

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5747 / June 4, 2021

ADMINISTRATIVE PROCEEDING
File No. 3- 20360

In the Matter of

Michelle E. MacDonald,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Michelle E. MacDonald (the “Respondent” or “MacDonald”).

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 her 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 Cease-and-Desist Proceedings Pursuant to Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹

Summary

From late 2015 through 2017, Michelle E. MacDonald, the Chief Financial Officer of VII Peaks Co-Optivist Income BDC II, Inc. (the "BDC"), a business development company, and Vice President of Compliance at VII Peaks Capital, LLC ("VII Peaks"), the BDC's investment adviser, caused VII Peaks to breach its fiduciary duty to the BDC. On multiple occasions, when the BDC received due diligence fees for loans it made to portfolio companies, MacDonald caused the BDC to transfer the fees to VII Peaks despite knowing that the agreements identified the BDC as the recipient of the fees and not being aware of any obligation to transfer the fees to VII Peaks. MacDonald also failed to disclose or seek approval from the BDC's Board of Directors to have VII Peaks retain the fees. By her conduct, MacDonald was a cause of VII Peaks' violations of Section 206(2) of the Investment Advisers Act.

Respondent

1. **Michelle E. MacDonald ("MacDonald")**, age 53, resides in San Francisco, California. From April 2015 to April 2019, MacDonald was CFO of the BDC and VP of Compliance at VII Peaks. She continues to serve as the CFO of the BDC and since May of 2019 also serves as the Chief Compliance Officer of VII Peaks. She was formally a registered representative of a FINRA-member firm and previously held Series 7, 24, and 66 licenses.

Other Relevant Entities and Individuals

2. VII Peaks Co-Optivist Income BDC II, Inc., incorporated in Maryland in 2011, is a non-diversified closed-end investment company that elected to be regulated as a business development company pursuant to Section 54(a) of the Investment Company Act. It has been registered with the Commission since 2012.

3. VII Peaks Capital, LLC, located in Walnut Creek, California, was founded in 2009 and has been registered with the Commission as an investment adviser since June 2010. VII Peaks is the investment adviser to the BDC and private funds, and manages their assets, including selecting the appropriate investments. According to its most recently filed Form ADV Annual Updating Amendment dated March 31, 2021, VII Peaks reported just under \$27.8 million in regulatory assets under management.

4. Gurprit Chandhoke ("Chandhoke"), age 46, resides in Santa Monica, California. Chandhoke is the principal, managing member, co-founder, and chief investment officer of VII Peaks. He also serves as the Chairman of the Board of Directors and Chief Executive Officer and

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

President of the BDC. He was formerly a registered representative of a FINRA-member firm and holds Series 7, 63, and 66 licenses and previously held a Series 65 license. As the chief investment officer of VII Peaks, he recommended and determined all investments for the BDC.

Background and MacDonald's Conduct

5. Prior to September 2015, VII Peaks through Chandhoke, its chief investment officer and a managing member, invested the BDC's assets primarily in publicly traded discounted corporate debt, senior secured loans, and equity-linked debt securities of public and private companies trading on the secondary and publicly traded loan market. Beginning in 2015 and continuing through at least 2017, VII Peaks and Chandhoke changed their strategy and began placing the BDC's investments into direct debt financing to companies in the form of secured loans. The loan agreements for these loans ("loan agreements") typically had 24-month maturities with interest rates at about 12% to 13% payable on a monthly or quarterly basis. Unlike the publicly traded debt securities, the loan agreements could generate significant income for the BDC through fees the portfolio companies paid. Such income was important to the BDC because it could be used to pay dividends to investors and cover expenses.

6. Until mid-2017, many of the loan agreements provided that the portfolio companies would pay due diligence fees to the BDC, rather than VII Peaks. In practice, the BDC deducted the due diligence fee and other fees when making the loans, and provided the balance of the loans to the portfolio companies. The BDC then transferred the due diligence fees to VII Peaks. The BDC's Board of Directors understood that these fees were transferred to VII Peaks for the purpose of paying third-party experts who conducted the due diligence. In fact, VII Peaks did not hire third-party experts, but instead retained the fees without disclosing to the Board that it was doing so.

7. From January 1, 2015 through December 2018, the advisory agreement between VII Peaks and the BDC provided that the BDC was to pay VII Peaks 2% of the net asset value of the BDC as an annual fee and, under certain circumstances, VII Peaks could be entitled to a 20% performance fee. The responsibilities of VII Peaks in return for its advisory fee included the performance of "due diligence on prospective portfolio companies." MacDonald knew that under the advisory agreement, the BDC paid VII Peaks, in part, to conduct due diligence on the portfolio companies. MacDonald as the CFO of the BDC was responsible for ensuring that appropriate payments were made by the BDC.

8. In late 2015, VII Peaks received \$25,000 in due diligence fees for a loan the BDC made to a portfolio company. The agreement between the BDC and the portfolio company stated that the portfolio company would pay a due diligence fee to the BDC. MacDonald knew the agreement stated that the portfolio company was to pay the BDC, not VII Peaks. She was unaware of any obligation by the portfolio company or the BDC to pay VII Peaks the due diligence fees. However, she failed to exercise reasonable care by causing the \$25,000 in diligence fees to be transferred to VII Peaks and by failing to disclose to the BDC's Board of Directors that VII Peaks would retain those fees.

9. In 2016, VII Peaks received \$475,000 in due diligence fees for loans made by the BDC to portfolio companies. At the time the loan agreements were signed and executed, the

agreements provided that the portfolio companies would pay the BDC the due diligence fees. MacDonald was unaware of any obligation by the portfolio company or the BDC to pay VII Peaks the due diligence fees. Nonetheless, MacDonald she failed to exercise reasonable care and caused the BDC to pay the \$475,000 to VII Peaks and did not disclose to the BDC's Board of Directors that VII Peaks would retain those fees.

10. On March 30, 2017, VII Peaks filed its annual Form ADV brochure with the Commission, which for the first time disclosed that it was receiving the due diligence fees, and that those fees created a potential conflict of interest for VII Peaks. The BDC's Form 10-K for fiscal year 2016, which was approved by the Board of the BDC and filed with the Commission in June 2017, disclosed that due diligence fees received by the BDC would be remitted to VII Peaks as the collateral and administrative agent. MacDonald, however, failed to exercise reasonable care to determine that approval was sought from the BDC's Board of Directors for VII Peaks to retain all of these fees.

11. In 2017, VII Peaks received \$222,500 in due diligence fees for loans made by the BDC to portfolio companies. At the time the loan agreements were signed and executed, the agreements provided that the portfolio companies would pay the BDC the due diligence fees. Nevertheless, MacDonald failed to exercise reasonable care and caused these fees to be transferred to VII Peaks even though she was unaware of any obligation by the portfolio company or the BDC to pay VII Peaks the due diligence fees. She also did not disclose to the BDC's Board of Directors that VII Peaks would retain these fees.

Violation

12. Section 206(2) of the Advisers Act prohibits investment advisers from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *In the Matter of KPMG Peat Marwick LLP*, Admin. Proc. No. 3-9500 (2001). As a result of the conduct described above, MacDonald was a cause of VII Peaks' and Chandhoke's violations of Section 206(2) of the Advisers Act.

IV.

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

Accordingly, pursuant to Section 203(k) of the Advisers Act, it is hereby ORDERED that:

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

B. Respondent MacDonald shall pay a civil money penalty in the amount of \$20,000 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). Payment shall be made in the following installments: \$2,600 within 90 days; \$5,800 within 180 days; \$5,800 within 270 days; and \$5,800,

plus any additional interest due, within 360 days. Payments shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury.

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 Michelle E. MacDonald, 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 Monique Winkler, Associate Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

C. 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 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.

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