

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6500 / March 15, 2019

Administrative Proceeding
File No. 3-15124

In the Matter of

**David F. Bandimere and
John O. Young**

**Order Granting in Part Motion
for More Definite Statement**

Respondent David Bandimere has moved for a more definite statement. The Division of Enforcement opposes the motion, arguing that Bandimere has all the information he is entitled to receive. For the reasons discussed below, Bandimere’s motion is granted in part.

Background

The Securities and Exchange Commission initiates administrative proceedings by issuing an order instituting proceedings (OIP).¹ Rule of Practice 200(b)(3) distinguishes between an OIP that requires an answer and one that does not. If the OIP does not require an answer, it need only “[c]ontain *a short and plain statement* of the matters of fact and law to be considered and determined.”² But if the OIP requires an answer, it must “set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.”³ The fact that the Commission chose to make this distinction suggests that it considers the *short and plain statement* formulation—which seemingly echoes Federal Rule of Civil Procedure

¹ See 17 C.F.R. § 201.200(a)(1).

² 17 C.F.R. § 201.200(b)(3) (emphasis added).

³ *Id.*

8(a)(2)⁴—insufficient for OIPs that require an answer. In combination with the use in Rule 200(b)(3) of the words *detail* and *specific*, it is apparent that the Commission intended that OIPs requiring an answer must allege detailed information.

Motions for more definite statement are governed by Rule of Practice 220(d), which requires a movant to “state the respects in which, and the reasons why, each ... matter of fact or law [to be considered or determined] should be required to be made more definite.”⁵ A respondent in Commission administrative proceedings is entitled in an OIP to notice of the charges against him but not to the disclosure of evidence.⁶ Because the Commission’s policy, however, is “to encourage ... the exchange of relevant information where practical and reasonable to expedite proceedings, arrive at settlements or simplification of the issues and assure fairness to respondents,”⁷ administrative law judges retain the discretion to order the Division to provide greater specificity even if a respondent fails to show that a more definite statement is required.⁸

The OIP and Bandimere’s motion

The OIP alleges that Bandimere has committed a host of securities violations related to a Ponzi scheme. He faults the OIP because it does not allege:

- (1) to whom he allegedly sold unregistered securities;
- (2) how he was involved as a “seller”;

⁴ Rule 8(a)(2) states that a civil complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

⁵ 17 C.F.R. § 201.220(d).

⁶ *See Murray Sec. Corp.*, Securities Exchange Act of 1934 Release No. 5510, 1957 WL 52415, at *1 (May 2, 1957).

⁷ Miscellaneous Amendments, 37 Fed. Reg. 23,827, 23,827 (Nov. 9, 1972).

⁸ *Murray Sec.*, 1957 WL 52415, at *2; *see* 37 Fed. Reg. at 23,827 (noting with approval “the trend ... in orders issued by hearing officers toward requiring the disclosure of more information in advance of hearing” and conferring authority “in the exercise of ... sound discretion” to direct disclosure “even of ... evidentiary” materials).

(3) the people to whom he made misleading statements;

(4) the misleading statements;

(5) the time and place the statements were made; or

(6) the context in which misrepresentations by omission were made, specifically including when he learned of allegedly undisclosed facts.⁹

Bandimere also argues that the Division should disclose its theory of liability under Securities Act of 1933 Section 17(a)(1) and (3) and Exchange Act Rule 10b-5(a) and (c).¹⁰ He additionally complains that claims under the Investment Advisers Act of 1940 are alleged in the alternative without identifying the factual allegations relevant to the claims.¹¹

The Division opposes Bandimere's motion and argues that the OIP has provided Bandimere with detailed factual allegations, including a "time period" at issue, "when and how" he "solicited investors," how he sold unregistered securities, and what he failed to disclose.¹² It argues that the OIP describes that he sold securities to over 60 investors over a four-year period and lists 15 specific red flags that Bandimere failed to disclose.¹³ And it argues that the OIP discloses its theory of scheme liability: Bandimere took investors' money, kept commissions, set up entities in which to place investors' funds, and omitted material facts.¹⁴ Finally, the Division explains its alternative theory under the Advisers Act and that this theory is based on the same facts as the primary theory.¹⁵

⁹ Mot. at 3–4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 5–6.

¹² Opp'n at 3–5.

¹³ *Id.* at 4.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7. The Division relies on *Dempsey-Tegeler & Co.*, Admin. Proc. Rulings Release No. 50, 1970 WL 11234, at *1 (Hr'g Examiner June 16, 1970). Opp'n at 4. This decision is of little help to the Division. Even assuming the validity of its analysis, it did not establish precedent and, contrary to the Division's position in this proceeding, the adjudicator in *Dempsey-Tegeler* exercised his discretion and ordered the Division to disclose some of the information a respondent sought. *Id.* at *1–2.

In reply, Bandimere observes that instead of relying on a claim of undue burden, the Division simply argues that it is not required to provide more information.¹⁶ He does not respond to the Division’s explanation of its scheme liability theory.¹⁷

Discussion

For the most part, the OIP only alleges the dates Bandimere took or began taking certain actions by year.¹⁸ In some instances, no date or year is alleged.¹⁹ It alleges in general terms that he told 60 investors various things and that he failed to disclose certain red flags.²⁰ But it does not allege who those 60 investors were or whether he made the same misstatements or omissions to all or only to some of them. No specifics of any conversation are alleged. And the OIP does not allege the circumstances establishing Bandimere’s knowledge of the putative red flags.

Three factors weigh in favor of granting Bandimere’s motion. First, as discussed, Rule 200(b)(3) requires specificity in respect to factual allegations. Second, it has long been the case that fraud allegations must be alleged with particularity.²¹ That practice continues today in federal district courts.²² And the particularity requirement serves an important notice function, “enabl[ing] the defendant to respond specifically and quickly to the

¹⁶ Reply at 2. He also claims that the Division did not interview all of the alleged victims and, in consequence, there is no factual basis for the OIP. *Id.* at 3–4. This argument does not provide a basis to order a more definite statement.

¹⁷ Bandimere says that the Division’s theory under the Advisers Act is “nonsense.” Reply at 4–5. Even if this is so, the allegedly nonsensical nature of the Division’s theory is not a basis to order a more definite statement.

¹⁸ OIP ¶¶ 1, 2, 20, 24, 26–28.

¹⁹ OIP ¶ 23.

²⁰ OIP ¶¶ 20, 23–24, 28.

²¹ *See Stearns v. Page*, 48 U.S. 819, 829 (1849).

²² *See Fed. R. Civ. P. 9(b)*. States also require that fraud claims be alleged with particularity. *See Sargiss v. Magarelli*, 909 N.E.2d 573, 575 (N.Y. 2009); *Lazar v. Superior Court*, 909 P.2d 981, 989 (Cal. 1996).

potentially damaging allegations.”²³ This dovetails with the third factor, Commission policy, which “encourage[s] ... the [prehearing] exchange of relevant information ... to *expedite proceedings*, arrive at settlements or simplification of the issues and *assure fairness to respondents*.”²⁴

Given the lack of clarity in the OIP regarding what Bandimere allegedly said or failed to say, whom he said or failed to say it to, and when he said or failed to say certain things, the Division must identify the 60 investors alleged in the OIP and explain what specific statements Bandimere made to investors that were rendered misleading by the allegedly omitted red flags and when Bandimere allegedly made them.²⁵ If Bandimere did not make the same statements to all investors, the Division may comply with this requirement by providing specific representative examples of Bandimere’s statements and grouping its identification of investors according to the statements Bandimere allegedly made.²⁶ The Division must also explain when Bandimere allegedly first learned of each red flag.

As noted, Bandimere does not respond to the Division’s explanation of its theory of scheme liability. And, although he thinks the Division’s Advisers

²³ *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003).

²⁴ 37 Fed. Reg. at 23,827 (emphasis added).

²⁵ *Cf. SEC v. Wey*, 246 F. Supp. 3d 894, 911 (S.D.N.Y. 2017) (holding that “a complaint alleging securities fraud based on misstatements” must “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent”) (citation omitted); *SEC v. Brown*, 740 F. Supp. 2d 148, 162 (D.D.C. 2010) (holding that “[a] complaint alleging securities fraud” must state “(1) precisely what statements ... or ... omissions were made[,] ... (2) the time and place of each such statement[,] ... (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud”); 2 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 9.03[b] (3d ed. 2019) (describing the matters that usually must be alleged under Rule 9(b)).

²⁶ *Cf. United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 509–11 (6th Cir. 2007); *United States ex rel. Bilotta v. Novartis Pharm. Corp.*, 50 F. Supp. 3d 497, 518 (S.D.N.Y. 2014); Moore’s ¶ 9.03[b].

Act theory is “nonsense,” he now knows what it is.²⁷ Because the Division has explained its legal theories, Bandimere’s motion as it relates to the Division’s legal theories is denied.

Conclusion

Bandimere’s motion is GRANTED IN PART. By March 29, 2019, the Division shall provide Bandimere with the following:

- (1) the identities of the 60 or so investors to whom Bandimere allegedly sold securities, as alleged in the OIP;
- (2) the identities of the investors to whom Bandimere allegedly made material misrepresentations or omissions, the specific alleged statements as to each investor that were rendered misleading by the omission of the red flags alleged in the OIP, and when and where the alleged misrepresentations or omissions occurred²⁸; and
- (3) when Bandimere allegedly learned of each of the 15 red flags alleged in the OIP.²⁹

By April 12, 2019, Bandimere shall file his answer to the new information provided by the Division.³⁰

In addition, I ORDER the parties to confer and submit, jointly if possible, a proposed prehearing schedule and hearing start date by March 22, 2019.

James E. Grimes
Administrative Law Judge

²⁷ Bandimere questions in a footnote whether the Division is permitted to plead in the alternative. Mot. at 5 n.3. But he offers no additional argument to show that alternative pleading is prohibited.

²⁸ As noted, the Division may comply with this requirement by providing specific representative examples grouped according to Bandimere’s alleged statements.

²⁹ See *Murray Sec.*, 1957 WL 52415, at *2; see 37 Fed. Reg. at 23,827.

³⁰ 17 C.F.R. § 201.220(d).