

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85197 / February 26, 2019

Admin. Proc. File No. 3-18832

In the Matter of

UNITED DEVELOPMENT FUNDING III,
L.P., UNITED DEVELOPMENT FUNDING
IV, and UNITED DEVELOPMENT
FUNDING INCOME FUND V

ORDER SETTING BRIEFING SCHEDULE

On September 24, 2018, the Commission instituted proceedings against United Development Funding III, L.P., United Development Funding IV, and United Development Funding Income Fund V (“Respondents”), pursuant to Section 12(j) of the Securities Exchange Act of 1934.¹ The order instituting proceedings (“OIP”) alleged that Respondents “are delinquent in their periodic filings with the Commission and have repeatedly failed to meet their obligations to file timely periodic reports.”² The Commission must determine, based on those allegations, “[w]hether it is necessary and appropriate for the protection of investors to suspend . . . or revoke” the registration of the Respondents’ securities under the Exchange Act.³ In their answer, Respondents admit that they were “unable to file” the periodic reports at issue. Nonetheless, they claim that various “facts and circumstances” support “a determination that suspension or revocation of [Respondents’] registration is not necessary or appropriate.”

On November 2, 2018, the Division of Enforcement and Respondents filed a joint report on their prehearing conference. As part of that report, the Division asserts that this matter “is well suited for, and should be decided by, summary disposition,” pursuant to Commission Rule of Practice 250(b).⁴ Rule 250(b) also provides that motions for summary disposition may be made after a respondent’s answer has been filed and documents have been made available for

¹ *United Development Funding III, LP*, Exchange Act Release No. 84273, 2018 WL 4562835 (Sept. 24, 2018).

² *Id.* at *1.

³ *Id.* at *2.

⁴ 17 C.F.R. § 201.250(b) (motion for summary disposition in 30- and 75-day proceedings).

inspection and copying pursuant to Rule of Practice 230.⁵ The joint report recites that the “Division has complied with Rule 230 . . .” and that “[t]he parties are currently engaged in discussions about the categories of documents Respondents want to inspect and copy.”

Rule 250(b) provides further that summary disposition is appropriate if “there is no genuine issue with regard to any material fact and [] the movant is entitled to summary disposition as a matter of law.”⁶ The Division supports its argument in favor of summary disposition by noting that Respondents “admit that they have not filed their required periodic reports” and by claiming that the facts raised in their answer as an affirmative defense, “even if proven, would not raise a genuine issue of fact material to a decision in this matter.”

Respondents, however, argue that “the matter should not be decided by summary disposition, and should instead be referred to an administrative law judge or other appropriate hearing officer as a 120-day case under Rule [of Practice] 360(a)(2) for a hearing and initial decision.”⁷ According to Respondents, “[i]t would deprive [them] of due process and their rights under the Administrative Procedure Act . . . and the Securities Exchange Act . . . to deny them an evidentiary hearing on both the liability and relief issues presented in this matter.”

It is unclear at this stage in the proceeding whether an evidentiary hearing before a trier of fact is necessary.⁸ Instead, it appears appropriate for both parties to be given the opportunity to file briefs in support of motions for summary disposition under Rule of Practice 250(b).⁹ Such briefs should include references to relevant undisputed pleaded facts along with facts eligible to be officially noted pursuant to Rule of Practice 323,¹⁰ and should include, as attachments, relevant declarations, affidavits, and other supporting documentation.

The briefs should address whether and to what extent the Division disputes the factual assertions in Respondents’ answer. To the extent either party opposes summary disposition, it

⁵ 17 C.F.R. § 201.250(b); 17 C.F.R. § 201.230.

⁶ 17 C.F.R. § 201.250(b).

⁷ See 17 C.F.R. § 201.360(a)(2) (directing, in proceedings before a hearing officer, that Commission specify a time period—30, 75, or 120 days—for issuance of an initial decision).

⁸ See, e.g., *Adoption of Amendments to the Rules of Practice*, Exchange Act Release No. 78319, 2016 WL 3853756, at *22 (Jul. 13, 2016) (observing that summary disposition is typically appropriate in 12(j) proceedings “because the issues to be decided are narrowly focused and the facts not genuinely in dispute”).

⁹ See *United Development*, 2018 WL 4562835, at *3 (“The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide . . . that any motion for summary disposition shall be filed under Rule 250(b).”).

¹⁰ 17 C.F.R. § 201.323.

should precisely specify the basis for that opposition in its responsive briefing, identify with particularity the material factual issues in dispute, and address relevant Commission precedent.¹¹

Respondents request five depositions. But depositions are available only in a proceeding designated as a 120-day proceeding pursuant to Rule of Practice 360(a)(2).¹² Although the OIP in this case did not designate whether the initial decision in this case should be prepared within 30, 75, or 120 days following any hearing because it set the matter for a hearing before the Commission and not an administrative law judge, proceedings before a law judge under Section 12(j) of the Exchange Act are typically designated as 30-day proceedings.¹³ Rule of Practice 233(a) provides that other than in cases “under the 120-day timeframe . . . [no] other depositions shall be permitted” except in situations involving a witness who may be unavailable to attend a hearing.¹⁴ Accordingly, depositions are not usually available in a proceeding under Section 12(j) of the Exchange Act.¹⁵ We see no reason to apply a different procedure here.

Respondents also request that their offer of settlement be conveyed to the Commission for consideration before any further proceedings are held. Rule 240 governs settlements and provides the procedures for having a settlement offer considered by the Commission.¹⁶

As discussed above, Rule of Practice 250(b) provides that motions for summary disposition may be made once Rule 230’s provisions regarding document production have been satisfied.¹⁷ The joint report states that the Division has complied with Rule 230.¹⁸ Accordingly,

¹¹ See, e.g., *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *5-8 (Apr. 4, 2014) (discussing types of factual disputes that may be relevant in ruling on summary disposition in 12(j) proceeding); cf. *China MediaExpress Holdings, Inc.*, Initial Decision Release No. 464, 2012 WL 2884859, at *1 (July 16, 2012) (ruling on summary disposition after considering the circumstances that led to Respondents’ failure to file the required reports, “namely, an alleged short-selling scheme by outsiders targeting the company, the resignation of its auditors, and an ongoing internal investigation”).

¹² See Rule of Practice 233, 17 C.F.R. § 201.233.

¹³ See *Adoption of Amendments*, 2016 WL 3853756, at *6 (“The 30-day designation typically is reserved for proceedings under Section 12(j) of the Exchange Act.”).

¹⁴ See Rule of Practice 233(a), (b), 17 C.F.R. § 201.233(a), (b).

¹⁵ See *Adoption of Amendments*, 2016 WL 3853756, at *9 (stating that “the parties will not be permitted to notice depositions in proceedings where the initial decision is placed on either the 30- or 75-day timeline under amended Rule 360”).

¹⁶ See Rule of Practice 240, 17 C.F.R. § 201.240.

¹⁷ 17 C.F.R. § 201.250(b); 17 C.F.R. § 201.230.

¹⁸ We note that, in their joint report, the parties state that they are prepared to stipulate to the authenticity and admissibility of certain filings and submissions, and they agree that official notice may be taken of these and certain additional documents. The parties agree that service

(continued . . .)

it is ORDERED that briefs in support of motions for summary disposition may be filed by the parties by March 28, 2019; opposition briefs may be filed by April 29, 2019; and reply briefs, if any, may be filed by May 13, 2019.¹⁹

By the Commission.

Brent J. Fields
Secretary

(. . . *continued*)

may be made by overnight delivery service and/or by email to the addresses designated in their joint report. In addition to filing hard copies of all filings with the Office of the Secretary, it is requested that they email courtesy copies to APFilings@sec.gov in PDF text-searchable format.

¹⁹ Rule 250(e) and (f) governs the length limitations for dispositive motions, oppositions to dispositive motions, and reply briefs. *See* 17 C.F.R. § 201.250(e), (f).