

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 86781 / August 27, 2019**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 5333 / August 27, 2019**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-19384**

**In the Matter of**  
  
**EMS Capital LP,**  
  
**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(K) OF THE INVESTMENT ADVISERS ACT OF 1940, 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”) and Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against EMS Capital LP (“EMS” 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 and Section 203(k) of the Investment Advisers Act of 1940, 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 finds<sup>1</sup> that:

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<sup>1</sup> 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

### **A. Background**

1. EMS is a Delaware limited partnership and is headquartered in New York, New York. EMS has been registered with the Commission as an investment adviser since September 29, 2010. EMS is the investment manager to two hedge funds, EMS Equities Ltd. (“Equities Fund”) and EMS Opportunity Ltd. (“Opportunity Fund”). EMS employs 16 people. EMS has assets under management of approximately \$3.05 billion and 12 clients.

### **B. EMS Caused Regulation SHO Violations**

2. From at least April 2014 to November 2017 (the “Relevant Period”), while EMS’s net aggregate positions in the common stock of Issuer A, Issuer B, and Issuer C were each net flat (consisting of equal sized long and short positions) or net short, at the time that EMS submitted sell orders to its broker for execution, EMS misidentified short sales of these securities as long sales.

3. Rule 200(g) of Regulation SHO requires broker-dealers to mark orders in all equity securities “long” or “short,” or “short exempt.” *See* 17 C.F.R. §§ 242.200(g). The broker-dealer may mark the order “long” only if the seller (1) is deemed to own the security being sold pursuant to Rule 200(a) through (f), and (2) the broker-dealer either has possession or control of the security to be delivered or it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction. Rule 200(c) provides that a person shall be deemed to own a security only to the extent that he has a net long position in such security.

4. Under Regulation SHO Rule 200(g), EMS’s sales of Issuer A common stock from April 29, 2014 to May 7, 2014, Issuer B common stock on October 10, 2014, and Issuer C common stock from January 6, 2016 to February 23, 2016, should have been identified by EMS to its broker as short sales because, although EMS’s prime brokerage accounts showed long and short positions in the securities of Issuer A, Issuer B, and Issuer C, EMS’s net aggregate position in each security was not net long.

5. From April 29, 2014 to May 7, 2014, EMS sold short Issuer A common stock in 15 trades, misidentifying each of these trades as long sales on trade orders to EMS’s broker.

6. On October 10, 2014, EMS sold short Issuer B common stock in 4 trades, misidentifying each of these trades as long sales on trade orders to EMS’s broker.

7. From January 6, 2016 to February 23, 2016, EMS sold short Issuer C common stock in 24 trades, misidentifying each of these trades as long sales on trade orders to EMS’s

broker.

8. Based on information from EMS, its broker then mismarked these sell orders as long, not as short.

9. Regulation SHO Rule 203(b)(1) provides that a broker or dealer may not accept a short sale order in an equity security from another person or effect a short sale in an equity security for its own account unless the broker or dealer has borrowed the security, entered into a bona fide arrangement to borrow the security, or has “reasonable grounds” to believe the security can be borrowed so that it can be delivered on the delivery date. This is generally referred to as the “locate” requirement. Rule 203(b)(1) also requires the broker or dealer to document its compliance with the “locate” requirement. To document compliance with the obligations under Regulation SHO, brokers or dealers typically create and maintain a “locate log” that documents the basis for each locate provided.

10. When initiating its positions in each of the securities named above, EMS properly obtained the required locates and then in a cross trade simultaneously sold short and bought long, creating a net flat position. Based on the long positions reflected in certain accounts at its prime brokers (albeit not an overall net long position in such securities across all of its accounts), EMS identified its subsequent sales of the securities referenced above as long sales. However, for any such sales EMS made while its net aggregate position in each security was not net long, those sales should have been identified in trade orders to its broker as short sales.

11. Because EMS identified its sales of common stock of Issuer A, Issuer B, and Issuer C, to its broker as long sales, such broker did not perform locates or document compliance with the locate requirement of Regulation SHO.

12. As a result of the conduct described above, EMS caused its broker to violate Regulation SHO Rule 200(g) [17 C.F.R. § 242.200(g)] which identifies the circumstances when a broker or dealer may mark a sell order “long,” and Rule 203(b)(1) [17 C.F.R. § 242.203(b)] which prohibits broker-dealers from accepting or effecting short sale orders in equity securities unless they satisfy the locate requirement and document compliance with the locate requirement of Regulation SHO. Scierter is not required to cause a violation of either of these rules.

### **C. EMS’s Books and Records Violations**

13. EMS also committed additional violations by failing to make and keep true and accurate order memoranda and copies of all written communications sent by such investment adviser relating to the placing or execution of any order to sell any security. EMS’s books and records reflected the orders as they were, in fact, transmitted to the company’s broker. However, for each of the misidentified short sale orders in the common stock of Issuer A, Issuer B, and Issuer C discussed above, EMS failed to make and keep accurate order memoranda and written communication that reflected that each such order was a short sale and not a long sale order.

14. As a result, EMS violated Section 204 of the Advisers Act and Rules 204-2(a)(3)

and 204-2(a)(7)(iii) thereunder, which require registered investment advisers to make and keep true, accurate and current order memoranda and written communications for the purchase and sale of any security on behalf of a client by failing to make accurate order tickets. EMS's order tickets and written communications to its broker inaccurately reflected the short sale orders as long orders. Accordingly, EMS violated Section 204 of the Advisers Act and Rules 204-2(a)(3) and 204-2(a)(7)(iii) thereunder.

15. In determining to accept EMS's Offer, the Commission considered the cooperation EMS afforded the Commission staff.

#### IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act and Section 203(k) of the Advisers Act, Respondent EMS cease and desist from committing or causing any violations and any future violations of Regulation SHO Rules 200(g) and 203(b) (17 C.F.R. §§ 242.200(g) and 242.203(b)) and Section 204 of the Advisers Act and Rules 204-2(a)(3) and 204-2(a)(7)(iii) thereunder (17 CFR §§ 275.204-2(a)(3) and 204-2(a)(7)(iii)).

B. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of \$229,374, prejudgment interest of \$28,041.10, and a civil money penalty in the amount of \$60,000, 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 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 EMS 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 Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 801 Brickell Avenue, Suite 1800, Miami, FL 33131.

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