

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4872/June 15, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of

BARBARA DUKA

ORDER CORRECTING RECORD
INDEX AS TO
DIVISION EXHIBITS 209 AND 324

Respondent Barbara Duka objects to the inclusion of Division of Enforcement exhibit 209 in the record index. Duka asserts that exhibit 209 was not admitted. The Division opposes, asserting that its exhibit 209 was admitted. As is explained below, exhibit 209 was not admitted. Duka's objection is thus sustained.

The hearing in this matter lasted nine days and occurred on various dates between November 2016 and January 2017. In the morning of the second day of the hearing, the Division offered into evidence its exhibit 209, which is a memorandum prepared by one of the Division's witnesses. Tr. 301–03. Duka objected. Tr. 303. After some discussion, the parties' focus narrowed to two sentences in the exhibit. Tr. 304–05. Initially, I concluded that I would admit exhibit 209 solely as to the two sentences offered by the Division. Tr. 306. Almost immediately, however, I reconsidered and stated that I would review the document during a subsequent lunch recess and then issue a ruling. Tr. 306–07.

In response, Duka's counsel asserted that if I intended to review exhibit 209, I should also read the document to which he said it responded. Tr. 307. I agreed and Division counsel said, "[j]ust to reiterate, to the extent [Duka is] not going to offer that memo," *i.e.*, the document to which exhibit 209 responded, "we will not offer [exhibit 209] in rebuttal." Tr. 307. This prompted Duka's counsel to suggest that "perhaps we should wait on the question of admissibility in whole." Tr. 307. I responded that I would review both documents during the later lunch recess. Tr. 307.

As we later prepared to break for lunch, I asked the parties whether they would give me the two documents to review. Tr. 367. After Duka's counsel suggested that the parties might have "sort of reached an agreement," I asked the parties to discuss the matter further. Tr. 367. I did not review the documents during lunch.

At the end of the second day, the parties and I clarified which exhibits had been admitted, and exhibit 209 was not on that list. Tr. 414. Division counsel interjected that "We also had 209," and I asked whether that was the exhibit the parties were going to discuss and whether they were "still talking about it." Tr. 414. Counsel said they were, and I replied that they should continue that discussion and that we could resolve the issue "in due course." Tr. 415.

Division exhibit 209 did not come up again until the sixth day of the hearing. That day, Duka's counsel offered Respondent's exhibit 637 into evidence and the Division objected. Tr. 1410. Division counsel explained that exhibit 637 "relates to the documents that Ms. Duka's counsel sought to preclude as relating to the investigation as to what happened.... I thought counsel agreed they weren't going to introduce that evidence. And based upon that, we didn't seek to introduce, I think it was 209, with" the witness who was testifying when the Division offered its exhibit 209. Tr. 1410. After further discussion, I asked Division counsel whether he had offered Division exhibit 209 into evidence. Tr. 1412. Counsel responded:

We offered it. There was one snippet about the statement of having to explain the different applications in new issuance and surveillance.

And ultimately it was not admitted after a discussion. We offered to let you look at some stuff at lunch.

And then after [Duka's counsel] and I spoke, we did not do that; because my understanding was the fact that neither side was going to offer evidence, such as memos or emails, that discussed the investigation, and specifically the conclusions that came out of that investigation.

Tr. 1412-13.

This discussion prompted me to ask Division counsel whether he would maintain his objection to Respondent's exhibit 637 if Division exhibit 209

were admitted into evidence. Tr. 1413. Because counsel replied that he would maintain his objection, I decided to review both exhibits and reach a decision whether to admit them. Tr. 1413–14. At the end of the sixth day, however, Duka’s counsel withdrew Duka’s offer of her exhibit 637. Tr. 1669–70. This meant that it was no longer necessary for me to consider whether to admit either Respondent’s exhibit 637 or Division exhibit 209. Tr. 1670. Division exhibit 209 did not come up again during the remainder of the hearing.

As the foregoing reveals, with the agreement of the parties, Division exhibit 209 was not admitted into evidence. Duka’s objection is thus sustained, and Division exhibit 209 shall be removed from the record index list of the Division’s “offered and admitted” exhibits, and shall be categorized as a Division exhibit that was “offered but not admitted.”

Division exhibit 324, Respondent’s answer, shall also be removed from the record index list of the Division’s “offered and admitted” exhibits, and shall be categorized as a Division exhibit that was “offered but not admitted,” as that document was already part of the record before the hearing began.

James E. Grimes
Administrative Law Judge