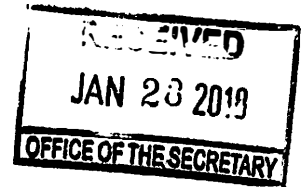


**UNITED STATES OF AMERICA**  
Before the  
**SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15124**

**In the Matter of**

**DAVID F. BANDIMERE and**  
**JOHN O. YOUNG**

**DIVISION OF ENFORCEMENT'S BRIEF  
IN OPPOSITION TO RESPONDENT  
BANDIMERE'S MOTION FOR MORE  
DEFINITE STATEMENT**

The Division of Enforcement ("Division") hereby files its brief in opposition to Respondent David F. Bandimere's motion for a more definite statement ("Motion").<sup>1</sup>

**I. INTRODUCTION**

Bandimere's Motion asks, not for the basic nature of the charges against him, but rather for pre-hearing disclosure of specific evidence, witnesses, and legal theories. Under longstanding precedent, such a motion is improper. The Division's Order Instituting Proceedings ("OIP") contains nearly 40 paragraphs of detailed allegations outlining Bandimere's misconduct. Bandimere is on notice of the claims against him and has information sufficient to prepare a defense. Bandimere's Motion should be denied.

**II. LEGAL STANDARD**

Under Rule 200(b) of the Commission's Rules of Practice, the OIP must "contain a short and plain statement of the matters of fact and law to be considered and determined" and where, as

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<sup>1</sup> On January 7, 2019, the Division filed a motion for a continuance of matters currently pending in this case, including the response to Bandimere's motion for a more definite statement, in light of the partial federal government shutdown. Bandimere opposed the motion. As of January 10, 2019, there had not been a ruling on the Division's motion for a continuance, and therefore undersigned counsel was granted excepted status for the limited purpose of responding to Bandimere's motion for a more definite statement.

here, an answer is required, “set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.” In light of this pleading standard,

[t]he Commission has repeatedly held, when dealing with challenges to the adequacy of allegations in an order for proceedings, that a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but that he is not entitled in advance of the hearing to a disclosure of the evidence on which the Division intends to rely.

*In the Matter of Jett*, Rel. No. 502, Admin. Proc. File No. 3-8919, 1996 WL 220933 (Apr. 25, 1996) (citing cases); *see also In the Matter of Aesoph and Bennett*, Rel. No. 762, Admin. Proc. File No. 3-15168 (Apr. 2, 2013) (Foelak, J.) (“[T]he Commission has long held that a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but that he is not entitled in advance of the hearing to a disclosure of the evidence on which the Division intends to rely.”).

For this reason, “[t]he Division is not required to detail and itemize all the particular acts, which together constitute the [charged] offense.” *In the Matter of Jett*, 1996 WL 220933 (citing *Michael J. Meehan*, 1 S.E.C. 238, 240 (1935)); *see also In the Matter of Dempsey-Tegeler & Co., Inc.*, Rel. No. 50, Admin Proc. File No. 3-2393, 1970 WL 11234 (June 16, 1970) (“Such information as the precise acts and activities of respondents relative to the various allegations, the exact nature and factual detail of each allegedly fraudulent statement or omission, the persons to whom and by whom they were made and the details of the financial condition of [the corporation] are evidentiary matters which need not be revealed prior to the hearing.”).

Thus, “[t]he function of [a] motion [for a more definite statement] is not to provide respondents with general discovery, nor are they entitled to disclosure of evidence.” *In the Matter of First Jersey Sec., Inc.*, Rel. No. 219, Admin. Proc. File No. 3-5739, 1979 LEXIS 2432 (Aug. 21, 1979). Rather, “[b]riefly, a respondent is entitled to be given notice in the proceedings

against him sufficient to inform him of the nature of the charges he will be called upon to meet so that he may adequately prepare his defense. No greater particularity is required.” *Id.*

### III. ARGUMENT

The OIP charges Bandimere with violating the anti-fraud and registration provisions of the federal securities laws in connection with his conduct soliciting investors for two separate Ponzi schemes. The OIP makes detailed allegations regarding Bandimere’s misconduct. It alleges the time period during which the misconduct occurred. *See, e.g.*, OIP ¶¶ 1-2. It alleges when and how Bandimere solicited investors. *See id.* ¶¶ 19-29. It alleges how Bandimere acted as an unregistered broker and sold unregistered securities. *See id.* ¶¶ 30-33, 37-38. It alleges the material facts that Bandimere failed to disclose to investors, as well as the red flags that Bandimere ignored. *See id.* ¶¶ 34-36. And finally, it specifies that the alleged misconduct violated specific provisions of the federal securities laws. *See id.* ¶¶ 48-51.

Despite this, Bandimere claims that the OIP “fails to set out basic factual allegations regarding the securities law violations which Mr. Bandimere is alleged to have committed,” citing to cases like *In the Matter of Alfred M. Bauer*, 1996 WL 529025 (Aug. 27, 1996). Motion at 2. But comparing the instant OIP to the *Bauer* OIP underscores that Bandimere is plainly on notice of the charges against him. In *Bauer*, “the entirety of the factual allegations as to the [relevant] respondent was” set forth in three generalized paragraphs. *In the Matter of Aesoph and Bennett*, Rel. No. 762, Admin. Proc. File No. 3-15168 (Apr. 2, 2013) (Foelak, J.). Here, by contrast, the OIP pleads nearly 40 paragraphs of detailed allegations outlining Bandimere’s misconduct. Bandimere is plainly aware of the “nature of the charges he will be called upon to meet.” *In the Matter of First Jersey Sec., Inc.*, Rel. No. 219, Admin. Proc. File No. 3-5739, 1979 LEXIS 2432.

Bandimere specifically argues that the OIP does not provide sufficient notice of the charges regarding the alleged sale of unregistered securities. Motion at 2. Bandimere is wrong. The OIP alleges that Bandimere sold unregistered securities to more than 60 investors between 2006 and 2010. *See, e.g.*, OIP ¶ 2. Such allegations provide appropriate notice of the charges against him. Bandimere argues that the OIP was required to allege the specific identity of each of the investors to whom he sold unregistered securities. Motion at 3; *see also id.* at 6. But such a request impermissibly seeks disclosure of specific pieces of evidence, which is not the purpose of an OIP. The OIP's allegations are more than sufficient to permit Bandimere to prepare his defense. *Cf. In the Matter of Dempsey-Tegeler & Co., Inc.*, Rel. No. 50, Admin Proc. File No. 3-2393, 1970 WL 11234 (June 16, 1970) (“Such information as ... the persons to whom and by whom [false statements] were made ... are evidentiary matters which need not be revealed prior to the hearing.”).

Similarly, Bandimere claims that the OIP does not provide sufficient notice of the charges regarding the fraudulent omissions at issue. Motion at 3-4. Again, Bandimere is wrong. The OIP alleges that, between 2006 and 2010, Bandimere misled potential investors by presenting a one-sided, positive view of the investments he touted while failing to disclose numerous red flags and potentially negative facts. *See* OIP ¶¶ 2, 34-36. The OIP goes on to detail fifteen specific red flags and negative facts that Bandimere failed to disclose. *See id.* ¶ 35. a-o. Bandimere claims the OIP must allege much more: he argues the OIP must allege the specific identity of the persons to whom each of the alleged misleading statements was made, the specific time and place that those statements were made, and the specific date that Bandimere learned each of the facts that he later failed to disclose. Motion at 3-4; *see also id.* at 6. But such an argument runs counter to longstanding Commission precedent. *See, e.g., In the Matter of Dempsey-Tegeler & Co., Inc.*, 1970

WL 11234 (“Such information as the precise acts and activities of respondents relative to the various allegations, the exact nature and factual detail of each allegedly fraudulent statement or omission, the persons to whom and by whom they were made and the details of the financial condition of [the corporation] are evidentiary matters which need not be revealed prior to the hearing.”). Indeed, the only Commission authority cited by Bandimere – *In the Matter of James A. Winklemann* – is inapposite. There, the OIP alleged that an advisor made misrepresentations to one unnamed “advisory client,” presumably out of a number of the respondent’s clients. 2016 WL 11034805 (July 20, 2016). In other words, the ALJ required the Division to specify which single client of many potential clients was allegedly defrauded. Here, by contrast, the OIP alleges the same general material omissions were made to essentially all of Bandimere’s solicited investors. See OIP ¶¶ 34-35. Further, *Winklemann* required the Division identify unnamed “false and misleading statements,” 2016 WL 11034805; here, the OIP details the specific negative facts and red flags Bandimere failed to disclose. See OIP ¶ 35.a-o. The remaining cases cited by Bandimere address the heightened pleading standards of the Federal Rules of Civil Procedure – rules that do not apply to these proceedings. See, e.g., *In the Matter of John Thomas Capital Mgmt. Grp. LLC*, Rel. No. 3733, 2013 WL 6384275, \*6 & n.44 (Dec. 6, 2013); see generally *In the Matter of Charles L. Hill, Jr.*, Exchange Act Rel. No. 79459, 2016 SEC LEXIS 4491, at \*12-13 (Dec. 2, 2016) (“[T]he fact that the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply in administrative proceedings is not a violation of due process.”). Put simply, the OIP need not plead any more detail than it already has.<sup>2</sup>

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<sup>2</sup> Bandimere further contends that the OIP fails to state a claim because none of the statements made by Bandimere were rendered misleading by the information he omitted. Motion at 4. Putting aside that such an argument is inappropriate for a motion for a more definite statement, it fails as a matter of law. Bandimere repeatedly painted a positive picture of the investments at issue – their consistent rates of return, established track record of performance, and use of

Bandimere also argues that the OIP does not provide him sufficient notice of the Division's claims under Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) – provisions commonly referred to as “scheme liability.” Motion at 5. Specifically, Bandimere argues that the OIP does not sufficiently allege what “misleading conduct” Bandimere engaged in. *Id.* Yet again, Bandimere ignores the allegations of the OIP. The OIP puts Bandimere on notice of the misleading conduct he engaged in, including taking money from investors, keeping commissions, setting up entities to act as a vehicle through which to place investors' funds into fraudulent investments, and omitting material facts from investors. OIP ¶¶ 21-29, 34-36. These allegations are sufficient to allow Bandimere to prepare a defense. *See, e.g., In the Matter of Jett*, 1996 WL 220933 (“The Division is not required to detail and itemize all the particular acts, which together constitute the [charged] offense.”).<sup>3</sup>

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experienced traders – while omitting facts such as previous SEC legal trouble, problems with commission payments, lack of financial information, and the serious financial problems of one of the investment's principals. *See* OIP ¶¶ 34-35. Presenting positive material facts regarding an investment while hiding negative material facts constitutes actionable fraud. *See SEC v. Curshen*, 372 Fed. App'x 872, 880 (10<sup>th</sup> Cir. 2010) (“[W]here 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); *see also In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir.2010) (“The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context. Thus, when an offering participant makes a disclosure about a particular topic, whether voluntary or required, the representation must be complete and accurate.”).

<sup>3</sup> Contrary to Bandimere's suggestion that the Division has alleged (or must allege) separate claims for misrepresentations and scheme liability, the OIP does not plead a stand-alone claim for scheme liability. *See* OIP ¶ 48. Rather, scheme liability – employing devices or schemes to defraud or engaging in deceptive conduct, *see* 15 U.S.C. § 77q(a)(1), (3); 17 C.F.R. §240.10b-5(a), (c) – is simply one of the ways liability may be found for violations of Section 17(a), Section 10(b), and Rule 10b-5. To the extent that Bandimere is arguing that the Division's “scheme liability” claim must be based on more than just misrepresentations, such an argument is not only inappropriate for a motion for more definite statement and ignores the allegations of the OIP, it is also legally suspect. *See, e.g., Lorenzo v. SEC*, 872 F.3d 587, 591-92 (D.C. Cir. 2017) (“[C]onduct potentially subject to Rule 10b5-(b)'s bar against making false statements can

Finally, Bandimere argues that the OIP fails to provide sufficient information about the Division’s alternative claim under the Investment Advisers Act of 1940 (“Advisers Act”). Not so. The OIP alleges two theories of liability regarding the securities sold by Bandimere. The Division’s principal theory is that Bandimere directly sold unregistered securities in the two Ponzi schemes at issue in this case – Universal Consulting Resources LLC (“UCR”) and IV Capital Ltd. (“IV Capital”). *See* OIP ¶ 37. Under this theory, Bandimere is liable for violations of the Securities Act and the Exchange Act, since he engaged in fraudulent conduct while operating as an unregistered broker in selling these unregistered securities. The OIP also alleges, in the alternative, that Bandimere sold unregistered interests in various limited liability companies (“LLCs”) and that he then pooled those funds and passed them on to UCR and IV Capital. *See id.* ¶ 38. This alternative theory of relief does not set forth any additional factual allegations. Rather, this alternative theory was pled in the event that the court determines that, legally, the securities sold by Bandimere were actually interests in the LLCs, which were established by Bandimere to pass investor funds on to UCR and IV Capital. In that case, additional liability would also apply to Bandimere under the Advisers Act, since Bandimere would have been functioning as an investment adviser to the LLCs.<sup>4</sup> *See* OIP ¶ 38. More specifically, in addition to liability under the Securities Act and Exchange Act, Bandimere would also be liable for violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and relief would also be appropriate under Section 203(f) of the Advisers Act. *See id.* ¶ 51 & § III.D. Put simply, the facts alleged are the same

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also fall within Rule 10b-5(a)’s more general prohibition against employing fraudulent devices ...”), *cert. granted*, 138 S. Ct. 2650 (June 18, 2018).

<sup>4</sup> Bandimere claims there are no factual allegations to support the Division’s alternative claim that Bandimere advised any pooled investment vehicle. Motion at 5-6. But the OIP plainly alleges that, as to the alternative claim, Bandimere “pooled investor funds” from the LLCs and “functioned as an investment adviser to the LLCs.” OIP ¶ 38.

under both the Division's primary and alternative legal theories; it is only the legal interpretation of those facts that is subject to the Division's alternate theory. Thus, the OIP provides a sufficiently detailed description of the Division's alternate theory to allow Bandimere to prepare a defense.

#### IV. CONCLUSION

For the reasons outlined above, Bandimere's motion for a more definite statement should be denied.

Dated: January 11, 2019

Respectfully submitted,

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Certificate of Service

On January 11, 2019, the foregoing was sent to the following parties and other persons entitled to notice as follows:

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