could reappear at any time and start trading the stock. Tr. 6371, 6424-26, 7402-03, 7347, 7377-78, 7475-77. Hunt also traded Cardinal Health. Tr. 7403. At times during the relevant period Cardinal Health was assigned to the same panel as Goldman Sachs, and at times they were at separate panels. Tr. 7359-60, 7404-05; Resp. Ex. Fleet 2. When they were at separate panels, it was not possible for one specialist to trade both; if Gillespie showed up, Hunt might trade in either panel. Tr. 7405-06. Goldman Sachs was a very active and volatile stock. Tr. 6425-26, 7348-49, 7416-19, 7478-80. At times Cardinal Health also became active and volatile and attracted large crowds. Tr. 7360, 7416.

Usually there were crowds in Goldman Sachs and Cardinal Health. Tr. 6273, 6431-32. The crowd in Goldman Sachs usually numbered five to fifteen, or even fifty, yelling. Tr. 6429, 6434, 7349-50, 7365-67, 7422-23, 7477, 7482, 7495. One day in July 2002 there were at least one hundred people in the crowd. Tr. 7420-22. When at his panel, Hunt stood about one and a half or two feet in front of his clerk; at times he was in the midst of the crowd; at times he looked at one or more DB screens or other screens that displayed market data. Tr. 6268-71, 6389-90, 6445-46, 7362-63. He did not notice small changes in his own stocks, such as 200 to 1,000 shares, but he would notice if his position changed by 5,000 shares. Tr. 6272-73.

Hunt recognized that the alleged interpositioning and trading ahead conduct was improper. Tr. 6234, 6258-62, 6266-67, 7391-92. He denied intentionally trading ahead of a customer order or interpositioning between two customer orders or instructing a clerk to do so. Tr. 7394. He suggested that the interpositioning and trading ahead transactions that occurred while he was at his panel were either errors or clerks trading on their own initiative. Tr. 6267-68, 6279-80, 6438-43. Due to increased volume, during the relevant period he often relied on clerks to execute DOT orders, rather than orally crossing each such trade. Tr. 6263-66.

Cunningham[60] clerked for Hunt from time to time between May 1999 and October 2000, when she became a specialist. Tr. 7341-42. Thereafter, as a relief specialist, until January 2002, she worked primarily with Hunt and Gillespie, backing Hunt up when Gillespie left the floor or when Hunt needed a second specialist in busy trading. Tr. 7342, 7352-53. She testified that Hunt did not direct, or advise, her to trade ahead of a marketable DOT order. Tr. 7355. Nor did she hear him tell anyone else to do so. Tr. 7359. In one instance, she was trading Cardinal Health, and Hunt was trading Goldman Sachs at the next panel; she asked him for advice on pricing a trade that involved a DOT order; finally she instructed her clerk as to the terms of the trade, but before the trade could be entered, a DOT order on the other side appeared. Hunt instructed her to pair off the DOTs as it was now inappropriate to trade ahead of the first DOT order. Tr. 7356-58. In doing so, the principal was foregoing a profit. Tr. 7358. Additionally, Bryant, who was called by the Division in its case against Foley, and who clerked for Hunt a few days at a time in 1999, testified briefly that he had a very high opinion of Hunt's integrity and that he knew of no instance in which Hunt traded ahead or interpositioned. Tr. 6881-85. Likewise, O'Brien, who

[60] Cunningham started at a predecessor of Fleet in 1996 as a backup clerk and became a specialist in October 2000. Tr. 7335, 7337-38. She left in 2005 and now works for the NASDAQ Stock Market as a liaison with the broker-dealer community; her job is to increase NASDAQ's market share. Tr. 7336-37.

was called by Foley in his case, and who clerked for Hunt for short periods between May 1999 and January 2000, after which he became a specialist himself, had a high opinion of Hunt's honesty and integrity; Hunt never instructed him to trade ahead or interposition. Tr. 7149-57.

Rufo,[61] who was Hunt's front-line clerk from April 2002 to June or July 2003, testified that Hunt did instruct him to trade improperly. Gillespie was formally assigned to the panel where Goldman Sachs was traded, but, by that time, Hunt was trading the stock most of the time. Tr. 6371. Trading ahead in time sequence was acceptable at the firm and practiced by Hunt. Tr. 6373-75, 6506. (Out of sequence trading was considered improper. Tr. 6484.) In addition, there were instances of interpositioning with respect to orders that appeared simultaneously out of a freeze. Tr. 6375-77. Rufo believes that Hunt was aware of the orders displayed on the DB at those times. Tr. 6375, 6378. At times Rufo questioned the trades Hunt ordered coming out of a freeze, asking him to explain why he was not pairing off the DOT orders; Hunt would instruct him to execute the trades he ordered and not pair off. Tr. 6378-79. Trading ahead in sequence occurred less often in times of high volume, because there was no time to determine the sequence of the orders.[62] Tr. 6380-81, 6496. Hunt did not like him to use the freeze key; sometimes he inadvertently hit the freeze key. Tr. 6436-37. If on unfreezing the book there were a lot of orders on both sides of the book, he would be more likely to pair them off to get rid of them than to trade ahead of them. Tr. 6497.

To instruct Rufo to trade ahead in sequence for the principal account when the book was unfrozen and when there was no crowd, Hunt would say "you" bought or sold, or a designated number of shares "trades" at a price that no order on the book could fulfill. Tr. 6381-82, 6506-07. If a crowd was present, Hunt would cross the orders and then instruct Rufo that "you," "I," or "we" bought or sold. Tr. 6382-85. If he meant to pair off, and there was an imbalance between the DOT buy and sell orders, he would specify the number of shares that would trade. Tr. 6385. If the book was frozen, became unfrozen, and orders of 1,000 to buy and 300 to sell appeared, and Hunt said 1,000 trades at a price, Rufo would include the 300 share DOT order in the trade; if he said "you" sold 1,000, the principal would sell 1,000 shares and the 300 share DOT order would not participate. Tr. 6386. If he meant to trade with both sides, he would announce two trades – one between the principal account and the sell order and one between the principal account and the buy order. Tr. 6386-87. If a crowd were present, similarly he would announce two trades, although the possibility existed that the crowd might participate in one or both of the trades. Tr. 6387-89. At times Hunt would point at Rufo's chest to indicate "you," that is, the principal account was to trade. Tr. 6391.

In August 2001 Hunt and his family moved, and he was away from the NYSE at times incident to purchasing and moving to the new residence. Tr. 7408-09. After September 11, 2001, he attended many memorial services, some of which were during work hours. Tr. 7414-15. In

[61] Rufo started as a backup clerk in 1996, became a front-line clerk at a predecessor of Fleet in 1997, and was a specialist from 2004 to 2007. Tr. 6365-67.

[62] Goldman Sachs's volume was record-breaking on July 19, 2002, and the exceptions pertaining to that stock for July 2002 were low compared to other months. Tr. 6497-99; Div. Exs. 194-A, B.

late 2001 and for much of 2002, he left the NYSE in the middle of the day and did not return, on many occasions, due to a medical problem of a family member. Tr. 7410-12. Throughout the relevant period he occasionally attended social functions, such as golf outings, for which he would leave in the middle of the day and not return. Tr. 7412-13. Reflecting the gradual diminution of Gillespie's trading of Goldman Sachs, during 1999, Hunt traded Goldman Sachs about 15% of the time. Tr. 7186, 7403. He continued as a relief specialist during 2000. Tr. 7395-96. During 2001 he traded the stock 50% of the time. Tr. 7377-78. During 2002 through the end of the relevant period, he traded the stock 90% of the time. Tr. 6371, 6417, 7449.

Hunt learned of the NYSE investigation in early December 2002. Tr. 6245, 6254, 7445-46. It was a topic of discussion among people on the floor. Tr. 6255, 7446. However, in March 2003 Fleet's compliance officer convened a meeting and formally informed the specialists of the investigation. Tr. 6283. He testified that he did not change his trading practices after learning about the investigation or being notified of it. Tr. 6276-77, 7446. Nor did he inform Rufo that they would have to trade differently. Tr. 6511-12, 7446-47. However, Hunt's interpositioning and trading ahead exceptions declined substantially in and after December 2002 and dropped almost to zero in and after March 2003. Div. Exs. 194-A, 194-B.

Bajaj testified on behalf of Hunt, performing the same analysis he performed on the computer data in Phase I and thus, that discussion and corresponding conclusions are incorporated by reference herein. Tr. 7596, 7645-46; Resp. Ex. Fleet 85. Bajaj's analysis with respect to Hunt was tailored to Hunt's trading only and similar to the analysis done for the other Respondents for whom Bajaj testified in Phase II; such discussions and corresponding conclusions are incorporated by reference herein. Tr. 7596, 7599-600, 7606, 7618, 7624, 7631-34, 7640-41; Resp. Ex. Fleet 85. Since Hunt has exceptions from two stocks that overlap, Bajaj had the computer data necessary to analyze whether exceptions can occur due to demands on the specialist rather than intentional profit-motivated trading. Tr. 7641; Resp. Ex. Fleet 85 at 39-43. Bajaj concluded that exceptions were likely in Cardinal Health stock during times when Hunt was busy with Goldman Sachs stock and vice versa. Tr. 7641-44; Resp. Ex. Fleet 85 at 40-41. Bajaj performed a regression analysis, using intensity and complexity in Cardinal Health stock, to conclude that those variables do indeed correlate to the exceptions in Goldman Sachs stock and vice versa. Tr. 7643-45; Resp. Ex. Fleet 85 at 42-43.

The Division ascribes 1,966 interpositioning exceptions and 7,532 trading ahead exceptions to Hunt from August 1999 through June 2003. Div. Exs. 194-A, 194-B. Of the interpositioning exceptions, 97.51% were customer disadvantaged, 0.05% were customer advantaged, and 2.44% were break-even, and of the trading ahead exceptions 80.51% were customer disadvantaged, 3.40% were customer advantaged, and 16.09% were break-even. Div. Exs. 194-A, 194-B. The period included 344 customer disadvantaged (and 2 break-even) exceptions in 1999 and 2000, 855 customer disadvantaged (and 8 break-even) exceptions in 2001, and 718 customer disadvantaged (and 1 customer advantaged and 24 break-even) exceptions in 2002 through June 2003. Div. Exs. 194-A, 194-B.

Factors impacting on the reliability of the testimony of Rufo, who clerked for Hunt for more than a year, were described above. Cunningham, Bryant, and O'Brien testified favorably as to Hunt, but clerked for him only briefly. However, the fact that Hunt's exceptions declined markedly after he became aware of the NYSE investigation corroborates the testimony of Rufo that he did, in fact, trade improperly prior to that time. Additionally, as with other Respondents, the lopsided proportion of customer disadvantaged exceptions to customer advantaged exceptions also bolsters the finding that he traded improperly.

The amount of Fleet's profits from Hunt's trading at issue during the period from November 2000 to June 2003 as identified by the Division is $800,107 - $146,226 from interpositioning exceptions and $653,881 from trading ahead. Div. Ex. 187-A. Applying the 2.05% haircut to compensate for timestamp anomalies reduces the firm's trading ahead profits to $640,476 and the total to $798,277.[63]

The Division contends that Hunt received $126,144, included in bonus payments for the period from November 2000 through June 2003, as a result of the trading at issue. Div. Ex. 206. The figures for Hunt's bonuses in Div. Ex. 206 are roughly consistent with Hunt's rough estimates as to his compensation.

Using the Division's reasoning, set forth in Div. Ex. 206, the amount of bonus payments Hunt received for the period from November 1, 2000, to June 30, 2003, was $123,996. To estimate his gains related to that trading, the Division calculates it as the amount it assumes Hunt's bonus was increased as the result of his violative trading by calculating the percentage relationship of the bonus to his trading profits. (The value for his trading profits for the period December 1, 1999, to November 1, 2000, is not available. Div. Ex. 206. Therefore, gains cannot be calculated for this period.) For example, for the period December 1, 2002, to June 30, 2003, Hunt's bonus of $150,000 was 7.2% of his trading profits. Div. Ex. 206. Therefore, using the Division's reasoning, Hunt's gains of 7.2% from his trading at issue during that period, $4,918, were $354. Div. Ex. 206. For November 2000, the corresponding numbers are 16.89% of $107,034 in firm profits from his trading at issue, or $18,078; for December 2000 through May 2001, 16.89% of $341,443 in firm profits from his trading at issue, or $57,670; for June through November 2001, 16.79% of $215,193, or $36,131; for December 2001 through May 2002, 9.84% of $38,878, or $3,826; and for June through November 2002, 10.37% of $76,542, or $7,937. To account for any possibility that Gillespie was trading in Hunt's panel, any day that Fleet's records showed both Gillespie and Hunt assigned to the panel was backed out for Hunt. Tr. 1547-49. Because of this no haircut will be applied to the total proven gains of $123,996.

F. VDM

Richard P. Volpe and Robert A. Scavone, Jr., were associated with Van der Moolen Specialists, USA, LLC (VDM).[64] VDM was 75% owned, through a subsidiary, by Van der

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[63] Division Ex. 206 contains information for prior periods, but, because the given information is incomplete, Hunt's gains are unable to be calculated for those periods.

[64] Pursuant to Stipulations 11 and 12, transcripts of selected testimony from United States v. Scavone, No. 1:05-cr-00390-SHS (S.D.N.Y.), and United States v. Volpe, No. 1:05-cr-00390-SHS (S.D.N.Y.) were received in evidence. Tr. 7705-11 (S-11, S-12). Citations to these transcripts will be noted as "Scavone Tr. __" and "Volpe Tr. __." Official notice, pursuant to 17

Moolen Holding N.V., a Dutch firm, and 25% owned by sixty-six VDM specialists and management individuals.[65] Resp. Ex. 755 at 1. In October 1998 Van der Moolen Holding N.V. purchased a controlling interest in Lawrence, O'Donnell, Marcus, LLC (LOM), and in July 1999 LOM changed its name to VDM. Tr. 7809 (S-18). By the end of the relevant period VDM had acquired a number of specialist firms, including Einhorn & Company, LLC (Einhorn) in 1999, Scavone, McKenna, Cloud & Co., LLC (SMC) in August 2001,[66] and Fagenson, Frankel, & Streicher, LLC (Fagenson Frankel) in June 2000. Tr. 7707 (S-11), 7712, 7900, 8127-28, Volpe Tr. 1053-54, 1071. In 2002 VDM had about sixty-five specialists. Volpe Tr. 1055.

Volpe arrived at VDM with Einhorn, and Scavone, with SMC. Tr. 7712; Scavone Tr. 754. Both were terminated on November 12, 2004. Tr. 7708 (S-11), 7834-36. Their arrests and trials in United States v. Volpe, No. 1:05-cr-00390-SHS (S.D.N.Y.) and United States v. Scavone, No. 1:05-cr-00390-SHS (S.D.N.Y.) have had a devastating effect on Volpe and Scavone professionally, financially, and personally. Tr. 7832-34. The news of their acquittals was much less publicized than the news of their arrests. Tr. 7833.

Day-to-day management of VDM was carried out by members of the Management Committee. Resp. Ex. 755 at 1-2, Resp. Ex. 783 at 12. Former LOM specialists dominated management and policies at VDM during the relevant period: the Management Committee consisted of Joseph Bongiorno (Bongiorno), James P. Cleaver, Jr. (Cleaver), Chairman, Michael J. Hayward (Hayward), Patrick J. McGagh, Jr. (McGagh) (as of January 1, 2003), Michael F. Stern (Stern), as well as Robert B. Fagenson (Fagenson), Vice Chairman, formerly of Fagenson Frankel, and a representative of VDM's Dutch parent. Tr. 7809 (S-18); Resp. Ex. 755 at 1-2; Volpe Tr. 559-60, 691, 1055-56. Cleaver, Bongiorno, Hayward, McGagh, and Stern were from LOM. Tr. 8128; Volpe Tr. 694-95, 703, 1049. They did not like Volpe. Tr. 7900-06, 8167-68; Volpe Tr. 1063-64. Bongiorno and Hayward, with Stern as the alternate, were in charge of trading policy and administration of the clerks and determined who was promoted from clerk to specialist. Volpe Tr. 1055-56. Before joining the Management Committee, McGagh directly supervised the clerks. Volpe Tr. 1056, 1060-61. Bongiorno and Hayward, primarily, and also Stern and McGagh, were responsible for ensuring compliance by clerks and specialists with NYSE rules pertaining to the DB. Volpe Tr. 1057.

C.F.R. § 201.323, is taken of the Judgments of Acquittal in Scavone and Volpe filed on August 2 and September 19, 2006, respectively.

Due to the serious medical condition of his father, Scavone did not appear in person and testify at the VDM Phase II hearing, and, pursuant to the parties' stipulation, no inference is drawn from his absence. Tr. 7705 (S-11).

[65] VDM left the specialist business, and its operations were acquired by Lehman Brothers on December 10, 2007, and operated as Lehman Brothers MarketMakers; as of September 25, 2008, after the collapse of Lehman Brothers, Barclays Capital acquired the market making business.

[66] The conduct alleged by the Division as to Scavone occurred during his association with VDM from the August 2001 merger to June 2003.

Compensation of a VDM specialist was not tied directly to the profitability of the panel in which he specialized. Resp. Ex. 755 at 2. Specialists, including Volpe and Scavone, were compensated as follows: a yearly salary of $150,000, a share of the firm's monthly profit and loss proportional to the specialist's ownership interest in the firm, NYSE seat rental payment, and a bonus. Tr. 7810-13 (S-18); Resp. Ex. 362 at VDMCR 006604. As a practical matter, the bonus amounts were determined by Bongiorno, Hayward, and Stern, using subjective criteria; they did not use a set formula to determine the amounts. Tr. 7811 (S-18), Tr. 8175-76; Resp. Ex. 362 at VDMCR 006604. Among several factors that they might consider was profitability of an individual specialist's panel. Tr. 7812-13; Resp. Ex. 362 at VDMCR 006604.

VDM settled charges arising out of the trading of Volpe, Scavone, and other VDM specialists, by, in addition to agreeing to various undertakings, paying $57,675,104 (consisting of civil penalties of $22,748,491 and disgorgement of $34,926,613). Van der Moolen Specialists USA, LLC, 82 SEC Docket 2113 (Mar. 30, 2004). VDM's Dutch parent paid 75% of these sums, and the individual owners, including Volpe and Scavone, paid the remaining 25% in proportion to their ownership interests. Tr. 7813-14 (S-18), 7998-8000. Volpe's ownership interest was 0.9363%. Resp. Ex. 783 at A-4. Thus, his share of the payments was $540,012. Whatever was available in his capital account was taken, and he wrote a check to VDM for the balance of $401,872. Tr. 7999-8000. Scavone's ownership interest was 0.6433%. Tr. 7708 (S-11); Resp. Ex. 783 at A-3. Thus, his share of the payments was $371,024. The $34,926,613 in disgorgement in the VDM settlement was calculated using all of the allegedly violative trades attributed to Volpe and Scavone in this proceeding. Tr. 7790 (S-13). Neither Volpe nor Scavone participated in VDM's decision to settle. Tr. 8055-56.

Stepping ahead of public orders had been pervasive at LOM, and was company policy at VDM. Tr. 8182-83, 8226-29; Volpe Tr. 688-90. Such trading was known by the legitimate-sounding term "DOT arbitrage." Volpe Tr. 1065, 1071-72. VDM management openly promoted it: a member of the Management Committee addressed the clerks and instructed them not to pair off DOTs. Volpe Tr. 560-62. At a specialists' morning meeting, Bongiorno stated that firm policy was not to pair off DOTs and that anyone who disagreed could work elsewhere. Tr. 8182-83, 8226-29. Bongiorno would yell at a clerk if he caught him pairing off DOTs, as would Hayward. Volpe Tr. 558, 699-700, 10227-28. Hayward even continued his practices after the NYSE investigation into improper trading was generally known. Volpe Tr. 1027-30, 1044-45, 1067. Certainly, the proclivities toward improper trading at VDM were not concealed and were, in fact, generally known, as indicated by the testimony of witnesses called both by the Division – Kathryn Handelman (Handelman), Robert Corcoran (Corcoran), Michael Studer (Studer), and Theodore Gatsonis (Gatsonis) – and by Volpe and Scavone – Jason Blatt (Blatt), Brian Schaeffer (Schaeffer), and Fagenson. Tr. 8129-32; Volpe Tr. 240, 302, 404, 414, 663-64, 691-700, 1032, 1039, 1062-63; Scavone Tr. 325.

Fagenson joined the Management Committee after his company was acquired by VDM. Volpe Tr. 1068. The Management Committee continued to operate almost the same way as before he got there; for example, he was left out of decisions on promoting clerks to specialists. Volpe Tr. 1068. He did, however, confront Bongiorno, both at meetings and on the trading floor, concerning his instructions that DOTs not be paired off. Tr. 8182-83; Volpe Tr. 1062-63.

Fagenson considered pairing off DOT orders "rule number one," and consistently told specialists this. Scavone Tr. 833.

Neither Volpe nor Scavone operated the DB keyboard. Tr. 7882; Volpe Tr. 388, 640-41, 666, 1042; Scavone Tr. 304. Thus, all of their trades were entered by clerks. While working as a specialist, Volpe referred to his clerk Robert Corcoran as his "electric link" on the DB. Tr. 7917-19; Resp. Ex. 782. Volpe and Scavone each acknowledged that he was responsible for the trades in his panel entered by his clerk. Tr. 8030; Scavone Tr. 763. A specialist was not, however, responsible for trades ordered by a relief specialist who was trading in his panel. Tr. 7851-52. Volpe's clerks from whom evidence was received were Division witnesses Handelman (Eli Lilly, early 2000, Volpe Tr. 162-371), Corcoran (Disney, early 2001 through 2002, Volpe Tr. 372-633), Studer (Pfizer, fall 2000 to spring 2001, Volpe Tr. 633-764) and Volpe witnesses Blatt (VDM clerk and specialist who clerked for Volpe at Einhorn, Tr. 8125-8244) and Schaeffer (Disney, January 2003 through the remainder of Volpe's tenure at VDM, Volpe Tr. 1023-51). Scavone's clerks from whom evidence was received were Division witness Gatsonis (Eli Lilly, April 2002 to January 2003, Scavone Tr. 278-505) and Scavone witness John Napoli (Napoli) (clerked for Scavone as front-line clerk at SMC and as relief clerk at VDM, Tr. 8059-71; Scavone Tr. 869-879).

VDM did not keep contemporaneous attendance records, so the dates that the Division used to attribute exceptions to them are based on after-the-fact estimates. Tr. 8162-63; Resp. Ex. 755 at 2. To respond to a Commission inquiry, VDM directed specialists to try to recall their attendance and panel assignments. Tr. 7927-28, 8163; Resp. Ex. 755 at 2.

Clerks whose evidence (transcripts of their testimony from Volpe or Scavone) was offered by the Division testified pursuant to non-prosecution agreements. Volpe Tr. 163, 374-75, 634; Scavone Tr. 283; Div. Ex. P VDM 8-9 at Gov't Ex. 3509-10. At an early stage of the NYSE investigation Corcoran, Studer, and Gatsonis (Handelman was no longer working at the NYSE) were called to give testimony under oath by the NYSE Division of Market Surveillance in the spring of 2003. Volpe Tr. 376, 635; Scavone Tr. 284. The three testified that there was no improper trading by VDM specialists. Volpe Tr. 375-76, 636; Scavone Tr. 285. They did so to protect their jobs at VDM.[67] Volpe Tr. 376, 578, 636, 714; Scavone Tr. 285. In Scavone's criminal trial Gatsonis affirmatively testified that he would lie under oath to protect his job. Scavone Tr. 406. The VDM clerks were represented at the NYSE testimony sessions by VDM's lawyers. Volpe Tr. 376, 712-13; Scavone Tr. 285. Subsequently, in 2004, they were interviewed by the NYSE Division of Enforcement and stated that the VDM specialists did trade improperly. Volpe Tr. 377, 636; Scavone 285. For those interviews they had their own lawyers, not VDM's. Volpe Tr. 377, 592; Scavone Tr. 412. Handelman also was interviewed then by the NYSE Division of Enforcement and was represented by her own lawyer. Volpe Tr. 263-64. Later, all

[67] Later, Gatsonis believed that he had been passed over for promotion to specialist because his response to the NYSE investigation was not considered satisfactory. Scavone Tr. 408-09, 876-79. Subsequently, a few months after he provided different information in his interview by prosecutors and 2005 grand jury testimony, he was promoted to specialist. Scavone Tr. 417-25, 879.

four were interviewed by agents of the U.S. Attorney's Office, stated that the specialists traded improperly, and were given non-prosecution agreements. Volpe Tr. 264, 341-42, 594-606, 758-63; Scavone Tr. 415-24; Div. Ex. P VDM 8-9 at Gov't Ex. 3509-10. Their testimony in the criminal trial was consistent with the statements they had given during their interviews. Indeed, Corcoran believed that if he testified that he did not know whether Volpe intentionally engaged in any improper trades, the government would tear up the non-prosecution agreement and prosecute him for perjury. Volpe Tr. 609-10. Handelman and Gatsonis recognized that the prosecutors, not the presiding judge, would determine whether their testimony was truthful for the purpose of their non-prosecution agreements. Volpe Tr. 343-44; Scavone Tr. 423. Thus, just as Volpe's and Scavone's testimony must be viewed in the light of their self-interest, the testimony of the clerks must be viewed in the light of their self-interest. An additional factor bearing on Corcoran's recollection of the events in question is his contemporaneous use of opiates and other controlled substances while at work and heavy drinking after work. Volpe Tr. 377-78, 552-53. His drug and alcohol abuse did not affect his work performance at the time, however. Tr. 7843-44, 7918; Volpe Tr. 553.

1. Volpe

Volpe testified that he did not realize at the time that Bongiorno, Hayward, Stern and McGagh were trading improperly. Tr. 8027-28. Likewise, he testified that he did not realize at the time that VDM clerks were trading ahead and interpositioning. Tr. 7842-47, 8030-31. Essentially, he testified that many specialists and clerks were trading ahead and interpositioning to make money for the firm, but that he was unaware of it at the time. Tr. 8033-35. This is not entirely consistent with the testimony of VDM specialist Blatt, called by Volpe, that, at a specialists' meeting, Volpe – and only Volpe – protested Bongiorno's instructions not to pair off DOTs. Tr. 8182-83, 8226-29. Also, as found above, the proclivities toward improper trading at VDM were not concealed and were, in fact, generally known. Volpe acknowledged that he did not train his clerks, as at Einhorn, rather, that VDM assigned him clerks trained by VDM management, including McGagh. Tr. 7748-49, 7840-41, 8025-26. Such clerks would be inclined to follow management's stated policies concerning trading DOTs.

At VDM, Volpe traded Eli Lilly and Company (Lilly) from January to February 2000. Tr. 7926-28. Handelman testified that she clerked for Volpe in Lilly from January to June 2000. Volpe Tr. 169. His recollection is accepted over hers. She continued in Lilly when that stock was taken over by Stern. Volpe Tr. 266-67. Thus the source of her recollection that Volpe traded Lilly through June 2000 is the fact that she herself was clerking in Lilly through June 2000. Volpe's testimony that he traded Lilly at VDM for two months or less is also bolstered by Blatt's testimony that he could not recall Volpe trading Lilly at all after the takeover by VDM. Tr. 8163-64. Volpe traded Pfizer Inc. (Pfizer) from about October 2000 to about January 2001. Tr. 7928. He traded The Walt Disney Company (Disney) from approximately June 2001 to November 2004. Tr. 7721-23.

Generally Volpe concentrated on the crowd, while the clerk concentrated on the DB. Volpe Tr. 640-41, The crowd usually numbered two to three or more in Lilly, Volpe Tr. 308, one to seven in Pfizer, Volpe Tr. 642, and one to ten in Disney. Tr. 7945; Volpe Tr. 388. When at his panel, Volpe stood in front of the post about two or three feet from the DB screen; at times his attention was wholly focused on floor brokers in the crowd; at times he turned and looked at the DB screen or other screens that displayed market data. Tr. 7749-51; Volpe Tr. 227-28, 640-42.[68] He was not necessarily looking at the 8 price window while looking at the DB screen; the depth price window, for example, would have been useful to him while dealing with large crowd orders. Tr. 7751; Volpe Tr. 281. Although he monitored his positions constantly, he would not necessarily have noticed small changes arising from the relatively smaller trading ahead DOT transactions. Tr. 7750-52, 7772-76. Also, his position would have been the same before and after an interpositioning transaction. Volpe Tr. 288.

Volpe recognized that the alleged interpositioning and trading ahead conduct was improper and well-known to be a violation of the negative obligation. Tr. 7745-48. Volpe suggested that interpositioning and trading ahead transactions that occurred while he was actually at his panel were either errors or were the product of clerks trading on their own. Tr. 7839-45, 7951-53. He denied instructing clerks to trade ahead or interposition. Tr. 7770, 7837. Schaeffer,[69] who clerked for Volpe in Disney from approximately January 2003 to November 2004, testified that Volpe, unlike Hayward, never directed him to enter an improper trade. Volpe Tr. 1027, 1032, 1036, 1039-40, 1044-45, 1049-50. However, as found below, the NYSE investigation had become known to Volpe by March 2003, and even according to the Division's exception exhibits, Volpe's interpositioning and trading ahead exceptions decreased between December 2002 and January 2003 and decreased markedly, almost to zero, after March, 2003. Div. Exs. 198A, 198B. Blatt,[70] who became a specialist at VDM, clerked for Volpe at Einhorn in Lilly and other stocks, testified that Volpe never traded improperly when he clerked for him. Tr. 8125-27. Volpe always paired off DOTs at Einhorn, and as far as Blatt knew, did not change his trading style at VDM. Tr. 8128-29.

Volpe testified that when instructing a clerk to pair off orders on the book, he would turn to the book and use minimal verbiage, such as "5 cents, 4 cents, 3 cents," to tell the clerk the price, and the clerk would know that any DOT order available to trade at that price would trade at that price, and the principal account would be used to offset any small disparities. Tr. 7762. If dealing with the crowd when there was nothing in the book, he would say, for example, "I sold 5,000 to Bear Stearns in the crowd." Tr. 7764.

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[68] Corcoran's testimony concerning where Volpe stood is confusing and has been disregarded. Corcoran testified, "I stood in front of him," when asked where he stood when clerking for Volpe. Volpe Tr. 386. Then he was asked "How were you able to tell?" after he testified that Volpe paid attention to the flow of orders on the screen, and responded "Because he was in front of me." Volpe Tr. 387.

[69] Schaeffer started as a backup clerk in 1997 and was a VDM specialist at the time of Volpe's trial in 2006. Volpe Tr. at 1024-25.

[70] Blatt, who became a VDM specialist in November 1999, started as a backup clerk in 1992. Tr. 8125.

Witnesses called by the Division who clerked for Volpe at VDM before the NYSE investigation became known testified that he did instruct them to trade improperly. Handelman[71] clerked for Volpe in early 2000 in Lilly. Volpe Tr. 169. She was accustomed to trading improperly, having clerked for Stern and Bongiorno. Volpe Tr. 240, 266, 301-02. Until she started working for Volpe, she did not know whether he interpositioned or not. Volpe Tr. 314-15. So, she testified, to ascertain whether he would trade in this manner, she set up an improper trade on the DB and asked him whether he wanted to execute it; he asked her whether the other specialists did it, she responded that they did, and he did not respond. Volpe Tr. 232-33, 247, 315-16. She estimated that fewer than 5% of the trades (not volume) were improper. Volpe Tr. 241. Although she acknowledged executing some trades on her own, she estimated that Volpe ordered 98% of the improper trades. Volpe Tr. 246-47. She testified that when Volpe directed her to trade ahead and interposition he said "you" to indicate the principal account bought or sold. Volpe Tr. 241, 313. Volpe's testimony that he used "I" to indicate principal participation in trades with the crowd when there was nothing in the book is not inconsistent with this. Tr. 7764. Volpe testified that he did not recall using "you" to indicate dealer participation. Tr. 7764. Corcoran[72] clerked for Volpe from the beginning of 2001 to the end of 2002 in Disney. Volpe Tr. 385. He testified that Volpe directed him to interposition by specifying two trades, for example, "2,000 traded at 19.98, 2,000 traded at 20.03," while to pair off, Volpe would specify one trade, for example, "2,000 traded at 20." Volpe Tr. 402. Corcoran estimated that he executed such trades 50% of the time on his own, and 50% at the direction of Volpe. Volpe Tr. 401, 440. Such improper trades were company policy, and he did not inform Volpe when he executed them on his own. Volpe Tr. 404. Like Handelman, he estimated that the proportion of improper trades was less than 5%. Volpe Tr. 411-12. Studer[73] clerked for Volpe from fall 2000 to spring 2001 in Pfizer. Volpe Tr. 639. He testified that he never traded improperly on his own. Volpe Tr. 647. Studer testified that Volpe always traded orders according to the sequence in which they appeared on the DB, but that when buy and sell market orders appeared simultaneously coming out of a freeze, Volpe paired them off. Volpe Tr. 658-62. Corcoran and Studer agreed that Volpe never instructed them, "Don't pair off DOTs," or words to that effect, unlike some other specialists. Volpe Tr. 558-60, 685-86, 699-700

Volpe was known for taking large positions, which increased the possibility of profits and the risk of loss. Tr. 8166; Volpe Tr. 1031. Sometimes Volpe would be relieved from his trading by Bongiorno's SWAT team, which included McGagh, Hayward, and Stern in addition to Bongiorno; this occurred during breakout situations and when Bongiorno became concerned

[71] Handelman started as a backup clerk in 1994. Volpe Tr. 165-66. She eventually left VDM and the securities industry. Tr. 170.

[72] Corcoran started on the NYSE floor in 1993. Volpe Tr. 380. He left VDM in 2004. Volpe Tr. 384.

[73] Studer started on the NYSE floor in 1988. Volpe Tr. 637. He became a specialist at VDM in 2003, but was demoted to clerk after two and a half years because his trading was not profitable enough for the firm. Volpe Tr. 639-40. He was a VDM clerk at the time of Volpe's trial in 2006. Volpe Tr. 640.

about the size of Volpe's positions and desired to trade to lower the size of the positions.[74] Tr. 7824-25 (S-20), 7939, 7955-58, 8131-32; Resp. Exs. 751, 786. In these situations the SWAT team's trading included trading ahead and interpositioning. Tr. 7824-25 (S-20); Resp. Ex. 751. Volpe had many friends and relatives on the floor, and visited them when the SWAT team occupied his panel, as well as on other occasions. Tr. 7944-45, 8169-70.

While taking large positions intraday, Volpe attempted to be flat overnight, which accorded with VDM policy. Tr. 7938-39; Volpe Tr. 554.

Volpe was a floor official during the relevant period through 2002 and was a floor captain for VDM. Tr. 7907-09. These duties took him away from his panel anywhere from a few seconds to two hours at a time. Tr. 7909-10, 8132-33. During 2000, Volpe acted as a floor official in 190 incidents, in 2001, 679, and in the first six months of 2002, 680. Tr. 7826-29 (S-21); Resp. Ex. 750. Volpe's breaks included a one-hour break in the afternoon. Tr. 8168; Volpe Tr. 643-44. On the one-hour break, Volpe engaged in what he characterized as meditation and Bongiorno and others, a nap. Tr. 7962-63, 8168. Volpe noted some anomalies relating to his badge swipe records and the exception reports: exceptions shown before he swiped onto the trading floor. Tr. 7972-88.

Volpe learned of the NYSE investigation into improper trading in early 2003. Tr. 7737. He recalls a partners' meeting at which it was discussed in March 2003. Tr. 7737. This is consistent with Fagenson's testimony that he received a letter from the NYSE in January 2003 requesting extensive information about certain stocks that VDM traded, that he did not know the nature of the problem at that time, but that he spoke with the specialists and clerks who traded the stocks at issue, and that in the following months up to April 2003, he learned more specifics and conveyed the information to the specialists and clerks. Volpe Tr. 1064-67, 1071-74; Scavone Tr. 804-12.

Bajaj testified on behalf of Volpe, performing the same analysis he performed on the computer data in Phase I and thus, that discussion and corresponding conclusions are incorporated by reference herein. Tr. 8250. Bajaj's analysis with respect to Volpe was tailored to Volpe's trading only and similar to that analysis done for the other Respondents for whom he testified in Phase II; such discussions are incorporated by reference herein. Tr. 8250; Resp. Ex. 788. Bajaj reached similar conclusions as well. Tr. 8250; Resp. Ex. 788.

The Division ascribes 12,655 interpositioning exceptions and 6,511 trading ahead exceptions to Volpe from January 2000 through June 2003. Div. Exs. 198-A, 198-B. Of the interpositioning exceptions, 98.95% were customer disadvantaged, 0.04% were customer

[74] Corcoran estimated that there were about fifty breakout situations while he was clerking for Volpe. Volpe Tr. 389. Nonetheless, he recalled the SWAT team taking over trading in Disney only about five times. Volpe Tr. 626. Volpe did not quantify the SWAT team's incursions, but described them as "quite often." Tr. 7939.

advantaged, and 1.01% were break-even; of the trading ahead exceptions, 62.65% were customer disadvantaged, 2.24% customer advantaged, and 35.11% break-even. Div. Exs. 198-A, 198-B.

Factors impacting on the reliability of the testimony of clerk witnesses were described above. However, the fact that Volpe's exceptions declined markedly after he became aware of the NYSE investigation corroborates the testimony of former clerks that he did, in fact, trade improperly prior to that time. Additionally, as with other Respondents, the lopsided proportion of customer disadvantaged exceptions to customer advantaged exceptions also bolsters the finding that he traded improperly.

Using the Division's exception figures as a starting point, after removing March and April 2003 exceptions, a substantial haircut would be necessary to take account of VDM's lack of attendance and assignment records, the SWAT team's trading in Volpe's panel, and Volpe's absences from his panel on floor captain and floor official duties. However, it is unnecessary to apply the haircut to ascertain gains Volpe received from the trading at issue. The sum that Volpe paid toward VDM's settlement, $540,012,[75] far exceeds the approximately $82,500 that the Division calculates as Volpe's gains.

2. Scavone

Scavone traded Lilly from August 2001 throughout the relevant period. Tr. 7708 (S-11). Scavone's clerks were Gatsonis,[76] during 2002, followed by Corcoran as of January 2003.[77] Tr. 7708-09 (S-11); Scavone Tr. 458, 755. Napoli was Scavone's full-time front-line clerk at SMC until it was taken over by VDM in August 2001. Tr. 8061. At VDM he filled in as a relief clerk almost daily when Scavone's clerk was on breaks.[78] Tr. 8064-65, 8068.

Generally Scavone concentrated on the crowd, while the clerk concentrated on the DB. Scavone Tr. 386. The crowd in Lilly numbered one to three in 2002. Scavone Tr. 308, 334.

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[75] Approximately 60% of VDM's settlement amount, which included all of Volpe's exceptions, was disgorgement. According to the Division's calculations, Volpe received gains of about 7% of the profits generated by the questioned trades. In funding VDM's settlement with the Commission, Volpe paid far more than the Division calculated that he benefited from the trading at issue. This results primarily from the fact that VDM disgorged the entire amount of its profits from the violative trades identified in Van der Moolen Specialists USA, LLC, infra, while the profits ascribed to the individual traders were derived as a small percentage of those same profits.

[76] Gatsonis started as a backup clerk in February 1998, progressed to front-line clerk, and became a specialist in August 2005; he was a VDM specialist at the time of Scavone's trial in 2006. Scavone Tr. 279-81.

[77] There is no evidence in the record from Corcoran regarding Scavone's trading.

[78] Napoli started at SMC in 1995; he continued as a clerk until he left VDM in 2006. Tr. 8059-60.

When at his panel, Scavone stood in front of the post about two or three feet from the DB screen; at times his attention was wholly focused on floor brokers in the crowd; at times he turned and looked at the DB screen or other screens that displayed market data. Scavone Tr. 305, 332-34, 386-88, 426-27, 433-34, 438, 756-58. Even if he were seen looking at the DB screen, it would not be possible to tell which window that was currently displayed had his attention. Scavone Tr. 438-39. Concerning monitoring his position, specialists cared about the value of their positions at the end of the day, not intraday. Scavone Tr. 498-99. They liked to end as flat as possible at the end of the day. Scavone Tr. 456-57.

Scavone recognized that the alleged interpositioning and trading ahead conduct was improper and well-known to be a violation of the negative obligation. Scavone Tr. 756, 762, 765-67. At the time of the NYSE investigation, Scavone expressed disbelief and frustration when advised that interpositioning and trading ahead transactions had occurred at his panel. Scavone Tr. 807, 812, 817. Napoli testified that Scavone never instructed him to trade ahead or interposition at SMC or at VDM. Tr. 8062-65.

Gatsonis testified that Scavone instructed him to trade improperly. Scavone Tr. 284, 336-37. Generally, Gatsonis testified, Scavone executed the improper trades when they appeared simultaneously or in sequence, that is trading first with the order that arrived first and second with the order that arrived second. Scavone Tr. 339-43. At the time, Gatsonis did not consider that improper, but sometimes Scavone traded with orders out of time sequence, which Gatsonis attempted, unsuccessfully, to challenge. Scavone Tr. 343-45. Scavone also paired off DOTS regularly. Scavone Tr. 335-36. In fact, Gatsonis estimated that Scavone traded properly 95% to 98% of the time. Scavone Tr. 376. Gatsonis testified that Scavone never explicitly instructed him "let's cheat the DOTs," or words to that effect, but rather instructed Gatsonis with conventional phrases, such as "you sold, you bought" to indicate that the principal account sold or bought. Scavone Tr. 479-81.

Scavone was relieved by the SWAT team, as was every other VDM specialist, on occasion; this occurred during breakout situations.[79] Tr. 7824-25 (S-20), 7933-34, 8131-32; Resp. Exs. 751, 786. In these situations the SWAT team's trading included trading ahead and interpositioning. Tr. 7824-25 (S-20); Resp. Ex. 751. Scavone was a floor captain for VDM. Tr. 7909-10, 8132-33; Scavone Tr. 754. When he was called upon, these duties took him away from his panel anywhere from five minutes to two hours. Tr. 8133. Scavone took two breaks a day of ten to twenty-five minutes and would remain at his panel during busy parts of the day, at the opening, from 9:30 to 10:30 a.m., and close, from 3:00 to 4:00 p.m. Scavone Tr. 347-48. Scavone had many friends and relatives on the floor and visited with them from time to time. Scavone Tr. 426-27. When present on the floor, Scavone was at his panel 70% to 90% of the trading day, Gatsonis estimated. Scavone Tr. 348.

Scavone learned of the NYSE investigation into improper trading in early 2003. Scavone Tr. 762-63. He recalls receiving a letter requiring him to appear and testify before the NYSE

[79] Gatsonis testified that breakout situations in Lilly occurred at least six times a year. Scavone Tr. 290.

Division of Market Surveillance in March 2003. Scavone Tr. 762-63. This is consistent with Fagenson's testimony that he received a letter from the NYSE in January 2003 requesting extensive information about certain stocks that VDM traded, that he did not know the nature of the problem at that time, but that he spoke with the specialists and clerks who traded the stocks at issue, and that in the following months up to April 2003, he learned more specifics and conveyed the information to the specialists and clerks. Scavone Tr. 804-12; Volpe Tr. 1064-67, 1071-74. Scavone's exceptions declined markedly after he became aware of the NYSE investigation. Div. Ex. 197A, 197B.

Bajaj testified on behalf of Scavone, performing the same analysis he performed on the computer data in Phase I and thus, that discussion and corresponding conclusions are incorporated by reference herein. Bajaj's analysis with respect to Scavone was tailored to Scavone's trading only and similar to that analysis done for the other Respondents for whom he testified in Phase II; such discussions are incorporated by reference herein. Tr. 8249; Resp. Ex. 789. Bajaj reached similar conclusions as well. Tr. 8249; Resp. Ex. 789.

The Division ascribes 3,616 interpositioning exceptions and 5,485 trading ahead exceptions to Scavone from August 2001 through June 2003. Div. Exs. 197-A, 197-B. Of the interpositioning exceptions, 97.54% were customer disadvantaged, 0.14% were customer advantaged, and 2.32% were break-even, and of the trading ahead exceptions 80.44% were customer disadvantaged, 3.81% were customer advantaged, 15.75% were break-even. Div. Exs. 197-A, 197-B.

Factors impacting on the reliability of the testimony of Gatsonis were described above, including his testimony that he would lie under oath to protect his job when he was still employed at VDM. While Napoli, who testified that Scavone did not trade improperly was Scavone's full-time clerk at SMC, he clerked for brief periods for Scavone as a relief clerk during the relevant period at VDM. However, the fact that Scavone's exceptions declined markedly after he became aware of the NYSE investigation corroborates the testimony of Gatsonis that he did, in fact, trade improperly prior to that time. Additionally, as with other Respondents, the lopsided proportion of customer disadvantaged exceptions to customer advantaged exceptions also bolsters the finding that he traded improperly.

Using the Division's exception figures as a starting point, a substantial haircut would be necessary to take account of VDM's lack of attendance and assignment records, a certain amount of trading by the SWAT team in Scavone's panel, and Scavone's absences from his panel on floor captain duties. However, it is unnecessary to apply the haircut to ascertain gains received from the trading at issue. The sum that Scavone paid toward VDM's settlement, $371,024,[80] far exceeds the approximately $28,500 that the Division calculates as Scavone's gains.

[80] Approximately 60% of VDM's settlement amount, which included all of Scavone's exceptions, was disgorgement. According to the Division's calculations, Scavone received gains of about 5% of the profits generated by the questioned trades. As with Volpe, in funding VDM's settlement with the Commission, Scavone paid far more than the Division calculated that he benefited from the trading at issue.

G. Bear Wagner

Frank A. Delaney, IV, was associated with Bear Wagner Specialists LLC (Bear Wagner).[81] He became a specialist in 1989 and joined a predecessor of Bear Wagner in 2000. Tr. 3823-25, 3872-78. He became a partner in Bear Wagner in June 2000. Tr. 3841. John Mulheren, Jr. (Mulheren), was the CEO of Bear Wagner; below him in the chain of command were Jay Mahoney (Mahoney) and Peter Murphy, who ran the floor, and below them were Delaney and two other super captains. Tr. 3879-80. Delaney's career ended on April 12, 2005, when he was indicted based on the conduct at issue in this proceeding,[82] and he has not worked since, except for trading his own account. Tr. 3930-31. He has been personally and financially devastated. Tr. 3938.

Delaney's compensation, including bonus and share of profit, was over $2 million each year in 2002 and 2003. Tr. 3841-42. In 2002, his compensation was salary of $250,000, partnership distribution of $950,000, and bonus of $1.9 million (paid in March 2003). Div. Ex. BW-1 at 190-91. In 2001, his salary was $250,000 and the rest of the compensation was about $4 million; likewise, the bonus was actually paid in the following year, 2002. Div. Ex. BW-1 at 191. Profitability was one of many factors taken into account for specialists' bonuses, but not at a fixed percentage, as every specialist's situation was different. Resp. Ex. 232 at 38-41. Mulheren, who determined specialists' bonuses, tried to pay out as little as possible.[83] Ex. 232 at 38-42.

Bear Wagner settled charges arising out of the trading of Delaney and other Bear Wagner specialists by, in addition to agreeing to various undertakings, paying $16,259,446 (consisting of disgorgement of $10,724,903 and a civil money penalty of $5,534,543). Bear Wagner Specialists LLC, 82 SEC Docket 2052 (Mar. 30, 2004). Delaney contributed, unwillingly, to these sums; he does not know the amount of his contribution, which was taken out of his capital account. Tr. 3870-71. He did not agree to the settlement. Tr. 3870. The $10,724,903 in disgorgement in the Bear Wagner settlement was calculated using all of the allegedly violative trades attributed to Delaney in this proceeding. Tr. 4613 (S-5).

Delaney never used the DB keyboard and did not know how to operate it. Tr. 3840-41, 3877, 3909. Thus, all of his trades were entered by clerks. Delaney guardedly conceded that a specialist was responsible for trades entered by clerks, absent errors or misunderstandings. Tr.

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[81] Bear Wagner was acquired by JPMorgan following the collapse of Bear Stearns. Currently, JPMorgan has agreed to sell the business to Barclays Capital, which will merge its operation with its own NYSE market-making business. See *Bear Wagner is Sold*, WALL ST. J., Mar. 10, 2009, at C4.

[82] Subsequently, on review of the evidence in the case and information pertaining to Delaney subsequent to the filing of the indictment, the Government concluded that further prosecution of Delaney would not be in the interests of justice, and an order of Nolle Prosequi was entered on November 21, 2006. United States v. Delaney, No. 1:05-cr-00394-HB (S.D.N.Y. Nov. 21, 2006).

[83] Mulheren was a tough and intimidating executive. Tr. 4566.

3834, 3934-35. Errors did occur. Tr. 3990, 8361. Delaney's clerks from whom evidence was received were Division witnesses Jennifer Trentacosta Maher (Maher) (January to May 2002, Tr. 3939-4013) and David Carroll (Carroll) (May to December 2002, Tr. 4335-4412) and Delaney witness Brent Mekosh (Mekosh) (June to November 2001, Tr. 8349-99). Additionally, Jason Dowd (Dowd), a former clerk of another Bear Wagner specialist, Kevin Fee, who was called by then-Respondent Fee, testified tangentially as to Delaney. Tr. 4471-73.

Division witnesses Maher and Carroll testified pursuant to non-prosecution agreements with the U.S. Attorney's Office. Tr. 3940-41, 4338. In January 2003 each was interviewed by Bear Wagner management, which was conducting an internal investigation. Tr. 3942-43, 4354-59. Maher told them that she had not seen any improper trading, and testified consistently before the NYSE later in 2003. Tr. 3943-45, 3976-80. At the hearing, she characterized her 2003 statement and testimony as untruthful, stating that she was afraid of losing her job at the time. Tr. 3943-45, 3977. In July 2004, however, she left the NYSE and the securities industry. Tr. 3941-42. Then, in 2005, she went to a proffer session with the U.S. Attorney's Office, stated that in fact she had seen interpositioning and trading ahead, and was given a non-prosecution agreement. Tr. 3945-46, 3970-71. This was the first time she had her own defense lawyer. Tr. 3981. When she testified before the NYSE, she was represented by Bear Wagner's lawyer. Tr. 3985. She testified at the hearing that she finally told the truth then because she no longer feared for her job. Tr. 3981-82. When interviewed by Bear Wagner management in January 2003, Carroll was shown screenshots of improper transactions in Merrill Lynch; he said that Delaney had instructed him to trade that way. Tr. 4358-60. Management advised him that Delaney had no recollection of that and, shortly thereafter, removed him from the floor and assigned him to work in "upstairs trading."[84] Tr. 4337-38, 4358, 4360, 4363-64. Later in 2003 he testified before the NYSE consistently with the statements he gave Bear Wagner management. Tr. 4409. He gave a consistent statement to the U.S. Attorney's Office, was given a non-prosecution agreement, and testified before the grand jury. Tr. 4409-10. Both Maher and Carroll acknowledged that they could be prosecuted if they did not testify consistently with what they had told the U.S. Attorney's Office. Tr. 3983, 4410.

Delaney witness Mekosh was interviewed by Bear Wagner management and the NYSE and on each occasion stated that Delaney did not trade ahead of DOT orders. Tr. 8367-70, 8377. Eventually he was interviewed by the U.S. Attorney's Office and showed MARS reports and screenshots which he was told represented Delaney's trades; he said the trades were improper. Tr. 8367-70. Mekosh testified that any statement he made to the U.S. Attorney's Office that Delaney's trading was improper was based on the documentation he was shown and, outside of the MARS reports and screenshots he was shown, he had no basis to state that Delaney traded improperly. Tr. 8371-78, 8383. Contrary to the Division's argument, there is no evidence in the

[84] Unlike Maher and Mekosh, whom Delaney had recommended highly, Carroll did not become a specialist after leaving Delaney's panel. Tr. 3921-23, 4395-97. Carroll was disappointed. Tr. 3924, 4398. Delaney suggests that Carroll's testimony was biased because he blamed Delaney for his failure to become a specialist. Carroll, however, blamed the investigation, not Delaney. Tr. 4398-99. Additionally, Carroll's statements and testimony are consistent with concerns that he expressed to Delaney in 2002 while he was still clerking for him. Tr. 4352-53, 4412, 4471-72.

record that he told the U.S. Attorney's Office that he had any doubts about Delaney's trading when he was clerking for him or otherwise outside of the documents he was shown. Tr. 8375-99.

During the relevant period Delaney traded Bank One Corp. (Bank One) from approximately November 2000 to May 2001 and Merrill Lynch & Co. Inc. (Merrill Lynch) from approximately June 2001 to June 2003. Tr. 3825-27. At the same time that he traded Merrill Lynch, he traded ACS and had two trading assistants, one for each stock, each with his own DB. Tr. 3880-81.

Generally Delaney concentrated on the crowd, while the clerk concentrated on the DB. Usually there was a crowd in Merrill Lynch, and sometimes in ACS, too. Tr. 3839, 3886-87. The crowds in Merrill Lynch were especially large in the months following September 11, 2001. Tr. 8353-54, 8358. At times, trading was so busy that Delaney called for a second specialist; he ran the crowd or crowds while the second specialist ran the DB. Tr. 3887-91, 8354, 8359. When at his panel, Delaney stood in front of the post about two or three feet from the post and the DB screen; at times his attention was wholly focused on floor brokers in the crowd; at times he turned and looked at the DB screen or other screens that displayed market data. Tr. 3835-40, 3843, 3908, 3947, 3994, 4346. Delaney did not look at the DB all the time, and when he did, he looked at the orders displayed in the 8 price window on the left of the screen, not the Smart Report template where the clerk reported executions, on the right. Tr. 3908-10, 3917, 8355. Delaney had available a video display of Bear Wagner's "Position Management" database, which enabled him to track the inventory in the firm's principal account, in over 300 stocks, and all the use of its capital for every individual stock, what each panel was doing individually, and the overall P&L of the firm. Tr. 3836, 3838. He did not notice small changes in his positions in his own stock, Merrill Lynch, such as 200 to 1,500 shares, as his trading strategy involved taking positions of 15,000 to a million shares. Tr. 3884, 3911.

Delaney recognized that the alleged interpositioning and trading ahead conduct was improper. Tr. 3827-33. He suggested that interpositioning and trading ahead transactions that occurred while he was at his panel were either errors or the result of miscommunications. He denied trading ahead or interpositioning or instructing clerks to do so. Tr. 3833, 3867, 3912, 3927, 3932. Mekosh[85] clerked for Delaney from June to November 2001. Tr. 8352. To his knowledge, Delaney did not intentionally trade ahead of DOT orders; it was Delaney's practice to pair off pairable DOT orders coming out of a freeze. Tr. 8364. If Delaney instructed him to trade for the principal account, and he knew there were DOT orders entitled to execution, he would inform Delaney. Tr. 8366.

Witnesses called by the Division who clerked for Delaney testified that he did instruct them to trade improperly. Maher[86] clerked for Delaney from January to May 2002. Tr. 3941.

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[85] Mekosh started as a backup clerk in 1996, became a front-line clerk in 1998, and was a specialist with Bear Wagner from November 2001 to February 2006. Tr. 8349-53.

[86] Maher started as a backup clerk in 1996, became a front-line clerk in 1999, and was a specialist from May 2002 to July 2004, when she left Bear Wagner and the securities industry. Tr. 3939-42.

She testified that he instructed her to trade ahead of pairable DOT orders daily. Tr. 3951-62. She understood that he was looking at the DB screen and knew the orders were pairable when he made comments such as "screw the DOTs." Tr. 3957-59. All the specialists with whom she worked said "screw the DOTs." Tr. 4000. At one time, before the NYSE investigation, specialists routinely traded with pairable DOT orders according to the time sequence in which they appeared on the DB. Tr. 3975, 3987, 3990, 4006-07. Delaney also paired off DOTs. Tr. 3963-64. When he intended to trade ahead for the principal account he would instruct her "you" bought or sold. Tr. 3964-65, 3994, 3999-4000, 4004-06. On one occasion when she argued with him over an improper trade, he responded that he was not concerned about the NYSE Division of Market Surveillance. Tr. 3960-61. However, she also testified that she did not consider trading ahead of DOT orders in time sequence to be improper until she became aware of the NYSE investigation. Tr. 4006-08. She explained this apparent inconsistency by testifying that Delaney also traded ahead out of time sequence and that other specialists did not. Tr. 4008.

David Carroll[87] clerked for Delaney from May to December 2002. Tr. 4337. He testified that Delaney instructed him to trade ahead of pairable orders; he assumed that Delaney knew they were pairable. Tr. 4341-50, 4365-84; Div. Ex. 130-H. When Delaney intended to trade ahead of DOT orders, he would instruct him "you" bought or sold. Tr. 4349. There were rumors during the summer or fall of 2002 of an investigation into trading ahead of DOT orders. Tr. 4350-51. Then, sometime in the fall, Bear Wagner manager Jay Mahoney called a meeting of the clerks and told them that they must pair off pairable DOT orders and should report anyone who tells them to do otherwise to management. Tr. 4351-52. Shortly thereafter, Carroll approached Delaney and told him that everyone was talking about trading ahead of DOT orders, that they had been doing it and had to stop doing it. Tr. 4352. Delaney's response was that Carroll should not worry, Delaney had been doing it for years. Tr. 4352-53. Carroll discussed his concerns about Delaney's trading with other clerks, including Dowd. Tr. 4361-63, 4471-72.

When Delaney told his clerk that "you" bought or sold, "you" could indicate the book as well as principal participation. Tr. 3906, 4004-05, 8365-66. The clerk would understand through instinct, experience, and context whether he meant the principal account or DOT orders (or both) each time he said "you." Tr. 3934, 3964-65, 3999-4000, 4005-06.

The volume of orders was so great that it was not possible for Delaney to cross every trade. Tr. 8360-61. Delaney did not cross orders that were small or if a trade between two like orders was obvious; he would merely say a number of shares trades at a price or say "pair them off." Tr. 3963-64, 4349. Delaney usually crossed DOT orders that could be paired off if there was a crowd present. Tr. 3964, 4349. He did not cross them when there was no crowd present. Tr. 4348; Div. Ex. BW-1 at 58.

As a super captain, Delaney was in charge of the firm's trading on the floor and would troubleshoot when a specialist was going to commit a large amount of capital, in a breakout

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[87] Carroll started as a backup clerk in 1996 and became a front-line clerk in 1997. Tr. 4336-37. At the time of the hearing he was working for Bear Wagner's parent, Bear Stearns. Tr. 4338.

situation, when a stock became volatile, or when a specialist was losing a great deal of money. Tr. 3883, 3913-14; Div. Ex. BW-1 at 92-93. When such a situation arose, which was not uncommon, he would be paged and go to the post that was experiencing the problem. Tr. 3883, 3913-15. This responsibility had priority over trading his own panel. Tr. 3883. At such times, a relief specialist or the specialist at the adjacent panel would take over Delaney's panel. Tr. 3915, 8364; Div. Ex. BW-1 at 93. There were no records kept of these occurrences. Tr. 3899, 3917-18. Also, quite often, other specialists would come to him and ask for advice. Tr. 3916. He also took breaks three or four times a day for personal reasons or to discuss issues with other captains; a break might last up to an hour when he was trying to walk off back pain. Tr. 3917-18. All told, Delaney estimated he was away from his post 25% of the time. Div. Ex. BW-1 at 92-93. Maher estimated that he was at his panel 90% of the time normally, and 75% to 80% on days when a breakout situation occurred. Tr. 3948-49. However, she conceded that was just an estimate; it could have been 50%. Tr. 3999.

Delaney first learned of the NYSE investigation into improper trading in November 2002 when Mahoney advised him and other captains and super captains that the NYSE's then-CEO Dick Grasso (Grasso) had met with the heads of specialist firms and advised that there was improper trading of DOT orders and that this was to stop. Tr. 3853-63. In January 2003, Mulheren came to his home and informed him that there was a problem with improper trading of Merrill Lynch. Tr. 3858-59, 3928. Delaney testified, somewhat equivocally, that he did not have an understanding as to the nature of the improper trading of DOT orders until warned by Mulheren in January. Tr. 3854-63. He also testified that shortly after the November 2002 meeting with Mahoney he asked Carroll and another trading assistant, Gregory Shields, whether there was any problem with trading DOT orders but did not discuss the issue with any other specialists. Tr. 3862-63. The claimed lack of curiosity about the nature of the DOT problem is not completely consistent with Delaney's position as a super captain, whose duties included helping less experienced or overwhelmed specialists trade. Delaney testified that, three days a week, he and the other super captains had a morning meeting with the firm specialists at which topics for discussion included "any kind of compliance issues that were relevant at the time." Tr. 3896. The claim that he did not discuss with other specialists a compliance issue that Grasso and Bear Wagner management considered important is not entirely consistent with that testimony. It is found that Delaney became aware in November 2002 that Grasso and the NYSE were concerned about specialists' stepping ahead of DOT orders. Delaney's interpositioning and trading ahead exceptions declined substantially after November 2002. Tr. 3865-67; Div. Exs. 231-A, 231-B.

The Division ascribes 2,081 interpositioning exceptions and 2,484 trading ahead exceptions to Delaney from November 2000 through June 2003. Div. Exs. 231-A, 231-B. Of the interpositioning exceptions, 90.82% were customer disadvantaged, 0.62% were customer advantaged, and 8.55% were break-even, and of the trading ahead exceptions, 56.04% were customer disadvantaged, 4.43% were customer advantaged, and 39.53% were break-even. Div. Exs. 231-A, 231-B.

Mark Ready, Ph.D. (Ready) testified for Delaney. He was accepted as an expert in finance, including the specialist function at the NYSE. Tr. 8413-15. Ready is a professor at the

University of Wisconsin, having previously served as Chief Economist for the Commission. Tr. 8405-06; Resp. Ex. 246, Ex.1.

Ready testified that almost half of the charged trading ahead exceptions could have been explained as oral consummation preceding the disadvantaged order's DBTime. Tr. 8442; Resp. Ex. 247, Exs. E, F. He further testified that Delaney lost more money with the exceptions than otherwise. Tr. 8448; Resp. Ex. 247, Ex. H. However, Ready's calculations failed to account for filtering, ensuring each exception disadvantages only one customer order, and failed to remove orders ineligible to be exceptions thus generating artificially low conclusions. Tr. 8418, 8452-55, 8458-60.

Factors impacting on the reliability of the testimony of Maher and Carroll were described above.[88] However, the fact that Delaney's exceptions declined markedly after he became aware of the NYSE investigation corroborates the testimony of Maher and Carroll that he did, in fact, trade improperly prior to that time. Additionally, as with other Respondents, the lopsided proportion of customer disadvantaged exceptions to customer advantaged exceptions also bolsters the finding that he traded improperly.

Using the Division's exception figures as a starting point, a 25% haircut will be applied to take account of Delaney's absences from his panel on super captain duties and for other reasons as found above. The 25% figure is consistent with Delaney's own estimate of his absence from his panel.

The amount of his firm's profits from Delaney's trading at issue during the period from November 2000 to June 2003 as identified by the Division is \$551,179 - \$168,715 from interpositioning and \$382,464 from trading ahead. Div. Ex. 224-A. Applying the 2.05% haircut to compensate for timestamp anomalies reduces the firm's trading ahead profits to \$374,624 - \$12,869 in 2000, \$151,259 in 2001, \$208,540 in 2002, and \$1,956 in 2003.

Using the Division's reasoning, set forth in Div. Ex. 202, the amount of bonus payments Delaney received for July 1999 through December 2000, 2001, 2002, and 2003, as a result of his trading at issue is \$70,706. To estimate his gains related to that trading, the Division calculates it as the amount that it assumes Delaney's bonus was increased as a result of his violative trading by calculating the percentage relationship of the bonus to his trading profits. For example, in 2001, Delaney's bonus of \$2,662,229 was approximately 14% of his trading profits of \$18,998,261. Div. Ex. 202. Therefore, using the Division's reasoning, Delaney's gains of approximately 14% profit from his trading at issue, which totaled \$250,307 in 2001, were \$35,043. Div. Ex. 202. For July 1999 through December 2000, the corresponding numbers are 20.23% of \$13,624 in firm profits from his trading at issue, or \$2,756; for 2002, 11.37% of \$277,433, or \$31,544; and for

[88] Carroll's statements, however, have been consistent from the first time he was interviewed by Bear Wagner management to his testimony in this proceeding, and his version of events is corroborated by the testimony of Dowd that Carroll had expressed concern to him about Delaney's trading during the time at issue.

2003, 16.42% of $1,973, or $324. Applying a 25% haircut to the total of $69,667, it is found that Delaney's proven gains from the trading at issue were $52,250.

III. CONCLUSIONS OF LAW

The OIP charges that Respondents, through their interpositioning and trading ahead, violated the antifraud provisions of the Securities and Exchange Acts, NYSE Rules pertaining to the "negative obligation" and other trading issues, and Exchange Act Section 11(b) and Rule 11b-1, pertaining to the NYSE's and Commission's regulation of specialists. In this section it is concluded that each Respondent violated NYSE Rules 92, 104, and 401. It is further concluded that all other violations charged in the OIP are unproven.[89]

A. Antifraud Provisions

Respondents are charged with violating antifraud provisions of the Securities and Exchange Acts – Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 – which prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4 & 778 (1979); SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 469 (S.D.N.Y. 2004). The Division argues that the record shows that Respondents violated these provisions. However, despite the Division's eloquence, the antifraud charges must be dismissed, in light of United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008). See also United States v. Hayward, 284 Fed. Appx. 857 (2d Cir. 2008).[90]

B. Exchange Act Section 11(b) and Rule 11b-1 thereunder; NYSE Rules

The concept of securities industry self-regulation, with Commission oversight, is well-known.[91] In the case of regulation of specialists, the Commission is authorized by Exchange Act Section 11(b) to provide direct regulation, if it chooses, but it has chosen, by Exchange Act Rule 11b-1 to defer regulation in the first instance, to the NYSE – Rule 11b-1(a) as to formulation of NYSE Rules, and Rule 11b-1(b) as to enforcement of the negative obligation of NYSE Rule 104.[92] Exchange Act Section 11(b) provides, "When not in contravention of [Commission rules

[89] In light of the conclusions herein, all motions for summary disposition are denied as moot.

[90] Even if the defendant knew he had violated a NYSE rule and tried to cover it up, violation of an NYSE rule does not establish securities fraud, even in the civil context. Finnerty, 533 F.3d at 151; accord, Hayward, 284 Fed. Appx. at 857.

[91] The legislative history of the 1975 amendments to the securities statutes, P.L. 94-29, discusses such self-regulation as it applies to specialists, indicating that Congress intended that exchanges have the primary responsibility for the formulation and enforcement of the regulation of specialists. See S. REP. NO. 94-75, at 14-15, 22-23, 34-35, 100, 133-34 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 192-94, 200-02, 212-13, 278-79, 310-11.

[92] The regulatory regime for specialists embodied in Rule 11b-1 and exchange rules, under which the exchanges have maximum self-regulatory responsibility under Commission oversight, was the

and regulations], the rules of a national securities exchange may permit . . . (2) a member to be registered as a specialist [who] may be permitted to act as a broker and dealer." Rule 11b-1(a) requires an exchange to require "as a condition of a specialist's registration, that a specialist engage in a course of dealings for his own account to assist in the maintenance, so far as practicable, of a fair and orderly market" and to have "[p]rovisions restricting [a specialist's] dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market." The NYSE requirements pursuant to Exchange Act Section 11(b) and Rule 11b-1(a) that are at issue in this proceeding are NYSE Rules 92, 104, and 123B. The OIP also charges that Respondents violated NYSE Rule 401, a generic rule requiring "good business practice" of all NYSE members. These NYSE Rules are set forth in Div. Ex. 5A (selections from NYSE Constitution and Rules, Sept. 1999 ed.), Div. Ex. 5B (selections from NYSE Constitution and Rules, Aug. 2003 ed.); and Resp. Exs. 612, 617, and 619.

NYSE Rule 104 sets forth the so-called "negative obligation" forbidding a specialist from trading for his account "unless such dealings are reasonably necessary to . . . maintain a fair and orderly market." NYSE Rule 92 forbids proprietary trades when a specialist has an agency order that could be executed at the same price. This proscription is the same both before and after the 2001 amendment of NYSE Rule 92.[93] The provisions of NYSE Rule 123B concern DOT orders

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product of negotiations between the Commission and the NYSE and American Stock Exchange (Amex), in consideration of the recommendations of the Special Study (REPORT OF THE SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, PT. 2, 88th Cong., 167-71 (1963)). Regulation of Specialists, 29 Fed. Reg. 15862, 15863 (Nov. 26, 1964); Securities Specialists, Notice of Proposed Rule Making (NPRM), 29 Fed. Reg. 13777, 13779 & n.2 (Oct. 6, 1964); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE, 340-43 & n.140 (3d ed. 2003); *Securities Industry Study, Part 4: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong. 1-21, 47-49, 121-22 (1972); STAFF OF SUBCOMM. ON SECURITIES OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 93D CONG., SECURITIES INDUSTRY STUDY REPORT 201-04 (Comm. Print 1972). The Commission could exercise its residual power of direct regulation pursuant to Section 11(b), Regulation of Specialists, 29 Fed. Reg. at 15863; NPRM, 29 Fed. Reg. at 13779 & n.2, but has not done so. (The Commission adopted some technical, non-substantive changes – changing "stock" to "securities" and eliminating duplicative language – in 1981. Regulation of Specialists, 46 Fed. Reg. 15134 (Mar. 4, 1981)).

[93] The earlier version of NYSE Rule 92(a) forbids such trades while a specialist "personally holds or has knowledge that his member organization holds an unexecuted" market order or unexecuted limit order that could be executed at the same or better price. Div. Ex. 5A. The later version forbids such trades "if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order . . . which could be executed at the same price." Div. Ex. 5B. The Supplementary Material provides, at .10, "A member . . . shall be presumed to have knowledge of a particular customer order . . ." and, at .30, "a member organization's member on the Floor . . . may not execute a proprietary order at the same . . . or . . . better price, as an unexecuted customer order that he or she is representing." Div. Ex. 5B.

and, inter alia, require specialists to cross DOT orders. These NYSE Rules do not specify any particular level of intent that is an element of violating them. Respondents argue that proof of violation of NYSE Rule 92 requires "scienter" but use "scienter" interchangeably with "intentionally."

The Division requests sanctions pursuant to, inter alia, Sections 15(b) and 21B of the Exchange Act. The Commission must find willful violations of the securities laws or the Commission's Rules to impose sanctions under Sections 15(b) and 21B of the Exchange Act. A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

The Division argues that Respondents violated NYSE Rules 92, 104, 123B, and 401 and through those violations, Exchange Act Section 11(b) and Rule 11b-1, as well. Based on the facts found above, each Respondent violated NYSE Rules 92 and 104. By violating those Rules, each violated the "good business practice" prescription of NYSE Rule 401. While the evidence of record does not show that any individual exception, or each and every exception, alleged as a violation against each Respondent was itself a violation, the computer evidence together with the evidence of the clerks shows that each Respondent engaged in trading ahead and interpositioning in violation of those NYSE Rules. As found above, the record of evidence as to each Respondent shows that each one's acts that constituted his violations were clearly intentional. Thus, each violated these three NYSE Rules willfully. On the basis of the evidence of record, however, it cannot be concluded that Respondents failed to cross DOT orders, in violation of NYSE Rule 123B, in furtherance of their other Rule violations. Indeed, the record contains evidence of the use of oral crossing instructions to communicate violative executions.

Respondents have not, however, through their misconduct violated Exchange Act Section 11(b) or Rule 11b-1. Section 11(b) authorizes the Commission and national securities exchanges to regulate specialists in the public interest, to maintain fair and orderly markets, and to promote other lofty goals. However, as relevant here, Section 11(b) does not place any requirements directly on specialists, and thus cannot be violated by specialists.[94]

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[94] Section 11(b) does place directly on specialists requirements that are not relevant to the issues in this proceeding:

> It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist who may be acting for such specialist: *Provided, however,* That the Commission, by rule, may require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist permitted to act as a broker and dealer to

Likewise, Exchange Act Rule 11b-1 (authorized pursuant to Exchange Act Sections 11(a), 11(b), and 23(a)) places requirements on exchanges in carrying out their regulation of specialists. It does not place any requirements directly on specialists and thus cannot be violated by specialists.[95] There is no litigated case that provides the interpretation of the plain language of Section 11(b) and Rule 11b-1 that the Division urges in arguing that Respondents' misconduct violated those provisions. As the Division points out, several settlements, including settlements in this proceeding, referenced at note 1, found that specialists violated Exchange Act Section 11(b) and Rule 11b-1.[96] However, it goes without saying, as the Commission has many times stressed, that settlements are not precedent. See Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (citing David A. Gingras, 50 S.E.C. 1286, 1294 (1992), and cases cited therein); Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975) (citing Samuel H. Sloan, 45 S.E.C. 734, 739 n.24 (1975); Haight & Co. Inc., 44 S.E.C. 481, 512-13 (1971), aff'd without opinion, (D.C. Cir. 1971); Security Planners Assocs., Inc., 44 S.E.C. 738, 743-44 (1971)); see also Michigan Dep't of Natural Res. v. FERC, 96 F.3d 1482, 1490 (D.C. Cir. 1996) and cases cited therein (settlements are not precedent). Like all such Commission settlement orders, the settlements in this proceeding contain a disclaimer to this effect, at note 1 of the settlement orders: "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."

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effect on the exchange as broker any transaction except upon a market or limited price order.

[95] As noted above, the text of Rule 11b-1 was the product of negotiations between the Commission and the NYSE and Amex. The Commission's earliest, February 11, 1964, proposed draft furnished to the NYSE and Amex placed requirements, including the negative obligation, directly on specialists. The NYSE vehemently objected to this, and the offending language was replaced in the rule as proposed and adopted with language placing the responsibility on the exchanges for imposing requirements on specialists. *Securities Industry Study, Part 4: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1-21, 47-49, 121-22 (1972); STAFF OF SUBCOMM. ON SECURITIES OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 93D CONG., SECURITIES INDUSTRY STUDY REPORT 201-04 (Comm. Print 1972).

[96] The earliest uncontested case that suggested that Section 11(b) could be violated by specialists was Re, Re & Sagarese, Exchange Act Release No. 6551 (May 4, 1961) (Order), 41 S.E.C. 230 (1962) (Findings and Opinion of the Commission). The respondents in that case had taken advantage of their position as specialists to rig the markets for securities in which they were effecting massive illegal distributions on the Amex, violating the antifraud, manipulation, and registration provisions of the securities laws. The Re case was symptomatic of the breakdown of self-regulation at the Amex that appeared in the 1950s and was followed by a house cleaning supervised by the Commission. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE, 285-89, 305-09 (3d ed. 2003).

IV. SANCTIONS

The Division seeks sanctions under Securities Act Section 8A and Exchange Act Section 21C, which authorize the Commission to impose a cease-and-desist order and order disgorgement against any person who "is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder"; Exchange Act Section 21B, which, as relevant here, in Section 21B(a)(1), authorizes civil money penalties against a Respondent who "has willfully violated any provision of the Securities [or Exchange Acts] or the rules or regulations thereunder"; and Exchange Act Sections 15(b)(4)(D) and 15(b)(6)(A)(i), which authorize so-called remedial relief, such as censure and suspension or bar from association with a broker or dealer against a Respondent who "has willfully violated any provision of the Securities [or Exchange Acts or] the rules or regulations under any of such statutes." Additionally, the Division argues that such remedial relief can be applied pursuant to Exchange Act Rule 11b-1.

For the reasons discussed below, each Respondent will be barred from association with a broker or dealer and the Division will be ordered to request the Commission to impose discipline pursuant to Exchange Act Rule 11b-1(b) on the six Respondents who have not been so disciplined.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006). The Commission also considers the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors, and the combination of sanctions against the respondent. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1192 (2001). See also WHX Corp. v. SEC, 362 F.3d 854, 859-860 (D.C. Cir. 2004). Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG, 54 S.E.C. at 1185. Such a showing is "significantly less than that required for an injunction." Id., 54 S.E.C. at 1185-91.

B. Sanctions

1. Securities Act Section 8A and Exchange Act Sections 15(b), 21B, and 21C

Sanctions pursuant to Securities Act Section 8A or Exchange Act Section 21C are not available because no Respondent "is violating, has violated, or is about to violate any provision of [the Securities or Exchange Acts], or any rule or regulation thereunder." A NYSE Rule[97] is not a Commission "rule or regulation" under the Securities or Exchange Acts. The Exchange Act makes clear the distinction of "rules of an exchange" from such Commission rules. Unlike Securities Act Section 8A and Exchange Act Sections 15(b)(4), 15(b)(6), 21B, and 21C, some provisions reference "rules of an exchange" in addition to Commission rules and regulations. For example, Exchange Act Section 6(b)(6), which requires that the rules of an exchange provide discipline "for violation of the provisions of this title, the rules or regulations thereunder, or the rules of the exchange" and Exchange Act Section 6(d)(1)(B), which requires that a determination by the exchange to impose a disciplinary sanction be supported by a statement that includes "the specific provision of this title, the rules or regulations thereunder, or the rules of the exchange" violated. Likewise, Exchange Act Section 19(g)(1) requires a self-regulatory organization to comply with "the provisions of this title, the rules and regulations thereunder, and its own rules" and to enforce compliance with such provisions by its members and persons associated with its members. The Commission also recognizes the distinction. For example, Exchange Act Rule 19d-1(c)(1)(i), which distinguishes between "(A) The rules of such [self-regulatory] organization;" and "(B) The provisions of the Act or rules thereunder." Accordingly, it is concluded that action under Securities Act Section 8A and Exchange Act Section 21C is limited to those who violate the federal securities statutes and Commission rules thereunder.

Assuming, arguendo, that cease-and-desist orders were authorized for violations of NYSE Rules, they would not be appropriate for the Respondents in this proceeding because the likelihood of future violation is close to zero for each Respondent. Respondents Luckow and Parolisi have been permanently barred from the NYSE and from any association with an NYSE member. Thus, it is impossible for them to act in any capacity on the NYSE floor, let alone violate NYSE Rules pertaining to specialists. As to the other six Respondents (five of whom were fired by their then-employers), in light of the change in the nature of the specialist function, the surveillance techniques instituted by the NYSE, and, with the decline in employment on the NYSE floor, the unlikelihood of their regaining employment on the NYSE floor, as a practical matter, the likelihood of their future violation of NYSE Rules is nil. Assuming, arguendo, that disgorgement were authorized, the gains from violative conduct as to each Respondent as found in the Findings of Fact section are Donald R. Foley, II, - $331,232, Scott G. Hunt - $123,996, Frank A. Delaney, IV, - $52,250, James V. Parolisi - $29,634, Robert W. Luckow - $23,152, Robert A. Johnson, Jr., - $11,557, Richard P. Volpe - none, and Robert A. Scavone, Jr., - none.

[97] "Rules of an exchange" are defined in Exchange Act Section 3(a)(27).

For the reasons discussed above, sanctions for violations of NYSE rules are not available under Exchange Act Section 21B (civil money penalties against a Respondent who "has willfully violated any provision of the Securities [or Exchange Acts] or the rules or regulations thereunder") and Exchange Act Sections 15(b)(4)(D) and 15(b)(6)(A)(i) (remedial relief, such as censure and suspension or bar from association with a broker or dealer against a Respondent who "has willfully violated any provision of the Securities [or Exchange Acts or] the rules or regulations under any of such statutes").

2. Exchange Act Rule 11b-1 – Enforcement of the Negative Obligation

Rule 11b-1(b) sets forth the Commission's role in sanctioning a specialist who deviates from NYSE requirements pertaining to the negative obligation referenced in Exchange Act Rule 11b-1(a):

> If after appropriate notice and opportunity for hearing the Commission finds that . . . a specialist in specified securities has, for any account in which he, his member organization, or any participant therein has any beneficial interest, direct or indirect, effected transactions in such securities which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market . . . in the securities in which he is registered and were not effected in a manner consistent with the rules adopted by [his] exchange pursuant to paragraph (a)(2)(iii) of this section, the Commission may by order direct such exchange to cancel, or to suspend for such period as the Commission may determine, such specialist's registration in one or more of the securities in which such specialist is registered: *Provided, however,* If such exchange has itself suspended or cancelled such specialist's registration in one or more of the securities in which such specialist is registered, no further sanction shall be imposed pursuant to this paragraph (b) except in a case where the Commission finds substantial or continued misconduct by a specialist . . . .[98]

a. Cancellation of Registration

Respondents Luckow and Parolisi have been subjected to NYSE sanctions that exceed cancellation of the registration in the securities in which they had been registered. Their sanctions resulted from a refusal to provide testimony before the NYSE concerning the events at issue in this proceeding. Each received a censure and a permanent bar from membership, allied

[98] As noted above, the text of Rule 11b-1 was the product of negotiations between the Commission and the NYSE and Amex. This convoluted indirect procedure for Commission enforcement was at the insistence of the NYSE, which wanted no Commission involvement with its regulation of specialists. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE, 342 & n.140 (3d ed. 2003). Indeed, the negative obligation is the only area where the Commission has any authority at all in enforcing NYSE Rules pertaining to specialists.

membership, approved person status, and from employment or association in any capacity with any member or member organization. Even absent a specific cancellation of the registration of the securities in which he had been registered, it would not be possible for a former specialist subject to these bars to maintain the registration of the security in which he had been registered.

The evidence of record does not show that the NYSE has cancelled or suspended the registration of any of the other six Respondents. While Exchange Act Rule 11b-1 provides that the Commission may order the NYSE to do so, the NYSE is not a party to this proceeding. To amend the OIP to add the NYSE as a party is beyond the powers that the Commission has delegated to the administrative law judge. Since the Commission has not delegated its authority to authorize OIPs to administrative law judges, they do not have authority to initiate new charges or to expand the scope of matters set down for hearing beyond the framework of the original OIP. See J. Stephen Stout, 52 S.E.C. 1162 n.2 (1996) (citing Comment (d) to 17 C.F.R. § 201.200). Since it is beyond the power of the undersigned to order the NYSE to take action against the six Respondents, the undersigned will order the Division to take appropriate action leading to NYSE discipline of the six Respondents.

b. Further Sanction

According to the procedure prescribed in Rule 11b-1(b), the Commission may order the NYSE to cancel a specialist's registration for violation of the negative obligation, but "no further sanction shall be imposed pursuant to [Rule 11b-1(b)]" except for "substantial or continued misconduct."[99]

Rule 11b-1 contains no indication of what "further sanction" the Commission might impose for "substantial or continued misconduct." In adopting Rule 11b-1 the Commission described this portion of the Rule as establishing a procedure that "permits the Commission to institute proceedings, under certain circumstances, to require an exchange to cancel or suspend a specialist's registration" in his stock for violation of the negative obligation; no mention is made of the phrase "except in a case where the Commission finds substantial or continued misconduct by a specialist." Regulation of Specialists, 29 Fed. Reg. 15863; NPRM, 29 Fed. Reg. at 13777. Nor has there been any litigated case that explicates its meaning. However, it is concluded that Respondents' misconduct, ranging upward from eighteen months, in the case of Luckow, to more than four years, was "continued." Concerning the "further sanction," the Division argues that remedial relief like that available under Exchange Act Section 15(b) is available under Exchange

[99] The convoluted wording of Rule 11b-1(b) is susceptible of the interpretation that the Commission cannot impose a further sanction for substantial and continued misconduct until after the exchange has cancelled or suspended the specialist's registration. Such an interpretation, urged by Respondents, defies common sense as requiring the Commission to await NYSE action before initiating enforcement action against the more egregious violators. In light of the remedial purpose of the Exchange Act and Rules thereunder, the language of Rule 11b-1 should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

Act Rule 11b-1. This argument is accepted. At the time Rule 11b-1 was adopted, such remedial relief was the sanction available in Commission administrative proceedings under the Exchange Act.[100] The Commission could have, but did not, specify a different type of sanction in Rule 11b-1.

Respondents' violations of the negative obligation embodied in NYSE Rule 104 were egregious. Not only was the negative obligation a key concept in circumscribing the role of NYSE specialists, but the violations of NYSE Rule 104 were aggravated by the nature of Respondents' misconduct: trading to the disadvantage of their customers' orders to profit their firms' accounts, in violation of NYSE Rule 92. The violations are neither recent nor distant in time. Consistent with a vigorous defense of the charges against him, no Respondent admitted wrongdoing or made assurances against future violations. Each Respondent's infraction was recurrent over a lengthy period ranging from eighteen months to more than four years.[101] The violations were willful. Each Respondent caused, at a minimum, many hundreds of thousands of dollars of harm to the marketplace. Additionally, the fact that the violations occurred at the NYSE, long regarded as the nation's premier trading venue, means that the welfare of investors nationwide was affected and reflects negatively on standards of conduct in the securities industry generally, necessitating a strong deterrent. While Respondents prided themselves on straight dealing with floor brokers, an element of dishonesty crept into their dealing with DOT orders, and the securities industry is "a field where opportunities for dishonesty recur constantly." Ahmed M. Soliman, 52 S.E.C. 227, 231 (1995). While no Respondent is likely to obtain future employment on the floor of the NYSE, each, by virtue of his age, education, and experience, could re-enter the securities industry and, absent a bar, return to association with a broker or dealer. See Thomas J. Donovan, 86 SEC Docket 2652, 2663 (Dec. 5, 2005).

[100] Cease-and-desist orders and civil money penalties pursuant to Securities Act Section 8A and Exchange Act Sections 21C and 21B could not have been contemplated by the Commission when it adopted Rule 11b-1 in 1964 (or in 1981, the last time it amended Rule 11b-1) as these sanctions did not become available until October 15, 1990, with the passage of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 101 P.L. 429, 104 Stat. 931 (1990).

[101] While many Respondents' violative conduct began before April 12, 2000, outside the five-year statute of limitations applicable to the sanction of a bar from association with a broker or dealer, acts outside the statute of limitations may be considered to establish a Respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations. Sharon M. Graham, 53 S.E.C. 1072, 1089 n.47 (1998) (citing Fed. R. Evid. 404(b) and Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960)), aff'd, 222 F.3d 994 (D.C. Cir. 2000); Terry T. Steen, 53 S.E.C. 618, 623-24 (1998) (citing H.P. Lambert Co. v. Sec'y of the Treasury, 354 F.2d 819, 822 (1st Cir. 1965)). Further, such acts may be considered in determining the appropriate sanction if violations are proven. Steen, 53 S.E.C. at 623-25.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the revised record index issued by the Secretary of the Commission on July 8, 2009.

VI. ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that, pursuant to Section 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 thereunder, the Division of Enforcement request that the Commission order the NYSE to impose discipline pursuant to Exchange Act Rule 11b-1 on Donald R. Foley, II, Scott G. Hunt, Frank A. Delaney, IV, Robert A. Johnson, Jr., Richard P. Volpe, and Robert A. Scavone, Jr., unless the NYSE has done so on its own accord.

IT IS FURTHER ORDERED that, pursuant to Section 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 thereunder, Donald R. Foley, II, Scott G. Hunt, Frank A. Delaney, IV, James V. Parolisi, Robert W. Luckow, Robert A. Johnson, Jr., Richard P. Volpe, and Robert A. Scavone, Jr., are BARRED FROM ASSOCIATION WITH ANY BROKER OR DEALER.

IT IS FURTHER ORDERED that the allegations that Respondents violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder are dismissed.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge