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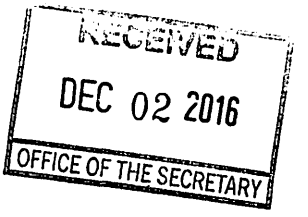

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17614

In the Matter of

LAURENCE I. BALTER d/b/a ORACLE INVESTMENT RESEARCH,

Respondent.

Administrative Law Judge
Carol Fox Foelak

JOINT PROPOSED PREHEARING SCHEDULES

Pursuant to the Court's Order entered November 21, 2016, counsel for the Division of Enforcement ("Division") and Respondent Laurence I. Balter met and conferred about a schedule for prehearing discovery. The parties were able to reach agreement on some, but not all, issues. The agreement is predicated on the date that the hearing is currently scheduled to begin, June 19, 2017. Respondent has indicated that he may seek to delay the start of the hearing; such a request would be brought to the Court by separate motion.

Following is the proposed schedule for the items on which the parties agreed:

Item	Joint Proposal
Exchange of witness and exhibit lists, submission of stipulated facts, and requests for judicial notice	May 26, 2017
Filing of prehearing briefs, motions in limine, and objections to exhibits	June 2, 2017
Opposition to prehearing briefs, motions in limine, and responses to objections	June 7, 2017
Prehearing conference	June 12, 2017
Hearing commences	June 19, 2017

In addition, the parties agree on the date for the exchange of expert reports. The parties disagree, however, on the appropriate schedule for the close of fact discovery and on the schedule for expert discovery. Each proposal is taken in turn below:

The Division's Proposal

The Division proposes that fact discovery should close simultaneously with the exchange of expert reports, as is typical in litigation. *See EEOC v. Peoplemark, Inc.*, No. 1:08-cv-907, 2010 WL 748250, at *7 (W.D. Mich. Feb. 26, 2010) (noting that expert reports normally fall due at the end of discovery). In fact, as highlighted in the Division's recent opposition to respondent's motion for a more definite statement, the customary practice in SEC administrative

proceedings is for the disclosure of expert reports mere weeks before the hearing. *See, e.g.*, *Equity Trust Co.*, Admin. Proc. Rel. No. 3069, 2015 SEC LEXIS 3481, at *1 (Aug. 26, 2015) (Foelak, J.) (order setting exchange of reports four weeks before hearing); *Thomas A. Neely, Jr.*, Admin. Proc. Rel. No. 1959, 2014 SEC LEXIS 4074, at *1 (Oct. 29, 2014) (Foelak, J.) (three weeks before hearing); *Wedbush Secs. Inc.*, Admin. Proc. Rel. No. 1771, 2014 SEC LEXIS 3227, at *1 (Sept. 5, 2014) (Foelak, J.) (twenty-five days before hearing).

The Division, in an effort to compromise between this customary practice and respondent's stated need for an early disclosure of expert reports, offered the following proposal that calls for the exchange of expert reports some *four months* prior to the hearing in this matter:

Item	Division Proposal
Close of fact discovery and exchange of expert reports	February 17, 2017
Exchange of rebuttal reports	March 3, 2017
Close of expert discovery	April 19, 2017

This proposal would pose no disadvantage to respondent, as his expert reports have already been drafted and would allow respondent access to the Division's expert reports significantly earlier than is custom.

Respondent, however, proposes that the parties should deviate from typical practice to allow respondent to both obtain early the Division's expert reports *and* conduct fact discovery for an additional two months. Respondent's "have your cake and eat it too" proposal should be rejected. First, there is no reason here to deviate from the typical practice whereby the expert witness formulates an opinion based on all facts in the record. *See SEC v. SBM Inv. Certificates, Inc.*, No. DKC 2006-0866, 2007 WL 609888, at *20 & n.10 (D. Md. Feb. 23, 2007) ("[t]he SEC cites significant authority for the proposition that complex litigation often is conducted with expert discovery delayed until after some or all fact discovery is completed") (citing *Manual for*

Complex Litigation, § 11.481 at 98 (4th ed. 2004)). Second, such an approach creates inefficiency, as it "would require significant revisions of expert reports in response to later-discovered facts." *Id.* at *20 (revising scheduling order to establish expert deadlines after the close of fact discovery). Finally, setting the fact discovery deadline to follow the disclosure of expert reports could result in the consequence (intended or otherwise) of the parties engaging in gamesmanship by using fact witnesses to undercut the opposing expert report.

For these reasons, the Division requests that the Court adopt a schedule that closes fact discovery at or before the time expert reports are due.

The Respondent's Proposal

Mr. Balter proposes that fact discovery cutoff and expert discovery cutoff be set on the same date, April 19, 2017. Such proposal reasonably provides Mr. Balter and the Division two months to conduct fact discovery after he learns about the data driven expert reports that will be at the core of the presentations at the hearing.

Item	Division Proposal
Exchange of expert reports	February 17, 2017
Exchange of rebuttal reports	March 24, 2017
Close of all discovery (fact and expert)	April 19, 2017

The difference between the Division's proposal and that of the Respondent can be summarized as follows: would justice more likely be served by allowing Respondent to conduct his limited fact discovery after learning about the data driven expert opinions upon which this action is founded, or would justice more likely be served by requiring that Respondent conduct his limited fact discovery blind to the issues that will be presented at the hearing. Obviously, justice requires the former. That is particularly the case if the Court were to deny Respondent's motion for a more definitive statement (which it should not do).

This case involves transactional data from multiple accounts over a relatively short 2 year trading period. The expert reports are data driven based on the specific trades at issue in the case. That data is not going to change. There are undoubtedly different characterizations of that statistical data, but the data, itself, is not going to change. Thus, this is not a case were changes to the expert reports are likely to be generated by allowing discovery to proceed after the exchange of expert reports.

The Respondent has already submitted its two expert reports to the Court and to the Division. The Division has already verbally presented to Mr. Balter's counsel, without permitting possession or copying, excerpts of its expert reports and analysis. But, such presentation did not allow Respondent to understand, with particularity, the differences between his experts' reports, which reflect that he did not commit any of the violations at issue in this case, and the Division's expert analysis on the same topics. What the Respondent needs to understand, in order to commence meaningful discovery, is what factual differences exist between the expert reports of the Division and Respondent. For example, if the Division's expert relies on an ambiguous statement from the transcript of investigative testimony of Witness A, Respondent should be entitled to depose Witness A to clear up any ambiguity, ensure the veracity and foundational knowledge of Witness A pertaining to such statement, and determine the biases of that Witness. Under Respondent's proposal, he could do so. Under the Division's approach, Respondent would be stuck trying to subpoena the witness to the hearing in Hawaii and hoping that witness would appear and testify at the hearing in a light favorable to Respondent.

The Division is concerned that its experts might have to revise their reports upon the discovery of new facts. This irrational fear is far from compelling under these circumstances. If the expert report is based on false facts, it should be revised to present the truth. While that process is possible, albeit unlikely, there are substantial benefits to the interests of justice that

true facts, not false facts, support the expert reports to be presented to the court. Balancing the Division's purported need to protect its experts from the chore of editing his or her rebuttal report to comport with true facts revealed in fact discovery, with the benefits of getting to the truth, the benefits of getting to the truth prevails. Simply put, there is no harm to the expert or the parties of this proceeding in allowing the truth to reach the hearing.

There is little likelihood that new facts would become available to the experts upon post-expert exchange fact discovery, because the Division's factual record is sufficiently developed after years of unilateral discovery by the Commission Staff. Before those expert reports were developed, the Division literally spent years developing its factual case, including examining and deposing numerous witnesses. That discovery included taking informal investigative testimony of Mr. Balter for three days at his home, and then taking **two days** of his formal testimony by deposition. There is no risk, under such circumstances, that Mr. Balter's **sixth day** of deposition by the Division after the exchange of expert reports in February 2017, would result in revisions to the expert witness reports.

The cases cited by the Division offer no guidance. It is true that in a few instances, the judge in those cases did establish expert witness report exchange dates weeks before the hearing, but there is no discussion or analysis pertinent to the arguments made in this case and the factors to be applied to such analysis are not found in any of that case law. A hearing officer has ample discretion to set a fair and just pre-trial schedule with the goal of permitting the parties to prepare for the hearing, after an opportunity for meaningful discovery. To exercise that discretion properly, the hearing officer must take each case on its merits.

This case involves hundreds of transactions, but is otherwise not a complex case. This is a case against a single investment advisor, and a narrow period of approximately 2 years. Mr. Balter voluntarily resigned his career after suffering devastating losses to his own portfolio, as well as his clients' portfolio. He is supporting his wife and children by giving flight lessons and

driving for Uber. Because Mr. Balter's professional reputation, career, and livelihood are at stake, ensuring Mr. Baler's right to a fair hearing on the merits of the claims against him should be paramount to any conceived risk that an expert might have to edit his or her report. That is particularly necessary here, since Mr. Balter's right to conduct pre-trial discovery is extremely abbreviated, and the schedule for conducting the hearing on the merits expedited. Mr. Balter should be given a fair opportunity to conduct discover ***after*** learning the case against him. Unless the Court requires the Division to state, with particularity, its case against him and present its expert witness reports, sufficiently in advance of the fact discovery cutoff date, Mr. Balter would be compelled to expend his limited time before the discovery cutoff date and limited financial resources conducting discovery based on speculation as to what facts might be relevant to the claims to be asserted against him at the hearing on this matter and the defenses that might apply to those claims.

On the other side of the argument, it is highly likely that the expert reports that would be at the center of the trial would rely on factual statements, testimony of third-parties and correspondence that would warrant further factual discovery to test its characterization, foundation, veracity and relevance.

Under these circumstances, justice requires that Mr. Balter be given detailed notice of exactly what he is being accused of doing, the exact transactions and communications with respect to which he is accused of wrongdoing, and a reasonable time, after learning of the specifics necessary to defend himself, to conduct meaningful discovery. Anything short of that would effectively deprive Mr. Balter of an opportunity to develop his case for trial and give Mr. Balter good cause to challenge any ruling that might come out of an administrative hearing.

Mr. Balter has proposed such a schedule. The Division, on the other hand, opposed Mr. Balter's motion for a more definitive statement, and now opposes any discovery after Mr. Balter is afforded the expert reports which would tell him, for the first time, the basis of the action

against him. The parties agree that February 17, 2017 would be an appropriate date for the exchange of expert reports. Frankly, Mr. Balter would want that date to be earlier. But, in the spirit of compromise, agreed to that date.

The parties disagree, however, as to whether fact discovery should be allowed to go forward after February 17, 2017. Of course, it must. This entire case turns on the factual assumptions underlying those expert reports. Only after Mr. Balter receives the report would he be able to conduct meaningful discovery to test those assumptions. The Division hopes to hide the ball on its expert reports until Mr. Balter's fact discovery rights expire, by proposing that the fact discovery is cutoff on the same date that the expert reports are due.

Dated: December 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Pease, hereby certify that an original and three copies of the foregoing

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was filed on December 1, 2106 with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Mailstop 1090, Washington, D.C. 20549, and that a true and correct copy of the foregoing has been served by U.P.S., marked for next day delivery on December 2, 2016 and emailed on the following person entitled to notice:

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