

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67510 / July 26, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3439 / July 26, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14962

In the Matter of

Wesley Capital Management, LLC,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(e) 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 Section 203(e) of the Investment Advisers Act of 1940 (“Advisers Act”), against Wesley Capital Management, LLC (“Wesley” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Wesley 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 Wesley and the subject matter of these proceedings, which

are admitted, Wesley consents 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 Section 203(e) 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 Wesley’s Offer, the Commission finds that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Wesley. Wesley was at all relevant times the investment adviser to multiple hedge funds and one managed account. On two occasions in April 2009, Wesley violated Rule 105 of Regulation M by purchasing securities in public offerings by Duke Realty Corporation (“Duke”) and Host Hotels & Resorts, Inc. (“Host”) after having sold short the securities of both of these issuers during the five business days prior to the pricing of the public offerings. By participating in these offerings, Wesley realized profits of \$142,124.

Respondent

2. Wesley is a Delaware limited liability company located in New York, New York. The firm has been registered with the Commission as an investment adviser since March 30, 2009 and managed approximately \$253 million in investor assets as of January 31, 2012.

Other Relevant Entities

3. Duke is a publicly traded real estate investment trust headquartered in Indianapolis, Indiana. Duke’s stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

4. Host is a publicly traded real estate trust investment headquartered in Bethesda, Maryland. Host’s stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

Respondent’s Violations of Regulation M

5. Rule 105 of Regulation M of the Exchange Act provides, 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 period (“Rule 105 restricted period”) that is the

shorter of the period: (1) Beginning five business days before the pricing of the offered securities; or (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing.

17 C.F.R. § 242.105(a)(1) and (a)(2) (effective October 9, 2007).

6. Rule 105 of Regulation M is designed to protect the independent pricing mechanism of the securities market shortly before follow-on or secondary offerings. Rule 105 is a prophylactic provision and prohibits the conduct irrespective of the seller's intent. Pursuant to amendments that became effective in October 2007, it is not required that the shares purchased in the offering be used to "cover" the restricted period short sales for there to be a violation of Rule 105. Short Selling in Connection with a Public Offering, Rel. No. 34-56206, 72 Fed. Reg. 45094 (August 10, 2007) (effective October 9, 2007).

7. On Thursday, April 9, 2009, and on Wednesday, April 15, 2009, five of the funds advised by Wesley sold short a total of 460,000 shares of Duke stock at prices ranging from \$7.59 to \$8.22 per share.

8. On Wednesday, April 15, 2009, Duke stock closed at \$8.44. On Thursday, April 16, 2009, before the trading markets opened, Duke priced a follow-on offering of its stock at \$7.65 per share. The registered shares were offered to the public through a group of underwriters on a firm-commitment basis. Accordingly, the Rule 105 restricted period ran from Thursday, April 9, 2009 through Wednesday, April 15, 2009.

9. On Thursday, April 16, 2009, the same five funds advised by Wesley that had sold Duke short, purchased 225,000 shares in the follow-on offering at \$7.65 per share. Wesley therefore realized an unlawful profit of \$82,027 by participating in the Duke offering after having shorted Duke stock during the Rule 105 restricted period.

10. On Thursday, April 23, 2009, five of the funds advised by Wesley sold short a total of 950,000 shares of Host stock at prices ranging from \$6.98 to \$7.55 per share.

11. On Thursday, April 23, 2009, Host stock closed at \$7.10 per share. On Friday, April 24, 2009, before the trading markets opened, Host priced a follow-on offering of its stock at \$6.60 per share. The registered shares were offered to the public through a group of underwriters on a firm-commitment basis. Accordingly, the Rule 105 restricted period ran from Friday, April 17, 2009, through Thursday, April 23, 2009.

12. On Friday, April 24, 2009, the same five funds advised by Wesley that had sold Host short, purchased 125,000 shares in the follow-on offering at \$6.60 per share. Wesley therefore realized an unlawful profit of \$60,097 by participating in the Host offering after having shorted Host stock during the Rule 105 period.

13. After the conduct described above, Wesley developed and implemented policies and procedures pertaining to compliance with Rule 105 of Regulation M.

Violations

14. As a result of the conduct described above, Wesley willfully¹ committed violations of Rule 105 of Regulation M.

IV.

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

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

A. Respondent Wesley 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 Wesley is censured.

C. Respondent shall, within 20 days of the entry of this Order, pay disgorgement of \$142,124, prejudgment interest of \$15,165, and a civil penalty of \$75,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 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

¹ 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)).

Payments by check or money order must be accompanied by a cover letter identifying Wesley 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 George N. Stepaniuk, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy
Secretary