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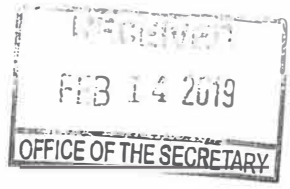
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of

DAVID F. BANDIMERE and
JOHN O. YOUNG

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT DEVID F. BANDIMERE'S MOTION FOR RULING ON THE PLEADINGS

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The Division of Enforcement ("Division") respectfully submits this response in opposition to Respondent David F. Bandimere's Motion for Ruling on the Pleadings ("Motion"). The Motion should be denied.

I. INTRODUCTION

Bandimere moves to dismiss this proceeding based on a scattershot of arguments that are inconsistent with relevant statutes and case law, ignore the allegations of the Order Instituting Proceedings, and otherwise do not withstand scrutiny.

In arguing that the Commission lacks jurisdiction to consider the merits of the allegations in the Order Instituting Proceedings because the Tenth Circuit did not expressly remand the case, Bandimere ignores the fact that virtually identical arguments have been rejected in every appellate court in which they have been raised. And he offers no authority to support his back-up argument that the Order Instituting Proceedings somehow expired while the Commission's petition for certiorari was pending with the Supreme Court—a conclusion that is contrary to the facts and the law.

Bandimere's alternative contention that the Commission violated the statutory deadlines for providing a hearing rests on a gross misunderstanding of the procedural context. The Tenth Circuit sustained Bandimere's Appointments Clause challenge to the manner of appointment of the Administrative Law Judge ("ALJ") who presided over the original hearing in this matter. *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016). While the Commission's petition for certiorari was pending, the Supreme Court reached the same conclusion as the Tenth Circuit in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Rather than dismiss the case, the Court in *Lucia* held that the appropriate remedy was a new hearing on remand before a properly appointed ALJ. After *Lucia* was handed

down, the Court denied the petition for certiorari in this case, and the Commission remanded to a different ALJ for a new hearing.

Unsatisfied with that remedy, Bandimere now contends that the Commission did not comply with the statutory deadlines for a hearing because the ALJ was not properly appointed when the case was first instituted and those deadlines have now passed. Bandimere argues that this circumstance entitles him to the drastic remedy of outright dismissal—a remedy that, notably, the Supreme Court itself was unwilling to grant for the underlying constitutional violation. In short, in Bandimere's view, the Commission is powerless to grant the precise remedy the Supreme Court ordered and has no choice but to grant the remedy the Court rejected. Bandimere's novel proposition finds no support in logic, disregards the text of the relevant deadlines, and ignores Supreme Court precedent establishing that dismissal would be an inappropriate remedy even if the Commission had violated the deadlines. If adopted, his argument would reduce Commission administrative cease-and-desist proceedings to a one-and-done affair in which any error in the process meriting a remand following judicial (or even Commission) review would render the proceedings a nullity and allow securities law violators to escape sanction without regard to the merits of the allegations of wrongdoing. That cannot be the law.

Bandimere's remaining arguments are also unavailing. At least two statutes authorize the civil penalties the Division seeks here. Further, the OIP appropriately details Bandimere's fraudulent misconduct and his scienter, outlining how he recklessly withheld negative information while touting the positive aspects of various investments to prospective investors. And finally, Bandimere's cursory attack on the fairness of the proceeding falls far short of making out a due process violation.

II. PROCEDURAL BACKGROUND

On December 6, 2012, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Respondents Bandimere and John O. Young. ALJ Cameron Elliot was designated to preside over a public hearing, which was held over six days from April 22 to May 2, 2013. On July 8, 2013, ALJ Elliot issued an Initial Decision finding that Bandimere had violated the securities registration, broker registration, and antifraud provisions of the federal securities laws and that it was in the public interest to sanction Bandimere for his misconduct. Bandimere sought Commission review of the Initial Decision.

On October 29, 2015, after an independent review of the record, the Commission unanimously ruled that Bandimere had violated Section 5 of the Securities Act of 1933 by offering and selling unregistered securities, Section 15(a) of the Securities Exchange Act of 1934 by acting as an unregistered broker, and antifraud provisions of the Securities Act and Exchange Act by failing to disclose material information necessary to make his statements to investors not misleading. For his misconduct, the Commission imposed an industry bar, disgorgement of Bandimere's ill-gotten gains (plus pre-judgment interest), and civil penalties. The Commission also rejected Bandimere's constitutional challenges to the proceeding, including his argument that it was unlawful because the ALJ was not appointed in a manner consistent with the Appointments Clause.

Bandimere filed a petition for review in the Tenth Circuit, which, on December 27, 2016, ruled that ALJ Elliot had not been properly appointed and therefore set aside the Commission's opinion. *Bandimere*, 844 F.3d 1168. The court denied the Commission's petition for rehearing or rehearing *en banc* on May 3, 2017, and issued the mandate on May 11, 2017.

On September 29, 2017, the Solicitor General, on behalf of the Commission, filed a petition for certiorari in the Supreme Court, arguing that the Appointments Clause question warranted review by the Court in light of the split between the Tenth Circuit in this case and the D.C. Circuit in *Lucia*. The Solicitor General urged the Court to hold the petition "pending [its] consideration of the petition for a writ of certiorari in *Lucia v. SEC*, No. 17-130, and then dispose[] of [it] as appropriate."

On January 12, 2018, the Supreme Court granted certiorari in *Lucia*. On June 21, 2018, the Court held that the Commission's ALJs are inferior officers and that ALJ Elliot had not been appointed in the manner required by the Appointments Clause. *Lucia*, 138 S. Ct. 2044. The Court stressed that "the appropriate remedy" for that violation was "a new hearing before a properly appointed official." *Id.* at 2055 (quotation omitted). It further directed that "another ALJ (or the Commission itself) must hold the new hearing." *Id.*[1] On June 28, 2018, one week after it decided *Lucia*, the Supreme Court denied the petition for certiorari in this case.

Immediately following the release of the Supreme Court's decision in *Lucia* on June 21, 2018, the Commission issued an order staying for thirty days "any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the Commission." *Pending Admin. Proc.*, Securities Act Rel. No 10510 (June 21, 2018). The following month, it extended the stay until August 22, 2018. *Pending Admin. Proc.*, Securities

[1] The Court remanded the case to the D.C. Circuit for further proceedings consistent with its opinion. *Lucia*, 138 S. Ct. at 2056. On remand, the D.C. Circuit granted the petition for review, set aside the Commission's decision and order, and remanded the case to the Commission "for a new hearing either before another [ALJ] or before the Commission, in accordance with *Lucia*." *Lucia v. SEC*, No. 15-1345 (D.C. Cir. Aug. 15, 2018); *see also Harding Advisory LLC et al. v. SEC*, No. 17-1070 (D.C. Cir. Sept. 19, 2018) (order stating that language in *Lucia* concerning remand to Commission for a new hearing "must be treated as authoritative") (quotation omitted), *pet. for rehearing en banc denied* (Jan. 9, 2019).

Act Rel. No 10522 (July 20, 2018). On August 22, 2018, the Commission ended the stay, ordering that Bandimere and respondents in over 100 other pending matters "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter" and vacating "any prior opinion" it had issued in those matters. *Pending Admin. Proc.*, Securities Act Rel. No 10536 (Aug. 22, 2018). The order thus left the OIP in this case intact.

Shortly thereafter, this case was reassigned to ALJ Foelak, who ordered the parties to submit a joint proposal for the conduct of further proceedings. *Order*, Admin. Proc. Rulings Rel. No. 6132 (Oct. 2, 2018). On November 30, 2018, the parties submitted this joint proposal. While Bandimere preserved certain arguments, such as that this case is no longer pending, the parties agreed on a case schedule which included a proposed hearing date in May of 2019. On January 16, 2019, Bandimere filed the instant Motion with ALJ Foelak seeking dismissal of this proceeding under Rule 250(a) of the Commission's Rules of Practice.

III. ARGUMENT

A. The Commission has jurisdiction to consider the merits of the allegations in the OIP.

1. The absence of an express remand by the Tenth Circuit does not deprive the Commission of jurisdiction over further proceedings.

Bandimere erroneously contends that the Tenth Circuit's decision setting aside the Commission's order deprives the Commission of jurisdiction to conduct a new hearing on the merits of the OIP's allegations before a properly appointed ALJ because the court did not expressly remand the case. Nearly identical arguments have been rejected by every appellate court in which they have been raised. Remarkably, Bandimere does not even acknowledge, let alone address, the case law uniformly contradicting his position.

Most recently, the D.C. Circuit considered whether a properly constituted NLRB could reconsider (as part of the same underlying administrative proceeding) the merits of an order the

court had previously vacated on the ground that three of the NLRB's five members had been improperly appointed under the Recess Appointments Clause. *Noel Canning v. NLRB*, 823 F.3d 76, 78-79 (D.C. Cir. 2016). The petitioner argued that the NLRB had no jurisdiction to do so because in vacating the order, the Court's opinion, judgment, and mandate made "no mention of remand." *Id.* at 79. The Court nonetheless held that the NLRB's decision to reconsider the merits of the case and issue a new decision "was not only consistent with [the Court's] mandate, but also reasonable and in furtherance of justice." *Id.* at 80. More generally, the Court observed that the notion that vacatur of an agency decision for reasons unrelated to the merits forecloses further agency proceedings "is not totally consistent with common sense." *Id.*

The Fourth, Seventh, and Eighth Circuits have all reached similar conclusions, even in cases in which the courts had specifically denied agency requests for a remand. *See Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 712 (7th Cir. 2015) (explaining that its prior decision vacating the NLRB's order "was final only with respect to the matter we actually decided"—the Recess Appointments Clause issue—and thus the NLRB "was not precluded from conducting further proceedings and having a properly constituted Board decide the case on the merits"); *Huntington Ingalls Inc. v. NLRB*, 631 F. App'x 127 (4th Cir. 2015) ("A decision finding the lack of a proper quorum clearly contemplated further Board action [despite the absence of an explicit remand], and thus the Board here did not err when it revisited [the merits of the] challenges."); *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011) (holding that the court's previous denial of the NLRB's application of enforcement based on lack of a proper quorum did not deprive the NLRB of jurisdiction to consider the merits anew); *see also NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011) (considering the merits of an NLRB decision entered after the court denied enforcement for lack of a proper quorum but did not expressly remand).

Here too, the Commission's decision to order a new hearing before a properly appointed ALJ is consistent with the Tenth Circuit's opinion, which contains no suggestion that further proceedings are foreclosed, as well as the Supreme Court's instruction in *Lucia* that such a hearing is the "appropriate remedy" for an Appointments Clause violation. 138 S. Ct. at 2055. Of course, courts setting aside an agency order do sometimes expressly remand the case for further proceedings, especially when the court has specific instructions or guidance for the agency to consider on remand. *See* Mot. 10-11 (citing *Antoniu v. SEC*, 977 F.2d 721 (8th Cir. 1989)). But in arguing (Mot. 10) that a remand is a necessary prerequisite to further agency proceedings, Bandimere has simply disregarded the contrary holdings of every circuit to have considered the issue.

2. Bandimere's alternative theory that the Commission lacks jurisdiction because this proceeding is no longer pending finds no support in the facts or the law.

For the reasons above, jurisdiction over further proceedings in this matter returned to the Commission when the Tenth Circuit issued its mandate on May 11, 2017. *See In re Sunset Sales, Inc.*, 195 F.3d 568, 571 (10th Cir. 1999) (upon issuance of the mandate "[j]urisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate") (quotation omitted). Shortly after the Supreme Court denied the Commission's petition for certiorari, the Commission remanded the matter for a new hearing before a properly appointed ALJ consistent with the remedy ordered in *Lucia*. Bandimere contends (Mot. 11) that the Commission lacked jurisdiction to do so because the proceeding was no longer "pending." His arguments in support of this theory—for which he is unable to muster a single authority—are implausible.

First, Bandimere notes that this proceeding appears on the Commission's public website in a list of "Closed Administrative Proceeding Cases." Mot. 11 (citing

https://www.sec.gov/litigation/apdocuments/ap-closed-fileno-asc.xml). But this list—which is maintained by the Office of the Secretary—includes cases in which an appeal is pending in the federal courts of appeals. *See, e.g.*, *The Robare Group, Ltd. et al. v. SEC*, No. 16-1453 (D.C. Cir.). Thus, a matter's appearance on the list does not amount to a concession on the part of the Commission that it can never regain jurisdiction. Nor is there any basis to conclude that the Commission's jurisdiction over a proceeding turns on how the Office of the Secretary categorizes it on the Commission's website.

Second, Bandimere's argument (Mot. 11-12) that the Commission lacks jurisdiction because its November 30, 2017 ratification order did not remand this proceeding to the ALJ makes no sense. The Commission reasonably declined to act at that time because a petition for certiorari in this matter was pending before the Supreme Court. That was not the case in any of the other matters remanded in the November 30, 2017 order. Bandimere's premise that in choosing not to order a new hearing while the Supreme Court was considering its petition for certiorari the Commission somehow conceded that the OIP had expired is absurd. Nor is there any inconsistency between the November 30, 2017 order and the August 22, 2018 order remanding the matter for a new hearing, as Bandimere suggests (Mot. 13). By that time, the Supreme Court had denied the petition for certiorari and affirmed in *Lucia* that a new hearing was the proper remedy for the Appointments Clause violation.

Third, Bandimere's contention (Mot. 12) that the Commission acted arbitrarily in characterizing the proceeding as "pending" in its June 21, 2018 stay order is baseless. The June 21, 2018 stay order did not characterize any specific proceeding as pending. *See Pending Admin. Proc.*, Securities Act Rel. No. 10510 (June 21, 2018). The October 2, 2018 order in which

Bandimere purports to find this "Commission's characterization" was in fact issued by the presiding ALJ. *Order*, Admin. Proc. Rulings Rel. No. 6132 (Oct. 2, 2018).

Fourth, Bandimere erroneously contends (Mot. 12) that "the Commission's records reflect that the Commission did not approve the August 22, 2018 Order." But the order states on its face that it was issued "By the Commission" on August 22, 2018 with no dissent noted, and Bandimere identifies no plausible basis to question that representation. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.") (alterations in original and quotation marks omitted). Nor was the issuance of the order a secret: it is posted on the Commission's website under "Commission Opinions and Adjudicatory Orders." *See* https://www.sec.gov/litigation/opinions.shtml. Bandimere offers no support for the preposterous assertion that an inadvertent delay in posting the vote tally on the "Commission Votes" section of the Commission's website would void the order.

Similarly farfetched is Bandimere's theory (Mot. 13) that, because the Tenth Circuit had already vacated the Commission's opinion, the Commission could not have intended the August 22, 2018 order, which vacated "any prior [Commission] opinion" in the remanded matters, to apply to this matter. The order expressly referenced both matters in which a Commission opinion was still in effect and matters (like this one and *Lucia*) in which the Commission's opinion had already been vacated on appeal. In vacating *any* prior opinion, the order simply makes clear that opinions in the former category of cases are also now void.

B. The Commission has complied with its statutory obligations to adjudicate this case in a timely manner.

1. The Commission complied with the statutory provisions governing the timing of a hearing.

Section 8A(b) of the Securities Act, Section 21C(b) of the Exchange Act, and Section 203(k)(2) of the Advisers Act provide that a "notice instituting [administrative cease-and-desist] proceedings . . . shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served." 15 U.S.C. §§ 77h-1(b), 78u-3(b), 80b-3(k)(2). Consistent with this requirement, the OIP ordered that a public hearing before an ALJ "shall be convened not earlier than 30 days and not later than 60 days from service of this Order." OIP at 13. Bandimere does not dispute that he consented to scheduling the hearing more than 60 days after the OIP was served. *See* Mot. 14. The Commission thus complied with the statutory provisions governing the timing of the hearing in this case.

Bandimere's contention (Mot. 13-15) that the Commission has nonetheless violated the statutory deadlines in light of the Tenth Circuit's and Supreme Court's subsequent holding that ALJ Elliot was not properly appointed finds no support in the text of Sections 8A, 21C, or 203(k). None of these provisions speaks directly to the effect of a court-ordered vacatur of a Commission order and remand for a new hearing. That should be the end of the matter. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

But there is more. Congress enacted Sections 8A, 21C, and 203(k) as part of an effort "to give the SEC greater authority and flexibility in the conduct of its law enforcement efforts and strengthen the remedial effect of the SEC's enforcement programs." S. Rep. No. 101-337 at 2; *see also* H.R. Rep. 101-616 at 13-14. These provisions in particular were intended not "to provide protection to respondents," as Bandimere claims (Mot. 14), but to enable the

Commission "to resolve cases without protracted negotiation or litigation" and "to respond in a more timely fashion to violat[ive] conduct or practices." S. Rep. No. 101-337 at 18; *see also* H.R. Rep. 101-616 at 23 (noting that the provisions "permit[] swift remedial action in response to illegal conduct"). Bandimere's interpretation would thwart that purpose, transforming the deadline into a statute of limitations on the Commission's ability to conduct new hearings in enforcement matters that courts have remanded. It would also make it impossible for the Commission to determine whether it had complied with the deadline until a reviewing court resolved a subsequent petition for review. And in defending the validity of the proceeding, the Commission would risk losing its ability to remedy the underlying securities law violations. Bandimere identifies no evidence that Congress intended to frustrate the Commission's mission in this manner. Nor is there any reason to believe Congress intended to create a more severe sanction for constitutional violations than the Constitution itself requires, *see Lucia*, 138 S. Ct. at 2055 ("appropriate remedy" for an Appointments Clause violation is a new hearing).

2. Even if the Commission had violated the statutory deadlines, Bandimere would not be entitled to dismissal of the proceeding.

The Supreme Court has repeatedly held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993). And the Court has firmly rejected the very argument that Bandimere proffers here (Mot. 14-15)—that a statute's use of the term "shall" is sufficient indication of congressional intent to enforce a deadline through dismissal. Rather, the Court has long recognized, the "mere use of the word 'shall'" in a statutory timing provision "is not enough to remove [an agency's] power to act after [the deadline]." *Brock v. Pierce County*, 476 U.S. 253, 262 (1986); *see also Montford & Co., Inc. v. SEC*, 793 F.3d 76, 83 (D.C. Cir. 2015) (noting

"strong presumption that, where Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result"); *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009) (a statute that "seeks to direct official action by a particular deadline . . . needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done") (quotations and alteration omitted).

Sections 8A, 21C, and 203(k) do not specify any consequences for failing to hold a hearing within the thirty-to-sixty day window. There is thus no basis to conclude that Congress "intended the [Commission] to lose its power to act." *Brock*, 476 U.S. at 260. And given that "important public rights are at stake" in Commission enforcement actions, such a "drastic" remedy would be particularly inappropriate here. *Id.*; *see also Montford & Co., Inc.*, Advisers Act Rel. No. 3829 (May 2, 2014), at 16 (refusing to dismiss action brought outside statutory period to file within 180 days of a Wells notice in part because "dismissal of the action would harm the investing public by foreclosing the Commission from taking appropriate remedial measures"), *aff'd*, 793 F.3d 76.

3. The Commission has acted consistently with its obligation to conclude this matter within a reasonable time.

There is no merit to Bandimere's argument (Mot. 15-16) that the Commission has failed to "conclude" this matter "within a reasonable time," as the Administrative Procedure Act requires. 5 U.S.C. § 555(b). The Commission has not unreasonably delayed this proceeding, let alone caused the kind of egregious delays that might conceivably warrant outright dismissal.

Bandimere's claim that the Commission has exhibited "utter disregard" for its obligation to provide a timely hearing in this matter ignores reality. Bandimere consented to the timing of the original hearing, which was presided over by an ALJ whose manner of appointment had never been questioned by any court. In ruling on appeal that that the ALJ had not been properly

appointed, the Tenth Circuit created a circuit split on the issue, which the Solicitor General urged the Supreme Court to resolve in petitions for certiorari in this case and in *Lucia*. It was hardly unreasonable for the Commission to await the Court's disposition of those petitions before conducting further proceedings.

Bandimere complains that the Commission has not acted quickly enough to schedule a new hearing after the *Lucia* decision on June 21, 2018. But only about two months later, the Commission issued an order setting forth procedures and deadlines for potentially over 100 new ALJ hearings on remand. *Pending Admin. Proc.*, Securities Act Rel. No. 10536 (Aug. 22, 2018). And on November 30, 2018 – while preserving his arguments that the August 2018 order "did not give meaningful guidance" and that this case is no longer pending before the Commission – Bandimere agreed to a case schedule that included a hearing in May 2019. Bandimere offers no persuasive explanation why that timeframe is unreasonable under 5 U.S.C. § 555(b), particularly given the large volume of new hearings that must be held before a limited number of ALJs.

C. Civil penalties are authorized by statute.

Contrary to Bandimere's arguments (Mot. 16-20), at least two statutes provide authority for imposition of civil penalties in this action.

First, Section 21B(a)(1) of the Exchange Act authorizes the Commission to impose civil penalties here because this action is brought pursuant to Section 15(b)(4) and Section 15(b)(6) of the Exchange Act. 15 U.S.C. § 78u-2(a)(1). This action is brought pursuant to Section 15(b)(4) and Section 15(b)(6) through allegations that Bandimere acted as a broker and, at the time of the alleged misconduct, was associated with a person acting as a broker. *See, e.g.*, OIP ¶¶ 30-33, 49.

Bandimere argues that this action cannot be brought pursuant to Section 15 because the OIP does not allege that anyone acting as a broker was registered as brokers. Mot. 17-18. This

argument is defeated by the plain text of Section 15(b)(4) and Section 15(b)(6), neither of which limit actions to only those in which brokers are registered. Indeed, this argument has been rejected numerous times. *See, e.g.*, *In the Matter of John Kilpatrick*, Release No. 23251 (May 19, 1986) ("...Section 15(b)(6) does not limit us to proceeding against persons associated with registered broker-dealers."); *In the Matter of Tzemach David Netzer Korem*, Release No. 70044 & n.68 (July 26, 2013) ("It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding.") (citing decisions). The decision and quotation cited by Bandimere (Mot. 17-18) concern the willful standard and do not purport to interpret the scope of actions brought under Section 15(b)(4) and Section 15(b)(6).

Second, Section 203(i) of the Investment Advisers Act ("Advisers Act") also authorizes the Commission to impose civil penalties here because this action is brought pursuant to Section 203(f) of the Advisers Act. *See, e.g.*, OIP ¶¶ 38, 51; 15 U.S.C. § 80b-3(i). Section 203(i) applies here because the OIP alleges that Bandimere sold unregistered interests in limited liability companies and that he then pooled those funds and passed them on to UCR and IV Capital. *See id.* ¶ 38.

Bandimere argues that the Advisers Act claim asserted in the OIP is improper because it is alleged as an alternative theory. Mot. 18-19. Bandimere cites no authority that prevents the assertion of alternative theories in an OIP, and the Division is aware of none. Moreover, Bandimere's argument also fails because it is premised on the incorrect view that the OIP asserts inconsistent factual allegations. As explained in the Division's Opposition to Bandimere's Motion for More Definite Statement dated January 11, 2019 (at p. 7), the claim asserted under the Advisers Act relies on the same set of alleged facts underlying the Division's theory of liability under the

Securities Act and Exchange Act. This additional theory of liability is intended to cover the event that the court determines that, as a legal matter, the securities sold by Bandimere were actually interests in limited liability companies. The OIP therefore advances claims that cover two legal consequences of the same facts—not the "inconsistent factual allegations" which, Bandimere claims, would impair notice to Bandimere of the charges in this action. Mot. 19.

Accordingly, Section 21B(a)(1) of the Exchange Act and Section 203(i) each provide the Commission authority to impose civil penalties in this action.

D. The OIP appropriately alleges securities fraud.

Bandimere's argument that this case must be dismissed because the OIP does not adequately allege fraud is similarly unavailing. A motion for ruling on the pleadings may only be granted if, accepting all of the Division's factual allegations as true and drawing all reasonable inferences in the Division's favor, Respondent is still entitled to judgment as a matter of law. 17 C.F.R. § 250(a). Bandimere makes two arguments in claiming the OIP fails to state a claim for securities fraud: first, he claims the OIP does not adequately allege fraudulent omissions of material fact (Mot. 20-21), and second, he claims the OIP does not adequately allege scienter (*id.* 22-23). Both arguments fail.

First, the OIP adequately alleges that Bandimere violated Section 17(a) of the Securities Act and Rule 10b-5 of the Exchange Act by omitting facts necessary to make his statements not misleading. The crux of Bandimere's fraudulent omissions is that he highlighted material, positive characteristics of the IV Capital and UCR investments while omitting material red flags and negative facts about the investments and their principals, Larry Parrish and Richard Dalton. *See, e.g.*, OIP ¶¶ 34-35. Indeed, while presenting the positive characteristics of the investments, he omitted to state material facts such as: Parrish had previously been sued by the SEC; Dalton

had issues getting paid commissions by Parrish; IV Capital and UCR paid Bandimere large commissions to recruit investors; the investments lacked basic written documentation and financial statements; Dalton and Parrish refused to provide Bandimere with documents about the investments' trading; Parrish and Dalton regularly violated their compensation agreements with Bandimere; Dalton lacked experience managing a large investment program; and Dalton had serious financial problems. *See id.* ¶ 35.a.-o. Bandimere violated Section 17(a) and Rule 10b-5 by electing to disclose materially positive facts about the investments without also disclosing the materially negative red flags and facts. *See, e.g.*, *SEC v. Curshen*, 372 Fed. Appx. 872, 880, 2010 WL 1444910, at *7 (10th 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.") (citations omitted); *see also Meyer v. Jinkosolar Holdings Co., Ltd.*, 761 F.3d 245, 250 (2d Cir. 2014) ("[O]nce a company speaks on an issue or topic, there is a duty to tell the whole truth.").[2]

Second, the OIP adequately alleges that Bandimere acted with scienter. "Scienter may be established by recklessness," which is conduct that "presents a danger of misleading buyers or

[2] In a footnote, Bandimere argues that any claim for "scheme liability" – by which he presumably means claims under Section 17(a)(1) and (3) of the Securities Act and Rule 10b-5(a) and (c) of the Exchange Act – must be dismissed because the OIP does not allege any "inherently deceptive act" that he committed. But misstatements and omissions are deceptive acts that are actionable under the "scheme liability" provisions of Section 17(a) and Rule 10b-5. *See, e.g.*, *In the Matter of Dennis J. Malouf*, 2016 WL 4035575, at *9 (Comm. Op. July 27, 2016) ("The three subsections of Rule 10b-5 need not be read exclusively, such that conduct that falls within the purview of one—e.g., misstatements or omissions, within subsection (b)—cannot also fall within another. To the contrary, we have advised that the subsections of the rule are 'mutually supporting rather than mutually exclusive.'"); *see also id.* at 8, 11-12 (finding repeated misstatements and omissions violate Rule 10b-5(a) and (c) and Section 17(a)(1) and (3)). The OIP also details other deceptive conduct, including taking money from investors, keeping commissions, and setting up entities to act as vehicles through which to place investors' funds into fraudulent investments. *See* OUP ¶¶ 21-29. The OIP adequately alleges that Bandimere violated all of the subsections of Section 17(a) and Rule 10b-5.

sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." *In the Matter of David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *5 (Dec. 21, 2007) (bracketed language in original; quotations and citations omitted). As a threshold matter, the OIP generally alleges scienter, *see, e.g.*, OIP ¶ 2 ("Bandimere acted recklessly ...."), which is sufficient at the pleading stage. *See SEC v. Arnold*, 2007 WL 2786428, *2-3 (D. Colo. Sept. 24, 2007) (denying motion to dismiss under Rule 12(b)(6) because scienter may be averred generally); *see generally Amendments to the Commission's Rules of Practice*, 2016 WL 3853756, *22 n.110 (July 13, 2016) (motion for ruling on the pleadings is analogous to motion to dismiss under Fed. R. Civ. P. 12(b)(6)). But even were more detail required, the OIP lays out Bandimere's reckless conduct. It alleges that Bandimere knew about – but omitted – numerous material red flags and negative facts regarding the UCR and IV Capital investments. *See, e.g.*, OIP ¶¶ 34-35. Omitting such critical facts plainly demonstrates a danger of misleading investors that Bandimere either knew or must have been aware of, since these facts "would have seriously called into question the legitimacy and quality of IV Capital and UCR." *Id.* ¶ 36. The OIP further alleges that Bandimere failed to disclose his handsome compensation for recruiting investors for UCR and IV Capital, *see id.*, which standing alone supports a finding of scienter. *See Curshen*, 372 Fed. Appx. at 882.

Bandimere argues that, if fraud claims are based on the failure to discover another's fraud, a scienter showing must "approximate an actual intention to aid in that fraud." Mot 22. But the fraud charges against Bandimere are not based on a failure to discover another's fraud; rather, they are based on Bandimere's failure to disclose materially negative facts and red flags while touting the positive aspects of the investments. *See, e.g.*, OIP ¶ 2 ("Bandimere misled potential investors by presenting only a one-sided, positive view of the IV Capital and UCR

investments while failing to disclose numerous red flags and potentially negative facts relating to those investments."); *see also id.* ¶¶ 34-35. For this reason, Bandimere's citation to *SEC v. Cohmad Securities Corp.* is inapposite – there, the complaint "d[id] not allege statement or omissions ... that are fraudulent absent an awareness or notice that Madoff's investment advisory business was a sham." 2010 WL 363844, *1 (S.D.N.Y. Feb. 2, 2010).

In sum, the OIP adequately alleges Bandimere's fraudulent misconduct and scienter.

E. Bandimere's due process arguments lack merit.

Bandimere's final challenge to the fairness of this administrative proceeding is likewise meritless. He argues (Mot. 23-24) that the Commission cannot, consistent with due process, adjudicate the allegations in the OIP or decide how to distribute the proceeds of any disgorgement or civil penalties because it describes itself as the "investor's advocate." But this sort of "broad attack[] on the procedures of the administrative process ha[s] been repeatedly rejected by the courts." *Charles L. Hill, Jr.*, Exchange Act Release No. 79459, 2016 WL 7032731, at *3 (Dec. 2, 2016) (quotation omitted).

Bandimere erroneously contends that the mere "appearance of unfairness" violates due process. On the contrary, the Supreme Court has made clear that a person claiming bias on the part of an administrative tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Riggins v. Goodman*, 572 F.3d 1101, 1112-15 (10th Cir. 2009); *Blinder, Robinson, & Co., Inc. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir. 1988). Bandimere must demonstrate that "the risk of unfairness is intolerably high" by identifying "some substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated." *Riggins*, 572 F.3d at 1112 (quotation omitted).

Bandimere has not come close to making the required showing. That the Commission—consistent with its statutory mandate—considers itself an advocate for investors in general does not mean that it is "not capable of judging a particularly controversy fairly on the basis of its own circumstances." *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 492-93 (1976) (quotation omitted). A holding to the contrary would bar the Commission from adjudicating a wide swath of cases that Congress specifically authorized it to bring in the administrative forum. *See* 15 U.S.C. §§ 77h-1, 78u-3, 80b-3(k). "To give credence to [Bandimere's] dark suspicion of bias notwithstanding this carefully crafted [statutory scheme] would flout . . . [the] presumption of honesty and integrity on the part of those who serve in office." *Blinder, Robinson, & Co., Inc.*, 837 F.2d at 1106-07 (quotation omitted).

IV. CONCLUSION

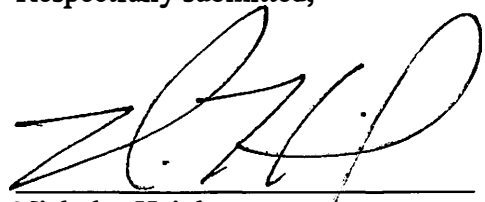
For the foregoing reasons, Bandimere's Motion should be denied.

CERTIFICATION OF WORD COUNT

Undersigned counsel certifies, pursuant to Rule 154(c), that based on the word-count of the word processing program used to prepare the document, this Opposition to Defendant David F. Bandimere's Motion for Ruling on the Pleadings contains 6007 words, exclusive of the table of contents and table of authorities.

Dated: February 13, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

On February 13, 2019 the foregoing was sent to the following parties and other persons entitled to notice as follows:

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