

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16795

In the Matter of

Joseph J. Fox,

Respondent.



DIVISION OF ENFORCEMENT'S
MOTION TO STRIKE

The Division of Enforcement ("Division") moves to strike the Reply Brief in Support of the Petition for Review of the Initial Decision ("Reply Brief") filed by Respondent Joseph J. Fox ("Fox"). Fox's Reply Brief violates the Commission's Rules of Practice, and prejudices the Division, in multiple, material ways. Fox advances several new, spurious arguments, including new arguments attacking the Order Instituting Proceedings ("OIP"), for the first time in the Reply Brief. Fox did not raise these new arguments in his opening brief; nor are Fox's new arguments responsive to arguments raised by the Division in its opposition brief. Similarly, further highlighting the problems with his Reply Brief, Fox has submitted twenty new exhibits which are not part of the record in this proceeding. And to top it all off, Fox's Reply Brief is twenty-seven single-spaced pages long, close to twice the presumptively acceptable page length for replies. The Reply Brief is grossly prejudicial to the Division. Moreover, the prejudicial effect of the deficiencies embodied in Fox's Reply Brief, when taken together, cannot be rectified by simply striking selected portions of the brief. The Division therefore requests that the entire Reply Brief, together with its supporting exhibits, be stricken

from the record. Alternatively, in the event that the Commission decides to permit Fox's overlong Reply Brief, including its newly raised arguments and newly submitted exhibits, the Division requests leave to file an additional response brief of equal length, together with supporting exhibits.

A. Fox's Reply Brief Violates Rule 450(b)

Rule 450(b) of the Rules of Practice provides that “[r]eply briefs shall be confined to matters in opposition briefs of other parties.” The Division’s opposition brief was limited to a discussion of how the *Steadman* factors apply in this case. In his Reply Brief, Fox goes far beyond the matters addressed in the opposition brief to discuss matters that have little or no bearing on the issue presented in this case. To cite just two of several examples, the Reply Brief contains a long, irrelevant discourse regarding Fox’s personal disputes with shareholders and former co-workers and a comparably long, irrelevant, and groundless complaint about what Fox perceives to be hostility directed at him by the Division. These arguments do not respond to the Division’s opposition brief, nor were they advanced in Fox’s initial brief. Rather, Fox simply springs them on the Division for the first time in his Reply Brief. Moreover, Fox’s new arguments are irrelevant to the sole issue presented in this case: whether it is in the public interest to bar Fox from participating in the securities industry.¹ The Commission should not consider these arguments in deciding this appeal and, instead, should strike Fox’s Reply Brief.

¹ In addition to improperly advancing new arguments in his Reply Brief, Fox violates the terms of his bifurcated settlement by contesting the factual allegations of the OIP, which he agreed would be taken as true. If the Commission permits Fox’s Reply Brief and allows the Division an opportunity to respond, the Division will address, and refute, all of Fox’s arguments.

B. Fox's Reply Brief Violates Rule 452

It is improper for a litigant to attempt to supplement the record on appeal with documents or other evidence that were not introduced in the underlying proceedings unless the Commission has allowed the submission of such evidence pursuant to Rule 452. Rule 452 requires the party to file a motion seeking leave to submit additional evidence and to show "with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." In connection with his Reply Brief, Fox filed twenty exhibits that were not previously a part of the record.² Fox did not seek leave to submit these materials; nor did he provide any explanation as to why he failed to offer them before the law judge. None of the materials appear to have been recently created or discovered; and there is no other readily apparent reason why Fox was unable to offer the exhibits until this late stage in the proceedings. Moreover, Fox has provided no showing of why any of the new exhibits are material to this proceeding. For these reasons, the Commission should not allow these exhibits to become part of the record.

C. Fox's Reply Brief Violates Rule 450(c)

Fox's Reply Brief is twenty-seven single-spaced pages long. The Division has not performed a word count on the brief, but it is obviously far in excess of the permitted limits. Rule 450(c) allows reply briefs containing up to 7,000 words of fact and argument. Rule 450(d) provides that briefs which do not exceed 15 pages, exclusive of certain specified portions, are presumed to comply with the 7,000-word limitation. A longer brief must be accompanied by a certification that the brief complies with the word limitation. Coming in as it does at twenty-seven pages, and unaccompanied by a certification, Fox's Reply Brief is

² The new exhibits include 3, 5, 6, 7A, 7, 8, 9, 10, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 26 and 27.

clearly in violation of Rule 450(c) and should be stricken for that reason alone. The Commission recently granted the Division's motion to strike a similarly-overlong brief in another pending Administrative Proceeding in which the respondent ignored the length limitations contained within Rule 450(c). See, e.g., In the Matter of the Application of Laurie Bebo and John Buono, CPA, Exchange Act Rel. No. 77163 (Feb. 17, 2016).

CONCLUSION

For the foregoing reasons, the Division respectfully requests that Fox's Reply Brief, together with its supporting exhibits, be stricken. In the alternative, the Division requests leave to file a responsive brief of equal length, together with supporting exhibits.

Dated: September 27, 2016

Respectfully submitted,



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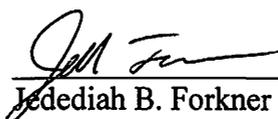
CERTIFICATE OF SERVICE

Jedediah B. Forkner, an attorney, certifies that on September 27, 2016, he caused a true and correct copy of the **Division of Enforcement's Motion to Strike** to be served on the following Respondent by United Parcel Service Overnight Delivery and e-mail delivery:

Mr. Joseph J. Fox

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By:



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