

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

Administrative Proceedings Rulings
Release No. 6441/ February 6, 2019

Administrative Proceeding
File No. 3-16509

In the Matter of

**Edward M. Daspin, a/k/a
“Edward (Ed) Michael”,
Luigi Agostini, and
Lawrence R. Lux**

**Order Denying Motion
for an Order to Show Cause
and Entering Protective Order**

Background

Edward M. Daspin, who appears pro se, is the only remaining Respondent in this administrative proceeding, which the Securities and Exchange Commission initiated on April 23, 2015, by issuing the order instituting proceedings (OIP). The proceeding was assigned to me on September 12, 2018. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2-4 (Aug. 22, 2018); *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2, *4 (ALJ Sept. 12, 2018). A public hearing addressing the allegations in the OIP is scheduled to begin on February 25, 2019. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 6342, 2018 SEC LEXIS 3260, at *4 (ALJ Nov. 19, 2018).

Under the procedural schedule, the parties were to exchange the names of proposed witnesses, including experts, on December 14, 2018. *See id.* at *3. Daspin failed to do so, and on December 15, 2018, Daspin instructed the Division not to contact him.

On December 21, 2018, the Division requested issuance of subpoenas for the depositions of Daspin and his wife on January 8 and 9, 2019. I signed the subpoenas on December 26, 2018. On the same day that the Division requested subpoenas, Daspin submitted two notes from his personal

physician to the Office of the Secretary. The Division alerted me to these notes in a letter, which it requested be filed under seal due to its discussion of Daspin's medical records.

Commission employees were furloughed from December 27, 2018, and the Commission stayed all administrative proceedings on January 16, 2019, due to a lapse in appropriations. *Pending Admin. Proc.*, Securities Act Release No. 10602, 2019 SEC LEXIS 5, at *1 (Jan. 16, 2019). The Division wrote in its December 27 cover letter serving the subpoena that “[u]nless prevented from doing so by a continuing SEC shutdown” the Division intended to go forward with the depositions. In an email on December 28, 2018, Daspin expanded on the description of the medical issue in the physician's notes. The Division clarified in an email to Daspin that it intended to go forward with his deposition “even if the partial government shutdown continues.” Daspin did not respond until after the deposition was to have started on January 8, 2019.

On January 9, 2019, the Division filed under seal a motion for an order to show cause why Daspin should not be deemed in default (Motion) with a declaration and exhibits A through AA.¹ The Division alleges that neither Daspin nor his wife appeared to be deposed on January 8 or 9, 2019. On January 21, 2019, Daspin filed a “cover brief to the 1/17/19 declaration.”

The government furlough ended and Commission employees returned to work on January 28, 2019, and on January 30, 2019, the Commission lifted its stay. *Pending Admin. Proc.*, Securities Act Release No. 10603, 2019 SEC LEXIS 37, at *1. Even though administrative proceedings were stayed beginning on only January 16, the order lifting the stay recognized that the shutdown began several weeks earlier and directed that this should be taken into account when amending deadlines and procedural schedules. *See id.*

On February 1, 2019, the Division filed a letter requesting a prehearing conference to discuss the pending Motion and to set prehearing deadlines.

Ruling

Four concerns must be dealt with. Most of the procedural schedule was upended by the government shutdown and Commission stay, so the schedule must be revised. Next are the Division's Motion for an order to show cause,

¹ The Division requests that the filing be done under seal because the Declaration and exhibits contain confidential medical information. Declaration at 1 n.1.

the issue of which documents may be filed under seal and finally, the Division's request for a prehearing conference.

Procedural schedule

I CANCEL the hearing scheduled to begin on February 25, 2019. Under the old schedule the time for Daspin to amend his answer and the exchange of the names of proposed witnesses, including experts, has passed and the record will show what did and did not occur. Because of the alleged confusion, I will begin the new schedule with the request for depositions. I ORDER the following:

- February 13, 2019: Parties exchange the names of proposed witnesses, including experts.
- February 15, 2019: Deadline for requests for depositions and documents under Rules of Practice 232 and 233, 17 C.F.R. §§ 201.232, .233.
- March 1, 2019: Parties exchange expert reports, if any.
- March 15, 2019: Deadline for completion of discovery.
- March 22, 2019: Deadline for exchange of final witness and exhibit lists and rebuttal expert reports, if any.
- April 5, 2019: Deadline for prehearing briefs, stipulations, requests for official notice, and any motions.
- April 15, 2019: Hearing commences at 9:00 a.m. EDT in New York, New York, at a location to be determined.

The amended schedule includes a new date by which the parties should disclose their proposed witnesses. The *proposed* list need not be the *final* list, which is exchanged closer to the hearing date. If either party fails to identify any potential witnesses, and I find that failure has impaired the other party's ability to prepare for the hearing, I may limit that party's ability to present evidence. See 17 C.F.R. §§ 201.111(d), .180(a)(1).

The Division's Motion

The Division's Motion pursuant to Rule of Practice 155, 17 C.F.R. § 201.155, is based on Daspin's failure to appear pursuant to a subpoena for a deposition on January 8, 2019, his alleged failure to comply with other

orders, and his failure to otherwise participate meaningfully in and defend the proceeding. Motion at 1.²

I DENY the Motion for the following reasons. The Division is incensed by Daspin's failure to obey a deposition subpoena, to provide the names of witnesses as called for by the original procedural schedule, and his numerous statements that he will not attend a hearing. But Rule 155 allows a default finding against a respondent only where a party fails to appear at a hearing or prehearing conference; answer the OIP, answer a dispositive motion, or otherwise defend the proceeding; or cure a deficiency within the time specified. 17 C.F.R. §§ 201.155(a)(1)-(3).

While the Division's factual assertions in support of the Motion appear to be valid, they do not meet the standard for a default finding. Daspin has answered the OIP, he appeared at the prehearing conference, and he is on record vigorously disputing the allegations.

Two other factors deserve consideration. First, a default is a severe measure reserved for extreme circumstances. This is a major proceeding; it was initiated as a cease and desist proceeding where the initial decision shall be issued within 300 days from the date of service and was converted to a 120-day case under the revised Rules of Practice when it was reassigned to me. See OIP at 15; *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4 n.6. Resolution of the allegation by default is not warranted and would be inappropriate.

Second, this proceeding has been going on for over three years; however, the only relevant actions are those that occurred since the Commission provided Daspin with a new hearing before an administrative law judge who had not previously participated in the matter. See *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *2-4. The Motion references past conduct that is not in the record before me.

Finally, the Motion requests that I order Daspin to produce his medical records and those of his wife. Motion at 10. The revised procedural schedule gives the Division ample time to submit subpoenas to the appropriate parties

² A reply to a motion is normally due within five days of service of the motion. 17 C.F.R. § 201.154(b). However, the Commission extended until February 13, 2019, all deadlines that fell between December 27, 2018, and January 30, 2019. *Pending Admin. Proc.*, 2019 SEC LEXIS 37, at *1. Daspin has not yet filed a reply, but I am not waiting for him to do so given my disposition of the Motion.

for the production of those records, *see* 17 C.F.R. § 201.232(a); an order directing the same would be premature.

Protective order

Rule 322 of the Rules of Practice states that Commission proceedings are deemed public and a protective order should be granted only upon a finding that harm from disclosure outweighs the benefits of disclosure. 17 C.F.R. § 201.322. For this reason, filings that contain personally identifiable information shall be given confidential treatment.

I GRANT under seal treatment to two Division filings on December 28, 2018: a letter which references doctor's notes pertaining to Daspin and his wife, including the notes themselves; and the portions of the Division's Motion that contain personally identifiable information. The Division shall provide the Secretary with a redacted copy of its Motion and exhibits by February 13, 2019, so that the redacted version may be made available to the public.

The parties should eliminate personally identifiable information from their filings or may continue to move separately each time that invoking Rule 322 is appropriate.

Prehearing conference

Given the rulings made above, there is no need for a prehearing conference at this time. I DENY the Division's letter request.

Brenda P. Murray
Chief Administrative Law Judge