Robert J. Peacock

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Office of the Secretary
United States Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-9303

Comments

**Admin. Proc. File Nos. 3-11445, 3-11446, 3-11447,
3-11448, 3-11449, 3-11558, 3-11559 ("NYSE Fraud")
FUND ADMINISTRATOR'S PROPOSED FAIR FUND DISTRIBUTION PLAN**

Preface:

The NYSE Fraud has created a horrendous mess.

Judging by the data released in the Proposed Plan (i.e. $157,624,364 in disgorgement amounts on over 2.6 million transactions identified by the SEC and the NYSE's Self Regulatory Organization as "Violative Transactions,"), it is obvious that the NYSE Fraud was in fact a "skimming scheme", skimming (stealing) anywhere from a fraction of a cent per share to three cents, five cents, or twenty five cents or more per share.

Due to the nature of the NYSE Fraud, that is reporting executions that are just pennies off where the transactions should have been filled, no doubt some "injured customers" will be shocked to get a check from the escrow agent of the Fund Administrator because they were unaware that they had been victimized in the first place. Some of these victims may not even be aware that the NYSE Fraud took place at all.

Some of the large Wall Street firms that routinely participate in what is known as "program trading" will not be surprised when they receive a check, but will likely have no clue as to when specific violations occurred, nor will the amount of check be material to their overall financial statements as such program trading activity is a miniscule percentage of their overall business models.
However, there is a category of victims that was financially devastated by the NYSE Fraud, and I include myself in this category. From December, 2000, through March, 2005, as an independent contractor to Sea Carriers of Greenwich, Connecticut, I traded over 500,000,000 shares of stock listed on the NYSE. I actively traded baskets of the

largest capitalized and most actively traded stocks listed on the Exchange. The specific stocks I traded included TXN, MOT, MER, C, EMC, GLW, GS, GE, JPM, JNJ, MWD, TYC, MRK, AOL, IBM, MU, AIG, TER, VZ, PFE, LLY, ADI… The SEC has identified these stocks in particular were at the epicenter of the NYSE Fraud. My orders were transmitted directly to the NYSE Specialists via the NYSE's Super DOT system. The Super DOT system was at the epicenter of the NYSE Fraud. I used unconditional market orders to buy or sell stocks. Unconditional market orders to buy or sell transmitted over the Super DOT system were not only at the epicenter of the NYSE Fraud, but it has been reported in the criminal investigation of certain NYSE Specialists that the Specialists had a "screw the DOTS (orders)" mentality.

I was a small, independent trader, caught smack in the crosshairs of the NYSE Fraud. I was a small independent trader, whose career was focused on trading stocks, to the exclusion of everything else. I depended on this career to pay my mortgage, care for my family, and put my two daughters through college. I worked countless hours at Sea Carriers, and was made a partner. I depended on this career to build my retirement account.

My compensation as an independent trader contracted by Sea Carriers was based solely on performance. I received 20-25% of any trading gain I generated (after SEC fees and brokerage commissions). For those new traders that were assigned to me to mentor, I was paid 5% of their net profits. From 2001 to 2002, I traded approximately 392,225,000 shares of stock for the Empire Programs/Sea Carriers joint venture. From January, 2003 to March, 2005, I traded approximately 107,775,000 shares of stock for Sea Carriers Limited Partnership I, and for a portion of this period was also an investor in Sea Carriers Limited Partnership I.

Being in the crosshairs of the NYSE Fraud finally overwhelmed Sea Carriers. The NYSE Fraud diminished investment returns, and investors redeemed their shares in Sea Carriers Limited Partnership I. In March, 2005, Sea Carriers was forced to cease trading. My job was lost, and my promotion to partner was meaningless. The four years I dedicated to this career opportunity, becoming a partner in Sea Carriers, was all for nothing. The NYSE Fraud derailed my career at a critical time, and as a result, declaring personal bankruptcy is a distinct possibility for me today.

The financial impact of the NYSE Fraud has been devastating. The delay in being reimbursed for losses has only exacerbated the situation.

The SEC and Fund Administrator have made a good ***start*** in the process of identification of "injured customers." Specifically, the Administrator states he is in the process of

identifying "injured customers" by ascertaining the person or entity whose name and address is shown on the books of a clearing member as the owner of an account defrauded by NYSE specialists. In certain cases, however, the impact of the NYSE Fraud materially and adversely affected persons or entities beyond the actual "owners" of security accounts now being identified by the Fund Administrator.

The securities account opened at Spear, Leeds & Kellogg (SLK) by R. Allan Martin in the name of Empire Programs is a case in point (Empire Programs has been named by Federal Judge Robert Sweet as co-lead plaintiff in the class action lawsuit against the NYSE and its member firms). Mr. Martin/Empire had a joint venture ("joint venture" is the precise term R. Allan Martin used to describe the arrangement) with Sea Carriers, whereby Empire Programs provided trading capital, and Sea Carriers and its independent traders/contractors, designed and executed the trading strategy.

Having named Empire Programs as co-lead plaintiff in the class action lawsuit, Judge Sweet determined that Empire Programs has the largest financial interest in the matter of the NYSE Fraud. As such, it is reasonable to assume that Empire is likely to be paid the largest sum of money compared to any of the other "injured customers" identified by the Fund Administrator. ***Because of the magnitude of this account and the likelihood that Empire's reimbursement will be the largest distribution of the Fair Fund, this matter warrants special consideration by the SEC and Fund Administrator.***

The terms of the Empire Programs/Sea Carriers joint venture were straightforward. On a monthly basis, 20-25% (and in some cases more than 25%) of Net Trading Profits (that is trading profits less commissions and SEC fees) were paid out to Sea Carriers independently contracted traders. Joint venture expenses (which included but were not limited to utility costs, office rent, data costs…) were then deducted from the remaining Net Trading Profits, if any. Any amount remaining was split 50% to Empire Programs, 50% to Sea Carriers.

Mr. Martin, in his May 12, 2004 Declaration in connection with Empire's Lead Plaintiff Motion filed in US District Court stated, "Empire and Empire alone owns its claims herein…" (the "claims herein" being any disbursements of reimbursement of losses, prejudgment interest, and/or penalties). As a result of Mr. Martin's claims, Sea Carriers filed a lawsuit against Empire Programs in the US District Court, Southern District of NY (Index No. 04-CV-7395). Among other things, Sea Carriers has petitioned Judge Sweet to block any payments to Empire Programs by the Fund Administrator.

To summarize the arrangement between Empire, Sea Carriers and its independent traders, every $100 (of disgorgement amounts, prejudgment interest, and/or penalty amounts) should be allocated as follows:

$25 payout for the independent traders of Sea Carriers
$37.50 to Sea Carriers

$37.50 to Empire

Based upon Mr. Martin's May 12, 2004 Declaration in connection with Empire's Lead Plaintiff Motion stating, "Empire and Empire alone owns its claims herein…" (the "claims herein" being any disbursements of reimbursement of losses, prejudgment interest, and/or penalties), Mr. Martin's formula is:

$0 payout for the independent traders of Sea Carriers
$0 to Sea Carriers
$100.00 to Empire

The NYSE Fraud diminished Net Trading Profits generated by the Empire Programs/Sea Carriers joint venture. As such, it adversely affected not only Empire Programs, but it also adversely affected Sea Carriers and its traders that it had independently contracted. Sea Carriers and its independent traders were all compensated based solely upon performance. The actual performance was diminished by the NYSE Fraud, and therefore the amount that Sea Carriers and its independent traders earned was also diminished.

Summary of Comments Regarding – "Injured Customers"

1. The class of "Injured Customers" in the Fund Administrator's Proposed 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.

2. Derivative Claimants should be eligible to receive distributions of penalties and consequential damages, whether Derivative Claimants receive compensatory Disgorgement Amounts or not.

3. If the Plan is not changed to accommodate the two requests above, language in the Commission's final order should nevertheless:

    - Maintain jurisdiction over this matter even after the fund Administrator has made all distributions.

    - Issue an express finding that the Specialist Firms' trading violations have injured persons besides account parties-specifically, third parties positioned to benefit (or lose) from transactions involving the Specialist Firms and the account parties.

    - Make Injured Customers acknowledge, as a precondition to their receipt of distributions, their legal obligation to share distributions with third party beneficiaries of the transactions at issue; and

- Permit Derivative Claimants to seek further SEC review if such Injured Customers do not so share the distributions received.

Discussion of "Injured Customers"

1. The class of "Injured Customers" should include certain injured persons other than account parties.

   The class of "Injured Customers" should be broadened for three reasons. First, this interpretation is consistent with the stated goals of the Fair Fund. Second, some Injured Customers have expressed a subversive intention not to share distributions with other parties whom Violative Transactions affect. Third, the nature of the entity comprising an Injured Customer might give the partner of an Injured Customer a direct pro rata interest in distribution proceeds.

   First, according to the Commission, Fair Fund distributions aspire to redress injuries arising "as a result of the Specialist Firms' trading violations."[1] The current Distribution Plan therefore limits the class of claimants to "the customers who were injured as a result of" Violative Transactions.[2] Without any stated legal justification, however, the Plan interprets "Injured Customers" to include only account parties identified by Clearing Members or Nominees.[3] This interpretation clashes with the Commission's stated intent, because Violative Transactions were the proximate cause of substantial economic injuries beyond those to account parties. The Plan acknowledges that "one transaction could represent a block of trades from more than one Injured Customer."[4] Thus, if a Clearing Member identifies "multiple Injured Customers" for one transaction, the Fund Administrator allocates the Disgorgement Amount "to each Injured Customer pro rata."[5] If, however, a Violative Transaction caused an Injured Customer in turn to injure multiple Derivative Claimants, and a Derivative Claimant therefore loses investors, the Plan unreasonably fails to allocate compensatory distributions pro rata to each injured Derivative Claimant. Such a failure unequally treats persons who are similarly situated.

   Second, the Distribution Plan should not make it easy for Injured Customers to subvert the Commission's intent by withholding distributions from other parties whom Violative Transactions affect. Perhaps the Fund Administrator has assumed that consequential injuries are matters to be resolved between an Injured Customer and a Derivative

[1] Notice of Proposed Distribution Plan and Opportunity for Comment at 2.
[2] Fund Administrator's Proposed Fair Fund Distribution Plan at 4.
[3] Fund Administrator's Proposed Fair Fund Distribution Plan at 5.
[4] Fund Administrator's Proposed Fair Fund Distribution Plan at 5.
[5] Fund Administrator's Proposed Fair Fund Distribution Plan at 6.

Claimant—not between them and the Commission. As shown by the example of Empire, however, some Injured Customers have already decided, if possible, not to share their distributions with Derivative Claimants. Empire's statements exemplify a problem that will only worsen if the Commission does not speak to the issue.

Third, the Plan fails to recognize that the nature of the entity comprising an Injured Customer might give the partner of an Injured Customer a direct pro rata interest in distribution proceeds. The Uniform Partnership Act, for example, rebuttably presumes property purchased with partnership funds to be partnership property, notwithstanding the name in which title is held.[6] The current Plan's simplistic method ignores such complexities, thereby fostering unfairness.

2. Derivative Claimants should be eligible to receive distributions of penalties and consequential damages.

By definition, "consequential damages" arise not from the immediate act of the party, but in consequence of such act—such as if a person throws a log into the public streets and another falls upon it and becomes injured by the fall.[7] Violative Transactions in the current matter triggered a chain of effects that resulted in numerous consequential damages. Injuries to Derivative Claimants fall under the heading of "consequential damages," both because Injured Customers passed their losses on to Derivative Claimants and because Derivative Claimants suffered further financial harm as a result of their injured track record.

Similarly, by definition, a "penalty" punishes a person for the commission of a crime.[8] Accordingly, the essential element of the penalties in this matter is the fact that they deprive the Specialists of certain monies—not the fact that Injured Customers receive them. Distributions of penalties will therefore penalize the Specialists just as much if Derivative Claimants receive them as if Injured Customers receive them.

Summary of Comments on the Proposed Distribution Plan:

1. All distributions of any kind (disgorgement amounts plus prejudgment interest and/or any related penalty amounts) to Empire Programs, Inc., (3 Kenwood Road, Saddle River, New Jersey, 07458, R. Allen Martin, President) should be deposited into an

[6] "Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership." Uniform Partnership Act § 204(c) (1997), posted at http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa97fa.htm (last visited Jan. 23, 2006). The Uniform Partnership Act of 1997 has been adopted in every state except Louisiana.

[7] *See, e.g.*, Black's Law Dictionary: Pocket Edition, ed. Bryan A. Garner (West Group 1996) at 163.

[8] *See id.* at 475.

escrow account to be overseen by Judge Robert Sweet, US District Court, Southern District of NY.

2. All distributions for Empire Programs, Inc., should be accompanied with a detailed itemization of each Violative Transaction, and include the following information for each of the Violative Transactions:

    Prejudgment Interest Amount
    Clearing member number
    Clearing member name
    Trade date
    Security symbol
    Firm mnemonics
    Branch and sequence codes
    Turn around code
    Transaction type
    Number of shares
    Time of trade
    The Specialist Firm
    The Disgorgement Amount
    The Execution Price
    The CUSIP number
    The principal/agency code
    Violation Type – front running, negative obligation…

3. The Fund Administrator should <u>immediately and without delay</u> make available (on a computer file) an up to date listing of all Violative Transactions identified as those to be disbursed to Empire Programs, Inc, along with a complete breakdown per Violative Transaction as described in Comment #2. This listing of Violative Transactions for Empire Programs should be updated at least once a week, reflecting any additional information that the Administrator receives from Spear, Leeds & Kellogg, Empire Program, Inc.'s only clearing and execution broker.

4. On the top of page 4 of his proposed Distribution Plan, the Administrator described that a "retroactive surveillance" was conducted by the NYSE to identify Violative Transactions. The Administrator also indicated that the surveillance used, " certain time parameters." The specific particulars of the "retroactive surveillance" that was conducted should be disclosed to the public, in its entirety and without ambiguity as to methods/parameters, scope… **<u>Public disclosure of this information, however, should not delay for one second the distribution of funds to the NYSE Fraud victims (noting the exception for freezing all distributions to Empire Programs).</u>**

5. The delay in reimbursing damages caused by the NYSE Fraud has only exacerbated the financial devastation to some of the NYSE Fraud victims. The SEC and Fund Administrator should take all actions necessary to set as a number one priority the immediate reimbursement of damages to all the victims. Specifically, Goldman

Sachs/Spear, Leeds & Kellogg should be given an order by the SEC to complete its entire submission to the Fund Administrator within 7 days, or face a $100,000 per day fine until Fund Administrator's request for information is completely fulfilled. Furthermore, the SEC and Fund Administrator should streamline their future interactions so as to allow the actual reimbursement of damages to occur as soon as possible.

Summary of comments on "the use to be made of any funds left after the contemplated payments have been made" (currently estimated to be $50-70 million).

The NYSE Fraud caused Sea Carriers, the firm I worked at for four years, to cease operations. As a result, I lost my job, and all the time and effort I put into the firm to become a partner was all for nothing. The NYSE derailed my career at a critical time, a time when I needed income to pay college tuition costs for my two daughters, at a time that I needed to reduce the amount of debt I owed to others, and at a time that I needed to grow my retirement account.

Because the NYSE Fraud affected me and my personal situation so materially, a huge portion of my time became focused and directed at the Fraud. Beginning in 2003, much of my time at Sea Carriers was devoted to trying to analyze and understand exactly what the NYSE Specialists were doing. I spent a tremendous amount of time dealing/complaining to NYSE's self regulatory organization over specific fraudulent trades. I was totally distracted by fellow traders calling in hundreds (if not more) specific complaints to our broker, SLK, and then Calyon. I spent hours corresponding and speaking with staff members of US Senator Jon Corzine on various NYSE Fraud related issues, and I helped my colleagues contact their elected officials. In particular, US Congressman Christopher Shays of Connecticut was contacted multiple times seeking his assistance in this matter. A member of Congressman Shays' staff actually visited Sea Carriers' office. I spent countless hours with Sea Carriers' attorneys on all the matters related to the NYSE Fraud.

Please consider a scenario where the NYSE Fraud never took place at all. As a partner of Sea Carriers, I would have focused 100% of my activities and efforts on trading, developing new systems, and growing the amount of money under management. My income and equity in Sea Carriers could have grown by tens of millions of dollars.

I therefore request that the SEC consider my special circumstances, consider that I personally was financially devastated by the NYSE Fraud, and therefore conclude that I am entitled to additional compensation with respect to the actual, derivative and consequential damages suffered as a result of the NYSE Fraud. I seek and claim that I, Robert J. Peacock, am entitled to a direct payment of $4,000,000 to be paid from the estimated $50-70 million of funds left after the contemplated payments have been

made.