

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10546 / September 14, 2018

SECURITIES EXCHANGE ACT OF 1934
Release No. 84126 / September 14, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 5010 / September 14, 2018

INVESTMENT COMPANY ACT OF 1940
Release No. 33227 / September 14, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18768

In the Matter of

**CECIL GREGORY EARLS
AND THOMAS R. CAGGIANO,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTION 21C
OF THE SECURITIES EXCHANGE ACT OF
1934, SECTIONS 203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTION 9(b) 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 8A of the Securities Act of 1933 (“Securities Act”), Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203 (f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”) against Cecil Gregory Earls (“Earls”) and Thomas R. Caggiano (“Caggiano”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (“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 Respondents 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, Section 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act Of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”).

III.

On the basis of this Order and Respondents’ Offers, the Commission finds that:

Summary

This matter concerns false and misleading statements by Cecil Gregory Earls about the management of Kandax Capital Management, LLC, an unregistered hedge fund adviser that Earls formed, and its affiliated hedge fund, The Fincastle Fund, L.P. He has prior criminal and civil judgments entered against him for violating the federal securities laws. In 2005, he was sentenced to approximately ten years in prison and ordered to pay criminal restitution of \$21.9 million, nearly all of which is unpaid. In 2011, he was barred from acting as an officer or director of a public company.

Shortly after his release from prison, Earls formed an investment adviser entity and hedge fund and began soliciting investors. From 2015 through 2018, in connection with this hedge fund business, Earls made, or caused to be made, false and misleading statements to investors. As described below, on the Kandax website and in offering materials, Earls claimed Kandax had a management team consisting of Thomas Caggiano and two other individuals, and that Earls was a portfolio manager who did not exercise any “managerial control” over Kandax. These statements were materially false. Earls alone managed and controlled Kandax and Fincastle Fund. Caggiano, the purported “Managing Member” of Kandax, performed only limited administrative functions at Kandax, and the two other individuals held out as “Managing Directors,” were passive investors who had no role in managing Kandax.

Earls enlisted his friend Caggiano to hold the title of Managing Member because Earls had been unable on his own to open a brokerage account for Fincastle Fund due to his criminal history. Caggiano opened the Fincastle Fund brokerage account at Earls’ request. In doing so, Caggiano falsely represented to the brokerage firm that none of the officers or principals of Kandax or Fincastle Fund had a criminal conviction, and that Caggiano would be the only authorized user on

the account. Once opened, Caggiano provided Earls with the user name and password of the account, and Earls conducted or directed all trading and other transactions in the account.

As a result of the conduct described herein, Earls willfully violated the antifraud provisions of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. Caggiano willfully aided and abetted and caused Earls' violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder, and Advisers Act Section 206(4) and Rule 206(4)-8 thereunder.

Respondents

1. **Cecil Gregory (a/k/a "CG") Earls** ("Earls"), age 74, resides in New York, New York. Earls has never been registered with the Commission in any capacity. During the relevant time period, Earls managed and controlled Kandax, an unregistered investment adviser, and Fincastle Fund, its affiliated hedge fund.

2. **Thomas Caggiano** ("Caggiano"), age 73, resides in Washington, D.C. Caggiano has never been registered with the Commission in any capacity. During the relevant time period, Caggiano held the title of Managing Member of Kandax and Managing Member of Fincastle GP, LLC, the general partner of Kandax's affiliated hedge fund, Fincastle Fund.

Other Relevant Entity

3. **Kandax Capital Management, LLC** ("Kandax") is a Delaware limited liability company that operated from an office in New York, New York. During the relevant time period, Kandax was an unregistered investment adviser to Fincastle Fund. Kandax is no longer operating.

4. **The Fincastle Fund, L.P.** ("Fincastle Fund") is a Delaware limited partnership. Fincastle Fund's general partner is Fincastle GP, LLC, a Delaware limited liability company. During the relevant time period, Fincastle Fund was a pooled investment vehicle within the meaning of Rule 206(4)-8(b). Fincastle Fund has returned invested capital and accrued profits to investors and is no longer operating.

Previous Judgments Against Earls

5. In 2004, after a jury trial in the U.S. District Court for the Southern District of New York, Earls was convicted of 22 counts of securities fraud and mail and wire fraud, in connection with a fraud Earls perpetrated while he was the chairman and CEO of U.S. Technologies, Inc. The court sentenced Earls to 125 months in prison and ordered him to pay restitution of \$21.9 million. *U.S. v. Earls*, 1:03-CR-00364 (NRB) (S.D.N.Y.). In a related SEC civil action, Earls consented to a final judgment in 2011 that imposed injunctive relief and prohibited Earls from acting as an officer or director of a public company for a period of 20 years. *SEC v. Earls*, C.A. No. 02-2495 (JR) (D.D.C.).

Kandax and Fincastle Fund

6. Shortly after his release from prison in 2014, Earls began raising money to open a hedge fund that would invest in small-cap banks. Earls raised approximately \$600,000 from family and friends and formed Kandax, an unregistered investment adviser, and Fincastle Fund, the affiliated hedge fund. Between 2015 through 2018, Earls raised approximately \$625,000 in investments for Fincastle Fund. At all relevant times, Earls alone managed and controlled the operations of Kandax and Fincastle Fund.

Misrepresentations Regarding the Management of Kandax and Fincastle Fund

7. From 2015 through 2018, on the Kandax website, and in offering and marketing materials that he provided to investors, Earls made material misrepresentations about the management of Kandax and Fincastle Fund. He did this to create the false appearance that others were involved in management of the hedge fund operation, and to minimize his own role in the business due to his criminal history.

8. The Kandax website and the Private Placement Memorandum (“PPM”) for Fincastle Fund falsely identified two individuals as Managing Directors of Kandax, and provided biographies highlighting their business backgrounds. Neither of these individuals performed any management work at Kandax. Both of these individuals were long-time acquaintances of Earls who had invested in Kandax.

9. The Kandax website and the PPM for Fincastle Fund also identified Thomas Caggiano as the Managing Member of Kandax. The PPM stated that “[a]s the controlling person of the General Partner and the Investment Manager, Thomas R. Caggiano controls all of the Partnership’s operations and activities.” The PPM identified Earls as the portfolio manager, and stated “[Earls] is not a principal of either the General Partner and Investment manager and does not have managerial control over either entity.” These were materially false and misleading statements. Caggiano performed some work for Kandax, as directed by Earls. Caggiano did not manage Kandax or Fincastle Fund. Caggiano’s title notwithstanding, Earls alone managed and controlled Kandax and Fincastle Fund.

10. Earls made other false and misleading statements about Kandax’s purported “management team” in solicitation letters to prospective investors. For example, in letters to prospective investors in 2015 and 2016, Earls stated that “Fincastle and its investment adviser, Kandax, have a strong and experienced management team who know the sector quite well,” and are “deeply experienced in [the small cap banking] sector.” This was false and misleading because there was no “management team,” much less a “management team” with significant experience in the small cap banking sector.

Misrepresentations and Deceptive Acts in Opening and Accessing Brokerage Account

11. Earls enlisted his friend Caggiano to be the purported Managing Member of Kandax, in part because Earls was unable to open brokerage accounts due to his criminal history. At Earls' request, Caggiano signed applications and other documents to open a brokerage account for Kandax and Fincastle Fund. These applications and account opening documents contained materially false and misleading representations, including that none of the adviser's "principals, officers or authorized users" have a criminal conviction or regulatory history, and that Caggiano would be the only authorized user on the account. When opening this account, Earls and Caggiano both knew that Earls would control the account. Once opened, Caggiano provided Earls with his username and password, and Earls subsequently conducted or directed all trading and other transactions in the account.

Misrepresentation and Deceptive Acts Regarding Earls' Criminal History

12. In September 2015, Earls began soliciting a family investment office in Florida to invest money in Fincastle Fund. Earls sent numerous letters and emails to the office, and spoke to its representatives by phone. During these communications, Earls did not disclose the criminal or civil judgments entered against him.

13. On the advice of counsel, Earls included in the PPM for Fincastle Fund disclosures about the criminal and civil judgments entered against Earls. In October 2015, however, Earls sent the Florida family office a copy of the PPM that did not include the disclosures about his criminal and civil judgments.

Violations

14. As a result of the conduct described above, Earls willfully violated Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities; Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities; and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit an investment adviser from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in a pooled investment vehicle.

15. As a result of the conduct described above, Caggiano willfully aided and abetted and caused Earls' violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

Civil Penalties

16. Earls submitted a sworn Statement of Financial Condition dated April 18, 2018 and other evidence and has asserted his inability to pay a civil penalty.

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, Section 21C of the Exchange Act, and Sections 203(f) and (k) of the Advisers Act, it is hereby ORDERED that:

A. Earls cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule and 206(4)-8 thereunder.

B. Earls be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization;

Any reapplication for association by Earls will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Earls, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

C. Based upon Earls' sworn representations in his Statement of Financial Condition dated April 18, 2018, and other documents submitted to the Commission, the Commission is not imposing a penalty against Earls.

D. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

E. Caggiano cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(4) and Rule 206(4)-8 thereunder.

F. Caggiano be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization; and

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

Any reapplication for association by Caggiano will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Caggiano, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

G. Caggiano shall, within 30 days of the entry of this Order, 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 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 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 Thomas R. Caggiano 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 Brian Quinn, Assistant Director, Division of Enforcement, U.S. Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5020B.

H. 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, Caggiano agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of his payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Caggiano agrees that he 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 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 Caggiano 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.

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, and further, any debt for disgorgement, prejudgment interest, civil penalty, or other amounts due by Respondents 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 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