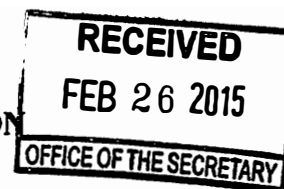


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**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**



ADMINISTRATIVE PROCEEDING
File No. 3-16358

In the Matter of

SPECTRUM CONCEPTS, LLC,
DONALD JAMES WORSWICK,
MICHAEL NICHOLAS GROSSO
and MICHAEL PATRICK BROWN

Respondents

**RESPONDENTS, SPECTRUM CONCEPTS, LLC AND
DONALD JAMES WORSWICK'S
REPLY TO DIVISION OF ENFORCEMENT'S RESPONSE
IN OPPOSITION TO MOTION FOR MORE DEFINITE STATEMENT**

Respondents, SPECTRUM CONCEPTS, LLC ("SPECTRUM") and DONALD JAMES WORSWICK ("WORSWICK") (or collectively referred to as the "Respondents"), by and through the undersigned counsel, respectfully submit this Reply to the Division of Enforcement's ("Division"), Response to a Motion for Definite Statement (the "Motion") previously filed by the Respondents. The Division's Response was received by the Respondents on February 20, 2015.

INTRODUCTION

The Order Instituting Proceedings ("OIP") instituted by the Division alleges, in part, that the Respondents violated Section 17(a) of the Securities Act of 1933 as amended (the "Act"), in connection with the offer and sale of "Private Joint Venture Credit Enhancement Agreements" ("Enhancement Agreements") to five investors, two of which received a total

return of their funds in the amount of \$265,000. OIP ¶6. The OIP, however, fails to identify which subsection(s) of Section 17(a) of the Act has been allegedly violated leaving Respondents to guess at the specific charges being brought against them. Because this pleading deficiency could deprive Respondents the opportunity to assert specific defenses that are unique to the subsections of Section 17(a) of the Act, Respondents filed their Motion on February 17, 2015, together with their Answer and Affirmative Defenses to request that the Division identify which of the Section 17(a) subsections are at issue in this matter.

OVERVIEW OF SECTION 17(a) OF THE ACT

Section 17(a) prohibits fraud and misrepresentations in the offer and sale of securities and provides as follows:

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Most courts have interpreted the three subsections of Section 17(a) as involving different types of misconduct. SEC v. Kelly, 817 F. Supp. 2d 340, 343-45 (S.D.N.Y. 2011). Subsection 17(a)(1) and 17(a)(3) involve what has been described as “scheme” liability while subsection 17(a)(2) covers misrepresentation and omissions liability. *Id.* Claims under

subsection 17(a)(1) require proof of scienter while claims under subsections 17(a)(2) and 17(a)(3) may be based on negligent conduct. Aaron v. SEC, 446 U.S. 680, 696-97 (1980); SEC v. Monarch Funding Corp., 192 F. 3d 295, 308 (2d Cir. 1999).

Another distinction amongst the subsections of Section 17(a) lies between claims for misstatements and omissions under subsection 17(a)(2) and claims for “scheme” liability under subsection 17(a)(3). Courts have generally required that in order for the SEC to state a claim under subsection 17(a)(3), it must allege a scheme or course of conduct that goes beyond any misrepresentations or omissions of material fact alleged under subsection 17(a)(2). SEC v. Kelly, 817 F. Supp. 2d at 346; SEC v. Daifotis, 2011 BL 149557 at 9-10 (N.D. Cal. June 6, 2011).

SUBSECTIONS OF SECTION 17(A) SHOULD BE IDENTIFIED IN THE OIP

Due to the different types of conduct involved under the three separate subsections of Section 17(a) and the different legal standard required to demonstrate a violation as previously described, there exist different and unique defenses to each respective 17(a) subsection. For example, if a misstatement or omission violation is alleged against the Respondents under Section 17(a)(2) of the Act, “materiality” and “ultimate authority” would be appropriate affirmative defenses to raise, especially for Worswick. *See* SEC v. Kelly, 817 F. Supp. 2d 340 (S.D. N.Y. 2011). However, the OIP makes no reference to Section 17(a)(2) although it does contain general allegations that Worswick made “misrepresentations to investors.” *See e.g.* “Introduction to OIP.” By contrast, the OIP details a number of specific

alleged misrepresentations that were made to the three investors at issue¹ by Respondent, Michael Nicholas Grosso (“Grosso”). *See e.g.* OIP ¶¶26-29. These misrepresentations, as alleged, however, are not directed to Worswick. It is not certain, therefore, that the OIP states a claim under Section 17(a)(2).

In addition and as noted, a violation of Section 17(a)(3) of the Act requires that the alleged scheme conducted go beyond the misrepresentations attached to a claim under 17(a)(2). SEC v. Stoker, 865 F. Supp. 457 (S.D. N.Y. 2012). If the Division has alleged a claim under Section 17(a)(3), then Respondents could raise this affirmative defense. However, the OPI’s sole reference to Section 17(a), without more, does not sufficiently provide Respondents with notice of the “charges” being brought. *See Jeffrey A. Wolfson*, AP Rulings Release No. 699, 2012 WL 8702983 at 1 (ALJ March 28, 2012).

Through its Motion, Respondents are not seeking disclosure of evidence that the Division intends to rely on and merely asks that the Division identify which subsection(s) of Section 17(a) of the Act are involved. In its Response, the Division states that violations of all three subsections of Section 17(a) have been alleged in the OIP. Division Response at page 5. In the same breath, however, the Division’s Response states “to the extent that violations of Section 17(a)(3) are alleged.” *Id.* These two conflicting positions underscore the very relief Respondents are requesting in their Motion, which is for the Division to simply identify which 17(a) subsections are at issue so that Respondents may raise additional affirmative defenses, if necessary.

¹ Two other investors received a full return of their purported investment funds that collectively totaled the sum of \$265,000. OIP at ¶6.

The investigative files and transcripts that the Division has produced are not a replacement for the OIP itself and Respondents should not be left to guess or speculate about the specific charges that are being brought against them.

CONCLUSION

For the reasons as presented in this Reply, the Respondents would respectfully request that its Motion be granted to require the Division to amend the OIP and identify in paragraph 32 under the hearing “Violations” thereof, which specific subsections of Section 17(a) [17(a)(1); 17(a)(2); 17(a)(3)] are at issue. Respondents, further request that they be given leave to file an Amended Answer and Affirmative Defenses after the Chief Administrative Law Judge has ruled on the Motion.

February 25, 2015.

Respectfully submitted.



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