

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-13063

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
August 7, 2008

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In the Matter of :  
: ORDER  
MICHAEL K. BRUGMAN :  
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On June 30, 2008, the Division of Enforcement (Division) filed a pleading titled “Division’s Filing Pursuant to Order Entered June 27, 2008.” Attached as Exhibit A to the pleading was the Omnibus Formal Order of Investigation in In the Matter of Certain Mutual Fund Trading Practices (NY-7220), issued by the Securities and Exchange Commission (Commission) on September 10, 2003.

The Division now moves to seal the Omnibus Formal Order of Investigation, invoking 17 C.F.R. § 203.5. That rule provides that all formal investigative proceedings shall be non-public, unless otherwise ordered by the Commission. The Division reasons that the Commission has never ordered the Omnibus Formal Order of Investigation to be made public.

The Commission has twice discussed and summarized the Omnibus Formal Order of Investigation in its own public orders. See Warren Lammert, 91 SEC Docket 856, 861 (Aug. 9, 2007) (Order Denying Petition for Interlocutory Review) (“On September 10, 2003, we issued an omnibus formal order, NY-7220, based upon widespread allegations contained in the [New York State Attorney General’s] complaint that involved other mutual fund complexes in addition to Janus. The omnibus formal order authorized Commission staff to issue subpoenas in order to investigate possible market-timing and late-trading activity. . . .”); Michael Sassano, 92 SEC Docket 111, 111 (Nov. 30, 2007) (Order Denying Interlocutory Review) (“The NY-7220 Order authorized an investigation into certain practices in connection with the trading of mutual fund shares. . . .”).

In addition, the Division and the Respondents in the Michael Sassano proceeding filed public copies of the September 10, 2003, Omnibus Formal Order of Investigation no less than three times. See Exhibit 2 to Declaration of David Stoelting, counsel for the Division, dated June 28, 2007, attached to Division’s Brief in Support of Motion for Interlocutory Review; Exhibit 2 to Declaration of David Stoelting, counsel for the Division, dated June 13, 2007, attached to Division’s Brief in Support of Motion for a Stay; and Exhibit B to Michael Sassano’s Motion to Compel Production, dated May 29, 2007. Neither the Division nor Sassano requested confidential treatment of the Omnibus Formal Order of Investigation. These exhibits are part of

the public record, where they have been available for more than one year to anyone who may wish to read them.<sup>1</sup>

Rule 322 of the Commission's Rules of Practice governs the issuance of a protective order in the present proceeding. A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

Under the Freedom of Information Act, the government could not block disclosure of a document if the identical information was already in the public domain pursuant to official disclosure. See, e.g., Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007); Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981); Founding Church of Scientology v. NSA, 610 F.2d 824, 831-32 (D.C. Cir. 1979); Lamont v. Dept. of Justice, 475 F. Supp. 761, 772 (S.D.N.Y. 1979); cf. United States v. Snapp, 897 F.2d 138, 141 (4th Cir. 1990) (injunctive action). It is unclear why the Division believes a different standard should apply here.

Pursuant to Rule 322(c) of the Commission's Rules of Practice, the Division shall provide additional information with respect to the grounds for confidentiality. The Division shall specifically state why the Omnibus Formal Order of Investigation did not lose its non-public character in light of the Commission's Interlocutory Orders of August 9 and November 30, 2007, and the Division's and Sassano's public filings between May 29 and June 28, 2007. In the alternative, if the Division wishes to withdraw its request for confidential treatment, it shall so state. The Division's supplemental pleading shall be filed within seven days.

SO ORDERED.

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James T. Kelly  
Administrative Law Judge

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<sup>1</sup> Pursuant to 17 C.F.R. § 203.7, copies of formal orders of investigation may be furnished to witnesses and subpoena recipients with the express approval of the appropriate supervisory officials in the Division's regional and district offices. Thus, the Division is incorrect in asserting that 17 C.F.R. § 203.5 is the only possible path for releasing an order of investigation.