

NYSE ARCA, INC.

HEARING BOARD DECISION 09-ARCA-3

April 22, 2009

TRACK DATA SECURITIES CORP.
ETP HOLDER

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Violated NYSE Arca Equities Rules 6.18(a) and 6.18(c) by failing to reasonably supervise, including enforcing written supervisory procedures and providing adequate review and follow-up, to ensure compliance with NYSE Arca Equities Rules and federal securities laws and rules prohibiting wash sales and prearranged trades; violated NYSE Arca Equities Rule 9.2(a) by failing to use due diligence to learn essential facts relative to one or more customer accounts and certain orders of those customers; violated NYSE Arca Equities Rule 9.2(b) by failing to diligently supervise one or more customer accounts, including failing to review these accounts periodically for irregularities or abuses, such as wash sales and pre-arranged trades – Consent to censure, \$160,000 fine and an undertaking.

HEARING BOARD DECISION 09-ARCA-4

STANLEY STERN
CHIEF COMPLIANCE OFFICER

Caused violation of NYSE Arca Equities Rules 6.18(a) and 6.18(c) by failing to reasonably supervise, including enforcing Firm's written supervisory procedures and ensuring adequate review and follow-up, to ensure compliance with NYSE Arca Equities Rules and federal securities laws and rules prohibiting wash sales and prearranged trading; caused violation of NYSE Arca Equities Rule 9.2(a) by failing to use due diligence to learn essential facts relative to one or more customer accounts and certain customer orders – Consent to censure and \$15,000 fine.

Appearances:

For Division of Enforcement
Virginia Harnisch, Esq.
Christopher Hill, Esq.

For Respondent
Robert P. Bramnik, Esq.

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A Hearing Officer on behalf of the General Counsel of NYSE Arca, Inc. ("NYSE Arca"), considered an Offer of Settlement and Consent ("Offer of Settlement") executed by Track Data

Securities Corp. (“Track Data” or the “Firm”) an NYSE Arca ETP holder,¹ and Stanley Stern (“Stern”) the Chief Compliance Officer, collectively the Respondents.

The Offer of Settlement was submitted 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 finding referred to therein. The Division of Enforcement of NYSE Regulation, Inc. does not contest the Offer of Settlement and recommends its acceptance. With due regard to the stipulated facts and violations and the proposed sanction contained therein, the Hearing Officer believes it is appropriate to accept the Offer of Settlement and issues this Decision in accordance with NYSE Arca Equities Rules. The Offer of Settlement is made a part of this Decision by reference herein.

STIPULATION OF FACTS AND VIOLATIONS

1. Between September 2005 and December 2008 (the “Relevant Period”), Track Data and its Chief Compliance Officer, Stern, failed to reasonably supervise the Firm’s customer orders, despite having just received regulatory notice that the Firm had failed to reasonably supervise customer orders. Despite such notice, the Firm and Stern failed to enforce the Firm’s written supervisory procedures and to implement adequate systems and controls, including adequate review and follow-up investigation. This resulted in the Firm’s and Stern’s failure to prevent or detect apparent violative wash sales and pre-arranged trades routed through Track Data’s systems to the NYSE Arca Marketplace by two of the Firm’s customers. In addition, Track Data and Stern failed to use due diligence to learn the essential facts of certain customer accounts and customer orders.
2. The foregoing conduct constituted violations of NYSE Arca Equities Rules 6.18(a) and (c), 9.2(a) and (b) by the Firm, and NYSE Arca Equities Rules 6.18(a) and (c) and 9.2(a) by Stern.

BACKGROUND AND JURISDICTION

3. During the Relevant Period, Track Data was an Equity Trading Permit (“ETP”) Holder of NYSE Arca Equities registered to transact business on the NYSE Arca Marketplace in accordance with NYSE Arca Equities Rules. As an ETP Holder, the Firm is subject to NYSE Arca Equities disciplinary jurisdiction pursuant to NYSE Arca Equities Rule 10.1(a).
4. During the Relevant Period, Stern was the Firm’s Chief Compliance Officer, a position he has held since April 2005. Stern was responsible for overseeing the Firm’s compliance with the federal securities laws and regulations and NYSE Arca

¹ Prior to the closing of the merger between the New York Stock Exchange (“NYSE”) and Archipelago Holdings, LLC on March 7, 2006, the exchange now designated as NYSE Arca Equities was known as the Archipelago Exchange (“ArcaEx”), and was governed by the rules of PCX Equities, Inc. (“PCXE”). The applicable rules were not changed by the merger, and for convenient reference, this document refers to the former ArcaEx as “NYSE Arca Equities” and the governing rules as “NYSE Arca Equities Rules,” even when referring to pre-merger periods.

Equities Rules. From 1987 through 2001, Stern had various sales positions at the Firm.

5. During the Relevant Period, NYSE Arca Equities Rules 6.15(b), 6.18(a), 6.18(c), 9.2(a), and 9.2(b), as well as Section 9(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), were each in full force and effect.

OVERVIEW

VIOLATIVE CONDUCT

Violative Wash Sales and/or Pre-arranged Trading by Track Data Customers

6. Exchange Act Section 9(a) prohibits any person from either effecting wash sales² or entering matched orders³ for the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange.
7. NYSE Arca Equities Rule 6.15(b) prohibits “prearranged trades,” defined as “[a]n offer to sell coupled with an offer to buy back at the same or at an advanced price, or the reverse.”
8. During the Relevant Period, the Firm provided its public customers with Direct Market Acces (“DMA”) services called “myTrack System” which allowed customers to enter orders directly onto the NYSE Arca Marketplace and other securities exchanges, utilizing the Firm’s software and infrastructure.
9. As noted in NYSE Arca Equities Regulatory Bulletin RBE-07-01, entitled *ETP Holders’ Supervisory Obligations of Order Flow*, NYSE Arca Equities rules establish that “any ETP Holder that enters customer orders onto [the NYSE Arca Marketplace] retains the responsibility and disciplinary liability for ensuring that such orders comply with all NYSE Arca rules and other applicable laws and regulations.”
10. During the Relevant Period, two Firm customers executed numerous apparent violative wash sales and pre-arranged trades that the Firm neither detected nor prevented from recurring, as set forth below.

² As indicated by Exchange Act Section 9(a), a wash sale is a securities transaction that involves no change in the beneficial ownership thereof. See Exchange Act Section 9(a)(A).

³ As indicated by Exchange Act Section 9(a), matched orders are orders for the purchase [or sale] of a security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale [or purchase] of any such security, has been or will be entered by or for the same or different parties. See Exchange Act Section 9(a)(B)-(C).

Track Data and Stern Failed to Reasonably Supervise its Customers' Orders to Detect and Prevent Violative Wash Trades

Regulatory Obligations to Supervise

11. NYSE Arca Equities Rule 6.18(a) provides that “no ETP Holder may engage in conduct in violation of the federal securities laws, the Constitution or the Rules of [NYSE Arca Equities]. Every ETP Holder must supervise persons associated with it as to assure compliance therewith.”
12. NYSE Arca Equities Rule 6.18(c) requires that “[e]ach ETP Holder must establish, maintain, and enforce written procedures to supervise the business in which it engages and to supervise the activities of its associated persons that are reasonably designed to achieve compliance with applicable federal securities laws and regulations, and with the NYSE Arca Equities Rules.”
13. NYSE Arca Equities Rule 9, *Conducting Business with the Public*, requires ETP Holders to take additional supervisory steps when accepting any orders from public customers. The Rule 9 obligations apply whether orders are transmitted via direct electronic methods or otherwise. Specifically, NYSE Arca Equities Rule 9.2(a), *Diligence As to Accounts*, requires every ETP Holder, through a general partner, a principal executive officer, or a designated authorized person, to “use due diligence to learn the essential facts relative to every customer, every order, every account accepted or carried by such ETP Holder....”
14. Additionally, NYSE Arca Rule 9.2(b), *Account Supervision*, requires every ETP Holder to supervise diligently all accounts accepted or carried by the ETP Holder. The Rule specifies that this supervision must include “reviewing accounts periodically for any irregularities or abuses.”

Failure to Take Appropriate Supervisory Steps in Response to a Letter of Caution

15. NYSE Arca Equities sent Track Data a Letter of Caution (“LOC”) in September 2005 for its failure to supervise customers who appeared to be conducting improper wash trades. The LOC was sent to the attention of and received by Stern. The LOC reminded Stern and the Firm about the Firm’s responsibility to supervise its customer accounts to detect and prevent such trading activity under NYSE Arca Equities Rules 6.18 and 9.2. The LOC concluded that the Firm’s failure to investigate or detect certain wash trades violated NYSE Arca Equities Rules 6.18, 9.2(a), and 9.2(b), and expressly warned the Firm that “***further such violations will subject Track Data to formal disciplinary action with penalties including but not limited to monetary fines and/or suspension of ETP trading privileges.***” (Emphasis in original.)
16. Neither Stern nor the Firm took reasonable steps to improve Track Data’s wash sale compliance in response to the LOC.

Failure to Adequately Enforce and Implement Written Supervisory Procedures

17. The Firm had written supervisory procedures (“WSPs”) to detect and prevent wash sales and pre-arranged trades by Firm customers. Specifically, the WSPs required Firm Compliance Staff (“Staff”) under Stern’s supervision, to generate and review a

- “Wash Sale Report” (the “Report”) that was designed to identify potential wash sales by Firm customers that might require additional investigation by the Staff. The WSPs required the Staff to review the Report on a weekly basis, with follow up as needed on trades flagged by the Report that appeared to be potentially violative. To evidence each such review, the WSPs required an e-mail from the reviewing employee to Stern, the Firm’s Chief Compliance Officer.
18. During the Relevant Period, however, Stern and the Firm did not enforce or otherwise follow its WSPs. Between September 2005 and December 2006, the Report was not reviewed on a weekly basis (as required by the WSPs) or even on a monthly basis. In addition, on the few occasions when the Report was reviewed, Staff did not document these reviews of the Report through e-mails to the Firm’s Chief Compliance Officer. Even after he received the 2005 LOC, and for more than a year thereafter, Stern did not implement any procedures to ensure that the Report was being reviewed.
 19. Additionally, the Firm also failed to investigate numerous potentially violative wash trades that had been flagged by the Report, due in part to an erroneous interpretation of trading that constituted violative wash transactions.
 20. Consequently, between October 2005 and September 2006, one Track Data non-member customer engaged in an apparent scheme to improperly collect liquidity rebates from NYSE Arca Equities by executing over 7,700 violative wash trades (totaling over 69 million shares) on the NYSE Arca Marketplace. As a result of this wash trading scheme, the customer improperly collected almost \$54,000 in liquidity rebates paid by NYSE Arca Equities.⁴ None of this customer’s wash trading activity was detected or curtailed by Track Data.
 21. Additionally, in November and December 2007, a second Track Data non-member customer engaged in a limited number of transactions on the NYSE Arca Marketplace that appear to have been both wash trades and prearranged trades. This trading activity was noted by the Staff on the Wash Sale Report, but Stern and the Staff incorrectly determined that no further investigation of this activity was necessary because the orders involved appeared not to originate from the “same account.”
 22. At no time during the Relevant Period, even after receiving the September 2005 LOC, did Stern or the Firm identify that the Staff was using an inaccurate and narrow definition of violative wash trades in its review of the Wash Sale Report.
 23. At no time during the Relevant Period, even after receiving the September 2005 LOC, did Stern or the Firm give the Staff any guidance about what constituted a wash trade or how Staff should use the Report to detect potentially violative wash trades.
 24. Furthermore, after receiving the September 2005 LOC, and for more than a year thereafter, neither Stern nor the Firm followed up with the Staff to make sure that the Staff was reviewing the Report on a weekly basis, and that this review was documented, as required by the Firm’s WSPs.

⁴ This conduct by the Firm customer was in apparent violation of Exchange Act Section 9(a)(1), Section 10(b), and Rule 10b-5.

Violations by the Firm

25. The acts, practices and conduct described above constitute violations of NYSE Arca Equities Rules 6.18(a) and 6.18(c) by Track Data in that the Firm failed to reasonably supervise, including enforcing its written supervisory procedures and providing adequate review and follow-up, to ensure compliance with NYSE Arca Equities Rules and federal securities laws and rules prohibiting wash sales and prearranged trades.
26. The acts, practices and conduct described above constitute violations of NYSE Arca Equities Rule 9.2(a) by Track Data in that the Firm failed to use due diligence to learn essential facts relative to one or more customer accounts and certain orders of those customers.
27. The acts, practices and conduct described above constitute violations of NYSE Arca Equities Rule 9.2(b) by Track Data in that the Firm failed to diligently supervise one or more customer accounts, including failing to review these accounts periodically for irregularities or abuses, such as wash sales and pre-arranged trades.

Violations by Stern

28. The acts, practices and conduct described above constitute violations of NYSE Arca Equities Rule 6.18(a) and (c) by Stern in that he failed to reasonably supervise, including enforcing the Firm's written supervisory procedures and ensuring adequate review and follow-up, to ensure compliance with NYSE Arca Equities Rules and federal securities laws and rules prohibiting wash sales and prearranged trading.
29. The acts, practices and conduct described above constitute violations of NYSE Arca Equities Rule 9.2(a) by Stern in that he failed to use due diligence to learn essential facts relative to one or more customer accounts and certain customer orders.

DECISION

The Hearing Officer accepted the Offer of Settlement as set forth above, and Respondents are found to have committed the violations contained therein.

PENALTY

In accordance with the Offer of Settlement, Respondent Track Data Securities Corp is hereby censured, fined \$160,000 and an undertaking to be completed within 6 months of the date the decision in this matter becomes final. Pursuant to the undertaking, the Firm shall engage an independent consultant not unacceptable to NYSE Regulation. The independent consultant shall conduct a review of the Firm's supervisory practices and procedures, including its follow up and review, with regard to its supervision of customer accounts and customer orders, especially relating to the detection and prevention of wash sales and/or prearranged trades. The independent consultant shall issue a written report within 4 months after the date the decision in this matter becomes final. This report shall provide specific recommendations and timelines for improving the Firm's practices and procedures.

The report shall also contain an analysis concerning whether the current size and resources of the Firm's Compliance Department is sufficient to perform the functions required to keep the Firm in reasonable compliance with all applicable rules in all markets where the Firm currently enters orders on behalf of its customers.

Within 2 months after the Firm's receipt of the consultant's written report, the Firm shall implement each recommendation contained in the consultant's report, or provide a written explanation not unacceptable to NYSE Regulation detailing why the Firm has not timely implemented each of the consultant's recommendations.

Respondent Stanley Stern is hereby censured and fined \$15,000.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer