

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 76980 / January 27, 2016

Admin. Proc. File No. 3-17020

In the Matter of
DIANE D. DALMY, ESQ.

ORDER DENYING PETITION TO LIFT
TEMPORARY SUSPENSION AND
DIRECTING HEARING

Diane D. Dalmy, Esq., an attorney licensed to practice law in Colorado, has filed a petition, pursuant to Rule 102(e)(3)(ii)¹ of the Commission's Rules of Practice, to lift her temporary suspension from appearing or practicing before the Commission as an attorney. For the reasons set forth below, we deny the motion and set the matter down for hearing before an administrative law judge.

On August 1, 2013, the Commission filed a civil complaint against Dalmy and others in the United States District Court for the Northern District of Illinois alleging, among other things, that Dalmy, a transaction attorney for penny stock company Zenergy International, Inc., issued opinion letters that improperly concluded that her and others' shares of Zenergy were unrestricted and freely tradable.² As Zenergy's stock price increased in conjunction with promotional activity and other misconduct, the complaint alleged, Dalmy sold her shares to unsuspecting investors for illicit profits.³ The complaint charged Dalmy with violating Section 5 of the Securities Act of 1933⁴ and sought injunctive and monetary relief against her.⁵

¹ 17 C.F.R. § 102(e)(3)(ii) (providing that "[a]ny person temporarily suspended from appearing and practicing before the Commission . . . may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension").

² *SEC v. Zenergy Int'l, Inc.*, Case No. 1:13-cv-05511 (N.D. Ill. Aug. 1, 2013), ECF No. 1.

³ *Id.*

⁴ 15 U.S.C. § 77e.

⁵ *SEC v. Zenergy Int'l, Inc.*, Case No. 1:13-cv-05511 (N.D. Ill. Aug. 1, 2013), ECF No. 1.

On September 30, 2015, the district court granted partial summary judgment in favor of the Commission on its claims against Dalmy.⁶ The district court found that Dalmy violated Section 5 based on an undisputed factual showing that Dalmy sold Zenergy shares, those shares were unregistered, and no exemption to the registration requirements applied.⁷ The district court did not find that Dalmy's conduct was not willful. The district court has not ruled on the Commission's pending requests for monetary and injunctive relief against Dalmy.

On December 22, 2015, we issued an order instituting proceedings against Dalmy and imposing a temporary suspension⁸ pursuant to Rule 102(e)(3)(i)(B).⁹ In the order, we found it "appropriate and in the public interest" that Dalmy be temporarily suspended from appearing or practicing before the Commission as an attorney based on the findings of the Northern District of Illinois, a court of competent jurisdiction, in an action brought by the Commission, that Dalmy violated Section 5. We advised Dalmy that the temporary suspension would become permanent unless she filed a petition to lift it within thirty days pursuant to Rule 102(e)(3)(ii).¹⁰ We further advised that, pursuant to Rule 102(e)(3)(iii),¹¹ upon receipt of such a petition, we would either lift the temporary suspension, schedule the matter for hearing, or both.

On December 28, 2015, Dalmy filed this timely petition requesting that the temporary suspension be lifted because it is "premature." In the petition, Dalmy states that "[b]ecause Section 5 liability is strict liability,¹² the court did not—in fact it would not—opine on Dalmy's mental state, i.e., willfulness."¹³ Dalmy argues that "until such time as the court determines

⁶ *SEC v. Zenergy Int'l, Inc.*, Case No. 1:13-cv-05511 (N.D. Ill. Sept. 30, 2015), ECF No. 84.

⁷ *Id.*

⁸ *Diane D. Dalmy, Esq.*, Exchange Act Release No. 76740, 2015 WL 9297327 (Dec. 22, 2015).

⁹ 17 C.F.R. § 102(e)(3)(i)(B) (authorizing the Commission to temporarily suspend from appearing or practicing before it an attorney who has been "[f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (*unless the violation was found not to have been willful*) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder") (emphasis supplied).

¹⁰ 17 C.F.R. § 102(e)(3)(ii).

¹¹ 17 C.F.R. § 102(e)(3)(iii).

¹² *See, e.g., SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1256 (9th Cir. 2013) (stating that scienter is not an element of a Section 5 violation); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 859-60 (S.D.N.Y. 1997) (same), *aff'd*, 159 F.3d 1348 (2d Cir. 1998).

¹³ Contrary to Dalmy's suggestion, a finding of willfulness does not require an intent to violate the law, but merely an intent to do the act which constitutes the violation. *See, e.g., Steadman v. SEC*, 603 F.2d 1126, 1135 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Arthur*

willfulness, it is premature for the Commission to suspend her on the basis that the court has not opined that she did not act willfully." In her view, a temporary suspension "where a 'no willfulness' finding is not possible because the issue is not yet before the court cannot possibly be the intent of Rule 102(e)(3)(i)(B)." Dalmy further argues that "[i]n the remedies phase, the court will consider whether Dalmy acted willfully." Consequently, Dalmy believes that it is "appropriate, reasonable, and justified for the SEC to consider a suspension after the court makes a remedies determination where willfulness is an issue."

The Commission's Office of the General Counsel ("OGC") has opposed Dalmy's petition and argues, *inter alia*, that "the intent of Rule [102(e)(3)(i)(B)] is to empower the Commission to protect the investing public by enabling the Commission to issue a temporary suspension when a professional has been found by a court to have violated the securities laws, unless a court specifically finds that the professional did not act willfully." According to OGC, "[i]n the absence of any finding by the Court regarding willfulness, the professional is given ample opportunity in an administrative proceeding before an ALJ to demonstrate whether a lesser, or no, suspension is warranted." Thus, OGC argues, "[b]ecause the predicate for a temporary suspension has been met—*i.e.*, a finding of a securities law violation with no finding that it was not willful—the Commission's temporary suspension of Dalmy was not premature and should not be lifted." OGC also argues that the Commission need not wait until after the district court makes its remedies determination before ordering a temporary suspension. In support of this argument, OGC relies by analogy on cases holding that a pending appeal from a district court order on which a temporary suspension is based does not justify lifting the temporary suspension.¹⁴

The plain language of Rule 102(e)(3)(i)(B) authorizes us to temporarily suspend a professional who appears or practices before us without a preliminary hearing if, as here, the professional has been found by a court of competent jurisdiction, in an action brought by the Commission, to have violated the federal securities laws, and there was no finding that the professional did not act willfully.¹⁵ Dalmy does not cite, nor have we uncovered, any authority holding that a finding of willfulness is a prerequisite to ordering a temporary suspension under Rule 102(e)(3). Rather, as we recently stated, Rule 102(e)(3) "reflects our determination that a

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Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); *David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *25 (Oct. 29, 2015).

¹⁴ See, e.g., *Thomas D. Melvin*, Exchange Act Release No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015) (stating that "[a]s we have repeatedly held, the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related 'follow-on' cases"); *Ulysses Thomas Ware*, Exchange Act Release No. 51222, 2005 WL 399675, at *1 n.8 (Feb. 17, 2005) (stating that "even an appeal of a district court opinion does not alter the effect of an injunction" in a Rule 102(e)(3) proceeding).

¹⁵ See *supra* note 9.

finding by a court of competent jurisdiction that a respondent has violated securities laws , or that an injunction against future violations is warranted, is a sufficient standard of unfitness for practice before the Commission that we 'will afford a hearing only to consider mitigating or other factors why neither censure nor temporary or permanent disqualification should be imposed.'"¹⁶

Continuing Dalmy's temporary suspension pending a hearing before a law judge serves the public interest and protects the Commission's processes.¹⁷ As discussed, Dalmy was found by a district court to have violated Section 5. That finding alone provided a statutory basis for us to temporarily suspend her without a preliminary hearing.¹⁸ Dalmy is licensed as an attorney and

¹⁶ *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146, at *6 (Sept. 20, 2012) (quoting *Final Amendment to Rule 2(e) of the Rules of Practice*, Exchange Act Release No. 9164, 1971 WL 126066, at *1 (May 10, 1971)).

¹⁷ This result is consistent with the results reached in similar cases. *See, e.g., Virginia K. Sourlis, Esq.*, Exchange Act Release No. 69358, 2013 WL 1453371, at *2 (Apr. 10, 2013) (denying respondent's motion to lift a temporary suspension under Rule 102(e)(3)(i)(B) that was based on findings by a district court, entered on summary judgment, that she aided and abetted antifraud violations; determining that continuation of temporary suspension pending a hearing served the public interest and protected the Commission's processes notwithstanding the assertion that a temporary suspension was premature because the district court's summary judgment order was not a final order); *Stewart A. Merkin, Esq.*, Exchange Act Release No. 68981, 2013 WL 661621, at *2 (Feb. 25, 2013) (denying respondent's motion to lift a temporary suspension under Rule 102(e)(3)(i)(B) that was based on findings by a district court, entered on summary judgment, that respondent violated antifraud provisions; determining that continuation of temporary suspension pending a hearing served the public interest and protected the Commission's processes notwithstanding the assertion that respondent was seeking appellate review of district court's summary judgment order); *Michael C. Pattison, CPA*, Exchange Act Release No. 64598, 2011 WL 2169094, at *2 (June 3, 2011) (denying respondent's motion to lift temporary suspension that was based on both a jury's findings of securities law violations and a district court's imposition of an injunction; determining that continuation of temporary suspension was warranted notwithstanding the assertion that it was "premature" because respondent filed a "meritorious motion to amend the [final judgment]" with the district court and intended to "appeal any adverse ruling on his motion" to the court of appeals); *Ware*, 2005 WL 399675, at *1 (denying respondent's motion to lift a temporary suspension under Rule 102(e)(3)(i)(A) and (B) that was based on a district court's entry of a default judgment and issuance of a permanent injunction finding that respondent had violated antifraud, registration, and reporting provisions; concluding that continuation of temporary suspension was warranted notwithstanding assertion that "the Commission did not have jurisdiction to enter the temporary suspension because the injunction is not a final order" and attaching a motion that he filed with the court to set aside the default judgment).

¹⁸ Although Dalmy argues that we should wait until after the district court makes its remedies determination before ordering a temporary suspension, we have already determined that it was in the public interest to temporarily suspend Dalmy, *see supra* note 8, and Dalmy has not provided, nor do we see, any persuasive reason why we should forebear from acting promptly under Rule

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has not expressed an intent to stop working in securities law. She "thus remains in a position to harm the Commission's processes if the temporary suspension is lifted and she is permitted to appear and practice before the Commission pending the outcome of a hearing."¹⁹

Accordingly, IT IS ORDERED that Diane D. Dalmy, Esq.'s petition to lift the temporary suspension is denied, and that the temporary suspension will remain in effect pending a public hearing and decision in this matter; it is further

ORDERED that this proceeding be set down for a public hearing before an administrative law judge in accordance with Commission Rule of Practice 110. As specified in Rule of Practice 102(e)(3)(iii), the hearing shall be expedited in accordance with Rule of Practice 500; and it is further

ORDERED that the administrative law judge shall file an initial decision no later than 210 days from the date of service of this order.

By the Commission.

Brent J. Fields
Secretary

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102(e)(3) to protect our own processes. *See, e.g., Merkin*, 2013 WL 661621, at *2 n.9 (rejecting respondent's argument that the Commission "wait until after a final judgment is effective before ordering a temporary suspension" and stating that "we have already found that it was in the public interest to do so once the district court had made the findings set forth above"); *Pattison*, 2011 WL 2169094, at *2 (rejecting respondent's argument that the temporary suspension was premature and stating that "neither the pendency of [respondent's] current motion [to amend] before the district court nor the possibility of an appeal to the court of appeals 'alter[s] the effect' of the jury's finding of securities law violations or the court's imposition of an injunction here") (quoting *Daniel S. Lezak*, Exchange Act Release No. 50729, 2004 WL 2721400, at *2 n.16 (Nov. 23, 2004)).

¹⁹ *Sourlis*, 2013 WL 1453371, at *2.