

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3756/April 1, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17157

In the Matter of

STEVEN ZOERNACK AND
EQUITYSTAR CAPITAL MANAGEMENT, LLC

ORDER POSTPONING HEARING,
GRANTING EXTENSION, AND
DIRECTING FOR A DECLARATION
OF SERVICE

On March 8, 2016, the Securities and Exchange Commission issued an order instituting administrative and cease-and-desist proceedings (OIP) against Respondents pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. A hearing is currently scheduled for April 11, 2016.

Service

On March 22, 2016, my office communicated with the parties to inquire whether the OIP was served on Respondents. The Division of Enforcement replied that the OIP had been served on both Respondents, and attached an email from the Office of the Secretary, which included screenshots of U.S. Postal Service tracking information. These screenshots simply indicate that a delivery occurred on March 16, 2016, in Naples, Florida. They do not provide the specific address to which the OIP was delivered and whether such address is a valid address of each Respondent. In its email to the Division, the Office of the Secretary noted that it had not yet received return receipts from the U.S. Postal Service confirming delivery.

Given this lack of confirmation of service, and uncertainty as to Respondents' specific address(es), my office requested that the parties confirm that Respondent Steven Zoernack was properly served with the OIP and that he accepted service of the OIP on behalf of Respondent EquityStar Capital Management, LLC. The Division responded via email that: (1) it believed Mr. Zoernack and EquityStar received actual notice of the proceedings; (2) Mr. Zoernack was properly served because emails exchanged between Mr. Zoernack and the Division establish "confirmed telegraphic notice" pursuant to Commission Rule of Practice 141(a)(2)(i); (3) since Mr. Zoernack is the managing member and only employee of EquityStar, serving him satisfies Rule 141(a)(2)(ii) as to service on EquityStar; and (4) Mr. Zoernack is in the "best position" to say whether he received a copy of the OIP from the U.S. Postal Service.

I find that service of the OIP on Respondents is not yet established in accordance with Rule 141(a)(2). *See* 17 C.F.R. § 201.141(a)(2)(i), (ii). A precise date of service of the OIP in these proceedings must be established because it triggers when Respondents' answers are due and when the initial decision must be issued. *See* OIP at 8; 17 C.F.R. §§ 201.220(b), .360(a)(2). I reject the assertion that an email meets the standard of "confirmed telegraphic notice" under Rule 141(a)(2)(i).

Accordingly, I ORDER that by April 6, 2016, the Division shall file a declaration with supporting evidence confirming whether service has been properly accomplished in accordance with Rule 141. To the extent the Division relies on serving Mr. Zoernack on behalf of EquityStar, it must provide evidence that Mr. Zoernack is a managing member or officer of EquityStar. In lieu of a declaration of service, the Division may file a stipulation from Mr. Zoernack that he was served with the OIP on a specific date on behalf of himself and EquityStar.

Postponement and Extension

On March 21, 2016, the Division moved to convert the April 11 hearing to a telephonic prehearing conference. The Division represented that "Mr. Zoernack has indicated that he is not currently willing to confer, and instead has asked the undersigned to grant him a 30-day extension of time to secure representation," and it attached an email exchange with Mr. Zoernack to that effect. Motion at 2; Att. at 5. I construe Mr. Zoernack's correspondence with the Division as a request for a thirty-day extension of time to answer and conduct the prehearing conference, and as a waiver of Respondents' right to a hearing commencing between thirty and sixty days from service of the OIP. *See* 15 U.S.C. §§ 77h-1(b), 78u-3(b), 80b-3(k)(2); 17 C.F.R. § 201.161.

Pursuant to Rule 161(a), a hearing officer "may, for good cause shown," extend any time limits for filing papers and may postpone or adjourn any hearing. 17 C.F.R. § 201.161(a). But the hearing officer "should adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request . . . would substantially prejudice their case." 17 C.F.R. § 201.161(b)(1).

"In determining whether to grant any requests," I must "consider, in addition to any other relevant factors: (i) [t]he length of the proceeding to date; (ii) [t]he number of postponements, adjournments or extensions already granted; (iii) [t]he stage of the proceedings at the time of the request; (iv) [t]he impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and (v) [a]ny other such matters as justice may require." *Id.* (formatting altered). The first three factors weigh in favor of granting the request because the proceeding is at a preliminary stage, and no extensions have been granted. The fourth factor – my ability to complete the proceeding in the 300-day timeline – weighs against granting the requested extension. While that loss of time is significant, foregoing any further extensions, the adverse impact will be manageable. And because Respondents currently lack representation, it would be in the interest of justice to grant them a short extension so they can better prepare an answer and any affirmative defenses.

As such, Respondents' request for an extension is GRANTED. Notice(s) of appearance by Respondents' counsel, if any, and Respondents' answer(s) must be filed by May 11, 2016, provided that service of the OIP is properly established as set forth above.

The Division's motion to convert the hearing to a prehearing conference is GRANTED IN PART. The hearing scheduled for April 11, 2016, is POSTPONED. By May 12, 2016, the parties will hold a prehearing conference without the hearing officer to discuss each numbered item in Rule 221(c), 17 C.F.R. § 201.221(c), including the date by which each item will be accomplished. By May 13, the parties shall file a joint prehearing conference statement, which addresses each numbered item in Rule 221(c), includes proposed due dates where applicable,¹ and proposes a procedural schedule that will result in a hearing commencing no later than August 1, 2016. *See* 17 C.F.R. § 201.360(a)(2). Based on this prehearing conference statement, a subsequent prehearing conference with the hearing officer will be scheduled as appropriate. While the parties are welcome to satisfy any or all of the preceding obligations before the prescribed deadlines, these are firm deadlines, not subject to extension, given the additional thirty days already provided.

The parties are also asked to email electronic courtesy copies of any filings in this proceeding in Word and PDF text-searchable format to ALJ@sec.gov.

Jason S. Patil
Administrative Law Judge

¹ The parties may denote that an item is "not applicable" in their filing.