

ADMINISTRATIVE PROCEEDING
FILE NO. 3-16590

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

BRIAN J. OURAND,

Respondent.

Hon. Carol Fox Foelak

**DIVISION OF ENFORCEMENT'S REPLY TO
RESPONDENT BRIAN J. OURAND'S POST-HEARING BRIEF**

February 12, 2016

Division of Enforcement
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Rather than address the overwhelming and uncontested evidence against him, Respondent Brian J. Ourand requests that the Hearing Officer suspend or delay issuing an initial decision in this matter pending the outcome of his related criminal case. Ourand contends that as a result of his recent indictment he was placed in an “unfair position” at the hearing and had no choice but to assert his Fifth Amendment right against self-incrimination and believed that it was in his best interests to withdraw all of his exhibits, to call no witnesses on his behalf, and to conduct no cross-examination of the Division’s witnesses. As the Hearing Officer previously found, the pendency of Ourand’s criminal case provided no basis for postponing the evidentiary hearing. *See Brian J. Ourand*, AP Rulings Rel. No. 3384 (Dec. 9, 2015) (denying Ourand’s motion to stay pending outcome of related criminal proceeding). It equally follows that Ourand’s tactical decision at the hearing to mount no defense, and to selectively invoke his Fifth Amendment rights when examined by the Division, provides no basis to postpone an initial decision in this matter.

The Commission’s Rules of Practice strongly disfavor extensions of time, postponements or adjournments in administrative proceedings. 17 C.F.R. § 201.161(b). Indeed, the rules permit postponements in only two enumerated circumstances: (1) to permit Commission consideration of an offer of settlement (17 C.F.R. § 201.161(b)(2)); or (2) where leave to intervene is sought by a state or federal criminal prosecuting authority for the purpose of requesting a stay during the pendency of the criminal investigation or prosecution (17 C.F.R. § 201.210(c)(3)). Neither circumstance is present here. Accordingly, Ourand’s request for a stay should be denied. *See, e.g., Michael Lauer*, Initial Decision Rel. No. 369, 2009 SEC LEXIS 222, at *10 (Jan. 29, 2009) (denying request for stay pending upcoming criminal trial); *Jerome M. Wenger*, Initial Decision Rel. No. 192, 2001 SEC LEXIS 1933, at *6 (Sept. 24, 2001) (Foelak, J.) (same).

Rule 161 also permits postponements where the moving party is able to make a strong showing that the denial of the request or motion would substantially prejudice their case. 17 C.F.R.

§ 201.161(b). In making that determination, Rule 161(b) provides the hearing officer should consider the length of the proceeding to date, the number of postponements already granted, that stage of the proceedings at the time of the request, the impact of the request on the hearing officer's ability to complete the proceedings in the time specified by the Commission, and any other matters as justice may require. *Id.*

None of those factors warrant a postponement. Indeed, there is nothing to postpone. The evidentiary hearing has concluded and there is no reason not to issue an initial decision in this matter within the 300-day time limit prescribed by the Commission. Nor do the interests of justice require a stay in this case. *See Jerome M. Wenger*, 2001 SEC LEXIS 1933, at *6 (citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980) (discussing factors, including a party's Fifth Amendment privilege against self-incrimination, that bear on a court's determination of whether to stay a civil proceeding pending the outcome of a criminal proceeding)). The Division presented substantial evidence at the hearing, separate and apart from Ourand's Fifth Amendment invocation, demonstrating that Ourand violated, willfully aided and abetted, and caused violations of Sections 206(1) and (2) of the Advisers Act. Ourand admitted his theft of client funds to Live Nation's internal investigators just weeks after he was placed on administrative leave (*see, e.g.*, DOE Ex. 25) and he has never identified any conceivable defense that he could have been presented, but was prevented from doing so. Furthermore, Ourand could have introduced exhibits, called witnesses on his behalf, or cross-examined the Division's witnesses, without implicating his Fifth Amendment interests. The fact that he knowingly and voluntarily chose to relinquish all of those rights provides no basis to postpone a decision in this matter. *Cf. Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) ("[t]he Constitution does not ordinarily require a stay of proceedings pending the outcome of criminal proceedings."); *Joseph P. Galluzi*, 55 S.E.C. 1110, 1116, n.21 (Aug. 23, 2002) (Comm. Op.) (pending criminal appeal does not preclude Commission

from acting to protect the public interest); *Jon Edelman*, 52 S.E.C. 789, 790 (May 6, 1996) (Comm. Op.) (“[t]he public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way”).

Finally, the initial decision in this matter, even if adverse to Ourand, will not serve to prejudice him in his criminal case, as the standard of proof in an administrative proceeding is by a preponderance of the evidence, rather than proof beyond a reasonable doubt. *In the Matter of Sandra K. Simpson*, 55 S.E.C. 766, 2002 SEC LEXIS 3419, *57 (Comm. Op., May 14, 2002); *SEC v. Steadman*, 450 U.S. 91, 102-03 (1981). As such, the initial decision will have no *res judicata* effect in his criminal case. *Helvering v. Mitchell*, 303 U.S. 391, 397 (“[t]he difference in the degree of the burden of proof in a criminal and civil cases precludes application of *res judicata*.”); *United States v. Konovsky*, 202 F.2d 721, 726-27 (7th Cir. 1953) (the adjudication of a fact in a civil proceeding can afford no basis for the doctrine of *res judicata* when offered in a criminal case).

In short, the evidence establishes that Ourand willfully violated, willfully aided and abetted and caused violations of Sections 206(1) and (2) of the Advisers Act and Ourand has presented no evidence or argument to the contrary. Accordingly, the hearing officer should deny Respondent’s request for a stay.

Dated: February 12, 2016

Respectfully submitted,

DIVISION OF ENFORCEMENT

/s/ Payam Danialpour

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Certificate of Service

I certify that on February 12, 2016, I caused the foregoing to be served on the following persons by the method of delivery indicated below.

Brent J. Fields, Secretary
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/s/ Donald W. Searles

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