UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 8864 / November 27, 2007

Securities Exchange Act of 1934
Release No. 56849 / November 27, 2007

Administrative Proceeding
File Number 3-11893

In the Matter of	:	ORDER MAKING FINDINGS,
	:	IMPOSING REMEDIAL SANCTIONS,
	:	AND IMPOSING A CEASE-AND-DESIST
David A. Finnerty,	:	ORDER PURSUANT TO SECTION 8A
Donald R. Foley II,	:	OF THE SECURITIES ACT OF 1933 AND
Scott G. Hunt,	:	SECTIONS 15(b)(6), 21C AND 11(b) OF THE
Thomas J. Murphy, Jr.,	:	SECURITIES EXCHANGE ACT OF 1934 AND
Kevin M. Fee,	:	RULE 11b-1 THEREUNDER AS TO
Frank A. Delaney IV,	:	MICHAEL J. HAYWARD
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.	:	
	:	
Respondents.	:	

I.

On April 12, 2005, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder ("OIP") against respondent Michael J. Hayward ("Hayward").

II.

Hayward has submitted an Offer of Settlement ("Offer") in these administrative proceedings, 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 him and the subject matter of these proceedings, which are admitted, Hayward consents to the entry of this Order Making Findings, Imposing Remedial Sanctions, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder as to Michael F. Hayward ("Order"), as set forth below.

III.

On the basis of this Order and Haywards' Offer, the Commission finds[1] that:

FACTS

1. Hayward is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with fraudulent and other improper trading during the period from at least 1999 through June 30, 2003, while they were acting as specialists on the New York Stock Exchange ("NYSE").

2. Hayward, age 53, acted as a specialist on the NYSE at Van der Moolen Specialists USA, LLC ("Van der Moolen") from at least January 1, 1999 to approximately March 2004 (the "Relevant Period").

3. From January 1999 to June 2003, Hayward was the specialist in SPX Corp. (from January 1999 to July 1999, from March 2001 to May 2001, and from November 2001 to February 2002), Time Warner Inc. (from approximately August 1999 to approximately January 2001), and Apache Corp. ("Apache") (from approximately March 2002 to approximately June 2003) (collectively, the "Relevant Securities").

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

4. As a NYSE specialist, Hayward had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, Van der Moolen. In his role as a NYSE specialist, Hayward had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from Van der Moolen's own account when those customer orders could be matched with other customer orders. Hayward violated this obligation by filling orders through proprietary trades rather than through other customer orders, through two types of improper trading referred to herein as "interpositioning" and "trading ahead."

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm's proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm's proprietary account at a higher price – thus locking in a riskless profit for the specialist firm's proprietary account. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm's proprietary account at a lower price – again, locking in a riskless profit for the specialist firm's proprietary account. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm's proprietary account – and thereby improperly 'steps in front' of, or 'trades ahead' of, another agency order – simply to allow the specialist firm to take advantage of market conditions promptly. Unlike interpositioning, the practice of "trading ahead" does not necessarily involve a second specialist trade for the specialist firm's proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may "trade ahead" by filling a market buy order by selling stock from the specialist firm's proprietary account in front of an agency market sell order. In so doing, the specialist would lock in a higher price for the proprietary trade, then fill the agency sell order *after* the proprietary trade, and thereby force the agency market sell order to accept a slightly lower price as the price of the stock fell.

7. During the Relevant Period, in the Relevant Securities, Hayward knowingly or recklessly engaged in approximately 2,774 instances of interpositioning, locking in a riskless profit of approximately $333,216 for his firm's proprietary account at the expense of customer orders, and approximately 3,524 instances of trading ahead, causing approximately $751,973.75 in customer harm.

8. On July 14, 2006, Hayward was found guilty on a jury verdict of one count of securities fraud in U.S. v. Joseph Bongiorno, et. al, 05 Crim. 390 (S.D.N.Y.) (the "Hayward Criminal Proceeding") with respect to his trading as a specialist in the securities of Apache stemming from the same conduct as that charged in the OIP. On January 25, 2007, Hayward was sentenced to 6 months imprisonment and 2 years of supervised release, and assessed a $250,000 fine. On January 29, 2007, Hayward filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. Hayward paid the $250,000 fine into a court-administered account on February 21, 2007.

APPLICABLE LAW

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 Thereunder

9. The antifraud provisions of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit, among other things, any schemes to defraud or fraudulent or deceptive acts and practices in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b) and Rule 10b-5) of securities. Basic, Inc. v. Levinson, 485 US 224, 235 n.13 (1988) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc)). To prove a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove that the respondent acted with scienter. Aaron v. SEC, 446 U.S. 680, 691 (1980). Scienter may be established by proof of conscious behavior or recklessness on the part of the respondent. In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 74 (2d Cir. 2001); SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999). Scienter need not be shown in order to establish violations of Sections 17(a)(2) and (3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). A specialist who engages in trading ahead and/or interpositioning may be found to have employed a scheme or device to defraud, as well as a course of business operating as a fraud, in violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. *See, e.g.*, U.S. v. Bongiorno, 05 Cr. 390, 2006 WL 1140864 (S.D.N.Y.); U.S. v. Finnerty, 05 Cr. 393, 05 Cr. 397, 2006 WL 2802042 (S.D.N.Y.).

10. As a result of the conduct described above, Hayward willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder

11. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market."

12. Where specialists make trades for their firm's proprietary accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," and "were not effected in a manner consistent with the rules adopted by [the pertinent national securities exchange]," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).

13. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist's duty to maintain a fair and orderly market.

14. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists' obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: "No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . ., unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."[2]

15. NYSE Rule 92 (Limitations on Members' Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

[2] Rule 104.10(3), which describes specialists' affirmative obligations, also expands on the negative obligation:

> Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings … are not to be effected.

> No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.[3]

16. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.

17. NYSE Rule 123B (Exchange Automated Order Routing Systems) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: "a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*" (Emphasis added).

18. NYSE Rule 401 requires NYSE members to "adhere to the principles of good business practice in the conduct of his or its business affairs." Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of "conduct or proceeding inconsistent with just and equitable principles of trade."

19. As a result of the conduct described above, Hayward willfully violated NYSE Rules 104, 92, 123B, and 401, as well as Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Hayward's Offer.

Accordingly, it is hereby ORDERED that:

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[3] Rule 92 was amended on January 7, 2002 to read in relevant part:

> no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a 'proprietary order'), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

1. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Hayward shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 11(b) of the Exchange Act and Rules 10b-5 and 11b-1 thereunder.

2. Pursuant to Section 15(b)(6) of the Exchange Act, Hayward be, and hereby is, barred from association with any broker or dealer.

   Any reapplication for association by Hayward will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Hayward, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

3. Pursuant to Section 8A of the Securities Act and Sections 21B and C of the Exchange Act, Hayward shall pay disgorgement in the sum of $113,356.57, representing profits gained as a result of the conduct alleged in the OIP, together with prejudgment interest in the amount of $51,808.82, for a total of $165,165.39, which sum shall be reduced dollar for dollar by any sums Hayward pays in satisfaction in whole or in part of the fine imposed on him in the Hayward Criminal Proceeding (the "Disgorgement Payment"). Hayward shall pay any Disgorgement Payment then due and owing under this section at the earlier of: (i) December 31, 2011; or (ii) upon the conclusion of the Hayward Criminal Proceeding. For purposes of this section, "the conclusion of the Hayward Criminal Proceeding," shall mean the conclusion of any and all appeals in that matter, provided that, in the event any appellate court orders a retrial in that matter, "the conclusion of the Hayward Criminal Proceeding" shall mean the conclusion of any final re-trial or any and all appeals therefrom in the event any such appeals are made.

   Effective upon the entry of this Order, Hayward is assigning to the Securities and Exchange Commission any and all right, title and interest he has or may have in the future in that portion of the monies currently deposited in the Crime Victims Fund administered by the United States Attorneys Office for the Southern District of New York in connection with the Hayward Criminal Proceeding (the "Criminal Proceeding Fund"), representing the Disgorgement Payment. Upon conclusion of the Hayward Criminal Proceeding, Hayward shall permit the Clerk of the Court of the United States District Court, Southern District of New York to pay, within ten days of the conclusion of the Hayward Criminal Proceeding, any Disgorgement Payment 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 Hayward 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 Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281. Payment by the Clerk of the Court of the United States District Court, Southern District of New York pursuant to the provisions of this paragraph shall be deemed satisfaction of the Disgorgement Payment. For purposes of this section, any payments Hayward makes to the Commission before the conclusion of the Hayward Criminal Proceeding shall reduce the Disgorgement Payment dollar for dollar.

In the event the conclusion of the Hayward Criminal Proceeding has not occurred by December 31, 2011, Hayward shall pay, by December 31, 2011, disgorgement in the sum of $113,356.57, representing profits gained as a result of the conduct alleged in the Order, together with prejudgment interest in the amount of $51,808.82, for a total of $165,165.39 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 Hayward 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 Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281.

By the Commission.

Nancy M. Morris
Secretary