

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 4581/February 3, 2017

ADMINISTRATIVE PROCEEDING  
File No. 3-17651

In the Matter of

ADRIAN D. BEAMISH, CPA

ORDER ON JOINT MOTION FOR  
ADDITIONAL DEPOSITIONS  
AND RELATED RELIEF

On January 31, 2017, the Division of Enforcement and Respondent jointly moved for: (1) leave for each party to take up to five depositions under Rule 233(a); (2) a ruling that the Division's anticipated deposition of Jonas Balsys, who resides in the United Kingdom, not count against the number of depositions each party is permitted under Rule 233(a); and (3) permission for the Division's anticipated deposition of Nahum Lan to occur after the March 3, 2017, deadline for completing fact depositions. The motion is **GRANTED IN PART** and **DENIED IN PART**, without prejudice, for the reasons discussed below.

**(1) Leave for Five Depositions**

Under Rule 233(a), each side in this proceeding is entitled to three depositions "as a matter of right" and may move for leave to take up to two additional depositions. 17 C.F.R. § 201.233(a)(1), (3); Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50216-17 (July 29, 2016). Rule 233(a)(3)(ii) requires that such leave not be granted to the parties unless they demonstrate a "compelling need" for the additional depositions by: (A) identifying each party's three "of right" deponents as well as the proposed additional deponents; (B) describing the role of each deponent; (C) describing the matters about which each deponent will be questioned and why each deposition is necessary for the relevant party's arguments, claims, or defenses; and (D) showing that the additional depositions will not be unreasonably cumulative or duplicative. 17 C.F.R. § 201.233(a)(3)(ii).

I commend counsel for their continuing cooperation on prehearing matters and encourage such cooperation going forward. I hold, however, apparently as a matter of first impression, that the above requirements cannot be "satisfied pursuant to the [p]arties' stipulation." *See* Mot. at 2. The parties analogize to Federal Rule of Civil Procedure (FRCP) 30(a)(2)(A), which provides that civil litigants need not obtain leave of the court to take an additional deposition if the parties have "stipulated to the deposition." *Id.* at 2 n.1. But in amending Rule 233, the Commission "[did] not agree with commenters who advocated further expanding . . . deposition rights in [Commission] administrative proceedings commensurate with [FRCP] 30." 81 Fed. Reg. at 50216. Instead, the Commission emphasized its "strong interest in establishing a timely and

efficient administrative forum” and mandated the specific and unique requirements of Rule 233(a)(3)(ii), including particularized proof of a “compelling need” for additional depositions. *Id.* at 50216-17. Indeed, Rule 233(a)(3)(ii) seemingly embodies the antithesis of FRCP 30(a)(2)(A). Therefore, allowing additional depositions merely because the parties have stipulated to them is inconsistent with the rule’s text and the Commission’s accompanying guidance.

As for Rule 233(a)(3)(ii)’s specific requirements, the parties have not definitively identified and differentiated each party’s three “of right” and additional deponents, as the rule requires. 17 C.F.R. § 201.233(a)(3)(ii)(A). In running through their meet-and-confer history, the parties note that each initially identified three deponents, Mot. at 2, but their motion culminates in indefinite requests to potentially depose “up to five” witnesses without specifically identifying and distinguishing those that are “of right” from those that are additional, *see id.* at 4-6. While some of the uncertainty around potential expert deponents<sup>1</sup> is understandable, especially given that expert and rebuttal reports are not due until March,<sup>2</sup> that circumstance does not merit prospectively granting additional depositions without conforming to the demands of the rule. Moreover, the parties have not described with adequate specificity the matters about which each deponent will be questioned and why each deposition is necessary for the relevant party’s arguments, claims, or defenses. 17 C.F.R. § 201.233(a)(3)(ii)(C); *see* Mot. at 4-6.

Accordingly, the parties’ request for leave to take five depositions is DENIED without prejudice. The parties may make a renewed motion for additional depositions, either jointly or separately, by February 15, 2017.<sup>3</sup> The parties are encouraged to include in any such motions additional information relevant to the requirements of Rule 233(a)(3)(ii)(A)-(D).

## (2) Balsys Deposition

The parties agree that the Division’s anticipated deposition of Balsys, who resides in the United Kingdom and who is unable to attend the hearing due to absence from the United States, will be taken pursuant to Rule 233(b). Accordingly, his deposition does not count toward the

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<sup>1</sup> The parties are informed that I *will* count expert depositions against Rule 233(a)’s deposition limit. There is no textual basis for excluding them from the count, and the Commission did not modify the rule pursuant to a commenter’s suggestion “that the three- and five-deposition limits . . . be limited to fact witnesses, and not include experts.” *See* 81 Fed. Reg. at 50215.

<sup>2</sup> The parties are cautioned that in other proceedings I have accorded no weight to expert opinions on purely legal issues. *See, e.g., Ironridge Glob. Partners, LLC*, Admin. Proc. Rulings Release No. 4409, 2016 SEC LEXIS 4475, at \*1 (ALJ Dec. 2, 2016); *BDO China Dahua CPA Co.*, Initial Decision Release No. 553, 2014 WL 242879, at \*82 n.55 (Jan. 22, 2014), *finality notice as to one respondent*, Securities Exchange Act of 1934 Release No. 74552, 2015 WL 1267418 (Mar. 20, 2015).

<sup>3</sup> Any such motion made by February 15 will be deemed timely, given that the parties’ instant joint motion was filed more than ninety days prior to the May 8, 2017, hearing date. 17 C.F.R. § 201.233(a)(3)(i).

deposition limit of Rule 233(a). *See* 17 C.F.R. § 201.233(b) (such depositions are “[i]n addition to depositions permitted under paragraph (a) of this rule”); 81 Fed. Reg. at 50217 (“A deposition granted under paragraph (b) does not count against the moving side’s permissible number of depositions by right or additional depositions under paragraph (a).”).

### **(3) Lan Deposition**

The parties’ request that the Division’s anticipated deposition of Lan be allowed to occur after the March 3, 2017, deadline for completing fact depositions is GRANTED.

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Cameron Elliot  
Administrative Law Judge