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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3041/August 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16509

In the Matter of EDWARD M. DASPIN, AKA "EDWARD (ED) MICHAEL," LUIGI AGOSTINI, and LAWRENCE R. LUX	SCHEDULING ORDER

In this Order, I lift the postponement as to Respondent Edward M. Daspin and direct that the hearing in this matter will begin on January 4, 2016. Additionally, I enter a prehearing scheduling order.

Background

The Commission instituted this proceeding in April 2015. Shortly thereafter, Mr. Daspin moved to alternatively dismiss or stay the proceedings. The briefing associated with this request was filed under seal, subject to a protective order under 17 C.F.R. § 201.322. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 2699, 2015 SEC LEXIS 1985 (May 20, 2015). The motion was based on evidence that Mr. Daspin suffers from serious medical problems. The Division of Enforcement opposed the motion, asserting that Mr. Daspin's condition is less serious than he has claimed.

During a prehearing conference in May 2015, the administrative law judge previously assigned to this proceeding scheduled the hearing in this matter for November 2, 2015, in New York. *Edward M. Daspin*, 2015 SEC LEXIS 1985. On June 15, 2015, the administrative law judge entered a postponement "*sine die*" as to Mr. Daspin and required him to "file a report as to the status of his health on September 15, 2015, and every ninety days thereafter." *Edward M. Daspin*, Admin. Proc. Rulings Release No. 2810, 2015 SEC LEXIS 2387. This order was later modified to require Mr. Daspin to make his medical records available on July 31, 2015, and every thirty days thereafter. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 2939, 2015 SEC LEXIS 2933 (July 17, 2015). Mr. Daspin complied with the modified order on July 31, 2015.[1]

[1] In Mr. Daspin's submission, his doctor said that "[t]here is no known remedy that exists that can stop the risk at this time" related to Mr. Daspin's participation in the hearing. He also

On that same day, this matter was re-assigned to me by Chief Administrative Law Judge Brenda P. Murray. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 2999, 2015 SEC LEXIS 3137 (July 31, 2015). I subsequently directed the parties to "submit a proposed prehearing schedule." *Edward M. Daspin*, Admin. Proc. Rulings Release No. 3003 (Aug. 3, 2015). This prompted the Division, Mr. Daspin, and Respondent Luigi Agostini to send me a letter asking that I schedule a prehearing conference. In their letter, the parties proposed delaying the proceeding as to Mr. Agostini until Mr. Daspin is in better health so as to avoid the need to hold two hearings.

I subsequently scheduled and held a telephonic prehearing conference on August 12, 2015. During the conference, I confirmed with Mr. Daspin's counsel the facts noted in footnote one, *supra*, and raised the concern that we could be facing an indefinite continuance, a possibility that suggested the hearing should not be delayed. Counsel explained that Mr. Daspin is consulting with specialists and that the consultation process will run through October. During the conference, I also confirmed that the Division is still opposed to a continuance for Mr. Daspin. Additionally, I solicited the parties' views regarding how to handle this matter in light of Rules 161 and 360.[2] Both the Division and Mr. Daspin's counsel suggested that we could avoid the problem posed by Rule 360 if I were to ask the Chief Administrative Law Judge to ask the Commission to extend the deadline for issuing an Initial Decision. *See* 17 C.F.R. § 201.360(a)(3).

Discussion

1. The postponement

My authority to act in a proceeding assigned to me is limited to the authority granted me by the Commission. By issuing Rules 161 and 360, the Commission has limited that authority in relation to continuances. Rule 161 governs extensions of time and postponements. *See* 17 C.F.R. § 201.161. Subsection (b)(1) mandates that the Commission's administrative law judges "adhere to a policy of strongly disfavoring" continuance requests. 17 C.F.R. § 201.161(b)(1). Rule 360 provides that the Commission will specify in the Order Instituting Proceedings (OIP) the deadline for issuance of an Initial Decision. 17 C.F.R. § 201.360(a)(2). That deadline may be either 120, 210, or 300 days from the date the OIP is served. *Id.* Rules 161(b)(1) and 360 are designed to work together. *See* Rules of Practice, 68 Fed. Reg. 35,787, 35,787-88 (June 17, 2003).

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said that it will be a year before we know whether Mr. Daspin could handle the stress associated with a hearing.

[2] Rule 161 requires me to "adhere to a policy of strongly disfavoring" continuance requests. 17 C.F.R. § 201.161(b)(1). Rule 360 requires me to issue an Initial Decision within 300 days of service of the Order Instituting Proceedings. 17 C.F.R. § 201.360(a)(2); *see* OIP at 15.

The OIP in this case specified that the Initial Decision must be issued 300 days after service of the OIP. OIP at 15. The OIP was served by April 28, 2015. The Initial Decision, therefore, must be issued by February 22, 2015.

The difficulty in this case is that Mr. Daspin has presented evidence that he has a serious medical condition which warrants continuing this matter. Were it not for Rules 161 and 360 and the OIP, I might be inclined to agree that this matter should be postponed further. But, Mr. Daspin's counsel and his physician have confirmed that it may be some time before we know whether he *might* be able, at some point in the future, to participate in a hearing. Nothing in the Rules of Practice, however, gives me the authority to grant what amounts to an indefinite continuance. The Rules of Practice also contain no exception for Mr. Daspin's medical circumstance.

Both the Division and Mr. Daspin, however, suggest that I may simply seek an extension under Rule 360(a)(3). In full, subsection (a)(3) provides:

> *Motion for Extension*. In the event that the hearing officer presiding over the proceeding determines that it will not be possible to issue the initial decision within the specified period of time, the hearing officer should consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. This motion must be filed no later than 30 days prior to the expiration of the time specified in the order for issuance of an initial decision. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

17 C.F.R. § 201.360(a)(3). I disagree that subsection (a)(3) provides an escape hatch in this situation.

The current version of Rule 360(a), with its three-tiered deadline structure, was adopted because the Commission's "experience with non-binding completion dates" showed that "non-binding completion dates" did not lead to the "timely adjudication and disposition of administrative proceedings." 68 Fed. Reg. at 35,787. It thus instituted a tiered structure of *binding* completion dates. The tenor of Rule 360(a)(3) and the supplementary information about it in the Federal Register show that Rule 360(a)(3) was intended to be used in those circumstances in which, despite diligent efforts to issue a timely Initial Decision, an administrative law judge finds that he or she will be unable to do so. If an administrative law judge could avoid the need to comply with Rule 360(a)(2) and the Commission's direction in the OIP by planning ahead of time—before the hearing occurs—to use Rule 360(a)(3), then the

exception would swallow the rule and the Commission's designation of a deadline would be meaningless and non-binding.

I therefore conclude that there is currently no authority to indefinitely continue this proceeding. This is especially so here, where Mr. Daspin's doctor estimates that it will be at least a year before he can determine whether Mr. Daspin will ever be able to participate in this proceeding. In other words, I lack the authority to indefinitely continue this matter.

Mr. Daspin's case, however, has been stayed for two months. It would be unfair to make him suddenly prepare for the hearing that is currently scheduled to take place on November 2, 2015. Taking account of the two months that Mr. Daspin's case has been stayed and the parties' desire not to hold separate hearings for Mr. Dapsin and Mr. Agostini, I ORDER that the hearing as to Mr. Daspin and Mr. Agostini will begin on January 4, 2016.

The orders regarding Mr. Daspin's medical status reports are MODIFIED. Mr. Daspin's counsel has stated that his next status report will report no change but that Mr. Daspin will consult with a specialist in late September. Mr. Daspin therefore need not file a status report on September 15, 2015, but shall report the results of his next consultation as soon as he is aware of those results, but no later than October 15, 2015.[3] If the Division chooses to retain a medical expert, Mr. Daspin shall submit to an examination by that expert, on reasonable notice by the Division.

2. Hearing procedures

On or before November 2, 2015, the parties shall jointly report their plan for accommodating Mr. Daspin's condition during the hearing. In this regard, the parties are directed to determine a method to allow Mr. Daspin to participate in this matter. The Division is directed to work with Mr. Daspin's counsel and physician to figure out the logistics so that the hearing can occur while accommodating Mr. Daspin's condition. This requirement extends to the attendance of appropriate medical personnel.

I will be flexible regarding the hearing location and manner in which the hearing takes place. The hearing previously scheduled for November 2, 2015, was to occur in courtroom 238 at 26 Federal Plaza in Manhattan. If that courtroom is available for the hearing in January, there is a sofa in the office attached to the courtroom and Mr. Daspin is free to use it as necessary. If the parties have proposals for a more suitable location for the hearing, I will entertain those proposals. I will also entertain reasonable suggestions regarding the length or location of Mr. Daspin's testimony.

If the parties agree, Mr. Daspin may appear by video teleconference. In that event, the Division will work with Mr. Daspin's counsel to make appropriate arrangements so that Mr. Daspin may fully participate, to include being able to confidentially communicate with his counsel during the hearing.

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[3] This modification does not apply to the requirement that Mr. Daspin provide any updated medical records every thirty days.

3. *Prehearing schedule*

I ORDER the following schedule in this matter:

Oct. 19:	Parties may file motions for summary disposition.
Nov. 2:	Oppositions to motions for summary disposition.
Nov. 23:	Parties may file expert reports.
Nov. 30:	Parties file witness lists and exchange, and exchange (but do not file) pre-marked copies of exhibits and exhibit list.
Dec. 7:	Motions in limine and objections to exhibits and witnesses due.
Dec. 14:	Parties may file rebuttal reports to expert reports.
Dec. 18:	Prehearing briefs due.
Dec. 21:	Requests for official notice, stipulations, and admissions of fact are due.
Dec. 21:	Parties shall participate in a telephonic prehearing conference, at a time to be determined.
Jan. 4:	Hearing begins at 9:30 a.m. EST, in New York, New York.

The parties are reminded that in addition to serving each other and this Office electronically, they must file hard copies of all filings with the Office of the Secretary. *See* 17 C.F.R. §§ 201.151, .152. They are asked to always email courtesy copies of filings to alj@sec.gov in PDF text-searchable format. Electronic copies of exhibits should not be combined into a single PDF file, but sent as separate attachments.

4. 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.

A. Settlement. The parties are encouraged to consider whether this matter may be resolved through settlement. If the Division and any Respondent jointly notifies my Office that they require assistance in facilitating settlement negotiations and are willing to participate in good faith in confidential settlement negotiations, I will issue an appropriate order referring the matter to another administrative law judge solely for purposes of settlement. *See Airtouch Commc'ns, Inc*., Admin. Proc. Rulings Release No. 2253, 2015 SEC LEXIS 271 (Jan. 23, 2015). Participation in any settlement negotiation is entirely voluntary. Absent extraordinary

circumstances, requests of this nature must be made no later than three weeks before the scheduled hearing date.

B. Subpoenas. My general practice is to sign subpoenas the afternoon after the day they are received, absent notice of an objection. Parties should therefore review requests for subpoenas as soon as they are received. A party's motion to quash 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.

C. Exhibits. The parties shall confer and attempt to stipulate to the admissibility of exhibits. In order to avoid duplication of exhibits, the parties should identify joint exhibits. Because this matter involves multiple respondents, the parties should agree to a consistent nomenclature for identifying exhibits. By way of example, each Respondent's exhibits could be identified using that Respondent's initials. Respondent Daspin's first exhibit would thus be designated as ED 1.

D. 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 lists. 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. There is no need in the interim to submit exhibit lists or 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.

E. Expert reports and testimony. Expert witness disclosures must, at minimum, comply with Rule 222(b), including the provision of a "brief summary" of an expert's expected testimony. 17 C.F.R. § 201.222(a)(4), (b). Expert reports should be as specific and detailed as those presented under Federal Rule of Civil Procedure 26(a)(2). Failure to comply with these requirements may result in the striking of an expert's report. 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. As needed, I will entertain requests for brief direct examination of a party's expert.

F. 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 15 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 and ten minutes. I will entertain requests for additional breaks, as needed by Mr. Daspin.

G. Hearsay. Evidence that is irrelevant, immaterial, or unduly repetitious is inadmissible; all other evidence is presumptively admissible. 17 C.F.R. § 201.320. As a result, the fact that

evidence constitutes hearsay goes to weight, not admissibility, and is thus a proper subject for cross-examination or post-hearing briefing.

H. Hearing issues.

1. Examination.

a) In general, the Division of Enforcement presents its case first, because it has the burden of proof. The Respondents then present their case. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.

b) If the Division calls a non-party witness that Respondents also wish to call as a witness, the Respondents should cross-examine the witness as if they were calling the witness in their own case. This means that cross-examination may exceed the scope of direct examination. This will avoid the need to recall a witness just so the witness can testify for the Respondents' case.

c) 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 one of the Respondents as its last witness, the parties may agree that Respondents' counsel will conduct the direct examination, followed by the Division's cross-examination, which may exceed the scope of direct. In the absence of any agreement, the Respondents' testimony will proceed in the usual manner, *i.e.*, the Respondents will be called as a witness and examined potentially multiple times. If the Division calls one of the Respondents as a witness and the Respondent later testifies as part of his own case, the Division's cross-examination during the Respondents' case will be limited to the scope of the direct examination.

d) In general, cross-examination may be conducted by leading questions, even as to Division witnesses that the Respondents wish to call in their own case. Counsel may not lead his or her client, however. Thus, if a Respondent is called as a witness in the Division's case, Respondents' counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for the Respondents, the Division may not ask leading questions on cross-examination.

2. Other hearing issues.

a) 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.

b) Hit the high points on cross-examination. It is a waste of time to wade into every bit of minutiae that is related to your case. Cross-examination is more effective and less stultifying if you emphasize the strong points and address tangential points quickly, if at all.

I. 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); *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012). For the same reason, counsel should use the same font size in footnotes as that used in the body of a pleading.

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James E. Grimes
Administrative Law Judge