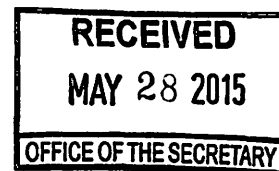


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16463

-----X
: **In the Matter of** :
: :
: **AEGIS CAPITAL, LLC** :
: **CIRCLE ONE WEALTH** :
: **MANAGEMENT, LLC** :
: **DIANE W. LAMM** :
: **STRATEGIC CONSULTING** :
: **ADVISORS, LLC and** :
: **DAVID I. OSUNKWO** :
: **Respondents.** :
: :
: :
-----X

RESPONDENTS STRATEGIC CONSULTING ADVISORS, LLC AND DAVID I. OSUNKWO'S OPPOSITION TO UNITED STATES ATTORNEY'S APPLICATION TO INTERVENE AND MOTION TO STAY THIS ADMINISTRATIVE PROCEEDING

I. Background

On May 18, the United States Attorney's Office for the Eastern District of New York ("USAO") filed a motion to intervene in this administrative proceeding and requesting that the administrative proceeding be stayed pending the outcome of a purportedly related criminal case against Respondent Diane Lamm (the "Motion to Stay"). The Motion to Stay does not make the required showing under established federal law to justify the imposition of a stay in this proceeding, especially where, as here, there is no real factual overlap between the criminal and civil proceedings, the Criminal Case is in a very early stage and the stay requested in the Motion to Stay has no set time to expire; there would be no prejudice to the Division of Enforcement in denying the Motion to Stay; there is a very significant burden placed on respondent (here David

Osunkwo (“Osunkwo”) if the stay is granted because his ability to earn a living will be dramatically curtailed as long as the administrative proceedings remain unresolved and it is in the interest of Commission that administrative proceedings be handled in a timely manner and not stayed indefinitely. In so far as the Motion to Stay does not indicate how long the USAO anticipates having the stay in place and provides no way for Respondents Strategic Consulting Advisors, LLC (“Strategic Consulting”) and Osunkwo to address the serious allegations made against them in the OIP -- allegations which are preventing Osunkwo from working as a securities compliance consultant – granting the Motion to Stay would effectively convert it into a temporary restraining order or cease and desist against Strategic Consulting and Osunkwo, without the benefit of a hearing.

As discussed herein, the Motion to Stay falls far short of meeting the standards that must be met under Commission Rule 210(c)(3) before an administrative proceeding can be stayed – including that the criminal case against Diane Lamm (the “Criminal Case”) involve the same or similar facts – and, therefore, the Motion to Stay should be denied. Moreover, the pending administrative proceeding has had a devastating impact on the livelihood of Respondent Osunkwo – who has no involvement in the Criminal Case. As detailed in the declaration of Osunkwo submitted with this opposition the administrative proceeding has made it extremely difficult for him to continue earning a living as a compliance consultant while this matter is pending. The extreme hardship that the pending administrative proceeding is having on Respondent Osunkwo weighs heavily in favor of denying the Motion to Stay.

In addition, under Section 21C(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) Osunkwo is entitled to a hearing in the cease and desist proceeding within sixty days of when the OIP was filed. Osunkwo’s initial agreement to waive the sixty day deadline for the

hearing was made prior to the time the USAO filed its Motion to Stay and Osunkwo hereby retracts his waiver and submits that it is not valid given that it was made prior without knowledge that a Motion to Stay would be filed, let alone the duration of the stay (which as reflected in the Motion to Stay has no duration).

II. Argument

A. The Criminal Case and the Administrative Proceeding Do Not Involve the “Same or Similar Facts”

Rule 210(c)(3) of the Commission’s Rules of Practice states that an administrative proceeding may be stayed upon the application of a United States Attorney’s Office only when the criminal prosecution arises “out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding” and upon a showing that the stay is in the public interest (emphasis added). A review of the February 3, 2015 indictment of Diane Lamm (the “Indictment”) that the US Attorney’s Office for the Eastern District of New York (“USAO”) relies on as the basis of their application for a stay clearly shows that there is no overlap in the facts between the criminal case against Lamm and this administrative proceeding.

The Indictment alleges a fraudulent scheme whereby Lamm and an individual named John R. Lakian (who is not a respondent in this administrative proceeding) defrauded investors in the Aegis Capital Fund, LLC (again an entity that is not a respondent in this administrative proceeding or even mentioned in the Order Instituting Proceedings) by making misrepresentations to investors about the use of funds that Lamm and Lakian were raising. However, the Indictment does not make any allegations related to the operation of the two registered investment advisors in this administrative proceeding – Aegis Capital, LLC and Circle One Wealth Management, LLC. In contrast, the OIP in this matter alleges that Aegis Capital, LLC and Circle One Wealth Management, LLC failed to timely file accurate reports with the

Commission and to maintain required books and records (OPI ¶ 1). The OIP also alleges that Respondents Strategic Consulting and Osunkwo failed to adequately prepare, review and file the Aegis Capital, LLC Form ADV for the year end December 31, 2009 (OPI ¶ 2). Nothing in the OIP relates to misrepresentations by Respondent Lamm made to investors in entities that are not parties to this administrative proceeding. Moreover, there is absolutely no factual overlap between the allegations in the Indictment and the allegations in the OIP against Strategic Consulting and Osunkwo.

The motion by the USAO for a stay makes only unsupported conclusory statements that there is factual overlap between the criminal case and the administrative proceedings. In fact, the motion by the USAO makes it clear that the true reason the USAO seeks a stay is to preserve a perceived tactical advantage in the criminal case against Lamm because a “portion of the proof at trial of the Criminal Case will include the same witnesses, documents and other evidence that would likely be presented at the hearing in this administrative proceeding.” (USAO Motion ¶ 5) The mere fact that the USAO wants to preserve a tactical advantage in the criminal case is not sufficient grounds to grant a stay, particularly in a case such as this one where there is no overlap in the facts in the criminal case and the administrative proceeding. In SEC v. Oakford Corp., 181 F.R.D. 269, 270 (S.D.N.Y. 1998) the Court held that “providing discovery to those defending themselves against serious civil charges, which may also be helpful in defending their criminal case, is not a cognizable harm to the government. Rather, it only implicates the government’s desire to maintain a tactical advantage, which is not by itself a proper basis for granting a stay.” Oakford at 273. Moreover, the Division of Enforcement’s failure to object to the Motion to Stay raises questions as to why Osunkwo was named in this proceeding with Lamm if not for perceived tactical advantages for the Division and for the USAO.

B. The Motion to Stay Also Fails to Meet the Requirements Federal Courts Have Set Forth When Deciding Whether to Grant a Motion to Stay.

In making the decision whether to grant a stay, federal courts have developed a test, which balances the parties' interests in staying the proceedings against allowing them to continue. This inquiry was first crystallized in Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Transworld Mechanical Inc. , 886 F.Supp. 1134 (S.D.N.Y. 2003). The Transworld case laid out six factors, which the court used to make its decision. They include:

1. The extent of overlap between the criminal and civil proceedings;
2. The status of the criminal case;
3. The private interests of the civil plaintiff;
4. The burden on the defendant from proceeding with or delaying the civil litigation;
5. The interests of the courts; and
6. The public interest.¹

Although this is a balancing test where none of the factors are outcome determinative, the court stated that the most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues (which has been addressed above). In addition, the other factors also weigh in favor of denying the Motion to Stay because the Criminal Case is in a very early stage and the stay requested in the Motion to Stay has no set time to expire; there would be no prejudice to the Division of Enforcement in denying the Motion to Stay; there is a very significant burden placed on Respondent Osunkwo if the stay is granted because his ability to earn a living will be dramatically curtailed or even extinguished as long as the administrative proceedings remain unresolved and it is in the interest of justice that administrative proceedings be handled in a timely manner and not stayed indefinitely.

Applying the six factor test set forth above several courts have denied motions to stay civil enforcement cases. For example in SEC v. Saad, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) the Court denied a request by the USAO for a general stay of discovery.² In Saad, the SEC had filed a complaint against a number of defendants accusing them of engaging in a fraudulent scheme to inflate the reported financial results of Impath, Inc. One day prior to the commencement of this civil case, the USAO had brought a criminal case against the same defendants for various alleged criminal violations arising from the same allegations set forth in the SEC's complaint. When the defendants denied the SEC's allegations, the USAO intervened in the civil suit for the purpose of seeking a stay of the suit pending resolution of the criminal case. Their rationale was that if discovery were permitted to proceed in the civil action, the defendants would be permitted to obtain more discovery about the underlying events than they would be able to obtain in the criminal case.

The Saad court engaged in a simplified balancing of the parties competing interests and stated, "it's strange that the USAO, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously." Saad, at 91. Ultimately the Saad Court denied the USAO's request, emphasizing "the defendants were not just facing a criminal indictment, they were also facing a very serious SEC civil action, and they were thus fully entitled to the timely discovery that federal law grants them in defending such an action." Saad, at 92

District courts in the Eastern District of New York have also followed this approach. For example in SEC v. Cioffi, 868 F.Supp.2d 65 (E.D.N.Y., 2008), the court denied the USAO motion to stay all discovery proceedings in a civil enforcement case. In Cioffi, the USAO again

argued that it would be unfair to allow criminal defendants to engage in broad discovery in a civil context because it would hurt their prosecution of the criminal case. The court added an interesting wrinkle to the analysis and stated that the “USAO request did not present sufficient particularized facts to conduct the required balancing of interests. Without specific discovery requests and specific objections before it, the court simply cannot evaluate the validity and strength of the government’s concerns relative to the defendants interest in a prompt resolution of the allegations against them.”³ Overall, this goes to show that some courts may require the USAO to make their motions to stay with particularity in order to even trigger a balancing inquiry.

Courts as well as Rule 210(c)(3) of the Commission’s Rules of Practice also require an analysis of whether granting the stay would be “in the public interest or for the protection of investors.”⁴ Here there is a strong public interest in allowing the administrative proceeding to proceed as to Respondents Strategic Consulting and Osunkwo. As detailed in the Osunkwo Declaration dated May 26, 2015 (“Osunkwo Decl.”) submitted herewith the unproven allegations in the OIP has had a devastating impact on his ability to make a living as a securities compliance professional, a career he has been in for over fifteen years. Mr. Osunkwo has lost the majority of his income Osunkwo Decl. ¶ 6), had his speaking and publishing engagements halted (Osunkwo Decl. ¶ 7) and has been forced to curtail his marketing and client development during the pendency of the charges in the OIP (Osunkwo Decl. ¶ 8) As a result of the allegation in the OIP Osunkwo’s consulting practice has fallen behind on bill payments and he is experiencing significant financial hardship (Osunkwo Decl. ¶ 9). Strategic Consulting and Osunkwo are not named or implicated in any way in the Indictment. Any extended delay in resolving the charges

⁴ Aegis Capital, LLC and Circle One Wealth Management, LLC are no longer in business so there would be no harm to investors resulting from a denial of the Motion to Stay.

in the OIP will extinguish Osunkwo's small practice. For these reasons, the public interest factor also weighs in favor of denying the Motion to Stay.

Moreover, under Section 21C(b) of the Exchange Act Osunkwo is entitled to a hearing in the cease and desist proceeding within sixty days of when the OIP was filed. Osunkwo's initial waiver of the sixty day deadline for the hearing was made prior to the time the USAO filed its Motion to Stay and Osunkwo hereby retracts his waiver and submits that it is not valid given that it was made without knowledge that a Motion to Stay would be filed.

III. Conclusion

Based upon the foregoing, Respondents Strategic Consulting and Osunkwo respectfully request that the Motion to Stay be denied.

Dated: New York, New York
May 27, 2015

Respectfully submitted,

MEYERS & HEIM LLP

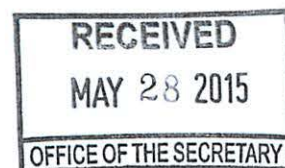
By:



Robert G. Heim
444 Madison Avenue, 30th Floor
New York, New York 10022
Phone: (212) 355-7188 ext. 1
Facsimile: (212) 355-7190

*Attorneys for Strategic Consulting Advisors, LLC
and David I. Osunkwo.*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16463

-----X
:
In the Matter of :
:
AEGIS CAPITAL, LLC :
CIRCLE ONE WEALTH :
MANAGEMENT, LLC :
DIANE W. LAMM :
STRATEGIC CONSULTING :
ADVISORS, LLC and :
DAVID I. OSUNKWO :
:
Respondents. :
:
:
-----X

CERTIFICATE OF SERVICE

I, Robert G. Heim, certify that on the 27th day of May, 2015 I caused a true and correct copy of the: (i) Opposition to the US Attorney's Application to Intervene and Motion to Stay the Administrative Proceeding of Respondents Strategic Consulting Advisors, LLC and David I. Osunkwo; and (ii) Declaration of David I Osunkwo dated May 27, 2015 to be filed and served in the manner indicated on the following:

Brent J. Fields
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E. Mail Stop 20549
Washington, DC 20549
(By facsimile and overnight delivery – original and three copies)

W. Shawn Murnahan, Esq.
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1382
(By email and overnight delivery)

Robert Heim