

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11893

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
June 1, 2009

In the Matter of :
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 :
 DAVID A. FINNERTY, DONALD R. FOLEY II, :
 SCOTT G. HUNT, THOMAS J. MURPHY, JR., :
 KEVIN M. FEE, FRANK A. DELANEY IV, :
 FREDDY DeBOER, TODD J. CHRISTIE, : ORDER
 JAMES V. PAROLISI, ROBERT W. LUCKOW, :
 PATRICK E. MURPHY, ROBERT A. JOHNSON, JR., :
 PATRICK J. McGAGH, JR., JOSEPH BONGIORNO, :
 MICHAEL J. HAYWARD, RICHARD P. VOLPE, :
 MICHAEL F. STERN, WARREN E. TURK, :
 GERARD T. HAYES, and ROBERT A. SCAVONE, JR. :

This proceeding has ended as to twelve of the twenty captioned Respondents. David A. Finnerty, 90 SEC Docket 2062, 2069 (May 23, 2007), 92 SEC Docket 2, 10, 17 (Nov. 27, 2007), 93 SEC Docket 7726, 7812 (July 16, 2008), 94 SEC Docket 10684, 10815, 10822, 10828 (Oct. 15, 2008), Exchange Act Release No. 59998 (May 28, 2009) (May 28 Settlement). An Initial Decision is pending as to eight more.

The proceeding concerns Respondents' actions as specialists at the New York Stock Exchange (NYSE) in "trading ahead" of customer orders for more favorable prices and "interpositioning" trades between customer bids and offers so as to profit from the spread at customer expense in contravention of the "negative obligation" to refrain from such trades while acting as agents for customers. The OIP alleges that Respondents violated the antifraud provisions of the securities laws – Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder¹ – as well as various NYSE rules.

The misconduct alleged against the original twenty Respondents was the same, differing only as to the identity of the stock traded, dates, and times. Fifteen of the twenty were prosecuted criminally for securities fraud, and some were convicted. All convictions, including those based on guilty pleas, were vacated following the ruling of the United States Court of

¹ These provisions prohibit essentially the same type of conduct. See 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).

Appeals for the Second Circuit that the conduct did not constitute securities fraud. United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008). The court held, “The sole issue on appeal is whether the government proved that Finnerty’s conduct was deceptive. Because it did not, the [District Court’s] judgment of acquittal is affirmed.” Finnerty, 533 F.3d at 145. In its post-hearing brief and reply brief, the Division of Enforcement (Division), however, continued to argue that the record shows that Respondents violated the antifraud provisions.

Following the Finnerty decision, the Division and Respondent Finnerty reached a settlement of the charges against him in this proceeding, which the Securities and Exchange Commission (Commission) approved in the May 28 Settlement. The May 28 Settlement states that Finnerty violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Also on May 28, the Division filed a Motion for Leave to File a Sur-Reply post-hearing pleading to bolster the argument that Respondents violated the antifraud provisions.² The Division refers to new theories articulated in the May 28 Settlement.

The Division’s request will be denied as untimely. Additionally, inasmuch as the Division refers to the May 28 Settlement as the impetus for preparing a Sur-Reply, it goes without saying that a settlement is not precedent.³

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

² The eight active Respondents filed an Opposition today, requesting that the Division’s Motion for Leave to File a Sur-Reply be denied.

³ The Commission has stressed many times 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 Commission settlement orders, the May 28 Settlement contains a disclaimer to this effect: “The findings herein are made pursuant to Finnerty’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.” May 28 Settlement at n.1.