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

Administrative Proceedings Rulings
Release No. 6680 / September 18, 2019

Administrative Proceeding
File No. 3-17950

In the Matter of

David Pruitt, CPA

Order on Objections to Exhibit Lists

I issued the current scheduling order in February 2019.[1] Under it, the parties were required to exchange and file witness and exhibit lists on August 16, 2019, and objections one week later, on August 23, 2019.[2] Although this might be a short window, neither party objected or asked for additional time to file objections.

The parties timely filed their exhibit lists. The Division of Enforcement listed 547 exhibits in a spreadsheet with the following identifying columns: exhibit number, date, description, Bates range, investigative testimony exhibit number, and deposition exhibit number. Respondent David Pruitt listed 1,758 exhibits in a spreadsheet with the following identifying columns: Exhibit ID, Beg Bates/Document, Deponent, and Depo Exhibit #.

On August 23, 2019, Pruitt filed a 67-page spreadsheet listing his objections, such as hearsay, relevance, and authenticity, to the 547 exhibits the Division identified.[3] He also objected to what he described as the Division's practice of "listing as single exhibits entire third-party document productions that span tens of thousands of pages."[4] As examples, Pruitt

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1 *David Pruitt, CPA*, Admin. Proc. Rulings Release No. 6465, 2019 SEC LEXIS 210 (ALJ Feb. 19, 2019).

2 *Id.* at *2.

3 Objections, Ex. A.

4 Objections at 1.

asserted that Division exhibits 440 and 441 respectively contain over 16,000 pages and almost 14,000 pages.[5] Pruitt also complained that although the documents the Division produced to him were identified using the Bates identifier SEC-NY09140-EPROD, in some cases, the Division identified exhibits on its list using the identifier L3-DOJ-SEC.[6]

The Division did not submit objections. It instead submitted a letter in which it stated that it was reserving the right to object at a later point and asserted that Pruitt had not "provide[d] any information concerning the substance or relevance of testimony many of the thirty-two proffered witnesses would provide, and has failed to provide information *at all*, other than bates numbers, for the majority of the 1,758 proffered exhibits."[7] It also asserted that character-witness testimony is not admissible.[8]

The Division's submission prompted Pruitt to file a motion in which he argues that the Division has waived the right to object to his exhibits.[9] Pruitt also objects to Division exhibits 440, 441, 485, and 486, because they "collectively contain more than 34,000 pages and hundreds and even thousands of individual documents."[10]

In the introduction to its opposition, the Division complains that Pruitt's exhibit list, which is 195 pages long and lists 1,758 exhibits, fails to include dates, descriptions, or additional detail for the exhibits.[11] It lauds its own list,

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5 *Id.* Pruitt asserted that "these are just two examples" of the practice about which he complained.

6 *Id.* at 2.

7 Letter from Paul G. Gizzi (Aug. 23, 2019).

8 *Id.* For the sake of clarity, the Commission considers character evidence when assessing sanctions. *See Denise M. Olson*, Securities Exchange Act of 1934 Release No. 75838, 2015 WL 5172954, at *7 n.48 (Sept. 3, 2015); *Murray A. Kivitz*, Securities Act of 1933 Release No. 5163, 1971 WL 127547, at *8 (June 29, 1971), *rev'd on other grounds*, 475 F.2d 956 (D.C. Cir. 1973). Such evidence, however, is subject to exclusion if unduly repetitious. *See* 17 C.F.R. § 201.320.

9 Mot. at 3–5.

10 *Id.* at 6. Pruitt does not mention his earlier complaint about the Division's Bates identifiers. That complaint is therefore not further discussed in this order.

11 Opp'n at 1.

which identified only 547 exhibits and provided more information about each exhibit.[12]

Moving to its argument, the Division asserts that "the sheer number" of Pruitt's exhibits makes it "essentially impossible" to assess the relevance of Pruitt's exhibits.[13] It adds that Pruitt's 32-person witness list is excessive and asks that I direct him to provide a summary of each witness's expected testimony so that it can assess the relevance of the witness's testimony.[14]

Turning to Pruitt's motion, the Division argues that precluding it from objecting to his exhibits would be "extraordinary."[15] It says the cases on which Pruitt relies do not apply because the parties in this case only had one week to file objections and no chance to meet and confer.[16]

Discussion

Although the Securities and Exchange Commission's Rules of Practice do not specifically require administrative law judges to issue prehearing scheduling orders, the rules anticipate that the parties and the presiding administrative law judge will discuss the procedural schedule leading to the hearing and that a procedural order will follow that discussion.[17] Consistent with Rule 221(c)(2), the prehearing procedural order in this case directed that the parties exchange and file witness and exhibit lists on August 16, 2019.[18] And the order directed the parties to file objections to exhibits on August 23, 2019.[19]

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12 *Id.*

13 *Id.* at 2.

14 *Id.* at 2–3; *see* 17 C.F.R. § 201.222(a)(4).

15 Opp'n at 3.

16 *Id.* at 4.

17 *See* 17 C.F.R. § 201.221(c), (e).

18 *Pruitt,* 2019 SEC LEXIS 210, at *2.

19 *Id.*; *see* Fed. R. Civ. P. 26(a)(3)(B). Although Rule 26(a)(3)(B) does not apply in Commission proceedings, it fulfills a useful notice function to which practitioners are accustomed, helps to "expedite the presentation of evidence at trial," and lessens the need to call foundation witnesses. Amendments to the Rules of Civil Procedure, Advisory Committee's Notes, *reprinted in* 146

(continued…)

Here, the Division filed no specific objections to Pruitt's exhibits by the August 23 deadline. Although it now appears to suggest that one week was not enough time to offer objections, it did not seek an extension of the deadline. There is support for Pruitt's argument that in this circumstance, the Division has waived admissibility objections that it reasonably could have raised by the deadline.[20] And although the Division essentially says there were too many exhibits, too many witnesses, too little information, and too little time for it assess relevance, the solution for this problem would have been to file a motion seeking appropriate relief.

On the other hand, the Division has a point about Pruitt's exhibit list. As the Division asserted in its letter, Pruitt's list provides very little useful information. So neither side is entirely blameless.

Although the Division could have sought relief before August 23, 2019, it did not do so. Giving effect to the Division's omission, I find that it has waived any authenticity objections to Pruitt's exhibits.

The Division's letter, however, did put Pruitt on notice that his list was potentially deficient. By the prehearing conference on September 27, 2019, Pruitt must submit a revised exhibit list that reasonably identifies his exhibits.

The Division also says in its opposition that I should direct Pruitt to file a summary of his witnesses' expected testimony. As to this request, Securities and Exchange Commission Rule of Practice 154(a) provides:

F.R.D. 401, 637. An objection deadline is thus a typical feature of prehearing scheduling orders. As noted, neither party objected to the objection deadline or its timing.

[20] *See Griffeth v. United States*, 672 F. App'x 806, 813 (10th Cir. 2016) ("The opposing party waives any objection not made within [the] time" specified in Rule 26(a)(2)(B) "unless the court excuses the failure for good cause"); *Young Again Prods., Inc. v. Acord*, 459 F. App'x 294, 304 (4th Cir. 2011); *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co*., 173 F. Supp. 3d 363, 383 (N.D. Tex. 2016) (holding that hearsay objections were waived as untimely absent good cause), *aff'd as modified and remanded*, 725 F. App'x 256 (5th Cir. 2018); *Henderson v. Peterson*, No. 07-cv-2838, 2011 WL 2838169, at *14 (N.D. Cal. July 15, 2011) ("Defendants' failure to provide individualized objections to Plaintiff's designations amounts to a waiver of their right to object (other than as to objections permitted under Federal Rule of Evidence 402 and 403).").

> Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon.[21]

This rule echoes Federal Rule of Civil Procedure 7(b)(1), which provides:

> (b) Motions and Other Papers.
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> (1) In General. A request for a court order must be made by motion. The motion must:
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> (A) be in writing unless made during a hearing or trial;
>
> (B) state with particularity the grounds for seeking the order; and
>
> (C) state the relief sought.

Because the Commission has not provided guidance about the requirements of Rule 154, it is appropriate to see how federal courts interpret the analogous requirements of Rule 7(b)(1).[22] And the rule there is that a request for affirmative relief must be made by motion; a litigant cannot seek affirmative relief in an opposition to an opponent's motion.[23] I therefore decline the Division's invitation.

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[21] 17 C.F.R. § 201.154(a).

[22] *Cf. AMS Homecare, Inc.*, Securities Exchange Act of 1934 Release No. 68506, 2012 WL 6642540, at *2 n.19 (Dec. 20, 2012) (relying on precedent relevant to a rule of civil procedure because the relevant Commission rule was "modeled" on that rule).

[23] *News Am. Mktg. FSI LLC v. Four Corners Direct, Inc.*, 192 F. Supp. 3d 1277, 1278 n.3 (M.D. Fla. 2016); *see CompRehab Wellness Grp., Inc. v. Sebelius*, No. 11-cv-23377, 2013 WL 1827675, at *7 n.20 (S.D. Fla. Apr. 30, 2013) (noting that "a response to a motion is not a motion" (citing Fed. R. Civ. P. 7)); *cf. Carlin v. Bezos*, 649 F. App'x 181, 183 (3d Cir. 2016) ("To the extent that Carlin's response in opposition to Amazon's motion to file a supplemental appendix requests affirmative relief, the motion is denied."); *TransEnterix Inv'r Grp. v. TransEnterix, Inc.*, 272 F. Supp. 3d 740, 762 (E.D.N.C. 2017) ("Under Rule 7(b)(1) of the Federal Rules of Civil Procedure,

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Turning to Pruitt's argument, he complains that four of the Division's exhibits "collectively contain more than 34,000 pages and hundreds and even thousands of individual documents."[24] The Division does not respond to this argument and has consequently waived[25] any argument in opposition.

But even absent waiver, it is not clear the Division would have fared better. Because the Commission's Rules do not explain how to designate exhibits, it is again appropriate to turn to Federal Rule of Civil Procedure 26. As discussed Rule 26(a)(3)(B) directs the parties to file objections to "materials identified under Rule 26(a)(3)(A)(iii)." And the latter rule discusses the pretrial "identification of *each* document or other exhibit, including summaries of other evidence—*separately* identifying those items the party expects to offer and those it may offer if the need arises."[26] For purposes of the current dispute, the emphasized words *each* and *separately* are important.

Because exhibits must each be separately identified, composite exhibits are prohibited.[27] This means a party cannot simply identify as an exhibit all documents received from a particular source.[28] By the September 27, 2019 prehearing conference, the Division shall compile a new exhibit list specifying each document within exhibits 440, 441, 485, and 486 that it might offer.[29]

'[a] request for a court order must be made by motion.' A responsive brief is not an appropriate means to request leave to amend a complaint.").

[24] Mot. at 6.

[25] Some may debate whether the Division's omission actually amounts to forfeiture rather than waiver. Maybe it does. Then again, maybe it doesn't matter. *See Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 498–99 (7th Cir. 2018).

[26] Fed. R. Civ. P. 26(a)(3)(A)(iii) (emphasis added).

[27] *Murphy v. Precise*, No. 1:16-cv-143, 2017 WL 6033063, at *4 (M.D. Ala. Dec. 1, 2017) (quoting *Blanco v. Capform, Inc.*, No. 11-cv-23508, 2013 WL 12061862, *1 (S.D. Fla. Jan. 9, 2013)).

[28] *See id.* (sustaining an objection to an exhibit list that included several composite exhibits).

[29] *See Med. Ctr. of Cent. Ga., Inc. v. Denon Dig. Emp. Benefits Plan*, No. 5:03-cv-32, 2005 WL 1073624, at *8 (M.D. Ga. May 4, 2005).

The description of each document "must be sufficient to put [Pruitt] on notice of exactly which documents it can expect to see" during the hearing.[30]

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James E. Grimes
Administrative Law Judge

30 *Id.*