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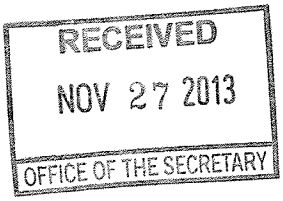
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
FILE NO. 3-15124

DAVID F. BANDIMERE and JOHN O. YOUNG	:

OPPOSITION OF RESPONDENT DAVID F. BANDIMERE TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY AFFIRMANCE OF INITIAL DECISION

Respondent David F. Bandimere, through his attorneys, Davis Graham & Stubbs LLP, responds in opposition to the Division of Enforcement's Motion for Summary Affirmance of Initial Decision.

I. INTRODUCTION

Mr. Bandimere, who is now 67 years old, had only modest investment experience. He spent his life working in his family's automotive business. Shortly before the events at issue, Mr. Bandimere sold his interest in the family business to his brother, which provided a significant amount of money available for investment.

Mr. Bandimere was victimized by two related Ponzi schemes. Richard Dalton, a friend of 30 years who Mr. Bandimere met through church activities, solicited Mr. Bandimere to invest in what was later uncovered as a Ponzi scheme called IV Capital Ltd. ("IV Capital") run by Larry Michael Parrish. Then, after Mr. Dalton apparently concluded that he could run a Ponzi scheme as well as Mr. Parrish, Mr. Dalton solicited Mr. Bandimere to invest in a Ponzi scheme run by Mr. Dalton himself, called Universal Consulting Resources ("UCR").

Mr. Bandimere's victimization occurred in two ways. He invested over $1 million of his money in the two schemes, which was lost when those schemes collapsed. In addition, Mr. Bandimere, who was prominent in the Denver, Colorado, evangelical Christian community, communicated his apparent investment success in what turned out to be fraudulent schemes to family and friends, some of whom invested and ultimately lost their investments as well. That second victimization, which the Commission has recognized to be a common aspect of affinity Ponzi schemes[1], cost Mr. Bandimere his reputation and many relationships. If Shakespeare is to be believed, the loss of reputation was more damaging than the financial loss.[2]

Counsel for Mr. Bandimere is unaware of any case where the Commission brought an enforcement action against a victim of a Ponzi scheme. Nevertheless, an administrative proceeding was initiated against Mr. Bandimere, by an Order Initiating Proceedings (the "OIP") alleging fraud in willful violation of Section 17(a) of the Securities Act and SEC Rule 10b-5, a willful violation of Section 5 of the Securities Act of 1933, a willful violation of Section 15(a) of the Securities Exchange Act of 1934, and, in the alternative, a violation of Section 206(4) of the Investment Advisers Act of 1940.

A five-day hearing on the allegations in the OIP began in late April, 2013. Twelve fact witnesses and one expert testified. The transcript of proceedings exceeded 1,300 pages. Some 145 exhibits were introduced.

Just prior to the commencement of the hearing, the Division of Enforcement (the "Division") disclaimed pursuing liability for fraud under a theory of scheme liability. Therefore, the only theory at issue regarding whether Mr. Bandimere violated the anti-fraud provisions related to misrepresentations in violation of Section 17(a)(2) of the Securities Act and Rule 10b-

[1] e.g., SEC Investor Bulletin: Affinity Fraud, posted on the SEC website September 2012.

[2] "Who steals my purse steals trash. . . . But he who filches from me my good name . . . makes me poor indeed." W. Shakespeare, Othello, the Moor of Venice, Act III, scene iii.

5(b). As part of its post-hearing submission, the Division conceded that it had not proven its claim under the Advisers Act.

On October 8, 2013, the law judge issued an 89 page Initial Decision, finding that Mr. Bandimere had violated all of the statutory provisions and rules as alleged in the OIP, except for the claim under the Advisers Act. Although Mr. Bandimere gave assurances against involving anyone in investments in the future, the law judge found those assurances not to be credible. As a result, the law judge determined that a "severe" sanction was necessary to protect the public interest, and imposed a cease and desist order against future violations, a full associational bar, disgorgement of $638,056.33, with pre-judgment interest to be calculated from February 1, 2010, and a civil penalty of $390,000.

Mr. Bandimere, on October 25, 2013, filed a timely Petition for Review, raising issues of the lack of adequate notice of law and facts that were to be at issue, that the findings of violation were not supported by a preponderance of evidence and, therefore, were clearly erroneous, that he had been denied due process and equal protection of the law, and that the imposition of sanctions were arbitrary and capricious and not supported by the evidence.

On November 15, 2013, the Division filed a Motion for Summary Affirmance, arguing in a cursory and conclusory way, that the Initial Decision was correct in every respect and that there are no issues that need concern the Commission any further.

II. THE DIVISION HAS FAILED TO DEMONSTRATE THAT SUMMARY AFFIRMANCE IS APPROPRIATE.

A. Factors to be Considered in Granting Summary Affirmance.

The Division is only partly correct when it asserts that the only question for the Commission to decide in granting summary affirmance is whether any issues are raised in a petition seeking review of an initial decision warrant consideration by the Commission of further

oral or written argument. That language, taken from Commission Rule 411(e)(2), fails to consider the entire rule, and ignores completely the Commission's guidance provided in its decisions addressing the circumstances under which summary affirmance of an initial decision is appropriate.

Commission Rule 411(e)(2) provides expressly that summary affirmance will not be granted where a "reasonable showing" is made that prejudicial error was committed in the conduct of the proceeding, or that the initial decision embodies an exercise of discretion or decision or law or policy that is important and that the Commission should review. The Commission has not defined what constitutes such a reasonable showing.

However, the Commission has made clear in earlier orders addressing motions for summary affirmance that "Summary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters." *Theodore W. Urban*, Order Denying Motion for Summary Affirmance, Rel. No. 63456 (Dec. 10, 2010), p. 3, *citing Salvatore F. Sodano*, Order Denying Motion for Summary Affirmance, Exchange Act Rel. No. 56961 (Dec. 13, 2007). Further, because the Commission reviews the findings of fact and conclusions of law in an initial decision *de novo*, an initial decision is entitled to no deference. *Id.* at 4, n.10. Because the Division has not even attempted to show that this is a "rare" case in which the Commission has no interest in articulating its views, or that Mr. Bandimere has no right to a full consideration of the issues he has raised, the Division has not met its burden in demonstrating that summary affirmance is warranted.

The Division has not pointed to any prior decision where summary affirmance of an initial decision was granted in remotely similar circumstances. There is no such decision. To the

contrary, the Commission's earlier decisions support the conclusion that summary affirmance must be denied.

In *John P. Flannery and James D. Hopkins*, Securities Act Rel. No. 9307 (Mar. 30, 2012), p. 4, the Commission denied a motion for summary affirmance, noting that an extensive record developed below and a lengthy decision by the law judge were circumstances making it appropriate to consider the parties' arguments as part of the normal appellate process. In *Christopher A. Lowry*, Rel. No. 45131 (Dec. 5, 2001), p. 2, the Commission denied summary affirmance because the law judge's decision to impose a permanent bar which the respondent directly challenged, constituted an exercise of discretion which was important and that the Commission should review. [3]

Here, there is an extensive record and a lengthy decision, and the law judge imposed a permanent associational bar which Mr. Bandimere has directly challenged which, under its precedent, warrant the denial of the Division's Motion for Summary Affirmance. In addition, as discussed below, Mr. Bandimere's Petition for Review raises issues that the Commission should review, and which Mr. Bandimere reasonably expects to receive full consideration.

B. Mr. Bandimere's Petition for Review Raises Issues for Which Summary Affirmance is not Appropriate.[4]

Although the Division has failed to make even a *prima facie* case warranting summary affirmance, Mr. Bandimere's Petition for Review raises issues that the Commission should decide.

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[3] The Commission's decision in *Lowry* is significant also because summary affirmance was denied notwithstanding the Division's contention that the respondent represented an on-going threat to the investing public and the request for review was merely a tactic to delay the imposition of the sanction. Here, the Division has not even suggested that Mr. Bandimere represents any threat to the investing public, or that his petition for review was filed only to delay a final order.

[4] Because the Division has failed to make even a *prima facie* showing that summary affirmance is appropriate, its motion should be denied. Mr. Bandimere's discussion of issues here is illustrative and not intended to be a waiver of any issue not addressed.

1. Denial of Equal Protection.

The Commission's decision to proceed against Mr. Bandimere administratively, rather than by a civil injunctive action, denied Mr. Bandimere equal protection of the laws. Had this case been filed in federal court, Mr. Bandimere would have had the right to a jury trial, and a variety of discovery rights that would have aided in this defense. Mr. Bandimere demonstrated at the hearing that people who the Commission contended committed fraud by inducing investors to invest in Ponzi schemes were not subject to administrative proceedings in the first instance, but were prosecuted either criminally or in civil injunctive actions. Exhibit 228. The Division put on no evidence of a benign reason for Mr. Bandimere being singled out for deprivation of important procedural protections, such as a jury trial and the panoply of civil discovery. A preponderance of the evidence in the record supports the conclusion that this case was brought administratively in order to impair Mr. Bandimere's ability to defend himself, which constitutes a denial of equal protection of the laws.

Mr. Bandimere's legal argument is based on *Gupta v. SEC,* 796 F.Supp. 2d 503 (S.D.N.Y. 2011). The law judge rejected the equal protection defense on the grounds that he lacked the authority to consider it. Initial Decision, p. 76. In the alternative, the law judge rejected the claim on the merits, stating that the Commission's decision on the forum in which to proceed is not reviewable under any circumstances. *Id.* However, that assertion is contrary to the position which the Commission took in *Gupta*, in which it argued that Mr. Gupta failed to exhaust his administrative remedies.

The rejection of Mr. Bandimere's equal protection defense, which Mr. Bandimere believes is a question of first impression to the Commission, raises important issues that the Commission should decide, including whether a law judge has the authority to afford a

respondent relief on such a defense, and if so, whether the Commission's decision to proceed administratively is reviewable at all, and the circumstances under which a claim asserting a violation of equal protection can be presented and proved in the administrative proceeding. In this regard, the Commission should note that it argued in *Gupta* that the complaint should be dismissed because Mr. Gupta failed to exhaust his administrative remedies. If, as the law judge found, there is no viable administrative remedy to an alleged violation of equal protection, the Commission will have reversed its previously asserted position with no explanation or justification. The Commission should not seek dismissal in one case based on a claimed failure to exhaust administrative remedies, and then argue in another case that there is no administrative remedy to exhaust.

2. Lack of Due Process Due to Improper Notice.

Mr. Bandimere was deprived of due process of law through a lack of proper notice of the matters against which he had to defend. The OIP was specific that Mr. Bandimere's alleged *scienter* was based upon recklessness in not knowing that IV Capital and UCR, the two Ponzi schemes in which he invested more than $1 million were "likely frauds." OIP II.A.2; II E. 36. It is settled law that recklessness means extreme conduct that is tantamount to actual knowledge. No other allegations relating to Mr. Bandimere's *scienter* appear in the OIP. However, the Division, shortly before the evidentiary hearing, took the position, which the law judge accepted, that its case did not depend on Mr. Bandimere's knowledge that he was involving people in a fraudulent scheme.

The law judge's determination that Mr. Bandimere acted with *scienter* was not based on his recklessness as alleged in the OIP, but, rather, were based on findings that Mr. Bandimere had intentionally made false representations to several of the investors, and had "bullied" another

investor. Initial Decision, pp. 59-61. However, the OIP did not allege that Mr. Bandimere acted intentionally or "knowingly" in making any misrepresentations and none of the purported intentional misrepresentations on which the law judge based his determination that Mr. Bandimere acted with *scienter* were mentioned at all in the OIP.

The bottom line is that the Division did not prove the only facts that the OIP alleged constituted Mr. Bandimere's *scienter*. The law judge, presumably so he could find in favor of the Division, simply treated those essential factual allegations in the OIP as surplusage. The law judge then found that Mr. Bandimere acted with *scienter* based on facts that were never alleged in the OIP.

The approach taken by the Division and the law judge represents a violation of the Commission's precedent as to how an OIP is to be construed, *Charles M. Weber*, Rel. No. 34-4230 (SEC, April 16, 1953) (the OIP did not embrace matters other than those specified) and, further, represents a finding of violation as to which proper notice was not provided. *Jaffee v. SEC*, 446 F.2d 387 (2d Cir. 1971).

The Commission has an interest in assuring that its administrative proceedings are conducted fairly. *Clark T. Blizzard*, Rel. No. IA-2032 (SEC, April 24, 2002). That is particularly true now that the fairness of the Commission's administrative proceeding is coming under long overdue public scrutiny. Gretchen Morgenson "At the S.E.C., a Question of Home-Court Edge," New York Times, October 5, 2013.

3. The Division Did Not Prove its Securities Fraud Claim.

The only affirmative misrepresentations which the Division contends that Mr. Bandimere made were telling investors that investments in either IV Capital of UCR were safe, and that they

were good investments. OIP, Section II.D. 36. There is no evidence in the record that Mr. Bandimere told any investor either of those things.

With respect to fraud by omission, the OIP listed a number of alleged material facts which it contends were not disclosed to investors. OIP, Section II.D. 35. However, the OIP did not identify, and the law judge did not find, any specific statement that was rendered misleading by any of the alleged material facts that were not disclosed. In fact, none of the investor witnesses had a recollection of what they were told by Mr. Bandimere about the investments, other than the returns that the investments had been providing, and that Mr. Bandimere and some of his friends had invested. However, there is no evidence that the investments were not providing the returns discussed by Mr. Bandimere, and it is undisputed that Mr. Bandimere and some of his friends had made substantial investments.

Nevertheless, the law judge determined that Mr. Bandimere had committed fraud through omission, without identifying any statement rendered misleading by any material fact that he found had not been disclosed. Initial Decision, pp. 58-59.

It is basic to a claim for securities fraud through misrepresentations by omission that the omission of a material fact must render a statement actually made misleading. *Matrixx Initiatives Siracusano*, 131 S. Ct. 1309 (2011); *SEC v. St. Anselm Exploration Co.*, 2013 WL 1313765 (D. Colo. Mar. 29, 2012). An accurate statement of past results is not rendered misleading by the failure to disclose facts which bear on whether past successes will be duplicated in the future. *Findwhat Investors Group v. Findwhat.com*, 658 F.3d 1282, 1306 (11th Cir. 2011); *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 361 (1st Cir.1994). A finding of misrepresentation through omission without identifying the statement that was rendered misleading by the omission is contrary to basic law. Therefore, the finding that Mr. Bandimere

business of effecting transactions in securities for the account of others, but rather, a variety of factors to be considered, none of which have dispositive weight, whether the law judge properly evaluated the various factors in determining whether Mr. Bandimere was a broker is an issue which should be important to the Commission, and is certainly an issue which Mr. Bandimere reasonably expects to be addressed by the Commission.

With respect to the finding that Mr. Bandimere willfully sold unregistered securities, Mr. Bandimere contends that the law judge improperly construed what was meant by "willfully." Further, the lawyer with whom Mr. Bandimere consulted regarding the legality of the activities in which he engaged admitted at the hearing that he missed the issue of whether Mr. Bandimere's conduct might have constituted a violation of Section 15(a). Whether Mr. Bandimere acted "willfully" in violation the law, where he consulted counsel regarding the legality of his activities, and whose counsel admitted to failing to identify an issue of potential illegality as an unregistered broker, are important issues for the Commission to decide, and ones that Mr. Bandimere could reasonably expect the Commission to address.

6. Sanction

Because the law judge imposed what he characterized as "severe" sanctions, whether the law judge properly used his discretion in imposing those sanctions is an important issue for the Commission to consider, and an issue which Mr. Bandimere reasonably would anticipate the Commission to address. More specifically, Mr. Bandimere contends that the imposition of a cease and desist order, where there is no evidence of a likelihood of a future violation of the law was an abuse of discretion, as was the imposition of permanent, industry-wide associational bars. Mr. Bandimere also disputes that the imposition of third-tier civil penalties was a proper exercise of discretion. Lastly, Mr. Bandimere challenges the award of disgorgement in light of the facts

that he did not profit from the totality of his activities relating to the Ponzi schemes, and that the Division did not provide evidence of a reasonable approximation of any profits that Mr. Bandimere might have obtained from illegal activities. Mr. Bandimere contends further that the law judge abused his discretion in finding that the Division had made a reasonable approximation of profit and that the profit shown was sufficiently related to the violations of law found to warrant disgorgement.

In light of the severity of the sanctions imposed, the amount of disgorgement awarded, and the equitable considerations of whether a victim of a Ponzi scheme who overall has suffered substantial loss should be required to disgorge funds he received, thereby increasing his loss, the disgorgement ordered should receive review by the Commission through normal appellate processes.

III. CONCLUSION

The Division has failed to meet its burden to show that this case provides one of the rare occasions where summary affirmance of an initial decision is appropriate. Further, Mr. Bandimere has made a reasonable showing that prejudicial error was committed in the conduct of the proceedings and that the Initial Decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

The Division's Motion for Summary Affirmation should be denied.

Dated this 22nd day of November, 2013.

Respectfully submitted:

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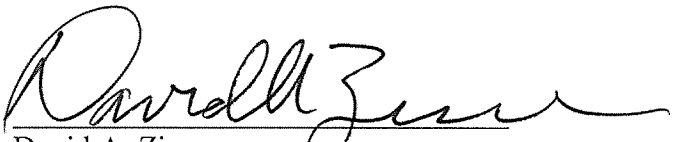

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