

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12156

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 21, 2006

In the Matter of :
: ORDER ON MOTION FOR MORE
STEPHEN J. HORNING : DEFINITE STATEMENT
:

The Securities and Exchange Commission (Commission) instituted this proceeding on January 20, 2006, pursuant to Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 (Exchange Act) and Section 14(b) of the Securities Investor Protection Act of 1970 (SIPA). On February 11, 2006, Stephen J. Horning (Horning) filed an Answer, a Motion for More Definite Statement (Motion), and a Notice of Representation. The hearing will begin in Denver, Colorado, on April 24, 2006, at 9:30 a.m. local time.

Horning's Motion

Horning argues that the Order Instituting Proceedings (OIP) is deficient because it fails to identify: (1) the specific books and records that contain false entries and the dates of those entries; and (2) the specific conduct that supports the sanctions requested under Section 14(b) of SIPA. Specifically, Horning claims that paragraph twenty-four of the OIP alleges that Horning aided and abetted the violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by Rocky Mountain Investment & Securities, Inc. (Rocky Mountain), but fails to state "which specific books and records were false and how they were false." (Motion at 1.) Similarly, in connection with allegations that Rocky Mountain's trader and operations manager made false entries, Horning faults the OIP for not providing him with the "basics of when, where and by how much." (*Id.*) Horning claims that his need for specificity is acute because: (1) he has not had access to Rocky Mountain's records since February 2003; and (2) he will have an abbreviated time to mount a defense because the Commission ordered an Initial Decision within 300 days of his receipt of the OIP, yet the Division of Enforcement (Division) has been investigating the matter for over three years. Finally, Horning cites *Dirks v. SEC*, 802 F.2d 1468 (D.C. Cir. 1986), in support of his claim that Section 14(b) of SIPA is unconstitutionally vague unless limited by an appropriate interpretation by the Commission. Horning argues that the OIP does not contain the constitutionally mandated limiting interpretation and thus it fails to provide him with sufficient notice of the claims against him and adequate notice as required by the United States Constitution.

Division's Opposition to the Motion

The Division denies that the OIP is vague. (Opposition to the Motion, filed Feb. 13, 2006.) The Division cites to the OIP: (1) paragraphs five and six that specify allegedly fraudulent conduct by the trader and the operations manager “from at least April 2002 through January 2003”; (2) paragraphs seven through eleven that describe conduct by the trader and the operations manager that resulted in errors in Rocky Mountain's FOCUS reports, net capital, and customer protection reserve accounts; (3) paragraph thirteen that details the operations manager's errors in making the quarterly securities count for the quarter ended September 30, 2002; and (4) paragraphs seventeen through nineteen that describe Horning's failure to supervise the trader and the operations manager.

The Division assumes that Horning's constitutional argument is that the SIPA statute is too vague. It cites case law upholding the Commission's authority to sanction someone who has caused a violation of the securities statutes: KPMG Peat Marwick LLP, 54 S.E.C. 1135 (2001), reconsideration denied, Exchange Act Rel. 44050 (March 8, 2001), 74 S.E.C. Docket 1351, petition for review denied, 289 F.3d 109 (D.C.Cir. 2002). The Division disagrees that the Commission must issue rules interpreting “the cause standard” citing Edward Sinclair, 44 SEC 523, 527 (1971), aff'd, 444 F.2d 399 (2d Cir. 1971).

Horning's Reply in Support of the Motion

Horning maintains that the Division missed the gist of his arguments. He argues that a portion of the OIP is: (1) inadequate because it does not detail what books and records contained the fictitious trades entered by the trader, Dileo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990), and (2) unconstitutionally vague because it does not identify the specific conduct that supports the relief requested pursuant to SIPA. According to Horning, the OIP alleges conduct ranging from causing books and records violations to aiding and abetting securities fraud. These violations involve different mental states and degrees of intentional conduct so that the OIP is unconstitutionally vague if it alleges this range of conduct violates Section 14(b) of SIPA, citing Dirks v. SEC, 802 F.2d 1468 (D.C. Cir. 1986).

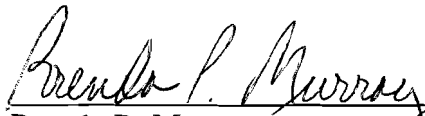
Ruling

A respondent is entitled to be sufficiently informed of the charges so that he or she may adequately prepare a defense, but a respondent is not entitled in advance of the hearing to disclosure of the evidence on which the Division intends to rely. Charles M. Weber, 35 S.E.C. 79 (1953); J. Logan & Co., 38 S.E.C. 827 (1959); M. J. Reiter Co., 39 S.E.C. 484 (1959). The OIP provides Horning with sufficient information to defend the allegations so that it meets the standard of the Commission's Rules of Practice and the applicable case law.¹

¹ An OIP shall state the nature of any hearing; the legal authority and jurisdiction under which the hearing is held; and where an answer is require, “set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto;” and state the nature of any relief or action sought. 17 C.F.R. § 201.200(b).

I find that the OIP provided Horning with sufficient detail as to the allegations to enable him to adequately defend the allegations. The fact that Horning's Answer indicates no difficulty in responding to the allegations supports my finding. The situation in Dileo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990), is distinguishable on its facts. In Dileo, persons who purchased shares of Continental Illinois Bank (bank) sought to sue the bank's auditor for securities fraud following the bank's "financial distress." The Court of Appeals found that the complaint failed to state in sufficient detail what the auditors did, or failed to do, that amounted to fraud. Here Horning was the president, a registered financial and operations principal, compliance director, a director, a registered representative, and a thirty-nine percent shareholder of a broker-dealer that had to liquidate, allegedly because of fraud committed by its trader and operations manager. The OIP details the illegal conduct and alleges that Horning willfully aided and abetted and caused Rocky Mountain's violations of Sections 15(c)(3), 17(a), and 17(e) of the Exchange Act and Rules 15c3-1, 15c3-3, 17a-3, 17a-5(a), 17a-5(c), 17a-5(d), 17a-11, and 17a-13. Finally, Horning has received the Division's investigative record, and will receive the Division's list of witnesses and exhibits more than a month before the hearing.

Horning's position on the constitutionality of Section 14(b) of SIPA is a legal argument that the parties may address in their briefs following the evidentiary stage of the proceeding. The Motion for More Definite Statement is DENIED.



Brenda P. Murray
Chief Administrative Law Judge