

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 749 / February 11, 2013

ADMINISTRATIVE PROCEEDING  
File No. 3-15124

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In the Matter of	:	
	:	ORDER ON MOTIONS FOR A
DAVID F. BANDIMERE and	:	MORE DEFINITE STATEMENT
JOHN O. YOUNG	:	
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The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on December 6, 2012, alleging that Respondents David. F. Bandimere (Bandimere) and John O. Young (Young) violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act), and Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder. The OIP alleges, in the alternative, that Bandimere also violated Section 206(4) of the Investment Advisers Act of 1940 (Advisers Act) and Rule 206(4)-8 thereunder.

Bandimere filed an Answer to the OIP and a Motion for a More Definite Statement (Bandimere Motion) on January 4, 2013. This Office received a copy of Young's Answer to the OIP and a Motion for Definite Statement (Young Motion) on January 18, 2013. The Division of Enforcement (Division) filed a Brief in Opposition to Bandimere's Motion on January 22, 2013 (Opposition 1), and on January 23, 2013, this Office received Bandimere's Reply to the Division's Opposition (Reply). The Division filed a Brief in Opposition to Young's Motion (Opposition 2) on January 29, 2013. Young did not file a reply brief.

In his motion, Bandimere seeks the identities of the investors who he allegedly defrauded and argues that the Division must provide a more definite statement regarding, "the statements which the Division . . . contends were rendered misleading by a failure to disclose material facts." Bandimere Motion, pp. 2, 5. Bandimere explains that because "virtually all the misrepresentations alleged [in the OIP] were by omission," the Division needs to provide the content of the statements that were rendered misleading by the alleged omissions. *Id.*, p. 2. Further, Bandimere requests that the Division provide "the dates by which [he] was aware of the facts which the Division claims were material and the dates on which he made misrepresentations by a failure to disclose those material facts."<sup>1</sup> *Id.*, p. 5.

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<sup>1</sup> Bandimere initially argued that the Division failed to provide sufficient information regarding: 1) its theories of scheme liability under Section 17(a)(1) and (3) of the Securities Act and Exchange Act Rule 10b-5(a) and (c); and 2) under what circumstances the Division will pursue its alternative theory of liability under the Advisers Act, specifically the identity of the pooled investment vehicles mentioned in the OIP. Bandimere Motion, pp. 4-5. Bandimere acknowledges in his Reply that the

Young also seeks the identities of the investors who he allegedly defrauded and requests that the Division specify the acts which reflect his mental state and the means of the fraud. Young Motion, p. 1.

It is well-established that respondents in administrative proceedings are entitled to be sufficiently informed of the charges against them so that they may adequately prepare their defense; however, respondents are not entitled to a disclosure of evidence in advance of the hearing. See Charles M. Weber, 35 S.E.C. 79 (1953); see also M.J. Reiter Co., 39 S.E.C. 484 (1959). This has been called the “distinction between allegations and evidence.” Western Pacific Capital Management, LLC, Administrative Proceedings Rulings Release No. 691 (Feb. 7, 2012). Rule 200(b) of the Commission’s Rules of Practice states that the OIP “shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.” 17 C.F.R. § 201.200(b).

### **1. Identity of Investors**

With respect to Bandimere, the OIP alleges that he made misrepresentations or omissions to “investors” and “potential investors,” and that he “raised at least \$9.3 million from over 60 investors.” OIP, ¶¶ 2, 34, 35. The OIP alleges that Young “raised approximately \$2.5 million from at least 20 investors,” “made numerous misrepresentations to investors,” and directly offered a particular investment to “at least five potential investors but only one person actually made an investment.” Id., ¶¶ 3, 39, 40.

Both Bandimere and Young argue that unless the Division identifies the investors who it claims were misled, they will be unable to prepare a defense. Bandimere Motion, pp. 3-4; Young Motion, p. 1. The Division argues on the other hand that Respondents’ request for a list of investors is merely an attempt to obtain a witness list prior to the time required for disclosure and to improperly obtain discovery, which is not contemplated by the Commission’s Rules of Practice. Opposition 1, pp. 1, 3; Opposition 2, pp. 1-2.

Given the specific facts of this case, the Division will be required to provide Respondents with the identities of the investors allegedly defrauded. Respondents are seeking information that will allow them to respond to the allegations in the OIP and formulate a defense, and are not seeking disclosure of any specific evidence beyond the identity of the alleged victims. In light of the number of investors involved, the variety of misrepresentations and omissions potentially at issue, and the fact that the alleged conduct occurred over a period of five years, the investors and potential investors must be identified. That some or all of the investors and potential investors alleged as victims might testify does not make their identities purely evidence, as opposed to allegation. The Division’s attempt to clarify the OIP with respect to Bandimere by pointing out that it alleges misconduct in connection with “all potential investors (with one exception),” is not enough. Opposition 1, p. 2. In fact, the case for identifying “potential investors” may be even stronger because they may not be included on trading or investment records (if such records exist) and there may be no other way to identify them prior to the hearing.

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Division provided sufficient additional information regarding these theories in its Opposition and he therefore no longer seeks a more definite statement as to these theories. Reply, p. 7.

## **2. Misrepresentations, Omissions, and Red Flags**

The OIP sets forth detailed allegations regarding the alleged omissions and misrepresentations made by Bandimere and Young. See OIP, ¶¶ 34-36, 45-46. The OIP also identifies certain “red flags” that the Division contends should have alerted Respondents that they were dealing with likely frauds. See Id., ¶¶ 35-36.

Bandimere argues that since virtually all of the misrepresentations alleged by the Division were by omission, the Division should identify what he actually stated that was thereby rendered misleading by the alleged omissions. Bandimere Motion, p. 2. Bandimere requests that the Division provide the time when the alleged misrepresentations or omissions were made with greater specificity than the five-year period presently alleged. Id., p. 3. Bandimere also argues that the Division should set forth, with respect to each of the “red flags,” the time frame when he first learned of these “red flags.” Id., pp. 3, 5. The Division opposes Bandimere’s requests and argues that its allegations of fraud are sufficiently detailed to allow Bandimere to prepare a defense, and points out that the Federal Rules of Civil Procedure, cited by Bandimere, are inapplicable to administrative proceedings, and therefore the heightened pleading standard for fraud does not apply. Opposition 1, p. 2.

Bandimere’s request is granted in part. The Division shall identify, to within at least a month, the time frame: 1) that the alleged misrepresentations and omissions were made to investors; and 2) that the alleged “red flags” were first known to Respondents. This applies to the allegations against Bandimere and against Young. Bandimere’s request for a more definite statement regarding the contents of the alleged misrepresentations is, however, denied. Paragraphs thirty-four through thirty-six of the OIP sufficiently set forth the alleged misrepresentations and omissions made by Bandimere, and Bandimere should not need any further information regarding the content of his statements to formulate a defense.

## **3. Acts Specifying Mental State and Means of Fraud**

Young requests that the Division specify, “what acts evince [Young’s] mental state when the purported bad acts were undertaken,” and set forth “the means of the fraud,” citing Rule 9 of the Federal Rules of Civil Procedure. Young Motion, p. 1. Young’s request for this information is denied. As noted by the Division, the OIP alleges that Young acted knowingly or recklessly when he made the alleged misrepresentations or omissions, and the Federal Rules of Civil Procedure do not apply to administrative proceedings. See Opposition 2, pp. 3-4; OIP, ¶ 45. This constitutes a request for evidence in advance of the hearing and is squarely prohibited by Commission precedent. The information that the Division is being ordered to provide in response to Respondents’ other requests should allow Young to formulate a defense.

### **Order**

It is ORDERED that Bandimere and Young’s Motions are GRANTED IN PART and DENIED IN PART as set forth above.

It is FURTHER ORDERED that, by February 25, 2013, the Division shall file a statement setting forth: 1) the names of the investors or potential investors alleged to have been defrauded as identified in the OIP; and 2) for each alleged misrepresentation, omission, or “red flag” identified in

the OIP, the time frame, to within a month, as to when such misrepresentation or omission was made and when each “red flag” was first known by Respondents.

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Cameron Elliot  
Administrative Law Judge