

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10345 / April 10, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17919

<p>In the Matter of</p> <p style="text-align:center">CYTRX CORPORATION,</p> <p>Respondent.</p>

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, 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 8A of the Securities Act of 1933 (“Securities Act”) against CytRx Corporation (“CytRx” 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 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order (the “Order”), as set forth below.

III.

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

SUMMARY

A basic purpose of Section 5 of the Securities Act is to ensure that full and accurate information concerning an issuer and its securities is disseminated in connection with an offer and sale of the issuer's securities.² Securities Act Section 5(b)(1) requires that any prospectus used to offer a security after the filing of a registration statement comply with Securities Act Section 10. Prospectuses that fail to disclose to investors the information required by Section 10 could artificially affect the price of an issuer's security. Issuers of securities, underwriters, and dealers must be cognizant of their obligations to refrain from improperly stimulating investor interest or conditioning the markets prior to or during securities offerings through the direct or indirect transmission of prospectuses that fail to comply with Securities Act Section 10.

CytRx violated Securities Act Section 5(b)(1) when, while it was in registration: (1) articles appeared on an investment website that were generated by a firm hired by CytRx, (2) a third party publisher transmitted to his subscribers and other potential investors a report about CytRx, the content of which was largely drafted by CytRx, and subsequently published the report as an article on an investment website, and (3) CytRx forwarded the article published by the third party to a large number of potential investors via email.³ The publications and emails constituted prospectuses — written offers to sell CytRx's securities — that did not comply with Section 10.⁴

RESPONDENT

1. **CytRx Corporation** is a biopharmaceutical company incorporated in Delaware and headquartered in Los Angeles, California. CytRx's common stock is registered with the Commission pursuant to Exchange Act Section 12(b) and trades on the NASDAQ Capital Market Exchange.

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.

² See Publication of Information Prior to or after the Effective Date of a Registration Statement, Securities Act Release No. 3844, 22 Fed. Reg. 8359 (Oct. 4, 1957).

³ The information about CytRx in the articles and report is not alleged to have been false or misleading.

⁴ These prospectuses did not meet the requirements for final prospectuses, preliminary prospectuses, or free writing prospectuses.

OTHER RELEVANT INDIVIDUALS/ENTITIES

2. **Michael A. McCarthy**, 47, resides in San Antonio, Texas. McCarthy founded The DreamTeam Group, LLC, a Florida limited liability company headquartered in Indianapolis, Indiana, in 2004. The DreamTeam Group, LLC and other entities owned and controlled by McCarthy, including Mission Investor Relations, LLC (“MissionIR”), a Delaware limited liability company headquartered in Atlanta, Georgia, provided services to CytRx and other issuers that included the generation of articles and blog posts describing the issuers’ securities on investment websites. DreamTeam Group, LLC and MissionIR, which described themselves as being part of a “Family of Businesses,” will be referred to together in this Order as “DreamTeam.” The Commission has charged McCarthy and DreamTeam for misconduct related to misconduct described in this Order, and for other misconduct unrelated to CytRx.

FACTS

3. In July 2013, DreamTeam approached CytRx about the possibility of hiring DreamTeam to provide services that included the generation of articles concerning CytRx on investment websites such as Seeking Alpha.⁵ DreamTeam told CytRx that it had relationships with independent writers looking for ideas for articles that would increase their readership, and that DreamTeam would try to persuade these writers to publish articles about CytRx.

4. In September 2013, CytRx signed a contract with DreamTeam for social media, marketing and branding services. The contract stated, among other things, that “[r]etail trading will be the target.” CytRx signed contract extensions in October 2013 and January 2014. In total, CytRx paid DreamTeam \$65,000 for its services.⁶

5. By December 24, 2013, CytRx was exploring the possibility of conducting a public offering in the last week of January 2014 (the “January 2014 Offering”). On December 27, CytRx emailed DreamTeam, “We need one to two articles that are bullish on seeking alpha by 12/31. In addition we need a huge blitz in January 2014”⁷ By early January, 2014, CytRx had reached an understanding with a broker-dealer that it would serve as the managing underwriter for the January 2014 Offering should CytRx’s Board of Directors authorize the offering to go forward.

⁵ Seeking Alpha maintains a website (www.seekingalpha.com) that describes itself as a “platform for investment research, with broad coverage of stocks, asset classes, ETFs and investment strategy,” where “articles frequently move stocks, due to a large and influential readership which includes money managers, business leaders, journalists and bloggers.”

⁶ DreamTeam refunded \$27,500 of the \$65,000 when CytRx cancelled its contract in February 2014.

⁷ CytRx continued to press DreamTeam for articles in the weeks leading up to the offering. On January 12, 2014, CytRx emailed DreamTeam, “Start the Blitz for Jan [sic] as we have lots of important developments coming.” Three days later, CytRx stated in an email to DreamTeam, “Hope to see some blitz soon. So far nothing recently.”

The restrictions on offering communications imposed by the federal securities laws commenced no later than when CytRx and the broker-dealer reached this understanding.⁸

6. Between that time and the end of the January 2014 Offering (which CytRx announced on February 5, 2014), three articles regarding CytRx were published on www.wallstcheatsheet.com by a writer who was paid by DreamTeam.⁹ CytRx reviewed and edited these articles, and approved them before they were published. Also, DreamTeam posted an article to its blog on Seeking Alpha's website that summarized, linked to, and quoted from one of these articles.¹⁰

7. In December 2013, CytRx prepared a presentation about the company for the publisher of an investment report who was thinking about circulating a report about CytRx. After receiving the presentation, the publisher asked CytRx to convert the information into a narrative. CytRx drafted the narrative, and worked with the publisher on subsequent versions. The publisher emailed the completed report, which was largely identical to the narrative written by CytRx, to his subscribers and other potential investors on January 9, 2014. On January 17, 2014, he published the same report, in substantially the same form, as an article on Seeking Alpha's website. Later that day, CytRx sent the article to a large number of potential investors via multiple emails.

⁸ The January 2014 Offering was made pursuant to a delayed shelf registration on Form S-3 that CytRx filed on December 6, 2012, and a prospectus supplement thereunder. CytRx was not "in registration" with respect to the offering, and the offering-communications restrictions of Securities Act Section 5(b)(1) did not apply, until CytRx began the process of offering the securities off the shelf. *See, e.g.,* Use of Electronic Media, Securities Act Release No. 7856, 65 Fed. Reg. 25843, 25845 n.10 (May 4, 2000) (" 'In registration' is a term that refers to the entire registration process under the Securities Act, 'at least from the time an issuer reaches an understanding with the broker-dealer which is to act as managing underwriter [before] the filing of a registration statement' until the end of the period during which dealers must deliver a prospectus. See Securities Act Release No. 5180, at n.1 (Aug. 16, 1971) [36 FR 16506]. An issuer will not be considered to be 'in registration' at any particular point in time solely because it . . . has on file a registration statement for a delayed shelf offering on Form S-3 . . . and has not commenced or is not in the process of offering or selling securities 'off of the shelf.' ")

⁹ DreamTeam's payment of the writer was contrary to DreamTeam's representation, before CytRx and DreamTeam entered into their first agreement, that the articles would be written by independent writers looking for ideas for articles that would increase their readership. The Commission is charging McCarthy, DreamTeam and the writer for violating Securities Act Section 17(b) and other provisions of the federal securities laws in connection with these articles.

¹⁰ *See CytRx Corp (CYTR) Continues Positive Trajectory, Says Wall St. Cheat Sheet Contributor*, published on MissionIR's blog on Seeking Alpha's website on January 13, 2014.

VIOLATIONS

8. As a result of the conduct described above, CytRx violated Securities Act Section 5(b)(1). The articles, report, and emails were “offers” and “prospectuses” as defined by the Securities Act and were not subject to any exemption or safe harbor. The articles, report and emails are attributable to CytRx because of the company’s involvement in generating the articles and report, and because of CytRx’s explicit or implicit endorsement or approval of the article it emailed to potential investors.¹¹ These prospectuses failed to meet the requirements of Securities Act Section 10, and CytRx directly and/or indirectly transmitted them while it was in registration with respect to, or conducting, the January 2014 Offering.

UNDERTAKING

Respondent has undertaken to:

A. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, (i) agree to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) accept service by mail, email, or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoint Respondent’s counsel in these proceedings as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent’s travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consent to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

In determining whether to accept the Offer, the Commission has considered the undertaking set forth above.

¹¹ See, e.g., Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52056, Investment Company Act Release No. 26693, 70 Fed. Reg. 44722, 44745 n.211 (August 3, 2005) (“[W]hether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. The courts and we have referred to the first line of inquiry as the entanglement theory and the second as the adoption theory.”). See also *id.* at 44757 (“If an issuer or offering participant prepares, pays for, or gives consideration for the preparation, publication or dissemination of or uses or refers to a published article, television or radio broadcast, or advertisement, the issuer or other offering participant will have to satisfy the conditions to the use of any other free writing prospectus of that offering participant at the time of the publication or broadcast.”)

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent CytRx cease and desist from committing or causing any violations and any future violations of Section 5(b) of the Securities Act.

B. Within 14 days of the entry of this Order, Respondent CytRx shall pay a civil money penalty in the amount of \$75,000 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 the civil money penalty is not made, 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 the payor as the 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 Hodgman, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

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.

Brent J. Fields
Secretary