UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64553 / May 26, 2011

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** **Admin. Proc. File No. 3-11448** **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.**	:	**ORDER APPROVING TRANSFER OF REMAINING DISTRIBUTION FUNDS TO THE U.S. TREASURY**

In this order, we consider the use to be made of the money remaining in seven Fair Funds ("the distribution funds") created in connection with orders instituting and settling proceedings ("the settlement orders") against seven specialist firms ("the specialist firms") operating on the New York Stock Exchange ("NYSE"). Pursuant to the settlement orders, the specialist firms paid over $247 million in disgorgement and civil penalties into the distribution funds. After six distributions, $159.8 million remains in the funds ("the remaining funds").

On July 30, 2009, the Commission issued notice ("July 30 Notice") that the distribution funds would be closed and that the administrator had concluded that the remaining funds should be transferred to the United States Treasury. Exchange Act Rel. No. 60403 (July 30, 2009). The Commission requested public comment regarding this determination. After reviewing the comments we received, we agree that the remaining funds should be transferred to the Treasury.

I. FACTS

A. The Commission and the specialist firms settled charges that the firms failed to serve public customer orders over their own proprietary interests.

In March and July 2004, the Commission instituted proceedings against, and entered into settlements with, the seven specialist firms operating on the New York Stock Exchange (Bear Wagner Specialists LLC; Fleet Specialist, Inc. ("Fleet"); LaBranche & Co. LLC; Spear, Leeds & Kellogg Specialists LLC; Van der Moolen Specialists USA, LLC ("VDMS"); Performance Specialist Group LLC; SIG Specialists, Inc.). Exchange Act Rel. Nos. 49498–49502 and Nos. 50075–50076. Two specialist firms, VDMS and Fleet, submitted comments in response to the Commission's July 30 Notice. Fleet's comment was written on behalf of all the specialist firms.

In these proceedings, the Commission charged (and found) that the specialist firms had failed to satisfy their obligation to match executable public customer or "agency" buy and sell orders. Instead, the firms executed proprietary trades for their own account, primarily in the form of "interpositioning" and "trading ahead," obtaining a profit for themselves while simultaneously placing executable public customer orders at a disadvantage. Interpositioning occurs, for example, when a specialist firm buys stock for the firm's own account from a customer sell order, and then fills a customer buy order by selling from the firm's account at a higher price—thus realizing a profit from the spread. "Trading ahead" occurs, for example, when a specialist firm fills one agency order through a proprietary trade for the firm's account, and thereby improperly "trades ahead" of another executable agency order. As a result, the customer order that was traded ahead of is disadvantaged because it is executed at a price that is inferior to the price received by the dealer account.

The extent of the violative trading was determined through the use of a retroactive surveillance conducted by the NYSE, at the direction of the Commission's Office of Compliance Inspections and Examinations. This surveillance generated an exception report that identified a series 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. In order to account for possible false positives—due to system errors and the oral execution of orders in an open outcry auction market—the Commission's settlements only counted as violations those instances where the specialist traded for the proprietary account ahead of an executable agency order that had been visible on the specialist's book for a certain period of time, at least ten seconds. The exception report 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. These transactions caused approximately $157 million in customer harm.

The settlement orders thus required, among other things, that the specialist firms pay, in the aggregate, roughly $157 million in disgorgement and almost $90 million in penalties. Each settlement order provided that the disgorgement and civil penalties attributable thereto would be added to a distribution fund. The proceeds of all seven funds would be jointly administered and distributed according to a plan drawn up by a fund administrator that we would appoint.

Each settlement order gave the administrator the task of identifying "the customers who were injured as a result of [the specialist firm's] trading violations as determined herein by the Commission staff and the [New York Stock Exchange]." *E.g.*, *In re Bear Wagner Specialists LLC*, Exchange Act Rel. No. 49498, at ¶ IV.E, 2004 WL 626586, at *12 (Mar. 30, 2004). The administrator would then use the distribution funds "(i) to pay the costs of administering the [p]lan; (ii) to reimburse injured customers for their loss; and (iii) to pay prejudgment interest to injured customers." *Id.* As to any residual funds not distributed or used to cover the costs of administering the plan, each settlement order stated that "[t]he 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]." *Id*.

B. Injured investors filed suit against the specialist firms in federal court.

Just before the Commission settled its administrative proceedings against the specialist firms, investors filed five actions in the U.S. District Court for the Southern District of New York, alleging, on behalf of a purported class, that the seven specialist firms violated the securities laws. *See In re NYSE Specialists Sec. Litig.*, No. 03 Civ. 8264 (RWS) (S.D.N.Y.). The district court consolidated the cases in May 2004, and appointed Empire Program, Inc. ("Empire") and California Public Employees' Retirement System ("CalPERS") as co-lead plaintiffs. (In February 2007, the district court issued an opinion disqualifying and removing Empire as co-lead plaintiff.) Empire and CalPERS submitted comments in response to the Commission's July 30 Notice. Another commenter, Robert J. Peacock, worked as an independent trader for Empire and another class member, Sea Carriers Corporation.

The district court certified a class on June 5, 2009. *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 59–60 (S.D.N.Y. 2009). In its opinion, the court specifically addressed the overlap, or lack thereof, between the class action and the Commission's settlement in response to the specialist firms' argument that a class should not be certified because the class action was "duplicative" of the Commission's proceedings. *Id*. at 81. The court explained that even though the class action complaint alleged the same type of wrongdoing as that alleged by the Commission, the class action was "not duplicative" because it "only provides for relief for those violative transactions not yet accounted for" by the settlement. *Id*. (*citing* 405 F. Supp. 2d 281, 311 (S.D.N.Y. 2005), *aff'd and vacated in part on other grounds,* 503 F.3d 89 (2d Cir. 2007)); *see also id*. at 60 ("[N]o customer could recover with respect to trades already covered by the Specialist Firms' regulatory settlements."). Specifically, the certified class consists of those customers whose orders were allegedly disadvantaged by violative transactions that were not included in the Commission's settlements, namely customers whose trades fell in the 1 to 10 second time period. Thus, the transactions covered by the settlements and the transactions at issue in the pending class action are mutually exclusive.

C. The administrator proposed a distribution plan that the Commission approved.

In October 2004, the Commission established the seven distribution funds described in the settlement orders and appointed Heffler, Radetich & Saitta L.L.P. ("Heffler") to serve as their administrator. Exchange Act Rel. Nos. 50529–50535. The October orders directed Heffler to create a distribution plan, which we published for comment on December 27, 2005 and approved, as modified, on May 17, 2006. Exchange Act Rel. Nos. 53025 and 53823. The plan was implemented on July 5, 2006. Exchange Act Rel. No. 54102.

Heffler's plan, as modified, consisted of three parts: identification, calculation, and distribution. As a first step, Heffler would identify the investors who were injured as a result of the violative transactions that had previously been identified by the staff of the Commission and the NYSE. Once Heffler identified the injured investors, Heffler would calculate the respective distribution amount, which would consist of the disgorgement amount tied to the specific violative transaction, plus "prejudgment interest" (covering the period from the date of the transaction to the date of the settlement order) and "post-judgment interest" (covering the period from the day following the entry of the settlement order to the date of distribution). Third, Heffler would pay out the distribution amounts on a rolling basis, seeking approval from the Commission prior to each distribution.

D. Heffler identified injured investors and distributed checks totaling over $141 million in six distributions.

Pursuant to the plan and the terms of the settlement orders, Heffler set out to identify customers who were injured as a result of the previously identified violative trades. As stated, those trades were listed on an NYSE exception report that identified the stock and the clearing firm, as well as the date, time, and size of the order. The report listed over 2.6 million violative transactions and included the following information for each transaction: 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, specialist firm number, disgorgement amount, execution price, CUSIP number, and principal/agency code.

Heffler used the clearing firm numbers listed in the exception report to identify over 160 clearing firms. Heffler then sent an electronic file containing the applicable violative transactions to the respective clearing firm, and requested that the firm identify the customer or customers associated with each harmed transaction. A number of clearing firms indicated that they did not have the information to identify the underlying investor, and instead, directed Heffler to introducing broker-dealers to identify the underlying customer, or customers in the case of certain nominee accounts.

As a result, the process of identifying injured customers was labor intensive and required contacting approximately 7,022 entities (including clearing firms, broker-dealers, and nominees) and asking them to supply customer information relating to the specific trades identified in the NYSE exception report. Overall, Heffler was able to identify customers connected to approximately 2.065 million of the 2.661 million violative transactions. Because some of the violative transactions were entered in the name of nominee accounts, more than one injured customer could be connected to a particular violative trade. At the same time, some customers could be connected to multiple violative transactions.

After identifying the injured customers, Heffler proceeded to calculate each customer's distribution amount, which consisted of the disgorgement tied to the particular violative trade plus "pre- and post-judgment" interest. After getting Commission approval to distribute the funds, Heffler made six rolling distributions under the plan, issuing 564,755 checks totaling, in the aggregate, over $141 million consisting of disgorgement and interest. *See* Table 1.

Table 1

Disbursement Dates (Exch. Act Rel. No.)	**Total**	**Disgorgement**	**Prejudgment**	**Post-Judgment**
Jul. 19, 2006 (54102)	$52,732,921.43	$42,082,144.95	$6,101,253.76	$4,549,522.72
Nov. 30, 2006 (54815)	$42,765,263.59	$33,548,991.43	$4,942,721.04	$4,273,551.12
Jun. 19, 2007 (55915)	$14,305,053.02	$10,923,205.08	$1,606,357.24	$1,775,490.70
Dec. 19, 2007 (56944)	$10,733,490.40	$7,935,062.94	$1,267,325.27	$1,531,102.19
Jun. 30, 2008 (58035)	$2,885,895.39	$2,069,722.41	$354,784.94	$461,388.04
Dec. 30, 2009 (61199A)	$18,016,066.99 [1]	$12,258,318.38	$1,816,110.21	$3,292,552.00

Heffler has represented that it encountered a number of obstacles in its efforts to identify injured investors. In particular, many of the trades at issue were already several years old when Heffler began the process of identifying injured investors. Because of the passage of time and the retention periods specified in broker-dealer recordkeeping rules, many records necessary to identify injured investors were no longer available. Some of the records relating to the transactions were kept on outdated computer systems—and sometimes even on microfiche—and had to be accessed manually. In several instances, the broker-dealers themselves were no longer operating due to mergers, takeovers, or business closings. Despite Heffler's best efforts, the customers connected with approximately 22.4% of the violative transactions remain unidentified.

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[1] This total includes an additional $649,086.40. In connection with this sixth and final distribution, the plan was modified to include a *de minimis* gross-up provision so that currently identified customers who would otherwise have received less than $5, instead received a $5 check. Heffler identified 192,713 such customers, and distributed $963,565.00 to them, instead of the $314,478.60 they would have received absent the gross-up. Exchange Act. Rel. No. 61199A, 2009 WL 4885569, at *2 (Dec. 17, 2009).

In addition, some of the customers who were successfully identified could not be located or were deceased,[2] while others failed to cash the checks that were sent to them. The checks that were ultimately returned to Heffler, mostly as undeliverable, totaled approximately $13 million. The uncashed (but unreturned) checks totaled approximately $24 million. Heffler has represented that, in its experience with settlement administration, checks for a relatively low dollar amount are often not cashed by the recipient. In this case, there are approximately 193,471 checks that either were returned or remain uncashed; of these, 125,607 are for amounts of $20 or less.

As part of the plan, Heffler sent a follow-up letter to the recipient of any outstanding check in an amount of $500 or more that was not returned to Heffler as undeliverable but that remained uncashed for more than 90 days. Even after the reminder letter was sent, less than ten percent of these customers subsequently cashed their checks.

Heffler has represented to the Commission that it has exhausted reasonable efforts to identify injured customers and to locate those customers it has successfully identified. Heffler has stated that it believes undertaking further efforts at this juncture to locate additional injured investors will be much less favorable due to the additional time that has passed since the damaged transactions originally occurred. Heffler has also concluded that additional efforts to reach identified investors, including employing additional locator services, would have an unknown success rate, would be expensive, and, given the time and effort involved, would not be warranted. As a result, Heffler has represented to the Commission that it has completed its efforts under the plan, that it should be discharged as the fund administrator, and that the distribution funds should be terminated.

E. Following the distributions, $159.8 million remains in the distribution funds.

Despite Heffler's efforts to identify injured investors and distribute the funds, $159.8 million remains.

The residual is calculated as follows. The specialist firms paid disgorgement of $157.8 million and civil penalties of $89.4 million, for a total of $247.2 million. The distribution funds earned $30.1 million in interest, bringing the total to approximately $277.3 million. As indicated above, Heffler identified customers connected with approximately 77.6% of the violative transactions, and made six distributions. These distributions totaled $141.4 million. But, as discussed above, $37 million in checks either could not be delivered or were not presented for payment. Thus, net distributions totaled $104.3 million. Taxes and administrative costs totaling $13.2 million reduced the residual to $159.8 million ($277.3 mil - $104.3 mil - $13.2 mil = $159.8 mil). The civil penalty component of the distribution funds was $89.4 million, which can be deemed to have earned approximately $13.7 million in interest, for a total of approximately $103.1 million. The residual tied to the disgorgement amount can therefore be deemed to be $56.7 million.

[2] Heffler took several steps to check addresses in order to locate injured customers, including using the U.S. Postal Service's "National Change of Address" service. If a check was returned to Heffler without forwarding information, Heffler utilized a second locator service to obtain updated address information. Heffler indicated that this locator service has a success rate similar to many other locator services, including locator services that are more expensive.

After the sixth and final distribution, we stated that Heffler would begin the process of closing out the distribution fund. We also noted that Heffler had proposed that the remaining funds should be transferred to the U.S. Treasury. *See* Exchange Act Rel. No. 60402 (July 30, 2009). We then sought public comment "on the use of the Remaining Funds," including the proposal to transfer the residual to the Treasury. The Commission received such comments from Empire, Fleet, Van der Moolen Holdings, N.V. ("VDM"), CalPERS, Independent Asset Management and its principals, and two individuals, Robert J. Peacock and Ola Holmstrom.

II. THE REMAINING FUNDS WILL BE DISTRIBUTED TO THE U.S. TREASURY.

After careful consideration of the commenters' views, we have decided to exercise our discretion to order that the remaining funds be transferred to the U.S. Treasury. The commenters oppose this course of action. They assert that the administrator has not adequately identified injured investors or distributed funds to injured investors that it did identify; they claim that the Commission's rules and the language of the settlement orders forbid distributing the residual to the Treasury; and they contend that the remaining funds should be used to compensate class members in the private class action, distributed *pro rata* to those who have already received funds, given to those who suffered derivative injuries, or placed in an escrow account to benefit the investors of VDM.

For the following reasons, and in light of the statutory and regulatory context described below, we disagree. Heffler undertook reasonable efforts to identify and distribute funds to injured investors, and we agree with Heffler that no other reasonable options for identification remain. We also agree that further efforts to distribute funds are not warranted. We do not agree with the commenters who assert that our rules or the language in the settlement orders bar the distribution of the remaining funds to the Treasury. And we are not persuaded that the alternatives presented by the commenters comport with the settlement orders, the Commission's rules, or the purposes underlying the establishment of Fair Funds in these proceedings.

A. Statutory and regulatory background

The Securities Exchange Act of 1934 authorizes the Commission to enter an order of disgorgement in its administrative proceedings. Exchange Act Sections 21B(e) and 21C(e), 15 U.S.C. 78u-2(e) and 78u-3(e). Under these provisions, the Commission may order that the disgorgement amount, or some portion thereof, be returned to investors, but "there is no requirement that it do so." *Rules of Practice*, Exchange Act Rel. No. 35833 (June 9, 1995), 60 Fed. Reg. 32738, 32790 (June 23, 1995).

No such mandate exists because the "primary purpose of disgorgement . . . is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). "Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal." *Id.*[3] Accordingly "the size of a disgorgement order need not be tied to the losses suffered

[3] *See also SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1097 (9th Cir. 2010) ("[T]he purpose of a disgorgement remedy is to prevent unjust enrichment and to make securities law violations unprofitable, not to compensate victims."); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) ("[T]he primary purpose of disgorgement is not to compensate

by defrauded investors," *Official Comm. of Unsecured Creditors of WorldCom v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (internal quotation omitted), and "[t]he Commission has the power to require disgorgement of a wrong-doer's ill-gotten gains obtained by virtue of his or her securities law violation, regardless of whether particular investors suffered any damages." *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Rel. No. 49412 (Mar. 12, 2004), 69 Fed. Reg. 13166, 13168 (Mar. 19, 2004).

The Exchange Act, as amended by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, also authorizes the Commission to impose penalties in its administrative proceedings. Exchange Act Section 21B(a), 15 U.S.C. 78u-2(a). Like disgorgement, penalties serve as a deterrent, but unlike disgorgement, penalties punish individual violators for their wrongdoing. *Unsecured Creditors of WorldCom*, 467 F.3d at 81 (explaining that penalties "further the dual goals of punishment of the individual violator and deterrence of future violations") (internal quotation marks omitted). The purpose of ordering penalties is not compensation.

Before 2002, disgorgement could be used to compensate injured investors, but penalties could not. At that time, in judicial actions and administrative proceedings, disgorgement payments were sometimes placed into a fund to benefit injured investors. *See generally Rules of Practice*, Exchange Act Rel. No. 33163 (Nov. 5, 1993), 58 Fed. Reg. 61732, 61771, 1993 WL 468594 (Nov. 22, 1993); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018, 1021 (2d Cir. 1987). In 1995, the Commission promulgated rules regarding the procedures to be used with respect to disgorgement funds in administrative proceedings in order to formalize what had previously been an *ad hoc* process. *See* Exchange Act Rel. No. 33163, 58 Fed. Reg. at 61732, 1993 WL 468594, at *2; Exchange Act Rel. No. 35833, 60 Fed. Reg. at 32789 ("The rules relating to disgorgement are based on the Commission's experience in judicial actions involving disgorgement."). At that time, however, civil penalties were payable only to the U.S. Treasury and were unavailable to injured investors. *Unsecured Creditors of WorldCom*, 467 F.3d at 82.

Section 308(a) of the Sarbanes-Oxley Act of 2002 gave the Commission added flexibility with regard to penalties. The provision afforded the Commission the option to distribute civil penalties to defrauded investors. Section 308(a) states:

> "If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 78c(a)(47) of this title) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and

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investors."); *In the Matter of David Henry Disraeli and Lifeplan Assoc.*, Exchange Act Rel. No. 57027, 2007 WL 4481515, at *18 (Dec. 21, 2007) ("The primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'"), *aff'd*, 334 Fed. Appx. 334 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1914 (2010).

> become part of the disgorgement fund for the benefit of the victims of such violation."

15 U.S.C. 7246(a) (2002). Section 308 provided "the SEC with flexibility by permitting it to distribute civil penalties among defrauded investors" if it so chose. *Unsecured Creditors of WorldCom*, 467 F.3d at 83. Section 308 is permissive; "the SEC is not required to distribute Fair Fund proceeds to injured investors," and "the decision remains in the hands of the SEC whether to distribute civil penalties to victims *at all*." *Id*. (emphasis in original).

In 2004, we amended the 1995 rules to accommodate our new authority under Sarbanes-Oxley. Among other things, the rules permit Fair Fund plans to "provide for payment of funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings." 17 C.F.R. 201.1102(a). Moreover, the rules state, as they did in 1995, that "[w]hen, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the disgorgement funds and any civil penalty shall be paid directly to the general fund of the United States Treasury." 17 C.F.R. 201.1102(b).

In our 2004 adopting release, we stressed that disgorgement and penalties need not always be distributed to investors. We explained that in some instances, "the Commission may conclude that it is in the public interest to impose a civil money penalty and order disgorgement even though the relative value of the ill-gotten gains and the number of potential claimants would result in high administrative costs and de minimis distributions to individual investors." 69 Fed. Reg. at 13168. Under these circumstances, we explained that we "will not create a Fair Fund and will continue [our] practice of ordering that the disgorgement and civil penalty amount be paid directly to the United States Treasury." *Id*.; *see also id*. at 13173 (stating that the rule allows "monies that otherwise would go into a Fair Fund to be paid to the Treasury" even though that comes "at a cost to victims who might have received a minimal payment from a Fair Fund.").

B. The administrator made reasonable efforts to identify injured investors and distribute funds to them.

Two commenters assert that the fund administrator failed to make adequate efforts to identify injured customers and to distribute the money to those it did identify. Empire claims that Heffler failed to identify injured customers, including Empire, either through "indifference or incompetence (or some other unknown reason)." Empire Letter at 4. CalPERS asserts that the administrator has not made sufficient efforts to identify injured customers and states that there are a number of "time-tested methods" that could still be used to identify injured customers, although it does not specify what those methods are. CalPERS Letter at 5.[4]

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[4] Although CalPERS does not identify in its letter the "time-tested methods" that could still be used to identify injured customers, CalPERS lawyers have suggested to the Commission staff that notices could be published in newspapers soliciting injured customers to submit claims. Such notices would be wholly inappropriate and ineffective in a case such as this one. Because customers do not see order flow, they cannot know what other orders have been placed on the

As our factual findings demonstrate, Heffler engaged in a painstaking process to identify, and distribute disgorgement to, harmed investors. Heffler contacted over seven thousand entities to identify harmed customers associated with over two million transactions. After calculating each investor's harm and adding interest, Heffler distributed over 500,000 checks to the identified investors. Although Heffler was unable to identify all of the injured customers and was unable to locate some of those it did identify, this hardly indicates any "indifference or incompetence" on Heffler's part. The problems Heffler encountered were generally due to the state of the records and the passage of time. We conclude that the efforts made by Heffler were reasonable and appropriate and that further efforts to identify previously unidentified investors whose transactions were the subject of the settlement orders would not be reasonable or appropriate under the circumstances here. We further conclude that Heffler has taken adequate steps to ensure that funds were distributed to identified investors. Heffler has served as a claims or fund administrator in over 500 matters, and has handled securities cases since 1974. Based on its long experience administering funds and the particular facts of this case, Heffler has concluded that it has exhausted reasonable efforts to locate injured investors and that further efforts are unlikely to be fruitful.[5] We agree.

NYSE or the times those orders are received, nor do they know when a specialist enters a proprietary order. As a result, no customer could ever know whether its order had been traded ahead of or interpositioned. The only way to establish such activity is to look at the NYSE data that included all orders and the times they were entered.

[5] Commissioner Paredes, in a dissent, states that, before the funds are transferred to the Treasury, further efforts should be made to reach injured investors. In particular, Commissioner Paredes proposes that additional efforts be made to locate certain investors whose checks were returned as undeliverable, and to have certain checks that were not cashed reissued to injured investors. We have considered these additional efforts and believe that on the facts of this case, and based on the conclusions reached by Heffler, an experienced fund administrator, further steps need not be taken. For example, Heffler has advised us that hiring an additional locator service for undeliverable checks would duplicate prior efforts and would not necessarily result in locating any significant number of additional investors. Similarly, based upon Heffler's experience, we question whether reissuing checks to injured investors would produce meaningful results. As we noted, Heffler sent a follow-up letter to the recipient of any outstanding check in an amount of $500 or more that was not returned to Heffler as undeliverable but that remained uncashed for more than 90 days. Less than 10 percent of these customers subsequently cashed their checks. In light of this very low response rate, we agree with Heffler's conclusion that "[t]he time, effort and money that would be expended for further attempts at distribution are not warranted." April 14, 2011 Letter from Robert Bertino, Heffler, Radetich & Saitta L.L.P. at 6. While we recognize that reasonable persons can differ about whether it is appropriate to transfer the remaining funds to the Treasury without further efforts, this is the sort of judgment that necessarily involves an exercise of discretion. We conclude, in the exercise of discretion, that the transfer is appropriate at this time.

C. The Commission's rules do not bar distribution of the remaining funds to the U.S. Treasury.

Three commenters assert that the Commission's rules prohibit the Commission from distributing the remaining funds to the U.S. Treasury. One commenter also argues that such a distribution is inconsistent with the settlement orders. We disagree.

1. *Rule 1102(b) does not bar distributing the remaining funds to the U.S. Treasury.*

Empire asserts that if there are "any plausible injury claims that have no[t] been fully satisfied, the Remaining Funds should not be distributed to *anyone* other than injured investors—and certainly not to the U.S. Treasury." Empire Letter at 9. In support, Empire cites Commission Rule 1102(b), 17 C.F.R. 201.1102(b). *Id.* CalPERS also contends that Rule 1102(b) bars distribution of the remaining funds to the U.S. Treasury. CalPERS Letter at 1–2. In particular, CalPERS asserts that disbursement to the Treasury is improper because "the value of remaining funds far exceeds any cost of administering the plan of disgorgement." Fleet makes the same argument on behalf of the specialist firms. Fleet Letter at 2 ("[T]he Commission cannot satisfy the standards set forth in § 201.1102(b) to permit transfer to the Treasury given the present circumstances.").

We do not agree with this interpretation. Instead, as demonstrated below, we conclude that, by its terms, Rule 1102(b) does not apply to the distribution of residual funds. While the rule confirms that the Commission need not always require plan administrators to propose a plan of administration and distribution of monies to investors, the rule does not address or otherwise limit how residual funds in an administered plan may be distributed. Thus, the rule is silent as to what the Commission may do with residual funds after an administrator administers a fund, distributes monies to investors, and exhausts reasonable efforts to identify additional injured investors.

Rule 1102(b) provides that when the Commission determines that the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the funds to injured investors, the Commission may approve a plan providing that disgorgement funds (and any civil penalty) be paid directly to the U.S. Treasury. The rule thus authorizes the Commission to approve a plan that pays disgorgement and civil penalty amounts directly to the Treasury instead of requiring an administrator to pay them to investors. The rule makes clear that the Commission has the option to approve sending disgorgement and penalties to the Treasury when it appears that the costs of administering a fund will outweigh the benefit to injured investors, such as when there are thousands of potential claimants and a small amount of disgorgement.

Therefore, Rule 1102(b) expands the options available to the Commission; it does not restrict them. Indeed, the rule uses discretionary terms ("may") to authorize the Commission to approve a plan calling for payment of disgorgement and monetary penalties to the Treasury in lieu of making any distribution to investors. The rule in no way limits the Commission's discretion to order paying a residual to the Treasury after an administrator has exhausted reasonable efforts to return the funds to injured investors.

Moreover, even assuming Rule 1102(b) did somehow apply to and limit the Commission's authority regarding the residual of an administered fund, paying the remaining funds to the U.S. Treasury under the circumstances here best comports with the rule. The rule covers situations where distribution of the disgorgement funds is not justified because the costs outweigh the benefits. In this context, where an administrator has, for more than five years, reasonably endeavored to identify, and distribute funds to, injured investors and, in the process, exhausted reasonable means of doing so—such that the benefits of continued efforts are likely to be negligible, or nonexistent—Rule 1102(b) supports distributing the remainder of the money to the U.S. Treasury.[6]

2. *The settlement orders do not bar paying the remaining funds to the U.S. Treasury.*

Fleet contends that distributing the remaining funds to the class, instead of the U.S. Treasury, is compelled by the settlement orders. Fleet writes that "so long as there is some use that will benefit investors, the Settlement Orders do not provide for any Remaining Funds to be turned over to the Treasury, and instead compel that they be made available for the benefit of investors such as those that are the subject of the Private Action." Fleet Letter at 2.

We do not agree. 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." Immediately following is the statement that: "Under no circumstances shall any part of the Distribution Fund be returned to [the Specialist Firms]." *E.g.*, Exchange Act Rel. No. 49498, at ¶ IV.E, 2004 WL 626586, at *12 (Mar. 30, 2004). Whether funds can, in fact, be appropriately used to benefit investors is a discretionary determination. As we have concluded, further efforts to distribute the funds to harmed investors are not warranted. The only remaining option for compensating harmed investors that bears careful consideration is that of directing the funds to the district court conducting the class action. As we explain in more detail below, however, on balance, we find that distributing the remaining funds to investors in the class would conflict with the orders' intent not to benefit the firms (as it expressly instructs that no part of the distribution funds may be returned to the firms).

D. Distributing the remaining funds to the U.S. Treasury is more appropriate than the commenters' suggested alternatives.

Having determined that we are not prohibited from sending the remaining funds to the Treasury, we nevertheless consider whether we should exercise our discretion to order that they go elsewhere. The commenters suggest several alternative destinations for the remaining funds. Instead of paying the money to the Treasury, they contend, we should (1) make it available for the benefit of the investor class in the private class action; (2) distribute it *pro rata* to those persons who previously received money after being identified as injured investors; (3) give it to persons who suffered derivative injuries collateral to the primary injury covered by the settlement orders; and (4) with regard to the remaining funds attributable to the disgorgement and penalties paid by VDMS, one of the specialist firms, place it in an escrow account in The Netherlands.

[6] *See also* 69 Fed. Reg. at 13168 ("Where there are no identifiable victims of a violation, the Commission will continue to require that any disgorgement and civil money penalty amounts be paid to the United States Treasury.").

For the reasons explained below, we reject these alternatives and decide to exercise our discretion to distribute the entire residual to the U.S. Treasury.

1. *Distribution for the benefit of investors involved in the private class action.*

Two commenters suggest that the remaining funds be directed to the Southern District of New York to benefit the investors who have asserted claims against the specialist firms in the pending class action. Fleet, writing on behalf of the specialist firms, points out that the Commission's rules "expressly contemplate making the Remaining Funds available for the benefit of investors covered by the Private Action." Fleet Letter at 2. Fleet cites Rule 1102(a), which states that "a plan for the administration of a Fair Fund or a disgorgement fund may provide for payment of funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings." 17 C.F.R. 201.1102(a).

We note at the outset that Rule 1102(a) is permissive, not mandatory. It authorizes the Commission, in its discretion, to provide for payment of funds into a private action pending in federal court. We did not exercise our discretion to authorize such a distribution when we approved the administrator's plan, and we do not exercise our discretion to order such a distribution now. Although the violations at issue in the class action arose out of similar misconduct to that in the Commission's settlements, and although Rule 1102(a) allows the use of funds in class actions arising from "substantially similar facts," we think a distribution to the class under the circumstances of this case would undermine the settlements we reached with the firms because it would indirectly return settlement funds to the firms. In accordance with the terms of the class certification, the violative transactions that are at issue in the class action are different violations than those that formed the basis of the Commission's settlements. To the extent that such violations can be proved, they give rise to separate and distinct liabilities for the specialist firms. The settlement orders state expressly that "[u]nder no circumstances shall any part of the Distribution Fund be returned" to the specialist firms. If the Commission distributed the remaining funds into a court registry for the benefit of investors litigating the class action, the Commission would reduce the specialist firms' liability in that action, indirectly accomplishing what the settlement orders strictly forbid. *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 417 (S.D.N.Y. 2009) ("If the undistributed funds were used to settle related litigations . . . some investors would receive compensation for injuries similar to those that were to be compensated by the Distribution Funds. However, Defendants would benefit from not having to pay those settlements with their own money," which would violate the terms of the settlement "by, in effect, returning funds to the Defendants for use to settle other matters.").

Empire also recommends distributing the remaining funds to investors involved in the class action, but its reasoning differs. Empire claims in its letter that the violative transactions identified in the settlement orders "were a fraction of the unlawful proprietary trades executed by the Specialist Firms from 1999 to 2003" (Empire Letter at 5), and Empire suggests that the remaining funds be used to compensate investors who were injured in transactions not covered by the settlements (Empire Letter at 8, 13 n.5).

The Commission does not agree with this suggestion, which involves upsetting the terms of the settlements reached between the Commission and the specialist firms. In essence, Empire is arguing that transactions that were specifically excluded from the Commission's settlements (and that formed the basis for certifying the class) should have been included in the settlements, and therefore that the customers connected to those transactions should now be compensated using settlement funds. In reaching the settlements, the Commission staff used an NYSE exception report that reasonably took into account system lags and the possibility of oral executions in determining what constituted a violation. Had the Commission included other transactions as part of the settlements, the terms of the settlements would have been different. The Commission will not revisit the settlements seven years after approving them.

Second, and related, it bears repeating that the transactions at issue in the private class action are distinct from the transactions at issue in the settlement orders. Use of the remaining funds to remedy the violations at issue in the private class action would necessarily be inconsistent with the terms of the settlement orders, which cover only a specific group of transactions. *See In re NYSE Specialists Sec. Litig.*, 260 F.R.D. at 60 (noting that the court previously held that "no customer could recover with respect to trades already covered by the Specialists Firms' regulatory settlements [with the Commission])." Indeed, in rebutting the specialist firms' argument that the class action should be dismissed because victory in the class action would result in an impermissible double recovery for the plaintiffs, Empire and CalPERS successfully contended that there was no duplication. *In re NYSE Specialists Sec. Litig*., 405 F. Supp. 2d at 308 ("The Plaintiffs argue that the alleged fraudulent and manipulative scheme at issue in this action exceeds the conduct uncovered in the SEC's investigation.").

Moreover, as noted above, using the remaining funds to benefit investors harmed by transactions that are specifically not covered by the settlement orders, and thus not covered by the distribution funds created pursuant to those orders, would benefit the wrongdoers in contravention of the settlement orders. Applying the remaining funds to cover liabilities in the class action would, at least indirectly, return a significant portion of the distribution funds to the specialist firms. *Bear, Stearns,* 626 F. Supp. 2d at 417.

Finally, we note that apart from the reasons for transferring the entirety of the residual to the Treasury, discussed above, we would in any event exercise our discretion to transfer to the Treasury, at a minimum, \$89.4 million—the amount we ordered paid as penalties by the specialist firms (plus proportional interest thereon)—because we included a provision in each settled order[7] that "prevents the use of [the specialist firms'] civil penalty payments to offset

[7] This provision states:

> Regardless of any such Fair Fund distribution, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that it shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this proceeding that is proportionately attributable to the civil penalty paid by Respondent ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent agrees that it shall, within 30 days after entry of a final order granting the offset or reduction, notify the Commission's counsel in this action

civil damages" in a related private action such as the pending class action. *See In re NYSE Specialists Sec. Litig.*, 405 F. Supp. 2d at 311. Moreover, although we exercised our discretion at the outset of these proceedings to create a Fair Fund of disgorgement and penalties (as specified in Sarbanes-Oxley Section 308, "for the benefit of the victims of such violations"), in retrospect, we can conclude that the penalties would not have been needed to compensate identified investors for their identified losses from the violations addressed in the settlement orders. In this circumstance, it would be reasonable for us to exercise our discretion to transfer $89.4 million (plus a proportionate amount of interest thereon) to the Treasury, since that amount would have gone there if it had not been added to the distribution funds.

2. *Pro rata distribution to previously identified injured investors.*

Empire submits that the Commission should "make a *pro rata* distribution of the Remaining Funds to the identified Injured Customers" instead of sending the funds to the U.S. Treasury. Empire Letter at 12. Empire appears to contemplate that the Commission would order Heffler to make another distribution of checks to those customers who have already received them. Underpinning Empire's comment are the assertions that there is no way to know whether Empire, or any other identified customer, "received reimbursement anywhere near 100% of its actual losses" and that the "Commission did not attempt to, or purport to, reimburse customers for 100% of the losses caused by the Specialist Firm's illegal proprietary trading." *Id*.

The Commission disagrees with these assertions. The Commission's settlements in this case were based on specifically identified violative transactions and the amount of disgorgement was based on clearly identifiable and measurable customer harm. As a result, the injured customers who were linked to specific violative transactions and who cashed their distribution checks have been fully compensated for their losses connected to those transactions, including "pre- and post-judgment" interest. Of course, it is possible that some customers who were fully compensated for their losses with respect to a particular transaction may have also suffered a loss with respect to another transaction that was part of the settlement, but where, for one reason or another, the customer could not be identified as linked to the loss. But this does not change matters because there is no requirement that a plan administrator compensate any person for losses that cannot be substantiated. Indeed, Empire points to nothing more than supposition to support its assertion that neither it nor any other identified investor has received 100% of losses from transactions covered by the settlements.

We continue to be concerned that a *pro rata* distribution in this case would give an underserved windfall to the injured customers who already received payment. *See* Exchange Act Rel. No. 53823, 2006 WL 1358131, at * 7. There are funds remaining in the distribution fund not simply because some investors were not identified but also because: substantial penalties were included in the fund; identified injured investors could not be located after reasonable effort; identified injured investors who had been located failed to present the checks that they

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and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed against Respondent in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

received for payment; and the fund earned a sizable amount of interest. Therefore, redistributing the entirety of these funds *pro rata* to those who already received money necessarily would give those injured investors a premium over their losses. This would not further the purposes of creating the distribution funds. Rather, it would provide an undeserved reward to a subset of injured investors that could be identified because another, and different, subset of identified injured investors could not be located or failed to cash their distribution checks, because yet another subset of investors could not be identified and because the distribution funds earned sizable interest and contained significant penalty amounts.[8]

Empire also calls our attention to a number of Commission distribution plans where we have approved disbursements using a *pro rata* methodology, including plans purportedly distributing *pro rata* residual monies "without limitation to the actual injury suffered . . . ." Empire Letter at 11 n.3. Empire's letter states that the Commission in such cases has even allowed persons "who were not injured" to benefit in such distributions. *See* Empire Letter, Appendix B. Thus, Empire's comment implies that using the residual funds here to pay the previously identified customers would not be an undeserved (or even unusual) windfall.

While the Commission has approved plans that called for a *pro rata* distribution, including *pro rata* distributions of remaining funds, that does not mean that the Commission countenances windfalls. All of the plans cited by Empire involved injury over an extended period of time to mutual funds, *i.e.*, pooled investment vehicles in the form of registered investment companies, where the ownership structure of the mutual fund can and does change on a regular basis. Because the purpose of the distribution plans was to compensate, to the extent reasonable, the harm suffered by the mutual funds and, given the ownership structure of the mutual funds, the Commission sought, in these cases, to distribute funds to persons who were shareholders at the time of the misconduct. In virtually all such cases, however, it was not feasible or practicable to locate and compensate mutual fund shareholders who were injured at the time of the misconduct. As a result, the Commission considered and approved distributions, including residual distributions, allowing the injured mutual funds themselves to receive amounts that could not otherwise be distributed to underlying injured shareholders. These distributions did not, however, result in a windfall to any party.[9]

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[8] We again note that the plaintiffs in the class action represented to the district court that they would "ensure that there will be no double recovery for injured investors who recovered from the SEC's settlement." *In re NYSE Specialists Sec. Litig.*, 260 F.R.D at 81.

[9] For example, Empire cites to the residual distribution portion of the plan in *In the Matter of Janus Capital Management LLC* (*Janus*), Admin. Proc. File No. 3-11590, 2004 WL 1845502 (Aug. 18, 2004) (order instituting proceedings). *See* Exchange Act Rel. No. 57721 (Apr. 25, 2008) (order approving the *Janus* plan). The *Janus* plan, like other plans cited by Empire, involved distributions to mutual fund investors in connection with improper conduct involving the market timing of mutual funds. In *Janus*, where the respondent was the adviser to the mutual funds, the harm to the funds was two-fold: the funds suffered certain quantifiable costs as a result of the improper trading, and the funds were harmed as a result of paying advisory fees to the respondent adviser, a fiduciary that was in breach of its fiduciary obligations. The *Janus* plan provided, in accordance with the terms of the Commission's settlement order, for "investors to

In contrast with distributions involving misconduct over time affecting pooled investment vehicles, the underlying misconduct at issue in the specialist firms' settlements disadvantaged millions of identifiable individual customer orders. The plan here recognized this and sought to compensate identified customers whose specifically identified trades were disadvantaged. The justification for a *pro rata* distribution in the market timing cases involving injuries to pooled investment vehicles thus is not present here. Moreover, we do not construe the decision to approve a *pro rata* distribution of a residual in other plans as establishing any rule or general practice that *pro rata* distributions are mandatory or necessarily even appropriate in other instances. Each plan responds to the unique facts of the proceeding that led to the creation of the distribution fund in the first instance. What is appropriate in one will not necessarily be appropriate in another.

In the Commission's view, the American Law Institute's Principles of the Law of Aggregate Litigation do not "mandat[e]" a *pro rata* distribution, as Empire claims. Empire Letter at 9–11. The ALI's views naturally do not bind the Commission, and, in any event, they are inapposite. The cited provision assumes that "funds generated through the aggregate prosecution of divisible claims are presumptively the property of class members." American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010). It was only "[s]tarting from this vantage point" that the ALI concluded that a *pro rata* distribution to class members may be preferable to a *cy pres* distribution in some circumstances. *Id*. In a private class action, where individual plaintiffs aggregate their claims for redress, a *pro rata* distribution may indeed make sense because the class action seeks money as damages for the plaintiffs' losses. By contrast, as described above, disgorgement and penalties obtained by the Commission serve to deprive a wrongdoer of ill-gotten gains, sanction the wrongdoer, and deter future violations. In addition, as previously noted, the Commission is authorized, but not required, to distribute funds collected in its actions to harmed individuals, and may choose instead to remit the funds directly to the U.S. Treasury. In a Commission proceeding, the ALI presumption that funds to be distributed are the property of class members does not apply. *Cf. Bear, Stearns*, 626 F. Supp. 2d at 419 ("The original sources of the Distribution Funds were disgorgement and penalties. Those monies are the property of the Government.").

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receive, from the monies available for distribution in order of priority, (i) their proportionate share of losses suffered by the fund due to [the misconduct], and (ii) a proportionate share of advisory fees paid [to the respondent] by funds that suffered such losses during the period of [the respondent's misconduct]." *Janus*, 2004 WL 1845502, at *9. While Empire correctly notes that aggregate fund losses stemming directly from the improper market timing misconduct were calculated at approximately $21 million and the plan administrator was distributing $100 million, Empire neglects to consider that the Janus mutual funds also suffered additional injury because they paid advisory fees to the respondent adviser while the adviser was in breach of its fiduciary duty to the funds. When we created the Fair Fund in the *Janus* settlement, we determined it would be appropriate to return *both* a proportionate share of losses and a proportionate share of advisory fees to investors. Empire is incorrect in claiming that the *Janus* plan paid the affected investors and funds amounts in excess of the injury. While the *Janus* plan does not refer to the dollar amount of advisory fees paid, the fees paid were well in excess of the $79 million distributed as a return of fees.

Moreover, the ALI rejected the argument that a further *pro rata* distribution would constitute a windfall to the class members receiving the further distribution *based on the assumption* that "few settlements award 100 percent of a class member's loss" and that further distributions would therefore not likely result in more than 100% recovery. In this case, however, as described above, the injured customers who were linked to specific violative transactions and who cashed their distribution checks have obtained full compensation for their identified losses, plus "pre- and post-judgment" interest. Additionally, as stated above, given the size and composition of the distribution funds, including significant interest, penalties and amounts due to uncashed and returned checks, a *pro rata* distribution to those who have already received and cashed checks would necessarily result in a windfall. As a result, transfer of the residual to the Treasury is appropriate. *See Bear, Stearns*, 626 F. Supp. 2d at 407, 417, 419 (concluding that where funds in an SEC distribution fund exceeded the total substantiated claims, transfer of remaining funds to the U.S. Treasury was "[c]onsistent with the premise articulated by the American Law Institute").

3. *Distribution to those who suffered derivative injuries.*

Robert J. Peacock ("Peacock") is a trader who claims that he is a "special victim" of the specialists' misconduct. He claims a variety of injuries. In, for example, an attachment to a letter dated January 3, 2011, Peacock asserts that the Commission's collection of transaction trading fees was improper because the Commission failed to regulate the NYSE. January 2 Memorandum at 2–3. Had these fees not been collected, Peacock claims, his income would have increased by $125,000. Peacock seeks payment from the Commission of $510,000, which purportedly includes a reimbursement of his transaction fees plus interest and a $250,000 civil penalty against the Commission. *Id*. at 3. This claim for reimbursement and penalty to be paid by the Commission does not appear to seek money *from the distribution funds* and therefore is not responsive to the notice put out for comment. It is meritless in any event. The Commission is statutorily authorized to collect the transaction fees that Peacock mentions, and the assertion that the Commission failed to regulate the NYSE provides no basis for the return of such fees.

Throughout the period of plan administration, Peacock has also claimed that, as a result of the specialist misconduct, he lost income and business and that his losses should be satisfied out of the distribution funds. Notably, the Commission considered and rejected this claim when it approved the distribution plan here.[10] *See In the Matter of Bear Wagner Specialists LLC,* Exchange Act Rel. No. 53823, 2006 WL 1358131, at * 5–6 (May 17, 2006). We continue to

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[10] Two other commenters have also responded to the Commission's July 30 Notice by reiterating their requests that their derivative harms be compensated using distribution funds. *See* Independent Asset Management Letter, dated May 6, 2010, and Ola Holmstrom Letter, dated December 2, 2010. The distribution plan defines "Injured Customers" as "those individuals or entities whose trades were previously identified by the Commission staff and the NYSE in connection with the Specialist Firm Orders." We continue to reject these requests to compensate non-customer harm. *See* Exchange Act Rel. No. 53823, 2006 WL 1358131, at *5–*6 (rejecting "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.") (emphasis in original).

reject Peacock's assertion that he should be compensated for purported harms that are at most derivative of the specialist firms' securities law violations. Put simply, Peacock's claimed injuries are speculative and too far removed from the securities law violations at the heart of the settlement orders.

4. *Distribution to an escrow account for the benefit of investors in one of the specialist firms.*

Pursuant to its 2004 settlement order, VDMS, a majority-owned subsidiary of Van der Moolen Holdings, N.V. ("VDM"), paid in excess of $57 million in disgorgement and civil penalties. On August 10, 2009, VDM filed for bankruptcy protection in The Netherlands, where it was headquartered. Later that month, VDM's bankruptcy administrators submitted a comment letter to us requesting that remaining VDMS funds "be transferred to an escrow account in The Netherlands to be set up for a foundation that will be created to collect, manage and transfer the funds to the public shareholders and creditors of VDM." VDM Letter at 2. In that letter, VDM's administrators also suggested that distribution of the remaining funds should be postponed until The Netherlands' bankruptcy court and government ministries were afforded an opportunity to play a role in determining the destination of the portion of the remaining funds attributable to VDMS.

We reject these suggestions. First, in September 2009, the bankruptcy court declared VDM bankrupt and, later, VDM's assets were liquidated—the administrators having concluded that there "was nothing left to salvage."[11] Because the firm is no longer an ongoing concern, much of VDM's request is moot. Second, in any event, there has never been a legal basis for using VDMS's disgorgement and penalties to compensate VDM's shareholders or its creditors. The plan of distribution was structured, consistent with the settlement order, to compensate customers who were injured as a result of VDMS's unlawful trading practices. There is no legal basis for using those funds to compensate VDM's shareholders or its creditors. They were not the direct victims of VDMS's illegality, and while their investment in VDM may have suffered as a result of VDMS's illicit conduct, that fact does not transform them into the "investors" covered by the settlement order.

[11] *Update 2-Court declares Van der Moolen bankrupt*, Reuters, Sept. 10, 2009, *available at* http://www.reuters.com/article/2009/09/10/vandermoolen-idUSLA18529920090910 (last visited Apr. 13, 2011).

III.

In view of the foregoing, it is ORDERED that:

Following payment of any outstanding taxes, administrative fees and costs, the remaining funds in the distribution funds established in this matter shall be paid to the Securities and Exchange Commission for transfer to the U.S. Treasury.

By the Commission (Chairman SCHAPIRO, Commissioner CASEY, and Commissioner AGUILAR; Commissioner PAREDES dissenting; and Commissioner WALTER not participating).

Elizabeth M. Murphy
Secretary