

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3961/July 1, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16463

In the Matter of

AEGIS CAPITAL, LLC,
CIRCLE ONE WEALTH MANAGEMENT, LLC,
DIANE W. LAMM,
STRATEGIC CONSULTING ADVISORS, LLC, AND
DAVID I. OSUNKWO

ORDER DENYING
CONTINUANCE

A hearing in this matter is currently scheduled to begin on Monday, July 25, 2016. On June 27, 2016, Respondents Strategic Consulting Advisors, LLC and David I. Osunkwo moved to continue the hearing in this matter. After considering Respondents' motion, the Division of Enforcement's opposition, Respondents' reply, and oral argument from the parties, Respondents' request is DENIED.

Discussion

In their motion, Respondents argued that the Division has not complied with Rule of Practice 230, 17 C.F.R. § 201.230, in that it has not given Respondents full access to a copy of an encrypted server the Division obtained from a third party. Mot. at 2-5. In response, the Division submitted evidence that it provided Respondents' former counsel with access to the server starting on April 29, 2015, and—after counsel failed to avail himself of that access—reminded former counsel about the server in March 2016. Opp. at Ex. D. In reply, Respondents addressed the Division's arguments. At the end of their reply, Respondents added a new argument: that absent a continuance, they will not be able to engage new counsel to replace their previous counsel, who withdrew in early May 2016. Reply at 6-7.

During a telephonic conference held on June 30, 2016, I orally entered findings of fact and conclusions of law. In short, I determined that the Division had complied with its obligations under Rule of Practice 230 and that Respondents' circumstance in relation to the copy of the third-party server results from the fact that their former counsel—whose acts and omissions are attributed to Respondents—waited nearly a year to seek access to the server. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993) (“respondents [must] be held accountable for the acts and omissions of their chosen counsel”); *Johnny Clifton*, Securities Act of 1933 Release No. 9465, 2013 SEC LEXIS 3151, at *8 (Oct. 9,

2013) (“[A] party is bound by the actions of the attorney he retained.”). I thus denied Respondents’ request for a continuance based on their unsupported allegation that the Division failed to comply with Rule 230.

After I denied Respondents’ request, they asked that I grant them a continuance because they are *pro se*.¹ They allege that since early May, when former counsel withdrew, they have attempted to retain new counsel but have been hampered in their efforts by the current hearing schedule. In their reply, they say there is insufficient time for any newly retained counsel to “review the investigative file and prepare, including the [copy of the third-party server], which has still not been produced in its entirety.” Reply at 6-7. They concede that they did not raise the need to retain counsel as a basis for their initial motion. *Id.* at 7.

As an initial matter, because they waited until their reply to the Division’s opposition to raise it, respondents have waived the argument that I should continue this matter based on their need to retain new counsel. *Cf. Aleutian Pribilof Islands Ass’n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1, 12 n.5 (D.D.C. 2008) (“[I]t is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief.” (citing *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992))).

Nonetheless, even considering the merits of Respondents’ request, I would deny it. Respondents’ continuance request for the purpose of seeking new counsel implicates Rules of Practice 161 and 360. *See* 17 C.F.R. §§ 201.161, 201.360. 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 Respondents “make[] a strong showing that the denial of the request or motion would substantially prejudice their case,” I must “adhere to a policy of strongly disfavoring [continuance] requests.” 17 C.F.R. § 201.161(b)(1). In deciding whether to grant a 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.

17 C.F.R. § 201.161(b)(1).

¹ Respondent Osunkwo, who is a licensed attorney, is representing himself. Respondent Strategic Consulting is appearing in the person of a corporate officer, Sidney Wigfall, who is also an attorney. Rule of Practice 102(b) permits an officer of a corporation to appear on behalf of that corporation when it is a respondent. 17 C.F.R. § 201.102(b). Wigfall has averred that he falls under the terms of Rule 102(b). The Division has not objected to Mr. Wigfall’s continued participation in this matter. Mr. Wigfall is directed to file an entry of appearance in this matter. *See* 17 C.F.R. § 201.102(d)(2).

The Commission directed in the order instituting proceedings (OIP) that I issue a decision in this matter within 300 days of service of the OIP. OIP at 7. 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).

Administrative law judges have discretion in deciding whether to grant a continuance. *Gregory M. Dearlove*, Securities Exchange Act of 1934 Release No. 57244, 2008 SEC LEXIS 223, at *132-33 (Jan. 31, 2008). It is “rare” for the Commission to determine that the denial of a continuance amounts to an abuse of discretion. *Id.* at *134. A circumstance in which a “respondent [is] left without assistance of counsel at or near the hearing date,” would qualify as a rare case in which denying a continuance would amount to an abuse of discretion.² *Id.* at *134 & n.157.

The particular circumstances here, however, do not warrant granting a continuance. The fundamental problem for Respondents is that they have acted with a marked lack of diligence and should not be rewarded for waiting until the last minute to request relief. For eleven months, their former counsel took no action to obtain a copy of the server the Division offered. This lack of diligence is attributed to Respondents. *See Pioneer Inv. Servs.*, 507 U.S. at 396-97. Once counsel withdrew, Respondents waited nearly two months to seek a continuance. Even then, they did not mention retaining new counsel as a basis for a continuance until their reply to the Division’s opposition. Based on Respondents’ lack of diligence in seeking to obtain a copy of the third-party server—a failure that is largely to blame for Respondents’ current difficulties in obtaining counsel³—and their significant delay in seeking a continuance after former counsel withdrew, I find that they have failed to “make[] a strong showing that the denial of” their “request . . . would substantially prejudice their case.” 17 C.F.R. § 201.161(b)(1). Rather, any prejudice results from their lack of diligence. Respondents’ failure to meet their burden is, under the plain language of Rule 161(b)(1), a sufficient basis to deny their request. *Id.*

Additionally, the factors under Rule 161(b)(1) do not support granting a continuance. Forty-nine days elapsed between service of the OIP on April 22, 2015, and June 10, 2015, when

² In *Dearlove*, the Commission relied on its previous decision in *Philip L. Pascale, CPA*, Order Granting Postponement of Administrative Hearing, File 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.*

³ Respondents say there is “insufficient time [for any newly retained counsel] to “review the investigative file and prepare, including the [copy of the third-party server], which has still not been produced in its entirety.” Reply at 6-7. But I have found that, contrary to Respondents’ assertions, the Division did give them access to a copy of the third-party server. Additionally, they knew about former counsel’s withdrawal for nearly two months before they raised it as a basis for a continuance.

I stayed this proceeding pending criminal prosecution of Respondent Diane W. Lamm. Inasmuch as I lifted the stay on February 29, 2016, operation of Rule 360 means that the hearing in this matter should begin in May 2016. Nonetheless, after Respondents' former counsel asked that I set the matter for a hearing in August, I ordered that the hearing take place in late July. Prehearing Transcript 23; *Aegis Capital, LLC*, Admin. Proc. Rulings Release No. 3759, 2016 SEC LEXIS 1220 (ALJ Apr. 4, 2016). Respondents have thus benefited from a nearly nine-month stay and have been afforded two additional months beyond what is contemplated in Rule 360. And, by the time of hearing, Respondents will have had nearly three months to prepare after their counsel's withdrawal.

Finally, to the extent that denying a continuance leaves Respondents "without assistance of counsel at or near the hearing date," *Gregory M. Dearlove*, 2008 SEC LEXIS 223, at *134, that circumstance was needlessly brought on by Respondents' inaction and delay in seeking a continuance. *See* 17 C.F.R. § 201.161(b)(1)(v) (permitting consideration of "any other such matters as justice may require"). Granting a continuance now would only reward such inaction and encourage imitation. Notably, both Osunkwo and Wigfall, Strategic Consulting's representative, are attorneys and are thus in a better position than many respondents to take action to protect their interests.

In sum, Respondents have not shown that a continuance is warranted. Their request for a continuance based on alleged violations of Rule 230 is DENIED for the reasons stated on the record during the telephonic conference held on June 30, 2016. The request for a continuance based on Respondents' need to secure new counsel is DENIED for the reasons stated in this order. All current deadlines remain in effect. Respondents are encouraged to review the scheduling order entered on April 4, 2016.

James E. Grimes
Administrative Law Judge