

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 100172 / May 20, 2024

ADMINISTRATIVE PROCEEDING

File No. 3-21942

In the Matter of

**KERSHNER TRADING
AMERICAS, LLC,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Kershner Trading Americas, LLC (“Kershner” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) 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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings concern Kershner's violations of Rule 105 of Regulation M [17 C.F.R. §242.105] ("Rule 105") through transactions occurring between February 2019 and June 2022.¹ In total, Kershner's violative conduct resulted in gains of \$593,375.76.

Respondent

Kershner, a Delaware limited liability company based in Austin, Texas, is a proprietary trading firm that utilizes approximately 120 to 140 traders to trade Kershner's capital. Kershner is not registered with the Commission. Kershner is a wholly owned subsidiary of Kershner Trading Group, LLC, which is majority-owned and managed by Andrew Kershner.

Background

1. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a covered public offering if that person sold short the security that is the subject of the offering during the restricted period as defined in the Rule, absent meeting the conditions of an exception. 17 C.F.R. § 242.105(a); *see* Short Selling in Connection With a Public Offering, Rel. No. 34-56206, 72 Fed. Reg. 45094 (Aug. 10, 2007) (effective Oct. 9, 2007). The Rule 105 "restricted period" 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 a registration statement or notification on Exchange Act Form 1-A or 1-E and ending with the pricing. 17 C.F.R. § 242.105(a)(1) and (a)(2).

2. The Commission adopted Rule 105 "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." 72 Fed. Reg. 45094. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent. *Id.*

3. Rule 105 contains three exceptions, each containing specific conditions which must be met in order to qualify for that exception, under which, in general, it shall not be prohibited for a person to purchase the offered securities: (i) where a person makes a bona fide purchase(s) of the security that is the subject of the offering; (ii) where a person sold short during the Rule 105 restricted period in a separate account, if decisions regarding securities transactions for each account are made separately and without coordination of trading or cooperation among or between the accounts; or (iii) with respect to an investment company (as defined by Section 3 of the Investment Company Act of 1940) that is registered under Section 8 of the Investment Company

¹ The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

Act of 1940 that sold the offered security short during the Rule 105 restricted period. 17 C.F.R. § 242.105(b)(1) – (3).

4. Between February 2019 and June 2022, Kershner purchased equity securities in 23 covered offerings, without meeting the conditions of a Rule 105 exception, after Kershner had sold short the same securities during Rule 105's restricted period. For example:

- a. *Carnival Corp. ("Carnival")*: Between March 26, 2020, and April 1, 2020, Kershner sold short 717,868 shares of Carnival common stock. On April 1, 2020, after the market close, a follow-on offering of Carnival common stock was priced at a share price of \$8.00. In violation of Rule 105, Kershner purchased 25,000 shares in the offering. The difference between Kershner's cost to purchase the 25,000 offering shares and the proceeds from an equivalent number of restricted period short sales, net of any commissions and fees, resulted in ill-gotten gains to Kershner of \$55,162.45.
- b. *Norwegian Cruise Line Holdings, Ltd. ("Norwegian")*: On May 5, 2020, Kershner sold short 222,897 shares of Norwegian common stock. On May 5, 2020, after the market close, a follow-on offering of Norwegian common stock was priced at a share price of \$11.00. In violation of Rule 105, Kershner purchased 50,000 shares in the offering. The difference between Kershner's cost to purchase the 50,000 offering shares and the proceeds from an equivalent number of restricted period short sales, net of any commissions and fees, resulted in ill-gotten gains to Kershner of \$43,646.69.
- c. *Sonnet Biotherapeutics Holdings, Inc. ("Sonnet Biotherapeutics")*: On August 19, 2021, Kershner sold short 197,034 shares of Sonnet Biotherapeutics common stock. After the close of the market on August 19, 2021, a secondary offering of Sonnet Biotherapeutics common stock was priced at a share price of \$0.84. In violation of Rule 105, Kershner purchased 100,000 shares in the offering. The difference between Kershner's cost to purchase the 100,000 offering shares and the proceeds from an equivalent number of restricted period short sales, net of any commissions and fees, resulted in ill-gotten gains to Kershner of \$94,876.23.

5. Kershner's violations of Rule 105 resulted in gains to Kershner of \$593,375.76.

6. After learning of the Commission's investigation, Kershner prohibited its traders from purchasing equity securities in covered offerings.

Violations

7. As a result of the conduct described above, Kershner violated Rule 105 of Regulation M under the Exchange Act.

Disgorgement and Civil Penalties

8. The disgorgement and prejudgment interest ordered in paragraph IV.C of the Order is consistent with equitable principles, does not exceed Respondent's net profits from its violations, and returning the money to Respondent would be inconsistent with equitable principles. Therefore, in these circumstances, distributing disgorged funds to the U.S. Treasury is the most equitable alternative. The disgorgement, civil money penalty and prejudgment interest ordered in paragraph IV.C shall be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Undertakings

9. If Kershner wishes to purchase equity securities in any covered offering in the future, Kershner undertakes that, before it purchases equity securities in such offering, it will:
- a. adopt, implement, and maintain written compliance policies and procedures reasonably designed to prevent violations of Rule 105 and, commencing the year it begins purchasing equity securities in covered offerings, review those policies and procedures annually;
 - b. provide training on Rule 105 to all new and existing employees, traders, and affiliates of Kershner who purchase in or supervise trades or trading decisions;
 - c. require individuals executing any trade in a public offering (either on behalf of Kershner or other affiliated entities) to identify the trade and cause further review to ensure compliance with Rule 105;
 - d. designate a senior level Kershner officer or employee with responsibility for overseeing Kershner's compliance with Rule 105 and these undertakings; and
 - e. certify in writing to the Commission no later than 30 days after purchasing equity securities in any such covered offering, for the first time after the entry of this Order, that it has adopted the policies and procedures described in subparagraphs a.– d. above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Assistant Director Samantha Martin, with a copy to the Office of Chief Counsel of the Enforcement Division.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Kershner's Offer.

Accordingly, it is hereby ORDERED that:

- A. Pursuant to Section 21C of the Exchange Act, Respondent Kershner cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M under the Exchange Act.
- B. Respondent shall comply with the undertakings enumerated in Section III.9 above.
- C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of \$593,375.76, prejudgment interest of \$94,268.84, and a civil money penalty of \$812,355.40 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment of disgorgement and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.
- D. Payment must be made in one of the following ways:
 - (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
 - (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
 - (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Kershner Trading Americas, LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Samantha Martin, Division of Enforcement, Securities and Exchange Commission, 801 Cherry St., 19th Floor, Fort Worth, Texas 76102.

E. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary