

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3875/May 26, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17157

In the Matter of

STEVEN ZOERNACK AND
EQUITYSTAR CAPITAL MANAGEMENT, LLC

ORDER DENYING MOTION
TO STAY AND DIRECTING
RESPONDENTS TO ANSWER

On March 8, 2016, the Securities and Exchange Commission issued an order instituting 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.

Respondents were personally served with the OIP on April 7, 2016, in accordance with Commission Rule of Practice 141(a)(2)(i), (ii), 17 C.F.R. § 201.141(a)(2)(i), (ii). *Steven Zoernack*, Admin. Proc. Rulings Release No. 3844, 2016 SEC LEXIS 1742 (ALJ May 16, 2016). Respondents requested and were granted an extension of time in which to file their answers, but did not file answers by the new May 11 deadline. *Id.*; *Steven Zoernack*, Admin. Proc. Rulings Release No. 3756, 2016 SEC LEXIS 1214 (ALJ Apr. 1, 2016). On May 16, I ordered Respondents to show cause by May 23, 2016, why this proceeding should not be determined against them due to their failures to file answers or otherwise defend the proceeding. *Steven Zoernack*, 2016 SEC LEXIS 1742.

On May 23, Respondents emailed a response comprised of two requests. First, Respondents requested “to stay the SEC preceding [sic] because of [a] pending indictment.” Respondents contended “it would be unfair to defend . . . in two U.S. government cases running simultaneously.” Respondents also requested another answer deadline extension of thirty days to retain an attorney, citing “difficulty engaging an attorney only because the retainer is so costly to go to trial in a civil SEC case” As evidence of their efforts to obtain counsel, Respondents reported that they “contacted Tom Sporkin Esq. who has helped . . . in the recent past.”

On May 25, the Division of Enforcement filed a response, contending that Respondents should be deemed in default due to their failures to meet court-imposed deadlines, and because the response to the show cause order is inadequate. *See* Div. Resp. at 1, 3. The Division advised that it did not have information that Respondent Zoernack is facing an indictment, which is the basis for Respondents’ stay request. *Id.* at 3 n.1, 5. With regard to the requested extension to

retain counsel, the Division contends that Respondents – who are not guaranteed counsel in these proceedings – have not established what reasonable, good faith efforts they have taken to obtain counsel that would justify a further extension. *See id.* at 4 & n.3 (citing *Berrios v. New York City Housing Auth.*, 564 F.3d 130, 134 (2d Cir. 2009)).

Request for a Stay

The requirements to stay proceedings in relation to a parallel criminal investigation or prosecution are established by Rule 210(c)(3), 17 C.F.R. § 201.210(c)(3), which provides that

[T]he hearing officer may grant leave to participate on a limited basis to . . . [a] criminal prosecutorial authority . . . for the purpose of requesting a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement . . . proceeding. Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for stay shall be favored.

17 C.F.R. § 201.210(c)(3). The rules do not authorize such a stay based on a request by respondent(s). *Cf. id.* No criminal prosecutorial authority has asked to make a limited appearance to move for a stay in this matter. Beyond Respondents' email, I lack any information concerning whether and to what extent, if any, there is a parallel criminal investigation or action involving Respondent Zoernack. Indeed, I requested additional information from Respondents concerning a potential indictment, but to date, have received no response, and the Division stated in its response that it is unaware of any pending indictment against Respondent Zoernack. Div. Resp. at 3 n.1, 5. Even if a stay could be granted on Respondents' motion, which the rules do not permit, I note that Respondents' sole justification for a stay, that it would be "unfair" to defend proceedings simultaneously, does not establish how a stay here would further "the public interest" or "the protection of investors." While I therefore deny Respondents' request for a stay, in the event that a criminal prosecutorial authority subsequently makes such a request, I shall then consider the issue anew on its merits.

Request for an Extension

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 foregoing factors weigh against another thirty-day extension of the deadline for Respondents' answers. Because of the last extension I granted at Respondents' request, it is now more than forty-five days since service of the OIP – fifteen-percent of the entire 300-day period allotted to decide the case. If I grant another thirty-day extension, more than twenty-five percent of the whole period will be lost. I granted the last extension with the admonition that “[w]hile that loss of time is significant, foregoing any further extensions, the adverse impact will be manageable.” *Steven Zoernack*, 2016 SEC LEXIS 1214, at *5. I also forewarned Respondents that the deadlines I previously prescribed for action were “firm deadlines, not subject to extension, given the additional thirty days already provided.” *Id.* at *6.

In keeping with the policy “strongly disfavoring such requests,” 17 C.F.R. § 201.161(b)(1), for an extension, I will grant only a portion of the requested time. Regardless of whether Respondents are able to retain counsel, they must nonetheless file their answers to the OIP no later than June 8 2016,¹ or will be deemed in default. OIP at 8; 17 C.F.R. §§ 201.155(a)(2), .220(f). Respondents must file any objections to the deadlines proposed in the Division's prehearing conference statement by June 15, 2016.²

In addition, by June 15, 2016, the parties shall submit their positions regarding the most appropriate location for the hearing to begin on August 1, 2016, as well as its estimated duration. The “place for [a] hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives.” 17 C.F.R. § 201.200(c). In addressing these factors, the parties shall address the convenience of potential fact and character witnesses, among others. Although the OIP alleges that Respondent Zoernack resides in Nokomis, Florida, OIP ¶ 3, it also alleges that “[d]uring all relevant periods, [Respondent] EquityStar's principal offices were located in Newport Beach, California, and Washington, D.C.” and that Respondent EquityStar is “an unregistered investment adviser for Global Partners and Momentum,” *id.* ¶ 4, both of which have “principal offices . . . in Newport Beach, California,” *id.* ¶¶ 5-6. From the face of the OIP, it is not clear whether the hearing should be fixed near Newport Beach, Nokomis, Washington, or another location. In addition to addressing the hearing's location, each party shall advise regarding the number of hearing days it projects it may use in its case, including rebuttal, in order to ensure a courtroom will be available for the entire hearing. Barring extraordinary circumstances, no party will be permitted to use any more time to present its case than it requests in its June 15 filing.

Jason S. Patil
Administrative Law Judge

¹ Currently, the Division has proposed a deadline of June 1, 2016, for filing motions for summary disposition, if any. Due to the extension of Respondents' time to file answers, I anticipate setting the deadline for these motions to the end of June.

² However, the August 1, 2016, commencement for the hearing is firm, and Respondents cannot object to this date.