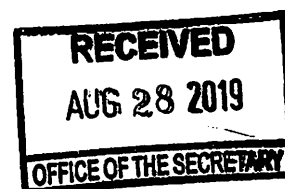


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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-15006



In the Matter of

**RAYMOND J. LUCIA COMPANIES,  
INC. and RAYMOND J. LUCIA, SR.,**

Respondents.

**DIVISION OF ENFORCEMENT'S  
OPPOSITION TO RESPONDENTS'  
MOTION FOR A MORE DEFINITE  
STATEMENT**

The Division of Enforcement (“Division”) submits this brief in opposition to the Motion for a More Definite Statement (“Motion”) made by respondents Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. (collectively “Respondents”).

## **I. INTRODUCTION**

The order instituting proceedings (“OIP”) sets forth detailed allegations concerning Respondents’ fraudulent conduct in advertising their “Buckets of Money” (“BOM”) investment strategy at seminars from 2003 through 2010, using a lengthy slideshow in which they reported the purported results of historical tests of the performance of the BOM strategy over two specific historical periods: (i) from 1973 to 1994, and (ii) from 1966 to 2003. The slideshow at issue was provided to Respondents in September 2012, as part of the Division’s initial disclosures.

Respondents’ Motion argues that the OIP fails to give them adequate notice of the “how, when and to whom they allegedly made actionable statements.” Motion at pp. 1, 3-6. In fact, the OIP alleges in specific detail the content of the misleading slides and the reported results of the

purported historical performance tests, as well as alleging in detail how the information provided was misleading, and so provides the “how” in great detail. *See* OIP at ¶¶ B.14-18 (“Respondents’ Misleading Slideshow Promoting the BOM Investment Strategy and its Backtesting”); ¶¶ C.19-27 (“Respondents’ Touting of the Results of Their Backtesting in Their Seminars Was Materially Misleading”). Because this case involves advertisements of Respondents’ services using the slideshow, it is the content of the advertisement that is at issue, and not the identity of every person who might have seen the advertisement at any time. Because this case does not involve particularized misrepresentations to specific potential clients, Respondents’ demand for the “when and to whom” of each seminar seeks information that is not necessary to prepare their defense. Moreover, Respondents kept records of the attendees at their seminars, which was not provided to the Division during the investigation. Respondents already have the information in their records that they seek through this Motion.

Respondents also argue that the OIP contains “no elaboration” of their failure to keep books and records supporting their advertisements for managed accounts. Motion at p. 1. In fact, the OIP specifically identifies the books and records as consisting of two spreadsheets (the “1966 Spreadsheet” and the “1973 Spreadsheet”) and alleges that they failed to provide support for the advertised results of the BOM investment strategy over the 1966 and 1973 periods, as described in the slideshow. *See* OIP at ¶¶ B.5, C.19-28.

## **II. PROCEDURAL AND FACTUAL HISTORY**

On September 5, 2012, the Commission instituted proceedings against Respondents pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. The OIP alleges that since 2003, respondents have promoted their “Buckets of Money” (“BOM”) investment strategy at numerous seminars using as “lengthy slideshow” in an effort to obtain advisory clients who could be charged fees. *See* OIP at ¶¶ B.11-14. The OIP alleges that in the slideshow used at the seminars, Respondents claimed to have tested their BOM strategy using

historical market data to show that BOM actually worked over two specific historical periods: (i) what respondents termed the bear market for equities from January 1, 1973 to 1994, and (ii) the historical period from 1966 to 2003. *Id.* at ¶¶ B.4, B.14-16, C.19-27. Respondents referred to these historical tests as “backtests.” *Id.*

The OIP specifically identifies the slides in the slideshow which report the results of Respondents’ purported historical performance calculations over the 1966 and 1973 periods. With regard to Respondents’ claims concerning performance over the 1973 period, the OIP alleges in detail the contents of slides in the slideshow that compared the alleged results of three alternative investment strategies, the “Conservative Campbells,” the “High Rolling Hendersons,” and the “Balanced Buttafuccos,” with the BOM strategy followed by the “Bold Bucketeers,” over the period from 1973 to 1994. *Id.* at ¶ B.15. With regard to the Respondents’ claims concerning performance over the 1966 period, the OIP again alleges in detail the contents of slides in the slideshow which reported the alleged results of three portfolio strategies, including BOM without real estate investments trusts (“REITs”), and BOM with REITs. *Id.* at ¶ B.16. The OIP further alleges in detail how the reported results of Respondents’ purported historical performance tests, as set forth in the slideshow and purportedly supported by the spreadsheets, were misleading. *Id.* at ¶¶ C.19 -27.

With regard to the books and records allegations, Respondents identified the 1966 Spreadsheet and the 1973 Spreadsheet as the books and records that provided factual support for their claimed performance tests. *Id.* at ¶¶ B.5, C.19-28. The OIP alleges that the spreadsheets “fail to duplicate the advertised investment strategy,” *id.* at ¶ D.28, and so Respondents failed to maintain the required books and records to support the claims made in their slideshow.

On September 14, 2012, the Division made available for inspection and copying its Rule 230 disclosures, and provided copies, at Respondents’ request, on September 18, 2012. The Division’s rule 230 production included, among other things, a copy of the slideshow at issue, bates numbered SEC-LA3937-00092-00218, which was also an exhibit used during Mr. Lucia’s

investigative testimony. The Division produced the 1966 Spreadsheet, bates numbered SEC-LA3937-00230-31, and the 1973 Spreadsheet, bates numbered SEC-LA3937-00228-29, which were also used as exhibits during Mr. Lucia's investigative testimony. The Division also produced a copy of a 2010 examination report which identified the deficiencies in the slideshow, and a December 17, 2010 deficiency letter from the Commission's Office of Compliance, Inspections, and Examinations which addressed the deficiencies in the slideshow.

### **III. ARGUMENT**

#### **A. Legal Standard Applicable to Respondents' Motion**

An order instituting proceedings is required to contain "the factual and legal basis alleged therefore in such detail as will permit a specific response." Rule 200(b)(3) of the Commission's Rules of Practice. Under Rule 220(d), a party may move "for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite." The standard for pleading is clear: a pleading must "sufficiently inform[] [a respondent] of the nature of the charges so that he or she may adequately prepare a defense; however, a respondent is not entitled to a disclosure of evidence in advance of the hearing." *In the Matter of Wolfson, et al.*, 103 S.E.C. Docket 1153, 2012 WL 8702983 (Mar. 28, 2012) (citation omitted); *see also In the Matter of optionsXpress, Inc., et al.*, S.E.C. Docket 419, 2012 WL 8704501 (July 11, 2012) (denying motion where the Division met the burden to inform "respondents of the charges against them so they can prepare a defense"). Thus, "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 the Matter of Western Pacific Capital*, 102 S.E.C. Docket 3633, 2012 WL 8700141 (Feb. 7, 2012.) Finally, to the extent that an OIP contains introductory or summary allegations that are not elements of proof, such allegations do not warrant a more definite statement. *See Wolfson, supra.*

**B. The Factual Allegations in the OIP Provide Sufficient Notice**

The OIP provides sufficient information to inform the Respondents of the charges so that they can prepare a defense. The OIP alleges that Respondents made materially misleading statements in their slideshow, presented at numerous seminars from 2003 to 2010, concerning the historical performance of their BOM strategy in their 1973 and 1966 backtests. The slideshow is specifically identified and discussed at length, as are the materially misleading statements made in the slideshow. *See* OIP at ¶¶ B.14-C.27. In support of their Motion, Respondents point to introductory allegations in the OIP that refer to Lucia’s radio show and books, and misconstrue those introductory allegations to argue that the Division must identify “*which* seminars, radio shows, statements on a website, books or other publications are actionable, providing a clue about *when* the statements were made, or identifying *to whom* they were made . . . .” Motion at p. 4 (emphasis in original). Respondents’ argument is disingenuous because the OIP identifies with great particularity that the slideshow presented at the seminars was the source of the materially misleading statements, and the factual allegations concerning those materially misleading statements refer to the slideshow, and not to a book, or a website, or some other publication or communication. *See* OIP at ¶¶ B.14-18, C.19-27.

In a strained effort to support their Motion, Respondents simply ignore the extensive allegations in the OIP in paragraphs B.14-C.27. In fact, in their argument in their Motion, Respondents cite only to the factual allegations in paragraphs B.1, B.2, B.11, and B.14 of the OIP. Respondents ignore all the other detailed allegations about the slideshow and the 1966 and 1973 performance tests. If all the factual allegations are considered, the OIP plainly informs Respondents of the charges against them sufficient for them to prepare a defense. *See In the Matter of Donald J. Anthony, Jr., et al.*, 107 S.E.C. Docket 4716, 2013 WL 11234078 (Dec. 12, 2013) (OIP sufficient where respondent was put on notice of the issues that would be an issue in the proceeding).

Respondents' demand for the Division to identify in a more definite statement who was present at every seminar, and the dates of every seminar, misunderstands the nature of the claim at issue here. The Division's claims under Section 206 of the Investment Advisers Act of 1940 ("Advisers Act") do not depend on actual injury to any client, and the Division does not need to show that any client or potential client relied on the materially misleading information. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. Ct. 275, 284, 11 L.Ed.2d 237 (1963); *SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1105 (9th Cir. 1977); *SEC v. Blavin*, 760 F.2d 706, 712 (6th Cir. 1985). In this case, the OIP alleges that Respondents breached their fiduciary duty by misleading potential clients about their historical performance claims for the BOM strategy. The statements were made by Respondents by displaying the slideshow presentation to a crowd of attendees at seminars presented by Lucia. The slideshow is an advertisement for Respondents' services, and Respondents cite not authority for the proposition that the Division must identify every person who viewed an advertisement in order for a respondent to have adequate notice of the charges.

The cases cited by Respondents do not support their request for a more definite statement under the facts here. In *Winklemann*, the motion did not seek the identity of everyone who saw the offering memorandum which contained misrepresentations, but rather was limited to an allegation of "other false and misleading statements to advisory clients." *In the Matter of James A. Winklemann, Sr., et al.*, 114 S.E.C. Docket 4038, 2016 WL 11034805 (July 20, 2016). In response to a demand for the "when, how and to whom" the additional false statements were made, the Division was ordered to identify the single client and list the additional false and misleading statements. *Id.* The Division was not ordered to identify every person who had received an offering memorandum, or the date of receipt. In contrast, here Respondents seek the date and identity of thousands of individuals who attended their seminars. But Respondents already have that information. Respondents maintained attendance lists and generated follow-up letters to persons who attended their seminars, since they were advertising their services and trying to

generate additional advisory business. Unlike in *Winklemann*, here Respondents uniquely have the information they now seek in their Motion.<sup>1</sup>

Similarly, *Bandimere* did not involve repeated presentations to large groups of potential clients, but rather the respondents were alleged to have defrauded investors in the offer and sale of specific securities which involved a variety of misrepresentations and omissions, and it was “the specific facts of this case” that warranted ordering the Division to identify the identities of the defrauded investors. *In the Matter of David F. Bandimere, et al.*, 105 S.E.C. Docket 2729, 2013 WL 10619168 (Feb. 11, 2013). *Bauer* involved allegations of making unsuitable recommendations of securities to clients, distributing false portfolio valuations that induced customers to buy additional securities, and engaging in the unauthorized purchase of securities. *In the Matter of Alfred M. Bauer, et al.*, Securities Act Release No. 7309, Securities Exchange Act Release No. 37386, Admin. Release No. 3-9034 (June 28, 1996). Under such circumstances involving specific harms to specific investors, the hearing officer determined that respondents were entitled to know the names of the customers and the identity of the securities. *In the Matter of Alfred M. Bauer, et al.*, 62 S.E.C. Docket 2273, 1996 WL 529025 (Aug. 27, 1996). Finally, *Pruitt* did not require disclosure of who, what, and where, but rather what the violations were – which is detailed in the OIP in this matter. In that internal controls case, the Division was required to identify the specific internal control that was allegedly violated, and the documents that comprised the books and records involved in the violation. *In the Matter of David Pruitt, CPA*, Admin. Proceedings Rulings Release No. 4888 (June 23, 2017).

The cases cited by Respondents do not stand for the proposition that to provide adequate notice in a case involving misleading statements in an advertisement, that the Division must identify how and when every person saw the advertisement, *e.g.*, every attendee at every seminar. Rather, these cases establish that when allegations involve discrete and specific instances of fraud

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<sup>1</sup> Respondents did not provide attendance information to the Commission during the investigation, but provided examples of the follow-up form letters that were sent to seminar attendees.

involving specific securities, such information should be provided. Indeed, a ruling requiring the Division to identify every person who saw the slideshow would be impossible to satisfy because Respondents uniquely have that information and did not provide it to the Division. Such a ruling would frustrate the ability of the Division and the Commission to seek corrective action against persons who made misleading statements in advertisements for their services. Here, the OIP, and the Division's Rule 230 production, provide Respondents with sufficient knowledge of the factual and legal basis of the OIP's allegations to provide them a fair opportunity to defend themselves at an evidentiary hearing. *See In the Matter of Harding Advisory LLC, et al.*, S.E.C. Release No. APR 1239, 2014 WL 10937672 (Feb. 12, 2014) (denying request for more definite statement of which investors were deceived or defrauded because the OIP provided adequate information about how an offering circular was misleading).

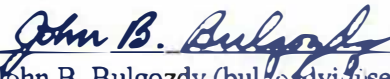
Respondents also claim that the OIP does not adequately identify the "form" the advertisements took. Motion at p. 3. The OIP identifies the form as the slideshow used at the seminars. *See* OIP at ¶¶ B. 14-17. The OIP thus provides adequate notice of the "form" of the advertisement at issue.

#### IV. CONCLUSION

For the foregoing reasons, the Motion for a More Definite Statement should be denied.

Dated: August 27, 2019

Respectfully submitted,

  
John B. Bulgozdy ([bulgozdy@sec.gov](mailto:bulgozdy@sec.gov))  
Peter J. Del Greco ([delgreco@sec.gov](mailto:delgreco@sec.gov))  
Amy Longo ([longoa@sec.gov](mailto:longoa@sec.gov))  
Counsel for the Division of Enforcement  
Securities and Exchange Commission  
444 S. Flower Street, Suite 900  
Los Angeles, CA 90071  
Telephone: 323.965.3322  
Facsimile: 213.443.1904  
*Attorneys for the Division of Enforcement*



**CERTIFICATE OF SERVICE**

I certify that on August 27, 2019, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

Vanessa Countryman, Acting Secretary  
Securities and Exchange Commission  
100 F. Street, N.E., Mail Stop 1090  
Washington, DC 20549  
Fax: (202) 772-9324

(By Fax and By UPS)  
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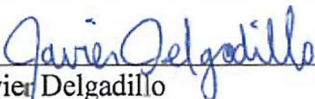
Courtesy Copy to:

Honorable Carol Fox Foelak  
Administrative Law Judge  
Securities and Exchange Commission  
alj@sec.gov

(By electronic mail)

Margaret A. Little  
Caleb Kruckenberg  
New Civil Liberties Alliance (NCLA)  
1225 19th Street NW, Suite 450  
Washington, DC 20036  
(Peggy.little@ncla.legal)  
(Caleb.kruckenberg@ncla.legal)  
(Counsel for Respondents Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.)

(By electronic mail)

  
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Javier Delgadillo