**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 6438 / September 28, 2023**

**ACCOUNTING AND AUDITING ENFORCEMENT**
**Release No. 4464 / September 28, 2023**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-21750**

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| **In the Matter of**<br><br>**FOREPONT CAPITAL LLC,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO 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 Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Forepont Capital LLC ("Forepont," or the "Respondent").

## II.

In anticipation of the institution of these proceedings, the Respondent has submitted an Offer of Settlement ("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 it and the subject matter of these proceedings, which are admitted, the Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to 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 the Respondent's Offer, the Commission finds that:

### Summary

1. Forepont is a registered investment adviser and committed multiple violations of the Advisers Act with respect to the two private funds that it advised. First, Forepont failed to timely distribute annual audited financial statements prepared in accordance with generally accepted accounting principles ("GAAP") to the investors in the two private funds for fiscal years 2020 and 2021, resulting in violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, commonly referred to as the "custody rule."

2. Second, Forepont engaged in principal transactions with one of the two private funds without disclosing to its client, the fund, in writing prior to completion of the transactions that Forepont was acting as principal and without obtaining the client's consent to the transactions. In March 2021, Forepont arranged for transfers to the fund, retroactive to the fund's inception on September 30, 2020, of multiple securities held by two Forepont officers and co-owners and a third senior associated person: (1) its chief executive officer ("CEO"), who was also its chief investment officer ("CIO") and a co-owner; (2) its chief financial officer ("CFO"), who was also its chief compliance officer ("CCO") and a co-owner; and (3) one of Forepont's venture partners. In exchange, the three individuals received equity interests in the fund. Because these three individuals were officers, owners and/or senior associated persons of Forepont, these transfers constituted principal transactions between Forepont and the fund and therefore required Forepont to provide the requisite written disclosure to, and obtain prior consent from, the fund. Forepont failed to do so, resulting in violations of Section 206(3) of the Advisers Act.

3. Third, the transferred assets included securities of a company whose CEO and co-founder is the brother of Forepont's CEO and securities of a company whose founder, chairman of the board, and chief innovation officer is the Forepont venture partner whose securities were also transferred to the fund. In addition, all the securities transferred to the fund for purposes of these in-kind exchanges had been acquired by the individuals prior to September 30, 2020 but were transferred to the fund at the individuals' purported cost basis in those securities. Because Forepont did not provide advance disclosure to the fund of these material facts concerning the transfers and the associated conflicts of interest or the relationships between Forepont and the individuals whose securities were transferred to the fund, Forepont also violated its fiduciary duty to its client and thereby violated Section 206(2) of the Advisers Act in connection with these retroactive transfers.

4. Finally, Forepont also failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder, resulting in a violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, commonly referred to as the "compliance rule."

## Respondent

5. Forepont is a Delaware limited liability company with its principal office and place of business in White Plains, New York. Forepont has been registered with the Commission as an investment adviser since May 2020. According to Forepont's Form ADV filed in March 2023, it has approximately $82 million in regulatory assets under management in two pooled investment vehicles.

## Facts

Background

6. During the relevant period, a Forepont affiliate was the general partner of, and Forepont served as investment adviser for, Forepont Capital Partners Fund 2, L.P ("Cayman Fund"). Forepont also served as investment adviser and investment manager for Forepont Capital Partners Fund II FPCI ("French Fund"), a private equity fund organized under the laws of France. As investment manager of the French Fund, Forepont had the authority to obtain possession of, or had access to, the French Fund's funds and securities. The stated investment strategy for both funds focused on equity investments in pharmaceutical, biotech, life-sciences, and technology startups.

Custody Rule Failures

7. The custody rule is designed to protect investment advisory clients from the misuse or misappropriation of their funds and securities. It requires that registered advisers who have custody of client funds or securities implement an enumerated set of requirements to prevent loss, misuse, or misappropriation of those assets.

8. An investment adviser has custody of client assets if it or a related person holds, directly or indirectly, client funds or securities, or if it has the ability to obtain possession of, or has access to, those assets, including, among other things, by acting as a managing member of a limited liability company, a general partner of a limited partnership or a comparable position for another type of pooled investment vehicle. *See* Rule 206(4)-2(d)(2). Because an affiliate of Forepont was the general partner of the Cayman Fund and Forepont was the investment manager of the French Fund, Forepont had custody of the assets of the two funds as defined in Rule 206(4)-2.

9. A registered investment adviser who has custody of client assets must, among other things: (1) ensure that a qualified custodian maintains the client assets; (2) notify the client in writing of accounts opened by the adviser at a qualified custodian on the client's behalf; (3) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients, except if the client is a limited liability company or a limited partnership for which the adviser or a related person is a managing member, general partner, or comparable position for another type of pooled investment vehicle, the account statements must be sent to each member or limited partner; and (4) ensure that client funds and securities are verified by actual

examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser. *See* Rule 206(4)-2(a)(1)-(4).

10. The custody rule provides an alternative to complying with the requirements of Rule 206(4)-2(a)(2), (3), and (4) for investment advisers to limited liability companies, limited partnerships or other types of pooled investment vehicles, such as the two Forepont funds at issue. The custody rule provides that an investment adviser "shall be deemed to have complied with" the independent verification requirement and is not required to satisfy the notification and accounts statements delivery requirements with respect to a fund if the fund is subject to audit at least annually and "distributes [the fund's] audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members . . .) within 120 days of the end of [the fund's] fiscal year" ("Audited Financials Alternative"). *See* Rule 206(4)-2(b)(4). The accountant performing the audit must be an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB"). *See* Rule 206(4)-2(b)(4)(ii). An investment adviser to a limited liability company or limited partnership that fails to meet the requirements of the Audited Financials Alternative to timely distribute audited financial statements prepared in accordance with GAAP would need to satisfy all of the requirements of Rules 206(4)-2(a)(2), (3), and (4) in order to avoid violating the custody rule.

11. While Forepont stated in its relevant Forms ADV that it was relying on the Audited Financials Alternative to comply with the custody rule, Forepont did not satisfy the requirements of the Audited Financials Alternative with respect to either of the two funds. Forepont engaged an independent, PCAOB-registered accounting firm to conduct an annual audit of the financial statements of the French Fund and Cayman Fund for fiscal years 2020 and 2021, but the audit firm did not complete the audits and issue audit reports until well after 120 days following the end of both years. Accordingly, audited financial statements were not distributed by Forepont to the investors in the two funds until long after 120 days of the end of the respective fiscal years, as set forth in the table below:

| Fund | End of Fiscal Year | Date Distribution Required | Date Distributed | Days Late |
|---|---|---|---|---|
| French Fund | December 31, 2020 | April 30, 2021 | December 14, 2022 | 593 days |
| Cayman Fund | December 31, 2020 | April 30, 2021 | December 14, 2022 | 593 days |
| French Fund | December 31, 2021 | April 30, 2022 | December 14, 2022 | 229 days |
| Cayman Fund | December 31, 2021 | April 30, 2022 | December 15, 2022 | 230 days |

12. Because Forepont did not satisfy the requirements of the Audited Financials Alternative, Forepont was required to comply with each of the provisions of Rules 206(4)-2(a)(2), (3), and (4), which it failed to do. For example, Forepont did not ensure that client funds and securities were verified by actual examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser, in accordance with Rule 206(4)-2(a)(4).

Prohibited Principal Transactions and Undisclosed Conflicts of Interest

13. On March 1, 2021, the Cayman Fund, acting through Forepont, acquired equity interests in four companies from two individuals who were officers and co-owners of Forepont and a third individual who was also a senior associated person of Forepont: (1) Forepont's CEO, CIO and co-owner; (2) its CFO, CCO and co-owner; and (3) a Forepont venture partner. In exchange, these three individuals received limited partnership interests in the Cayman Fund. Although these in-kind transfers occurred on March 1, 2021, they were deemed to be effective as of September 30, 2020, the date of the Cayman Fund's initial close. The individuals purchased the transferred securities at various times prior to September 30, 2020.

14. Because the three individuals were officers, owners and/or senior associated persons of Forepont, these transfers constituted principal transactions between Forepont, as investment adviser, and its advisory client, the Cayman Fund. Accordingly, Section 206(3) of the Advisers Act required Forepont to disclose to the Cayman Fund in writing, prior to completion of the transfers, that Forepont was acting as principal in these transactions and to obtain the Cayman Fund's consent to each transaction. Forepont and its affiliates could not consent to the transactions on behalf of the Cayman Fund because of the conflicts of interest the transactions presented, and the Cayman Fund did not have a limited partners' committee with the requisite authority to act on behalf of the limited partners in the event of a conflict. Accordingly, Forepont was required to provide the requisite written disclosure to the Cayman Fund's limited partners before completion of the transactions and to obtain their consent to each transaction. Forepont failed to do so.

15. Forepont also failed to disclose to the limited partners of the Cayman Fund all the material facts concerning additional conflicts of interest arising from the transfers. The transfers included securities of a company whose CEO and co-founder is the brother of Forepont's CEO and securities of a company whose founder, chairman of the board, and chief innovation officer is the Forepont venture partner whose shares were also transferred to the Cayman Fund. Moreover, all the securities transferred to the Cayman Fund for purposes of these in-kind exchanges had been acquired by the individuals at various times prior to the fund's close but were transferred to the fund at the individuals' purported cost basis in those securities. Because Forepont did not provide advance disclosure to the limited partners of the Cayman Fund of these material facts concerning the transfers and the associated conflicts of interest or the relationships between Forepont and the individuals whose securities were transferred to the fund, Forepont also violated its fiduciary duty to the Cayman Fund and thereby violated Section 206(2) of the Advisers Act in connection with these retroactive transfers.

Compliance Rule Failures

16. In addition, Forepont failed to comply with the requirement that every investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. *See* Rule 206(4)-7(a). While Forepont's written policies and procedures referenced the custody rule, they were not reasonably designed and implemented to prevent violations of the rule. Similarly, although the compliance manual contained generic language regarding potential conflicts of interest, Forepont also lacked written policies or procedures reasonably designed and implemented to prevent violations of Sections 206(2) or 206(3) of the Advisers Act with respect to principal or other transactions giving rise to the type of conflicts described above.

## Violations

17. Section 206(2) of the Advisers Act makes it "unlawful for any investment adviser . . . to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Section 206(3) of the Advisers Act prohibits an investment adviser from, directly or indirectly, "acting as principal for his own account, knowingly to sell any security to or to purchase any security from a client … without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

18. Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in acts, practices or courses of business that are fraudulent, deceptive, or manipulative, as defined by the Commission in rules and regulations promulgated under the statute. Rule 206(4)-2 provides that it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) for a registered investment adviser to have custody of client assets unless the adviser complies with the custody rule. Among other things, Rule 206(4)-2 requires registered investment advisers with custody of client funds or securities to have independent public accountants conduct surprise examinations of those client funds or securities, or to have private fund clients timely distribute to their investors annual audited financial statements prepared in accordance with GAAP. Rule 206(4)-7 requires, among other things, that an investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and rules thereunder.

19. As a result of the conduct described above, Forepont willfully[1] violated Sections 206(2), 206(3) and 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-7 thereunder.

[1] "Willfully," for purposes of imposing relief under Sections 15(b) of the Exchange Act and 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[ted]" 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 the Offer.

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

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(3), and 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-7 thereunder.

B. Respondent is censured.

C. Within 21 days of the entry of the Order, Forepont shall pay a civil monetary penalty in the amount of $150,000 to the 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.

D. 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 Forepont as the 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 George Stepaniuk, Assistant Regional Director, Securities and Exchange Commission, New York Regional Office, 100 Pearl Street, Suite 20-100, New York, NY 10004.

E. 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, Respondent shall not argue that it is entitled to, nor shall it 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 it 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.

By the Commission.

Vanessa A. Countryman
Secretary