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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3416/December 18, 2015

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

Respondent Edward M. Daspin has submitted a witness list that includes, among others, United States Senator Elizabeth Warren, Securities and Exchange Commission Chair Mary Jo White, attorneys from the Division of Enforcement, and all five of the Commission's administrative law judges. The Division moved in limine to strike these witnesses from Daspin's witness list and Daspin filed an opposition. Because Daspin has failed to establish that any of the proposed witnesses would offer testimony relevant to the allegations in this proceeding, the Division's motion is GRANTED.

Discussion

As an initial matter, although they were due December 14, 2015, Daspin has not submitted subpoenas to secure the testimony of any witnesses and he has not requested—nor would I grant—leave to do so after that deadline. *See Edward M. Daspin*, Admin. Proc. Rulings Release No. 3372, 2015 SEC LEXIS 4956, at *4 (Dec. 4, 2015). Therefore, his arguments are largely moot. Even ignoring these facts, his arguments lack merit.

Senator Warren

Daspin attempts to demonstrate the relevance of Senator Warren's testimony by noting that:

> [Senator Warren] is a superior senator with strong leadership on the SEC and it is my right to inquire about the unconstitutionality of that portion of the Dodd frank that contravenes the other portions of the constitution as is occurring here and now. Senator [W]arren is an educator and a representative as a senator and her

> interest in the unconstitutionality facing me and her enforcement of that portion of the law has played a role in Commissioner Mary Joe [W]hite enforcing unconstitutional laws against me. Senator [W]arren may have knowledge about my case and certainly about the appointments clause.

Opp. at 2.

Daspin further claims that he has:

> a right to involve [Senator Warren] as the ranking senator to establish if she condones what's going on here as her knowledge can provide all of us with the understanding of her support for this appointments clause violation or her lack of support and whichever that may be we are entitled to have the senior ranking senator explain her role in pushing [C]ommissioner [C]ox to move above and beyond the privileges that she believes she has to prosecute, Judge the Judge provide this court the right to violate the constitution and to contravene my rights[.]

Id. As the above shows, Senator Warren has nothing to do with this proceeding and Daspin has failed to articulate any legal basis to call her to testify. Daspin also fails to explain why it matters whether Senator Warren "condones what's going on here." The constitutionality of any statute as applied to Daspin does not depend on Senator Warren's testimony. And Daspin provides no reason to believe Senator Warren has any knowledge about his case.

Lastly, Daspin fails to explain his reference to former Commission Chairman Cox or how he is related to this proceeding.

Chair White

With respect to Chair White, Daspin asserts that he has "a right to prove that the commissioners would not have permitted this case to have been filed had they know the truth as we know it today." Opp. at 2. He also claims "a right to know each and every oral and or written information the commissioners received with respect to this case to support the Commissions permission for the case to have been filed." *Id*. Finally, he asserts that because he has alleged prosecutorial misconduct, he has a "right to ascertain the basis that the commission had to permit the case to be filed in its name." *Id*. at 3.

As with Senator Warren, Daspin fails to identify any legal authority granting him the various rights that he claims. Even if Daspin had identified legal authority, absent exceptional circumstances, a high-ranking government official should not be called to testify regarding the reasons for taking official action. *See United States v. Morgan*, 313 U.S. 409, 421-22 (1941); *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1510 (2014). Daspin has offered nothing more than speculation, which is not enough to show exceptional circumstances. *See Lederman*, 731 F.3d at 203.

Further, absent a showing of bad faith, agency decisions "speak for themselves." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). It is therefore the case that unless a respondent *shows* "bad faith or improper behavior," "the actual subjective motivation of [an] agency decisionmaker[] is immaterial as a matter of law." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998).

Daspin has not come close to showing bad faith or improper motive. Instead, he merely offers his opinion that, in light of purportedly exculpatory evidence, the Division's evidence is insufficient to show that he is liable. From this premise, he assumes the Division must have hidden certain information from the Commission when it sought to bring this action. But simply invoking prosecutorial misconduct does not make it so.

The Division's attorneys

Courts also take a dim view of attempts to take opposing counsel's testimony. *See Nguyen v. Excel Corp*., 197 F.3d 200, 209 & n.26 (5th Cir.1999); *Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986); *Coleman v. District of Columbia*, 284 F.R.D. 16, 18 (D.D.C. 2012). Under this precedent, in order to call Division counsel to testify, Daspin must:

> show[] that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327.[1]

Daspin has made no such showing. Daspin seeks testimony of Division counsel seemingly to demonstrate prosecutorial misconduct. Daspin appears to believe that because he views the evidence against him as flawed, the Division must have engaged in prosecutorial misconduct. As an initial matter, Daspin has made only bare allegations of prosecutorial misconduct by the Division. Again, merely alleging prosecutorial misconduct is not enough alone to make it so. Moreover, Daspin cites no precedent or rule that would support permitting him to take testimony from the Division's counsel simply because, under his view of the evidence, the Division's case is flawed. If, however, Daspin wishes to present evidence that the Division's allegations against him lack merit, he will have an opportunity during the hearing to do so.

[1] The Second Circuit has taken a slightly different view, opining that with regard to depositions, the Federal Rules of Civil Procedure, which do not apply in this proceeding, "require a flexible approach to lawyer depositions" such that a judge should "take[] into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003). As the Second Circuit expressly recognized, its decision on this matter was entirely *obiter dicta*. *Id*. at 72 n.4.

The Commission's administrative law judges

Daspin appears to believe that testimony from the Commission's administrative law judges would be relevant to his argument that the Commission's administrative proceedings are biased against him. His bias claim generally rests on three bases, none of which support calling the Commission's administrative law judges to testify.

First, Daspin's systemic bias claim has been rejected. *See Withrow v. Larkin*, 421 U.S. 35, 49-55 (1975); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-07 (D.C. Cir. 1988). The fact that administrative law judges exercise authority within the Commission, therefore, is not a basis to call them to testify. Daspin also ignores the fact that the Commission's administrative law judges are insulated from influence, as they do not receive performance evaluations or bonuses, cannot be compensated based on their rulings, may not be removed or disciplined except for good cause shown before the Merit Systems Protection Board, and cannot be assigned to "perform duties inconsistent with their duties and responsibilities as administrative law judges." 5 U.S.C. §§ 3105, 5372(b)(3)(A); 5 C.F.R. §§ 930.206(a), (b), .211.

Second, Daspin speculates that my order lifting the indefinite stay and setting this case for a hearing is evidence of bias or "judge shopping." He asserts that Chief Judge Murray "applied" pressure "to ensure [I] would violate [his] constitutional rights."

Unfounded speculation is insufficient to demonstrate relevance or bias. Essentially, Daspin speculates that there is a causal relationship between my assignment and my order setting this matter for a hearing. But confusing a temporal relationship for a causal one is a logical fallacy. *See McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1243 (11th Cir. 2005). The fact that I lifted the indefinite stay speaks only to my evaluation of the facts and the law. *See Checkosky*, 23 F.3d at 489 (agency decisions "speak for themselves"). Daspin has failed to demonstrate anything remotely inappropriate regarding the order, and his bare allegations of bias do not overcome the "presumption of honesty and integrity" that cloaks my participation in this proceeding.[2]

Moreover, Daspin's speculation is unfounded. The actual reason for my assignment to this case related to nothing more than relative caseloads. And the reason Daspin's case was set for hearing related to nothing more or less than the reasons I stated in the scheduling order; no one hinted or said that I should take any course of action in this case. The fact of my order, therefore, does not support hearing testimony from the Commission's administrative law judges.

Third, Daspin has repeatedly referred to articles published in the Wall Street Journal. One article reported that a former Commission administrative law judge claimed a conversation

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[2] *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 618 (2d Cir. 2004); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

occurred in which she was pressured to rule in the Division's favor. Jean Eagleshem, *SEC Wins with In-House Judges*, The Wall Street Journal, May 6, 2015. The article also claimed that since 2010, the Division has had a higher rate of success with administrative cases as compared to those in district court. *Id*.

I have previously explained to Daspin that even if the reported conversation occurred, it is not relevant to this matter. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 3263, 2015 SEC LEXIS 4435, at *14 (Oct. 28, 2015). *If* the conversation occurred, it happened years before I was appointed and I have never witnessed nor been subjected to anything remotely similar to the reported conversation. *Id*.

I also suggested that statistics purporting to compare the Division's administrative success rate with its rate of success in district court are not all they appear to be. *Edward M. Daspin*, 2015 SEC LEXIS 4435, at *14. By ignoring the cases in which the Commission prevails on summary judgment, the statistics understate the number of cases the Division wins in district court. *Id.* (relying on Urska Velikonja, Reporting Agency Performance: Behind the SEC's Enforcement Statistics, 101 Cornell L. Rev. (forthcoming 2016) at 55-56, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654427). And, by counting as wins for the Division cases in which a respondent prevails on the majority of charges,[3] the statistics over-represent the Division's degree of success before administrative law judges. *See David J. Montanino*, Initial Decision Release No. 773, 2015 SEC LEXIS 1406 (ALJ Apr. 16, 2015). Put another way, if sports leagues used this latter sort of statistical logic, the Cleveland Browns could claim to be undefeated because they have not yet been shut out. The statistics, therefore, do not reliably demonstrate anything.

Daspin asserts that former Commission Chairman Cox reportedly said that the Commission's administrative law judges "are in close headquarters with the senior prosecutors that are also employees of the SEC and that [they] make friendships with the prosecutors." Opp. at 1. As with the allegations concerning a former administrative law judge, I cannot speak to allegations about how things worked before I was appointed. Even assuming former Chairman Cox was speaking based on experience rather than surmise, the allegation that administrative law judges form close friendships with attorneys from the Division is inconsistent with my experience and with the isolated nature of my office's circumstance.

Daspin next notes a report about comments the Commission's chief administrative law judge made about the Commission's view regarding summary disposition. *See* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, The Wall Street Journal, Nov. 22, 2015. He apparently believes this comment is evidence of undue influence. In context, however, the comment is more mundane than was reported.[4] Moreover, the chief administrative law judge's opinion about

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[3] *See Jean Eaglesham, SEC Judges Are Finding Against Agency More Often Lately*, The Wall Street Journal, Nov. 22, 2015.

[4] Chief Judge Murray said:

> I can tell you – I think I said this on a phone call. The Commission does not want interlocutory appeals. The case law is pretty -- well,

how the Commission views summary disposition is irrelevant because: (1) the chief administrative law judge is not presiding over this proceeding, (2) Daspin did not even file a motion for summary disposition until nearly seven weeks after the deadline, and (3) his untimely motion ultimately only succeeded in showing that material facts are in dispute. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 3409, 2015 SEC LEXIS 5125, at *3 (Dec. 17, 2015).

Because I am granting the Division's motion, Daspin may make a brief proffer at the beginning of the hearing regarding what he expects the excluded witnesses would say. I will briefly entertain his questions about my factual observations in this order.

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James E. Grimes
Administrative Law Judge

> it is not pretty -- it is absolute on that point. They think judges should handle things.
>
> Now, in the order, if you want me to type it up, I will put in those citations. But as I tried to explain on the phone call, nothing has happened that I know of in the facts that are different from when they instituted this proceeding and set it down for hearing. So for me to say I am wiping it out because granting the motion, it looks like I am saying to these presidential appointee commissioners, I am reversing you. And they don't like that. So you don't have a chance on an interlocutory appeal.
>
> Now, when I get the facts in this case and I study the law in this case, then I might agree with you. I don't know. I have to know what the facts are.
>
> So, I will find the case law that supports my position. First of all, leave at this point in time, before the Division presents its direct case, there is no justification under Rule 250 for me to do that, to grant you leave. If I take their position as true, you don't have a chance.
>
> So, why would I grant you leave and send the motion upstairs? Because it is not going to fly. Does that answer at all your question or am I just repeating -- it sounds good to me but I –

Transcript of Record at 20-21, Donald J. Anthony, Jr., et al., No. 3-15514.