

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6876/October 14, 2022

ADMINISTRATIVE PROCEEDING

File No. 3-20801

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

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 A¹ 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.²

Under consideration is Respondent's October 6, 2022, Application for Scheduling Order and responsive pleadings. Respondent requests that a prehearing conference be convened promptly for the purpose of establishing a hearing date within a short time period. Referring to the deadline for the Initial Decision set in 17 C.F.R. § 201.360 (Rule 360), the Division points to Rule 360(a)(2), which provides that the time period runs from "[t]he completion of briefing on a § 201.250 motion [for summary disposition] in the event the [ALJ] has determined that no hearing is necessary" and argues that it is not necessary to set a hearing date, if needed, until after the undersigned has ruled on the pending motion for summary disposition. In reply, Respondent argues that Rule 250 does not permit the filing of a motion for summary disposition unless an answer has been filed³ and states that the Division declined to confer to agree on jointly proposed hearing dates.

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

² 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.*

³ Rule 250 provides that a party may file a motion for summary disposition "after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying pursuant to § 201.230." 17 C.F.R. § 201.250(b), (c). In the instant case, Respondent has vigorously defended against the charges but has not filed a document titled "Answer." It has not previously argued that Rule 250 does not permit the pending motion for summary disposition.

Following the ruling on the motion for summary disposition, a hearing may be required on questions of material fact bearing on one or more claims or defenses. Waiting to set a hearing date until after the ruling may introduce additional delay. Accordingly, the parties will be ordered to file a list of proposed hearing dates in the first quarter of 2023 when each will be available. The hearing will be held by remote means. The parties should file their proposal by November 4, 2022.

IT IS SO ORDERED.

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

Respondent thus waived this argument by raising it for the first time in a reply brief on the instant application. *See Board of Regents v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (“[W]e have generally held that issues not raised until the reply brief are waived.”); *cf. Anthony Fields, CPA*, Securities Act Release No. 9727, 2015 SEC LEXIS 662, at *46 & n.115 (Feb. 20, 2015) (noting that arguments supporting reversal are waived if first raised in a reply brief). In any event, Respondent was permitted to file an answer by April 20, 2022, *see DF Growth REIT II, LLC*, Admin. Proc. Rulings Release No. 6842, 2022 SEC LEXIS 983 (A.L.J. Apr. 12, 2022), but did not file one. Rule 250 does not preclude a motion for summary disposition in this circumstance.