UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90517 / November 24, 2020

Admin. Proc. File No. 3-19419

In the Matter of

ERHC ENERGY, INC. AND
IDDRIVEN INC.,

Respondents.

ORDER DENYING MOTION FOR RULING ON THE PLEADINGS

The Division of Enforcement moves for a ruling on the pleadings revoking the registration of each class of the securities of ERHC Energy, Inc. ("ERHC") that is registered with the Commission pursuant to Section 12 of the Securities Exchange Act of 1934.[1] We deny the Division's motion because it has not established that it is entitled to a ruling on the pleadings.

I. Background

On September 5, 2019, the Commission issued an order instituting proceedings against ERHC pursuant to Exchange Act Section 12(j).[2] The OIP alleged that ERHC was "delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2017."[3] The OIP also alleged that, for this reason, ERHC had failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, which require issuers of classes of securities registered with the Commission pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports.[4] The OIP instituted public administrative proceedings to

1 *See* Rule of Practice 250(a), 17 C.F.R. § 201.250(a) (authorizing filing of motion for ruling on the pleadings); Exchange Act Section 12, 15 U.S.C. § 78*l*.

2 *ERHC Energy, Inc.*, Exchange Act Release No. 86880, 2019 WL 4242449 (Sept. 5, 2019); 15 U.S.C. § 78*l*(j). The OIP ordered that a public hearing before the Commission would be held at a time and place to be fixed by further order of the Commission. The OIP also instituted proceedings against another respondent that is not at issue here.

3 2019 WL 4242449, at *1.

4 2019 WL 4242449, at *1; 15 U.S.C. §§ 78m(a), 78*l*; 17 C.F.R. §§ 240.13a-1, .13a-13.

determine, among other things, whether "it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of [ERHC's] securities registered pursuant to Section 12 of the Exchange Act."[5]

On September 26, 2019, ERHC filed an answer to the OIP. In its answer, ERHC conceded that its last filed Form 10-Q was filed on June 30, 2017. ERHC also asserted a number of explanations and affirmative defenses and mitigating circumstances, including the "impending resolution" of litigation that has resulted in "material constraints" on its ability to make mandatory disclosures and its "prior long history of prompt filings."

On October 25, 2019, the Division of Enforcement filed a motion for a ruling on the pleadings against ERHC. The Division asserted that, based on the pleadings, it is entitled to an order revoking the registration of each class of ERHC's securities registered with the Commission "as a matter of law." ERHC did not respond to the motion.

We now deny the Division's motion. A motion for a ruling on the pleadings addresses only the sufficiency of the pleadings and does not implicate the underlying factual record. The Division does not identify and cite to undisputed allegations of the OIP and assert that they entitle it to the relief it seeks, as it would have to do to prevail on its motion. Nor could it in this case. Several factors determine whether suspension or revocation of the registration of the securities of a delinquent filer is the appropriate remedy in the public interest.[6] Because the public interest is neither an allegation of fact nor an affirmative defense, neither the OIP nor the answer in a Section 12(j) proceeding address the factors relevant to determining any appropriate sanction. And although Section 12(j) proceedings are often resolved based on motions for summary disposition because there we may consider the entire record, we will not convert the Division's motion into a motion for summary disposition. Our rules do not allow us to do so, and ERHC would not have known of a need to make a filing sufficient to oppose such a motion. We thus deny the motion.

II. Analysis

A. Rule of Practice 250(a) authorizes resolution of a proceeding on the pleadings where the pleadings establish that the movant is entitled to a ruling as a matter of law.

Rule 250(a) of our Rules of Practice permits any party, "[n]o later than 14 days after a respondent's answer has been filed," to "move for a ruling on the pleadings on one or more

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5 2019 WL 4242449, at *2.

6 *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 WL 1506286, at *4 (May 31, 2006) ("[W]e will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and the credibility of its assurances, if any, against further violations.").

claims or defenses."[7] Rule 250(a) "thus permits a respondent to seek a ruling as a matter of law based on the factual allegations in the OIP and permits either party to seek a ruling as a matter of law after the filing of an answer."[8] We have recognized that the procedure provided under Rule 250(a) is analogous to that applicable in federal district court to motions to dismiss and for judgment on the pleadings under Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure.[9] We have also considered precedent construing the Federal Rules of Civil Procedure when construing our Rules of Practice (although that precedent does not bind us when doing so).[10] As with a motion under Federal Rules of Civil Procedure 12(b)(6) and 12(c), to succeed on a motion under Rule 250(a), a movant must establish that "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law."[11]

The Commission promulgated current Rule 250(a) when it amended the Rules of Practice in 2016. The Commission amended Rule 250 to provide for three separate types of dispositive motions: a motion for a ruling on the pleadings under Rule 250(a); a motion for summary disposition under either Rule 250(b) or (c) (depending on the type of proceeding); and a motion

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7 17 C.F.R. § 201.250(a).

8 *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 78319 (July 13, 2016), 81 Fed. Reg. 50,212, 50,224 (July 29, 2016) ("2016 Adopting Release"). The 2016 Adopting Release adopted, with some revisions, amendments to the Rules of Practice proposed in 2015. *See generally 2016 Adopting Release*, 81 Fed. Reg. 50,212; *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 75977 (Sept. 24, 2015), 80 Fed. Reg. 60,082 (Oct. 5, 2015).

9 2016 Adopting Release, 81 Fed. Reg. at 50,224 n.110.

10 *See, e.g.*, *James S. Tagliaferri*, Exchange Act Release No. 75820, 2015 WL 5139389, at *2 n.14 (Sept. 2, 2015) ("In construing our rules, 'we have been guided by the liberal spirit of the Federal Rules of Civil Procedure' with respect to amendment [of pleadings]." (quoting *Carl L. Shipley*, Exchange Act Release No. 10870, 1974 WL 161761, at *4 n.16 (June 21, 1974) (bracketed text inserted))); *see also S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *3 n.11 (Dec. 5, 2014) ("Although we are not governed by the Federal Rules of Civil Procedure, those rules sometimes provide helpful guidance."); *cf. David Mura*, Exchange Act Release No. 72080, 2014 WL 1744129, at *4 n.23 (May 2, 2014) (finding precedent interpreting similar Federal Rule of Civil Procedure to be "relevant," but recognizing that "we are 'not bound to interpret [our] own rule in the same way federal courts interpret their rule'" (quoting *Rapoport v. SEC*, 682 F.3d 98, 104 (D.C. Cir. 2012)); *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *5 (May 20, 2008) (recognizing approach taken in Federal Rules of Civil Procedure, but applying controlling provision of Rules of Practice).

11 17 C.F.R. § 201.250(a); *see also, e.g.*, *Furgess v. Penn. Dep't of Corrections*, 933 F.3d 285, 288 (3d Cir. 2019) (standard under Rule 12(b)(6)); *Beil v. Lake Erie Correction Records Dep't*, 282 F. App'x 363, 366 n.4 (6th Cir. 2008) (standard under Rule 12(c)).

for a ruling as a matter of law following completion of the case in chief under Rule 250(d).[12] Each of these motions requires that a decision be made on the basis of a different record.

First, in determining whether to grant a motion for a "ruling on the pleadings" under Rule 250(a), our focus is necessarily on the pleadings;[13] matters outside them are not properly before us.[14] This is because a motion for a ruling on the pleadings addresses only the sufficiency of the pleadings and does not implicate the underlying factual record.[15] Pleadings clarify what is in dispute; they do not present the factual record to resolve them.[16]

Second, Rules 250(b) and (c) provide for a motion for summary disposition "on one or more claims or defenses" on the basis of the evidentiary record "after a respondent's answer has been filed and documents have been made available to that respondent for inspection and

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[12] Rule of Practice 250(a)-(d), 17 C.F.R. § 201.250(a)-(d); 2016 Adopting Release, 81 Fed. Reg. at 50,224.

[13] 17 C.F.R. § 201.250(a).

[14] *Cf. Wolfington v. Reconstructive Orthopaedic Associates II PC*, 935 F.3d 187, 197 (3d Cir. 2019) ("Because the District Court relied on matters outside the pleadings, it erred in entering judgment on the pleadings."); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) ("When considering a motion for judgment on the pleadings . . . , the court generally must ignore materials outside the pleadings . . . ."); *National Juvenile Law Center, Inc. v. Regnery*, 738 F.2d 455, 456 n.1 (D.C. Cir. 1984) ("The District Court's opinion refers to matters outside the pleadings and thus could not be a judgment on the pleadings . . . .").

[15] *Cf. Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."); *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 831 (N.D. Ohio 2010) ("The purpose of a motion under either [Rule of Civil Procedure 12(b)(6) or 12(c)] is to test the sufficiency of the complaint—not to decide the merits of the case."); *Vega v. Lantz*, No. 3:04CV1215, 2006 WL 2788374, at *1 (D. Conn. Sept. 26, 2006) ("The purpose of a motion for judgment on the pleadings 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" (quoting *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York*, 375 F.3d 168, 176 (2d Cir. 2004))).

[16] *See, e.g.*, *Muehl v. Schrubbe*, No. 09–cv–16–bbc, 2009 WL 1587176, *1 (W.D. Wis. June 5, 2009) ("The purpose of the answer is not [to] provide plaintiff with detailed information about defendants' litigation strategy, but only to determine which of plaintiff's allegations defendants dispute."); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1182 ("[T]he function of a pleading in federal practice is to inform the opposing party and the court of the nature of the claims and defenses being asserted by the pleader and, in case of an affirmative pleading, the relief being demanded.").

copying pursuant to Rule 230."[17] These motions are analogous to summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure.[18] Unlike under Rule 250(a), where the non-movant's factual allegations must be accepted as true, under either Rule 250(b) or (c) the movant need only "show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law."[19] "The facts on summary disposition must be viewed in the light most favorable to the non-moving party."[20] But the party "opposing summary disposition 'may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing.'"[21]

Third, under Rule 250(d), "[f]ollowing the interested division's presentation of its case in chief, any party may make a motion, asserting that the movant is entitled to a ruling as a matter of law on one or more claims or defenses."[22] "This is analogous to Federal Rule of Civil Procedure 50(a) (judgment as a matter of law)."[23] The record on which a decision on a motion under Rule 250(d) is based is "the Division's case in chief" presented at the hearing.[24]

Although the Federal Rules of Civil Procedure permit a court to convert a motion to dismiss or for judgment on the pleadings to a summary judgment motion if the parties submit materials outside the pleadings, our Rules of Practice contain no similar provision.[25]

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17 Rule 250(b) & (c), 17 C.F.R. § 201.250(b) & (c).

18 2016 Adopting Release, 81 Fed. Reg. at 50,224 nn.112 & 115.

19 17 C.F.R. § 201.250(b) & (c).

20 *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014) (citing *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *9 (Aug. 5, 2011)).

21 *Tagliaferri*, 2017 WL 632134, at *7 (quoting *Daniel Imperato*, Exchange Act Release No. 74596, 2015 WL 1389046, at *6 (Mar. 27, 2015), *vacated in part on other grounds as to remedy*, Exchange Act Release No. 86261, 2019 WL 2725332 (July 1, 2019)); *see also Comeaux*, 2014 WL 4160054, at *2 ("Once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing." (citing *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013))).

22 17 C.F.R. § 201.250(d).

23 2016 Adopting Release, 81 Fed. Reg. at 50,225 n.124.

24 2016 Adopting Release, 81 Fed. Reg. at 50,225.

25 *Compare* Fed. R. Civ. P. 12(d) (providing that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion

B. The Division of Enforcement will not be entitled to a ruling on the pleadings on its claims against a respondent in most cases in which the respondent files an answer.

The United States Supreme Court has explained that, when considering whether to grant a judgment on the pleadings in favor of a plaintiff in a federal court proceeding, the defendant's "denials and allegations of the answer which are well pleaded must be taken as true."[26] Similarly, when the Division moves for a ruling on the pleadings with respect to a claim against a respondent, our Rule 250(a) requires that a respondent's well pled denials and any additional facts it avers must be accepted and reasonable inferences drawn in its favor. The Division is thus unlikely to prevail on a motion for judgment on the pleadings on its claims in a disputed matter.[27]

The Division is also unlikely to be able to establish that it is entitled to relief based on the pleadings in a disputed proceeding pursuant to Section 12(j).[28] The OIP in a Section 12(j) proceeding institutes proceedings to determine whether the facts alleged by the Division are true, whether respondents have any defenses, and whether "it is necessary and appropriate for the

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must be treated as one for summary judgment under Rule 56") *with* Rule of Practice 250, 17 C.F.R. § 201.250 (containing no provision analogous to Fed. R. Civ. P 12(d)).

[26] *Beal v. Missouri Pac. R.R. Corp.*, 312 U.S. 45, 51 (1941), *cited with approval in District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO v. Liberty Maritime Corp.*, 933 F.3d 751, 761 (D.C. Cir. 2019).

[27] *Healthway Shopping Network*, Exchange Act Release No. 89374, 2020 WL 4207666, at *3 (July 22, 2020). *See generally Scottsdale Ins. Co. v. Columbia Ins. Grp.*, 972 F.3d 915, 919 (7th Cir. 2020) ("When a plaintiff moves for judgment on the pleadings, the motion should not be granted unless it appears beyond doubt that the nonmovant cannot prove facts sufficient to support its position, and the plaintiff is entitled to relief."); *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) ("[A] plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings."); 5C Charles Alan Wright and Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1368 (3d ed.) ("A motion for judgment on the pleadings under Rule 12(c) may be granted only if all material issues can be resolved on the pleadings by the district court; otherwise, a summary judgment motion or a full trial is necessary. . . . Thus, the plaintiff may not secure a judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. . . . Because of this limitation on the successful utilization of the Rule 12(c) procedure, the moving party always should consider employing a summary judgment motion rather than a motion for judgment on the pleadings.").

[28] *Healthway Shopping Network*, 2020 WL 4207666, at *3.

protection of investors" to impose remedial relief.[29] The pleadings alone in a disputed Section 12(j) case are unlikely to present a sufficient basis to make these determinations.

As relevant here, we have articulated a broad nonexclusive set of factors to apply in determining in cases filed pursuant to Exchange Act Section 12(j) whether either suspension or revocation of the registration of registered classes of securities of a delinquent filer is the appropriate remedy in the public interest.[30] Because the public interest is neither an allegation of fact nor an affirmative defense, neither the OIP nor the answer in a Section 12(j) proceeding address the factors relevant to determining any appropriate sanction.

This is not to say that the registration of a delinquent issuer's securities can never be suspended or revoked in a proceeding based solely on the papers. The Division may file a motion for summary disposition under Rule 250(b), and "we have repeatedly observed that summary disposition is typically appropriate" in "proceedings pursuant to Exchange Act Section 12(j)" "because the issues to be decided are narrowly focused and the facts not genuinely in dispute."[31] But, unlike a motion pursuant to Rule 250(a), we are not limited to considering the OIP and the answer in evaluating a motion for summary disposition under Rule 250(b).

We also have resolved Section 12(j) cases in which the respondent has not answered the OIP through our default procedures.[32] Rule 155(a) permits us to "determine the proceeding against [the defaulting] party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true."[33] As a result, in the case of a default the OIP itself may provide a sufficient basis to impose sanctions in a Section 12(j) proceeding. But with respect to a motion for a ruling on the pleadings under Rule 250(a), where an answer to the OIP has been filed the OIP may not itself be sufficient to impose sanctions. As discussed above, under Rule 250(a) a respondent's well-pled denials and any additional facts it avers in its answer must be accepted and reasonable inferences drawn in its favor.

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29 *See, e.g., supra* note 5.

30 *See supra* note 6 (citing *Gateway Int'l Holdings, Inc.*, 2006 WL 1506286, at *4).

31 2016 Adopting Release, 81 Fed. Reg. at 50,224 & n.113; *see, e.g.*, *China Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013) (holding summary disposition in a Section 12(j) proceeding appropriate because respondent "still has not identified any evidence demonstrating a genuine issue of material fact"); *Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 WL 2499350, at *8 (June 29, 2012) ("We have found that summary disposition is appropriate in proceedings like this one brought pursuant to Exchange Act Section 12(j), where the issuer has not disputed the facts that constitute the violation.").

32 *See, e.g.*, *Gepco, Ltd.*, Exchange Act Release No. 85299, 2019 WL 1167736, at *1 (Mar. 13, 2019).

33 17 C.F.R. § 201.155(a).

C. We deny the Division's motion for a ruling on the pleadings.

Applying these principles, we deny the Division's motion for a ruling on the pleadings for two reasons. First, the Division does not cite or apply the controlling standard. A movant must show that "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law."[34] The Division does not identify and cite to undisputed allegations of the OIP and assert that they entitle it to the relief it seeks, as it must.[35] ERHC averred in its answer that it had "duly and timeously [sic] filed its periodic reports for over 10 years," and cited pending litigation subject to a state court "sealing order" as "restraining any disclosure" and "depriving [ERHC] of the resources to meet certain regulatory obligations." The Division focuses only on ERHC's concession that its Form 10-Q is delinquent and does not address the substance of its answer.

Second, the record is insufficient for us to determine the public interest at this time. As explained above, Section 12(j) proceedings are often resolved based on motions for summary disposition. But because the Division filed a motion for a ruling on the pleadings under Rule 250(a), none of the additional materials beyond the pleadings that we would consider under Rule 250(b) are before us now.[36] And we will not convert the Division's motion into a motion for summary disposition for the reasons explained above.

Accordingly, IT IS ORDERED that the Division of Enforcement's motion for a ruling on the pleadings against ERHC Energy, Inc., is denied.

By the Commission.

Vanessa A. Countryman
Secretary

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34 *See supra* note 11.

35 *See generally Talon Real Estate Holding Corp.*, Exchange Act Release No. 87614, 2019 WL 6324601, at *7 (Nov. 25, 2019) (rejecting respondent's request for a ruling on the pleadings under Rule 250(a) because respondent had not shown that, 'even accepting all of the [Division's] allegations as true and drawing all reasonable inferences in the [Division's] favor, [Talon] is entitled to ruling as a matter of law'") (alterations in original) (quoting Rule 250(a)).

36 *Cf. United Development Funding*, Exchange Act Release No. 89535, 2020 WL 4720528, at *4 n.21 (Aug. 12, 2020) (granting summary disposition to the Division of Enforcement in a Section 12(j) proceeding because the Division did not argue that "'the missing filings are all' that must be shown to justify revocation" but rather submitted a brief that showed revocation was warranted based on "a consideration of all of the *Gateway* factors").