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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17614

In the Matter of

LAURENCE I. BALTER d/b/a ORACLE INVESTMENT RESEARCH,

Respondent.

Administrative Law Judge
Carol Fox Foelak

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

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INTRODUCTION

Respondent Laurence I. Balter improperly requests the Court to order the Division of Enforcement (Division) to disclose, at the pleading stage, its evidence that supports its well-pleaded Order Instituting Proceedings (OIP). The detailed allegations in the OIP, however, combined with the production of the Division's investigative file and the additional information provided to respondent, are more than sufficient to inform respondent of the nature of the charges pending against him. For these reasons, as discussed further below, respondent's motion for a more definite statement should be denied.

PROCEDURAL BACKGROUND

The Commission issued the Order Instituting Proceedings in this matter on October 4, 2016. *See* OIP. The Division of Enforcement served its disclosures pursuant to Rule 230 of the Commission's Rules of Practice on October 11, 2016. *See* Tashjian Decl. ¶ 2 (filed concurrently). Within days of the Rule 230 disclosures, the Division provided the transcripts of investigative testimony, along with the testimony exhibits, and the documents and evidence identified in the disclosures. *See id.* ¶¶ 3-4. In addition, the Division agreed—without court intervention—to provide a list of the witnesses interviewed in its investigation, as well as review its attorney notes of the interviews and approximately 9,000 e-mail messages and attachments for material to be disclosed by the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963) and the Jencks Act [18 U.S.C. § 3500]. *See id.* ¶ 5. The Division voluntarily committed to producing *Brady* and Jencks Act material to counsel by mid-December. *Id.*

The Division subsequently agreed to respondent's request to ask the Court to extend the time to answer and for a briefing schedule for respondent's motion for a more definite statement. *See* Stipulation (Oct. 18, 2016); Postponement Order (Oct. 21, 2016). Although respondent informed the Division that he was considering filing of the motion, counsel provided no details

or substance of the alleged deficiencies in the OIP prior to serving the motion on November 8, 2016. *See* Tashjian Decl. ¶ 6.

At the Court's suggestion, the parties met and conferred on November 21, 2016, to discuss respondent's motion. *See* Prehearing Order (Nov. 21, 2016); Tashjian Decl. ¶ 7. During the telephone conference, which lasted for more than an hour, it became apparent to the Division that the motion is an effort by respondent to seek early disclosure of the Division's expert analysis. *See* Tashjian Decl. ¶ 7. As the Division explained at the prehearing conference and again to counsel on the conference call, its expert analysis has yet to be completed. *See id.* The Division is more than willing, however, to agree to a schedule for the timely exchange of reports at the close of fact discovery. *See id.*

In an effort to reach a compromise and avoid unnecessary judicial involvement, the Division identified for respondent's counsel the data that its experts intend to use to form their opinions, including the specific spreadsheets already produced to respondent and, in some instances, the specific trades requested in respondent's motion. *See* Tashjian Decl. ¶ 8 & Exh. A (identifying by bates number spreadsheets containing trading data as well as table of violative trades). The Division noted that the investigative staff had met with respondent's counsel prior to the initiation of the proceedings and provided a detailed explanation of an analysis performed by the Commission's Division of Economic Research and Analysis (DERA), which the Division believes will be substantially similar to that presented at hearing in this matter. *See id.* ¶ 8. The Division nonetheless offered to provide another overview of its experts' methodology, if the respondent requested. *See id.*

Despite these attempts to address, respondent's counsel cancelled a follow-up telephone call that was scheduled for November 23, 2016, and declined to withdraw the motion. *See* Tashjian Decl. ¶¶ 9-10 & Exh. B.

SUMMARY OF ALLEGATIONS

The Order Instituting Proceedings details "three distinct schemes" perpetrated by respondent on his advisory clients. OIP ¶ 1. First, respondent abused his position by assigning profitable trades that he placed in an omnibus brokerage account to his personal accounts, while assigning unprofitable trades to one of his clients. *Id.* ¶¶ 7-15. As part of this practice, respondent—contrary to representations he made in his firm's Form ADV—placed trades for his own benefit alongside trades in the same securities on behalf of clients in the omnibus account. *Id.* ¶ 11. The Division alleges that respondent received approximately $490,000 in ill-gotten gains from his so-called "cherry-picking" scheme. *Id.* ¶ 14.[1] Second, respondent reneged on his promise to clients not to "double-dip" with respect to his advisory fees. *Id.* ¶¶ 16-17. Contrary to written and verbal assurances, respondent charged clients both his standard fee as well as management fees from his affiliated Oracle Mutual Fund in which he placed his clients' funds. *Id.* ¶ 17. Third, respondent made investment decisions on behalf of the mutual fund that caused the fund to breach its fundamental investment limitations. *Id.* ¶¶ 18-25. Specifically, because of respondent's trading, the mutual fund's portfolio was not "diversified" and was overly-concentrated in certain industry sectors, both of which were contrary to the fund's basic investment strategy outlined to investors. *Id.* ¶ 23.

[1] It is well established that cherry-picking constitutes fraud and a breach of an investment adviser's fiduciary duties. *See, e.g., J.S. Oliver Capital Management, L.P.*, Admin. Proc. Rel. No. 4431, 2016 SEC LEXIS 2157, at *5-6 (June 17, 2016) (affirming initial decision); *The Dratel Group, Inc.*, Admin. Proc. Rel. No. 77396, 2016 SEC LEXIS 1035, at *39 (Mar. 17, 2016) (sustaining Financial Industry Regulatory Authority finding that cherry-picking amounted to "device, scheme [and] artifice to defraud"); *see also SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1302-09 (S.D. Fla. 2007) (finding that cherry-picking scheme violated antifraud provisions).

ARGUMENT

The legal standard for a motion for a more definite statement

The Commission's Rules of Practice set forth the requirements for the Order Instituting Proceeding. *See* 17 C.F.R. §201.200 ("Initiation of proceedings"). As respondent concedes, an OIP must only "[c]ontain a *short and plain* statement of the matters of fact and law to be considered and determined[.]" *See* Resp. Br. at 3 (citing 17 C.F.R. § 201.200(b)(3)) (emphasis added). "[A]llegations in an OIP are sufficient if they 'inform' a respondent 'of the nature of the charges against him so that he may adequately prepare his defense." *Aegis Capital, LLC*, Admin. Proc. Rel. No. 2732, 2015 SEC LEXIS 2127, at *5 (May 27, 2015) (citing *Morris J. Reiter*, Exch. Act Rel. No. 6108, 1959 SEC LEXIS 588, at *5 (Nov. 2, 1959)); *see also Marc Sherman*, Admin. Proc. Rel. No. 2106, 2014 SEC LEXIS 4694, at *4 (Dec. 5, 2014) (Foelak, J.) (denying motion for more definite statement where OIP "contain[ed] a number of specific allegations relating to" respondent, and thus provided respondent "with legally sufficient notice of the allegations against him").

A respondent is not entitled in advance of the hearing to the disclosure of the evidence on which the Division expects to rely. *See Spectrum Concepts, LLC*, Admin. Proc. Rel. No. 2370, 2015 SEC LEXIS 771, at *3 (Mar. 2, 2015). "It has long been established that 'when dealing with challenges to the adequacy of allegations in an [OIP], 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 in advance of the hearing to a disclosure of the evidence on which the Division intends to rely.'" *Thomas R. Delaney II*, Admin. Proc. Rel. No. 1557, 2014 SEC LEXIS 2223, at *6 (June 25, 2014) (citations omitted); *see also Aegis Capital*, 2015 SEC LEXIS 2127, at *5 ("[a] respondent 'is not entitled to a disclosure of evidence'") (citation omitted).

Where the respondent is seeking facts that go beyond the type that are necessary to give the respondent fair notice of the charges against him, a motion for more definite statement should

be denied. *See, e.g., Harding Advisory LLC*, Admin. Proc. Rel. No. 1239, 2014 SEC LEXIS 539, at *6 (Feb. 12, 2014) (denying motion where many of respondents' requests "related to disputed facts and are not properly the subject of a more definite statement"). Similarly, motions that seek "an unreasonable amount of specificity from the Division as to facts the Division might introduce to prove the allegations in the OIP" are not proper. *Houston Am. Energy Corp.*, Admin. Proc. Rel. No. 1867, 2014 SEC LEXIS 3701, at *5 (Sept. 30, 2014).[2] Nor are motions that "consist[] mainly of legal arguments" about the sufficiency of evidence. *OptionsXpress, Inc.*, Admin. Proc. Rel. No. 710, 2012 SEC LEXIS 2231, at *5-6 (July 11, 2012).[3]

When the Division provides additional information in response to a motion for definite statement, courts have found that such information effectively moots the respondent's motion. *See Aegis Capital*, 2015 SEC LEXIS 2127, at *3-4 (finding that additional information, taken with allegations in OIP, was "sufficient to inform [respondents] of the allegations against them"); *see also Donald J. Anthony, Jr.*, Admin. Proc. Rel. No. 1098, 2013 SEC LEXIS 3907, at *7-8 (Dec. 12, 2013) (denying motion where Division made investigative file available to respondents for inspection and copying, provided respondents with additional factual information, and intended to provide respondents with names of witnesses, exhibit list, and expert reports ahead of hearing); *Houston Am. Energy Corp.*, 2014 SEC LEXIS 3701, at *4-5 (denying motion where Division provided additional information in response to motion and supplemental appendix along with production of investigative file); *OptionsXpress*, 2012 SEC

[2] As respondent's authority plainly states in a similar case, "[T]here simply is no basis for requiring the Division to incorporate in its allegations the mass of evidentiary detail that movant seeks." *Donald T. Sheldon*, Admin. Proc. Rel. No. 270, 1986 SEC LEXIS 2293, at *6 (June 9, 1986) (Resp. Br. at 4).

[3] For this reason, the Division moves to strike the various exhibits attached to respondent's motion as an improper attempt to engage in a legal argument over the sufficiency of the evidence.

LEXIS 2231, at *5-6 (denying motion where Division made available non-privileged portions of investigative file and met on numerous occasions with respondents to provide information).

Respondent's requests for evidence and early disclosure of expert analysis should be denied

Respondent styles his motion as a request for additional information about "specific transactions and emails," accusing the Division of "play[ing] hide the ball." Resp. Br. at 4. This is disingenuous. The staff met with respondent's counsel during the pre-filing investigation to provide a detailed account of the DERA analysis of respondent's trading. The Order Instituting Proceedings provides the required "short and plain" statement of the allegations against respondent. *See* 17 C.F.R. § 201.200(b)(3). The Division completed its disclosures in a timely manner and produced its investigative file. In addition, the Division provided respondent with a list of witnesses interviewed by staff during the investigation, committed to producing additional information pursuant to its *Brady* and Jencks Act obligations, and offered to provide another overview of the analysis its experts intend to perform. Far from hiding the ball, the Division has taken its disclosure obligations seriously while seeking to fulfill its public responsibility to hold respondent accountable for his violations of the securities laws.

As discussed below, moreover, respondent's requests appear to be nothing more than an attempt to force the Division to turn over its expert reports before they are completed and in advance of the close of fact discovery. Disclosure of the expert reports more than seven months before hearing is premature and highly unusual. *See, e.g., Equity Trust Co.*, Admin. Proc. Rel. No. 3069, 2015 SEC LEXIS 3481, at *1 (Aug. 26, 2015) (Foelak, J.) (order setting exchange of reports four weeks before hearing); *Thomas A. Neely, Jr.*, Admin. Proc. Rel. No. 1959, 2014 SEC LEXIS 4074, at *1 (Oct. 29, 2014) (Foelak, J.) (three weeks before hearing); *Wedbush Secs. Inc.*, Admin. Proc. Rel. No. 1771, 2014 SEC LEXIS 3227, at *1 (Sept. 5, 2014) (Foelak, J.) (twenty-five days before hearing); *see also Harding Advisory LLC*, Admin. Proc. Rel. No. 1195,

2014 SEC LEXIS 280, at *2-3 (Jan. 24, 2014) (noting deviation from "usual practice" by ordering exchange of expert reports three weeks prior to hearing).

Each of respondent's requests is unwarranted for the reasons that follow:[4]

1. Transactional details (time, date, issuer or stock, number of shares traded) of the transactions upon which the claim is based that Mr. Balter fraudulently allocated profitable trades to himself instead of "Client A", presumably Brian Barbata and his family's accounts.

Respondent's request is overbroad and far exceeds the pleading requirements of Rule 200 of the Commission's Rules of Practice. The OIP sufficiently informs respondent of the nature of the trade allocation, or cherry-picking, allegations. Moreover, the Division has produced all of the data underlying the allegations, including all of the transactions requested, as part of its Rule 230 production. *See* Tashjian Decl. ¶ 8. In response to the motion, the Division identified the specific spreadsheets that it anticipates its experts will analyze. *See id.* & Exh. A at 2-3.[5] The Division also informed respondent that it intends to use publicly-available stock and option price data, which it would produce to respondent at no cost at the time of the exchange of expert reports. *See id.* Finally, the Division offered to explain the data to respondent's counsel—an offer that it was prepared to discuss further on the telephone call that was canceled by respondent's counsel. *See id.* Because respondent has been informed of the nature of the charges

[4] Notably, none of respondent's requests is similar to factual deficiencies found in the cases respondent cites. Unlike in *David F. Bandimere*, Admin. Proc. Rel. No. 739, for example, respondent does not seek the identity of unnamed investors or clarification of unspecified "red flags." *See* 2013 SEC LEXIS 452, at *3-7 (Feb. 11, 2013) (Resp. Br. at 3-4). Nor does respondent seek the identity of unspecified "customers, accounts, and securities," as in *Alfred M. Bauer*, Admin. Proc. File No. 3-9034, 1996 SEC LEXIS 2546, at *3 (Aug. 27, 1996), or unspecified customers, sales practices, and securities, as in *J.W. Barclay*, Admin. Proc. File No. 3-10765, 2002 SEC LEXIS 3456, at *3-5 (June 13, 2002). *See* Resp. Br. at 4-5 (citing authority).

[5] It is common practice in cherry-picking cases for the Division to offer an analysis that examines all of the trades within an omnibus (or "block trading") account for a statistically significant discrepancies in the allocation of trades among accounts. *See, e.g., J.S. Oliver Capital Management, L.P.*, 2016 SEC LEXIS 2157, at *10-12 (affirming liability based on expert statistical analysis of "first-day returns" of trades allocated among favored and disfavored accounts).

against him, the Court should deny his request. *See, e.g., Aegis Capital*, 2015 SEC LEXIS 2127, at *3-4.

2. Documents, verbal agreements or testimony that establish the terms of the fee agreements upon which the Division's claims that profits should have been allocated on a "first-day returns" basis using only a single Barbata account, rather than a holistic analysis of fair allocations of actual profits among all Barbata accounts under management by Mr. Balter, as was actually and fairly allocated by Mr. Balter and as Mr. Barbata testified he believed was the parties' actual agreement.

Respondent's request plainly—and improperly—seeks the Division to disclose the specific evidence upon which it intends to prove its case. The Division produced all of the documents and testimony transcripts from its investigation as part of its Rule 230 production and has no further obligation to highlight selected portions of the evidentiary record in response to the request. *See Aegis Capital*, 2015 SEC LEXIS 2127, at *5.[6]

3. Transactional details (time, date, issuer or stock, number of shares traded, and market capitalization of issuer at the time of transaction) upon which the Division claims that Mr. Balter defrauded his clients by trading before them or alongside them with respect to the same issuer's shares.

In response to respondent's motion, the Division listed the specific trades that it believes are responsive. *See* Tashjian Decl. ¶ 8 & Exh. A at 4. The Division previously produced all of the trading data, including all of the transactions requested, as part of its Rule 230 production. *See id.* ¶ 8. As respondent has been sufficiently informed of the nature of the allegations against him, the request should be denied. *See Aegis Capital*, 2015 SEC LEXIS 2127, at *3-4.

4. Transactional details (time, date, issuer or stock, number of shares traded, diversification and industry concentration information) of each transaction which allegedly caused the Fund to violate the diversification and, separately, the industry concentration standards upon which the OIP is based.

Respondent's request is overbroad and far exceeds the Rule 200 pleading requirements. The OIP sufficiently informs respondent of the nature of the allegations relating to the Oracle

[6] The issue of "first-day returns" is an issue for expert opinion and statistical analysis. *See* n.5, *supra*.

Mutual Fund. Moreover, the Division produced all of the data underlying the allegations, including all of the transactions requested, as part of its Rule 230 production. *See* Tashjian Decl. ¶ 8. In response to the motion, the Division identified the specific spreadsheets that it anticipates its experts will analyze. *See id.* & Exh. A at 5. In addition, the Division offered to attempt to provide an itemization of the specific trades in the near future. *See id.* Because respondent has been informed of the nature of the charges against him, the Court should deny his request. *See, e.g., Aegis Capital*, 2015 SEC LEXIS 2127, at *3-4.

5. Client communication details (who, what, when, how and to whom) in which Mr. Balter allegedly made representations to clients that there will be no double dipping; and exactly what charges, if any, violated such representation on a client by client basis.

Respondent's request improperly seeks the Division to disclose the specific evidence upon which it intends to prove its case. The Division produced all of the documents and testimony transcripts from its investigation as part of its Rule 230 production and has no further obligation to highlight selected portions of the evidentiary record in response to the request. *See Aegis Capital*, 2015 SEC LEXIS 2127, at *5.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court deny respondent's motion for a more definite statement.

Dated: November 28, 2016

Respectfully submitted,

Robert L. Tashjian
DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17614

In the Matter of

LAURENCE I. BALTER d/b/a ORACLE INVESTMENT RESEARCH,

Respondent.

Administrative Law Judge
Carol Fox Foelak

DECLARATION OF ROBERT L. TASHJIAN IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

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I, Robert L. Tashjian, declare:

1. I am an attorney duly admitted to practice in the State of California. I am a Trial Counsel in the United States Securities and Exchange Commission's Division of Enforcement (the "Division"), the plaintiff in the above-captioned matter. I am one of the attorneys with primary responsibility for litigating this matter. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify as follows:

2. The Division served its disclosures pursuant to Rule 230 of the Commission's Rules of Practice on October 11, 2016.

3. On October 12, 2016, the Division sent the transcripts of investigative testimony and the testimony exhibits to respondent's counsel.

4. After receiving a computer hard drive from respondent's counsel, the Division produced the documents and evidence identified in its Rule 230 disclosures on October 27, 2016.

5. The Division provided counsel with a list of the witnesses interviewed by the staff in its investigation by letter dated November 4, 2016. In addition, the Division agreed to review its attorney notes of the interviews and the more than 9,000 e-mail messages and attachments sent by the staff for material to be disclosed by the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963) and the Jencks Act [18 U.S.C. § 3500]. The Division committed to producing such material by December 16, 2016.

6. As a professional courtesy, and at the request of counsel, the Division agreed to stipulate to extend respondent's time to answer. In conversations about the extension, respondent's counsel indicated that he intended to file a motion for more definite statement. Prior to the filing of the motion, counsel did not inform the Division about the alleged deficiencies in the Order Instituting Proceedings.

7. Following the Prehearing Conference with the Court on November 21, 2016, my colleague and I spoke with respondent's counsel by telephone for more than one hour in an effort

to provide more information about the Division's allegations. During the call, it became apparent that respondent was seeking early disclosure of the Division's expert analysis. As we explained to counsel on the conference call, the Division's expert analysis has yet to be completed. We expressed a willingness, however, to agree to a schedule for the timely exchange of reports at the close of fact discovery.

8. On the call with counsel and by subsequent letter, we identified the data—already produced to respondent— that the Division's experts intend to use to form their opinions, including the specific spreadsheets already produced to respondent and, in some instances, the specific trades requested in respondent's motion. We also reminded counsel that the investigative staff had met with them prior to the initiation of the proceedings and provided a detailed explanation of an analysis performed by the Commission's Division of Economic Research and Analysis. That analysis will be substantially similar to that presented at hearing in this matter. Nonetheless, we offered to provide another overview of its experts' methodology, if the respondent requested. Attached as Exhibit A is a true and correct copy of the transmittal letter memorializing the telephone call and the Division's commitments.

9. At the end of the telephone conference, we scheduled a follow-up telephone call with counsel for 10:00 a.m. PST on November 23, 2016. Before the call occurred, however, respondent's counsel informed the Division that respondent would not withdraw the motion. Attached as Exhibit B is a true and correct copy of counsel's e-mail message.

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10. In reply, I offered to speak to counsel, as scheduled. I received no call or other response from counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was signed in San Francisco, California on November 28, 2016.

By: _____
Robert L. Tashjian

EXHIBIT A

UNITED STATES
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November 22, 2016

Via Electronic Mail Only

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Re: In the Matter of Laurence I. Balter d/b/a Oracle Investment Research (SF-3954-B) (Administrative Proceeding File No. 3-17614)

Dear Messrs. Corrigan and Morris:

This letter follows our telephone conversation yesterday morning in which we discussed Mr. Balter's motion for a more definite statement and the schedule for discovery. These subjects are addressed below.

Response to Motion

In his motion, Mr. Balter accuses the Division of Enforcement of "play[ing] hide the ball" and requests additional information "to adequately prepare his defenses." Before turning to the specific requests, the Division would note the extraordinary lengths it has gone to provide information to Mr. Balter. During the investigation, before any action was instituted, the staff met with counsel to explain its case and shared an 80-page Power Point presentation that included a detailed analysis performed by the Division of Economic Research and Analysis (DERA) on Mr. Balter's trading accounts. The Order Instituting Proceedings sets forth the Division's factual allegations and legal conclusions in a specific and detailed manner. The Division produced its investigative file immediately upon instituting this matter and voluntarily offered to provide potential *Brady* and Jencks Act disclosures without waiting for Court intervention. In addition, as we discussed on yesterday's call, the Division is willing to point to the specific datasets, already provided to you, that it anticipates its experts will use to form their opinions—information that is not usually provided prior to the disclosure of expert reports.

We hope that, in consideration of these steps, that Mr. Balter will withdraw his pending motion and that the parties can use the Court's time more productively. Indeed, we believe that all of this information provides Respondent with considerably more than sufficient notice of the allegations against him, which is all that he is entitled to at this stage of the proceedings. *See Marc Sherman*, Admin. Proc. Rel. No. 2106, 2014 SEC LEXIS 4694, at *4 (Dec. 5, 2014)

(Foelak, J.) (denying motion for more definite statement where Division provided respondent "with legally sufficient notice of the allegations against him").

The Division has two general objections to Mr. Balter's specific requests, moreover. As we discussed, the requests read as contention interrogatories propounded under the Federal Rules of Civil Procedure. The Division has no obligation under the Commission's Rules of Practice, however, to provide the specific facts and evidence that supports the allegations lodged in the Order Instituting Proceedings. *See Thomas R. Delaney II*, Admin. Proc. Rel. No. 1557, 2014 SEC LEXIS 2223, at *6 (June 25, 2014) ("[i]t has long been established 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 in advance of the hearing to a disclosure of the evidence on which the Division intends to rely") (citations omitted). As noted above, pursuant to Rule 230, the Division has produced the documents and sworn testimony obtained in the investigation and has no further obligation to highlight portions of the evidentiary record for the respondent.

In addition, it is evident from the requests, the prehearing conference, and yesterday's call that Mr. Balter is intent on obtaining the Division's expert report at the outset of discovery. To be clear: the Division's expert report is not in final form, nor do we believe that it is usual or customary to provide an expert's report prior to the close of fact discovery, let alone seven months prior to a hearing. *See Harding Advisory LLC*, Admin. Proc. Rel. No. 1195, 2014 SEC LEXIS 280, at *2-3 (Jan. 24, 2014) (noting that court had deviated from "usual practice" of requiring exchange of expert reports three weeks in advance of hearing). The staff met with counsel on June 25, 2015, and presented a detailed explanation of the analysis that the Division believes will be substantially similar to the analysis offered at the hearing. As discussed below, moreover, the Division proposed a discovery schedule to permit an early exchange of expert reports to allow Mr. Balter ample time to prepare for expert depositions and cross examination at hearing. The Division objects to an immediate disclosure of expert reports, however, as premature and unnecessary.

Subject to those objections, the Division is willing to provide additional information in response to Mr. Balter's five requests. Each is taken in turn—

1. Transactional details (time, date, issuer or stock, number of shares traded) of the transactions upon which the claim is based that Mr. Balter fraudulently allocated profitable trades to himself instead of "Client A", presumably Brian Barbata and his family's accounts.

The Division has produced all of the trading data, including all of the transactions requested, as part of its Rule 230 production. To the extent that the request seeks the Division's expert analysis, the Division will include the analysis in its expert reports at an agreed-upon date or as ordered by the Court. As you know from the June 25, 2015, meeting with staff, the Division's experts will likely focus on all trading in Mr. Balter's omnibus (or "block") trading account. This data was obtained from Fidelity Investments and TD Ameritrade and can be found among the following documents already produced to Mr. Balter—

SEC-NFS-E-0005692 (an Excel spreadsheet from Fidelity Investments);

SEC-NFS-E-0005693 (a cover letter from Fidelity Investments explaining the spreadsheet, referred to as "Exhibit L");

SEC-TDA-E-0004228 (an account listing from TD Ameritrade);

SEC-TDA-E-0004205 (an allocation report from TD Ameritrade); and

SEC-TDA-E-0000591 (an Excel spreadsheet from TD Ameritrade).

As discussed on yesterday's call, the Division has also offered to walk you through any of the above documents to the extent you have particular questions about the underlying data that will be used to support the Division's expert analysis.

The Division reserves the right to ask its experts to analyze other data, as it becomes known, and the evidentiary record, as it develops in discovery. The Division's experts will likely also rely on publicly-available data, including closing market prices of equity securities and stock options. This data can be obtained from resources such as the Center for Research in Securities Prices at the University of Chicago and firms such as Optionmetrics. The Division anticipates that it will provide this data at no expense to Mr. Balter as part of its expert reports.

2. Documents, verbal agreements or testimony that establish the terms of the fee agreements upon which the Division's claims that profits should have been allocated on a "first-day returns" basis using only a single Barbata account, rather than a holistic analysis of fair allocations of actual profits among all Barbata accounts under management by Mr. Balter, as was actually and fairly allocated by Mr. Balter and as Mr. Barbata testified he believed was the parties' actual agreement.

The Division has produced all of the documents and testimony transcripts from its investigation as part of its Rule 230 production. The Division believes it has no further obligation to highlight selected portions of the evidentiary record in response to the request, which resembles a contention interrogatory in federal court litigation. Based on yesterday's discussion, however, we understand that counsel's questions center on DERA's "first-day returns" analysis that was presented at the June 25, 2015, meeting. We attempted to recap that analysis on the call. Please let me and Mr. Habermeyer know if you believe that further discussion would be helpful, particularly in aid of resolution of this matter. While we will not make our expert or our expert analysis available prior to the scheduled disclosure date, we might be able to provide our explanation of the analytical methods used by the Division's expert.

3. Transactional details (time, date, issuer or stock, number of shares traded, and market capitalization of issuer at the time of transaction) upon which the Division claims that Mr. Balter defrauded his clients by trading before them or alongside them with respect to the same issuer's shares.

The Division has produced all of the trading data, including all of the transactions requested, as part of its Rule 230 production. Notwithstanding the material already produced, the Division voluntarily discloses the following trades that are responsive to the request—

Trade Date	Ticker	Buy/Sell
3/11/2011	CYH	Sell
3/14/2011	ALL	Sell
3/14/2011	V	Sell
7/28/2011	MCP	Buy
5/22/2012	CVX	Buy
5/23/2012	OGXPY	Buy
6/5/2012	CVX	Buy
6/5/2012	CVX	Sell
7/9/2012	CVX	Sell
11/8/2012	AAPL	Buy
11/8/2012	AAPL	Sell
11/9/2012	AAPL	Buy
11/9/2012	AAPL	Sell
11/12/2012	AAPL	Buy
11/12/2012	AAPL	Sell
12/5/2012	AAPL	Buy
2/27/2013	AMZN	Sell
4/15/2013	SPY	Sell

The Division reserves the right to assert that Mr. Balter breached his obligations to his advisory clients based on other trades, as they become known, and the evidentiary record, as it develops in discovery.

4. Transactional details (time, date, issuer or stock, number of shares traded, diversification and industry concentration information) of each transaction which allegedly caused the Fund to violate the diversification and, separately, the industry concentration standards upon which the OIP is based.

The Division has produced all of the trading data, including all of the transactions requested, as part of its Rule 230 production. To the extent that the request seeks the Division's expert analysis, the Division will include the analysis in its expert reports at an agreed-upon date or as ordered by the Court. The Division's experts will likely focus on the following data—

SEC-MSS-E-0000231 (sales journal spreadsheet);

SEC-MSS-E-0003023 (purchase journal spreadsheet);

SEC-OIR-000238 – 293 (testimony exhibit no. 25); and

SEC-MSS-E-0000001 – 8502 (Oracle Holdings.xlsx and Oracle Holdings -- without security lending.xlsx).

From our call, we understand that counsel is focused on the specific trades that caused the mutual fund to violate its fundamental limitations. We may be able to provide an itemization of the specific trades by December 16, 2016, or soon thereafter. However, the Division reserves the right to ask its experts to analyze other data, as it becomes known, and the evidentiary record, as it develops in discovery.

5. Client communication details (who, what, when, how and to whom) in which Mr. Balter allegedly made representations to clients that there will be no double dipping; and exactly what charges, if any, violated such representation on a client by client basis.

The Division has produced all of the documents and testimony transcripts from its investigation as part of its Rule 230 production. The Division believes it has no further obligation to highlight selected portions of the evidentiary record in response to the request, which resembles a contention interrogatory in federal court litigation.

Discovery schedule

During yesterday's call, the parties exchanged the following proposals for a discovery schedule in light of the Court's order setting June 19, 2017, as the first day for the hearing in this matter—

Item	Division's Proposal	Respondent's Proposal
Close of fact discovery and exchange of expert reports	February 17, 2017	April 19, 2017
Exchange of rebuttal expert reports	March 3, 2017	May 3, 2017
Close of expert discovery	April 19, 2017	May 19, 2017
Exchange of witness and exhibit lists	April 21, 2017	May 26, 2017
Stipulations, admissions of fact, and requests for judicial notice	May 19, 2017	May 26, 2017
Pre-hearing briefs filed	June 2, 2017	June 5, 2017
Pre-hearing conference	June 12, 2017	June 12, 2017
Hearing commences	June 19, 2017	June 19, 2017

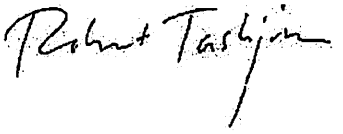
After considering the proposed schedules, the Division believes that an earlier exchange of expert reports and more time for preparation for the hearing would benefit the efficient outcome of this matter. As we also discussed on the call, we anticipate that a majority of the allotted depositions will be used to depose the parties' experts in this matter. We are unwilling to stipulate to a greater number of depositions than permitted by the Rules, and thus believe that an extended period for expert discovery would allow the parties more flexibility in scheduling depositions. Please let us know your thoughts so that we can set forth the positions for the Court if the parties cannot agree.

Other Items

As we discussed, the Division intends to send a notice for Mr. Balter's deposition in January. Please let us know available dates between January 4, 2017, and January 17, 2017. In addition, the parties should agree on a location in Hawaii for the June 19, 2017, hearing. We believe that Honolulu would be the most convenient location for reserving a conference room at the United States Attorney's Office or other federal building, but would like your thoughts.

I look forward to speaking with Mr. Corrigan on Wednesday to follow up on these issues. If the disclosures in response to Mr. Balter's motion are satisfactory, we would request that you ask the Court to take the motion off-calendar.

Sincerely,



Robert L. Tashjian
Trial Counsel

EXHIBIT B

From: Brian Corrigan
To: Tashjian, Robert
Cc: Stanley Morris
Subject: SEC v Balter
Date: Tuesday, November 22, 2016 8:12:18 PM

Robert, Mr. Balter is not willing to withdraw his motion. Simply put, he wants the information requested for the reasons stated in the motion. Anything short of that is not acceptable.

In terms of the Pretrial schedule, we don't seem to have made any headway. Let's regroup after the holiday weekend and discuss how best to present the scheduling issues to our hearing officer. We were willing to compromise on your point that fact discovery ends before expert reports are designated, to get agreement on the schedule we had tentatively reached. But, since you've changed your mind on the schedule, we would propose a different schedule with an early designation and report exchange and a much later fact cutoff date.

Have a great weekend. Brian

Sent from my iPhone

CERTIFICATE OF SERVICE

I, Eric Pease, hereby certify that an original and three copies of the foregoing

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

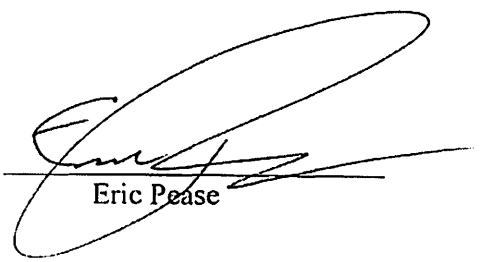
DECLARATION OF ROBERT L. TASHJIAN IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Mail Stop 1090, Washington, D.C. 20549, and that a true and correct copy of the foregoing has been served by UPS, marked for next day delivery on November 29, 2016 and email on the following person entitled to notice:

Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 2557
Washington, DC 20549-2557
Email: ALJ@sec.gov

and by UPS marked for next day delivery and email on the following persons entitled to notice:

Mr. Laurence I. Balter
c/o Stanley C. Morris, Esq.
Corrigan & Morris LLP
201 Santa Monica Boulevard, Suite 475
Santa Monica, CA 90401-2212
Email: scm@cormorllp.com
Email: bcorrigan@cormorllp.com



Eric Pease