

NEW YORK STOCK EXCHANGE LLC

HEARING BOARD DECISION 09-NYSE-2

February 19, 2009

BRIAN K. SCHAEFFER
FORMER SPECIALIST

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Violated NYSE Rule 104.10 by failing to maintain fair and orderly market by opening trading in NYSE-listed security at significant disparity from prior day's closing price which did not reflect proper assessment of market conditions and supply and demand as represented by orders in market at time of opening, and failing to effectively represent and execute certain orders entrusted to him in connection with opening of trading in NYSE-listed security – Consent to censure and \$25,000 fine.

HEARING BOARD DECISION 09-NYSE-3

VAN DER MOOLEN SPECIALISTS USA, LLC
FORMER MEMBER FIRM

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Violated NYSE Rule 104.10 by failing to maintain fair and orderly market by opening trading in NYSE-listed security at significant disparity from prior day's closing price which did not reflect proper assessment of market conditions and supply and demand as represented by orders in market at time of opening, and failing to effectively represent and execute certain orders entrusted to it in connection with opening of trading in NYSE-listed security – Consent to censure, \$40,000 fine and an undertaking.

Appearances:

For the Division of Enforcement
Steven Brostoff, Esq.
Neil Berson, Esq.
Kenneth R. Bozza, Esq.
Felix M. Hester, Esq.
Edward Luppens

For Respondent
Marvin G. Pickholz, Esq.

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09-NYSE 02.1 & 03.1

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 Brian K. Schaeffer, a former specialist and Van der Moolen Specialists USA, LLC (“VDM” or the “Firm”) a former NYSE member organization (collectively, the “Respondents”). Without admitting or denying guilt, Respondents consented to a finding by a Hearing Officer that they violated NYSE Rule 104.10 by failing to maintain a fair and orderly market in that they opened trading in an NYSE-listed security at a significant disparity from the prior day’s closing price which did not reflect a proper assessment of market conditions and supply and demand as represented by the orders in the market at the time of the opening, and failed to effectively represent and execute certain orders entrusted to them in connection with the opening of trading in an NYSE-listed security.

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, Respondents stipulate to certain facts, the substance of which follows:*

Background and Jurisdiction

Schaeffer

1. Schaeffer, a former NYSE member, began working in the securities industry in 1997 as a backup clerk for Lawrence O’Donnell Marcus & Co. (“Lawrence O’Donnell”). In 1998, Van der Moolen Holding NV acquired a 75% ownership interest in Lawrence O’Donnell, and Lawrence O’Donnell changed its name to Van der Moolen Specialists USA in July 1999. Schaeffer became a member of the NYSE and a specialist at VDM in December 2004. He ceased to be an employee of the Firm in January 2008 and began working for VDM Trading LLC and VDM Capital Markets, LLC, non-member firms and subsidiaries of Van der Moolen Holding, NV, in January 2008.
2. Following a referral from NYSE Regulation’s Division of Market Surveillance pertaining to trading that took place on July 26, 2007 in XYZ stock, by letter dated October 4, 2007, Enforcement notified Schaeffer of its investigation.

VDM

3. VDM, a former member organization, was a majority-owned subsidiary of the international trading firm Van der Moolen Holding N.V. VDM acted as the registered specialist for approximately 306 NYSE-listed securities. In 2007, the securities for which VDM acted as the specialist accounted for approximately 11.2 % of the share volume traded on the NYSE. Effective December 17, 2007, VDM sold its specialist assets to Lehman Brothers Market Makers. VDM withdrew as a

* 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, except that a pseudonym has been provided to protect the privacy of a non-party.

member organization of the NYSE in January 2008.

4. By letter dated January 31, 2008, Enforcement notified VDM that it was retaining jurisdiction over the Firm in connection with this investigation.

Overview

5. While acting as a specialist for VDM in XYZ on July 26, 2007, Schaeffer and the Firm failed to maintain a fair and orderly market and failed to effectively represent certain orders entrusted to them in violation of NYSE Rule 104.10 when Schaeffer opened XYZ at 9:38:38 a.m. at a price of \$61.25, on 117,900 shares down \$12.43 from the previous day's closing price.

Regulatory Framework

Fair and Orderly Market

6. NYSE Rule 104.10 states in part that “[t]he function of a member acting as regular specialist on the Floor of the [NYSE] includes, in addition to the effective execution of commission orders entrusted to him, the maintenance, in so far as reasonably practicable, of a fair and orderly market on the [NYSE] in the stocks in which he is so acting.”

Openings and Halts in Trading

7. NYSE Rule 123D states in part that, “Openings and reopenings should be timely, as well as fair and orderly, reflecting a professional assessment of market conditions at the time, and appropriate consideration of the balance of supply and demand as reflected by orders represented in the market. Specialists should, to the best of their ability, provide timely and impartial information at all phases of the opening process...It is also incumbent upon specialists to seek the advice of Floor Officials when openings are delayed or when a halt in trading may be appropriate due to unusual market conditions.”

Market Maintenance Violation

8. At all relevant times, VDM was the registered specialist for XYZ, which Schaeffer was responsible for trading. On July 25, 2007 XYZ closed at a price of 73.68.
9. On July 26, 2007, at approximately 9:26:42 a.m., responding to a Floor broker who informed Schaeffer that he had stock for sale and requested the expected price and volume in XYZ, Schaeffer informed the broker that it looked like XYZ would open down about two dollars or at around 70.50 on around 30,000 shares.
10. In response to an inquiry from a different Floor broker at approximately 9:27:30 a.m.,

Schaeffer began “price discovery” by entering prices in the Display Book in an attempt to match buy and sell orders to arrive at a price at which XYZ might open and stated that the opening may be worse than he previously thought.

11. Between 9:29:07 a.m. and 9:30:56 a.m. Schaeffer, continuing his price discovery, entered prices of 69.00, 68.95 and 65.00 into the Display Book. At 9:29:07 a.m., at the price of 69.00, the Display Book reflected that XYZ had a volume of 46,500 shares for sale, which included a sell order imbalance of 20,700 shares. At 9:30:48, at the price of 68.95, the Display Book reflected that XYZ had a volume of 77,200 shares for sale, which included a sell order imbalance of 50,300 shares. At 9:30:56 a.m., at the price of 65.00, the Display Book reflected that XYZ had a volume of 77,800 shares for sale, which included a sell order imbalance of 45,800 shares.¹
12. Between 9:29:07 a.m., and 9:30:56 a.m., at the prices of 69.00 and 68.95, there were a total of 39,600 shares of sell stop orders. At the price of 65.00, there was a total of 60,300 sell stop orders.
13. On the date at issue, the amount of sell stop orders at a particular price was not set forth on the Display Book. Because stop orders appeared in the opening template as if they were regular buy or sell orders, Schaeffer did not recognize the extent of sell stop order interest on the Display Book.
14. Prior to 9:30 a.m., Schaeffer paged a Floor Governor to assist him with the opening of XYZ.
15. At approximately 9:33:19 a.m., after Schaeffer had entered a price of 60.00 into the Display Book, which showed an imbalance of 108,700 (the imbalance included 104,200 shares of sell stop orders), a Floor Governor arrived at Schaeffer’s Post and panel. At 9:34:08 a.m., Schaeffer showed the Floor Governor that the imbalance in the stock continued down to a price of 55.00.
16. At approximately 9:34:23 a.m., with the Display Book showing an imbalance of 146,000 shares to sell at a price of 60.00, Schaeffer sought the assistance of the NYSE Floor Governor as to where to price the opening. The Floor Governor suggested to Schaeffer that he should post a pre-opening price indication to the market of 60.00 – 63.00. Schaeffer concurred with this recommendation, and a delayed-opening message was disseminated followed by a price indication of 60.00 to 63.00 that was published at 9:34:50 a.m. At 9:37:27 a.m., Schaeffer indicated that the stock price was “firming up,” *i.e.*, within the price range. Thereafter, the Floor Governor agreed to open XYZ.
17. By approximately 9:38 a.m., Schaeffer had entered the price of 61.25 into the Display Book. At this time, however, 136,700 shares of market sell orders had cancelled and

¹ Where there is a sell imbalance at the opening, to the extent that the imbalance was not satisfied by orders entered by willing buyers, the specialist would have had to satisfy the imbalance by purchasing shares for his dealer account.

new buy interest had been received.

18. At 9:38:38 a.m. Schaeffer opened XYZ at a price of 61.25 on 117,900 shares. Schaeffer bought 27,600 shares for the Firm's dealer account. 16,600 of the shares to sell (14%) were market orders and 101,300 shares (86%) were sell stop orders elected by the opening price.²
19. The difference between the July 26, 2007 opening price and the prior day's closing price was 12.43 (16.8%).
20. After the opening transaction, XYZ traded at various prices between 61.50 and 62.93 between 9:38:39 a.m. and 9:41:20 a.m. At 9:46:08 a.m., approximately seven minutes and 30 seconds after the opening trade, a non-regulatory trading halt³ was called by a Floor Governor due to a large buy side imbalance. During the period between the open and the halt, Schaeffer sold the XYZ stock that he had acquired on the open.
21. At 10:04:37 a.m., Schaeffer published an 83,400-share trade (reopening transaction) to the tape at a price of 70.75, an increase of \$7.82 or 12% from the last sale (62.93). Thereafter, trading was orderly with the stock trading in the range of 66.66 to 72.46 and closing for the day at a price of 69.07.
22. Schaeffer and the Firm failed to arrange the opening in a fair and orderly manner and failed to effectively execute certain orders entrusted to them in XYZ on July 26, 2007 in violation of NYSE Rule 104.10. Schaeffer and the Firm failed to make a proper professional assessment of the extent of the sell imbalance that existed at various price points and that the imbalance increased at progressively lower prices. Schaeffer and the Firm also failed to take into consideration, prior to the opening, that a significant amount of sell interest had cancelled and new buy interest had been received and thus should have disseminated a second pre-opening price indication at prices based on the current state of the imbalance in the marketplace.

DECISION

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

PENALTY

In view of the above findings, the Hearing Officer, imposed the penalty consented to by Respondent Schaeffer of a censure and a \$25,000 fine and Respondent VDM of a censure, a

² The Dow Jones Industrial Average opened down on July 26, 2007.

³ The Floor Official Manual (June 2004) at p. 128 indicates that a non-regulatory trading halt may be called by a Floor Official when there is a large order imbalance.

\$40,000 fine and an undertaking in an amount of up to \$400,000 to adjust the price that customers received on the NYSE on the opening of XYZ on July 26, 2007. The Firm shall be required to offer adjustment checks to the NYSE member firms that represented the customers who sold XYZ on the open on the NYSE within six months from the date that the decision in this case becomes final. The Firm and Enforcement have agreed to a plan (the "Plan"), submitted by the Firm, for the reasonable and fair distribution of the funds set aside for adjustments. The Plan sets forth how and when the affected member firms will be contacted, how and when the funds will be distributed, and that an accounting of the distribution of funds will be made to Enforcement.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer