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

RESPONDENT DAVID F. BANDIMERE'S MOTION FOR RULING ON THE PLEADINGS

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Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C., and pursuant to Rule 250(a) moves for a ruling on the pleadings as follows.

I. INTRODUCTION AND BACKGROUND

The Order Instituting Proceedings (the "OIP") in this matter was issued on December 6, 2012.[1] The matter was assigned to ALJ Elliot, who presided over a six-day evidentiary hearing in May, 2013. ALJ Elliot issued his Initial Decision on October 8, 2013. Mr. Bandimere filed a petition for review of the Initial Decision, in which he raised numerous substantive and procedural issues, including a challenge to ALJ Elliot's authority because he was not appointed in conformity with Art. II, Section 2 of the United States Constitution (the "Appointments Clause"). The Commission issued its Opinion and Order (the "Opinion") October 29, 2015, rejecting all of Mr. Bandimere's arguments.

Mr. Bandimere filed a timely Petition for Review of the Opinion with the United States Court of Appeals for the Tenth Circuit in which he also raised a number of substantive and procedural challenges, including a challenge to ALJ Elliot's authority based on the Appointments Clause. The Court of Appeals granted Mr. Bandimere's Petition on December 27, 2016, *Bandimere v. SEC,* 844 F.3d 1168 (10th Cir. 2016), accepting Mr. Bandimere's Appointments Clause argument. The Court of Appeals set aside the Opinion, but did not address any of Mr. Bandimere's other challenges to the Opinion.

The Commission unsuccessfully sought rehearing and rehearing *en banc* of the Court of Appeals' decision setting aside Opinion. The Commission petitioned the Supreme Court for a writ of certiorari, which was denied on June 28, 2018.

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[1] The proceeding initiated by the OIP is referred to as the "2012 Proceeding."

Neither the Court of Appeals, nor the Supreme Court, remanded the 2012 Proceeding to the Commission. Nor did the Commission ever seek a remand.

While the Court of Appeals for the Tenth Circuit considered Mr. Bandimere's Petition for Review, the Court of Appeals for the District of Columbia Circuit considered a Petition for Review of the Commission's Decision and Order in *In the Matter of Raymond J. Lucia Companies*. That petition, like Mr. Bandimere's, included a challenge to ALJ Elliot's authority under the Appointments Clause. The Court of Appeals in *Lucia* rejected the challenges to the Commission's Decision, including the argument under the Appointments Clause. *Raymond J. Lucia Companies, Inc. v. SEC* , 832 F.3d 277 (D.C. Cir. 2016) *petition for en banc review denied by equally divided court* 868 F.3d 1021 (D.C. Cir. 2017). The decision in *Lucia* created a split between the Courts of Appeals for the District of Columbia and the Tenth Circuit regarding whether ALJ Elliot was an inferior officer within the meaning of the Appointments Clause.

The Supreme Court granted certiorari in *Lucia* on the Appointments Clause issue and in *Lucia v. SEC,* 138 S. Ct. 2044 (2018) reversed the Court of Appeals, finding that administrative law judges working for the Commission were inferior officers of the United States who had to be appointed in conformity with the Appointments Clause.[2]

An order purportedly issued by the Commission[3] on August 22, 2018, established the process by which "pending" administrative proceedings would be processed for decision in light of *Lucia.* Order, *In re Pending Administrative Proceedings,* Rel. No. 33-10536 (August 22, 2018). That purported order identified the 2012 Proceeding as a "pending" proceeding, and is the basis for the 2012 Proceeding now being considered by this Court.

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[2] The Supreme Court did not rule on the Commission's petition for certiorari in *Bandimere* until a week after it decided *Lucia.*

[3] As discussed below, the Commission's records to not reflect approval of the Order by the Commissioner.

II. STANDARDS GOVERNING MOTIONS FOR RULING ON THE PLEADINGS

Motions for Ruling on the Pleadings under Rule 250(a) of the Rules of Practice are analogous to motions to dismiss for failure to state a claim and for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(b)(6) and 12(c). Motions for Ruling on the Pleadings are to be decided on the pleadings, matters subject to judicial notice, matters of public record, and documents attached to the pleadings, if any. *In the Matter of Adrian D. Beamish, CPA* Rel. No. APR-4504, 2017 WL 1175585 (January 6, 2017). The non-movant's factual allegations must be accepted as true, and all reasonable factual inferences must be drawn in favor of the non-movant. The motion should be granted where the movant is entitled to a ruling as a matter of law. Rule of Practice 250(a).

Because a Motion for Ruling on the Pleadings is analogous to motions to dismiss for failure to state a claim, or for judgment on the pleadings under the Federal Rules of Civil Procedure, pleading requirements under the Federal Rules of Civil Procedure, at least to some extent, also must apply to the allegations in an OIP. Rule 200(b)(3), which requires an OIP to include a short and plain statement of the facts and law to be determined, must be construed as requiring sufficient allegations of fact, which if proved, would constitute proof of the violations asserted. Anything less would make a Motion for Ruling on the Pleadings a meaningless exercise.

Under these standards, Mr. Bandimere is entitled to a ruling in his favor.

III. THERE IS NO PENDING CASE AGAINST MR. BANDIMERE BECAUSE THE PROCEEDING INITIATED BY THE ORDER INSTITUTING PROCEEDINGS ISSUED DECEMBER 6, 2012 HAS BEEN RESOLVED

Although the 2012 Proceeding is before this court as a "pending" proceeding, it is not pending and has not been for years. The Commission characterized the 2012 Proceeding as

pending, but has not explained how the 2012 Proceeding can be pending before it after the Court of Appeals set aside the Decision and failed to remand to the Commission for further proceedings. Indeed, there is no indication that the Commission considered the circumstances regarding the 2012 Proceeding when the Commission included it in a list of pending cases for the first time in August 22, 2018. Rather, it appears that the Commission lumped Mr. Bandimere together with respondents in many other matters without any apparent evaluation of whether the 2012 Proceeding, in light of the facts and circumstances relating to it, was actually pending before the Commission in 2018.

Although there are cases which were tainted by the Commission's improper appointment of its administrative law judges which may be pending before the Commission, the 2012 Proceeding is not one of them.

A. The 2012 Proceeding was Concluded When the Court of Appeals Vacated the Decision and Chose Not to Exercise Its Discretion to Remand

The 2012 Proceeding was concluded when the Court of Appeals granted Mr. Bandimere's Petition for Review, and because that proceeding was concluded, the OIP which initiated the 2012 Proceeding is no longer operative.

The Court of Appeals acquired exclusive jurisdiction over the 2012 Proceeding when Mr. Bandimere filed a timely petition for review and the Commission filed the administrative record with the Court of Appeals. Securities Exchange Act of 1934 (the "Exchange Act"), Section 25(a)(3). When the Court of Appeals exercised its exclusive jurisdiction and set aside the Opinion, without ordering a remand (which the Commission never requested), it ended the 2012 Proceeding, a conclusion that necessarily flows from the meaning of a remand.

"When a court remands a case, it sends the case back to the place from which it came for the purposes of having some further action taken in the tribunal of origin." *Etape v. Chertoff,* 497

F.3d 379, 384 (4th Cir. 2007). In the context of an administrative adjudication, a remand to the agency represents a continuation of the case. *New Mexico ex rel. Richardson v. Bureau of Land Mgt.,* 565 F.3d 683, 698 (10th Cir. 2009) *citing Caesar v. West*, 195 F.3d 1373, 1374 (Fed. Cir. 1999). When the Court of Appeals issued its judgment setting aside the Opinion without a remand, that judgment did not provide for a continuation of the 2012 Proceeding. Rather, the judgment by the Court of Appeals concluded the 2012 Proceeding without returning jurisdiction to the Commission for further proceedings.

The Court of Appeals could have remanded the 2012 Proceeding to the Commission if the Court believed that a remand was warranted. A court of appeals has the equitable power to remand a case to an administrative agency. *Ford Motor Company v. N.L.R.B.* 305 U.S. 364, 373 (1939). But, the existence of the power to remand shows that a return of jurisdiction to the administrative agency is not automatic; rather, a remand must be ordered as a matter of equitable discretion.

But the Commission in this case failed to provide the Court of Appeals with any basis to remand the 2012 Proceeding because the Commission did not ask for a remand, either in the primary briefing relating to Mr. Bandimere's Petition, or in the Commission's petition for rehearing or rehearing *en banc.*

The decision in *Antoniu v. S.E.C.*, 877 F.2d 721 (8th Cir. 1989) provides a useful illustration. There, a petition for review of an administrative proceeding barring Antoniu from the securities industry was granted because a commissioner who had participated in the proceeding had given a speech indicating that he had prejudged Antoniu's case. The Court set aside the Commission's order, and remanded with directions that the Commission make a *de*

novo review of the evidence without the participation of the commissioner who had prejudged the matter.

The Court of Appeals did not continue the 2012 Proceeding by remanding the case to the Commission for further action. Therefore, jurisdiction over the 2012 Proceeding, which the Court of Appeals obtained pursuant to Section 25(a)(3) of the Exchange Act, was not returned to the Commission. The Court of Appeals' Order setting aside the Opinion ended the 2012 Proceeding.[4]

B. The Commission's Records Show that the 2012 Proceeding was Concluded and No Longer Pending Before the Commission

Facts apart from the Court of Appeals' failure to remand the case support Mr. Bandimere's position that the 2012 Proceeding is not pending before the Commission.

The Commission's records reflect that the 2012 Proceeding is closed. The Commission discloses to the public on its website a list of proceedings that are closed and archived. "Closed Administrative Proceedings Cases." www.sec.gov/litigation/apdocuments/ap-closed-fileno-asc.xrr. The 2012 Proceeding is included on that list of closed administrative cases. Including a matter on a list of closed cases is inconsistent with the position that the matter is pending.

In addition, in its November 30, 2017 Order *In re: Pending Administrative Proceedings* Rel. No. 10440, issued almost a year after the Court of Appeals sustained Mr. Bandimere's Appointments Clause challenge, the Commission purported to cure the Appointments Clause problem by ratifying the appointments of its administrative law judges[5] and instructing the

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[4] Of course, setting aside the Opinion because of a procedural defect was not a determination on the merits. The Commission may issue a new OIP raising the same claims as were raised in the 2012 OIP, if it chooses to do so, without being vulnerable to the affirmative defense of *res judicata. E.g., Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981). However, the period of limitations will not be tolled by the 2012 Proceeding. *Hawkins v. McHugh*, 46 F.3d 10, 12 (5th Cir. 1995).

[5] Mr. Bandimere does not agree that the purported ratification of the earlier improper appointment constitutes an appointment that satisfies the Appointments Clause.

administrative law judges, for all "pending" cases, to re-decide their previous decisions. The 2012 Proceeding was not included in the list of pending proceedings appended to that order, recognizing that the 2012 Proceeding was not pending.

The Commission issued an order on June 21, 2018, Order staying all "pending" proceedings in light of the Supreme Court's decision in *Lucia*. The Court noted that the June 21, 2018 Order included the 2012 Proceeding, see, October 2, 2018 Order, APR Rel. No. 6132. But the status of the 2012 Proceeding on June 21, 2018 was unchanged from November 30, 2017: on both dates, the 2012 Proceeding was subject to a Petition for Writ of Certiorari on which the Supreme Court had not ruled. The 2012 Proceeding could not be simultaneously pending before the Supreme Court and the Commission. Further, the Commission's characterization of the 2012 Proceeding as pending before the Commission on June 21, 2018 was arbitrary and capricious in light of its recognition in November, 2017 that the 2012 Proceeding was ***not*** pending before the Commission.

The Commission, on August 22, 2018, purportedly issued an Order allowing the stay entered on June 21, 2018 to expire on "pending" proceedings, and vacating any "prior opinions" issued by it in any of the "pending" proceedings. But, the Commission's records reflect that the Commission did not approve the August 22, 2018 Order. The Commission, to comply with its obligations under the Freedom of Information Act, maintains a public record of its orders, including the final votes of the Commissioners. www.sec.gov/about/commission-votes.shtml. There is no record of any Commission vote on the August 22, 2018 Order. Because the Commission's records do not reflect that the August 22, 2018 Order was approved by a majority of a quorum of Commissioners, that Order identifying the 2012 Proceeding as a case pending before the Commission is has no effect.

Further, although the August 22, 2018 order ended the stay of the pending cases and vacated prior opinions, there was no opinion relating to Mr. Bandimere that could be vacated because the Opinion in the 2012 Proceeding had been set aside by the Court of Appeals almost two years earlier. The absence of an opinion relating to Mr. Bandimere to vacate in August, 2018 strongly shows that the Commission did not consider the 2012 Proceeding to be among the cases pending before it.

Although the Commission's August 22, 2018 Order attached a list of purportedly pending cases, which included the 2012, there is no explanation why or how the 2012 Proceeding, which was not pending in November 30, 2017, became a pending case by August 22, 2018. On the face of the Orders discussed, the Commission's characterization of the 2012 Proceeding as "pending" before the Commission, if not an unintentional mischaracterization, is arbitrary and capricious.

The proceeding initiated against Mr. Bandimere in 2012 was concluded by the Court of Appeals setting aside the Commission's Decision. If the Division of Enforcement wishes to pursue any claim against Mr. Bandimere, the Commission must initiate a new proceeding.

IV. THE COMMISSION HAS FAILED TO PROVIDE MR. BANDIMERE WITH A TIMELY HEARING

A. The Commission Did Not Meet Statutory Deadlines to Provide a Hearing

Further support for the conclusion that the Division of Enforcement cannot proceed against Mr. Bandimere under the 2012 OIP is found in the fact that the Commission did not provide Mr. Bandimere with a hearing to which he was entitled within the time frame mandated by the statutes governing administrative enforcement proceedings.

Section 8A(b) of the Securities Act, Section 21C(b) of the Exchange Act, and Section 203(k)(2) of the Investment Advisers Act each provides that a hearing in an administrative proceeding must be provided no earlier than 30 days nor later than 60 days after service of the

notice instituting proceedings, unless the respondent agrees to either an earlier or later date. Because the 2012 Proceeding was brought pursuant to sections 15(b) of the Exchange Act and 203(f) of the Investment Advisers Act, which requires hearings to be "on the record," the hearing to which Mr. Bandimere was entitled could be presided over only by the Commission, one or more members of the Commission, or an administrative law judge appointed by the Commission. 5 U.S.C. § 556.

The statutory time frames for a hearing are both mandatory, and designed to provide protection to respondents such as Mr. Bandimere. The relevant statutes all provide that the Commission "shall" schedule the hearing within the statutory time frames, and that a departure from those time frames is allowed only if a ***respondent*** agrees to such a departure.

Mr. Bandimere agreed to a hearing before an administrative law judge more than 60 days after the 2012 OIP was served. However, as the Court of Appeals held, and the Supreme Court confirmed in *Lucia,* the hearing provided to Mr. Bandimere was illegal because ALJ Elliot was hired in violation of the Appointments Clause. The statutory requirement that a respondent be given a hearing on the record no later than 60 days after the service of an OIP is not satisfied by providing a hearing with a presiding officer not qualified under the Constitution to act in that capacity. Therefore, Mr. Bandimere did not receive the hearing to which he was entitled within the time frames mandated by the Securities Act, the Exchange Act, and the Investment Advisers Act.

Because the statutory deadlines for a hearing under Sections 8A(b) of the Securities Act, 21C(b) of the Exchange Act, and 203(k)(2) of the Investment Advisers Act were not met for the 2012 OIP, the Commission lacks authority to find any violations of the Securities Act, the Exchange Act, and the Investment Advisers Act under that OIP. In essence, the 2012 OIP has

expired because of the failure to provide a hearing. If the Commission wants to proceed anew against Mr. Bandimere, it must issue a new OIP, and provide him with a hearing with a qualified presiding officer within the statutory timeframe.

B. Mr. Bandimere Has Been Deprived of His Right to a Prompt Hearing

The Commission has acted with utter disregard of Mr. Bandimere's right to a prompt hearing under the Administrative Procedure Act, which, in 5 U.S.C. § 555(b), provides in relevant part "With due regard for the convenience and necessity of the parties or their representatives ***and within a reasonable time***, each agency shall proceed to conclude a matter presented to it."(emphasis added)

The Court of Appeals, on December 27, 2016, found that Mr. Bandimere did not receive a valid hearing under the 2012 OIP. *Lucia,* which reached the same conclusion regarding what the Appointments Clause required, was decided on June 21, 2018. The outcome in *Lucia* could not have been a surprise in light of the confession of error on the Appointments Clause issue by the Solicitor General in November, 2017. *See, In re: Pending Administrative Proceedings* Rel. No. 10440, November 30, 2017. The Commission had ample time to create a plan to provide Mr. Bandimere with a hearing presided over by a qualified presiding officer in a reasonable amount of time. But, the Commission failed create such a plan, and failed to provide a hearing in a reasonable period of time. Instead, the Commission ignored Mr. Bandimere's right to a hearing in a reasonable period of time, and acted to serve only its own convenience.

The Commission's initial approach to rectify its Appointments Clause problem, reflected in its November 30, 2017 Order, involved no meaningful remedial action. It purported to cure the Appointments Clause defect by "ratifying" the earlier, improper appointment of its administrative law judges and instructed the administrative law judges merely to re-decide the

cases they already decided on the basis of the existing record, while allowing the parties to submit additional evidence or arguments.

That purported fix did not survive *Lucia* because the Supreme Court recognized that an administrative law judge who decided a case when he or she was improperly appointed could not, assuming a subsequent proper appointment, re-decide the case as if he or she had not already decided it. *Lucia,* 138 S. Ct. at 2055.

Once *Lucia* made clear that the Commission's Appointments Clause violation required meaningful remediation, the Commission stayed all "pending" cases for 62 days, at which time it outlined a process of reassignment and the submission of proposals for proceeding, which would take an additional 42 days. *See, In re Pending Administrative Proceedings*, Rel. No. 33-10536 (August 22, 2018). Only after this lengthy period ran its course would a re-hearing be scheduled. The only interest which the Commission appears to have considered in creating this schedule is its own, and that of its staff. Mr. Bandimere's interests, and the interests of other respondents, were ignored. Indeed, no hearing for Mr. Bandimere has been scheduled.

Because the purportedly pending proceeding against Mr. Bandimere has not been concluded in a reasonable time, as required by the Administrative Procedure Act, the OIP should be dismissed. *See, Strunk v. U.S.* 412 U.S. 434 (1973) (dismissal is the appropriate remedy for depriving accused of the right to a speedy trial).

V. CIVIL PENALTIES ARE NOT AVAILABLE

Civil penalties may be imposed on Mr. Bandimere only if those penalties are authorized by statute. They are not.

The OIP alleges that Mr. Bandimere raised money for two fraudulent schemes, IV Capital and UCR. OIP, ¶ 29. Those schemes ended no later than June, 2010. OIP ¶¶ 15 and 17.

Because Mr. Bandimere's conduct pre-dated the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which became effective on July 21, 2010, the statutory scheme applicable to the imposition of sanctions in this case is the one that existed pre-Dodd-Frank. *Bartko v. SEC,* 845 F.3d 1217, 1224 (D.C. Cir. 2017); *Koch v. SEC*, 793 F. 3d 147, 157-9 (D.C. Cir. 2015).

Section 929P of Dodd-Frank provided the Commission with the authority to impose civil penalties in cease and desist proceedings under Section 8A(g) of the Securities Act, Section 21B(a)(2) of the Exchange Act, Section 9(b) of the Investment Company Act and Section 203(i)(1)(B) of the Investment Advisers Act. Because the authority to impose civil penalties under those provisions post-dated Mr. Bandimere's alleged conduct, those provisions cannot support the imposition of civil penalties.

Section 21B(a)(1) of the Exchange Act, which authorizes the imposition of civil penalties for proceedings instituted pursuant to (as relevant here) Section 15(b)(4) and 15(b)(6) was in effect during the time of the alleged violations. A civil penalty can be imposed on Mr. Bandimere under Section 21B(a)(1) only if the case was brought properly under Section 15(b)(4) or (6). It was not.

The action against Mr. Bandimere was not brought properly under Section 15(b)(4) because only registered securities professionals are subject to Section 15(b)(4). The Commission made that limitation clear in *Jacob Wonsover*, 1999 WL 100935 at *10, Rel. No. 34-1123 (Mar. 1, 1999), *aff'd, Wonsover v. SEC,* 205 F.3d 408 (D.C. Cir. 2000). In that case, the SEC confronted a challenge to its position that a "willful" violation required only that a respondent intended to commit the act that constituted a violation.[6] To support the reasonableness of that

[6] The Commission's Appointments Clause violation is willful under that standard.

position, the Commission interpreted Section 15(b)(4) to apply only to *registered* securities professionals, who were obligated to know the securities laws, and stated "Wonsover--***like anyone else subject to a Section 15(b)(4) proceeding***—is a registered professional in an industry suffused with regulation." (emphasis added) The OIP alleges in ¶ 32 that Mr. Bandimere was not a registered securities professional. Therefore, Section 15(b)(4) cannot apply to him.

Section 15(b)(6) is not implicated by any of the allegations in the OIP. There are no allegations that Mr. Bandimere was ever associated with a broker or dealer, or that he ever sought to become associated with a broker or dealer. By its terms, Section 15(b)(6) does not apply to Mr. Bandimere either.

Because neither Section 15(b)(4) or 15(b)(6) of the Exchange Act apply to Mr. Bandimere, Section 21B(a)(1) of the Exchange Act cannot serve as a statutory basis to impose civil penalties.

The only other potential basis for authority to impose civil penalties is found in Section 203(i) of the Investment Advisers Act, which provides for civil penalties in a proceeding under Sections 203(e) and (f).

The Division of Enforcement has admitted that there is no evidence that Mr. Bandimere received compensation for providing investment advice, which precludes a finding that he was an investment adviser. Division of Enforcement Post-Hearing Brief as to David F. Bandimere, p. 14, fn. 2. It cannot proceed in good faith under the Investments Advisers Act without such evidence.[7]

Apart from the admitted lack of evidence supporting an element of the definition of investment adviser, the OIP does not allege that Mr. Bandimere engaged in misconduct as an

[7] That admission raises the obvious question of why a violation of the Investment Advisers Act was alleged in the OIP at all.

investment adviser sufficiently to implicate either Section 203(e) or 203(f). The only allegations regarding Mr. Bandimere acting as an investment adviser are found in¶ 38 of the OIP. These allegations are stated "in the alternative" and are entirely conclusory. Further, the allegation that Mr. Bandimere acted as an investment adviser to the limited liability companies Exito, Victoria, and MMI are inconsistent with the detailed factual allegations contained in¶ 25 of the OIP. Those allegations make clear that Mr. Bandimere did not provide investment advice to any of the limited liability companies, because those limited liability companies did not, and were not intended to, make their own investments. Rather, investments were made by the individual members who allocated their money to various programs which the members, and not the limited liability companies, chose.

In contrast to Fed.R.Civ.P. 8(d)(2) and (3), nothing in the Rules of Practice allows allegations in an OIP to be asserted in the alternative, or allows the assertion of inconsistent factual allegations. To the contrary, Rule 200(b)(3) requires that an OIP set out a "...short and plain statement of the matters of fact and law to be considered and determined..." Allowing an OIP to assert alternative, inconsistent factual allegations contravenes the requirement that the statement of matters of fact must be "plain." Further, allowing the assertion of inconsistent factual allegations impairs the notice to Mr. Bandimere, or any other respondent, of the charges against which he must defend.

Moreover, allowing inconsistent factual allegations serves no useful purpose. The Division of Enforcement, in all but emergency situations, has the ability to perform an extensive investigation to determine the facts before requesting the Commission to issue an OIP. The ability of the Commission's enforcement staff to subpoena documents and testimony before a proceeding is initiated stands in sharp contrast to a plaintiff in normal civil litigation who cannot

perform a comparable investigation before filing a complaint, and who may require the flexibility to make alternative and inconsistent factual allegations in order to seek redress for a wrong whose details cannot be determined before initiating litigation.

Because the allegations regarding Mr. Bandimere's actions as an investment adviser are without supporting evidence, conclusory, and inconsistent with other allegations, they cannot support a claim under the Investment Advisers Act. And, without a claim under Section 203(e) or (f) of the Investment Advisers Act, the Commission lacks authority to impose civil penalties on Mr. Bandimere under Section 203(i) .

VI. THE OIP FAILS TO STATE A CLAIM FOR SECURITIES FRAUD

The OIP alleges that Mr. Bandimere violated Sections 17(a) of the Securities Act and Rule 10b-5 by making misrepresentations. OIP ¶¶ 2, 34 and 35.

To state a claim for securities fraud, a complaint must allege facts regarding the following elements: (1) the defendant made an untrue or misleading statement of material fact, or failed to state a material fact necessary to make statements not misleading; (2) the statement complained of was made in connection with the purchase or sale of securities; (3) the defendant acted with scienter, that is, with intent to defraud or recklessness. *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1095 (10th Cir. 2003). [8]

Mr. Bandimere is alleged to have affirmatively misrepresented that the investments were "low risk" or "very good investments." OIP ¶ 31. Although Mr. Bandimere denies making such statements, even if he did so, those generalized representations are puffing, and not actionable under the antifraud provisions. *E.g. Grossman v. Novell Inc.*, 120 F.3d 1112, 1119-20 (10th Cir.

[8] In a private action, additional elements of reliance and damages must also be alleged.

1997); *SEC v. Mapp,* 240 F. Supp. 3d 569, 579 (E.D. Texas 2017); *In re J.P. Morgan Chase Sec. Litig.,* 363 F.Supp.2d 595, 633 (S.D.N.Y. 2005).

The majority of misrepresentations alleged in the OIP appear to involve omissions. OIP ¶¶ 35 and 36. The failure to disclose a material fact is actionable under Sections 17(a)(2) and Rule 10b-5(b) only when the omitted fact is necessary to make statements made, in light of the circumstances under which they were made, not misleading. *Matrixx Initiatives Inc. v. Siracusano,* 563 U.S. 27, 44-5 (2011); *Employees' Retirement System of Rhode Island v. Williams Companies, Inc.*, 889 F.3d 1153, 1164 (10th Cir. 2018); *SEC v. St. Anselm Exploration Co.* 936 F. Supp. 2nd 1281, 1295 (D. Colo. 2013). Allegations of fact sufficient to support a claim of securities fraud must include the alleged misleading statements. *Adams v. Kinder-Morgan, Inc., supra; Findwhat Investors Group v. Findwhat.com,* 658 F.3d 1282, 1296 (11 Cir. 2011).

The OIP sets out a number of facts which Mr. Bandimere is alleged to have known but not disclosed to investors. OIP ¶ 35. a. through o. However, the OIP does not set out a single statement allegedly made by Mr. Bandimere which is alleged to have been rendered misleading by the failure to disclose any of those facts. Rather, the OIP alleges that Mr. Bandimere represented IV Capital and UCR in a "materially positive way," which then created a duty to disclose negative facts in order to avoid an unbalanced or one-sided view. OIP ¶ 35. However, nothing in Section 17(a)(2) of the Securities Act, or Rule 10b-5(2) requires that representations about an investment must be balanced or not one sided. As long as statements actually made are not misleading because of a failure to disclose a material fact, neither the statute nor the rule is violated.[9]

[9] Although the OIP alleges only misrepresentations, the OIP also fails to state a claim for securities fraud under a theory of scheme liability. Liability for a fraudulent scheme "hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement." *SEC v. Kelly*, 817 F. Supp.2d 340, 344 (S.D.N.Y. 2011). The OIP fails to allege any inherently deceptive act committed by Mr. Bandimere.

Nor does the OIP allege facts sufficient to support an inference that Mr. Bandimere acted with scienter, or even negligence.

The OIP does not even suggest that Mr. Bandimere acted with an intent to defraud. Rather, it alleges that Mr. Bandimere acted recklessly by allegedly selling investments despite the existence of facts which are characterized as "red flags." OIP ¶ 2. Scienter can be established by proof of extreme recklessness. *Dolphin and Bradbury*, 512 F.3d 634, 639 (D.C. Cir. 2008). Recklessness is extreme conduct, which is more egregious than "white heart/empty head" good faith. *SEC v. Platforms Wireless International Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010). Knowledge of undisclosed facts is insufficient to establish scienter in the absence of knowledge that the undisclosed facts are material, so that the failure to disclose them is likely to mislead investors. *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1261 (10th Cir. 2001). Further, when fraud is alleged based on a failure to discover a fraud perpetrated by another, a sufficient showing of recklessness must approximate an actual intention to aid in that fraud. *South Cherry Street LLC v. Hennessee Group, LLC*, 573 F.3d 98, 109-10 (2d Cir. 2009).

Where, as here, the alleged fraud is referring other investors to an investment which turns out to be a Ponzi scheme, establishing recklessness is difficult. After all, Ponzi schemes fool many people, including sophisticated investors and trained investigators working for the Commission, as illustrated by the Commission's failure to discover the Ponzi scheme perpetrated by Bernard Madoff. However, once a Ponzi scheme comes to light, it is all too easy to assert fraud by hindsight.

The difficulty in asserting sufficient factual allegations supporting an inference of recklessness is shown by *SEC v. Cohmad Securities Corp.,* 2010 WL 363844 (S.D.N.Y., Feb.2, 2010). In that case, the Commission claimed that a registered broker-dealer violated the antifraud

provisions by referring customers to the Madoff scheme. The Commission alleged a variety of factors in support of its claim that the broker dealer acted recklessly, including high compensation for making referrals, Madoff's secrecy, and high returns to investors. However, these allegations were found to be insufficient, and the complaint was dismissed.

Moreover, the fact that Mr. Bandimere himself invested hundreds of thousands of dollars of his own money strongly undercuts any inference of an intention to defraud. *In re Merkin and BDO Seidman Sec. Lit.,* 817 F. Supp.2d 346, 357 n. 8 (S.D.N.Y. 2011).

The alleged red flags in the OIP that are claimed to establish recklessness are similar to those found to be inadequate in *Cohmad,* and represent nothing more than an attempt to establish fraud by hindsight.

For these reasons, Mr. Bandimere is entitled to judgment on the claim that he violated the antifraud provisions of the Securities Act and under Rule 10b-5.

VII. AN ADMINISTRATIVE ENFORCEMENT PROCEEDING WILL NOT AFFORD MR. BANDIMERE DUE PROCESS

Mr. Bandimere is entitled to contest the allegations in the OIP in a proceeding that provides him with due process. Due process requires both actual fairness, and the appearance of fairness. *Antoniu v. S.E.C.*, 877 F.2d 721 at 724, *citing In re Murchison,* 349 U.S. 133 (1955); *Amos Treat & Co. v. S.E.C.* 306 F.2d 260, 267 (D.C. Cir. 1962). A hearing on the charges in the OIP in an administrative proceeding, where the Commission will be the ultimate adjudicator, will not comport with the requirements of due process.

Mr. Bandimere is alleged to have defrauded numerous investors. Among the issues to be decided is whether to establish a fair fund for the benefit of defrauded investors to distribute whatever disgorgement, interest and civil penalties may be imposed. OIP, § III.F.

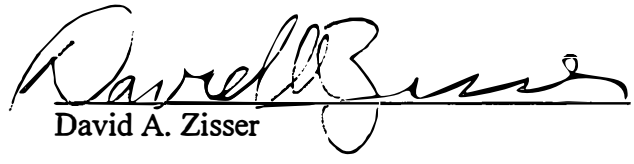
The court may take judicial notice of the fact that the Commission holds itself out to the public as the "investor's advocate." (*See* Exhibit A.) However, an advocate for investors cannot, consistent with due process, act as the adjudicator in an enforcement proceeding where the respondent is accused of defrauding investors, and where monetary sanctions may be imposed and then be distributed to investors. Even if the Commission could act fairly in Mr. Bandimere's case, the appearance of unfairness is unavoidable, and would deprive Mr. Bandimere of a proceeding that provides due process.

VIII. CONCLUSION

Mr. Bandimere has been subjected to an unconstitutional proceeding which required him to seek redress in the Court of Appeals. The Commissioner now seeks to continue a proceeding that has been resolved in Mr. Bandimere's favor. It cannot do so.

CERTIFICATE OF WORD COUNT

I certify, pursuant to Rule 154(c), that this Motion for Ruling on the Pleadings complies with the limitation on length and contains 5,747 words, exclusive of the Table of Contents and Table of Authorities.

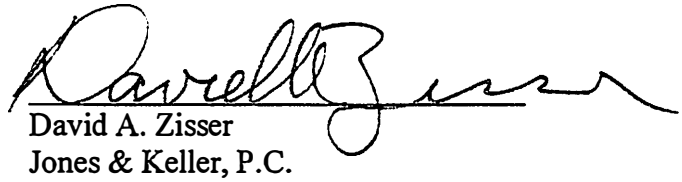


David A. Zisser

Dated this 15th day of January, 2019.

Respectfully submitted:

JONES & KELLER, P.C.



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ATTORNEY FOR
DAVID F. BANDIMERE

CERTIFICATE OF SERVICE

I certify that on this 16th day of January, 2019 I forwarded a true and correct copy of the foregoing **RESPONDENT DAVID F. BANDIMERE'S MOTION FOR RULING ON THE PLEADINGS** to the following as indicated:

Securities and Exchange Commission (Original and three copies by Federal Express)
Elizabeth Murphy, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

Honorable Carol Fox Foelak (courtesy copy via email at alj@sec.gov)
Administrative Law Judge
100 F Street, N.E.
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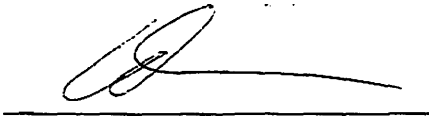

Emily Morse-Lee


U.S. SECURITIES AND
EXCHANGE COMMISSION
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WE ARE THE
INVESTOR'S ADVOCATE
The SEC protects investors, promotes fairness in the securities markets, and shares information about companies and investment professionals to help investors make informed decisions and invest with confidence.

EXHIBIT A