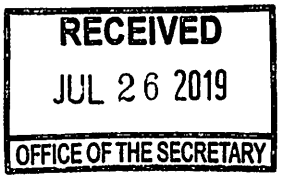
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3 15124



In the Matter of

DAVID F. BANDIMERE and JOHN O. YOUNG

RESPONDENT DAVID F. BANDIMERE'S MOTION FOR SANCTIONS FOR MISCONDUCT BY THE DIVISION OF ENFORCEMENT

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Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C., and pursuant to Rule of Practice ("ROP") 154, moves for sanctions for the failure of the Division of Enforcement ("Enforcement") to produce all material exculpatory information in accordance with ROP 230(b)(2), and Enforcement's subsequent written misrepresentations in this tribunal that all material exculpatory material has been provided.

The misconduct committed by Enforcement in this matter[1] came to light when counsel for Mr. Bandimere reviewed notes of interviews (the "Interview Notes") conducted by the Enforcement staff which Enforcement produced on May 31, 2019 in response to an April 24, 2019 subpoena. Many of the Interview Notes contained obvious exculpatory material which Enforcement should have produced in January, 2013, as part of its initial production of documents pursuant to ROP 230(a) and (b)(2).

Enforcement's misconduct was flagrant, repeated, and prejudicial to Mr. Bandimere. Mr. Bandimere invokes the Court's authority to regulate the conduct of the parties and their counsel, set out in ROP 111(d) to impose sanctions.

I. BACKGROUND AND PROCEDURAL HISTORY

The misconduct addressed by this Motion began in December, 2012, when Enforcement failed to comply with ROP 230, which required it to produce to Mr. Bandimere documents obtained in its investigation.

The Order Instituting Proceedings (the "OIP") was issued December 6, 2012. The OIP alleged that Richard Dalton, a long-time friend of Mr. Bandimere through activities in Denver's evangelical Christian community, induced him to participate as an investor in two investment programs, IV Capital and Universal Consulting Resources (UCR). IV Capital was managed by

[1] It is Mr. Bandimere's position that the proceeding initiated by the December 6, 2012 Order Instituting Proceedings, (the "OIP") has been concluded. Nothing in this Motion is intended to waive that position, or suggest that Mr. Bandimere agrees that the 2012 proceeding is ongoing.

Michael Parrish. UCR was managed by Dalton. Mr. Bandimere invested several hundred thousand dollars of his own money in IV Capital and UCR. Each paid Mr. Bandimere substantial returns. Wishing to share the benefits of what he believed was an advantageous investment, Mr. Bandimere introduced a number of family members and friends to those programs. However, both programs appear to have been Ponzi schemes.[2] The OIP alleged that Mr. Bandimere defrauded investors that he introduced to those programs by making material misrepresentations, both affirmatively and by omission, regarding the lack of risk in the programs, and that investment returns were guaranteed. The OIP alleged further that Mr. Bandimere acted with scienter because he recklessly ignored facts that should have alerted him to the fraudulent nature of those programs. The OIP also alleged that Mr. Bandimere sold unregistered securities, not subject to exemption, and that he acted as an unregistered broker.

The OIP was served on December 12, 2012. Under ROP 230(d), production of documents is to be made no later than seven days after the OIP was served.

Counsel for Mr. Bandimere was concerned that Enforcement's production of documents was not complete, and, on or about January 14, 2013, requested the administrative law judge ("ALJ") then presiding to issue a subpoena to the Commission for additional documents.

As it relates to this current Motion for Sanctions, Mr. Bandimere sought the factual portions of notes of interviews taken by members of Enforcement during its investigation. For reasons unknown to Mr. Bandimere, Enforcement did not take investigative testimony of anyone to whom Mr. Bandimere introduced IV Capital or UCR, except Camerson Syke, Mr. Bandimere's former counsel. Therefore, Interview Notes were the only source of investors' recollections.

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[2] Using an innocent, respected member of a religious community is a common technique used by promotors of Ponzi schemes to spread the word about fraudulent schemes. *E.g.*: SEC Investor Bulletin, "Affinity Fraud," September 1, 2012, available at https://www.sec.gov/files/affinityfraud.pdf

Enforcement filed a Motion to Quash, appended as Exhibit 1, on the grounds that the notes were protected attorney work product. Motion to Quash, pp. 2-3. Enforcement also asserted that it was then conducting a *Brady*[3] review, and represented that it would produce "any material exculpatory evidence" to Mr. Bandimere which, it claimed, was further justification for quashing the subpoena. Motion to Quash, p. 4.

The ALJ, in an Order on Motion to Quash Subpoena, issued on February 6, 2013, appended as Exhibit 2, granted the Motion to Quash regarding interview notes, but ordered Enforcement to submit a declaration describing its compliance with its *Brady* obligations, stating that such declaration "... is all Bandimere is entitled to." Order on Motion to Quash Subpoena, p. 2. Mr. Bandimere requested interlocutory review of that order, but that request was denied.

Enforcement, on February 19, 2013, filed the Declaration of Dugan Bliss Regarding Division of Enforcement's Search for Material Exculpatory Evidence, appended as Exhibit 3, a Withheld Document List, appended as Exhibit 4, which described only categories of documents withheld, and a List of Possible Material Exculpatory Evidence From Withheld Documents Regarding Respondent Bandimere, appended as Exhibit 5. Mr. Bliss, who was trial counsel, stated in his Declaration that Enforcement had done a *Brady* review of all documents in the Withheld Document List, which included a review of more than 80 interview memoranda or notes, which Mr. Bliss asserted he had conducted personally. Mr. Bliss asserted further that all "possible" material exculpatory information was being provided to Mr. Bandimere. The List of Possible Material Exculpatory Evidence From Withheld Documents Regarding Respondent Bandimere did not include any actual notes or portions of notes. Rather, Enforcement summarized what it claimed was possible exculpatory evidence that it obtained. Those

[3] A "Brady" review refers to a review for exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83 (1963).

summaries were basically opinions by 13 interviewees that they did not blame Mr. Bandimere, or that they believed that Mr. Bandimere did not intend to harm anyone.[4]

Based on Enforcement's failure to provide any information that any of the more than 80 interviewees stated that Mr. Bandimere had disclosed the existence of risk, or did not represent that investments were guaranteed, Mr. Bandimere prepared his defense under the belief that there were not a significant number of investors who could be called as witnesses to testify that Mr. Bandimere had, in fact, advised of risk, and did not, in fact, guarantee investment returns.

A six-day evidentiary hearing began on April 22, 2013, and concluded on May 2, 2013. An Initial Decision was issued finding that Mr. Bandimere had committed securities fraud, acted as an unregistered broker, and sold unregistered securities. Mr. Bandimere appealed the Initial Decision to the SEC, which issued its Opinion finding the same violations as were found in the nitial Decision. Substantial monetary and prohibitive relief were imposed as sanctions.

Mr. Bandimere sought judicial review in the United States Court of Appeals for the Tenth Circuit. The Court of Appeals set aside the SEC's Opinion on the grounds that the appointment of the presiding ALJ was unconstitutional. *Bandimere v. SEC,* 844 F.3d 1168 (10th Cir. 2016), *rehearing and rehearing en banc denied* 855 F.3d 1128 (10th Cir 2017), *cert denied SEC v. Bandimere,* 138 S. Ct. 2706 (2018).

More than a year after its ruling regarding Mr. Bandimere had been set aside, the SEC determined that the allegations in the 2012 OIP should be retried before a different ALJ, and that prior rulings by the original ALJ, and the SEC itself, should not be presumed to be correct. Mr. Bandimere again sought the factual portions of notes of interviews conducted by the Enforcement staff, which Enforcement continued to claim were protected work product. After

[4] The only interviewee for which specific exculpatory information was disclosed was Harley Hunter; Enforcement disclosed that Mr. Hunter stated that Mr. Bandimere had disclosed that Parrish had previously "been in trouble" with the SEC before.

attempting to obtain those notes through informal negotiation, Mr. Bandimere sought, and on April 24, 2019, obtained a subpoena for notes of interviews of certain investors who were believed to have information that might assist his defense. Enforcement provided the subpoenaed notes on May 31, 2019.

Even a cursory review of those notes showed that, contrary to the representations of Enforcement going back to January, 2013, at least 19 people interviewed by Enforcement staff provided specific exculpatory evidence regarding Mr. Bandimere's lack of solicitation, the absence of misrepresentations made by Mr. Bandimere, his disclosure of risk, and that he did not represent that investments were guaranteed. This information had not been disclosed previously. Had this information been provided in January, 2013, Mr. Bandimere's defense would have been structured far differently than it was.

Enforcement's failure to provide exculpatory evidence in a timely manner, in violation of ROP 230, was egregious. That failure deprived Mr. Bandimere due process in his 2013 hearing (in a way that cannot be rectified by a new trial), and was highly prejudicial. Enforcement's false assertions in various filings that all possible *Brady* material had been provided was also egregious, and violated ROP 153(b)(1). Sanctions for this misconduct should be imposed.

II. IMPROPERLY WITHHELD INTERVIEW NOTES CONTAINED OBVIOUS EXCULPATORY INFORMATION THAT WAS NOT TIMELY DISCLOSED

A. Enforcement Must Produce Exculpatory Evidence Regardless of Potential Privilege

The Interview Notes reflected Enforcement staff interviews with purported "victims" of Mr. Bandimere's alleged securities law violations. The OIP alleged that Mr. Bandimere stated that returns were "guaranteed," OIP, ¶ 24, and had assured investors that the investments were "low risk" and "very good investments" (quotation marks in the original). OIP, ¶ 36. Although

the OIP did not identify any specific investors who were allegedly defrauded, Enforcement, to comply with an order requiring a more definite statement, submitted a list of approximately 97 investors which it claims Mr. Bandimere defrauded, as alleged in the OIP.[5] See, Division of Enforcement's List of Allegedly Defrauded Investors or Offerees, February 25, 2013, appended as Exhibit 6. Further, according to Enforcement, Mr. Bandimere made all the misrepresentations alleged to all potential investors, save one. See, Division of Enforcement's Brief in Opposition to Respondent's Motion for More Definite Statement, January 18, 2013, appended as Exhibit 8. Therefore, to the extent that any of the Interview Notes contain information that would assist Mr. Bandimere in rebutting any of the allegations relating to violations of the law in the OIP, that information would be exculpatory.

ROP 230(a) requires Enforcement to make available to a respondent, without the need for a specific request, all documents obtained by Enforcement in the investigation leading to Enforcement's recommendation to institute proceedings. ROP 230(b)(1) allows Enforcement to withhold certain documents, including privileged documents, and a "note or writing prepared by a Commission employee." However, ROP 230(b)(2) specifies "Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement of disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland,* 373 U.S. 83, 87 ... (1963) documents that contain material exculpatory evidence." So, Enforcement must produce all documents which it obtained in its investigation, except for privileged documents and notes or other writings prepared by Commission employees. But even privileged documents, notes or other writings containing material exculpatory evidence within the meaning of *Brady* must be

[5] This list appears to lack a reasonable basis. Fewer than half of the people which Enforcement identified as having been defrauded by Mr. Bandimere were ever interviewed by the Enforcement staff, and 10 of the interviewees were interviewed **after** the List of Allegedly Defrauded Investors was filed. See, Division's Supplemental Withheld Document List, April 3, 2019, appended as Exhibit 7.

produced. Moreover, the duty to provide *Brady* material is continuing. *In the Matter of Harding Advisory LLC,* Order Denying Respondents' Motion for Adjournment, Rel. No. APR-1195, 2014 WL 10937716 *3 (January 24, 2014); *In the Matter of Donald T. Sheldon,* Order Regarding Jencks Act Issues, APR-273, 1986 WL 175660 *2, fn. 1 (September 10, 1986).

Evidence encompassed by *Brady* consists of "evidence favorable to an accused . . . where the evidence is material to either guilt or punishment." *Brady*, 373 U.S. at 87. Impeachment evidence falls within the ambit of *Brady. U.S. v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material if there is a "reasonable probability" that, had the evidence been disclosed, the outcome of the proceeding would have been different. That does not mean that a respondent must demonstrate that disclosure of the undisclosed exculpatory evidence would have resulted in an exoneration. Rather, a "reasonable probability" is shown when suppression of exculpatory evidence undermines confidence in the outcome of a proceeding. *Bagley,* 473 U.S. at 682. In making that determination, a court must consider the effect that the suppression of exculpatory evidence might have had on the preparation or presentation of a defendant's case. *U.S. v. Pasha,* 797 F.3d 1122, 1133, (D.C. Cir. 2015), *citing U.S. v. Bagley,* 473 U.S. at 683. The effect of failing to disclose exculpatory evidence must be considered collectively, not on an item by item basis. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). And, when uncertainty exists in a retrospective review of whether the suppression of *Brady* material might have resulted in obtaining additional exculpatory evidence, the burden of that uncertainty falls on the government. *Pasha,* 797 F.3d at 1136.

The adversary process is impaired in at least two ways where, as here, a prosecutor fails to meet *Brady* obligations. A respondent wrongfully deprived of exculpatory evidence has been denied due process. Also, an incomplete production of exculpatory evidence is a

misrepresentation that additional evidence does not exist. *Bagley*, 473 U.S. at 682. Reasonable defense counsel may rely on such a misrepresentation by abandoning lines of independent investigation or trial strategies that it otherwise would have pursued. *Id.* This additional adverse effect must be considered in determining whether, under the totality of the circumstances, the failure to disclose exculpatory evidence undermines confidence in the outcome of a proceeding, and, therefore, is "material." *Bagley*, 473 U.S. at 683.

While complying with *Brady* obligations may require Enforcement to make close judgments, it is appropriate that a prudent prosecutor will resolve close questions in favor of disclosure. *Kyles,* 514 U.S. at 439.[6]

B. Enforcement Made an Incomplete Disclosure of Exculpatory Evidence

Enforcement belatedly attempted to address its obligation to produce exculpatory evidence on February 19, 2013. However, the actual Interview Notes contain much more specific and factual exculpatory information, which Enforcement's summaries hid.

JoAnna Gager: Interview Notes relating to Ms. Gager, appended as Exhibit 8, reflect that she told Enforcement "She can't say that it was 100% safe, Bandimere never in words promised her that." That information is clearly exculpatory regarding the allegation in the OIP that Mr. Bandimere guaranteed investment returns.

Phil Flentge: Interview Notes for Mr. Flentge, appended as Exhibit 9, reflect that he told Enforcement that he, not Mr. Bandimere, brought up the subject of investments in 2005/2006, on several occasions and that Mr. Bandimere did not want to solicit him. Moreover, the conversations with Mr. Flentge predated Mr. Bandimere's receipt of compensation from either IV Capital or UCR. That information is material because it reflects that Mr. Bandimere was not

[6] As discussed below, the suppression of favorable evidence about which Mr. Bandimere complains does not involve close questions.

soliciting Mr. Flentge for purposes of earning compensation. It also shows that Mr. Flentge's discussion with Mr. Bandimere predated almost all the alleged "red flags" that the OIP asserts should have alerted Mr. Bandimere to the possibility of fraud.

Ken Pullen: Interview Notes for Mr. Pullen, appended as Exhibit 10 reflect, among other things, that Mr. Pullen "always understood that his principal was at risk." That information is exculpatory regarding the allegation in the OIP that Mr. Bandimere guaranteed investment returns, and represented the investments were low risk.

Tony Archer: Interview Notes for Mr. Archer, appended as Exhibit 11, reflect that he informed Enforcement that he had been watching the IV Capital investment for three years before he decided to invest in August, 2008. That information is exculpatory because it indicates that Mr. Archer was first informed about the potential investment in 2005, which predated the time that Enforcement alleges that Mr. Bandimere knew of virtually all the so-called "red flags" relating to IV Capital.[7]

Ted and Linda Pampeyan: Interview Notes for Ted and Linda Pampeyan, appended as Exhibit 12, reflect, among other things, that they "understood that there was risk with the investments, they did not think their principal was secure." That information is exculpatory regarding of the allegation in the OIP that Mr. Bandimere guaranteed investment returns, or stated that the investment was low risk.

Rick Moravec: Interview Notes for Mr. Moravec, appended as Exhibit 13, reflect that he told Enforcement that he "does not feel like Bandimere was only encouraging him/soliciting him in the sense of how saying how great a deal it was and enticing him with great returns." That

[7] See, Division of Enforcement's Supplemental Statement Pursuant to the Court's Order on Respondents' Motions for More Definite Statement, filed March 8, 2013.

information is exculpatory because it contradicts Mr. Bandimere's sales approach as alleged in the OIP.

Beverly Umphenhour: Interview Notes for Mrs. Umphenhour, appended as Exhibit 14, reflect that Mr. Bandimere "Did not say it would be a good deal and they should invest." That information is exculpatory because it contradicts the allegations in the OIP regarding Mr. Bandimere's alleged misrepresentations.

Jack Henniger: Interview Notes for Mr. Henniger, appended as Exhibit 15, reflect that Mr. Henniger informed Enforcement that he invested through family connections and was not solicited. Further, Mr. Henniger indicated that Mr. Bandimere advised him that there was no guarantee of returns and a likelihood that he could lose principal. That information is exculpatory regarding the allegations in the OIP that Mr. Bandimere said the investments were low risk, that he guaranteed investment returns and solicited investors in order to earn compensation.

Dean Eloe: Interview Notes for Mr. Eloe, appended as Exhibit 16, reflect that Mr. Eloe told Enforcement that he was approached about investing in IV Capital by Sam Noel, not Mr. Bandimere, and that he knew there were no guarantees. Further, Mr. Eloe told Enforcement that he attended a presentation made by Mr. Parrish, which appears to be the basis on which he made his investment. There is no indication in the Interview Notes that Mr. Bandimere told Mr. Eloe anything. This information is exculpatory regarding the allegation in the OIP that Mr. Bandimere guaranteed investment returns, and, further that Mr. Bandimere was the one who made representations about the investment opportunity.

Enforcement's wrongful failure to disclose exculpatory evidence goes far beyond the important omissions in the incomplete disclosure discussed above. Interview Notes reflect that

Enforcement obtained exculpatory evidence from many interviewees about which it made no disclosure at all.

Bill Musselman: Interview Notes for Mr. Musselman, appended as Exhibit 17, reflect that Mr. Bandimere had no involvement at all in the investment decision made by Mr. Musselman. Mr. Musselman advised Enforcement that he was contacted by Cameron Syke, his personal attorney, that he watched a presentation by Mr. Parrish in Mr. Syke's office and that Mr. Bandimere was "sort of like the bookkeeper. Bandimere didn't sell him the investment." The exculpatory nature of this information should require no further elaboration.

John Bricker: Interview Notes for Mr. Bricker, appended as Exhibit 18, show that John Bricker did not make any investments himself, but that his father, Thomas Bricker, invested personally, and later made an investment in John Bricker's name. This information is exculpatory because it shows that Mr. Bandimere did not sell anything to John Bricker[8]. Moreover, Mr. Bricker advised Enforcement that he "assumed" that principal was safe and that the investment was risk free; he did not state that Mr. Bandimere made any assertions regarding safety or risk.

Deborah Pickering: Interview Notes for Ms. Pickering, appended as Exhibit 19 reflect that her investments in IV Capital resulted from conversations she had with several people, including Parrish. However, she made no reference to communications with Mr. Bandimere in which he provided any information regarding her investments in IV Capital. This information is exculpatory regarding claims that Mr. Bandimere solicited and defrauded her regarding IV Capital.

Tracy Sloan: Interview Notes for Ms. Sloan, appended as Exhibit 20, reflect that she "probably got most of her initial questions answered by Syke," (who is her brother) but only

[8] John Bricker was identified as a person defrauded by Mr. Bandimere, Exhibit 6.

spoke with Mr. Bandimere "some." This information is exculpatory regarding claims against Mr. Bandimere, because it indicates that representations regarding Ms. Sloan's investments were not made by Mr. Bandimere, but were made by her brother, Syke.

Ellie Mann: Interview Notes for Ms. Mann, appended as Exhibit 21, reflect that she told Enforcement that Mr. Bandimere made no representations about past performance and told her there is always risk. This information is clearly exculpatory since it contradicts the sales practices which Mr. Bandimere allegedly used.

Greg Dixon: Interview Notes for Mr. Dixon, appended as Exhibit 22, reflect that he told Enforcement that Mr. Bandimere did not actively solicit him to invest. The Interview Notes also reflect that Mr. Dixon advised Enforcement "No reps money was safe, assumed a high risk investment. Dave never said secure, neither did Cam." This evidence is obviously exculpatory since it contradicts the improper sales practices which Mr. Bandimere is alleged to have used.

David Loebe: Interview Notes for Mr. Loebe, appended as Exhibit 23, reflect that he told Enforcement that investments were "not entirely risk free but almost guarantied(sic) return." This evidence is exculpatory because it negates the allegation that Mr. Bandimere told investors that the investment was guaranteed. Something is either guaranteed or it's not, and Mr. Loebe's characterization of the investment as being "almost" guaranteed presents an obvious basis for cross-examination regarding what Mr. Bandimere said about whether investment returns were guaranteed. Moreover, Mr. Loebe testified at the evidentiary hearing in this matter held in 2013 that Mr. Bandimere said there was a guaranteed return, without any qualifier. See, Tr. p. 304, appended as Exhibit 24. Enforcement's failure to advise that Mr. Loebe said that the returns were "almost" guaranteed when it purported to disclose exculpatory information in February, 2013, was bad enough. However, Enforcement compounded its initial wrongful suppression of

exculpatory evidence when it again failed to provide that information after Mr. Loebe testified inconsistently with what he had previously told Enforcement.

Chris Doig: Interview Notes for Mr. Doig, appended as Exhibit 25, reflect that Mr. Doig told Enforcement "Bandimere-told them some risk involved." The Interview Notes also reflect the following question and answer: "Did Bandimere give opinions on safety/past performance/quality of investments? Again, nothing specific." This information is clearly exculpatory with respect to claims that Mr. Bandimere made misrepresentations to Mr. Doig as alleged in the OIP.

John Davis: Interview Notes for Mr. Davis, appended as Exhibit 26, reflect that he told Enforcement that Mr. Bandimere "came just short of guaranteeing it would be safe." This evidence is exculpatory with respect to the allegation that Mr. Bandimere, in fact, guaranteed investment returns.

Joe Gruenwald: Interview Notes for Mr. Gruenwald, appended as Exhibit 27, reflect that he advised Enforcement, with respect to the investments which he, and his son, made "They all went into it knowing it was a risk." This statement is exculpatory regarding the allegation that Mr. Bandimere guaranteed investment returns.

The impact on Mr. Bandimere's defense in the original trial in this matter, under the totality of the circumstances, easily meets the burden of showing that the extensive amount of suppressed exculpatory evidence was material. No fewer than 19 people who Enforcement claimed were defrauded by Mr. Bandimere provided evidence that specifically rebutted some, or all, of those claims. However, because Enforcement hid the specific exculpatory evidence, Mr. Bandimere's counsel did not consider presenting a defense based on evidence from investors that Mr. Bandimere had, in fact, not guaranteed investment results, had disclosed significant risk,

and, in some instances, had not even been part of a sale. Calling as witnesses the large number of investors who informed Enforcement that Mr. Bandimere had not guaranteed anything, and had disclosed risk, would have established a course of conduct in which Mr. Bandimere made significant disclosures inconsistent with an intent to defraud, and would have undermined Enforcement's few witnesses who claimed that disclosure of risk was not made. Demonstrating a practice of disclosing risk and not making guarantees would have been powerful evidence that Mr. Bandimere did not act with scienter for any investor.

With respect to Mr. Loebe, who testified that Mr. Bandimere had guaranteed returns, evidence that he told Enforcement during an interview that Mr. Bandimere "almost" guaranteed the investment would have undercut his credibility. Without evidence from Mr. Loebe's Interview Notes, Mr. Bandimere's counsel had no basis on which to challenge Mr. Loebe's false testimony that Mr. Bandimere had given a "guarantee."

The amount, and nature, of suppressed, exculpatory evidence is such that confidence in the result of the first trial would be undermined. Therefore, the exculpatory evidence was material. And, once it is determined that suppressed evidence is material, no further harmless error analysis is required. *Kyles,* 419 U.S. at 435.

III. DISMISSAL IS AN APPROPRIATE SANCTION FOR ENFORCEMENT'S FAILURE TO PROVIDE EXCULPATORY INFORMATION AND ITS MISREPRESENTATIONS THAT EXCULPATORY INFORMATION HAD BEEN PROVIDED

Enforcement engaged in at least two separate types of misconduct which the court should consider in fashioning an appropriate sanction. First, Enforcement violated its obligation to provide Mr. Bandimere with *Brady* material, within seven days of the service of the OIP, pursuant to ROP 230. The failure to make timely *Brady* disclosures deprived Mr. Bandimere of due process.

Secondly, Enforcement misrepresented that it had, in fact, met its obligations to provide *Brady* material. Those misrepresentations were contained in, at least, the false Declaration of Dugan Bliss, appended as Exhibit 4, Enforcement's incomplete and misleading List of Possible Material Exculpatory Evidence From Withheld Documents Regarding Respondent Bandimere, appended as Exhibit 5, and the Division of Enforcement's Brief in Opposition to Respondent Bandimere's Motion to Compel Production of Documents Containing Brady Material Pursuant to Rule 230(b)(2), dated March 1, 2013, appended hereto as Exhibit 28, in which Enforcement falsely represented that "The Division provided all possible material exculpatory evidence of which it is aware to Respondent..." These false assurances of compliance with *Brady* obligations violated ROP 153(b)(1)(ii), which provides that counsel's signature on the filing of papers is a certification that to the best of counsel's knowledge, information, and belief, the filing is well grounded in fact.

Each of these types of misconduct require sanctions. The deprivation of due process requires the imposition of an appropriate sanction to ensure that the lack of due process does not continue prospectively. The filing of false and misleading papers by counsel require sanctions that will act as a deterrent against such misconduct in the future.

Case law supports dismissal as a sanction under circumstances similar to those here. Both *Brady* violations, and misrepresentations to the court regarding compliance with *Brady*, were at issue in *U.S. v. Chapman*, 524 F.3d 1073 (9th Cir. 2008). In that case, it became clear that the government failed to provide *Brady* material, notwithstanding the lead AUSA's assertion that all *Brady* material had been provided. *Chapman,* 524 F.3d at 1078. The District Court dismissed the indictment, and the Court of Appeals affirmed. Although the Court of Appeals noted that the appropriate remedy for *Brady* violations is usually a new trial, the flagrant misconduct by the

prosecutors, combined with substantial prejudice to the defendants, warranted dismissal. *Chapman*, 524 F.3d at 1086-7. The misconduct by Enforcement here was more egregious than that in *Chapman*. There, prosecutors represented to the court that all *Brady* material had been provided without maintaining a log of the materials provided to enable that assertion to be made with a reasonable basis. Here, Enforcement represented unequivocally, but falsely, that all "possible" *Brady* material had been produced even though it must have known that assertion to be untrue because of the obvious exculpatory nature of the material which it failed to provide.

Further support for the inference that Enforcement, knowingly and in bad faith, failed to disclose exculpatory information and misrepresented that it had provided all "possible" exculpatory information, is found in the fact that Enforcement, where it purported to provide *Brady* material, did not provide the Interview Notes in which that information appeared, as required by ROP 230 (b)(2). By its terms, ROP 230 (b)(2) provides that Enforcement may not withhold "***documents*** that contain material exculpatory evidence." (Emphasis added) But, Enforcement only summarized what it falsely asserted to be the only exculpatory material in those Interview Notes as to which it made any disclosure at all. See, Exhibit 5. Now that the Interview Notes have been provided, Enforcement's motivation to provide only summaries of exculpatory material becomes clear: it provided summaries of only a portion of the exculpatory material contained in the Interview Notes in order to hide the more significant exculpatory information contained in the Interview Notes, which was not mentioned in the summaries.

Mr. Bandimere has been severely prejudiced by Enforcement's flagrant misconduct. The cost of his defense was needlessly increased by requiring his counsel to expend time seeking information which Enforcement falsely claimed did not exist. He structured his defense on the assumption that the only exculpatory information that investors would provide were essentially

their opinions that he acted in good faith and did not mean to harm anyone. That assumption was reasonable because Enforcement touted that more than 80 Interview Notes had been reviewed but no exculpatory information regarding what Mr. Bandimere had represented was disclosed. That was an implicit representation, on which Mr. Bandimere's counsel could rely, that no exculpatory information about Mr. Bandimere's representations could be found among the 80 persons which Enforcement interviewed. *Bagley*, 473 U.S. at 682.

Moreover, the exculpatory information which Enforcement knew existed was not disclosed for approximately 6 ½ years after the time that disclosure should have been made. That delay, with the attendant fading of recollection, makes the suppression of exculpatory evidence more like the destruction of exculpatory evidence. See, *Pasha*, 797 F.3d at 1138-9, where the court held that an 8-month delay in disclosing exculpatory information impaired the probative impact of that evidence.[9] As a result, the deprivation of due process to Mr. Bandimere resulting from the hiding of exculpatory evidence cannot be cured by a new trial. Dismissal is the only effective sanction. Even if the due process deprivation could be cured by dismissing only the fraud claims, a further sanction is necessary to address Enforcement's misrepresentations, and its all but complete disregard of its *Brady* obligations

It should be noted as well that granting a new trial to Mr. Bandimere is no sanction at all for Enforcement's flagrant misconduct. Mr. Bandimere, through his own efforts and expense, had the result of his prior trial set aside because the forum provided by the SEC was flawed under the Constitution. *Bandimere v. SEC, supra.* Because Mr. Bandimere had the earlier findings of wrongdoing set aside for constitutional violations having nothing to do with his

[9] In addition, William Musselman has died. Mr. and Mrs. Pampeyan, who resided in Denver in 2013, have since moved to the Pacific Northwest, which adds substantially to the cost of calling them as witnesses.

Brady rights, merely granting a new trial effectively condones Enforcements misconduct by giving it a pass.

A sanction beyond dismissal of the fraud claims is necessary, to impress upon Enforcement the importance of meeting its *Brady* obligations. The record here shows that instruction to be needed. The prior Enforcement staff treated its *Brady* obligations with contempt. It did not even purport to do a *Brady* review of the documents it withheld until after *Brady* material should have been provided. Once it conducted its review, it hid obvious exculpatory information, but asserted it had made full disclosure. Both respondents and administrative law judges are forced to rely on Enforcement's representations that it has complied with *Brady* because law judges do not, and should not be required to, routinely perform an independent review of withheld documents to ensure that all exculpatory information has been disclosed. Therefore, it is important that Enforcement approach its *Brady* obligations with the utmost integrity.

Although current Enforcement staff produced Interview Notes containing exculpatory information pursuant to subpoena, those materials should have been provided automatically under ROP 230. Rather, Mr. Bandimere was forced to push Enforcement to obtain materials which ROP 230 provides were to be provided without request. That effort increased Mr. Bandimere's cost of defense, and delayed Mr. Bandimere's receipt of exculpatory information.

To summarize the timeline, Enforcement made its initial ROP 230 production in December, 2012, but withheld all Interview Notes, including those notes that contained exculpatory information. Incomplete summaries of exculpatory information were provided on February 19, 2013 and March 6, 2019, when Enforcement provided summaries of additional investor opinions of Mr. Bandimere's good faith. See, Exhibit 30. Although the 2019 summaries

were more complete than those provided in 2013, significant exculpatory information was omitted. The summary for Ellie Mann failed to disclose that Mr. Bandimere told her, "there is always risk," and that he made no representations about past performance. Compare Exhibit 29 with Exhibit 21. With respect to Greg Dixon, the March 6, 2019 summary makes no mention of Mr. Bandimere's disclosure of risk and that Mr. Bandimere never represented that investments were safe. Compare Exhibit 22 with Exhibit 29.

On April 3, 2019, Enforcement provided a supplemental withheld document list which, for the first time, identified interviewees for which Interview Notes existed. See, Exhibit 7. On April 17, 2019, counsel for Mr. Bandimere and counsel for Enforcement exchanged emails in which counsel for Mr. Bandimere again raised Enforcement's apparent failure to provide *Brady* material for certain investors which were believed were likely to have provided exculpatory information in their interviews. See, Exhibit 30. Counsel for Enforcement purported not to understand what *Brady* material Mr. Bandimere's counsel believed might exist for those investors and asked for elaboration. *Id.* That elaboration was provided. *Id.* However, that elaboration should not have been necessary because the Interview Notes for those investors contained obvious *Brady* material, as discussed above. Enforcement continued to drag its feet with respect to producing Interview Notes, see Exhibit 30, which led Mr. Bandimere to obtain a subpoena for certain Interview Notes. It was only in response to that subpoena were Interview Notes provided on May, 31, 2019, and the extent of the wrongfully withheld *Brady* material became known.

Enforcement's conduct suggests the existence of a nonpublic Enforcement policy to resist producing exculpatory information, even when it knows, or must know, that such material exists. Although Mr. Bandimere does not know what, if any, training is provided to Enforcement staff

relating to identifying and producing *Brady* material, the 108 page Enforcement Manual, issued November 28, 2017, makes no mention at all of Enforcement's obligation to produce exculpatory information. Enforcement's unwillingness to comply with ROP 230 as that rule contemplates is further evidence of the need to impose a significant sanction.

Although dismissal of the OIP is extreme, it is warranted under authorities referred to above. Further, no lesser sanction would be adequate. A new trial is no sanction at all. Precluding Enforcement from introducing evidence would be largely ineffective because the *Brady* violations resulted in Mr. Bandimere being deprived of helpful evidence. Mr. Bandimere should not have been deprived of his protections under ROP 230, and no other respondent should be deprived of those protections in the future. Dismissal of the OIP is the only appropriate sanction.

WHEREFORE, Mr. Bandimere prays that the OIP be dismissed.

Dated this 24th day of July, 2019.

Respectfully submitted:

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DAVID F. BANDIMERE

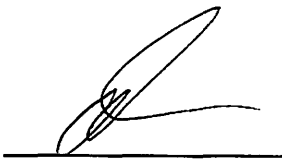
CERTIFICATE OF SERVICE

On July 24, 2019, the foregoing **RESPONDENT DAVID F. RESPONDENT DAVID F. BANDIMERE'S MOTION FOR SANCTIONS FOR MISCONDUCT BY THE DIVISION OF ENFORCEMENT** was sent to the following parties and other persons entitled to notice as follows:

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 James E. Grimes (courtesy copy via email at alj@sec.gov)
Administrative Law Judge
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549

Nicholas Heinke
Terry R. Miller
Securities and Exchange Commission
1961 Stout Street, Suite 1700
Denver, CO 80294
(courtesy copy via email at millerte@sec.gov
and HeinkeN@SEC.GOV, and US mail)



Emily Morse-Lee