

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding  
No. C05050015

Hearing Officer—Andrew H. Perkins

**ORDER GRANTING RESPONDENT 2'S  
MOTION FOR MORE DEFINITE STATEMENT**

The Department of Enforcement (the "Department") has charged Respondent 2 with participating in private securities transactions in violation of NASD Conduct Rules 3040 and 2110. In the First Cause of Complaint, the Department alleges that "[Respondent 2] solicited and/or referred 24 investors to [a company called e2 Communications, Inc.], all as more fully detailed on Exhibit "A", attached [to the Complaint]." In the Second Cause of Complaint, the Department further alleges that Respondent 2 solicited customer SF to purchase shares of e2 Communications common and preferred stock. Exhibit "A" to the Complaint, however, does not identify the 24 investors referenced in the First Cause of Complaint or the nine investors referenced in the Third Cause of Complaint that sets forth the charge against Respondent 1. Rather, the exhibit is a six-page "subscription list" dated March 2, 2000, for e2 Communications

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Series B Convertible Preferred Stock. The Complaint does not explain the import of this list.

Respondent 2 objects that the Complaint is too vague. Respondent 2 argues that the Complaint fails to identify the investors or the transactions underlying the allegations in the Complaint. Further, Respondent 2 states that the Complaint fails to allege whether any of Respondent 2's alleged actions had any nexus to any securities transaction.

Accordingly, in his motion for a more definite statement filed on May 31, 2005, Respondent 2 requests entry of an order requiring the Department to specify the conduct and transactions underlying the Complaint.

In opposition, the Department argues that Procedural Rule 9215(c) cannot be used to discover the Department's legal theories or to conduct discovery of the evidence supporting the Complaint. The Department does not claim undue burden or prejudice if it is required to more specifically set forth its claims.

For the reasons discussed below, the Hearing Officer overrules the Department's objections and grants Respondent 2's motion.

### **Discussion**

NASD Code of Procedure Rule 9212(a) requires that a complaint "specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated." This pleading requirement is satisfied if the allegations provide "a respondent sufficient notice to understand the charges and adequate opportunity to plan a defense."<sup>1</sup>

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<sup>1</sup> *District Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at \*10 (NBCC July 28, 1997) (construing former Rule 9212(a)). *Accord, e.g., Daniel Joseph Avant*, 52 S.E.C. 442 (Oct. 26, 1995) (construing former Rule 9212(a)); *Joseph H. O'Brien II*, 51 S.E.C. 1112 (1994) (same);

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On the other hand, if the Complaint does not meet this standard, the Department can cure this defect by filing a bill of particulars.

The Department argues that Rule 9215(c) generally cannot be used as a discovery tool to force the Department to reveal its legal theories, trial strategy, or the facts it intends to introduce at the hearing. Accordingly, the Department urges the Hearing Officer to deny Respondent 2's motion. However, unlike the system under the Federal Rules of Civil Procedure, respondents in NASD disciplinary proceedings are not afforded liberal discovery rights.<sup>2</sup> Most notably, respondents may not depose NASD staff or serve contention interrogatories to flesh-out the Department's pleadings. Thus, the Hearing Officer may exercise his discretionary authority to require the Department to file a more particular statement of its claim so that the respondent has full and fair notice of the charges against him.<sup>3</sup>

Here, the Hearing Officer finds that the Complaint, although factually detailed in many respects, fails to adequately apprise the Respondents of the charges against them. The Complaint does not identify the specific violative conduct and transactions. Without further information, the Respondents are left to guess which of the many transactions listed on the subscription list are those at issue. In summary, the Complaint does not give the Respondents fair and sufficient notice of the charges against them. And, where a

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*District Bus. Conduct Comm. v. Hamilton Inv., Inc.*, No. C8A940023, 1997 NASD Discip. LEXIS 19 (NBCC Feb. 26, 1997) (same). Former Rule 9212(a) is substantially the same as current Rule 9212(a).

<sup>2</sup> See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (holding that "simplified notice pleading is made possible by the liberal discovery and other pretrial procedures established by the Federal Rules of Civil Procedure").

<sup>3</sup> Cf. *Haragon v. Hingle*, 2003 U.S. Dist. LEXIS 16493, at \*10 (E.D. La. Sept. 11, 2003) (holding that the trial judge is given considerable discretion in deciding whether to grant a motion for a more definite statement under Fed. R. Civ. P. 12(e)).

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Complaint fails to provide sufficient notice of the allegations, a motion for more definite statement is appropriate.<sup>4</sup>

Accordingly, the Hearing Officer orders the Department to file and serve a Bill of Particulars that specifies: (1) Respondent 2's and Respondent 1's misconduct; (2) the identity of the customers involved; and (3) the details of the underlying securities transactions. In addition, the Department is ordered to clarify whether footnote 2 is meant to set forth a separate charge against Respondent 2.

The Department shall file the Bill of Particulars no later than June 21, 2005.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

June 7, 2005

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<sup>4</sup> *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (holding that "if a pleading fails to specify the allegations in a manner that provides sufficient notice," a motion for a more particular statement under Fed. R. Civ. P. 12(e) may be appropriate).