

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12559

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 30, 2007

In the Matter of	:	
	:	
TRAUTMAN WASSERMAN & COMPANY, INC.,	:	ORDER ON MOTIONS FOR A MORE DEFINITE STATEMENT AND DUE
GREGORY O. TRAUTMAN,	:	DATE FOR RESPONDENTS' ANSWERS
SAMUEL M. WASSERMAN,	:	
MARK BARBERA,	:	
JAMES A. WILSON, JR.,	:	
JEROME SNYDER, and	:	
FORDE H. PRIGOT	:	

The Securities and Exchange Commission (Commission) issued an order instituting administrative and cease-and-desist proceedings (OIP) on February 5, 2007, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act), Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act), and Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act). On June 1, 2007, the Commission issued an Order Dismissing Cease-and-Desist Proceedings Against [Respondent Mark] Barbera. See Exchange Act Release No. 55848. On June 29, 2007, the Commission issued an Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act as to Jerome Snyder. See Exchange Act Release No. 55990.

For legitimate reasons, the remaining six Respondents have not filed Answers to the OIP. At the third prehearing conference on June 26, 2007, certain Respondents indicated that they would be filing motions for a more definite statement pursuant to Rule 220(d). 17 C.F.R. § 201.220(d) Respondents Mark Barbera (Barbera), Forde H. Prigot (Prigot), Gregory Trautman (Trautman), and Samuel M. Wasserman (Wasserman) did so on July 11 and July 13, 2007.

Barbera's Motion for More Definite Statement and Memorandum in Support (Barbera's Motion)

The OIP alleges that Barbera, among other things: (1) was a member of Trautman Wasserman & Company's (TWCO) executive committee and its chief financial officer and was well aware of illegal late trading by two registered representatives, James A. Wilson, Jr.(Wilson) and Scott A. Christian (Christian) (OIP at 6.); (2) sought to obtain "timing capacity" as part of a late-trading scheme, helped negotiate a letter agreement for a customer's discretionary account that he knew would be used for late trading, and sought to develop a relationship with a data processing firm for late trading by TWCO (OIP at 7.); and (3) knew that others at TWCO were making trading decisions based on post-4 p.m. Eastern Time (ET) and on more than one occasion personally made trading decisions for TWCO's proprietary account after 4 p.m. ET. (OIP at 8.) The OIP charges that Barbera willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because he was well aware of the late trading scheme and solicited customers to late trade and, acting knowingly and/or recklessly, he gave false assurances to customers of the legality of late trading and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading, and he approved using TWCO assets for late trading of mutual funds and personally made late trading decisions. (OIP at 11.)

The OIP charges that, alternatively, Barbera willfully aided and abetted and caused TWCO's and TWCO's customers' violations of Section 10(b) of the Exchange Act and Rule 10b-5. Specifically, TWCO defrauded mutual funds and their shareholders by engaging in late trading in its proprietary account. Barbera was aware of this late trading scheme. Barbera solicited customers to late trade, falsely assured customers that late trading was lawful, and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading. Barbera was generally aware that his conduct was wrongful. (OIP at 11.)

The OIP charges further that Barbera willfully aided and abetted and caused TWCO's violations of Section 15(c) of the Exchange Act and Rule 10b-3 thereunder based on the conduct described above. (OIP at 12.) The OIP also charges that Barbera willfully aided and abetted and caused violations of Investment Company Act Rule 22c-1 by Banc of America Securities, LLC (B of A), TWCO's clearing broker.

Barbera's Motion argues that he cannot fairly answer the OIP because it contains vague allegations. Barbera insists that he needs to know: (1) with greater specificity, when he allegedly engaged in meetings and conversations that involved late trading and how these activities allegedly constituted violations; (2) whether the Division of Enforcement (Division) will allege he engaged in market timing; (3) how Barbera allegedly assisted Trautman's alleged late trading in violation of the law; (4) what acts amounted to "placing a late trade," how many late trades were involved and when; (5) if the Division alleges he knew that the trades made by others were late and illegal and, if so, the basis for the Division's conclusions; (6) how the Division alleges Barbera's presence and acknowledgement to a customer that Trautman profited on certain trades was a violation of law; (7) for what type of trading did Barbera allegedly try to obtain capacity, what efforts did Barbera allegedly make to do so, and how did this violate the securities laws; (8) the specifics supporting the allegation that Barbera

“participated in making arrangements for Hedge Fund C to obtain a loan to be used in mutual fund trading” (OIP at 7.); (9) how he allegedly violated any securities laws when he negotiated and drafted a fee arrangement for a TWCO customer and the basis for the assertion that Barbera knew about the nature of the account and Trautman’s intent to lie to the account holders; (10) what the OIP means by “seeking to develop a relationship” and how “seeking to develop a relationship” constitutes a violation of the securities laws” (Barbera’s Motion at 8.); and (11) how his monitoring of the TWCO proprietary account allegedly resulted in violations of the securities laws and what the OIP means by the term “trading decisions” and how these decisions violated any securities statutes. (Barbera’s Motion at 9.)

Barbera’s Reply Brief argues that he is alleged to have participated in but a few of the thousands of trades that occurred so that he needs to know which trades he allegedly played a role in and when they occurred.

Prigot’s Motion for More Definite Statement and Affidavit in Support (Prigot’s Motion)

The OIP alleges, among other things, that Prigot, as TWCO’s compliance officer, was aware that mutual funds were trying to curtail Wilson’s and Christian’s trading, and that on two occasions he erroneously informed mutual funds that accounts were house accounts when he knew the accounts belonged to customers of Wilson and Christian and were engaged in market timing. Prigot’s actions as a TWCO principal enabled TWCO to create duplicate accounts that Wilson and Christian used so their customers could continue to market time mutual funds without the funds’ knowledge. (OIP at 10, 11.)

The OIP alleges that Prigot willfully aided and abetted and caused TWCO’s violations of Section 15(c) of the Exchange Act and Rule 10b-3 thereunder. (OIP at 12.) And also that Prigot willfully aided and abetted and caused TWCO’s, Wilson’s, Christian’s, and their customers’ violations of Section 10(b) of the Exchange Act and Rule 10b-5. Prigot was generally aware that his conduct was wrongful. (OIP at 13-14.)

Prigot’s Motion charges that without more specificity from the Division he is unable to formulate a defense to the OIP because the allegations in the OIP are only summary or conclusory, the nature of the alleged violations is not clear, and the OIP does not set out the facts on which the allegations are based. In nine paragraphs, Prigot enumerates numerous specifics that he wants the Division to provide, for example, the manner and dates in which Prigot was involved in each market timing scheme and the Division’s legal theories in formulating the allegations. (Prigot’s Motion at 3-4.)

Prigot’s Memorandum in Reply (Prigot’s Reply) insists that he cannot prepare a defense because: (1) the OIP paragraphs cited refer to market timing and do not mention a late trading scheme; (2) there is no factual basis for the allegation that Prigot was aware that mutual funds were attempting to curtail late trading; and (3) the OIP paragraphs cited do not mention Prigot’s involvement in late trading.

Trautman's Motion for More Definite Statement and Memorandum in Support (Trautman's Motion)

The OIP charges that Trautman, as TWCO's chief executive officer, was aware of Wilson's and Christian's illegal late trading, that he referred to it as TWCO's "elixir," "magic potion," or "special juice," and that Trautman informed the Hedge Fund C representatives that outside counsel and internal compliance had reviewed the practice and considered it to be legal. (OIP at 2, 6.) Additionally, the OIP makes the following factual allegations: Trautman arranged for late trading for a customer, and he placed trades for TWCO's proprietary account based on information after the market closed that were priced at that day's net asset value (NAV). Trautman offered late trading to at least one of his customers (Customer 89001). (OIP at 7.) Trautman made money on trades using after-hours information (post-4 p.m. ET) trading. Trautman placed late trades for Customer 89001's account. (OIP at 7.) Trautman sought to obtain timing capacity as part of the late trading scheme and used his personal relationship with one fund manager at a fund complex to increase TWCO's capacity in those funds. (OIP at 7.) Trautman knew that one customer's discretionary account would be used for late trading and that Trautman planned to lie to the account holders and claim that TWOC would simply use a "black box" trading system. (OIP at 7-8.) Trautman assumed control over trading in TWCO's proprietary account and made trading decisions in the account based on news developments that occurred after 4 p.m. ET. (OIP at 8.)

The OIP alleges that Trautman willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5, in that, he was well aware of the late trading scheme and solicited customers to late trade, gave false assurances to customers concerning the legality of late trades, and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading. In addition, he approved using TWCO assets for late trading and personally made late trading decisions. Trautman allegedly acted knowingly and/or recklessly in engaging in these activities. Alternatively, the OIP contends that Trautman willfully aided and abetted and caused TWCO's and TWCO's customers violations of Section 10(b) of the Exchange Act and Rule 10b-5. Trautman was aware of the late-trading scheme; he solicited customers to late trade, gave false assurances to customers concerning the legality of late trading, and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading. Trautman was generally aware that his conduct was wrongful. (OIP at 11.) By the conduct detailed above, Trautman willfully aided and abetted and cause TWCO's violations of Section 15(c) of the Exchange Act and Rule 10b-3. In addition, Trautman willfully aided and abetted and caused B of A's violations of Investment Company Act Rule 22c-1. (OIP at 12.)

Trautman's Motion claims that the OIP fails to meet the standard for factual allegations that permits Trautman to file an Answer and the problem is exacerbated by the Division's failure to provide full and relevant discovery. Trautman claims to need: (1) "details of which alleged [firm] meetings Trautman attended, the dates and places of such meetings and specifically what allegedly occurred or was said at such meetings"; (2) the dates and the entity to whom Trautman gave false assurances about the legality of late trading; (3) more specifics about the late trading for one customer; (4) the name of the fund and fund manager where Trautman allegedly sought to obtain large amounts of capacity and clarification of what was

meant by assertions about a planned lie; and (5) specifics about alleged late trades in the proprietary account. (Trautman's Motion at 6-10.)

Trautman argues that the violations alleged in the OIP compound and exacerbate the factual deficiencies and lack of notice. For example, Trautman complains that the phrase "implicit, material false representation" is not defined in any of section of any statute cited in this proceeding. (Trautman's Motion at 10-12.)

Trautman's Reply Brief argues that he should be told the time, date, place, and third person names now and not on August 13, 2007, when the Division will disclose the names of its witnesses, its proposed exhibits, and the written testimony of any expert witnesses. Trautman asserts that TWCO executives continue to believe that trading after 4:00 pm ET, but before the NAV was calculated, is legal.

Wasserman's Motion for More Definite Statement and Memorandum of Law in Support (Wasserman's Motion)

The OIP, among other things, alleges that Wasserman, co-founder and chairman of TWCO, was well aware of Wilson's and Christian's illegal late trading. At a meeting on or about March 11, 2003, a Hedge Fund C principal explained to Wasserman how late trading allowed him to profit by making trades decisions based on news after 4 p.m. ET and stated that he wanted to "ramp up" his investments with TWCO. Wasserman sought to obtain timing capacity as part of the late trading scheme. Wasserman used his contacts at another fund complex to increase TWCO's capacity at those funds. Wasserman did not disclose to the fund complexes that TWCO would use the capacity for late trading. According to the OIP, Wasserman knew that a letter agreement that Barbera drafted in September 2002 to establish a discretionary account for one customer would be used for late trading. .

The OIP alleges that Wasserman willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5. Wasserman was well aware of the late trading scheme and solicited customers to late trade, gave false assurances to customers concerning the legality of late trades, and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading. (OIP at 11.) In addition, Wasserman approved of using TWCO assets for late trading. Wasserman acted knowingly and/or recklessly in engaging in these activities.

Alternatively, the OIP alleges, Wasserman willfully aided and abetted and caused TWCO's and TWCO's customers' violations of Section 10(b) of the Exchange Act and Rule 10b-5. Wasserman was aware of the late-trading scheme, solicited customers to late trade, gave false assurances to customers concerning the legality of late trading, and/or took other steps such as setting up customer accounts and negotiating capacity from mutual funds to be used for late trading. Wasserman was generally aware that his conduct was wrongful. (OIP at 11.)

By the conduct detailed above, Wasserman willfully aided and abetted and caused TWCO's violations of Section 15(c) of the Exchange Act and Rule 10b-3. In addition,

Wasserman willfully aided and abetted and caused B of A's violations of Investment Company Act Rule 22c-1. (OIP at 12.)

Wasserman claims that the OIP does not provide sufficient notice to allow him to defend himself. He argues for a more definite statement or, at a minimum, that the Division be required to state which trades it claims were improper and some factual support for the allegation that Wasserman was aware these trades were illegal. (Wasserman's Motion at 1-2, 4-5.) Wasserman charges that while his name is sprinkled throughout the OIP, there are no specific allegations that he was aware of Wilson's and Christian's alleged late trading and market timing. (Wasserman's Motion at 2-3.) Wasserman claims further that he must know: (1) the funds from which he allegedly sought capacity and how he allegedly knew the fund capacity would be used for late trading; (2) details concerning the one customer's alleged discretionary account that was used for late trading; and (3) details concerning Wasserman's conduct that allegedly caused the violations cited in the OIP. (Wasserman's Motion at 6-7.)

Wasserman's Reply Memorandum (Wasserman Reply) claims that he cannot investigate the allegations or talk to individuals who could appear as witnesses because the OIP fails to provide him with sufficient information. (Wasserman Reply at 3.) He reiterates that he should be provided specifics: (1) on the Hedge Fund C meeting and any allegedly improper trades; (2) on obtaining capacity from fund companies and the discretionary account that Wasserman allegedly knew would be used for late trading; and (3) the subordinate who allegedly informed Wasserman of mutual funds' efforts to curtail TWCO's market timing activities.

Division's Memorandum in Opposition (Division's Opposition)

The Division maintains that granting Respondents' motions would require the Division to detail all the evidence it intends to present at the hearing. In support of its position that the OIP is sufficient, the Division cites cases interpreting the requirements for what an OIP must contain. According to the Division, the Commission in recent years has disfavored motions for a more definite statement and the cases cited by Respondents do not support their position. (Division's Opposition at 12-17.) The Division distinguishes J.W. Barclay & Co., 77 SEC Docket 2819 (June 13, 2002), in that the OIP in that case alleged five different sales practices against nine respondents, including misrepresentations to specific customers, in just six paragraphs. (Division's Opposition at Exhibit B.) The Division argues that unlike Barclay, here it is not necessary to know the details of the thousands of alleged late or market timed trades to conclude that TWCO's mutual fund trading department engaged in a wide range, fraudulent scheme. (Division's Opposition at 13-14.)

The Division contends that Respondents have fair notice of the claims lodged against them and the grounds on which those claims rest from the OIP and from receiving all non-privileged portions of the Division's investigative file. According to the Division, the OIP describes a long-term, widespread late trading and market timing scheme conducted by TWCO's mutual fund trading department with the oversight, approval, and participation of the Respondents. The Division's Opposition summarizes what the OIP alleges against each individual Respondent. (Division's Opposition at 11-12.) The Division points out that Respondents will learn the contents of its direct case: the identity of its witnesses, including

any expert testimony in written form, and exhibits by August 13, 2007, almost two months before the hearing is scheduled to begin. (Division's Opposition at 3.)

The Division views the Commission's denial of Barbera's motion to dismiss the proceeding as a finding that it determined the OIP was factually sufficient.¹ Trautman Wasserman & Co., (June 29, 2007) (Order Denying Petition for Interlocutory Review). In the Order Denying Petition for Interlocutory Review, the Commission found Barbera's claim that the OIP failed to allege facts that demonstrated he acted with fraudulent intent or severe reckless without merit. It concluded that "[t]he OIP alleges a number of facts that, if proven at the hearing, could support a finding that Barbera acted with scienter. See, e.g., ¶¶ 4, 31, 38, 40, 44, 60 - 64, Trautman Wasserman & Co., Order Instituting Proceedings, Admin. Proc. File No. 3-12559 (Feb. 5, 2007)." Order Denying Petition for Interlocutory Review at 5 n.13.

Finally, the Division notes that most of the materials in its investigative files originated with Respondents. It claims that Barbera's Wells submission and Wasserman's investigative testimony contain some of the information they now claim the OIP lacks. (Division's Opposition, Exhibits C, D.)

Ruling

The Commission's Rules of Practice require, among other things, that where, as here, an Answer is required the OIP shall "set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto."

With some deviation in unusual circumstances, not present here, the long standing case law holds that a respondent is entitled to be sufficiently informed of the charges so that he or she may adequately prepare a defense, but a respondent is not entitled in advance of the hearing to disclosure of the evidence on which the Division intends to rely. Morris J. Reiter, 39 S.E.C. 484, 486 (1959); see also Rita J. McConville, 85 SEC Docket 3127, 3149 (June 30, 2005); J. Logan & Co., 38 S.E.C. 827, 829-30 (1959); Charles M. Weber, 35 S.E.C. 79, 80-81 (1953).

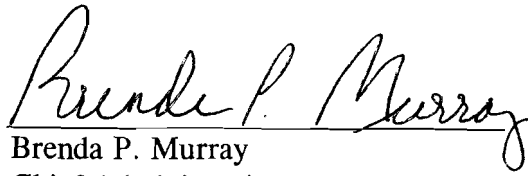
Respondents' Motions for a More Definite Statement are DENIED because the OIP satisfies the requirements of Rule of Practice 200(b). Nothing in the Respondents' voluminous pleadings is persuasive that the OIP has left them unaware of the facts and legal arguments that the Division contends resulted in violations of the securities statutes. In addition, Respondents by their own admission, have received voluminous materials from the Division's investigative files, most of which originated with them, and they will receive a description of the Division's direct case on August 13, 2007, for a hearing scheduled to begin on October 9, 2007.

The ruling in Barclay granting a motion for a more definite statement on which Respondents rely appears to be premised on the wording of the OIP and a concern that the proceeding might become unmanageable. Barclay, 77 SEC Docket at 2819. Those

¹ The Division cites several cases for the proposition that the federal courts do not allow parties to file motions for a more definite statement after filing a motion to dismiss. (Division's Opposition at 18, n.9.)

considerations are inapplicable here where there are six rather than nine Respondents, the OIP takes eleven pages rather than two pages to describe the facts and alleged violations, and the proceeding is manageable.

At the prehearing conference on June 26, 2007, I stated I would set a date for Respondents' Answers depending on my ruling on the motions for a more definite statement. Accordingly, I ORDER that Respondents' Answers are due by August 7, 2007.

A handwritten signature in cursive script that reads "Brenda P. Murray". The signature is written in black ink and is positioned above a horizontal line.

Brenda P. Murray
Chief Administrative Law Judge