

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8824 / July 11, 2007

CORRECTED

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56045 / July 11, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2618 / July 11, 2007

Admin. Proc. File No. 3-12288

In the Matter of

DAVID HENRY DISRAELI
and
LIFEPLAN ASSOCIATES, INC.

ORDER DENYING MOTION FOR LEAVE TO TAKE ADDITIONAL EVIDENCE

On June 13, 2007, Respondents David Henry Disraeli and Lifeplan Associates, Inc. ("Respondents") filed a "Motion for Leave to Take Additional Evidence" in which they "request[ed] that the Commission order joint depositions" of an attorney in the Division of Enforcement and a staff accountant in the Office of Compliance, Inspections, and Examinations. 1/ For the reasons discussed below, we deny the motion.

Rule of Practice 233 prescribes the standards for taking depositions in our administrative proceedings. 2/ Rule 233 is part of the Rule 200 series of our Rules of Practice governing the initiation of proceedings and prehearing rules. The Rule requires the filing of a written motion to obtain permission to take a deposition and specifies the particular, limited circumstances in

1/ Respondents appear before the Commission pro se. Respondents state that they move for the submission of additional evidence "pursuant to Rule 201.42." Although our Rules of Practice contain no such rule, we nonetheless consider Respondents' motion.

2/ 17 C.F.R. § 201.233.

which a party may obtain testimony from a witness by deposition in lieu of at the hearing. ^{3/} These circumstances include the likelihood that the prospective witness will give testimony material to the proceeding, that the prospective witness, who is then in the United States, will be unable to attend or testify at the hearing due to age, sickness, infirmity, imprisonment, other disability, or absence from the United States, and that the taking of the deposition will serve the interests of justice. ^{4/} The comment to Rule 233 states that depositions should be used "only to preserve testimony of a witness who would be unlikely to be able to attend the hearing." ^{5/} The placement of the Rule among those governing prehearing proceedings, the procedural requirements for obtaining permission to take a deposition and the limitations on its availability, and the comment's reference to witnesses "unlikely to be able to attend the hearing" evince our intention that any depositions will be taken prior to a hearing, in lieu of, rather than in addition to, testimony given at the hearing, and will be the exception to the usual rule that witnesses will provide testimonial evidence at the hearing. Depositions are not intended to be used as a means of adducing additional evidence after a hearing. The depositions sought by Respondents cannot be scheduled prior to the hearing because the hearing has already been concluded.

Rule of Practice 452 provides that a party may file a motion to adduce additional evidence after the conclusion of a hearing. ^{6/} However, any such motion must show "that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." ^{7/} Respondents have not demonstrated either materiality or reasonable grounds for failing to adduce the evidence previously. ^{8/} Respondents acknowledge that the enforcement attorney was on both parties' witness lists and that Respondents did not call her due to a dispute between Respondents and their counsel. Respondents claim that the attorney's testimony will show that the investigation was not objective. The potential materiality of this testimony is unclear. The initial decision was not based on the investigation but on the evidence adduced at the hearing. Respondents also make no argument that any issue of age, sickness,

^{3/} Id. § 201.233(a)-(b).

^{4/} Id. § 201.233(b).

^{5/} Rules of Practice, Exchange Act Rel. No. 35833 (June 9, 1995), 59 SEC Docket 1546, 1573.

^{6/} 17 C.F.R. § 201.452.

^{7/} Id.

^{8/} Cf. Thomas F. White, 51 S.E.C. 1194, 1197 n.6 (1994) (granting respondent's request under the predecessor to Rule 452 to adduce as additional evidence a witness's sworn deposition testimony where the evidence was material and respondent had shown reasonable grounds for the failure to adduce the evidence before the law judge because the witness "was out of the country during the hearings before the law judge").

infirmity, imprisonment, other disability, or absence from the United States provided a basis for the enforcement attorney's non-appearance at the hearing. 9/

Respondents also acknowledge that the staff accountant testified at the hearing on August 15, 2006. She therefore was available for cross-examination. Thus, Respondents' request is for testimony in addition to that given at the hearing. 10/ Respondents' reasons for requesting depositions do not satisfy the standards set forth in our Rules of Practice, and we deny Respondents' motion for leave to take additional evidence. 11/

Accordingly, IT IS ORDERED that the "Motion for Leave to Take Additional Evidence" of David Henry Disraeli and Lifeplan Associates, Inc., be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

9/ Respondents blame counsel who represented Respondents at the hearing for committing "grave errors" by failing to "call certain witnesses to testify against the protests of Respondents" and for failing to bring the staff accountant's alleged failures "to the court's attention." We reject this argument as a basis for ordering post-hearing depositions. Cf. William A. Calvo, III, Order on Motion for Supplemental Hearings and/or Briefs and for Reconsideration of Motion to Admit Additional Evidence, Admin. Proc. Rulings Rel. No. 342 (Aug. 29, 1989), 1989 WL 376620, at *1 (order of administrative law judge)(denying respondent's request to admit additional evidence that respondent contended was "'crucial to a 'complete evaluation of the matter under consideration'" where respondent's "only slightly veiled effort to blame counsel for not offering the materials in a timely fashion [was] without substance" because respondent "had a full opportunity to present evidence and argument" and there was "no reason why he should be permitted to start over again").

10/ Respondents claim that the accountant's testimony will demonstrate that her analysis of their financial records did not comport with generally accepted accounting principles.

11/ We also deny Respondents' request that we "grant an extension to Respondents in order to include the additional evidence obtained in the depositions requested."