

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 691 / February 7, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14619

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In the Matter of	:	
	:	ORDER GRANTING IN PART AND
WESTERN PACIFIC CAPITAL	:	DENYING IN PART MOTION FOR
MANAGEMENT, LLC and	:	A MORE DEFINITE STATEMENT
KEVIN JAMES O'ROURKE	:	OF FACT AND LAW

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The Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) issued on November 10, 2011, alleges that Respondents violated Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a)(1) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5, and Sections 206(1)-(4) of the Investment Advisers Act of 1940 (Advisers Act) and Advisers Act Rule 206(4)-8. Respondents filed their Answer to the OIP with the Office of the Secretary on January 5, 2012.<sup>1</sup>

On January 5, 2012, Respondents filed a Motion for a More Definite Statement of Specified Matters of Fact and Law (Motion), a Memorandum in Support of Motion (Memorandum) with three exhibits attached thereto, and Declaration of Gary J. Aguirre in Support of Motion (Declaration). On January 11, 2012, this Office received a Revised Declaration and eleven exhibits attached thereto. The same day, the Division of Enforcement (Division) filed its Opposition to the Motion (Opposition) and Response to the Revised Declaration with two exhibits attached thereto. On January 17, 2012, this Office received Respondents' Reply Memorandum in Support of Motion (Reply) and a Declaration in Support of Reply with two exhibits attached thereto.<sup>2</sup>

Respondents seek a "more definite statement of the specified matters of fact and law alleged expressly or implicitly in" paragraphs thirteen, fourteen, and twenty-four of the OIP. Motion at 1; Memorandum at 1, 3. I grant Respondents' Motion with respect to paragraph thirteen and deny their Motion with respect to paragraphs fourteen and twenty-four. Both parts of Respondents' Motion are addressed below.

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<sup>1</sup> Citation to Respondents' Answer is noted as "Answer at \_\_\_".

<sup>2</sup> Citations to the Respondents' Motion, Memorandum, and Reply are noted as "Motion at \_\_\_," "Memorandum at \_\_\_," and "Reply at \_\_\_," respectively. Citation to the Division's Opposition is noted as "Opposition at \_\_\_".

## 1. Paragraph thirteen of the OIP

In pertinent part, paragraph thirteen of the OIP states that Respondents “failed to disclose to each of their clients, prior to their participation in the Offering that Western Pacific would receive a 10% success fee.” OIP at 4. Respondents state that paragraph thirteen of the OIP does not disclose which of the Western Pacific Capital Management, LLC (Western Pacific) clients did not receive the fee disclosure. Memorandum at 2; Reply at 3. Respondents, therefore, request that the Division provide the names of such clients. Memorandum at 3; Reply at 6.

It is well-established that respondents in administrative proceedings are entitled to be sufficiently informed of the charges against them so that they may adequately prepare their defense; however, respondents are not entitled to a disclosure of evidence in advance of the hearing. See Charles M. Weber, 35 S.E.C. 79 (1953); see also M.J. Reiter Co., 39 S.E.C. 484 (1959). Rule 200(b) of the Securities and Exchange Commission’s (Commission) Rules of Practice states that the OIP “shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.” 17 C.F.R. § 201.200(b).

The Division contends that Respondents’ request for a more definite statement of paragraph thirteen of the OIP is “nothing more than a request that the Division be ordered to set forth its evidence supporting its claims.” Opposition at 2. In support of this contention, the Division states that Respondents’ filings support a finding that they understand the factual and legal basis of the claim and that paragraph thirteen incorporates sufficient details enabling Respondents to respond to the allegations. Opposition at 2-3. The Division offers Respondents’ Answer, in which Respondents state, “investigative records, including statements taken from Western Pacific clients relating to the allegations in [paragraph thirteen] of Part II of the OIP, were provided to Respondents’ counsel on December 27, 2011,” as proof that Respondents understand the legal and factual basis of the allegations. Answer at 7. Further, the Division asserts that this statement demonstrates that Respondents have, in their possession, all of the documents necessary to identify the Western Pacific clients at issue. Opposition at 2-3.

The Commission, in Weber and M.J. Reiter, distinguishes between allegations and evidence. Allegations set forth in an OIP must sufficiently set forth the charges against a respondent and permit it to adequately prepare its defense. However, once the factual basis of the allegation is sufficiently known by a respondent, any additional information is considered evidence to which a respondent is not entitled prior to hearing.

In Weber, respondents made a motion for a bill of particulars requesting disclosure of various details including “the names of the persons by and to whom the statements were made and the time and place such statements were made.” 35 S.E.C. at 80. Subsequently, the Division provided a bill of particulars stating that the allegedly false and misleading statements were “made by respondent, his employees, servants and agents, to *all* persons who purchased the stock from respondent.” Id. (emphasis added). After considering the bill of particulars, the Commission held that the OIP “as supplemented by the [bill of] particulars” informs respondents of the nature of the charges against them and permits them to adequately prepare their defense. Id. at 81. The provision of additional information would be considered evidence. See id. at 80.

In M.J. Reiter, respondents filed a motion for a bill of particulars requesting the disclosure of numerous items relating to the allegations set forth in the OIP, including the names

of the customers involved in the alleged transactions. 39 S.E.C. at 485. Distinguishing between allegations and evidence, the Commission denied respondents' request, finding that, as it relates to certain of respondents' requests, the "factual basis of the violations charged is clearly alleged in the [OIP]," and as it relates to the remaining requests, including the request for the identities of the customers, such items are "matters of evidence which need not be presented in advance of the hearing." Id. at 486.

Applying the Commission's distinction between allegations and evidence to the instant proceeding, I conclude that Respondents' request for the identities of the Western Pacific customers at issue is not a request for evidence. The OIP states that Respondents "failed to disclose to *each of* their clients" the 10% fee. OIP at 4 (emphasis added). Unlike the bill of particulars in Weber that stated, "*all* persons who purchased stock," the use of "each of their clients" in the instant proceeding's OIP is unduly ambiguous. 35 S.E.C. at 80; OIP at 4. That is, the factual basis of paragraph thirteen is not "clearly alleged" within the meaning of M.J. Reiter. 39 S.E.C. at 486. If paragraph thirteen's allegations should be read as a failure to disclose to "all" clients, the Division could have so stated in its Opposition, but it did not. Because the Division apparently alleges a failure by Respondents to disclose the fee to less than 'all' Western Pacific clients, the identities of such clients are necessary to sufficiently inform Respondents of the charges against them and to prepare for hearing, and are not evidence. See Opposition at 3.

Respondents' Motion will be granted as to paragraph thirteen of the OIP, and the Division shall file a list of the Western Pacific customers it alleges were not provided with the fee disclosure prior to investing.<sup>3</sup>

## **2. Paragraphs fourteen and twenty-four of the OIP**

Respondents' Memorandum contends that paragraphs fourteen and twenty-four of the OIP rest on a faulty legal premise which would require Respondents to file written disclosures under Section 206(3) of the Advisers Act. Memorandum at 1, 3.

Section 206(3) of the Advisers Act states that it is unlawful for an investment adviser "acting as *broker* for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction." See 15 U.S.C. § 80B-6(3); Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Release No. IA-1732 (July 17, 1998) (emphasis added).

Respondents contend that Section 206(3) of the Advisers Act applies to only two types of transactions: (1) where an investment adviser, acting as principal, sells securities from the adviser's own account to an advisory client, and (2) where the adviser, acting as broker, arranges a transaction between advisory clients or between a brokerage customer and an advisory client. Memorandum at 4. Respondents assert that neither of these situations apply to this proceeding. Reply at 6-11. As such, Respondents claim that the Division should be required to "submit a more definite statement of facts to bring the allegations within the scope of the limited transactions that violate Section 206(3) [of the Advisers Act] or dismiss the claim." Memorandum at 4; Reply at 6-11.

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<sup>3</sup> This list may be in the form of a simple, plain statement; there is no need for an amended OIP.

In its Opposition, the Division states that Respondents “were acting as brokers for Ameranth when selling Ameranth stock to Western Pacific clients.” Opposition at 4. Respondents contest the Division’s allegation that they acted as a broker during the transaction. Answer at 10; Reply at 9. The Division’s allegation that Respondents were acting as brokers in the transaction is sufficient to bring it within the scope of Section 206(3) of the Advisers Act. Respondents’ assertion is simply a dispute of fact, specifically, whether Respondents acted as brokers and were subject to Section 206(3) of the Advisers Act. The existence of a dispute of fact is not grounds for a more definite statement. In fact, the Division has already provided a more definite statement by effectively supplementing paragraphs fourteen and twenty-four of the OIP with statements made in its Opposition. See Opposition at 4-5. Based on the foregoing, Respondents’ arguments are rejected.

### **Ruling**

It is hereby ORDERED that Respondents’ Motion for a More Definite Statement of Specified Matters of Fact and Law is GRANTED as to paragraph thirteen of the Order Instituting Proceedings and DENIED as to paragraphs fourteen and twenty-four of the Order Instituting Proceedings.

The Division is ORDERED to file a list of the clients referenced in paragraph thirteen of the Order Instituting Proceedings by February 24, 2012.

SO ORDERED.

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Cameron Elliot  
Administrative Law Judge