

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-05 (2008014227-02).

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

RESPONDENT 1,

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding  
No. 20080148227-02

Hearing Officer—DRS

**ORDER DENYING RESPONDENTS’ PRECLUSION MOTION**

**A. Introduction**

On January 26, 2016, Respondents filed a joint motion to preclude the Department of Market Regulation from seeking findings of violations against them based on the trading activity of any person or entity other than Respondents (“Motion”). Respondents represent that they understand that Market Regulation plans to seek findings of violations against them based on the trades of other, non-party persons at GP. This approach, according to Respondents, “violates the limited basis on which the Complainant was given leave to amend the original complaint, which was strictly limited to allow Complainant to pursue joint liability **as between Respondents.**”<sup>1</sup> [Bold in original].

Stated another way, Respondents assert that Market Regulation is trying impermissibly to add a new charge and liability theory, namely, that Respondents did not simply act in concert with each other, but also “in concert with **other, non-party [GP] traders** who are not identified in the Amended Complaint.”<sup>2</sup> [Bold in original]. Respondents accuse Market Regulation of laying the groundwork for this new charge through a “subtle” change it made in the Amended

<sup>1</sup> Mot. at 1.

<sup>2</sup> Mot. at 2.

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Complaint. The original Complaint alleged that “[Respondent 1, Respondent 2, and GP,] acting through [Respondent 1] and [Respondent 2]” engaged in manipulative conduct.<sup>3</sup> In the Amended Complaint, however, that allegation was changed to: “[GP, Respondent 1 and Respondent 2,] singly and in concert, individually and jointly” engaged in the violative actions.<sup>4</sup> This new language, Respondents contend, should not enable Market Regulation to assert a new, broader, unauthorized charge, supported by evidence of transactions by other GP traders.<sup>5</sup> According to Respondents, they “would be prejudiced if Complainant is allowed, at this late stage, to add a theory predicated on an unknown number of traders, whose identities and whereabouts are not known.”<sup>6</sup> Therefore, Respondents request that I preclude Market Regulation “from alleging or arguing at the hearing that [they] acted jointly with individuals or entities other than [themselves].”<sup>7</sup>

Market Regulation opposed the motion on February 9, 2016. In support of its opposition, Market Regulation argues that the Amended Complaint clarifies the basis for scheme liability consistent with my earlier preclusion order, and provides Respondents with sufficient notice to understand the charges and an adequate opportunity to plan a defense. Further, Market Regulation disputes that Respondents will be prejudiced by the notice of its intention to use the trading activity of other traders and maintains that doing so comports with fair process. Finally, Market Regulation contends that Respondents waived their current objection to the Amended Complaint by not raising the point when they filed their objections to the motion for leave to amend the Complaint.

As explained below, I deny the Motion.

## **B. Discussion**

The Motion presents two primary questions. First, by asserting that the common scheme included other traders at GP, is Market Regulation exceeding the limitation I imposed when I granted it permission to seek leave to amend the Complaint? And, second, if so, should I preclude it from making this assertion?

Regarding the first question, I find that Market Regulation's intended use of the trading by other GP traders exceeds the limitation I imposed. Previously, I found that the Complaint did not allege that the manipulative scheme involved joint/in concert action by Respondents.

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<sup>3</sup> Mot. at 9; Compl. ¶ 118.

<sup>4</sup> Mot. at 9; Am. Compl. ¶ 119.

<sup>5</sup> Mot. at 2.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.*

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Therefore, I ruled “that it would be unfair to require [them] to defend against common scheme liability charges that were not alleged in the Complaint.”<sup>8</sup> Nevertheless, I did not preclude Market Regulation “from seeking leave to amend the Complaint for the limited purpose of asserting, as a basis of liability, that [Respondent 1] and [Respondent 2] acted together in such a combination.” Thereafter, Market Regulation moved for leave to amend the Complaint, and I granted the motion.

The Amended Complaint added allegations that GP and Respondents acted singly and in concert, individually and jointly. It also eliminated certain language in the Complaint. The Amended Complaint does not, however, explicitly aver that Respondents engaged in a manipulative scheme with other traders at GP. But in opposing the motion to preclude, Market Regulation explained that it eliminated the “acting through [Respondent 1] and [Respondent 2]” language “to make it clear that the common scheme included [GP], and that other activity at [GP] in the subject securities would also be evidence of the common scheme.”<sup>9</sup> Specifically, Market Regulation intends to use “the conduct of other [GP] traders as proof of a common scheme.”<sup>10</sup>

Using this trading to prove a common scheme would expand the scope of the scheme alleged in the Complaint and would expand the basis for liability against Respondents.<sup>11</sup> According to Market Regulation, the manipulative scheme described in the Complaint involved trading by Respondents.<sup>12</sup> It did not identify trading by other GP traders as comprising part of that alleged scheme. While I permitted Market Regulation to seek leave to amend the Complaint, I limited it to asserting, as a basis of liability, that Respondents acted together in a common scheme. Market Regulation’s intended use of other traders’ conduct exceeds this limitation. Thus, grounds exist to grant the Motion.

Nevertheless, there are compelling considerations that weigh against preclusion. First, there is a strong preference<sup>13</sup> for resolving disputes on the merits. And central to this case is a

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<sup>8</sup> Order Granting Resp’ts’ Preclusion Mot. at 5 (Sept. 21, 2015).

<sup>9</sup> Mkt. Regulation’s Opp’n to Resp’ts’ Mot. to Preclude (“Opp’n to Mot.”) at 2 (Feb. 9, 2016).

<sup>10</sup> *Id.* at 5. *See also* Mkt. Regulation’s Omnibus Opp’n to Resp’ts’ Mots. for More Def. Statement (“Opp’n to Mot. for More Definite Statement”) at 7 (Jan. 12, 2016).

<sup>11</sup> *Cf. John R. Brick*, Admin. Proceeding No. 3-3167, 1973 SEC LEXIS 3470, at \*39–40 (Feb. 1, 1973) (finding that once the respondents’ “concert of action” had been established, “evidence admissible against [one respondent] on the issue of his alleged fraud became admissible with respect to the alleged fraud perpetrated by [the other respondent].”).

<sup>12</sup> Opp’n to Mot. at 3–5.

<sup>13</sup> *See* Fed.R.Civ.P. 15(a), which governs motions to amend complaints and espouses a permissive standard consistent with the strong preference for resolving disputes on the merits. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015).

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determination of what conduct constituted participation in the alleged manipulative scheme. Second, FINRA Rule 9263(a) directs a Hearing Officer to "receive relevant evidence," although the Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious or unduly prejudicial." Motions in limine to exclude broad categories of evidence are disfavored and should only be granted when the evidence at issue would be inadmissible for any purpose.<sup>14</sup> Evidence of other traders' involvement in the alleged scheme may be relevant, at a minimum, in determining the scope of the scheme, including whether Respondents participated in it. Third, Respondents have not shown that they would be prejudiced if I allowed Market Regulation to present evidence of the alleged broader scheme. To the contrary, Market Regulation represents that Respondents have received discovery that includes the trading records at issue;<sup>15</sup> Respondents are now clearly on notice that Market Regulation may assert that the alleged scheme involved other traders at GP; and, since the hearing has not yet been rescheduled,<sup>16</sup> Respondents will have a full opportunity to defend against those assertions.<sup>17</sup>

On balance, I find that the interests of justice would be better served if I permit Market Regulation to assert that the alleged manipulative scheme included trading by other GP traders and to offer admissible evidence in support of that assertion. Accordingly, the Motion is **DENIED**.<sup>18</sup> However, to minimize the risk of potential prejudice to Respondents, **I HEREBY ORDER** Market Regulation to disclose to Respondents, by no later than **February 23, 2016**, the identity of all traders it contends were part of Respondents' alleged manipulative scheme.

**SO ORDERED.**

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David R. Sonnenberg  
Hearing Officer

Dated: February 16, 2016

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<sup>14</sup> OHO 16-04 (2012033393401) at 2 (Feb 3, 2016) (and cases cited therein).

<sup>15</sup> Opp'n to Mot. for More Definite Statement at 5.

<sup>16</sup> The parties will be submitting, by February 22, 2016, proposed pre-hearing schedules based on hearing dates of June 1–10, 2016.

<sup>17</sup> *Cf. Dep't of Enforcement v. Berry-Shino Sec., Inc.*, No. C3A030001, 2003 NASD Discip. LEXIS 61, at \*32–33 (OHO Dec. 10, 2003) ("Even if a charge is not clearly articulated in the Complaint, it may be adequately clarified during the pre-hearing process and a respondent may be held liable if it is clear that the respondent had adequate notice of the charge and a fair chance to defend.").

<sup>18</sup> This ruling is without prejudice to Respondents' right to object on any other appropriate grounds to the introduction of specific evidence relating to the trading by other traders at GP.