

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 99578 / February 21, 2024

ADMINISTRATIVE PROCEEDING

File No. 3-21860

In the Matter of

**CONTRARIAN
CAPITAL
MANAGEMENT, L.L.C.,**

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 Contrarian Capital Management, L.L.C. (“Contrarian” 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 finds that:

Summary

1. These proceedings concern violations of Rule 105 of Regulation M [17 C.F.R. § 242.105] (“Rule 105”) under the Exchange Act by Contrarian, a registered investment adviser based in Greenwich, Connecticut. Between April 2020 and June 2020, Contrarian purchased shares of stock for six of its investment advisory clients in two offerings of securities by public companies after effecting short sales in the same stocks in one or more advisory client accounts during Rule 105’s defined restricted period without an applicable exception. The short sales during the restricted period were effected after third-parties exercised call options during the restricted period that Contrarian had caused its advisory clients to sell prior to the restricted period. The exercise and assignment processes resulted in Contrarian’s advisory clients being assigned the exercised options, and short sales being booked to their accounts to fulfill their obligations to deliver shares under the options contracts. Contrarian’s violative conduct resulted in gains to its advisory clients of \$351,726.86.

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

3. 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 in effecting the short sale. Id.

4. Between April 2020 and July 2020, on two separate occasions, Contrarian purchased offering shares for certain of its investment advisory clients from an underwriter or broker-dealer participating in a follow-on or secondary public offering of stock despite causing at least one advisory client to sell short the same security during the Rule 105 restricted period. In each instance, the short sales booked as a result of the assignment of previously sold call options occurred during the five business days that preceded the pricing of the offered securities. As a result, Contrarian violated Rule 105.

5. Each restricted period short sale was linked to call options that Contrarian had sold for its advisory clients. The options were exercised by third parties and assigned by a clearing corporation to Contrarian’s advisory clients. The assignment of the call options to Contrarian’s advisory clients created a contractual obligation for the assigned advisory clients to deliver shares of the underlying common stock that the advisory clients did not own, which Contrarian understood would result in a short sale being automatically booked in the advisory

clients' brokerage accounts. In each instance, the restricted period short sales resulted from the exercise and assignment of options.

Respondent

6. Contrarian Capital Management, L.L.C. is a limited liability company organized under the laws of Delaware, with a principal place of business in Greenwich, Connecticut. Contrarian is registered with the Commission as an investment adviser. Its investment advisory clients include private funds and separately managed accounts. As of December 31, 2022, Contrarian had approximately \$4.6 billion in regulatory assets under management.

Facts

7. The short sales that took place in Contrarian's advisory client accounts during Rule 105's restricted period prior to the two offerings were effected when in-the-money call options that Contrarian had sold on behalf of its advisory clients prior to the Rule 105 restricted period were exercised and assigned to Contrarian's advisory clients during the restricted period.

8. Between April 14, 2020 and April 17, 2020, Contrarian's traders and a portfolio manager discussed that Darden Restaurants, Inc. ("Darden") call options, which Contrarian had sold on behalf of certain advisory clients on April 1, 2020, would expire on Friday, April 17, 2020, and would be assigned to their advisory clients if Contrarian did not take action. They discussed fully closing out the existing options position and opening a new options position with a different strike price and expiration date, which would have avoided assignment. They ultimately decided to let the options expire, acknowledging that the options would be assigned to their advisory clients.

9. On Friday, April 17, 2020, six advisory client accounts under Contrarian's management sold short a combined total of 300,000 shares of Darden common stock, at an average price of \$45.00 per share. The short sales were effected when the in-the-money Darden call options were exercised and assigned to the Contrarian advisory clients for which Contrarian had sold the call options. Those Contrarian advisory clients then had an obligation to deliver Darden shares in fulfillment of the options contracts. Because the advisory clients did not own Darden shares, a transaction was initiated to borrow shares of Darden so that the advisory clients whose options contracts had been assigned would be able to fulfill their obligations under those contracts.

10. On Monday, April 20, 2020, Darden filed a preliminary prospectus supplement to a shelf registration statement previously filed on October 4, 2019 for a follow-on offering of its common stock (the "Darden Offering"). On April 20, 2020, after the securities markets closed, the Darden Offering was priced at \$58.50 per share. On April 21, 2020, Contrarian purchased a combined total of 10,000 shares in the Darden Offering for the six advisory clients' accounts. Contrarian and its advisory clients were prohibited from participating in the Darden Offering, absent an exception, because the April 17, 2020 short sales of Darden

common stock had taken place during the Rule 105 restricted period. Contrarian's advisory clients improperly benefitted from their prohibited participation in the Darden Offering because Contrarian purchased offering shares on their behalf at a discount to the volume weighted average price of Darden common stock on the open market on April 21, 2020. In doing so, Contrarian's advisory clients received gains of \$41,788.

11. In June 2020, Contrarian directed the purchase of shares for its advisory clients in a second covered offering that Rule 105 prohibited them from participating in, absent an exception, because short sales in the same stock that was the subject of the offering had taken place during the restricted period. On Wednesday, June 17, 2020, an advisory client account under Contrarian's management sold short 542,700 shares of American Airlines Group, Inc. ("American Airlines") common stock at an average price of \$11.00 per share. The short sales were effected when in-the-money American Airlines call options with an expiration date of June 19, 2020 that Contrarian had sold on behalf of the advisory client approximately one month earlier were exercised by the options buyers and assigned to that advisory client. Contrarian's advisory client then had an obligation under the options contract to deliver American Airlines shares, which it did not own, to the options buyers.

12. On Sunday, June 21, 2020, American Airlines filed a preliminary prospectus supplement to a shelf registration statement previously filed on February 19, 2020, for a follow-on offering of its common stock to be priced after the market closed on Monday, June 22, 2020 (the "American Airlines Offering"). On Monday, June 22, 2020, after the securities markets closed, the American Airlines Offering was priced at \$13.50 per share. On June 23, 2020, Contrarian purchased a combined total of 1,250,000 shares in the American Airlines Offering for six advisory clients. Contrarian and its advisory clients were prohibited from participating in the American Airlines Offering, absent an exception, because the June 17, 2020 short sales in the advisory client's account managed by Contrarian had occurred during the Rule 105 restricted period. Contrarian's advisory clients improperly benefited from their prohibited participation in the American Airlines Offering because Contrarian purchased offering shares on their behalf at a discount to the volume weighted average price of American Airlines common stock on the open market on June 23, 2020. In doing so, Contrarian's advisory clients received gains of \$309,938.86.

13. In total, Contrarian's violations of Rule 105 resulted in gains to its advisory clients of \$351,726.86. Contrarian has represented to the Commission staff that it is currently in possession of the amounts subject to disgorgement.

14. The Rule 105 violations occurred despite Contrarian having a Rule 105 policy and written procedures in place at the time. These procedures required, among other things, that prior to participating in a covered offering, Contrarian personnel determine whether any advisory client accounts managed by Contrarian had entered into a short sale of the same security during the five-business day period prior to the pricing of the offering.

15. During the course of the Commission staff's investigation, Contrarian undertook certain remedial acts. Contrarian revised its written Rule 105 procedures to address short sales resulting from options assignments. For example, Contrarian's revised

procedures specify that options trades will be added to a review list in Contrarian's order management system, and subsequent order entries of equity purchased in the underlying security will be flagged for pre-trade review. Contrarian also conducted a subsequent review of its trading history and notified the Commission staff of the April 2020 Darden transactions.

Violations

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

Disgorgement and Civil Penalties

17. The disgorgement and prejudgment interest ordered 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 ordered 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.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Contrarian 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 Contrarian shall, within 10 days of the entry of this Order, pay disgorgement of \$351,726.86 and prejudgment interest of \$29,600.50 and a civil money penalty of \$140,000.00 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 Contrarian Capital Management, L.L.C. 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 John T. Dugan, Division of Enforcement, Securities and Exchange Commission, 33 Arch St., 24th Floor, Boston, MA 02110.

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