

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11893

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 20, 2007

In the Matter of :
 :
 :
 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

DEC 21 2007

FIRST CLASS

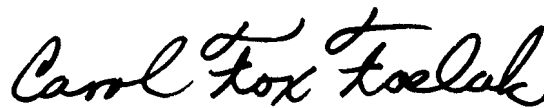
ORDER

The Order Instituting Proceedings in this matter alleges that each Respondent engaged in misconduct while associated with one of five specialist firms at the New York Stock Exchange (NYSE). Under consideration is several Respondents' December 12, 2007, Application for Subpoena to NYSE (MARS Access), the NYSE's December 13 Opposition, and Respondents' December 14 Reply. Several Respondents had engaged an expert to analyze and assess data regarding quotes, orders, and trades by specialists that include data from systems and stores maintained at the SIAC facility at 55 Water Street and the MARS facility at 14 Wall Street.¹ Following negotiation with the NYSE, Respondents obtained access to the MARS facility under highly secure conditions as of October 11. However, they state, the NYSE suddenly cut off access as of December 10, citing a plan to renovate the premises. The NYSE states that it has attempted to accommodate Respondents' needs, questions their diligence, and stresses the urgency of the renovation project which is projected to last through the Spring of 2008. Respondents reply that they have substantial need for MARS, the Division of Enforcement (Division) has had access for years, and without continuing access they will be severely prejudiced in preparing and presenting their defense.

¹ SIAC is the acronym for Securities Industry Automation Corporation, and MARS, for Market Analysis Reconstruction System. MARS is a confidential proprietary surveillance tool used by NYSE Enforcement to surveil for violative conduct. The Division of Enforcement has had access to the MARS facility in connection with the charges in this proceeding.

The availability of subpoenas in the Securities and Exchange Commission's administrative proceedings is set forth in 17 C.F.R. § 201.232, which authorizes, in addition to subpoenas ad testificandum, "subpoenas requiring the production of documentary or other tangible evidence." Whatever the merits of Respondents' arguments concerning their need for MARS access, their request, for access to premises controlled by the NYSE, does not come within the description of "documentary or other tangible evidence" and thus lies outside the subpoena power. To the extent that any due process or fairness concerns result from Respondents' lack of access to the MARS facility, it will be necessary to resolve them through evidentiary rulings, such as excluding the Division's evidence or limiting its weight.

IT IS SO ORDERED.



Carol Fox Foelak
Administrative Law Judge