

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF GROWTH REIT II, LLC.,

Respondent.

**DIVISION OF ENFORCEMENT'S
MOTION TO STRIKE DF GROWTH REIT
II, LLC 'S MOTION TO DISMISS**

The Division of Enforcement (“Division”) submits this Motion to Strike in response to Respondent DF Growth REIT II’s (“Respondent”) Motion to Dismiss served on April 12, 2022.

I. THE COURT’S APRIL 12, 2022 ORDER FOUND THAT AN OIP HAD BEEN ISSUED

On April 11, 2022, the parties in this action filed a joint prehearing conference statement that outlined a proposed prehearing schedule, at the Court’s request. In that statement, Respondent argued that an Order Instituting Proceedings (“OIP”) had not been issued by the Securities and Exchange Commission (the “Commission”).

On April 12, 2022, this Court issued an Order Setting the Prehearing Schedule in this matter (the “Order”). In the Order, the Court addressed Respondent’s arguments, finding that the Commission’s March 16, 2022 Order Temporarily Suspending Respondent’s Regulation A Exemption and the Commission’s March 31, 2022 Order setting this matter for a hearing “constitute the OIP.” *Order Setting Prehearing Schedule*, Rel. No. 33-6842 (April 12, 2022) at

1.

In addition, this Court noted that Respondent has been provided fair notice of the action as required under 17 C.F.R. § 201.200(a)(1) because the issuances “provided Respondent with notice of the proceeding, granted Respondent the right to request a hearing, stated the legal authority and jurisdiction for the proceeding, contained ‘a short and plain statement of the matters of fact and law’ leading to the Commission’s action, and stated the nature of the action taken (temporary suspension) as well as what would happen if Respondent did not request a hearing (permanent suspension).” *Id.*

Thus, this Court has already ruled that there is an operative OIP in this case and that Respondent has been provided with appropriate notice as required under the Commission’s Rules of Practice.

II. RESPONDENT’S APRIL 13, 2022 MOTION TO DISMISS IS MERITLESS

Despite the Court’s explicit findings on these issues, on April 13, 2022, Respondent filed a meritless Motion to Dismiss in this proceeding, rehashing the same argument that it had not been given notice that a proceeding had been initiated. In the alternative, Respondent requested that the Court require the Commission to issue another OIP.

The motion was also replete with broad assertions ranging from its purported past offers of voluntary cooperation, alleged harm to its investors arising from this proceeding, and arguments on the merits that are inappropriate for consideration on a motion to dismiss. Many of these arguments were recycled from Respondent’s prior briefing before the Commission and in matters that are currently pending before the Ninth Circuit.

Respondent requested that the Court vacate the current prehearing schedule and that the Court reset the hearing for a later date.

III. THE DIVISION'S MOTION TO STRIKE

In an effort to avoid relitigating issues on which this Court has definitively held, the Division requests that this Court issue an order striking Respondent's Motion to Dismiss. To borrow from the Federal Rules of Civil Procedure, Rule 12(f) states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial...." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (quotation marks, citation, and first alteration omitted), rev'd on other grounds by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

Here, the Court may use the same reasoning. Respondent's Motion to Dismiss is simply a second bite at raising an insufficient defense, that is, there is no OIP and thus, the hearing should be dismissed, or that the hearing should be continued until another OIP is issued. Respondent's Motion to Dismiss is also redundant of its initial position in the Joint Prehearing Statement. Because the Court has previously decided that there is an operative OIP in this matter, any subsequent litigation to the contrary raises spurious issues. A Motion to Strike is appropriate under these circumstances.

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IV. CONCLUSION

The fact that Respondent does not want to recognize that this Court has already ruled that the March 16, 2022 Order functions as an OIP is not grounds to dismiss this proceeding. The Division respectfully requests that the Court strike the Respondent's motion, or, in the alternative, set a briefing schedule on the Motion to Dismiss if it is inclined to re-visit the issue of whether there is an operative OIP.

Respectfully submitted,

Dated: April 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Motion to Strike DF Growth REIT II, LLC's Motion to Dismiss was served on the following on this 14th day of April, 2022, in the manner indicated below:

By Electronic Mail:

The Honorable Jason S. Patil
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Date: April, 14, 2022

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