

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10970160
v.	:	
	:	
	:	Hearing Officer - EBC
	:	
	:	
Respondent.	:	

ORDER DENYING MOTION FOR A MORE DEFINITE STATEMENT

The Department of Enforcement commenced this disciplinary proceeding on September 22, 1997, by filing a Complaint with the Office of Hearing Officers against Respondent _____. The Respondent is charged with unauthorized trading and failing to follow customers' instructions regarding their securities accounts. On October 10, 1997, the Respondent filed an Answer to the Complaint. In the Answer, as his First Affirmative Defense, the Respondent asserts, in essence, that the allegations in the Complaint are not sufficiently detailed to allow him to effectively defend the Department of Enforcement's charges against him.¹

¹ Respondent's First Affirmative Defenses states:

The NASD's allegations are insufficiently particular to adequately apprise _____ of the claims asserted against him and therefore, preclude effective defense of those claims. The NASD has not set forth with any modicum of particularity the impropriety of which it complains. The NASD has failed to describe or recount with any specificity any incident, action or omission on the part of _____ which could possibly give rise to a cause of action. The Panel should require the NASD to restate its claims with greater particularity as to the alleged impropriety of _____ acts or omissions.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-5 (C10970160).

On October 29, 1997, an Initial Pre-Hearing Conference was held in this proceeding. As I indicated during the Conference, the Code of Procedure contemplates that challenges to the adequacy of a complaint be raised through a motion for a more definite statement (see Code of Procedure Rule 9215(c)) and that I would treat the Respondent's First Affirmative Defense as such. During the Conference, I heard argument from the Parties on the issue of the sufficiency of the Complaint. Both Parties declined the invitation to submit papers on this issue.

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)).²

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).³ Further, the case law

² 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.

³ 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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developed in the SEC administrative proceeding forum makes 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).

I apply these principles in assessing the legal sufficiency of the allegations in the Complaint in this matter.

RULING

I. First Cause of Action

The First Cause of Action in the Complaint alleges that the Respondent violated NASD Conduct Rules 2110 and 2120, by executing or causing the execution of, ten unauthorized transactions in the accounts of five customers. (Complaint, ¶ 2.) The Respondent asserts that this cause of action is insufficient because no customer complaint letters or order tickets in support of the unauthorized trading charges were described in or attached as exhibits to the Complaint.

The Department of Enforcement's First Cause of Action identifies the names of the customers, the dates of the transactions, the securities and number of shares involved in each alleged unauthorized transaction, and the nature of each transaction, i.e., whether it was a purchase or sale. (Complaint, ¶ 2(a) - 2(j).) The cause of action also identifies the specific rule provisions that the Respondent allegedly violated. In my judgment sufficient detail has been provided to allow the Respondent to adequately defend the charges of unauthorized trading. There is no reason to require the Department of Enforcement to incorporate in its allegations the evidentiary detail that the Respondent seeks, or to require the Department of Enforcement to attach to its Complaint the documentary evidence that the Respondent seeks.

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II. Second Cause of Action

The Second Cause of Action in the Complaint alleges that the Respondent violated NASD Conduct Rules 2110 and 2120, by failing to follow five customers' instructions concerning "orders to sell securities, close securities accounts and to forward proceeds." (Complaint, ¶ 3.) The Respondent challenges the sufficiency of this cause of action on the grounds that it fails to identify what securities were the subject of the customers' instructions and because no supporting documents were attached to the Complaint.

The Department of Enforcement's Second Cause of Action identifies the names of the five customers, the dates of the transactions, and a description of the customers' instructions that the Respondent allegedly failed to follow. (Complaint, ¶ 3(a) - 3(l).) One customer's instructions are described as "failure to sell and close account" (Complaint, ¶ 3(a) - 3(b)); another customer's instruction is described as "failure to sell" (Complaint, ¶ 3(c)); and the remaining customers' instructions are described as "failure to sell and forward proceeds." (Complaint, ¶ 3(d) - 3(l).) This cause of action also identifies the specific rule provisions that the Respondent allegedly violated. However, in my judgment this cause of action is unnecessarily vague in that it fails to identify the securities that were the subject of the customers' alleged instructions to sell. I reject the Respondent's other challenge to the sufficiency of this cause of action because this challenge is premised on the view that he is entitled to evidentiary detail at the pleading stage, which he is not.

Pursuant to my October 31, 1997 Order, copies of all non-privileged and otherwise discoverable documents, in the Department of Enforcement's investigative file in this matter, will be made available to the Respondent on November 10, 1997. In light of this, while I agree that Respondent is entitled to greater particularity as to the allegations in the Second Cause of Action,

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Respondent's motion is, at this time, DENIED. 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). The Respondent may renew his motion for a more definite statement, if he is unable to discern from the Department of Enforcement's documents the names of the securities that are the subject of the customers' instructions referred to in the Second Cause of Action in the Complaint.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: Washington, DC
November 6, 1997