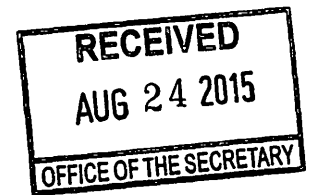


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16497

In the Matter of
R. SCOTT PEDEN, ESQ.

JOINT MOTION TO STAY OR POSTPONE PROCEEDINGS
WITH SUPPORTING POINTS AND AUTHORITIES

INTRODUCTION

The parties jointly move for a stay or postponement of the hearing in this matter pending the outcome of appeals filed by Respondent and the Commission that are now pending in the United States Court of Appeals for the Fifth Circuit from the district court judgment that is the basis for this proceeding under Rule 102(e) of the Commission's Rules of Practice. Respondent's appeal urges the Fifth Circuit to reverse, among other things, the judgment that he aided and abetted a violation of Section 13(a) of the Exchange Act. The Commission's cross appeal asks the Fifth Circuit to reinstate a jury verdict that Respondent violated Section 17(a) of the Securities Act. The resolution of these appeals may have a substantial impact on the appropriate disposition of this proceeding and a stay or postponement will promote administrative efficiency because it will obviate the potential need for subsequent proceedings to either reduce the sanction if Respondent prevails on appeal, or increase the sanction if the Commission prevails on appeal. The parties recognize that should this motion be granted the

temporary suspension entered by the Commission will remain in effect, thereby protecting the public interest as Respondent may not appear or practice as an attorney before the agency during the stay. Should this motion be granted, the parties will promptly notify the ALJ of any significant developments in the pending appeals in the Fifth Circuit.

BACKGROUND

On January 16, 2015, the United States District Court for the Western District of Texas entered a final judgment (“Judgment”), following a jury trial, that enjoined Respondent from violating provisions of the federal securities laws and imposed a \$2,000,000 civil penalty. The jury found that Respondent violated Section 17(a) of the Securities Act of 1933 (“the Securities Act”), and aided and abetted a violation of Section 13(a) of the Securities Exchange Act of 1934 (“the Exchange Act”), together with Rules 12b-20, 13a-1 and 13a-13 thereunder, by Life Partners Holdings, Inc. (LPHI), a company for which Respondent served as secretary and general counsel. However, the court set aside the jury’s verdict that Respondent violated Section 17(a), and entered the judgment against him based solely on violations of Section 13(a) and the rules thereunder. In determining the civil penalty against Respondent, the court also found that a second-tier penalty was appropriate, because Respondent had acted with recklessness in aiding and abetting LPHI’s violations.

On April 16, 2015, the Commission issued an Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3)(i)(A) against Respondent, based on the Judgment.

Meanwhile, on January 20, 2015, Respondent filed an appeal to the United States Court of Appeals for the Fifth Circuit seeking reversal of the verdict under Section 13(a) of the Exchange Act, as well as reversal of the civil penalty and the injunction against future violations

of the securities laws. On March 16, 2015, the Commission cross appealed the district court's decision to vacate the jury's verdict that Respondent violated Section 17(a).¹

The Fifth Circuit's resolution of these cross-appeals could greatly impact the ALJ's decision as to what remedial relief, if any, is warranted in this matter. The uncertainty of how the Fifth Circuit may rule is also affecting the parties' attempts to settle this proceeding. To illustrate, the Fifth Circuit could: (1) affirm the judgment as to Section 13(a) and reinstate the jury verdict in favor of the Commission under Section 17(a); (2) affirm the judgment as to Section 13(a), but vacate the second-tier civil penalty and the court's finding of recklessness; (3) vacate the judgment under Section 13(a), but reinstate the jury verdict under Section 17(a); (4) affirm the district court's decision in all respects; (5) vacate the district court's decision in all respects; or, (6) reach some other resolution.

ARGUMENT

Each of the potential outcomes to the pending appeals to the Fifth Circuit – other than Respondent prevailing entirely – could arguably support a different analysis as to the application of the *Steadman* factors to Respondent's conduct. As the ALJ is well aware, the appropriate remedial sanction for an attorney who has violated the federal securities laws is guided by the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Those include the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition

¹ The cross-appeals are currently stayed pending bankruptcy proceedings involving LPHI, a co-defendant in the underlying case that has also appealed. Respondent and another co-defendant, Brian Pardo, have filed an unopposed motion to sever their appeals from LPHI's appeal, and that motion is pending before a motions panel of the Fifth Circuit. Respondent has already filed his brief.

of the wrongful nature of his conduct, the likelihood that the respondent's occupation will present opportunities for future violations, and the deterrent effect of a suspension. *See, e.g., Steven Altman*, Exchange Act Release No. 34-63306, 2010 WL 5092725 (Nov. 10, 2010). The outcome of the cross appeals will have a substantial impact on at least two of these factors: the egregiousness of the conduct and the degree of scienter involved. For example, if the Fifth Circuit reinstates the Section 17(a) verdict, the ALJ could find that the underlying conduct is more egregious. Conversely, if the Fifth Circuit reverses the finding – made in connection with setting the civil penalty – that Respondent acted recklessly, the ALJ could find that the degree of scienter on that issue is lower. And if the Fifth Circuit reinstates the Section 17(a) verdict but reverses the recklessness finding, the ALJ will have to weigh the offsetting effects of those changes to the current judgment. Under each of these scenarios, a different calculus of the *Steadman* factors is likely.

In view of these uncertainties, their potential impact upon the resolution of this proceeding, and the interests of administrative efficiency in resolving this matter in its entirety, we urge the ALJ to exercise his broad discretion under Rules 111 and 161(b) of the Rules of Practice to grant the jointly-requested stay. While no Commission Rule expressly provides for a stay under the circumstances here, there is precedent under Rules 111 and 161(b) for an ALJ to grant an unopposed application in a follow-on 102(e) proceeding against an attorney for a stay pending resolution of a respondent's appeal of the underlying civil judgment.

I. THE ALJ HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED UNDER RULE 111

The ALJ's stay order entered in *In the Matter of Herbert M. Campbell II, Esq.*, Administrative Proceeding File No. 3-10268 (Stay Order dated April 11, 2003; attached as Exhibit 1), is illustrative of the authority to grant a stay or postponement of this proceeding

pending resolution of the cross appeals. There, the district court entered a permanent injunction against Campbell enjoining him from future violations of antifraud and books and records provisions of the federal securities laws. The Commission then issued an order instituting a Rule 102(e) proceeding against Campbell based on that final judgment. Meanwhile, Campbell appealed the final judgment to the United States Court of Appeals for the Tenth Circuit and filed a motion requesting that the ALJ stay the pending Rule 102(e) proceeding pending the outcome of the appeal; the Office of General Counsel did not oppose that motion. The ALJ, noting that the outcome of the appeal would resolve the question whether Campbell would be sanctioned, stayed the proceedings. *Id.* at 2. The ALJ issued the stay pursuant to Commission Rule of Practice 111, which generally describes the authority of ALJs, and provides:

[A] hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.

In the instant case, there is a far greater reason for the ALJ to exercise his authority under Rule 111 and stay these proceedings than existed in *Campbell*. That case involved an appeal presenting two likely possible outcomes: dismissal of the proceeding if the respondent prevailed and the *status quo* if he did not. In this case, the cross appeal creates additional potential outcomes that, as noted above, could substantially affect the appropriate disposition of the matter.

While a different ALJ declined to follow *Campbell* and grant a stay to a respondent in an administrative proceeding under Section 15(b) of the Exchange Act, pending his appeal of an underlying judgment, see *In the Matter of Richard L. Goble*, AP File No. 3-14390, Order Denying Motion to Stay dated July 21, 2011, 2011 WL 10845972, that decision is

distinguishable for several reasons. In *Goble*, the respondent's motion was opposed by the Division of Enforcement and there is no indication that the respondent offered any compelling argument in favor of a stay, and relied solely on the pendency of his appeal. *Id.* Thus, the ALJ found that Goble did not make the required "'strong showing' that the 'denial of the request . . . would substantially prejudice [his] case.'" *Id.* at *1.

In contrast with *Goble*, the motion for a stay here is submitted jointly by the parties. Furthermore, unlike *Goble*, this case involves a substantial potential prejudice to both parties if a stay is not granted. As noted above, there is a range of potential outcomes of the issues appealed to the Fifth Circuit that could affect this matter, some of which may weigh in favor of a greater or lesser sanction under the *Steadman* factors. While the mere pendency of a respondent's appeal is ordinarily not an adequate basis for granting a stay or postponement, where (as here) both parties have demonstrated that their interests will potentially be prejudiced in the absence of a stay, and the range of potential outcomes increases the probability that the ALJ will have to revisit any decision, the ALJ may properly exercise his discretion to grant a stay or postponement.

While the ALJ in *Goble* found two principal reasons for not following *Campbell*, *id.* at *2, those reasons are not compelling here. First, he stated that it was unclear from the Initial Decision and "readily available public record" in *Campbell* what rule the ALJ had relied on in granting the stay. *Id.* However, as discussed above, the Stay Order in *Campbell* reveals that the ALJ relied on Rule of Practice 111, which provides that "a hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties." This broad language should encompass the authority to issue a stay of proceedings where the interests of the

parties and administrative efficiency will be served; particularly where, as here, both parties agree to a stay and there will be no harm to the public interest caused by the stay.

The ALJ in *Goble* also found *Campbell* inapposite because, at the time of the stay, the Office of Administrative Law Judges was not operating under hard deadlines to dispose of proceedings. *Id.* (citing Securities Act Release No. 33-8240 (June 11, 2003), 80 SEC Docket 1266). However, it is unlikely that the Commission, in imposing deadlines, intended to deprive ALJ's of the power to issue a stay under Rule 111 where, as here, a jointly-requested stay is appropriate to protect the interests of the parties and to ensure a fair and efficient result. The comment to Rule 111 explains that the "hearing officer is permitted to take any action necessary and appropriate to discharge his or her duties." And, "[a]s the courts have repeatedly held, inherent in the powers of a trial judge in both federal judicial proceedings and administrative proceedings is the power to police and maintain the orderly administration of justice . . ." *In the Matter of Russo Securities, Inc., et al.*, Administrative Proceeding File No. 3-9484, Order On Motion in Limine dated April 21, 1998, 1998 WL 211391 (citations omitted). Moreover, the "powers" of the ALJ specifically delineated under Rule 111, at subsection (d), include "regulating the course of a proceeding."

II. THE ALJ ALSO HAS THE DISCRETION TO GRANT A STAY OR POSTPONEMENT PURSUANT TO RULE 161

Commission Rule of Practice 161 provides for extensions of time, postponements and adjournments, subject to certain requirements. Rule 161(b) states that the Commission or hearing officer "should adhere to a policy of strongly disfavoring [such delays], except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case." The delineated factors the hearing officer is to consider in deciding on a postponement or adjournment under Rule 161 include the length of

the proceeding to date, the number of postponements previously granted, the stage of the proceeding at the time of the request for a postponement, *the efficient administration of justice and any other matters justice requires*. See *In the Matter of Paul Free, CPA*, AP File No. 3-14629, Order Denying a Stay or Postponement of Proceedings dated January 26, 2012, 2012 WL 266986 at footnote 6 (emphasis added). This latter basis applies with particular force here.

The Commission has recognized that for good cause shown, Rule 102(e) proceedings may be postponed or adjourned pending an appeal, pursuant to Rule 161. *Id.* at *2. In *Free*, the respondent filed an opposed motion under Rule of Practice 401(c) to stay administrative proceedings following his temporary suspension, until he completed his appeal. The Commission found that Rule 401(c) was inapplicable, but considered the respondent's motion for a stay as a request for an extension of time, postponement, or adjournment under Rule 161. *Id.* Although the Commission declined to grant a postponement or adjournment of the proceedings pending an appeal by the respondent, it did so because the respondent failed to make a showing that he would suffer substantial prejudice, and not because Commission deadlines precluded a justifiable stay. *Id.*

As discussed above, denying a postponement or adjournment pending resolution of the Fifth Circuit appeals could substantially prejudice the arguments of both parties and raises the prospect of additional proceedings once the appeals are resolved. The efficient administration of justice and the interests of finality are best served by a postponement until the appeals are decided. For these reasons, a postponement is also appropriate under Rule 161.

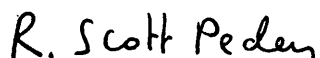
CONCLUSION

For the reasons set forth above, the parties respectfully request that the ALJ stay or postpone these administrative proceedings pending resolution of the parties' appeals to the Fifth Circuit.

Respectfully submitted,



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*Signed by John P. Tavana on behalf of R. Scott Peden, with his permission.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion To Stay Proceedings was served on each of the following on August 24, 2015, in the manner indicated below:

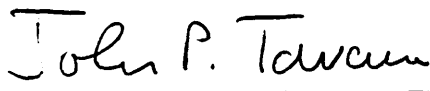
By Hand:

The Honorable James E. Grimes
Administrative Law Judge
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Secretary of the Commission
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John P. Tavana

EXHIBIT 1

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10268

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 11, 2003

APR 11 2003

~~FILE NO.~~ 1st class

In the Matter of :
:
HERBERT M. CAMPBELL II, ESQ. : STAY ORDER
:
:

The Securities and Exchange Commission (Commission) issued an Order Instituting Public Administrative Proceeding and Imposing a Temporary Suspension Pursuant To Rule 102(e)(3) of the Commission's Rules of Practice (OIP) on August 10, 2000. A telephonic prehearing conference is scheduled for April 14, 2003. By letter, dated April 11, 2003, Respondent requests that the scheduled telephonic prehearing conference be rescheduled due to the ongoing appeal process in the Tenth Circuit Court of Appeals. The Office of the General Counsel (General Counsel) has no objection to this postponement.

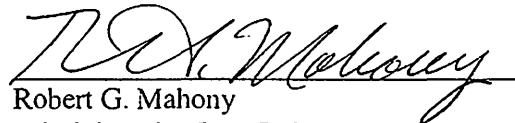
Part of the history of this case, as obtained from the OIP, is as follows: On July 20, 1998, the Commission brought an action in federal district court against Respondent and others alleging that Mr. Campbell violated Section 17(a) of the Securities Act of 1933 (Securities Act) and Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 (Exchange Act). See SEC v. Solv-Ex Corp., John S. Rendall, and Herbert M. Campbell, U.S. District Court for the District of New Mexico (District Court), Case No. 98-860 BB/RLP. On December 20, 1999, a bench trial was commenced concerning the Commission's allegations. On March 31, 2000, District Court Judge Bruce D. Black issued the Court's Findings of Fact and Conclusions of Law. On May 16, 2000, the District Court entered its Final Judgment, permanently enjoining and restraining Mr. Campbell from violating Section 17(a) of the Securities Act and Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, and 13a-13, thereunder.

Mr. Campbell has appealed the District Court case to the Tenth Circuit Court of Appeals (Court of Appeals) where it now rests. If the Court of Appeals reverses the District Court, the General Counsel has advised that there will be no basis for the OIP. If the Court of Appeals affirms the District Court, Respondent understands that the General Counsel will seek a permanent bar. Therefore, since a ruling by the Court of Appeals will likely resolve the matter, the scheduling of an administrative hearing is postponed.

Based on the above, Respondent's request will be treated as a Motion for Stay of Proceedings. The Motion is GRANTED.

Pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111, IT IS ORDERED that the instant proceeding be, and hereby is, STAYED pending a decision by the Court of Appeals in the parallel matter.

IT IS FURTHER ORDERED that Respondent shall report on the status of the parallel matter on July 14, 2003. The telephonic prehearing conference scheduled for April 14, 2003, is canceled.


Robert G. Mahony
Administrative Law Judge