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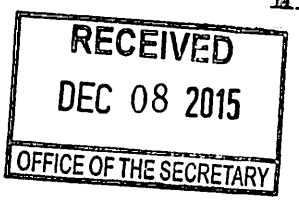


ADMINISTRATIVE PROCEEDING
FILE NO. 3-16590

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

| | |
|---|---|
| **In the Matter of**<br><br>**BRIAN J. OURAND,**<br><br>**Respondent.** | **Judge Carol Fox Foelak** |

# DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

December 7, 2015

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## TABLE OF CONTENTS


Page

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 1

A. Background ..... 1

B. Ourand's Misappropriation of Client Funds ..... 3

C. The Division's Witnesses ..... 5

1. SFX's Chief Compliance Officer: Eugene Mason ..... 5

2. Live Nations's Vice President of Internal Auditing: Brad Nelson ..... 5

3. The Three Victim Clients ..... 6

4. Respondent Brian Ourand ..... 7

5. Summary witness: Deborah Russell ..... 7

III. LEGAL ARGUMENT - LIABILITY ..... 8

A. SFX Violated Section 206(1) and (2) of the Advisers Act and Ourand Violated or, Alternatively, Aided, Abetted, and Caused Violations of Sections 206(1) and (2) of the Advisers Act ..... 8

1. SFX violated Section 206(1) and (2) of the Advisers Act ..... 8

2. Ourand Directly Violated Sections 206(1) and (2) of the Advisers Act ..... 9

3. Alternatively, Ourand aided, abetted, and caused SFX's violations of Sections 206(1) and (2) of the Advisers Act ..... 10

IV. LEGAL ARGUMENT – RELIEF ..... 13

A. A Permanent Associational Bar Will Be Justified ..... 13

B. A Cease-And-Desist Order Will Also Be Warranted ..... 15

C. Third-Tier Civil Penalties Will Be Warranted ..... 16

D. Disgorgement ..... 18

V. CONCLUSION ..... 19

## TABLE OF AUTHORITIES

**Cases**

*Adrian C. Havill,*
53 S.E.C. 1060 (1998) ..... 13

*Alexander V. Stein,*
52 S.E.C. 296, 1995 SEC LEXIS 3628 (June 8, 1995) ..... 11

*Brandt, Kelly & Simmons, LLC.,*
Initial Dec. Rel. No. 289, 2005 SEC LEXIS 1599 (June 30, 2005) ..... 12

*Brendan E. Murray,*
Admin. Proc. File No. 3-12436
2007 SEC LEXIS 1486 (July 10, 2007) ..... 9, 18

*Clarke T. Blizzard,*
Advisers Act Rel. No. 2253, 2004 SEC LEXIS 1298 (June 23, 2004) ..... 13

*David W. Baldt,*
Initial Decision Rel. No. 418, 2011 SEC LEXIS 1391 (Apr. 21, 2011) ..... 10

*Donald L. Koch,*
Exchange Act Rel. No. 72179, 2014 SEC LEXIS 1684 (May 16, 2014) ..... 19, 20

*Finance Investments, Inc.,*
Exchange Act Release No. 62448, 2012 SEC LEXIS 2216 (July 12, 2010) ..... 11, 12

*Hollinger v. Titan Capital Corp.,*
914 F.2d 1564 (9th Cir. 1990) ..... 9

*Howard v. SEC,*
376 F.3d 1136 (D.C. Cir. 2004) ..... 12

*John J. Kenny,*
Advisers Act Rel. No. 2128 (May 14, 2003) ..... 10

*John P. Flannery,*
Securities Act Rel. No. 6989, 2014 SEC LEXIS 4994 (Dec. 14, 2014) ..... 14, 15, 16, 17

*Julieann Palmer Martin,*
Initial Decision Rel. No. 751, 2015 SEC LEXIS 880 ..... 18

*KPMG Peat Marwick LLP,*
54 S.E.C. 1135 (2001), *recon. denied,* 55 S.E.C. 1 (2001), *pet. denied,*289 F.3d 109 (D.C. Cir. 2002), *reh'g en banc denied,*2002 U.S. App. LEXIS 14543 (Jul. 16, 2002) ..... 12

*Mark David Anderson,*
Securities Act Rel. No. 8265, 2003 SEC LEXIS 3285, (Aug. 15, 2003) ..... 18

*Ronald S. Bloomfield*,
Exchange Act Rel. No. 71632, 2014 SEC Lexis 698 (Feb. 27, 2014) ..... 19

*Robert M. Fuller*,
Exchange Act Rel. No. 48406, 2003 SEC LEXIS 2041
(Aug. 25, 2003), *petition for review denied*, 95 F. App'x. 361 (D.C. Cir. 2004) ..... 12

*SEC v. Apuzzo*,
689 F.3d 204 (2d Cir. 2012) ..... 12

*SEC v. Batterman*,
2002 U.S. Dist. LEXIS 18556 (S.D.N.Y. Sept. 30, 2002) ..... 9

*SEC v. Capital Gains Research Bureau, Inc.*
375 U.S. 180 (1963) ..... 8

*SEC v. Espuelas*,
698 F. Supp. 2d 415 (S.D.N.Y. 2010) ..... 12

*SEC v. First City Fin. Corp.*,
890 F.2d 1215 (D.C. Cir. 1989) ..... 20

*SEC v. First Pac. Bancorp*,
142 F.3d 1186 (9th Cir. 1998). ..... 19

*SEC v. Johnson*,
530 F. Supp. 2d 325 (D.D.C. 2008) ..... 12

*SEC v. JT Wallenbrock & Assoc.*,
440 F.3d 1109 (9th Cir. 2006) ..... 19

*SEC v. Lybrand*,
281 F. Supp. 2d 726 (S.D.N.Y. 2003), *aff'd on other grounds*, 425 F.3d 143
(2d Cir. 2005) ..... 18

*SEC v. Manor Nursing Ctrs., Inc.*,
458 F.2d 1082 (2d Cir. 1972) ..... 9

*SEC v. Opulentica, LLC*,
479 F. Supp. 2d 319 (S.D.N.Y. 2007) ..... 19

*SEC v. Platforms Wireless*,
617 F.3d 1072 (9th Cir. 2010) ..... 19

*SEC v. Steadman*,
967 F.2d 636 (D.C. Cir. 1992) ..... 9

*Sharon M. Graham*,
53 S.E.C. 1072 (1988) *aff'd*, 222 F.3d 994 (D.C. Cir. 2000) ..... 13

*Spring Hill Capital Markets. LLC*,
Initial Dec. Rel. No. 919 (Nov. 30, 2015) ..... 11, 15

*Steadman v. SEC*,
603 F.2d 1126 (5th Cir. 1979) ..... 9, 12, 15

*Swartwood, Hesse, Inc.*,
Exchange Act Rel. No. 31212, 1992 SEC LEXIS 2412 (Sept. 22, 1992) ..... 13

*S.W. Hatfield, CPA*,
Exchange Act Release No. 73763, 2014 SEC LEXIS 4691 (Dec. 5, 2014) ..... 20

*Transamerica Mortgage Advisors, Inc. v. Lewis*,
444 U.S. 11 (1979) ..... 8

*United States v. Mann*,
811 F.2d 495 (9th Cir.1987) ..... 13

*vFinance Investments, Inc.*,
Exchange Act Rel. No. 62448, 2010 SEC LEXIS 2216 (July 2, 2010) ..... 11

*Voss, et al. v. SEC*,
222 F.3d 994 (D.C. Cir. 2000) ..... 11

*Wonsover v. SEC*,
205 F.3d 408 (D.C. 2000) ..... 15

**Securities Exchange Act of 1934**

Section 20(e)
[15 U.S.C§78t-2(e)] ..... 12

**Investment Advisers Act of 1940**

Section 202(a)(11)
[15 U.S.C. § 80b-2(a)(11)] ..... 9, 10

Section 202(a)(17)
[15 U.S.C. § 80b-2(a)(17)] ..... 14

Section 203(e)
[15 U.S.C. § 80b-3(e)(5),(6), (f)] ..... 14

Section 203(f)
[15 U.S.C. § 80b-3(f)] ..... 13, 14, 16

Section 203(i)
[15U.S.C § 80b-3(i)] ..... 14, 17

Section 203(i)(2)(C)
[15 U.S.C. § 80b-3(i)(2)(3)] ..... 18

Section 203(k)
[15 U.S.C. § 80b-3(k)] ..... 13, 14, 16

Section 206
[15 U.S.C. § 80b-6(8)] ..... 8, 10

Section 206(1)
[15 U.S.C. § 80b-6(1)] ..... passim

Section 206(2)
[15 U.S.C. § 80b-6(2)] ..... 8, 9, 11, 12

**Investment Company Act of 1940**

Section 9(b)
[15 U.S.C.§ 80a-9(b)] ..... 13, 14, 16

Section 9(d)
[15 U.S.C.§ 80a-9(d)] ..... 14, 17

Section 9(d)(1)
[15 U.S.C.§ 80a-9(d)(1)] ..... 17

Section 9(d)(2)(C)
[15 U.S.C.§ 80a-9(d)(2)(c)] ..... 18

**Federal Regulations**

17 C.F.R. § 201.1004 ..... 18

**Other Authorities**

Dodd-Frank Act Section 929P(a) ..... 17

Applicability of the Advisers Act to Financial Planners, Pension Consultants,
and Other Persons,Advisers Act Rel. No. 1092 SEC LEXIS 3487 (Oct. 8, 1987) ..... 10

## I. INTRODUCTION

This matter involves Respondent Brian J. Ourand's multi-year theft of client funds while managing the assets of several investment advisory clients of his employer, SFX Financial Advisory Management Enterprises, Inc. ("SFX"). From 2006 to 2011, Ourand, who was SFX's Vice President and then President, misappropriated at least $670,000 from three SFX client accounts. In doing so, Ourand's knowingly or recklessly violated his fiduciary duties he owed to his clients as their entrusted investment adviser. Nor are the facts in seriously dispute: when SFX investigated Ourand's misconduct, Ourand readily admitted to SFX's internal investigators that he had stolen his clients' money and used it for his personal benefit without their authorization. And when questioned about his misconduct during the Division's investigation, Ourand repeatedly asserted his Fifth Amendment right against self-incrimination.

The evidence the Division expects to present at the hearing will show that Ourand willfully violated or, in the alternative, willfully aided and abetted and caused SFX's violations of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). These antifraud provisions make it unlawful for an adviser to employ any device, scheme or artifice to defraud any client or prospective client; or to engage in any transaction, practice of course of business which operates as a fraud or deceit upon any client or prospective client. The evidence will further demonstrate that the Division is entitled to the relief it seeks, including permanent associational bars, a cease-and-desist order, significant civil penalties, and full disgorgement of Ourand's ill-gotten gains, together with prejudgment interest.

## II. STATEMENT OF FACTS

### A. Background

SFX is a Delaware corporation, headquartered in Washington, DC. SFX became registered with the Commission as an investment adviser on September 21, 1992, but withdrew its registration on September 12, 2012 (after the conduct at issue herein) due to its failure to maintain eligibility for

registration based on assets under management. Live Nation Worldwide, Inc., which is owned by Live Nation Entertainment, Inc. ("Live Nation") (NYSE: LYV), wholly-owns SFX.

SFX specializes in providing advisory and financial management services to high net-worth individuals, primarily current and former professional athletes. During the relevant period, SFX had between $78 million and $368 million in assets under management. From 2006 through 2011, there were only two main individuals at SFX providing client services: Ourand and Eugene Mason.

Among other things, the services SFX provides clients include asset management, financial planning, bill-paying, and tax return preparation. During the relevant period, all these services were memorialized in written agreements between the clients and SFX. Fees were described in these agreements and in Forms ADV and typically consisted of an annual flat fee and a fee based on assets under management (excluding cash and equivalents) ranging between 0.25% and 1% per year. With respect to asset management services, SFX recommended particular mutual funds to clients. SFX also determined the asset allocation strategy for each client and recommended third-party managers to implement the chosen strategy. SFX, through its financial planning and advisory agreements, had discretion to determine how much client money should be in client brokerage accounts, and thus invested in securities.

SFX entered into agreements with Glen Rice, Michael Tyson and Dikembe Mutombo (the "Clients") to provide, among other services, investment advisory and bill-paying services. The Clients had both bank and brokerage accounts over which SFX had the power to withdraw and deposit assets.

In 1986, Ourand began working at Professional Services Inc., which SFX acquired in 1999. From June 2003 to March 2007, Ourand served as SFX's Vice President. Ourand served as SFX's President from March 2007 through August 2011. As President of SFX, Ourand signed (on SFX's behalf) the financial planning and advisory agreements with clients that gave SFX discretionary

authority to trade in client accounts as well as authority over client bank accounts to pay bills, transfer money, and deposit checks. In addition to these agreements, Ourand was personally given – by a separate trading authorization with brokers – discretionary authority to trade in client accounts. While Ourand did not exercise his discretionary trading authority on a daily basis, he testified during the investigation of this matter that he gave advice with respect to investing in securities and placed orders for clients, and has admitted, in his answer to the OIP, that he was given discretionary authority to trade in client brokerage accounts and gave clients advice with respect to investing in securities. *See* Answer, ¶ 6.

In addition to serving as SFX's President, Ourand was the SFX relationship manager for the Clients. In this role, Ourand was primarily responsible for providing bill-paying services for the Clients. Ourand had the power to pay the Clients' bills by virtue of having full signatory power over their bank accounts. As part of this responsibility, Ourand determined how much of each Client's assets should be in the brokerage accounts, and thus invested in securities. Ourand regularly sent instructions (both pursuant to his own discretion and at the request of the Clients) to brokers to effect partial or full liquidations of investments in the Clients' brokerage accounts and deliver the funds to the bank accounts. Similarly, Ourand issued checks (that he signed) from the Clients' bank accounts to the Clients' brokerage accounts. Once the broker received the funds, there were standing instructions that the funds be used for trading by third-party managers.

**B. Ourand's Misappropriation of Client Funds**

From 2006 to 2011, Ourand misappropriated at least $670,000 from the Clients. He did this by using his bill-paying authority to withdraw money from the Client accounts as well as by forging his Clients' signatures.[1]

[1] SFX's internal investigation, which lasted approximately two months, concluded that Ourand misappropriated an additional $345,000 through additional wires, checks, ATM transactions, travel

With respect to Rice, from August 2006 to March 2011, Ourand misappropriated at least $353,383. Ourand accomplished this by writing checks that were either paid to cash, to Ourand, to Rice (which Ourand then endorsed by forging Rice's signature), or transferring money to himself or a friend via telephone or wire transfers. With respect to the Tysons, from August 2009 to June 2011, Ourand misappropriated at least $227,436. Ourand accomplished this by writing checks payable to himself or cash or transferring money to himself via telephone or wire transfers. With respect to Mutombo, from September 2006 to July 2009, Ourand misappropriated at least $90,548. Ourand accomplished this by writing checks to himself and charging Mutombo's credit card for funds sent to friends through Western Union.

In July 2011, SFX learned that Ourand had misappropriated assets when Mutombo complained to Mason after his credit card was denied and he learned from his credit card company of certain charges placed on his card that were not his. Live Nation and SFX immediately conducted an internal investigation and confronted Ourand. SFX's internal investigator, Brad Nelson, and SFX's human resources manager, Marielle Angers, interviewed Ourand on August 16, 2011, during which Ourand admitted that he had misappropriated funds from his clients' accounts. *See* Exs. 25 (Nelson's Interview Memorandum),116 (Declaration of Nelson), 117 (Declaration of Angers).

Live Nation decided to reimburse the Clients for Ourand's misappropriation. Live Nation made the reimbursements conditional upon the Clients entering into settlement and release agreements. In the end, Live Nation fully reimbursed Rice and Mutombo. With respect to Tyson, Live Nation originally reimbursed him $225,000 of the $303,008 Live Nation calculated that

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expenses, and opening charge cards in his Clients' names and then charging personal expenses to those cards. The Division is not seeking to prove up these additional acts, or disgorgement of those ill-gotten gains.

Ourand embezzled because Tyson refused to sign a release. Tyson sued Live Nation and SFX in Los Angeles County Superior Court and the parties reached a settlement.

### C. The Division's Witnesses

The Division anticipates calling eight witnesses: SFX's Chief Compliance Officer; Live Nation's Vice President of Internal Auditing; each of the Clients, along with one of their wives; Ourand; and a summary witness from the Division. The Division has also listed 239 exhibits evidencing Ourand's fraud, all of which are admissible because Ourand did not object to any of them.

#### 1. SFX's Chief Compliance Officer: Eugene Mason

Eugene Mason has been SFX's Chief Compliance Officer since September 2004. He holds a Series 65 license. In addition to being SFX's CCO, Mason handles bill-paying services on behalf of some clients and has been in charge of SFX since Ourand was terminated in August 2011. The Division expects Mason to describe the investment advisory services provided by SFX, Ourand's role and clientele at SFX, Mason's involvement in the internal investigation, and his role in attempting to secure settlement agreements with the Clients.

#### 2. Live Nations's Vice President of Internal Auditing: Brad Nelson

Brad Nelson is the Senior Vice President of Internal Auditing and Chief Compliance Officer at Live Nation Entertainment, Inc. Nelson and his audit team determined the total amounts Ourand misappropriated from his clients and had numerous interactions with Ourand during that investigation, both in person and by email, in which he sought explanations from Ourand for the various transactions under review. On August 16, 2011, Nelson, along with Marielle Angers, SFX's Human Resource Director, interviewed Ourand regarding the activity in Mutombo's, Rice's and Tyson's accounts. As to each of those accounts, Ourand admitted that he had misappropriated client funds for his personal benefit. *See* Exs. 25 (Nelson's Interview Memorandum), Ex. 116 (Nelson Declaration).

### 3. The Three Victim Clients

The Division expects to call each of the three clients.

***The Tysons***. The Division will call both Michael Tyson and his wife, Likiha Tyson. Mike Tyson, age 47, is a resident of Las Vegas, Nevada. Tyson is a retired professional boxer. SFX managed accounts for Tyson and Tyrannic Productions LLC ("Tyrannic"), a limited liability company owned by Tyson and his wife.

The specific acts of misappropriation that involve the Tysons are set forth at Exhibits 201-257, and total $227,436. The Division expects that the Tysons will confirm that with respect to each of those transactions, they did not authorize Ourand to transfer funds from their accounts to his personal account or to write checks on their accounts made payable to himself or to cash.

***Dikembe Mutombo***. Dikembe Mutombo, age 47, is a resident of Atlanta, Georgia. Mutombo is a retired professional basketball player. Mutombo is the Chairman and President of the Dikembe Mutombo Foundation ("DM Foundation"), a charitable organization dedicated to improving the health, education and quality of life for the people of the Democratic Republic of the Congo. SFX managed accounts for both Mutombo and the DM Foundation.

The specific acts of misappropriation that involve Mutombo are set forth at Exhibits 301-317, and total $90,548. The Division expects that Mutombo will confirm that with respect to each of those transactions, he did not authorize Ourand to transfer funds from his accounts to Ourand's friends or to write checks on Mutombo's accounts made payable to himself.

***Glen Rice***. Glen Rice, age 46, is a resident of Coral Gables, Florida. Rice is a retired professional basketball player. Rice was also the owner of G-Force Promotions LLC ("G-Force"), a mixed martial arts entertainment company. SFX managed accounts for both Rice and G-Force.

The specific acts of misappropriation that involve Rice are set forth at Exhibits 401-453, and total $353,383. The Division expects that Rice will confirm that with respect to each of those

transactions, he did not authorize Ourand to transfer funds from his accounts to Ourand's personal account, to Ourand's friends, or to write checks on Rice's accounts made payable to himself or to cash.

**4. Respondent Brian Ourand**

The Division will also call Ourand. During his investigative testimony, Ourand asserted his Fifth Amendment right not to testify as to certain questions, but substantively answered others. The Division expects that Ourand will continue to invoke his Fifth Amendment rights at the hearing and, should he do so, will request that the hearing officer draw an adverse inference against him.

If, however, Ourand does not invoke his Fifth Amendment right not to incriminate himself, the Division expects that he will offer a variety of explanations as to some – but not all – of the transaction as issue. His excuses could include the following: (i) Ourand gave the cash to the Clients so they would not have to go to a bank themselves; (ii) they were reimbursements for expenses Ourand paid on the Clients' behalf; (iii) Ourand paid back some of the money he had taken; (iv) some of the withdrawals from Mutombo's and Rice's accounts were loans they had authorized; and (v) some of the payments were for Ourand's "consulting services" to the Clients' separate companies that, according to Ourand, were not SFX clients.

The evidence to be presented at the hearing will show, with respect to the specific transactions at issue, that the Clients did not authorize Ourand's withdrawals. And as to Ourand's last justification, that the Clients' companies were his separate clients separate and apart from SFX, Mason and the Clients are expected to testify that SFX's advisory agreements covered those companies and that, in any event, the Clients never authorized Ourand's withdrawals from their company accounts.

**5. Summary witness: Deborah Russell**

Finally, the Division will call Deborah Russell as a summary witness. Russell is a staff accountant in the Division of Enforcement. She will be called to summarize the Division's

financial exhibits relating to the amounts Ourand misappropriated from the Clients and to provide a summary of the amounts at issue with respect to each client for purposes of calculating disgorgement.

## III. LEGAL ARGUMENT - LIABILITY

### A. SFX Violated Section 206(1) and (2) of the Advisers Act and Ourand Violated or, Alternatively, Aided, Abetted, and Caused Violations of Sections 206(1) and (2) of the Advisers Act

Section 206 of the Advisers Act establishes a federal fiduciary standard for investment advisers, including the obligations to exercise the utmost good faith in dealing with their clients, to disclose to their clients all material facts, and to employ reasonable care to avoid misleading their clients. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). Section 206(1) of the Advisers Act prohibits an investment adviser from using instruments of interstate commerce to employ a device, scheme, or artifice to defraud any client or prospective client. Section 206(2) makes it unlawful for an adviser to use instruments of interstate commerce to engage in a transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client.

Section 206(1) requires scienter; Section 206(2) does not. *Steadman v. SEC*, 603 F.2d 1126, 1134-35 (5th Cir. 1979). Scienter may be established by a showing of extreme recklessness. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *see also Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (*en banc*) (recklessness standard).

#### 1. SFX violated Section 206(1) and (2) of the Advisers Act

The evidence will show that SFX, a registered investment advisor at the time of the conduct at issue, violated Section 206(1) and (2) of the Advisers Act by misappropriating its client funds. The theft of client funds is a clear violation of these antifraud provisions. *Brendan E. Murray*, Admin. Proc. File No. 3-12436, 2007 SEC LEXIS 1486, at *31 (July 10, 2007) (Initial Decision)

(citing *SEC v. Batterman*, 2002 U.S. Dist. LEXIS 18556, at *25 (S.D.N.Y. Sept. 30, 2002)). SFX's scienter is based on the intentional acts of misappropriation by Ourand, the firm's President. *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1089 n.3, 1096-97 nn. 16-18 (2d Cir. 1972) (company's scienter imputed from individuals who control it). Indeed, SFX has consented to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order, in which the Commission found, among other things, that SFX willfully violated Section 206(2) of the Adviser's Act. *See* Ex. 138 (AP File No. 3-16591).

**2. Ourand Directly Violated Sections 206(1) and (2) of the Advisers Act**

The evidence will establish that Ourand directly violated Sections 206(1) and (2) by stealing his clients' money. As a threshold matter, he was an investment adviser at the time of the misconduct. Under Section 202(a)(11) of the Advisers Act, an investment adviser is, *inter alia*, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities . . ." "An associated person may be charged as a primary violator under Section 206 where the activities of the associated person cause him or her to meet the broad definition of 'investment adviser.'" *John J. Kenny*, Advisers Act Rel. No. 2128, at n.54 (May 14, 2003) (Commission Opinion).[2]

Ourand's activities bring him within the broad definition of "investment adviser" in Section 202(a)(11), and support direct charges under the Advisers Act. Ourand possessed discretionary trading authority over client accounts, signed advisory agreements on SFX's behalf, and had the

[2] Charging Ourand as a primary violator is consistent with cases even when the violator did not control the adviser. *See e.g., David W. Baldt*, Initial Decision Rel. No. 418, 2011 SEC LEXIS 1391 at *71 (Apr. 21, 2011) (finding that portfolio manager who did not control the investment adviser directly violated Section 206(1) of the Advisers Act by breaching his fiduciary duty and defrauding his fund-client by tipping nonpublic information to investors in the fund who redeemed on the basis of the nonpublic information), *final decision*, Advisers Act Rel. No. 3209 (May 20, 2011).

authority to withdraw money from client accounts. In addition, Ourand gave clients investment advice and placed orders for them. While Ourand did not routinely place trades for clients or give specific investment advice, doing so is not required. *See Applicability of the Advisers Act to Financial Planners, Pension Consultants, and Other Persons*, Advisers Act Rel. No. 1092, 1987 SEC LEXIS 3487, at *11-12 (Oct. 8, 1987) ("The giving of advice need not constitute the principal business activity or any particular portion of the business activities of a person in order for the person to be an investment adviser under Section 202(a)(11). The giving of advice need only be done on such a basis that it constitutes a business activity occurring with some regularity. The frequency of the activity is a factor, but is not determinative."). Further, Ourand's compensation, in addition to his salary, included a set percentage of SFX's gross revenues, including fees SFX received for investment advisory services. Ourand also received the requisite "compensation" when he stole money from his clients' accounts. *See Alexander V. Stein*, 52 S.E.C. 296, 299-300, 1995 SEC LEXIS 3628 at *8 & n.13 (June 8, 1995) (misappropriation constitutes compensation because it is an economic benefit). Finally, Ourand was President of SFX (the most senior position at the firm) and was one of only two individuals who directly interacted with clients at SFX.

Accordingly, the evidence will establish that Ourand, as an investment adviser, directly violated Sections 206(1) and 206(2) of the Advisers Act. While president of an SEC-registered advisory firm, he misappropriated over $670,000 of client funds over almost five years. In addition, he knew that he was not authorized to make withdrawals from client accounts for personal purposes, but did so repeatedly.

### 3. Alternatively, Ourand aided, abetted, and caused SFX's violations of Sections 206(1) and (2) of the Advisers Act

Even if Ourand were, for some reason, not deemed an "investment adviser" who directly violated the Advisers Act, the evidence will also show that Ourand willfully aided and abetted, and/or caused SFX's violations of Sections 206(1) and (2).

To establish aiding and abetting liability, the Division must show: (1) the existence of an independent primary wrong; (2) actual knowledge or reckless disregard by the alleged aider and abettor of the wrong and of his/her role in furthering it; and (3) the aider and abettor substantially assisted in the accomplishment of the primary violation. *See vFinance Investments, Inc.*, Exchange Act Rel. No. 62448, 2010 SEC LEXIS 2216, *41 (July 2, 2010) (Commission Opinion). In administrative proceedings, the Commission applies a "recklessness" standard for aiding and abetting liability. *Id.* at *46; *see also Voss, et al. v. SEC*, 222 F.3d 994, 1004-06 (D.C. Cir. 2000); *see also, Spring Hill Capital Markets. LLC*, Initial Dec. Rel. No. 919 (Nov. 30, 2015) at 13 (Foelak, J.) (the knowledge or awareness requirement can be satisfied by recklessness when the aider and abettor is a fiduciary or active participant). The recklessness standard is satisfied where the respondent fails to use due diligence to investigate a circumstance with unusual factors or ignores red flags and suggestions of irregular conduct. *See Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004). "A defendant provides substantial assistance only if [he] affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed." *SEC v. Espuelas*, 698 F. Supp. 2d 415, 433 (S.D.N.Y. 2010) (internal quotation marks and citations omitted); *see also SEC v. Apuzzo*, 689 F.3d 204, 213 (2d Cir. 2012) (holding that "[t]he SEC is not required to plead or prove that an aider and abettor proximately caused the primary securities fraud violation"); *see also SEC v. Johnson*, 530 F. Supp. 2d 325, 333 (D.D.C. 2008) (holding that "willful" aiding and abetting standard applied in administrative proceedings is less burdensome than the "knowingly" aiding and abetting standard applied in district court cases under Exchange Act Section 20(e)); *In the Matter of v.Finance Investments, Inc.*, Exchange Act Release No. 62448, 2012 SEC LEXIS 2216, at *46-47 (July 12, 2010) (same).

For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or

should have known, that his act or omission would contribute to the violation. *Robert M. Fuller*, Exchange Act Rel. No. 48406, 2003 SEC LEXIS 2041 (Aug. 25, 2003), *petition for review denied*, 95 F. App'x. 361 (D.C. Cir. 2004). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *See Howard*, 376 F.3d at 1141; *In the Matter of KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recon. denied*, 55 S.E.C. 1, 4 & n.8 (2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002), *reh'g en banc denied*, 2002 U.S. App. LEXIS 14543 (Jul. 16, 2002). Section 206(2) of the Advisers Act does not require a showing of scienter. *Steadman v. SEC*, 603 F.2d at 1134-35, n. 5; *Brandt, Kelly & Simmons*, LLC, Initial Dec. Rel. No. 289, 2005 SEC LEXIS 1599, at *18 (June 30, 2005) (Foelak, J.). In addition, a finding that a respondent willfully aided and abetted violations of the securities laws necessarily makes that respondent a "cause" of those violations. *See Clarke T. Blizzard*, Advisers Act Rel. No. 2253, 2004 SEC LEXIS 1298, at *16 n.10 (June 23, 2004) (Commission Opinion); *In the Matter of Sharon M. Graham*, 53 S.E.C. 1072, 1085 n.35 (1988), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000); *In the Matter of Adrian C. Havill*, 53 S.E.C. 1060, 1070 n.26 (1998).

Under these standards, Ourand's aiding and abetting, or causing, liability will be established by the evidence. As discussed above, SFX's primary violations will be proven by the evidence.[3] Since Ourand was the one who personally misappropriated the Clients' funds, there will be no question that he substantially assisted those primary violations, or that he caused them. For the same reason, it will also be shown that he knowingly or recklessly, or at least negligently did so.

[3] Although the Commission did not charge SFX with a violation of Section 206(1) of the Advisers Act, Ourand may still be found to have aided and abetted SFX's violation of that section. *See Swartwood, Hesse, Inc.*, Exchange Act Rel. No. 31212, 1992 SEC LEXIS 2412, n.8 (Sept. 22, 1992) (Commission Opinion) (rejecting as "without merit" the respondent's argument that he could not be held liable for aiding and abetting where the primary violator was not charged, noting that "[e]ven in the criminal context, it is not necessary to identify, indict, try or convict a principal wrongdoer in order to convict an aider and abettor.") (citing *United States v. Mann*, 811 F.2d 495, 497 (9th Cir.1987)).

Indeed, his contemporaneous admission of the theft to the SFX internal auditor will strongly support such a finding, and a negative inference from his potential Fifth Amendment assertions will also be justified.

## IV. LEGAL ARGUMENT – RELIEF

As to Ourand, the Division seeks: (1) an associational bar under Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") and Section 203(f) of the Advisers Act; (2) a cease-and desist order under Section 203(k) of the Advisers Act; (3) third-tier civil penalties under Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act; and (4) disgorgement under Section 203(i) of the Advisers Act and Section 9(e) of the Investment Company Act.[4]

### A. A Permanent Associational Bar Will Be Justified

To impose a suspension or bar from association with investment advisers or investment companies under Section 9(b) of the Investment Company Act, it must be shown that Ourand (i) willfully violated or willfully aided or abetted violations of any provision of the Advisers Act and (ii) the sanction is in the public interest. *See John P. Flannery*, Securities Act Rel. No. 6989, 2014 SEC LEXIS 4994, at *136 (Dec. 14, 2014). A suspension or bar from association under Section 203(f) of the Advisers Act is warranted if the hearing officer finds the two above criteria and, in addition, that Ourand was a "person . . . associated with an investment adviser" during the relevant period. *Id.*, 15 U.S.C. § 80b-3(e)(5),(6), (f).

The Division expects that the evidence presented at the hearing will justify the imposition of permanent associational bars against Ourand. First, as a threshold matter, Ourand was associated with an investment adviser. Under the Advisers Act, the term "person associated with an

[4] This administrative and cease-and-desist proceeding was instituted under Sections 203(f) and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act.

investment adviser" means: "[A]ny partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee or such investment adviser." 15 U.S.C. § 80b-2(a)(17). At the time of the conduct at issue SFX was a registered investment adviser, and Ourand was the President of SFX and played an integral role in its operations. As such, there should be no question that Ourand was associated with an investment adviser. *Flannery*, at *144-145 & n. 194.

Second, a permanent bar will be justified because it will be shown that Ourand's violations were willful. In the context of the securities laws, the term "willfully" means merely "that the person charged with duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. 2000) (internal quotation marks omitted). It is sufficient that the actor "intentionally" or "voluntarily" committed the act that constitutes the violation; he need not also be aware that he is violating the securities laws. *Id.*, at 414; *Spring Hill Capital Markets. LLC*, Initial Dec. Rel. No. 919 at 13. Here, the evidence will show that Ourand acted intentionally and knowingly in misappropriating funds from his clients' accounts, and thereby willfully violated the securities laws.

Third, a permanent bar would be in the public interest. When determining whether remedial action is in the public interest, the hearing officer should consider: 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 respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *See Flannery*, at *138; *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). This inquiry is a flexible one, and no one factor is dispositive. *Flannery,* at *138. Furthermore, this remedy is intended to "protect[] the trading public from further harm," not to punish the respondent. *Id.*

The evidence will show that a permanent bar is justified. Ourand, the most senior official at SFX, stole hundreds of thousands of dollars from multiple advisory clients over a period of years. In addition, he has given no assurance to the Division that he understood his conduct was wrong, or that it would not be repeated should he again be trusted with client funds.

Accordingly, based on the expected hearing record, the Division will likely be asking the Hearing Officer to impose a permanent associational bar under both the Investment Company Act and the Advisers Act.[5]

**B. A Cease-And-Desist Order Will Also Be Warranted**

The Division also anticipates seeking a cease-and-desist order against Ourand. Section 203(k) of the Advisers Act authorizes the hearing officer to issue a cease-and-desist order against any person who "has violated" that statute or rules thereunder. When determining whether such an order is appropriate, the hearing officer should consider the same public interest factors as those considered when imposing a suspension or bar. *Flannery,* at *146. In addition, the hearing officer should consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of other sanctions being sought. *Id.* Again, no single factor is dispositive. Evidence of a past violation ordinarily suffices to establish a risk of future violations, absent evidence to the contrary. *Id.*

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[5] Under the Advisers Act, the Division seeks to bar Ourand from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Advisers Act § 203(f) [15 U.S.C. § 80b-3(f)]. Under the Investment Company Act, the Division seeks an order prohibiting Ourand 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. Investment Company Act § 9(b) [15 U.S.C. § 80a-9(b)].

The Division anticipates that the hearing record will more than justify a cease-and-desist order against Ourand. As discussed, the public-interest factors will all weigh heavily in favor of such relief – Ourand's violations were egregious, recurrent, and knowingly committed. This misconduct, as a trusted adviser, also significantly impacted and harmed his own clients, and, to date, Ourand has not shown any regret or remorse for what he has done.

### C. Third-Tier Civil Penalties Will Be Warranted

The Division also anticipates seeking third-tier civil penalties against Ourand, given the brazenness of his fraud. Both the Advisers Act and the Investment Company Act authorize the hearing officer to impose penalties in administrative suspension proceedings, such as this one.[6] There are three levels of penalties available, with the third-tier reserved for fraud that cause substantial losses to investors or resulted in substantial pecuniary gain to the person who committed the act or omission. Section 9(d) of the Investment Company Act [15 U.S.C. § 80a-9(d)(1)]; Section 203(i) of the Advisers Act § 203(i) [15 U.S.C. § 80b-3(i)(1)]. Under both Acts, penalties are appropriate where the respondent willfully violated or aided and abetted violations of the securities laws and that imposing penalties would be in the public interest. Here, the evidence will establish that Ourand willfully violated or aided and abetted violations of the securities laws. In determining whether penalties are in the public interest, the hearing officer should consider whether the act or omission involved fraud; whether the act or omission resulted in harm to others; the extent to which any person was unjustly enriched; whether the individual committed previous violations;

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[6] Section 929P(a) of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") granted the Commission new authority to impose penalties in some cases, including administrative cease-and-desist proceedings under the Advisers Act and the Investment Company Act. There is no concern about the retroactivity of the Dodd-Frank Act in this case for two reasons: (1) even prior to the Dodd-Frank Act, both the Advisers Act and the Investment Company Act allowed for the imposition of civil penalties in suspension proceedings; and (2) the respondent's illegal conduct continued past the effective date of the Dodd-Frank Act. *See Flannery*, at *148-149.

the need to deter such person or others from committing violations; and such other matters as justice may require. *Flannery*, at *150-151.

Based on the expected hearing record in this case, third-tier statutory penalties will be justified. Ourand's acts involved fraud and deceit, his acts resulted in substantial losses or created the risk of such losses other persons, and his acts resulted in significant pecuniary gain to Ourand. *See* Section 9(d)(2)(C) of the Investment Company Act [15 U.S.C. § 80a-9(d)(2)(C)]; Section 203(i)(2)(C) of the Advisers Act [15 U.S.C. § 80b-3(i)(2)(C)]. In addition, a significant penalty is appropriate to deter Ourand, and others, from committing such violations. In short, all of the above factors warrant the imposition of a significant penalty.

The maximum third-tier civil penalty in 2011, when Ourand's conduct stopped as a result of his termination from SFX, *for each violation*, was $150,000. 17 C.F.R. § 201.1004. Here, each act of misappropriation by Ourand could be considered a separate violation of the securities laws, thus resulting in *hundreds of violations* over a period of years. *See, e.g., Mark David Anderson,* Securities Act Rel. No. 8265, 2003 SEC LEXIS 3285, at *41-42 (Aug. 15, 2003) (Commission Opinion) (imposing a civil penalty for each of the respondent's ninety-six violations).

While the statutory tier system sets forth the maximum penalty, it is up to the hearing officer to determine the amount of the penalty to be imposed within the tier. *See Julieann Palmer Martin*, Initial Decision Rel. No. 751, 2015 SEC LEXIS 880, at *80 (March 9, 2015), *citing Brendan E. Murray*, Advisers Act Rel. No. 2809, 2008 SEC LEXIS 2924 (Nov. 21, 2008). In making that assessment, courts have considered the following factors established in *SEC v. Lybrand*:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd on other grounds*, 425 F.3d 143 (2d Cir. 2005); *see also David F. Bandimere*, Initial Decision Rel. No. 507, 2013 SEC LEXIS 3142, at *251-52 (Oct. 8, 2013). Although these factors provide guidance, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed." *Martin,* at *80, *quoting SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007).

Moreover, the size of a civil penalty is "not limited to the amount of profits derived from the violation." *Martin,* , at *81, *citing Ronald S. Bloomfield*, Exchange Act Rel. No. 71632, 2014 SEC LEXIS 698, at *91 (Feb. 27, 2014) (Commission Opinion). Thus, the civil penalty imposed against Ourand may far exceed any personal gain he had, since civil penalties can be imposed "without regard to defendants' pecuniary gain." *Id.* (finding that penalty for one respondent that was 27 times larger than his pecuniary gain was proper).

The Division submits that the evidence will demonstrate that, at a minimum, one third-tier penalty for each client Ourand stole from would be appropriate, resulting in a $450,000 penalty.

**D. Disgorgement**

The Division will also seek disgorgement, with prejudgment interest. The goal of disgorgement is two-fold: "'to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.'" *SEC v. Platforms Wireless*, 617 F.3d 1072, 1096 (9th Cir. 2010), *quoting SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). Therefore, "the amount of disgorgement should include all gains flowing from the illegal activities." *Id.*, *see also Donald L. Koch*, Exchange Act Rel. No. 72179, 2014 SEC LEXIS 1684, at *90 (May 16, 2014) (Commission Opinion) (*citing SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006)).

When seeking disgorgement, the Division only needs to present evidence of a "reasonable approximation" of the ill-gotten gains. *See Platforms Wireless*, *Koch* and *JT Wallenbrock, supra.*

Once the Division has made that showing, the burden shifts to the respondent "clearly to demonstrate that the disgorgement figure was not a reasonable approximation," and any "risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989); *see also Koch,* at *90-91 & n. 233; *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *3 (Dec. 5, 2014) (Commission Opinion).

The evidence to be presented at trial will demonstrate that Ourand obtained at least $671,367 in ill-gotten gains. And while SFX has made Rice and Mutombo whole, and has settled with the Tysons, Ourand did not contribute any funds to those efforts and has retained all of his ill-gotten proceeds. Accordingly, the evidence will demonstrate that Ourand should be ordered to disgorge $671,367, and pay prejudgment interest on that amount.

## V. CONCLUSION

As explained, the evidence presented at the hearing will establish 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. The evidence will further establish that it is in the public interest to impose the relief requested by the Division,

Dated: December 7, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

*/s/ Donald W. Searles*

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**Certificate of Service**

I certify that on December 7, 2015, I caused the foregoing to be served on the following persons by the method of delivery indicated below.

| | |
|---|---|
| Brent J. Fields, Secretary<br>Securities and Exchange Commission<br>100 F. Street, N.E., Mail Stop 1090<br>Washington, D.C. 20549 | (by United Parcel Service, and by facsimile)<br><br>(original, three copies) |
| Honorable Carol Fox Foelak<br>Administrative Law Judge<br>100 F Street, N.E., Mail Stop 2557<br>Washington, D.C. 20549-2557<br>Email: alj@sec.gov | (by United Parcel Service and by email) |
| Brian J. Ourand, Respondent<br>[redacted]<br>Chicago, IL [redacted]<br>Email: [redacted] | (by United Parcel Service and email) |

*/s/ Donald W. Searles*
Donald W. Searles