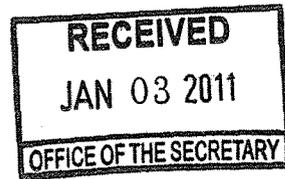


HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

**JOHN P. FLANNERY,
AND JAMES D.
HOPKINS,**

Respondents.

**Administrative Proceeding
File No. 3-14081**

**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS'
MOTIONS FOR LEAVE TO FILE
MOTIONS FOR SUMMARY DISPOSITION**

The Division of Enforcement ("Division") respectfully opposes the motions of Respondent James D. Hopkins and John Patrick ("Sean") Flannery for leave to file motions for summary disposition for the reasons set forth below.

I. Leave Should Be Denied As To Hopkins Because Even A Complete Victory On His Narrow Motion Will Not Limit The Factual Or Legal Scope Of The Hearing.

Contrary to Hopkins' representations in his motion for leave, granting his motion for summary disposition will not "avoid an unnecessary trial" by demonstrating "there is no legal or factual basis for the charges against him." The Division alleged claims against Hopkins pursuant to Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder as well as pursuant to Section 17(a)(1)-(3) of the Securities Act of 1933 ("Securities Act"). (Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") ¶¶ 5, 42-44.) As evidenced by Hopkins' Motion for Summary Disposition, he only alleges that he is entitled to "summary disposition" as to claims pursuant to Rule 10b-5 and Section 17(a)(2). He does not contend that he is entitled to summary disposition as to the Division's claims pursuant to Section 17(a)(1) or 17(a)(3).

Thus, even if the Hearing Officer were to rule in favor of Hopkins on his motion for summary disposition, a hearing would still need to go forward with the Division's charges pursuant to 17(a)(1) and 17(a)(3). In particular, the Division alleges in the OIP that Hopkins engaged in a "course of business which operates...as a fraud or deceit upon the purchaser" during a two-year time period. (OIP ¶¶ 1, 42.) Even if the Hearing Officer were to grant Hopkins' motion, the Hearing Officer would still need to hold a hearing as to every factual allegation against Hopkins during that two-year time period, thus not shortening the hearing in any way. (See, e.g. OIP ¶¶ 13-24, 31-35.). Moreover, because Hopkins has not opposed the Division's claim pursuant to Section 17(a)(1), which has the same scienter requirement as Rule 10b-5, even if the Hearing Officer were to grant Hopkins' motion for summary disposition, evidence of scienter would still need to be presented. *SEC v. Forman*, 2010 WL 2367372 at *6 (D. Mass. June 9, 2010).

II. Respondents' Motions For Leave Should Be Denied Because They Improperly Seek To Expand The Nature Of The Relief Contemplated By Rule 250.

Neither Respondent's motion seeking leave to file a motion for summary disposition acknowledges the burden they bear to demonstrate good cause why such a motion should be permitted before the Division has presented its case in chief. Both Respondents confuse motions for summary disposition that are permitted with leave of the Hearing Officer by Rule 250 of the Commission's Rules of Practice with the more broadly-functioning motions for summary judgment that are permitted as of right by Rule 56 of the Federal Rules of Civil Procedure.

In promulgating Rule 250, the Commission stated that motions for summary disposition serve a far more limited purpose than summary judgment motions under Rule 56 and stated that "the circumstances where summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare," and require "good cause [be] shown." *SEC Release No.*

35833, 59 SEC Docket 1170, 1995 WL 368865, *68 (June 9, 1995). The “rationales that justify prehearing summary disposition procedures under the Federal Rules of Civil Procedure do not apply equally to Commission administrative proceedings” because, among other reasons, a “panel of public officials, such as the Commission, [] must authorize the filing of” proceedings such as this. *Id.* at 67. Where, as here, the litigation involves basic disagreements concerning numerous material facts and mixed questions of fact and law such as the Respondents’ states of mind, the Commission is clear that leave to file summary disposition motions should not be granted. *See id.* at *66-67. Granting Respondents’ motions for leave to file in this matter would not serve the efficiency-focused goals of Rule 250 because an unnecessary hearing would not be eliminated, and to the contrary, a significant pretrial cost would be imposed – particularly considering the voluminous materials on which Respondents purport to rely.

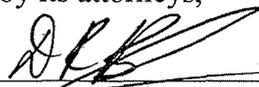
Even a cursory perusal of Respondents’ motions demonstrates that they are seeking summary disposition on inappropriate issues such as the existence of scienter, and even negligence, the extent of Respondents’ involvement in certain communications, and their responsibility for “making” misleading statements – in flat contradiction of the allegations in the OIP. Because “there is a legal basis for finding violations as a matter of law if the facts in the OIP are true as alleged,” leave should not be granted at this time (and summary disposition motions should even ultimately be denied when they are brought at the conclusion of the Division’s case). *See In the Matter of David Barr*, 72 SEC Docket 2291, 2000 WL 1092302, *4 (Murray, ALJ July 27, 2000).

CONCLUSION

Both Respondents should be denied leave to file motions for summary disposition because they have failed to demonstrate good cause why their motions should be allowed at this time and their motions stretch Rule 250 far beyond the limited purpose it is designed to serve. Further, Hopkins should independently be denied leave to file his motion because even granting that motion would not “avoid an unnecessary trial” or foreclose any legal or factual basis for the charges against him.

Respectfully submitted,

DIVISION OF ENFORCEMENT,
by its attorneys,



Deena Bernstein, Senior Trial Counsel
Kathleen Shields, Senior Trial Counsel
Robert Baker, Senior Enforcement Counsel
Boston Regional Office
Securities and Exchange Commission
33 Arch Street, 23rd Floor
Boston, MA 02110
(617) 573-8813 (Bernstein)
(617) 573-4590 (Fax)
BernsteinD@sec.gov

Dated: December 30, 2010