

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61718 / March 16, 2010

INVESTMENT ADVISERS ACT OF 1940
Release No. 3002 / March 16, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13818

In the Matter of

GPS PARTNERS, LLC
and BRETT S. MESSING,

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF
1934 AND SECTIONS 203(e) AND 203(f) OF
THE INVESTMENT ADVISERS ACT OF
1940, MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

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 Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) against GPS Partners, LLC and Brett S. Messing (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 Section 21C of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940,

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 finds¹ that:

Respondents

1. **GPS Partners, LLC (“GPS”)** is a Delaware limited liability company with its principal place of business in Santa Monica, California. GPS was registered as an investment adviser with the Commission from June 2005 through November 2009 and advised proprietary hedge funds and other pooled investment vehicles as well as separate account clients. As of August 2007, GPS had approximately \$2 billion under management.

2. **Brett S. Messing (“Messing”)**, age 45, resides in Los Angeles, California. Messing is GPS’ founder, managing partner, chief executive officer, and primary portfolio manager. He owns 85% of GPS. Prior to starting GPS, Messing held various management, advisory, and brokerage positions at several securities firms.

Summary

3. In 2006, GPS and Messing violated the former version of Rule 105 of Regulation M, “Short Selling in Connection with a Public Offering,” in five instances, and in 2007 GPS and Messing violated the current version of Rule 105 in one instance. As a result, GPS obtained profits of more than \$1.1 million.

Legal Framework

4. In 2006, when GPS participated in five of the transactions at issue, Rule 105 of Regulation M provided, in pertinent part: “In connection with an offering of securities for cash pursuant to a registration statement ... filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the ... period beginning five business days before the pricing of the offered securities and ending with such pricing” *Final Rule: Short Sales*, Rel. No. 34-50103, 69 Fed. Reg. 48008 (July 28, 2004) (effective Sept. 7, 2004) (“*Former Rule Release*”). This five business day or shorter period is referred to herein as the “restricted period.”

5. The Commission adopted Rule 105 in an effort to prevent manipulative short selling prior to a public offering. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller’s intent in effecting the short sale.

¹ The findings herein are made pursuant to Respondents’ Offers and are not binding on any other person or entity in this or any other proceeding.

6. The Commission has recognized that violations of Rule 105 could result from sham transactions designed to evade the text of the rule. Interpretative guidance issued by the Commission in 2004 provided that a transaction violates Rule 105 “where the transaction is structured such that there is no legitimate economic purpose or substance to the contemporaneous purchase and sale, no genuine change in beneficial ownership, and/or little or no market risk . . .” *Former Rule Release*. The Commission described one type of sham transaction as occurring when “a trader effects pre-pricing short sales during the Rule 105 restricted period, receives offering shares, sells the offering shares into the open market, and then contemporaneously or nearly contemporaneously purchases an equivalent number of the same class of shares as the offering shares, which are then used to cover the short sales.” *Id.*

7. The Commission amended Rule 105 prior to one of the transactions at issue. Effective October 9, 2007, Rule 105 provided, 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 restricted period. 17 C.F.R. § 242.105.

8. One exception to the current version of Rule 105 applies when an equal or greater number of the issuer’s shares are purchased after the last restricted short sale is effected but before the follow-on offering (known as the “bona fide purchase” exception). If a bona fide purchase is made, participation in the offering will not violate the rule. *See* 17 C.F.R. § 242.105(b)(1). However, “[p]urchases made during the Rule 105 restricted period but before the last Rule 105 restricted period short sale do not qualify as a bona fide purchase . . .” *Final Rule: Short Selling in Connection with a Public Offering*, Rel. No. 34-56206, 72 Fed. Reg. 45094 (Aug. 10, 2007).

The Violative Trades

9. During the relevant period, GPS and Messing engaged in transactions prohibited by Rule 105 in connection with purchases of securities in public offerings made by Washington Real Estate Investment Trust (“WRE”), W&T Offshore, Inc. (“WTI”), MCG Capital Corp. (“MCGC”), Luminent Mortgage Capital Inc. (“LUM”), NorthStar Realty Finance Corp. (“NRF”), and Kinder Morgan Energy Partners LP (“KMP”). As portfolio manager, Messing was generally responsible for the trading at GPS, including the trades at issue here.

A. Sham Transactions Using Market Orders

10. In connection with the WRE and WTI follow-on offerings, GPS executed transactions which lacked economic purpose or substance by contemporaneously entering market orders to sell the offering shares and purchase shares in the open market, which were then used to cover the short positions that had been established during the restricted period. These violations resulted in profits of \$121,241.

11. For example, GPS participated in a follow-on offering of WRE on June 1, 2006. The shares were priced after the close of trading on May 31, 2006 at \$34.40/share. During the restricted period, GPS established a 55,000 share short position in WRE at \$34.90/share.

12. On the morning of June 1, 2006, GPS received a 55,000 share allocation of the WRE offering, resulting in a 55,000 share short position and a 55,000 share long position.

13. Later that morning, through two different brokers, GPS contemporaneously entered a market order at 9:35:52 a.m. to sell the 55,000 offering shares and another market order at 9:36:04 a.m. to buy 55,000 shares to cover the restricted short position. The orders were filled within one minute of each other and at exactly the same price of \$34.00/share. This resulted in profits of \$29,981.

B. Sham Transactions Using VWAP Algorithms

14. In connection with the MCGC, LUM, and NRF follow-on offerings, GPS executed transactions which lacked economic purpose or substance by contemporaneously entering orders using VWAP algorithms² to sell offering shares and purchase shares in the open market, which were then used to cover the short position that had been established during the restricted period. These violations resulted in profits of \$73,654.

15. For example, GPS participated in a follow-on offering of MCGC on October 11, 2006. The shares were priced after the close of trading on October 10, 2006 at \$15.75/share. During the restricted period, GPS established a 81,500 share short position with three transactions consisting of 50,000 shares at \$16.006/share, 5,000 shares at \$16.177/share, and 26,500 shares at \$16.101/share.

16. On October 11, 2006, GPS received a 200,000 share allocation of the MCGC offering, resulting in a 81,500 share short position and a 200,000 share long position.

17. On October 19, 2006, through two different brokers, GPS contemporaneously entered an order to sell 82,200 offering shares and buy 82,200 shares to cover part of the restricted short position. Both orders were placed using a VWAP algorithm and were executed from 11:05 a.m. to 3:59 p.m. The sale order was executed in 302 fills with an average price of \$16.777/share, and the buy order was executed in 525 fills with an average price of \$16.786/share – a difference of \$0.009. This resulted in profits of \$24,140.

C. KMP Follow-On Offering

18. GPS participated in a follow-on offering of KMP on November 30, 2007. The shares were priced prior to the market's opening on November 30, 2007 at \$49.34/share. During the restricted period, GPS established a short position of 150,400 shares consisting of 28,000 shares on November 23 at \$49.57/share, 10,000 shares on November 26 at \$49.26/share, 11,000 shares on November 28 at \$50.64/share, and 101,400 shares on November 28 at \$50.857/share.

² "VWAP" refers to volume weighted average price. A VWAP algorithm is a trading strategy that breaks orders into multiple smaller trades that are executed throughout the day with an aim to achieve an overall price close to the VWAP benchmark for that day.

19. On November 27 and 29, 2007, GPS purchased 38,000 and 112,400 shares of KMP, respectively, for a total of 150,400 shares. Neither purchase, however, qualified for the bona fide purchase exception because: (i) the November 27 purchase did not occur after the last restricted short sale, which occurred on November 28, and (ii) the November 29 purchase of 112,400 shares was not equal to or greater than the total number of shares shorted during the restricted period (150,400).

20. On November 30, 2007, GPS received a 1,410,000 share allocation of the KMP offering, which amounted to 23% of the entire offering. As a result, GPS obtained profits of \$956,376.

21. As a result of the conduct described above, GPS and Messing willfully³ committed violations of Rule 105.

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act and Sections 203(e) and 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent GPS shall 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 Messing shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M under the Exchange Act.

C. Respondent GPS is censured.

D. Respondent Messing is censured.

E. Respondents shall, jointly and severally, within thirty (30) days of the entry of this Order, pay disgorgement of \$1,151,271 and prejudgment interest of \$132,900 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies GPS Partners, LLC and Brett S. Messing as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew G. Petillon,

³ 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)).

Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 5670 Wilshire Blvd., Suite 1100, Los Angeles, California 90036.

F. Respondents shall, jointly and severally, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$575,635 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies GPS Partners, LLC and Brett S. Messing as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew G. Petillon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 5670 Wilshire Blvd., Suite 1100, Los Angeles, California 90036.

By the Commission.

Elizabeth M. Murphy
Secretary