

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

Administrative Proceedings Rulings
Release No. 6724 / January 15, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

Scheduling Order

This proceeding began February 18, 2014. After its opinion and order was vacated by the United States Court of Appeals for the Ninth Circuit, the Securities and Exchange Commission ordered that Respondent be provided with the opportunity for a new hearing. Accordingly, I set the following procedural schedule:

January 27, 2020: Respondent may file a supplemental or new answer or elect to rely solely on his answer filed March 12, 2014. 17 C.F.R. § 201.220.

The Division of Enforcement must make available to Respondent all documents specified in Rule 230, if it has not already done so. 17 C.F.R. § 201.230.

February 3, 2020: Submit to my office any requests for subpoenas requiring the production of documents. 17 C.F.R. § 201.232. A copy of the document subpoena form is available at <https://www.sec.gov/alj/subpoena-to-produce.pdf>.

February 18, 2020: File motions for summary disposition under Rule 250(b). 17 C.F.R. § 201.250(b). The filing of such motions is optional.

February 25, 2020: File oppositions to summary disposition. *See* 17 C.F.R. § 201.154(b).

- February 28, 2020: File replies in support of summary disposition.
- March 2, 2020: Submit to my office any requests for subpoenas requiring a person to appear and testify at the hearing. A copy of the appearance subpoena form is available at <https://www.sec.gov/alj/subpoena-to-appear.pdf>.
- March 16, 2020: Exchange witness lists, exhibit lists, and exhibits. Please send a courtesy copy of the lists to alj@sec.gov. Exhibits are not filed with the Office of the Secretary until the close of the hearing.
- March 23, 2020: File motions in limine, including objections to exhibits and witnesses. I will not entertain a prehearing motion seeking to preemptively preclude hearing objections based on the failure to raise objections by this deadline. I may, however, consider the failure to raise an objection by this deadline in resolving objections at the hearing.
- File stipulations, admissions of fact, and requests for official notice.
- March 30, 2020: File oppositions to motions in limine and requests for official notice.
- April 6, 2020: Final telephonic prehearing conference at 4:00 p.m. EDT / 1:00 p.m. PDT.
- April 13, 2020: Hearing begins at a location to be determined in the San Francisco Bay area, California. My office will secure a hearing location.

The parties are reminded that all filings must be filed in hard copy with the Office of the Secretary. *See* 17 C.F.R. §§ 201.151–.153. In addition, they are asked to email courtesy copies of filings to alj@sec.gov. Electronic copies of exhibits should not be combined into a single PDF file, but sent as separate attachments, and should be provided in text-searchable format whenever practicable.

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 these guidelines*.

Subpoenas. A party's motion to quash a subpoena 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. A party moving to quash a subpoena to produce documents based on a claim of privilege must support its motion with a declaration and privilege log. *Accord Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996); *Caudle v. District of Columbia*, 263 F.R.D. 29, 35 (D.D.C. 2009).

Motions for summary disposition. A motion for summary disposition must include legal analysis and evidentiary support for the allegations and requested relief in accordance with *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012), and *Ross Mandell*, Securities Exchange Act of 1934 Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

- a. A motion for summary disposition must be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue. The statement should consist of short numbered paragraphs, each of which must include citations to supporting evidence. I may disregard a factual assertion that fails to cite supporting evidence, even if the opposing party fails to controvert it.
- b. An opposition to such a motion must be accompanied by a separate responsive statement of material facts. The responsive statement should address each numbered paragraph in the moving party's statement, by including citations to evidence establishing the existence of a genuine issue necessary to be litigated or agreeing that the asserted fact is undisputed. The responsive statement may contain, in addition, short numbered paragraphs as to which the opposing party contends there is no genuine issue. These additional paragraphs must also be supported by citations to evidence and should continue the numbered list started by the moving party.
- c. The moving party may file a reply statement that addresses the opposing party's statement, with citations to evidence as appropriate. Each point in the reply statement should include the text of the numbered paragraph from the filing to which it responds.
- d. Each such motion, opposition, and reply should cite to the appropriate paragraphs of a statement of material facts rather than to the record. The motion, opposition, and reply—not the respective statements of material facts—are where parties should make their legal arguments and cite to applicable legal authority. The

memorandum of points and authorities required by Rule 154(a) need not be a separate document from the motion.

- e. If the opposing party fails to controvert any fact asserted by the moving party in its statement of material facts (or the moving party fails to controvert any fact asserted by the opposing party in its responsive statement of additional material facts), I may deem such fact admitted in deciding the motion.
- f. The Division, having moved for summary disposition against a pro se respondent, must serve and file as a separate document, together with its motion and supporting materials, the “Notice to Pro Se Respondent” that is attached as Exhibit A to this order, along with the full text of Rules of Practice 155, 250, and 323.

Witness Lists. Witness lists must include witnesses’ names, occupations, city and state of residence, and a brief summary of their expected testimony. 17 C.F.R. § 201.222(a)(4). Home addresses should not be included in the filing. The party making the filing should promptly make complete witness information, including a witness’s address, available to another party upon request.

Exhibits. The parties should confer and attempt to stipulate to the admissibility of exhibits. To avoid duplication of exhibits, the parties should identify joint exhibits. Exhibits are not filed with the Office of the Secretary until the close of the hearing at my instruction.

Exhibit lists. A comprehensive exhibit list prevents a party opponent from being surprised in the middle of the hearing. An exhibit list must not be excessively long, vague, or confusing to the point of prejudicing the opponent’s ability to raise prehearing objections or to prepare its case. 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 that may be subject to admissibility objections. Each party should serve its opponent with any amendments to its exhibit list. 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. 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.

A party may offer an exhibit not included on the exhibit list if good cause, for example the need to respond to unexpected testimony, can be shown.

Hearing schedule. The first day of the proceeding will begin at 10:00 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 5:00 p.m. I generally take one break in the morning, lasting about fifteen minutes, and at least one break in the afternoon. I generally break for lunch around 12:30 p.m., for about one hour.

Witness examination.

- a. In general, the Division presents its case first because it has the burden of proof. Respondent then presents his 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 Respondent also wishes to call as a witness, Respondent's cross-examination of the witness may exceed the scope of what was covered by Division's direct examination of that same witness. This will avoid the need to recall a witness just so the witness can testify for Respondent's case.
- c. In general, cross-examination may be conducted by leading questions, even as to Division witnesses that Respondent wishes to call in his own case. If a Commission employee is called as a witness for Respondent, the Division may not ask leading questions on cross-examination.
- d. 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.

Jason S. Patil
Administrative Law Judge

Exhibit A

Notice to Pro Se Respondent

The Division of Enforcement has moved for summary disposition under Rule of Practice 250. This means that the Division has asked the administrative law judge to decide this proceeding based on written evidentiary materials submitted in support of its motion. **Be aware that if the Division's motion for summary disposition is granted, the proceeding may be decided against you without a hearing, and sanctions may be imposed.**

To oppose the Division's motion, your filing must include sufficient evidence contradicting the material facts asserted by the Division. You may not oppose summary disposition simply by relying on bare allegations or denials. See *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *7 (Feb. 15, 2017) (“The party opposing summary disposition may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing.” (internal quotation marks omitted)). Rather, you must submit evidence—such as declarations, your own affidavit and/or the affidavits of others, prior testimony, documentary evidence, or facts that can be officially noticed under Rule of Practice 323—countering the facts asserted by the Division and raising specific facts that support your contention that this matter requires a hearing.

Failure to respond to the Division's motion may be grounds for a default under Rule of Practice 155.