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SEC Levels New Claims Against Short Selling Trader

By **Jessica Corso**

Law360 (June 12, 2023, 9:48 PM EDT) -- The U.S. Securities and Exchange Commission filed a lawsuit Monday against a New Jersey-based investment adviser that has fallen under the agency's microscope before, this time alleging the firm and its leader made over $2 million off naked short sales of public company stock.

The SEC **accused** Sabby Management LLC and its managing partner, Hal D. Mintz, of conducting illegal short sales in the stock of 10 public companies. The agency did not name the companies.

Short selling is the legal practice of selling borrowed securities in the hope of later buying the same securities at a lower price, thereby earning a profit before they need to be returned to their original owners.

The SEC said that Sabby Management's short sales were "naked" because, in some instances, it didn't actually borrow or own any securities that it promised to sell. The adviser at times attempted to cover its tracks by purchasing the securities after it offered to sell them, the SEC said.

"Defendants knew or were reckless in not knowing that these practices failed to comply with applicable trading rules that require, with very narrow exceptions not applicable here, a short seller to locate the stock prior to the short sale," the complaint alleges.

Other times, however, Sabby Management was not able to locate the securities by the settlement date, according to the SEC.

"The SEC alleges that Sabby and Mintz attempted to game the system and make an illegal profit," Carolyn Welshhans, associate director of the SEC's Division of Enforcement, said in a statement. "When someone uses naked shorts or other manipulative practices to cheat the market and investors, the SEC will ensure that they are held accountable."

In one scheme detailed in the complaint, the SEC alleges that a fund managed by Sabby entered into a securities purchase agreement with an unnamed public company that the agency refers to in the complaint as "Issuer 1." Issuer 1 is a Nevada corporation with its headquarters in Palo Alto, California, the complaint alleges.

The SEC says that the agreement allowed the fund to purchase Issuer 1's stock at a 20% discount but Sabby entered short sale orders prior to exercising its right to purchase those shares. It then turned around and bought the shares at a 20% discount in an unsuccessful attempt to cover the short sales, the SEC alleges.

"In other words, by short selling without first obtaining a locate, they effectively were able to sell at market price and then acquire the shares at a 20% discount to market price, earning substantial illicit proceeds," according to the complaint.

The SEC says that the adviser was able to obtain at least $2 million in profit through that and similar schemes and is seeking a court order to disgorge those gains as well as a civil penalty and a permanent injunction to prevent Mintz and Sabby from violating federal securities laws in the future.

An attorney for Mintz and Sabby vowed to fight the SEC's suit.

"We will be asserting a vigorous and appropriate defense," said Jay Auslander of Wilk Auslander LLP, who is representing both defendants.

"In particular, we are confident that there is no merit to the [fraud] claims," he added.

The SEC's complaint notes that this isn't the first time Sabby's short selling practices have led to SEC action.

In 2015, it was **one of six firms** to settle allegations that it was involved in short selling certain stocks right before buying shares from an underwriter, broker or dealer participating in a follow-on public offering.

Sabby paid a total of $278,749 to settle those charges without admitting or denying the SEC's findings.

The SEC is represented by its own Daniel Maher, Edward Reilly, Amy Friedman and Christopher Mathews.

Sabby and Mintz are represented by Jay Auslander of Wilk Auslander LLP.

The case is SEC v. Mintz et al., case number 2:23-cv-03201, in the U.S. District Court for the District of New Jersey.

--Editing by Daniel King.