

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5416 / December 10, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19615

In the Matter of

**KORNITZER CAPITAL
MANAGEMENT, INC. and
JOHN C. KORNITZER**

Respondents,

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e), 203(f)
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 Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against Kornitzer Capital Management, Inc. (“KCM”) and John C. Kornitzer (“Kornitzer” and, collectively with KCM, “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, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) 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 finds that:

Summary

This matter arises from registered investment adviser, KCM's, and its president, CEO, and majority owner, Kornitzer's, repeated failures to follow client instructions to reduce high concentrations in securities of a single company ("Company A") held by four collective investment trusts ("CITs"). As manager of the CITs, KCM began purchasing the securities of Company A in 2011 and, as of December 2015, Company A securities were between 30% to 89% of the CITs' assets. From 2016 to 2018 (the "Relevant Period"), the board members of the CITs repeatedly requested that Respondents reduce concentration levels in Company A securities to 10% in order to bring the CITs into compliance with new investment policies put in place in 2016 and to provide a specific plan to bring the CITs into compliance. Respondents did not provide a plan, but told the board in February 2016 that they would reduce the concentrations to 10% within 12 to 18 months. However, Respondents failed to do so and concentrations remained high until late 2018. In August 2018, a plan was finally put in place which brought the concentration levels into compliance as of December 31, 2018. As a result of Respondents' failures to follow client directions and investment policies, the CITs incurred significant losses after Company A's stock price dropped significantly in 2018.

Additionally, prior to February 2018, KCM failed to adopt or implement, and after February 2018, KCM failed to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with adhering to client objectives and restrictions.

As a result, KCM violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, and Kornitzer violated Section 206(2) of the Advisers Act and caused KCM's violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

Respondents

1. **Kornitzer Capital Management, Inc.** ("KCM"), a Kansas corporation headquartered in Shawnee Mission, Kansas has been registered with the Commission as an investment adviser since 1989. KCM is the investment adviser to the four CITs and has been since their launch. It also is the adviser to other collective investment trusts, mutual funds, and separately managed private and institutional accounts. According to its most recently filed Form ADV, Part 2A, KCM manages accounts with combined assets under management of approximately \$6.8 billion.

2. **John C. Kornitzer** ("Kornitzer"), age 74 and a resident of Fairway, Kansas, owns approximately 75% of KCM through a series of trusts and has been its president and CEO since he founded the company in 1989. During the Relevant Period, Kornitzer served as KCM's chief investment officer and also as the portfolio manager of the CITs until August 2018.

Other Relevant Entities

3. **Trust Company** (“TC”), a corporation headquartered in Kansas, is majority owned by and for the benefit of Kornitzer’s immediate family and is an affiliated entity of KCM. TC sponsors the CITs and acts as their trustee, administrator, and custodian. The CITs are investment vehicles that invest in securities and are offered as investments to TC’s clients. TC’s board, consisting of five members, managed the CITs and was responsible for the hiring and oversight of KCM on behalf of the CITs.

4. The four CITs involved are as follows: (a) **The Collective Equity Investment Fund of Retirement, Pension, and Profit Sharing Trusts** (“Retirement Equity Fund”), a collective investment trust offered by TC starting in 1994 for retirement assets; (b) **The Collective Fixed Investment Fund of Retirement, Pension, and Profit Sharing Trusts** (“Retirement Fixed Fund”), a collective investment trust offered by TC starting in 1994 for retirement assets; (c) **The Common Fixed Fund of Personal Trusts** (“Common Fixed Fund”), a collective investment trust offered by TC starting in 1997 for non-retirement assets; and (d) **The Common Equity Funds of Personal Trusts** (“Common Equity Fund”), a collective investment trust offered by TC starting in 1997 for non-retirement assets. KCM served as the investment adviser to each of the CITs during the Relevant Period.

Facts

5. Starting in 2011, Kornitzer, who was the KCM portfolio manager for the CITs and selected the investments, began making large investments for each of the CITs in equity and debt securities in Company A. Throughout the Relevant Period, Company A’s equity securities traded on the New York Stock Exchange. By the end of 2015, based in part on significant appreciation, the CITs became highly concentrated in Company A, with Company A equity and debt securities making up 30% of the assets in Common Equity Fund and the Retirement Equity Fund, 79% in the assets in the Retirement Fixed Fund, and 89% of the assets in the Common Fixed Fund.

6. In February 2016, the stock price of Company A dropped significantly. The TC board recognized that there was substantial risk associated with continued high concentrations in Company A securities, and instructed KCM to develop a plan to reduce the concentrations of Company A securities in the four CITs to 10% in 12 to 18 months. In February 2016, Respondents represented to TC’s board that the CITs would be brought into compliance with the 10% concentrations limits within 12 to 18 months depending on market conditions.

7. In May 2016, TC’s board of directors formally adopted new investment policies for the CITs restricting investment in a single issuer of debt and equity securities to 10%, and advised Respondents of the new investment policies.

8. As of May 2016, KCM’s compliance manual lacked any policies and procedures requiring that fund investments be consistent with client objectives and restrictions. Kornitzer reviewed and approved KCM’s policies.

9. During 2016, KCM took steps to reduce concentrations in Company A securities, but the CITs continued to have concentrations in Company A securities well exceeding the 10% limit outlined in the investment policies. At the end of 2016, the concentrations in Company A securities were 28% in the Retirement Equity Fund, 28% in the Common Equity Fund, 39% in the Common Fixed Fund, and 53% in the Retirement Fixed Fund.

10. On April 6, 2017, TC's board requested a plan from KCM and Kornitzer concerning the anticipated timing and process for continuing to reduce the concentrations in Company A securities. KCM and Kornitzer failed to provide any plan to the TC board in response to this request.

11. On July 13, 2017, TC's board sent a memorandum to KCM requesting a written plan from KCM to bring the concentrations of Company A securities in the CITs into compliance with the investment policies. KCM and Kornitzer again failed to provide any plan to the TC board or to provide any specific information to the TC board regarding the timing and process for reducing the concentrations. Rather, KCM informed the TC board that it was extending the timeframe for reducing the concentrations in Company A securities to February 2018 (instead of the prior 12 to 18 month timeframe that would conclude in August 2017).

12. On August 2, 2017, TC's board sent a letter to KCM asking it to confirm that all CITs would be brought into compliance with the concentration limits by February 1, 2018 and that KCM would start reducing concentrations in the very near term. KCM responded that it was impossible for it to guarantee a timeframe for compliance with the investment policies and failed to confirm that it was going to start reducing concentrations in the near term.

13. During 2017, due to appreciation in the value of Company A securities, sales of other assets held by the CITs, and lack of significant sales of Company A securities, the concentrations in Company A securities in the CITs actually increased rather than decreased from the prior year. As of December 31, 2017, the concentrations in Company A securities were 37% in the Retirement Equity Fund (a 9% increase), 36% in the Common Equity Fund (an 8% increase), 61% in the Common Fixed Fund (a 22% increase), and 74% in the Retirement Fixed Fund (a 21% increase).

14. In the first half of 2018, the TC board continued to engage in discussions with KCM and Kornitzer concerning the over concentrations in Company A securities in the CITs, but KCM and Kornitzer still failed to reduce the concentrations to comply with the 10% limit. In February 2018, KCM added a new compliance policy requiring that investments be consistent with client objectives and restrictions. However, despite this new policy, as of June 30, 2018—more than two years after the board's initial request that KCM and Kornitzer reduce the concentration of Company A to no more than 10% of the CITs' assets—Company A securities still well exceeded the 10% limit set forth in the investment policy statements. Specifically, the concentrations in Company A securities were 25% in the Retirement Equity Fund, 22% in the Common Equity Fund, 52% in the Common Fixed Fund, and 72% in the Retirement Fixed Fund.

15. In August 2018, at the request of TC’s board, Kornitzer agreed to step down as the CITs’ portfolio manager and was replaced by other KCM portfolio managers. That same month, the new CIT portfolio managers submitted a plan to the TC board to reduce concentrations in Company A securities to the 10% limit by December 31, 2018. Within five months of submitting the plan, KCM achieved compliance with the 10% concentration limit.

16. In December 2018, well after the beginning of the Commission’s investigation, KCM and TC made contributions to the Retirement Equity Fund and the Retirement Fixed Fund to compensate the CITs for millions of dollars in losses suffered as a result of overconcentrations in Company A securities during 2018. The price of Company A’s equity securities dropped from \$33.81 as of December 29, 2017, to \$23.85 as of July 31, 2018, and to \$16.10 as of December 31, 2018.

17. Based on foregoing, Kornitzer and KCM breached the fiduciary duties they owed as investment advisers to the CITs by failing to comply with directives from TC’s board, including failing to develop a concrete plan to reduce concentrations prior to August 2018 and failing to comply with the investment policies.

Violations

18. Section 206(2) of the Advisers Act makes it unlawful for an adviser, directly or indirectly, to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Scier is not required to establish a violation of Section 206(2), which 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, 194-95 (1963)). As a result of the conduct described above, Kornitzer and KCM willfully violated Section 206(2).¹

19. Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder require a registered investment adviser to, among other things, “[a]dopt and implement written policies and procedures reasonably designed to prevent violation” of the Advisers Act and its rules. As a result of the conduct described above, KCM willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7, and Kornitzer caused KCM’s violations of these provisions.

¹ “Willfully,” for purposes of imposing relief under Section 203(e) of the Advisers Act, “means no more than 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.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has “willfully omit[ed]” material information from a required disclosure in violation of Section 207 of the Advisers Act).

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 Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

- A. Respondents KCM and Kornitzer shall cease and desist from committing or causing any violations and any future violations of Section 206(2) and Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.
- B. Respondents KCM and Kornitzer are censured.
- C. Respondents KCM and Kornitzer shall pay disgorgement, prejudgment interest, and a civil money penalty as follows:
 - (1) Respondent KCM shall pay disgorgement of \$4,978,448 of which \$4,132,132 is deemed satisfied by the payments KCM previously made in December 2018 to the Retirement Fixed Fund and the Retirement Equity Fund and/or investors in those funds. Thus, KCM shall pay the remaining disgorgement amount of \$846,316 and prejudgment interest of \$80,679 consistent with the provisions of this Subsection C.
 - (2) KCM and Kornitzer shall pay, joint and severally, a civil money penalty of \$2,700,000 consistent with the provisions of this Subsection C.
 - (3) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to the Common Fixed Fund and the Common Equity Fund, and/or past and present investors in those CITs from January 1, 2016 through December 31, 2018 affected by the conduct described above (collectively "Distribution Recipients"). 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 Respondents' 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 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 one or both

Respondents 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.

- (4) Within ten (10) days of issuance of this Order, Respondents shall deposit the full amount (\$3,626,995) of the disgorgement, prejudgment interest, and civil monetary penalties (the “Fair Fund”) that they each have been ordered to pay into an escrow account at a financial institution not unacceptable to the Commission staff and Respondents shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 31 U.S.C. § 3717.
- (5) Respondents shall be responsible for administering the Fair Fund and may hire a professional acceptable to the Commission staff, at its own costs, to assist them in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by Respondents and shall not be paid out of the Fair Fund.
- (6) Respondents shall distribute from the Fair Fund to each of the Distribution Recipients pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection C. The Calculation shall be subject to a *de minimis* threshold. No portion of the Fair Fund shall be paid to any individual investor accounts in which any Respondent or any of KCM’s current or former officers or directors have a financial interest.
- (7) Respondents shall, within ninety (90) days of the entry of this Order, submit a proposed Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the staff, Respondents, along with any third-parties or professionals retained by Respondents to assist in formulating the methodology for its Calculation and/or administration of the Distribution, shall make themselves available for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the staff with an opportunity to ask questions. Respondents shall also provide to the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondents’ proposed Calculation or any of its information or supporting documentation, Respondents shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within ten (10) days of the date that Respondents are notified of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

- (8) After the Calculation has been approved by the Commission staff, Respondents shall submit a payment file (the “Payment File”) for review and acceptance by the Commission staff demonstrating the application of the methodology to the Distribution Recipients. The Payment File should identify, at a minimum: (1) the name of each Distribution Recipient, (2) the exact amount of the payment to be made from the Fair Fund to each Distribution Recipient, and (3) the amount of any *de minimis* threshold to be applied.
- (9) Respondents shall complete the disbursement of all amounts payable to Distribution Recipients within 90 days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in Paragraph (13) of this Subsection C.
- (10) If, after Respondent’s reasonable efforts to distribute the Distribution Fund pursuant to the approved Payment File, Respondents are unable to distribute any portion of the Fair Fund for any reason, including an inability to locate a Distribution Recipient or any factors beyond Respondents’ control, Respondents shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Securities Exchange Act of 1934, pursuant to the instructions set forth in Paragraph D, below, when the distribution of the funds is complete and before the final accounting provided for in Paragraph (12) of this Subsection C is submitted to Commission staff.
- (11) A Fair Fund is a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code (“IRC”), 26 U.S.C. §§ 1.468B.1-1.468B.5. Respondents shall be responsible for any and all tax compliance responsibilities associated with the Fair Fund, including but not limited to tax obligations resulting from the Fair Fund’s status as a QSF and the Foreign Account Tax Compliance Act (“FATCA”), and may retain any professional services necessary. The costs and expenses of tax compliance, including any such professional services, shall be borne by Respondents and shall not be paid out of the Fair Fund.
- (12) Within 150 days after Respondents complete the distribution of all amounts payable to Distribution Recipients, Respondents shall submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall be in a format to be provided by the Commission staff. The final accounting and certification shall include, but not be limited to: (1) the amount paid to each Distribution Recipient, with reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of money transferred; (4) the amount of any returned payment and the date received; (5) a description of any effort to locate a prospective Distribution Recipient whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that Respondents have made payments from the Fair Fund to

affected investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies KCM and Kornitzer as Respondents in these proceedings and the file number of these proceedings to Kimberly L. Frederick, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294. Respondents shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

- (13) The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Fair Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.
- D. Respondents' transfer of any undistributed funds to the Commission for transmittal to the United States Treasury must be made in one of the following ways:
- (a) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
 - (b) Respondents 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
 - (c) 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 KCM and Kornitzer as Respondents 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 Kimberly L. Frederick, Assistant Regional Director, Asset Management Unit, Denver Regional Office, U.S. Securities and Exchange Commission, Bryon G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, CO 80294, or such other address as the Commission staff may provide.

V.

It is further Ordered that, 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 Kornitzer, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Kornitzer 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 Kornitzer 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.

Vanessa A. Countryman
Secretary