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January 24, 2006

Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303

**Re: Release No. 34-53025
Fund Administrator's Proposed Fair Fund Distribution Plan**

In the Matters of

**Bear Wagner Specialists LLC
Admin. Proc. File No. 3-11445
Fleet Specialist, Inc.
Admin. Proc. File No. 3-11446
LaBranche & CO. LLC
Admin. Proc. File No. 3-11447
Spear, Leeds & Kellogg Specialists LLC
Admin Proc. File No. 3-11448
Van der Moolen Specialists USA, LLC
Admin Proc. File No. 3-11449
Performance Specialist Group LLC
Admin Proc. No. 3-11559
SIG Specialists, Inc.
Admin. Proc. File No. 3-11559**

Dear Securities and Exchange Commission,

Introduction

This letter is being submitted to the Commission in order to comment regarding the Proposed Fair Fund Distribution Plan in the NYSE Specialist matter. Empire Programs has been notified by the plan administrator, Heffler, Radetich, & Saitta that there are approximately 80,000 transactions for Empire's account that are included in the database of transactions for which Disgorgement is to be paid. Empire's transactions cover the period of 1999 through 2003.

The purpose of this letter is to specifically address the use of funds that exceed the funds required to make Disgorgement and Pre-Judgment Interest payments. The Commission currently estimates that these excess funds total between fifty and seventy million dollars. These funds represent funds collected in the Civil Penalty portion of the SEC Actions. These funds will equal the Civil Penalty collected less the payment of pre-judgment interest and the cost of administering the Fair Fund.

Sarbanes-Oxley Act of 2002 Directs Civil Penalties to be added to Disgorgement

Section 308 of The Sarbanes Oxley Act of 2002 directs that any Civil Penalties should be added to Disgorgement Funds in cases where the settlement provides for both Disgorgement and Civil Penalties.

SEC. 308. FAIR FUNDS FOR INVESTORS.

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE

RELIEF OF VICTIMS.—If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

Furthermore, the Commission issued a report in connection with the Sarbanes-Oxley Act of 2002 which reviewed Commission proceedings in relation to Section 308 of the Act. In its review the Commission indicated that the Fair Fund provision is important and that whenever possible, the Commission should look to add Civil Penalties to Disgorgement amounts for the benefit of Injured Customers.

- A. *The Fair Fund provision is an innovative legislative response to some of the financial obstacles that prevent the Commission from providing funds to injured investors. Making appropriate distributions to investors, by applying the Fair Fund provision, is a desirable and important objective. The Commission intends to use the provision whenever reasonably possible, consistent with its mission to protect investors. The Fair Fund provision is the only exception to the statutes which require that penalties paid in Commission enforcement actions must be turned over to the U.S. Treasury. Under the Fair Fund*

provision, the Commission may make a motion to the court to add penalties paid by a defendant to a distribution fund if that defendant also has been ordered to pay disgorgement. The fact that another defendant in the same case or investigation has been ordered to pay disgorgement is not sufficient to trigger the Fair Fund provision with respect to another defendant's payment of a penalty. The Commission has already approved the filing of motions to apply the Fair Fund provision in a number of enforcement actions: an offering fraud;⁷³ issuer financial fraud and reporting cases;⁷⁴ a fraudulent touting case;⁷⁵ "pump and dump" and classic manipulation cases;⁷⁶ a Ponzi scheme;⁷⁷ and an insider trading case.

Both the Sarbanes-Oxley Act and the Commission's own initiatives indicate that the remaining amounts in the Specialist Fair Fund should be distributed for the benefit of Injured Customers.

Alternate use of Funds not warranted in this Case

The administrative proceedings against the Specialist Firms mandate that extensive supervision and surveillance measures be taken by the Specialist Firms to prevent future wrongdoing. Furthermore the Commission censured the NYSE on April 12th 2005 (File No. 3-11892) for failing to detect the Specialist wrongdoing. The NYSE Censure also mandated that the Exchange implement additional procedures to detect and prevent future wrongdoing and established a \$20,000,000 fund for this purpose. Both of these measures will tend to ensure that the public is protected from future wrongdoing.

Suggested Distribution of Remaining Funds

Perhaps the fairest and simplest way to distribute the remaining funds is to allocate the funds on a pro-rata basis to the recipients of Disgorgement amounts from the Fair Fund. A reserve can be maintained by the Administrator sufficient to cover any costs associated with the administration of the Fair Fund. All remaining funds, less the reserve, can be distributed with the regular distributions. Since the pre-judgment interest should already be calculated, only the size of the reserve needs to be determined prior to distribution. The payment of these funds currently will reduce the administrative effort of making two payments to Injured Customers.

One alternate proposal would be to distribute the excess funds on a pro-rata basis to the Injured Customers whose transactions were violated with *Scienter* as defined by the Administrative Proceedings. Since the commission determined a higher level of misconduct on these transactions, the customers may be entitled to greater recovery.

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Conclusion

In any event it is our position that the remaining Civil Penalty funds be distributed to the Injured Customers identified by the administrator. Both Section 308 of the Sarbanes-Oxley Act and the Commission's own statements direct that the remaining funds be added to the Disgorgement for the benefit of Injured Customers such as Empire. We appreciate the opportunity to comment and thank the Commission for their work in this Specialist Matter.

Sincerely yours,

Robert A. Martin