

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4513 / August 25, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32238 / August 25, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17506

In the Matter of

**ORINDA ASSET
MANAGEMENT, LLC,**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 203(e) OF THE
INVESTMENT ADVISERS ACT OF 1940
AND SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY 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 203(e) of the Investment Advisers Act of 1940 (“Advisers Act”) and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against Orinda Asset Management, LLC (“Respondent” or “Orinda”).

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 Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company 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 Respondent's Offer, the Commission finds that:

Summary

This matter concerns omissions of material fact in an application for exemptive relief and other disclosures filed with the Commission. On April 7, 2011, Orinda and Advisors Series Trust ("AST") filed an exemptive order application seeking relief from the requirement to obtain shareholder approval to enter or materially amend subadvisory agreements, as well as from certain disclosure requirements. This initial application disclosed that Orinda had entered into an agreement with its lead subadvisor ("Subadvisor") providing for termination payments should Orinda recommend Subadvisor's termination for something other than cause. After being informed by the Division of Investment Management ("IM") that it would not support the application with the termination payment provisions, Orinda and AST agreed to remove the provisions and filed an amended application on April 20, 2012. In the interim, however, Orinda had agreed with Subadvisor to waive its ability to terminate, or recommend the termination of, Subadvisor altogether. The termination waiver arrangement limited Orinda's ability to oversee Subadvisor. Neither Orinda nor AST informed IM of the revised side agreement. Pursuant to authority delegated by the Commission, IM granted the exemptive order on May 21, 2012. Additionally, registration statements of each AST fund advised by Orinda filed with the Commission inaccurately stated that all of its subadvisory agreements could be terminated at any time by Orinda and failed to disclose the side agreement.

Respondent

1. Orinda Asset Management, LLC, an investment adviser to registered investment companies and pooled investment vehicles, is a Delaware limited liability company headquartered in Orinda, California. Formed in 2010, Orinda has been registered with the Commission as an investment adviser since February 7, 2011. As of December 31, 2015, Orinda provided discretionary investment management services to five clients and managed over \$273 million in assets.

Other Relevant Entity

2. Advisors Series Trust, an administrator-sponsored fund, was formed as a Delaware statutory trust on October 3, 1996 and is headquartered in Milwaukee, Wisconsin. AST is registered under the Investment Company Act as an open-end management investment company. In an administrator-sponsored fund, the sponsoring administrator typically provides back office support, fund accounting, compliance support, a board of trustees, and other services to mutual funds managed by unaffiliated registered investment advisers. In 2012, AST consisted of forty series, two of which were managed by Orinda.

Background

3. From 2011 to 2014, Orinda advised two funds organized as AST series, the Orinda SkyView Macro Opportunities Fund and the Orinda SkyView Multi-Manager Hedged Equity Fund

(collectively, the “Funds”). Orinda operated the Funds through a manager of managers structure, allocating fund assets among alternative investment portfolio managers who served as subadvisors to the Funds.

4. During this time period, Orinda engaged a lead subadvisor, Subadvisor, to assist Orinda in its management of the Funds and the selection, monitoring, and evaluation of the other subadvisors.

Side Agreement with Subadvisor

5. Orinda engaged Subadvisor based on its expertise as a hedge fund of funds operator. Because it would be operating in a new mutual fund format, Subadvisor asked for additional certainty as to the relationship between Orinda and Subadvisor. To address Subadvisor’s concerns, Orinda agreed to certain restrictions on its ability to terminate Subadvisor.

6. Specifically, Orinda agreed to make termination payments to Subadvisor should it recommend its termination to the AST Board of Trustees (the “Board”) for something other than cause. Any termination payments would be made from Orinda’s own resources, and not from the Funds. Orinda explicitly reserved the right to recommend Subadvisor’s termination “for cause” and its ability to provide information to the AST Board necessary for its review of Subadvisor’s performance.

7. Based on its recognition of the impact of the conflict of interest raised by this provision with respect to its oversight of Subadvisor, Orinda disclosed the arrangement to the Board. In response, and following discussions with counsel to the AST Funds (“Fund Counsel”), the Board requested additional detail and explanation concerning the agreement. The Board received assurances that the Board retained the ability to terminate Subadvisor without restriction and that any termination payments would be made by Orinda. The Board also anticipated that the conflict would be disclosed to the Commission in connection with a contemplated request for exemptive relief.

Initial Application for Exemptive Relief

8. Orinda’s investment approach required flexibility with respect to its selection and oversight of the subadvisors managing the portfolios within the Funds. Ordinarily, the retention of a subadvisor or any material change in a subadvisory agreement requires approval of fund shareholders. To facilitate its management of the subadvisors and to reduce the costs of shareholder solicitation, Orinda and AST decided to seek Commission relief from these shareholder approval requirements.

9. Consequently, on April 7, 2011, Orinda and AST jointly filed an application for exemptive relief with the Commission. The application requested an order under Section 6(c) of the Investment Company Act exempting them from Section 15(a) of the Act and Rule 18f-2 thereunder, as well as from certain disclosure requirements. If granted, the order would have permitted Orinda to enter into and materially amend subadvisory agreements without shareholder approval and also would have granted relief from certain disclosure requirements. The application sought relief not

only with respect to the subadvisors retained to manage the individual portfolios, but also with respect to the lead subadvisor, Subadvisor.

10. The initial application, filed by Orinda and AST, stated that Orinda had entered into a side letter agreement with Subadvisor. Orinda and AST also disclosed that the side letter included a termination fee provision, through which Subadvisor could obtain termination fees from Orinda for recommending Subadvisor's termination.

11. The exemptive order application was reviewed by IM. In written correspondence and discussions with Fund Counsel, IM expressed concerns about the termination provisions, noting the prohibition against termination restrictions contained in Section 15(a)(3) of the Investment Company Act and the potential inconsistency with fiduciary obligations. IM copied Orinda and AST on several of its written communications. Although AST and Orinda both received certain communications directly from IM, and Orinda had separate counsel, Fund Counsel handled much of the interaction between IM and the applicants.

12. In response to IM, Fund Counsel argued that any concern was mitigated by the fact that the Board ultimately retained discretion over the termination decision and that the adviser, and not the Funds, would pay any termination fee. Over several communications, IM explained that this distinction did not resolve its concerns.

13. In January 2012, IM informed AST and Orinda that it would not support the exemptive order application unless the termination provision was removed. In February 2012, based on IM's objections, Orinda terminated the side letter, and Fund Counsel informed IM of the change.

Amended Application for Exemptive Relief

14. On April 20, 2012, Orinda and AST jointly filed an amended application with the Commission. The amended application removed any discussion of the termination restriction from the discussion of Orinda's oversight of and arrangements with subadvisors. Although the amended application excluded Subadvisor from the scope of the requested relief, it continued to include extensive discussion about Subadvisor's role as lead subadvisor and Orinda's relationship with Subadvisor. The amended application identified no restrictions on Orinda's oversight of Subadvisor.

15. Based on the representations in the amended application, IM granted the exemptive order pursuant to delegated authority on May 21, 2012.

Revised Side Agreement

16. Before filing the amended application, however, Orinda had reached an agreement with Subadvisor to waive its ability to terminate, or to recommend the termination of, Subadvisor.

17. The revised side agreement replaced the termination penalty with a termination waiver: rather than obligating itself to pay a termination fee, Orinda waived its right to terminate or to recommend termination altogether. As with the first side agreement, the Board retained the right

to terminate Subadvisor, and Orinda was able to communicate information about Subadvisor to the Board. This revised agreement was documented in a second side letter dated April 30, 2012.

18. Before the Amended Application was filed with the Commission, Orinda informed Fund Counsel and the Board of the termination waiver. In response, the Board sought and obtained additional information regarding the revised side letter.

19. Neither Orinda nor AST informed IM of the revised arrangement. Multimanager orders rely upon a fund's primary investment adviser being able to oversee subadvisors and to recommend their hiring, termination, and replacement to the fund's board. Because Orinda was to oversee Subadvisor, and Subadvisor was to assist Orinda in the selection, monitoring, and evaluation of the other subadvisers, the termination waiver was material to IM's evaluation of the request for exemptive relief.

Prospectus Disclosures

20. On or about April 30, 2012, AST filed with the Commission a prospectus and statement of additional information for the Orinda SkyView Macro Opportunities Fund. Similarly, on or about June 28, 2012, AST filed with the Commission a prospectus and statement of additional information for the Orinda SkyView Multi-Manager Hedged Equity Fund. Orinda reviewed the prospectuses and statements of additional information, which were drafted and filed by AST.

21. In both prospectuses and statements of additional information, AST made certain disclosures about the relationship among AST, Orinda, and Subadvisor, and the agreements with Subadvisor. Among other things, AST stated that all of the subadvisory agreements may be terminated at any time, without penalty, by Orinda. The disclosures in the prospectuses and statements of additional information conflicted with and failed to disclose the terms of the revised side agreement between Orinda and Subadvisor.

Violations

22. Section 34(b) of the Investment Company Act makes it unlawful for any person to make any untrue or misleading statement of material fact in any registration statement, application, report, account, record, or other document filed with the Commission under the Investment Company Act, or to omit from any such document any fact necessary in order to prevent the statements made therein from being materially misleading. A violation of Section 34(b) does not require a finding of scienter. *In re Fundamental Portfolio Advisers, Inc.*, Investment Company Act Release No. 26099 (July 15, 2003). As a result of the conduct described above, Orinda willfully¹ violated Section 34(b) of the Investment Company Act and caused AST's violations of Section 34(b) of the Investment Company Act.

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)).

IV.

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

Accordingly, pursuant to Section 203(e) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Orinda cease and desist from committing or causing any violations and any future violations of Section 34(b) of the Investment Company Act.

B. Respondent Orinda is censured.

C. Respondent Orinda shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$75,000 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 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 Building, Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, Oklahoma 73169

Payments by check or money order must be accompanied by a cover letter identifying Orinda Asset Management, LLC 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 Paul A. Montoya, Assistant Regional Director, Asset Management Unit, Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 900, Chicago, Illinois, 60604.

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 thirty (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.

Brent J. Fields
Secretary