

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 68981 / February 25, 2013

Admin. Proc. File No. 3-15158

In the Matter of

STEWART A. MERKIN, ESQ.

ORDER DENYING MOTION
TO LIFT TEMPORARY SUSPENSION
AND DIRECTING HEARING

On December 27, 2012, we issued an order instituting proceedings ("OIP") against Stewart A. Merkin, Esq., pursuant to Commission Rule of Practice 102(e)(3)(i)(B).¹ The OIP temporarily suspended Merkin, an attorney licensed in Florida, from appearing or practicing before the Commission.² Merkin has now filed a petition, pursuant to Rule 102(e)(3)(ii),³ requesting that his temporary suspension be lifted. For the reasons set forth below, we have determined to deny Merkin's petition and set the matter down for hearing.

Merkin served as outside general counsel for StratoComm Corporation ("StratoComm") from at least May 2006 until early 2011. On October 3, 2011, the Commission filed a complaint against Merkin in the U.S. District Court for the Southern District of Florida alleging that Merkin violated antifraud provisions of the federal securities laws by making false public statements in connection with the purchase or sale of the stock of StratoComm. Specifically, the complaint alleged that Merkin made false statements in Attorney Letters addressed to Pink OTC Markets, Inc., dated April 8, 2008, June 17, 2010, September 15, 2010, and December 17, 2010, that appeared on the Pink OTC Markets, Inc. website, to the effect that StratoComm was not under investigation for violations of securities laws, when in fact, as Merkin knew when he prepared and signed those letters, StratoComm was under investigation by the Commission.

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 *Stewart A. Merkin, Esq.*, Securities Exchange Act Release No. 68543, 2012 SEC LEXIS 4084 (Dec. 27, 2012).

³ 17 C.F.R. ' 201.102(e)(3)(ii).

On October 3, 2012, the district court granted the Commission's motion for summary judgment on its antifraud claims against Merkin. The court found that Merkin made untrue statements of material fact when he authored and signed the Attorney Letters denying the Commission's investigation and forwarded them to StratoComm with the intent and understanding that the letters would be posted on the OTC Markets website; that the false statements denying that the Commission was investigating StratoComm would obviously be important to investors and therefore were material; that the false statements were made in connection with the purchase or sale of securities because they were (as Merkin knew they would be) posted on the OTC Markets website and thus made available to potential investors; and that Merkin, who drafted and signed the Attorney Letters knowing that the contents were false and who repeated the false statements on at least four occasions, acted with scienter.⁴ Although the court had not yet entered a final judgment, Merkin nonetheless filed a notice of appeal from the summary judgment order to the U.S. Court of Appeals for the Eleventh Circuit on November 30, 2012.⁵

In issuing the OIP, we found it "appropriate and in the public interest" that Merkin be temporarily suspended from appearing or practicing before the Commission based on the findings of the Southern District of Florida, a court of competent jurisdiction, in an action brought by the Commission, that Merkin violated the federal securities laws. We stated that the temporary suspension would become permanent unless Merkin 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 his petition, Merkin states that he disputes the legal and factual findings made by the district court in the enforcement action and is seeking appellate review of those findings. He points out that Rule 102(e)(3) permits the Commission to file a temporary suspension order "within 90 days of the final judgment or judicial order becoming effective," and that, also under Rule 102(e)(3), the order becomes effective "upon completion of review or appeal procedures or because further review or appeal procedures are no longer available." Since he is currently seeking appellate review, he argues, the district court's order is not "effective," and the Commission should therefore defer any administrative action "until there is a final judgment not subject to judicial review."

The Office of the General Counsel ("OGC") has opposed Merkin's petition. OGC argues, among other things, that: (1) the pendency of Merkin's appeal is not a valid reason for delaying Commission action under Rule 102(e)(3)⁶; (2) the Commission already found in the OIP that it was

⁴ *SEC v. Merkin*, No. 11-23585-CIV-Graham/Goodman (S.D. Fla. Oct. 3, 2012).

⁵ *Id.*, appeal docketed, No. 12-16238-A (11th Cir. Dec. 6, 2012). On December 28, 2012, Merkin filed an unopposed motion to stay or abate his appeal pending entry of a final judgment by the district court.

⁶ *See, e.g., Michael T. Studer*, Exchange Act Release No. 50411, 57 SEC 890, 2004 SEC LEXIS 2135, at *11 (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).

in the public interest that Merkin be temporarily suspended, and Merkin has offered no reason to question that determination; and (3) in view of the district court's findings that Merkin violated the antifraud provisions of the securities laws through at least four instances of intentional material false statements, Merkin is not an appropriate candidate for the lifting of a temporary suspension.

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."⁷ We have determined to deny Merkin's petition and set the matter down for hearing before an administrative law judge.⁸ Continuing Merkin's temporary suspension pending a hearing on the issues raised in his petition serves the public interest and protects the Commission's processes. As discussed, Merkin was found by a district court to have violated the federal securities laws by acting with scienter when he made material false statements in connection with the purchase and sale of securities on at least four occasions. That finding provided a statutory basis for the Commission to temporarily suspend Merkin without a preliminary hearing.⁹ It appears that Merkin remains licensed as an attorney and has not expressed any intent to stop working in the area of securities law. He thus remains in a position to harm the Commission's processes if the temporary suspension is lifted and he is permitted to practice before the Commission pending the outcome of a hearing.

Under the circumstances, we find it appropriate to continue Merkin'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 Merkin'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

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

⁸ The Commission has denied similar petitions in the recent past. *See, e.g., Jilaine H. Bauer*, Exchange Act Release No. 68214 (Nov. 13, 2012), 2012 SEC LEXIS 3509 (Nov. 13, 2012); *Mitchell Segal, Esq.*, Exchange Act Release No. 67930, 2012 SEC LEXIS 3044 (Sept. 26, 2012); *Ran H. Furman*, Exchange Act Release No. 65680, 2011 SEC LEXIS 3877 (Nov. 3, 2011); *Michael C. Pattison, CPA*, Exchange Act Release No. 64598, 2011 SEC LEXIS 1914 (June 3, 2011); *Carl W. Jasper, CPA*, Exchange Act Release No. 64077, 2011 SEC LEXIS 909 (Mar. 11, 2011); *William D. Shovers*, Exchange Act Release No. 59874, 2009 SEC LEXIS 1516 (May 6, 2009); *Chris G. Gunderson, Esq.*, Exchange Act Release No. 56396, 2007 SEC LEXIS 2025 (Sept. 12, 2007); *Ulysses Thomas Ware*, Exchange Act Release No. 51222, 2005 SEC LEXIS 391 (Feb. 17, 2005); *Daniel S. Lezak*, Exchange Act Release No. 50729, 2004 SEC LEXIS 2726 (Nov. 23, 2004); *Herbert M. Campbell, II*, Exchange Act Release No. 43422, 2000 SEC LEXIS 2154 (Sept. 25, 2000).

⁹ Although Merkin argues that we could wait until after a final judgment is effective before ordering a temporary suspension, 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.

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 Stewart A. Merkin, Esq., entered on September 12, 2012, remain in effect pending a hearing and decision in this matter.

By the Commission.

Elizabeth M. Murphy
Secretary