

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2015045508801**

TO: Department of Enforcement
Financial Industry Regulatory Authority (FINRA)

RE: Ascendant Capital Markets, LLC (Respondent)
Member Firm
CRD No. 152912

Pursuant to FINRA Rule 9216, Respondent Ascendant Capital Markets, LLC (Ascendant or the Firm) submits this Letter of Acceptance, Waiver and Consent (AWC) for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against Respondent alleging violations based on the same factual findings described in this AWC.

I.

ACCEPTANCE AND CONSENT

A. Respondent hereby accepts and consents, without admitting or denying the findings and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

Respondent has been a FINRA member since February 2011. The Firm is headquartered in Jupiter, Florida and employs 24 registered individuals at its four branch offices. It is a full-service investment banking firm that provides, among other things, market making and institutional sales and trading services, and also engages in proprietary trading.¹

OVERVIEW

On May 7, 2015, Ascendant's market making desk effected 45 short sales in an equity security, Riviera Tool Co. (RIVT), for its own account, without complying with the locate requirement of Rule 203(b)(1) of Regulation SHO of the Securities Exchange Act of 1934 (Regulation SHO). In each of these 45 instances, the firm erroneously relied upon the bona-fide market making exemption to Rule 203(b)(1) of Regulation SHO, effecting each short sale without (1) borrowing the security, or entering into a bona-fide arrangement to borrow the security; or (2) having reasonable grounds to believe that the security could be borrowed so that it could be delivered on the date delivery was due; and

¹ For more information about the Firm, including prior regulatory events, visit BrokerCheck® at www.finra.org/brokercheck.

(3) documenting compliance with Rule 203(b)(1) of Regulation SHO. This conduct violated Rule 203(b)(1) of Regulation SHO and FINRA Rule 2010, and generated \$26,720 in net profits for the firm and its traders.

Moreover, Ascendant failed to follow in connection with these 45 transactions the process outlined in its written supervisory procedures (WSPs) for verifying the applicability of the bona-fide market making exception. Ascendant thereby failed to enforce a system of supervision that was reasonably designed to comply with Regulation SHO in violation of FINRA Rules 3110(b) and 2010.

FACTS AND VIOLATIVE CONDUCT

Rule 203(b) of Regulation SHO and FINRA Rule 2010

The Securities and Exchange Commission (SEC) adopted Regulation SHO in January 2005 to update short sale regulation and to address concerns regarding persistent fails to deliver of securities from trading and potentially abusive “naked” short selling (*i.e.*, the sale of securities that an investor does not own or has not borrowed).

Pursuant to Rule 203(b)(1) of Regulation SHO, a broker-dealer, subject to certain exceptions, may not accept an equity short sale order from another person, or effect an equity short sale for its own account, without having borrowed the security, or entered into a bona-fide arrangement to borrow the security, or reasonable grounds to believe the security can be borrowed, so that it can be delivered when due. That is, the short seller must identify or “locate” the security it intends to sell short prior to effecting the transaction.

Rule 203(b)(2)(iii) of Regulation SHO exempts from compliance with the locate requirement short sales effected by a market maker² in connection with bona-fide market making activity in the security for which the exception is claimed. The SEC defines a market maker engaged in bona-fide market making as a “broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market.”³

FINRA Rule 2010 states that “[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.” A violation of Rule 203(b)(1) of Regulation SHO and any other FINRA rule constitutes a violation of FINRA Rule 2010.

² Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, defines a “market maker” as any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer, who, with respect to a security, holds himself [or herself] out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his [or her] own account on a regular or continuous basis.

³ SEC Amendments to Regulation SHO, Rel. No. 34-58775, 73 FR 61690, 61698-99 (Oct. 17, 2008).

Ascendant Violated Rule 203(b) of Regulation SHO and FINRA Rule 2010 Because it Impermissibly Relied on the Market Maker Exception and Failed to Comply with the Locate Requirement.

On the morning of May 7, 2015, Tesla Motors Inc. (Tesla) announced that it planned to purchase Riviera Tool & Die, a privately-held, Michigan-based tool manufacturer.

Riviera Tool & Die, however, bore a very similar name to RIVT, a publicly traded company that also was a Michigan-based tool manufacturer. Because the published news did not specify which of these companies Tesla planned to purchase, many investors assumed that Tesla intended to buy the publicly-traded RIVT, and began buying shares in that company. As a result, the price of RIVT closed the trading day on May 7 approximately 4,400% higher than the prior day's closing price.

Ascendant recognized during the trading day that the news report did not reference a planned acquisition of RIVT, but instead described Tesla's intention to purchase the similarly-named privately-held company. An Ascendant analyst sent electronic communications to the firm's sales distribution list, informing recipients to short RIVT. Shortly thereafter, a member of the firm's institutional sales department sent electronic communications to traders on the firm's market making desk that stated "smart \$ shorting RIVT."

Prior to May 7, 2015, Ascendant's market making desk had never traded in RIVT. On that date, however, Ascendant registered as a market maker in RIVT and began trading in the symbol. Before the firm's market making desk received the email from the firm's institutional sales department, it submitted bids and offers in RIVT relatively evenly. After receiving the email, the quoting activity decreased on the buy side and increased on the sell side. By the time trading was halted in RIVT later that day, the Firm had effected 45 short sales in RIVT, initiating negotiations in 40 of them, and accumulated a proprietary short position of over 200,000 shares. Although the market maker desk's trading activity in RIVT after receiving the email was not consistent with bona-fide market making activity, it effected all of these short sale transactions without complying with the locate requirement of Rule 203(b)(1) of Regulation SHO. This short selling in RIVT generated for Ascendant and its traders a net profit of \$26,720.

Based on the foregoing, the Firm violated Rule 203(b)(1) of Regulation SHO and FINRA Rule 2010.

Ascendant Failed to Reasonably Supervise for Compliance with Rule 203(b)(1) of Regulation SHO.

FINRA Rule 3110(b) requires each member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA Rules.

The Firm's WSPs provided for a review intended to verify whether the bona-fide market making exception to Rule 203(b)(1) of Regulation SHO applied to specific short sales effected by the Firm's market making desk. Among other things, the designated desk supervisor was responsible for ensuring, with respect to each security in which the Firm sought to apply the market making exception to Rule 203(b)(1) of Regulation SHO, that:

- The firm is registered as a market maker in the relevant security or a related derivative product;
- The activity is occurring from a proprietary account typically utilized for market making activity;
- The desk is regularly and continuously placing orders/quotations in its capacity as a market maker on both the bid and offer side of the market and is continuously at or near the best bid and offer;
- The quotations are widely accessible to the public;
- The firm is providing liquidity to the markets of securities, taking the other sides of trades when there are short-term buy-and-side imbalances in the customer orders, and/or attempting to prevent excess volatility;
- The market making activity does not appear to be related to speculative selling strategies or investment purposes of the firm or disproportionate to the usual market making patterns or practices of the broker/dealer in that security.

The Firm failed to enforce its WSPs with respect to the 45 short sales in RIVT on May 7, 2015. Ascendant reviewed these transactions on the day they were entered. Despite being part of a short-lived, narrow speculative trading strategy involving RIVT that reflected a failure to place regular and continuous two-sided bids, Ascendant mistakenly determined that the market making exception to Rule 203(b)(1) of Regulation SHO applied.

As a result, the firm failed to enforce a system of supervision that was reasonably designed to comply with Regulation SHO in violation of FINRA Rules 3110(b) and 2010.

B. Respondent also consents to the imposition of the following sanctions:

- a censure;
- a \$35,000 fine; and
- disgorgement of \$26,720.

Respondent agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payment is due and payable. Respondent has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

Respondent specifically and voluntarily waives any right to claim an inability to pay, now or at any time after the execution of this AWC, the monetary sanctions imposed in this matter.

The sanctions imposed in this AWC shall be effective on a date set by FINRA.

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a complaint issued specifying the allegations against it;
- B. To be notified of the complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made, and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council (NAC) and then to the SEC and a U.S. Court of Appeals.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Legal Officer, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

Respondent further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

Respondent understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (ODA), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against Respondent; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action brought by FINRA or any other regulator against Respondent;
 - 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 - 4. Respondent may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Respondent may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects Respondent's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. Respondent may attach a corrective action statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this statement. This statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA.

The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce Respondent to submit this AWC.

8/6/2021
Date


Ascendant Capital Markets, LLC
Respondent

Print Name: MARK BERGENDAHL

Title: CEO

Accepted by FINRA:

Signed on behalf of the
Director of ODA, by delegated authority

August 17, 2021

Date



Jennifer Lane Gachiri
Senior Counsel
FINRA
Department of Enforcement
200 Liberty Street
New York, NY 10281