

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET
REGULATION,

Complainant,

Disciplinary Proceeding
No. 20080121376

v.

Hearing Officer – MAD

GREGORY RICHARD IMBRUCE
(CRD No. 4392235),

HEARING PANEL DECISION

Respondent.

January 7, 2011

Respondent willfully violated Rule 105 of Regulation M under the Securities Exchange Act of 1934, and Conduct Rule 2110 by purchasing equity securities in a secondary offering from a participating underwriter, after having sold short the same equity securities during the restricted period. Respondent is censured, fined \$50,000, and suspended from associating in any capacity with any member firm for 30 business days.

Appearances

For Complainant: Ricardo J. Nuñez, Esq., and James J. Nixon, Esq., Rockville, MD, FINRA Department of Market Regulation.

For Respondent: Brian E. Spears, Esq., Westport, CT.

DECISION

I. INTRODUCTION

On February 25, 2010, the Department of Market Regulation ("Market Regulation") filed a Complaint with the Office of Hearing Officers alleging that Respondent Gregory Richard Imbruce ("Imbruce") willfully violated Rule 105 of Regulation M ("Rule 105") under the

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Securities Exchange Act of 1934 ("Exchange Act") and Conduct Rule 2110.¹ Imbruce was registered with Bernard L. Madoff Investment Securities, L.L.C. (the "Firm" or "Madoff") at the time of the alleged violation. The Complaint alleges that Imbruce purchased ATP Oil & Gas Corporation ("ATPG") equity securities in a secondary public offering from a participating underwriter, after having directed the short sale of the same equity securities during the five business days before the pricing of the public offering (the "restricted period"). The transactions occurred in a Madoff proprietary trading account designated as account "GD" (the "GD account").

On April 7, 2010, Imbruce filed an Answer, denying the charges and requesting a hearing. The hearing was held on October 5 and 6, 2010, in New York, New York, before a Hearing Panel composed of the Hearing Officer and two current members of FINRA's District 10 Committee. Market Regulation called two witnesses: Edward Coughlin ("Coughlin"), a supervisor at Madoff, and Scott Trilling ("Trilling"), FINRA Deputy Director, Market Regulation. Market Regulation also presented the video testimony of Peter Berkowitz ("Berkowitz"), an assistant trader at Madoff, who is no longer subject to FINRA's jurisdiction. Imbruce testified; he did not call any other witnesses.²

II. ORIGIN OF THE INVESTIGATION

This case arose from the surveillance functions of the Trading Practices Group in FINRA's Market Regulation Department.³ The Trading Practices Group performs surveillance for possible Regulation M violations.⁴ Specifically, the Group looks at recent offerings and

¹ As of July 30, 2007, NASD and New York Stock Exchange Regulation, Inc. consolidated their member regulation functions and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). This Decision refers to and relies on the NASD rules in the Complaint that were in effect at the time of the Respondent's alleged misconduct.

² In this decision, "Tr." refers to the transcript of the hearing; "CX" to Market Regulation's exhibits; "RX" to Respondent's exhibits. "Stip." refers to the parties' stipulations.

³ Tr. 112.

⁴ Tr. 111.

market movements that may indicate a Regulation M Rule 105 violation.⁵ Based on its surveillance, the Group selected ATPG to review,⁶ which led to the filing of this Complaint.

III. FINDINGS OF FACT

A. The Respondent

Imbruce first registered with FINRA as a General Securities Representative in April 2001.⁷ Between March 2006 and March 2008, Imbruce worked at Madoff where he was registered as a General Securities Representative, as well as an Equity Trader.⁸ On March 11, 2008, Madoff filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on Imbruce's behalf, terminating his registration with Madoff.⁹ Imbruce has not been associated with a FINRA member since the filing of his Form U5. FINRA has jurisdiction over this disciplinary proceeding because (1) the Complaint was filed within two years after March 11, 2008, the date FINRA terminated Imbruce's registration, and (2) the Complaint charges him with misconduct that occurred while he was registered with a FINRA member firm.¹⁰

B. Background

In November 2007, Madoff's proprietary desk consisted of 18 different groups, one of which was the energy proprietary trading desk.¹¹ The mandate of the energy proprietary trading desk was to trade energy stocks long and short.¹² The desk consisted of two individuals: Imbruce, the portfolio manager, and Berkowitz, the assistant trader.¹³ As the portfolio manager,

⁵ Tr. 112-13.

⁶ Tr. 113.

⁷ CX-19, at 6.

⁸ *Id.* at 1, 11-12.

⁹ *Id.* at 1-5.

¹⁰ See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

¹¹ Tr. 34-35.

¹² Tr. 35.

¹³ Tr. 35-36, 232; CX-6, at 6. At the end of November 2007, Imbruce transitioned off the energy trading desk and joined Madoff Holdings Energy, L.L.C. ("Madoff Energy"). Tr. 230-31.

Imbruce made the investment and position decisions,¹⁴ and Berkowitz assisted him.¹⁵ For example, Imbruce would direct Berkowitz to institute trades after he made a stock selection.¹⁶

Madoff assigned the GD account to Imbruce for his stock selections for the energy trading desk.¹⁷ He had sole responsibility for the GD account.¹⁸ While Imbruce and Berkowitz worked side by side on the energy trading desk,¹⁹ Berkowitz did not have authority to make trading decisions in the GD account without Imbruce's permission.²⁰

C. Short Sales of ATPG on November 14, 2007

1. Imbruce's Instruction to Short Sell

On November 14, 2007, Imbruce left New York to attend a Bank of America energy industry conference in Florida.²¹ That same day, Imbruce called Berkowitz at the Madoff office regarding a short sale.²² Berkowitz stated that Imbruce instructed him specifically to short 10,000 shares of ATPG because he wanted to reduce the exposure of the energy proprietary trading desk's portfolio.²³ According to Berkowitz, Imbruce told him to give the order to Bank of America because he was attending the Bank of America conference.²⁴ Imbruce asserted that he did not instruct Berkowitz to short a specific stock; rather, he instructed him "to short \$500,000 in value of any energy stock in order to reduce our then current \$500,000 net long position so

¹⁴ Tr. 36; CX-6, at 11.

¹⁵ Tr. 37-39; CX-6, at 11, 13-14; CX-9, at 1.

¹⁶ Tr. 38-39; CX-6, at 14.

¹⁷ Tr. 39; CX-12, at 1; CX-18, at 13-15.

¹⁸ Tr. 40; CX-6, at 16.

¹⁹ CX-6, at 7.

²⁰ Tr. 40; CX-6, at 11, 16.

²¹ RX-12, at 2; Tr. 255, 312. Imbruce testified that he did not return to the office until November 26, 2007. Tr. 256-57; RX-18.

²² Tr. 261, 315; CX-22, at 4; CX-9, at 1.

²³ CX-9, at 1.

²⁴ *Id.*; CX-6, at 23-25.

that we were 'market neutral' during the week I was out of the office....²⁵ Berkowitz testified that he had never been permitted to short a specific dollar amount of a stock of his choosing.²⁶

2. Trading in ATPG on November 14, 2007

On the morning of November 14, 2007, the GD account held no position in ATPG.²⁷ That day, several orders for ATPG short sales and purchases were placed through the GD account at Madoff.²⁸ At 1:44 p.m., Berkowitz submitted an order to Bank of America to sell short 10,000 shares of ATPG for the GD account.²⁹ Later that afternoon, because the ATPG order was not fully executed,³⁰ Berkowitz manually entered additional short sales through BATS Trading, Inc. and NASDAQ Single Book.³¹ At 3:41 p.m., when the GD account was short 10,251 shares of ATPG,³² Berkowitz manually entered ATPG purchase orders through BATS and NASDAQ to ensure that the GD account was short exactly 10,000 shares.³³

In total, the GD account sold short 10,300 shares of ATPG at prices between \$52.00 and \$53.30 per share, and purchased 300 shares at prices between \$52.05 and \$52.50.³⁴ At the end of the trading day, the GD account's total short position for ATPG was 10,000 shares.³⁵

D. The ATPG Secondary Offering

On November 14, 2007, ATPG filed a prospectus with the Securities and Exchange Commission ("SEC") as part of its registration statement.³⁶ ATPG used a "shelf" registration

²⁵ CX-22, at 4; CX-21, at 21-22; Tr. 261.

²⁶ CX-6, at 24-25.

²⁷ Tr. 123-25; CX-18, at 25-28.

²⁸ Stip. at 1.

²⁹ CX-9, at 1; CX-6, at 23; Tr. 151-52, 169; CX-1, at 1; CX-2, at 5. At 1:26 p.m., a sales broker from underwriter Johnson & Rice Company sent Berkowitz an instant message, inquiring how he could contact Imbruce. CX-16. Berkowitz told the broker that Imbruce had just landed. *Id.*

³⁰ CX-6, at 29.

³¹ Stip. at 1.

³² CX-1, at 2.

³³ CX-6, at 29-30.

³⁴ CX-1, Tr. 160-68.

³⁵ *Id.*

³⁶ CX-20.

process to sell its securities in one or more offerings.³⁷ The ATPG secondary offering was priced after the market closed on November 14, 2007.³⁸ A prospectus supplement, dated November 15, 2007, offered 5,000,000 shares of ATPG common stock at a public offering price of \$47.00.³⁹ The ATPG offering was conducted on a firm commitment basis.⁴⁰ When an offering is conducted on a firm commitment basis, participating underwriters are obligated to purchase any shares that they do not sell.⁴¹ Johnson Rice & Company ("JRCO") was one of two participating underwriters for this ATPG offering.⁴²

E. Imbruce's Purchase of 10,000 Shares of ATPG in the Secondary Offering

Imbruce independently purchased 10,000 shares of ATPG in the secondary offering,⁴³ after JRCO contacted him.⁴⁴ At 5:06 p.m., Imbruce provided an indication of interest to purchase 10,000 shares of ATPG.⁴⁵ The order ticket was marked "Market Not Held."⁴⁶ After the shares were allocated in the secondary offering, the order ticket was updated to reflect the allocation of 10,000 shares and the offering price of \$47.00.⁴⁷ JRCO called Berkowitz and informed him that

³⁷ *Id.* at 4.

³⁸ The offering was priced between the closing of the market on November 14, 2007, and the filing of the supplemental prospectus on November 15, 2007. Tr. 113.

³⁹ CX-27.

⁴⁰ Tr. 146-51; CX-20, at 40, 79.

⁴¹ Tr. 144-46; CX-20, at 40.

⁴² CX-20, at 68. Both Imbruce and Berkowitz had worked with JRCO prior to the ATPG offering. Tr. 252, 321-22, 349-50; CX-6, at 26-27. Imbruce had known the brokers from JRCO since 2005. Tr. 321-22. Members of JRCO had assisted Imbruce in the past by providing a lot of research to him. Tr. 350. In addition, Imbruce and the JRCO brokers had invested alongside each other in drilling wells. Tr. 322.

⁴³ Tr. 323-24. ATPG was included in the models Imbruce and Berkowitz had researched. Tr. 331-32. Imbruce knew the fundamentals of the company. *Id.*

⁴⁴ Tr. 265, 273-74. Imbruce claims that he was initially contacted by JRCO on the evening of November 14, 2007. Tr. 265. However, instant messages reveal that a broker from JRCO was trying to reach Imbruce at 1:26 p.m. on November 14, 2007. CX-16.

⁴⁵ CX-10; CX-11, at 4; Stip. at 3. The order ticket was time-stamped immediately after the completion of the call in which the order was placed. Stip. at 3.

⁴⁶ Stip. at 3.

⁴⁷ Stip. at 3-4.

Imbruce had purchased 10,000 shares of ATPG.⁴⁸ Berkowitz then acknowledged the trade in the Madoff internal system.⁴⁹

Imbruce's purchase, coupled with the short sales on November 14, enabled Madoff to realize a \$58,721.26 profit.⁵⁰

IV. Imbruce Willfully Violated Rule 105 of Regulation M

Rule 105 prohibits the sale of securities during the restricted period and then the purchase of the same securities in a secondary public offering.⁵¹ It prohibits the conduct irrespective of the short seller's intent in effecting the short sales.⁵² Proof of scienter is not required.⁵³

The SEC amended Rule 105 in October 2007. In its adopting release, the SEC explained:

Generally, the offering prices of ... secondary offerings are priced at a discount to a stock's closing price prior to pricing. This discount provides a motivation for a person who has a high expectation of receiving offering shares to capture this discount by aggressively short selling just prior to pricing and then covering the person's short sales at the lower offering prices with securities received through an allocation.⁵⁴

The SEC further noted that "[c]overing the short sale with a specified amount of registered offering securities at a fixed price allows a short seller largely to avoid market risk and usually guarantee a profit."⁵⁵ The goal of Rule 105 is to promote offering prices that are based on supply and demand, not artificial forces.⁵⁶

⁴⁸ CX-6, at 30; CX-9, at 1. Berkowitz testified that he did not know that the purchase was part of a secondary offering. CX-6, at 30; CX-9, at 1. He stated that a purchase from a secondary offering is processed in the same manner as a regular stock purchase. CX-6, at 19.

⁴⁹ CX-9, at 1.

⁵⁰ CX-1, at 2; Tr. 222-23.

⁵¹ 17 C.F.R. § 242.105; see *Short Selling in Connection with a Public Offering*, Exchange Act Release No. 56206, 72 Fed. Reg. 45094, 45094 (Aug. 10, 2007) (effective Oct. 9, 2007) (codified at 17 C.F.R. pt. 242) ("Adopting Release on Rule 105").

⁵² *Adopting Release on Rule 105*, 72 Fed. Reg. at 45094.

⁵³ *Adopting Release on Rule 105*, 72 Fed. Reg. at 45094; *Department of Enforcement v. D.L. Cromwell Investments, Inc.*, 2003 NASD Discip. LEXIS 53, at *40, n.14 (O.H.O. Nov. 19, 2003) (noting that proof of scienter is not required for a Regulation M violation).

⁵⁴ *Adopting Release on Rule 105*, 72 Fed. Reg. at 45096.

⁵⁵ *Id.*

⁵⁶ *Short Sales; Final Rule*, Exchange Act Release No. 50103, 69 Fed. Reg. 48008, 48020 (Aug. 6, 2004).

The restricted period for ATPG included the five business days before the pricing of the offering.⁵⁷ During the evening of November 14, 2007, after the market closed, or in the early morning of November 15, 2007, the ATPG secondary offering of common stock priced at \$47.00 per share.⁵⁸ The shares were offered to the public on a firm commitment basis.⁵⁹ Imbruce purchased 10,000 shares of the secondary offering in the GD account.⁶⁰ On November 14, 2007, prior to the secondary offering purchase and during the restricted period, Imbruce directed Berkowitz to short 10,000 shares of ATPG in the GD account. As a result of the above trading in the ATPG shares, Imbruce violated Rule 105 and Conduct Rule 2110.⁶¹

A finding of willfulness does not require a determination that the respondent intended to violate FINRA's rules.⁶² Rather, the Hearing Panel need only find that Imbruce voluntarily committed the act that constituted the violation,⁶³ i.e., selling short the ATPG shares during the restricted period and then purchasing ATPG in the public offering from a participating underwriter. Measured by those principles, the Hearing Panel finds that Imbruce's conduct was willful.

V. Imbruce's Arguments

Imbruce's primary argument in defense of the violation is that he did not instruct Berkowitz to short ATPG. He maintains that Berkowitz selected ATPG on his own after they discussed a plan to balance the portfolio and reduce Madoff's net long position by shorting an unspecified energy stock.⁶⁴ There is no evidence other than Imbruce's testimony that supports his position. In contrast, Berkowitz's testimony is corroborated by the ATPG trading on November

⁵⁷ 17 C.F.R. § 242.105(a)(1) (effective Oct. 9, 2007).

⁵⁸ Tr. 113.

⁵⁹ See *supra* footnotes 40 and 41.

⁶⁰ Tr. 323-24, 357; CX-10; CX-11, at 4.

⁶¹ A violation of a federal statute or rule also violates Conduct Rule 2110. *Steven J. Gluckman*, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

⁶² *Department of Enforcement v. Kraemer*, 2009 FINRA Discip. LEXIS 39, at *16 (N.A.C. Dec. 18, 2009).

⁶³ *Id.*

⁶⁴ Tr. 318-19; CX-17, at 4.

14, 2007. He testified that he usually placed the trades himself because it was cheaper;⁶⁵ however, in this instance, he utilized Bank of America, consistent with the instruction he received from Imbruce.⁶⁶ Berkowitz was instructed to short 10,000 ATPG shares, and he made sure that the short sales totaled exactly 10,000 at the end of the day on November 14, 2007.⁶⁷ He even manually entered orders himself to ensure that the short sales were completed by the close of business on November 14, 2007.⁶⁸ Had Berkowitz followed the instruction that Imbruce claims he gave him, there would have been no need for Berkowitz to have completed the short sales in one business day because Imbruce's alleged instruction was to reduce "the net long position so that we were 'market neutral' during the week [Imbruce] was out of the office...."⁶⁹ Further, Imbruce's own actions are inconsistent with his asserted instruction. It is counterintuitive that Imbruce would direct Berkowitz to short sell \$500,000 of any energy stock in order to flatten the portfolio on November 14, and then purchase approximately \$500,000 of ATPG the next morning. To do so, would negate his goal of flattening the portfolio in the GD account to remain market neutral.

The Panel finds that it was not a mere coincidence that Berkowitz shorted 10,000 of the exact same stock that Imbruce purchased less than 24 hours later. Even accepting Imbruce's explanation, the Panel finds that Imbruce, as a securities professional, should have taken the necessary steps to ensure that a Rule 105 violation did not occur. Assuming he instructed Berkowitz to short "any energy stock," Imbruce should have contacted Berkowitz to make sure that he did not short the exact same stock that Imbruce was purchasing in the secondary offering the next day.

⁶⁵ CX-6, at 15.

⁶⁶ CX-2, at 5-15.

⁶⁷ CX-6, at 29-30.

⁶⁸ *Id.* at 29.

⁶⁹ CX-22, at 4.

Imbruce also argues that he had no motivation to short sell the ATPG stock as he was not eligible to receive any of the ATPG trading profits as a bonus in 2007.⁷⁰ However, his lack of potential monetary gain is no defense because there is no scienter requirement for this violation. For the same reason, the Panel need not determine if he was otherwise motivated to short sell the ATPG stock.⁷¹

Imbruce also points out that because Coughlin had access to all the trading on the proprietary trading desk, he should have known that a short sale and purchase in the same stock took place within the restricted period.⁷² Imbruce's argument is unavailing. The law is clear that a securities professional is independently responsible for compliance with regulatory requirements; he cannot shift responsibility to his supervisor.⁷³

VI. SANCTIONS

The FINRA Sanction Guidelines ("Guidelines") contain no specific guideline applicable to Imbruce's Rule 105 violation. Nevertheless, the Guidelines provide principal considerations to guide the formulation of all sanctions.

Upon review of the principal considerations, the Panel concludes that this case involves several aggravating factors. First, Imbruce's conduct was intentional.⁷⁴ At the time he purchased ATPG in the secondary offering, he knew, at a minimum, that Berkowitz had shorted an energy stock. Even accepting Imbruce's version of his instruction to Berkowitz, which the Panel was unwilling to do, Imbruce never contacted Berkowitz or Coughlin to specifically inquire if

⁷⁰ Tr. 237-38.

⁷¹ The evidence at the hearing revealed that JRCO had assisted Imbruce in the past. Tr. 349-50. Imbruce testified that JRCO was begging for his assistance with this offering. Tr. 273-74. Because the ATPG secondary offering was on a firm commitment basis, Imbruce may have wanted to purchase the ATPG shares in order to assist JRCO in satisfying its commitment. In addition, Coughlin testified that Imbruce's energy group was not successful in 2007. Tr. 68-69. Imbruce acknowledged that his group was being watched carefully by Coughlin. Tr. 250-51. Imbruce also stated that "we [the energy group] had to capture gains where we could at that point in time." Tr. 250.

⁷² Tr. 232, 236, 248, 360.

⁷³ See *Phillippe N. Keyes*, 2006 SEC LEXIS 2631, at *22 (Nov. 8, 2006); see also *Department of Enforcement v. Merhi*, 2007 NASD Discip. LEXIS 9, at *27-28 (N.A.C. Feb. 16, 2007).

⁷⁴ Sanction Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 13).

Berkowitz had shorted the ATPG stock.⁷⁵ Imbruce testified that he was aware of Rule 105,⁷⁶ yet he failed to take any steps to ensure that he complied with it.

Second, Imbruce has never accepted responsibility for or acknowledged his misconduct.⁷⁷ Imbruce continues to assert that Berkowitz selected the ATPG stock on his own, and thus he should not be liable for this violation. And, he blames Coughlin for not alerting him that the GD account was short ATPG when he purchased in the secondary offering.⁷⁸ Imbruce fails to appreciate that the GD account was assigned to him, and thus he was responsible for the transactions that took place in that account.

Third, Imbruce's misconduct also resulted in the potential for monetary and other gain.⁷⁹ Indeed, the violative ATPG transactions resulted in profits of \$58,721.26 for Madoff.⁸⁰ While Imbruce did not personally reap financial benefits, he testified that his energy group was performing poorly and he felt the need to capture gains wherever he could.⁸¹

Rule 105 is a prophylactic rule, designed to prohibit abusive short selling and manipulation. Such prohibited short selling ahead of an offering can reduce the proceeds received by the public company and its shareholders. Imbruce thwarted the goal of Rule 105. If Imbruce was aware of the Rule, as he claims, he certainly took a lackadaisical approach to ensuring that a Rule 105 violation did not occur. Such an approach cannot be tolerated in an industry that demands pricing integrity in the capital-raising process.

After careful consideration of the above aggravating factors and the lack of mitigating circumstances, the Panel finds that the appropriate remedial sanctions for the violation were a censure, a \$50,000 fine, and a 30 business day suspension in all capacities.

⁷⁵ Tr. 325-27, 360-61.

⁷⁶ Tr. 308.

⁷⁷ Sanction Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 2).

⁷⁸ Tr. 360.

⁷⁹ Sanction Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 17).

⁸⁰ Tr. 222-23; CX-1.

⁸¹ Tr. 250.

VII. CONCLUSION

Imbruce willfully violated Rule 105 of Regulation M under the Exchange Act and Conduct Rule 2110 by purchasing equity securities in a secondary public offering from a participating underwriter after having directed the short sale of the same equity securities during the restricted period.⁸² For this violation, Imbruce is censured, suspended from associating with any FINRA member firm in any capacity for 30 business days, and fined \$50,000.

If this decision becomes FINRA's final action in this matter, Imbruce's suspension in all capacities will commence at the opening of business on Monday, March 7, 2011, and end at the close of business on Wednesday, April 15, 2011. In addition, Imbruce shall pay costs in the amount of \$3,903.70, which represents the cost of the hearing transcript together with a \$750.00 administrative fee. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

HEARING PANEL


By: Maureen A. Delaney
Hearing Officer
For the Hearing Panel

Copies to: Gregory Richard Imbruce *(via overnight courier and first-class mail)*
Brian E. Spears, Esq. *(via electronic and first-class mail)*
Ricardo J. Nuñez, Esq. *(via electronic and first-class mail)*
James J. Nixon, Esq. *(via electronic and first-class mail)*

⁸² The Hearing Panel considered and rejected without discussion all other arguments of the parties.