

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

Administrative Proceedings Rulings
Release No. 5028 / September 7, 2017

Administrative Proceeding
File No. 3-18099

In the Matter of

**Black Diamond Asset
Management LLC and
Robert Wilson**

Scheduling Order

The Securities and Exchange Commission instituted this proceeding on August 4, 2017. The Division of Enforcement has submitted a letter memorandum and the declaration of a process server addressing service of the order instituting proceedings (OIP) on Respondents. These filings and the records of the Office of the Secretary establish that Black Diamond Asset Management LLC was served with the OIP on August 7, 2017, by mailing the OIP by priority mail express to Black Diamond's most recent address shown on its most recent filing with the Commission in accordance with Rule of Practice 141(a)(2)(ii), 17 C.F.R. § 201.141(a)(2)(ii). As such, Black Diamond's answer was due by August 30, 2017. OIP at 6; 17 C.F.R. §§ 201.160(b), .220(b).

The Division's filings further establish that Robert Wilson was served with the OIP on August 25, 2017, by handing him a copy of the order in accordance with Rule of Practice 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i). Wilson e-mailed my office disputing service but failed to provide any evidence contradicting or undermining the process server's sworn affidavit. *See* Ex. B. Wilson's answer is due by September 14, 2017. OIP at 6; 17 C.F.R. § 201.220(b).

A telephonic prehearing conference was held today. The Division appeared, but Respondents did not.

This week, Wilson sent two e-mails to my office that direct abusive and profane language to counsel for the Division. Copies of these e-mails are

attached to this order as exhibits. *See* Exs. A, B. Wilson is ORDERED to stop sending unprofessional e-mails of this type to my office's e-mail address. My office's e-mail address is not intended to serve as a forum for the airing of grievances. Instead, parties should attempt to resolve disputes amongst themselves before raising disputes with me. And in raising a dispute with me, the parties must follow the Commission's rules that require papers to be filed with the Office of the Secretary. *See* 17 C.F.R. §§ 201.151–.153. Doing so ensures that everything that takes place during the course of a proceeding is preserved for the public record.

Failure to comply with the above will result in sanctions, including losing the privilege and convenience of communicating with my office by e-mail and striking any filing associated with an unprofessional and abusive e-mail. *See* 17 C.F.R. §§ 201.152(f), .180(a)(1), (b).

I FURTHER ORDER the following schedule:

- September 14, 2017: Deadline for Respondent Wilson to file answer to OIP.
- October 6, 2017: Parties exchange preliminary fact witness lists.
- October 13, 2017: Disclosure of expert witnesses.
- October 20, 2017: Parties exchange and file expert reports, if any.
- November 17, 2017: Deadline for requests under Rule of Practice 232 for deposition subpoenas and for subpoenas to produce documents.
- December 1, 2017: Parties exchange and file rebuttal expert reports.
- December 7, 2017: Deadline for non-expert depositions.
- December 8, 2017: Production under Rule of Practice 230 of any previously undisclosed materials in the investigatory file.
- December 14, 2017: Deadline for expert witness depositions.
- December 19, 2017: Motions for summary disposition, if any, under Rule 250(c) are due. A motion under Rule 250(c) for leave to file a motion for summary disposition should be filed in conjunction with the motion for summary disposition.

- January 9, 2018: Oppositions to motions filed under Rule 250(c) are due.
- January 16, 2018: Replies to oppositions to motions filed under Rule 250(c) are due.
- January 16, 2018: Parties exchange and file witness and exhibit lists.
- January 22, 2018: Motions in limine, including objections to witnesses and exhibits are due.
- Stipulations, requests for official notice, and admissions of fact are due.
- Requests under Rule 232 for subpoenas requiring the attendance and testimony of a witness at the hearing are due.¹ Requests for such subpoenas submitted after this date will be permitted only upon a showing of good cause.
- January 24, 2018: Prehearing briefs, if any, are due.²
- January 29, 2018: Parties exchange but do not file premarked exhibits.
- Amendments to witness lists are due.
- January 31, 2018: The parties will participate in a telephonic prehearing conference at a time to be determined.
- February 5, 2018: The hearing will begin at 9:30 a.m. at a location to be determined.

The parties are reminded that all filings must be filed in hard copy with the Office of the Secretary. *See* 17 C.F.R. §§ 201.151, .152. They are asked to e-mail PDF text-searchable courtesy copies of any filings to alj@sec.gov.

¹ Although January 22, 2018, is the deadline for requesting such subpoenas, to minimize inconvenience and provide adequate notice to third parties, the parties are encouraged not to wait to submit requests for such subpoenas.

² Prehearing briefs are optional. The parties should note, however, that I do not normally entertain opening statements and that a prehearing brief serves as the party's opening statement.

Electronic copies of exhibits should not be combined into a single PDF file, but sent as separate attachments, and should be provided in text-searchable format whenever practicable.

Hearing Guidelines

I will follow the general guidelines described below during these proceedings. The parties should review what follows *and promptly raise any objections they may have to the application of these guidelines in this matter.*

1. Subpoenas. A party's motion to quash a subpoena will be due within five business days of the submission of the subpoena for signing. Any opposition to the motion to quash will be due within five business days thereafter.
2. Exhibits. The parties should confer and attempt to stipulate to the admissibility of exhibits. In order to avoid duplication of exhibits, the parties should identify joint exhibits. Exhibits are not filed with the Office of the Secretary until the close of the hearing at my instruction.
3. Exhibit lists. A comprehensive exhibit list prevents other parties from being surprised in the middle of the hearing. Given this fact, exhibit lists shall be exchanged among the parties and should include all documents that a party expects to use in the hearing for any purpose. This includes documents that are relevant only for impeachment purposes or which are presumptively inadmissible. The parties should serve their opponents with any amendments to their individual exhibit list. Because I rely on the parties' exhibit lists, the parties should provide me with a paper copy of their final exhibit lists at the beginning of the hearing. After filing the initial exhibit list, there is no need in the interim to submit amendments to my office. Following the hearing, I will issue a separate order directing the parties to file a list of all exhibits, admitted and offered but not admitted, together with citations to the record indicating when each exhibit was admitted.
4. Expert reports and testimony. Expert witness disclosures must comply with Rule of Practice 222(b)(1). Because this Rule is modeled on Federal Rule of Civil Procedure 26(a)(2)(B), the parties should look to Rule 26(a)(2)(B) and cases interpreting it for guidance. Failure to comply with the requirements of Rule 222(b) may result in the striking of an expert's report. *Cf.* Fed. R. Civ. P. 37(c). The filing of the expert's report according to the prehearing

schedule essentially constitutes the filing of the expert's direct testimony. During the hearing, the expert will not be subject to direct examination, and will simply be sworn in and proffered for cross-examination. On request, however, a party may conduct a brief direct examination of the party's expert.

5. Hearing schedule. The first day of the proceeding will begin at 9:30 a.m. Unless circumstances require a different schedule, we will begin each subsequent day at 9:00 a.m. Each day of the proceeding should last until at least 5:15 p.m. I generally take one break in the morning, lasting about fifteen minutes, and at least one break in the afternoon. I generally break for lunch between noon and 12:30 p.m., for about one hour.

6. Hearing issues.

a. Examination.

- i. In general, the Division of Enforcement presents its case first because it has the burden of proof. Respondents then present their case. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.
- ii. If the Division calls a non-party witness that Respondents also wish to call as a witness, Respondents should cross-examine the witness as if they were calling the witness in their own case. This means that Respondents' cross-examination of the witness in this circumstance may exceed the scope of what was covered by Division's direct examination of that same witness. This will avoid the need to recall a witness just so the witness can testify for Respondents' case.
- iii. I am flexible regarding the manner of presenting the testimony of Respondents, so long as the parties agree on it. By way of example, if the Division calls Respondent Wilson as its last witness, the parties may agree that Respondents will conduct the direct examination, followed by the Division's cross-examination, which may exceed the scope of Respondents' direct examination of Wilson. In the absence of any agreement, Wilson's testimony will proceed in the usual manner, *i.e.*, Wilson will be

called as a witness and examined potentially multiple times. If the Division calls Wilson as a witness and he later testifies as part of his own case, the Division's cross-examination during Respondents' case will be limited to the scope of the Respondents' direct examination.

- iv. In general, cross-examination may be conducted by leading questions, even as to Division witnesses that Respondents wish to call in their own case. If Respondents' retain counsel, that counsel may not lead his or her client, however. As a result, if Wilson is called as a witness in the Division's case, his counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for Respondents, the Division may not ask leading questions on cross-examination.
 - v. Avoid leading questions on direct examination. Leading questions during direct examination of a non-hostile witness are objectionable. Repeatedly having to rephrase leading questions slows down the hearing.
7. Pleadings. Prehearing and post-hearing briefs are limited to 14,000 words. *Cf.* 17 C.F.R. § 201.450(c) (imposing a word-limit for briefs filed before the Commission). Parties may seek leave to exceed this limit through a motion filed seven days in advance of the relevant briefing deadline. To enhance the readability of pleadings, I urge counsel to limit the use of acronyms to those that are widely known. *See* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 120–22 (2008); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320–21 (D.C. Cir. 2014) (Silberman, J., concurring). For the same reason, I ask that counsel use the same font size in footnotes as that used in the body of a pleading.

James E. Grimes
Administrative Law Judge