

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 2794/June 10, 2015

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 ON STAY
MOTION

The Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) in this matter on March 30, 2015.

On May 12, 2015, I held a telephonic prehearing conference in this matter. Counsel for the Division of Enforcement attended the conference, as did counsel for Respondent Diane W. Lamm, and Robert G. Heim, counsel for Respondents Strategic Consulting Advisors and David I. Osunkwo. The conference was also attended by Assistant United States Attorney Whitman Knapp. During the conference, Mr. Knapp explained that he intended to move on behalf of the United States Attorney for the Eastern District of New York to intervene in this matter and to move to stay the proceedings due to the pendency of a related criminal matter. Transcript (Tr.) 7. On being asked by Mr. Heim how long the stay might last, Mr. Knapp said that he anticipated it lasting until the criminal matter is resolved. Tr. 10.

Shortly after that exchange, I asked Mr. Heim whether Strategic Consulting and Mr. Osunkwo would waive their statutory right to a hearing within sixty days of the service of the OIP. Tr. 12; *see* 78 U.S.C. § 78u-3(b). He responded that they would waive that right. Tr. 12.

On May 18, 2015, the U.S. Attorney for the Eastern District of New York moved for leave under Commission Rule of Practice 210(c)(3) to stay this administrative proceeding. 17 C.F.R. § 201.210(c)(3). In the motion and attached memorandum of law, the U.S. Attorney represents that a pending criminal proceeding in the Eastern District of New York involves Respondent Diane W. Lamm and John R. Lakian, the director of Respondent Aegis Capital and director and chairman of Respondent Circle One. Motion at 1-3. The U.S. Attorney argues that the criminal proceeding substantially overlaps with the administrative proceeding, and a portion of the same evidence would likely be presented at both proceedings. *Id.* at 3. The U.S. Attorney contends that without a stay, the administrative proceeding would be prejudiced by certain

witnesses invoking their Fifth Amendment privileges, and the criminal proceeding would be prejudiced by the creation of multiple sworn statements of the same witnesses. Memo at 2-4.

On May 27, 2015, Respondents Strategic Consulting Advisors and David I. Osunkwo (Moving Respondents) submitted an opposition, attaching the declaration of Mr. Osunkwo.¹ Moving Respondents contend that the U.S. Attorney failed to show that the criminal and administrative proceedings involve “the same or similar facts” as required by Rule 210(c)(3), and point out that Moving Respondents are not defendants in the criminal proceeding. Opp’n at 3-4. Moving Respondents also argue that a stay would financially devastate Mr. Osunkwo, because his career will be negatively affected until the administrative proceeding is resolved. *Id.* at 5, 7-8; Osunkwo Decl. at 1-2. In addition, Mr. Osunkwo, who initially waived his statutory right under Section 21C(b) of the Securities Exchange Act of 1934 to a hearing within sixty days of the OIP, Tr. 12, now seeks to retract that waiver on the grounds that it was made without knowledge that the proceeding may be stayed. Opp’n at 8.

On June 4, 2015, the U.S. Attorney submitted its reply motion. The U.S. Attorney argues that the criminal and administrative proceedings significantly overlap. The U.S. Attorney contends that Mr. Osunkwo’s conduct is related to both proceedings, as he served as a chief compliance officer for Capital L, the parent company of Aegis Capital and Circle One, and that the criminal proceeding alleges that Ms. Lamm and Mr. Lakian defrauded Capital L and Aegis Capital investors. Reply at 1-3.

Also on June 4, 2015, the Division of Enforcement submitted a brief in reply to Moving Respondents’ opposition. The Division supports staying the administrative proceeding. It argues that the two proceedings overlap and that Mr. Osunkwo is not permitted to withdraw his waiver of the right to a hearing within sixty days. Div. Reply at 2-3. The Division also interprets Moving Respondents’ opposition as containing a request to sever the proceeding, which it argues can only be directed to the Commission. *Id.* at 2.

Finally, on June 9, 2015, Moving Respondents filed their opposition to the Division’s reply.² Moving Respondents again assert that Mr. Osunkwo’s waiver was not made knowingly and should be set aside. Second Opp’n at 1 n. 1. They also argue that the Division’s argument that the criminal and administrative proceedings overlap contradicts and broadens the Division’s earlier position regarding Mr. Osunkwo’s liability. *Id.* at 2-4. Moving Respondents believe that the stay should be denied or that the OIP should be dismissed as to them. *Id.* at 5.

¹ The U.S. Attorney represents that Respondent Lamm does not oppose the motion. Motion at 4. The U.S. Attorney was unable to determine whether Respondents Aegis Capital and Circle One are represented by counsel; nonetheless, they did not file an opposition to the motion.

² Because the Division’s brief came after Moving Respondents filed their opposition, I permitted them to file an opposition only as to the Division’s briefing. *Aegis Capital, LLC*, Admin. Proc. Rulings Release No. 2770, 2015 SEC LEXIS 2243 (June 4, 2015).

Discussion

I am sympathetic to the concerns raised by Moving Respondents. However, the Commission's Rules state that motions such as the one before me "shall be favored" when made during a pending criminal prosecution "arising out of the same or similar facts" as the administrative proceeding and upon a showing that "a stay is in the public interest." 17 C.F.R. § 201.210(c)(3). The U.S. Attorney has demonstrated that the criminal proceeding, which concerns related conduct pertaining to three of the Respondents in this proceeding, arises "out of the same or similar facts." The U.S. Attorney has also shown that a stay would be in the public interest because without a stay both the criminal and administrative proceedings may be prejudiced.

Moving Respondents' arguments are not enough to overcome the presumption in favor of the U.S. Attorney's motion. Because the proceedings arise out of similar facts, it is immaterial that Moving Respondents themselves are not parties to the criminal proceeding. *See, e.g., Middlebury Secs, LLC*, Admin. Proc. Rulings Release No. 2092, 2014 SEC LEXIS 4666 (Dec. 4, 2014) (granting stay in an administrative proceeding even though respondent was not subject to a related criminal proceeding). To the extent that Moving Respondents request that I sever or dismiss the proceeding as to them, I lack the authority to consider or grant such a request, and would not consider it warranted if I did. *See* 17 C.F.R. § 200.30-10(a)(8) (motions to discontinue administrative proceedings may be granted by the Chief Administrative Law Judge upon a motion by the Division); 17 C.F.R. § 201.201(b) ("Any motion to sever must be made solely to the Commission."). Nor is there any basis to allow Moving Respondents to retract the waiver of their right to a hearing within sixty days. This is especially the case because they waived that right after being informed by Mr. Knapp that the stay would last until the related criminal matter is resolved. Additionally, a stay would likely be appropriate even if Moving Respondents had not waived their right to a hearing within sixty days.

The U.S. Attorney's Application to Intervene is GRANTED. For the reasons discussed above, I GRANT the U.S. Attorney's motion to stay this proceeding. A telephonic prehearing conference will take place on September 10, 2015, at 11:30 a.m. EDT. If the U.S. Attorney files a written notice before that date, asking that the stay remain in effect and providing reasons for the stay to remain in effect, the telephonic prehearing conference will be canceled.

James E. Grimes
Administrative Law Judge