

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

Administrative Proceedings Rulings
Release No. 6757 / May 1, 2020

Administrative Proceeding
File Nos. 3-17545, 3-17546, 3-17547, 3-17548, 3-17549

In the Matters of

Fusion Pharm, Inc.;

Scott M. Dittman, CPA;

William J. Sears;

**Microcap Management LLC,
Bayside Realty Holdings LLC,
and Meadpoint Venture
Partners, LLC;**

Cliffe R. Bodden

**Order Regarding Service
and Following
Prehearing Conference**

The Division submitted evidence on April 21, 2020, that copies of the orders instituting proceedings (OIPs) were provided to each of the Respondents by first class mail or other reliable means. In conjunction with the previously filed evidence that Respondents waived service of the OIPs in their offers of partial settlement, I FIND that Rule 141(a)(4) has been satisfied for each Respondent.

On April 28, 2020, I held a telephonic prehearing conference for all of the parties in these proceedings, but only Scott M. Dittman, CPA, and his counsel Jeff Thomas; William J. Sears; and counsel for the Division of Enforcement participated. Sears stated that he was represented by Peter Bornstein based on a recent conversation with Bornstein; by contrast, the Division's understanding was that Sears was not represented by Bornstein. I encouraged Sears and the Division to determine whose understanding is correct; if

Bornstein is representing Sears, he should file a notice of appearance.¹ In addition, even though the Division represented in prior filings that it intended to serve Fusion Pharm, Inc., through Dittman, personally, and serve the remaining entity Respondents through Sears, Dittman and Sears disclaimed any representation of the entities. Finally, Cliffe R. Bodden did not participate.

During the conference, we discussed how the Division intends to proceed with respect to each Respondent.

The Division and Dittman represented that they are attempting to settle. Due to the COVID-19 pandemic, the Division has had trouble getting an offer of settlement to Dittman for execution. I ORDER that a telephonic prehearing conference with Dittman and the Division will be held on June 4, 2020, at 3:00 p.m. EDT, to ascertain the status of the settlement offer. The Division should obtain a court reporter and circulate dial-in instructions in advance of the conference. If a signed settlement offer is submitted to the Securities and Exchange Commission before June 4, the parties should file a motion to stay Dittman's proceeding pending settlement.²

The Division has not yet produced the investigative file to any of the remaining Respondents.³

The investigative file must be produced to Sears. If Bornstein is representing Sears, the Division will produce the file to Bornstein. If not, the Division should inform my office of how long it will take to complete the production to Sears in prison and of its efforts to coordinate with prison officials to ensure that Sears will receive and be able to review the investigative file. I recognize that the normal difficulties in communicating with incarcerated individuals have been compounded by the pandemic, and that may require me to extend the briefing schedule entered below.⁴

¹ See 17 C.F.R. § 201.102(d)(2).

² See 17 C.F.R. § 201.161(c)(2).

³ See 17 C.F.R. § 201.230(a). Thomas waived production of the investigative file to Dittman in light of the anticipated settlement. If Dittman does not settle, the Division will have to also produce the file to him.

⁴ See *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10767, 2020 WL 1322001, at *1 (Mar. 18, 2020) (“[A]ll reasonable requests for extensions of time will not be disfavored as stated in Rule 161.”); *Byron S. Rainner*, Securities Exchange Act of 1934 Release No. 59040, 2008 WL 5100855, at *2 (Dec. 2, 2008) (remanding a follow-on proceeding because the incarcerated

At this time, the investigative file need not be produced to Bodden and the entity Respondents. The Division represented that it does not intend to seek further sanctions against those Respondents. The Division should therefore move the Commission to dismiss the further proceedings to determine civil penalties and disgorgement as to them.⁵ In the event that the Commission dismisses further proceedings, production of the investigative file to Bodden and the entity Respondents may be unnecessary.⁶ If the Division does not move for dismissal, however, it must follow the procedural schedule below and either produce the investigative file to Bodden and the entity Respondents or show cause why it should be relieved from the obligation to produce its investigative file.⁷

As discussed, I ORDER the following briefing schedule for any dispositive motions.

May 22, 2020: File dispositive motions, including motions for summary disposition.

June 12, 2020: File oppositions to motions for summary disposition.

June 22, 2020: File replies, if any.

In addition to submitting filings to apfilings@sec.gov, the parties are reminded to e-mail courtesy copies of filings to alj@sec.gov as Word documents and as text-searchable PDFs. 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.

respondent was not permitted to review the Division’s entire investigative file, and directing the administrative law judge to ensure that the respondent “has had a reasonable amount of time to review the investigative file before being required to file any pleadings in the case, such as a response to a motion for summary disposition by the Division”).

⁵ *Accord Clayton T. Marshall*, Securities Act Release No. 10722, 2019 WL 5547071, at *1 (Oct. 28, 2019) (granting the Division’s motion to dismiss additional proceedings to determine civil penalties based on subsequent developments in related proceedings in federal court).

⁶ *See* 17 C.F.R. § 201.230(a) (requiring production “[u]nless otherwise provided ... by order of ... the hearing officer”).

⁷ *See* 17 C.F.R. § 201.230(a)(1), (d).

And because the schedule set in this order extends past the current due dates for the initial decisions, I ORDER that the deadlines for issuance of the initial decisions in these proceedings are EXTENDED until September 9, 2020.⁸ I find good cause for this extension based on, among other considerations, the need for the production and review of the investigative files and the current pandemic.

Guidelines

I will follow the general guidelines described below during the dispositive-motions portion of these proceedings. The parties should review what follows *and promptly raise any objections they may have to these guidelines.*

1. **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 duces tecum based on a claim of privilege must support its motion with a declaration and privilege log.⁹
2. **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*¹⁰ and *Ross Mandell*.¹¹
 - 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

⁸ See *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *2 n.7 (Aug. 22, 2018).

⁹ See *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).

¹⁰ 682 F.3d 98, 108 (D.C. Cir. 2012).

¹¹ Exchange Act 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).

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.

James E. Grimes
Administrative Law Judge

Served by e-mail on the Division of Enforcement and Respondent Scott M. Dittman, CPA.

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.¹ 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.

¹ See *James S. Tagliaferri*, Securities Exchange Act of 1934 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)).