

NEW YORK STOCK EXCHANGE LLC

NYSE HEARING BOARD DECISION 07-27
VAN DER MOOLEN SPECIALISTS USA, LLC
MEMBER ORGANIZATION

February 23, 2007

* * *

Violated NYSE Rule 476(a)(6) by inaccurately stating that it had obtained required Floor Official approval from Floor Official when that Floor Official had not given such approval; violated NYSE Rule 476(a)(10) by submitting to NYSE inaccurate Floor Official approval forms; violated NYSE Rule 440 by failing to maintain accurate records pertaining to Floor Official approvals; violated NYSE Rule 401 by failing to document whether it had obtained required Floor Official approval for election of certain stop orders; violated NYSE Rule 342 by failing to reasonably supervise and implement adequate supervisory procedures, including separate system of follow-up and review, reasonably designed to achieve compliance with NYSE rules and policies pertaining to obtaining, documentation, and submission of Floor Official approvals – Consent to censure and \$50,000 fine.

Appearances:

For the Division of Enforcement
Steven Brostoff, Esq.
Neil M. Berson, Esq.
Kenneth R. Bozza, Esq.
Joseph O. Okpaku, Esq.
Christopher DeLaRosa
Anselm LeBourne

For Respondent
Joseph A. Sack, Esq.

* * *

A Hearing Officer on behalf of the New York Stock Exchange LLC (“NYSE”) considered a Stipulation of Facts and Consent to Penalty entered into between NYSE Regulation, Inc.’s Division of Enforcement (“Enforcement”) and Van der Moolen Specialists USA, LLC (“Respondent,” the “Firm,” or “VDM”), an NYSE member organization. Without admitting or denying guilt, Respondent consented to a finding by a Hearing Officer that it:

- I. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that the Firm, on approximately 131 occasions, submitted to the NYSE records inaccurately stating that it had obtained the required Floor Official approval from a particular Floor Official when in fact that Floor Official had not given such approval.
- II. Violated NYSE Rule 476(a)(10) by, on approximately 131 occasions, submitting to the NYSE inaccurate Floor Official approval forms.
- III. Violated NYSE Rule 440 by failing to maintain accurate records pertaining to Floor Official approvals.
- IV. Violated NYSE Rule 401 by failing to adhere to the principles of good business practice in the conduct of its business affairs in that, on approximately 141 occasions, the Firm did not document whether it had obtained the required Floor Official approval for the election of certain stop orders.
- V. Violated NYSE Rule 342 during the period of September 2002 through early 2004 by failing to reasonably supervise and implement adequate supervisory procedures, including a separate system of follow-up and review, reasonably designed to achieve compliance with NYSE rules and policies pertaining to the obtaining, documentation, and submission of Floor Official approvals.

For the sole purpose of settling this disciplinary proceeding, without adjudication of any issues of law or fact, and without admitting or denying any allegations or findings referred to in the Stipulation of Facts and Consent to Penalty, Respondent stipulates to certain facts, the substance of which follows:*

Background and Jurisdiction

1. Van der Moolen Specialists USA LLC, a member organization since July 1999, is a majority-owned subsidiary of the international trading firm Van der Moolen Holding N.V., which in 2001 began trading American Depository Receipts on the NYSE. The Firm was established in or about July 1999 when VDM acquired a majority interest in several NYSE specialist firms. Since that time, the Firm has acquired four other NYSE specialist firms. For the purposes of this Stipulation and Consent, “VDM” or the “Firm” shall refer to Van der Moolen Specialists USA, LLC and its predecessor entities.
2. VDM acts as the registered specialist for approximately 432 NYSE-listed securities. In 2005, the securities for which VDM acted as the specialist accounted for approximately 12% and 13% respectively of the dollar and share volume traded on the NYSE.

* Hearing Officer Note: The facts, allegations, and conclusions contained in paragraphs 1 to 22 are taken from the executed Stipulation of Facts and Consent to Penalty between Enforcement and Respondent. No changes have been made to the stipulated paragraphs by the Hearing Officer.

3. In June 2004, Enforcement was informed by the Specialist Surveillance Department of the Division of Market Surveillance that on some of the Floor Official approval slips submitted by VDM, the Floor Official named on the slip as having given the approval had not been present on the NYSE Floor on the day in question.
4. In 2005 and 2006, additional matters were referred to Enforcement involving the Firm's failure to document whether it had obtained the required Floor Official approval pertaining to the election of stop orders during the period of January 2004 through May 2006.
5. By letters dated February 22, 2005, February 6, 2006, and July 31, 2006, VDM was notified in writing that Enforcement had opened an investigation into the above allegations.

Overview

6. As set forth below, the Firm, during the period of September 2002 through December 2004, violated NYSE Rules 476(a)(6), 476(a)(10) and 440 by submitting to the NYSE 131 Floor Official approval slips ("Floor Slips") which inaccurately indicated that approval had been obtained from certain Floor Officials who had not given such approval.
7. In addition, as set forth below, the Firm, during the period of January 2004 through May 2006, violated NYSE Rule 401 by failing to adhere to the principles of good business practice in that the Firm did not document whether it had obtained the required Floor Official approval for the election of certain stop orders.
8. Lastly, the Firm, during the period of September 2002 through early 2004, violated NYSE Rule 342 by failing to reasonably supervise and implement adequate supervisory procedures, including a separate system of follow-up and review, reasonably designed to achieve compliance with NYSE rules and policies pertaining to the documentation of Floor Official approvals.

Submitting Inaccurate Floor Official Approval Slips and Maintaining Inaccurate Records

9. NYSE Rule 123A.40 states, in relevant part, that a specialist may be a party to the election of stop orders "when his bid or offer has the effect of bettering the market, when he guarantees that the stop order will be executed at the same price as the electing sale, and with Floor Official approval if the transaction is more than 0.10 points away from the prior transaction."
10. During the period of September 2002 through December 2004, the Firm submitted to the NYSE 131 Floor Slips involving 69 different securities that inaccurately stated that a particular Floor Official had given the required Floor Official approval when in fact that Floor Official had not given such approval. All 131 transactions referenced

in the 131 Floor Slips involved the election of stop orders at prices more than 10 cents away from the prior sale. With respect to the 131 transactions, it does not appear that any of the underlying transactions would not have been approved by a Floor Official.

11. More specifically, the Firm listed on 24 different Floor Slips that it had obtained the approval of Floor Official A for the election of certain stop orders. However, it was determined that Floor Official A was not present on the NYSE Floor on the dates in question.
12. The Firm listed on 107 different Floor Slips that it had obtained the approval of Floor Official B for the election of certain stop orders. However, it was determined that Floor Official B was not present on the NYSE Floor on the dates in question.
13. For example, on October 7, 2002, the Firm completed and submitted a Floor Slip which indicated that at 9:30 a.m., at Post 11, Panel S, Floor Official A had approved the election of a stop order at a price more than 10 cents away from the prior sale in security "X." In fact, Floor Official A was not present on the NYSE Floor on October 7, 2002.
14. As another example, on August 21, 2003, the Firm completed and submitted a Floor Slip which indicated that at 11:27 a.m., at Post 10, Panel I, Floor Official B had approved the election of a stop order at a price more than 10 cents away from the prior sale in security "Y." In fact, Floor Official B was not present on the NYSE Floor on August 21, 2003.
15. By submitting records that inaccurately indicated that Floor Official approval had been obtained from either Floor Official A or Floor Official B when they had not given such approvals, the Firm: (i) engaged in conduct inconsistent with just and equitable principles of trade in violation of NYSE Rule 476(a)(6); and (ii) made misstatements of fact on records submitted to the NYSE in violation of NYSE Rule 476(a)(10).
16. By engaging in the above-described conduct, the Firm also failed to maintain accurate records pertaining to Floor Official approvals, in violation of NYSE Rule 440.

Failure to Document Whether Floor Official Approval Had Been Obtained

17. NYSE Rule 401 requires, in part, that every member organization "shall at all times adhere to the principles of good business practice in the conduct of . . . its business affairs."
18. During the period of January 2004 through May 2006, the Firm, on 141 separate occasions, did not document whether it had obtained the required Floor Official approval pertaining to the election of stop orders at a price more than 10 cents away from the prior sale.

19. As a result of the Firm's failure to document whether it had obtained the required Floor Official approval for these 141 occasions, it could not be determined whether Floor Official approval had in fact been granted. Because it was unable to demonstrate whether it had obtained the Floor Official approval required by NYSE Rule 123A.40, the Firm failed to adhere to the principles of good business practice in the conduct of its business affairs.

Failure to Reasonably Supervise

20. During the period of September 2002 through early 2004, the Firm violated NYSE Rule 342 by failing to reasonably supervise and implement adequate supervisory procedures, including a separate system of follow-up and review, reasonably designed to achieve compliance with NYSE rules and policies pertaining to the documentation of Floor Official approvals.
21. Specifically, the Firm failed to have in place any system or procedure that was reasonably designed to oversee the validity and accuracy of the obtaining, documentation, and submission of Floor Official approvals slips by its employees.

Other Factors Considered

22. In arriving at the agreed-upon penalty in this matter, Enforcement considered certain additional factors, including that: (i) since December 2004, there have been no additional reported instances in which the Firm had entered inaccurate Floor Official information onto its records; (ii) it does not appear that there was any intent to effect stop order elections that otherwise would not have been approved, nor does it appear that any of the underlying transactions would not have been approved by a Floor Official; and (iii) the Firm has since implemented policies and procedures regarding the obtaining, documentation, and submission of Floor Official approvals in an effort to prevent a recurrence of similar misconduct. Moreover, Enforcement has also taken into account that in the "Hybrid Market" there will no longer be stop orders requiring Floor Official approval, further making a recurrence of these violations unlikely.

DECISION

The Hearing Officer, in accepting the Stipulation of Facts and Consent to Penalty, found Respondent guilty as set forth above.

PENALTY

In view of the above findings, the Hearing Officer, imposed the penalty consented to by Respondent of a censure and a \$50,000.

For the Hearing Board

Vincent F. Murphy - Hearing Officer