

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55848 / June 1, 2007

Admin. Proc. File No. 3-12559

In the Matter of

TRAUTMAN WASSERMAN & COMPANY, INC.,
GREGORY O. TRAUTMAN,
SAMUEL M. WASSERMAN,
MARK BARBERA,
JAMES A. WILSON, JR.,
JEROME SNYDER,
and
FORDE H. PRIGOT

ORDER DISMISSING
CEASE-AND-DESIST
PROCEEDINGS AGAINST
BARBERA

On February 5, 2007, the Commission filed an Order Instituting Proceedings ("OIP") against Trautman Wasserman & Company, Inc., Gregory O. Trautman, Samuel M. Wasserman, Mark Barbera, James A. Wilson, Jr., Jerome Snyder, and Forde H. Prigot (together, "Respondents"). The OIP alleged that Respondents engaged in late trading and deceptive market timing practices that resulted in numerous violations of the securities laws. The OIP authorized public administrative proceedings against Respondents pursuant to Section 15(b) of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Section 203(f) of the Investment Advisers Act of 1940. 1/ The OIP also authorized cease-and-desist proceedings against Respondents, which included cease-and-desist proceedings against respondent Barbera under Section 8A of the Securities Act of 1933, Section 21C of the Exchange Act, and Section 9(f) of the Investment Company Act. 2/

1/ 15 U.S.C. §§ 78o(b), 80a-9(b), 80b-3(f).

2/ 15 U.S.C. §§ 77h-1, 78u-3, 80a-9(f). The OIP seeks cease-and-desist relief under Securities Act Section 8A and Exchange Act Section 21C against Trautman Wasserman & Company, Inc.; under Securities Act Section 8A, Exchange Act Section 21C, and Investment Company Act Section 9(f) against Trautman, Wasserman, and Wilson; and under Exchange Act Section 21C against Snyder and Prigot.

Respondent Wilson is a defendant in parallel criminal proceedings in New York. Wilson was indicted by a New York grand jury on two counts of fraud and nine counts of falsifying business records, based on essentially the same conduct at issue in this administrative proceeding. On March 13, 2007, the law judge granted an application by the Attorney General of the State of New York ("NYAG"), made pursuant to Rule of Practice 210(c)(3), 3/ to stay the proceeding until the conclusion of the criminal proceeding against Wilson.

However, the law judge lifted the stay by order dated March 23, 2007 in response to an argument by respondent Barbera that Exchange Act Section 21C(b) provides that "[t]he notice instituting proceedings . . . shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or later date is set by the Commission with the consent of any respondent so served." 4/ In her March 23 order, the law judge set a hearing date for all respondents of April 13, 2007, a date sixty days after Barbera was served with the OIP.

On March 28, 2007, the Division of Enforcement ("Division") notified the law judge by letter that it intended to file a motion with the Commission to withdraw those portions of the OIP that seek cease-and-desist relief against Barbera. On March 30, 2007, the law judge issued an order following a prehearing conference. 5/ The law judge stated that, during this conference, all Respondents except Barbera objected to commencing the hearing within sixty days and voiced concerns that the April 13 hearing date would not allow them sufficient time to review the large number of documents they expected to receive eventually from the NYAG and to prepare their defenses.

After a series of motions before the law judge, on April 10, 2007, the Division filed a motion before the Commission seeking to withdraw the cease-and-desist proceedings against Barbera, arguing that withdrawal of those proceedings would permit the Division to proceed against all respondents at one hearing, thereby avoiding substantial prejudice to the Division's case-in-chief. The same day, the law judge issued an order cancelling Barbera's April 13 hearing and confirming that a hearing as to all respondents would commence on June 4, 2007.

3/ 17 C.F.R. § 201.210(c)(3). Rule 210(c)(3) provides that the Commission or hearing officer may grant criminal prosecutorial authorities leave to participate in a proceeding on a limited basis for the purpose of requesting a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts at issue in the administrative proceeding, upon a showing that such a stay is "in the public interest or for the protection of investors."

4/ 15 U.S.C. § 78u-3(b). Securities Act Section 8A(b), 15 U.S.C. § 77h-1(b), and Investment Company Act Section 9(f)(2), 15 U.S.C. § 80a-9(f)(2), contain identical requirements.

5/ Pursuant to Rule 161(c)(2), 17 C.F.R. § 201.161(c)(2), the law judge also granted a joint motion by the Division and respondent Snyder to stay the proceedings as to Snyder to permit the Commission time to consider Snyder's recent settlement offer.

On April 17, 2007, we issued an interim stay of these proceedings to preserve the status quo ante while we awaited the filing of any opposing and reply briefs. On April 20, 2007, Barbera filed a timely opposition to the Division's motion to withdraw the cease-and-desist proceedings against him; in that submission, Barbera also moved to dismiss the entire proceeding against him. We now grant the Division's motion to dismiss the cease-and-desist proceedings against Barbera for the reasons detailed below. Barbera's motion to dismiss the entire proceeding will be addressed in a separate order.

In its April 10 motion, the Division argues that withdrawal of the cease-and-desist proceedings is necessary to prevent prejudice to the Division's case that would result if the Division were forced to conduct a bifurcated hearing because the two hearings would involve common witnesses and documents. The other statutory provisions under which the Division is proceeding against Barbera do not contain a requirement to commence a hearing within thirty to sixty days of service of the OIP; therefore, the Division notes, the dismissal of the cease-and-desist proceedings against Barbera would eliminate the need for a bifurcated hearing. Moreover, the Division points out that, although the result of dismissal of the cease-and-desist proceedings would be that the Division could not obtain a cease-and-desist order as relief from Barbera's alleged misconduct, "[a]ll other remedies would remain available, including revocation of registrations, bars or suspensions, civil penalties and disgorgement."

We agree that it is appropriate in this case to dismiss those provisions of the OIP that authorize the institution of cease-and-desist proceedings against Barbera. Barbera urges, however, that the failure to comply with the sixty-day hearing requirement under the cease-and-desist provisions also mandates dismissal of the rest of the proceedings against him. Barbera offers no explanation or support for this position. The remaining statutes under which the OIP was authorized, namely, Exchange Act Section 15(b), Investment Company Act Section 9(b), and Advisers Act Section 203(f), do not require that Barbera receive a hearing within a specified time. As courts have long recognized, an agency's decision whether to prosecute or enforce is generally within its absolute discretion. 6/

Barbera contends that the Division has abused its discretion by making false representations to the law judge about its intent to withdraw the cease-and-desist proceedings. However, the record of prehearing proceedings in this case offers no support for Barbera's allegations. The Division was consistent in its statements to the law judge that it would move the Commission to withdraw the cease-and-desist proceedings against Barbera if the law judge believed the authorizing statutes compelled a hearing within sixty days. The law judge issued an order on March 30, 2007, in which she postponed the hearing to June 4 despite Barbera's protests. The order mentions that the Division stated its intent to withdraw cease-and-desist

6/ See Board of Trade v. SEC, 883 F.2d 525, 530 (7th Cir. 1989) (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

proceedings against Barbera; however, that order does not clearly state that the law judge's decision was premised on the Division doing so. The law judge herself recognized that her order may have lacked clarity on this point, noting in her April 9, 2007 order, "I apologize to the Division because my March 30, 2007 order was not clear that the cease-and-desist provisions must be stricken at least as to Barbera." The Division promptly filed its motion to withdraw the cease-and-desist proceedings after the law judge clarified her position.

Therefore, under the circumstances of this case, it is appropriate to grant the Division's motion and dismiss the cease-and-desist proceedings against Barbera.

Accordingly, it is ORDERED that the cease-and-desist proceedings against Mark Barbera, as instituted by order dated February 5, 2007 and as authorized under Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 9(f) of the Investment Company Act, be, and they hereby are, dismissed.

By the Commission (Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY; Chairman COX not participating).

Nancy M. Morris
Secretary