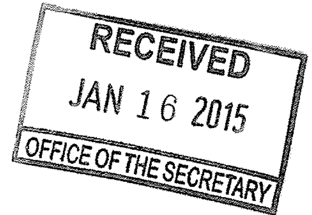
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16223

In the Matter of

SANDS BROTHERS ASSET MANAGEMENT, LLC, STEVEN SANDS, MARTIN SANDS AND CHRISTOPHER KELLY,

Respondents.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENTS SANDS BROTHERS ASSET MANAGEMENT, LLC, STEVEN SANDS, MARTIN SANDS AND CHRISTOPHER KELLY AND MEMORANDUM OF LAW IN SUPPORT

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The Division of Enforcement (the "Division") moves, pursuant to Rule 250 of the Commission's Rules of Practice, for summary disposition of the claims in the Order Instituting Proceeding ("OIP") in this matter, brought under Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act ("Advisers Act"), against Respondents Sands Brothers Asset Management, LLC ("SBAM"), Steven Sands ("S. Sands"), Martin Sands ("M. Sands") and Christopher Kelly ("Kelly").

The undisputed evidence demonstrates that for three years in a row, SBAM – a registered Investment Adviser – violated Rule 206(4)-2 (the "Custody Rule") under the Investment Advisers Act of 1940 ("Advisers Act") by delivering its funds' audited financial statements to investors more than 120 days after the end of each fund's fiscal year. Indeed, in one year, SBAM distributed audited financial statements to investors up to eight months beyond the Custody Rule deadline. SBAM's principals, control persons and executive officers, S. Sands, M. Sands, and Kelly aided and abetted and caused those violations. Moreover, SBAM, S. Sands and M. Sands acted in direct contravention of cease-and-desist orders that explicitly prohibited future violations of the Custody Rule.

In light of the undisputed facts presented below, summary disposition is appropriate. The Court should order all Respondents to cease and desist from further violations and impose third tier penalties. The Court should further: (1) revoke SBAM's registration as an investment adviser; (2) permanently bar S. Sands and M. Sands, who have lengthy disciplinary histories, from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and (3) permanently bar Kelly from serving as CCO in such organizations.

In support of its motion, the Division respectfully submits this Memorandum of Law.

STATEMENT OF UNDISPUTED FACTS

A. Background

SBAM is a limited liability company that has been registered as an investment adviser with the Commission since 1998. (OIP ¶ 3; Answer of Respondents SBAM, S. Sands and M. Sands ("SBAM Answ.") ¶ 3.) SBAM provides advisory services to pooled investment vehicles – a series of funds. SBAM advises: (i) seven venture capital funds that primarily invest in private placements of private and public companies;[1] (ii) two asset-based lending funds that primarily provide loans to privately held and publicly traded companies;[2] (iii) a distressed debt fund;[3] and (iv) a series of "fund of funds" that invest in unaffiliated hedge funds.[4] SBAM has approximately $64 million under management. (Ex. 2[5] (SBAM 2014 ADV) at 32 (Item 5 – Regulatory Assets Under Management).)

SBAM was founded and is run by its two principals – Respondents S. Sands and M. Sands (collectively, the "Sands"). The Sands are the senior portfolio managers at SBAM and are ultimately responsible for the 10 Funds' investments. (Ex. 3 (SBAM's website); Ex. 9 (2012

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[1] These funds are: Sands Brothers Venture Capital LLC ("SBVC I"), Sands Brothers Venture Capital II LLC ("SBVC II"), Sands Brothers Venture Capital III LLC ("SBVC III"), Sands Brothers Venture Capital IV LLC ("SBVC IV"), 280 Ventures LLC ("280"), Granite Associates LLC ("Granite"), and Katie and Adam Bridge Partners LLC ("K&A"). (Declaration of Nancy A. Brown, executed January 15, 2015 ("Brown Decl."), Ex. 1 (Dec. 22, 2014 Brochure) at 3.)

[2] These funds are: Genesis Merchant Partners, LP ("Genesis I") and Genesis Merchant Partners II, LP ("Genesis II"). (Brown Decl., Ex. 1 at 3, 4.)

[3] That fund is Vantage Point Partners, LP ("Vantage"). (Brown Decl., Ex. 1 at 3, 5.)

[4] These are called the Select Access Funds (Brown Decl., Ex. 1 at 3, 4); they are not at issue here. SBVC I, SBVC II, SBVC III, SBVC IV, Genesis I, Genesis II, 280, Granite, K&A, and Vantage are collectively the "10 Funds."

[5] References hereinafter to "Ex. __" are to the Exhibits to the Brown Declaration.

Slavin Report) at 3 (noting the Sands have "ultimate responsibility for the management of the funds which SBAM manages").)[6] Their families indirectly own SBAM as beneficiaries of the two trusts that are the sole members of SBAM LLC. (OIP ¶ 3; SBAM Answ. ¶ 3.) Both Sands' long careers in the securities industry have been marred by disciplinary proceedings, sanctions, and customer actions. (OIP ¶¶ 4-5; SBAM Answ. ¶¶ 4-5; Ex. 4 (S. Sands CRD) at 15-48; Id. (M. Sands CRD) at 17-84.)

Respondent Christopher Kelly was the Chief Compliance and Chief Operating Officer at SBAM from 2008 through at least May 2014. (OIP ¶ 6; SBAM Answ. ¶ 6.)[7] After 20 years in private practice as a corporate and regulatory attorney, in 2003, Kelly worked as a Chief Compliance Officer or General Counsel at a number of broker dealers and investment advisers. (Ex. 7 (Kelly CRD) at 4; Ex. 8 (Kelly Wells Submission) at 1, 4 (describing Kelly as an "experienced compliance professional" and his work history).) As Chief Operating Officer, Kelly was in charge of all non-investment functions at SBAM. (Ex. 9 at 3; Ex. 10 (Slavin Transcript ("Tr.")) at 61:17-62:3.) Kelly previously held a Series 7 registration. (Ex. 7 at 5.)

B. SBAM's Early Awareness of the Custody Rule

Under the Custody Rule, Advisers Act Section 206(4) and Rule 206(4)-2 thereunder, it is impermissible for an Adviser to pooled investment vehicles to have custody of client assets

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6 Attorney Richard Slavin was retained by SBAM as a compliance consultant pursuant to SBAM's 2009 stipulation with the Connecticut Department of Banking. (Ex. 11 at 2.) Slavin's reports do not cite SBAM's Custody Rule violations. Slavin testified, however, that he would have noted them had he known about those violations. (Ex. 10 at 97:23-98:5; 129:16-130:1.)

7 Kelly's Answer neither admits nor denies this allegation. Nonetheless, SBAM's 2012 Form ADV, which Kelly prepared and signed, identifies him as CCO and COO, as one of the three executive officers, and a "control person," of SBAM along with the Sands. (Ex. 5 at 125-28, 146; Ex. 6 (Kelly Tr.) at 8:17-9:1 (identifying Kelly as CCO and COO), 45:10-46:1 (noting Kelly completed SBAM's 2012 ADV).)

unless certain requirements, intended to safeguard those assets, are fulfilled. The adviser must (among other things) (i) submit to an annual surprise examination by an independent public accountant to verify the client assets over which it has custody; (ii) have a reasonable basis for believing that a qualified custodian sends quarterly account statements to fund investors; and (iii) provide notice to fund investors regarding the location of their assets. 17 C.F.R. § 275.206(4)-2(a)(2), (3), (4)(2010).[8]

Alternatively, such an adviser is "deemed to have complied" with the surprise examination requirement, and is "not required to comply with" the account statement and notice requirements, if it distributes audited financial statements to investors within 120 days of each fund's fiscal year end. Id. at § 275.206(4)-2(b)(4). SBAM admits that it had custody of client assets from 2010-2012. (OIP ¶ 19; SBAM Answ. ¶ 19.) During that period, SBAM did not submit to surprise examinations and it purportedly relied on distribution of its audited financial statements to comply with the Custody Rule. (See OIP ¶ 19; SBAM Answ. ¶ 19.)

In 1999, one year after its founding, SBAM was put on notice of its Custody Rule obligations when the Commission's Office of Compliance Inspections and Examinations ("OCIE") examined SBAM, and cited SBAM's custody of client assets in a resulting deficiency letter. (Ex. 12 (1999 Deficiency Letter) at 2 ("SBAM appears to have custody and possession of client assets").) The deficiency letter further laid out certain Custody Rule requirements (then in effect) with which SBAM would have to comply. (Id. at 4.)

Notwithstanding the 1999 Deficiency Letter, SBAM and the Sands continued to violate the Custody Rule.

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[8] Section 206(4) of the Advisers Act, pursuant to which Rule 206(4)-2 was promulgated, provides that it shall be unlawful for any investment adviser to "engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4).

C. The Commission's 2010 Cease-and-Desist Order Against SBAM and the Sands

In 2009, OCIE again examined SBAM. In response to a request directed to Kelly for evidence of compliance with the Custody Rule for fiscal year 2007, SBAM submitted auditors' reports and written statements showing that the audits for 8 of the 10 Funds and 4 fund of funds had been completed after the 120-day deadline, one dated as late as August 28, 2008.[9] (Ex. 13 (OCIE request and responses); Ex. 14.)

As a result, in October 2010, SBAM, S. Sands and M. Sands each consented to entry of a Cease-and-Desist Order, and other related sanctions, against them (the "2010 Order"). (Ex. 15 (Matter of Sands Brothers Asset Mgmt., I.A. Rel. No. 3099 (Oct. 22, 2010).) Kelly signed the consent on behalf of SBAM. (Ex. 16 (2010 Consent) at 8.) The 2010 Order found that SBAM willfully violated the Custody Rule by not timely distributing audited financials to investors:

> [T]he staff's exam revealed that the year-end December 31, 2007 financial statements for eight funds and four funds of funds managed by SBAM were not distributed to investors in accordance with the Rule. Because SBAM did not satisfy the exception in Rule 206(4)-2(b)(3), it was obligated to comply with Rule 206(4)-(2)(a)(3),[10] which it failed to do.[11]

(Ex. 15 ¶ 9.) The 2010 Order further found that, as the principals and the primary contacts for SBAM in responding to Commission inquiries, S. Sands and M. Sands willfully aided, abetted and caused SBAM's violations. (Id. ¶¶ 4, 13(e).) The Commission censured and required all respondents to "cease and desist from committing or causing any violations and any future

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9 SBAM provided proof of mailing for only one fund. (Ex. 14.)

10 See 17 C.F.R. § 275.206(4)-2(a)(3) (2008).

11 The 2010 Order also found that, as to nine SBAM-managed funds, the auditor's disclaimer of an opinion for the fiscal year 2003 did not satisfy the Custody Rule's requirement that audited financial statements be prepared and delivered to investors. (Ex. 15 ¶ 9.)

violations of Section[] . . .206(4) . . . of the Advisers Act and Rule[] . . . 206(4)-2 thereunder." (Ex. 15 at IV.A-B.) It ordered SBAM to pay a $60,000 civil penalty.[12] (Id. at IV.C.)

Notwithstanding the 2010 Order, and SBAM's and the Sands' consent to its entry, SBAM continued to violate the Custody Rule, and none of the Respondents did anything to ensure that it did not. As Kelly testified, no changes were made to SBAM's policies and procedures after entry of the 2010 Order to ensure future compliance with the Custody Rule. (Ex. 6 (Kelly Tr.) at 15:8-13 ("I don't remember any particular changes [to SBAM's compliance protocols] relating to this Order").)

D. SBAM'S Continued Custody Rule Violations

Within seven months of the 2010 Order, the firm again violated the Custody Rule. Its non-compliance continued for three years. The following chart summarizes the dates on which audited financial statements were distributed for the 10 Funds for the fiscal years 2010-2012.

[12] The 2010 Order also found that SBAM willfully violated numerous books and records provisions of the Advisers Act and that M. Sands and S. Sands willfully aided, abetted and caused those violations. (Id. ¶ 13.)

Fiscal Year 2010			
FUND	**FINANCIAL STATEMENTS DUE**	**AUDIT REPORT DATE**	**FINANCIAL STATEMENTS DELIVERED**
SBVC I	April 30, 2011[13]	June 9, 2011[14]	**June 20, 2011**[15]
SBVC II	April 30, 2011	June 9, 2011	**June 20, 2011**
SBVC III	April 30, 2011	June 9, 2011	**June 20, 2011**
SBVC IV	April 30, 2011	June 9, 2011	**June 20, 2011**
GMP I	April 30, 2011	June 9, 2011	**June 13, 2011**
GMP II	April 30, 2011	June 9, 2011	**June 13, 2011**
280	April 30, 2011	June 9, 2011	**June 9, 2011 or later**[16]
Granite	April 30, 2011	June 9, 2011	**June 9, 2011 or later**
K&A	April 30, 2011	June 9, 2011	**June 9, 2011 or later**
Vantage	April 30, 2011	June 9, 2011	**June 13, 2011**

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[13] Each of the 10 Funds used December 31 as its fiscal year end. (E.g., Ex. 17 (auditor engagement letters specifying audits cover year ended December 31).) Therefore, audited financial statements had to be distributed to investors by April 30 of the following calendar year.

[14] The 10 Funds' fiscal year 2010 audit reports are appended as Ex. 18.

[15] Documents evidencing the dates on which the 2010 audited financials were mailed, to the extent they exist, are appended as Ex. 19.

[16] According to a "Certification" of SBAM's fund administrator's President, there is no record of the 2011 distributions for 280, Granite or K&A. (Ex. 20 ¶ 5.) Thus, the chart reflects the audit report date. (Ex. 18.) SBAM continues to employ Greenwich Fund Services as its fund administrator. (Ex. 2 (2014 ADV) at 43, 49-50, 56, 62, 68, 74-75, 81, 87, 94, 100, 123.) Greenwich's President, Bisio, also serves as SBAM's Chief Administrative Officer and, for a period in 2014, as SBAM's CCO. (Ex. 1 at 1-2.)

Fiscal Year 2011			
FUND	FINANCIAL STATEMENTS DUE	AUDIT REPORT DATE	FINANCIAL STATEMENTS DELIVERED
SBVC I	April 30, 2012	October 26, 2012[17]	**November 14, 2012[18]**
SBVC II	April 30, 2012	October 26, 2012	**November 14, 2012**
SBVC III	April 30, 2012	October 26, 2012	**November 14, 2012**
SBVC IV	April 30, 2012	October 26, 2012	**November 14, 2012**
GMP I	April 30, 2012	October 26, 2012	**November 7, 2012**
GMP II	April 30, 2012	October 26, 2012	**November 7, 2012**
280	April 30, 2012	December 20, 2012	**December 28, 2012**
Granite	April 30, 2012	December 20, 2012	**December 28, 2012**
K&A	April 30, 2012	October 26, 2012	**November 20, 2012[19]**
Vantage	April 30, 2012	October 26, 2012	**November 7, 2012**

[17] The 10 Funds' fiscal year 2011 audit reports are appended as Ex. 21.

[18] Documents evidencing the dates on which the 2011 audited financials were mailed are appended as Ex. 22.

[19] The audit report for the K&A fund is dated October 26, 2012 (Ex. 21), but the Fund administrator did not mail for nearly a month. (Ex. 22 at GFS 000035.)

Fiscal Year 2012			
FUND	FINANCIAL STATEMENTS DUE	AUDIT REPORT DATE	FINANCIAL STATEMENTS DELIVERED
SBVC I	April 30, 2013	July 22, 2013[20]	**August 1, 2013[21]**
SBVC II	April 30, 2013	July 22, 2013	**August 1, 2013**
SBVC III	April 30, 2013	July 22, 2013	**August 1, 2013**
SBVC IV	April 30, 2013	July 22, 2013	**July 25, 2013**
GMP I	April 30, 2013	July 22, 2013	**July 23, 2013**
GMP II	April 30, 2013	July 22, 2013	**July 23, 2013**
280	April 30, 2013	July 22, 2013	**July 25, 2013**
Granite	April 30, 2013	July 22, 2013	**July 25, 2013**
K&A	April 30, 2013	July 22, 2013	**July 25, 2013**
Vantage	April 30, 2013	July 22, 2013	**July 25, 2013**

[20] The 10 Funds' fiscal year 2012 audit reports are appended as Ex. 23.

[21] Documents evidencing the dates on which the 2012 audit reports were sent are appended as Ex. 24.

i. Audited Financial Statements for the Fiscal Year 2010 Were Distributed up to 50 Days Late

SBAM had to circulate audited financial statements by April 30, 2011 to satisfy the audit-exception to the Custody Rule for 2010. That did not happen. Audited financial statements for the 10 Funds were completed on June 9, and sent to investors between June 9 and June 20, 2011. (See Exs. 18, 19.)

Five of the 10 Funds' audits were completed before the Custody Rule deadline, but were not distributed: SBVC I, 280, Granite, K&A and Vantage. M. Sands refused to allow their release; he would not sign the management representation letters for those funds' audits, representations that he knew prevented the auditors from releasing their reports.[22] Rather, he insisted that he review all 10 Funds' statements at once before he would sign any of the management representation letters. Email correspondence with the auditors makes this clear:

On April 29, 2011 at 2:59 pm, Rosalind Tsai of SBAM emailed Kelly, M. Sands and David LaRocca (at Cornick, Garber & Sandler ("CGS"), SBAM's auditor):

> *Please see attached for [management representation letters'] signature pages signed by Steven [Sands] and Gavin [Watson, SBAM portfolio manager].*

(Ex. 26.) At 3:05 pm, LaRocca responded:

> *Chris [Kelly], please send over the signature pages for Marty [Sands] and Yourself* ***so we can finalize these five reports***.

(Id. (emphasis added).) At 3:52 pm, Kelly responded in an email re "Sands Rep Ltrs":

> *Here they are with my signature.* ***Only Marty is left.*** *He said he would do it later today.*

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[22] M. Sands also refused to sign a loan receivable agreement between himself and SBVC I – another document required by the auditors. (Ex. 25 (email regarding loan receivable); Ex. 29 (email reflecting continued need for M. Sands' signature).) That agreement, however, only affected one of the audit reports that were otherwise ready for release.

(Ex. 27 (emphasis added).) At 4:55 pm, M. Sands' executive assistant wrote to LaRocca:

> *Marty needs you & Sal [Vicari at CGS] to call his cell.*

(Ex. 28.) There are no further email communications about the five finalized audited financial statements that day, and the statements were not released.

Three days later, on May 2, LaRocca wrote to Kelly and John Lanser (at the Funds' administrator) at 8:39 am:

> ***We have not yet received the rep letters with Marty's signature****, nor the loan receivable with Marty's signature for the SBVC I.* ***Once we have those we can finalize and release those five financial statements.***

(Ex. 29 (emphasis added).) Later that same day, at 4:32 pm, LaRocca wrote again to Lancer:

> Any word on Marty signing the rep letters for 280, Granite, K&A, SBVC I & Vantage along with the loan confirmation. ***His signature is still holding us up on finalizing the financial statements.***

(Ex. 30 (emphasis added).)[23]

In fact, M. Sands did not sign the representation letters until over a month later, on June 9, when he signed the representation letters for all 10 Funds, and the audits were not released until that day. (Ex. 31 (signed management representation letters); Ex. 18 (FY 2010 audit reports for 10 Funds).) As was made clear in a subsequent email, M. Sands wanted to review the audited financial statements "all at once." (Ex. 32.) As a result, the five funds' statements were delayed by over a month until all 10 Funds' financial statements could be reviewed by him – all at once.[24]

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[23] The Sands have a policy of never sending emails. (Ex. 9 (2012 Slavin Report) at 5.)

[24] The auditors made no changes to those financial statements over the following month. (See Ex. 33) (May 31, 2011 12:56 pm email stating "there has been no change to the Drafts sent for Vantage or the venture funds from the ones sent over during April other than a change in the eventual Report date. . . . ").)

ii. Audited Financial Statements for the Fiscal Year 2011 Were Distributed up to Eight Months Late

The audited financial statements for the fiscal year 2011, due on April 30, 2012, were distributed on November 7, 2012 for eight of the funds and on December 28, 2012 for the remaining two funds (280 and Granite).

Again, it appears in this year that audits with no apparent issues were not finalized because other funds' audits had not been completed. For example, there is no evidence of any issues after April 30, 2012 with the audits for SBVC I, 280, Vantage, Granite or K&A. Nonetheless, these funds' audit reports were not released before November.

Indeed, with respect to 280 and , the audited financial statements were not distributed until December 28, 2012, almost two months after the other funds' reports were circulated, and nearly 8 months after they were due. Contemporaneous emails evidence that – as in the prior year – the peculiar and extended delay was attributable to the Sands – this time their failure to pay the auditors for work done on those funds. On October 24, 2012, the auditors sent unpaid invoices to the funds' administrator:

> *Per our discussion, attached please find the four invoices totaling $8,575 that is over 1 year old for Granite Associate[s]. There is also a $1,500 bill for 280 Ventures from 9/30/2011 that is also now 1 year old. As we discussed,* ***CGS is not permitted under AICPA independence rules to issue the financial statements for these two entities without settlement of these amounts.***

(Ex. 34 (emphasis added); see also Ex. 35 ((resending the 280 bill on 11/16/12).)

SBAM's extreme delay in delivering the audit reports to investors in 2012 is particularly egregious in light of the fact that Respondents learned mid-year that the Division was, once again, investigating SBAM's compliance with the Custody Rule. On May 23, 2012, M. Sands gave testimony as part of the Division's investigation, during which he was asked about the

distribution of the fiscal year 2011 audited financial statements. M. Sands was unsure about the status, but insisted that they were close, if not already completed:

> I don't know if they're finished yet. I think they're in – or they're getting close. They may have already been done. I don't know. I have to check. But, they're very close. They're – they're in the process of being worked on. They're in the – they're either close to being done or they're finished. I have to check.

(Ex. 36 at 76:8-16.) The reports were in fact still 5 ½ months from distribution. The Division served four subsequent subpoenas in the remaining months of 2012 to SBAM or its auditors,[25] all calling for information about SBAM's compliance with the Custody Rule. (Ex. 38.)

iii. Audited Financial Statements for the Fiscal Year 2012 Were Distributed up to Three Months Late

SBAM's untimely distribution of the audited financials persisted for fiscal year 2012. The 10 Funds' financial statements were distributed to investors between July 25, 2013 and August 1, 2013, several months late.

Again, in this year there is no evidence that the auditors raised any issues with the financial statements of the 280, Granite and Vantage funds; but it appears that those funds' audit reports were not finalized by the Custody Rule deadline because other funds' audits were incomplete.

And, again SBAM continued to miss the deadline even though the Division's investigation into its Custody Rule compliance continued. In May 2013, Kelly sat for testimony, and was questioned almost exclusively about the late distribution of the audited financials. (Ex. 6 (Kelly Tr.).) On July 19, 2013, Division staff had a telephone call with counsel for SBAM and the Sands regarding SBAM's perpetual late distributions. (Brown Decl. ¶ 47.)

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[25] The auditors informed the Sands and Kelly about the Division's subpoenas to CGS. (E.g., Ex. 37.)

Indeed, it was not until 2014 that SBAM successfully delivered the 10 Funds' audited financial statements by the Custody Rule deadline. And that was only after the Division staff called counsel for SBAM and the Sands in February 2014 to advise that they intended to recommend that an action be filed against SBAM, the Sands and Kelly, in connection with the prior three years' late distributions. (Brown Decl. ¶ 48.)

In each of the years discussed above, S. Sands, M. Sands and Kelly knew that the audited financials were distributed after the deadline. Each signed yearly management representation letters – required to be signed the same day, but prior to the issuance, of the audit reports. Those same letters acknowledged that *management* –and not the auditors – "are responsible for the preparation and fair presentation of the financial statements." (Ex. 31.)

E. Responsibility for Custody Rule Compliance

The Sands and Kelly were all responsible for ensuring SBAM's compliance with the Custody Rule. SBAM's compliance manual – which Kelly revised after his hiring in 2008 (Ex. 8 at 6) – divided such responsibility between the Sands, as ultimate managers, and Kelly, as CCO:

> Steven Sands and Martin Sands, the Firm's Managers, shall be responsible for ensuring that the Firm provides adequate resources to the persons with the responsibilities for implementing an effective compliance program for the Firm.
>
> * * *
>
> Where the Firm maintains possession or custody of client funds/securities, the **Chief Compliance Officer** shall ensure compliance with the restrictions and requirements of *Rule 206(4)-2 adopted under the Advisers Act.*

(Ex. 39 (2009 Compliance Manual) at 1, 18-19 (emphasis in original).) More generally, the manual assigned responsibility to each employee at the firm to understand the rules and regulations applicable to him and required each to certify that he understood that obligation. (Id.

at 2, 4.) The Sands and Kelly each signed annual certifications attesting to his understanding and compliance with all applicable rules and regulations. (E.g., Ex. 40 ¶ 3 (2011 Acknowledgments of S. Sands, M. Sands and Kelly) ("The undersigned has since the date of employment of the undersigned, and will continue to, abide by: (i) all rules, restrictions, policies and procedures described in the Manual . . . and (ii) all laws, rules, and regulations applicable to the undersigned.").) So, too, did each acknowledge annual attendance at the mandatory compliance trainings, where the Firm's compliance policies were reviewed. (E.g., Ex. 40 ¶ 9; Ex. 39 at 7.)

Further, the Sands and Kelly, either acting on their own or through SBAM employees and agents, controlled the audits. At the outset of the audits, Kelly signed engagement letters retaining the auditors, acknowledging management's responsibility for maintaining records, establishing internal controls, applying accurate accounting principles, and complying with the laws and regulations applicable to its activities. (Ex. 17.) At the close of the audits, the Sands and Kelly signed management representation letters acknowledging their review of the financial statements and their responsibility for their preparation and presentation of the financial statements. (Ex. 31.) All three were active audit participants in the phases in between – including by staying in regular communication with the auditors, (e.g., Ex. 41), and by seeking out and providing additional support for SBAM's valuations of fund investments upon auditor request when the initial supporting materials provided by SBAM were stale or not reliable. (e.g., Ex. 42.) At times, the Sands or Kelly would even act on behalf of the portfolio companies in which the funds were invested during the audit, in instances where they held control positions in those companies. (E.g., Ex. 43.)

F. <u>CGS' SAS 115 Letter</u>

In September 2013, CGS issued a SAS 115 Letter to S. Sands and M. Sands. SAS 115, codified as AU § 325, provides that "[d]eficiencies identified during the audit that upon evaluation are considered significant deficiencies or material weaknesses under this section should be communicated, in writing, to management and those charged with governance as a part of each audit." AU § 325.17.

The letter alerted S. Sands and M. Sands – as those charged with governance of the audit process[26] – that the auditors had in fact encountered material weaknesses and significant deficiencies in the Funds' internal controls during the course of their fiscal year 2012 audit work. The letter identified deficiencies such as incorrectly prepared investment valuations and the realization of a gain that had been recorded as a loss because proceeds were mailed to the wrong address. (Ex. 44 (SAS 115 Letter) at 2-3.)

It also noted that information necessary to support management's valuations had not been timely supplied by management to the auditors, and the need for such information was entirely foreseeable:

> There was a delay in the timely receipt from management of the information supporting the valuation of non-performing loans . . . which significantly affected the completion of the audit and the timely issuance of the financial statements. ***Since these conditions were known or identifiable before the commencement of the audits*** we believe that a more proactive timely approach by your valuation staff in identifying these situations and obtaining the necessary documentation, whether it be updated appraisals, opinions from legal counsel or other

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[26] Under AU § 380.03, those charged with governance in relation to an audit of financial statements are those "with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process."

> evidence supporting management's valuation, could alleviate most of the audit issues.

(Id. at 3 (emphasis added).)

ARGUMENT

I. SUMMARY DISPOSITION IS APPROPRIATE PURSUANT TO RULE 250

A. Summary Disposition Standard

Commission Rule of Practice 250(a) permits a party, with leave of the hearing officer, to move for summary disposition of any or all the OIP's allegations.[27] It provides that a summary disposition motion should be granted if there is "no genuine issue with regard to any material fact" and the moving party is entitled to judgment "as a matter of law." 17 C.F.R. § 201.250(b).

Judges routinely grant summary disposition where scienter is not at issue – like the Division's Custody Rule claims against SBAM. But, even as to violations requiring scienter, like the Division's aiding and abetting claims against the individual Respondents, summary disposition is appropriate where the material facts, as here, are undisputed. E.g., Matter of S.W. Hatfield, CPA, No. 3-15012, 2014 WL 6850921 (S.E.C. Dec. 5, 2014) (reversing denial of summary disposition and finding Respondent liable for intentional and reckless violation of Exchange Act Rule 10b-5); Matter of Executive Registrar & Transfer, Inc., No. 3-12966, 2008 WL 5262371, at *29-31 (Initial Decision Dec. 18, 2008) (finding transfer agent's president/control person aided and abetted entity's violations of Exchange Act rules on summary disposition).

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[27] The Court granted the Division leave to file the instant motion in its December 2, 2014 Scheduling Order.

B. SBAM Violated the Custody Rule and the 2010 Order in Three Successive Years

SBAM did not comply with the Custody Rule for the fiscal years 2010-2012. SBAM admits that it had custody of client assets during that time. It further admits that it did not comply with the Custody Rule's surprise examination requirements in any of those three years. (SBAM Answ. ¶ 19.)

Thus, in order to comply with the Custody Rule, SBAM had to satisfy the Rule's alternative for advisers to pooled investment vehicles by distributing audited financial statements to fund investors within 120 days of the end of each fund's fiscal year. *See* 17 C.F.R. § 275.206(4)-2(b)(4).

SBAM did not do that. For the fiscal years 2010, 2011 and 2012, SBAM's records (where they exist) reflect that audited financial statements were delivered to investors weeks – sometimes months – *after* the 120 day deadline. See Chart, supra at pp. 7-9 and Exs. 18-24.

Because the Custody Rule provides for strict liability, SBAM's late delivery of the 10 Funds' audited financial statements makes it liable as a matter of law. See SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992) ("[S]cienter is not required under [Advisers Act] Section 206(4)."). And, because the 2010 Order ordered SBAM to cease and desist from "committing . . . any violations and any future violations of Section[] . . . 206(4) . . . and Rule[] . . . 206(4)-2," its late delivery also violates the 2010 Order.

C. S. Sands, M. Sands and Kelly Aided and Abetted SBAM's Custody Rule Violations

The undisputed facts also demonstrate that the Sands and Kelly aided and abetted SBAM's violations.[28] Aiding and abetting liability is established where (1) there has been a

[28] The Commission already determined that the Sands aided and abetted SBAM's 2003 and 2007 Custody Rule violations. (Ex. 15 (2010 Order) at ¶¶ 9, 13(e).)

primary violation of the securities laws; (2) Respondents acted with scienter; and (3) Respondents provided substantial assistance in the primary violation. SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009). Recklessness satisfies the scienter requirement if Respondents are fiduciaries or active participants, as here.[29] Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990). Recklessness is defined as conduct that is "an extreme departure from the standards of ordinary care," Hatfield, 2014 WL 6850921, at *7, and is present when "the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Matter of ZPR Investment Mgmt., Inc., No. 3-15263, 2014 WL 2191006, at *44 (Initial Decision May 27, 2014) (quotations omitted).

i. S. Sands and M. Sands

Throughout 2011-2013, S. Sands and M. Sands intentionally, or at least recklessly, disregarded SBAM's Custody Rule obligations. Where the respondent controls the primary violator and is engaged in the conduct that results in the violation, or fails to ensure the violator's compliance with the law, he is an aider and abettor.[30] ZPR Investment Mgmt., 2014 WL 2191006, at *54 (finding controlling shareholder and creator of violating advertisements liable as aider and abettor of adviser's violations); Matter of J.S. Oliver Capital Mgmt., L.P, No. 3-15446, 2014 WL 3834038, at *45 (Initial Decision Aug. 5, 2014) (finding adviser's control person aided and abetted record-keeping violations by taking no "steps to ensure" emails were maintained);

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[29] As control persons of a registered investment adviser, the Sands and Kelly were associated persons of SBAM. See 15 U.S.C. § 80b-2(a)(17); Ex. 5, Schedule A at 125-26. They were therefore fiduciaries. Matter of Fundamental Portfolio Advisors, Inc., No. 3-9461, 2003 WL 21658248, at *15 (S.E.C. July 15, 2003).

[30] The Commission has "frequently found aiding and abetting liability for a failure to act where, as here, the respondent has a clear duty to act and the failure to act itself constitutes the underlying primary violation." Matter of VFinance Investments, Inc., No. 3-12918, 2010 WL 2674858, at *13 (S.E.C. July 2, 2010).

Executive Registrar & Transfer, Inc., 2008 WL 5262371, at *30 (holding president/control person liable as aider and abettor for transfer agents' reporting violations, including untimely reporting); Matter of Zion Capital Mgmt. LLC, No. 3-10659, 2003 WL 193535, at *12 (Initial Decision Jan. 29, 2003) (holding adviser's control person liable as aider and abettor where he "failed to ensure that" records were maintained).

S. Sands and M. Sands are the principals, co-chairmen and controlling persons of SBAM. (Exs. 2 and 5, Schedule A.) Together, they make material decisions on behalf of SBAM. SBAM's compliance manual designates the Sands as the "Firm's Managers," and makes them responsible for "ensuring that the Firm provides adequate resources" to implement "an effective compliance program for the Firm." (Ex. 39 at 1.) In yearly Acknowledgements, S. Sands and M. Sands each acknowledged that he was "aware of all laws, rules and regulations applicable to [him], and undertakes to continue to remain informed about all relevant compliance requirements." (E.g., Ex. 40 ¶ 3.)

S. Sands and M. Sands were each aware that the Custody Rule required SBAM to deliver audited financial statements to fund investors within 120 days of the end of each fund's fiscal year. If not before, as of October 2010, the Sands understood their obligations to ensure SBAM's compliance with the Custody Rule because each consented to entry of the 2010 Order against him personally for aiding and abetting SBAM's Custody Rule violations. Moreover, the Custody Rule's 120-day requirement was set out in the Compliance Manual (Ex. 39, at Section IX. D. 5), and reviewed at the annual compliance meetings the Sands attended (id. at 7; see also Ex. 8, at 7 (noting audit requirement discussions at two 2008 compliance meetings).) Further, Kelly testified that he repeatedly reminded everyone in the working group – including the Sands – of the Custody Rule deadlines (Ex. 6 at 15:15-22; 20:23-21:5), and that he "repeatedly

emphasized the importance of the annual audit requirement to M. Sands and S. Sands." (Ex. 8, at 7.)

Not only were both S. Sands and M. Sands fully aware of SBAM's Custody Rule obligations, both controlled the audit process necessary to comply with its deadlines. The auditors required that S. Sands and M. Sands both sign the management representation letters for each audited Fund. The auditors would not sign and finalize the audit reports before the management representation letters were signed. (E.g., Ex. 29 (noting auditor "can finalize and release" reports after representation letters are signed).) In keeping with that requirement, each representation letter bears the same date as its respective audit report.[31] (Exs. 31 and 18, 21, 23.)

S. Sands and M. Sands did not ensure that the audits were completed on time. They did not allocate additional resources to the task, as the Compliance Manual required. They failed to make information available to the auditors necessary to the completion of the audit work. (Ex. 44, at 3.) According to the auditors, the delays in completing the audits stemmed directly from this failure, and were entirely avoidable since the information needed to support the investments' valuations was "known or identifiable." (Id.)

M. Sands, for his own part, did not just fail to act; in at least one year, he actively produced SBAM's violation by refusing to allow the distribution of completed financial statements. In 2011, as the auditors completed their work on the financial statements for the SBVC I, Granite, 280, Vantage and K&A funds, M. Sands refused to sign the Management Representation letters that the auditors required because he wanted to review the 10 Funds' financial statements "all at once." (Ex. 32.) As a result, although the audited financial

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[31] Because the Sands signed the management representation letters for each of the relevant years *after* the 120 days had expired, each knew that SBAM had failed to comply with the Custody Rule deadline. (Ex. 31.)

statements for those five funds could have been timely delivered, M. Sands acted affirmatively to prevent SBAM's compliance with the Rule in that year.

For the fiscal year 2011, both S. Sands and M. Sands actively stood in the way of the delivery of completed audited financial statements for two funds, 280 and Granite , by failing to pay invoices issued by the auditor for work on those at least two funds that were over one year old. While the rest of the 10 Funds' audit reports are dated October 26, 2012, the audit reports for 280 and Granite are dated more than two months later, December 28, 2012. (Ex. 21.) Contemporaneous emails explain that the delay was not in completing the audit, but in obtaining payment on the auditors' outstanding invoices. (Exs. 34, 35.)

Further, S. Sands and M. Sands appear to have done nothing to assure that their fund administrator paid attention to promptly mailing the completed audit reports to investors. So, for example, in 2012, even though the audited financial statements for the K&A fund were finally completed on October 26, 2012, it was not until November 20, 2012 that the Fund's administrator finally mailed them to investors. (Compare Ex. 21(K&A 2011 Audit Report) with Ex. 22 (GFS000035 (November 20, 2012 email confirming mailing)).) Neither acted to ensure that Greenwich Fund Services maintained adequate records to prove that statements were mailed at all. Thus, for the 2010 fiscal year audited financial statements for three funds, 280, Granite and K&A, the fund administrator has no record that the financial statements were *ever* mailed to those funds' investors. (Ex. 20 ¶ 5.) Notwithstanding those record-keeping failures, SBAM continues to employ Greenwich Fund Services as the Funds' administrators; indeed, for a brief period in 2014, SBAM even appointed the administrator's President, Doug Bisio, to be SBAM's CCO. (Ex. 1, at 2.)

Finally, S. Sands' and M. Sands' disregard for the Custody Rule continued in the face of the Division's investigation of SBAM's violations of that rule. From May 2012 forward, numerous subpoenas and testimony questioning about the status of the financial statement distributions – even a conversation with counsel on the subject – did not move S. Sands and M. Sands to act. It was not until the Division's staff notified SBAM's counsel that the staff was prepared to recommend an enforcement action that S. Sands and M. Sands finally exerted their control to bring SBAM in line with the rule.

Thus, it is clear that S. Sands and M. Sands knew about – or were, at the very least, reckless with regard to – SBAM's Custody Rule violations and provided substantial assistance to those violations.

ii. Kelly

Kelly's position as an SBAM control person makes him equally liable as an aider and abettor of SBAM's Custody Rule violations as it does for the Sands. But, as is true for the Sands, the record demonstrates that Kelly provided knowing or reckless substantial assistance to SBAM's violations.

SBAM's Compliance Manual – which Kelly drafted – tasked Kelly with "ensur[ing] compliance with the restrictions and requirements of Rule 206(4)-2 adopted under the Advisers Act." (Ex. 39 at 18-19; Ex. 8, at 6 (noting Kelly revised the Compliance Manual upon his arrival).) By virtue of the fact that SBAM was weeks, and even months, late in complying with its obligations, Kelly indisputably did not do that.

Kelly knew about the requirements of the Custody Rule, and maintains that he "emphasized the importance of" compliance with it year after year. (Ex. 8, at 7.) Yet even after he signed SBAM's consent to the entry of the 2010 Order, he admits that he did not implement

any changes to the compliance policies and protocols to ensure that SBAM lived up to its cease-and-desist obligations under the Order. (Ex. 6, at 15:8-13.)

Nor did Kelly do anything to ensure compliance in his role as Chief Operating Officer of SBAM either. Thus, to the extent that Kelly will claim that he had limited authority over SBAM's day-to-day operations as Chief Compliance Officer, his role as Chief Operating Officer – responsible for all of SBAM's "operations which do not involve investment decision-making" (Ex. 9, at 3) – gave him all the authority he needed to ensure that the firm satisfied its obligations under the Custody Rule.[32] (See also Ex. 10, at 61:17-62:3.)

Kelly was responsible for the audits and knew that SBAM was not meeting its Custody Rule obligations. Kelly engaged the auditors and, as the email correspondence reflects, he was one of the auditors' primary contacts at SBAM. (E.g., Exs. 17, 25-27, 29, 32-33, 37 and 41.) He reviewed draft audit reports prior to their issuance, as he repeatedly acknowledged in the management representation letters he signed every year. (E.g., Ex. 31.) As is true for the Sands, in signing those letters when he did, Kelly knew that the deadlines had not been met. (Id.) And, Kelly was informed by the fund administrators when the audit reports were distributed. (E.g., Ex. 19 (emails to Kelly regarding audited financial distribution) (SBAM 0006678); 22 (GFS 000011); 24 (SBAM 007901)).) Indeed, Kelly testified that he knew that the audited financial statements were distributed after the deadline. (Ex. 6, at 21:6-14 ("I couldn't remember each instance" that the audited financials were not distributed by the deadlines, "but I believe it happened last year, which means with respect to [the] 2011 audited financial statements.").)

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[32] Nor can Kelly escape his responsibility by arguing that he was a mere figurehead COO. Matter of Angelica Aguilera, No. 3-14999, 2013 WL 3936214, at *24 (Initial Decision July 31, 2013) (holding president liable for supervisory failures despite her claim that she was a "figurehead," noting that once a respondent accepts the title, she is "required to fulfill the obligations attached to [her] office") (quotations omitted).

There is no evidence that Kelly ever pushed for earlier audit planning sessions – meetings at which SBAM discussed with the auditors what will be required during the upcoming audits. Nor is there any evidence that Kelly ever arranged for, or recommended that, SBAM engage auditors to perform a surprise examination to comply with the Custody Rule in place of relying on timely distribution of audits. Nor is there any evidence that Kelly reached out to the Commission's staff for guidance when it became clear that the deadline could not be met. Instead of seeking to implement, or even explore, meaningful, firm-wide changes – or *any* changes for that matter – aimed at ensuring that SBAM lived up to its Custody Rule obligations and obligations under the 2010 Order, Kelly appears to have believed that his encouragement of others at SBAM to meet the deadline would suffice to satisfy his responsibilities as the firm's COO and CCO.

D. S. Sands, M. Sands and Kelly Caused SBAM's Custody Rule Violations

S. Sands, M. Sands and Kelly caused SBAM's Custody Rule violations. A causing violation occurs where: (1) a primary violation exists; (2) an act or omission by the respondent was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. Matter of John Thomas Capital Mgmt. Grp. LLC, No. 3-15255, 2014 WL 5304908, at *26 (Initial Decision Oct. 17, 2014), review granted, Rel. No. 3978, 2014 WL 6985130 (Dec. 11, 2014).

Negligence is sufficient to establish causing liability for a primary violation that does not require scienter, as here. Matter of Ambassador Capital Mgmt., LLC., No. 3-15625, 2014 WL 4656408, at *42 (Initial Decision Sept. 19, 2014) (citation omitted).

Where a respondent aids and abets another's primary violation, he necessarily also causes that violation. Ambassador Capital Mgmt., 2014 WL 4656408, at *42. Here, S. Sands, M.

Sands and Kelly each knew that SBAM was violating the Custody Rule. Although they controlled the entity, neither took steps to ensure that SBAM complied with its obligations, even after consenting to a cease-and-desist order prohibiting S. Sands, M. Sands and SBAM from further aiding and abetting and causing the exact same violations. As a result, each knew or should have known that his failure to ensure that SBAM timely delivered its audited financial statements caused SBAM's Custody Rule violations.

II. SIGNIFICANT SANCTIONS ARE APPROPRIATE

A. SBAM's Registration Should Be Revoked and Permanent Collateral Bars Should Be Imposed on S. Sands and M. Sands

Advisers Act Section 203(e) authorizes the Commission to revoke an investment adviser's registration and bar its associated individuals if the sanction is in the public interest and the adviser or associated person has (i) willfully violated any provision of the Advisers Act, 15 U.S.C. § 80b-3(e)(5), or (ii) willfully aided and abetted another person's violation of the Advisers Act, or its rules or regulations. Id. § 80b-3(e)(6).

SBAM acted willfully in violating the Custody Rule and the Sands willfully aided and abetted those violations. A "willful violation of the securities laws means 'intentionally committing the act which constitutes the violation' and does not require that the actor 'also be aware that he is violating one of the Rules or Acts.'" Hatfield, 2014 WL 6850921, at *9 (quotations omitted). SBAM, acting through the Sands, knew that it was not distributing its 10 Funds' audited financial statements by the 120-day deadline. As shown above, the Sands aided and abetted SBAM's violations because, at the least, they signed management representation letters necessary to complete the audits well after the 120 day period had run.

Thus, the Division only needs to show that revocation of SBAM's registration and permanently barring S. Sands and M. Sands from association is in the public interest. In assessing the public interest, the Commission considers

> 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

Matter of Vladimir Boris Bugarski, No. 3-14496, 2012 WL 1377357, at *4 (S.E.C. April 20, 2012) (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)) (the "Steadman factors"). The Commission also considers whether the sanction will have a deterrent effect. Id. "[N]o one factor is dispositive." Matter of Michael C. Pattison, CPA, No. 3-14323, 2012 WL 4320146, at *8 (S.E.C. Sept. 20, 2012).

Here, the Steadman factors establish that revocation of SBAM's registration and permanent industry bars for S. Sands and M. Sands are appropriate. The violations were recurrent – occurring three years in a row, in addition to the prior violations that were the subject of the 2010 Order. And the violations were egregious. Although SBAM and the Sands apparently viewed the Custody Rule as a mere technicality, it is clear that the Commission holds a different view. As the Commission noted when it amended the Custody Rule in 2009, the changes were designed to prevent adviser misappropriation and mishandling of client assets:

> We believe these amendments, together with the guidance for accountants, will provide for a more robust set of controls over client assets designed to prevent those assets from being lost, misused, misappropriated or subject to advisers' financial reverses. We acknowledge that no set of regulatory requirements we could adopt will prevent all fraudulent activities by advisers or custodians. We believe, however, that this rule, together with our examination program's increased focus on the safekeeping of client assets, will help deter fraudulent conduct, and increase the likelihood that

> fraudulent conduct will be detected earlier so that client losses will be minimized.

Rel. No. IA-2967, 2009 WL 5172038, *3 (Dec. 30, 2009) (Final Rule). In view of the important role the Custody Rule plays in combatting fraud, SBAM's and the Sands' cavalier approach to their obligations makes their conduct egregious – especially where the Respondents delivered the audited financials to investors not just days, but months, after they were due.

And to the extent that SBAM and the Sands argue that they cured their violations by ultimately delivering the audited financial statements that the Custody Rule requires, they will miss the importance of timeliness. As the Commission has held with respect to issuers' obligations to file timely financial statements under Exchange Act Section 13(a), "the 'timeliness of information [in periodic reports] has considerable value to investors and the markets' and 'a lengthy delay before that information becomes available makes the information less valuable to investors.'" Matter of China-Biotics, Inc., No. 3-14581, 2013 WL 5883342, at *13 (S.E.C. Nov. 4, 2013) (quotations omitted). No lesser importance can be ascribed to timely compliance with the Custody Rule's delivery requirement.

While SBAM and the Sands have not yet offered any assurances against future violations, their sincerity if they do must be viewed skeptically in light of the fact that they began to violate the 2010 Order only months after it was entered.

Indeed, where the violator has shown chronic disregard of its regulatory obligations, revocation of its registration is appropriate. E.g., Matter of Phlo Corp., No. 3-11909, 2007 WL 966943, at *12-13, 16 (S.E.C. Mar. 30, 2007) (revoking registration of transfer agent and of its common stock for repeated violations of Exchange Act, including late filings); Executive Registrar & Transfer, 2008 WL 5262371, at *33 (revoking the registration of transfer agent for,

inter alia, late filings); cf. China-Biotics, 2013 WL 5883342 (deregistering shares of issuer for repeated delinquent filings in violation of Exchange Act Section 13(a)).

This is particularly so where the violations occurred in the face of a cease-and-desist order prohibiting the same conduct. Executive Registrar & Transfer, 2008 WL 5262371, at *30, 32. In Executive Registrar, Donnelly, the president/control person of a transfer agent, Executive, had previously consented to a cease-and-desist order, along with the transfer agent he previously controlled, United. The order prohibited violations of, among other things, Exchange Act rules requiring transfer agents to make certain periodic reports. In finding that Donnelly had, once again, violated the rules he had been ordered to comply with, the Hearing Officer noted that Donnelly's persistent violations supported revocation of Executive's transfer agent registration, and a permanent industry bar for Donnelly: "This lack of effort to understand the ramifications of a legal order imposed upon him demonstrates Donnelly's indifference to following the rules and regulations imposed on transfer agents by the Commission and his apathy toward the importance of abiding by such rules and regulations." Id., 2008 WL 5262371, at *30.

Finally, if allowed to continue as a registered adviser, SBAM will have every opportunity to flout its regulatory obligations again. So, too, if S. Sands and M. Sands are not barred from the industry. And since all have been previously sanctioned by securities regulators,[33] none deserves a second chance. Matter of Ross Mandell, No. 3-14981, 2014 WL 907416, at *6 (S.E.C. March 7, 2014) (recidivist's disciplinary history is "an aggravating factor that strongly weighs in favor of an industry-wide collateral bar"). As the Commission most recently noted, "collateral bars [are] particularly appropriate when, as in this case, regulators have previously

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[33] Apart from the 2010 Order, both Sands have extensive disciplinary histories, as they admit. (SBAM Answ. ¶¶ 3, 4; Ex. 4 (M. Sands /S. Sands CRDs).)

attempted to limit the respondent's association in the industry, and those regulatory restrictions did not dissuade the respondent from engaging in further misconduct." Id.

B. Kelly Should Be Permanently Barred from Serving as a Chief Compliance Officer

The record demonstrates that Kelly was equally indifferent to compliance with the Custody Rule and the 2010 Order. As a compliance officer, and the person designated responsible by the SBAM Compliance Manual, Kelly bore responsibility for SBAM's compliance with the Custody Rule. But he admits that he took no programmatic steps to ensure such compliance. There is also no evidence that Kelly made recommendations to the Sands to address the persistently late audits, that he complained about any SBAM employee's failure to provide the auditors with the required information on a timely basis, or that he complained about the Fund Administrator's late mailings of the audits upon completion. In short, Kelly appears to have thought that responsibility for SBAM's compliance with the Custody Rule began and ended with his regular reminders to others that the rule imposes a 120-day deadline. These failures justify a permanent bar against Kelly that would prohibit him from acting as Chief Compliance Officer for any entity operating in the securities industry.

C. Cease-and-Desist Orders Should Be Imposed on All Respondents

Advisers Act Section 203(k) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate any provision" of the Advisers Act. The Division must show that there is some likelihood of future violations, although "a single past violation ordinarily suffices to establish a risk of future violations." J.S. Oliver Capital, 2014 WL 3834038, at *50 (citation omitted). The Commission considers the same Steadman factors to determine whether a cease-and-desist order is appropriate. Matter of KPMG Peat Marwick LLP, No. 3-9500, 2001 WL 47245, at * 23 (S.E.C. Jan. 19, 2001), pet.

denied, 289 F.3d 109 (D.C. Cir. 2002)). It additionally considers "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 any other sanctions." Hatfield, 2013 WL 6850921, at *10 (quotation omitted).

The additional factors point to the necessity for a cease-and-desist order against Respondents. The violations occurred as recently as 2013. While the Division maintains that nothing short of SBAM's revocation, industry bars for the Sands, and a CCO bar against Kelly, will provide the necessary protection for investors, if anything short of those remedies is granted, all Respondents should be subject to an Order prohibiting their future violations.

D. Third Tier Penalties Should Be Imposed on All Respondents

Under Advisers Act Section 203(i), a penalty for each violation is appropriate if a respondent willfully violated the Advisers Act and a penalty is in the public interest. 15 U.S.C. § 80b-3(i). Under the three-tier system provided by the Act, the third (highest) tier is reserved for conduct involving a "deliberate or reckless disregard of a regulatory requirement," and "such act or omission . . . created a significant risk of substantial losses to other persons." 15 U.S.C. § 80b-3(i)(1)(B)(2)(C)(i) and (ii).[34] The penalty is committed to the Court's discretion. ZPR Investment Mgmt., 2014 WL 2191006, at *58 (citations omitted).

Six factors are considered when determining appropriate penalties:

(1) Whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment

[34] The third tier provides for penalties of up to $150,000 for each act or omission by an individual occurring between March 4, 2009 and March 5, 2013; $160,000 for each act or omission by an individual occurring after March 5, 2013; $725,000 for each act or omission by an entity occurring between March 4, 2009 and March 5, 2013; and $775,000 for each act or omission by an entity occurring after March 5, 2013. 17 C.F.R. § 201.1005 and Table V.

and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. § 80b-3(i)(1)(B)(3). Here, third tier penalties are appropriate and in the public interest. Respondents' flagrant disregard for their Custody Rule obligations, as well as a Commission Order, constitute "deliberate or reckless disregard of a regulatory requirement." And while there is no evidence of investor loss, the Custody Rule's requirements are intended to prevent such loss. See supra at pp. 27-28. Thus, Respondents' failures to abide by those requirements subjected investors to significant risk of substantial loss. Cf. Matter of John P. Flannery, No. 3-14081, 2014 WL 7145625, at *41 (S.E.C. Dec. 15, 2014) (imposing penalties on adviser-associated respondents based on risk of investor harm).

In addition, SBAM's and the Sands' derogation of the Commission's 2010 Order, and the Sands' lengthy disciplinary histories call for significant penalties. Clearly, imposition of modest penalties in the 2010 Order was insufficient to impress the gravity of their violations on SBAM and the Sands; more onerous penalties are deserving, and necessary to convey that message now.

Finally, deterrence is needed. As OCIE announced in March 2013, its examiner teams have "observed widespread and varied non-compliance with elements of the custody rule" by Advisers it examines. National Exam Program Risk Alert, Vol. III, Issue 1, March 4, 2013, at 1. There is thus a need to send a message that compliance with the Custody Rule is an obligation that Advisers must take seriously; meaningful penalties here would underscore that message and provide the deterrent effect needed to ensure Adviser compliance.

Because the highest penalties are in the public interest here, a third tier penalty should be awarded against SBAM and the individual Respondents for each of SBAM's thirty violations. If the Court awards the maximum penalty in the third tier, SBAM would be liable for a total of

$22,250,000, with each Respondent additionally liable for a total of $4,600,000. At the maximum penalty awardable at the second tier, § 80b-3(i)(1)(B)(2)(B) (available only if the Court were to find that there was no significant risk of substantial losses), SBAM's 30 violations would produce a penalty of $11,500,000, with the individual Respondents liable for $2,300,000 each. The maximum first tier penalty, applicable only if the Court were to find none of the Respondents liable for intentional or reckless conduct, § 80b-3(i)(1)(B)(2)(A), would produce penalties for SBAM of $2,300,000, and penalties for each Respondent of $225,000. (Ex. 45 (penalty calculation).)

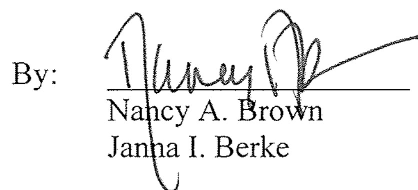
CONCLUSION

For the foregoing reasons, the Division respectfully requests that its motion for summary disposition and the relief requested be granted.

Dated: New York, New York
January 15, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

By: 

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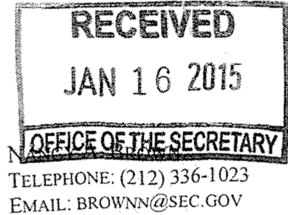

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January 15, 2015

VIA EMAIL AND UPS OVERNIGHT

Hon. Cameron Elliot
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D. C. 200549-2557

Re: In the Matter of Sands Brothers Asset Management, LLC, et al.
Admin. Proc. File No. 3-16223

Dear Judge Elliot:

We represent the Division in this matter. Pursuant to the Court's Scheduling Order, dated December 2, 2014, we enclose a courtesy copy of the Division's Motion for Summary Disposition pursuant to Commission Rule of Practice 250(a) and Memorandum of Law in Support, as well as my Declaration and the Exhibits thereto.

We will submit an email to the ALJ@sec.gov email box tomorrow that attaches a copy of our Motion and Memorandum and my Declaration, copying all Respondents. If the Court would like electronic copies of the Exhibits to my Declaration, we would be happy to submit a disc, but they are too voluminous to attach to the email.

By copy of this letter, we have delivered the original and three copies of our motion papers to the Office of Secretary for filing.

Respectfully submitted,

Nancy A. Brown

cc (w/ encls. as specified above):

Office of the Secretary (via UPS Overnight in two boxes)
Martin Kaplan, Esq. (Counsel for Respondents SBAM, S. Sands and M. Sands) (via email and UPS Overnight)
Christopher Kelly, Esq. (Pro Se) (via email and UPS Overnight)