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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SANDLAPPER SECURITIES, LLC (CRD No. 137906), TREVOR LEE GORDON (CRD No. 2195122), and JACK CHARLES BIXLER (CRD No. 22331), Respondents.	Disciplinary Proceeding No. 2014041860801 Hearing Officer—DW

ORDER DENYING RESPONDENTS' MOTION FOR MORE DEFINITE STATEMENT AND DEPARTMENT OF ENFORCEMENT'S MOTION TO STRIKE

A. Background

FINRA member firm Sandlapper Securities, LLC, its CEO Trevor Gordon, and the firm's Capital Markets Division President Jack Bixler (collectively "Respondents"), are charged with securities fraud and other violations in connection with certain sales of saltwater disposal wells to investors. They allegedly defrauded the investors by charging excessive and undisclosed markups in excess of $8 million. The Complaint alleges that each Respondent violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, as well as FINRA Rules 2010 and 2020 ("the fraud charges").[1] It also charges Gordon and Bixler

[1] *See* Complaint, First through Fourth Causes of Action.

with causing a third-party entity to act as an unregistered broker dealer,[2] and Gordon and Sandlapper with various supervision violations.[3]

Respondents moved for a more definite statement of the fraud allegations. Respondents argue that the Complaint inadequately pleads its fraud claims because certain allegations "are vague as to what was said or done, and generally do not specify who among the individual Respondents made certain statements, to whom each statement was directed, when or where each statement was made and/or who engaged in the specific act alleged."[4] Enforcement opposes the motion on the basis that Respondents applied an incorrect pleading standard, and that the facts set out in the 36-page, 188-paragraph Complaint adequately apprises Respondents of the nature of the charges against them.

Enforcement also moves to strike Sections I, II, III and V of Respondents' Answer, arguing that these sections are "scandalous or impertinent" materials that inappropriately disparage Enforcement staff or are irrelevant to the Complaint's allegations and are properly stricken pursuant to FINRA Rule 9136(e). Respondents maintain that the challenged sections of their Answer are proper.

After reviewing the Complaint, the Answer, and the parties' submissions, I find that the pleadings are adequate. Accordingly, for the reasons explained below, both motions will be denied.

B. Respondents' Motion for More Definite Statement

FINRA Rule 9212(a) requires a Complaint to "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 allegations of the complaint should provide "a respondent sufficient notice to understand the charges and adequate opportunity to plan a defense."[5] A complaint that provides such notice need not include evidentiary details.[6]

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[2] *See* Complaint, Fifth Cause of Action, alleging violations of Section 15(a) of the Exchange Act and FINRA Rule 2010.

[3] *See* Complaint, Sixth and Seventh Causes of Action, alleging violations of NASD Rule 3010 and FINRA Rules 3110 and 2010.

[4] Respondents' Motion at 2.

[5] OHO Order 16-28 (2014042524301) (Oct. 31, 2016), at 4, http://www.finra.org/sites/default/files/OHO_Order16-28_2014042524301_0.pdf (citing *Dist. Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (NASD NBCC July 28, 1997)).

[6] OHO Order 09-05 (2008012955301) (Dec 16, 2009), at 3, http://www.finra.org/sites/default/files/OHODecisions/p121082.pdf; OHO Order 05-23 (C050015) (June 7, 2005), at 2, http://www.finra.org/sites/default/files/OHODecision/p014437_0_0.pdf (If a complaint, "taken as a whole, fairly apprises the respondent of the charges and affords the respondent an adequate opportunity to plan a defense, a motion for more definite statement will not lie.").

FINRA Rule 9215(c) permits a respondent, after reviewing a complaint, to move for a "more definite statement of specified matters of fact or law to be considered or determined" in the matter. Such a motion affords clarification where a complaint is ambiguous, confusing, or lacks sufficient specificity and detail to permit the respondent to defend himself.[7] But a motion for a more definite statement may not be used as a discovery device.[8] Nor can it "be used as a discovery tool to force [a Complainant] to reveal its legal theories, trial strategy, or the facts it intends to introduce at the hearing."[9] And a motion for a more definite statement is disfavored when "the particular information [a movant] is seeking is within [movant's] own knowledge, which mitigates in favor of denying the motion."[10]

Respondents argue that the securities fraud claims are not pled with particularity, a heightened standard sometimes employed in federal court.[11] But "FINRA's Code of Procedure does not contain a heightened pleading requirement for fraud cases."[12] By the pertinent standard described above, Respondents identify no colorable ambiguity in the detailed allegations of the Complaint setting forth the allegedly fraudulent scheme. For instance, Respondents claim ambiguity in paragraph four, where the Complaint alleges that they improperly defrauded investors by interposing their development company between their fund and the "best available market" for fund investments in two wells, consequently overcharging investors. Respondents complain that the allegation leaves ambiguous what that "best available market" was.[13] Not so, as the Complaint elsewhere clearly points to the best available market, asserting that Respondents caused their development company "to purchase interests in two wells from RBJ [the well operator] and then caused [the fund] to purchase those interests from [the development company] at excessively marked up prices."[14] Indeed, Respondents concede as much in their

[7] OHO Order 07-28 (2005000323905) (July 2, 2007), at 2, http://www.finra.org/sites/default/files/OHODecision/p037092_0.pdf.

[8] OHO Order 00-06 (C3A990067) (Mar. 10, 2000), at 3, http://www.finra.org/sites/default/files/OHODecision/p007878.pdf.

[9] OHO Order 09-05 (2008012955301) at 2.

[10] *Babcock & Wilcox Co. v. McGriff, Seibels & Williams, Inc.*, 235 F.R.D. 632, 633-34 (E.D. La. 2006) (denying motion for more definite statement under Fed. R. Civ. P. 12(e) where defendant deemed in a better position than plaintiff to know which of its employees were associated with alleged misconduct and when and where it occurred) (quoting *Concepcion v. Bomar Holdings, Inc*., 1990 US. Dist. LEXIS 1047, at *2 (S.D.N.Y 1990) (applying Fed. R. Civ. P. 12(e))). *See also Wheeler v. U.S. Postal Service*, 120 F.R.D. 487, 488 (M.D. Pa. 1987) (motion for more definite statement under Fed. R. Civ. P. 12(e) denied where information about the extent and nature of plaintiffs' claims are within defendant's knowledge). *See also* OHO Order 10-04 (2008014621701) (July 12, 2010), at 2-3 http://www.finra.org/sites/default/files/OHODecision/p122653_0_0_0_0.pdf (denying motion for more definite statement where allegations involve information within respondent's knowledge).

[11] Respondents' Motion at 2.

[12] OHO Order 09-05 at 3.

[13] Respondents' Motion at 2.

[14] Complaint at ¶ 45.

Answer, stating that "FINRA alleges the best available market was [the development company's] purchase price from RBJ."[15]

Respondents also object to the allegation of paragraph eight of the Complaint concerning their conflicts of interest, claiming that it fails to specify the "numerous and obvious conflicts of interests" with fund investors that Respondents allegedly failed to remedy or address.[16] But as Enforcement notes in its Opposition, the Complaint elsewhere quotes from the fund's private placement memorandum that *expressly identifies* these conflicts.[17] And Respondents *admit* those portions of the Complaint.[18] Indeed, Enforcement's Opposition details a number of purported ambiguities claimed by Respondents that are in fact made clear by the other allegations of the detailed, 36-page, 188-paragraph Complaint.[19]

Taking the Complaint as a whole, I disagree with Respondents that greater detail is necessary for them to "evaluate" allegations of scienter or fraud at this stage of the action. Respondents point to various allegations that they claim require further elucidation, such as whether the subject wells were developed or not, the amounts of the purported reduction in distributions their investors received as a result of being defrauded out of a portion of their interests in the wells, and other details surrounding the allegations of the fraudulent scheme. But they make no claim that the Complaint's fraud or scienter allegations fail to adequately state a claim, and never offer any particularized explanation of how any perceived ambiguity impedes their defense. Rule 9215 requires only that a Respondent be provided enough detail to have a fair opportunity to plan a defense — the Rule cannot be used "as a device to force Enforcement to make an early disclosure of its evidence."[20] For now, Enforcement may allege that Respondents "inflated" the value of the securities without detailing how the values were inflated, or what a "fair price" for the securities should have been.[21] And it is clear from the extensive, detailed recitation of facts and law found in their Answer that Respondents are fully aware of the allegations against them and have an evident ability to plan their defense. Indeed, this detailed

[15] Answer at 41.

[16] Respondents' Motion at 2.

[17] Complaint ¶¶ 39-42.

[18] Answer, at 8. Indeed, the Answer includes an extensive discussion of the various conflicts disclosed in the various placement memoranda. *Id*. at 30-33.

[19] Enforcement's Opposition, at 5-6.

[20] OHO Order 10-04 at 3.

[21] *See* OHO Order 07-28 at 2 (denying motion for more definite statement seeking detail regarding the role Respondent played in a series of transactions, particular information about the transactions, and information supporting the contention that he acted with scienter –"Respondent may learn such evidentiary details through the discovery process under Rule 9251, but such evidentiary details exceed the scope of a motion for more definite statement").

recitation of the evidentiary record confirms that "the particular information [a movant] is seeking is within [movant's] own knowledge, which mitigates in favor of denying the motion."[22]

And contrary to Respondents' suggestions, the Complaint need not analyze the legal underpinnings of the various claims— again, a motion for a more definite statement may not "be used as a discovery tool to force Enforcement to reveal its legal theories, trial strategy, or the facts it intends to introduce at the hearing."[23] In sum, "if the Complaint, taken as a whole, fairly apprises the respondent of the charges and affords the respondent an adequate opportunity to plan a defense," it provides sufficient notice of the claims at issue.[24] Because the Complaint here adequately apprises the Respondents of the charges and permits them an opportunity to plan their defense, the motion for a more definite statement is **DENIED**.

C. Enforcement's Motion to Strike

Enforcement moves to strike the "introduction" (Sections I, II, III) and "general denial" (Section V) portions of Respondents' Answer. The "introduction" section contains a narrative description, from the Respondents' perspective, of the procedural history, Respondents' background, and an overview of the saltwater wells at issue in the case. The "general denial" is an extended, 24-page narrative from Respondents that describes the evidence and legal authorities that they maintain refute the charges set out in the Complaint.

Under FINRA Rule 9136(e), the Hearing Officer may strike from any filing "[a]ny scandalous or impertinent matter." "'Scandalous' matter 'casts a derogatory light on someone, usually a party to the action,' and 'impertinent' matter is 'not responsive or relevant to the issues involved.'"[25] The term "'[s]candalous' includes allegations that cast a cruelly derogatory light on a party or other person."[26] According to Enforcement, the challenged portions of Respondents' Answer are due to be stricken as either "scandalous" or "impertinent."[27]

Motions to strike are disfavored in this forum and generally should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation.[28] "Courts will not strike allegations in a pleading merely because they are 'overly narrative' or

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[22] *Babcock & Wilcox Co.*., 235 F.R.D. at 633-34 (E.D. La. 2006); OHO Order 10-04 at 3 (Respondent "would know to whom, when and how he communicated [his] decision to others").

[23] OHO Order 09-05 at 2.

[24] OHO Order 05-23 at 2.

[25] OHO Order 12-06 (2011026664301)(Oct. 23, 2012), at 2 (quoting *Egan-Jones Rating Company*, 2012 SEC LEXIS 2204, at *4 (July 13, 2012). *See also* OHO Order 98-20 (CAF970002) (Feb. 25, 1998), at 14 (quoting *Skadegaard v. Farrell*, 578 F.Supp. 1209, 1221 (D. N.J. 1984) (defining a scandalous pleading as one that reflects cruelly upon a party's moral character, uses repulsive language, or detracts from the dignity of the court).

[26] *In re 2TheMart.com, Inc. Sec. Litig*., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

[27] Enforcement's Motion to Strike at 2.

[28] OHO Order 17-01 (2013037401001) (Jan 30, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order-17-01_2013037401001.pdf.

contain 'generalized statements or matters of opinion.'"[29] That said, the pleadings reflect those matters the parties expect to prove at the hearing, and I am vested with "the authority and responsibility" to regulate the course of the hearing, including "the authority to exclude irrelevant and immaterial evidence."[30] To that end, striking immaterial matters from the pleadings serves to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial."[31]

Enforcement seeks to strike Respondents' narrative discussion of the procedural history of the case on the ground that it unfairly disparages Enforcement staff. The narrative asserts, among other things, that Enforcement staff originally (but mistakenly) believed that the disposal wells offered as investments were nonexistent; the staff later refused to engage in settlement negotiations after promising to do so; and finally the staff selectively leaked certain aspects of the investigation in order to disparage Respondents.[32] Enforcement maintains that these unsubstantiated allegations "impugn the staff and fall well within the range of 'scandalous' material."[33] Enforcement maintains that it would be unfair to permit the Hearing Panel to receive these unrebutted allegations prior to the hearing.[34]

I disagree that the allegations are "scandalous"— they do not "unnecessarily reflect on the moral character" of any identifiable Enforcement staff member or place any individual in a "cruelly derogatory light."[35] "It is difficult to believe there will be any harm to the reputation of either the Department of Enforcement or any of its employees – especially since no employees are mentioned by name – as a result of the challenged statements."[36] And I cannot say that some

[29] OHO Order 17-01 at 2, quoting *Lynch v. Southampton Animal Shelter Found. Inc.*, 278 F.R.D. 55, 65 (E.D.N.Y. 2011).

[30] OHO Order 17-01, at 1-2.

[31] *Whittlestone Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quotation omitted).

[32] Enforcement's Motion to Strike at 3-4.

[33] *Id*. at 4.

[34] *Id*.

[35] *Brambila v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 157203, at *6-7 (N.D. Cal. Nov. 1, 2012).

[36] OHO Order 98-20 at 14.

background information on the investigation of this matter is irrelevant to the proceedings.[37] I therefore decline to strike the "introduction" section of Respondents' Answer.[38]

Enforcement also challenges the "general denial" section of Respondents' brief, which spans 24 pages of the 48-page document. According to Enforcement, this section is largely a recapitulation of the Wells submission that Respondents submitted to Enforcement prior to the filing of the case. The general denial contains numerous factual and legal arguments that Respondents maintain undermine Enforcement's claims, including factual arguments that Respondents did not act with scienter, did not knowingly mislead investors or fail to disclose misleading information, and adequately disclosed potential conflicts, as well as legal arguments concerning whether the instruments marketed by Respondents were securities and whether FINRA has jurisdiction. Enforcement maintains that it is improper for Respondents to include what is effectively a legal brief as a part of their Answer.

Respondents maintain that their Answer is proper. They note that the Answer includes specific responses to each of the Complaint's 188 paragraphs, along with what Respondents characterize as their affirmative defenses. According to Respondents, nothing in Rule 9215 limits the length of an Answer; the rule requires Respondents to admit or deny particular allegations, *and* present any affirmative defense, without limitation as to form or length.[39]

As an initial matter, while the arguments presented in the general denial speak to Respondents' defenses to the charges, they are not "affirmative defenses." "An affirmative defense is a respondent's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."[40] The general denial does not presuppose the truth of the Complaint's allegations; instead, it explains why Respondents believe that Enforcement will not be able to establish intent, or other elements of its claims. A "negative" defense of this sort, where a Respondent undertakes no burden of proof and

[37] OHO Order 16-18 (2014043020901) (May 24, 2016), at 5, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf (because "FINRA Rule 9268(b) states that the decision shall include a description of the investigative or other origin of the disciplinary proceeding . . . some testimony regarding FINRA's investigation that led to the institution of these proceedings is relevant."); *and see, e.g.*, *Stanbury Law Firm, P.A. v. IRS*, 221 F.3d 1059, 1063 (8th Cir. 2000) (reversing grant of motion to strike where stricken material "provide[d] important context and background to [the plaintiff's] suit"); *Holt v. Quality Egg, LLC*, 777 F. Supp. 2d 1160, 1169 (N.D. Iowa 2011) ("even matters that are not 'strictly relevant' to the principal claim at issue should not necessarily be stricken, if they provide 'important context and background' to claims asserted or are relevant to some object of the pleader's suit."); *Jones v. Heritage-Crystal Clean, LLC*, 2016 U.S. Dist. LEXIS 99490, at *7 (M.D. Fla. July 29, 2016) (declining to strike allegations that "provide[d] helpful context and background information").

[38] Enforcement also requests that I strike subsequent portions of the introduction that discuss Respondents' background and give an overview of the saltwater wells at issue, but makes no argument as to why these aspects of the pleading should be stricken beyond the bald assertion that they are "impertinent and inappropriate." As these portions of the introduction seem to be clearly relevant to the case, I decline to strike these aspects of the Answer as well.

[39] *See* Respondents' Opposition at 2 citing Rule 9215.

[40] *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *87 (N.A.C. Dec. 20, 2007) (quotation omitted).

seeks to "demonstrate[] that plaintiff has not met its burden of proof as to an element plaintiff is required to prove," is not an affirmative defense at all.[41] Federal courts at times strike such negative defenses as redundant because they essentially duplicate the specific denials found elsewhere in an Answer.[42]

But as Respondents correctly point out, the rule governing motions to strike in federal court contemplates striking materials from a pleading that are redundant; Rule 9136 does not.[43] The narrative presented in the general denial is not scandalous, and is by and large pertinent to the issues at hand. And the fact that Respondents' denials are presented in the form of argument is not necessarily objectionable. "As long as the statement fairly meets the substance of the averment being denied and it is clear what defenses the adverse party is being called upon to meet at trial, a responsive plea should be upheld even though it may be argumentative in form."[44]

Enforcement's strongest contention is that the general denial is impertinent in those limited portions of the narrative discussion where Respondents discuss charges not included in the Complaint. Respondents include a discussion of why they have not violated Section 5 of the Securities Act of 1933, despite the fact that no such violation is alleged. They discuss why Respondent Sandlapper did not aid and abet Respondents Gordon and Bixler, though no such violation is charged. They also explain why they did not violate NASD Rule 3040 by failing to disclose an outside business activity, although no Rule 3040 violation is claimed.

While these discussions seem to be impertinent, or "not responsive or relevant to the issues involved,"[45] at this juncture I cannot say that there is no possibility that these seemingly irrelevant discussions may touch on certain of the issues pertinent to the case.[46] For instance, while it is true that the Complaint does not allege that Respondent Sandlapper aided and abetted violations by Respondents Gordon and Bixler, it *does* allege that Sandlapper lacked reasonable policies and procedures to supervise Gordon and Bixler's sales, and Sandlapper operated under

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[41] *Barnes v. AT&T Pension Ben. Plan*, 718 F.Supp 2d 1167, 1173 (N.D. Cal. 2010); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof [as to an element plaintiff is required to prove] is not an affirmative defense.")

[42] *Barnes*, 718 F.Supp 2d at 1173; *Federal Trade Comm'n*, 564 F. Supp. 2d 663, 665 (E.D. Tex. 2008). Other courts have noted that "because striking these defenses would not preclude defendants from presenting the same evidence, [there is no] prejudicial harm to the plaintiff and the defenses need not be stricken." *Williams v. Rosenblatt Secs. Inc.*, 2016 U.S. Dist. LEXIS 123135, at *2-3 (S.D.N.Y. Sept. 9, 2016) (quotation omitted).

[43] *Compare* Fed. R. Civ. Proc. Rule 12(f) (pemitting a court to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter") with FINRA Rule 9136(e) (permitting an adjudicator to strike from any brief, pleading or filing "[a]ny scandalous or impertinent matter.")

[44] *Scherer v. Equitable Life Assurance Society of U.S.*, 2004 U.S. Dist. LEXIS 18875, at *34 (S.D.N.Y. Sept. 21, 2004) (quoting Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 1268 (3d. ed. 1998)).

[45] *See* OHO Order 12-06 at 2.

[46] *See Porter v. U.S. Dep't of Army*, 1995 U.S. Dist. LEXIS 10864, at *14 (N.D. Ill. July 17, 1995) (noting that motions to strike are viewed with disfavor for various reasons, including "the risk that something may be discarded that may turn out to be material").

conflicts that compromised its ability to assess the suitability of the securities sold.[47] Similarly, while no violation of NASD Rule 3040 for undisclosed business activities is asserted as a claim, the Complaint *does* allege that violations of NASD Rule 3040 took place.[48] The brief discussion of Section 5 is tethered to the question of whether the interests are securities, a disputed point this is clearly relevant to the case.[49]

And irrespective of whether limited portions of the Answer are impertinent, Enforcement makes no substantial showing of prejudice. Its only argument on the point is that "Respondents make numerous legal arguments and assertions that Enforcement does not have an opportunity to rebut, [and] present a real danger of misleading the Hearing Panel regarding the applicable law."[50] But prior to the hearing, each side will have the opportunity to present all of its legal and factual arguments in their prehearing brief, and thus the opportunity to clarify any pertinent factual or legal issue. And Respondents are advised that proof of irrelevant issues and assertions will not be permitted at the hearing. Consequently, I find no good reason to undertake "the largely academic exercise of editing a [Respondent's] pleadings."[51] The motion to strike is **DENIED**.

SO ORDERED.

David Williams
Hearing Officer

Date: January 10, 2018

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[47] Complaint at ¶¶ 95-103.

[48] Complaint at ¶¶ 182-187.

[49] *See* Answer at 36.

[50] Enforcement's Motion at 6.

[51] *Illinois Tool Works Inc v. ESAB Group, Inc*., 2016 U.S. Dist. LEXIS 184333, at *4 (E.D. Wis. Sept. 13, 2016) ("[T]his court does not propose to entertain disfavored motions to strike merely to embark on the largely academic exercise of editing a defendants' pleadings. Instead, a party moving to strike must identify some actual prejudice it could expect to sustain as a result of the offending pleading. That has not been established here.")