

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1800/September 12, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15858

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In the Matter of	:	
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STANLEY JONATHAN	:	ORDER GRANTING CONTINUANCE AND
FORTENBERRY (A/K/A S.J.	:	CHANGING HEARING LOCATION
FORTENBERRY, JOHN	:	
FORTENBERRY, AND	:	
JOHNNY FORTENBERRY)	:	

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A hearing in this matter is currently scheduled to begin on Monday, September 22, 2014, in San Angelo, Texas. On September 9, 2014, Respondent Stanley Jonathan Fortenberry filed a Motion to Continue Procedural Schedule and Final Hearing, in which he asked that the hearing and all prehearing deadlines be postponed for three months due to the recent withdrawal of his counsel, John Nimmer. *See* Motion at 1-2. For the reasons stated below, I GRANT IN PART Mr. Fortenberry's motion. The hearing in this matter will begin on Monday, October 20, 2014, at a location to be determined in the Dallas/Fort Worth area.

**Ruling**

On August 29, 2014, my Office received by e-mail Mr. Nimmer's notice of withdrawal as counsel for Mr. Fortenberry. Mr. Nimmer stated in his notice that his withdrawal would be effective September 8, 2014.<sup>1</sup>

Considering the circumstances of Mr. Fortenberry's motion and the fast-approaching date of the hearing in this matter, I scheduled a telephonic conference to address Mr. Fortenberry's request. *See* 17 C.F.R. § 201.111 (giving the hearing officer "the authority to do all things necessary and appropriate to discharge his or her duties").

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<sup>1</sup> An attorney may withdraw his appearance simply by filing a notice of withdrawal with the Commission or the hearing officer. 17 C.F.R. § 201.102(d)(4); *see BDO China Dahua CPA Co., LTD.*, Exchange Act Release No. 72134, 2014 SEC LEXIS 1611, \*4-5 (May 9, 2014). The notice must be filed at least five days before the proposed effective date of the withdrawal. 17 C.F.R. § 201.102(d)(4).

In advance of the prehearing conference, the Division of Enforcement filed a Pre-Conference Memorandum in which it argues that I should deny Mr. Fortenberry's request for a continuance. Specifically, the Division asserts that (1) before this matter was initiated through the filing of an Order Instituting Proceedings (OIP), Mr. Fortenberry took a number of steps to delay the Division's investigation; (2) Mr. Fortenberry has continued to engage in securities offerings; and (3) delay will prejudice its case and its witnesses. Memorandum at 2-7. The Division also suggests that Mr. Nimmer's withdrawal is part of a calculated plan to delay this matter. *Id.* at 1-2.

I held the previously-mentioned telephonic prehearing conference on Thursday, September 11, 2014. During that conference, Mr. Fortenberry explained that he had discharged Mr. Nimmer because of a disagreement about litigation strategy.

Mr. Fortenberry's continuance request implicates Commission Rules of Practice 161 and 360. *See* 17 C.F.R. §§ 201.161, .360. Rule 161(a) provides that I may grant a continuance "for good cause shown." 17 C.F.R. § 201.161(a). Rule 161(b)(1), however, cautions that unless Mr. Fortenberry "makes a strong showing that the denial of the request or motion would substantially prejudice [his] case," I must "adhere to a policy of strongly disfavoring [his] request[]." 17 C.F.R. § 201.161(b)(1). In deciding whether to grant motion for a continuance, I am required to consider:

- (i) the length of the proceeding to date;
- (ii) the number of postponements, adjournments or extensions already granted;
- (iii) the stage of the proceedings at the time of the request;
- (iv) the impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and
- (v) any other such matters as justice may require.

*Id.*

The Commission directed in the OIP that I issue an initial decision in this matter within 300 days of service of the OIP. OIP at 11. Rule of Practice 360(a)(2) provides that in cases involving a 300-day deadline, I should adhere to a timeline in which the hearing shall take place approximately four months after service of the OIP, the parties shall have approximately two months after the hearing to submit briefs, and I shall have approximately four months after briefing to issue an initial decision. 17 C.F.R. § 201.360(a)(2).

In deciding whether to continue this matter, I am guided by Commission precedent providing that although I have broad discretion, I must not "myopic[ally] insist[] upon expeditiousness in the face of a justifiable request for delay" that might "render the right to defend with counsel an empty formality." *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, \*132 (Jan. 31, 2008). Although it is "rare" for the Commission to determine that the denial of a continuance amounts to an abuse of discretion, denying a

continuance in circumstances in which a “respondent [is] left without assistance of counsel at or near the hearing date,” would amount to an abuse of discretion.<sup>2</sup> *Id.* at \*134 & n.157.

I am sympathetic to the arguments the Division has raised. Mr. Nimmer filed his notice of withdrawal a bare three weeks before the scheduled start of the hearing in this matter and Mr. Fortenberry waited another week to seek a continuance. The Division has expended time and effort to prepare to present its case in San Angelo, Texas, at the scheduled time. Memorandum at 7. In addition, as the Division raises, continuances are “strongly disfavor[ed],” 17 C.F.R. § 161(b)(1), and granting a continuance will adversely impact the post-hearing schedule set forth in Rule 360(a)(2).

Additionally, several of the factors listed in Rule 161(b)(1) weigh in the Division’s favor. This matter has been pending since late April 2014, and the Division’s investigation lasted several years. Memorandum at 3, 6. Mr. Fortenberry’s request comes at a late stage in the parties’ preparation for the hearing. Delay will negatively impact my ability to issue a timely decision.

On the other hand, Mr. Fortenberry has not previously sought or received a continuance in this matter. And, considering what “justice may require,” 17 C.F.R. § 201.161(b)(1)(v), the Commission has directed that denying a continuance in this circumstance would be an abuse of discretion. *Dearlove*, 2008 SEC LEXIS 223 at \*134 & n.157. In light of *Dearlove* and *Pascale*, I am constrained to grant Mr. Fortenberry’s request.

I must, however, issue my initial decision within 300 days of May 5, 2014, the day Mr. Fortenberry was served. *See Stanley Johnathan Fortenberry*, Admin. Proc. Rulings Release No. 1480, 2014 SEC LEXIS 1874 (June 2, 2014); OIP at 11. As a result, I cannot continue this matter for three months, as Mr. Fortenberry has requested. Taking into account the need to issue a decision by March 2, 2015, and to allow the parties time to prepare and file post-hearing briefs, I direct that the hearing in this matter will begin on Monday, October 20, 2014. The parties are cautioned that no additional continuances of the hearing or of any deadline will be granted. As a result of this continuance, the parties’ post-hearing briefs will be due thirty days after the last day of the hearing. Reply briefs will be due fourteen days after the date initial post-hearing briefs are due. Mr. Fortenberry’s deadline for responding to the Division’s Memorandum in Further Support of the Admission of the Prior Sworn Testimony of Sherman Brooks Halsey is extended to October 6, 2014.<sup>3</sup>

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<sup>2</sup> In *Dearlove*, the Commission relied on its previous decision in *Philip L. Pascale, CPA*, Admin. Proc. No. 3-11194 (Nov. 24, 2003). *See Dearlove*, 2008 SEC LEXIS 223 at \*134 n.157. In *Pascale*, the Commission held, on interlocutory review, that the denial of a continuance was an abuse of discretion where Pascale’s counsel was incapacitated shortly before the hearing such that Pascale could not obtain substitute counsel. *See id.* Given that interlocutory review is reserved for “extraordinary circumstances,” 17 C.F.R. § 201.400(a), the decision in *Pascale* strongly supports Mr. Fortenberry’s request.

<sup>3</sup> Mr. Fortenberry’s request that the Division be estopped from offering any prior sworn testimony of Sherman Halsey is DENIED. *See Motion* at 3. Mr. Fortenberry has also requested

Finally, during the prehearing conference held on September 11, 2014, I raised the possibility of moving this hearing to a more easily accessible location. The Division stated that holding the hearing in the Dallas/Fort Worth area would be more cost-effective and logistically less complicated. Mr. Fortenberry had no objection to moving the location of the hearing. Given the foregoing, the hearing in this matter will be held in the Dallas/Fort Worth area at a location to be determined.

### CONCLUSION

For the foregoing reasons, I GRANT IN PART Mr. Fortenberry's motion for a continuance. The hearing will begin on Monday, October 20, 2014, in the Dallas/Fort Worth area at a location to be determined. The parties' prehearing briefs, previously due on September 15, 2014, are now due Tuesday, October 14, 2014.

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James E. Grimes  
Administrative Law Judge

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an extension of the deadline for the exchange of expert reports. *Id.* at 1. The deadline for expert reports was September 5, 2014, which occurred prior to Mr. Fortenberry's motion while he was still represented by Mr. Nimmer. *See Stanley Jonathan Fortenberry*, Admin Proc. Rulings Release No. 1506, 2014 SEC LEXIS 1992 (June 10, 2014). The request to extend the deadline for the exchange of expert reports is also DENIED.