ADMINISTRATIVE PROCEEDING
FILE NO. 3-10765

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 13, 2002

In the Matter of

J.W. BARCLAY & CO., INC.
JOHN A. BRUNO
MICHAEL J. WILLS
EDGAR B. ALACAN
EMMANUEL P. CUBE
MAYER DALLAL
DANOO NOOR, SR.
EMANUELE A. SCARSO
MICHAEL B. SCOTT

ORDER

On April 24, 2002, the Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) in this matter. The OIP alleges that six registered representatives of a brokerage firm had engaged in a pattern of sales practice abuses that defrauded customers from June 1997 through December 1998. The alleged misconduct includes, "among other things," purchases and sales of securities on margin in the accounts of "at least" eleven customers, churning the accounts of "at least" twelve customers, making materially misleading statements or omissions to "at least" two customers, making unsuitable purchases and sales in the accounts of "at least" thirteen customers, and failing to execute sell orders for "at least" four customers. The brokerage firm, its president, and its vice president are charged with failure to supervise. The misconduct is alleged to have occurred "primarily" in securities that the brokerage firm brought public or for which it was a market maker.

Certain Respondents filed motions for more definite statements, which the Division opposed. In my Order of June 13, 2002, I noted that the case has the prospect of becoming unmanageable because of the number of actively-defending Respondents (nine), the size of the Division's investigative file (more than thirty boxes of non-privileged materials), and the Division's stated intent to present evidence of fraudulent activity that took place more than five years before the OIP was issued. In those circumstances, and because of the wording of the OIP, I granted in part the motions for more definite statements.

I required the Division to file a more definite statement that provided a complete list of the customers who were allegedly defrauded and to identify the specific securities at issue in the OIP. See Order of June 13, 2002. The Division filed its more definite statement on June 19, 2002. It stated, without any equivocation, that its list of customer accounts was complete.

On November 12, 2002, the Division filed a list of fifty-six witnesses it proposes to call at the upcoming hearing. The list included not only witnesses who are expected to testify about the specific customer accounts identified in the more definite statement, but also nine additional witnesses who are expected to testify about customer accounts that were not identified on the more definite statement (Proposed Division Witnesses ## 11 and 44 through 51, inclusive). The Division's November 12, 2002, filing did not offer any explanation for the inclusion of prospective witnesses who will testify about the nine additional customer accounts not identified on its (supposedly complete) more definite statement.

On November 13, 2002, I ordered the Division to supplement its prospective witness list to explain the relevance of the proposed testimony about customer accounts not listed on its more definite statement. On November 20, 2002, the Division filed its supplement. On November 26 and 27, 2002, Respondents Cube and Scarso objected to the Division's plan to call any customer witnesses not identified on the Division's more definite statement. On December 3, 2002, the Division responded to the objections of Cube and Scarso. On December 6, 2002, I held a telephonic prehearing conference to discuss the issues raised by Cube, Scarso, and the Division.

Cube and Scarso suggest that the Division is not confident of the strength of its case against them, and needs to buttress its showing by offering additional complaining customers, even if it involves witnesses who were customers of firms other than Barclay, and alleged misconduct occurring before and after the time period alleged in the OIP. To put the matter in perspective, Respondents claim that the Division has now identified three new Scarso customers in addition to the four identified previously, and two new Cube customers in addition to the five previously named. Respondents emphasize that the Division has known about these customers for years. They argue that the inevitable result is a substantial expansion of the prosecution's case at an advanced stage of the proceeding.

The Division believes that it can prove the liability aspects of its case by sticking to the time period alleged in the OIP and the customer accounts identified in its more definite statement. The Division is not so sure it will receive the sanctions it wants if it confines its evidence to the time period alleged in the OIP and the customer accounts identified in its more definite statement. The Division contends that the testimony of proposed witnesses ## 11 and 44 through 51 will be relevant to sanctions; to prove motive, opportunity, intent, and the absence of mistake on the part of Respondents; and to show lack of credibility, if Respondents deny that they violated the federal securities laws or claim that their misconduct was isolated. The Division estimates that, if all fifty-six of its proposed witnesses testify, approximately 10% of its case will involve events occurring before June 1997 or after December 1998, or witnesses who did not transact business with one of the six registered representatives who are Respondents.

Respondents desire to file a motion in limine, aimed at barring the Division from offering the testimony of customer witnesses who were not identified on the Division's more definite statement. The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the

admissibility and relevance of certain forecasted evidence. See Luce v. United States, 469 U.S. 38, 41 n.4 (1984) (noting that, "[a]lthough the Federal Rules of Evidence do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials"); see also Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996); Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Group, 937 F. Supp 276, 283 (S.D.N.Y. 1996). Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. See SEC v. U.S. Environmental, Inc., 2002 U.S. Dist LEXIS 19701 at *5 (S.D.N.Y. Oct. 16, 2002). Courts considering a motion in limine may reserve judgment until trial, so that the motion is placed in the appropriate factual context. See Nat'l Union Fire Ins. Co., 937 F. Supp. at 287. Further, a court's ruling regarding a motion in limine is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the . . . proffer." Luce, 469 U.S. at 41.

Respondents may file a motion in limine at this time if they wish to do so, but they will face an uphill battle. The Commission has not been enthusiastic about orders by Administrative Law Judges granting motions in limine. See City of Anaheim, 71 SEC Docket 191 (Nov. 16, 1999) (vacating an ALJ's order granting a motion in limine). However, the Commission has emphasized that Administrative Law Judges retain flexibility in ruling on matters of relevance during the hearing. Id. at 194 ("We . . . wish to make clear that the law judge conducting the hearing may make such rulings with respect to particular evidence as it is introduced as the law judge deems appropriate.").

The present proceeding is not the only occasion an issue like this has arisen. In addition to City of Anaheim, discussed above, one must also recall Richmark Capital Corp., A.P. No. 3-9954. The OIP in Richmark Capital Corp. alleged misconduct occurring from July 1998 through at least August 1998. When Respondents moved for a more definite statement, the Division opposed their motion on the grounds that the time frame set out in the OIP was specific. Nonetheless, approximately three weeks before the hearing, the Division informed Respondents it intended to present evidence of illegal conduct from March 1998 to September 1998. Respondents claimed prejudice, and filed a motion in limine. The Administrative Law Judge accepted the Division's evidence at the hearing for limited purposes, but later granted Respondents' motion and restricted the Division's case to the time frame set out in the OIP. See Richmark Capital Corp., 77 SEC Docket 621, 650-51 (Initial Decision) (Mar. 18, 2002), review granted.

The Division is correct in claiming that the evidence Respondents seek to exclude by a motion in limine may entail a broad range of different types of evidence that could properly be admitted for various reasons. I cannot issue an order at this juncture that would exclude a broad

range of evidence that may turn out to be admissible at the hearing.[1] I can make sure that any prejudice suffered by Respondents in preparing for hearing will be minimized.

First, I will not require Respondents to incur the additional cost of traveling to Chicago to inspect and copy the Division's files a second time. The Division has agreed to provide Respondents a copy of the relevant portions of its investigative file, within one week, and at the Division's expense. This is an equitable resolution, inasmuch as the present predicament is entirely of the Division's own making. To be clear: the Division must transmit to each Respondent a copy of all materials in its investigative file relating to proposed witnesses ## 11 and 44 through 51, inclusive. If the Division is going to withhold any materials on the grounds of privilege, I am assuming that those items have already been identified in the Division's 371-item privilege log, dated July 3, 2002. If additional items, not on the July 3 privilege log, are now going to be withheld, the Division must identify each additional item with particularity when it transmits the materials to Respondents. Respondents should receive all such materials from the Division by December 20, 2002.

Second, if any Respondents wish to subpoena documents (such as account statements) from the newly identified customers on the Division's proposed witness list, they may do so. Respondents Cube and Scarso have already filed five such subpoena applications. I signed those subpoenas yesterday and returned them to counsel for service. If any other Respondents wish to subpoena customer records, they should file applications with this Office as soon as possible.

Third, I will require the Division to file and serve a supplement to its July 3 privilege log to provide additional details about withheld documents involving all prospective customer witnesses. Numerous entries on the Division's privilege log identify customer complaints, conversations with complaining customers or their representatives, customer correspondence, or the like. See, e.g., Items ## 20, 23, 51, 52, 61, 107, 145, 147, 148, 161, 162, 165, 166, 167, 178, 179, 193, 195, 197, 206, 209, 210, 211, 213, 217, 219, 222, 223, 225, 227, 230, 232, 235, 238, 239, 240, 241, 243, 244, 276, 304, 323. The Division should now state which, if any, of these items involve persons on its list of prospective witnesses. It should also link the prospective witnesses to the specific privileged item. In addition, the Division should explain why, in its judgment, the entire document is privileged, and why it is impossible to provide redacted copies of documents to Respondents. Finally, the Division should review these documents to determine whether, notwithstanding their privileged character, they should still be released under Brady v. Maryland, 373 U.S. 83 (1963), and Rule 230(b)(2) of the Commission's Rules of Practice. Several items on the Division's privilege log also refer to an "interview form," including Items ## 161, 162, 179, 193, 219, 222, 223, 232, 235, 238, 239, and 243. The Division should provide the same information for these withheld

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[1] The Division has not filed a motion to amend or expand its more definite statement. Rather, the Division is content to offer the testimony of the newly identified customer witnesses for the limited purposes it has described. See Division's Supplement to Witness List at 8; Division's Response to Objections of Scarso and Cube, at 7-8. Accordingly, the Division's expert witness testimony will focus only on the customer accounts identified in the Division's more definite statement. See Division's Supplement to Witness List at 14-15.

documents. This supplement to the Division's privilege log should be filed and served by January 10, 2003. Respondents should wait to file any motions to compel the production of documents until after the Division has filed and served the supplement.

Fourth, Respondents will have an opportunity to renew their claim of prejudice as the hearing date approaches. If Respondents file a motion in limine shortly before or at the hearing, I will consider several issues in deciding whether to grant it, including: (1) whether the Division has promptly provided its entire investigative file on the newly-identified customer witnesses to Respondents; (2) whether the Division has taken an overly-broad and unsupportable position on withholding privileged documents; (3) whether the Division has taken an overly-narrow and unsupportable position on disclosing exculpatory materials under Brady and Rule 230(b)(2) of the Commission's Rules of Practice; (4) whether the newly-identified customer witnesses have been forthcoming in providing Respondents with subpoenaed documents, or whether there is evidence of foot dragging; and (5) whether Respondents have received all relevant documents from subpoenaed customers at least thirty days before the hearing.

SO ORDERED.

James T. Kelly
Administrative Law Judge