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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1239/February 12, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of HARDING ADVISORY LLC AND WING F. CHAU	ORDER DENYING RESPONDENTS' MOTION FOR MORE DEFINITE STATEMENT

Background

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on October 18, 2013, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940. A hearing is scheduled to commence on March 31, 2014.

Pending before me is Respondents' Motion for a More Definite Statement (Motion), with three exhibits attached thereto, filed on January 10, 2014. On January 27, 2014, the Division of Enforcement (Division) filed a Memorandum of Law in Opposition to Respondents' Motion (Opposition), and on February 3, 2014, Respondents filed a Reply Brief in Further Support of Respondents' Motion (Reply), with four additional exhibits.

Arguments of the Parties

Respondents request the Division be ordered to specify:

(1) the interests of Magnetar Capital LLC (Magnetar), how those interests were not aligned with the interests of other investors, and what Respondents knew about Magnetar's interests and the Division's basis for any such claim (Request 1);

(2) which investors were deceived or defrauded and how these investors were deceived or defrauded, including specific facts that serve as a basis for this allegation (Request 2);

(3) the factual support for the claim that Respondents had a duty to disclose Magnetar's role in the asset selection, the factual support that would inform as to the theory of fraud

based on omissions, and the facts that render the assumption that the issuer knows everything known by its owners and fiduciary to be unreasonable (Request 3);

(4) which subsections of Section 17(a) of the Securities Act the Division alleges were violated and how they were violated (Request 4);

(5) what alleged conduct violated Sections 206(1) and 206(2) of the Advisers Act and how those sections were violated (Request 5); and

(6) what level of scienter is being alleged by the Division for violations of Section 17(a) of the Securities Act and Sections 206(1) and 206(2) of the Advisers Act (Request 6).

Motion at 5-13.

In its Opposition, the Division generally contends that Respondents' Motion demonstrates a detailed understanding of the Division's allegations and Respondents' arguments belong in a pre- or post-hearing brief, not a motion for more definite statement. Opposition at 2. The Division also argues that the OIP satisfies the requirements set forth in Rule 200(b) of the Commission's Rules of Practice and that Respondents are not entitled to disclosure of the evidence on which the Division intends to rely. Id. The Division argues that the arguments presented by Respondents address the merits of the case and that Respondents' requests are premature demands for production of the Division's witness and exhibit lists. Id. at 4.

Specifically, with respect to Request 1 relating to Magnetar, the Division asserts that the OIP already sets out this information in sufficient detail. Id. at 4-5. The Division states that the information sought by Respondents, including how Magnetar's interests were not aligned with the interests of other investors, is a matter of proof and argument. Id. at 5 & n.6. As to Request 2, the Division maintains that Respondents are seeking an advance list of witnesses or a preview of witness testimony. Id. at 6. The Division argues that the periods of violation, the name of the securities involved, and the nature of the deceptive statements and conduct are already alleged in the OIP, and Respondents are not entitled to a premature disclosure of the Division's witnesses. Id. The Division also asserts that: Respondents mischaracterize what this case is about; the OIP is centered on the corruption of the asset selection process and that this corruption was not disclosed; and the OIP explains the reason why manager discretion in the selection process matters. Id. at 6-7.

The Division argues that Respondents are not entitled to a more definite statement relating to Request 3 because the OIP alleges in plain terms why the alleged statements are misleading and Respondents are making a series of legal arguments that are not a proper basis for this type of motion. Id. at 8-9. With respect to Requests 4, 5, and 6, the Division states that it: alleges violations of all three subsections of Section 17(a) of the Securities Act; intends to show deceptive conduct as required; and is under no obligation to specify the level of scienter underpinning the violations. Id. at 10-11. The Division also provides additional information relating to the claims asserted under Sections 206(1) and 206(2) of the Advisers Act and the level of scienter required for such claims. Id. at 11-13. The Division insists that no further detail is required as to the manner in which the conduct violated the statute. Id.

In their Reply, Respondents state that they understand the law and what the OIP alleges, but "do not understand [the Division's] theory of liability." Reply at 1. The Reply relies heavily on SEC v. Tourre, No. 10-cv-3229 (S.D.N.Y), in which the Division allegedly "elicited testimony, argued to the jury, and represented to the [district] [c]ourt in its post-trial briefings factual points that directly contradict the allegations in this case." Id. at 4. In sum, the Reply is comprised of recitations of the direct examination, cross-examination, and re-direct examination of one witness and the Division's closing argument in Tourre, which Respondents assert contradicts the Division's allegations in this administrative proceeding. Id. at 5-16. Respondents assert, pointing to specific examination testimony, that the Division both argued in court and proved to a jury that the facts alleged in this proceeding do not establish a fraud. Id. Finally, Respondents state they do not understand: how the allegations in the OIP constitute fraud as to Octans I CDO Ltd.; or the Division's theory of liability relating to the purchase of Norma notes Id. at 16-17.

Discussion & Conclusions of Law

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 M.J. Reiter Co., 39 S.E.C. 484, 486 (1959); Charles M. Weber, 35 S.E.C. 79, 80-81 (1953). This has been called the "distinction between allegations and evidence." Western Pac. Capital Mgmt., LLC, Admin. Proc. Rulings Release No. 691 (Feb. 7, 2012), 2012 SEC LEXIS 434, at *6. Rule 200(b) of the Commission's 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).

Respondents are seeking information beyond that which will allow them to respond and prepare an adequate defense to the allegations set forth in the OIP. Respondents have sufficient knowledge of the legal and factual basis of the OIP's allegations to provide them a fair opportunity to defend themselves at the evidentiary hearing. See Rita J. McConville, Exchange Act Release No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3149 (OIP allegations sufficient where respondent was put "on notice" of the issues that "would be an issue in the proceeding"), pet. denied, 465 F.3d 780 (7th Cir. 2006). Many of Respondents' requests relate to disputed facts and are not properly the subject of a more definite statement. Respondents will have the opportunity to present their case and their arguments as to the disputed facts and the merits of the Division's case during the evidentiary hearing.

Request 1

Request 1 is DENIED. The OIP already provides sufficient detail. Paragraph 25 of the OIP explains with sufficient specificity what Magnetar's interests were and how they were not aligned with the interests of other investors. Paragraphs 30-53 and 60-66 of the OIP explain with sufficient specificity what Respondents knew about Magnetar's motivation during the relevant time and the basis for any such claim.

Request 2

Request 2 is DENIED. It is abundantly clear from their Motion that Respondents already know the identity of the investors. See Motion at 6-7. Additionally, the Paragraphs 54-59 of the OIP adequately allege that these investors did not get what they bargained for, because Respondents did not make sufficient disclosure of all material facts. OIP Further, Paragraph 56 of the OIP makes clear that it is alleged that the offering circular was misleading because it did not disclose Magnetar's involvement. That the offering circular may have been otherwise accurate is beside the point.

Request 3

Request 3 is DENIED. Paragraphs 9, 10, and 69 of the OIP clearly allege that Harding Advisory LLC (Harding) is a registered investment advisor, that Wing F. Chau (Chau) is alleged to be Harding's control person, and that Respondents are alleged to have breached their advisory obligations. Paragraphs 60-69 of the OIP, among others, clearly set forth the theory of fraud based on omissions and are sufficient to place Respondents on notice of that theory. Paragraph 58 of the OIP, which alleges false or misleading representations by Respondents to the issuer, is responsive to Respondents' request to specify facts that render false the assumption that an issuer knows everything its fiduciary and owners know. Whether the issuer was actually misled or deceived is a disputed fact not properly subject to a more definite statement.

Request 4

Request 4 is DENIED. In its Opposition, the Division states that it intends to prove all three prongs of Section 17(a) of the Securities Act. Opposition at 10. Further, the Division's allegations of scheme liability under Securities Act Section 17(a)(3) are sufficiently alleged in the OIP, including in Paragraphs 60-67, among others.

Request 5

Request 5 is DENIED. Paragraphs 9, 10, 57-59, 60, and 69 provide sufficient detail regarding Sections 206(1) and 206(2) of the Advisors Act. Harding is alleged to be a registered investment adviser, Chau is alleged to be Harding's control person, and Respondents are alleged to have breached their advisory obligations, resulting in fraud on the issuer and its investors.

Request 6

Request 6 is DENIED. Section 17(a)(1) of the Securities Act and Section 206(1) of the Advisers Act require proof of scienter, which is sufficiently alleged and is a disputed fact not properly subject to a more definite statement.

Tourre & Theory of Liability

In their Reply, Respondents assert that they fail to understand the Division's theory of liability, relying heavily on Tourre, and specifically state they do not understand the theory of liability relating to the purchase of Norma notes. Reply at 1, 3-5, 16-18.

First, the relevance of Tourre is not clear. The allegations in Tourre apparently related to Fabrice Tourre's defrauding the collateral manager, while here the OIP alleges that the collateral manager defrauded its client and investors. Further, whether a hedge fund's interests are aligned with those of a CDO's investors depends on the particular facts. The allegation here is that Magnetar's interests were not so aligned. Second, with respect to the Division's theory of liability relating to the purchase of Norma notes, the OIP sufficiently alleges in paragraphs 60-69 that the offering circulars failed to adequately disclose the involvement of Magnetar and Merrill Lynch, Pierce, Fenner & Smith Incorporated in selecting collateral, which was allegedly a breach of Respondents' advisory obligations; whether this is so is a disputed fact and not properly subject to a more definite statement.

Ruling

For the reasons above, I conclude that the OIP's allegations are sufficient to enable Respondents to prepare an adequate defense, and ORDER that Respondents' Motion for a More Definite Statement is DENIED.

Cameron Elliot
Administrative Law Judge