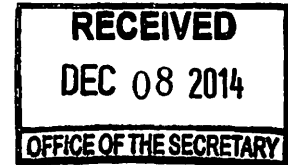


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UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of DAVID G. DERRICK, SR., Respondent.	MOTION FOR A MORE DEFINITE STATEMENT Administrative Proceeding File No. 3-16213
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Pursuant to Rule 200(b)(3) of the Security and Exchange Commission's ("Commission") Rules of Practice, the Respondent, David G. Derrick, Sr., through counsel, hereby moves the Commission for a more definite statement of the allegations against him. On or about October 24, 2014, the Securities and Exchange Commission ("Commission") issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("OIP").

Despite its seven pages of factual allegations, the OIP does not specify (1) which factual allegations allegedly give rise to the six violations Mr. Derrick is alleged to have committed and (2) whether the alleged improper conduct occurred within five years of the Commission's filing of allegations against Mr. Derrick, i.e., within the applicable statute of limitations period. See

28 U.S.C. § 2462. Accordingly, because the OIP is too vague and lacking in specificity to understand the alleged violations against him, Mr. Derrick respectfully requests that the Commission specify and expressly link which factual allegations give rise to which alleged violations and remedies, including the timing of the conduct that gave rise to each alleged violation.

FACTAL BACKGROUND

The Commission's vague and non-specific OIP makes it impossible for Mr. Derrick to know which alleged facts gave rise to which alleged violations or *when* the alleged improper conduct occurred.

The OIP begins with a lengthy narrative of factual allegations under a "Background" heading. This "Background" section begins at paragraph 5 and ends at paragraph 46. The vast majority of the factual allegations set forth in the "Background" section – specifically, paragraphs 5 through 41 – summarize events that allegedly occurred between September, 2007, and March, 2009.¹ Thus, virtually all of the factual allegations at issue in this matter relate to conduct that allegedly occurred more than five years before the issuance of the OIP and thus are time barred.

Although the OIP is not clear as to which alleged facts the Commission believes support the later identified alleged violations, the OIP focuses almost exclusively on Mr. Derrick's conduct *in 2007 and 2008*. During that early time period, Mr. Derrick was co-founder of SecureAlert, a corporation that markets and sells tracking devices used by probation and parole

¹ Paragraph 34 references a financial statement filed on January 13, 2010. Aside from this one reference, paragraphs 5 through 41 present a narrative of events occurring before October, 2009.

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offices. The OIP “Background” section alleges that, *in 2007*, Mr. Derrick and SecureAlert’s other co-founder, James Dalton, entered into agreements with a distributor pursuant to which the distributor agreed to purchase a total of 4,000 units of SecureAlert’s tracking device. *See* Appendix A, OIP at ¶¶ C5, C9. The OIP also alleges that *in 2007* Mr. Derrick personally guaranteed that he and Mr. Dalton would pay for any unused units if the distributor was not satisfied with the devices. *See id.* at ¶¶ C8, C9.

Finally, after its “Background” section, the OIP lists six separate alleged securities violations under the heading “Violations.” *See* Appendix A, OIP at ¶¶ D1 – D6 (pages 9-10). The six alleged violations, however, do *not* specify the facts that allegedly give rise to the listed violations. Instead, each listed violation begins with the following phrase: “As a result of the conduct described above” *Id.* After this vague reference to the factual allegations in the “Background” section, each alleged violation simply refers to a statutory or regulatory standard. The alleged violations provide no details concerning which specific factual allegations in the preceding forty-one paragraph “Background” section provide a basis for the six alleged violations. Accordingly, it is impossible to ascertain what alleged conduct gives rise to which alleged violation.

ARGUMENT

The Commission has not provided Mr. Derrick with fair notice of the allegations against him because it has not explained which facts give rise to which alleged violations and remedies. “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.” *In the Matter of Western Pacific Capital Management, LLC & Kevin James Orourke*, Release No. 691, 2012 WL 8700141 at *1 (Feb. 7, 2012) (citing *Charles M. Weber*, 35 S.E.C. 79 (1953)); *see also In the Matter of Alfred M. Bauer & J. Stephen Stout*, Release No. 517, 1996 WL 529025 (Aug. 27, 1996). A respondent’s right to be given fair notice of the allegations against him is codified at Rule 200(b)(3) of the Commission’s Rules of Practice, which states an 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).

The OIP issued in this matter is completely silent as to what specific conduct allegedly gave rise to the violations set forth therein – including silence as to what improper conduct allegedly occurred within the five-year statute of limitations period. The Commission’s silence as to what conduct gave rise to which violations falls short of the fair notice standard set forth at Rule 200(b)(3). To satisfy this standard, the Commission must provide details concerning facts underlying each alleged violation, as demonstrated by the decisions in *Western Pacific Capital Management* and *Alfred M. Bauer*. In *Western Pacific Capital Management*, the Administrative Law Judge (“ALJ”) held the Commission’s OIP was ambiguous regarding whether all or only a portion of the respondents’ customers were at issue. 2012 WL 8700141 at *3. The OIP in *Western Pacific Capital Management* alleged the respondents failed to disclose “to each of their clients” that they would receive certain fees. *Id.* at *1. The ALJ granted the respondents’ motion for a more definite statement, stating the identities of the clients were “necessary to sufficiently inform respondents of the charges against them and to prepare for the hearing, and are not evidence.” *Id.* at *3.

Similarly, in *Alfred M. Bauer* the ALJ held the Commission's OIP was "needlessly vague, ambiguous and generalized" because it failed to identify the customers, accounts, and securities at issue. 1996 WL 529025 at *1-2. Notably, the ALJ held the OIP was improperly vague despite the fact that the Commission had made its investigative file available to the respondent. *Id.* at *1. The ALJ in *Alfred M. Bauer* indicated that the respondent could engage in a meaningful review of the investigative file only if the Commission first provided more specific allegations. *Id.*

Here, the Commission has been more ambiguous than it was in *Western Pacific Capital Management* and *Alfred M. Bauer*. The OIPs in those cases fell short of the Rule 200(b)(3) standard because the Commission did not provide specific details concerning which individuals and accounts were at issue. In contrast, in this matter the Commission has not identified *any* facts underlying its alleged violations. The Commission effectively is "hiding the ball" by setting forth a long narrative of facts without making any attempt to connect those facts to the alleged violations. Mr. Derrick is in a far worse position than the respondents in *Western Pacific Capital Management* and *Alfred M. Bauer*. Rather than simply having to determine the identity of certain individuals or certain accounts, he has to guess as to which alleged facts the Commission believes give rise to the specific violations alleged in the complaint. This guessing game necessarily impairs Mr. Derrick's ability file a meaningful Answer to the OIP, to review discovery provided by the Commission, or to otherwise defend against the Commission's allegations. The Commission's guessing game also impairs a legal ruling on any statute of limitations defense Mr. Derrick may raise, as the Commission has not identified which violations are supported by conduct that allegedly occurred within five years of its filing of the OIP.

The Commission could easily rectify the unnecessary vagueness of its OIP. It could simply identify the specific facts that it believes support each alleged violation set forth at pages 9 and 10 of the OIP, as well as the remedy prayed for each alleged violation. Such a minimal clarification should be easy, as the Commission likely selected the specific violations alleged in the OIP after assessing facts that it believed support the identified violations. The Commission knows which facts in the “Background” section of its OIP support the alleged violations and is unnecessarily hiding that information from Mr. Derrick.

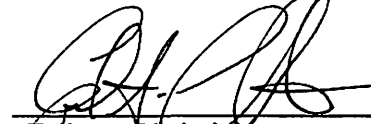
Mr. Derrick is *not* requesting that the Commission argue its entire case prior to the hearing. Rather, he is simply requesting that the Commission comply with its obligations and explain which of its factual allegations support the alleged violations at issue. Without such clarification, Mr. Derrick will be litigating a broad narrative of “Background” facts, virtually all of which fall outside of the applicable statute of limitations period, without any knowledge of whether such facts are or are not relevant to any particular alleged violation. As demonstrated by the above-referenced authority, Rule 200(b)(3) holds the Commission to a higher notice standard.

For the foregoing reasons, Derrick respectfully requests that the Commission order that a more definite OIP be filed, which specifically links the alleged facts to the alleged violations for which such conduct allegedly gives rise to violations. Even under the SEC’s own theory of the applicability of the five-year statute of limitations under *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1224 (2013), which limits the SEC to injunctive relief and/or disgorgement for events outside the five-

year statute of limitations, more is required.² The SEC strangely is seeking a civil penalty, and yet there is virtually no conduct alleged to have occurred within the five-year statutory period under 28 U.S.C. § 2462. Accordingly, Derrick cannot frame a meaningful response to the OIP or prepare for the hearing without more specificity by the Commission as to which conduct gives rise to which violations, and what relief is sought for each alleged violation. The Commission cannot simply list facts, the majority of which are time-barred, and then list purported violations and seek civil penalty remedies, without any link between the alleged facts, and the alleged violations and remedies.

DATED: December 3, 2014.

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² Derrick submits that the SEC is incorrect in its reading of *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1224 (2013), and that the five-year statute applies to all relief sought by the SEC, not just civil penalties.