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 REPLY IN SUPPORT OF MOTION FOR RULING ON THE PLEADINGS

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Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C. submits his Reply in Support of his Motion for Ruling on the Pleadings (the "Motion") as follows:

I. INTRODUCTION

The Opposition to Respondent David F. Bandimere's Motion for Ruling on the Pleadings (the "Opposition"), particularly when read in light of the Opposition to Mr. Bandimere's Motion for a More Definite Statement, shows that the Division of Enforcement ("Enforcement") cares about one thing, and one thing only: the facilitation of its ability to prevail in a proceeding against Mr. Bandimere without regard to the law, facts, or fairness to Mr. Bandimere.

Mr. Bandimere has already been subjected to an unconstitutional administrative enforcement proceeding. His objections to that proceeding, and its outcome, were given short shrift by the Commission, requiring him to bear the expense of pursuing a Petition for Review in the United States Circuit Court for the Tenth Circuit. He successfully challenged the constitutionality of the proceeding to which he was subjected, and the Court set aside the Commissioner's decision. Even then, the Commission added to Mr. Bandimere's burden by filing a Petition for Writ of Certiorari with the United States Supreme Court only to have the Commission, through its counsel, the United States Solicitor General, confess error and argue to the Supreme Court in *Lucia v. SEC,* 138 S. Ct. 2044 (2018) that Mr. Bandimere was right all along, and that the SEC's administrative enforcement proceedings were structurally deficient due to the unconstitutional hiring of its administrative law judges. *Lucia v. SEC,* Brief for Respondent Supporting Petitioners, p. 14; 2018 WL 1251862*14 (February 21, 2018).

Enforcement is now continuing the Commission's scorched earth approach. The Commission's administrative law judges are the only Commission employees that do not have an obvious interest in what happens to Mr. Bandimere. It is a sad fact that this court is the only

Commission actor likely to consider Mr. Bandimere's arguments and let the chips fall where they may.

II. THE 2012 PROCEEDING AGAINST MR. BANDIMERE HAS BEEN CONCLUDED

A. The Commission Agrees with Mr. Bandimere

The proceeding against Mr. Bandimere initiated by the OIP dated December 6, 2012 was concluded when the Court of Appeals set aside the Commission's October 29, 2015 opinion and order without a remand to the Commission for further proceedings. As explained in the Motion, that conclusion necessarily flows from the meaning of a remand, which represents a continuation of the case, as well as authority holding that courts have the power to remand a matter to an administrative agency, which implies that a remand must be ordered under that power, but does not occur automatically when a reviewing court sets aside an agency's decision. Motion, pp. 9-10.

Despite Enforcement's arguments to the contrary, the Commissioner agrees with Mr. Bandimere. In *In the Matter of Bennett Group Financial Services, LLC,* Rel. No. 33-10606, 2019 WL 653706 (February 15, 2019), the Commission denied as unnecessary a motion by Enforcement to lift a stay of sanctions imposed on a respondent after its Petition for Review had been denied, and the mandate of the court had issued. The Commissioner noted that the stay, by its terms, expired on the issuance of the court's mandate. The Commissioner went on to state, "Likewise, because the Tenth Circuit's mandate dismissing respondent's appeal did not direct additional proceedings before the Commission and because further appellate considerations is not available, *there is no pending proceeding to be 'closed.'*" (emphasis added.) *Id.*

That is exactly Mr. Bandimere's argument. The 2012 proceeding against him was completed when the Tenth Circuit set aside the Commissioner's final decision in that proceeding

and did not direct additional proceedings before the Commission. If Enforcement wants to proceed against Mr. Bandimere, it must convince the Commission to issue a new OIP.

B. Enforcement Has Not Shown an Exception to the Remand Rule

But even before *Bennett Group Financial Services, LLC*, Enforcement's argument had no merit. In arguing that a remand is unnecessary, Enforcement relies on a series of cases involving the National Labor Relations Board., one of which, *Huntington Ingalls Inc. v. NLRB*, 631 Fed. Appx. 127, 131 (4th Cir. 2015) characterized those cases as having "... carved out a very narrow exception to the remand rule where the court disposes of the case on the basis that the Board issued a quorumless decision." Rather than recognize those cases as a "very narrow exception to the remand rule," Enforcement contends that they represent a rule of general application which renders the concept of a court ordered remand superfluous. But a careful reading of those cases belies that contention, and shows that they cannot be extended to circumstances not involving the lack of a quorum.

In *Noel Canning v. NLRB,* 823 F.3d 76 (D.C. Cir. 2016), the court initially denied enforcement of an NLRB order because of a lack of a quorum, but did not include language remanding the matter to the NLRB because there was no properly constituted NLRB to which the court could remand the proceedings. *Noel Canning,* 823 F. 3d at 80. Because of that unusual circumstance, the court construed its mandate to enable the NLRB, once it had obtained a quorum, to consider the case on the merits. Significantly, the court pointed out that once the NLRB had obtained a quorum, the court remanded more than a dozen pending cases to it. *Id.*

Big Ridge, Inc. v. NLRB, 808 F. 3d 705, 711(7th Cir. 2015) is similar to *Noel Canning.* There, the court denied enforcement of an NLRB order for lack of a quorum, but did not remand to the NLRB because there was no properly constituted NLRB to which the matter could be

remanded. Nevertheless, the court stated that it anticipated that the NLRB would, in fact, reconsider the case once a quorum was obtained. *NLRB v. Whitesell Corp.*, 638 F.3d 883, 889 (8th Cir. 2011) is similar: an initial petition by the NLRB to enforce an order was denied because the order was issued when the NLRB lacked a quorum. Although the court did not explain why it denied a request for remand, it stated that it expected that the NLRB would, in fact, revisit the merits of the case again.

In *Huntington Ingalls*, the court denied enforcement of an order finding violations of the labor laws because the NLRB lacked a quorum. Unlike here, the NLRB requested that the court's decision include a remand provision because that decision anticipated further proceedings. However, in upholding the ability of the NLRB to revisit its decision when it had a quorum, the court essentially agreed that its decision based on the lack of a quorum anticipated further action once a quorum was obtained.

This Court should honor *Huntington Ingalls* characterization of that line of authority as being a narrow exception to the remand rule necessitated by the absence of a quorum, which as the *Noel Canning* and *Big Ridge* courts recognized created an unusual situation where there was no properly constituted agency to which a remand could be made. And, as the court in *Noel Canning* noted, it remanded many cases to the NLRB once a quorum was obtained.

The circumstances regarding the 2012 proceeding are dramatically different from the NLRB cases, and do not warrant an expansion of the very limited exception to the remand rule to his case. Unlike the NLRB cases, there was always a properly constituted Commission to which the 2012 proceeding could have been remanded. Further, the court set aside the Commission's decision in the 2012 proceeding because of a structural constitutional defect that infected the entire proceeding, and not a mere lack of a quorum.

Enforcement also never addressed why the Commission, if it actually intended to retry Mr. Bandimere under the December, 2012 OIP, did not seek a modification or clarification of the court's mandate to include a remand to allow it to do so, or why the Commission's failure to request a remand is not a waiver of that relief. Mr. Bandimere sought, and obtained, an order from the court's setting aside the Commission's decision in its entirety. The failure of the Commission to seek a remand, either in its initial briefing to the Court of Appeals, or in its subsequent petitions for rehearing, prevented Mr. Bandimere from arguing against a remand to the only body with authority to grant or deny that relief. By failing to present to the court the issue of whether the 2012 proceeding should be remanded, but simply taking the position that it has been, the Commission has usurped the authority of the Court of Appeals. Moreover, if the Commission adheres to its position that the case has been remanded to it even though the Court of Appeals did not order a remand, contrary to its decision in *Bennett Group Financial Services, LLC*, Mr. Bandimere will be forced to undergo yet another improper administrative proceeding before he can vindicate his rights before the Court of Appeals in what would be his second Petition for Review. Such a result is manifestly unjust, and constitutes prejudice to Mr. Bandimere which supports his argument that the Commission has waived any right to seek a remand which it might otherwise have had.

C. The Commission Has Consistently Treated the 2012 Proceeding as Closed

Enforcement concedes, as it must, that the 2012 proceeding against Mr. Bandimere has been closed. However, a review of the lists of closed and open administrative proceedings appearing on the Commissions website on February 15, 2019 reflects that, for the first time, the 2012 proceeding was moved from the list of closed cases to the list of open cases. Because the purported change of status was effectuated on the same day that the Commissioner issued its

order in *Bennett Group Financial Services, LLC*, it appears that the purported change in status was not made at the Commissioner's direction.

Notwithstanding Enforcement's pejorative characterizations of Mr. Bandimere's arguments, the Commission recognized in *Bennett Group Financial Services, LLC* that when a proceeding for a Petition for Review in a court of appeals is completed, and no remand for further proceedings is ordered, there so no case pending before the Commission. To hold otherwise for the 2012 Proceeding would be arbitrary and capricious.

III. THE FAILURE OF THE COMMISSION TO PROVIDE MR. BANDIMERE WITH A HEARING WITHIN STATUTORY DEADLINES REQUIRES DISMISSAL OF THE 2012 OIP

The Commission was obligated to provide Mr. Bandimere with a hearing no earlier than 30 days, and no more than 60 days, from service of the 2012 OIP, unless Mr. Bandimere consented to a variance from that time frame. Section 8A(b) of the Securities Act, Section 21C(b) of the Securities Exchange Act, and Section 203(k)(2) of the Investment Advisers Act. Although Mr. Bandimere consented to a later hearing, the hearing that he was provided was unconstitutional. Because Mr. Bandimere was never provided with a legal hearing under the 2012 OIP, a future hearing, which would be outside the time limits prescribed by statute, is impermissible. If the Commission wishes to proceed against Mr. Bandimere, it must issue a new OIP and provide him a legal hearing within the statutorily established time frames.

Enforcement argues first that the provisions requiring a hearing within a specified time frame do not speak directly to the effect of a court ordered vacatur of a Commission order and remand for a new hearing, which, Enforcement asserts, "should be the end of the matter." Opposition, p. 10. Although the meaning of that assertion is unclear, it is in any case irrelevant

because the Court of Appeals did not remand the 2012 proceeding to the Commission for a new hearing.

To the extent that Enforcement means to suggest that a hearing that is structurally defective under the Constitution nevertheless satisfies the requirements for a hearing under the federal securities laws, that suggestion is clearly inconsistent with *Lucia* and must be rejected.

Enforcement's argument that Mr. Bandimere's insistence on a constitutional hearing within the time frames established under the federal securities laws will somehow impair the ability of the Commission to resolve matters promptly through administrative enforcement proceedings is incomprehensible. Congress, not Mr. Bandimere, established the time frames in which the Commission is required to provide a hearing. It was the responsibility of the Commission to provide Mr. Bandimere with the hearing that comported with the Constitution, within those timeframes. It was not Mr. Bandimere's fault that the Commission failed in carrying out that basic responsibility.

Nor does Enforcement offer any persuasive reason why the failure of the Commission to meet its statutory obligations to provide for a prompt hearing should be without any consequence. The Congressionally mandated time period within which a hearing must be provided is not merely an internal housekeeping measure designed to spur the Commission to prompt action. Rather, because the time period can be modified only with the consent of a respondent, the time within which a hearing must be held provides an important procedural right to respondents. That fact, which Enforcement does not appear to dispute, makes inapplicable *U.S. v. James Daniel Good Real Property,* 510 U.S. 43 (1993), *Brock v. Pierce County*, 476 U.S. 253 (1986), *Montford & Co. Inc., v. SEC*, 793 F.3d 76 (D.C. Cir. 2015), and *U.S. v. Dolan*, 571 F.3d 1022 (10th Cir. 2009) on which Enforcement relies.

Further, Mr. Bandimere does not contend that the Commission's failure to provide a hearing within the statutory deadlines results in the inability of the Commission to act. If an OIP expires because the Commissioner failed to provide a hearing within the statutory time frame, the Commission could issue a new OIP and proceed under that charging document, assuming that a hearing within the statutory time frames was provided. This is precisely the type of "less drastic" remedy contemplated in *Brock* as an alternative to a complete prohibition on the Commission's ability to act.

IV. CIVIL PENALTIES ARE NOT AVAILABLE IN THIS CASE

Enforcement's argument in support of the availability of civil penalties illustrates its willingness to ignore the law, even as interpreted by the Commission.

Because the conduct in which Mr. Bandimere allegedly engaged predated the expansion of remedies provided by amendments to the federal securities laws contained in Dodd-Frank, and because the Dodd Frank remedies cannot be applied retroactively, civil penalties are available only to the extent that they would have been available prior to the Dodd- Frank amendments. As discussed in the Motion, pp. 17-18, civil penalties under the Exchange Act could be available only in a proceeding instituted pursuant to Section 15(b)(4) or Section 15(b)(6). But, the Commission in *Jacob Wonsover,* 1999 WL 100935 at*10, Rel. No. 34-1123 (March 1, 1999), *aff'd Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000) made clear that the only persons subject to a proceeding under Section 15(b)(4) were registered professionals. Because Mr. Bandimere was not a registered professional, Section 15(b)(4) did not apply to him.

Enforcement has no answer to the limitation of the scope of Section 15(b)(4) which the Commission recognized in *Wonsover.* Although Enforcement is correct that *Wonsover* (which Enforcement was unwilling to mention by name) addressed the limitation of the scope of Section

15(b)(4) in the context of analyzing the meaning of "willful," Enforcement is incorrect in suggesting that the Commission did not address whether the scope of Section 15(b)(4) was limited to registered persons or entities. To the contrary, limiting the scope of Section 15(b)(4) to registered professionals in *Wonsover* was critical to the Commission's rationale for its construction of the term "willful."

And, regardless of whether Section 15(b)(6) can apply to persons associated with unregistered broker-dealers, the OIP alleges only that Mr. Bandimere was a broker; it makes no allegation that he was associated with a broker, or was otherwise a person described in Section 15(b)(6). OIP, ¶¶ 2, 5, p. 7.

Section 203(i) of the Investment Advisers Act cannot be the basis for the imposition of a civil penalty because there are no factual allegations in the OIP to support a conclusion that Mr. Bandimere acted as an investment adviser. Enforcement's explanation that Section 203 (i) applies to Mr. Bandimere because he allegedly sold unregistered interests in limited liability companies and that he pooled those funds and passed them on to other entities does not make him an investment adviser to the limited liability companies. There are no allegations that Mr. Bandimere was compensated for providing investment advice to any limited liability companies, or, for that matter, to anyone else. The only compensation that Mr. Bandimere is alleged to have received was commissions from the sales of interests in two trading programs. OIP ¶¶ 22 and 24.[1] And, Enforcement simply ignored its previous admission that it had no evidence that Mr. Bandimere received compensation for providing investment advice. Motion, p. 18. Because nothing alleged in the OIP brings Mr. Bandimere within the definition of "investment adviser"

[1] Enforcement continues to urge that Mr. Bandimere acted as an investment adviser while ignoring its previous admission that it had no evidence that Mr. Bandimere received compensation for providing investment advice. Motion, p. 18.

contained in Section 202 (a)(11), Section 203(i) of the Investment Advisers Act does not provide a statutory basis for the imposition of civil penalties.

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

Enforcement's effort to show that the OIP states a claim for securities fraud reflects a shocking lack of familiarity with what the law requires.

Enforcement does not dispute that Mr. Bandimere's alleged affirmative representations that certain investments were "low risk" or "very good investments" are immaterial puffing and not actionable under the antifraud provisions. *E.g. Grossman v. Novell Inc.*, 120 F.3d 1112, 1119-20 (10th Cir. 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).

With respect to alleged fraudulent omissions, Enforcement ignores well-established law that 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). That means that an alleged material omission "alters the meaning" of the statement actually made. *McDonald v. Kinder Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002). Enforcement does not even attempt to point to language in the OIP which satisfies this standard.

Rather, Enforcement argues that Mr. Bandimere made positive statements about investments (which are not alleged to be untrue) but failed to disclose materially negative facts. Opposition, p. 16. However, that does not state a claim for securities fraud through omissions. There is nothing in the OIP that reflects a statement made by Mr. Bandimere which was rendered

misleading by the failure to disclose any material fact. Therefore, the OIP fails to state a claim for securities fraud by omissions.

With respect to the failure of the OIP to make sufficient allegations of Mr. Bandimere's recklessness, Enforcement's assertion that the fraud claim against Mr. Bandimere is not based on his failure to recognize that investment programs run by others were fraudulent ignores the plain language of the OIP. The OIP, in ¶ 36, which appears after the list of alleged red flags and negative facts that Enforcement contends should have been disclosed, states: "These numerous material red flags and negative facts cited above should have alerted Bandimere to the fact that IV Capital and UCR were likely frauds. These facts would have been important to investors in determining whether to invest, as these facts would have seriously called into question the legitimacy and quality of IV Capital and UCR. Bandimere recklessly ignored these obvious signs of fraud."

Contrary to Enforcement's assertion, the express language of the OIP relating to Mr. Bandimere's scienter relates specifically to Mr. Bandimere's failure to recognize a fraud committed by others. Therefore, Mr. Bandimere's reliance on *South Cherry Street LLC v. Hennessee Group, LLC*, 573 F.3d 98, 109-10 (2d Cir. 2009), *SEC v. Cohmad Securities Corp.*, 2010 WL 363844 (S.D.N.Y., Feb.2, 2010) as establishing the standard of alleging scienter for a person accused of acting as a feeder to a fraudulent scheme perpetrated by another is completely appropriate. Enforcement's suggestion that Mr. Bandimere's conduct should be considered apart from the conduct of the persons operating IV Capital and UCR would, if accepted, turns this case into something very different from the proceeding authorized in the OIP.

VI. MR. BANDIMERE CANNOT RECEIVE DUE PROCESS IN AN ADMINISTRATIVE ENFORCEMENT PROCEEDING

The Commission's announcement to the world that it is the advocate for investors is the undisputable fact that distinguishes Mr. Bandimere's claim that he cannot receive due process from the more common challenges of bias in an adjudicator on which Enforcement relies.

Mr. Bandimere recognizes that there are a great number of institutional forces which, as a practical matter, prevent the Commission from reviewing the facts and law in a particular case with the "cold neutrality of an impartial judge." *In the Matter of The Stewart-James Co., Inc.,* 50 SEC 468; 1991 WL 291802 *12, Rel. No, 34-28810 (Jan. 23, 1991) (Concurring Opinion of Commissioner Fleischman) (internal citations omitted). As former Commissioner Fleischman noted, Commissioners in deciding a particular case necessarily are affected by how that decision will affect broad policy goals. And, while the potential for bias created by these institutional pressures may be real, that potential bias is not, at least under current law, sufficient to preclude administrative agencies from performing an adjudicative function.

But, what the Commission has done by holding itself out as an advocate for investors goes beyond the institution bias that courts have allowed. After all, courts do not announce that they are advocates for union members, or assault victims, or dairy farmers, or any other group or category of persons whose interests may be litigated in those courts. For this reason, Enforcement's characterization of Mr. Bandimere's argument as a "broad attack on the procedures of an administrative process," Opposition, p. 18, is far off the mark. Mr. Bandimere's due process claim is highly specific.

Contrary to Enforcements suggestion, nothing in the Commission's statutory mandate is consistent with the Commission's assertion that it is an advocate for investors. The Commission was established by Section 4 of the Exchange Act, which contains no language at all suggesting

that the Commission was intended by Congress to be an advocate for any specific group which has an interest in the proper functioning of the capital markets. Indeed, the Dodd-Frank amendments to the Exchange Act created an Office of the Investor Advocate, which would be unnecessary if Congress had intended the Commission itself to act in that capacity. Section 4, Securities Exchange Act.

Nor is Enforcement on solid ground when it denigrates the appearance of unfairness as constituting a violation of due process. The ***appearance*** of ***complete*** fairness in SEC administrative proceedings was recognized to be a necessary element of due process in *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962), and nothing in the 57 years since that case was decided has changed the standard which it recognized. This court should be concerned that Enforcement is as uninterested with the appearance of fairness in administrative enforcement proceedings as it is.

And, contrary to the language taken out of context from *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n,* 426 U.S. 482, 492 (1976), Mr. Bandimere does not have to show that the Commission is not "capable" of deciding his case fairly. If such a subjective showing was required, every case that concluded that there was an unacceptable risk of bias in an adjudicator, or an unacceptable appearance of unfairness would be wrongly decided.

Enforcement's argument that the Commission's unnecessary, and improper, anointing itself as the investor's advocate would prevent it from adjudicating a large number of cases is beside the point. The courts have been generous with administrative agencies in not finding disqualifying biases arising from a necessary combination of adjudicative and other functions. However, that is not this case. It was no more necessary, or appropriate, for the Commission to declare itself the advocate for investors than it was for Commissioner Cox to make public

statements indicating that he had prejudged the facts of a case that would come before the Commission for decision. *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989).

The Supreme Court, in *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) stated:

> When a judge has served as an advocate... in the very case the court is now asked to adjudicate a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.

As a result, the Supreme Court in *Williams* determined that due process was violated when a justice on the Pennsylvania Supreme Court failed to recuse himself from considering a case in which he had participated as a district attorney almost three decades earlier.

Here, the Commission holds itself as an advocate for investors while it simultaneously adjudicates matters in which the interests of investors are at stake. As a result, the maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," *Williams,* 136 S. Ct. at 1905-6, should apply. Mr. Bandimere cannot receive due process if he is to be judged by an advocate for investors.

WHEREFORE, Respondent David F. Bandimere prays that the Motion for Ruling on the Pleadings be granted.

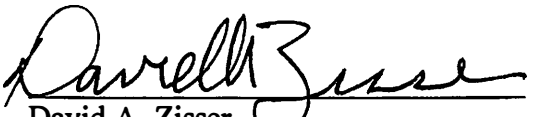
CERTIFICATE OF WORD COUNT

I certify, pursuant to Rule 154(c), that this Reply In Support of Motion for Ruling on the Pleadings complies with the limitation on length and contains 4,293 words, exclusive of the Table of Contents and Table of Authorities.

Dated this 19th day of February, 2019.

Respectfully submitted:

JONES & KELLER, P.C.



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CERTIFICATE OF SERVICE

On February 19, 2019, the foregoing **RESPONDENT DAVID F. BANDIMERE'S REPLY IN SUPPORT OF MOTION FOR RULING ON THE PLEADINGS** was sent to the following parties and other persons entitled to notice as follows:

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