

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Rel. No. 8865 / November 30, 2007

SECURITIES EXCHANGE ACT OF 1934

Rel. No.56874 / November 30, 2007

INVESTMENT ADVISERS ACT OF 1940

Rel. No.2679 / November 30, 2007

INVESTMENT COMPANY ACT OF 1940

Rel. No.28070 / November 30, 3007

Admin. Proc. File No. 3-12554

In the Matter of
MICHAEL SASSANO,
DOGAN BARUH,
ROBERT OKIN,
and
R. SCOTT ABRY

ORDER DENYING
INTERLOCUTORY REVIEW

I.

The Division of Enforcement ("the Division") seeks interlocutory review of an administrative law judge's order requiring that it provide Respondents Michael Sassano, Dogan Baruh, Robert Okin, and R. Scott Abry access to all relevant, non-privileged evidence the Division gathered pursuant to an omnibus formal order of investigation issued on September 10, 2003 (the "NY-7220 Order"). ^{1/} The NY-7220 Order authorized an investigation into certain practices in connection with the trading of mutual fund shares, and the Division subsequently opened numerous investigations under separate file numbers pursuant to the authority of the NY-7220 Order. The Division never sought separate formal orders of investigation for these subsequent investigations.

^{1/} On June 15, 2007, we stayed this proceeding pending our consideration of the Division's interlocutory appeal.

On January 29, 2004, the Division opened one of these investigations into mutual fund trading practices at Canadian Imperial Bank of Commerce, Inc. ("CIBC"). Although the Division opened a new file number for the CIBC investigation, NY-7273, it did not seek a new formal order of investigation and took testimony and subpoenaed documents pursuant to the authority of the NY-7220 Order.

II.

On January 31, 2007, the Commission instituted proceedings against Respondents. The Order Instituting Proceedings ("OIP") against Respondents alleges that each Respondent was associated with a broker-dealer subsidiary of CIBC.

Commission Rule of Practice 230 requires that, unless otherwise provided by order of the Commission or a hearing officer, the Division "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." ^{2/} The Division provided Respondents with access to the documents in its investigative file for the NY-7273 investigation.

However, Respondent Sassano requested that the Division provide access to all documents obtained pursuant to the NY-7220 Order. ^{3/} Sassano argued that "NY-7220 is the investigation that led to institution of this proceeding" because the "record establishe[d] beyond dispute that the Division gathered *all* of the evidence in this proceeding under the authority granted it by the Commission in formal order of investigation NY-7220." The Division responded that "only documents gathered in the file leading to the [Division's] specific recommendation [to institute proceedings] need be made available" and that the Division's "recommendation was made under NY-7273, not NY-7220."

On June 8, 2007, the administrative law judge granted Sassano's motion in part. The law judge noted that Comment (a) to Rule 230 provides that the "'investigation leading to the Division's recommendation to institute proceedings' ordinarily is delineated by the investigation number or numbers under which requests for documents, testimony, or other information were

^{2/} 17 C.F.R. § 201.230.

^{3/} Sassano made this request on May 29, 2007. On June 8, 2007, Respondent Abry filed a motion joining Sassano's request. These requests occurred more than three months after the Division provided access to the NY-7273 investigative file in February 2007. Although it does not affect our consideration of the Division's motion for interlocutory review, we are troubled by Respondents' delay in making these requests. We believe that respondents have an obligation to make discovery requests as quickly as possible so as not to delay the proceeding.

made." The law judge "reject[ed] the Division's argument that NY-7273 is the only relevant investigation here," noting that the Division conceded that it took testimony and subpoenaed documents pursuant to the NY-7220 Order. Although the law judge refused to require that the Division provide access to all documents obtained pursuant to the NY-7220 Order, he ordered that the Division provide access to all such non-privileged evidence "relating to any of the mutual funds, annuity funds, hedge funds, trading platforms, and individuals referenced in the OIP." ^{4/} The law judge also ordered that the Division supplement its privilege log.

The law judge ordered that "[i]f the Division is unable or unwilling to provide Respondents with access to the relevant, non-privileged portions of its investigative file in NY-7220 . . . then it may not introduce . . . evidence that it gathered pursuant to subpoenas authorized by NY-7220." The law judge noted that, "[i]f the Division so chooses, it may circumscribe its duty to produce materials from NY-7220 by scaling back on the thousands of exhibits it intends to offer and/or the 45 witnesses it intends to call at the hearing." The law judge denied the Division's ensuing motion to certify his order for interlocutory review, pursuant to Commission Rule of Practice 400. ^{5/}

III.

The Division argues that, "[i]n view of the importance of the issues in this appeal, the Commission should review the Order notwithstanding the law judge's denial of the Division's motion for certification." The Division contends that the burden of complying with the order, which, it believes, requires it to "review tens of millions of documents, select the documents that fall into the relevant categories, and prepare a document-by-document privilege log of withheld materials," is "substantial enough to warrant reversal."

Respondents oppose interlocutory review on the grounds that "an allegation that the court interpreted a relevant discovery rule incorrectly does not . . . warrant[] interlocutory appeal" and "the fact that a discovery order may place substantial burdens on a party is irrelevant for purposes of determining the propriety of interlocutory review."

Rule of Practice 400(a) provides that petitions for interlocutory review "are disfavored," that they will be granted "only in extraordinary circumstances," and that the Commission may

^{4/} The law judge also ordered that the Division provide access to documents obtained "in any other investigations that were not part of the omnibus NY-7220 investigation, but yielded documents that may become Division exhibits in this proceeding, including C-3781, In re Ritchie Capital Mgmt., and B-1229, In re Prudential Sec."

^{5/} 17 C.F.R. § 201.400 (stating that "a ruling submitted to the Commission for interlocutory review must be certified . . . by the hearing officer" but also providing that the Commission "may, at any time, on its own motion, direct that any matter be submitted to it for review").

decline to consider a petition "if it determines that interlocutory review is not warranted or appropriate." 6/ The Commission adopted this language "to make clear that petitions for interlocutory review . . . rarely will be granted." 7/

We find that the extraordinary circumstances justifying interlocutory review are not present here. "It is well-established that pre-trial discovery orders are almost never immediately appealable." 8/ We have previously found no extraordinary circumstances and denied interlocutory review on the ground that parties' "complaints about production of documents do not warrant our interference with the orderly hearing process." 9/ Although the Division argues that the burden of complying with the law judge's order renders the circumstances of this discovery obligation extraordinary, at least one court has held, in denying interlocutory review of an administrative agency's ruling on a discovery request, that the "mere expense and inconvenience in complying with a discovery order . . . do not ordinarily present grounds for interlocutory review of evidentiary rulings." 10/ Accordingly, we find no extraordinary circumstances justifying our intervention at this time.

6/ 17 C.F.R. § 201.400(a).

7/ Adoption of Amendments to the Rules of Practice, Securities Exchange Act Rel. No. 49412 (Mar. 12, 2004), 82 SEC Docket 1744, 1749.

8/ Borntrager v. Cent. States, Se. and Sw. Areas Pension Fund, 425 F.3d 1087, 1093 (8th Cir. 2005); cf. Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 382 (2004) (finding fact that "Vice President and his comembers on the [National Energy Policy Development Group] [were] the subjects of the discovery orders" "remove[d] this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise").

9/ Kevin Hall, CPA, Exchange Act Rel. No. 55987 (June 29, 2007), 90 SEC Docket 3068, 3069. Compare Gregory M. Dearlove, CPA, Admin. Proc. File No. 3-12064 (Jan. 6, 2006) (denying interlocutory review of law judge's order denying postponement of hearing due to complexity of case because respondent's argument about the complexity of his case could be made by many respondents in Commission cases and did not constitute extraordinary circumstances) with Philip L. Pascale, CPA, Admin. Proc. File No. 3-11194 (Nov. 24, 2004) (finding extraordinary circumstances justifying review of law judge's order denying postponement of hearing because counsel's medical condition rendered him effectively incapacitated and unable to participate effectively in the proceeding).

10/ Consol. Gas Supply Corp. v. FERC, 611 F.2d 951, 960 (4th Cir. 1979); see also Borntrager, 425 F.3d at 1093 ("The fact that an interlocutory discovery order may be onerous or inconvenient does not make the order immediately appealable . . .").

IV.

Although we are denying the Division's motion for interlocutory review, we nevertheless believe it is appropriate for us to address certain timing issues that have arisen in connection with this motion. ^{11/} In particular, the parties have expressed concern regarding their ability either to produce the documents as specified in the law judge's order in the time granted by the law judge, or to review those documents before the law judge begins the hearing in this case. Accordingly, under the circumstances, it seems appropriate to permit the Division up to sixty days from the date of this order to comply with the law judge's ruling and, thereafter, to permit the Respondents sixty days to review the documents once they have been made available by the Division.

In addition, the Division "requests that the Commission toll the 300-day period under Rule 360(a)(2) during the pendency of this interlocutory review." Rule 360(a)(2) provides that, in the OIP, the Commission "will specify a time period in which the hearing officer's initial decision must be filed." ^{12/} The OIP in this case specified a period of 300 days from service of the OIP. Respondents do not oppose the Division's request and, in light of the extended period these proceedings have been stayed, we consider it appropriate to grant that request. We also consider it appropriate to toll the 300-day period for the additional 120-day period we are providing the parties to respond to the law judge's order.

In his denial of certification for interlocutory review, the law judge stated that the Division's motion was "silent as to whether the Division is going to begin to gather in one location all the materials from NY-7220 that [he] ordered it to make available to Respondents." Rule of Practice 230(e), however, states that documents "shall be made available . . . at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree." Thus, we wish to alert the law judge to our view that the Rule does not contain a requirement that the Division gather all the documents in one location, and we encourage the parties to reach agreement on the procedures and conditions governing Respondents' review of the documents.

Accordingly, it is ORDERED that the Division's motion for interlocutory review and reversal of the law judge's June 8, 2007 order be, and it hereby is, denied; and it is further

ORDERED that the Division comply with the law judge's June 8, 2007 order within sixty days from the date of this order and that Respondents be given sixty days to review documents made available by the Division after it complies with the law judge's order; and it is further

^{11/} The Rules of Practice grant us broad discretion, upon our determination "that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding," to "direct, in a particular proceeding, that an alternative procedure shall apply." Rule of Practice 100(c), 17 C.F.R. § 201.100(c).

^{12/} 17 C.F.R. § 201.360(a)(2).

ORDERED that the 300-day period for rendering an initial decision in this proceeding be, and it hereby is, tolled for the period of the Commission's consideration of the Division's motion and for an additional 120 days beyond that period.

By the Commission.

Nancy M. Morris
Secretary