

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8857 / October 10, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2670 / October 10, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12865

In the Matter of

**SANDELL ASSET MANAGEMENT
CORP., LARS ERIC THOMAS
SANDELL, PATRICK T. BURKE and
RICHARD F. ECKLORD,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE
AND DESIST PROCEEDINGS,
MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER
PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933 AND
SECTIONS 203(e) AND 203(f) OF THE
INVESTMENT ADVISERS ACT OF
1940**

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 Section 8A of the Securities Act of 1933 (“Securities Act”) and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) against Sandell Asset Management Corp. (“SAM”), Lars Eric Thomas Sandell (“Thomas Sandell”), Patrick T. Burke and Richard F. Ecklord (collectively, “Respondents”).

II.

In anticipation of these proceedings, Respondents have each submitted an Offer of Settlement (collectively, the “Offers”) which the Commission has determined to accept.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and over the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease and Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

This matter concerns unlawful short selling by an unregistered investment adviser, SAM, on behalf of its client. SAM established long positions of approximately nine million shares of stock of Hibernia Corporation, a financial holding company, in the first half of 2005 in response to an announced business combination between Hibernia and Capital One Financial Corporation. Subsequent to establishing this position, SAM sold its Hibernia shares to third parties and entered into "swap" transactions with the third parties with respect to the Hibernia shares.² As a consequence of the swap, the fund managed by SAM, Castlerigg Master Investments, Ltd., no longer owned the shares of Hibernia it had recently purchased, but it retained all of the economic risks of loss should the price of the shares decline.

On August 29, 2005, Hurricane Katrina struck New Orleans, where Hibernia was headquartered and maintained substantial assets. After the hurricane hit and the levees in New Orleans began to break, SAM personnel speculated that Capital One would lower its offering price for Hibernia shares, causing a significant loss in Castlerigg's portfolio. In an attempt to offset this loss by hedging its position, Sandell personnel sold short 9,274,250 shares of Hibernia. Respondents marked the sales orders as "long" even though, in fact, they were short, alleviating the need to locate shares available to borrow and the trading restrictions of the "tick test."³ Over two million of these sales were

¹ The findings herein are made pursuant to the Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

² A swap is when one party periodically pays a fixed amount and the other party pays an amount based on the performance of a reference share, a basket of shares or a share index. In this case, after the fund sold the Hibernia shares to swap counterparties, it paid a fixed amount to the counterparties in return for any gain or loss in the value of the stock of Hibernia.

³ The "tick test" of Rule 10a-1 of the Securities Exchange Act of 1934 provided, in relevant part, that a listed security can be sold short only on a plus tick (that is, at a price above the immediately preceding sale price) or a zero-plus tick (that is, at the last sale price if it is higher than the last different price). The Commission eliminated Rule 10a-1 (effective as of July 3, 2007, with a compliance date of July 6, 2007) but it was in effect when this conduct occurred.

executed on a down tick or zero-minus tick in violation of the “tick test” and could not have been immediately executed had the sales been marked properly as “short.”

Respondents

Sandell Asset Management Corp. (“SAM”) is a New York based, unregistered investment adviser with affiliated offices in London and Hong Kong. The firm manages over \$7 billion in assets held by its clients, including Castlerigg Master Investments, Ltd.

Thomas Sandell is the founder, sole owner and Chief Executive Officer of SAM. His duties include managing the equity event portfolio and managing the firm.

Patrick T. Burke is a Senior Managing Director of SAM and reports directly to Thomas Sandell. His duties include managing the equity event portfolio and managing the firm.

Richard F. Ecklord is the head trader for SAM.

Other Relevant Entities

Hibernia Corporation was a financial services company with operations in Louisiana and Texas. Its stock was traded on the New York Stock Exchange until November 16, 2005 when Capital One Financial Corporation acquired 100% of its outstanding common stock.

Capital One Financial Corporation is a financial services company headquartered in McLean, Virginia. Its stock trades on the New York Stock Exchange.

Background

On March 6, 2005, Capital One and Hibernia announced that Capital One was acquiring Hibernia in a cash and stock transaction valued at \$5.3 billion. Both companies were listed on the New York Stock Exchange. The acquisition was set to close on September 1, 2005.

In March 2005, SAM began establishing “risk arbitrage” positions on behalf of its client, Castlerigg Master Investments, Ltd. (the “fund”), by taking a long position in Hibernia. With this strategy, the fund would profit from the difference between the market price for Hibernia shares at the time of the purchase and the deal price of \$33 (the price difference reflects the risk that the deal will not be consummated). The fund eventually acquired 9,274,250 shares of Hibernia.

In April and July of 2005, SAM entered into swap agreements with respect to the Hibernia shares with third parties. Pursuant to the terms of the agreements, the fund retained the risks of ownership, but the counterparties paid the fund for, and held legal

title to the shares. As a consequence, the fund no longer owned shares of Hibernia but it bore the risk of loss if the share price declined.

On August 17, 2005, Capital One and Hibernia announced that the Federal Reserve System Board of Governors approved the proposed merger of the two entities and that the companies expected the merger to be completed on September 1, 2005. The deadline for Hibernia shareholders to make an election whether to receive cash or stock in exchange for their shares was then set as August 25, 2005. As of that date, approximately 80% of the 139 million Hibernia shares issued and outstanding were subject to an election, leaving only approximately 20 million available for free trading. The counter-parties to the swap agreements with SAM exercised an election with respect to the shares at the request of SAM.

On Sunday, August 28, 2005, Hurricane Katrina made landfall on the coast of Louisiana. On Monday, August 29, 2005, Lake Pontchartrain began breaking through the levees and flooding parts of New Orleans. On Tuesday, August 30, 2005, some market analysts began predicting that the merger would be postponed until Capital One and Hibernia could assess the damage to New Orleans and Hibernia's assets. Neither company commented at that time regarding changing the closing date.

August 31, 2005 Trades Improperly Marked as "Long"

On early Wednesday morning, August 31, 2005, Thomas Sandell, who was on vacation but in regular, frequent telephone contact, as well as SAM's analysts, traders and portfolio managers, began speculating that the Capital One/Hibernia merger would be delayed and that SAM needed to hedge the fund's position in Hibernia stock to avoid a potential loss if the merger was repriced.⁴ In anticipation of the need to borrow Hibernia stock in order to effect short sales, Richard Ecklord and other firm personnel began contacting third parties to assess whether there was stock in the market to borrow. They found that there was an extremely limited number of shares available to borrow at the time.

By mid-morning, Sandell and Burke concluded that the merger would not close on time and that there was a risk that Capital One would lower its offering price. Sandell and Burke decided that SAM would hedge against the fund's exposure to a change in the deal price.⁵ However, as noted, Ecklord was unable to locate sufficient stock to borrow

⁴ A "short sale" is a sale of a security by a seller who does not actually own the stock. Typically, delivery occurs in three days from the date of the sale. The seller usually borrows the security for delivery from a broker-dealer. The short seller later closes out the position by returning the security to the lender, usually by purchasing securities on the open market. When executing a short sale, Regulation SHO requires a broker-dealer to have reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due before effecting a short sale order in any equity security. This "locate" must be made before effecting the short sale. 17 C.F.R. §242.203(b).

⁵ If the fund had been long the Hibernia stock, firm personnel simply could have sold the Hibernia stock in the open market. Since the firm was not long the stock, the firm had to hedge against its swap position by establishing a short position in Hibernia stock.

and he so advised Sandell and Burke. Burke and Sandell discussed the situation and inaccurately concluded that SAM could mark the sales as “long,” alleviating the need to locate shares to borrow and the trading restrictions of the “tick test.” They based their conclusion on a novel and inaccurate view of existing law. Although SAM had inside and outside counsel to advise management on such areas, Burke and Sandell did not seek advice of counsel at the time. With Sandell’s concurrence, Burke directed Ecklord to sell stock in the market, but to mark the sales as “long” instead of “short.”⁶

Beginning just after noon, Ecklord began executing short sales through a registered broker-dealer’s direct access system, marking the sales as “long,” as directed by Burke. Had Ecklord correctly marked the sales as “short,” the system would have automatically blocked execution of the trades because of the unavailability of shares to borrow. He sold over 3.5 million shares of Hibernia during the trading day by mismarking the sales as “long.” The trades would have been subject to the “tick test” imposed by Exchange Act Rule 10a-1 had they been marked correctly. Of the shares sold, 2,023,300 were executed on a down tick or a zero-minus tick in violation of the “tick test.”

Later that afternoon, Burke brought the matter to the attention of in-house counsel, who together with outside counsel, informed Burke, Sandell and Ecklord that SAM had mismarked the order tickets because they were actually short sales.

At approximately 6:30 p.m. that evening, Capital One announced that the merger closing would be postponed until September 7, 2005.

September 2, 2005 Trades Executed Without Proper Borrow

On September 1, 2005, at Thomas Sandell’s direction, firm traders continued short selling of Hibernia stock, marking the sales as “short” sales and locating shares to borrow to cover the short sales. On September 2, 2005, after locating one million shares to borrow for short selling, the firm’s traders were unable to locate any further shares to borrow. At that point, the trading ceased and firm personnel communicated to Sandell their inability to locate additional shares to borrow. Sandell, mindful that personnel in the past had located shares to borrow despite temporary failures to do so, challenged the conclusions of the firm personnel and an animated discussion followed.

Following this exchange, Sandell instructed firm personnel to keep selling short and to keep searching for shares to borrow despite the apparent unavailability of shares in the market. Sandell did not expressly condition the instruction to sell on the availability

⁶ Rule 200(g) of Regulation SHO provides that a broker-dealer must mark all sell orders of any equity security as “long,” “short” or “short exempt.” The Rule also provides that an order to sell shall be marked as “long” only if the seller is deemed to own the security being sold and the security is in the possession or control of the broker-dealer or it is reasonably expected that the security will be in the physical possession or control of the broker-dealer no later than the settlement of the transaction. 17 C.F.R. §242.200.

of shares to borrow. Rather, he insisted that firm personnel keep selling. Despite the exchange, the fact that shares could not be located and his instruction to keep selling, Sandell did not take steps to ensure that firm personnel understood that the selling should not occur without locating shares to borrow. He did not make sufficient inquiry to ensure that the firm was locating shares to borrow to cover the short sales. In fact, the traders understood Sandell's instruction to keep selling to mean that they should continue executing short sales of Hibernia stock whether or not they located stock to borrow. Firm personnel executed these sales on September 2 by misrepresenting to the broker-dealers that executed the trades that they had located stock to borrow when in fact they had not.

Proceeds from Short Selling

These short sales and subsequent purchases of Hibernia in the open market at lower prices to cover the positions generated proceeds that the firm used to offset its losses on its swap position.

By placing the short sales on August 31 and September 2 when there was no stock available to be borrowed, instead of waiting until there was stock available, the firm was able to avoid over \$6.5 million in losses.

As a result of the conduct described above, Respondent SAM willfully violated Section 10(a) of the Exchange Act and Exchange Act Rule 10a-1, which provides that short sales may be effected only on a plus tick (i.e., at a price above the price at which the immediately preceding last sale was effected) or a zero-plus tick (i.e., at a price equal to the last sale if the last preceding transaction at a different price was at a lower price). As a result of the conduct described above, Sandell, Burke and Ecklord willfully aided and abetted violations of Section 10(a) of the Exchange Act and Exchange Act Rule 10a-1.

As a result of the conduct described above, SAM willfully violated Section 17(a)(2) of the Securities Act which makes it unlawful for any person in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, to obtain money or property by means of any untrue statement of a material fact.⁷

As a result of the conduct described above, Thomas Sandell failed reasonably to supervise firm personnel with a view to preventing violations of the federal securities laws while they were subject to his supervision, within the meaning of Sections 203(e)(6) of the Advisers Act.

Undertakings

⁷ "Willfully" as used in this Order means intentionally committing the act which constitutes the violation, Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8(2d Cir. 1965). Scienter is not required to prove violations of Section 17(a)(2) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 697 (1980). Violations of this section may be established by showing negligence. SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997).

Respondent Sandell Asset Management Corp. has undertaken to:

Within 20 (twenty) days of the date of this Order, Sandell Asset Management Corp. shall employ an independent consultant not unacceptable to the Commission (“Independent Consultant”) (1) to conduct a review of the nature of Sandell Asset Management Corp.’s business and operations sufficient to enable him/her to make recommendations as to appropriate internal controls, policies, practices, and procedures reasonably designed to detect violations of the statutes and regulations governing short sales; and (2) to make recommendations for the implementation of any such internal controls, policies, practices or procedures.

Promptly provide the Independent Consultant with any and all documents pertaining to Sandell Asset Management Corp.’s operations (other than materials or information protected by a valid claim of attorney-client privilege or attorney work product) requested to enable the Independent Consultant to identify internal controls, policies and procedures that Sandell Asset Management Corp. should have in place to detect and prevent violations of the statutes and regulations governing short sales. Sandell Asset Management Corp. shall permit the Independent Consultant to meet with any officer, agent, or employee of Sandell Asset Management Corp. to discuss the business and future business plans and prospective operations for the purpose of ensuring that appropriate policies and practices are in place going forward regarding the execution of short sales.

Enter into an agreement with the Independent Consultant which requires that no later than three months from the date that Sandell Asset Management Corp. employs the Independent Consultant, the Independent Consultant shall submit, in writing, to Sandell Asset Management Corp., with a copy to the Division of Enforcement, his/her recommendations, if any, for revised or additional measures reasonably designed to detect and prevent violations of the statutes and regulations governing short sales.

Within 30 days after the date of the issuance of the Independent Consultant’s recommendations, shall adopt, implement and maintain any policies, practices or procedures identified by the Independent Consultant, or alternatives proposed in writing by Sandell Asset Management Corp. and accepted in writing by the Independent Consultant or the Commission.

No later than 30 (thirty) days from the date of the issuance of the Independent Consultant’s recommendations, through an officer, shall file an affidavit with the Commission stating that Sandell Asset Management Corp. has adopted the recommendations of the Independent Consultant and stating further that Sandell Asset Management Corp. has implemented and will maintain any revised or additional internal controls, policies, practices, or procedures recommended in the Independent Consultant’s report, or the alternatives proposed in writing by Sandell Asset Management Corp. and accepted in writing by the Independent Consultant or the Commission.

Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Sandell Asset Management Corp., or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Sandell Asset Management Corp., or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

Deadlines. For good cause shown, the Commission's staff may extend any of the procedural dates set forth above.

Respondents' Remedial Efforts

In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Sandell Asset Management and cooperation afforded the Commission by Respondents.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondents' Offers. Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Sandell Asset Management shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act;

B. Pursuant to Section 203(e) of the Advisers Act, Sandell Asset Management is hereby censured;

C. Pursuant to Section 203(f) of the Advisers Act, Thomas Sandell, Patrick Burke and Richard Ecklord are hereby censured;

D. Sandell Asset Management shall pay a civil penalty of \$650,000, Thomas Sandell shall pay a civil penalty of \$100,000, Patrick Burke shall pay a civil penalty of \$50,000 and Richard Ecklord shall pay a civil penalty of \$40,000;

E. Sandell Asset Management shall pay \$6,716,683.93 in disgorgement, plus \$730,811.74 in prejudgment interest, on behalf of its client Castlerigg Master Investments, Ltd., which received the proceeds from the short sales;

F. Each Respondent shall, within 10 days of the entry of this Order, pay the above amounts to the United States Treasury. Such payments shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop O-3, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies the paying Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Scott Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Mail Stop 5010-B, Washington D.C. 20549; and

G. Sandell Asset Management shall comply with the undertakings set forth above.

By the Commission.

Nancy M. Morris
Secretary