

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2008012955301

Hearing Officer—Andrew H. Perkins

ORDER DENYING MOTION FOR MORE DEFINITE STATEMENT

Respondents 1 and 2 (“Respondents”) filed a Motion for More Definite Statement of the factual allegations underlying the Fifth Cause of Action in the Complaint, which alleges that Respondents provided false testimony and inaccurate information during the underlying investigation, in violation of Procedural Rule 8210 and Conduct Rule 2110. In summary, Respondents contend that the Office of Hearing Officers should adopt the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure (“FRCP”), which requires civil litigants in federal court to plead fraud with particularity. The Department of Enforcement (“Enforcement”) opposed the motion.

For the reasons discussed below, the Hearing Officer denies Respondents’ motion.

Discussion

FINRA 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.” This pleading requirement is satisfied if the allegations provide “a respondent sufficient notice to understand the charges and adequate opportunity to plan a defense.”¹ Enforcement need not include evidentiary details in the Complaint to meet this standard.² On the other hand, if the Complaint does not meet this standard, a respondent can file “a motion for a more definite statement of the specified matters of fact or law to be considered or determined.”³ But Rule 9215(c) cannot 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.⁴

Respondents moved for a more definite statement because the Complaint does not spell out the specific questions and answers in their respective testimonies, or the sentences from their counsel's letter dated September 9, 2008, which are the basis for the Fifth Cause of Action.

Respondents contend that the Fifth Cause of Action therefore fails to comply with FRCP Rule 9(b), which provides, “in all averments of fraud or mistake, the circumstances constituting fraud

¹ *District Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (N.B.C.C. July 28, 1997) (construing former Rule 9212(a)). *Accord, e.g., Daniel Joseph Avant*, 52 S.E.C. 442 (Oct. 26, 1995) (construing former Rule 9212(a)); *Joseph H. O'Brien II*, 51 S.E.C. 1112 (1994) (same); *District Bus. Conduct Comm. v. Hamilton Inv., Inc.*, No. C8A940023, 1997 NASD Discip. LEXIS 19 (N.B.C.C. Feb. 26, 1997) (same).

² *See, e.g., Alfred M. Bauer*, 1996 SEC LEXIS 2546, at *2-3 (Aug. 27, 1996) (holding that the Commission has repeatedly ruled that a respondent is not entitled in advance of the hearing to a disclosure of the evidence on which the Division [of Enforcement] intends to rely).

³ Procedural Rule 9215(c).

⁴ Instead of formal discovery such as is provided for under the Federal Rules of Civil Procedure, FINRA's Code of Procedure requires the Enforcement to disclose information to respondents before the hearing. For example, Procedural Rule 9251 requires Enforcement to make relevant, non-privileged documents available to the defense for inspection and copying no later than 21 days after service of a respondent's answer unless otherwise ordered by the Hearing Officer. In addition, Rule 9242 requires the parties to file and exchange pre-hearing submissions in advance of the hearing, which submissions include: (1) an outline or narrative summary of a party's case or defense; (2) a statement of the legal theories upon which each party relies; (3) a list and copies of all documents that a party intends to offer into evidence at the hearing; and (4) a list of all witnesses who shall testify on each party's behalf.

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or mistake shall be stated with particularity.” The federal rules do not apply in FINRA disciplinary proceedings, which are governed by FINRA’s Code of Procedure.

FINRA’s Code of Procedure does not contain a heightened pleading requirement for fraud cases. Instead, FINRA Rule 9212(a) employs a pleading standard nearly identical to that used in proceedings brought by the Securities and Exchange Commission (“SEC”). The SEC has explained that “[t]he essence of the [its’] 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.”⁵ Further, SEC decisions make clear that evidentiary details need not be included in the charging document.⁶ A respondent is not entitled in advance of the hearing to disclosure of the evidence on which the SEC intends to rely.⁷ In applying this pleading standard, the SEC has taken into consideration the extent to which a respondent is able to derive further information from his own files or records based on the information given in the order instituting the proceeding and the extent to which the respondent has been granted access to the SEC’s underlying investigative files.⁸

Applying the foregoing standards to the pleading in this case, the Hearing Officer finds the allegations in the Fifth Cause of Action provide sufficient notice for Respondents to understand the nature of the charge and adequate opportunity to plan a defense. The Complaint provides considerable detail of the nature and timing of the Respondents’ alleged false statements, including direct quotes from their counsel’s letter dated September 9, 2008.⁹ The

⁵ *Donald T. Sheldon*, 52 S.E.C. 427, 1986 SEC LEXIS 2293, at *4 (June 9, 1986).

⁶ *Id.*

⁷ *See, e.g., MGSi Sec., Inc.*, 1998 SEC LEXIS 2411, at *3 (Oct. 21, 1998).

⁸ *Sheldon*, 1986 SEC LEXIS 2293, at *4-5.

⁹ For example, see paragraph 20 of the Complaint.

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Respondents have not shown that this level of detail is insufficient for them to understand the charge and plan their defense. Accordingly, the motion for a more definite statement is denied.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: December 16, 2009