UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 666 / February 24, 2011

ADMINISTRATIVE PROCEEDING
FILE NO. 3-14055

In the Matter of		
	:	ORDER DENYING MOTION
DAXOR CORPORATION	:	FOR ORAL DEPOSITION
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Cease-and-Desist Proceedings against Daxor Corporation (Respondent or Daxor) on September 17, 2010, pursuant to Section 9(f) of the Investment Company Act of 1940. The hearing in this matter is scheduled to begin on March 7, 2011, in New York City, New York.[1]

On February 14, 2011, Respondent filed a Motion for Leave to Take Deposition of Dr. Timothy Manzone (Motion), a deposition it proposed to take via videotape in Wilmington, Delaware, on February 28, 2011. Dr. Manzone, of Newark, Delaware, was included in Respondent's Final List of Witnesses (Witness List) submitted on January 27, 2011,[2] but no indication was given at that time regarding his apparent inability to testify at the scheduled hearing.[3] The Division of Enforcement (Division) filed its Memorandum of Law in Opposition to the Motion (Opposition) on February 17, 2011, to which Respondent provided its Reply Memorandum in Further Support of its Motion (Reply) on February 22, 2011.

Arguments of the Parties

Rule 233 of the Commission's Rules of Practice (Rule 233) is relevant to deciding whether to allow the oral deposition of a prospective witness. See 17 C.F.R. § 201.233. Under Rule 233(a), it is incumbent upon Respondent to specify the reasons it believes the witness will be unable to attend or testify at the hearing, as well as the matters concerning which he is expected to be questioned. Id.

[1] The parties agreed to the start date and location of the hearing at a prehearing conference held on November 8, 2010. (Preh'g Conf. Tr. 14-16, 18.) That date and location, as well as other prehearing procedural matters, was memorialized in a Scheduling Order issued November 17, 2010, after consultation among the parties and in consideration of their proposed schedule.

[2] The Witness List was received by the Office of the Secretary and filed on February 2, 2011.

[3] Dr. Manzone was also included in Respondent's proposed witness list exchanged between parties on January 13, 2011. (Scheduling Order at 1; Opp'n at 1.)

In its Motion, Respondent claims that Dr. Manzone would "find it a personal and professional hardship to have to travel to New York to appear as a witness." (Mot. at 1.) The Motion notes that he is Medical Director of Nuclear Medicine at a two-hospital health care system, that one of the hospitals is short-staffed by one of its three doctors of nuclear medicine, and that he has not taken a personal day from "his extraordinarily busy practice" this year and does not expect to until June. (Mot. at 1-2.) Citing to Rule 32(a) of the Federal Rules of Civil Procedure, Respondent contends that a physician's professional obligations are sufficiently "exceptional circumstances" to warrant the approval of its request for a videotaped deposition. (Mot. at 3 (quoting Fed. R. Civ. P. 32(a)(4)(E)).)

Dr. Manzone will testify about his involvement in a Daxor-sponsored, medical study and his experience regarding his hospital's awareness and purchase of Daxor's BVA-100 device. (Mot. at 2.) Respondent's Motion claims that Dr. Manzone would also lay the foundation for various exhibits of which the Division has objected to the admissibility. (Id.)

In its Opposition, the Division rebuts Respondent's reliance on the Federal Rules of Civil Procedure and argues that Respondent fails to meet the burden set under the Commission's Rules of Practice for the use of oral deposition in place of live testimony. (Opp'n at 2, 4.) Further, the Division asserts that the "belated" request for deposition "on the eve of trial is prejudicial to the Division." (Opp'n at 2.) Lastly, the Opposition reiterates an argument from its Motion *in Limine*, also filed February 17, 2011, that Dr. Manzone's proposed testimony is immaterial. (Opp'n at 3.) As the Division's Motion *in Limine* deals with its request for the preclusion of the introduction of certain evidence and testimony at hearing, it will be addressed at the scheduled prehearing conference on March 3, 2011.

In response to the Division's Opposition, Respondent claims that Dr. Manzone's testimony is relevant and not cumulative of other testimony. (Reply at 1-2.) Respondent also contends that any inconvenience to the Division is "outweighed by the serious burden on Dr. Manzone, and the risk to Daxor that his testimony will be lost." (Reply at 4.)

Conclusion of Law

Rule 233(b) requires the administrative law judge to make three findings before, in the judge's discretion, a deposition may be ordered. See 17 C.F.R. § 201.233(b). The rule requires findings that the prospective witness (1) will likely give testimony material to the proceeding, (2) is unable to attend or testify at the hearing due to certain enumerated circumstances, and (3) that taking the deposition will serve the interests of justice. Id.

As originally adopted, Rule 233(b) gave "age, sickness, infirmity, imprisonment or other disability" as the grounds for inability to attend. Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32765, 32765 (June 23, 1995). In 2003, the Commission proposed a very narrow and specific amendment to these reasons, noting that the rule as then written "does not permit the taking of a deposition when it is anticipated that a witness will be absent from the United States." Proposed Amendments to the Rules of Practice, Exchange Act Release No. 48832, 68 Fed. Reg. 68186, 68190-91 (Dec. 5, 2003). The Commission amended Rule 233(b) in 2004 to allow the taking of a deposition of a witness who is currently within the United States,

but who is expected to be outside the United States during the time of the hearing, provided that the party requesting the deposition did not procure the witness's absence. See Adoption of Amendments to the Rules of Practice, Exchange Act Release No. 49412, 69 Fed. Reg. 13166, 13170 (Mar. 19, 2004).

The specificity of the amendment to the enumerated reasons for unavailability indicates that those reasons were the only ones that the Commission found worthy of consideration, supporting the Division's interpretation of a literal reading of Rule 233(b). Respondent's reference to the Federal Rules of Civil Procedure and the actions of federal courts in interpreting those rules is not persuasive. In its 1995 adoption of the Rules of Practice, the Commission clearly noted the instances in which its rules were modeled after the Federal Rules of Civil Procedure. The Commission's discussion of Rule 233 contains no such indication. Cf. 60 Fed. Reg. at 32766 (Comment (c) to Rule 233 notes that the criteria for serving as a deposition officer are based on those in Rule 28 of the Federal Rules of Civil Procedure). Further, Rule 233(b) gives several identical grounds for finding that a witness is unavailable as are found in Federal Rule of Civil Procedure 32(a)(4) and Subsection 32(a)(4)(E)'s "exceptional circumstances" is not among them.[4] These omissions provide support that the Commission did not envision Rule 233 to mirror the Federal Rules of Civil Procedure. Despite Respondent's arguments to the contrary, Rule 233(b) is limited to the reasons listed as the basis for ordering a deposition, and its Motion does not fit within those grounds.

While Respondent characterizes Dr. Manzone's appearance in New York as an "extreme burden," it does very little to expound upon that generalization. Dr. Manzone is one of four doctors listed as witnesses for Respondent who will testify to the virtually identical and seemingly duplicative subject of "the clinical importance and application of Daxor's BVA-100 device and various medical research studies in which Daxor had involvement." (See Witness List at 3-4.) The Respondent's contention that his testimony is not cumulative seems to rest only in its own decision not to call the other physicians included in its Witness List. (Reply at 2-3.)

The location of the hearing was scheduled, in accordance with the Commission's Rules of Practice, "with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives." 17 C.F.R. § 201.200(c). At the request of Respondent, the location selected to meet these needs was New York City. (Preh'g Conf. Tr. 15.) Now Respondent, by virtue of its Motion, is claiming that the location is not convenient and therefore special procedures should be applied to one witness who would have to travel just over one hundred miles further to testify in New York City versus the requested deposition location of Wilmington.[5] Cf. Richard G. Wiwi, Admin. Proc. Rulings Release No. 498, 60 SEC Docket

[4] Assuming *arguendo* that the "exceptional circumstances" factor was operative here, the case law is not as clear cut as Respondent's Motion represents. See McDaniel v. BSN Medical, Inc., No. 4:07-cv-00036, 2010 WL 2464970, at *3-4 (W.D. Ky. June 15, 2010) (discussing the split in the federal courts on the circumstances under which a physician's professional responsibilities may constitute exceptional circumstances).

[5] Respondent's Witness List identifies Dr. Manzone as residing in Newark, Delaware, which is approximately fifteen miles from Wilmington, Delaware, and approximately one hundred and thirty miles to the hearing location at 26 Federal Plaza in New York City.

3345 (Jan. 4, 1996) (denying oral deposition for seventy-year-old witness who would have to travel over two hundred miles for the hearing). Respondent argues that the Division's inconvenience is not sufficient; but, likewise, remedying the mere inconvenience of one witness is not in the interests of justice, when due consideration for convenience was already given when the Respondent's requested hearing location was ordered.

In short, Respondent's Motion does not persuasively or sufficiently indicate that Dr. Manzone is, in fact, unable to attend or testify at the hearing or that his testimony is material, in as much as other proposed witnesses could establish the same evidence as Dr. Manzone's testimony; nor, at this late date, is it in the interests of justice to disrupt the agreed upon procedural schedule.

Ruling

The Respondent has not met its burden under Rule 233 to show that the prospective witness would be unable to appear at the hearing. ACCORDINGLY, the Respondent's Motion is DENIED.

Robert G. Mahony
Administrative Law Judge