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

Administrative Proceedings Rulings
Release No. 6521 / March 27, 2019

Administrative Proceeding
File No. 3-15124

In the Matter of

David F. Bandimere and
John O. Young

Order on Respondent's Motion for Judgment on the Pleadings

Respondent David F. Bandimere has moved for judgment on the pleadings. I partially resolved his motion during a prehearing conference held on March 13, 2019.[1] This order resolves the remaining portion of Bandimere's motion, concerning whether the order instituting proceedings (OIP) states a claim for securities fraud under Section 17(a) of the Securities Act of 1933 and Rule 10b-5 under the Securities Exchange Act of 1934.

Discussion

1. Legal Principles

A motion for a ruling on the pleadings is governed by Securities and Exchange Commission Rule of Practice 250(a), which requires the movant to show that "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law."[2] Rule 250(a) "is analogous to" Federal Rules of Civil Procedure 12(b)(6) and 12(c).[3] In deciding Bandimere's

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1 *See David F. Bandimere*, Admin. Proc. Rulings Release No. 6497, 2019 SEC LEXIS 496, at *1 (ALJ Mar. 15, 2019).

2 17 C.F.R. § 201.250(a).

3 Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,224 n.110 (July 29, 2016).

motion, therefore, I may not consider facts outside the pleadings unless they are attached to, referred to, or incorporated into the pleadings.[4] I may take official notice of matters that may be judicially noticed by a district court,[5] such as an issuer's filings with the Commission.[6]

The OIP alleges that Bandimere willfully violated the antifraud provisions found at Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.[7] The Division's burden under Section 10(b)

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[4] *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1201 n.3 (10th Cir. 2016) (Rule 12(c) motion); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (Rule 12(b)(6) motion); *see generally* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. Nov. 2018 update).

[5] *See* 17 C.F.R. § 201.323; *cf. Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (taking judicial notice of Commission filings when deciding appeal from granting of Rule 12(c) motion); *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997) (explaining that a court may take judicial notice in deciding a Rule 12(b)(6) motion).

[6] *See Am. Stellar Energy, Inc.*, Exchange Act Release No. 64897, 2011 WL 2783483, *6 n.27 (July 18, 2011) (taking official notice under Rule of Practice 323 of Commission filings); *cf. Oran*, 226 F.3d at 289.

[7] OIP ¶ 48. Section 17(a) which applies "in the offer or sale of any securities" makes it unlawful:

> (1) to employ any device, scheme, or artifice to defraud, or
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> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
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> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). Section 10(b) of the Exchange Act, which applies "in connection with the purchase or sale of any security," makes it unlawful "[t]o use or employ … any manipulative or deceptive device or contrivance in contravention of … rules" set by the Commission. 15 U.S.C. § 78j(b). Section 10(b) is implemented by Exchange Act Rule 10b-5, which makes it unlawful:

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and Section 17(a) is to show that (1) a respondent made a misrepresentation or omitted facts that rendered an affirmative statement misleading, (2) the misrepresented or omitted fact was material, (3) the respondent acted with scienter,[8] (4) the misrepresentation or omission was (a) in the offer or sale of any security (in the case of Section 17(a)), or (b) in connection with the purchase or sale of any security (in the case of Section 10(b)), and (5) the relevant conduct involved the requisite jurisdictional means.[9] In the case of omissions, the Division must show that a respondent knew about or recklessly ignored the omitted fact and knew or was reckless in not knowing that not disclosing the fact would likely mislead investors.[10]

"[T]he term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud."[11] The Division can show scienter by demonstrating extreme recklessness, which amounts to the conscious

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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

17 C.F.R. § 240.10b-5.

[8] "[S]cienter is a necessary element of a violation of § 10(b) and Rule 10b-5" and of Section 17(a)(1). *Aaron v. SEC*, 446 U.S. 680, 695–97, 701 (1980). Negligence is sufficient to establish a violation of Section 17(a)(2) or (3). *Id.* at 697, 702; *Dennis J. Malouf*, Securities Act Release No. 10115, 2016 WL 4035575, at *11 (July 27, 2016), *pet. pending*, No. 16-9546 (10th Cir.).

[9] *SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008); *SEC v. Levine*, 671 F. Supp. 2d 14, 27 (D.D.C. 2009). Bandimere does not contest the final two elements in his motion. As a result, they are not addressed in this order.

[10] *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1200–01 (10th Cir. 2015); *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1265 (10th Cir. 2001).

[11] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

disregard of obvious dangers.[12] A statement or omission is material if a "reasonable investor" would view it "as having significantly altered the 'total mix' of information made available."[13]

Although neither Section 10(b) nor Section 17(a) impose a duty to speak, if one chooses to speak, one "must speak truthfully about material issues."[14] And a wholly "truthful statement may provide a basis for liability if material omissions related to the content of the statement make it ... materially misleading."[15] In the case of alleged material omissions, the question is whether a respondent's "representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor."[16]

Puffery, which is a statement that is so general no reasonable investor would rely on it, is not actionable because it cannot mislead.[17] But if a

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[12] *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008); *see Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996).

[13] *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1247–48 (11th Cir. 2012) (applying the "total mix" standard in the case of a Commission enforcement action).

[14] *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2002); *see Emps.' Ret. Sys. of R.I. v. Williams Cos.*, 889 F.3d 1153, 1164 (10th Cir. 2018).

[15] *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 160 (S.D.N.Y. 2008); *see Caiola*, 295 F.3d at 331 ("Once Citibank chose to discuss its hedging strategy, it had a duty to be both accurate and complete.").

[16] *SEC v. Brown*, 740 F. Supp. 2d 148, 160 (D.D.C. 2010); *see Dolphin & Bradbury*, 512 F.3d at 638–39 ("an omitted fact is material if a 'reasonable investor' would have viewed it as 'significantly alter[ing] the total mix of information made available'") (citations omitted).

[17] *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 245 (2d Cir. 2016); *see Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014) ("'Puffing' concerns expressions of opinion, as opposed to knowingly false statements of fact: 'When valuing corporations,[] investors do not rely on vague statements of optimism like "good," "well-regarded," or other feel good monikers. This mildly optimistic, subjective assessment hardly amounts to a securities violation.'") (quoting *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010)).

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statement is capable of "objective verification," it is not puffery and can constitute a material misrepresentation.[18] Whether a statement is puffery or not, therefore, relates to the materiality element of a securities fraud claim.[19] Materiality is predominately a factual question that can be decided on the pleadings only when the alleged misrepresentations or omissions are "so obviously [un]important to an investor, that reasonable minds cannot differ on the question of materiality."[20] As a result, deciding whether a statement constitutes puffery typically cannot be decided on a motion for judgment as a matter of law.[21]

Certain prior statements by the Commission appear to discredit puffery as a valid defense. *See John R. Brick*, Admin. Proc. File No. 3-3167, 1975 WL 160409, at *7 n.23 (Oct. 24, 1975); *Cortlandt Inv. Corp.*, Admin. Proc. File No. 3-133, 1969 WL 95355, at *4 & n.9 (Aug. 29, 1969); *cf.* Safe Harbor for Forward-Looking Statements, 59 Fed. Reg. 52,723, 52,728 (Oct. 19, 1994). But puffery, as referenced here, flows from the principle that "[t]he role of the materiality requirement is not to attribute to investors a child-like simplicity …." *Basic Inc.*, 485 U.S. at 234 (internal quotation marks omitted); *see also Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (applying this principle in explaining that puffing statements generally lack materiality).

[18] *Apollo Grp.*, 774 F.3d at 606; *see Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996).

[19] *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) ("In applying the materiality element, courts have identified several categories of statements which are not considered materially misleading," including "[s]tatements classified as … 'mere puffing' …."), *quoted in SEC v. Curshen*, 372 F. App'x 872, 879 (10th Cir. 2010); *Howard v. Haddad*, 962 F.2d 328, 331 (4th Cir. 1992) ("'puffery[]' … lacks the materiality essential to a securities fraud allegation").

[20] *See TSC Indus.*, 426 U.S. at 450 (discussing materiality in the context of summary judgment); *Garcia v. Cordova*, 930 F.2d 826, 829 (10th Cir. 1991) (explaining the materiality is "generally more a factual question under the mixed standard of review"); *see also Basic Inc.*, 485 U.S. at 236 (characterizing materiality as "inherently fact-specific").

[21] *See Vivendi*, 838 F.3d at 247 n.14; *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 1004–05 (N.D. Cal. 2018) ("[W]hether a statement is deemed puffery is generally considered a question of fact, not law, although there are instances in which the answer is so clear that the issue may be decided as a matter of law …."); *cf. Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 564 (M.D. Pa. 2018),

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2. Bandimere's arguments

Bandimere argues that even taking the OIP's allegations as true, his alleged statements to investors are no more than "puffing" statements which are "not actionable."[22] Conceding that the OIP sets forth a number of facts he allegedly knew but failed to disclose, Bandimere faults the OIP because it does not include any statements he made that were rendered misleading in light of his alleged omissions and instead merely alleges that he "represented [investments] in a 'materially positive way.'"[23]

Bandimere also argues that the OIP alleges recklessness instead of an intent to defraud.[24] According to him, in cases involving allegations of recklessness, the Division must show that a respondent knew the undisclosed facts were material.[25] And, he posits, it is difficult to show that one is reckless when recommending investment in a Ponzi scheme because until the scheme is unraveled, it may "fool many people, including sophisticated investors and trained [Commission] investigators."[26] According to Bandimere, the fact that he personally invested in the scheme supports this argument.[27]

3. Analysis

Putting aside the fact that the OIP leaves something to be desired,[28] its allegations are sufficient to warrant denying Bandimere's motion. The OIP generally alleges that Bandimere painted a rosy picture of IV Capital Ltd. and Universal Consulting Resources LLC, which the OIP alleges were respectively operated as Ponzi schemes by Larry Michael Parrish and Richard Dalton.[29] Aside from generalities, the OIP alleges that Bandimere

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motion to certify appeal granted, No. 3:17-cv-1814, 2019 WL 1052014 (M.D. Pa. Mar. 5, 2019).

22 Mot. at 20.

23 *Id.* at 21.

24 *Id.* at 22.

25 *Id.*

26 *Id.*

27 *Id.* at 23.

28 *See David J. Bandimere*, Admin. Proc. Rulings Release No. 6500, 2019 SEC LEXIS 491, at *6–7 (ALJ Mar. 15, 2019).

29 OIP ¶¶ 1–2, 7–10, 34.

told Universal's potential investors that "they would earn a guaranteed annual return of 48 percent."[30] He also told investors that IV Capital and Universal had an "established track record of performance" and were run by "experienced and successful traders."[31] At the same time, the OIP alleges that Bandimere acted recklessly because he failed to tell investors a number of things, including that both IV Capital and Universal would pay him "large commissions" based on the amount of investor funds he brought in.[32]

These allegations sufficiently plead material misstatements or omissions and scienter. The fact that the person promoting an investment will receive compensation if an investor invests is the sort of information that any reasonable investor would find material.[33] But according to the allegations, Bandimere did not reveal this fact when he told investors that IV Capital and Universal had an "established track record of performance" and were run by "experienced and successful traders."[34]

And telling investors they would receive a guaranteed 48% return is self-evidently material. According to the OIP, moreover, when Bandimere guaranteed returns, he knew:

- Neither UCR nor IV Capital had any financial statements nor were they audited by any accounting firm
- Neither UCR nor IV Capital had any third-party service providers
- Dalton and Parrish refused to provide Bandimere with any documents confirming any aspects of the investments
- Neither IV Capital nor UCR ever provided any account statements documenting the investments or purported monthly earnings
- Bandimere was required each month to calculate returns for LLCs he created to facilitate investments and told Dalton and

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30 OIP ¶ 24.

31 OIP ¶ 34.

32 OIP ¶¶ 2, 35.c–e.

33 *See SEC v. Thompson*, 238 F. Supp. 3d 575, 598 (S.D.N.Y. 2017).

34 OIP ¶¶ 34–35.

Parrish how much to wire; neither Dalton nor Parrish provided the LLCs with this information

- Dalton and Parrish often wired insufficient funds to the LLCs
- Dalton and Parrish often paid Bandimere "significantly less than he was promised"
- Dalton had no experience with managing a large, successful investment program
- Dalton had been involved in multiple failed investment schemes
- Dalton had serious financial problems as a result of his unsuccessful investments.[35]

Putting these allegedly known but undisclosed facts together would call into question in any reasonable investor's mind whether any investor would actually receive a return, guaranteed or otherwise. In other words, knowledge of these facts would alter the total mix of information for a reasonable investor. The undisclosed red flags are thus material. And the undisclosed red flags alleged in the OIP of which Bandimere was aware could support the determination that Bandimere was extremely reckless in guaranteeing returns.

Further, the allegation that Bandimere knew of these red flags when he told investors that IV Capital and Universal had an "established track record of performance" and were run by "experienced and successful traders," is sufficient to support the inference that he was at least seriously reckless in making his assertions.[36]

The OIP also alleges that while knowing of the red flags, Bandimere told investors that IV Capital and Universal were "low risk" and "very good investments."[37] Standing alone, asserting that an investment is "low risk" or a "very good investment" may constitute mere puffery.[38] But if Bandimere

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[35] OIP ¶ 35.

[36] OIP ¶¶ 34–35.

[37] OIP ¶ 36.

[38] *See First Presbyterian Church of Mankato v. John G. Kinnard & Co.*, 881 F. Supp. 441, (D. Minn. 1995) ("It is certainly true that statements such as 'performing well' or 'low risk' are plainly expressions of opinion and, standing

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actually knew a host of facts that would objectively make IV Capital and Universal very bad investments and investing in them high risk, as the OIP alleges, Bandimere's omissions would be actionable.

In sum, the OIP sufficiently pleads material misstatements or omissions and scienter to state a claim for securities fraud.

Bandimere's motion for judgment on the pleadings is DENIED.

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James E. Grimes
Administrative Law Judge

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alone, are not actionable. However, … the court must view the statements in context to determine whether [the] claims are sufficient.")