

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF970002
v.	:	
	:	
	:	Hearing Officer - EBC
	:	
	:	
Respondents.	:	

ORDER DENYING MOTIONS FOR MORE DEFINITE STATEMENT

The Department of Enforcement commenced this disciplinary proceeding on October 15, 1997, by filing a Complaint with the Office of Hearing Officers. The 423-paragraph Complaint alleges that the Respondents engaged in a broad range of fraudulent sales practices or other misconduct while serving as principals, registered representatives, or associated persons of _____.

There are presently pending two motions seeking a more definite statement of certain allegations in the Complaint. On November 12, 1997, Respondents _____, _____, and _____ filed, with their motion for an extension of time to answer, a Motion for More Definite Statement. On November 14, these Respondents served and filed a supplemental submission identifying the specific paragraphs in the Complaint they considered inadequate and indicating the additional information sought. On November 13, 1997, one day after filing his Answer, Respondent _____ filed a Motion for More Definite Statement. On November 20, 1997, the Department of Enforcement served and filed papers in response to these motions. The

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Department of Enforcement has provided some of the information requested by Respondents

_____, and otherwise opposes both of the pending motions.

PLEADING STANDARD

Code of Procedure Rule 9212(a) requires that a complaint “specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated.” The pleading requirement is satisfied if the allegations provide “a respondent sufficient notice to understand the charges and adequate opportunity to plan a defense.” DBCC No. 9 v. Michael R. Euripides, Complaint No. C9B950014 (1997 NASD Discip. LEXIS 45) (NBCC July 28, 1997) (construing former Rule 9212(a)).¹

A virtually identical pleading standard is applied in SEC administrative proceedings: “[t]he essence of the Commission’s decisions dealing with challenges to the adequacy of allegations is that a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense” In re Donald T. Sheldon, 52 S.E.C. 427 (1986).² Further, the case law developed in the SEC administrative proceeding forum makes

¹ Accord, e.g., In re Daniel Joseph Avant, 60 S.E.C. Docket 1465, Exchange Act Rel. No. 36423 (Oct. 26, 1995) (construing former Rule 9212(a)); In re Joseph H. O’Brien II, 51 S.E.C. 1112 (1994) (same); DBCC No. 8 v. Hamilton Investments, Inc., Complaint No. C8A940023 (1997 NASD Discip. LEXIS 19) (NBCC Feb. 26, 1997) (same). Former Rule 9212(a) is substantially the same as current Rule 9212(a), and consequently, it is appropriate to rely on these cases for guidance.

² Accord, e.g., In re Gail G. Griseuk 57 S.E.C. 1006 (1994) (“[t]he standard for assessing whether the Order [Instituting Proceedings] is legally sufficient is whether it informs the Respondent of the nature of the charges so that he/she can prepare a defense.”)

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clear that evidentiary details need not be included in the charging document. E.g., In the Matter of James L. Copley, 55 S.E.C. 2770 (1994); In the Matter of Morris S. Ruggles, 52 S.E.C. 413 (1984).

The Hearing Officer applies these principles in assessing the legal sufficiency of the allegations as to which the Respondents request additional information.

RULINGS

I. Motion of Respondents

In their supplemental submission, Respondents _____ identified 61 paragraphs in the Complaint for which they request additional information.³ In its papers in response to the motion and prior to filing its response, the Department of Enforcement provided some of the information requested. As to the other information sought, the Hearing Officer has devoted considerable time to evaluating the allegations in view of the Respondents' requests only to find that in many instances the information sought is evident from the pleadings. Further, it appears that a dialogue between the movants' counsel and counsel for the Department of Enforcement would have allowed the Parties to narrow substantially the matters in dispute. In the future, Parties in this proceeding will be expected to make a good faith effort to resolve any disputes before filing motions.

The Hearing Officer's rulings on the movants' specific requests for a more definite statement follow.⁴ For ease of reference and to the extent possible, Respondents' requests have been grouped by category.

³ Respondents _____ specifically identified 61 paragraphs, but certain additional information they seek relates to a paragraph in the Complaint that they did not identify, paragraph 153. The Hearing Officer assumes that their failure to identify this paragraph was an oversight.

⁴ The Hearing Officer is unable to rule on a portion of Respondents' request with respect to paragraph 297 because their request related to material that could not be found in that paragraph. Nor did the Hearing

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A. Request for Identification of First and Last Names of Customers

(Complaint, ¶¶ 65, 66, 78, 104-06, 124, 132, 152-53, 174, 177, 189-90, 202-03, 211-12, 238-42, 251-54, 284 -85, 297, 324-25, and 349-50)

Throughout the Complaint alleged customer victims are identified by their first and last initials.

The movants request a more definite statement identifying by first and last name the customers referred to in the allegations that specifically mention Respondents _____. Counsel for the Department of Enforcement has represented that, on November 19, 1997, he provided Respondents' counsel with a letter setting forth this information. Accordingly, this portion of the Respondents' motion is denied as moot.

B. Request for a More Definite Statement of the Charges Summarized in Introductory Paragraphs in the Complaint

(Complaint, ¶¶ 1, 45, 119, 133, 137, 169, 178, 191, 195, 204, 208, 213, 216-17, 294, 305, 357, 371, and 375)

The Complaint contains a number of introductory paragraphs that set forth in summary fashion the nature of the alleged fraudulent sales practices at issue in this proceeding. No Respondents are individually identified in these paragraphs. Respondents _____ seek a more definite statement of the charges set forth in these introductory paragraphs, e.g., the names of the alleged customer victims, the identity of the stocks involved, and the dates

Officer receive any assistance from the Department of Enforcement in locating this material elsewhere in the Complaint.

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on which the alleged misconduct occurred, as well as an identification of the individual Respondents who are the subject of the charges.

The Complaint, taken as a whole, plainly distinguishes the charges against each individual Respondent, including the movants, and provides the detail claimed to be lacking. That the Department of Enforcement has chosen to include in the Complaint summary or introductory paragraphs that generally describe the nature of the alleged fraudulent sales practices at issue, without referring to particular Respondents by name, does not detract from the detail included in the paragraphs that follow each of the introductory paragraphs. Accordingly, this portion of the Respondents' motion is denied.

C. Request for Clarification as to the Term "Among Other Things"

(Complaint, ¶¶ 124, 211, and 297)

The movants point to several paragraphs in the Complaint where the Department of Enforcement has used the term "among other things" in its description of the alleged misconduct, and suggest that if additional acts are intended to be included in this phrase, then those acts should be specified. In its response, the Department of Enforcement indicated that its use of the phrase "among other things" is not intended to allege additional matters, but is intended to "add to the context" of the alleged misconduct. Accordingly, this portion of the Respondents' motion is denied.

D. Requests Pertaining to Discrete Paragraphs in the Complaint

1. Paragraph 106. Many of the Respondents are charged with making baseless or improper price predictions to customers. As to Respondent _____, paragraph 106 alleges:

_____ also made numerous price predictions to customer _____, including predictions in late January 1995 that United Leisure stock would go up 30 to 40 percent or more (from about \$5 per share) in a couple of months, or even 50 to 70 percent; in mid-February 1995, that DualStar would result in a \$50,000 to \$70,000 profit in 30 to 45 days; in April 1995, that, on a conservative basis, DualStar would go

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up from \$9 to \$12 per share in three weeks, and up to \$20 per share in a year; on or about May 17, 1995, that DualStar could go to \$20 to \$25 per share; and, on or about June 22, 1995, that DualStar warrants would almost triple in a month or month-and-a-half. By April 1996, DualStar was worth less than \$1 per share. The United Leisure stock never increased significantly, and in fact fell more than 60 percent by the end of April 1995.

The movants request a more definite statement identifying the names of any stocks, in addition to United Leisure, that were the subject of the “numerous price predictions.” Paragraph 106 is clear in alleging that, in addition to the price predictions relating to United Leisure, Respondent _____ made four price predictions relating to DualStar. Accordingly, this portion of the Respondents’ motion is denied.

2. Paragraph 124. The Complaint charges certain Respondents with failing to adequately or accurately disclose to customers the risks of various investments. As to Respondent _____, paragraph 124 alleges:

In January 1995, _____ made the following statements, among other things, to customer ____ to induce him to buy Master Glazier’s stock or warrants: “I am confident on the stock. All of my clients own it . . . I think you’re looking at a huge winner here very, very, very short term. Before the next new issue. I think you’re looking at a win, win situation.”

The movants request a more definite statement identifying the security that was the subject of the alleged statements and the issue dates for the warrants. Although the statements quoted refer only to stock, paragraph 124 plainly charges Respondent _____ with making these statements in connection with his efforts to induce purchases of the stock or warrants of Master Glazier. Further, the Hearing Officer rejects Respondents’ request for information regarding the issue dates of the warrants; this detail is not necessary to allow _____ to plan his defense to these allegations. Accordingly, this portion of the Respondents’ motion is denied.

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3. Paragraphs 132 and 174. The movants request a more definite statement identifying by date and time certain alleged conversations between Respondents _____ customers. In its response to the motion, the Department of Enforcement provided the additional information requested as to paragraph 132. The Department of Enforcement also provided the month and year of the conversations described in paragraph 174, indicating that it does not know the exact dates and times of these conversations. Accordingly, this portion of the Respondents' motion is denied as moot.

4. Paragraphs 152 and 153. The Complaint charges that when confronted with customers' concerns about risking money, certain Respondents promised to prevent or limit customers' losses. As to Respondent _____, paragraphs 152 and 153 allege:

_____ dissuaded customers from selling by promising them that the security at issue would be sold if it declined in value – promises he failed to keep. In this regard, in April 1994, _____ represented to customer _____ that his United Leisure stock would be sold if it lost 10 to 15 percent of its value. _____ failed to timely execute and/or process a sell order for United Leisure stock, causing this customer to incur a greater loss. (Complaint, ¶ 152.)

In a similar instance which took place in February 1995, _____ discouraged customer _____ from selling his United Leisure stock by representing that he would limit the customer's potential loss by selling this security if the price dropped by a fraction of a point. Subsequently, United Leisure stock declined in value and _____ failed to keep his promise to _____. (Complaint, ¶ 153.)

The movants request a more definite statement identifying the names of the "dissuaded customers" referred to in the first sentence of paragraph 152, the dates of the occurrences, and the date on which United Leisure stock declined in value. In its papers in response to the motion, the Department of Enforcement indicated that the phrase "dissuaded customers" refers to the customer whose initials are set forth in paragraph 152. In addition, the Department of Enforcement also provided the date on

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which United Leisure stock declined in value, notwithstanding that this information is publicly available.

Finally, paragraphs 152 and 153 specify by month and year the timing of the alleged conversations. No additional information is required to allow Respondent _____ to plan his defense to these charges.

Accordingly, this portion of the Respondents' motion is denied.

5. Paragraphs 202 and 203. These paragraphs allege that Respondent _____ improperly led customers to believe that unrelated stocks trading in the same price range could be expected to perform similarly. More specifically, paragraphs 202 and 203 allege that _____ solicited customers to purchase the stock of Select Media and DualStar, by comparing these issuers' stock to that of an unrelated issuer, Octagon, Inc. Paragraphs 202 and 203 quote statements allegedly made by _____, the initials of the customers to whom such statements were made, and the dates of the conversations. In describing the statements that _____ allegedly made in connection with his efforts to solicit purchases of Select Media, the Department of Enforcement begins the sentence with the phrase "[f]or instance." (Complaint, ¶ 202.) In the following paragraph, which describes the statements _____ allegedly made in connection with his efforts to solicit purchases of DualStar, the Department of Enforcement prefaces its description by stating "_____ engaged in similar misconduct." (Complaint, ¶ 203.)

The movants request a more definite statement identifying other instances, if there are any, included in the phrase "[f]or instance," and request a more definite statement as to the other misconduct included in the phrase "_____ engaged in similar misconduct." In its response to the motion, the Department of Enforcement indicated that there are no acts in addition to those specified in paragraphs 202 and 203. Accordingly, this portion of the Respondents' motion is denied.

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6. Paragraphs 211 and 212. The Complaint charges certain Respondents with defrauding customers by linking their participation in potentially lucrative initial public offerings to an agreement to purchase the new issue stock in the aftermarket or to purchase another stock. As to Respondent _____, paragraphs 211 and 212 allege:

In October 1993, _____ induced customer ____ to commit to buying Computer Marketplace stock by representing, among other things, that the customer was required to buy Computer Marketplace stock before he could buy securities offered in initial public offerings. (Complaint, ¶ 211.)

Similarly, in October 1994, customer ____ bought Solomon Page units, and _____ made an additional, unauthorized purchase of Solomon Page stock for him. When ____ objected to the additional purchase, _____ told him that the order to buy Solomon Page units could only be accomplished if the customer agreed to also buy the stock. (Complaint, ¶ 212.)

The movants seek a more definite statement identifying the names of the initial public offerings referred to in paragraph 211. In its response to the motion, the Department of Enforcement indicated that it believes that _____ was referring to initial public offerings generically. In any event, in the Hearing Officer's judgment, sufficient detail has been provided to allow Respondent _____ to adequately plan his defense to these charges. In this connection, the Hearing Officer notes that paragraph 211 identifies, by month and date, the timing of the alleged misconduct, and includes the name of the security that the customer committed to purchase in order to participate in initial public offerings.

The movants also request a more definite statement identifying the acts included in the term "similarly," which prefaces the Department of Enforcement's allegations in paragraph 212. The Hearing Officer believes it is evident from the pleadings (and the Department of Enforcement confirmed) that the term simply refers to the conduct alleged in paragraph 211.

Accordingly, this portion of the Respondents' motion is denied.

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7. Paragraphs 388-396. These paragraphs, which are set forth as part of the Fifth Cause of Action in the Complaint, relate to the preparation, review, and contents of various allegedly false and misleading telemarketing scripts that were used by _____ registered representatives as part of their sales presentations. The movants are not charged with the violations alleged in the Fifth Cause of Action.

The movants request a more definite statement identifying: (a) the names of the “researchers” and Compliance Directors, referred to in paragraph 388, who allegedly prepared and reviewed the scripts; (b) the names of the registered representatives, referred to in paragraph 388, who were required to follow the scripts; (c) the names of the issuers that were the subject of the sales scripts referred to in paragraphs 389 and 396; and (d) the “names” and dates of the sales scripts referred to in paragraphs 389-395.

Putting aside the fact that the allegations in paragraphs 388 through 396 do not charge the movants with any violation, the Hearing Officer observes that some of the additional information the movants seek is evident from the pleadings and, in the Hearing Officer’s judgment, the allegations set forth in these paragraphs are otherwise sufficiently detailed.

First, with respect to the movants’ request for the names of the registered representatives, it is evident from the pleading (and the Department of Enforcement confirmed) that the allegation relates to a general firm-wide requirement that _____ registered representatives follow the scripted materials. Similarly, with respect to the movants’ request for the names of the issuers that were the subject of the sales scripts referred to in paragraph 396 of the Complaint, the Hearing Officer notes that this information is already set forth in paragraph 396.

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Second, the Department of Enforcement has represented that the names of the researchers and Compliance Directors will be available through discovery and that the sales scripts will be produced. To the extent that this information is helpful or relevant to the movants' defense, they will have it well before the hearing. See, e.g., In the Matter of E. Ronald Lara, 57 S.E.C. 2951 (1994) (denying a respondent's motion for a more definite statement given the Division of Enforcement's intent to make its investigatory file available to the respondent).

Accordingly this portion of the Respondents' motion is denied.

II. Respondent _____ Motion

Respondent _____, a former _____ principal, is charged with failing to exercise adequately or reasonably his supervisory responsibilities and failing to observe high standards of commercial honor and just and equitable principles of trade in violation of NASD Conduct Rules 3010 and 2110. More specifically, the Complaint alleges that _____ was directly responsible for the supervision of _____ sales force (Complaint, ¶ 404); _____ overall supervisory system, in practice, was inadequate to prevent violations of the securities laws and the Association's Rules (Complaint, ¶ 405); and that although _____ supervisors had the means to monitor the conduct of the firm's registered representatives by, among other things, listening to telephone calls, some of which were tape recorded, the supervisors allowed or encouraged the fraudulent sales practices alleged in the Complaint. (Complaint, ¶ 406.)

In his motion for a more a definite statement, _____ seeks the following information:

the factual basis for the allegation that _____ was "directly responsible for the supervision of the conduct of _____ retail sales force." (Complaint, ¶ 404.)

The factual basis for the allegations that "_____ supervisory system was not operated in a way which would prevent violations of the securities laws and NASD

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regulations,” and that “there was no real accountability or exercise of control.”
(Complaint, ¶ 405.)

The factual basis for the allegation that “the supervisors allowed, or even encouraged, those persons reporting to them to engage in a widespread course of fraudulent sales practices.” (Complaint, ¶ 406.)

A motion for a more definite statement is not a discovery device. If the allegations in a complaint fairly apprise the respondent of the charges and afford the respondent an adequate opportunity to plan a defense, a motion for a more definite statement will not lie. On the other hand, if a complaint is so vague, ambiguous, incomplete, or confusing that it fails to satisfy this standard, a respondent may be entitled to a more definite statement.

It apparent from his Answer and Affirmative Defense that Respondent _____ understands the charges and is preparing his defense. _____ Answer denies the allegations against him and, in response to paragraph 406, admits that _____ supervisors had telephones that allowed them to listen to calls and that certain telephone calls were recorded. The Answer also interposes as an Affirmative Defense that “[t]o the extent _____ had any supervisory responsibility in connection with the conduct alleged against _____ brokers, he appropriately delegated that responsibility and reasonably relied on others to carry it out.”

No doubt, _____ would like a detailed account of the Department of Enforcement’s legal theories and evidence, but he cannot obtain that through a motion for a more definite statement. As noted above, evidentiary details – such as that sought by _____ – need not be included in a Complaint.

Pursuant to Code of Procedure Rule 9251(a), the Department of Enforcement is obliged to make available to _____ and other Respondents copies of all non-privileged and otherwise

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discoverable documents, in the Department of Enforcement's investigative file in this matter. Further, the Parties will be required to set forth their theories and evidence in detail, well in advance of the hearing date. The Complaint, however, fairly discloses the charges and adequately affords _____ an opportunity to prepare his defense. At this time, no more is required.

Based on the foregoing:

1. The Motion of Respondents _____ for More Definite Statement is denied.
2. Respondent _____ Motion for More Definite Statement is denied.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: Washington, DC
November 28, 1997