SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8833 / August 9, 2007

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56233 / August 9, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2629 / August 9, 2007

INVESTMENT COMPANY ACT OF 1940
Rel. No. 27927 / August 9, 2007

Admin. Proc. File No. 3-12386

In the Matter of WARREN LAMMERT, LARS SODERBERG, and LANCE NEWCOMB	ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

APPEARANCES:

Graeme W. Bush, Alexandra W. Miller, and Jill F. Dash, of Zuckerman Spaeder LLP, for Warren Lammert.

Richard Beckler and Joseph Walker, of Howrey LLP, for Lars Soderberg.

Marc B. Dorfman, Ellen M. Wheeler, and Akita N. Adkins, of Foley & Lardner LLP, for Lance Newcomb.

Polly A. Atkinson, Thomas J. Krysa, and Jeffrey E. Oraker, for the Division of Enforcement.

I.

Warren Lammert, Lars Soderberg, and Lance Newcomb, respondents in a Commission administrative proceeding, have filed an interlocutory petition that seeks dismissal of an order instituting proceedings ("OIP") issued against them. The Division of Enforcement opposes Respondents' petition. For the reasons discussed below, we decline to grant review of Respondents' interlocutory petition.

On July 31, 2006, we issued an OIP against Lammert, a portfolio manager employed by Janus Capital Management, LLC ("Janus Capital Management"), an investment adviser, Soderberg, an officer and director of Janus Capital Management, and Newcomb, also an officer and director of Janus Capital Management. The OIP alleges that Respondents violated certain antifraud provisions of the federal securities laws or, in the alternative, willfully aided and abetted and caused Janus Capital Management's violation of certain antifraud provisions and certain affiliated transactions provisions of the federal securities laws. The OIP further alleges that these violations occurred in connection with Respondents' involvement, variously, in market timing, frequent trading, and late trading activity, which related to certain mutual funds managed by Janus Capital Management, pursuant to arrangements with broker-dealers Trautman Wasserman & Company, Inc. ("Trautman Wasserman") and Brean Murray & Company, Inc. ("Brean Murray").

On September 6, 2006, an administrative law judge issued an order setting a hearing date of February 20, 2007. The law judge ordered the Division to "make available to Respondents, pursuant to 17 C.F.R. § 201.230, its complete investigative file." 1/

Subsequently, a dispute arose between the parties regarding the extent to which the Division complied with the September 6, 2006 order. Respondents contended that the Division had failed to make available material compiled from investigations of Trautman Wasserman and Brean Murray. The Division contended that it was under no such obligation and that it did make available its complete investigative file. 2/

In a February 7, 2007 order, the law judge concluded that, pursuant to Commission Rule of Practice 230(a), "the investigative files made available to the parties in [the Trautman

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1/ See text accompanying note 10.

2/ The Trautman Wasserman investigation led to our issuance of an OIP against that broker-dealer and various individual respondents on February 5, 2007. See Trautman Wasserman & Co., Gregory O. Trautman, Samuel M. Wasserman, Mark Barbera, James A. Wilson, Jr., Jerome Snyder, and Forde Prigot, Order Instituting Proceedings, Admin. Proc. File No. 3-12559 (Feb. 5, 2007). The Trautman Wasserman OIP alleges, among other things, that Trautman Wasserman engaged in a scheme to defraud certain mutual funds through late trading and deceptive market timing activities.

The Brean Murray investigation led to our acceptance of Brean Murray's offer of settlement in which it consented to, among other things, findings that it engaged in improper late trading and market timing activities that affected certain mutual funds and that it willfully aided and abetted and caused a clearing firm's violations of Rule 22c-1 of the Investment Company Act of 1940. See Brean Murray & Co., Order Instituting Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Admin Proc. File No. 3-11836 (Feb. 17, 2005).

Wasserman and Brean Murray] proceedings should be made available to Respondents." On February 9, 2007, at a prehearing conference, the law judge clarified that she believed that "the investigative file in the Trautman [Wasserman] matter and in the Brean [Murray] matter should be made available to [R]espondents ASAP."

On that same day, Soderberg filed a motion on behalf of Respondents to dismiss the OIP. The motion argued that the Respondents had been denied due process as a result of the Division's alleged failure to comply with discovery requirements.

On February 12, 2007, during the pendency of Soderberg's motion to dismiss, the Division filed a request with the law judge for certification of her ruling that the Division was required to make available to Respondents the investigative files in the Trautman Wasserman and Brean Murray matters. The Division also requested a stay of the proceedings pending the law judge's determination of the certification request.

On February 13, 2007, the law judge issued an order denying the Division's requests and reminding the Division "that delay in making the documents available may ultimately result in an Initial Decision dismissing this proceeding against Respondents." On that same day, the Division filed a notice of its intent to provide Respondents with access to the Trautman Wasserman and Brean Murray investigative files but reserved its objection to the law judge's order to make those materials available to Respondents.

On February 14, 2007, the New York Attorney General ("NYAG") requested a stay of this proceeding, pursuant to Rule of Practice 210(c)(3), 3/ pending the outcome of a criminal proceeding against James A. Wilson, Jr., a party in the Trautman Wasserman proceeding, that is alleged to be based on many of the same facts at issue here. On February 15, 2007, the law judge issued an order granting the stay and requesting the Division to report on May 25, 2007 the status of the Wilson criminal proceeding. 4/ The law judge also ordered the Division to make available to Respondents documents from the Brean Murray investigative file and to "assist Respondents in obtaining access to Trautman Wasserman material that has already been produced to Defendant Wilson, as well as to additional material, subject to confidentiality agreements, if necessary."

3/ 17 C.F.R. § 201.210(c)(3).

4/ In a motion filed before us in the Trautman Wasserman proceeding, the NYAG represented that Wilson was tentatively scheduled to be sentenced on June 7, 2007. A potential witness in this proceeding, Scott Christian, was also scheduled for sentencing on June 25, 2007. Court records indicate that sentencing of both defendants was, in fact, completed by these dates. See People v. James A. Wilson, Jr., No. 01488-2006 (N.Y. Sup. Ct., N.Y. County, Crim. Term); People v. Scott A. Christian, No. 03409-2005 (N.Y. Sup. Ct., N.Y. County, Crim. Term).

Also in that order, the law judge "declined to grant Respondents' request" made on February 9, 2007 to dismiss the OIP. Respondents sought reconsideration of this latter ruling on March 8, 2007. The law judge responded with an order dated March 26, 2007, in which she concluded that she was not authorized to dismiss the proceeding and that such a request "must be addressed to the Commission in the first instance."

In its April 26, 2007 opposition to this motion, the Division represented, without challenge by Respondents in their reply brief, 5/ that it has produced, and continues to produce, the Trautman Wasserman and Brean Murray files, except for a certain portion of documents that have been ordered by us to be withheld. 6/ For example, the Division represented that, among other things, it "produced the Brean investigative materials to respondents [that] consisted of more than 55 boxes of documents" and "copied several concordance databases containing Trautman investigative materials consisting of more than 400,000 documents onto a hard drive for respondents, produced subpoena and correspondence files, hard copies of documents received from third parties, and certain audiotapes of conversations of Trautman employees."

II.

Commission Rule of Practice 400(a) provides that "[p]etitions by parties for interlocutory review are disfavored" and will be granted "only in extraordinary circumstances." 7/ We adopted this language "to make clear that petitions for interlocutory review . . . rarely will be granted." 8/ Respondents argue that dismissal is warranted on several

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5/ As discussed infra, Respondents belatedly challenged one specific assertion concerning the Division's production in a June 7, 2007 supplemental brief.

6/ See infra note 16.

7/ 17 C.F.R. § 201.400(a).

8/ Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission, Securities Exchange Act Rel. No. 49412 (Mar. 19, 2004), 82 SEC Docket 1744, 1749.

grounds. 9/ For the reasons discussed below, we have determined that Respondents' petition does not satisfy the standards for interlocutory review.

A. Production of Investigatory Files. Respondents claim that they have been prejudiced by the Division's alleged violation of our Rule of Practice 230 with respect to the production of documents from the Trautman Wasserman and Brean Murray files. The relevant portion of Rule 230 provides:

> Unless otherwise provided by this rule, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. 10/

The question presented here is whether the Trautman Wasserman and Brean Murray files were obtained "in connection with" the same investigation leading to the Division's recommendation that this proceeding be instituted.

Certain events with respect to the investigation underlying this OIP are not in dispute. On September 3, 2003, the Division's Denver office opened a "matter under inquiry" regarding the Janus Mutual Fund complex ("Janus") based upon a complaint from the NYAG, alleging,

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9/ We note at the outset that our consideration of Respondents' motion has been hampered by various factors. Respondents' motion itself develops no argument, but instead incorporates by reference two pleadings before the law judge. Certain arguments developed in those pleadings rely on factual assertions concerning hearing dates and document production that were no longer true on the date Respondents filed their motion before us, and yet Respondents did not update their argument to reflect these changed circumstances.

Moreover, Rule of Practice 154(c), 17 C.F.R. § 201.154(c), limits the length of motions to 7,000 words or less. By incorporating by reference their earlier pleadings, Respondents violated this requirement.

Frequent noncompliance with the requirement of Rule 154(a), 17 C.F.R. § 201.154(a), that briefs accompanying any motion include points and authorities relied upon has further frustrated our review, as discussed in more detail, infra. Additionally, certain pleadings resort to more rhetoric than legal analysis. Such tactics are not an appropriate use of the Commission's adjudicatory processes, and we note that Rules of Practice 111 and 180, 17 C.F.R. §§ 201.111, 180, grant the law judges wide latitude to regulate the course of the proceeding and the conduct of the parties and their counsel.

10/ 17 C.F.R. § 201.230(a)(1).

among other things, certain improprieties at Janus. 11/ On September 10, 2003, we issued an omnibus formal order, NY-7220, based upon widespread allegations contained in the NYAG'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 and required that the order be used "in conjunction with a specific enforcement investigation." 12/

On September 12, 2003, the Division's Denver office opened an investigation entitled In the Matter of Janus Capital Corp., D-02597, ("Janus investigation"), to inquire into Janus's activities, using the authority of the omnibus formal order. In memoranda using the case number D-02597A, the Division recommended that we authorize a proceeding against Janus in 2004, as well as this proceeding against Respondents in 2006. 13/

The Division's New York office opened an investigation entitled In the Matter of Trautman Wasserman, NY-7277. The Division's Philadelphia office opened an investigation entitled In the Matter of Brean Murray & Co., P-01114. The Division's New York and Philadelphia offices issued subpoenas in the Trautman Wasserman and Brean Murray investigations, respectively, under the authority of the omnibus formal order, as did the Division's Denver office in connection with its investigation of Respondents.

Respondents claim that, pursuant to Rule 230, they are entitled to the Trautman Wasserman and Brean Murray investigative files because those files were compiled under the authority of the same omnibus order that authorized the investigation of Respondents' activities. Respondents allege that the Division failed "to turn over the [Trautman Wasserman and Brean Murray] documents in a timely manner" and construed Rule 230 in a "disingenuous, overly literal" fashion.

The Division counters that its production of documents

> was based on its good faith belief that it was required to produce only the Denver office's investigative file in the Janus investigation, not all the files relating to the more than 100 mutual fund investigations that used the omnibus formal order, which included the Trautman and Brean investigations conducted by the New York and Philadelphia offices, respectively. The Division's good faith

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11/ Matters under inquiry are informal investigations for which the Division lacks subpoena authority.

12/ See Warren Lammert, Declaration of Amy J. Norwood, Admin. Proc. File No. 3-12386 (Feb. 1, 2007), at 2.

13/ See Warren Lammert, Division of Enforcement's Response in Opposition to Respondents' Motion to Dismiss the Order Instituting Proceedings, Admin. Proc. File No. 3-12386 (Apr. 26, 2007), at 3.

> interpretation of Rule 230 was based on its past practices in cases involving omnibus formal orders and the absence of any contrary guidance on this issue. The Division maintained this good faith belief until the ALJ's February 7 and 9, 2007 orders requiring the Division to produce the Trautman and Brean files pursuant to Rule 230.

This issue is a matter of first impression. We note that this proceeding and the Trautman Wasserman and Brean Murray proceedings are distinct matters investigated by different Division offices located in different states, even if involving some of the same underlying facts, and even if subpoenas were issued pursuant to the same omnibus formal order. 14/ Although we do not reach the issue here, we disagree with Respondents that, under these circumstances, the Division acted in bad faith by asserting that the documents in the Trautman Wasserman and Brean Murray files were not obtained "in connection with the investigation leading to the Division's recommendation to institute proceedings." 15/

14/ Although not raised by the parties, we note that the comment to Rule 230 states that this language in the Rule "ordinarily is delineated by the investigation number . . . under which requests for documents . . . were made." This language suggests without elaboration that, in less ordinary circumstances, a different rule might apply. The comment also points out that recommendations by the Division to institute proceedings identifies the source investigation number "to which [the proceeding] relates." Ordinarily, those numbers would be the same. Here, they were not.

15/ Respondents assert that the Division's intent in failing to produce documents is irrelevant. However, United States v. Dahlstrum, 493 F. Supp. 966, 975 (C.D. Cal. 1980), cited by Respondents in their motion to dismiss before the law judge, supports a different conclusion:

> Dismissal of an indictment is required only in flagrant cases of government overreaching (citation omitted). Here, dismissal is mandated by the overwhelming evidence of the IRS's flouting of the civil summons authority granted to it by Congress. . . . [I]n view of the circumstances of this case, this Court feels compelled to dismiss the indictment with prejudice in order to preserve the interests of a taxpayer defendant subjected to this type of governmental misconduct, even though fueled only by "institutional bad faith" and not any personal bad faith.

We also note that Respondents' assertion that Dahlstrum stands for the proposition that "dismissal is the only effective deterrent when a case reaches the trial phase" is incorrect. Dahlstrum expressly is limited to the "criminal trial phase," which is inapplicable here. The other two cases to which Respondents cite in support of their argument that the Division's alleged misconduct warrants dismissal are similarly inapposite. See United

(continued...)

Moreover, Respondents fail to identify any harm they may have suffered that would warrant dismissal of the case. Although it does not concede that the law judge's construction of Rule 230 is correct, the Division has agreed to produce, in accordance with the law judge's order, everything Respondents are seeking from the Trautman Wasserman and Brean Murray files. The Division has represented, and Respondents concede, that the Division has made available, and continues to make available, such material. Although it is true that there has been a delay in obtaining access to the Trautman Wasserman and Brean Murray files, the hearing is currently set for October 2007, and this affords Respondents with adequate time to review the material. 16/

We also note that Rule 230(e) provides that documents "shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree." The record includes correspondence from counsel for Respondents stating, "We do not want to come to New York to review and instead would like simply to receive copies of all the documents that have not yet been produced to us from the Trautman investigation." 17/ Though the Division is free to accede to such a request, the additional burden it would impose would cause more delay.

Respondents argue that, because they had already accomplished much of their pre-trial preparation, they will have to expend additional resources reevaluating trial strategy as a result of the new material available to them. This contention is speculative. Because of the preliminary stage of the proceedings, it is unclear how much additional preparation might be required or whether some remedy other than dismissal might be more appropriate in the event such harm is established and attributable to some error on the Division's part. Respondents cite

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15/ (...continued)
States v. Weiss, 566 F. Supp. 1452, 1453 (C.D. Cal. 1983) (following Dahlstrum after finding the factual situation to be "virtually identical" to that case) and SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343 (D.D.C. 1980) (granting the Commission's motion to strike five of respondent's six affirmative defenses and finding that the sixth affirmative defense regarding an alleged breach of attorney-client privilege warranted further factual development).

16/ On June 1, 2007, we imposed a stay in this proceeding on the discovery of certain documents in the Trautman Wasserman investigative file that the NYAG identified as potentially prejudicial to its criminal cases against Wilson, as well as another individual who was employed by Trautman Wasserman, Scott Christian. This stay expired on June 25, 2007, based on the NYAG's representation that the two criminal proceedings were expected to conclude by that date. See supra note 4. There is no indication that Respondents have been harmed by gaining access to the materials at issue upon the expiration of that limited stay.

17/ E-mail of Graeme W. Bush to Division staff, dated April 5, 2007.

no authority for the proposition that dismissal is warranted because one party may be required to expend more resources than it expected at the outset of a proceeding.

In a June 7, 2007 motion requesting permission to file a supplemental brief ("the June 7 submission"), Respondents made an additional argument alleging the Division's failure to fulfill its Rule 230 obligations. 18/ This late filing was necessitated, Respondents contend, by the Division's May 23, 2007 production of certain transcripts of testimony of Ryan Goldberg and Michael Grady taken on September 14, 2005. Respondents' claim that the May 23 production of Goldberg's and Grady's testimony proves that the Division's representations to counsel for Respondents that neither Goldberg nor Grady gave testimony "during the course of the Division's investigation of Brean Murray" is "false." However, the June 7 submission makes clear that the Goldberg and Grady testimony to which it refers was given in September 2005 – seven months after the proceeding against Brean Murray concluded with a settlement agreement and order making findings. 19/ The June 7 submission does not explain how testimony taken after the conclusion of the Brean Murray settlement could have been taken "during the course of the . . . investigation of Brean Murray."

The Division indicates that attorneys in our Philadelphia office mistakenly thought that Respondents were seeking testimony taken during the investigation concerning the substantive allegations in that investigation. The testimony produced on May 23, 2007 pertained to Goldberg's and Grady's then-current financial condition in connection with settlement negotiations. 20/ At some point the Denver office became aware that Goldberg and Grady had given testimony, but withheld the testimony on the basis that it related to confidential settlement negotiations, and listed such material on its privilege log. After reviewing the materials and redacting confidential personal information such as Goldberg's and Grady's social security numbers and bank account numbers, the testimony was produced. Our review of the e-mail exchanges excerpted by the parties suggests at most a series of mis-communications among counsel. Respondents have not identified any harm as a result of the delay in producing the materials.

The June 7 submission also accuses the Division of making the "false" statement to the Commission in its April 26, 2007 opposition to Respondents' motion to dismiss that the Division had "produced sworn testimony from . . . [Goldberg and Grady] . . . ." Allegations that opposing counsel have made "false" statements to a tribunal are extremely serious. The record,

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18/ The Division did not oppose the motion, although it responded to the supplemental brief on June 15, 2007 ("the Division's June 15 response"), and we accordingly grant the motion.

19/ See Warren Lammert, Respondents' Motion for Leave to File Supplemental Brief in Support of Motion to Dismiss the Order Instituting Proceedings, Admin. Proc. File No. 3-12386 (June 7, 2007), at 1.

20/ Neither party has identified to what these settlement negotiations pertain.

however, does not support Respondents' claims. 21/ The Division's response makes clear that the Division had in fact produced Goldberg and Grady testimony, albeit testimony taken in the Janus investigation and in a separate injunctive matter, 22/ not the Brean Murray investigation. 23/

B. Obligations under Brady v. Maryland. Respondents also claim that they have been prejudiced by the Division's alleged disregard for its obligations under Brady v. Maryland. 24/ Respondents argue that "the Division had an independent constitutional obligation to search for and produce any Commission files that may contain exculpatory information regardless of which Commission office had possession of them." 25/ Respondents' position is not entirely clear, but it appears to be related to a separate argument, discussed infra, that the theory of liability set forth in the Trautman Wasserman OIP is inconsistent with the theory of liability set forth in Respondents' OIP. We understand Respondents to assert that the Division has an obligation to produce material under Brady because, in Respondents' view, the theory of liability in the Trautman Wasserman OIP "negates" the theory of liability in Respondents' OIP. On this theory, Respondents conclude that the Trautman Wasserman file might somewhere contain exculpatory material.

21/ The June 7 submission offered nothing to explain why, if Respondents believe the Division's statement to be untrue, they waited six weeks to file their supplemental brief. While we awaited the Division's response to the June 7 submission, we were puzzled by our discovery in the record that the Division had made similar statements concerning the production of testimony by Goldberg and Grady, in both a February 1, 2007 opposition filed with the law judge to Respondents' motion to compel and a letter to counsel for Respondents dated October 17, 2006, without prompting any outcry from Respondents' counsel that these statements were "false."

22/ SEC v. Treadway, 04-CV-3464 S.D.N.Y. (filed May 6, 2004).

23/ Respondents also argue that the above representation by the Division regarding Goldberg and Grady testimony is misleading. They do not explain this contention. Read in context, we do not construe the Division's April 26, 2007 representation to mean that the Goldberg and Grady testimony that had been produced as of that date was all the Goldberg and Grady testimony that might exist in the Division's files.

24/ See Commission Rule of Practice 230(b)(2), 17 C.F.R. § 201.230(b)(2), which provides that "[n]othing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of Brady v. Maryland, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence."

25/ See Warren Lammert, Respondents' Motion to Reconsider the Court's Denial of Their Motion To Dismiss, Admin. Proc. File No. 3-12386 (Mar. 8, 2007), at 11 (emphasis in original).

We have held that, "[t]o trigger the obligation to disclose under Brady, the evidence must be 'material either to [the defendant's] guilt or punishment' . . . ." 26/ As we have held, Brady does not "authorize a wholesale 'fishing expedition' into investigative material." 27/ Moreover, "the purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence . . . which might conceivably assist him in preparation of his defense." 28/ "Brady is not a discovery rule, instead, it is intended to insure that exculpatory material known to the Division is not kept from the respondent." 29/ The Division represents that it is not aware of any Brady material in any of the investigative files at issue. Respondents point to no evidence to contradict this representation.

Respondents rely on a decision by a Commodity Futures Trading Commission ("CFTC") law judge in Global Minerals & Metals Corp. 30/ to support their broader reading of the Division's Brady obligations. We note first that rulings by a CFTC law judge are not binding precedent on us. Further, Global Minerals does not stand for the proposition for which Respondents cite it. Rather, the law judge noted:

> [t]he [CFTC] has explained, "we expressly do not suggest that the Division of Enforcement must routinely cause a search to be made of other Commission divisions or offices for potentially discoverable or exculpatory . . . material where the Division has no knowledge that such material might exist and is not directed to it by a focused and specific defense request." First Guaranty Metals, Co., C.F.T.C. No. 79-55, 1980 WL 15696 (July 2, 1980). 31/

Respondents in Global Minerals identified specific exculpatory evidence that the CFTC's Division of Enforcement was alleged to have knowledge of and withheld. The law judge

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26/ Elizabeth Bamberg, 50 S.E.C. 201, 205 (1990) (citation omitted).

27/ See Haight & Co., 44 S.E.C. 481, 510-511 (1971) (rejecting respondents' argument that the Division of Enforcement improperly suppressed evidence favorable to their defense) (citation omitted); Orlando Joseph Jett, 52 S.E.C. 830, 830 (1996) ("[I]t is well established that the Supreme Court's Brady decision does not authorize respondents to engage in "fishing expeditions" through confidential Government materials in hopes of discovering something helpful to their defense.") (citation omitted).

28/ Rooney, Pace Inc., 48 S.E.C. 602, 606 n.7 (1986) (citing United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir. 1973)).

29/ David M. Haber, Exchange Act Rel. No. APR-418 (Feb. 2, 1994), 55 SEC Docket 3333, 3334.

30/ C.F.T.C. No. 99-11, 2003 WL 23112470, at *1 (Jan. 6, 2004).

31/ Global Minerals, 2003 WL 23112470, at *4 n.9.

concluded that the record provided sufficient reason to believe that the specific evidence may have been located in other CFTC offices because a certain individual associated with the evidence had changed positions within the CFTC. Thus, the law judge ordered the Division to search for the specific evidence in the locations that were "reasonably calculated to discover" such material. Respondents have offered no evidence to indicate that a situation similar to the Global Minerals matter exists in this proceeding. Under the circumstances, nothing suggests that a Brady violation has occurred.

C. Failure to Preserve Data and Programs. Respondents further claim that they have been prejudiced by the Division's alleged "failure to preserve crucial evidence that would support the report of its expert witness." The Division counters that "the Division's expert failed to retain a small amount of data and iterations of certain computer programs used to prepare calculations [of damages] associated with his report." We note that Respondents do not substantiate their claim that the Division is in any way responsible for the loss of evidence rather than, as the Division states, the expert. Without such substantiation, there is no support for allegations that this is the result of bad faith by the Division warranting such an extreme remedy as dismissal of the entire case. 32/

Even if we assume that Respondents' claims were true, however, we do not believe that their proffered remedy is appropriate. Our Rules of Practice provide specific procedures for addressing evidentiary issues at the hearing. Rule 321 provides that parties may object to the admission or exclusion of evidence. 33/ Rule 326 provides that parties are entitled to present oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination. 34/ Rule 340 provides that parties shall have an opportunity to file proposed findings and conclusions together with, or as a part of, their briefs, which may further address evidentiary objections. 35/ Because the proceeding was in a preliminary stage prior to the imposition of the stay, none of these avenues has been explored by the parties yet, and Respondents do not explain why we should circumvent them here. Further, Respondents will have an opportunity to raise any evidentiary issue in the event they should appeal any decision by the law judge. With so little information before us, we see no reason to prematurely interfere with an evidentiary issue that would be better resolved after the parties have had the opportunity to develop more information, and which is properly within the purview of the law judge to address. 36/

32/ See supra note 15 (discussing relevance of bad faith in Dahlstrum).

33/ 17 C.F.R. § 201.321.

34/ 17 C.F.R. § 201.326.

35/ 17 C.F.R. § 201.340.

36/ See Commission Rules of Practice 320-326, 17 C.F.R. §§ 201.320-326, which govern the (continued...)

D. Asserted Inconsistency of Proceedings. Respondents argue that dismissal is warranted by our purported "decision to pursue two mutually inconsistent administrative proceedings relating to the same case." Respondents contend that

> [t]he Commission has inappropriately asserted that Respondents were both securities fraud victims and violators through their interactions with Trautman Wasserman. This inconsistency is most dramatically shown by the Commission's allegations that Trautman Wasserman 'employed deceptive tactics to evade mutual funds' efforts to restrict [its] customers' market timing of mutual funds.' This is in direct conflict with the Commission's allegations that Respondents' [sic] knowingly and willfully facilitated Trautman Wasserman's market timing.

We wish to emphasize preliminarily that, once we have exercised our prosecutorial discretion to institute a proceeding, the appropriate remedy for any challenge to that exercise of discretion is to litigate the proceeding to a final decision. 37/

We are at a preliminary stage of the proceeding. On the record before us, we are not persuaded that any inconsistency exists. The Division contends that it "could prove under the same set of facts both that Lammert, Soderberg, and Newcomb, knowingly permitted and improperly facilitated Trautman's known market timing activity at Janus on the one hand, and that Trautman late traded and engaged in unknown deceptive trading practices at Janus on the other." We agree. Whether certain mutual fund companies were deceived by certain individuals associated with Trautman Wasserman, as alleged in the Trautman Wasserman OIP, does not necessarily have any bearing on whether Respondents, who were associated with Janus Capital Management, an investment adviser, were involved with Trautman Wasserman's activities, as alleged in Respondents' OIP. By their very nature, mutual fund companies, acting through their boards of directors, depend on the services of third parties, such as investment advisers, transfer agents, distributors, administrators, and other providers, to conduct their operations. It is not inconceivable that those third-party service providers could engage in misconduct unbeknownst to the mutual fund company.

Neither are we persuaded that these two proceedings are tantamount to "the same case." The Trautman Wasserman OIP is not limited to circumstances surrounding Janus, and Respondents' OIP is not limited to circumstances surrounding Trautman Wasserman. To the

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36/ (...continued)
evidentiary process in administrative law proceedings.

37/ See Kevin Hall, Order Denying Respondents' Motions for Summary Disposition and Oral Argument, Exchange Act Rel. No. 55987 (June 29, 2007), __ SEC Docket __ (observing that once the Commission has instituted a proceeding, the appropriate remedy for any challenge to its decision to institute is to litigate the proceeding to a final decision).

extent that the two proceedings appear to involve many of the same facts regarding activity relating to Janus and Trautman Wasserman, there is no indication at this stage of the proceeding that such facts will be proven or to what degree they will form the basis of the Division's allegations.

Moreover, Respondents have not offered any convincing authority that dismissal of the case against them is warranted. 38/ United States v. Gilmore, 39/ cited by Respondents, is an unpublished order issued by a district court in a criminal proceeding. The language in Gilmore quoted by Respondents ("There are situations where the Due Process Clause prohibits the government from presenting 'mutually inconsistent theories of the same case against different defendant'" 40/) is unhelpful because Respondents fail to identify the type of situation which might be covered by such a prohibition. In Gilmore, the court surmised that an example of a due process violation might include a situation where an inconsistency exists at the core of a criminal prosecutor's case against defendants for the same crime or where the evidence used at the two trials is factually inconsistent and irreconcilable. 41/ The court concluded that no such inconsistency existed in the Gilmore case. Respondents did not identify any inconsistency at the core of the Division's case, and point to no evidence that is factually inconsistent and irreconcilable.

E. Effect of Stay on Proceedings. Respondents claim that they have been prejudiced by the "indefinite" stay. The law judge, however, ordered the Division to report on May 25, 2007, and every ninety days thereafter, on the status of the Wilson proceeding and the continued appropriateness of the stay. The stay expired June 25, 2007. The law judge has scheduled the hearing to occur in October 2007.

In sum, Respondents have not demonstrated that their case involves "extraordinary circumstances," warranting dismissal of the proceeding against them.

Accordingly, IT IS ORDERED that the petition of Warren Lammert, Lars Soderberg, and Lance Newcomb to dismiss the order instituting proceedings in this matter be, and it hereby is, denied.

By the Commission.

38/ Cf. The Rockies Fund, Inc., 56 S.E.C. 1198, 1237-1238 (2003) (rejecting respondents' argument that, because the Division took an inconsistent position in a related proceeding, the Division was estopped from asserting certain charges against respondents).

39/ 2004 WL 539337 (W.D. Va. 2004) (unpublished order).

40/ Gilmore, 2004 WL 539337, at *2.

41/ Ibid.

Nancy M. Morris
Secretary