UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85352 / March 18, 2019

Admin. Proc. File No. 3-18811

In the Matter of

CEELOX, INC.,
TALON REAL ESTATE HOLDING CORP.,
VIRTUAL SOURCING, INC., AND
WINDSTREAM TECHNOLOGIES, INC.

ORDER

On September 20, 2018, the Commission issued an order instituting proceedings ("OIP") against the above-named respondents pursuant to Section 12(j) of the Securities Exchange Act of 1934.[1] Talon Real Estate Holding Corp., one of the respondents, filed an answer on September 28, 2018. On February 15, 2019, after the parties had filed a "Joint Prehearing Conference Statement," we issued a briefing schedule order setting March 1, 2019 as the due date for the filing of any motions for summary disposition.[2] We further noted, in that order, that Commission rules require the satisfaction of certain document production requirements before such motions can be made—specifically, that the Division first "make available for inspection and copying . . . documents obtained . . . prior to the institution of proceedings, in connection with the investigation . . ."[3]—and instructed the parties to notify us in the event that this had not occurred, in which case we would modify the briefing schedule.

On March 1, 2019, the Division filed its motion for summary disposition. On March 4, 2019, Talon claimed that the Division "has not provided discovery in compliance with Commission Rule of Practice 250(b)," requested "that the Commission vacate the scheduling order," and asked that the Commission order the Division to "comply with Commission Rule of Practice 250(b) prior to commencing with the motion for summary disposition."

The Division responded on March 5, 2019 by asserting that it had complied with the applicable document production requirements. The Division included in its response a copy of a

1 *Ceelox, Inc.*, Exchange Act Release No. 84243, 2018 WL 4537212 (Sept. 20, 2018).

2 *Ceelox, Inc.*, Exchange Act Release No. 85150, 2019 WL 653712 (Feb. 15, 2019).

3 17 C.F.R. §§ 201.230(a) and 250(b).

letter, dated September 21, 2018, addressed to Talon stating that "documents related to this matter are available for inspection and copying" at the Commission's Washington, D.C. headquarters. According to the Division, this letter was served on Talon along with the OIP. The Division further noted that Talon had not raised any concerns about discovery during a prehearing conference the parties held or in connection with a proposed briefing schedule to which the parties had earlier agreed. The Division also attached to its response a copy of its investigative file. According to the Division, "[n]o testimony was taken, no subpoenas were issued, and no one outside the Commission was consulted prior to the Division's recommendation" to institute these proceedings. The entire investigative file consists of five pages.

Talon filed a reply on March 11, 2019 in which it stated that the September 21, 2018 Division letter "did not constitute an offer to provide discovery to Talon in compliance with Commission Rules of Practice 230(b) and 250 when, at that juncture, Talon had not yet filed its Answer and Affirmative Defenses to the OIP." Talon also attached (1) an affidavit from its CEO stating that at no time between the February 15, 2019 briefing order and the Division's March 1, 2019 summary disposition filing did the Division "serve [Talon] with [its] document production pursuant to Commission Rule of Practice 250," and (2) electronic correspondence from March 6, 2019 which appears to show that a Division email purporting to transmit an unidentified "document" could not be accessed by counsel for Talon because, according to the counsel, it "was in a format that could not be opened."[4]

Talon appears to misunderstand the Division's discovery obligations. Rule of Practice 250(b) states that a party may move 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 Rule 230."[5] Nothing in that rule or elsewhere suggests that the documents must be made available after the answer has been filed, as Talon suggests. On the contrary, Rule of Practice 230(d) directs the Division to "commence making documents available to a respondent for inspection and copying pursuant to this rule no later than 7 days after service of the order instituting proceedings"—a deadline that precedes the filing deadline for the answer.[6]

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[4] Talon's counsel represented, in a cover letter, that this document "offer[ed] to make discovery material available to Talon," presumably in response to Talon's March 4 letter that claimed the Division had failed to provide discovery. The correspondence further indicated that the Division made repeated attempts to transmit the document and was perplexed as to why Talon could not open it. In any event, the correspondence noted that "hard copies" had also been delivered to Talon by the time the email was sent, so it does not appear to be disputed that Talon received this document regardless of any problems with the electronic "courtesy" copy.

[5] 17 C.F.R. § 201.250(b).

[6] 17 C.F.R. § 201.230(d); *see also Ceelox*, 2018 WL 4537212, at *3 (requiring filing of the answer within ten days after service of the OIP).

Furthermore, Rule of Practice 230 requires merely that the covered documents be made available for inspection and copying. There is no requirement that the Division serve a respondent with document production; on the contrary, Rule of Practice 230(e) states that the documents will be kept "at the Commission office where they are ordinarily maintained" and Rule 230(f) confirms that "[t]he respondent shall be responsible for the cost of photocopying."[7]

The Division complied with the applicable discovery requirements and thus was permitted, under Rule 250(b), to move for summary disposition when it did. Its September 21, 2018 letter notified Talon within seven days of service of the OIP that documents were available for inspection and copying, and Talon does not deny receiving that letter. There is no evidence, and Talon does not claim, that it sought and was denied access to the offered documents. Moreover, even if Talon established that the Division had not complied with Rule 230—and it has provided nothing to support such a finding—it would not justify rejecting the Division's summary disposition filing given the brevity of the investigative file (that Talon now has) and Rule 230's "harmless error" standard for assessing claims of non-compliance.[8]

Nevertheless, as a matter of discretion, and under the particular circumstances presented, we will extend the deadlines applicable to Talon in the February 15, 2019 briefing schedule. Accordingly, it is ORDERED that Talon shall file any motion for summary disposition and brief in opposition to the Division's motion for summary disposition by March 26, 2019—three weeks from the day the Division provided its investigative file and over six months after the Division informed Talon that the investigative file was available for inspection. It is further ORDERED that the Division's opposition brief to any motion for summary disposition Talon files and reply in support of the Division's motion for summary disposition is due April 16, 2019; and that any reply in support of a motion for summary disposition that Talon files is due April 23, 2019. Talon's motion is otherwise DENIED.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Acting Secretary

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7 17 C.F.R. §§ 201.230(e)-(f).

8 17 C.F.R. § 201.230(h) (providing that in the event a document required to be made available to a respondent by the Division of Enforcement is not made available "no rehearing or redecision of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not harmless error").