

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11390

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 4, 2004

SECURITIES AND EXCHANGE COMMISSION
MAILED FOR U.S. MAIL

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FIRST CLASS

In the Matter of :
: ORDER
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PAUL A. FLYNN :
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The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on February 3, 2004. The Chief Administrative Law Judge then assigned the matter to my docket and scheduled a hearing for March 8, 2004.

Respondent Paul A. Flynn (Flynn) acknowledged receipt of the OIP on February 8, 2004. The Office of the Secretary received notices of appearance from counsel for the Division of Enforcement (Division) and for Flynn on February 18 and 20, 2004, respectively. This Office received a motion for leave to intervene from the Attorney General of the State of New York (Attorney General) on February 17, 2004. The Attorney General's motion to intervene is now granted.

The Attorney General also moves to stay this administrative proceeding pending the outcome of a related criminal proceeding against Flynn in the City of New York, County of New York. The criminal proceeding is captioned People of the State of New York v. Flynn, Docket No. 2003-NY-008910, and it, too, was announced to the public on February 3, 2004. The Attorney General states that substantial prejudice will result to the criminal prosecution if the administrative proceeding is not stayed. He also represents that the underlying investigation of related criminal misconduct is ongoing.

In a telephonic conference call with the Division and Flynn on February 20, 2004, I verbally granted a fourteen-day housekeeping stay, thus postponing the Division's obligation to make its files available to Flynn for inspection and copying and postponing Flynn's obligation to answer the OIP. See Rules 161(a), 220(b), and 230(d) of the Commission's Rules of Practice.

There are three remaining issues: (1) whether dismissing the OIP without prejudice to re-institution after resolution of the criminal proceeding would be a more efficient and intelligent method of accomplishing the same thing as granting a lengthy stay; (2) if not, whether any conditions should be attached to a stay; and (3) whether such a stay has any impact on the

Commission's order to prepare an initial decision within 300 days after service of the OIP. At my request, the Division and Flynn have filed letters addressing these issues.

Stay vs. Dismissal Without Prejudice

The Commission has made it clear that administrative proceedings should not interfere with parallel criminal proceedings. A stay of the administrative proceeding under Rule 210(c)(3) of the Rules of Practice obviously provides one way of achieving that goal. At the prehearing conference, I asked the parties to consider whether a stay under Rule 210(c)(3) was the only way of achieving that goal, the preferred way of doing so, or the best way of doing so.

I sought the parties' views as to whether dismissing this proceeding without prejudice to reinstatement after resolution of the parallel criminal proceeding might not be a more efficient and intelligent way of accomplishing the same thing as granting a lengthy stay. See Jeffrey Trenk, 79 SEC Docket 1557 (Jan. 22, 2003); Jeffrey D. Pokross, 79 SEC Docket 471 (Dec. 11, 2002); cf. Richard Cannistraro, 53 S.E.C. 388 (1998). I did not suggest that I would dismiss the proceeding on my own motion. Rather, I inquired if the Division was willing to approach the Commission to ask it to dismiss the proceeding, as the Division did in William J. Bosso, 73 SEC Docket 4040 (Dec. 28, 2000), and City of Anaheim, 71 SEC Docket 1543 (Jan. 31, 2000). The Division opposes the idea, while Flynn endorses it.

According to the Division (emphasis added):

[T]he Division believes that a dismissal, even without prejudice, would undermine the Commission's dual goals of working with criminal authorities while advancing the Commission's own enforcement program, and thus would not accomplish the same thing as a stay. It is important that the public be aware that the Commission is involved in this matter, and that there are pending federal civil charges—not only charges brought on a state level. Under all of these circumstances, the Division believes that it is the intent of the Commission that Your Honor rule on the pending stay motion and that the Division not seek to have the proceeding dismissed.

According to Flynn (emphasis added):

This Court has suggested dismissal without prejudice, which seems the cleanest way to solve the problem. It is in strict conformity with the Rules. There is no prejudice to the [Division]. There is no prejudice to Mr. Flynn. There is no prejudice to the New York Attorney General's Office. There is no statute of limitations problem at this time that might prevent reinstating this action at a later time. No additional burden is imposed on any party whether it be a reporting requirement or otherwise. Judicial resources and the resources of Mr. Flynn, the New York Attorney General's Office and the SEC are conserved by taking this case off the calendar. It allows the parties to the criminal proceeding to focus their energies on that important matter. The status quo will be maintained and not disturbed in any way by a dismissal without prejudice.

Indeed, the [Division's] only real complaint is that the "atmospherics" it wants in connection with this case may be different if the case is dismissed without prejudice. But, even on this point, the [Division] has already achieved its objective of making the public aware of its interest in this matter and its intention to take action against Mr. Flynn. The publicity already achieved by the [Division] will not be dissipated by a dismissal without prejudice on account of the criminal indictment. In sum, the [Division] wants the case to remain on your docket but cannot demonstrate why it should.

The Division's argument emphasizes public relations, but ignores judicial economy. The Division states: "It is important that the public be aware that the Commission is involved in this matter." However, as Flynn correctly observes, that goal has been satisfied here by issuing simultaneous state and federal press releases on February 3, 2004, to announce the institution of the parallel criminal and administrative proceedings. Rule 210(c)(3) provides that a motion for stay "shall be favored," but only "upon a showing that such a stay is in the public interest or for the protection of investors." In refusing even to approach the Commission on this subject, the Division has equated its own institutional interest with the public interest.

Flynn could have made a more compelling case for dismissal without prejudice if he had waived any claims he might have under any applicable statute of limitations. This is what the respondents did in Bosso and City of Anaheim. Instead, Flynn limited himself to the lawyerly observation that there is no statute of limitations problem "at this time."

I am reminded of the maxim "you can lead a horse to water, but you cannot make it drink." Under the circumstances, I will grant the Attorney General's motion for a stay.

Periodic Status Reports

The Commission has explained that postponements under Rule 210(c)(3) cannot be open-ended and that Administrative Law Judges (ALJs) may require periodic status reports as a condition of granting or continuing such stays. See Pryor, McClendon, Counts & Co., Order Postponing Proceedings, Admin. Proc. No. 3-9884 (Sept. 30, 1999); A.S. Goldmen & Co., Order Postponing Proceedings, Admin. Proc. No. 3-9933 (Sept. 1, 1999).¹ Previous stay orders have typically required the Division, rather than the intervening prosecutor, to file such status reports. That, in turn, has put the burden on the Division to contact the prosecutor and to draft a status report that, at best, provides second-hand information about the criminal proceeding. In this case, requiring Flynn to provide status reports would also yield second-hand information, because different attorneys represent Flynn in the administrative and criminal proceedings.

¹ Copies of the unpublished Commission Orders in Goldmen and Pryor, McClendon appear as attachments A and B to the Stay Order in Michael J. Rothmeier, 72 SEC Docket 1471, 1473, 1481 (May 25, 2000) (ALJ).

The burden of filing periodic status reports should properly fall on the intervening prosecutor who represents that the failure to stay the administrative proceeding would substantially prejudice the parallel criminal proceeding. The Division observes that a strict reading of Rule 210(c)(3) might suggest that leave to intervene may be granted to non-party criminal prosecutors only “for the purpose of requesting a stay” and that imposing a reporting requirement on the non-party participant might arguably exceed the scope of that purpose. The Division’s concern is misguided, because I am attaching the reporting condition to a grant of a stay, and not to the intervention itself. In any event, Rule 210(f) of the Commission’s Rules of Practice provides that an ALJ “may, by order, modify the provisions of [Rule 210] which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as [the ALJ] may deem necessary or appropriate in the public interest.”

I will require the Attorney General to file and serve a status report here. Upon receipt of the Attorney General’s status report, the Division and Flynn will be required to file responses addressing the issue of whether a stay of the administrative proceeding continues to be appropriate under the five-prong test set forth in Rule 161(b)(1) of the Commission’s Rules of Practice or whether, in the alternative, dismissal without prejudice would be preferable to a continued stay. In their responses to the Attorney General’s status report, the Division and Flynn are specifically urged to address the Commission’s admonition in Goldmen, 72 SEC Docket at 1479-80 (“We . . . are concerned that postponement of the administrative proceeding pending disposition of the criminal matter (up to two years) may be so long as to be ‘unreasonable.’”).

300-Day Time Limit

Rule 360(a)(2) of the Commission’s Rules of Practice directs ALJs to issue initial decisions within the time period specified in the OIP. Here, Paragraph IV of the OIP requires me to prepare an initial decision within 300 days after service of the OIP upon Flynn. As presently written, Rule 360(a)(2) does not toll an ALJ’s obligation to issue an initial decision within the time specified, even if a proceeding is stayed pursuant to Rule 210(c)(3). Because the Attorney General’s motion to stay did not consider the impact of the requested stay on the Rule 360(a)(2) deadline, I asked the Division and Flynn to do so.

To address an ALJ’s ability to comply with the time period specified in the OIP where a proceeding is stayed under Rule 210(c)(3) because of a pending criminal investigation or prosecution, the Commission has proposed to amend Rule 360(a)(2). See Proposed Amendments to the Rules of Practice and Related Provisions, 81 SEC Docket 2724, 2730 (Nov. 23, 2003). The proposed amendment specifies that, if a proceeding were to be stayed under the authority of Rule 210(c)(3), the time period for issuance of the initial decision would be automatically tolled during the period in which the stay is in effect. Of course, this is only a proposed rule, not a final rule, and there is no assurance that the Commission will adopt it. Even if the proposal is adopted in the form proposed, it, like all rules, is likely to take effect prospectively, thirty days after publication in the Federal Register.

The Division expresses its belief that the proposed rule would also apply to instituted proceedings in which the OIPs have set deadlines and ALJs have already issued stays. It opines that the proposed amendment to Rule 360(a)(2) is probably going to be retroactive because

nothing in the proposed rule indicates that it would apply only to proceedings instituted after the rule becomes final. Flynn reads the proposed amendment as not being retroactive. I decline to speculate about how the Commission might address this issue when and if it adopts final changes to its Rules of Practice. A stay of limited duration will enable me to revisit the issue after the Commission has completed its final action in the rulemaking proceeding.

The Division also represents that it will file a statement in support of any motion by the Chief ALJ for tolling of the 300-day requirement, if relief under the proposed rule is not available in this matter, and if it becomes necessary to comply with the procedural requirements of existing Rule 360(a)(2). I conclude that the 300-day deadline in the OIP provides no legitimate basis for declining to grant the stay requested by the Attorney General.

Summary

The proceeding will be stayed through June 30, 2004. If the parallel criminal proceeding has been resolved by that date, we will proceed to a hearing in this matter. If the parallel criminal proceeding is still ongoing and the Attorney General represents that a hearing in this matter would still prejudice the criminal investigation and/or prosecution, I will require the Division to make the case for continuing the stay, based on a consideration of the five-prong test in Rule 161(b)(1) of the Commission's Rules of Practice. At that time, I will also consider whether dismissal without prejudice is appropriate, as it was found to be in Trenk, Pokross, and Cannistraro.

IT IS ORDERED THAT:

The hearing scheduled for March 8, 2004, is postponed to a date to be determined;

The proceeding is stayed through June 30, 2004;

On or before June 15, 2004, the Attorney General of the State of New York shall file and serve a report, explaining the current status of the related criminal proceeding and the continued appropriateness of staying this proceeding;

On or before June 21, 2004, the Division of Enforcement and Flynn shall file and serve replies to the Attorney General's status report, addressing the appropriateness of continuing to stay this administrative proceeding under the five-prong test in Rule 161(b)(1) of the Commission's Rules of Practice, and, in the alternative, the appropriateness of dismissal without prejudice; and

A telephonic status conference will be scheduled for June 28, 2004, at 10 a.m. Eastern time.



James T. Kelly
Administrative Law Judge