

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11893

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 27, 2007

In the Matter of :
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 :
 DAVID A. FINNERTY, DONALD R. FOLEY II, :
 SCOTT G. HUNT, THOMAS J. MURPHY, JR., :
 KEVIN M. FEE, FRANK A. DELANEY IV, :
 FREDDY DeBOER, TODD J. CHRISTIE, :
 JAMES V. PAROLISI, ROBERT W. LUCKOW, :
 PATRICK E. MURPHY, ROBERT A. JOHNSON, JR., :
 PATRICK J. McGAGH, JR., JOSEPH BONGIORNO, :
 MICHAEL J. HAYWARD, RICHARD P. VOLPE, :
 MICHAEL F. STERN, WARREN E. TURK, :
 GERARD T. HAYES, and ROBERT A. SCAVONE, JR. :

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

JUL 27 2007

FIRST CLASS

ORDER

The Securities and Exchange Commission (Commission) commenced this proceeding on April 12, 2005, with an Order Instituting Proceedings (OIP) that alleges that each Respondent engaged in interpositioning and/or trading ahead while associated with one of five specialist firms at the New York Stock Exchange (NYSE). The proceeding has been stayed pending the prosecution of parallel criminal proceedings against fifteen Respondents.¹ David A. Finnerty, Admin. Proc. No. 3-11893 (A.L.J. June 7, 2005) (unpublished). However, the stay was modified as to Respondents Foley, Hunt, T. Murphy, Fee, Delaney, Christie, Parolisi, Luckow, P. Murphy, Johnson, Volpe, Turk, Hayes, and Scavone with reference to their filing Answers and various motions, the production of documents pursuant to 17 C.F.R. § 201.230, and other discovery. David A. Finnerty, Admin. Proc. No. 3-11893 (A.L.J. May 3, 2007) (unpublished). Under consideration are: (1) these fourteen Respondents' Motion for More Definite Statement and Initial Prehearing Submission, filed May 25, 2007, the Division of Enforcement's (Division) June 15 opposition, and the Respondents' June 22 reply; and (2)

¹ The criminal proceedings have been resolved except for: Freddy DeBoer, reportedly a fugitive; Michael J. Hayward and Michael F. Stern, who appealed their convictions; and David A. Finnerty, in whose case the presiding judge set aside the jury's verdict of guilty, entered a judgment of acquittal, and conditionally granted his request for a new trial in the event the judgment of acquittal is later vacated or reversed. United States v. Finnerty, 05 Crim. 393 (S.D.N.Y. Feb. 21, 2007), appeal pending, No. 07-1104 (2d Cir.). The proceeding has ended as to Respondents McGagh and Bongiorno. David A. Finnerty, Securities Act Release Nos. 8805, 8806 (May 23, 2007).

Respondents Fee and Delaney's Motion to Expedite Hearing, filed May 22, 2007, the Division's May 25 opposition, and Respondents Fee and Delaney's May 31 reply.

The hearing is tentatively scheduled to start in February 2008. As previously agreed, evidence relating to all Respondents will be taken at initial hearing sessions (Stage One) to be followed by hearing sessions grouping Respondents based on the specialist firms with which they were associated (Stage Two), in the interest of efficiency and to reduce the burden on Respondents. The tentative schedule was intended to accommodate the lengthy preparation necessary, to balance the needs of all Respondents (recognizing that earlier or later dates would suit some), as well as to include the possibility that the Court of Appeals might have ruled on the issue of securities fraud that would be applicable to all Respondents.

As discussed at the May 2, 2007, telephone conference, Stage One, which is expected to last two to three weeks, would encompass such matters as the role of specialists and data to be used as evidence, such as exception reports, MARS reports, and screen shots, and the source of the data. Respondents are expected to present evidence to support their view of what the data shows and what the obligation of the specialists was in connection with what the data shows. They are expected to argue that the exception reports captured too many exceptions as violative, due to faulty algorithms, and that the data are not reliable in that there are timing anomalies between the time when a trade occurred and when it was entered on a specialist's panel.

Motion to Expedite Hearing

Respondents Fee and Delaney request that the hearing as to them² be expedited, stating that, since the April 2005 institution of this proceeding, they have been unable to find gainful employment in the securities industry. Both were indicted, but the U.S. Department of Justice dropped its cases against Fee and Delaney in late 2006, on the eve of trial. Consequently, they say, they are fully prepared for trial in this proceeding, and a February 2008 hearing date unnecessarily delays their day in court. They state that they are willing to reach stipulations with the Division to forego Stage One and proceed directly to Stage Two. They state that they would waive any attack on the admissibility of the Division's evidence and would stipulate that the data and the reports that it has generated, including the screen shots, the MARS reports, and the exception reports, all show what they purport to represent. However, in their Stage Two proceeding, Respondents Fee and Delaney envision raising defenses as to exception reports, screen shots, and MARS reports as applied to their trading to illustrate, for example, that their alleged trading ahead infractions were just as likely to be legitimate trades. The Division states that the case involves a large amount of technical data and computer evidence that must be presented in a methodical and detailed fashion to allow the undersigned to appreciate fully the various issues raised by the Division's charges and that it appears that Respondents Fee and Delaney would be raising Stage One defenses in their proposed Stage Two hearing.

² They are the only Respondents from Bear Wagner Specialists LLC in this proceeding.

To require the Division, in effect, to its present Stage One evidence twice – once before presenting its Stage Two evidence against Fee and Delaney and a second time in February 2008 – would be inconsistent with judicial economy and would amount to a severance, which can only be granted by the Commission, pursuant to 17 C.F.R. § 201.201(b). Additionally, it does not appear that Fee and Delaney have actually drafted proposed stipulations as to Stage One evidence. Absent a stipulation that eliminates the need for Stage One, Fee and Delaney's motion to expedite the hearing as to them cannot be granted.


Motions for More Definite Statement and Initial Prehearing Submission

The fourteen active Respondents argue that they should be informed of the specific trades that are alleged to be violative (further distinguishing between violations of the antifraud provisions and of the NYSE rules).³ The Division represents that it is in the process of compiling final exception reports as to each Respondent and now estimates that it will be able to provide Respondents with the final reports by the end of September.⁴

Additionally, Respondents urge that the Division should furnish initial prehearing submissions, pursuant to 17 C.F.R. § 201.322, including an outline or narrative summary of the case, the legal theories on which it will reply, and exhibit and witness lists.

It may be helpful to address these matters and any other matters that may bear on the resolution of this proceeding at a prehearing conference. A fourth telephone conference will be held on August 27, 2007, or such other date as may be appropriate.

IT IS SO ORDERED.


Carol Fox Foelak
Administrative Law Judge

³ Additionally, they urge that the Division should specify the particular monetary relief it seeks from each Respondent as well as the details of how it computes each item of such requested relief. However, it appears (from Respondents' Motion for Partial Summary Disposition and responsive pleadings) that the Division has in fact informed each Respondent as to the maximum amount of disgorgement and civil penalties it intends to seek from him, as well as the means of calculating the amounts, but that Respondents dispute whether any disgorgement is appropriate, as well as the Division's method of calculation as to individual Respondents.

⁴ At the May 30, 2007, telephone conference, the Division represented that it would complete these reports within one to two months from that date.