

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11909

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 27, 2005

In the Matter of :
: ORDER
:
PHLO CORPORATION, :
JAMES B. HOVIS, and :
ANNE P. HOVIS :

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 21, 2005. A telephonic prehearing conference is scheduled for August 2, 2005, at 2:00 p.m. EDT (Order of June 10, 2005). The hearing is scheduled to commence on August 8, 2005.

Before me is Respondents' request to postpone the hearing. Rule 161(b) of the Commission's Rules of Practice provides that such requests are strongly disfavored, except in circumstances where the requesting party makes a strong showing that the denial of the request would substantially prejudice its case. The hearing officer shall consider, in addition to any other relevant factors, the length of the proceeding to date; the number of postponements, adjournments, or extensions already granted; the stage of the proceedings at the time of the request; the impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and any other such matters as justice may require.

Respondents have missed several deadlines to date. Respondents sought a delay of one month to file Answers to the OIP. I denied that request, but granted them seven days of additional time (Orders of May 20 and 24, 2005). Respondents later agreed to take the deposition of a witness on July 12, 2005. At Respondents' request, I postponed the deposition until July 19, 2005 (Order of July 1, 2005; Letter from Charles D. Reed, dated July 7, 2005). Respondents promised to file their overdue annual report for fiscal year 2004 by June 27, 2005. In fact, Respondents did not file the overdue annual report until July 8, 2005. Respondents list of proposed witnesses and exhibits was due on July 15, 2005. At Respondents' request, I afforded them an additional week to supplement their lists with several missing items (Order of July 20, 2005). No such supplement was filed.

The former attorney for Respondents, Charles D. Reed, notified Respondents as early as May 25 or May 26, 2005, that he would be withdrawing from representation. Mr. Reed delayed

the effective date of his withdrawal until July 13, 2005, to afford Respondents the opportunity to engage substitute counsel (Notice of Withdrawal, dated July 8, 2005).

By letter dated July 25, 2005, Respondent Anne P. Hovis states that Respondents' inability to engage substitute counsel warrants a postponement of the hearing. The request for a postponement on this basis is denied. Respondents knew of Mr. Reed's intent to withdraw from representation before agreeing to the hearing schedule on June 1, 2005. There is no evidence of a diligent effort to obtain substitute counsel before July 13. In addition, both of the individual Respondents have identified themselves in Phlo Corporation's annual reports as law school graduates.¹

Mrs. Hovis's letter requests "a reasonable amount of time" in rescheduling the hearing. However, the letter does not propose a specific hearing date.² Nor is there any commitment to honoring the new hearing date, if one should be set. There is no indication that Respondents have conferred with the Division of Enforcement (Division). Respondents have not stated whether, as a condition of postponing the hearing to a later date, they would be willing to purchase a hearing transcript on an expedited basis (which may require the payment of a premium price to the reporting company) and whether they would be willing to compress the posthearing briefing schedule to less than the sixty days envisioned by Rule 360(a)(2) of the Commission's Rules of Practice. In short, the letter request is all "take" and no "give."

Mrs. Hovis further states that Charles Schwab & Co. has not yet responded to a third-party document subpoena. She professes ignorance of the procedures needed to compel compliance. I discussed the importance of attending to third-party subpoenas in a timely manner (Prehearing Conference of June 1, 2005, at 32-33). I signed the subpoena in question on June 15, 2005, the day it was presented to me, and counsel for Respondents received it the same day. The return date was June 25, 2005. Respondents have offered no explanation for their inaction between June 25 and the present. Accordingly, any failure by Charles Schwab & Co. to honor the subpoena does not constitute a valid basis for postponing the hearing.

In her July 25 letter, Mrs. Hovis also states that her husband, Respondent James B. Hovis, is experiencing lower back and abdominal pain that may prevent his participation in the upcoming hearing. Mrs. Hovis states: "At this juncture, it does not appear that Mr. Hovis would be able to attend a hearing where he was required to sit throughout the day (and for a period of several days to a week) without substantial pain and without being medicated with pain

¹ Mrs. Hovis is not an attorney at law admitted to practice before the United States Supreme Court or the highest court of any State (Prehearing Conference of June 1, 2005, at 7-8). She does not represent Mr. Hovis in this proceeding. See Rule 102(b) of the Commission's Rules of Practice.

² The parties agreed to take the videotaped deposition of one witness who will be unavailable during the week of August 8-12, 2005 (Order of July 1, 2005). Respondents have not explained whether they would insist on the live testimony of that witness at a rescheduled hearing, or whether they intend to honor their earlier agreement to accept the deposition testimony.

medication.” Mrs. Hovis purports to make these representations on her husband’s behalf “[w]ithout waiving any doctor-patient privilege.”³

The request for a medical postponement is denied, without prejudice to renewal by Mr. Hovis. A renewed motion shall be subject to the following conditions: (1) if Mr. Hovis wishes to make any factual representations about his medical condition, he must do so in detail and under oath; (2) if Mr. Hovis petitions for a medical postponement of the upcoming hearing, his pleadings must be received by this Office and by the Division before Monday, August 1, 2005, at 10:00 a.m. EDT; (3) any such petition must be accompanied by a report from Mr. Hovis’s treating physician, in which the physician presents his diagnosis and prognosis, provides a list of all prescribed medications and dosages, identifies any side effects to those medications that may impair Mr. Hovis’s ability to participate in the hearing, and explains any functional limitations that Mr. Hovis may have; (4) any such petition must also be accompanied by reports explaining the results of all recent diagnostic tests, including x-rays and MRIs administered after June 15, 2005; and (5) the treating physician should state whether, in the physician’s best professional judgment, Mr. Hovis can participate in a hearing during the week of August 8-12, 2005. If Mr. Hovis cannot participate in the hearing on a full-time basis, the treating physician should state whether Mr. Hovis can participate in the hearing for partial days and/or with frequent breaks. The Division may respond to any such motion by 10:00 a.m. on Tuesday, August 2, 2005. I will rule on any such motion at the August 2 prehearing conference.


Mr. Hovis may seek confidential treatment of any such motion pursuant to Rule 323 of the Commission’s Rules of Practice. Any motion for confidential treatment will be considered with favor. The materials will be available to the Division, but not to the general public.

Finally, Rule 161(b)(1)(v) permits a hearing officer to consider “any other such matters as justice may require.” Two such matters may warrant consideration here. First, during the telephonic prehearing conference of June 1, 2005, Mrs. Hovis represented that Phlo Corporation would file its overdue Forms 10-QSB for the quarters ending June 30, September 30, and December 31, 2004, no later than June 30, 2005. The promised filing date was before Mr. Hovis’s current illness. I see no evidence that such reports have been filed. If Respondents wish to provide a written explanation for their failure to honor that commitment, they must do so by 10:00 a.m. EDT on August 1, 2005. Second, this is apparently not the first litigated proceeding in which Phlo Corporation and Mr. and Mrs. Hovis have caused delay. See Phlo Corp. v. Stevens, 2003 U.S. App. LEXIS 6351, at *2-3 (2d Cir. Apr. 2, 2003) (noting that Phlo failed to appear for oral argument, without explanation; and further noting that the district court held Phlo and its principals in contempt; imposed fines, costs and attorney’s fees; and issued a warrant for James Hovis’s arrest); Butler v. Phlo Corp., 2002 U.S. Dist. LEXIS 11714, at *3 (S.D.N.Y. June

³ The transcript of the July 14, 2005, telephonic prehearing conference is not yet available. However, my notes of that conference reflect that Mrs. Hovis represented that her husband had a pinched nerve, arthritis in the spine, and lower back pain, and was taking muscle relaxants and pain medication. At that time, she also represented that Mr. Hovis’s impairment would not likely interfere with the upcoming hearing. Any discrepancies between these representations and the pending motion can be resolved once the transcript is available in the next few days.

28, 2002) (“This motion appears to be yet another delay tactic by Phlo to avoid having to comply with its obligations.”); Butler v. Phlo Corp., 2002 U.S. Dist. LEXIS 5987, at *6 (S.D.N.Y. Apr. 5, 2002) (“[I]t is obvious that despite the clear import of our earlier decision, Phlo Corporation and its principals will not abide by that decision unless the consequences of not doing so are decidedly enhanced.”). Respondents may address the relevance, if any, of these other proceedings by 10:00 a.m. EDT on August 1, 2005. I will reserve judgment on the relevance issue until after I have heard from the parties.

SO ORDERED.



James P. Kelly
Administrative Law Judge