

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2211/January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16198

In the Matter of

GAETON S. DELLA PENNA

ORDER DENYING
MOTION FOR STAY

The Securities and Exchange Commission issued an Order Instituting Proceedings (OIP) on October 15, 2014, pursuant to Section 203(f) of the Investment Advisers Act of 1940, against Respondent Gaeton S. Della Penna (Della Penna). The OIP alleges that Della Penna was permanently enjoined from violating the antifraud provisions of the securities laws in *SEC v. Della Penna*, No. 14-cv-1203 (M.D. Fla. Sep. 24, 2014). A schedule for motions for summary disposition was set at a December 5, 2014, prehearing conference, and Della Penna was ordered to file an Answer by January 9, 2015. *Gaeton S. Della Penna*, Admin. Proc. Rulings Release No. 2103, 2014 SEC LEXIS 4688 (Dec. 5, 2014); *Gaeton S. Della Penna*, Admin. Proc. Rulings Release No. 2128, 2014 SEC LEXIS 4810 (Dec. 12, 2014).

Instead of filing an Answer, and despite my having explained to him how to file one at the prehearing conference, on January 9, 2015, Della Penna filed a Motion for Stay of Proceedings (Motion). Though the Motion does not technically meet the requirements of an Answer, its filing implies that the parties have not yet been able to reach a settlement agreement, which was discussed as a possibility at the prehearing conference, and that Della Penna does not intend to default, which was also discussed as a possibility at the prehearing conference. Accordingly, I (very liberally) construe Della Penna's Motion as his Answer, and consider it as a representation that he denies all of the accusations against him in the OIP. The Division of Enforcement (Division) should conduct itself accordingly.

Della Penna argues in his Motion that a stay is necessary because a criminal indictment has been filed against him, and thus he is "temporarily precluded from defending [himself] in this administrative action." The criminal proceeding, *United States v. Della Penna*, 14-cr-203 (M.D. Fla.) (criminal proceeding), involves charges against Della Penna arising from facts similar to those leading to the injunction in *SEC v. Della Penna*. See Indictment, criminal proceeding, ECF No. 1 (May 22, 2014). Della Penna's Motion cites Commission Rule of Practice (Rule) 161(b)(1), 17 C.F.R. § 201.161(b)(1), as authority for staying the proceedings.

There is no authority to stay the proceeding on the basis stated, but I consider his Motion as a request for an extension of time to file a motion for summary disposition or oppose a motion for summary disposition by the Division. *See* 17 C.F.R. § 201.161. Rule 161(b)(1) sets forth five requirements for considering whether postponements, adjournments, or extensions are appropriate. They are: (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 any other matters as justice may require. 17 C.F.R. § 201.161(b)(1). Two months have passed since Della Penna was served with the OIP, and nearly nine months have passed since Della Penna was indicted in conjunction with the criminal proceeding against him, yet this is the first time he has raised the criminal proceeding as a barrier to his defense of this proceeding. Della Penna has received two extensions of time to file an Answer, which have already delayed the proceeding. An initial decision in this proceeding is due in June 2015. *See* OIP at 3; 17 C.F.R. § 201.360(a)(2). According to the docket sheet in the criminal case, Della Penna has waived his right to a speedy trial through June 30, 2015. Criminal proceeding, ECF No. 37. The criminal proceeding is, therefore, unlikely to be resolved before an initial decision is due in this case. Any delay pending resolution of the criminal proceeding would make it impossible to meet the deadline set for issuing the initial decision in this proceeding.

Accordingly, Della Penna's Motion is DENIED. Motions for summary disposition, oppositions, and replies remain due by the dates set forth in my order following the December 5, 2014, prehearing conference. *See Gaeton S. Della Penna*, 2014 SEC LEXIS 4688.

The United States Attorney may move for leave to participate in an administrative proceeding and request a stay of the proceeding if the criminal case arises from facts similar to those at issue in the administrative proceeding and if it believes a stay is "in the public interest or for the protection of investors." 17 C.F.R. § 201.210(c)(3). The Division is ORDERED to file a statement by January 30, 2015, regarding its knowledge, if any, of the intent of the United States Attorney for the Middle District of Florida to intervene in this proceeding.

Cameron Elliot
Administrative Law Judge