

7/30/08

J^d Cr: Hayward & Stern

07-0331-cr (Lead)
USA v. Bongiorno (Hayward)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of July, two thousand and eight.

Present:

HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges,
HON. JOHN G. KOELTL,*
District Judge.

UNITED STATES OF AMERICA,

Appellee,

- v -

Nos. 07-0331-cr (Lead), 07-0336-cr (con)

MICHAEL JOSEPH HAYWARD and MICHAEL STERN,

Defendants-Appellants.

* The Honorable John G. Koeltl, United States District Court for the Southern District of New York, sitting by designation.

For Appellants: JONATHAN P. BACH, (Jason M. Koral, Allison J. Hersh, *on the brief*),
Cooley Godward Kronish LLP, New York, NY, *for* Michael Hayward.

DAVID MEISTER, (Daniel Richman, *on the brief*), Clifford Chance LLP,
New York, NY, *for* Michael Stern.

For Appellee: LAUREN GOLDBERG, Assistant United States Attorney, (Anthony S.
Barkow, Celeste L. Koeleveld, Assistant United States Attorneys, *on the
brief*), *for* Michael J. Garcia, United States Attorney for the Southern
District of New York, New York, NY.

1 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
2 **DECREED** that the judgments of the United States District Court for the Southern District of
3 New York be **REVERSED**.

4 Defendant-Appellants Michael Hayward and Michael Stern appeal from judgments
5 entered January 25, 2007, in the United States District Court for the Southern District of New
6 York (Stein, J.), convicting them, following jury trials, of securities fraud in violation of 15
7 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2. We assume the parties'
8 familiarity with the facts, the procedural context, and the specification of appellate issues.

9 Defendants were specialists on the trading floor of the New York Stock Exchange
10 ("NYSE"), responsible for executing trades in particular securities for NYSE customers in
11 addition to trading for their firm's "proprietary" accounts. *See, e.g., In re NYSE Specialists Sec.*
12 *Litig.*, 503 F.3d 89, 92 (2d Cir. 2007). Defendants were charged with violating the securities
13 laws by trading for their proprietary accounts instead of matching executable buy and sell orders
14 from NYSE customers – practices also implicating NYSE Rule 92(a), which prohibits a
15 proprietary trade when the specialist "has knowledge of any particular unexecuted customer's
16 order to buy (sell) such security that could be executed at the same price."

17 Section 10(b) of the Securities Exchange Act of 1934 prohibits the use "in connection
18 with the purchase or sale of any security registered on a national securities exchange or any

1 security not so registered . . . any manipulative or deceptive device or contrivance.” 15 U.S.C. §
2 78j(b). Since the Government concedes that Defendants’ conduct was not manipulative, the
3 question is whether the Government sufficiently proved that it was deceptive. In a recent
4 opinion, we held that the Government failed to prove that similar conduct by another NYSE
5 specialist was deceptive within the meaning of the 1934 Act, and affirmed the district court’s
6 judgment of acquittal. *See United States v. Finnerty*, No. 07-1104, 2008 WL 2778830, at *1 (2d
7 Cir. July 18, 2008). In *Finnerty*, we observed that “‘deception’ . . . irreducibly entails some act
8 that gives the victim a false impression,” but the Government “identified no way in which
9 Finnerty communicated anything to his customers, let alone anything false.” *Id.* at *4-5. At
10 most, the Government proved that Finnerty violated a NYSE rule, but “violation of an NYSE
11 rule does not establish securities fraud in the civil context, let alone in a criminal prosecution.”
12 *Id.* at *7 (citation omitted).

13 *Finnerty* compels the same result here. Both parties conceded that the evidence offered to
14 convict Finnerty was largely indistinguishable from the proof submitted to convict Defendants.
15 As in *Finnerty*, that evidence was insufficient to prove “deception.” As a result, Defendants’
16 convictions must be reversed.

17 Accordingly, for the reasons set forth above, the judgments of the district court are
18 REVERSED.

19 For the Court:
20 Catherine O’Hagan Wolfe, Clerk

21
22
23 By: _____