UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56756 / November 6, 2007

Admin. Proc. File No. 3-11893

In the Matter of David A. Finnerty, Donald R. Foley, II, Scott G. Hunt, Thomas M. 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.	ORDER DENYING MOTION TO SEVER

On May 30, 2007, Donald R. Foley, II, a respondent in this proceeding, moved to sever the causes of action against him from those against the other named respondents pursuant to Commission Rule of Practice 201(b). 1/ Rule of Practice 201(b) provides in pertinent part that "any proceeding may be severed with respect to some or all parties," and provides further that "[a]ny motion to sever . . . must include a representation that a settlement offer is pending before

1/ 17 C.F.R. § 201.201(b).

the Commission or otherwise show good cause." 2/ As discussed below, we have determined to deny Foley's motion because he has not satisfied the standard set forth in Rule 201(b).

The Order Instituting Proceedings ("OIP") in this matter charges twenty registered specialists employed by five specialist firms with improper trading on the floor of the New York Stock Exchange ("NYSE") between 1999 and 2003. The OIP alleges that each of the respondents violated the federal securities laws and related rules by executing orders for their firms' proprietary accounts ahead of executable public customer or "agency" orders, thereby taking unfair advantage of their position as specialists. 3/ The OIP alleges that the named respondents engaged in improper trading practices known as "interpositioning" and "trading ahead" to give their firms an improper advantage over their public customers. 4/ Foley and three other respondents were employed by Fleet Specialists, Inc. ("Fleet"). 5/

The Division of Enforcement ("the Division") states that, at a prehearing conference with the Administrative Law Judge, the parties "generally expressed consent to a two-stage hearing, in which the first stage [("Stage I")] would involve issues common to all [r]espondents (including, without limitation, the admission into evidence of the data underlying the Division's charges) . . . ." Foley states that, in Stage I, the parties will "present common issues of fact before the [law judge] (i.e., the function of the specialist system, the authenticity and admissibility of certain records)." Foley does not move to be severed from Stage I of the hearing but seeks severance from the second stage ("Stage II"), which, the Division states, "would address specific conduct of [r]espondents, and would be organized sequentially by groups according to the firms that employed [r]espondents."

2/ Id.

3/ The OIP charges each respondent with violating Securities Act of 1933 Section 17(a), 15 U.S.C. § 77q(a), Exchange Act of 1934 Sections 10(b) and 11(b), 15 U.S.C. §§ 78j(b) and 78k(b), Rules 10b-5 and 11b-1, 17 C.F.R. §§ 240.10b-5 and 240.11b-1, thereunder. The OIP also charges each respondent with violating NYSE Rules 104, 92, 123B, and 401.

4/ As the OIP states, in "interpositioning, a specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction." The OIP describes "trading ahead" as "the specialist fill[ing] one agency order through a proprietary trade for the specialist firm's proprietary account -- and thereby improperly . . . 'trad[ing] ahead' of the agency order -- simply to allow the specialist firm to take advantage of market conditions promptly."

5/ Fleet is now known as Banc of America Specialists, Inc.

In applying Rule of Practice 201(b) to a request for severance, we first determine whether the allegations brought against the respondents were properly consolidated. 6/ If so, we then examine whether there exists good cause for severance. 7/ Foley claims that consolidation here is highly prejudicial because "it creates the inference that Mr. Foley's conduct was more widespread than it actually was." He argues that "[s]everance is necessary to prevent tarring Mr. Foley with evidence of purported wrongdoing that has nothing to do with Mr. Foley." 8/ Moreover, he claims that "[t]here will be no efficiencies gained by grouping any of the defendants, because, after Stage [I], each will need to tell his own story, and the Division will be obligated to prove the liability of each," with the result that "[t]he total time taken up by the respondents will be the same whether each is tried seriatim, or all put in their defenses seriatim in a joint hearing."

The Division responds that the standards for proper consolidation under Rule 201(a) are clearly met here because Foley "has been charged with identical conduct, giving rise to identical

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6/ John A. Carley, Securities Exchange Act Rel. No. 50695 (Nov. 18, 2004), 84 SEC Docket 434 ("Carley I").

7/ Foley argues that precedent applying the Federal Rules of Civil Procedure compels the conclusion that the causes of action against the respondents were improperly consolidated because they do not arise from the same transaction or occurrence. The provisions of the Federal Rules of Civil Procedure and our own Rules of Practice regarding consolidation or joinder differ significantly in that, "under the Federal Rules, joinder of claims is appropriate when the claims arise out of the same transaction or occurrence and there is at least one common question of law or fact, [but] . . . the Commission requires only . . . a common issue of law or fact" for consolidation. Carley I, 84 SEC Docket at 434-35. In any event, precedent applying the Federal Rules of Civil Procedure is not binding in our administrative proceedings since the Federal Rules do not govern these proceedings. John A. Carley, Exchange Act Rel. No. 50954 (Jan. 3, 2005), 84 SEC Docket 2317, 2318 n.6 ("[O]ur proceedings are not governed by the Federal Rules . . . .") ("Carley II").

8/ Among other asserted disadvantages, Foley specifically claims his defense will suffer "because . . . other specialists . . . but not Mr. Foley . . . made statements reflected in the OIP such as 'f--k the DOTS';" and because the OIP charges Foley "with a tiny percentage of improperly executed trades, other respondents . . . are accused [of improper trading] almost four times more frequently . . . ; . . . the specialists worked with different clerks . . . ; [and] . . . specialists had very different beliefs as to the priority of execution for public orders arriving via the [NYSE's] automated delivery system . . . ." (emphasis in original).

violations . . . as the other respondents." 9/ The allegations, according to the Division, "give rise to common legal questions as those facing the other Respondents" and "substantial common factual issues." Moreover, these common issues extend beyond those to be addressed in Stage I of the proceedings. The Division asserts that Foley "ignores the substantial, common factual issues the proceeding against him will have with the other Respondents who also worked at his firm, Fleet, and which further demonstrates the necessity of keeping the Stage [II] proceedings consolidated." These issues include Fleet's training of specialists, internal policies and procedures, and compensation. 10/ In addition, the Division argues that the requested severance "would clearly result in duplicative evidence and testimony, and a tremendous waste of judicial resources."

Consolidation in this proceeding was proper under Rule of Practice 201(a). The OIP charges each respondent with violating the same provisions of the federal securities laws and related rules. Consequently, many legal issues are common to all respondents. Foley himself admits that the issues to be addressed in Stage I of the hearing involving the work of specialists and related evidentiary issues are common to all the respondents; that, without more, establishes that consolidation was proper under Rule of Practice 201(a). As to Stage II of the hearing, there will be numerous common issues of fact with respect to Foley and the three other respondents employed by Fleet. 11/

9/ In David A. Finnerty, Exchange Act Rel. No. 52207 (Aug. 4, 2005), 85 SEC Docket 4448 ("Finnerty Order"), we stated "we believe there are common legal, factual, and evidentiary issues in these proceedings." The Division argues that the Finnerty Order in which another respondent in this proceeding was denied severance is law of the case and, as such, disposes of Foley's motion. The law of the case doctrine provides that "once an appellate court either expressly or by necessary implication decides an issue, the issue will be binding upon all subsequent proceedings in the same case." Key v. Sullivan, 925 F.2d 1056, 1060 (7th Cir. 1991). The Finnerty Order, however, did not address the issue of whether there is good cause to sever Foley from this proceeding and thus does not govern our consideration of this motion.

10/ Finnerty Order, 85 SEC Docket at 4449.

11/ Id. It appears from the parties' respective briefs that there is an additional issue of fact that can best be addressed in a consolidated Stage II hearing. The OIP alleges that some of the specialists sent electronic messages to each other allegedly expressing contempt for the NYSE's rules governing its automated order delivery system (e.g. "screw the DOTS"). Foley denies that he was responsible for any such messages, while the Division states that it "believes the evidence will show that it was [Foley] himself who was the source for that particularly revealing comment."

Foley does not submit that there is a settlement of the charges pending before the Commission and has not demonstrated good cause for severance. We are not persuaded by Foley's assertion that he will be unfairly prejudiced by having his case considered in a group with the other specialists who had been employed by Fleet. At the hearing, "the law judge, who is legally trained and judicially oriented, should have little difficulty in judging movant['s] case[] solely on the basis of the evidence adduced with respect to [him], without regard to the conduct of other respondents." 12/ We also are not likely to be "confused by the complexities of this case, nor to impute improperly any greater wrongdoing to Foley than the record will support," should we be required to review the decision of the law judge. 13/

Moreover, as we have stated, "considerations of adjudicatory economy carry great weight in the analysis of [a] motion [to sever]." 14/ It seems likely that Foley's Stage II hearing would require testimony pertinent to his employment at Fleet, which would duplicate the evidence presented at the Stage II hearing with respect to the other Fleet respondents. As we determined in an earlier severance request made by another respondent in this proceeding, the common legal, factual, and evidentiary issues in these proceedings "indicate[] that a single proceeding will be more efficient than separate trials from the standpoint of judicial economy and financial resources." 15/ Nothing justifies a different conclusion here.

Accordingly, IT IS ORDERED that the motion to sever filed by Donald R. Foley, II be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

12/ Id. at 4450.

13/ Carley I, 84 SEC Docket at 436.

14/ Id. at 435.

15/ Finnerty Order, 85 SEC Docket at 4450.