

# Davis Polk

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Re: Comments Regarding Exchange Act Release Nos. 34-60402 and 34-60403,  
In the Matters of Bear Wagner Specialists LLC, et al.

August 31, 2009

Office of the Secretary  
United States Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20546-1090

To the Commission:

We represent Fleet Specialist, Inc. (now Banc of America Specialist, Inc.), one of the seven Specialist Firms<sup>1</sup> that entered into settlements with the Commission that resulted in the creation of the Distribution Funds that are the subject of the above-referenced Notice and Order. We write on behalf of all the Specialist Firms to provide comments regarding the appropriate use of any funds remaining in the Distribution Funds after all payments have been made in accordance with the Commission's May 2006 Order (the "Remaining Funds"). Our comments here largely reflect what we understand our colleague Robert Trenchard at WilmerHale already communicated for the Specialist Firms to Mr. Sanjay Wadhwa of the SEC in a call earlier today, and we appreciate both that Mr. Wadhwa made himself available for that conversation, and that the Commission has afforded us an opportunity to submit this letter.

As the Commission is likely aware, there is a class action ("Private Action") currently pending before the Honorable Robert W. Sweet in the United States District Court for the Southern District of New York that names, among others, the Specialist Firms as defendants and raises allegations that mirror those addressed by the settlements with the Commission. Plaintiffs in the Private Action, however, contend that there are trades and damages amounts in addition to those covered by the Distribution Funds that resulted from the alleged conduct of the Specialist Firms. Plaintiffs further claim that those trades and damages amounts can be identified through the use of a modified form of the algorithm originally employed by the Commission in its settlements with the Specialist Firms. Although the Specialist Firms dispute plaintiffs' allegations and liability, they submit it would be in the best interest of investors and consistent with the express terms of the Specialist Firm Orders and SEC rules to use any Remaining Funds to satisfy potential investor claims in the Private Action rather than transferring those funds to the United States Treasury ("Treasury").

Under the "Fair Funds for Investors" provision of the Sarbanes-Oxley Act, 15 U.S.C. § 7246, and the Commission's rules implementing the Fair Funds legislation, 17 C.F.R. §§ 201.1100, et seq., any Distribution Plan is required to include a "provision for the disposition of any funds not otherwise distributed." See 17 U.S.C. § 201.1101(b)(5). Consistent with this requirement, the terms of the Settlement Orders expressly provide that any Remaining Funds are to be used exclusively "for the benefit

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<sup>1</sup> Unless otherwise defined herein, all capitalized terms are the same as those defined in Release Nos. 34-60402 and 34-60403.

of investors." This stands in contrast to other fair fund orders, whose provisions state that any funds remaining after distribution will be turned over to the Treasury. See, e.g., In re Franklin Advisers, Inc. and Franklin/Templeton Distributors, Inc., File No. 3-11769; In re Morgan Stanley DW, Inc., File No. 3-11335. Thus, so long as there is some use that will benefit investors, the Settlement Orders do not provide for any Remaining Funds to be turned over to the Treasury, and instead compel that they be made available for the benefit of investors such as those that are the subject of the Private Action. Significantly, those investors presumably include many of the same investors who have already received payments from the Distribution Funds, but who have claims on trades not covered by the SEC's algorithm but which are covered by plaintiffs' modified algorithm.

The Commission's rules also expressly contemplate making the Remaining Funds available for the benefit of investors covered by the Private Action. Specifically, the Commission's rules provide that funds may be transferred "into a court registry or to a court-appointed receiver in any case pending in federal or state court . . . based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order." 17 C.F.R. § 201.1102(a). Although the Funds Administrator has apparently exhausted its efforts to distribute the Remaining Funds to injured investors, that does not mean these funds can automatically be surrendered to the Treasury. To the contrary, before the Commission may abandon its effort to benefit investors and transfer funds to the Treasury, its rules provide that the Commission must reach the conclusion that "the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors." Id. § 201.1102(b). Where, as here, plaintiffs in a pending federal action based on the same underlying conduct at issue in the Settlement Orders contend that there are additional injuries beyond those already compensated by the Fair Fund, keeping the Remaining Funds available for these potential claimants is more consistent with the terms of the Settlement Orders than surrendering the funds to the Treasury. Moreover, the Specialist Firms respectfully submit that the Commission cannot satisfy the standards set forth in § 201.1102(b) to permit transfer to the Treasury given the present circumstances, and that such a transfer would be inconsistent with the Commission's obligation to administer the Remaining Funds for "the benefit of investors."

Because there may be several different methods by which the Remaining Funds may be made available for the benefit of investors in the Private Action, each with its own benefits and possible drawbacks, the Specialist Firms submit that further discussions are warranted regarding the use of the Remaining Funds that would be most consistent with the terms of the Settlement Orders and that would benefit investors. We would welcome the opportunity to meet with the Commission, the Fund Administrator and plaintiffs' counsel in the Private Action regarding the matters addressed in this comment and the use of the Remaining Funds.

Respectfully submitted,

  
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By Overnight Courier and Email ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))