

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67809 / September 10, 2012

In the Matters of	:	
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	:	
Bear Wagner Specialists LLC	:	
Admin. Proc. File No. 3-11445	:	ORDER DENYING REQUEST
Fleet Specialist, Inc.	:	OF ROBERT J. PEACOCK
Admin. Proc. File No. 3-11446	:	FOR “REVIEW AND REPEAL”
LaBranche & Co. LLC	:	OF COMMISSION’S ORDER OF
Admin. Proc. File No. 3-11447	:	MAY 26, 2011
Spear, Leeds & Kellogg Specialists LLC	:	
Admin. Proc. File No. 3-11448	:	
Van der Moolen Specialists USA, LLC	:	
Admin. Proc. File No. 3-11449	:	
Performance Specialist Group LLC	:	
Admin. Proc. File No. 3-11558	:	
SIG Specialists, Inc.	:	
Admin. Proc. File No. 3-11559	:	
	:	
Respondents.	:	

I.

As part of settlements that resolved proceedings against the seven specialist firms then operating on the New York Stock Exchange, the specialist firms agreed to disgorge ill-gotten gains and pay civil penalties, together totaling over \$247 million. This money was placed into seven funds for distribution to investors injured by the transactions covered by the settlements. After distributing this money to investors over the course of several years, \$159.8 million remained in the seven funds.

In July 2009, we issued a notice seeking public comment regarding the appropriate disposition of the remaining funds. Exchange Act Rel. No. 60403. The notice stated that comments should be submitted no later than August 31, 2009. Robert J. Peacock submitted several comments regarding the remaining funds, including submissions in June 2010, September 2010, December 2010, and January 2011. In his comment letters, Peacock claimed that he was a “special victim” of the specialist firms’ misconduct and he asserted that he had suffered a variety of injuries.

On May 26, 2011, we issued an order approving the transfer of the remaining distribution funds to the U.S. Treasury (the “Transfer Order”). Exchange Act Rel. No. 64553. We expressly addressed Peacock’s comments in that order, writing that “Peacock’s claimed injuries are speculative and too far removed from the securities law violations at the heart of the settlement orders.” Order, at 19.¹

Peacock filed a federal civil action in the District of New Jersey on June 21, 2011. *Peacock v. United States*, No. 2:11-cv-3551 (D.N.J.). Claiming to be “a special, documented victim of an organized institutional fraud,” Peacock seemed to challenge the Transfer Order, and he demanded \$25 million from the seven distribution funds, or alternatively, \$25 million “in damages” from the named defendants, which included the Commission, the Chairman and the Commissioners, and several other government agencies and officials, including President Obama and Treasury Secretary Geithner. The defendants moved to dismiss Peacock’s complaint in September 2011.

The district court granted this motion on April 10, 2012, entering an order dismissing Peacock’s complaint for lack of jurisdiction.² The district court held that Peacock “has not alleged or identified a cognizable basis for jurisdiction or facts showing an entitlement for relief.” The court explained that it lacked jurisdiction to review the Transfer Order because exclusive jurisdiction to review that order rests in the Court of Appeals pursuant to Section 25(a)(1) of the Exchange Act, 15 U.S.C. 78y(a)(1). The court further stated that because Peacock “failed to file an administrative complaint with the SEC notifying the agency of his charges” and his request for damages, he had not exhausted his administrative remedies under the Federal Tort Claims Act.³

By letter dated April 24, 2012, Peacock sent the Commission an “Administrative Complaint,” which the Commission received on April 30, 2012. In this document, Peacock seeks “review and repeal of the Commission’s May 26, 2011 ORDER” and asserts a “total claim of \$25,000,000.” Peacock stated: “Before submitting an appeal of the Commission’s Order before the U.S. Court of Appeals that has jurisdiction of this matter, I have been advised that I must first exhaust my administrative remedies, and this is precisely the reason for the submission of this Administrative Complaint to the SEC.”⁴

¹ Commissioner Paredes dissented from that order, but not on grounds related to Peacock’s claimed injuries. The May 26 order is currently under review by the Second Circuit in an appeal brought by a different party. *Martin v. SEC*, No. 11-3011 (2d Cir.).

² Dkt. No. 26, *Peacock v. United States*, No. 2:11-cv-3551 (D.N.J.)

³ It appears that the court was reading Peacock’s complaint as broadly as possible, so as to give him, as a pro se litigant, every possible ground on which his complaint could have been sustained.

⁴ Similar to his district court complaint, Peacock’s administrative complaint may be construed as asserting a claim under the FTCA. The Commission has treated his administrative complaint as such and has denied his FTCA claim in a letter sent at the same time as the issuance of this order.

II

We deny Peacock's request to "review and repeal" the Transfer Order because our procedural rules regarding Fair Funds expressly preclude such relief.

Rule 1106, 17 C.F.R. 201.1106, restricts public participation in the administration of Fair Funds to the submission of comments pursuant to Rule 1103, 17 C.F.R. 201.1103. Rule 1106 states:

"Other than in connection with the opportunity to submit comments as provided in Rule 1103, no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge an order of disgorgement or creation of a Fair Fund, or an order approving, approving with modifications, or disapproving a plan of disgorgement or a Fair Fund plan; or any determination relating to a plan based solely upon that person's eligibility or potential eligibility to participate in a fund or based upon any private right of action such person may have against any person who is also a respondent in the proceeding."

By requesting "review and repeal" of the Transfer Order, Peacock seeks "to participate," "to appear," or "otherwise to challenge" a "determination relating to a plan" regarding distribution funds "based solely" on his "eligibility or potential eligibility to participate in a fund." Rule 1106 plainly prohibits him from doing so. If Peacock believed he was aggrieved by the Transfer Order, his exclusive remedy was to seek review of the Transfer Order under Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a)(1).⁵

We note that Peacock availed himself of the comment process, "as provided in Rule 1103." He submitted four comments to the Commission regarding the disposition of the remaining funds, and we addressed his comments in our Transfer Order.

⁵ It might be possible to construe Peacock's submission as a motion for reconsideration. We decline to do so, and we do not reach the issue of whether our procedural rule regarding such motions (Rule 470, 17 C.F.R. 201.470) would apply in the Fair Fund context. We note, however, that Rule 470 requires reconsideration motions to be filed "within 10 days after service of the order complained of," and Peacock did not file his request for "review and repeal" until late-April 2012, nearly a year after we ordered the transfer of the remaining \$159.8 million to the U.S. Treasury.

Therefore, it is ORDERED that the request for review and repeal of the Transfer Order filed by Robert J. Peacock be, and hereby is, denied as prohibited by Rule 1106.⁶

By the Commission.

Elizabeth M. Murphy
Secretary

⁶ In a letter dated July 2, 2012, Peacock requests “a hearing before the SEC so as to address in detail my complaint against the SEC in the matter of the NYSE Execution Fraud.” Our Rules for Fair Funds and Disgorgement Plans do not provide for hearings on such matters. Rule 1106, quoted above, precludes Peacock from appearing “in any agency proceeding” based on his “potential eligibility to participate in a fund.” In addition, there is no legal requirement under the federal securities laws, the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, or the Commission’s Rules of Practice, for a hearing on Peacock’s substantive request made in his April 24 submission. Finally, Peacock’s written presentations have fully set forth his arguments, so that a hearing would serve no useful purpose.