

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 706/ June 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14862

In the Matter of	:	
	:	ORDER FOLLOWING PREHEARING
MIGUEL A. FERRER and	:	CONFERENCE
CARLOS J. ORTIZ	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on May 1, 2012, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940. Miguel A. Ferrer (Ferrer) and Carlos J. Ortiz (Ortiz) were served with the OIP on May 7 and May 5, 2012, respectively, and both filed Answers on May 25, 2012. An Initial Decision is due by March 4, 2013. OIP at 18.

The following issues were covered at a prehearing conference on May 29, 2012. Respondents have waived their statutory right to a hearing not longer than sixty days after service of the OIP. See 15 U.S.C. §§ 77h-1(b), 78u-3(b).

Prehearing procedures

I accepted the scheduling proposal, Parties' Joint Proposed Scheduling Order, filed May 25, 2012, as modified here, based on religious holidays even though it results in a hearing date over a month beyond the Commission's suggested hearing date. See 17 C.F.R. §201.360(a)(2).

June 29, 2012:	Exchange expert witness subject matter summaries;
July 11, 2012:	Status conference at 10:30 a.m. EDT;
July 23, 2012:	Exchange expert reports, if any;
Aug. 24, 2012:	Exchange lists of proposed witnesses;
Aug. 27, 2012:	Exchange written rebuttal expert reports, if any;
Sept. 7, 2012:	Exchange proposed exhibits;
Sept. 14, 2012:	prehearing briefs;
Sept. 21, 2012:	stipulations and exchange pre-marked exhibits;
Oct. 1, 2012:	Prehearing conference at 10:30 a.m. EDT; and
Oct. 9, 2012:	Hearing at 9:30 a.m. AST in Puerto Rico.

Respondents' counsel in New York City requested that the July 11, 2012, status conference be in-person. The Division of Enforcement (Division) in Miami opposed the request. I defer a ruling until closer to the prehearing conference date.

I reject Respondents' proposal for a four-stage exchange of witness and exhibit lists beginning on July 15 and ending on August 30, as unnecessarily complicated and time consuming. These lists are not carved in stone; their purpose is to keep the hearing on track by avoiding surprise. No witness will be excluded or exhibit refused because it was not on a list. The information is to be as accurate as possible when provided and updated as counsel makes subsequent litigation decisions. If the same names appear on more than one list, counsel can decide if they want the witness to appear once or twice.

Investigative subpoenas

Commission Rule of Practice 230(g) requires the Division to inform the Administrative Law Judge and each party if investigative subpoenas are issued under the same investigation file number as led to this OIP. In a letter filed on May 24, 2012, the Division informed me that it intended to issue investigative subpoenas for documents and testimony under the investigation number FL-03491. The Division represents that a subpoena to Ferrer is not for the purpose of obtaining evidence relevant to this proceeding, and that it will make any relevant documents received available to Respondents for inspection and copying.

In a May 24, 2012, letter, Ferrer claimed that the Division is gathering evidence directly related to this proceeding. Ferrer requests that the Division be precluded from seeking evidence from him during the pendency of this proceeding, and, alternatively, if the Division is allowed to proceed, that the Division take testimony from Ferrer in New York City and be precluded from using the testimony in this proceeding.

On May 25, 2012, the Division replied stating that: (1) Ferrer misrepresented the subject of his additional testimony, which the Division detailed in a letter to his counsel on April 3, 2012 (Exhibit A); (2) the further investigation of which Ferrer's testimony is a part is moving ahead; and (3) the Division attempted to schedule Ferrer's additional testimony before the Commission issued the OIP and Ferrer canceled scheduled appointments. (Exhibits B and C). The Division concludes that it does not intend to use additional testimony from Ferrer in this proceeding, and if it changes its position, it will seek a hearing on the issue.

Rule 230(g) provides that the Administrative Law Judge:

shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

I DENY Ferrer's request that I preclude the Division from taking additional testimony from him and dictate the conditions of his giving additional testimony. I have no authority to make such

a ruling. The work of the Division cannot be expected to stop because of one pending proceeding. I expect counsel to act reasonably so that other investigations and this proceeding can continue simultaneously.

Pursuant to Commission Rule of Practice 230(g), I ORDER that the Division shall not use any additional evidence gained through investigative subpoenas issued under investigation file number FL-03491 to support the allegations in the OIP. I FURTHER ORDER, as a necessary and appropriate measure to assure that any relevant documents obtained are shared, that the Deputy or an Associate Director in the Division submit written assurance for the record that, to the best of his/her knowledge and belief, any testimony or documents obtained through an investigative subpoena issued under investigation file number FL-03491 that are relevant to the allegations in the OIP were made available to each Respondent for inspection and copying on a timely basis. See 17 C.F.R. § 201.230(g).

Respondents' motions for more definite statement

Respondents filed Motions for More Definite Statement and Briefs in Support on May 25, 2012 (Ferrer Motion and Ortiz Motion), claiming that more definitive information is critical for Respondents to properly defend the allegations in the OIP. Ferrer Motion at 2; Ortiz Motion at 1. I allowed the Division until June 8, 2012, to file an Opposing Brief.

The Ferrer Motion seeks more information about the allegations in paragraphs 23-25, 27, 33, 39, 40-43, 46-47, 65-66, 70, 72-73, 75, and 77-78 of the OIP.¹ It claims the OIP is ambiguous, conclusory, and incomplete and that it does not identify the financial advisors (FA) and customers that Ferrer allegedly misled, how Ferrer's statements were misleading, the extent of the FAs' knowledge, whether the FAs repeated Ferrer's statements to customers, what the misleading statements were, and what customers the FAs communicated with. Ferrer Motion at 8-18. The Ferrer Motion also complains that certain allegations do not distinguish between Ferrer and Ortiz. Ferrer Motion at 17.

The Ortiz Motion argues that the OIP "needs to descend to particulars – to allege clearly the who, why, what, where and when of the alleged fraud." Ortiz Motion at 1. The Ortiz Motion poses multiple questions about Paragraphs 2, 3 and 23, 30, 49, 58, 60-61, and 76; it requests more information about paragraphs 23, 24 (factual topic b only), 65, 66, and 78; and it joins in the Ferrer Motion's claim to need to distinguish the allegations as between Ferrer and Ortiz. Ortiz Motion at 7 n.2.

On June 8, 2012, the Division filed separate responses to the Ferrer and Ortiz Motions (Response to Ferrer, Response to Ortiz). The Division claims Respondents' motions are attempts to engage in prehearing discovery and obtain the Division's evidence pre-hearing. Response to Ferrer at 1, Response to Ortiz at 1. It disputes Respondents' legal position on what it must show to prove fraud; it maintains that the OIP is sufficient in terms of the Commission's Rules of Practice and

¹ The Ferrer Motion contains considerable argument about the applicable legal standard and a preference for Rule 9(b) of the Federal Rules of Civil Procedure. Ferrer Motion at 1-2, 5-6, and 18-21.

cites several cases in support;² and it claims that the cases cited by Respondents are based on unique factual situations. Response to Ferrer at 1-4, 11-17, Response to Ortiz at 1-2. The Division sets out in twelve and seventeen bullet points, respectively, many of the specific factual allegations concerning Ferrer and Ortiz, referencing a paragraph(s) in the OIP. Response to Ferrer at 4-5, Response to Ortiz at 2-4. The Division argues that Respondents' Answers show that they understand the allegations and the specific facts alleged. Response to Ferrer at 7-10, Response to Ortiz at 4-6. A large portion of the Division's response refutes Respondents' position on the law. Response to Ferrer at 11-17, Response to Ortiz at 1-2.

On June 12, 2012, I received Ferrer's Reply Brief. He claims that the Division is taking new positions and that if it is going to maintain that he consistently misled certain customers, the Division must identify the customers, and it must identify the customers who bought shares after FAs gave them information they received from Ferrer. Reply Brief at 2-4. Ferrer claims his ability to file an Answer was based on a general understanding of the facts and allegations and he still needs to know the identity of customers he allegedly defrauded to prepare his defense. Reply Brief at 4. Finally, in lieu of more information, Ferrer will accept a stipulation that that the Division only intends to rely on communications from Ferrer to FAs and customers for whom it has provided customer statements and/or investigative testimony. Reply Brief at 4.

On June 13, 2012, I received Ortiz's Reply Brief. He has narrowed his request to the following information: (1) Paragraph 76, the dates of the sales meetings held between April and August 2009, where Ortiz allegedly made misleading statements and omissions; (2) Paragraphs 60-61, specific communications where Ortiz allegedly discouraged financial advisors from placing market orders; (3) Paragraph 49, the specific "reinvestment share orders" that allegedly were given preference over "other" sell orders; (4) either the names of the FAs and customers or, alternatively, agreement that the Division will only rely on those for whom it has produced testimony or witness statements; (5) Paragraphs 2, 3, and 23, identification of meeting(s) where Ortiz allegedly made false statements or material omissions to customers; and (6) Paragraph 30, the date of the alleged communication. Ortiz Reply Brief at 1-3.

For over fifteen years, the Commission has required that the OIP state the nature of the hearing, the legal authority, "a short and plain statement of the matters of fact and law to be considered and determined," and the nature of any relief sought. 17 C.F.R. § 201.200(b). Commission Rule of Practice 230(d), which requires the Division to make available to Respondents the investigative file for copying and inspection within seven days of service of the OIP with required observance of Jencks and Brady, supports a fair hearing process, as demonstrated by the fact that Respondents cite only three cases in support of their position. 17 C.F.R. §§ 201.230(b)(2), .231(a); Ferrer Motion at 8.

Many ruling have been made on this subject. I do not find the three rulings that Respondents cite to be controlling in these circumstances. In Alfred M. Bauer, Initial Decision Release No. 134 (Jan. 7, 1999), 68 SEC Docket 2819, two of three allegations of lack of specificity in the OIP were denied because the respondents had sufficient notice to defend the allegations; as to the third allegation, the Division was required to identify "the customer or customers, accounts, and

² The Division believes the OIP meets the pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. Response to Ferrer at 6 n.3.

securities referred to in” three subparagraphs of the OIP. No reason was given. In J. E. Barclay & Co., Administrative Proceeding File No. 3-10765, Order (June 13, 2002), the ruling granting motions for more definite statement was made under circumstances where the case was becoming unmanageable because there were nine respondents, a huge investigative record, and the Division intended to present evidence that occurred five years before the OIP was issued. In Western Pacific Capital Management, LLC, Administrative Proceedings Rulings Release No. 681 (Feb. 7, 2012), the phrase “to each of their clients” as opposed to “all” clients in the OIP was found to be ambiguous.

Charles M. Weber, 35 S.E.C. 79, 80-81 (1935), J. Logan & Co., 38 S.E.C. 827, 829-30 (1959) and M. J. Reiter Co., 39 S.E.C. 484, 486 (1959) established the prevailing standard, which is that a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but he is not entitled to disclosure of the evidence on which the Division intends to rely. In Reiter the Commission held that:

[T]he names of the person to whom the alleged false and misleading statements were made and the alleged unregistered stock was offered and sold and delivered, the particulars of transactions involving the use of the mails and the nature of such use, and the details of transactions effected in violation of net capital requirements, are matters of evidence which need not be presented in advance of the hearing.

39 S.E.C. at 486.

Respondents’ motions for a more definite statement seek an inappropriate level of detail about the Division’s evidence before the hearing or, alternatively, to limit the Division’s ability to present its case. I DENY the motions for the following reasons. Respondents have sufficient information to defend the allegations that they willfully violated the antifraud provisions of the securities statutes and regulations and that they willfully aided and abetted and caused UBS’s principal violations. The OIP is clear, unambiguous, and detailed and provides “a short and plain statement of the matters of fact and law to be considered and determined.” 17 C.F.R. § 201.200(b). The investigation that led to the OIP that is the subject of this proceeding began over two years ago, and Respondents are still employed by UBS Financial Services Inc. of Puerto Rico (UBS) which provided counsel to them and which entered a settlement on May 1, 2012. UBS, Financial Services Inc. of Puerto Rico, Securities Act Release No. 9318. The Division provided Respondents with Wells notices and Respondents made Wells submissions; many of the witnesses are Respondents’ co-workers, and Respondents created or received many of the exhibits. See Parties Joint Proposed Scheduling Order at 5-6, 8. Respondents’ Answers give no indication that they did not understand the allegations. The Division’s responses to the motion provided additional specifics about the allegations.

The OIP mentions clients, FAs, and sales force. Under the procedural schedule, Respondents will receive the list of the Division’s witnesses six weeks before the start of the hearing. Given all the information already provided, Respondents should have no trouble establishing who on the list of proposed witnesses is a FA, a customer, or a member of the sales force, but to err on the side of caution, I ORDER that the Division identify each of its prospective witnesses as being in one of these categories.

The OIP details the alleged violations and the harm caused to investors in paragraphs 21 through 85. There is no ambiguity about whether one or both Respondents are allegedly culpable. I reject Respondents' claim that the OIP does not give sufficient notice about the specific charges against them.

Brenda P. Murray
Chief Administrative Law Judge