JINA L. CHOI (Admitted to the New York Bar)
ERIN E. SCHNEIDER (Cal. Bar No. 216114)
schneidere@sec.gov
ROBERT J. DURHAM (Admitted to the New York Bar)
durhamr@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2800
San Francisco, California 94104-4802
Telephone: (415) 705-2500
Facsimile: (415) 705-2501

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>ANDREW L. EVANS,<br><br>Defendant. | Case No. 3:15-cv-2551<br><br><br><br>COMPLAINT |

Plaintiff Securities and Exchange Commission ("Commission") alleges:

**SUMMARY OF THE ACTION**

1. This case involves illegal securities trading by Andrew L. Evans ("Evans" or "Defendant") through Maritime Asset Management, LLC, an entity he operated with his wife to trade their capital. On multiple occasions from 2010 to 2012, Evans repeatedly violated an anti-manipulation provision of the federal securities laws known as Rule 105 of Regulation M ("Rule 105") by short selling shares of issuers in advance of public offerings by the issuers, and then purchasing lower-priced shares in those offerings that he could use to close out his short sales. Evans traded around these follow-on offerings at almost no risk to himself yet was able to reap almost $600,000 in illegal profits.

2. Rule 105 prohibits a person who sells equity securities short during a defined period before a public secondary or follow-on offering is priced from purchasing securities in that offering. Short selling can artificially depress the market price for a stock, which can lead to lower than anticipated offering prices, thus causing a reduction in an issuer's offering proceeds. Rule 105 is designed to foster secondary or follow-on offering prices that are determined by independent market forces and not potentially manipulative activity. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

3. As described in this Complaint, Evans took advantage of his ability to acquire shares in eleven different follow-on offerings by selling securities short before those offerings, and then purchasing shares in the offerings that were priced at a discount to the prevailing market price when he was short selling the shares, in violation of Rule 105. The Securities and Exchange Commission ("Commission") seeks an injunction enjoining him from further violations of Rule 105, disgorgement of ill-gotten gains plus prejudgment interest thereon, and payment of a civil monetary penalty.

## JURISDICTION

4. The Commission brings this action pursuant to Sections 21(d) and 21(e) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d) and 78u(e). This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u(e) and 78aa. Defendant, directly or indirectly, made use of the means or instruments of transportation or communication in interstate commerce, or of the mails, or of any facility of any national securities exchange in connection with the acts, transactions, practices and courses of business alleged in this Complaint.

## VENUE

5. Venue in this District is proper pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because certain of the transactions, acts, practices and/or courses of business occurred within the Northern District of California. Among other things, Evans effected all of the securities transactions at issue in this case through Maritime Asset Management LLC, which received its brokerage statements at a San Francisco address. Evans also effected several of the transactions through a broker-dealer located San Francisco.

## INTRADISTRICT ASSIGNMENT

6. Intradistrict assignment to the San Francisco Division is proper pursuant to Local Civil Rule 3-2(c) because Evans effected a number of the securities transactions at issue in this case through a broker located in San Francisco County, and in brokerage accounts that listed a mailing address in San Francisco County.

## DEFENDANT

7. Defendant Andrew L. Evans, age 63, is currently a resident of North Saanich, British Columbia, Canada. In 2005, Evans and his wife formed Maritime Asset Management, LLC ("Maritime") to engage in securities trading on their own behalf. Maritime traded in and maintained brokerage accounts at a number of brokers, including one based in San Francisco. Additionally, several of Maritime's brokerage statements were mailed to Maritime at a San Francisco address. Evans was responsible for all of Maritime's trading. He also negotiated with the underwriters who marketed the follow-on offerings and directed Maritime to enter into the trades that violated Rule 105.

## OVERVIEW OF RULE 105

8. Rule 105 (Short Selling in Connection with a Public Offering) provides, in pertinent part:

> In connection with an offering of equity securities for cash pursuant to a registration statement . . . filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short . . . the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period ("Rule 105 restricted period") that is the shorter of the period:
>
> (1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or
>
> (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing

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

9. A short sale is any sale of a security that the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller. The profit or loss on a short sale is determined by the price of the security purchased to close out the short sale,

i.e., the price of the security purchased to repay to the lender the borrowed shares originally sold short. Accordingly, a short sale is profitable when the price of a security decreases after the short sale and the security is purchased by the seller for less than it was sold short.

10. Short selling can artificially depress a security's market price, which can lead to lower than anticipated offering prices for secondary and follow-on offerings, potentially causing reduced offering proceeds for the issuer. Rule 105 is designed to foster secondary and follow-on offering prices that are determined by independent market forces and not by potentially manipulative market activity.

## FACTS

11. From December 2010 to May 2012, Evans, through Maritime, violated Rule 105 in connection with eleven follow-on offerings, by short selling shares of the issuer during the Rule 105 restricted period, and then purchasing shares in those offerings. As is common in follow-on offerings, the offering shares at issue here were sold at a discount to the prevailing market price at the time Evans was selling short. By shorting the stock, and then buying the shares in the follow-on offering, Evans was able to lock in significant profits on his short sales with little to no market risk. Ultimately, Evans reaped $582,175 in illegal trades. All eleven offerings were cash offerings underwritten on a firm commitment basis.

12. For example, one of the transactions involved a follow-on offering by Zogenix, Inc. ("Zogenix"), whose stock traded on the Nasdaq Global Market. In August 2011, Zogenix filed a Form S-1 registration statement proposing to offer shares to the public in an underwritten follow-on offering. The offering, for cash, was underwritten on a firm commitment basis.

13. During the marketing phase of the offering, on September 7, 2011, one of the underwriters participating in the offering (the "Underwriter") contacted Evans about buying shares in the offering. Evans expressed an interest to the Underwriter in possibly purchasing shares in the offering.

14. On September 14, 2011, Evans directed Maritime to sell short 42,800 Zogenix shares. On September 15, 2011 between 9:37 a.m. and 12:23 p.m. (Eastern Time), Evans directed Maritime to sell short an additional 84,200 Zogenix shares. These short sales, totaling 127,000 shares at an

average price of $2.3948 per share, were effected in an account that Maritime maintained at a broker based in San Francisco.

15. Later on September 15, 2011, between 6:00 p.m. and 6:40 p.m. (Eastern Time), Zogenix priced the offering at $2.00 per share. Zogenix announced the pricing to the public on September 16, 2011 before the opening of the market. Thus, under Rule 105(a), 17 C.F.R. § 242.105(a), the Rule 105 restricted period began September 9, 2011 and ended with the pricing the evening of September 15, 2011.

16. Even though Evans had directed Maritime to sell short 127,000 shares of Zogenix's stock during the Rule 105 restricted period, he also directed Maritime to purchase 850,000 shares in the Zogenix offering, at $2.00 per share. Accordingly, Evans violated Rule 105. He profited $53,320.80 in connection with this transaction.

17. Evans violated Rule 105 by short selling shares during the Rule 105 restricted periods and then purchasing shares in the secondary or follow-on offerings, in connection with the following ten other securities offerings:

| Offering | Profits |
|---|---|
| Amarin Corporation plc (January 2011) | $124,770 |
| Arena Pharmaceuticals, Inc. (May 2012) | $73,032.18 |
| Array BioPharma Inc. (February 2012) | $12,391.22 |
| Celldex Therapeutics Inc. (February 2012) | $35,508.57 |
| Chelsea Therapeutics International Ltd. (January 2012) | $72,200 |
| Dice Holdings, Inc. (December 2010) | $66,648 |
| OncoGenex Pharmaceuticals, Inc. (March 2012) | $34,720 |
| Sequenom, Inc. (January 2012) | $27,848.55 |
| Transcept Pharmaceuticals, Inc. (April 2012) | $31,436.04 |
| Vical Incorporated (January 2012) | $50,300 |

18. All told, Evans realized profits of $582,175.

**CLAIM FOR RELIEF**

**(Violations of Rule 105 of Regulation M)**

19. Paragraph numbers 1 through 18 are re-alleged and incorporated herein by reference.

20. In connection with an offering of equity securities for cash pursuant to a registration statement filed under the Securities Act of 1933, Defendant directed short sales of securities that were the subject of the offering within the Rule 105 restricted period, and purchased the offered securities from an underwriter or broker or dealer participating in the offering.

21. By reason of the foregoing, Defendant violated, and unless enjoined will again violate, Rule 105 of Regulation M, 17 C.F.R. § 242.105.

**PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that the Court:

I.

Permanently enjoin Defendant from violating Rule 105 of Regulation M, 17 C.F.R. § 242.105.

II.

Enter an order requiring Defendant to disgorge the ill-gotten gains resulting from the violations, plus prejudgment interest thereon.

III.

Enter an order requiring Defendant to pay civil penalties pursuant to Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d).

IV.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

V.

Grant such other and further relief as this Court may determine to be just, equitable and necessary.

Dated: June 9, 2015

Respectfully submitted,

*/s/ Robert J. Durham*

Robert J. Durham
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION