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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
January 31, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17651

In the Matter of	:	Administrative Law Judge
ADRIAN D. BEAMISH, CPA	:	Cameron Elliot
Respondent.	:	

JOINT MOTION FOR ADDITIONAL DEPOSITIONS AND RELATED RELIEF PURSUANT TO RULE 233

MOTION

Pursuant to Rule of Practice 233(a) and the Court's Order dated December 29, 2016 ("Scheduling Order"), the Division of Enforcement ("Division") and Respondent Adrian D. Beamish ("Respondent"), by counsel (collectively the "Parties") jointly move the Court for an order granting leave for each party to take up to five depositions in this administrative proceeding. Pursuant to Rule 233(b), the Parties further request that the deposition of Jonas Balsys, an employee for an entity affiliated with PricewaterhouseCoopers LLC ("PwC") in the United Kingdom who will not be available for hearing, not count against the number of depositions each party is permitted to take pursuant to Rule 233(a). Last, the Parties request that the Court permit the deposition of Nahum Lan to occur after the March 3, 2017 deadline for completing fact depositions because Lan, an employee for PwC in the San Francisco Bay Area, is unavailable for deposition from February 8 through March 7. The Parties provide the grounds for this requested relief in their memorandum of points and authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Parties Agree that Each Party Should Be Permitted to Take Five Depositions Given the Specific Circumstances of this Proceeding.

Pursuant to Rule 233(a)(1), each party here may file written notices to depose no more than three persons. A motion to take additional depositions is governed by Rule 233(a)(3), which permits additional depositions only in those exceptional circumstances where a party can demonstrate a "compelling need." Rule 233(a)(3)(ii). Rule 233(a)(3)(ii)(C) further requires a party seeking additional depositions to explain "why the deposition of each witness and proposed additional witness is necessary for the moving side's arguments, claims, or defenses." And under Rule 233(a)(3)(ii)(D), the depositions may not be unreasonably cumulative or duplicative. Here,

Rule 233(a)'s requirements are satisfied pursuant to the Parties' stipulation.[1]

The Parties have been meeting and conferring regarding depositions since December 2016. *See, e.g.*, Stipulation and Jt. Request Regarding Procedural Schedule (filed Dec. 21, 2016) at 2 (noting that the Division identified the first witness it sought to depose on December 9). The Parties further exchanged a good faith list of expected deponents on January 17, 2017. The Division identified three deponents (Respondent, Nahum Lan, and Respondent's anticipated expert) as did Respondent (Helen Sen, Jean Yang, and the Division's anticipated expert).[2]

Respondent subsequently raised his intent to depose Bryant Fong, a member of the general partner of Burrill Life Sciences Capital Fund III, L.P. (the "Fund"), and seek leave to take at least four depositions pursuant to Rule 233(a). Respondent became aware of the need to depose Fong upon reviewing the Division's notes from its interview of Fong, which the Division produced on January 17, 2017 (the same day the Parties exchanged their good faith lists of expected deponents). Counsel for Respondent informed the Division of the potential need to depose Fong as soon as they had reviewed the notes and considered whether a deposition would be required.

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[1] By way of analogy, under Federal Rule of Civil Procedure 30(a)(2)(A), "a party must obtain leave of court, and the Court must grant leave to the extent consistent with Rule 26(b)(2) ... *if the parties have not stipulated to the deposition* and ... the deposition would result in more than 10 depositions being taken under this rule." Fed. R. Civ. P. 30(a)(2)(A) (emphasis added). In considering whether to enlarge the number of allowable depositions, federal courts consider whether: "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Smith v. Ardew Wood Products, Ltd.*, 2008 WL 4837216, *1 (W.D. Wash. 2008) (citing Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii)); *see also Burdette v. Steadfast Commons II, LLC*, 2012 WL 3762515, *2 (W.D. Wash. 2012) (holding same).

[2] Sen and Yang were employees at Burrill & Company and interacted with PwC at times during the relevant period.

On January 24, 2017, pursuant to the Scheduling Order, the Parties exchanged disclosures identifying their respective expert witnesses and subject matters for each party's case-in-chief. The Division identified one expert, Harris L. Devor, a certified public accountant and a partner in the accounting firm of Friedman LLP, to offer an opinion regarding:

> the procedures that Respondent directed, performed, and approved on the audits of the financial statements of Burrill Life Sciences Capital Fund III, L.P. for the years ended December 31, 2009, 2010, 2011, and 2012. As the basis for his opinion, Mr. Devor will analyze whether the audits conducted by Respondent on behalf of PricewaterhouseCoopers LLP of the fund's financial statements issued during the years in question complied with Generally Accepted Auditing Standards; whether the financial statements were prepared in accordance with Generally Accepted Accounting Principles; and whether the audit procedures and calculations performed were reasonable under the circumstances.

Respondent identified four experts as follows:

Expert Name	Expert Subject Area
Gary Goolsby	Compliance with applicable audit and accounting standards and matters related thereto.
William Holder	Compliance with applicable accounting standards and relevant policy considerations.
John Riley	History of Rule 102(e); analysis of disclosures.
Howard Scheck	History and practices around Rule 102(e); application of 102(e) to Mr. Beamish.

On January 25 and 27, 2017, the Parties met and conferred regarding depositions, experts, and related matters. The Division raised the lack of specificity in Respondent's expert disclosures and apparent duplicative subject areas of Respondent's anticipated experts. Respondent provided further detail regarding each of his anticipated experts and maintained that their respective testimony would not be duplicative. On January 30, 2017, Respondent provided the following written information regarding his anticipated experts, Riley and Scheck:

> Riley: Mr. Riley will describe his experience and observations with the history and practices around 102(e), during his time at the Commission (up until 1995),

> and practices and observations around the Commission's treatment of disclosures such as at issue here.
>
> Scheck: Mr. Scheck will discuss his observation of practices around 102(e) during his tenure at the Commission (after 1995), and application to and treatment of accountant matters and conduct.

While the Division expects Respondent's expert testimony to be cumulative and duplicative (and objectionable on additional grounds as well), it is unable to address this issue adequately prior to receiving each expert's report on March 3, 2017, and possibly deposing them.[3] The Division is also considering whether it will engage a rebuttal expert to address Respondent's proposed expert testimony (rebuttal expert reports are due on March 17, 2017).

Based on the foregoing unusual circumstances, the Parties agreed to join each party's respective request to depose up to five witnesses.[4] The Division would seek to depose six witnesses (Respondent, Lan, and each of Respondent's four expert witnesses) if permitted under the Rules of Practice, so if leave to depose five witnesses is granted, the Division will need to decide which witness it will forgo deposing. Respondent would depose up to five witnesses (Sen, Yang, Fong, the Division's expert, and possibly the Division's rebuttal expert) if leave is granted to depose five witnesses.[5]

The Division believes it is justified seeking to depose five witnesses here. Respondent has identified four expert witnesses, none of which have previously spoken with the Division regarding this matter. Expert depositions are needed in order to prepare for hearing and each

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[3] Respondent disagrees with the Division's characterization and maintains that the testimony will be neither cumulative nor otherwise objectionable.

[4] *But see RD Legal Capital, LLC*, Release No. 4387, 2016 SEC LEXIS 4373, *5 (Nov. 23, 2016) (Judge Foelak ruling that expert depositions do not count against Rule 233(a)'s deposition limit); *Laurence I. Balter*, Release No. 4560, 2017 SEC LEXIS 283, * (Jan. 27, 2017) (Judge Foelak holding same). The Division maintains its position rejected by Judge Foelak that expert depositions should count against the limit set forth by Rule 233(a).

[5] As discussed *infra*, the Parties' deposition of Jonas Balsys pursuant to Rule 233(b) will not count against either party's deposition limit.

expert deposed would be questioned regarding his expert report, expected testimony at hearing, and if warranted, the Division's expected rebuttal testimony. Respondent represents that each of his expert's testimony will not be unreasonably cumulative or duplicative.

The Division also seeks to depose Respondent in order to address areas of expected testimony at hearing not addressed during his investigative testimony, including but not limited to any facts relating to the 17 affirmative defenses raised by Respondent's Answer (filed Nov. 23, 2016), the private litigation between the Fund's investors, the Fund's management, and PwC, and matters raised during that litigation, which primarily occurred after Respondent provided investigative testimony to the Division. Finally, the Division seeks to depose Lan because he was one of two PwC co-managers that worked on the 2012 audit of the Fund and he reported to Respondent. Lan has not previously provided sworn testimony regarding this matter and the Division anticipates that he will testify at hearing. The Division does not anticipate his testimony to be unreasonably cumulative or duplicative because Lan and his co-manager during the 2012 audit, Balsys, each directed separate aspects of the audit and Lan likely had separate communications with the Fund's management.

Respondent also believes he has a compelling need to depose five witnesses in this case. Each of these deponents is expected to provide information that is important to Beamish's defense and is not unreasonably cumulative or duplicative of the testimony offered by other deponents. First, Sen (who worked with Beamish and the PwC team) is expected to provide essential testimony on both the related party transfers at issue in this case and their treatment in the audited financial statements. The Division's decision to take the testimony of Sen over a period of four days appears to confirm her importance. Because this Court generally deems investigative testimony inadmissible (*see* Order dated Dec. 29, 2016 at 3), it is equally important to depose her now. Second, Yang was also involved with the audit process and interacted with

PwC auditors. While comments made during her attorney's September 18, 2014 proffer to the Division indicate that she has information relevant to the Division's claims and to Beamish's defense, she has not yet been put on the record in this matter. Further, because her relationship to PwC's audit differed from Sen's (relating more, for example, to supplying supporting documents in response to PwC questions than to addressing questions regarding audit philosophy), Yang's testimony is unlikely to be duplicative. Finally, Fong is expected to provide testimony relating to the relevant disclosures and his understanding of the impact of those disclosures on the Limited Partners. Fong has also not provided sworn testimony in this matter. Given that his testimony is expected to relate to the effect of the disclosures rather than the process by which those disclosures were formulated, there is little risk of overlap.

In addition to the fact witnesses, Respondent also will need to depose the Division's expert witness and any rebuttal expert the Division may use. As the Division has stated, expert depositions will be a critical component of hearing preparation. Given the unique circumstances of this case (*i.e.*, the potential use of a rebuttal expert and the differing roles of the three fact witnesses), it is both necessary and appropriate for Beamish to depose five witnesses.

The Parties therefore respectfully request that the Court grant leave for each party to depose up to the five witnesses discussed above.

B. The Parties Agree that the Deposition of Jonas Balsys Does Not Count Towards Their Respective Deposition Limit.

On January 30, 2017, the Division requested the Court grant permission to take the deposition of Balsys pursuant to Rule 233(b). *See* Notice of Stipulated Deposition of Jonas Balsys Pursuant to Rule 233(b). Balsys, an employee of an United Kingdom entity associated with PwC who worked on the 2012 audit as a co-manager and reported to Respondent, resides in the United Kingdom and, according to Respondent's counsel, he is not available for hearing.

Pursuant to Rule 233(b), this deposition is in addition to those depositions permitted pursuant to Rule 233(a) and therefore it should not count towards each party's deposition limit.

C. The Parties Agree that the Deposition of Nahum Lan Should Be Permitted To Occur After the End of Fact Discovery.

Pursuant to the Scheduling Order, fact depositions must be completed by March 3, 2017. Respondent's counsel represents that Lan is unavailable for deposition between February 8 and March 7, 2017, and therefore Lan is only available for deposition on February 6 or 7. Respondent's counsel provided this information to the Division on January 25, 2017, at which time counsel for the Division responded that it was not available to depose Lan on February 6 or 7, and that its decision to depose Lan was further complicated by Respondent's disclosure of four expert witnesses, putting the Division in the difficult position of deciding one witness to forgo deposing if the Court grants it leave to depose five witnesses.

The Parties therefore agreed to seek the Court's permission to depose Lan after the March 3, 2017 end of fact discovery. The Parties continue to discuss deposition scheduling and anticipate that Lan will be deposed in mid-March 2017 if the Court grants such permission.

CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court issue an order granting them leave to take five depositions per party, in addition to the deposition of Jonas Balsys, and ordering that the deposition of Lan may occur after March 3, 2017.

Dated: January 31, 2017

Respectfully submitted,

/s/ Thad A. Davis
Thad A. Davis, Esq.
Gibson, Dunn & Crutcher LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
E-mail: tdavis@gibsondunn.com
ATTORNEYS FOR RESPONDENT

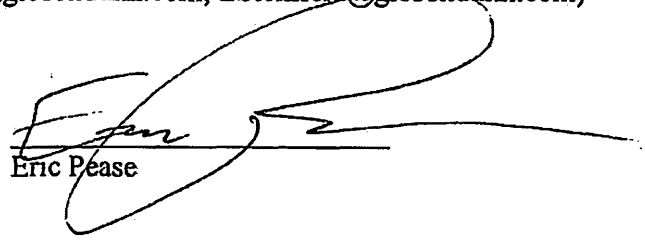
/s/ E. Barrett Atwood
E. Barrett Atwood, Esq.
Securities and Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
E-mail: attwoode@sec.gov
ATTORNEYS FOR THE DIVISION OF ENFORCEMENT

CERTIFICATE OF SERVICE

I, Eric Pease, hereby certify that an original and three copies of **JOINT MOTION FOR ADDITIONAL DEPOSITIONS AND RELATED RELIEF PURSUANT TO RULE 233** was filed 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. Delivery, marked for next day delivery on February 1, 2017, and electronic mail on the following persons entitled to notice:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Mailstop 2557
Washington, DC 20549-2557
(By U.P.S. and electronic mail to ALJ@sec.gov)

Thad A. Davis, Esq.
Marc J. Fagel, Esq.
Monica K. Loseman, Esq.
Amruta Godbole, Esq.
Elizabeth Steinfeld, Esq.
Gibson, Dunn & Crutcher
555 Mission Street
Suite 3000
San Francisco, CA 94105-0921
Attorneys for Respondent
(By U.P.S. and electronic mail to TDavis@gibsondunn.com, MFagel@gibsondunn.com, MLoseman@gibsondunn.com, AGodbole@gibsondunn.com, ESteinfeld@gibsondunn.com)



Eric Pease