



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of

DAVID F. BANDIMERE and
JOHN O. YOUNG

DIVISION OF ENFORCEMENT'S
REPLY IN SUPPORT OF MOTION
FOR SUMMARY AFFIRMANCE OF
INITIAL DECISION

The Division of Enforcement ("Division") hereby submits this reply in support of its motion for summary affirmance of the Initial Decision in this matter against Respondent David F. Bandimere ("Bandimere").

ARGUMENT

1. Summary affirmance is appropriate here based on the applicable factors.

According to the factors applied by the Securities and Exchange Commission (the "Commission"), summary affirmance of the Initial Decision in this matter pursuant to Commission Rule ("Rule") 411(e)(2) is appropriate if the Administrative Law Judge's (the "ALJ's") Initial Decision raises no issue that warrants consideration by the Commission of further oral or written argument. Summary affirmance is appropriate in the absence of a prejudicial error committed in the conduct of the proceeding or a decision that embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review. Rule 411(e)(2); A-Power Energy Generation Systems, Ltd., Release No. 69439 (April 24, 2013) (ordering summary affirmance); Andover Holdings, Inc., Release No. 68966 (Feb. 21, 2013) (ordering summary affirmance).

As detailed in the Division's motion, Bandimere's Petition for Review of Initial Decision (the "Petition") raises numerous issues, none of which warrants consideration by the Commission. Bandimere merely re-argues the same points that the ALJ thoroughly considered and rightly decided during the hearing in this matter. Thus, the Commission should grant summary affirmance of the Initial Decision and reject the Petition.

2. Bandimere's Petition raises no issue that warrants consideration by the Commission of further oral or written argument.

a. **Denial of Equal Protection**

The ALJ's ruling on Bandimere's denial of equal protection claim involved no prejudicial error, and was not an exercise of discretion or decision of law or policy that is important and that the Commission should review. As an initial matter, it is well-established that administrative proceedings comport with the due process requirements of the Constitution. See Jonathan Feins, 54 S.E.C. 366, 378 (1999) (holding that "[a]dministrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding").

Bandimere claims that he was selectively prosecuted, but "[t]o prevail on a claim of improper selective prosecution, a respondent must establish that it was singled out for enforcement action while others similarly situated were not, and that its prosecution was motivated by arbitrary and unjust considerations, such as race, religion, or a desire to prevent the exercise of a constitutionally-protected right." In re Indigenous Global Dev. Corp., Release No. 325, 89 S.E.C. Docket 2452 (January 12, 2007). Bandimere was not singled out; the Division filed administrative actions against two other respondents resulting from the same investigation: John O. Young (in this action) and David R. Smith

(in a settled action, Release No. 9373). Bandimere has identified no protected class to which he belongs or even alleged the basis of his selective prosecution. And Bandimere himself identified a dozen other Ponzi-related cases that were brought as administrative proceedings. Exh. 228. Bandimere claims that his equal protection defense is based upon Gupta v. SEC, 796 F. Supp. 2d 503 (S.D.N.Y. 2011), but that was a federal district court case in which Gupta challenged an administrative proceeding separately instituted against him. The Gupta court found that such counterclaims are not permitted in administrative proceedings. Id. at 513.

Ultimately, the ALJ correctly rejected Bandimere's equal protection defense based on the facts and the established law, finding that Bandimere did not prove any element of his defense, and finding that the law supports no such defense. See Initial Decision at 75-77. Thus, review by the Commission is not warranted.

b. Lack of Due Process Due to Improper Notice

The ALJ's ruling on Bandimere's lack of due process due to improper notice claim involved no prejudicial error, and was not an exercise of discretion or a decision of law or policy that is important and that the Commission should review. Bandimere misstates the allegations of the OIP, and on that basis claims a due process violation, based on the Division's allegations related to scienter. But the OIP is clear: Bandimere's scienter is based upon the contrast between the positive material representations he made to investors and the negative material facts he hid from investors. See OIP ¶¶ 35-36. This is the precise basis on upon which the ALJ found scienter. See Initial Decision at 57-59. The Division's proof of scienter did not depend on the allegation that Bandimere should have been alerted to the fact that the investments were likely frauds. See id. at 76-77.

The ALJ correctly ruled that the Division proved scienter, as alleged in the OIP, and Bandimere's arguments that he suffered a due process violation are without merit. Thus, review by the Commission is not warranted.

c. The Division Proved its Securities Fraud Claim.

Bandimere asserts that "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." Opposition at 9. This is simply false. The ALJ detailed the positive material statements told to investors by Bandimere, including that the investments he offered were good, safe investments, and found that "Bandimere's disclosure of positive information about the investments was rendered materially misleading in light of his failure to disclose other material facts to investors." Initial Decision at 58-59 (citing Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1321 (2011)). The ALJ also analyzed in detail the negative material facts that Bandimere hid from investors. See id. at 63-75.

The ALJ correctly ruled that the Division proved its securities fraud claim, and Bandimere's arguments to the contrary have no basis in fact or law. Thus, review by the Commission is not warranted.

d. Willful Violations of Section 5 of the Securities Act

Bandimere claims that the ALJ erred in ruling that Bandimere acted willfully in violating Section 5 of the Securities Act, but this argument is completely baseless. Bandimere makes two arguments, both of which the ALJ correctly rejected: that his activities were intended only to benefit others, not himself, and that he relied on counsel. The ALJ rightly rejected Bandimere's first argument because Bandimere received about \$735,000 in fees or commissions for his offering and sales of the securities at issue,

benefiting himself, and making his reliance on Pinter v. Dahl, 486 U.S. 622 (1988) misplaced. See Initial Decision at 48-51. Bandimere's reliance on counsel argument is equally unavailing because the Commission has held that reliance on counsel "is of no consequence" to its determination of violations of Securities Act Section 5 because the "advice-of-counsel defense only goes to the question of scienter" and scienter is not an element of Section 5 violations. Zacharias v. SEC, 569 F.3d 458, 467 (D.C. Cir. 2009); Rodney R. Schoemann, Securities Act Release No. 9076 (Oct. 23, 2009), 97 SEC Docket 21726, 21745, *aff'd*, 398 F. App'x 603 (D.C. Cir. 2010) (*per curiam*); see also Initial Decision at 52.

The ALJ correctly ruled that the Bandimere willfully violated Section 5 of the Securities Act, and Bandimere's arguments to the contrary are unfounded. Thus, review by the Commission is not warranted.

e. Willful Violations of Section 15(a) of the Exchange Act

Similar to his Section 5 claim, Bandimere argues that the ALJ erred in ruling that Bandimere acted willfully in violating Section 15(a) of the Exchange Act, but this argument is also baseless. Bandimere makes two arguments, both of which the ALJ correctly rejected: that he did not engage in the business of effecting transactions in securities for the accounts of others, and that he relied on counsel. Based on established law, the ALJ rule that Bandimere was a broker – i.e., he was engaged in the business of effecting transactions in securities for the accounts of others – for numerous independent reasons, including that he received about \$735,000 in transaction-based compensation, and that he was thoroughly involved in effecting securities transactions for the investors to whom he offered investments. See Initial Decision at 52-56. And the ALJ rejected

Bandimere's advice of counsel defense because, like Section 5, scienter is not relevant to Section 15(a), so any advice of counsel defense is likewise irrelevant. See id. at 56.

The ALJ correctly ruled that the Bandimere willfully violated Section 15(a) of the Exchange Act, and Bandimere's arguments to the contrary have no support. Thus, review by the Commission is not warranted.

f. Sanctions

Finally, Bandimere challenges the sanctions ordered against him by the ALJ. But there was no prejudicial error or issue worthy of the Commission's further consideration. The ALJ meticulously outlined that evidence relevant to the sanction determination, including willful violations, the public interest, and the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See Initial Decision at 79-83. The ALJ also carefully addressed the issue of disgorgement, and even credited Bandimere for funds used to repay investors. See id. at 83-85. Finally, the ALJ awarded an appropriate amount of civil penalties, within the statutory and legal guidance. See id. at 86-88. Thus, this proper ordering of sanctions does not merit review by the Commission.

CONCLUSION

For the reasons stated above, the Commission should grant summary affirmance of the Initial Decision pursuant to Rule 411(e)(2).

Respectfully submitted this 4th day of December, 2013.



Dugan Bliss
Thomas J. Krysa
Counsel for the Division
1801 California St., Ste. 1500
Denver, CO 80202
Phone: 303-844-1000