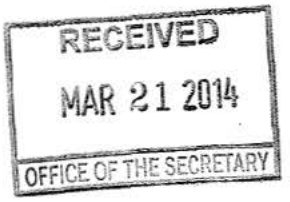
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of

DAVID F. BANDIMERE and
JOHN O. YOUNG

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT DAVID F. BANDIMERE'S OPENING BRIEF

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INTRODUCTION

David F. Bandimere ("Bandimere") played a critical role in brokering unregistered securities while recklessly making fraudulent misstatements and omissions to investors. These securities later turned out to be a part of two Ponzi schemes. Between 2006 and 2010, Bandimere acted as an unregistered broker in selling unregistered securities in Universal Consulting Resources LLC ("UCR") – operated by Richard Dalton ("Dalton") – and IV Capital Ltd. ("IV Capital") – operated by Larry Michael Parrish ("Parrish") – two schemes against which the Commission brought actions in 2010 and 2011 respectively.

Bandimere raised over $9 million from about 60 investors, earning approximately $735,000 in transaction-based compensation, which was set at a percentage of funds invested. Bandimere knew of numerous discrepancies, risks and failures related to IV Capital and UCR, yet continued to broker the unregistered securities without disclosing these issues to current or new investors. Most critically, Bandimere told investors and potential investors material positive information, focusing on IV Capital and UCR's consistent rates of returns and established track records of performance, yet hid material facts including that Parrish was subject to a prior SEC action, that IV Capital and UCR refused to provide documents confirming their trading programs, and that Bandimere made large commissions. These material omissions rendered Bandimere's material positive representations misleading.

After a five-day evidentiary hearing, the law judge correctly found that Bandimere willfully 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 Exchange Act Rule 10b-5. The law judge correctly barred Bandimere from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally

recognized statistical rating organization, ordered Bandimere to disgorge $638,056.33 plus prejudgment interest, imposed a civil penalty of $390,000, and ordered Bandimere to cease and desist from committing or causing violations of the above-listed provisions of the Securities and Exchange Acts.

FACTUAL SUMMARY

Between 2006 and 2010, Bandimere raised over $9 million from over 60 investors to invest in IV Capital and UCR securities, two purported investments which later turned out to be Ponzi schemes, for which Bandimere earned about $735,000 in transaction-based compensation during that period. Evidentiary Hearing Transcript ("Tr.") 861:9-14; Exhs. 93, 113. He also made at least $475,000 in earnings on his personal investments in UCR and IV Capital securities before those Ponzi schemes collapsed. Evidentiary Hearing Exhibit ("Exh.") 93. Bandimere initially sold IV Capital directly to investors, but then set up three LLCs to facilitate bringing in investors. Tr. 884:25-886:2. He also facilitated the investment of retirement funds by setting up self-directed IRA accounts through a third party provider. Tr. 848:15-25, Answer ¶ 26.

Bandimere was involved throughout the entire investment process with investors, and acted as an unregistered broker and sold unregistered securities by doing the following:

- Meeting with investors and potential investors;
- Explaining IV Capital and UCR's investment programs;
- Answering questions about IV Capital and UCR;
- Handling investor paperwork for IV Capital and UCR;
- Obtaining signatures from investors for IV Capital and UCR;
- Managing the LLCs to facilitate investments in IV Capital and UCR;
- Accepting and managing investor funds in IV Capital and UCR;

- Working with a self-directed IRA provider to accept investor funds;
- Providing a money-market option to investors;
- Determining monthly returns due for IV Capital and UCR;
- Mailing "return" checks to investors for IV Capital and UCR;
- Providing information about monthly returns due to Parrish and Dalton; and
- Creating and maintaining individual account records for investors.

Tr. 844:12-848:25. From beginning to end, Bandimere was involved in the process of handling investments for his investors in IV Capital and UCR through the LLCs. Tr. 849:1-5.

Bandimere misled potential investors by presenting only a one-sided, positive view of the IV Capital and UCR investments while failing to disclose numerous red flags and negative facts, as detailed below. Throughout, and even before, the five years in which Bandimere offered and brokered the unregistered IV Capital and UCR securities, he knew of numerous discrepancies, risks and failures related to Parrish, Dalton and IV Capital and UCR, which he did not disclose to investors:

- Bandimere knew and failed to disclose that IV Capital and UCR paid him large commissions tied to the amount of funds he brought in for investment.
- Bandimere knew and failed to disclose that Parrish had been sued by the SEC in 2005.
- Bandimere knew and failed to disclose that IV Capital and UCR failed to provide written documentation when additional investments were made and failed to provide any account statements documenting the investments or purported monthly earnings, and that Parrish refused to provide Bandimere with any documents confirming trading, IV Capital's traders, or any other aspects of the investments.

- Bandimere knew and failed to disclose that Dalton had no experience with managing a large, successful investment program; and in fact, Dalton had been involved in multiple failed investment schemes.
- Bandimere knew and failed to disclose that Dalton had serious financial problems as a result of his unsuccessful investments.
- Bandimere knew and failed to disclose that each month he calculated the amount the LLCs were owed based on the purported returns and then directed Parrish to wire those amounts.
- Bandimere knew and failed to disclose that even after receiving notice of the monthly amounts owed, Parrish often wired insufficient funds to the LLCs

See Section 4(d), below. Investors would have found the information not disclosed by Bandimere to be important to their investment decisions. Tr. 298:16-300:7, 457:10-458:10, 465:12-466:4, 466:20-467:11, 508:7-509:1. Investors were devastated by their losses. Tr. 178:1-15, 247:7-250:17, 300:8-12, 510:9-11. Investors would not invest through Bandimere again. Tr. 178:17-19, 250:13-17, 300:13-15, 468:12-14, 510:12-14, 601:20-22. The law judge made detailed findings of fact consistent with this factual summary. See Initial Decision at 3-45.

SCOPE OF REVIEW

"The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." Commission Rule of Practice 411(a).

ARGUMENT

1. The law judge correctly found that Bandimere Violated Section 15(a) of the Exchange Act by acting as an unregistered broker in connection with the offer and sale of IV Capital and UCR securities.

a. Section 15(a) legal standards

Section 15(a) of the Exchange Act makes it illegal for a broker to attempt to induce the purchase of a security, or to effect securities transactions, unless the broker is registered with the Commission or is associated with a registered broker or dealer. 15 U.S.C. § 78o(a)(1). Scienter is not required for a violation of this provision. SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

Section 3(a)(4) of the Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others." The phrase "engaged in the business" connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution." Massachusetts Fin. Serv., Inc. v. Sec. Investor Prot. Corp., 411 F. Supp. 411, 415 (D. Mass.), aff'd, 545 F.2d 754 (1st Cir. 1976); see also SEC v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). It can be evidenced by such things as regular participation in securities transactions, receiving transaction-based compensation or commissions (as opposed to salary), a history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors. See, e.g., SEC v. George, 426 F.3d 786, 797 (6th Cir. 2005); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). Actions indicating that a person is "effecting" securities transactions include soliciting investors; handling customer funds and securities; participating in the order-taking or order-routing process; and extending or arranging for the extension of credit in connection with a securities transaction. See, e.g., SEC v. Benger, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (Section 15(a) claim adequately alleged where defendant

received transaction-based compensation, collected and held investor funds, received and processed investment documents, and sent investors their share certificates); SEC v. Margolin, No. 92 Civ. 6307, 1992 WL 279735, at *5 (S.D.N.Y. Sept. 30, 1992) (SEC demonstrated substantial likelihood of success on the merits where the defendant provided clearing services, received transaction-based compensation, advertised for clients, and possessed client funds and securities."); SEC v. Hansen, 1984 WL 2413 at *10, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,426 (S.D.N.Y. 1984) ("Among the factors listed as relevant to a determination of whether an individual acted as a broker within the meaning of [Section 15(a)] [is] whether that person . . . is involved in negotiations between the issuer and the investor . . . .").

b. Bandimere violated Section 15(a) by acting as an unregistered broker.

The law judge correctly found that "Bandimere violated Section 15(a) of the Exchange Act by acting as an unregistered broker in connection with the offer and sale of IV Capital and UCR securities." Initial Decision at 53. Further, "Bandimere has never been registered with the Commission as a broker, dealer, or investment adviser and has never been associated with a registered broker, dealer, or investment adviser." Id. The law judge's finding was based on the fact that "Bandimere regularly participated at key points in the chain of distribution of IV Capital and UCR securities." Id. Specifically:

> Bandimere introduced the IV Capital and UCR investments to many of the investors, and, while he may not have used actual "promotional materials" when discussing the IV Capital and UCR investments, he described the investments to potential investors and answered questions posed by potential investors. Bandimere handled the paperwork necessary for people to invest in IV Capital and UCR, and obtained signatures from investors. Investors gave their money to Bandimere to be invested, and received their returns from, or had their returns coordinated by, Bandimere. Bandimere recruited many of the investors by sharing stories of his success.

Id. (citing Tr. 155-56, 170-72, 295-96, 438-39, 506, 546-47, 550, 673, 683-84, 844-45, 848, 1188). Bandimere also received transaction-based compensation in the amount of 10% of investors' monthly returns from IV Capital and 2% each month of investors' capital in UCR. Initial Decision at 54 (citing Tr. 870, 926). In other words, the more investor funds he brought into IV Capital and UCR, the more he was compensated, based on a percentage of investments he brokered. Id. (citing Tr. 446-48, 673, 870).

The evidence at the hearing established that Bandimere solicited investors through his social and religious network, explained the investments to potential investors, answered investor's questions, set up entities to handle and make the investments, arranged investments, provided monthly returns to investors, created and provided documentation to investors, and received transaction-based compensation. Tr. 844:12-848:25, 849:1-5, 870:4-23. Given all of this evidence, Bandimere's claim that he did not effect transactions in securities for others is flatly wrong.[1] And despite his significant role in the securities transactions, Bandimere was not registered as a broker or dealer and he was not an associated person of a registered broker or dealer at the time the sales. See Joint Stipulations at 1. Bandimere raised over $9 million from about 60 different investors and received approximately $735,000 in transaction-based compensation. Tr.

[1] Also, Bandimere did not only solicit family and close friends. Several investors had little or no relationship with Bandimere prior to him pitching IV Capital and/or UCR. See Tr. 154:7-155:13 (investor Moravec met Bandimere at a car club meeting at which Bandimere told the club that he had an "investment deal going on[,]" after which Moravec invested); 210:4-212:19, 218:19-222:4 (investor Pickering was introduced to Bandimere by Syke via Parrish; Bandimere later called Pickering to offer her the ability to invest her IRA funds, then transferred her money through the IRA provider); 286:19-288:11 (investor Loebe met Bandimere via a mutual friend who arranged a meeting during which Bandimere "said that he had several funds[,]" which led Loebe to invest through Bandimere); 437:21-438:23 (investor Blackford met Bandimere at a pastors' retreat, during which Bandimere and Blackford "took a long walk together and talked about . . . [Bandimere's] investments . . . and how exciting it was[,]" which led Blackford to invest); 491:19-497:10 (investor Davis met Bandimere via a mutual friend of Dalton's, who introduced Davis to Dalton, who in turn introduced Davis to Bandimere; Bandimere described the available investments to Davis, and Davis invested).

861:9-14; Exhs. 93, 113. Thus, Bandimere violated Section 15(a) of the Exchange Act by acting as an unregistered broker in connection with the offer and sale of IV Capital and UCR securities.

2. The law judge correctly found that Bandimere violated Sections 5(a) and 5(c) of the Securities Act by selling IV Capital and UCR Securities when no registration statement was in effect.

a. Section 5 legal standards

Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, prohibits any person from offering or selling a security in interstate commerce unless it is registered or otherwise exempt from registration. To prove a violation of Section 5 requires establishing three prima facie elements: (1) that the respondent directly or indirectly sold or offered to sell securities; (2) that no registration statement was in effect for the subject securities; and (3) that interstate means[2] were used in connection with the offer or sale.[3] SEC v. Universal Exp., Inc., 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007). Registration of a security is "transaction-specific," in that the requirement of registration applies to each act of offering or sale; proper registration of a security at one stage does not necessarily suffice to register subsequent offers or sales of that security. SEC v. Cavanagh, 155 F.3d 129, 133 (2d Cir. 1998). Liability for violations of Section 5 extends to those who have engaged in steps necessary to the distribution of unregistered security issues. Universal Exp., Inc., 475 F. Supp. 2d at 422 (quotation omitted). "[P]articipant liability has been laid in SEC enforcement actions brought to obtain injunctions for violations of Section 5. In these cases, those who had a necessary role in the transaction are held liable as participants." SEC v. Murphy, 626

[2] The law judge correctly found that the interstate means "requirement is satisfied by Bandimere's use of the mail to send return checks to investors, his use of wires to send money from the LLCs to IV Capital and UCR, and his use of faxes, email and telephone to communicate with Parrish, among other things." Initial Decision at 52 (citing Tr. 846-47, 849, 942, 1209.).

[3] Once the Division has established a prima facie violation of Section 5, the burden shifts to the Respondent to prove whether any exemption from registration applies. SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); SEC v. Cavanagh, 155 F.3d 129, 133 (2d Cir. 1998). Bandimere does not argue that any such exemption applies.

F.2d 633, 649-51 (9th Cir. 1980) (citations omitted). The Division need not also show scienter to prove a Section 5 violation. Aaron v. SEC, 446 U.S. 680, 714 n. 5 (1980).

b. Bandimere violated Section 5 by selling unregistered securities.

The law judge correctly found that "[t]he evidence is clear that Bandimere sold IV Capital and UCR securities[4] when no registration statement was in effect through the use of interstate facilities or the mails."[5] Initial Decision at 49. The law judge detailed the evidence supporting his finding as follows:

> Bandimere: introduced and explained the IV Capital and UCR securities to investors; answered investors' questions about the securities; handled the paperwork necessary for investors to invest; obtained signatures from investors for their investments; accepted their investment funds in the LLCs he managed or co-managed; sent investment funds from the LLCs to IV Capital and UCR for investment; sometimes signed investor return checks and provided those checks to investors, sometimes by mail; and . . . received transaction-based compensation for selling those securities. When asked whether "from the beginning to the end, you were involved in the process of handling investments of your investors in IV Capital and UCR," Bandimere replied, "yes." Bandimere was therefore both a necessary participant and a substantial factor in the illicit sales of IV Capital and UCR securities.

Initial Decision at 49-50 (citing Tr. 844-47).

Bandimere asserts that he did not violate Sections 5(a) and 5(c) of the Securities Act because his motivation was to benefit others, not himself, citing Pinter v. Dahl, 486 U.S. 622 (1998). The law judge rightly rejected this argument on the factual basis that Bandimere received nearly $735,000 in commissions for selling the IV Capital and UCR securities, benefitting himself substantially. See Initial Decision at 50. Additionally, Pinter's interpretation of a "seller" included

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[4] Bandimere does not appear to challenge the law judge's correct finding that the IV Capital and UCR securities were, in fact, securities. See Initial Order at 45-48. Additionally, two federal judges already found the IV Capital and UCR investments to be securities. SEC v. Parrish, No. 11–cv–00558, 2012 WL 4378114 (D. Colo. Sept. 25, 2012); SEC v. Universal Consulting Resources LLC, No. 10–cv–02794, 2011 WL 6012532 (D. Colo. Dec. 1, 2011).

[5] The IV Capital and UCR securities were never registered with the Commission. See Joint Stipulation at 1.

someone who was "motivated at least in part by a desire to serve his own financial interests. . . ." Pinter, 486 U.S. at 647. Bandimere was so motivated to the tune of nearly three-quarters of a million dollars. And regardless, Zacharias v. SEC, 569 F.3d 458, 466-67 (D.C. Cir. 2009), held that the relevant holding of Pinter does not extend to actions under Section 5 of the Securities Act. See also Initial Decision at 50-51. Thus, Bandimere's argument that he was not a seller fails.

In sum, Bandimere violated Sections 5(a) and 5(c) of the Securities Act because no registration statement was in effect or had been filed for IV Capital or UCR securities, because Bandimere directly or indirectly sold and offered these securities by engaging in steps necessary to the distribution of unregistered IV Capital and UCR securities, and because Bandimere introduced the unregistered securities to investors, offered the unregistered securities to investors, arranged the sales of the unregistered securities to investors, and received transaction-based compensation. See Tr. 845:18-847:15.

3. The law judge correctly found that Bandimere acted willfully in violating Section 15(a) of the Exchange Act and Sections 5(a) and 5(c) of the Securities Act.

The law judge correctly found that Bandimere "willfully" violated Section 15(a) of the Exchange Act and Sections 5(a) and 5(c) of the Securities Act. See Initial Decision at 51-52, 56. Bandimere argues that the standard for willfulness requires some awareness of wrongdoing on his part or some heightened level of culpability, but it does not. The Commission has consistently held that it is not necessary to find that the respondent was aware of the rule he violated or that he acted with a culpable state of mind to find a willful violation. See Joseph S. Amundsen, Exchange Act Release No. 69406 (Apr. 18, 2013), 106 SEC Docket 66744, 66757 ("A willful violation under the federal securities laws means 'that the person charged with the duty knows what he is doing.' It is not necessary to additionally find that the respondent 'was aware of the rule he violated or that he acted with a culpable state of mind.'") (citations omitted). The D.C. Circuit held long ago that "[i]t

is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949); accord Wonsover v. SEC, 205 F.3d 408, 414-15 (D.C. Cir. 2000).

Bandimere appears to argue that he did not act willfully because he did not understand that the IV Capital and UCR securities needed to be registered. But he testified to the opposite during the hearing, admitting that he "tried to be very careful to let [investors] know that [IV Capital and UCR] were not registered securities. . . ." Tr. 856:12-16.

Bandimere attempts to claim that the involvement of Syke – an attorney – somehow absolves Bandimere. As an initial matter, scienter is not required for the Division to prove violations of Section 5 of the Securities Act and Section 15(a) of the Exchange Act, so any type of reliance on advice of counsel defense is irrelevant. See SEC v. Friendly Power Co. LLC, 49 F. Supp. 2d 1363, 1368 (S.D. Fla. 1999) ("neither a good faith belief that the offers or sales in question were legal, nor reliance on the advice of counsel, provides a complete defense to a charge of violating Section 5 of the Securities Act.") (citing SEC v. Holschuh, 694 F.2d 130, 137 n. 10 (7th Cir. 1982); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314–15 n. 28 (D.C. Cir. 1981)); see also U.S. v. Ragsdale, 426 F.3d 765, 778 (5th Cir. 2005) (where violation of a statute "does not require an intent to violate the law, [defendant] could not assert as a defense that he relied on advice from counsel. . . .").

Furthermore, the testimony of Syke at the hearing confirmed that he did not act as Bandimere's attorney in relation to any of the issues here, other than the formation of the Exito and Victoria LLCs. Tr. 720:13-16, 721:4-723:17. Syke testified that he did not provide legal advice to Bandimere as to whether taking certain measures related to the LLCs would result in compliance

with the securities laws. Tr. 734:4-736:12. More specifically, Syke did not advise Bandimere whether the securities offerings and Bandimere's activities were in compliance with Section 5 of the Securities Act and Section 15(a) of the Exchange Act. Tr. 736:23-737:21.

Syke was also unaware of the operations of Victoria and Ministry Minded, and did not know key red flags about IV Capital and UCR that Bandimere did not disclose to him, such as Parrish's prior regulatory action by the SEC, the lack of documentation, problems with payments, and Dalton's past failed investments. Tr. 744:10-745:2, 777:13-780:5. Thus, in any case, Syke could not have provided meaningful legal advice to Bandimere about his offerings, since Bandimere kept Syke in the dark about the same material red flags that Bandimere hid from investors. See Zacharias v. SEC, 569 F.3d 458, 467 (D.C. Cir. 2009) (reliance on advice of counsel requires complete disclosure to counsel). And Syke's involvement in any case does not excuse Bandimere's legal violations. See Wonsover, 205 F.3d at 415 (a broker's reliance on other professionals does not excuse his legal violations). Thus, Bandimere "willfully" violated Section 15(a) of the Exchange Act and Sections 5(a) and 5(c) of the Securities Act.

4. The law judge correctly found that Bandimere violated the antifraud provisions of the Securities Act and the Exchange Act by making material misrepresentations and omissions, primarily by disclosing positive material facts while hiding negative material facts.

a. Legal standards of the antifraud provisions of the Securities Act and Exchange Act.

To prove a misstatement or omission under Exchange Act Section 10(b) and Rule 10b-5(b), the SEC must demonstrate that a respondent directly or indirectly: (1) each made an untrue statement of material fact or omitted to state a material fact; (2) with scienter; (3) in connection with the purchase or sale of a security; and (4) using any means of interstate commerce or of the mails. 17 C.F.R. § 240.10b-5(b); SEC v. Smart, 678 F.3d 850, 856-57 (10th Cir. 2012); SEC v. Morgan Keegan & Co., Inc., 678 F.3d 1233, 1244 (11th Cir. 2012); Gebhart v. SEC, 595 F.3d

1034, 1040 (9th Cir. 2010); SEC v. Pirate Investor LLC, 580 F.3d 233, 239 (4th Cir. 2009); SEC v. Wolfson, 539 F.3d 1249, 1256 (10th Cir. 2008).

Under Section 17(a)(2), the SEC must prove that a respondent directly or indirectly: (1) obtained money or property by means of an untrue statement of material fact or an omission to state a material fact; (2) with negligence; (3) in the offer or sale of securities; and (4) using any means of interstate commerce or of the mails.[6] 15 U.S.C. § 77q(a)(2); Smart, 678 F.3d at 856-57; SEC v. Shanahan, 646 F.3d 536, 545 (8th Cir. 2011).

Information is considered material when there is a substantial likelihood that a reasonable investor would consider it important in determining whether to buy or sell securities. Basic v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus. v. Northway, 426 U.S. 438, 449 (1976). For omissions, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., 426 U.S. at 439; see also SEC v. TLC Inv. and Trade Co., 179 F. Supp. 2d 1149, 1153 (C.D. Cal. 2001) (paying securities sales commissions material).

b. The Division alleged that Bandimere knew about material red flags and negative facts associated with IV Capital and UCR and never disclosed them to investors, while telling them positive material facts about the investments.

As described by the law judge, "the gravamen of the antifraud allegations is that Bandimere knew about material red flags and negative facts associated with IV Capital and UCR and never disclosed them to investors, which constitutes a highly misleading sales approach." Initial Decision at 62 (citing Order Instituting Proceedings ("OIP") at 9). The law judge detailed the Division's fraud allegations as follows:

> The Division contends that when describing the IV Capital and UCR securities to investors, Bandimere represented to many investors that he thought the investments were low risk and very good investments and he also presented a one-sided view to

[6] The Division did not pursue scheme liability under Section 10(b) or Section 17(a) at the hearing.

> potential investors and highlighted only positive facts, including: 1) the consistent rates of return; 2) the established track record of performance; 3) the experienced and successful traders; 4) his personal dealings with Parrish and Dalton which gave him confidence in their abilities; and 5) with regard to Dalton, his long-standing personal relationship.

Initial Decision at 58 (citing OIP at 8-9). The testimony of defrauded investors at the hearing established that Bandimere told investors this materially positive information about IV Capital and UCR, while omitting any negative information. See Tr. 157:12-17, 161:4-8, 164:4-11 (Moravec); 221:2-223:16, 242:22-243:15, 244:25-245:2 (Pickering); 297:2-4, 304:7-305:13 (Loebe); 438:24-442:10 (Blackford); 495:23-496:7, 504:24-505:18, 507:5-508:6 (Davis); 581:25-583:14, 587:15-20 (Koch); 669:6-671:8 (Radke).

c. The law judge correctly found that Bandimere made material misrepresentations to investors about IV Capital and UCR.

In addition to finding that Bandimere made material positive representations to investors, the law judge correctly found that Bandimere falsely represented to investors that the IV Capital and UCR securities were low risk, safe, and/or good investments. See, e.g., Initial Decision at 27-28 ("Loebe had the impression from Bandimere that returns on the IV Capital investment were guaranteed and also that the investment was safe because Bandimere and his friends had invested.") (citing Tr. 304-05); Initial Decision at 32 ("Davis understood that all investments were risky, but the fact that Bandimere said he was receiving a regular rate of return and he felt it was a good investment implied to Davis that it was a safe investment.") (citing Tr. 536-37); Initial Decision at 59 ("Radke testified that Bandimere told him that the investment principal would be kept in a bank as collateral and it was not the investors' money that would go directly to the trader to be used in deals, essentially implying that the funds would be safe.") (citing) Tr. 674-75. Initial Decision at 59. At the hearing, investors repeatedly testified that Bandimere told them that the IV Capital and UCR securities were good investments and/or had low risk. See, e.g., Tr. 305:5-13,

537:9-18, 704:23 (good investment representations); Tr. 483:7-10, 487:10-489:11, 757:19-759:2 (low risk representations).

Furthermore, Bandimere does not appear to dispute, as the evidence at the hearing established, that he made positive material representations to investors about the high rate of return that the IV Capital and UCR securities promised, and described that return to some investors as good or great. See Initial Decision at 58 (Investors "Moravec, Loebe, Blackford, Koch, and Radke all testified that Bandimere told them the rate of return the IV Capital investment was supposed to earn and some of these investors testified that Bandimere described the rates of returns as good or great.") (citing Tr. 160, 288, 439-40, 582-83, 584-85, 669-70); 59 ("With respect to UCR, Moravec, Loebe, Davis, and Koch all testified that Bandimere told them about the rate of return the UCR investment was supposed to earn.") (citing Tr. 162-63, 288-89, 501, 504, 525-26, 584-85).

d. The law judge correctly found that Bandimere knew about material red flags and negative facts associated with IV Capital and UCR and never disclosed them to investors.

In light of these positive material representations about the IV Capital and UCR securities that Bandimere made to investors—as alleged in paragraphs 34-36 of the OIP—the law judge correctly found that Bandimere's failure to disclose negative material facts that he knew rendered his positive statements misleading: "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 59 (citing Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1321 (2011)).

Specifically, the law judge found that Bandimere failed to disclose the following negative material facts that were specifically and directly alleged in the OIP, which rendered his positive material representations described above misleading:

"**Bandimere knew and failed to disclose that IV Capital and UCR paid him large commissions tied to the amount of funds he brought in for investment**. . . ." Initial Decision at 63; OIP ¶ 35(c)-(e). The evidence at the hearing supported this conclusion. Bandimere admitted that he earned these large commissions (up to 24% of annual investor returns) and did not disclose them, while investors likewise testified that Bandimere did not disclose his large commissions to them. See Tr. 165:22-166:1, 166:13-17, 293:25-294:16, 432:14-22, 465:5-9, 466:14-19, 507:5-10, 591:19-23, 592:15-19, 681:20-682:4, 926:3-928:8, 928:23-929:6, 929:18-931:8. The law judge correctly found this non-disclosed fact to be material. See Initial Decision at 63 ("The fact that the fees received were tied to the amount invested is material because it creates the potential for a conflict of interest in Bandimere's sale of the investments. The large amount of the commissions is material because it indicates that in addition to generating returns for investors, the investments would need to generate the large fees payable to Bandimere and the LLCs for the investments to be successful.") (citing IMS/CPAs & Assocs., 55 S.E.C. 436, 453-54 (2001) ("Courts have recognized that economic conflicts of interest, such as undisclosed compensation, are material facts that must be disclosed.")).

"**Bandimere knew and failed to disclose that Parrish had been sued by the SEC in 2005**. . . ." Initial Decision at 65; OIP ¶ 35(a). The evidence at the hearing supported this conclusion. Bandimere selectively told some investors about Parrish's "SEC problem" during 2004 or 2005, which Bandimere knew about while offering IV Capital securities, while failing to disclose this fact to other investors. Exh. 71, 143; Tr. 165:16-21, 232:16-238:10, 430:3-431:23, 465:12-21, 553:4-557:13, 592:11-14, 909:9-910:13, 911:5-9. In addition, Bandimere specifically told one investor that there had been an "SEC complaint problem." Exh. 71; Tr. 232:16-238:10. The law judge correctly found this non-disclosed fact to be material. See Initial Decision at 65 ("In

deciding whether or not to invest in IV Capital, investors would have considered the fact that a principal of IV Capital had been sued by the SEC to be an important factor in their decision, and an investor in this case testified to that fact.") (citing Wilson v. Great Am. Indus., Inc., 855 F.2d 987, 991-92 (2d Cir. 1988) (failure to disclose adverse civil judgment held material under Exchange Act Rule 14a-9)).

"**Bandimere knew and failed to disclose that IV Capital and UCR failed to provide subsequent written documentation when additional investments were made and failed to provide any account statements documenting the investments or purported monthly earnings. . . . Parrish refused to provide Bandimere with any documents confirming trading, IV Capital's traders, or any other aspects of the investments. . . .**" Initial Decision at 67, 71; OIP ¶ 35(f), (i), (j). The evidence at the hearing supported this conclusion. After Bandimere brokered investments in IV Capital and UCR for his investors, there was no subsequent documentation of any kind provided by IV Capital or UCR; Parrish refused to provide any documents confirming trading, their traders, or any other aspects of the investments, which Bandimere did not disclose. See Tr. 166:2-6, 166:23-167:2, 297:23-298:7, 457:10-458:10, , 507:20-508:2, 592:3-7, 593:7-10, 680:15-681:9, 886:13-888:11, 897:24-899:11, 903:9-11, 903:18-905:6. The law judge correctly found these non-disclosed facts to be material. See Initial Decision at 67 ("The lack of subsequent documentation or account statements documenting investments or purported monthly earnings is clearly material to investors. A reasonable investor would consider the absence of documentation confirming his or her investments or transactions to be important in deciding whether or not to invest."), 70 ("Reasonable investors would consider the fact that the principal of the entity they had invested with had refused to provide documents confirming trading, its traders, or any other aspects of the investments, to be material and an important consideration in

deciding whether or not to invest. Without trading records, investors are not able to evaluate whether their money was invested in accordance with their understanding of the investments.").

"**Bandimere knew that Dalton had no experience with managing a large, successful investment program; and in fact, Dalton had been involved in multiple failed investment schemes**," and "**Bandimere knew that Dalton had serious financial problems as a result of his unsuccessful investments.**" Initial Decision at 71-72; OIP ¶ 35 (n), (o). The evidence at the hearing supported this conclusion. Specifically, Bandimere knew, but did not disclose, that Dalton was previously involved in a debenture project that suffered $2 to $3 million in losses, including $50,000 in personal losses by Bandimere, and Bandimere also knew that Dalton was involved in another investment in the Philippines, in which Bandimere also lost $50,000. Tr. 245:3-5, 298:8-15, 508:3-6, 875:24-876:21, 877:14-878:4, 1243:18-1244:12, 1245:5-1246:14. Bandimere further knew, but did not disclose, that Dalton had serious financial problems as a result of these unsuccessful investments. Bandimere had loaned Dalton money to participate in a multilevel marketing program after Dalton lost his money in a different multilevel marketing program that had gone bankrupt, and Bandimere also found Dalton an inexpensive apartment in a complex he owned which Dalton rented for several years, a living situation which was inconsistent with the high level of income Dalton claimed to be earning from his UCR investments. Tr. 166:18-20, 467:16-20, 874:12-875:6, 878:5-879:10. The law judge correctly found these non-disclosed facts to be material. See Initial Decision at 72 ("Dalton's involvement in previous failed financial dealings, and in particular a situation where $2 to $3 million of investor funds was lost, clearly constitutes material information that a reasonable investor would want to know before investing. Failed financial dealings and investments raise questions as to the competence, skill, and judgment of the person involved in the investment and the fact that there were failings would certainly alter

the 'total mix' of information available to the investor.") (citing TSC Indus., Inc., 426 U.S. at 449; Erik W. Chan, 55 S.E.C. 715, 723-25, 731 (2002) (failure to disclose incorporator's prior bankruptcy in private placement offering materials found to be a material omission under anti-fraud provisions of securities laws)).

"**Bandimere knew and failed to disclose that each month he calculated the amount the LLCs were owed based on the purported returns and then directed Parrish to wire those amounts. . . . Bandimere knew and failed to disclose that even after receiving notice of the monthly amounts owed, Parrish often wired insufficient funds to the LLCs. . . .**" Initial Decision at 73, 75; OIP ¶ 35(k), (l). The evidence at the hearing supported this conclusion. Each month, Bandimere calculated how much the LLCs were owed based upon the purported guaranteed returns and then directed Parrish to wire those amounts, but Parrish often wired insufficient funds; Bandimere did not disclose this to investors. See Tr. 166:7-12, 167:3-7, 230:21-231:4, 297:12-22, 466:10-13, 593:11-13, 681:16-19, 889:24-890:11, 890:20-891:18, 894:4-895:3, 906:2-908:19, 931:16-933:9, 940:16-22, 941:8-942:8, 952:10-954:11, 1259:1-1262:20; Exhs. 11, 111, 112, 125. Bandimere admitted during the hearing that in certain months Parrish sent insufficient funds to pay both his investors and his commissions.[7] See Tr. 906:2-25. The law judge correctly found these non-disclosed facts to be material. See Initial Decision at 73 ("Bandimere's calculation of the returns on investments, rather than Parrish, is material because it

[7] Hearing Exhibit 93 also demonstrates repeated shortages in payment of commissions. Bandimere testified at the hearing that the document represents his effort to differentiate between funds received as earnings and funds received as commissions (or "management fees"). Hearing 11:26:18-1127:13. The document shows that on a month-by-month basis, Bandimere kept the excess returns beyond his investment earnings for his commissions; for each month the total amount received from Parrish and Dalton is the same as the combined amount paid for earnings plus commissions. Exh. 93 at 30, 33, 38, 41, 42, 45, 48. The document evidences numerous occasions on which commissions were shorted, as admitted by Bandimere during the hearing. Hearing 888:16-895:16. Furthermore, Bandimere's contemporary records indicate numerous shortages of funds and other errors in payment by Parrish. See, e.g., Exh. 111 (records re Parrish payments) at 598 ("errors"), 599 ("errors"), 614 ("short"), 624 ("shortage").

suggests that Parrish did not keep track of the returns on his own. That information would be important to an investor in deciding whether or not to invest, because it raises the possibility that the returns investors received from IV Capital may not have actually been earned by that entity, because Bandimere did not use any actual trading records, just the number of alleged trade dates, to calculate the returns."), 75 ("Receiving insufficient funds on a month-to-month basis or frequent errors in calculation are material to investors because it suggests that IV Capital at least performed incorrect or careless accounting work, and, more significantly, that the investment returns they were receiving were not necessarily sustainable, given its inability to keep up with monthly return and fee payments.").

e. The law judge correctly found that the red flags and negative facts associated with IV Capital and UCR that Bandimere did not disclose were material.

Contrary to Bandimere's assertions, the law judge did apply the correct standard of materiality to his Initial Decision: "[t]he standard of materiality is whether or not a reasonable investor would have considered the information important in deciding whether or not to invest, and if disclosure of the misstated or omitted fact would have significantly altered the total mix of information available to the investor." Initial Decision at 57 (citations omitted). Once Bandimere described IV Capital and UCR to potential investors in a very positive way, he was under a duty to make fair and complete disclosure rather than presenting only a one-sided view of the investment. See, e.g., Rule 10b-5 ("It shall be unlawful...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"); SEC v. Curshen, 372 Fed. App'x 872, 880 (10th Cir. 2010) ("where a party without a duty elects to disclose material facts, he must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.") (citation omitted); Lormand v. US Unwired, Inc., 565 F.3d 228, 249 (5th Cir. 2009) (a "duty to

speak the full truth arises when a defendant undertakes a duty to say anything. Although such a defendant is under no duty to disclose every fact or assumption underlying a prediction, he must disclose material, firm-specific adverse facts that affect the validity or plausibility of that prediction.") (citation omitted); Schlifke v. Seafirst Corp., 866 F.2d 935, 944 (7th Cir. 1989) (even absent fiduciary duty, "incomplete disclosures, or 'half-truths,' implicate a duty to disclose whatever additional information is necessary to rectify the misleading statements"); First Virginia Bankshares v. Benson, 559 F.2d 1307, 1315 (5th Cir. 1977) ("[A] duty to speak the full truth arises when a defendant undertakes to say anything"); Rowe v. Maremont Corporation, 650 F. Supp. 1091, 1105 (N.D. Il. 1986) ("Numerous courts have followed Bankshares to hold that a party who makes a materially incomplete disclosure thereby triggers a duty under Rule 10b-5 to disclose whatever additional information is necessary to prevent the earlier statement from being misleading.").

f. The law judge correctly found that Bandimere acted with scienter.

Bandimere attempts to argue that the Division cannot prove scienter if Bandimere did not know that IV Capital and UCR were fraudulent schemes. But, as the law judge recognized, the Division's case was never based on whether Bandimere knew or should have known that IV Capital and UCR were frauds. Rather, the Division alleged and prevailed on the basis that Bandimere knew certain "red flags" about the investments, which he never told investors while telling them positive claims about the investment. This misleading conduct demonstrates his scienter:

> Bandimere's claim that the Division's ability to prove that he acted with scienter is inextricably tied to its ability to prove that he knew or must have known that IV Capital and UCR were fraudulent investment programs is meritless. As discussed in greater detail in Section III.E., infra, the OIP does not charge Bandimere with operating a Ponzi scheme or even knowing that the securities he sold were interests in Ponzi schemes. Instead, the gravamen of the antifraud allegations is that

> Bandimere knew about material red flags and negative facts associated with IV Capital and UCR and never disclosed them to investors, which constitutes a highly misleading sales approach. Those material red flags can be proven, and, in certain cases described below, have been proven, irrespective of whether Bandimere knew IV Capital and UCR were Ponzi schemes.

Initial Decision at 62 (citing OIP at 9). The law judge ultimately found that "Bandimere's high degree of scienter is demonstrated by various knowing falsehoods, intentional concealments, and counter-accusations that he directed to his victims, whose investments resulted in his handsome compensation." Initial Decision at 59. The law judge further detailed his findings that Bandimere's hiding of red flags from investors proved scienter:

> The transaction-based compensation that Bandimere received from IV Capital, UCR, and the UCR Diamond Program was large and tied to the amount of money the investments brought in, thus giving him a motive to mislead his victims. It does not matter whether Bandimere knew he had a duty not to omit disclosing the red flags alleged in the OIP, because his conduct toward, at a minimum, Loebe, Koch, Radke, and Pickering amply demonstrates that, by remaining silent about certain issues, he intended to defraud all the investors as to which violations have been found.

Initial Decision at 62. Thus, the law judge's finding of scienter was based on Bandimere's hiding from investors all of the red flags detailed above. See Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000) ("An egregious refusal to see the obvious, or to investigate the doubtful, may in some cases give rise to an inference of recklessness."). Recklessness may be established by showing that a defendant had knowledge of facts or access to information contradicting his public statements, or where a defendant "ignored obvious signs of fraud." Id. A party cannot "escape liability for fraud by closing his eyes to what he saw and could readily understand." SEC v. McNulty, 137 F.3d 732,737 (2d Cir. 1998). "Red flags about the legitimacy of a transaction can be used to show both actual knowledge and conscious avoidance." U.S. v. Ferguson, 676 F.3d 260, 279 (2d Cir. 2011) (citing U.S. v. Nektalov, 461 F.3d 309, 312, 317 (2d Cir. 2006)); accord SEC v. Forte, Nos. 09–63, 09–64, 2012 WL 1719145, at *6 (E.D. Pa. May 16, 2012) ("Under abundant

authority, an Investor may evince 'actual fraudulent intent' by willful or reckless blindness—i.e., by willfully or recklessly ignoring red flags that suggest a fraudulent scheme without investigating or taking other appropriate action.") (citing Stephenson v. PricewaterhouseCoopers, LLP, 768 F. Supp. 2d 562, 574–75 (S.D.N.Y. 2011) (allegations of accounting violations and reckless ignorance of red flags sufficient to plead "fraudulent intent")).

The law judge also found that certain additional statements and omissions made by Bandimere to investors evidenced scienter. See Initial Decision at 59-62. For instance, Bandimere hid the true identity of Dalton from certain investors who knew Dalton (which is related to the Division's claim that Bandimere did not disclose Dalton's past financial failures, as people who knew him would have known about these failures), Bandimere bullied an investor, and Bandimere was "shamelessly cruel" to an investor by allowing her to invest borrowed funds after he had been advised by his lawyer that there should be no further investments given the investments' mounting problems. These statements were all properly considered and evidence of scienter. While the particular statements were not contained in the OIP, the OIP did allege that Bandimere acted with scienter, so these evidentiary statements provided at the hearing were properly considered as evidence in support of the OIP's allegations.[8] It is well established that respondents in administrative proceedings are entitled to be sufficiently informed of the charges against them such that they may adequately prepare their defense; however, respondents are not entitled to a disclosure of evidence in advance of the hearing. See 17 C.F.R. § 201.200(b); Charles M. Weber, 35 S.E.C. 79 (1953); see also M.J. Reiter Co., 39 S.E.C. 484 (1959). This is the "distinction

[8] Additionally, the Division provided Bandimere with a list of all investors that the Division claimed that he defrauded two months prior to the hearing, in response to the law judge's order on Bandimere's motion for a more definite statement. See Division of Enforcements List of Allegedly Defrauded Investors or Offerees (dated Feb. 25, 2013). The Division also submitted its witness list nearly three weeks in advance of the hearing. See Division of Enforcement's Witness List (dated April 2, 2013). Thus, Bandimere had the ability to prepare his defense in advance of the hearing.

between allegations and evidence." Western Pacific Capital Mgmt., LLC, Admin. Proceedings Ruling Release No. 691 (Feb. 7, 2012); see also Steven E. Muth, Exchange Act Rel. No. 52551 (Oct. 3, 2005), 86 SEC Docket 1217, 1233 n.40 (finding that allegation provided sufficient notice where it alleged applicant "engaged in various sales practices," but "did not specify unauthorized trades"); Rita J. McConville, Exchange Act Rel. No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3149 (noting that, although the NYSE must inform a respondent of enough detail for the respondent to prepare a defense, the NYSE "need not disclose to the respondent the evidence upon which [it] intends to rely"); Blair & Co., 7 S.E.C. 977, 980 (1940) (denying motion for bill of particulars by noting that respondents "have generally been apprised of the nature of this proceeding; any uncertainty that may exist at the present time as to particular contentions ... will be dissipated during the course of the proceedings by the evidence introduced").

Thus, the law judge properly found that Bandimere made material misrepresentations and omissions to investors, with scienter, while offering and selling the IV Capital and UCR securities.

5. The law judge correctly ordered Bandimere to cease and desist from violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5.

The law judge rightly ordered Bandimere to cease and desist from violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5. See Initial Decision at 82. In evaluating the propriety of a cease-and-desist order, the law judge properly considered the Steadman factors, as well as the recency of the violations, the resulting degree of harm to investors or the marketplace, and the effect of other sanctions. KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1192 (2001), recon. denied, 55 S.E.C. 1, aff'd, 289 F.3d 109 (D.C. Cir. 2002). The Steadman factors include: (1) the egregiousness of the respondent's actions; (2) the isolated or

recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations.[9] Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). While some showing of a likelihood of violation is required, it is "significantly less than that required for an injunction." KPMG Peat Marwick, 54 S.E.C. at 1183-91. Absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1191.

A cease and desist order is warranted here. The recency of Bandimere's violations as well as the resulting harm to investors, which was significant, support a cease and desist order. In addition, the Steadman factors support such an order. Bandimere's violations were egregious. He misled numerous investors causing significant losses. His violations were recurrent in nature, occurring over a lengthy period of time and involving numerous transactions and unregistered sales. As explained above, Bandimere acted with a high degree of recklessness, exhibited by his repeated and continued sale of IV Capital and UCR securities despite the red flags that he encountered. Bandimere has not acknowledged any wrongdoing, so any assurance that he will not commit violations in the future cannot be considered sincere. Finally, there does exist a likelihood of future violations. Given Bandimere's past investment history, his willingness to act as an unregistered broker, and his proclivity for recruiting and involving others in his investments, there

[9] Bandimere argues that the Steadman "factors have been rejected as a formula on which to base sanctions." Opening Brief at 28 (citing PAZ Securities, Inc. v. SEC, 566 F.3d 1172, 1175 (D.C. Cir. 2009)). But PAZ Securities merely held that the Steadman factors need not be applied mechanically in every case. Furthermore, contrary to Bandimere's arguments, it is appropriate to consider his lack of recognition of the wrongfulness of his conduct. As the law judge found, "Bandimere is entitled to present a zealous defense of the charges against him but the fact remains that he repeatedly made material misrepresentations and omissions to investors with scienter and does not recognize that his conduct was wrongful." Initial Decision at 82 n.49 (citing Seghers v. SEC, 548 F.3d 129, 136-37 (D.C. Cir. 2008) ("due process is not violated by giving a respondent a choice between recognizing the wrongfulness of his conduct, or refusing to do so and thereby risking more severe remedial action")).

exists a significant probability that he will commit securities violations again in the future. For these reasons, a cease and desist order was properly entered by the law judge.[10]

6. The law judge correctly ordered disgorgement of Bandimere's ill-gotten gains.

The law judge rightly ordered disgorgement in the amount of $638,056.33 plus prejudgment interest against Bandimere. See Initial Decision at 85. This calculation was based on the $734,996.33 in commissions made by Bandimere for his brokering and selling of unregistered IV Capital and UCR securities, minus the $96,940 he returned to investors. See id. Disgorgement of illegally obtained profits is an appropriate remedy for violations of the federal securities laws. New Allied Development, Exchange Act Release 37990 (November 26, 1996), 63 SEC Docket 650. See also, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1113-14 (2d Cir. 1972) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable."); SEC v. Materia, 745 F.2d 197, 200-201 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (disgorgement is designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws). Where the Division has produced a reasonable approximation of the disgorgement amount, the burden shifts to the defendant "clearly to demonstrate that the disgorgement figure was not a reasonable approximation." SEC v. First City Financial Corp., 890 F.2d at 1232. The wrongdoer, who has created the uncertainty by his violation, bears the risk of that uncertainty. SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994).

[10] Bandimere argues that the law judge improperly ordered sanctions based on conduct that was not alleged in the OIP. As an initial matter, the conduct was alleged in the OIP, as detailed in Section 4(f) above. Regardless, though, sanctions may be based on matters outside of the OIP. See Gateway Int'l Holdings, Inc., Release No. 34-53907 (May 31, 2006), 88 SEC Docket at 440 at n.30 ("Although we are not finding violations based on those failures, we may consider them, and other matters that fall outside the OIP, in assessing appropriate sanctions.") (citing Robert Bruce Lohmann, Exchange Act Rel. No. 48092 (June 26, 2003), 80 SEC Docket 1790, 1798 n.20).

Bandimere argues that any disgorgement is inappropriate because the amount that he lost in his personal investments in IV Capital and UCR was slightly greater than the commissions he made by brokering and selling those unregistered securities to his investors. But this is conflating two separate issues: the misconduct alleged in the OIP was not based on Bandimere's personal investments. Rather, it was based on his illegal brokering and selling of unregistered securities to his investors and his fraudulent statements and omissions in furtherance of those activities. Thus, the amount he earned for those activities is subject to disgorgement, regardless of any gains or losses in his separate personal investments. See Initial Decision at 83-84. Bandimere's commissions were profits to him that other investors did not receive. It would unjustly enrich Bandimere to allow him to keep these illegally obtained returns when other investors suffered such substantial losses, but received no commissions. See SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (disgorgement is designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws).

Bandimere also asserts that because he purportedly spent 90% of his time on bookkeeping and administrative matters, he should not have to disgorge this amount. But, as the law judge recognized, because his brokering and selling of unregistered IV Capital and UCR securities was illegal, all of Bandimere's activities related to those activities was illegal:

> Bandimere's assertion that 90% of the management fees he earned are not subject to disgorgement because he spent 90% of his time engaged in legitimate administrative and management activities is also rejected. All of the administrative and managerial activities he engaged in were in furtherance of his illegal sale of unregistered securities while acting as an unregistered broker. Bandimere made material misrepresentations and omissions to investors while selling those unregistered securities. Therefore, none of Bandimere's administrative and managerial tasks were in furtherance of legitimate activities and the management fees are causally connected to Bandimere's violations.

Initial Decision at 84; see also SEC v. Kenton Capital Ltd., 69 F. Supp. 2d 1 (D.D.C. 1998) ("overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses").

Thus, the disgorgement ordered by the law judge was appropriate.

7. The law judge correctly ordered $390,000 in civil penalties against Bandimere.

The law judge rightly ordered $390,000 in civil penalties against Bandimere. Civil penalties may be imposed against Bandimere for willful violations of the provisions alleged against him and if the penalties are determined to be in the public interest. Securities Act Section 8A(g); Exchange Act Section 21B. Violations of the Securities Act and Exchange Act in proceedings brought under Exchange Act Section 15(b) have long been punishable by civil penalties. See 15 U.S.C. § 78u-2. For willful violations, the Division need not prove an intent to violate the law, but merely an intent to do the acts which constitute a violation of the law. Wonsover, 205 F.3d at 414. To determine whether the penalty is in the public interest, the law judge should apply the Steadman factors.

Three third-tier civil penalties[11] – totaling $390,000 – were justified because Bandimere brokered, offered, and sold at least three distinct securities: IV Capital, UCR's trading program, and UCR's diamond program. The law judge could have ordered substantially higher penalties, based on the number of violations, but did not. See Initial Order at 86-88. As demonstrated above, Bandimere's violations were willful, and involved fraudulent conduct and reckless disregard of regulatory requirements. The hearing record indicates that Bandimere in fact intended to do the acts

[11] For violations occurring between February 2005 through March 2009, the maximum penalty per violation for a natural person is $6,500 for a first tier penalty, $65,000 for a second tier penalty, and $130,000 for a third tier penalty. 17 C.F.R. § 1003, Table III. Second tier penalties may be imposed for violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Exchange Act Section 21B(b). Third tier penalties may be imposed if the requirements for a second tier penalty are met and the respondent's conduct resulted in substantial losses, created the risk of substantial losses, or resulted in substantial pecuniary gain to the respondent. Id.

that resulted in the alleged violations – such as interacting directly with Parrish and Dalton about the IV Capital and UCR securities, brokering and selling those unregistered securities, and communicating directly with investors about their investments. Moreover, as previously discussed, the Steadman factors weigh in favor of the Division. In particular, Bandimere's violations caused significant harm to investors. For example, investor [redacted] testified during the hearing that the impact of his investment losses on his life had been "unbearable," that he currently lived in a 600-square foot cabin that just had plumbing installed, and that his life had been totally devastated. Tr. 178:1-15. Investor [redacted] testified that due to her investment losses her "immune system basically collapsed," leading to several surgeries. In addition, she has had to move in with her brother. Tr. 248:19-250:12. On balance, the Steadman factors support a significant penalty against Bandimere. In sum, Bandimere's illegal brokering and selling of unregistered securities, and fraudulent statements and omissions in doing so, combined with millions in losses by his investors, justify the ordered penalty.

Bandimere attempts to argue that any penalty is impermissible because he was not, and was not associated with, a registered broker. But this argument misses the point: Bandimere acted as an unregistered broker, and therefore is subject to civil penalties under Exchange Act Section 15(b)(6), as it is well established that the Commission authorized to sanction an unregistered broker-dealer in an administrative proceeding. See Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013) at n. 68 (citing Vladislav Steven Zubkis, Exchange Act Release No. 52876, 2005 WL 3299148, at *6 (Dec. 2, 2005) (barring, pursuant to Exchange Act § 15(b)(6)(A), an associated person of an unregistered broker-dealer from associating with any broker-dealer and from participating in any penny stock offering, based on injunction prohibiting securities laws violations); John Kilpatrick, Exchange Act Release No. 23251, 48 SEC 481, 1986 WL 626187, at

*4 (May 19, 1986) (noting that § 15(b)(6) of the Exchange Act authorizes the Commission to sanction "any person associated ... with a broker or dealer" without being limited to registered broker-dealers)) (other citations omitted); see also Initial Decision at 86 (citing Zubkis).

8. The law judge correctly entered an associational bar against Bandimere.

The law judge correctly entered an associational bar against Bandimere. Bandimere's only argument against the bar is, again, that he was not, and was not associated with, a registered broker. But again, Exchange Act Section 15(b)(6) applies to unregistered brokers. See Korem, Zubkis, and Kilpatrick, supra. Thus, Bandimere's argument fails.

9. The law judge correctly found that Bandimere did not prove an equal protection defense.

The law judge correctly found that Bandimere failed to prove an equal protection defense, assuming one is even available to him. The Supreme Court has recognized that in the context of a selective prosecution defense, "We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution [on an improper basis]." U.S. v. Armstrong, 517 U.S. 456, 461 n.2 (1996). Courts since Armstrong have noted that the victim of selective prosecution is entitled to some remedy, but "[t]he precise nature and scope of that remedy, however, has not yet been delineated." U.S. v. Hedaithy, 392 F.3d 580, 606 n.23 (3d Cir. 2004) (citing Armstrong).

The Commission's Rules of Practice do not provide for a remedy for selective prosecution, though they do allow for the assertion of affirmative defenses. See Rule of Practice 220(c). The Commission, however, has previously ruled on (and rejected for lack of evidence) selective prosecution assertions. See, e.g., Demitrios Julius Shiva, Release No. 38389, 64 S.E.C. Docket 143 (March 12, 1997); C.E. Carlson, Inc., Release No. 23610, 48 S.E.C. 564 (Sept. 11, 1986)

(aff'd C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1437 (10th Cir. 1988)); see also In re Indigenous Global Dev. Corp., Release No. 325, 89 S.E.C. Docket 2452 (January 12, 2007) (Kelly, law judge).

A decision to bring a claim administratively rather than civilly is "committed to agency discretion," and is presumptively unreviewable. See Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7509-10 n.74 (internal quotation marks omitted); Eagletech Communications, Inc., Exchange Act Release No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1231. The Commission's decision to institute an administrative proceeding is unaffected by any possible bias on the part of its staff. See C.E. Carlson, Inc., 48 S.E.C. 564, 568 (1986) ("Our decision to institute these proceedings was wholly unaffected by any possible bias on the part of our staff."), aff'd, 859 F.2d 1429 (10th Cir. 1988).

While there is ambiguity as to the available or appropriate relief for a selective prosecution defense in an administrative proceeding, that is irrelevant here because there is no evidence of selective prosecution in this case, which was Bandimere's burden to prove. "To 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." Indigenous Global, supra. Bandimere has not identified any protected basis on which he was improperly subjected to an administrative proceeding. Furthermore, 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). And Bandimere himself identified a dozen other Ponzi-related cases that were brought as administrative proceedings. See Exh. 228. Finally, there was no improper motive in bringing the case, as the law judge recognized after his in camera

review of the action memorandum. See Tr. 1106:10-1107:1. Thus, the law judge's determination was correction. See Initial Section at 75-77.

10. The law judge correctly granted the Division's motion to quash Bandimere's subpoena.

The law judge correctly granted the Division's motion to quash a subpoena served by Bandimere. See A.P. Rulings Release No. 746 (Feb. 5, 2013) ("Motion to Quash Order"). Rule 232(e) of the Commission's Rules of Practice provides that a subpoena may be quashed if compliance with the subpoena would be unreasonable, oppressive or unduly burdensome. See Rule of Practice 232(e). Further, "it is well settled that parties have no basic constitutional right to pre-trial discovery in administrative proceedings. In addition, the Commission's Rules of Practice provide for only limited discovery." Gregory M. Dearlove, CPA, Admin. Proceedings Ruling Release No. 315 (July 27, 2006) (citations omitted).

Bandimere's subpoena requested a plethora of improper production requests, which were appropriately quashed by the law judge as follows:

- **Request 1:** Bandimere sought production of the "factual portion" of all documents relating to Bandimere, Parrish, Dalton, UCR, IV Capital, and the LLCs, which had been withheld, in whole or in part, on the grounds of attorney work product, "including by way of example and not limitation, interview notes (whether handwritten or otherwise) and memoranda and all non-identical drafts thereof." The law judge correctly quashed this request on the basis that the Commission's Rules of Practice provide for the withholding of internal memoranda, notes, or writings prepared by Commission employees, and for attorney work product, unless they constitute Brady material (the Division did provide Bandimere with Brady material). 17 C.F.R. § 201.230(b). See Motion to Quash Order at 2. Furthermore, attorney

notes and memoranda of witness interviews are subject to heightened protection, amounting to "almost absolute immunity" from discovery and are "virtually undiscoverable." In re Grand Jury Proceedings, 492 F.3d 976, 981-982 (8th Cir. 2007); Baker v. General Motors Corp., 209 F.2d 1051, 1054 (8th Cir. 2000) In re Grand Jury Proceedings, 43 F.3d 966, 970 (5th Cir. 1994), quoting Hickman v. Taylor, 329 U.S. 495, 512 (1947). As the Supreme Court stated in Upjohn Co. v. United States, 449 U.S. 383, 400 (1981), "work product [based on oral statements from third parties] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." Upjohn, 449 U.S. at 401. Courts have found that attorney notes of a witness interview "are opinion work product entitled to almost absolute immunity" on the basis that the notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that he deems legally significant. Baker, 209 F.2d at 1054. Bandimere made no showing to justify the production of portions of work product documents, so the law judge's ruling was also correct for this reason.

- **Request 2:** Bandimere sought production of the investigative file associated with SEC v. Z-Par Holdings, Inc., No. 1:05-cv-01031 (JFM) (D. Md. 2005), a prior investigation of, and litigation against, Parrish that dealt with a scheme that ended in 2005, with no facts or allegations relevant here. See SEC Litigation Release No. 20121 (http://www.sec.gov/litigation/litreleases/2007/lr20121.htm). The law judge correctly quashed this request on the basis that the Z-Par case had nothing to do with the instant case, and Bandimere made no showing to the contrary. See Motion to Quash Order at 2-3.

- **Requests 3-5:** Bandimere sought production of a variety of documents related to Parrish's filings in Z-Par related to the Temporary Restraining Order against him. The law judge again correctly quashed this request on the basis that the Z-Par case had nothing to do with the instant case, and Bandimere made no showing to the contrary. See Motion to Quash Order at 3.
- **Request 6:** Bandimere sought all training materials used by the Commission relating to facts or circumstances which may evidence or indicate the existence of a Ponzi scheme. The law judge again correctly quashed this request on the basis that such materials were not relevant to Bandimere's state of mind, as he claimed they were, because he did not see them. Further, internal training materials were irrelevant, and requiring production of them would be unreasonable and seriously impair the Commission's ability to conduct future investigations because these training materials would provide a road map to Ponzi schemers to evade detection. See Motion to Quash Order at 4. Additionally, these materials fall squarely within the law enforcement privilege, which protects documents that contain, as relevant here, "information pertaining to law enforcement techniques and procedures . . . [or] information that would seriously impair the ability of a law enforcement agency to conduct future investigations." In re The City of New York, 607 F.3d 923, 948 (2d Cir. 2010) (citations and quotations omitted). "Once the party asserting the privilege successfully shows that the privilege applies, the district court must balance the public interest in nondisclosure against the need of a particular litigant for access to the privileged information." Id. (citation and quotation omitted). "There is a strong presumption against lifting the privilege." Id. (citation and quotation omitted).

- **Request 8:**[12] Bandimere sought the factual portions of all documents which relate to or reflect the decision to initiate an administrative proceeding against Bandimere, as opposed to a civil enforcement action in a United States District Court. The law judge again correctly quashed this request on the basis that the factual portions would be irrelevant to any equal protection defense (finding that only the non-factual portions, those dealing with motive, intent, etc., would be relevant). See Motion to Quash Order at 4-5. Additionally, the law judge's decision was correct because the decision to bring a claim administratively rather than civilly is committed to agency discretion. See Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7509-10 n.74; Eagletech Communications, Inc., Exchange Act Release No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1231. Furthermore, Bandimere's subpoena asked for documents protected by the deliberative process privilege. "The deliberative process privilege applies to materials that are part and parcel of the process of internal agency decision making." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). In order to secure protection under the deliberative process privilege, an agency must show that a document is both "predecisional" and "deliberative." Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999). Bandimere's request called for documents that are both predecisional (because they relate to the decision-making process of what type of action to bring against Bandimere, which necessarily occurred before the decision was made) and deliberative (because, again, they relate to the deliberation regarding

[12] The Division produced documents in response to Request 7.

the type of action to bring against Bandimere). Thus, the law judge's order quashing Bandimere's subpoena was correct.

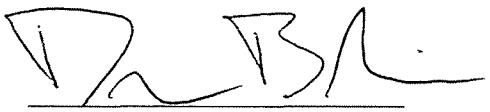
11. The law judge did not admit irrelevant evidence; the impact of investor losses is highly relevant to the determination of sanctions.

Bandimere argues that the law judge improperly admitted evidence of the impact of investor losses, which he claims is irrelevant. But it is plainly relevant. Investor losses constitute one of the factors in assessing civil penalties. See Exchange Act Section 21B(b). The impact of those losses is part and parcel with the losses themselves. A complete analysis of investor losses cannot be made without understanding their impact (for instance, a $100,000 loss could be devastating to one person, but a minor issue for another). Furthermore, the egregiousness of the respondent's actions is one of the Steadman factors, and the impact of Bandimere's actions on his investors informs the egregiousness of his actions. See Initial Decision at 87. Thus, the law judge did not admit irrelevant evidence.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission affirm the law judge's Initial Decision.

Respectfully submitted this 20th day of March, 2014.



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