UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITES EXCHANGE ACT OF 1934
Release No. 53823 / May 17, 2006

In the Matters of	:	
	:	
Bear Wagner Specialists LLC	:	
Admin. Proc. File No. 3-11445	:	
Fleet Specialist, Inc.	:	
Admin. Proc. File No. 3-11446	:	
LaBranche & Co. LLC	:	
Admin. Proc. File No. 3-11447	:	
Spear, Leeds & Kellogg Specialists LLC	:	**ORDER APPROVING A**
Admin. Proc. File No. 3-11448	:	**DISTRIBUTION PLAN**
Van der Moolen Specialists USA, LLC	:	
Admin. Proc. File No. 3-11449	:	
Performance Specialist Group LLC	:	
Admin. Proc. File No. 3-11558	:	
SIG Specialists, Inc.	:	
Admin. Proc. File No. 3-11559	:	
	:	
Respondents.	:	

SUMMARY

In March and July 2004, the Commission entered into settlements with the seven specialist firms operating on the New York Stock Exchange ("NYSE"). The Commission's orders (Securities Exchange Act Release Nos. 49498 – 49502, and Nos. 50075 – 50076) (the "Settlement Orders") provided, among other things, for payment of disgorgement and civil penalties totaling, in the aggregate, over $247 million. The Settlement Orders further provided that the disgorgement and civil penalties were to be placed in Fair Funds to be distributed pursuant to a distribution plan drawn up by a fund administrator. Heffler, Radetich & Saitta L.L.P. ("Heffler") was appointed the fund administrator in October 2004.

On September 8, 2005, Heffler submitted a proposed distribution plan to the Commission's Office of the Secretary. In accordance with the previous orders in this matter, the Plan sets forth the steps Heffler has taken, and will take, to identify the customers injured as a result of each specialist firm's trading violations as determined by the Commission staff and the NYSE in connection with the Settlement Orders. The Plan further provides a mechanism for calculating each injured customer's distribution amount and a mechanism for making actual

distributions. Finally the Plan provides a verification procedure whereby persons may determine whether they are in the class of injured customers, and, if so, verify the accuracy of their distribution amount.

On December 27, 2005, the Commission published a Notice of Proposed Distribution Plan and Opportunity for Comment ("Notice") in connection with the above proceedings (Securities Exchange Act Release No. 53025) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1103. This Notice advised interested parties that they could obtain a copy of the proposed plan of distribution of monies placed into Fair Funds authorized by the Commission, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 (the "Plan"), by visiting http://www.sec.gov/litigation/admin/34-53025-pdp.pdf or www.hrsclaimsadministration.com, or by submitting a written request to Ronald A. Bertino, c/o Heffler, Radetich & Saitta, LLP, 1515 Market Street, Suite 1700, Philadelphia, PA 19102. The Notice also advised that all persons desiring to comment on the Plan, or the use to be made of any funds left after the contemplated payments have been made ("Remaining Funds"), may submit their views, in writing, no later than January 26, 2006. The Notice stated that such Remaining Funds could total anywhere between $50 and $70 million.

In response to the Notice, eight persons (five individuals and three entities) submitted comments to the Office of the Secretary. Five of the comment letters were submitted by persons formerly associated or affiliated with an entity named Sea Carriers Limited Partnership I ("Sea Carriers"), who argue, generally, that the Plan should not be limited to compensating injured customers who actually traded, but should be broadened to provide compensation to persons who allegedly suffered derivative or consequential harm from the improper trading. Some of these persons also claim that they should receive significant portions of any Remaining Funds because they were particularly harmed by the specialist firms' misconduct. Another comment letter suggests that the Commission should publish a list of the violative trades and the identities of the injured customers. The two remaining comment letters address only the use of the Remaining Funds, both suggesting that such funds be paid to the injured customers either on a pro-rata basis or in the form of post-judgment interest calculated through the date of distribution.

After careful consideration, the Commission has concluded that the Plan should be modified to include the payment of post-judgment interest to injured customers, subject to adequate tax documentation, calculated through the date of distribution, and approved with such modification.

FACTS

A. The Commission's Actions and the Fund Administrator's Proposed Plan

In the Settlement Orders, the Commission found that the specialist firms had been filling customer orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged. The extent of the violative trading was determined through the use of a retroactive surveillance conducted by the NYSE, which identified a large number of specific transactions where specialists had unlawfully either traded ahead of executable customer orders, or interpositioned themselves between two customer orders that

should have been matched against one another. The surveillance enabled the Commission staff and the NYSE to calculate precisely the dollar amount by which a particular customer order had been disadvantaged by a specific violative trade. The disgorgement paid by each specialist firm was therefore tied to the specific violative trades identified by the Commission staff and the NYSE. The specialist firms were also ordered to pay civil penalties tied to the amount of customer harm caused by the identified violative trades. All told, the seven specialist firms paid $247,028,778 in disgorgement and civil penalties.

Each of the Settlement Orders provided for the appointment of a fund administrator, and specified the fund administrator's function and the uses to which the disgorgement and civil penalties are to be used:

> The disgorgement and the civil penalties which shall be added to a Fair Fund (the "Distribution Fund") shall be maintained in an interest-bearing account and shall be distributed pursuant to a distribution plan (the "Plan") drawn up by an administrator (the "Administrator") to be chosen by the staff of the Commission and the NYSE. The Administrator shall identify the customers who were injured as a result of [the specialist firm's] trading violations as determined [in the Settlement Order] by the Commission staff and the NYSE. The Distribution Fund shall be used: (i) to pay the costs of administering the Plan; (ii) to reimburse injured customers for their loss; and (iii) to pay prejudgment interest to injured customers. The Commission shall determine the appropriate use for the benefit of investors of any funds left in the Distribution Fund following such payments. Under no circumstances shall any part of the Distribution Fund be returned to [the specialist firm].

In October 2004, the Commission issued orders that, among other things, created Fair Funds, appointed Heffler administrator of the Fair Funds, and directed the transfer of settlement funds into escrow accounts for investment and subsequent disbursement to injured customers. On September 8, 2005, Heffler submitted a proposed Plan for Commission approval. The proposed Plan is divided into three phases: the initial phase requires Heffler to identify the customers who were injured as a result of the previously identified violative trades. The second phase requires Heffler to calculate each injured customer's distribution amount, which is the sum of the disgorgement amount and prejudgment interest. The final phase of the Plan requires Heffler to distribute the distribution amounts to the injured customers. In addition, the Plan sets forth verification procedures to afford injured customers an opportunity to verify their status and the amount of their distribution. On December 27, 2005, the Commission issued the Notice, which gave the public 30 days to submit comments on the various procedures set forth in the Plan, as well as the use to be made of any Remaining Funds.

B. Public Comments Concerning the Proposed Distribution Plan

Eight persons submitted comments in response to the Notice. Five of the letters came from persons formerly associated or affiliated with Sea Carriers, a Connecticut-based trading company that ceased operations in March 2005, who claim that they suffered injury as a result of the specialists' trading violations and deserve compensation, even though they are not the named customers connected to the disadvantaged trades. Two comment letters were submitted concerning the use of the Remaining Funds, one by a trading company, Empire Programs Inc. ("Empire"), and the other by a Washington-based advocacy group, the Washington Legal Foundation ("WLF"). These comments are limited to the use to be made of the Remaining Funds, and suggest that such funds should be paid to the injured customers either on a pro-rata basis or in the form of post-judgment interest calculated through the date of distribution. The final comment, which was submitted by an individual affiliated with Zermatt Capital Management, a Utah-based investment adviser, suggests that the Commission publish a list of the violative trades and the identities of the injured customers on its website. The Commission's responses to these comments are discussed below.

1. Comments from Persons Formerly Associated with Sea Carriers

The five persons formerly associated with Sea Carriers include three individuals who identify themselves as former "independent contractors/traders" for Sea Carriers (the "SC Traders"), an entity, Independent Asset Management ("IAM"), which managed a fund that invested in Sea Carriers, and an individual who describes herself as a former "programmer/trader" at Sea Carriers who also invested in Sea Carriers and in IAM. The letters assert, in nearly identical language, that the Plan should not be limited to compensating injured customers who actually traded, but should be broadened to allow compensation of persons who may have derivative claims or may have suffered consequential damages as a result of the specialist misconduct. Although the arguments overlap, these commentators appear to be making three distinct claims: a) that the fund administrator should look past the account holder and distribute funds to persons who have a derivative interest in the account; b) that the class of claimants eligible to receive disgorgement funds should not be limited to injured customers but should be broadened to include other persons who were derivatively injured by the specialists' misconduct; and c) that the Remaining Funds should be used to pay consequential damages to persons who were affected by the misconduct. The Commission addresses each of these claims in turn:

a. Looking Past the Account Holder

Some of the Sea Carriers commentators argue that the Plan unfairly limits the class of "injured customers" to the account holders, identified by clearing firms and nominees, whose trades were disadvantaged.[1] These commentators claim that they have a derivative interest in the

[1] The Plan defines a "Nominee" as "a brokerage firm, bank, investment firm, etc., with current or former clients that are Injured Customers." When a disadvantaged trade is placed through what appears to be a nominee account, Heffler contacts the named account holder to verify whether

business of the account holder, or in the trades themselves, and are thus entitled to compensation. For example, the SC Traders claim that Sea Carriers had a joint venture agreement with Empire, a large trading firm, pursuant to which Empire provided trading capital and Sea Carriers and the SC Traders designed a trading strategy and executed trades through an account held in Empire's name. The SC Traders claim that they were supposed to share in the net trading profits their trades generated. The SC Traders argue that they were deprived of trading profits by the specialists' misconduct, and thus have a derivative claim to any recovery obtained by Empire. As a result, the SC Traders want Heffler to allocate any funds that Empire may be due to Sea Carriers and the SC Traders on a pro rata basis, consistent with the terms of the alleged joint venture agreement. Similarly, IAM wants the Plan to specifically recognize the validity of derivative claims IAM may have – as the manager of a fund that invested in Sea Carriers – against Sea Carriers.

The Commission disagrees with the suggestion that the fund administrator should look beyond the account holders to determine whether any other person has a claim, contractual or otherwise, to the assets of an account that might be entitled to a distribution. These are essentially disputes among private parties that are best resolved by the parties themselves or through the judicial system. The Commission is aware that Sea Carriers is presently involved in a lawsuit against Empire in federal district court, *Sea Carriers Corp. v. Empire Programs, Inc.,* 04-CV-7395 (SDNY 2004), regarding this same issue, namely whether Sea Carriers should share in any recovery Empire might obtain in a distribution from Heffler or in a related class action. Among the matters at issue in that lawsuit are whether Sea Carriers ever had a joint venture agreement with Empire, and the terms of that agreement. These matters are most appropriately resolved in the context of that lawsuit rather than by the fund administrator.[2] Heffler has neither

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the account is a proprietary account or a nominee account. If the account is a nominee account, Heffler asks the nominee to identify the clients who placed the disadvantaged trades.

[2] As part of the lawsuit, Sea Carriers moved the court in January 2005 for emergency relief to enjoin Heffler from distributing any funds to Empire, and to enjoin Empire from accepting any such funds, until Sea Carrier's right to share in the distribution is adjudicated. On February 16, 2005, the court denied the motion, without prejudice, because of the absence of any need for immediate relief. In November 2005, Sea Carriers filed a motion for partial summary judgment on the issue of whether there was a joint venture between Sea Carriers and Empire. Opposing and reply papers have been filed and the summary judgment motion is presently pending before the court. On January 23, 2006, Sea Carriers asked Heffler to withhold any payments to Empire, and informed Heffler that Sea Carriers planned to renew its motion for injunctive relief. On March 22, 2006, Sea Carriers again filed a motion for injunctive relief, seeking, among other things, to enjoin Empire and its President, Robert A. Martin ("Martin"), from receiving or accepting any distributions from Heffler, or to compel Empire and Martin to deposit all distributions with the clerk of the court. This motion was instituted by Order to Show Cause and included an application for a temporary restraining order ("TRO"). On March 23, 2006, the court, after a hearing on the merits, denied Sea Carriers' application for a TRO. The preliminary injunction hearing was adjourned without date. All of the issues concerning the disposition of any distribution funds that Empire may receive are therefore pending before the federal district

the resources nor the expertise to make such judgments, which require complex legal and factual findings about the business arrangements and contractual undertakings of the parties. Heffler's identification of the customers injured as a result of the specialists' trading violations is properly limited to identifying the account holder whose trade was disadvantaged and making distributions to that account holder. If others have claims to that money – because they are partners, joint venturers, shareholders, investors, or otherwise have an interest in the business of the account holder – those disputes should be resolved in another forum, rather than by the fund administrator.[3]

b. Expanding the Class of Injured Customers to Include Other Injured Persons

Several of the commentators argue generally that the class of injured customers should not be limited to persons who actually traded, but should be broadened to include any person who suffered some loss that can be derivatively connected to the specialists' misconduct. For example, IAM asserts that "the class of 'Injured Customers' in the Fund Administrator's Distribution Plan should be changed to include certain injured persons other than account parties and Nominees identified by Clearing Members, and these additional injured persons ("Derivative Claimants") should be eligible to receive distributions of compensatory Disgorgement Amounts, with prejudgment interest." There are two possible ways to interpret such claims: (i) the commentators are seeking to be added to the class of injured customers; and (ii) the commentators are suggesting that, in the alternative, their claims should be satisfied out of the Remaining Funds. The Commission's response to item (ii) is discussed in paragraph c. below.

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court, and the Commission anticipates that the court will be able to take any steps necessary to protect the interests of the parties involved in this active litigation.

[3] The types of judgments that IAM and the SC Traders would have the fund administrator make are very different from those that the fund administrator will make when it looks behind *nominee* accounts to determine the identity of the customer who placed the disadvantaged trade. A nominee is, by definition, acting on behalf of another person. When a client of a brokerage firm or other financial institution places a trade, the broker will often execute the trade through an omnibus or other joint trading account in the name of the broker, and then allocate the trade to the customer's account. In those situations it is appropriate for the fund administrator to seek from the broker the name of the actual customer who placed the trade in order to make a distribution to that client. IAM and the SC Traders, on the other hand, are asking the fund administrator to look behind *proprietary* accounts to determine whether any person other than the named account holder has an interest, contractual or otherwise, in that account. In the case of nominee accounts, the fund administrator's task is fairly mechanical: it involves seeking from the nominee the name of the client on whose behalf the nominee placed the trade, and to whose account the trade is subsequently allocated. To go behind proprietary accounts to determine whether some person other than the account holder has a derivative interest in the account is a far more complicated task, involving complex factual and legal determinations that the fund administrator is ill-equipped to make.

The Commission disagrees with the suggestion that persons who suffered some loss that might be *derivatively connected* to the specialists' misconduct should be included in the class of injured customers. This approach would not be consistent with the theory of the underlying case as embodied in the Settlement Orders entered in this matter. The Settlement Orders require the fund administrator to "identify the *customers* who were injured as a result of the [specialist firm's] trading violations as determined [in the Settlement Orders] by the Commission staff and the NYSE," and specify that the distribution funds are to be used to pay administrative expenses, "to reimburse *injured customers* for their loss" and "to pay prejudgment interest to *injured customers*." *Emphasis added*. The disgorgement obtained in this matter was tied to specific violative transactions that disadvantaged "*customer* orders," resulting in precisely quantifiable harm to identifiable customers. The Settlement Orders were structured to ensure that the disgorged funds are returned to those customers as compensation for the quantifiable harm they suffered. The Settlement Orders also make clear that the injured customers are to be the priority recipients of further distributions by specifying that they should receive prejudgment interest. Changing the class of "injured customers" to include "additional injured persons" who have derivative claims would not be consistent with the plain language and intent of the Settlement Orders.[4]

c. Use of the Remaining Funds

The Settlement Orders provide that "the Commission shall determine the appropriate use for the benefit of investors of any funds left in the Distribution Fund" after the contemplated payments to injured customers and for administrative expenses have been made. Several of the commentators argue that even if the class of injured customers is not broadened to include additional persons who suffered derivative injuries, the Remaining Funds could be used to compensate persons who suffered derivative or consequential damages. For example, two of the SC Traders and IAM argue that they should receive large sums of money – ranging from 1.5 million to 10 million dollars – out of the Remaining Funds, because they claim that the specialist firms' improper conduct ultimately led Sea Carriers to go out of business, causing the SC Traders to lose their jobs and miss out on large profits they would have otherwise obtained, and causing IAM's business to suffer.

As discussed below, the Commission finds that the Plan should be modified to provide for the payment of post-judgment interest to injured customers, but should not be further modified at this time to address the use of any Remaining Funds. Although the Notice solicited comment regarding the Remaining Funds, the comments received reflect a fairly narrow range of options that may not be in the best interest of investors overall. Using the Remaining Funds to pay consequential damages would be particularly problematic. For example, the SC Traders and IAM seek compensation for such things as loss of future business, loss of earnings, loss of investment opportunities, and loss of business reputation. One of the SC Traders, without elaboration, asserts a claim to 1.5 million dollars of the Remaining Funds because he was

[4] Expanding the class of claimants eligible to receive disgorgement funds to include persons other than the injured customers would necessarily reduce the pool of money available to compensate the actual customers. Depending on how broadly the claimant class was expanded, this approach could result in the injured customers not being made whole.

"deprived of current and potential future income as a trader" resulting from "the financial hardship and damages inflicted as a result of the fraudulent activity of the N.Y.S.E. specialist firms." A second SC Trader, who was a partner at Sea Carriers, claims that he is "entitled to a direct payment of $4,000,000" because his "income and equity in Sea Carriers could have grown by tens of millions of dollars" in the absence of the specialist firms' improper conduct. IAM, which manages a fund that invested $4.5 million in Sea Carriers, asserts that the derivative or consequential damages suffered by Sea Carriers, resulting from its alleged joint venture with Empire, caused IAM and its fund, in turn, to suffer material consequential damages, resulting in "investor withdrawals, strategic partners' resignations, and loss of income to principals, thereby diverting limited resources away from core business activities, etc." Claiming that it was "financially devastated" by the specialist firms' improper conduct, IAM states that "it is entitled to a direct payment of $10 million to be paid from the [Remaining Funds]."

Consequential damages of the sort claimed by IAM and the SC Traders are speculative, remote, and notoriously difficult to calculate. Neither the Commission staff nor the fund administrator has the knowledge or expertise to evaluate these claims, and doing so would require the expenditure of considerable resources. If speculative consequential damages are entertained, there are potentially millions of claimants (there are over 2.6 million violative trades, each of which may have resulted in some consequential harm to some person), and the process of adjudicating the relative merits of all these claims would quickly dissipate the Remaining Funds. The Commission shall therefore address the use to be made of any Remaining Funds at a later date, after the public is given further opportunity for comment. In the meantime, the Commission shall approve the Plan, as modified to provide post-judgment interest payments, so that injured customers can begin receiving funds as soon as possible.

2. Other Comments Concerning the Use of the Remaining Funds

Two other commentators wrote with suggestions concerning the use of the Remaining Funds. In its comment letter, WLF urges the Commission to provide more detail as to how it intends to use the Remaining Funds. WLF contends that it is not sufficient, under Rule 1101(b)(5) of the Fair Fund Rules, for the Plan to merely provide that the Commission shall determine the appropriate use of any Remaining Funds at some unspecified date in the future. Instead, WLF argues that the Plan should set forth those appropriate uses, and provide interested parties an opportunity to comment on those uses. However, Rule 1101(b)(5) of the Fair Fund Rules merely requires there be "a provision for the disposition of any funds not otherwise distributed." The Commission believes that by setting forth a termination date for the Fair Funds and providing that the Commission shall determine the appropriate use for the benefit of investors of any funds left in the Fund following all payments, the Plan satisfies the requirements of Rule 1101(b)(5). The Commission, however, agrees with WLF's suggestion that there be further opportunity for public comment on the use of the Remaining Funds.

Substantively, WLF suggests that the Commission distribute the Remaining Funds to the injured customers, in the form of post-judgment interest, and Empire, in its comment letter, suggests that the Commission distribute the Remaining Funds to the injured customers on a pro-rata basis. Specifically, WLF argues that it "would be wholly appropriate for the Commission to award additional interest – calculated through the date of distribution – for the Injured

Customers." The Commission agrees with WLF's suggestion that injured customers should receive post-judgment interest:[5] such payments will more fully compensate injured customers by taking account of the time-value of the money they are owed. The Commission, however, disagrees with Empire's suggestion that the Remaining Funds should be distributed pro-rata to the injured customers, because such payments would result in the injured customers obtaining an undeserved windfall. The Commission believes that the determination of what to do with any Remaining Funds left after the payments to injured customers, including payments of post-judgment interest, should be made by the Commission at a later date, after further public notice and comment.

3. Comment Regarding Publication of Violative Trades and Injured Customers

One commentator, Franco Mortarotti of Zermatt Capital Management, suggests that a list of the violative trades and the identities of the injured customers be published on a website. The Commission disagrees with this suggestion. Disclosing the identities of the injured customers and information about their trades raises serious privacy concerns. Indeed, divulging certain identifying information may run afoul of the privacy laws in effect in the various domestic and foreign jurisdictions where the injured customers may reside. In any event, the Plan provides a verification procedure whereby persons may determine whether they are in the class of injured customers, and, if so, verify the accuracy of their distribution amount. The verification procedure provides an efficient mechanism for persons to determine whether they are eligible for a distribution without raising the kind of privacy concerns that would be implicated by publishing a list of injured customers and their trades.

Accordingly, IT IS HEREBY ORDERED, pursuant to Rule 1104 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1104, that the Distribution Plan is modified to include the payment of post-judgment interest to injured customers, subject to adequate tax documentation, calculated through the date of distribution, and approved with such modification.

By the Commission.

Nancy M. Morris
Secretary

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[5] The fund administrator may not be able to make post-judgment interest payments to every injured customer because, under the Internal Revenue Code, payments of post-judgment interest can only be made to persons who have submitted certain tax documentation. The Plan, as modified, makes clear that the fund administrator need only make payments of post-judgment interest where the proper tax documentation is made available by the injured customer.