

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 68214 / November 13, 2012

Admin. Proc. File No. 3-15020

In the Matter of

JILAIN H. BAUER, ESQ.

ORDER DENYING MOTION
TO LIFT TEMPORARY SUSPENSION
AND DIRECTING HEARING

On September 12, 2012, we issued an order instituting proceedings ("OIP") against Jilaine H. Bauer, Esq., pursuant to Commission Rule of Practice 102(e)(3)(i)(B).¹ The OIP temporarily suspended Bauer, an attorney licensed in Illinois and Wisconsin, from appearing or practicing before the Commission.² Bauer has now filed a petition, pursuant to Rule 102(e)(3)(ii),³ requesting that her temporary suspension be lifted. For the reasons set forth below, we have determined to deny Bauer's petition and set the matter down for hearing.

Bauer was the former general counsel, chief compliance officer, secretary, and senior vice president of Heartland Advisors, Inc. ("HAI") and the former vice president of Heartland Group, Inc. ("Heartland Group"). On December 11, 2003, the Commission filed a civil injunctive action against Bauer (and others) in the U.S. District Court for the Eastern District of Wisconsin alleging, among other things, that Bauer violated the federal securities laws by engaging in insider trading in the shares of Heartland Group's Short Duration High-Yield Municipal Fund (the "Short Duration Fund"). Specifically, the complaint alleged that on October 3, 2000, Bauer sold her shares in the Short Duration Fund with knowledge that it had liquidity and pricing problems. The complaint further alleged that, as a result of her sale, Bauer avoided losses in the amount of \$20,033.25.

¹ 17 C.F.R. § 201.102(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").

² *Jilaine H. Bauer, Esq.*, Securities Exchange Act Release No. 67845, 2012 WL 3992034 (Sept. 12, 2012).

³ 17 C.F.R. § 201.102(e)(3)(ii).

On May 25, 2011, the district court granted the Commission's motion for summary judgment on its insider trading claims against Bauer, finding that Bauer possessed material, nonpublic information when she sold her shares in the Short Duration Fund, and that she acted with scienter.⁴ On June 15, 2012, the district court entered a final judgment against Bauer, finding that she violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder,⁵ and ordering her to disgorge \$20,033.25, plus prejudgment interest.⁶ The district court determined that permanent injunctive relief and a monetary penalty should not be imposed.⁷ Bauer thereafter appealed the district court's final judgment to the U.S. Court of Appeals for the Seventh Circuit.⁸ Her appeal is in its early stages.

In issuing the OIP, we found it "appropriate and in the public interest" that Bauer be temporarily suspended from appearing or practicing before the Commission based on the findings of the Eastern District of Wisconsin, a court of competent jurisdiction, in an action brought by the Commission, that Bauer violated the federal securities laws. We stated that the temporary suspension would become permanent unless Bauer filed a petition seeking to lift it within thirty days of service of the OIP, pursuant to Rule 102(e)(3)(ii). We further advised that, pursuant to Rule 102(e)(3)(iii), upon receipt of such a petition, we would either lift the temporary suspension, set the matter down for a hearing, or both.

In her petition, Bauer advances a host of arguments challenging the temporary suspension, including the following: (1) the temporary suspension was based on stale, twelve-year old facts and therefore barred by the statute of limitations set forth in 28 U.S.C. § 2462, due process, and fundamental fairness; (2) the public interest factors contained in *Steadman v. SEC*⁹ have already been adjudicated in her favor when the district court declined to enter a permanent injunction and should not be relitigated in this administrative proceeding; (3) even if the *Steadman* factors were to be relitigated here, the Commission would have to reach the same conclusion as the district court; (4) a Rule 102(e) suspension is a "penalty" within the meaning of *Johnson v. SEC*,¹⁰ and the inappropriateness of a penalty has already been adjudicated in Bauer's favor when the district court declined to assess a monetary penalty; and (5) the temporary suspension should be lifted for the reasons stated in Bauer's appellate brief filed in the Seventh Circuit and incorporated by reference in her petition to lift the temporary suspension.

⁴ *SEC v. Bauer*, No. 03-C-1427, 2011 WL 2115924 (E.D. Wis. May 25, 2011)

⁵ 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), & 17 C.F.R. § 240.10b-5.

⁶ *SEC v. Bauer*, No. 03-C-1427, 2012 WL 2217045 (E.D. Wis. June 15, 2012).

⁷ *Id.*

⁸ *SEC v. Bauer*, No. 03-C-1427, 2012 WL 2217045 (E.D. Wis. June 15, 2012), *appeal docketed*, No. 12-2860 (7th Cir. Aug. 10, 2012).

⁹ 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

¹⁰ 87 F.3d 484 (D.C. Cir. 1996).

The Office of the General Counsel ("OGC") has opposed Bauer's petition. OGC argues, among other things, that: (1) this Rule 102(e)(3) follow-on proceeding was timely brought, having accrued on June 15, 2012, when the district court entered its final judgment against Bauer in the civil injunctive action, and the proceeding does not violate due process and is not fundamentally unfair; (2) the district court's consideration of certain *Steadman* factors does not collaterally estop the Commission from considering those factors from the standpoint of protecting its processes; (3) even assuming, for the sake of argument, that a Rule 102(e)(3) suspension is a "penalty," the district court's failure to impose a monetary penalty in the civil injunctive action has no bearing on the Commission's decision whether to impose a suspension in this follow-on proceeding; (4) a pending federal appeal does not render the district court's final judgment ineffective as a basis for Commission action under Rule 102(e)(3)¹¹; and (5) Bauer cannot relitigate the district court's final judgment in this Rule 102(e)(3) proceeding.¹²

Rule 102(e)(3)(iii) provides that, "[w]ithin 30 days after filing of a petition [to lift a temporary suspension] in accordance with paragraph (e)(3)(ii) of this section, the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both."¹³ We have determined to deny Bauer's petition and set the matter down for hearing before an administrative law judge.¹⁴ Continuing Bauer's temporary suspension pending a hearing on the issues raised in her petition serves the public interest and protects the Commission's processes. As discussed, Bauer was found by a district court to have violated the federal securities laws by engaging in insider trading. That finding provided a statutory basis for the Commission to temporarily suspend Bauer without preliminary hearing. Bauer remains licensed as an attorney in two different states and continues to work in the securities field as a compliance consultant. She thus remains in a position to harm the Commission's processes if the temporary suspension is lifted and she is permitted to practice before the Commission pending the outcome of a hearing.

¹¹ See, e.g., *Michael T. Studer*, Exchange Act Release No. 50411, 57 SEC 890, 2004 WL 2104496, at *3 (Sept. 20, 2004) ("[T]he fact that Studer is still litigating that action [on appeal] does not affect [the Commission's] statutory authority to conduct this proceeding."), aff'd, 148 F. App'x 58 (2d Cir. 2005). Were Bauer to prevail on appeal before the Seventh Circuit, she could apply to the Commission for reinstatement to practice under Rule 102(e)(5). See 17 C.F.R. § 201.102(e)(5).

¹² See 17 C.F.R. § 201.102(e)(3)(iv) (stating that, in any hearing held on a petition filed in accordance with Rule 102(e)(3)(ii), the petitioner may not contest any findings made against him or fact admitted by him in the underlying proceeding); see also, e.g., *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *4 n.20 (Jan. 16, 2007) (the appropriate forum for respondent's challenges to the underlying litigation is in the court of appeals).

¹³ 17 C.F.R. § 201.102(e)(3)(iii) (emphasis added).

¹⁴ The Commission has denied similar petitions in the recent past. See, e.g., *Mitchell Segal, Esq.*, Exchange Act Release No. 67930, 2012 WL 4458283 (Sept. 26, 2012); *Ran H. Furman*, Exchange Act Release No. 65680, 2011 WL 5231425 (Nov. 3, 2011); *Michael C. Pattison, CPA*, Exchange Act Release No. 64598, 2011 WL 2169094 (June 3, 2011); *Carl W. Jasper, CPA*, Exchange Act Release No. 64077, 2011 WL 881508 (Mar. 11, 2011); *William D. Shovers*, Exchange Act Release No. 59874, 2009 WL 1271170 (May 6, 2009); *Chris G. Gunderson, Esq.*, Exchange Act Release No. 56396, 2007 WL 2668485 (Sept. 12, 2007); *Ulysses Thomas Ware*, Exchange Act Release No. 51222, 2005 WL 399675 (Feb. 17, 2005); *Daniel S. Lezak*, Exchange Act Release No. 50729, 2004 WL 2721400 (Nov. 23, 2004); *Herbert M. Campbell, III*, Exchange Act Release No. 43422, 2000 WL 1482918 (Oct. 6, 2000).

Under the circumstances, we find it appropriate to continue Bauer's suspension pending the holding of a public hearing and decision by an administrative law judge. As provided in Rule 102(e)(3)(iii), we will set the matter down for a public hearing. We express no opinion as to the merits of Bauer's claims.

Accordingly, IT IS 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 in this matter shall be expedited in accordance with Rule of Practice 500; it is further

ORDERED that the administrative law judge shall issue an initial decision no later than 210 days from the date of service of this Order; and it is further

ORDERED that the temporary suspension of Jilaine H. Bauer, Esq., entered on September 12, 2012, remain in effect pending a hearing and decision in this matter.

By the Commission.

Elizabeth M. Murphy
Secretary