

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10454 / January 23, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 4848 / January 23, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18349

In the Matter of

**AmericaFirst Capital Management, LLC,
Rick A. Gonsalves, and
Robert L. Clark,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933 AND
SECTIONS 203(e) AND 203(k) 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 8A of the Securities Act of 1933 (“Securities Act”) and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against AmericaFirst Capital Management, LLC (“AFCM”), Rick Gonsalves (“Gonsalves”), and Robert Clark (“Clark”) (together “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”), 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 them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 203(e) and 203(k) 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 Respondents’ Offers, the Commission finds¹ that:

Summary

These proceedings concern disclosure violations by AmericaFirst Capital Management, LLC (“AFCM”) and its two principals, Rick Gonsalves and Robert Clark, while selling promissory notes to individual retail investors, including the firm’s advisory clients. From December 2012 through February 2015 (“the relevant time period”), AFCM was a registered investment adviser that was experiencing cash flow issues and turned to borrowing cash from investors in order to cover its business expenses. While soliciting investors to purchase or renew \$2.7 million in AFCM’s promissory notes, Clark – who was directed by AFCM’s CEO Gonsalves – gave the impression to investors that AFCM was a profitable business and failed to disclose that there was a risk of default associated with the promissory notes. In reality, the firm for several years had experienced increasingly negative net worth and decreasing net income, and had been sustaining its business operations through cash raised from the promissory notes sold to investors. As a result of their failure to exercise reasonable care in providing investors with complete and accurate disclosures regarding AFCM’s financial health, AFCM, Gonsalves, and Clark violated Section 17(a)(2) of the Securities Act; and AFCM and Gonsalves violated, and Clark caused AFCM’s violations of, Section 206(2) of the Advisers Act.

Respondents

1. AmericaFirst Capital Management, LLC is a California limited liability company formed in February 2007, with its principal place of business in Roseville, California. AFCM has been registered with the Commission as an investment adviser since May 2007. During the relevant time period, AFCM served as the investment adviser to five mutual funds that had approximately \$150 million in assets under management primarily from individual investors, and more than 25 individual retail clients, with approximately \$4 million in assets under management. For its advisory services, AFCM charged fees of between 1% and 1.95% of assets under management to the affiliated mutual funds and individual retail clients of AFCM.

2. Rick Allan Gonsalves, age 49, is a resident of Granite Bay, California. Gonsalves is the founder of AFCM and, since its inception, has served as AFCM’s CEO and owned approximately 38% of the firm. Gonsalves also served as the portfolio manager for all of AFCM’s advisory clients, including more than 25 individual retail clients and 5 affiliated mutual funds, during the relevant timeframe. Gonsalves received an annual salary from AFCM, which

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

generated its revenues from advisory fees from managing the portfolios of AFCM's affiliated mutual funds and its individual retail clients.

3. Robert Lee Clark, age 72, is a resident of Grass Valley, California. During the relevant timeframe, Clark was a principal and owned approximately 15% of AFCM. Clark was also an investment adviser representative of AFCM, but did not manage client portfolios or have advisory clients at the firm. Additionally, Clark served as President and Chief Operating Officer of AFCM and received an annual salary from AFCM, which generated its revenues from advisory fees from managing the portfolios of AFCM's affiliated mutual funds and its individual retail clients.

Facts

4. At all relevant times, AFCM was a Commission-registered investment adviser that provided investment advice to five mutual funds and more than 25 individual retail clients. As of December 2012, AFCM was struggling financially because its ongoing business expenses (approximately \$2.3 million) exceeded the amount of money it generated from advisory fees (approximately \$1.4 million). Nearly half of AFCM's yearly operational costs related to payroll and office expenses. Another significant portion of AFCM's business expenses consisted of marketing expenses designed to attract more assets under management to AFCM's mutual funds. These expenses included hundreds of thousands of dollars in payments to industry wholesalers to solicit other investment advisers and broker-dealers, who in turn would have their clients invest in AFCM's mutual funds.

5. To bridge the gap between AFCM's advisory fees and its operational expenses and additional costs related to growing the business, Gonsalves determined that AFCM should raise money for itself by issuing unsecured promissory notes with maturity terms ranging from nine to twelve months. Gonsalves decided that AFCM would target individual retail investors because he perceived these investors to be the easiest way to raise cash. Moreover, to attract investments, Gonsalves set the interest rate at 12 percent, well above prevailing bond market rates.

6. From December 2012 through February 2015, Gonsalves authorized Clark, AFCM's President and COO, to solicit friends, family members, and AFCM's advisory clients to invest in new promissory notes and to renew any pre-existing AFCM promissory notes at maturity. At Gonsalves's direction, Clark contacted prospective noteholders ("investors") through telephone conversations and in-person meetings. During these oral conversations, Clark stated to some investors, and otherwise led other investors to believe, that AFCM was profitable and that the promissory notes would provide predictable monthly interest income at a high interest rate. Clark orally disclosed that the cash would be used to supplement AFCM's short-term cash flow needs, but failed to disclose further that the cash was necessary to cover the firm's ongoing business expenses and might not be repaid in the long term unless the business improved.

7. In addition, the documents that AFCM provided to investors at the time of investment or renewal did not fully disclose to investors the degree of risk they faced in purchasing or renewing AFCM's promissory notes. These documents included a pro forma letter signed by Gonsalves; the promissory note agreement, which only set forth the interest rate and maturity date, and mentioned that the cash raised would be used for AFCM's business expenses; and AFCM's ADV Brochure. Although Gonsalves assumed that his staff would provide AFCM's financial statements to noteholders, he did not follow up to ensure that this disclosure happened. Accordingly, several investors purchased or renewed their promissory notes without the benefit of this information, and invested based on the high interest rate and purportedly stable monthly interest income, and with the expectation that they would receive their full principal at maturity.

8. At the time, however, Gonsalves and Clark were aware of the fact that AFCM likely would not be able to repay the notes when due unless they raised cash on hand in the short term, or increased their assets under management in the long term. In fact, they considered the promissory notes to be similar to non-investment grade bonds (i.e., high risk junk bonds). Based on their regular review of AFCM's financial statements, Gonsalves and Clark each knew that the firm's cash balance was often negative, and that its revenues were insufficient to cover its yearly business expenses, which contrasted with the more favorable impression that investors had of AFCM's financial health. Indeed, Gonsalves and Clark did not disclose to investors AFCM's full financial picture, including the risks of default and liquidity associated with the promissory notes.

9. As a result, Gonsalves and Clark succeeded in raising \$1.4 million in AFCM promissory notes and renewing an additional \$1.3 million in pre-existing promissory notes from 21 individual retail investors. Fourteen of the investors were AFCM's advisory clients whose portfolio accounts were managed by Gonsalves. In addition, based on their ongoing efforts to encourage investors to renew for two year periods or longer, the firm currently holds a promissory note balance of over \$2 million, even though its plan to increase its assets under management has not been successful. Thus far, AFCM has remained in operation, and has been able to make timely interest payments to noteholders as well as all requested redemptions of notes.

10. As AFCM's CEO, Gonsalves was responsible for making decisions regarding the promissory notes, overseeing the investment process, and ensuring the accuracy and completeness of the relevant disclosures made to prospective investors, including his advisory clients. Based on his approval of AFCM's expenses and periodic review of its financial statements, Gonsalves was aware of AFCM's cash flow issues and financial condition. Nonetheless, Gonsalves failed to exercise reasonable care in ensuring that investors, including AFCM's advisory clients, received appropriate information regarding AFCM's financial condition when deciding whether to invest in or renew the promissory notes. In particular, Gonsalves did not properly instruct Clark regarding the appropriate financial information and risk disclosures that should have been disclosed to investors in connection with the promissory notes. Nor did Gonsalves properly oversee his staff in ensuring that AFCM's financial

statements were provided to investors. To the extent that Gonsalves met with AFCM's clients who invested in the promissory notes, he also did not make the appropriate disclosures.

11. Similarly, as AFCM's President and COO, Clark failed to exercise reasonable care in making the appropriate disclosures to prospective investors, including advisory clients of AFCM. Among other things, Clark reviewed AFCM's financial statements on a regular basis and therefore was aware of the risk that AFCM could not pay the principal on the vast majority of promissory notes as they became due. Nevertheless, Clark led investors to believe that AFCM was profitable and failed to disclose the risks of default and liquidity associated with the promissory notes.

Violations of Law

12. As a result of the conduct described above, AFCM, Gonsalves, and Clark violated Section 17(a)(2) of the Securities Act. Section 17(a)(2) makes it unlawful, in the offer or sale of securities, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

13. As a result of the conduct described above, AFCM willfully² violated, Gonsalves violated, and Clark caused AFCM's violations of, Section 206(2) of the Advisers Act, which makes it "unlawful for any investment adviser . . . directly or indirectly to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

Undertakings

14. AFCM has agreed to the following undertakings:

a. AFCM's Chief Compliance Officer ("CCO") shall submit, within thirty (30) days from the end of the second quarter of 2018, a written and detailed report to AFCM and the staff of the Commission ("Report") regarding the status of all promissory notes from the date of the entry of this Order through the date of the Report. The Report shall include (1) records sufficient to identify all noteholders of AFCM, by name, amount, and maturity date, from the date of the entry of this Order through the date of the Report; (2) records sufficient to identify all correspondence, including all attachments and financial statements, to these noteholders from the date of the entry of this Order through the date of the Report; (3) AFCM's most recent financial statements. The Report shall also include an interim review of AFCM's policies and procedures

² 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)).

concerning the issuance or renewal of AFCM's promissory notes, including a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the CCO's recommendations for changes in or improvements to AFCM's policies and procedures and/or disclosures to clients (as well as any changes or improvements already implemented), and a procedure for implementing the recommended changes in or improvements to AFCM's policies and procedures and/or disclosures. This review supplements, and does not abrogate, AFCM's requirements to conduct an annual compliance review pursuant to the federal securities laws.

b. AFCM shall adopt all recommendations contained in the Report within sixty (60) days of the date of the Report.

c. Within ninety (90) days of AFCM's adoption of all of the recommendations in the Report that the CCO deems appropriate, as determined pursuant to the procedures set forth herein, AFCM shall certify in writing to the Commission staff that AFCM has adopted and implemented all of the CCO's recommendations in the Report. Unless otherwise directed by the Commission staff, the Report, certifications, and other documents required to be provided to the Commission staff shall be sent to Jennifer J. Lee, Assistant Regional Director, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104-4802, or such other address as the Commission staff may provide.

15. Recordkeeping. AFCM shall preserve for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of AFCM's compliance with the undertakings set forth in this Order.

16. Notice to Investors. Within ten (10) days of the entry of this Order, AFCM shall post prominently on the homepage of AFCM's website (<http://www.afcmportfolios.com>) a summary of this Order in a form and location acceptable to the Commission staff, with a hyperlink to the entire Order, for a period of twelve (12) months. Within thirty (30) days of the entry of this Order, AFCM shall provide a copy of the Order to each person who invested in or renewed AFCM promissory notes after December 1, 2012 via mail, e-mail, or such other method as may be acceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff. Furthermore, for a period of twenty-four (24) months from the entry of this Order, to the extent that AFCM is required to deliver a brochure to a client and/or prospective client pursuant to Rule 204-3 of the Advisers Act, AFCM shall also provide a copy of the Order to such client and/or prospective client.

17. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

18. Certifications of Compliance by Respondent AFCM. AFCM shall certify, in writing, compliance with its undertakings set forth above. The certification shall identify the

undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and AFCM agrees to provide such evidence. The certification and supporting material shall be submitted to Jennifer J. Lee, Assistant Regional Director, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104-4802, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549-6553, no later than ninety (90) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act and Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents AFCM, Gonsalves, and Clark cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 206(2) of the Advisers Act.

B. Respondent AFCM is censured.

C. Respondent AFCM shall pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. Payment shall be made in the following installments: \$12,500 within 90 days of the entry of this Order; \$12,500 within 180 days of the entry of this Order; \$12,500 within 270 days of the entry of this Order; and \$12,500 within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application.

D. Respondent Gonsalves shall pay a civil money penalty in the amount of \$25,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. Payment shall be made in the following installments: \$6,250 within 90 days of the entry of this Order; \$6,250 within 180 days of the entry of this Order; \$6,250 within 270 days of the entry of this Order; and \$6,250 within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application.

E. Respondent Clark shall pay a civil money penalty in the amount of \$25,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. Payment shall be made in the following installments: \$6,250 within 90 days of the entry of this Order; \$6,250 within 180 days of the entry of this Order; \$6,250 within 270 days of the entry of this Order; and \$6,250 within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application.

Payment must be made in one of the following ways:

- (1) Respondents may transmit payments electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents may make direct payments from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents 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 AFCM, Gonsalves, or Clark 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 Jennifer J. Lee, Assistant Regional Director, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104-4802.

F. 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, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they 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, Respondents agree that they 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 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.

G. Respondent AFCM shall comply with the undertakings enumerated in Section III, paragraphs 14 to 18, above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondents Gonsalves and Clark, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents Gonsalves and Clark under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents Gonsalves and Clark of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
Secretary