UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60440 / August 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13569

In the Matter of	:	
TJM PROPRIETARY TRADING, LLC, MICHAEL R. BENSON, AND JOHN T. BURKE,	:	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b) and 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**
Respondents.	:	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against TJM Proprietary Trading, LLC ("TJM") and Michael R. Benson, and pursuant to Section 15(b) of the Exchange Act against John T. Burke (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

These proceedings arise out of Respondent TJM's violations of Regulation SHO. Subject to certain exceptions, Regulation SHO requires market participants seeking to effect a short sale to borrow, arrange to borrow, or have reasonable grounds to believe that a security can be borrowed prior to effecting the short sale. This is also known as the "locate requirement." Market makers, who ensure liquidity in the market, are excepted from the locate requirement if they are engaged in bona-fide market making activities.

At the time, Regulation SHO also required "fail-to-deliver" positions[2] in certain securities that have lasted for thirteen consecutive settlement days to be immediately closed out.[3] In contrast to the locate requirement, market makers are not excepted from Regulation SHO's close-out requirement.

In this case, Respondent TJM engaged in certain transactions, known as "reverse conversions," which resulted in violations of Regulation SHO's locate and close-out requirements. A reverse conversion involves selling a put option and buying a call option – a transaction combination that creates what is known as a "synthetic" long position – while selling short the underlying stock. The short sale of the underlying stock serves as a hedge to the synthetic long position. By engaging in these transactions, Respondent TJM profited on the spread between the price of the put option and the price of the call option, while avoiding the cost of borrowing shares

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] "Fails-to-deliver" occur when a seller fails to deliver securities to the buyer when delivery is due. Generally, investors complete or settle their security transactions within three settlement days. This settlement cycle is known as T+3 (or "trade date plus three days"). T+3 means that when a trade occurs, the participants to the trade deliver and pay for the security at a clearing agency three settlement days after the trade is executed so the brokerage firm can exchange those funds for the securities on that third settlement day. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next settlement day following the trade (or T+1).

[3] A "close out" of a fail position involves the purchase of shares of like kind and quantity in the amount of the fail to deliver position.

of stock to sell short. As described below, because TJM failed to borrow securities to make delivery when delivery was due, the short sales were "naked" short sales.[4]

Specifically, from January 2007 through July 2007, Respondent TJM willfully[5] violated Rule 203(b)(1) of Regulation SHO as a result of Respondent Benson improperly utilizing the market-maker locate exception to avoid locating shares prior to effecting short sale transactions. In willful violation of Rule 203(b)(3) of Regulation SHO, TJM engaged in a series of transactions through Respondent Benson's use of short-term FLEX options that did not satisfy its close-out obligations in Regulation SHO threshold securities[6] that had been allocated to TJM by its clearing firm. Finally, Respondent John Burke, TJM's Chief Operating Officer, failed reasonably to supervise Respondent Benson with a view to preventing him from willfully aiding and abetting and causing TJM's violations of Rules 203(b)(1) and 203(b)(3) of Regulation SHO, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

Respondents

1. TJM Proprietary Trading, LLC ("TJM"), an Illinois limited liability company located in Chicago, Illinois, is a market-maker registered with the Chicago Board Options Exchange, Inc. ("CBOE") since May 2003. TJM also is a broker-dealer registered with the Commission since May 2003. During the relevant time period, John T. Burke was associated with TJM as its Chief Operating Officer.

2. John T. Burke, age 48, is a resident of Glencoe, Illinois and served as a principal and the Chief Operating Officer of TJM during the relevant time period. As Chief Operating Officer, Burke was responsible for supervising TJM's traders. Burke holds the following securities licenses: Series 3, Series 4, Series 7, Series 24, Series 27, and Series 63.

3. Michael R. Benson, age 45, is a resident of Clarendon Hills, Illinois and worked as a trader at TJM Proprietary Trading, LLC during the relevant time period. He holds a Series 7 securities license.

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[4] In a "naked" short sale, the seller does not borrow or arrange to borrow the securities in time to make delivery to the buyer within the standard three-day settlement period, and the seller fails to deliver the securities to the buyer when delivery is due.

[5] With respect to direct violations, a willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

[6] A "threshold security" is a security for which there is an aggregate "fail-to-deliver" position exceeding the criteria set forth in Rule 203(c)(6) of Regulation SHO for a period of five consecutive settlement days.

Facts

A. Respondent TJM Failed to Locate Shares Prior to Effecting Short Sale Transactions

4. During the period January 2007 through July 2007, Respondent TJM engaged in transactions known as "reverse conversions" with purchasers of Regulation SHO threshold securities.

5. As part of these reverse conversions, Respondent Benson, on behalf of TJM, sold short shares of Regulation SHO threshold securities while simultaneously creating a synthetic long position by purchasing call options and selling put options (with the same strike price and expiration date) on the same threshold securities.[7] TJM purchased enough call options and sold enough put options so that the number of shares underlying the options equaled the number of shares it sold short. Through this set of transactions, Respondent TJM reduced its market risk because the short position was used to hedge the synthetic long position that had been created by purchasing call options and selling put options.

6. Respondent TJM profited from this set of transactions because the premium it received for the put options it sold was greater than the premium it paid to purchase the call options. As a general matter, this disparity in premiums for the put and call options (despite their same strike price and expiration date) on Regulation SHO threshold securities exists because of the additional cost that is incurred to hedge the sale of the put option. Specifically, the seller of the put option hedges that transaction by selling short the underlying security. Because these threshold securities were generally hard to borrow, they were more expensive to sell short. Consequently, the cost of hedging the sale of put options in Regulation SHO threshold securities causes the corresponding put options to trade at a higher price than that of the corresponding call options.

7. While engaging in these reverse conversions, Respondent TJM improperly availed itself of the market-maker exception in Rule 203(b)(2)(iii) of Regulation SHO and failed to locate, arrange to borrow, or borrow shares of the security in question prior to effecting the short sales.

B. Respondent TJM Failed to Close Out "Fail-to-Deliver" Positions in Regulation SHO Threshold Securities

8. Respondent TJM's short sales resulted in a "fail-to-deliver" position in the threshold security on the books and records of its clearing firm – i.e., TJM had not delivered the shares it sold short to its clearing firm so that the clearing firm could settle the trade.

9. Rule 203(b)(3) of Regulation SHO requires clearing firms immediately to close out any "fail-to-deliver" position in a threshold security that lasts for thirteen consecutive settlement days by purchasing securities of a like kind and quantity. In addition, pursuant to Rule 203(b)(3)(vi) of Regulation SHO, a clearing firm is permitted reasonably to allocate a "fail-to-

[7] In general, a call option purchaser pays a premium to buy the call option, and a put option seller (or writer) receives a premium for selling (or writing) the put option.

deliver" position to a broker or dealer whose sale resulted in the position. Once the clearing firm has allocated the "fail-to-deliver" position to another broker or dealer, the obligation for complying with the mandatory close-out shifts to that broker or dealer.

10. Respondent TJM's clearing firm, through electronic mail or other means, notified TJM that it was shifting the obligation to TJM to close out the "fail-to-deliver" positions and that it would close out those positions if TJM itself did not do so.

11. Respondent TJM did not want its "fail-to-deliver" position – which resulted from the short sale portion of the reverse conversion – to be closed out by the clearing firm because this would result in the clearing firm making large purchases of Regulation SHO threshold securities at a price determined by the market and allocating that cost to TJM. Additionally, the close-out would have exposed Respondent TJM to market risk on its initial reverse conversion transaction because it would eliminate the short position that had been used to hedge the synthetic long position created by purchasing call options and selling put options.

12. In order to avoid a close-out, Respondent Benson, on behalf of TJM, entered into a series of transactions that failed to satisfy TJM's obligation under Regulation SHO to close out its "fail-to-deliver" position. These complex transactions gave the appearance that TJM was closing out its "fail-to-deliver" position by purchasing securities of like kind and quantity.

13. Specifically, Respondent Benson, on behalf of TJM, effected short-term in-the-money FLEX option transactions in conjunction with stock-purchase transactions that did not satisfy the Regulation SHO close-out requirements.

14. A FLEX option allows the investor to customize the option's terms, such as strike price and expiration date. In this case, the FLEX options allowed Respondent TJM to reset the close-out date so that it would have an additional thirteen days to close out any "fail-to-deliver" position. Specifically, Respondent TJM "purchased" stock in the Regulation SHO threshold security from another market participant and simultaneously purchased a short-term, deep in-the-money FLEX put option for a corresponding number of shares from the same market participant. On the day that it "purchased" the stock, TJM's clearing firm received notice of the "purchase" and closed out the "fail-to-deliver" position. Respondent TJM, however, knew that the following day, or shortly thereafter, the FLEX put option would expire in-the-money, causing TJM to exercise the option and sell the stock.

15. Respondent TJM, however, did not actually receive any shares from the other market participant because that market participant was selling short the stock without having any shares to sell. Accordingly, Respondent TJM did not receive any shares and did not in fact close out the short position – as required by Regulation SHO – that was initially established during the reverse conversion transaction. In these instances, TJM knew, or should have known, that the combination of the purchase of securities and the purchase of the FLEX option would result in maintenance of the "fail-to-deliver" position.

16. TJM's clearing firm, however, reset TJM's Regulation SHO close-out obligation to day one (thus giving TJM a fresh thirteen days in which to close out the short position) based on the "purchase" of shares and the exercise of the FLEX option.

17. After receiving close-out notices from its clearing firm, TJM continued to engage in these and similar types of transactions until the initial options positions (call options purchase/put options sale) expired, at which point it no longer had a synthetic long position that needed to be hedged, and so closed out the short position. By engaging in this course of conduct, TJM impermissibly maintained "fail-to-deliver" positions in numerous Regulation SHO threshold securities.

18. During the relevant period, TJM engaged in a large volume of reverse conversions and reset transactions in numerous threshold securities, including, but not limited to, Medis Technologies Ltd., American Home Mortgage, and NutriSystem, Inc. As a result of TJM's repeated violation of Regulation SHO's locate and close-out requirements, it received ill-gotten gains of $541,000.

19. In addition, in a limited number of instances, Respondent TJM acted as the contraparty to other market participants engaging in the same trading activity involving FLEX options. Specifically, Respondent TJM (i) sold short shares of Regulation SHO threshold securities so that other market participants could close out their own "fail-to-deliver" positions, and (ii) simultaneously entered into deep in-the-money FLEX options, the combination of which allowed the other market participants to circumvent their own Regulation SHO close-out obligations.

C. Respondent Burke Failed Reasonably to Supervise

20. As Chief Operating Officer of TJM, Respondent Burke was responsible for oversight of all operations of the firm, including trading. The firm's traders, including Benson, reported directly to Burke.

21. A firm employee raised with Burke concerns regarding the propriety of Benson's use of FLEX options and informed Burke that there was a regulatory concern that such use of FLEX options may not satisfy the locate and close-out requirements of Regulation SHO.

22. Although Burke knew about Benson's use of FLEX options, he continued to allow Benson to engage in these transactions while failing to follow-up on the "red flags" indicating that such trading was improper.

23. By ignoring these "red flags" concerning the use of FLEX options, Burke failed reasonably to supervise Benson's trading with a view to preventing violations of Regulation SHO.

Legal Analysis

A. Rule 203(b)(1) of Regulation SHO

24. Pursuant to the locate requirement of Rule 203(b)(1) of Regulation SHO, a broker or dealer cannot effect a short sale in an equity security unless it has "(i) [b]orrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) [r]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) [d]ocumented compliance with [these requirements]."

25. Rule 203(b)(2)(iii) contains an exception to this locate requirement for short sales made "by a market maker in connection with bona-fide market making activities in the security for which this exception is claimed."

26. At the time Respondent TJM placed orders to sell short certain Regulation SHO threshold securities, it failed to locate, arrange to borrow, or borrow the securities. Because the market-maker exception was not available to Respondent TJM, it willfully violated Rule 203(b)(1) of Regulation SHO by failing to locate, arrange to borrow, or borrow the securities before selling short.

27. As a result of his conduct, Benson willfully aided and abetted and caused TJM's violations of Rule 203(b)(1) of Regulation SHO.

B. Rule 203(b)(3) of Regulation SHO

28. At the time, Rule 203(b)(3) imposed an obligation on clearing firms to immediately close out any "fail-to-deliver" positions in a threshold security that lasts for thirteen consecutive settlement days by purchasing securities of like kind and quantity.[8] Pursuant to Rule 203(b)(3)(vi), however, a clearing firm is permitted reasonably to allocate a "fail-to-deliver" position to a broker or dealer whose short sale resulted in the position. Once the clearing firm has allocated the "fail-to-deliver" position to another broker or dealer, the obligation for complying with the mandatory close-out shifts to that broker or dealer.

29. Once the "fail-to-deliver" position is allocated to the broker or dealer, that broker or dealer, in order to satisfy the close-out requirement of Rule 203(b)(3) of Regulation SHO, must purchase securities of like kind and quantity. Borrowing securities, or otherwise entering into an arrangement that merely creates the appearance of a purchase, does not satisfy Regulation SHO's close-out requirement. Specifically, Rule 203(b)(3)(vii) provides that a clearing firm – or a broker

[8] Effective in September 2008, the Commission adopted Rule 204T, which amended Regulation SHO by, among other things, requiring that participants of a registered clearing agency close out fails resulting from short sales no later than the beginning of regular trading hours on the day immediately after the fail occurs. The rule also requires participants of a registered clearing agency to close out fails resulting from long sales or market making activity by no later than the beginning of regular trading hours on the third day after the fail occurs.

or dealer to which the clearing firm allocated a "fail-to-deliver" position – will be deemed not to have satisfied the close-out obligation if it knows, or has reasonable grounds to believe, that the close-out purchase will result in a "fail-to-deliver."

30. By purchasing deep in-the-money FLEX options while simultaneously purporting to "purchase" stock, Respondent TJM engaged in transactions that gave the appearance that it was closing out its "fail-to-deliver" position. As a result, TJM willfully violated Rule 203(b)(3) of Regulation SHO.

31. As a result of his conduct, Benson willfully aided and abetted and caused TJM's violations of Rule 203(b)(3) of Regulation SHO.

C. Failure to Supervise

32. Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. See, e.g., Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (Oct. 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." Id. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer.

33. Based on the foregoing, Respondent Burke failed reasonably to supervise Respondent Benson, with a view to preventing Benson's willful aiding and abetting and causing TJM's violations of Rules 203(b)(1) and 203(b)(3) of Regulation SHO, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

Undertakings

34. Pursuant to the Chicago Board Options Exchange's ("CBOE") Decision Accepting Offer of Settlement (File No. 08-0049), Respondents shall pay, jointly and severally, a fine in the amount of $250,000 to the CBOE's Business Conduct Committee within fifteen (15) business days of the entry of the CBOE's issuance of its Decision Accepting Offer of Settlement (File No. 08-0049).

35. Respondent Benson shall provide to the Commission, within thirty days after the end of the three-month suspension period described below, an affidavit confirming that he has complied fully with the sanctions described in Section IV below.

36. Respondent Burke shall provide to the Commission, within thirty days after the end of the nine-month supervisory suspension period described below, an affidavit confirming that he has complied fully with the sanctions described in Section IV below.

In determining whether to accept the Offers, the Commission has considered these undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondents' Offers.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent TJM cease and desist from committing or causing any violations and any future violations of Exchange Act Rules 203(b)(1) and 203(b)(3);

B. Respondent Benson cease and desist from causing any violations and any future violations of Exchange Act Rules 203(b)(1) and 203(b)(3);

C. Respondent TJM is censured;

D. Respondent Benson be, and hereby is, suspended from association with any broker or dealer for a period of three (3) months, effective on the second Monday following the entry of this Order;

E. Respondent Burke be, and hereby is, suspended from acting in a supervisory capacity with any broker or dealer for a period of nine (9) months, effective on the second Monday following the entry of this Order;

F. Respondent TJM shall pay disgorgement in the amount of $541,000, payment of which shall be deemed satisfied by the payment of $541,000 to the CBOE's Business Conduct Committee pursuant to the CBOE's Decision Accepting Offer of Settlement (File No. 08-0049) within fifteen (15) business days of the entry of the CBOE's issuance of its Decision Accepting Offer of Settlement (File No. 08-0049).

G. Respondent Benson shall comply with the undertakings enumerated in Section III, paragraph 35 above; and

H. Respondent Burke shall comply with the undertakings enumerated in Section III, paragraph 36 above.

By the Commission.

Elizabeth M. Murphy
Secretary