

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
June 13, 2007

In the Matter of	:	
	:	
MICHAEL SASSANO,	:	ORDER DENYING DIVISION OF
DOGAN BARUH,	:	ENFORCEMENT'S MOTION FOR
ROBERT OKIN, and	:	CERTIFICATION AND STAY
R. SCOTT ABRY	:	

By motion dated June 12, 2007, the Division of Enforcement (Division) asked me to certify for interlocutory review my Order of June 8, 2007. The Division also requested me to stay the proceeding pending the completion of interlocutory review. See Rules 400(c) and (d) of the Rules of Practice of the Securities and Exchange Commission (Commission). Both requests are denied.

The Division's June 12 motion is quite brief, and it does not address several relevant issues. Specifically, the Division's motion for certification treats Rules 400(c)(2)(i) and (ii) as if they are alternatives, and that satisfying either prong would suffice. If Rule 400(c)(2) applies, both prongs must be satisfied. In any event, it appears that Rule 400(c)(1), not Rule 400(c)(2), governs here. The Division's motion for certification is denied.

The Division's motion for a blanket stay is also incomplete. First, the motion is not supported by affidavits or sworn statements on facts subject to dispute. See Rule 401(a) of the Commission's Rules of Practice. Second, the Division does not address the criteria for obtaining a stay, and specifically, the likelihood of success on the merits. See Comment to Rule 401 of the Commission's Rules of Practice, as published in the Federal Register; cf. Wis. Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841, 843-45 (D.C. Cir. 1977). Finally, the Division does not explain what (if anything) it believes should happen while the requested stay is in place and how long it would take to proceed to a hearing once interlocutory review has been completed and the requested stay has been lifted. If the Division contends that nothing should happen while the requested stay is in place, it has an obligation to explain how that approach is consistent with the public interest.


At Respondents' request, I have issued several subpoenas requiring third parties to produce documents in the next few days. The requested documents are not within the scope of the issue as to which the Division expects to seek interlocutory review. The Division's motion is silent as to whether its requested stay should or should not freeze the obligation of these third parties to respond to the outstanding subpoenas, to produce documents, to assert any claimed privileges, and/or to move to quash or modify. The Division's motion is also silent as to whether the requested stay should or should not preclude me from ruling on any such issues as may be

presented to me by these third parties and/or Respondents while interlocutory review is ongoing. Cf. Rule 401(b) of the Commission's Rules of Practice.

The Division's request for a stay is also silent as to whether the Division is going to begin to gather in one location all the materials from NY-7220 that I have ordered it to make available to Respondents, and to prepare an expanded privilege log, or whether, in the alternative, it plans to take no action in response to the June 8 Order until the Commission issues an interlocutory ruling. The issue is significant, because the requested stay is likely to have an effect on the Commission's directive to complete this proceeding in 300 days. At a minimum, the Division should state how long, in the Division's judgment, it would likely take to gather all the materials from NY-7220, to afford Respondents a reasonable opportunity to digest any new materials provided from NY-7220, to complete the remaining prehearing obligations, and to finish the hearing once the requested stay has been lifted.¹ Affidavits or sworn statements would be particularly appropriate on this subject.

A telephonic prehearing conference has already been scheduled for June 18, 2007, at 10:30 a.m., E.D.T. (Order of Apr. 10, 2007). In addition, the current schedule requires the Division to provide Respondents with three demonstrative exhibits and the transcripts of 121 recorded telephone conversations by June 18, 2007 (Order of May 18, 2007). These requirements will remain in place, unless the parties jointly request otherwise, or the Commission orders otherwise.

SO ORDERED.



James T. Kelly
Administrative Law Judge

¹ Rule 360(a)(2) of the Commission's Rules of Practice anticipates that there shall be approximately 120 days from service of the Order Instituting Proceedings to the hearing. In this proceeding, the 300-day period began to run on March 9, 2007, when the Commission served Respondent Michael Sassano (Orders of Mar. 6 and Apr. 10, 2007). As of today, 106 days have already passed. Thus, if the Commission were to grant interlocutory review and toll the 300-day period during while interlocutory review is pending, the first day after the completion of interlocutory review (when the requested stay presumably would be lifted) would become the 107th day of the 300-day period. If the Division's approach is going to require 400 or 450 days (instead of the required 300 days), the Division should so inform the Commission.