

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

Administrative Proceedings Rulings  
Release No. 6658 / August 22, 2019

Administrative Proceeding  
File No. 3-15124

In the Matter of

**David F. Bandimere and  
John O. Young**

**Order Regarding Evidentiary  
Motions and Objections**

The parties have filed three motions regarding the admission of evidence at the upcoming hearing, as well as objections to each other's witness and exhibit lists. This order addresses the motions and certain of the objections. The parties should be prepared to address any witness or exhibit objections not resolved in this order during the prehearing conference on August 26, 2019.

*Prior Testimony*

Securities and Exchange Commission Rule of Practice 235(a) precludes the introduction of a non-party's prior sworn statement unless the declarant is unavailable to testify as a witness or the interests of justice would otherwise warrant its admission. The party seeking to introduce the prior statement must "make a motion setting forth the reasons" it should be permitted.<sup>1</sup> The Division of Enforcement's exhibit list includes transcripts of the trial testimony of nine witnesses from the 2013 hearing of this matter. The Division has filed motions specifically requesting permission to use the 2013 hearing testimony of two of the witnesses, Deborah Pickering and Harley Hunter, instead of calling them to testify in person. Because the Division has not filed motions regarding the other seven witnesses, it is apparent that the Division does not intend to introduce those transcripts as

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<sup>1</sup> 17 C.F.R. § 201.235(a).

substantive evidence. The transcripts of all of the witnesses may, however, be used for impeachment.

As to Pickering, the Division represents that she has serious medical issues and financial constraints that make traveling from southern California to Denver a significant hardship. Hunter has a preplanned vacation for the time of the hearing. Respondent David F. Bandimere opposes the use of Pickering's and Hunter's prior testimony on the grounds that it would be prejudicial and "deprive [him] of the benefits of the new trial to which he is entitled" and that the Division has not satisfied the requirements of Rule 235.<sup>2</sup>

Bandimere does not dispute the Division's representation that Pickering is unavailable to testify "because of age, sickness, infirmity, . . . or other disability." Given the Commission's instruction, however, that "an ALJ who did not previously participate in the matter" preside over a "new hearing" and "not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter,"<sup>3</sup> as well as the availability of other options for obtaining Pickering and Hunter's testimony, I do not find that the interests of justice favor admitting their prior testimony.<sup>4</sup>

#### *Summary Exhibits*

Bandimere has moved to exclude Division Exhibit 164, "Summary Chart(s) prepared by Michael Hennigan," because the Division has not yet provided the exhibit to Bandimere, despite the August 5, 2019, deadline for exchanging exhibits. Similarly, the Division objects to Bandimere's exhibits numbered 250 through 258 as unreliable summary exhibits because Bandimere has not provided or identified the underlying data.

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<sup>2</sup> Pickering Opp'n at 1–5.

<sup>3</sup> *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609 (Aug. 22, 2018).

<sup>4</sup> In cases of an unavailable witness, Rule 233(b) allows for additional depositions beyond those authorized by Rule 233(a). 17 C.F.R. § 201.233(b). The parties could also agree to allow Pickering or Hunter to testify by telephone or videoconference, as Hunter has indicated a willingness to do. Hunter Mot. at 2. I could hold the hearing record open after the hearing to accommodate these options or to allow Pickering or Hunter to testify in person at a later date and more convenient location.

The dispute centers on the applicability, or not, of Federal Rule of Evidence 1006.<sup>5</sup> The Commission's Rules of Practice do not have a provision regarding summary exhibits. Although the rules of evidence do not apply in Commission administrative proceedings,<sup>6</sup> they provide useful guidance, particularly in situations not addressed by the rules of practice.<sup>7</sup> It is thus appropriate to rely on Rule 1006 in deciding whether and under what circumstances to admit summaries of "voluminous books, records, or documents."<sup>8</sup>

Rule 1006 allows the use of summaries, charts, and calculations, but provides that the party offering the summary "must make the originals or duplicates available" to other parties "at a reasonable time and place."<sup>9</sup> The rule "operates independently of the discovery rules," placing an affirmative burden on the proponent of the summary to make the underlying data available by "provid[ing] a list or description of the documents supporting the exhibit."<sup>10</sup>

Although the parties' briefing suggests neither party has fully complied with the requirements of Rule 1006, the parties were not on notice that I would apply the rule in this proceeding. To the extent a party has not provided its summary or chart exhibits to the other side and identified and made available the data underlying those exhibits, that party should be

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<sup>5</sup> See Exhibit 1 to Bandimere's Resp. to Div. Objections to Witnesses and Exhibits, which consists of a chain of emails between counsel.

<sup>6</sup> *Del Mar Fin. Servs., Inc.*, Exchange Act Release No. 48691, 2003 WL 22425516, at \*8 (Oct. 24, 2003).

<sup>7</sup> *Cf. Yanopoulos v. Dep't of Navy*, 796 F.2d 468, 471 (Fed. Cir. 1986) ("Although the Federal Rules of Evidence do not apply to Board hearings, they are a helpful guide to proper hearing practices.") (citation omitted).

<sup>8</sup> Fed. R. Evid. 1006 advisory committee's note on proposed rules.

<sup>9</sup> Fed. R. Evid. 1006.

<sup>10</sup> *Air Safety, Inc. v. Roman Catholic Archbishop of Bos.*, 94 F.3d 1, 8 (1st Cir. 1996); see 31 Charles Alan Wright et al., *Federal Practice and Procedure* § 8045 (1st ed. Apr. 2019 update) ("[A]s a condition to the admission of summary evidence, the proponent of that evidence must show that it made the source materials reasonably available. This is a burden independent of the burden to produce documents imposed by discovery rules.").

prepared at the prehearing conference to address its plan to comply with the requirements of Rule 1006.

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James E. Grimes  
Administrative Law Judge