

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4973 / July 19, 2018

INVESTMENT COMPANY ACT OF 1940
Release No. 33162 / July 19, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18604

In the Matter of

MICHAEL DEVLIN,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO 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 CEASE-AND-
DESIST ORDER**

I.

The Securities and Exchange Commission (the “Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to 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 Michael Devlin (“Devlin” or “Respondent”).

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 Respondent and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to 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 Cease-and-Desist Order (the “Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

These proceedings concern Devlin's failure to disclose a material conflict of interest and obtain client approval of a transaction in which he had a conflict of interest. In May 2013, Devlin, then a managing partner and the Chief Compliance Officer ("CCO") of a private equity adviser ("Adviser"), arranged for an Adviser-managed fund to invest in a subsidiary of a portfolio company on the condition that a portion of the investment proceeds be used to purchase from Devlin a personal investment that he had previously made. Devlin did not disclose the conflicted transaction to the fund's limited partnership advisory committee ("LPAC") or obtain the LPAC's consent to the conflicted transaction. Such a disclosure to the LPAC and the LPAC's consent were required by Adviser's compliance policies and by the fund's limited partnership agreement ("LPA"). By negotiating for and entering into the conflicted transaction without the informed consent of the client, Devlin violated Section 206(2) of the Advisers Act.

Respondent

1. Devlin, age 58 and a resident of Nashville, Tennessee, and London, England, was a managing partner of Adviser between June 2001 and March 2015 and the CCO of Adviser between approximately 2011 and March 2015.

Other Relevant Entities

2. Adviser is an investment adviser registered with the Commission since October 2011 and based in Dallas, Texas, and Nashville, Tennessee. Adviser is the general partner and managing member of five private equity funds with total combined assets of approximately \$698 million as of December 31, 2017.

3. Pharos Capital Partners II-A, LP (the "Fund") is a private equity fund managed by Adviser.

4. Company A is a Massachusetts-based manufacturer of magnetic resonance imaging breast cancer detection systems. Between 2006 and 2015 (the "Relevant Period"), the Fund, along with a parallel private equity fund managed by Adviser, invested approximately \$20 million in Company A, obtaining a combined equity interest in Company A of approximately 25%.

5. Company B was a wholly-owned subsidiary of Company A and the entity through which Company A conducted its business in Taiwan during the Relevant Period.

6. Breast Cancer Detection Center (the "Center") was a Taiwanese entity that operated a breast cancer detection unit in a hospital in Taiwan during the Relevant Period. Company B, in part, funded the creation of the Center and, by 2013, owned a 19% interest in it.

Devlin's Personal Investment

7. Between 2007 and March 2015, Devlin was the Adviser managing partner responsible for overseeing the Fund's investment in Company A. In that role, he served as a member of the boards of directors of both Company A and Company B.

8. In 2007, Company B entered an agreement to place one of Company A's cancer detection systems in the Center.

9. At approximately the same time, Devlin and other board members of Company A made personal investments in the Center. Specifically, Devlin invested 6,000,000 Taiwanese dollars, or roughly \$187,740 USD, in the Center. The funds from the investments of Devlin and the other board members were to be used to capitalize the Center and assist in its purchase of a cancer detection system from Company B.

10. Devlin never disclosed his Center investment to the Fund or the Fund's LPAC. Between 2007 and May 2013, Devlin received no return or dividend of any kind from his Center investment.

The May 2013 Transaction

11. By early 2013, Company A was in critical need of cash and working capital. Devlin offered to arrange a loan to Company A from an Adviser-managed fund on the condition that a portion of the loan proceeds be used to purchase his investment in the Center. Company A agreed.

12. Thereafter, on behalf of the Fund, Devlin negotiated and signed a May 6, 2013 Note Purchase and Guaranty Agreement (the "May 6 Agreement") by which the Fund purchased a total of \$500,000 in secured notes from Company C, a 100%-owned subsidiary of Company B.

13. The May 6 Agreement provided for the Fund to purchase the notes in two separate tranches: \$250,000 of "Initial Notes" and \$250,000 of "Additional Notes." Under the terms of the May 6 Agreement, Company C was required to use a portion of the proceeds from the Initial Notes to repay an intercompany account payable owed to Company B, which in turn was required to use those proceeds to purchase Devlin's ownership interest in the Center. Moreover, under the terms of the May 6 Agreement, only after Devlin's ownership interest had been purchased would the Fund make the second investment by purchasing the second tranche of Additional Notes from Company C.

14. On May 8, 2013, Company B paid \$187,740 to Devlin, who then transferred to Company B his ownership interest in the Center.

15. Adviser's compliance policies and the Fund's LPA both provided that conflicts of interest must be disclosed to the Fund's LPAC, which then could consent to the conflict on behalf of the Fund. Although Devlin told certain Adviser employees that a condition of the

Fund's purchase of the notes of Company C was Company B's purchase of his Center ownership interest, Devlin did not disclose to the Fund's LPAC, or obtain the consent of the Fund's LPAC for, either his personal investment in the Center or his use of client assets to purchase that investment.

16. Devlin's interests in the negotiation and execution of the May 6 Agreement created a conflict of interest that had never been disclosed to the Fund and to which the Fund had never consented. By failing to make such disclosures to, and obtain the consent of, the Fund's LPAC, Devlin breached his fiduciary duty to his advisory client.

Subsequent Sale of the Notes

17. Effective March 27, 2015, Devlin resigned as a managing partner and CCO of Adviser.

18. The Fund ultimately did not lose money on its investment in the Company C because (i) before resigning, Devlin arranged for the notes to be re-sold at face value to an unaffiliated third party, and (ii) in June 2015, Adviser paid the Fund the interest that had accrued on the notes prior to their resale.

19. As a result of the conduct described above, Devlin willfully¹ violated Section 206(2) of the Advisers Act, which makes it unlawful "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." A violation of Section 206(2) may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)). Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. *Id.*

IV.

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

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

A. Respondent Devlin cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

B. Respondent Devlin be, and hereby is:

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)).

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, 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,

with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent 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 the Respondent, 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.

D. Respondent Devlin shall be, and hereby is, subject to the following limitations on his activities:

Respondent shall not act in a compliance capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

E. Any application to act in such a compliance capacity will be subject to the applicable laws and regulations governing the reentry process, and permission to act in such a compliance capacity 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 the Respondent, 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.

F. Respondent Devlin shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$80,000 to the Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Securities Exchange Act of 1934. 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 Devlin as 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 Stephen E. Donahue, Assistant Regional Director, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia 30326, or such other address as the Commission's staff may provide.

G. 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, 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 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 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 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.

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