

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6875/October 7, 2022

ADMINISTRATIVE PROCEEDING

File No. 3-20801

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In the Matter of	:	
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DF GROWTH REIT II, LLC	:	ORDER

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The Securities and Exchange Commission instituted this proceeding with an Order Temporarily Suspending Exemption Pursuant to Section 3(b) of the Securities Act of 1933 and Rule 258 of Regulation A<sup>1</sup> Thereunder and Notice of Opportunity for Hearing on March 16, 2022. Respondent DF Growth REIT II, LLC (Respondent or REIT II), requested a hearing, and, on March 31, 2022, the Commission ordered that the matter be heard by an Administrative Law Judge (ALJ). On May 16, 2022, the proceeding was reassigned to the undersigned. The Division of Enforcement's Motion for Summary Disposition and responsive pleadings are pending.<sup>2</sup>

Under consideration is Respondent's August 2, 2022, Application to Quash or Modify Investigatory Subpoenas and responsive pleadings.<sup>3</sup> The subpoenas were issued by the Division to three individuals in connection with formal investigation No. LA-5266, In the Matter of DiversyFund, Inc., which directed an investigation into DiversyFund and associated persons and entities for potential violations of the antifraud and registration provisions.<sup>4</sup> Respondent and the three individuals, who are DiversyFund employees, are associated persons of DiversyFund. Noting that the investigation leading to the instant proceeding was conducted pursuant to the same formal

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<sup>1</sup> Regulation A consists of Securities Act Rules: 17 C.F.R. §§ 230.251-263 (Rules 251-263).

<sup>2</sup> See *DF Growth REIT II, LLC*, Admin. Proc. Rulings Release No. 6869, 2022 SEC LEXIS 2375 (A.L.J. Sept. 14, 2022). The proceeding was stayed between August 15 and September 14, 2022, based on the parties' request for a Stay Pending Commission Consideration of Offer of Settlement. *Id.*

<sup>3</sup> Pending responsive filings and the undersigned's ruling on the Application to Quash, compliance with the subpoenas was stayed. See *DF Growth REIT II, LLC*, Admin. Proc. Rulings Release No. 6861, 2022 SEC LEXIS 1908 (A.L.J. Aug. 3, 2022).

<sup>4</sup> The specific provisions are Securities Act Sections 5(a), 5(c), and 17(a); Sections 10(b) and 15(a) of the Securities Exchange Act of 1934; and Section 203(a) of the Investment Advisers Act of 1940.

investigation, LA-5266, Respondent argues that the subpoenas seek evidence directly relevant to the instant proceeding.

The Division had not notified the undersigned of these investigatory subpoenas. *See* 17 C.F.R. § 201.230(g) (Rule 230(g)). When Respondent brought this requirement to the Division's attention and asked it to withdraw the subpoenas, the Division's response did not even acknowledge the requirement. Motion to Quash, Ex. A at Exs. 1-3.

The Division admits that it failed to comply with Rule 230(g), but argues that the subpoenas relate to a phase of the DiversyFund LA-5266 investigation (initially ordered on November 8, 2021) that antedated the institution of, and is beyond the subject of the instant proceeding. However, the date[s] of the investigatory subpoenas, not the date of the formal order, triggers the Division's duty under Rule 230(g), according to the plain language of the rule.<sup>5</sup> Further, even a cursory glance at the allegations concerning Respondent show alleged involvement with other DiversyFund persons or entities. The Division further argues that the cases interpreting Rule 230(g) show that the policy behind the rule is to prevent the Division from using investigative subpoenas after the institution of an administrative proceeding to prepare for an upcoming hearing, but that no hearing is scheduled in this proceeding, in light of the pending motion for summary disposition. This argument overlooks the possibility that the motion for summary disposition might be denied, as well as the plain language of 17 C.F.R. § 201.250(b) that permits a motion for summary disposition to be supported with various types of evidence, making Rule 230(g)'s concern about the use of newly discovered evidence relevant even if no hearing takes place.<sup>6</sup> At any rate, the Division argues, the rule does not prohibit investigative subpoenas after the institution of an administrative proceeding; rather, the policy behind the rule is to allow the ALJ to fashion appropriate relief to ensure that the Division is not issuing investigative subpoenas to obtain evidence for the hearing, as well as to ensure that the opposing party is on notice of the Division's investigation and is able to obtain any documents that the Division may use in the litigation.

The Division argues that Respondent has not suffered any prejudice from the subpoenas, nor will it suffer any prejudice in the future since they were served on counsel for DiversyFund, which is also counsel for Respondent, and will have access to any copies of the produced documents. While Respondent has not suffered any prejudice to date, since compliance with the subpoenas has been stayed, it goes without saying that the interests of one or more of the individuals might diverge from that of Respondent, such that the individual[s] retain separate counsel. If that occurs, Respondent would have no guarantee of access to produced documents or testimony, absent the steps ordered herein.

### *Ruling*

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<sup>5</sup> "The Division . . . shall promptly inform the hearing officer and each party if investigatory subpoenas are issued . . . pursuant to the same order directing private investigation ('formal order') under which the investigation leading to the institution of proceedings was conducted." Rule 230(g).

<sup>6</sup> 17 C.F.R. § 201.250(b) provides that a motion for summary disposition may be supported with "undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noticed pursuant to § 201.323."

The subpoenas will not be quashed, but pursuant to Rule 230(g), steps will be taken to insure that the subpoenas are not used “for the purpose of obtaining evidence relevant to the proceedings.” First, material discovered from documents produced or testimony elicited as a result of the subpoenas will not be used in this administrative proceeding. Second, all relevant documents uncovered must be made available to Respondent. This goes beyond the Division’s obligation, formalized in Rule 230(b)(3), to make available, pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

Pursuant to Rule 230(g), these specific steps will be ordered to ensure that the Division makes available to Respondent all material that is relevant to this proceeding: (1) Respondent counsel may attend all testimony that occurs as a result of the subpoenas. (2) On November 1, 2022, and the first business day of every second month thereafter, the Division will submit an affidavit that provides a general description of the investigation to date; discloses whether any material relevant to this administrative proceeding has been uncovered and whether it has been turned over to the Respondent; and affirms that it is not using newly discovered material obtained from the ongoing investigation in the this administrative proceeding, File No. 3-20801. This obligation will continue as long as the instant proceeding remains pending.

The stay on compliance with the subpoenas is lifted, subject to the establishment of new dates for production of documents and appearance for testimony.<sup>7</sup>

IT IS SO ORDERED.

/S/ Carol Fox Foelak  
Carol Fox Foelak  
Administrative Law Judge

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<sup>7</sup> The dates specified in the subpoenas have passed.