

NEW YORK STOCK EXCHANGE LLC

NYSE HEARING BOARD DECISION 07-55

April 25, 2007

JOSEPH BONGIORNO  
FORMER SPECIALIST

\* \* \*

**Violated Section 10(b) of Securities Exchange Act of 1934 and Rule 10b-5 thereunder by knowingly or recklessly employing device, scheme or artifice to defraud, and engaging in acts, practices, and course of business which operated to defraud customers in connection with purchase or sale of securities by engaging in Interpositioning and Trading Ahead; violated NYSE Rule 92 by Interpositioning and Trading Ahead in securities for Firm's dealer account while there were unexecuted customer orders to buy (or sell) such securities which could have been executed at same price; violated NYSE Rule 104 by effecting trades for Firm's dealer account that were not reasonably necessary to maintain fair and orderly market, and failed to effectively represent and execute agency orders entrusted to him; violated NYSE Rule 123B(d) by failing to execute customer orders in accordance with NYSE auction market rules and procedures, including requirements to cross and execute customer orders against each other before buying or selling for Firm's dealer account; violated NYSE Rules 476(a)(6), 476(a)(7) and 401(a) by engaging in Interpositioning and Trading Ahead – Consent to censure and permanent bar.**

**Appearances:**

For the Division of Enforcement  
Susan Light, Esq.  
Virginia Harnisch, Esq.  
Sharon Tilove-Navatta, Esq.

For Respondent  
Barry Berke, 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 Joseph Bongiorno ("Respondent"), a former specialist with Van der Moolen Specialists USA, LLC, an NYSE member organization. Without admitting or denying guilt, Respondent consented to a finding by a Hearing Officer that he:

- I. Violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, in that he, using the facilities of a national securities

- exchange, did knowingly or recklessly (i) employ a device, scheme or artifice to defraud and (ii) engage in acts, practices, and a course of business which operated to defraud customers in connection with the purchase or sale of securities by engaging in Interpositioning and Trading Ahead transactions, thereby disadvantaging customer orders;
- II. Violated NYSE Rule 92 in that he effected Interpositioning and Trading Ahead transactions in certain securities for his member Firm's dealer account while there were unexecuted customer orders to buy (or sell) such securities which could have been executed at the same price;
  - III. Violated NYSE Rule 104 in that he effected trades for his member Firm's dealer account that were not reasonably necessary to maintain a fair and orderly market, and failed to effectively represent and execute agency orders entrusted to him;
  - IV. Violated NYSE Rule 123B(d) in that he failed to execute certain customer orders in accordance with NYSE auction market rules and procedures, including requirements to cross and execute customer orders against each other before buying or selling for the Firm's dealer account;
  - V. Violated NYSE Rule 476(a)(6) in that he engaged in conduct inconsistent with just and equitable principles of trade in that he engaged in Interpositioning and Trading Ahead transactions, thereby disadvantaging customer orders;
  - VI. Violated NYSE Rule 476(a)(7) in that he engaged acts detrimental to the interest or welfare of the NYSE in that he engaged in Interpositioning and Trading Ahead transactions, thereby disadvantaging customer orders and
  - VII. Violated NYSE Rule 401(a) in that he failed to adhere to the principles of good business practice in the conduct of his affairs in that he engaged in Interpositioning and Trading Ahead transactions, thereby disadvantaging customer orders.

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. Bongiorno was born in 1954. He entered the securities industry in 1979 as a back-up specialist clerk at Spear, Leeds, and Kellogg Corp. In 1987, he became a member of the NYSE and a specialist on the NYSE trading Floor at Marcus & Company, which later became Lawrence O'Donnell Marcus LLC. ("Lawrence O'Donnell"). In 1999, Lawrence O'Donnell merged with Van der Moolen Specialists USA, LLC ("VDM"

---

\* Hearing Officer Note: The facts, allegations, and conclusions contained in paragraphs 1 to 28 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.

or the “Firm”)<sup>1</sup> and Bongiorno became a specialist at VDM. Bongiorno’s employment with VDM was terminated on November 1, 2004.

2. During the period January 1999 through April 2003 (the “Relevant Period”), VDM was, and is currently, a member organization engaged in business as a registered specialist firm on the Floor of the NYSE. At all relevant times, VDM was the registered specialist firm in, among other securities, Hewlett-Packard Co. (“Hewlett-Packard”). Hewlett-Packard securities trade on the Floor of the NYSE under the symbol HPQ.
3. During the Relevant Period, Bongiorno was VDM’s designated specialist in Hewlett Packard. Bongiorno was the regular specialist in Hewlett-Packard during the period from January 1999 to April 2003 (the “Hewlett-Packard Period”). Bongiorno served on VDM’s management committee during the Relevant Period.
4. By letters dated March 7, 2003 and August 26, 2003, which Bongiorno received, Enforcement notified Bongiorno that it was investigating his activities as a specialist with VDM.
5. On May 12, 2006, Bongiorno pled guilty to one count of securities fraud in the United States District Court, Southern District of New York in U.S. v. Joseph Bongiorno, et al., 05 Crim. 390 (S.D.N.Y.), stemming from the same conduct as that charged in Enforcement’s Charge Memorandum dated April 12, 2005, and as addressed in this Stipulation of Facts and Consent to Penalty. He was sentenced on October 13, 2006 to 27 months in prison followed by 2 years supervised release, and a \$250,000 fine.

#### **Summary of Violative Conduct**

6. As set forth below, during the Relevant Period, on thousands of occasions Bongiorno knowingly or recklessly engaged in fraudulent trading on the Floor of the NYSE and violated his fundamental agency obligations as a specialist to hold the interest of public customer orders entrusted to him above the proprietary interests of his member Firm and himself, and to match executable customer orders. The public customer orders were transmitted to the Floor of the NYSE electronically using the NYSE’s Super Designated Order Turnaround System (“Super DOT”). Instead of pairing buy and sell DOT orders, Bongiorno intentionally “interpositioned” the Firm’s dealer account between those orders or Bongiorno intentionally “traded ahead” of those orders thereby disadvantaging customer orders, as described below.

#### **The General Obligations and Role of Specialists**

7. Specialists occupy a position of public trust and are responsible for maintaining a fair and orderly market in the stocks assigned to them. Specialists have a general duty to

---

<sup>1</sup> For purposes of this document, the term “VDM” shall refer to Van der Moolen Specialists USA, LLC and its predecessor entities.

cross or pair-off executable public customer or “agency” buy and sell system orders at the best available price, and a duty not to fill customer orders through trades from their member firm’s own account (the “dealer account”) when those customer orders could be matched with other customer orders.

8. The specialist’s obligation to make purchases or sales of securities for their firm’s dealer account only when necessary to maintain a fair and orderly market is referred to as a specialist’s “negative obligation.”
9. The responsibilities of specialists are set forth in the NYSE Rules and the NYSE Floor Official Manual. As set forth in the Floor Official Manual, although a specialist is required to trade from his or her dealer account to maintain price continuity with reasonable depth (the specialist’s “affirmative obligation”), all of the specialist’s purchases and sales must meet the test of reasonable necessity.

### **The Violative Trading Practices**

10. During the Hewlett-Packard Period, there were two types of violative conduct, referred to hereafter as “Interpositioning” and One Sided Trading Ahead (“Trading Ahead”) transactions.
11. In “Interpositioning” transactions, executable buy and sell system orders (i.e., DOT orders) that became visible on the Display Book following a freeze<sup>2</sup> were not crossed or paired-off, and instead the Firm’s dealer account was interpositioned between such orders, buying from (or selling to) a customer on one side of the market and then selling to (or buying from) a customer on the other side of the market. A profit was thereby generated for VDM’s dealer account.
12. In “Trading Ahead” transactions, the Firm’s dealer account traded ahead of executable DOT orders. The DOT orders that the dealer account traded ahead of were then executed at an inferior price than the price received for the dealer account.
13. During the Hewlett-Packard Period, Bongiorno knowingly or recklessly engaged in Interpositioning transactions on approximately 14,000 occasions, locking in a profit of approximately \$1,300,000 for the Firm’s dealer account at the expense of customer orders. As one example of Bongiorno’s thousands of instances of Interpositioning, on November 20, 2002, at 9:34:32, Bongiorno’s Display Book showed, among other things, that at a price of \$16.47, there were orders to buy 15,100 HPQ shares and

---

<sup>2</sup> During the trading day, the specialist can cause the Display Book to be “frozen” in a particular security. The Display Book is an electronic workstation provided by the NYSE to specialist firms on the trading Floor for use by their specialists. When the Display Book is frozen, new DOT Orders in that security cannot be seen on the Display Book, although they continue to queue in the system in Order Time priority. When the Display Book is “unfrozen,” DOT Orders that queued during the freeze are viewable on the Display Book.

orders to sell 5,100 shares. Accordingly, at this price, orders for 5,100 shares of HPQ were matchable and should have been paired off before Bongiorno traded for VDM's dealer account. Rather than pairing off these orders, Bongiorno interpositioned between them. First, at 9:34:36 he purchased 5,100 shares for the Firm's dealer account at a price of \$16.47. Next, Bongiorno raised the price to \$16.54 and at 9:34:38, he sold 14,500 shares from the dealer account. As a result, Bongiorno disadvantaged customer orders and locked in a riskless profit of approximately \$357 for the Firm's dealer account.

14. During the Hewlett-Packard Period, Bongiorno knowingly or recklessly engaged in 7,500 instances of Trading Ahead for the Firm's dealer account, causing approximately \$1,100,000 in customer harm.

**Bongiorno Violated Section 10(b) of the Securities Act of 1934 and Rule 10b-5 Promulgated Thereunder**

15. Section 10(b) of the Securities Exchange Act of 1934 makes it illegal to "use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §78j(b).
16. Rule 10b-5, which was promulgated pursuant to Section 10(b), provides that: "It shall be unlawful for any person, directly or indirectly, by the use of any means or ... any facility of any national securities exchange, (a) to employ any device, scheme or artifice to defraud, ... or (c) to engage in any act or practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." SEC Regulation 240.10b-5.
17. By knowingly or recklessly engaging in the Interpositioning and Trading Ahead transactions described above during the Relevant Period and thereby disadvantaging customer orders, Bongiorno violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

**Bongiorno Violated NYSE Rule 92 by Trading Ahead of Customer Orders for the VDM Dealer Account**

18. NYSE Rule 92 provides that "no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization ... is directly or indirectly interested (a "proprietary order"), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price."
19. A member is "presumed to have knowledge" of a particular unexecuted customer order under NYSE Rule 92.10.

20. By effecting Interpositioning and Trading Ahead transactions for the VDM dealer account during the Relevant Period while there were unexecuted customer orders to buy (or sell) such security which could be executed at the same price, Bongiorno violated NYSE Rule 92.

**Bongiorno Violated NYSE Rule 104 by Failing to Maintain a Fair and Orderly Market**

21. NYSE Rule 104 states, in pertinent part, that “[n]o specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he, [or] his member organization . . . is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market . . .”
22. NYSE Rule 104.10(3), which sets forth the specialist’s “negative obligation,” further states that transactions by a specialist for the dealer account “must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings . . . are not to be effected.”
23. By effecting Interpositioning and Trading Ahead transactions for the VDM dealer account during the Relevant Period that were not reasonably necessary to maintain a fair and orderly market, Bongiorno violated NYSE Rule 104.

**Bongiorno Violated NYSE Rule 123B by Executing Trades for the VDM Dealer Account That Were Not in Accordance with Exchange Auction Market Rules and Procedures**

24. In connection with the specialists’ obligation to maintain fair and orderly markets, NYSE Rule 123B(d) provides, in pertinent part, that a “specialist shall execute [SuperDOT] orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading Crowd and to cross orders before buying or selling for his own account.”
25. By effecting Interpositioning and Trading Ahead transactions for the VDM dealer account during the Relevant Period, Bongiorno failed to follow Exchange auction market rules and procedures, and failed to cross orders before buying or selling for the Firm’s dealer account, in violation of NYSE Rule 123B(d).

**Bongiorno Engaged In Conduct Inconsistent With Just and Equitable Principles of Trade, Acts Detrimental to the Interests and Welfare of the NYSE and Violated NYSE Rule 401**

26. NYSE Rule 401(a) provides that “[e]very member, allied member and member organization shall adhere to the principles of good business practice in the conduct of

- his business affairs.”
27. NYSE Rules 476(a)(6) and (7) provide for disciplinary action against members who engage in “acts detrimental to the interest or welfare of the Exchange” and “conduct or proceeding inconsistent with just and equitable principles of trade.”
  28. By effecting Interpositioning and Trading Ahead transactions for the VDM dealer account during the Relevant Period, Bongiorno failed to adhere to the principles of good business practice, engaged in conduct inconsistent with just and equitable principles of trade and engaged in acts detrimental to the interest or welfare of the Exchange.

### **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 permanent bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer