

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 53631 / April 12, 2006

ADMINISTRATIVE PROCEEDING
File No. 3-12259

In the Matter of

INET ATS, Inc.

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE AND
CEASE-AND-DESIST PROCEEDINGS, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER PURSUANT TO SECTIONS 15(b) AND
21C OF THE SECURITIES EXCHANGE ACT OF
1934**

I.

The Securities and Exchange Commission (“Commission” or “SEC”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against INET ATS, Inc. (“Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

1. INET ATS, Inc. ("INET"), a subsidiary of Instinet Group Incorporated ("Instinet Group") during the relevant period, is a Jersey City, NJ-based registered broker-dealer that operates an alternative trading system ("ATS") pursuant to Regulation ATS under the Exchange Act. INET was formed between December 2003 and February 2004, through the combination of two ATSs: (i) an ATS operated by Instinet Corporation ("Instinet's ATS"), a subsidiary of Instinet Group, and (ii) The Island ECN, Inc. ("Island"), another ATS purchased by Instinet Group on September 20, 2002. The combined ATS was then renamed INET. The conduct addressed in this order was committed by Instinet's ATS before it was merged with Island and renamed INET. An ATS is any organization, association, person, group of persons, or system: (a) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Exchange Act Rule 3b-16; and (b) that does not: (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) discipline subscribers other than by exclusion from trading.

2. Rule 301(a) of Regulation ATS provides that an ATS must comply with Rule 301(b) of Regulation ATS, unless the ATS is registered as a national securities exchange or qualifies for another enumerated exclusion. During the relevant period, Instinet's ATS was not registered as a national securities exchange and did not qualify for an enumerated exclusion. Therefore, Instinet's ATS was required to comply with Rule 301(b) of Regulation ATS.

3. During the relevant period, Rule 301(b)(5) of Regulation ATS required an ATS that had 20 percent or more of the average daily volume (the "fair access threshold") for any covered security during four of the preceding six months to comply with "fair access" requirements including: (a) establishing written standards for granting access to trading on its system with respect to such security; and (b) not unreasonably prohibiting or limiting any person in respect to access to services offered by the ATS with respect to such security by applying such standards in an unfair or discriminatory manner. 17 CFR 242.301(b)(5)(ii) (A) and (B); Exchange Act Release No. 40760 (December 8, 1998), 68 SEC Docket 2188, 2217-2218 ("Adopting Release"). The fair access requirements apply on a security-by-security basis. Adopting Release, 68 SEC Docket at 2217 ("The twenty percent volume threshold will be applied on a security-by-security basis for equity securities. Accordingly, if an alternative trading system accounted for twenty percent or more of the share volume in any equity security, it must comply with fair access requirements in granting access to trading in that security."). A denial of access is reasonable if it is based on objective standards that are applied in a fair and non-discriminatory manner. A denial of access might be unreasonable if it were discriminatorily applied among similar subscribers. Adopting Release, 68 SEC Docket 2188, 2218.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. The fair access requirements of Regulation ATS were based on the principle that qualified market participants should have fair access to the nation's securities markets. Adopting Release, 68 SEC Docket at 2217. Fair treatment of potential and current subscribers by an ATS is particularly important when an ATS captures a large percentage of the trading volume in a security because viable alternatives to trading may be limited. Adopting Release, 68 SEC Docket at 2216. Direct participation in an ATS offers certain benefits with respect to which an ATS that crosses the fair access threshold for a covered security should not unfairly discriminate in granting access with respect to such security. Adopting Release, 68 SEC Docket at 2216; Exchange Act Release No. 39884 (April 17, 1998), 66 SEC Docket 3119, 3154. These benefits include the ability to view all orders (depth of book), not just the best bid or offer (top of book), which provides important information about the depth of interest in that security. Adopting Release, 68 SEC Docket at 2216.

5. Regulation ATS requires an ATS that crosses the fair access threshold in a covered security to report all grants, denials, and limitations of access (and the reasons, for each applicant, for granting, denying, or limiting access) with respect to such security on its quarterly Form ATS-R. 17 CFR 242.301(b)(5)(ii)(D).

6. Instinet's ATS crossed the fair access threshold every month between February 2002 and July 2003 (the "relevant period") with respect to between 12 and 105 covered securities in each month. Therefore, with respect to these securities during the relevant period, Instinet's ATS was subject to the fair access requirements of Regulation ATS as well as the requirement to report all grants, denials, and limitations of access (and the reasons, for each applicant, for granting, denying, or limiting access) with respect to such securities on its quarterly Form ATS-R.

7. During the relevant period, Instinet's ATS functioned as an agency broker and as an ATS. As an ATS, Instinet's ATS collected, prioritized, displayed, provided routing services and matched orders within its member network, and provided certain other services.

8. During the relevant period, Instinet's ATS had a member network composed of broker-dealer subscribers, who entered into contractual agreements to access the ATS for purposes of effecting transactions in securities or submitting, disseminating, or displaying orders on the ATS.

9. In early 2002, Instinet's ATS developed a data-only product called "BookStream" that allowed a subscriber the ability only to view orders contained in the ATS book without interacting with the order book, or submitting, disseminating or displaying orders on the ATS. BookStream featured the full "depth of book" data that allowed a subscriber the ability to view not only the best bids and offers, but all of the bids and offers on the ATS. BookStream was an important ATS feature because it enabled subscribers to view, on a real-time basis, market data regarding the depth of trading interest in covered securities.

10. During the relevant period, Instinet's ATS had written access standards that incorporated by reference subscriber agreements that contained a clause governing "redistribution" of services, which stated, in relevant part: "subscribers are prohibited from making Instinet services and data available, directly or indirectly, to third parties (other than subscriber's properly

authorized employees, affiliates, employees of affiliates) without the prior written approval of Instinet.” This “redistribution” standard was not an objective standard applied in a fair and non-discriminatory manner because it did not specify the circumstances under which Instinet’s ATS would authorize subscribers to provide or redistribute these services to customers.

11. After BookStream was implemented by Instinet’s ATS, various broker-dealer subscribers requested to redistribute BookStream to their customers.

12. BookStream was an ATS function and a benefit to ATS membership to which an ATS could not unreasonably prohibit or limit access in an unfair or discriminatory manner with respect to those covered securities for which Instinet’s ATS crossed the fair access threshold. 17 CFR 242.301(b)(5)(ii)(B).

13. During the relevant period, Instinet’s ATS contractually granted permission to some subscribers to redistribute BookStream while other similarly situated subscribers were not permitted to redistribute BookStream. While such disparate treatment may be justified if it is based on objective standards that are applied in a fair and non-discriminatory manner (Adopting Release, 68 SEC Docket at 2218), this was not the case here. Therefore, Instinet’s ATS willfully violated Rule 301(b)(5)(ii)(B) of Regulation ATS under the Exchange Act.²

14. During the relevant period, Instinet’s ATS filed five Forms ATS-R with the Commission. These filings did not disclose all required grants, denials and limitations of access to BookStream.

15. By failing to disclose, with respect to covered securities in which Instinet’s ATS exceeded the fair access threshold, all required grants, denials, or limitations of access on its Form ATS-R during the relevant period, Instinet’s ATS willfully violated Rule 301(b)(5)(ii)(D) of Regulation ATS under the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondent’s Offer.

Accordingly, it is hereby ORDERED:

- A. That Respondent be, and hereby is, censured;
- B. That Respondent cease and desist from committing or causing any violations and any future violations of Rules 301(b)(5)(ii)(B) and 301(b)(5)(ii)(D) of Regulation ATS under the Exchange Act; and

² “Willfully” as used in this Offer means intentionally committing the act which constitutes the violation, *see Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

C. That Respondent shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$350,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies INET ATS, Inc. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Securities and Exchange Commission, Boston District Office, 73 Tremont Street, 6th Floor, Boston, MA 02108.

By the Commission.

Nancy M. Morris
Secretary