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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	: : : : :

REPLY BRIEF OF RESPONDENT DAVID F. BANDIMERE

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Respondent David F. Bandimere, through his attorneys, Davis Graham & Stubbs LLP, submits his Reply Brief pursuant to Commission Procedural Rule 450(a).

I. INTRODUCTION

Mr. Bandimere demonstrated in his Opening Brief that the Initial Decision in this case (the "I.D.") was fatally flawed, and that the record did not support a finding that he engaged in willful violations of Section 5 and 17(a) of the Securities Act of 1933, and Sections 15(a) and 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. The Division of Enforcement's (the "Division") Response to Mr. Bandimere's Opening Brief (the "Response") does not show otherwise.

The Division relies on arguments which the courts and the Commission have previously rejected, attempts to stretch the I.D. and the evidentiary record well beyond the breaking point, and ignores the many findings, facts and legal authority that undermine its position.

The Commission should dismiss this case and end Mr. Bandimere's agonizing experience that began with his unwitting involvement with two con-men, and has been extended by this unsupported enforcement action.

II. THE DIVISION FAILED TO CARRY ITS BURDEN OF PROVING THAT MR. BANDIMERE VIOLATED EITHER SECTION 17(a)(2) AND RULE 10b-5(b).

A. The Division Failed to Prove That Mr. Bandimere Acted With *Scienter* or Negligence.

The most obvious of the many flaws in the alleged violations of Section 17(a)(2) and Rule 10b-5 relate to Mr. Bandimere's state of mind, a necessary element to establish a violation.

The only allegation relating to Mr. Bandimere's state of mind for purposes of the anti-fraud allegations made in the Order Instituting Proceedings (the "OIP") was that Mr. Bandimere was reckless in involving investors in IV Capital, Ltd. and Universal Consulting Resources, LLC ("UCR") because he ignored obvious red flags that those investments were frauds. OIP II.A.2

and E.36. That is not an extraneous allegation. Knowing and not disclosing material facts does not establish *scienter*. It must be shown also that the speaker knew (or was reckless in not knowing) that the failure to disclose the fact would mislead. *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1261 (10th Cir. 2001); *Dolphin and Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008). The allegation that Mr. Bandimere recklessly ignored facts that made it obvious that IV Capital and UCR were likely frauds is the essential factual allegation that Mr. Bandimere acted with *scienter*.[1] The OIP included no other allegations of fact, or even conclusory allegations, that Mr. Bandimere acted with any intention to defraud.[2]

But the law judge expressly rejected the allegation that Mr. Bandimere acted recklessly, or even negligently, in failing to recognize IV Capital and UCR were fraudulent schemes, finding: "There was insufficient evidence presented as to whether Bandimere knew of should have known IV Capital or UCR was a Ponzi scheme and any such claim would be denied." I.D. p. 79. That finding was not challenged by the Division, and is not subject to further review. E.g. *Gregory Batko*, Rel. No. 71666 (Mar. 7, 2014). The finding that Mr. Bandimere neither knew nor should have known that either IV Capital or UCR was a Ponzi scheme establishes that Mr. Bandimere was not reckless for purposes of Rule 10b-5(b) or negligent, for purposes of Section 17(a)(2), as alleged in the OIP, and should have ended the fraud claims.

The law judge tried to save the fraud claims, and went far beyond the allegations of the OIP to find *scienter*, based on purported facts that were never alleged in the OIP. The Division

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[1] The Division's characterizations of these supposedly material facts as "red flags" is telling, since it raises the question of what the "red flags" signify, if not the fraudulent nature of IV Capital and UCR.

[2] The Division's assertion that the OIP alleged that Mr. Bandimere "acted with scienter," Response, p. 23, is false. There is no such allegation in either words or substance.

never raised any of those facts in its post-hearing submissions.[3] Violations cannot be based upon matters that were not alleged in the OIP because Mr. Bandimere was not given notice that such matters would be at issue, and, therefore, had no reasonable opportunity to address them in his defense.

Though conceding that none of the facts found by the law judge to support *scienter* were mentioned in the OIP, the Division argues that Mr. Bandimere was sufficiently notified of the charges against him, and that facts on which the law judge rested his finding of *scienter* were merely evidence, which Mr. Bandimere had no right to know before the hearing. Response, pp. 23-24.

That argument is precluded by *Jaffee & Co. v. SEC*, 446 F.2d 387 (2d Cir. 1971), where the court vacated a finding of violation due to insufficient notice, and stated:

> A respondent may not reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated from a complaint or order if one were to explore every permutation of fact and law there alluded to or asserted. The Commission's proposed test would make a guessing-game of proceedings that the notice and hearing requirement are designed to rationalize.

Jaffee & Co., 446 F.2d at 394.

The law judge also contravened Commission precedent by finding *scienter* based on unalleged facts after he determined the facts alleged were not proved. In *Charges M. Weber*, 1953 WL 44090, Rel. No. 34-4830, at *2 (Apr. 16, 1953), the Commission held that the phrase "among other things" in an OIP was ". . . not intended to embrace matters in addition to those specified . . . ." Here the OIP did not even contain the phrase "among other things" in its allegations regarding *scienter*.

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[3] The Division's assertion that the law judge based his findings of *scienter* on the failure to disclose red flags, Response, p. 22, is false. The law judge was clear that he based *scienter* on misrepresentations and omissions and "bullying," which he outlined at I.D. pp. 59-62. None of these matters was mentioned in the OIP.

The Division's argument that the unalleged facts on which the law judge based his finding of *scienter* were merely evidence as to which Mr. Bandimere had no right to notice is an improper effort to draw a semantic distinction in order to obtain an unfair procedural advantage. The right to notice is fair notice of the *claim* and the grounds upon which it rests. *Jaffee & Co.*, 446 F.2d at 394. Whether the Commission labels something a "fact" or "evidence" cannot be determinative of sufficient notice.

Commission precedent establishes that disputed matters outside the OIP should not be considered, either to establish a violation, or to determine a sanction.[4] E.g., *Wheat, First Securities, Inc. f/k/a First Union Capital Markets Corp.*, Rel. No. 48378 (Aug. 20, 2003); *In the Matter of Russell W. Stein*, Rel. No. 47504, at n.34 (Mar. 14, 2003); *Robert Thomas Clawson*, Rel. No. 48143 (July 9, 2003); *IFG Network Securities, Inc.*, Initial Decision, Rel. No. 273 (Feb. 10, 2005) (Folelak, ALJ); *Gregory M. Dearlove*, Initial Decision, Rel. No. 315 (July 27, 2006) (Kelly, ALJ). Further, because none of the "facts" on which the law judge relied to find *scienter* was mentioned in the OIP, the requirement in Rule 200(b)(3) that an OIP contain a statement of ". . . the matters of fact and law to be considered and determined" was violated.

It was error for the law judge to find *scienter* based on facts that were not alleged. The Division's arguments to the contrary reflect an implicit belief that a respondent should be kept in the dark about what is at issue for as long as possible.

B. The Division Failed to Prove that Mr. Bandimere Made a Misrepresentation.

The Division failed to establish violations of the anti-fraud provisions because it failed to prove that Mr. Bandimere made any misrepresentations, either through affirmative misrepresentations, or by omitting to state material facts necessary to make statements made not misleading.

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[4] The Division's assertion to the contrary, Response, p. 26, n. 10, is incorrect.

The only specific statements which the OIP attributed to Mr. Bandimere were that he assured investors that investments were "low risk" and "very good investments." OIP II.E.36 (quotation in the originals). There is no evidence in the record that Mr. Bandimere gave those assurances or made those statements.

The Division's assertion that the law judge found that Mr. Bandimere falsely represented to investors that IV Capital and UCR investments were low risk, safe, and good investments, Response, p. 14, is false. The law judge made no such finding, nor would the record have supported such a finding if he made one.

The evidence discussed in the Response, p. 14, reflects that Mr. Bandimere made true statements about substantial investments in IV Capital and UCR which he and others made, and that the returns were as anticipated. These statements were true and not misleading. While some investors testified that they inferred from Mr. Bandimere's large personal investment and his historical receipt of returns, that the investment was "safe," Mr. Bandimere's true statements did not imply anything about safety and did not constitute assurances about the risk or safety of those investments.

Nor were Mr. Bandimere's truthful statements that he and others had invested in IV Capital and UCR, and that those investments had performed well, tantamount to misleading statements that they were "very good investments."

To the extent that the Division contends that Mr. Bandimere's disclosure of accurate information regarding historical performance of IV Capital or UCR was misleading because he failed to disclose facts which might suggest that future performance might not equal historical performance, that contention has been rejected consistently by the courts. *Findwhat Investors Group v. Findwhat.com*, 658 F.3d 1282, 1306 (11th Cir. 2011); *In re Advanta Corp Sec. Lit.,*

180 F.3d 525, 538 (3d Cir. 1999) (abrogated on other grounds); *Serabian v. Amoskeag Bankshares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994).

Both Section 17(a)(2) and Rule 10b-5(b) address circumstances where a statement that is literally true may mislead. Those provisions expressly proscribe omitting to state a material fact necessary to make a statement made, in light of the circumstances in which it was made, not misleading. That means that the omitted fact "alters the meaning" of a statement that was made. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002). Neither the OIP, the Division, nor the law judge identified any statement made by Mr. Bandimere that was rendered misleading by the failure to disclose any of the alleged omitted material facts.

The Division is arguing that the failure to disclose a material fact violates both Section 17(a)(2) and 10b-5(b) regardless of whether those omissions render misleading any statements made. According to the Division, if Mr. Bandimere made any positive statements about IV Capital or UCR, "He was under a duty to make fair and complete disclosure rather than presenting only a one-sided view of the investment." Response, p. 20. However, that argument finds no support in the language of Section 17(a)(2) or Rule 10b-5(b) or in the case law.

The Supreme Court, in *Matrixx Initiatives v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011), recently reiterated that failing to disclose a material fact does not violate the law, except to the extent that it renders a statement made misleading.

The authority cited by the Division in support of its theory provides no support at all. In *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009), the defendants made affirmative, positive statements about a business plan that had been implemented, but did not disclose their belief, based on prior experience, that the business strategy would be disastrous. *Lormand*,

565 F.3d at 237; 248-9. There is no claim, and no evidence, that Mr. Bandimere made any positive statement that he believed to be untrue because of facts which he did not disclose.

In *Schlifke v. Sea First Corp.,* 866 F.2d 935, 944 (7th Cir. 1989), the court stated in affirming summary judgment granted to the defendants ". . . the plaintiffs do not explain how the litany of alleged omissions rendered any particular statements in the loan documents misleading . . . ." *Schlifke*, 866 F.2d at 945. In the footnote accompanying that text, the *Schlifke* court reiterated "Plaintiffs neglect, however, to point to any specific statements by the Bank that are rendered misleading as a result of these omissions." *Schlifke*, 866 F.2d at 945, n.11. *Schlifke* provides strong support for Mr. Bandimere, but no support for the Division.

In *First Virginia Bankshares v. Benson*, 559 F.2d 1307 (5th Cir. 1977), a defendant stated that his experiences with the third-party had been satisfactory, but failed to disclose that the third-party had falsified accounting records. *First Virginia Bankshares*, 559 F.2d at 1310-11; 1317. Nothing akin to the misrepresentation in *First Virginia Bankshares* was proved here.

In *Rowe v. The Maremont Corp.,* 650 F. Supp. 1091, 1105 (N.D. Ill. 1986), the court stated "Maremont was under no obligation to disclose the possibility of a tender offer or the existence of the FTC consent decree absent statements which would be materially misleading without the disclosure of that additional information." The Division's contention that a misrepresentation by omission can exist without proof of a statement rendered misleading by the omission finds no support in *Rowe*.

In *SEC v. Curshen,* 32 F. App'x 872, 880 (10th Cir. 2010), a paid promoter used false identities to make positive statements about a stock while he was selling shares of the stock which he was promoting. *Curshen* does not support the Division's argument, since

Mr. Bandimere was not acting under a false identity, and was not liquidating his positions in IV Capital and UCR.

In each case cited by the Division where the court found that an actionable omission had been properly pled, or sufficiently established by the evidence, the court identified a particular statement as being rendered misleading because of the omission of a material fact. Because Mr. Bandimere made no representations which were rendered misleading by the omission of any material fact, the Division's reliance on the authority it cites is unjustified.

C. The Division Failed to Prove that Parrish Sent Insufficient Funds.

The Division relies primarily on Exhibit 93 to demonstrate that Parrish failed to make full payment of amounts due to the limited liability companies. Exhibit 93 is an analysis prepared by Mr. Bandimere during the investigation at the request of the Division, reflecting the management fees which Mr. Bandimere had received from the limited liability companies. However, Exhibit 93 does not show the management fees paid by Parrish to the limited liability companies; rather, it shows only what Mr. Bandimere withdrew and when he withdrew it. Tr. 1126:14-1129:8. However, these entries do not show that Parrish sent inadequate funds, even though Mr. Bandimere initially acquiesced in the Division's characterization of what the document reflected.

The Division attempted to prove that Mr. Bandimere was regularly "shorted" on his management fees by referring to an entry on p. 33 of Exhibit 93 reflecting Mr. Bandimere received $7.00 in management fees for Victoria relating to June, 2008 earnings received in July, 2008, an entry on p. 38 of Exhibit 93 reflecting Mr. Bandimere received no management fees for Exito for June, July, and August 2008, an entry on p. 42 of Exhibit 93 reflecting Mr. Bandimere received minus $300 in management fees for Victoria for earnings paid in July, 2009, and an

entry on p. 45 reflecting Mr. Bandimere received minus $281 in management fees for earnings paid in January, 2009. Tr. p. 891:19-892:5; 894:4-19: 895:4-16; 895:17-23.

Mr. Bandimere prepared calculations for payments due from IV Capital including payments for both earnings and fees, which are in evidence in Exhibits 14 and 111. A comparison between the amounts requested (Exhibit 111, pp. 582 and 586; Exhibit 14, p. 429) for the months that the Division claims Exhibit 93 shows were underpaid, and the amounts received as reflected in general ledgers of Victoria (Exhibit 137, p. 46) and Exito (Exhibit 138, p. 16) establishes that for each of those months, Parrish sent exactly the amount that Mr. Bandimere said was due. The only evidence of an instance where Parrish did not send the amounts that were requested occurred in May, 2008, when payments of $36,472 for Victoria and $44,136 for Exito were made by IV Capital for April earnings and fees, instead of $38,520 and $46,850, respectively, which had been requested. (Exhibit 111, p. 580; Exhibit 137, p. 100; Exhibit 138, p. 16). However, those discrepancies were caused by Parrish's use of the calculation sheet sent for the prior month, resulting in the same amounts being sent to Victoria and Exito in successive months, Exhibit 111, p. 614, and were corrected days after they were brought to Parrish's attention. Exhibit 138, p. 16.

The references in footnote 7 of the Response to shortages reflected by Exhibit 111 do not support the Division's claim that Parrish regularly sent insufficient funds. The "errors" reflected in pages 598 and 599 of Exhibit 111, on their face, were overpayments, not underpayments. The shortage reflected on p. 614 related to the May, 2008 error discussed above, which was corrected in two days. The "shortage" reflected on p. 624, on its face, was caused by Mr. Bandimere miscalculating the actual return by using a 2.5% return, rather than a 2.53% return.

III. THE DIVISION FAILED TO PROVE THAT MR. BANDIMERE WILFULLY VIOLATED SECTION 5 OF THE SECURITIES ACT OR SECTION 15(a) OF THE EXCHANGE ACT.

A. Mr. Bandimere Did Not Act Wilfully.

While arguing that "willful" for purposes of this case means only that a respondent is aware of what he is doing, the Division ignored *Int'l S'holders Serv. Corp.*, 1976 WL 160366 (SEC Apr. 29, 1976), as amended, 1976 WL 182458 (SEC June 8, 1976) where the Commission held that a broker which sold unregistered securities under a mistaken belief that an exemption was available did not "willfully" violate Section 5. The Commission determined that although the broker knew it was selling unregistered stock, because the broker did not know, nor could have known in the exercise of reasonable diligence, that the exemption had been lost, finding that the broker had engaged in a "willful" violation would "deprive that term of any significant meaning."[5]

The Division fails to cite a single case in which the Commission found a willful violation because a respondent merely knew what he was doing when engaging in the act which constituted the violation.

The Division's reliance on *Hughes v. SEC,* 174 F.2d 969, 977 (D.C. Cir. 1949), which stated that "willful" *generally* means that a person knows what he is doing, is misplaced. That general meaning is subject to an exception, where, as here, a technical statute presents a danger of ensnaring individuals who engage in apparently innocent behavior. *Bryan v. U.S.*, 524 U.S. 184, 194 (1998).

The Division's reliance on *Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000) is also misplaced. *Wonsover* does not hold that a "willful" violation simply means knowing what one is

[5] The sales by the respondent in *Int'l S'holders Ser. Corp.* did not cause the loss of the exemption. Similarly, there is no evidence that Mr. Bandimere's activities were the cause of an exemption for interests in IV Capital or UCR being unavailable.

doing. Rather, *Wonsover* noted that the Commission did not endorse the "knows what he's doing" standard, and affirmed the Commission's finding of a willful violation based upon the Commission's determination that the respondent had failed to conduct an adequate investigation.

The Commission in *Jacob Wonsover*, 1999 WL 1000935, Rel. No. 34-1123 (March 1, 1999) explained the reasoning behind its interpretation of what constitutes a "willful" violation. The Commission stated that the context in which the term "willful" is construed is important, and that Section 15(b)(4) was limited to actions brought against registered professionals in a highly regulated industry who can be expected to know what the law requires. Indeed Mr. Wonsover admitted at the hearing that he knew what was expected of him. *Jacob Wonsover,* at *3. By emphasizing that actions under Section 15(b)(4) were limited to licensed professionals, the Commission distinguished authority such as *Bryan v. U.S., supra*, which recognized that the general meaning of willfulness was subject to an exception where apparently innocent conduct is proscribed by law.

The Commission's reasoning in *Jacob Wonsover* means that the general meaning of "willful" cannot apply to Mr. Bandimere, because he was not a registered professional. There must be some evidence of some culpability before a willful violation can be found against him. Such evidence is completely lacking here.[6] Cases cited on page 11 of the Response are irrelevant because none arose under Section 15(b)(4) which requires a willful violation.

The Response points to nothing that supports a determination that Mr. Bandimere acted with any culpability at all. In fact, Mr. Bandimere's consultation with Mr. Syke, an attorney, certified public accountant, and former registered stockbroker, precludes a determination that

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[6] As discussed below, *Jacob Wonsover* also shows that an action under Section 15(b)(4) against Mr. Bandimere was improper.

Mr. Bandimere acted other than as would a prudent person.[7] The Division's citation of *Wonsover v. SEC* for the proposition that a broker's reliance on other professionals does not excuse a legal violation stretches that case far beyond the breaking point. In *Wonsover*, the broker claimed to rely on information provided by a transfer agent, not an attorney or other professionals.

B. The Division Did Not Prove That Mr. Bandimere Violated Section 5.

Mr. Bandimere's defense to the claim that he violated Section 5 of the Securities Act is based on *Pinter v. Dahl*, 486 U.S. 622 (1998), which held that a seller did not include a person who was motivated solely to benefit the buyer, and not himself. Mr. Bandimere's motivation is a question of fact to be established by a preponderance of the evidence. The Division has failed to show that a preponderance of the evidence shows that Mr. Bandimere's motivation was, even in part, to benefit himself by involving others in IV Capital or UCR.

The Division argues that Mr. Bandimere was motivated to involve others in IV Capital and UCR because he received management fees that were substantial. Even if Mr. Bandimere's receipt of fees is evidence of his motivation, that evidence is not conclusive, and, considering the record as a whole, does not constitute a preponderance of the evidence.

The Division ignored evidence that Mr. Bandimere's motivation had nothing whatever to do with his receipt of management fees. The evidence is uncontroverted that Mr. Bandimere involved others in investments that were working well for him before he was paid any management fees. Tr. 966 (began talking to investors in 2006); Tr. 1199 (fees offered to LLCs); Exhibit 11 (LLC formed in 2007). The Division also ignored evidence that Mr. Bandimere did not engage in organized or consistent sales activities using promotional materials, or even

[7] The Division's assertion that Syke was not acting as Mr. Bandimere's attorney in discussing the legalities of involving others in investments is not supported by the record. Tr. 734-6; Exhibit 215. The Division happily refers to Syke as Mr. Bandimere's attorney when it suits its purpose. Response. p. 23.

business cards. If Mr. Bandimere's motivation was profit, the Division did not explain why Mr. Bandimere did not take steps to maximize his profits. The Division ignored the testimony from investors that Mr. Bandimere was not engaged in selling, but appeared to be sharing what he believed was his good fortune in having been involved in an investment that appeared to working so well. Tr. 469-70; 704; 783. Lastly, the Division ignored Mr. Bandimere's testimony that he was motivated to help others and the evidence of Mr. Bandimere's deep Christian faith, which caused him to share with others an opportunity which he believed would benefit them. Tr. 1185-7.

Neither the Division, nor the law judge, made any effort to weigh this evidence. However, when the evidence is weighed, it cannot be said that a preponderance of evidence demonstrates that Mr. Bandimere's motivation, even in part, was to benefit himself by the investment of others in either IV Capital or UCR.

C. The Division Did Not Prove by a Preponderance of Evidence That Mr. Bandimere Acted as a Broker.

Mr. Bandimere falls within the definition of a "broker" if the evidence established that he was engaged in the business of effecting transactions in securities for the account of others. The Division has failed to prove by a preponderance of the evidence that Mr. Bandimere did so.

There are no standards that show when a person has engaged in the business of effecting transactions in securities for the account of others. Rather, there a number of non-exclusive factors that have been identified, none of which, either alone or in combination, has been found to be determinative. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).

Where, as here, evidence shows that Mr. Bandimere engaged in some, but not all, of the factors that should be considered in determining whether a person falls within the definition of a broker, distinguishing between a totality of circumstances that results in a person being

considered a broker and a totality of circumstances that does not result in a person being a broker is problematic. Indeed, as the court recognized in *SEC v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005) *aff'd on other grounds* 538 F.3d 1043 (9th Cir. 2008) it is not enough to point to factors that exist that support the conclusion that a person is a broker. It is also necessary to explain why the absence of other factors does not result in the conclusion that a person is not a broker.

Both the law judge and the Division address only what is from their point of view the positive side of the equation without explaining how they treat the negative side of the equation.

To the extent that the Commission has unarticulated criteria which it uses to determine whether a person falls within the definition of a broker, it is impermissible to apply those criteria to find that Mr. Bandimere is a broker. *Chekosky v.* SEC, 23 F.3d 452, 482 (D.C. Cir. 1994). If there are no unarticulated criteria that guide the determination of when a person who meets some, but not all, of the relevant criteria, is a broker, but broker status is decided on a case-by-case basis without any analytical structure that provides predictability, then finding one person to be a broker is an exercise in arbitrariness. *See, id.* 483-4. However, agency action that is arbitrary cannot be sustained.

IV. THE DIVISION FAILED TO DEMONSTRATE THAT THE SANCTIONS IMPOSED WERE BASED ON A PROPER EXERCISE OF THE LAW JUDGE'S DISCRETION.

A. A Cease and Desist Order is Not Warranted.

The Division's justification for the imposition of a cease and desist order appears to do exactly what the Court of Appeals for the District of Columbia said should not be done in *PAZ Securities, Inc. v. SEC,* 566 F.3d 1172, 1175 (D.C. Cir. 2009): treat the various factors as a mechanical punch list. The Division runs through various factors which have been held to justify a cease and desist order without considering the actual facts.

The fundamental consideration is whether Mr. Bandimere, in the absence of a cease and desist order, is likely to violate the law in the future. Mr. Bandimere is 67 years old, inexperienced in securities, and was duped by a friend he had met in church more than 30 years before, to invest in, and induce others to invest in, two fraudulent schemes. That friend will be incarcerated for another decade. The investments Mr. Bandimere made cost him his personal fortune and hurt many of his family and closest friends. To suggest, as does the Division, that Mr. Bandimere's experience will have no impact on his future activities is to impute to him a sociopathic personality that finds no support in the record.

The Division's reliance on *Seghers v. SEC*, 548 F.3d 129, 136-7 (D.C. Cir. 2008), in which the Court of Appeals rejected a challenge to sanctions based on a due process argument, underscores a theme implicit in many of the Division's arguments: that it is acceptable, and perhaps the point of an administrative proceeding, to be as unfair as possible to a respondent up to the limit of what due process prohibits. At least one former Commissioner, while a Commissioner, disagreed. *The Stuart-James Co., Inc.*, 1991 WL 291802, at *7 (Jan. 23, 1991) (concurring opinion of Commissioner Fleichman).

B. The Division Has Not Shown a Statutory Basis for the Imposition of a Civil Penalty.

The law judge imposed civil penalties on Mr. Bandimere pursuant to Section 15(b)(6) of the Exchange Act. I.D. 86. Section 15(b)(6) is inapplicable to this proceeding. Mr. Bandimere was not alleged or found to be a person who was at the time of the alleged misconduct, associated, or seeking to become associated, with a broker or dealer, or who was participating in an offering of a penny stock. However, those are the only persons who fall within Section 15(b)(6).

Mr. Bandimere was found to have acted as a broker. However, Mr. Bandimere cannot associate with himself and thereby fall within Section 15(b)(6). Therefore, the Division's citation of authority reflecting the applicability of Section 15(b)(6) to persons associated with unregistered brokers, even if correct, is irrelevant. Mr. Bandimere was not alleged to be, found to be, nor could he have been found to be, associated with any broker, registered or not.

The Division, correctly, did not even attempt to justify the imposition of a civil penalty under Section 15(b)(4). The Commission, in *Jacob Wonsover*, *supra*, held that only registered professionals could be subject to a Section 15(b)(4) proceeding. Since it is beyond dispute that Mr. Bandimere was not, and has never been a registered securities professional, *Jacob Wonsover* precludes Section 15(b)(4) from being applied to Mr. Bandimere.

Lastly, the Division does not contend that amendments to the Exchange Act and the Securities Act included in the Dodd-Frank legislation can be applied to Mr. Bandimere. Those amendments became law only in July, 2010, which post-dated any wrongful conduct alleged against Mr. Bandimere, and cannot be applied retroactively. E.g., *Landgraff v. U.S.I. Film Products,* 511 U.S. 244, 282-3 (1994).

C. The Division Has Not Shown a Statutory Basis For the Imposition of an Associational Bar.

Similar to the civil penalties, the industry-wide associational bar imposed against Mr. Bandimere was based on Section 15(b)(6) of the Exchange Act. I.D. pp. 82-83. As discussed above, Mr. Bandimere was neither alleged to be nor found to be within the ambit of Section 15(b)(6), nor would the record support such a finding. Therefore, Section 15(b)(6) cannot apply to Mr. Bandimere, and any sanction imposed under that provision cannot stand.

Similarly, Section 15(b)(4) is not available as a basis on which to impose a sanction against Mr. Bandimere because of the Commission's ruling in *Jacob Wonsover* that only registered persons are subject to Section 15(b)(4).

D. The Division Failed to Demonstrate that the Order of Disgorgement was a Proper Exercise of the Law Judge's Discretion.

The Division's arguments relating to the disgorgement imposed on Mr. Bandimere ignores the central reality in this matter: there were no legitimate earnings or gains to anyone. Because IV Capital and UCR were both Ponzi schemes, no one's investment went to legitimate investment activities; invested funds were used to pay other investors. No one actually earned anything, and everyone was paid either with their own funds, or funds contributed by other investors. That is the essential nature of a Ponzi scheme. Because the law judge found that Mr. Bandimere did not know, nor should he have known, that either scheme was a Ponzi scheme, Mr. Bandimere was no less a victim of the schemes than any other investor. The only difference is the amount of Mr. Bandimere's victimization.

Disgorgement is a discretionary remedy. There is no requirement to impose disgorgement when it is inequitable to do so, or when the purposes to be served by disgorgement are absent.

The purposes of disgorgement are to deprive a wrongdoer of ill-gotten gains, and to deter others from violating the law. There is no issue of depriving Mr. Bandimere of an ill-gotten gain. Rather, the Division seeks to increase the amount of Mr. Bandimere's undeserved loss resulting from the fraud perpetrated by Parrish and Dalton. The Division refers to no case where disgorgement was used to increase a loss experienced by an investor caused by the fraud of another.

There is no reason to believe that increasing Mr. Bandimere's loss is necessary to deter others from following in his footsteps. Those whose violations are inadvertent will not have the knowledge of potential consequences from acting in a way they had no idea were improper. Those whose violations are not inadvertent are going to violate the law anyway, and can take no comfort from appropriate treatment for inadvertent violators.

Nor has the Division explained, or provided any authority to support its contention that it is unjust for Mr. Bandimere's loss to be smaller than it would otherwise have been because he received payments that other investors did not receive.

The fairness of one victim of a Ponzi scheme losing less than other victims of the same scheme is an issue that arises where a receiver is appointed to try to maximize recovery for all victims after a scheme collapses. It is not considered unjust for a victim of a Ponzi scheme to retain payments received from the scheme that do not exceed what was contributed, even though that victim's losses may be less than the losses of other victims who did not receive comparable payments. E.g., *In re Slatkin*, 525 F.3d 805, 814-15 (9th Cir. 2008). Up to the point of breakeven, the return of money from a Ponzi scheme is not deemed to be at the expense of other victims. *Id.* Mr. Bandimere, who was a net loser, had no gain, and was not unjustly enriched. Therefore, disgorgement was not appropriate.

V. MR. BANDIMERE ESTABLISHED HIS EQUAL PROTECTION DEFENSE.

The Division has failed to rebut Mr. Bandimere's showing that he introduced sufficient evidence into the record to establish that he was denied equal protection of the laws because the Commission brought an administrative case against him rather than bringing an action against him in federal district court.

Mr. Bandimere produced evidence that was sufficient to establish a claim for denial of equal protection of the laws. *Gupta v. SEC,* 796 F.Supp. 2d 503, 513 (S.D.N.Y. 2011). The

efforts of the law judge and the Division to distinguish that evidence failed, as discussed in Mr. Bandimere's Opening Brief.

The Division's argument urging rejection of Mr. Bandimere's equal protection claim because the choice of forum is a matter of unreviewable agency discretion cannot be credited. First, the claim of unreviewable discretion does not resolve the equal protection claim. As Judge Rakoff noted in *Gupta v. SEC*, even if the Commission was acting within its discretion, an equal protection claim would still lie if the unequal treatment of a defendant was still arbitrary and irrational. 796 F.Supp. 2d at 513. On the record, the choice of the administrative forum meets those criteria, and the Division offered nothing in rebuttal.

No less importantly, the contention that the choice of forum is not reviewable contradicts the position taken by the Commission, through its general counsel, in *Gupta v. SEC*, where the Commission argued that the it could review and rule on that claim, and that its decision could be adequately addressed on appeal in a United States Court of Appeals. *Gupta v. SEC*, Case No. 11-cv-01900-JSR (S.D.N.Y.), Memorandum of Law in Support of Motion to Dismiss Complaint, Apr. 1, 2011, ECF No. 13, p. 21. *Accord, Jarkesy v. SEC*, Case No. 14-cv-00114-BAH (D.D.C.), Memorandum of Law in Opposition to Application for Temporary Restraining Order, Jan. 30, 2014, ECF No. 9, p. 21. Indeed, Mr. Bandimere relied on the Commission's position in *Gupta* when he raised his equal protection claim within the administrative process, rather than in a separate action in federal court.

VI. MR. BANDIMERE WAS PREJUDICED BY PROCEDURAL ERRORS CONCERNING THE FAILURE TO ISSUE A SUBPOENA, AND THE ADMISSION AND RELIANCE ON INADMISSIBLE EVIDENCE.

A. The Law Judge Acted Arbitrarily and Capriciously in Refusing to Issue a Subpoena Requested by Mr. Bandimere.

Mr. Bandimere contends that the law judge acted arbitrarily and capriciously in failing to issue a subpoena sought by Mr. Bandimere, and objected to by the Division. Mr. Bandimere's argument is based upon Rule 323(e)(2) which provides that the only basis for modifying or quashing a requested subpoena is that it is "unreasonable, oppressive, or unduly burdensome." Mr. Bandimere contends that the law judge abused his discretion and acted arbitrarily and capriciously in rejecting the subpoena because the law judge relied on a purported lack of relevance of the information requested. That is not an appropriate basis to refuse to issue a subpoena. Further, Mr. Bandimere argued that the law judge acted arbitrarily and capriciously because he did not have sufficient information to determine whether there was, in fact, an undue burden in producing documents, or, whether there was an applicable privilege that would warrant refusing to produce certain documents.

The Division, when it objected to Mr. Bandimere's subpoena did not identify any particular document which it claimed to be privileged, presented no declaration providing any details of what would be the burden of producing the documents requested, and allowed the Division's trial counsel, alone, to assert the law enforcement and deliberative process privilege.

The Response does not address any of those issues. It does not identify any document which it claimed to be privileged, and does not point to any specification in the record as to the burden that would be involved in producing documents. The Division relied on the concept of relevance as being a sufficient basis to deny a subpoena without regard to Rule 323(e)(2) and on its own made conclusory assertions of privilege that require support from a more senior level.

Just as it did with the law judge, the Division's position is that by making the conclusory assertions, it has created an adequate basis for the Commission to decide that the law judge was correct in refusing to issue the subpoena requested by Mr. Bandimere.

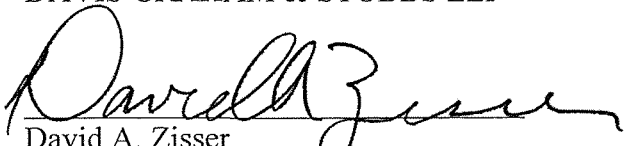
Mr. Bandimere does not see how that argument can be accepted. Except as to possible knowledge of facts which the Commission may have that are outside the record of this proceeding, the Commission is as much in the dark about what the Division is really talking about as the law judge. Moreover, Mr. Bandimere's Motion for *in Camera* Review filed April 23, 2013 demonstrated that the Division had misrepresented the nature and content of documents which it initially withheld. Nevertheless, the law judge accepted uncritically the Division's representations regarding privilege.

Mr. Bandimere sought documents that could reasonably be expected to be relevant to his defense and the law judge acted arbitrarily and capriciously in failing to order that they be produced. That improper action tainted the entire proceeding, and warrants dismissal.

Dated this 3rd day of April, 2014.

Respectfully submitted:

DAVIS GRAHAM & STUBBS LLP

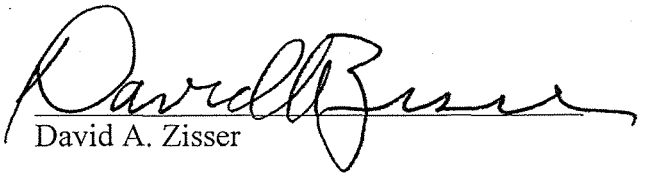


David A. Zisser
Davis Graham & Stubbs LLP
1550 17th Street, Suite 500
Denver, Colorado 80202
(303) 892-9400 - Main
(303) 892-7256 – Direct
(303) 893-1379 - Fax
Email: david.zisser@dgslaw.com

ATTORNEYS FOR DAVID F. BANDIMERE

CERTIFICATE OF COMPLIANCE

This Reply Brief complies with SEC Rule 450 in that it contains 6,756 words.



David A. Zisser