

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.

RESPONDENT DF GROWTH REIT II, LLC'S MOTION
FOR AN ORDER TO SHOW CAUSE
WHY THE ENFORCEMENT DIVISION SHOULD NOT BE
SANCTIONED FOR:

- 1) (APPARENTLY) FAILING TO SERVE RESPONDENT DF GROWTH REIT II, LLC WITH ITS RESPONSE TO RESPONDENT'S JUNE 21, 2022 PLEADING; AND**
- 2) (APPARENTLY) FAILING TO INCLUDE ACCURATE CERTIFICATE(S) OF SERVICE WITH ITS FILING(S)**

July 7, 2022

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I. INTRODUCTION

To no one's great surprise, the importance of the "due process of law" is a quintessential truism – appearing in the Fifth Amendment to the U.S. Constitution and deriving its origins from none other than the Magna Charta (signed by King John of England in 1215).¹ At times it seems difficult, if not impossible, to find two scholars (or Supreme Court Justices) whose interpretations of this oft-studied phrase align perfectly. Legal commentators going back to at least the seventeenth century have generally agreed, however, that (at a minimum) the ancient legal word "process" had, and has, a procedural focus akin to modern 'service of process.'²

For centuries, virtually every adjudicatory tribunal in the United States – including administrative proceedings conducted by the United States Securities and Exchange Commission ("SEC") – has recognized that, "In addition to complying with the Rules of Practice, any method of service must also satisfy constitutional due process, which requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *China Biopharma, Inc.*, Admin Pro. File No. 3-17886 (March 20, 2019); see *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); see also *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973) (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at

¹ Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE LAW JOURNAL 1672 (2012).

² Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of the Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 267 (1975) (stating that the statute requiring due process "appears to demand that judgment and execution were not to be rendered against any man unless and until he was brought personally before the court by the appropriate writ").

issue, requiring a hearing in latter proceedings but not in the former); *Londoner v. City of Denver*, 210 U.S. 373 (1908) (same).

II. FACTUAL BACKGROUND

On June 3, 2022, the Division of Enforcement (“the Division”) properly filed and served its Motion for Summary Disposition and supporting pleadings (collectively, “the Division’s June 3 Motion”). On June 21, 2022, Respondent DF Growth REIT II, LLC (“Respondent”) timely filed and properly served (along with the requisite Certificate of Service) its (1) Response to the Division’s Motion for Summary Disposition; (2) Suggestion of Mootness; and (3) Motion for an Order Vacating the Temporary Suspension Order Currently in Effect (“Respondent’s June 21 Response and Motions”). On June 22, 2022, this Court issued an Order specifying that the Division’s reply/response to Respondent’s June 21 Response and Motions was due on June 28, 2022.

Accordingly, and consistent with this Court’s Order, Respondent (through its counsel) expected to be served with the Division’s reply/response to Respondent’s June 21 Response and Motions on June 28, 2022. That date came and went, however, without Respondent or counsel receiving anything whatsoever from the Division. Respondent’s counsel naturally assumed that the Division had inadvertently missed its June 28 deadline (an unfortunate occurrence, but one with which Respondent’s counsel can certainly sympathize), and that the Division would file and serve its reply/response the following day. Surprisingly, that did not happen the next day, or the day after that, or the day after that. ***In fact, as of midnight on July 6, 2022 (the date counsel prepared this Motion for an Order to Show Cause), Respondent’s counsel still has not been served by the Division with any reply/response to Respondent’s June 21 Response and Motions.***

Counsel has diligently checked the SEC’s docket report for this administrative proceeding daily. See <https://www.sec.gov/litigation/apdocuments/ap-3-20801.xml>. However, that docket report has not, and still does not, reflect any of the Division’s filing(s) that were due on June 28, 2022. (A PDF of the docket report as of July 6, 2022, is attached as Exhibit A, to this motion.)

III. ARGUMENT

Respondent’s counsel can only assume that either (1) the Division opted not to file anything whatsoever in reply/response to Respondent’s June 21 Response and Motions (which, frankly, seems unlikely); or (2) the Division did file its reply/response with this Court, but failed to serve Respondent’s counsel, thereby egregiously violating Rule of Practice 150. See 17 C.F.R. § 201.150 (requiring electronic service upon counsel who has filed a notice of appearance on behalf of a party); see also 17 C.F.R § 201.151(a) (specifying that “[a]ll papers required to be served upon any person” shall “*be filed contemporaneously* with the [Court]”) (emphasis added).

Moreover, assuming the second explanation is the correct one, it necessarily follows that the Division also failed to attach a Certificate of Service (or, at least, a truthful Certificate of Service) to its filing(s) with this Court, in blatant disregard of Rule of Practice 151(d). See 17 C.F.R § 201.151(d) (“Papers filed with ... a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the mailing address or email address to which service was made, if not made in person.”)

Contrary to the Division’s (apparent) disregard for the applicable Rules of Practice – not to mention its (apparent) disregard for, literally, centuries of Due Process jurisprudence – requiring it to serve Respondent’s counsel with “each paper, including each notice of appearance, written motion, brief, or other written communication,” 17 C.F.R. § 201.150(a), at the same time, see 17

C.F.R § 201.151(a) (“contemporaneously”), that that “paper ... or other written communication” is filed with this Court is no mere clerical task.

Rather, the requirement that the Division serve “each paper” it files with this Court “contemporaneously” on Respondent’s counsel is so fundamental and so essential to a fair hearing or adjudication that (unlike virtually every other provision of the Rules of Practice) it is unambiguously reiterated or referred to at least *four times* within the Rules:

- See Rule of Practice 150 (“Service of Papers by Parties”), which contains five separate subparts detailing how to complete service on parties in various circumstances, 17 C.F.R. § 201.150;
- See Rule of Practice Rule 151(d) (“Certificate of Service”), which states, “Papers filed with ... a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the ... email address to which service was made,” 17 C.F.R. § 201.150(d);
- See Rule of Practice 154 (“Motions”), which expressly applies “to motions and related filings” and, in subsection (a), states that “All written motions shall be served in accordance with [Rule] 150, [and] be filed in accordance with [Rule] 151,” 17 C.F.R. § 201.154(a); and
- See Rule of Practice 151(a) (“When to File”), which states, “All papers required to be served upon any person shall also be filed contemporaneously with the Commission electronically.... *The person making such filing is responsible for ensuring that the Commission receives a complete ... filing within the time limit set for such filing.*” 17 C.F.R. § 201.151(a) (emphasis added).

Read in concert, these Rules explicitly and unmistakably underscore the crucial role of proper and timely service in ensuring due process for all parties by affirmatively requiring that “each paper” filed with this Court be accompanied by a Certificate of Service.³ In fact, the Rules specifically vest the specific person within the Division who (presumably) filed “papers” with this Court on or about June 28, 2022, with “responsibl[ity] for ensuring that the [Court] receive[d] a complete ... filing,” including an accurate Certificate of Service, “within the time set for such filing.” 17 C.F.R. § 201.151. Assuming that the Division did actually file anything on or about June 28, 2022, given the facts stated above, one can only conclude that the Division intentionally or accidentally – but certainly recklessly and carelessly – abdicated its responsibility to serve Respondent’s counsel, to ensure that this Court received a complete filing, and, more generally, to comply with the Rules of Practice applicable to this proceeding.

Again, assuming that the Division did file pleadings on or about June 28, 2022, its utter – and ongoing – failure to comply with its obligation to serve Respondent’s counsel has unfairly prejudiced Respondent. For example, according to Rule of Practice 154(b), Respondent’s reply brief (in support of its June 21 Response and Motions) “shall be filed within three days after service of [the Division’s] opposition.” 17 C.F.R. § 201.154(b). Absent service of the Division’s opposition (assuming it filed one), Respondent can hardly prepare a reply brief, much less have any idea on what date such a brief might be due.

This conundrum, in turn, exposes Respondent to the very real possibility that this Court may (erroneously) conclude that Respondent has nothing further to say regarding its June 21

³ Unlike Certificates of Service, which are so important that they are *always* required to accompany every filing, the Rules of Practice require other types of certifications only in specific, typically unusual, instances, such as to confirm compliance with length limitations of filings exceeding a given number of pages, *see e.g.*, 17 C.F.R. § 201.154(c), or to explain an inability to file electronically, *see e.g.*, 17 C.F.R. § 201.152(a)(1).

Response and Motions, or – worse – may determine that Respondent has defaulted by failing to file a reply brief “or otherwise defend the proceeding.” As Rule of Practice 155(a) makes clear:

A party to a proceeding may be deemed to be in default and ... the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails ... (2) to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding[.] 17 C.F.R. § 201.155(a)

Respondent emphatically wishes to defend its position that, because the Regulation A offering at issue has already been permanently terminated, this administrative proceeding should be dismissed as moot. Accordingly, Respondent wishes to reply to the opposition brief that it can only assume the Division filed well over a week ago. Of course, because the Division has yet to serve Respondent or counsel with whatever it (presumably) filed with this Court on or about June 28, 2022, Respondent cannot meaningfully respond to the Division’s (as yet unknowable) arguments.

For the reasons discussed above, Respondent respectfully requests that this Court issue an Order to Show Cause why the Division should not be sanctioned for (apparently) completely ignoring both its obligations regarding service of process and its responsibility to provide this Court with an accurate Certificate of Service, by having whatever it (presumably) filed with this Court on or about June 28, 2022 rejected by this Court. *See* 17 C.F.R. § 201.180(b) (“The ... hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made.”) If, instead, this Court instead opts to direct the Division “to cure any deficiencies and to resubmit the filing within a fixed time period,” 17 C.F.R. § 201.180(b), Respondent respectfully requests that this Court order the Division to promptly and properly serve Respondent’s counsel with any and all relevant filings, complete with accurate Certificate(s) of Service.

In addition, the Division has substantially and unreasonably disrupted Respondent's counsel's previously scheduled plans (including counsel's personal plans with her minor children) by failing to serve counsel even approximately when expected. Accordingly, counsel respectfully requests that this Court grant Respondent *seven days to file its reply brief from the date* the Division serves the pleadings it (presumably) filed with this Court on or about June 28, 2022, rather than the typical three-day deadline ordinarily allowed for reply briefs. *See* 17 C.F.R. § 201.160. This brief extension from three days to seven days (beginning on an-as-yet-unknown service date) will allow counsel to meet both her professional and personal obligations, and will not prejudice the Division (which, after all, is responsible for the delay).

IV. CONCLUSION

For the reasons discussed herein, and in addition to the relief requested in the preceding paragraph, Respondent respectfully requests that this Court issue an Order to Show Cause why the Division should not be sanctioned for its (apparent) failure to serve Respondent or its counsel, as well as its (apparent) failure to file an accurate Certificate of Service, both in explicit violation of the Rules of Practice.

DATED: July 7, 2022

Respectfully submitted,

Leslie Hakala

By: _____

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Counsel for Respondent DF Growth REIT II, LLC

In the Matter of DF Growth REIT II, LLC

Administrative Proceeding File No. 3-20801

CERTIFICATE OF SERVICE

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

**RESPONDENT DF GROWTH REIT II, LLC'S MOTION
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was served on July 7, 2022, upon the following parties as follows:

The Honorable Carol Fox Foelak (By electronic email only)
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Dated: July 7, 2022

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