

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 101763 / November 26, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22334

In the Matter of

FIVET CAPITAL AG

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 FiveT Capital AG (“FiveT” 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:

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

Summary

1. These proceedings concern FiveT's violations of Rule 105 of Regulation M [17 C.F.R. § 242.105] ("Rule 105") under the Exchange Act through transactions made in its own account and on behalf of two of its private fund clients, FiveMore Special Situations Fund Ltd ("FiveMore") and FiveT Investment Management Ltd ("FTIM") (collectively, the "FiveT Funds") occurring between July and December 2020. In total, FiveT's conduct resulted in ill-gotten gains collectively by FiveT and the FiveT Funds of \$1,593,294.73.

Respondent

2. FiveT is a Swiss limited liability company headquartered in Pfäffikon, Switzerland. FiveT is licensed to provide asset management services under the supervision of the Swiss Financial Market Supervisory Authority. FiveT is the investment adviser to the FiveT Funds. FiveT is not registered with the Commission in any capacity.

Rule 105

3. Rule 105 makes it unlawful for any person to purchase equity securities from an underwriter, broker or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent meeting the conditions of an exception. 17 C.F.R. § 242.105; 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 Form 1-A or Form 1-E and ending with pricing. 17 C.F.R. §§ 242.105(a)(1) and (a)(2).

4. 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.

Facts

5. Between July and December 2020, FiveT purchased equity securities in fourteen covered offerings on behalf of the FiveT Funds, without meeting the conditions of a Rule 105 exception, after FiveT had sold short the same securities in its own account and on behalf of the FiveT Funds during the applicable Rule 105 restricted periods. For example:

- a. On July 23, 2020, FiveT sold short 200,000 shares of Marathon Patent Group Inc. ("MARA") during the restricted period at an average price of \$1.05 per share in FiveMore's account. After the market closed on July 23, 2020, MARA filed a preliminary prospectus supplement to a shelf registration statement previously filed on June 29, 2020, and priced the offering. Accordingly, the

short sales occurred during the Rule 105 restricted period, which ran from July 17, 2020, through July 23, 2020. FiveT nevertheless purchased on behalf of FiveMore's account 942,113 shares priced at \$0.90 in the MARA offering. The difference between FiveT's proceeds from the restricted period short sales of MARA shares and the price FiveT paid for the 200,000 offering shares was \$30,356.15. FiveT also improperly received a benefit of \$93,768.18 by purchasing the remaining 742,113 shares at a discount from MARA's market price. Thus, FiveT's participation in the MARA offering resulted in gains of \$124,124.33.

- b. On August 4 and 5, 2020, FiveT sold short a total of 80,300 shares of Simulations Plus Inc. ("SLP") during the restricted period at an average price of \$65.35 per share in its account and the accounts of the FiveT Funds. After the market closed on August 5, 2020, SLP filed a preliminary prospectus supplement to a shelf registration statement previously filed on July 9, 2020, and priced the offering. Accordingly, the short sales occurred during the Rule 105 restricted period, which ran from July 30, 2020, through August 5, 2020. FiveT nevertheless purchased on behalf of FTIM's account 40,000 shares priced at \$55 in the SLP offering. The difference between FiveT's proceeds from the restricted period short sales of SLP shares and the price FiveT paid for the 40,000 offering shares was \$413,588.70. Thus, FiveT's participation in the SLP offering resulted in gains of \$413,588.70.
- c. On August 12, 2020, FiveT sold short 95,000 shares of Adverum Biotechnologies Inc. ("ADVM") during the restricted period at an average price of \$15.24 per share in FiveMore's account. After the market closed on August 12, 2020, ADVM filed a preliminary prospectus supplement to a shelf registration statement previously filed on August 8, 2019, and priced the offering. Accordingly, the short sales occurred during the Rule 105 restricted period, which ran from August 6, 2020 through August 12, 2020. FiveT nevertheless purchased on behalf of FiveMore's account 200,000 shares priced at \$13.00 in the ADVM offering. The difference between FiveT's proceeds from the restricted period short sales of ADVM shares and the price FiveT paid for the 95,000 offering shares was \$212,591.99. FiveT also improperly received a benefit of \$4,164.73 by purchasing the remaining 105,000 shares at a discount from ADVM's market price. Thus, FiveT's participation in the ADVM offering resulted in gains of \$216,756.72.
- d. On August 18, 2020 through August 20, 2020, FiveT sold short a total of 213,827 shares of Centrus Energy Corp. ("LEU") during the restricted period at an average price of \$12.91 per share in its account and the account of FTIM. Before the market opened on August 21, 2020, LEU filed a preliminary prospectus supplement to a shelf registration statement previously filed on August 5, 2020, and priced the offering. Accordingly, the short sales occurred during the Rule 105 restricted period, which ran from August 14, 2020 through

August 20, 2020. FiveT nevertheless purchased on behalf of FTIM's account 500,000 shares priced at \$10.00 in the LEU offering. The difference between FiveT's proceeds from the restricted period short sales of LEU shares and the price FiveT paid for the 213,827 offering shares was \$620,782.41. FiveT also improperly received a benefit of \$31,139.24 by purchasing the remaining 286,173 shares at a discount from LEU's market price. Thus, FiveT's participation in the LEU offering resulted in gains of \$651,921.65.

- e. On December 10, 2020, FiveT sold short 22,826 shares of Amplify Energy Corp. ("AMPY") during the restricted period at an average price of \$1.23 per share in its account. Before the market opened on December 11, 2020, AMPY filed a preliminary prospectus supplement to shelf registration statements previously filed on May 1, 2018 and October 11, 2019 and priced the offering. Accordingly, the short sales occurred during the Rule 105 restricted period, which ran from December 4, 2020, through December 10, 2020. FiveT nevertheless purchased on behalf of FTIM's account 1,800,000 shares priced at \$1.15 in the AMPY offering. The difference between FiveT's proceeds from the restricted period short sales of AMPY shares and the price FiveT paid for the 22,826 offering shares was \$1,516.05. FiveT also improperly received a benefit of \$99,651.74 by purchasing the remaining 1,777,174 shares at a discount from AMPY's market price. Thus, FiveT's participation in the AMPY offering resulted in gains of \$101,167.79.

6. FiveT's violations of Rule 105 resulted in ill-gotten gains to FiveT totaling \$1,593,294.73.

Violations

7. As a result of the conduct described above, FiveT violated Rule 105 of Regulation M under the Exchange Act. FiveT has represented to the Commission staff that it is currently in possession of the amounts subject to disgorgement.

Disgorgement

The disgorgement and prejudgment interest referenced in paragraph IV.B is consistent with equitable principles, does not exceed the net profits from Respondent's 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 and prejudgment interest referenced in paragraph IV.B shall be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

FiveT's Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff. In particular, FiveT revised its policies and procedures to address Rule 105 and timely responded to voluntary requests for documents and trading records from Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent FiveT cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act.

B. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of \$1,593,294.73, prejudgment interest of \$357,199.05, and a civil money penalty of \$805,000 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.

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 FiveT Capital AG 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 Melissa R. Hodgman, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

C. 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