters as the basis for releasing MSLP shares for sale to the unsuspecting public. Pittera's conduct was also recurrent in nature. He wrote ten inaccurate opinion letters over a five month period in 2011. Moreover, if he is not suspended, Pittera is likely to engage in future violations. Pittera's regular legal practice includes securities law and there is nothing to stop him from continuing to write baseless opinion letters for clients. Any one of these factors—the egregious nature of his conduct, the recurrent nature of his infraction, and the likelihood of future violations—constitutes a sufficient basis for suspending Pittera.

Pittera's arguments cannot establish a likelihood of his success on the merits. To the extent he challenges the Court's finding that he violated provisions of the Federal securities laws and permanently enjoined him from future violations, that challenge must be rejected, as the factual findings made against him by the Court must be accepted as true. *See* Rule 102(e)(3)(iv). Moreover, Pittera does not challenge the main factual bases for the Order—that he signed ten baseless opinion letters. Instead, Pittera argues that he was misled by his client about the basis for issuing the letters, admitting that he was “an inexperienced securities attorney who failed to

³ The public interest factors for determining appropriate remedial action, as set forth in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), are: 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 of future violations. The inquiry into the appropriate remedial sanction “is a flexible one, and no one factor is dispositive.” *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875.

understand primarily that invoices could not be converted into securities by themselves” and that he “did not have the experience and requisite knowledge in writing the ten opinion letters[.]” Petition, at 4:4-6; 1:25-26. He thus acknowledges that he committed a securities law violation by issuing the opinion letters and effectively concedes that he is not fit to appear and practice before the Commission. Absolutely nothing in this argument negates the strong public interest in sanctioning him.

Although Pittera has moved to overturn the Court’s default judgment against him, here he cannot and has not challenged the factual basis for the default or judgment, and that default still stands undisturbed as providing the bases for the Commission’s Order.⁴ This factor weighs in favor of continuing the temporary suspension.

Pittera Will Not Suffer Irreparable Injury Absent a Stay.

Pittera does not contend in his Petition that he will suffer irreparable injury absent a stay of the temporary suspension or provide any evidence that he would do so. While contending that being “deprived of being able to practice Securities Law . . . will cause untold suffering” (Decl. of Joseph L. Pittera in Support of Response, ¶ 5), he admits that, since the Commission instituted the District Court case, he has worked “mostly on Family Law, Criminal, and Civil matters.” *Id.*, ¶ 6. This factor weighs against lifting the temporary suspension.

Substantial Harm to the Public if a Stay is Issued.

As discussed above, Pittera signed ten baseless attorney opinion letters, without which OTC would not have been able to trade unregistered MSLP stock on the open market when no

⁴ If Pittera succeeds in getting the default order lifted, he can then file a motion to have the suspension against him lifted; until then, the suspension should remain in place. *See Jilaine Bauer*, AP File No. 3-15020, Order Dismissing Proceeding (SEC Oct. 8, 2013) (available at <https://www.sec.gov/litigation/opinions/2013/33-9464.pdf>).

exemption from registration was applicable. Moreover, his explanation for signing the letters was his own lack of experience or diligence. Petition, at 1:25-26; 4:4-6. By engaging in that conduct, Pittera exposed the investing public to harm. A stay of Pittera's temporary suspension could expose the public to further harm, freeing him to engage in similar conduct while his challenge to the temporary suspension is litigated. This factor weighs against lifting the temporary suspension.

Public Interest in Issuance of a Stay.

In its Order dated August 26, 2016, the Commission found it "in the public interest" that Pittera be temporarily suspended. Moreover, the Commission has the authority to protect the integrity of its processes by prohibiting incompetent or unethical professionals from appearing or practicing before it. *See Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979). Nothing has changed here: the default against Pittera is undisturbed and Pittera has offered no good reason to question the Commission's previous determination. The public interest also weighs against the issuance of a stay of the temporary suspension.

The factors the Commission considers in determining whether to grant a stay weigh against granting the requested relief. Accordingly, Pittera's petition to lift his temporary suspension should be denied.

CONCLUSION

The Commission should deny Pittera's petition and set this matter for an administrative proceeding before an administrative law judge.

DATED: October 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2016, I caused a true and correct copy of the forgoing Office of the General Counsel's Opposition to Respondent's Petition for Lift of Temporary Suspension Pursuant to SEC Rule 102(e)(3)(ii) to be served upon the parties and persons entitled to notice below, by mailing through the U.S. Postal Service, by first class mail:

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