INITIAL DECISION RELEASE NO. 987
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16590

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of		
	:	INITIAL DECISION
BRIAN J. OURAND	:	March 29, 2016

APPEARANCES: Payam Danialypour and Donald Searles for the Division of Enforcement, Securities and Exchange Commission

Brian J. Ourand, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision concludes that Brian J. Ourand violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (Advisers Act) by misappropriating funds from advisory client accounts. The Initial Decision imposes a cease-and-desist order; orders disgorgement of $671,367 plus prejudgment interest; orders a $300,000 civil penalty; and bars Ourand from the securities industry.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on June 15, 2015, pursuant to Sections 203(f) and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act). The undersigned held a two-day hearing in Washington, D.C., on December 14-15, 2015. The Division of Enforcement (Division) called seven witnesses from whom testimony was taken. Numerous exhibits were admitted into evidence.[1]

[1] Citations to the transcript will be noted as "Tr. _." Citations to exhibits offered by the Division will be noted as "Div. Ex. __." Respondent Ourand did not offer any exhibits or call any witnesses.

The findings and conclusions in this Initial Decision are based on the record and public official records of which official notice has been taken, pursuant to 17 C.F.R. § 201.323. Preponderance of the evidence was applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 96-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division's Post-Hearing Brief, filed January 29, 2016; (2) Respondent's Post-Hearing Brief, filed January 29, 2016; and (3) the Division's Reply, filed February 12, 2016. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns Ourand's dealings with three investment advisory clients of his employer, SFX Financial Advisory Management Enterprises, Inc. The OIP alleges that Ourand misappropriated over $670,000 from three SFX client accounts. The Division is seeking a cease-and-desist order, disgorgement, a civil monetary penalty, and a bar. Ourand argues that this administrative proceeding should have been stayed pending the outcome of the criminal proceeding against him and states his belief that "in the SEC Court, where the SEC is the judge, the jury, and the prosecutor, it is blatantly obvious that the SEC gets the benefit of the doubt, not the Respondent."

C. Procedural Issues

1. No Adverse Inference from Refusal to Testify

Ourand invoked his Fifth Amendment right against self-incrimination when called by the Division to testify at the hearing.[2] An adverse inference may be drawn from a respondent's refusal to testify in a Commission administrative proceeding. *See Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986); *N. Sims Organ & Co., Inc. v. SEC*, 293 F.2d 78, 80-81 (2d Cir. 1961); *see also Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (Fifth Amendment privilege against self-incrimination does not forbid drawing adverse inferences from an inmate's failure to testify at his own disciplinary proceedings). Nonetheless, no adverse inference has been drawn from Ourand's refusal to testify. The findings and conclusions herein are based on the evidence that was adduced, without regard to Ourand's silence.

2. Unfairness

Ourand urges that the Commission's administrative proceedings are inherently unfair to respondents since both the administrative law judge (ALJ) and the prosecutor are Commission employees. This overlooks the safeguards regarding separation of functions provided in the Administrative Procedure Act (APA), which has been in effect for almost seventy years. *See* Sections 554(c), (d) and 556 of the APA; *see also Butz v. Economou*, 438 U.S. 478, 513-14

[2] In fact, he declined to offer any evidence at all, fearing a potential impact on the criminal case against him.

(1976) (pursuant to the APA, the ALJ exercises independent judgment on the evidence, free from pressures by the parties or other officials within the agency).

3. Stay

Ourand argues that this proceeding should have been stayed pending the outcome of *United States v. Ourand*, 1:15-cr-182 (D.D.C.). However, as the undersigned previously ruled, the Commission's rules do not authorize the undersigned to grant such a stay pending the outcome of a criminal matter at the request of a party.[3]

II. FINDINGS OF FACT

A. Relevant Individuals and Entities

1. SFX and Ourand

During the period 2006-2011, SFX was a Commission-registered investment adviser located in Washington, D.C.[4] Tr. 8, 13. Its clients were mostly professional athletes. Tr. 16. In addition to investment advisory services, SFX provided such services as tax work; bill paying; finding, purchasing, and financing homes; facilitating major purchases such as cars and insurance; and anything of a financial nature that clients requested. Tr. 16.

Ourand started working for a predecessor to SFX in 1988. Tr. 111. Ourand was president of SFX from 2007 until his termination from the company in 2011; prior to 2007 he was a vice-president.[5] Tr. 14-16; Div. Ex. 6 at 1-2; Div. Ex. 9 at 23. During the time at issue, Ourand received a salary and additional compensation based on the revenue his clients generated. Tr. 21.

For bill paying, SFX opened client accounts at the SunTrust Bank; Ourand had signature authority over his clients' bank accounts so that he would have the authority to write checks to pay their bills. Tr. 23, 39, 114, 119. He also had discretionary authority over the clients' brokerage accounts. Tr. 114, 117-119. The account statements for the bank and brokerage

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[3] *Brian J. Ourand*, Admin. Proc. Rulings Release No. 3384, 2015 SEC LEXIS 3384 (A.L.J. Dec. 9, 2015) ("An authorized representative of a United States Attorney may 'request[] a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts at issue in the pending Commission [administrative] proceeding.' 17 C.F.R. § 201.210(c)(3). The United States Attorney prosecuting *United States v. Ourand* has not done so.")

[4] Currently, SFX is registered with the District of Columbia; its assets are below the threshold for Commission registration. Tr. 13.

[5] Ourand testified that he was vice president, but never president. Tr. 112. However, SFX's Form ADV, filed on March 4, 2008, represents that he became president in March 2007. Div. Ex. 9 at 23. In any event, the issue of whether he was president is immaterial to this proceeding.

accounts were sent to SFX's office, not to the clients. Tr. 114, 148, 157, 164, 180, 243, 251, 257-58, 274.

Eugene Mason is, and was during the relevant period, SFX's vice president of finance and chief compliance officer. Tr. 12-13. The events at issue came to light in July 2011 when Mason received a late-night phone call from Ourand client Dikembe Mutombo, who complained that his American Express card had been declined and that American Express told him that the card was behind in payment and that there was activity on the card in Ourand's name. Tr. 34, 151-52. The next day Mason confronted Ourand and determined that Ourand had a card in his name on the Mutombo account. Tr. 35. SFX placed Ourand on a leave of absence, and Mason told Ourand to hand over his security card and office keys and to leave. Tr. 35-36. That same day Mason told SunTrust Bank not to negotiate checks signed by Ourand for any client accounts and learned that Ourand had already presented a check drawn on a client account for his own benefit. Tr. 36-37. SFX's parent company, Live Nation, immediately initiated an internal investigation concerning Ourand's activities in client accounts. Tr. 37.

William Bradley Nelson, the head of Live Nation's internal audit, conducted the investigation. Tr. 38, 70, 72. The audit team investigated each account to which Ourand had access, and evaluated each transaction in the accounts to a point back in time where there had been twelve months of no questionable activity. Tr. 74. For one client, this was as far back as 2003, but most were from 2007 to 2010. Tr. 75. They found numerous transactions made out to Ourand, made out to cash and signed by Ourand, or transferred from the client's account to Ourand's personal account at SunTrust Bank, as well as credit card transactions that were personal to Ourand made on the clients' credit card accounts. Tr. 75, 77. Nelson also interviewed Ourand in the investigation and confronted him with documentary evidence of questionable transactions. Tr. 77-106, 124, 129-30; Div. Ex. 25. Ourand was terminated on August 16, 2011. Tr. 90, 111, 128; Div. Ex. 25 at 4. Live Nation/SFX repaid to the clients the funds taken from them, having reached agreement or settlement of a lawsuit with each client as to the amount. Tr. 40-41, 53-54, 153-54, 248.

2. Ourand's Clients

Ourand's clients included Dikembe Mutombo, Glen Rice, and Michael Tyson. Tr. 25; Div. Exs. 10, 13, 15-16.

a. Dikembe Mutombo

Dikembe Mutombo is a retired professional basketball player. Tr. 143. His current activities include the Dikembe Mutombo Foundation, which funds humanitarian work in the Democratic Republic of the Congo, where he was born. Tr. 144-45. He became a client of SFX in 1991, when he graduated from college and started playing basketball professionally. Tr. 146. The Mutombo Foundation also received services from SFX. Tr. 147. Ourand provided SFX's services to Mutombo and the Mutombo Foundation during 2006-2011. Tr. 147. Mutombo spoke to Ourand on the telephone three or four times a week. Tr. 149. The services for Mutombo personally and the Mutombo Foundation included bill paying, investments, and tax preparation. Tr. 147-49.

Mutombo did not engage Ourand directly, outside of his contract with SFX, to provide any services; nor did he authorize Ourand to take money out of his accounts for his personal use. Tr. 149-50. Specifically, he did not authorize Ourand to transfer money to persons whom Mutombo did not know and charge the transfers to a Mutombo credit card. Tr. 158-63; Div. Exs. 301-10. Nor did he authorize Ourand to write checks to himself from the Mutombo Foundation's Bank of America account. Tr. 164-71; Div. Exs. 311-17.

b. Glen Rice

Glen Rice is a retired professional basketball player. Tr. 176-77. During the time at issue, he was an owner of G-Force Promotions, LLC. Tr. 177-78. He became a client of SFX in 1994 or 1995. Tr. 179. Ourand provided SFX's services to Rice. Tr. 179. Rice spoke to Ourand every day and "considered him a really good friend . . . . one of my best friends." Tr. 182. The services provided included bill paying and tax preparation pursuant to Rice's written contract with SFX. Tr. 179-80. Rice did not engage Ourand directly, outside of his contract with SFX, to provide any services. Tr. 180-82, 192. At one point Ourand told Rice he was having financial difficulties, but Rice did not loan Ourand any money or authorize him to take money out of his account as a loan. Tr. 187-88, 205-06. After SFX informed Rice that Ourand had been stealing from him, Ourand suggested that they play golf. Tr. 224. Unsurprisingly, Rice did not accept the golf invitation. Tr. 224-25.

c. Michael and Lakiha Tyson

Michael Tyson is a former world heavyweight boxing champion. Tr. 228. Currently he is involved in the entertainment industry. Tr. 227-28. His business is conducted through Tyrannic, LLC, jointly owned by Tyson and his wife, Lakiha Tyson. Tr. 228-29, 237. Tyson does not consider himself adept at financial matters, noting that he filed for bankruptcy in 2003. Tr. 229. As a result, he engaged SFX. Tr. 229-30. Ourand provided financial services for the Tysons and Tyrannic, including between 2009 and 2011. Tr. 230, 238-39. Tyson did not engage Ourand directly, outside of his contract with SFX, to provide any services; nor did he authorize Ourand to take money out of Tyson accounts for Ourand's personal use. Tr. 233-34. Tyson trusted Ourand. Tr. 233.

Lakiha Tyson, Tyson's wife and business partner, was the contact for the Tyson interests with Ourand. Tr. 232-33, 239-40, 259, 275-76. Mrs. Tyson spoke with Ourand a few times a week. Tr. 245. She felt comfortable with him. Tr. 245. She did not engage Ourand directly, outside of his contract with SFX, to provide any services; nor did she authorize Ourand to take money out of Tyson accounts for Ourand's personal use. Tr. 238-39, 243-44, 253-80. After being fired, Ourand told her that he was leaving SFX because he did not like the working conditions and asked her to sign a form to enable him to continue servicing the Tyson account.[6] Tr. 245-46.

[6] Mason emailed Mrs. Tyson that he would be taking over Ourand's accounts without disclosing the reason for the change. Tr. 246-47. Later he sent her a letter summarizing inappropriate

B. Ourand's Misappropriation of Client Funds

Ourand took funds from client accounts by such means as writing checks payable to cash, wire transfers, telephone transfers, ATM transactions, and debit card transactions, as well as credit card transactions that were personal to Ourand made on the clients' credit card accounts. Tr. 67-68, 77, 88.

1. Mutombo

From September 2006 to July 2009, Ourand misappropriated $90,548 from Mutombo and the Mutombo Foundation. Div. Ex. 456; *see* Div. Exs. 301-17; Tr. 290-93.

Ourand misappropriated money from a Citibank MasterCard account in Mutombo's name, as well as from a Bank of America account in the name of the Mutombo Foundation. Tr. 291. From the Bank of America account in the name of the Mutombo Foundation, Ourand wrote seven checks to himself that he both signed and endorsed, between September 19, 2006, and September 5, 2008. Tr. 292; Div. Exs. 311-17. From October 31, 2008, to July 31, 2009, Ourand made ten Western Union transfers from the Citibank MasterCard account to Danielle Sliva and Christopher Maris.[7] Tr. 291-92; Exs. 301-10.

Mutombo did not authorize any of these money transfers or checks. Tr. 162, 169-71; *see* Tr. 65, 104-05.

2. Rice

From August 2006 to March 2011, Ourand misappropriated $353,383 from Rice and G-Force. Div. Ex. 457; *see* Div. Exs. 401-53; Tr. 293-96.

Ourand misappropriated money from one account in the name of G-Force and two in Rice's; he also deposited a check made payable to Rice in his own account. Tr. 188-90, 293. With regard to one of the accounts in Rice's name, between August 9, 2006, and November 18, 2010: (1) Ourand wrote checks to himself and to cash; (2) transferred money to his own bank account; and (3) made a transfer to Christopher Maris. Tr. 294-95; Div. Exs. 406-26. With regard to the second account in Rice's name, between April 1, 2009, and February 28, 2011, Ourand wrote checks to himself, to cash, and to Rice, and made two wire transfers to his own account. Tr. 295-96; Div. Exs. 427-53. The checks written to Rice were deposited into Ourand's account, and those written out to cash were endorsed by Ourand. Tr. 295; Div. Exs. 409, 418, 427-28, 432-41, 449-51. Regarding the G-Force account, between June 18, 2010, and October 5, 2010, Ourand wrote four checks to himself that he endorsed, and he signed all but one of them. Tr. 294; Div. Exs. 402-05. Finally, on March 9, 2011, Ourand forged Rice's signature

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transactions in the Tyson accounts. Tr. 246-47. The Tysons sued SFX and Live Nation, and reached a settlement; they no longer use SFX's services. Tr. 248.

[7] Sliva and Maris were friends of Ourand's. Tr. 24-25, 92.

and endorsed a check from Robert P. Frankel & Associates, P.A., payable to Rice for $4,900 and deposited it in his own account. Tr. 188-90; Div. Ex. 401.

Rice did not authorize any of these money transfers or checks. Tr. 188-225; *see* Tr. 65-66, 104-05.

3. The Tysons

From August 2009 to June 2011, Ourand misappropriated $227,436 from the Tysons and Tyrannic. Div. Ex 455; *see* Div. Exs. 201-44, 246-57; Tr. 285-90.

Ourand misappropriated money from three accounts belonging to the Tysons: two accounts in Tyson's name, and one in Tyrannic's name. Tr. 287. From August 13, 2009, through June 24, 2011, using an account in Tyson's name, Ourand wrote checks to himself and to cash and made bank transfers to his own account. Tr. 288-89; Div. Exs. 224-44. All of the checks were signed by, and endorsed by, Ourand. Tr. 289; Div. Exs. 224-41. From May 28, 2010, through June 16, 2011, Ourand made twenty-three money transfers to his own bank accounts from a second account held in Tyson's name. Tr. 287-88; Div. Exs. 201-23. With regard to a third account held by Tyrannic, Ourand made twelve checks to himself between August 18, 2010, and June 24, 2011. Tr. 289-90; Exs. 246-57.

The Tysons did not authorize any of these money transfers or checks. Tr. 253-81; *see* Tr. 64, 104-05.

III. CONCLUSIONS OF LAW

The OIP charges violations of the antifraud provisions of the Advisers Act. Specifically, the OIP charges that Ourand willfully violated, or, in the alternative, willfully aided and abetted and caused violations of, Sections 206(1) and (2) of the Advisers Act. As discussed below, it is concluded that Ourand willfully violated those provisions. Thus, it is unnecessary to consider the alternate charge, based on the same facts, of secondary liability.

A. Antifraud Provisions

Advisers Act Sections 206(1) and 206(2) make it unlawful for any investment adviser, by jurisdictional means, respectively to: (1) employ any device, scheme, or artifice to defraud any client or prospective client; or (2) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

1. Scienter

Scienter is required to establish violations of Advisers Act Section 206(1). *SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron*, 446 U.S. at 686 n.5; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *SEC v. Steadman*, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. *See SEC v. Steadman*, 967 F.2d at 641-42; *David Disner*, Exchange Act

Release No. 38234, 1997 SEC LEXIS 258, at *15 & n.20 (Feb. 4, 1997). Reckless conduct is "conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 47 (2d Cir. 1978) (quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Advisers Act Section 206(2); a showing of negligence is adequate. *See SEC v. Steadman*, 967 F.2d at 643 & n.5. Negligence is the failure to exercise reasonable care. *IFG Network Secs., Inc.*, Exchange Act Release No. 54127, 2006 SEC LEXIS 1600, at *37 (July 11, 2006).

2. Willfulness

Respondent is charged with *willful* primary or secondary violations, of Advisers Act Sections 206(1) and 206(2). A finding of willfulness does not require an intent to violate the law, but merely an intent to do the act which constitutes a violation. *See Steadman v. SEC*, 603 F.2d 1126, 1135 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

3. Fiduciary Standard

As an officer and employee of SFX, Ourand was an associated person of an investment adviser. *See* Advisers Act Sections 202(a)(17), 203(f). Ourand was also an investment adviser within the meaning of Advisers Act Section 202(11) in that he "for compensation, engage[d] in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." Investment advisers and their associated persons are fiduciaries. *Fundamental Portfolio Advisors, Inc.*, 2003 SEC LEXIS 1654, at *54; *see Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92, 194, 201 (1963); *see also Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979). An investment adviser owes a duty to act "in a manner consistent with the best interest of [his] client and . . . not subrogate client interests to [his] own." *James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC LEXIS 2561, at * 8 (July 23, 2010) (alterations in original).

4. Primary Liability

As discussed below, the undersigned has concluded that Ourand violated Advisers Act Sections 206(1) and 206(2). Thus it is unnecessary to address, in the alternative, his secondary liability for violating those provisions.

B. Antifraud Violations

Ourand violated Advisers Act Sections 206(1) and 206(2) by stealing funds from his advisory clients' account by various means, including checks payable to cash, wire transfers, forged checks, and credit card charges. The proven misconduct occurred between August 2006 and June 2011. Ourand's scienter is obvious. The clients were unaware of Ourand's fraud

because their bank, brokerage, and credit card account statements were sent to SFX and they did not receive copies. The scheme might have continued indefinitely had Ourand not run up excessive unpaid charges on Mutombo's credit card, causing the card to be declined when Mutombo tried to use it. Ourand's intent to defraud even continued after the misconduct at issue was stopped – he gave a false explanation to Mrs. Tyson for his departure from SFX and attempted to have her sign a form that would enable him to continue handling the Tysons' accounts.

IV. SANCTIONS

The Division requests a cease-and-desist order, disgorgement, a civil monetary penalty, and a bar. As discussed below, the following will be ordered: a cease-and-desist order; disgorgement of $671,367 plus prejudgment interest; civil penalties of $300,000; and an industry bar.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co*., Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35-36 & n.46 (Jan. 31, 2006). As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company Act Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp*., Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. *See Leo Glassman*, Exchange Act Release No. 11929, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975).

B. Cease and Desist

Advisers Act Section 203(k) authorizes the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or who "is, was, or would be a cause of the violation." 15 U.S.C. § 80b-3(k). Whether there is a reasonable likelihood of such violations in the future must be considered.

KPMG Peat Marwick LLP, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *101 (Jan. 19, 2001), *pet. denied*, 289 F. 3d 109 (D.C. Cir. 2002). Such a showing is "significantly less than that required for an injunction." *Id*. at *114. In determining whether a cease-and-desist order is appropriate, the Commission considers the *Steadman* factors quoted above, as well as the recency of the violation, the degree of harm to investors or the marketplace, and the combination of sanctions against the respondent. *See WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004); *KPMG*, 2001 SEC LEXIS 98, at *116.

Ourand's conduct was egregious and recurrent, continuing over five years. Had Mutombo not serendipitously discovered a theft from his account, the misconduct might still be continuing. The conduct involved a high degree of scienter. There is a lack of assurances against future violations and recognition of the wrongful nature of the conduct. The violations are neither recent nor remote in time. The degree of direct financial harm to clients is quantified in the over $670,000 that Ourand misappropriated. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. In light of these considerations, a cease-and-desist order is appropriate.

C. Disgorgement

Advisers Act Section 203(j) and Investment Company Act Section 9(e) authorize disgorgement of ill-gotten gains, including reasonable interest, in cease-and-desist proceedings. Disgorgement of ill-gotten gains is "an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co. v. SEC*, 793 F.3d 76, 84 (D.C. Cir. 2015) (quoting *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1230 (D.C. Cir. 1989)). Ourand misappropriated a total of $671,367 from the Mutombo, Rice, and Tyson client accounts. While he directed some of the misappropriated funds to persons other than himself, "how a defendant chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise, is immaterial to disgorgement." *SEC v. Aerokinetic Energy Corp.*, 444 F. App'x. 382, 385 (11th Cir. 2011) (quotation omitted). Accordingly, $671,367 of ill-gotten gains is subject to disgorgement, and disgorgement in that amount will be ordered.

D. Civil Money Penalty

Advisers Act Section 203(i) and Investment Company Act Section 9(d) authorize the Commission to impose civil money penalties against a person who violated, or was the cause of the violation of, any provision of the Advisers Act, or rules thereunder, where such penalties are in the public interest. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. *See* Section 203(i)(3) of the Advisers Act; Section 9(d)(3) of the Investment Company Act.

As to Ourand, there are no mitigating factors,[8] and there are several aggravating factors. He violated the antifraud provisions, so his violative actions "involved fraud, deceit, [and] deliberate or reckless regard of a regulatory requirement" within the meaning of Advisers Act Section 203(i)(2)(C), (3) and Investment Company Act Section 9(d)(2)(C). Harm to others is quantified in the more than $670,000 that Ourand misappropriated. Deterrence requires a substantial penalty against Ourand because of the breach of the fiduciary duty owed to advisory clients.

Penalties in addition to the other sanctions ordered are in the public interest. Pursuant to Advisers Act Section 203(i)(2)(C) and Investment Company Act Section 9(d)(2)(C), for each violative act or omission after March 3, 2009, and before March 6, 2013, the maximum third-tier penalty is $150,000 for a natural person. 17 C.F.R. § 201.1004, Subpt. E, Table IV. A third-tier penalty is appropriate because Ourand's violative acts involved fraud and resulted in substantial losses to other persons and substantial gains for himself. The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue will be considered as three courses of action – Ourand's violative conduct with respect to the accounts of Mutombo, Rice, and the Tysons. However, the violative conduct with respect to Mutombo's account ended in 2009, more than five years before the institution of this proceeding, and thus outside the five year statute of limitations provided in 28 U.S.C. § 2462. Third-tier civil penalties totaling $300,000 – $150,000 for the violations related to the Rice accounts and $150,000 for the violations related to the Tyson accounts – will be ordered.

E. Bar

The Division requests an industry bar. Combined with the other sanctions ordered, a bar is in the public interest and an appropriate deterrent. Ourand's violation involved scienter. His business provides him with the opportunity to commit violations of the securities laws in the future. The record shows a lack of recognition of the wrongful nature of the violative conduct. Ourand's abuse of the trust placed on him as a fiduciary is particularly reprehensible.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 11, 2016.

[8] Ourand's lack of a disciplinary history is not mitigative and does not remove the need for sanctions. *Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 SEC LEXIS 1621, at *42 & n.39 (May 15, 2009) ("[T]he absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws.").

VI. ORDER

IT IS ORDERED that, pursuant to Section 203(k) of the Advisers Act, Brian J. Ourand CEASE AND DESIST from committing or causing any violations or future violations of Sections 206(1) and 206(2) of the Advisers Act.

IT IS FURTHER ORDERED that, pursuant to Sections 203(j) of the Advisers Act and 9(e) of the Investment Company Act, Brian J. Ourand DISGORGE $671,367 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from July 1, 2011, through the last day of the month preceding the month in which payment is made.

IT IS FURTHER ORDERED that, pursuant to Sections 203(i) of the Advisers Act and 9(d) of the Investment Company Act, Brian J. Ourand PAY A CIVIL MONEY PENALTY of $300,000.

IT IS FURTHER ORDERED that, pursuant to Sections 203(f) of the Advisers Act, and 9(b) of the Investment Company Act, Brian J. Ourand IS BARRED from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and IS PROHIBITED, permanently, 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.

Payment of disgorgement, prejudgment interest, and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, United States postal money order, or bank money order, payable to the Securities and Exchange Commission.

Any payment by check or money order shall include a cover letter identifying the Respondent and Administrative Proceeding No. 3-16590, and shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of

fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Carol Fox Foelak
Administrative Law Judge