

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 15, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF Growth REIT II, LLC,

Respondent.

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

Respondent DF Growth REIT II, LLC, ("REIT II") hereby opposes the Motion to Strike filed by the Enforcement Division ("ED") against REIT II's Motion to Dismiss (which also sought, in the alternative, an Order Instituting Proceedings or a more definite statement). The SEC's Rules of Practice do not authorize the ED's motion. Any response to REIT II's motion belongs in an opposition. REIT II has the right to make reasonable arguments in its defense, including even asking Your Honor to reconsider rulings. In a proceeding already shadowed by constitutional concerns for which judicial review in the Ninth Circuit has been sought, it makes no sense to increase irregularity by muzzling a party or sanitizing the record.

I. A MOTION TO STRIKE MAY NOT BE FILED ON A MOTION TO DISMISS

The ED relies upon Federal Rule of Civil Procedure 12(f) as authority for its motion to strike. However, Rule 12(f) only authorizes motions to "strike from a **pleading** an insufficient defense" or redundant material. Fed.R.Civ.P. 12(f) (emphasis added). Only Rule 7 pleadings (complaints, answers, cross-complaints, etc.) may be addressed under Rule 12(f), not motions or

memoranda. *Petaway v. City of New Haven Police Dep't*, 541 F. Supp. 2d 504, 507 (D. Conn. 2008) (denying a motion to strike as “[n]either a motion nor a memorandum is a pleading as defined in Rule 7(a) of the Federal Rules of Civil Procedure.”). *See also Nat. Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1161 (E.D. Cal. 2008) (“The Federal Rules of Civil Procedure do not provide for a motion to strike documents or portions of documents other than pleadings.”). Even where allowed, “[m]otions to strike are disfavored and infrequently granted.” 539 F. Supp. 2d at 1162. The ED should simply oppose REIT II’s motion, thereby addressing the many issues raised therein that were not the subject of Your Honor’s April 12, 2022 order.

II. REIT II WAS ENTITLED TO FILE ITS MOTION, WHICH SERVES A VALUABLE PURPOSE

A respondent has the right to “move for a ruling on the pleadings on one or more claims or defenses,” or to seek a more definitive statement. 17 C.F.R. §§ 201.250(a), § 201.220(d).¹ Nothing in the April 12, 2022 order overruled or negated these rights.

The ED’s claim that Your Honor already ruled on the issues raised in REIT II’s motion is both incorrect and irrelevant to the propriety of the ED’s motion to strike. The April 12 order, which was issued without the benefit of briefing, does not address jurisdiction,² due process,

¹ The Commission, in adopting Rule 250(a) in the 2016 amendments, made clear that “obtaining leave of the hearing officer prior to filing such a motion is unnecessary; a motion under paragraph (a) is, therefore, available to any party as a matter of right.” *See Amends. To the Commissions Rules of Prac.*, Rel. No. 34-78319 (July 13, 2016). The Commission has deemed a motion under Rule 250(a) as “analogous to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure,” thus permitting a motion challenging the sufficiency of the pleadings. *In the Matter of David Pruitt, CPA*, 2019 SEC LEXIS 666, *19, Rel. No. 6528 (March 28, 2019).

² “A court has an ‘affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.’” *Watson v. Faris*, 139 F. Supp. 3d 456, 459 (D.D.C. 2015) (citing *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001)).

compression of the hearing schedule,³ or sufficiency of the pleadings,⁴ all of which were raised in REIT II's motion to dismiss or for more definite statement. In the absence of briefing, Your Honor did not have the opportunity to address the full scope of issues that arise in absence of a proper OIP.

III. CONCLUSION

The ED's motion to strike is procedurally and substantively flawed, and should be denied regardless of the outcome on REIT II's motion to dismiss or for more definite statement.⁵

DATED: April 15, 2022

BUCHALTER
A Professional Corporation

By: /s/ Arielle Seidman

Sanjay Bhandari (619) 219-5376
Arielle Seidman (949) 224-6207
Buchalter
655 W. Broadway, Suite 1600
San Diego, CA 92101
COUNSEL FOR RESPONDENT,
DF GROWTH REIT II, LLC

³ REIT II's motion addresses the unfair compression of the schedule in these proceedings as a result of the ED's delayed document production and notice. Further, subsequent process throughout the proceeding is tied to the date that an OIP is issued and the information contained therein, thus requiring a definitive date of the OIP. *See, e.g.*, 17 C.F.R. § 201.360(a)(2) (setting the timeframe for the filing of an initial decision by the hearing officer based on the date of service of the OIP, which therein alters the dates for appeal and adoption or rejection of an initial decision).

⁴ Neither the ED's motion to strike nor Your Honor's April 12 order address pleading sufficiency. Whether or not the March 16 Order can function as an OIP is a separate question from whether any claim suggested therein was stated with sufficient particularity.

⁵ The ED's request for a briefing schedule is similarly unnecessary. The Rules of Practice already provide a briefing schedule: oppositions must be filed within five days, and replies three days thereafter. 17 C.F.R. § 201.154(b).

In the Matter of DF Growth REIT II, LLC
Administrative Proceeding File No. 3-20801
SERVICE LIST

Pursuant to Commission Rule of Practice 151 (17 C.F.R. §201.151), I certify that the attached:

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

was served on April 15, 2022, upon the following parties as follows:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop
1090 Washington, DC 20549-1090
countrymanv@sec.gov

(By electronic email only)

Jennifer C. Barry
Securities and Exchange Commission
444 S. Flower Street, Suite 900
Los Angeles, CA 90071
Email: barryj@sec.gov
(323) 965-3878

(By electronic email only)

Dated: April 15, 2022