

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10232 / October 13, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 79093 / October 13, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17625

In the Matter of

FORCERANK LLC,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against Forcerank LLC (“Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant To Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, And Imposing A Cease-And-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") was enacted to address many of the abuses that contributed to the 2008 financial crisis, including certain abuses associated with the over-the-counter derivatives market, through the establishment of a comprehensive regulatory framework for swaps and security-based swaps. As a general matter, these products include any agreement, contract or transaction whose value is based upon – or "derivative" of – the value of something else, e.g., interest rates, currencies, commodities, or securities, or that provides for a payment that is dependent on the occurrence, or the extent of the occurrence, or the extent of the occurrence, of an event or contingency associated with a potential financial, economic, or commercial consequence.

Among other reforms, Dodd-Frank sought to limit the sale of security-based swaps to persons who are not "eligible contract participants."¹ For example, Dodd-Frank modified Section 5 of the Securities Act to make offers and sales of security-based swaps to such persons unlawful without an effective registration statement covering the offering. This requirement was intended to ensure that persons who are not eligible contract participants receive financial and other significant information to allow them to properly evaluate a transaction involving security-based swaps. In addition, Section 6 of the Exchange Act was amended to require that all transactions in security-based swaps involving persons who are not eligible contract participants be effected only on a national securities exchange. This requirement was enacted in order to help ensure that these types of transactions occur only on exchanges subject to the highest level of regulation, which in turn helps ensure that such security-based swaps are cleared on registered clearing agencies. For products such as these, exchange trading and central clearing benefit those investors by providing public price discovery mechanisms, access to relevant trading information, appropriate monitoring of trading activity, and regulated counterparty credit risk management.

Forcerank LLC ran mobile phone games where players predicted the order in which 10 securities would perform relative to each other. In each week-long game, players won points for each instrument based on the accuracy of their prediction, and players with the most aggregate points received cash prizes at the end of the competition. Forcerank LLC kept 10% of the entry fees and obtained a data set about market expectations that it hoped to sell to hedge funds and other investors.

¹ The definition of "eligible contract participant" includes several categories of persons and, in certain cases, contains monetary thresholds that vary depending on the particular type of person or entity involved. For example, individuals need to have at least \$5 million and often \$10 million invested on a discretionary basis to qualify as eligible contract participants. See 7 U.S.C. § 1a(18).

Forcerank LLC's agreements with players were security-based swaps because they provided for a payment that was dependent on the occurrence, or the extent of the occurrence, of an event or contingency that was "associated with" a potential financial, economic, or commercial consequence and because they were "based on" the value of individual securities. From February to June 2016, Forcerank LLC violated Section 5(e) of the Securities Act and Section 6(l) of the Exchange Act when it offered and sold those security-based swaps to persons who were not eligible contract participants.

Respondent

Forcerank LLC is a Delaware limited liability corporation based in New York City that is a wholly-owned subsidiary of Estimote Inc. ("Estimote").

Facts

A. Forcerank LLC Created A Contest To Collect Data About Market Expectations

1. Starting in mid-2015, the people behind Forcerank LLC developed the software and structure for a platform – which they called "Forcerank" – to operate contests in which players would rank a group of stocks or exchange traded funds ("ETFs") based on expected performance over the upcoming week. They envisioned using the information obtained from those Forcerank games – especially changes in players' rankings over time – to create data sets about market expectations that could eventually be sold to hedge funds.

2. In 2016, Forcerank LLC released applications for iOS and Android phones to let users participate in Forcerank contests. As discussed in detail below, Forcerank LLC created multiple contests each week. For each contest, it provided participants with a list of 10 stocks or ETFs. Players paid an entry fee, ranked the stocks or ETFs based on expected performance in the upcoming week, and then received points based on the accuracy of each ranking. The players whose predictions earned the most points received cash payments.

3. The Forcerank contests were an extension of business for Estimote, a private company based in New York that collects and sells data about securities and trading. Estimote's main product is crowd-sourced predictions, primarily about public company earnings. Estimote collects predictions from market participants. It then keeps that raw data and creates aggregate predictions based on the crowd-sourced data.

4. In the existing product, people who make predictions about a company get access to some data, specifically other people's predictions about that company. In addition, Estimote sells live access to full data sets to hedge funds and other investors. The company cites academic research to argue that Estimote's data are better predictors than estimates by sell-side investment bank analysts.

B. In February 2016, Forcerank LLC Started Forcerank Contests That Let Players Pay For A Chance To Pick Stocks And Win Money

5. On or about February 1, 2016, Forcerank LLC began operating Forcerank contests with invited players. Forcerank LLC started with stakes of \$5 and about four games each week. It ran other free daily contests, primarily to introduce the game to new players. However, the company hoped to expand in the future with games that would cover more companies or industries, that would include more players, larger entry fees and larger prizes, and that possibly would last a month rather than a week.

6. Players signed up for accounts with Forcerank LLC using the mobile phone applications. They deposited money into their account using a credit card, and Forcerank LLC kept the money in its bank account. When players wanted to withdraw money, Forcerank LLC credited their credit card or issued checks, depending on the amount of the withdrawal. At the start of each contest, Forcerank LLC deducted the contest's entry fee from the players' accounts. At the end of the contest, it credited the accounts of players who had scored the most points in the game.

7. On or about March 10, 2016, Forcerank LLC began publicizing the contests and put the applications into on-line stores where anyone could download them. Forcerank LLC sought to attract users through press releases, podcasts, social media posts, and other means. Much of the initial publicity about the Forcerank contests focused on its similarities to daily fantasy sports competitions. For example, Estimote issued a press release announcing the official launch of the Forcerank contests that was titled "Get Involved in the Competition CNBC Dubbed 'Fantasy Sports for Stocks' - Estimote Introduces Forcerank."

8. No one at Forcerank LLC confirmed the identity or financial resources of players when they signed up for accounts or entered Forcerank games. Players voluntarily provided some information, but Forcerank LLC set no requirements that players own any specific amount of assets.

9. From February to June 2016, Forcerank LLC created weekly contests in which 10 stocks or ETFs were picked based on some similarity, generally based on an industry (such as social media companies or mid-sized biotech companies) or themes (such as most heavily shorted stocks or companies that would issue earnings reports that week). The plan was to run contests for many weeks with the same 10 stocks or ETFs in order to generate data about changes in predictions over time. Throughout the period, contests followed the same set of steps discussed below.

10. First, Forcerank LLC created the game by:

- picking a list of 10 stocks or ETFs grouped on a theme such as a sector or companies that report earnings this week;
- setting the maximum number of players and the entry fees, which were generally \$5 during these initial months; and
- setting the pay-out matrix for each game (i.e., in some games, the top 50% of players received prizes; in others, the top 20-23% received prizes).

Forcerank LLC kept 10% of the fees paid for each game. The remainder was paid as prizes to the top-scoring players.

11. Before the market open on Monday, people who had funded accounts with Forcerank LLC joined the game by:

- paying the entry fee to Forcerank LLC; and
- ranking the 10 stocks or ETFs in the contest from #1 to #10 based on the expected percentage change in market price, predicting for each security where it would fall from the best-performing (#1) to the worse-performing (#10) in the upcoming week.

12. After the market close on Friday, Forcerank LLC identified the players who should receive prizes by:

- for each player, calculating points for each of the 10 predictions made – 100 points if the player correctly predicted that security’s ranking, 50 points if the ranking was off by one spot, and ultimately down to zero points if the ranking was off by nine spots;
- for each player, calculating the aggregate points (or “score”) by adding up the points earned by each of the 10 predictions;
- comparing the scores of all the players in the game; and
- paying the players whose scores were high enough for prizes under the game’s pay-out matrix.

C. Forcerank LLC Told The Public That It Was Not Selling Security-Based Swaps

13. Forcerank executives recognized that players might be concerned that the Forcerank contests violated laws, including those related to the purchase and sale of swaps and security-based swaps. The Forcerank LLC website said:

Given that the Forcerank contest is not a security or security based swap, and is a skill based contest, it is not currently regulated by the federal government, any state government, or financial regulatory authority. Forcerank has been in close contact with various financial regulatory authorities both before and after launching Forcerank contests.

14. No regulatory authority had cleared the Forcerank contests as not involving swaps or security-based swaps.

D. Forcerank LLC Ran About 240 Contests And Paid About \$15,000 In Winnings

15. By early June 2016, Forcerank LLC had run about 240 paid Forcerank contests. In each, players paid a fee and ranked the stocks and ETFs included in the contest. Winning players were paid a prize according to the pay-off matrix.

16. About 337 players have funded accounts by paying money to Forcerank LLC through their credit cards. In aggregate, the transfers totaled about \$11,608. In aggregate, players paid about \$16,885 in entry fees and received about \$15,196 in prizes, according to data supplied by the company. At the time, Forcerank LLC intended to keep the remainder as profit.

17. All of the Forcerank contests involved the ranking of securities, either shares of ETFs or of single companies. The securities were grouped based on a theme such as “Apparel,” “US Sector ETFs,” or “Earnings 2/22 (Consumer).”

18. No registration statements were in effect for the Forcerank contests. None of the contests were effected on a national securities exchange.

19. Into early June 2016, Forcerank LLC planned to increase the number and size of the paid-entry contests. Shortly thereafter, Forcerank LLC canceled its plans after meeting SEC staff. Forcerank LLC refunded the money that players had deposited. In addition, Forcerank LLC paid players any winnings that had accumulated in their accounts.

Legal Analysis

20. Dodd-Frank was enacted to enhance transparency and regulation in the over-the-counter derivatives market, including through several investor protection measures.

21. Two provisions added by Dodd-Frank apply to the transactions entered by Forcerank LLC:

- Under what is currently Section 5(e) of the Securities Act, it is unlawful for any person to offer to sell, offer to buy, or purchase or sell a security-based swap to any person who is not an eligible contract participant without an effective registration statement. 15 U.S.C. § 77e(e).
- Under Section 6(l) of the Exchange Act, it is unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange. 15 U.S.C. § 78f(l).

22. The Commodity Exchange Act defines the term “swap” and includes agreements or transaction that provide for a payment dependent on an event or contingency “associated with” a potential financial consequence:

“[T]he term ‘swap’ [includes] any agreement, contract, or transaction—... (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence[.]”

7 U.S.C. § 1a(47) (Commodity Exchange Act section incorporated into the securities laws).

23. The Exchange Act, as amended by Dodd-Frank, defines the term “security-based swap” and includes swaps that are “based on” a single security or the value of that security:

“[T]he term ‘security-based swap’ means any agreement, contract or transaction that (i) is a swap as defined in [the Commodity Exchange Act] and (ii) is based on — (I) an index that is a narrow-based security-index, including any interest therein or on any value thereof; (II) a single security or loan, including any interest therein or on the value thereof; or (III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.”

15 U.S.C. § 78c(a)(68) (Exchange Act Section 3(a)(68)).

A. The Forcerank Entries Were Security-Based Swaps

24. As described above, the Forcerank entries were security-based swaps as defined in Section 3(a)(68) of the Exchange Act.

25. First, each Forcerank entry was a swap because each participant paid to enter into an agreement with Forcerank LLC that provided for the payment of points and, in certain cases, cash. Those payments were dependent upon the occurrence, or the extent of the occurrence, of an event or contingency (i.e., the player’s predictions about the price performance of individual securities being compared to actual performance and the player’s aggregate points being compared to other players). Such event or contingency was “associated with a potential financial, economic or commercial consequence” because it was calculated by measuring the change in the market price of an individual security over a period of time and comparing that change to an identical metric based on the market price of other individual securities.

26. Second, each swap was a security-based swap because it was based on the value of single securities. The term “based on” does not require an exclusive relationship between the payment and the movement of a security. In the Forcerank contests, players received points based on the change in the market price of a single security relative to the change in the market price of other securities.² For example, a player would receive 100 points if the player correctly predicted

² In a July 2012 joint release further defining certain terms pursuant to the Title VII of Dodd-Frank, including “swap,” “security-based swap,” and “mixed swap,” the Commission and Commodity Futures Trading Commission provided an example of a “mixed swap” by describing “certain Title VII instruments called ‘best of’ or ‘out performance’ swaps that require a payment based on the higher of the performance of a security and a commodity (other than a security).” *See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”*; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208, 48291 (Aug. 13, 2012).

In the example cited in that release, the instrument was a swap because it involved the comparison, at a fixed point in time, of the performance of one financial instrument against

a security to finish first in a contest and it outperformed each of the other securities. In addition, a player could receive cash based on several factors, including 1) that player's score, which was calculated by aggregating the points derived from the change in the market price of each single security in the contest relative to the change in the market price of other securities and 2) a comparison of that score to other players' aggregate points derived from equivalent calculations. For example, a player would receive cash as the first place finisher if the player made predictions precise enough to receive points such that his or her score was higher than the other players' scores.

B. Forcerank LLC Offered And Sold Security-Based Swaps In Violation Of The Dodd-Frank Restrictions

27. As described above, Forcerank LLC offered and sold swaps to each player in each game. No registration statements were in effect for the Forcerank entries. No transactions were effected on a national securities exchange. Forcerank LLC does not know the identity of the players, and it does not claim that any of the players qualified as "eligible contract participants."

28. Thus, Forcerank LLC violated Section 5(e) of the Securities Act and Section 6(l) of the Exchange Act when it entered into contracts with Forcerank game players who were not eligible contract participants because no registration statements were in effect for the offer and sale of the contracts and the contracts were not effected on a national securities exchange.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

- A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Forcerank LLC cease and desist from committing or causing any violations and any future violations of Section 5(e) of the Securities Act and of Section 6(l) of the Exchange Act.

another, thereby satisfying the requirement that the relevant event or contingency be "associated with a potential financial, economic, or commercial consequence." It was also a mixed swap because it was both a security-based swap (by virtue of it being based on the comparison of a single security to a single commodity) and a swap (by virtue of it being based on the comparison of a single commodity against a single security). In the Forcerank contests, points were not awarded based on the performance of a price of a security versus the price of a commodity, but rather on the performance of the price of a single security as compared to the price of other individual securities.

- B. Respondent shall, within five days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Forcerank LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Michael Osnato, Division of Enforcement, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022.

- (4) Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action"

means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary