UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
FILE NO. 3-15124

In the Matter of **DAVID F. BANDIMERE and JOHN O. YOUNG**	**RESPONDENT DAVID F. BANDIMERE'S PRE-HEARING BRIEF**

David A. Zisser
JONES & KELLER, P.C.
1999 Broadway, Suite 3150
Denver, Colorado 80202
(303) 573 -1600 Main
(303) 785-1689 Direct
(303) 573-8133 - Fax
Email: dzisser@joneskeller.com
ATTORNEYS FOR DAVID F. BANDIMERE

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David F. Bandimere was the victim of two related affinity fraud investment schemes. He was induced to invest approximately $1 million of his personal funds by Richard Dalton, who Mr. Bandimere knew for many years through board memberships in organizations active in the Denver faith-based Christian community. Dalton, in 2005, introduced Mr. Bandimere to "Michael" Parrish[1], who ran IV Capital, a Ponzi scheme purporting to engage in trading securities, currency, and commodities. Mr. Bandimere invested more than $400,000 in IV Capital. Dalton, in 2008, ensnared Mr. Bandimere in a second fraudulent scheme called UCR, Ltd., which Dalton ran with his wife. Mr. Bandimere invested more than $500,000 in the UCR scheme.

Mr. Bandimere was a pigeon ripe for plucking. He was not a securities professional, and had relatively little experience with securities, even as an investor. He spent his adult life involved in his family's various automotive businesses, which included the Bandimere Speedway, located in Morrison, Colorado. He is a devout Christian who has devoted much time and money to eleemosynary activities. When the Order Instituting Proceedings (the "OIP") was filed in late 2012, Mr. Bandimere was approaching his 68th birthday, and had never been in trouble a day in his life. He is now 74 years of age and his ongoing dispute with the SEC remains the only blemish on his exemplary life.

The SEC's dispute with Mr. Bandimere arises from that fact that Mr. Bandimere introduced other people to the IV Capital and UCR schemes. After months of receiving the high returns which Parrish and Dalton promised, Mr. Bandimere discussed these apparently advantageous investments with members of his family and close friends. Some of those people

[1] Parrish's real name is Larry Michael Parrish. It appears that he did not use his first name to hide the fact that at the time he met Mr. Bandimere, Parrish, under his real name, was in litigation with the SEC regarding a different allegedly fraudulent scheme.

chose to invest. As a result, Mr. Bandimere played an unwitting but not uncommon role in the Parrish/Dalton frauds. The SEC has long recognized that providing high returns to a respected figure in a community, who then informs others of the apparently successful opportunity, is a ploy frequently used by Ponzi scheme operators to perpetrate their fraud.[2] Now however, the Division disputes that Mr. Bandimere was an innocent dupe, but claims he was a culpable participant in Parrish's and Dalton's fraud.

But the SEC did not always take the position that Mr. Bandimere was a culpable participant in these frauds. To the contrary, Mr. Bandimere was cast as a victim when the SEC filed a complaint against Parrish.

The SEC obtained injunctions and other civil relief against Parrish and Dalton for these fraudulent schemes. Parrish also pled guilty to federal criminal charges in Maryland relating to IV Capital and received a nine-year prison sentence in 2014. Dalton and his wife also pled guilty to federal criminal charges in Colorado relating to UCR. Mr. Dalton received a 10-year prison sentence in 2013. Mrs. Dalton received a five-year sentence at the same time.

It remains to be seen if Mr. Bandimere will be finished with the SEC before Parrish and Dalton are finished with prison.

The purpose of this Pre-Hearing Brief is to assist the presiding officer to evaluate evidence introduced during the hearing by highlighting certain legal and factual issues which Mr. Bandimere now believes to be significant to the correct resolution of this matter. This Brief is not

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[2] See, Speech by SEC Commissioner Luis A. Aguilar, "Combating Securities Fraud at Home and Abroad," Third Annual Fraud and Forensic Accounting Education Conference, Atlanta, Georgia, May 28, 2009. "In these affinity fraud scams, the ringleaders are frequently members of the affected group, who often enlist unwitting community leaders from within the group to spread the word about the scheme." *Accord,* "Affinity Fraud," posted on the SEC website www.sec.gov last changed September 6, 2006; SEC Investor Bulletin: Affinity Fraud, posted on the SEC website, September, 2012.

intended to address all potential issues and should not be seen as a waiver of any issue or issues that are not addressed.

I. ENFORCEMENT'S THEORY THAT MR. BANDIMERE COMMITTED SECURITIES FRAUD IS NOT WELL GROUNDED IN LAW OR FACT

A. The SEC's Theory That Mr. Bandimere Committed Fraud Defies Common Sense.

The weakness of the fraud allegation as articulated in the OIP is obvious, even without a deep dive into the factual details.

This is a Ponzi scheme feeder case. The OIP does not allege that Mr. Bandimere personally ran a Ponzi scheme; rather, the OIP alleges that he introduced investors to Ponzi schemes run by others. But the OIP alleges that Mr. Bandimere acted with an intention to defraud, alleging that because he must have known that the schemes were fraudulent because he was aware of certain facts about both IV Capital and UCR which the OIP alleges were "obvious signs of fraud." OIP, ¶ 36.

Ponzi scheme feeder cases have unique and high hurdles to clear. Ponzi schemes can fool even sophisticated people, including trained SEC investigators. See, "Investigation of Failure of the SEC to Uncover Bernard Madoffs Ponzi Scheme - Public Version," available on the Commission's website. Therefore, facts must be developed to explain why a defendant was not taken in by the fraudulent scheme. Those seeking to impose liability on a feeder, including the SEC, often use hindsight after the scheme collapses to point to any number of facts that are alleged to demonstrate that the feeder knew of the fraud. But fraud cannot be shown by hindsight. *SEC v. Cohmad Securities Corp.*, 2010 WL 363844 *4 (S.D.N.Y., February 2, 2010).

Where, as here, the "feeder" is himself a substantial investor in the scheme, the assertion that feeder acted with an intention to defraud by having others invest in a program in which that person was himself invested is contrary to common sense. If Mr. Bandimere knew that IV

Capital or UCR were fraudulent schemes, he would not have made, and retained, the sizable investments that he made in those programs.

The evidence will show that Mr. Bandimere invested approximately $400,000 in IV Capital and $500,000 in UCR, that his investments were made over time (when the fraudulent nature of the schemes presumably should have become more apparent) and that Mr. Bandimere did not reduce the amount that he had invested. Mr. Bandimere' s large, personal investment in the programs obviously undercuts any inference that Mr. Bandimere must have known the investments were fraudulent. *In re Merkin,* 817 F. Supp.2d 346, 357, fn. 8 (S.D.N.Y. 2011).

B. Mr. Bandimere Made No Actionable Misrepresentations

The SEC's theory that Mr. Bandimere engaged in fraudulent conduct does not improve with a more granular look at the allegations and evidence. The allegations relating to Mr. Bandimere's alleged fraud are set out in ¶¶ 34, 35, and 36 of the OIP, which assert a claim that misrepresentations were made through omissions. In ¶ 34, the OIP alleges in general terms the representations that Mr. Bandimere allegedly made to potential investors. These representations relate to the consistent returns the investments provided, the established track record of performance, that experienced and successful traders were involved in IV Capital and UCR, that Mr. Bandimere's personal dealings with Dalton and Parrish gave him confidence in their abilities, and that he had a long-standing personal relationship with Dalton.

None of these representations are alleged to be false. Rather, ¶ 35 of the OIP lists 15 alleged material facts which Mr. Bandimere allegedly knew, but did not disclose, which "suggested" a different picture of the investments than the one allegedly drawn by Mr. Bandimere, and which would have "demonstrated" that both IV Capital and UCR had "very significant risks."

Omissions of a material fact are actionable only where 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 (2011). Disclosure of even a material fact is not required simply because a reasonable investor would like to know it. *Id., accord, SEC v. St. Anselm Exploration Co.,* 936 F.Supp.2d 1281, 1295 (D. Colo. 2013). Positive statements need not be accompanied by negative statements to create a balance. If only positive aspects of an investment are discussed, but are discussed accurately, there is no violation of the anti-fraud provisions by failing to discuss other aspects of an investment that are not positive. "A duty to disclose arises only when the statement made is material and the omitted fact is material to the statement in that in that it alters the meaning of the statement. *McDonald v. Kinder-Morgan, Inc.,* 287 F.3d 992, 998 (10th Cir. 2002).

The alleged material omissions set out in ¶ 35 of the OIP, do not, either alone or in combination, alter the meaning of any of the statements described in ¶ 34. The consistent rate of return that had been experienced and the established track record of performance (which appear to be the same thing) are statements of historical successes, which do not create a duty to disclose contingencies that might impact future returns. *McDonald,* 287 F.3d at 998; *FindWhat Investor Group v. FindWhat.com.*, 658 F.3d 1282, 1305-6 (11th Cir. 2011) (*citing cases*). None of the allegedly material undisclosed facts set out in ¶ 35 of the OIP constitute contingencies which could affect future performance. And, the evidence will show that the past performance of IV Capital and UCR that Mr. Bandimere may have communicated was not measured by **reported** profits merely communicated to Mr. Bandimere, but by cash that he received on a monthly basis over a period of years. Mr. Bandimere had no need to verify the receipt of cash by communicating with brokers, or auditors, or reviewing statements or trading records.

The only affirmative representations alleged are that Mr. Bandimere characterized the investments as "low risk" or "very good investments." Even if said (which Mr. Bandimere disputes), these generalized statements are non-actionable "puffing." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119-20 (10th Cir. 1997); *Carvelli v. Ocwen Fin. Grp.*, ___ F.3d. ___; 2019 WL 381-9305 **5-6 (11th Cir., August 15, 2019); *SEC v. True North Finance Corp.*, 909 F.Supp. 2d. 1072, 1101 (D. Minn. 2012); *SEC v. Reynolds*, 2008 WL 3850550, at *5 (N.D. Tex. Aug. 19, 2008).

C. Mr. Bandimere Did Not Act with Scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Scienter is a prerequisite to a finding of liability on claims alleging violation of Rule l0b-5. *SEC v. Wolfson*, 539 F.3d 1249, 1256-7 (10th Cir. 2008; *Dolphin and Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008).

Scienter can be established by proof of extreme recklessness. *Dolphin and Bradbury*, 512 F.3d at 639. Recklessness is extreme conduct, more egregious than "white heart/empty head" good faith. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010). Whether a person has acted recklessly has both a subjective and objective component. *Id.*

Mr. Bandimere's personal investment should eliminate any contention that he did not subjectively believe that the IV Capital and UCR programs were legitimate. And the facts alleged in the OIP, even if established, do not show that Mr. Bandimere objectively acted with an intention to defraud.

What makes the conduct described in ¶¶ 34 and 35 fraudulent, according to the OIP, is set out in ¶ 36: that the facts known by Mr. Bandimere, as alleged in ¶ 35 were so obviously indications that both IV Capital and UCR were likely frauds that Mr. Bandimere must have known that the investments were fraudulent. Although ¶ 36 speaks in terms of Mr. Bandimere's "recklessness," recklessness in this context means conduct so clearly misleading that the actor must have been aware of it. *Dolphin and Bradbury,* 512 F.3d at 639; *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1260 (10th Cir. 2001).

Knowledge of the existence of undisclosed facts is insufficient to establish scienter in the absence of knowledge that the undisclosed facts are material, so that the failure to disclose them is likely to mislead investors. *City of Philadelphia* 264 F.3d at 1261; *Dolphin and Bradbury, Inc.*, 512 F.3d at 639. Without a preponderance of evidence that Mr. Bandimere acted with extreme recklessness with respect to both knowing the facts that Enforcement alleges should have been disclosed and knowing that the undisclosed facts were material so that the failure to disclose them rendered misleading something that Mr. Bandimere actually said, Mr. Bandimere's scienter is not established.

In fact, the SEC has taken the approach that plaintiffs in feeder cases typically take: using hindsight to identify facts which are then claimed to have provided notice that an investment was a Ponzi scheme. But whatever clarity about the existence of a Ponzi scheme may emerge from a hindsight look (and here, there is no such clarity) is irrelevant because fraud cannot be established through the lens of hindsight. *Cohmad Securities Corp.,* at 4.

The so-called "red flags" on which the Division relies here are not compelling.[3] The fact that an investment program is run by someone who was previously sued by the SEC, OIP ¶ 35.a, is not an obvious sign of fraud. The SEC may sue someone but lose the case. The violation underlying the suit may relate to a technical matter having nothing to do with a defendant's integrity or competence. And the SEC brings enforcement actions against individuals or entities that are allowed to continue their activities in the securities industry. The fact that a person

[3] Mr. Bandimere does not concede the accuracy of any of the allegations in ¶ 35 but assumes that accuracy for purposes of discussion.

running an investment program has had a dispute about compensation, OIP, ¶¶ 35.b,l,m is not an obvious sign that the investment program is fraudulent. Disagreements about compensation are common in a variety of commercial contexts, including the securities industry, but do not necessarily mean that there is some underlying fraud. The fact that large commissions are paid, OIP, ¶¶ 35.c-e, is not an obvious sign of fraud in the investment vehicle to which the commissions relate. The amount of compensation paid in connection with an investment program can vary for any number of legitimate reasons, and hedge fund managers who are not committing fraud may receive compensation that is enormous by any standard. The absence of paperwork reflecting increases to investments for which there was paperwork when the investment was first made, OIP ¶35.f is not an obvious sign of fraud. Here, records such as wire transfer advices easily established the amounts of additional investments and when the investments were made. The inability to verify independently trading by and results of an investment program, OIP, ¶¶ 35 g-j, is not an obvious sign of fraud. The ability to verify may be beneficial, but there are investment vehicles which are secretive[4], or which purport to use proprietary strategies, which are not obvious signs of fraud. The fact that Mr. Bandimere calculated returns that he believes were due, OIP ¶ 35.k, which he communicated to the investment programs, does not mean that the investment programs were not doing their own calculations, and is not an obvious sign of fraud. To the contrary, Mr. Bandimere believed that it was incumbent upon him to do his own calculation of amounts due from IV Capital and UCR. The fact that an investment manager has not always been successful in the past, OIP ¶¶ 35 n, o is not an obvious indication that later success is the result of fraud.

[4] *Cohmad Securities Corp.* rejected the SEC's argument that the secrecy of the Bernard Madoff scheme created notice of a fraud.

The Commission's unsuccessful attempt to ***state*** a fraud claim against registered brokers who referred investors to a Ponzi scheme illustrates the high bar that exists in establishing recklessness or negligence. In *SEC v. Cohmad Securities Corp., supra,* the SEC claimed that a registered broker-dealer violated the anti-fraud provisions of the securities laws in the course of referring customers to the Bernard Madoff Ponzi scheme. The SEC argued that it raised an inference that the broker acted with scienter by alleging some of the same things that it has alleged here: a generous compensation arrangement to the referring people (some of whom worked from Madoff's business premises), Madoff's secrecy, and the large returns paid by the Madoff scheme. Those alleged facts purporting to show the defendants' scienter were found to be insufficient to sustain a claim of fraud, and were dismissed by the court as being an attempt to allege fraud by hindsight. *Id.* at *4. The same result should be reached here.

D. After Characterizing Mr. Bandimere as a Victim of a Fraud in Court Documents, Enforcement Cannot Now Claim He Was a Culpable Participant in the Same Fraud

Enforcement is barred by the doctrine of judicial estoppel from contending that Mr. Bandimere was not a victim of the IV Capital scheme who was duped by Parrish, but a culpable participant in that fraud.

In the complaint that the SEC filed against Parrish in the District of Colorado, the SEC alleged that, as part of Parrish's fraud, he engaged in lulling activities. Those lulling activities included scheduling a meeting in New York City with two investors, which was cancelled the evening before the meeting was to take place. The SEC referred to those lulling activities in its brief to obtain judgment against Parrish, and Judge Martinez referred to the alleged lulling activities in his Order granting that judgment. Mr. Bandimere was one of the investors referred to in the Complaint as having been lulled by Parrish. Enforcement's contention in this case that Mr. Bandimere must have known that Parrish was running a fraudulent investment scheme is inconsistent with its contention in the complaint against Parrish and in its motion for judgment, that Mr. Bandimere was an investor who was defrauded by Parrish's actions.

The doctrine of judicial estoppel prevents a litigant from talking out of both sides of its mouth on factual issues in different tribunals and is intended to prevent a situation where one tribunal or the other is misled. Factors to be considered in applying the doctrine of judicial estoppel are whether the positions are inconsistent, whether the party asserting the earlier position was successful, and whether the party asserting the position would gain an unfair advantage. The purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process. *New Hampshire v. Maine,* 532 U.S. 742, 749-51 (2001).

Judicial estoppel should prevent Enforcement from claiming that Mr. Bandimere must have known that IV Capital was a fraudulent scheme. When it served its purpose to claim that Mr. Bandimere was a victim who was duped by Parrish, the SEC, in its enforcement action against Parrish, alleged that Mr. Bandimere was the victim of Parrish's lulling activities. The SEC then pointed to the existence of those lulling activities in its motion for judgment, with the result that Judge Martinez specifically referred to the lulling activities in his Order granting judgment. Once the SEC got its judgment against Parrish, it took an inconsistent position to claim that Mr. Bandimere had not been duped at all, because he must have known that the IV Capital scheme was fraudulent. Enforcement either misled Judge Martinez or is attempting to mislead this tribunal. Either way, the doctrine of judicial estoppel does not allow Enforcement to have it both ways.

E. Mr. Bandimere Did Not Violate Section 206(4) of the Advisers Act or Rule 206(4)-8 Promulgated Thereunder.

The OIP asserts as an alternative theory that Mr. Bandimere willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. That claim must fail.

Rule 206(4)-8 became effective on September 10, 2007. Therefore, conduct that preceded the effective date of the rule cannot be actionable as a violation of that rule. *Bartko v. SEC*, 845 F.3d 1217, 1222-3 (D.C.Cir. 2017).

With respect to conduct which allegedly post-dated the effective date of Rule 206(4)-8, the express language of the rule is clear that Mr. Bandimere can violate the rule only if he was an investment adviser to a pooled investment vehicle. Rule 206(4)-8. However, Mr. Bandimere was not an investment adviser within the meaning of the Advisers Act. There is no allegation (and no evidence) that he was in the business of and received compensation for, providing advice regarding investing in securities, which is part of the definition of an investment adviser. Investment Advisers Act, § 202(a) (1 l). Further, there is no allegation (and no facts) that Mr. Bandimere provided investment advice to a pooled investment vehicle. The OIP ¶ 25 admits that the limited liability companies were merely conduits through which investors allocated their funds to specific investment programs of their own choosing. There is no evidence that Mr. Bandimere provided investment advice to any of those limited liability companies. Nor is there evidence that Mr. Bandimere provided investment advice to IV Capital or UCR. Because Rule 206(4)-8 applies only to advisers who advise pooled investment vehicles, that rule cannot be applied to Mr. Bandimere.

II. MR. BANDIMERE WAS NOT A SELLER OF UNREGISTERED SECURITIES

A. Interests in the Limited Liability Companies are not Securities

The definitions of "security" under the Securities Act, the Exchange Act, the Investment Company Act, and Investment Advisers Act do not denominate interests in limited liability companies as securities. Such interests can be securities, if at all, only where they are an "investment contract" within the meaning of those laws. *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F.Supp.2d 376 (D. Del. 2000). Whether an arrangement constitutes an investment contract is a factual question to be determined under the well-known test articulated by the Supreme Court in *SEC v. W. J. Howey,* 328 U.S. 293 (1946), which requires an investment of money, in a common enterprise, with profits to come from the efforts of others.

The interests in the limited liability companies which Mr. Bandimere managed, or co-managed, fail to meet the *Howey* test because they do not involve an investment in a common enterprise. As recognized in the OIP, Section II. ¶ 25, the operation of the limited liability companies (as the members were advised) involved no decision by the limited liability companies about the investments it should make. Rather, each member of each limited liability company directed where his or her money was to be placed, and the return which each member realized depended solely on the investments which the member chose. *Id* Without a common enterprise, the limited liability company interests were not securities under the *Howey* test. Therefore, activities with respect to the sale or distribution of the interests in those limited liability companies are outside the scope of the federal securities laws.

B. Mr. Bandimere was not a Seller of Securities Because his Motivation was to Benefit his Family and Friends and not Himself

The United States Supreme Court, in *Pinter v. Dahl,* 486 U.S. 622, 647 (1988), recognized that Congress did not intend the Securities Act to apply to persons involved in a sale of a security where the person's sole motivation was to benefit the buyer. As stated by the Fifth Circuit Court of Appeals in the case at an earlier stage, *Dahl v. Pinter,* 787 F.2d 985, 991 (1986):

> We believe that a rule imposing liability (without fault or knowledge) on friends and family members who give one and another gratuitous advice on investment matters unreasonably interferes with well...established patterns of social discourse. Absent express direction by Congress, we decline to impose liability for mere gregariousness.

The Supreme Court accepted the Fifth Circuit's view of the law but recognized that whether the advice in that case was truly gratuitous was an unresolved factual issue and remanded the matter for further proceedings. There is a similar factual issue here. Although Mr. Bandimere received compensation for administrative tasks, which Enforcement mischaracterizes as commissions, the evidence adduced at the hearing will show that Mr. Bandimere did not tell people about his investments or play a role in others making their own investments in order to advance his own economic interests.

III. Mr. BANDIMERE WAS NOT A BROKER

A claim for violation of Section 15(a) of the Exchange Act requires that Mr. Bandimere fall within the definition of a "broker" or "dealer." The terms "broker" and "dealer" are defined in Sections 3(a)(4)(A) and 3(a)(5)(A), respectively, of the Exchange Act. An essential element of both definitions is that a person be "in the business" of either affecting transactions in securities for the account of others or buying and selling securities for his own account. Mr. Bandimere was not "in the business" of engaging in either activity.

The hallmark of "being in the business" of affecting transactions in securities for the account of others, or for buying and selling securities for one's own account is the receipt of commissions or transaction-based compensation. *SEC v. Sky Way Global, LLC,* 2010 WL 5058509 (M.D. Fla. Dec. 6, 2010). Mr. Bandimere received no such compensation. The only remuneration which he received was for performing recordkeeping and other administrative functions.

IV. CIVIL PENALTIES ARE NOT AVAILABLE

A. The Only Provisions Providing for Civil Penalties During the Relevant Period do not Apply to Mr. Bandimere

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

The OIP alleges that Mr. Bandimere raised money for two fraudulent schemes, IV Capital and UCR. OIP, ¶ 29. Those schemes ended no later than June 2010. OIP ¶¶ 15 and 17. Because Mr. Bandimere' s conduct pre-dated the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which became effective on July 21, 2010, the statutory scheme applicable to the imposition of sanctions in this case is the one that existed pre-Dodd-Frank. *Bartko v. SEC*, at 1224; *Koch v. SEC*, 793 F.3d 147, 157-9 (D.C. Cir. 2015).

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

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

The action against Mr. Bandimere was not brought properly under Section 15(b)(4) because only registered securities professionals are subject to Section 15(b)(4). The Commission made that limitation clear in *Jacob Wonsover*, 1999 WL 100935 at *10, Rel. No. 34-1123 (Mar. 1, 1999), *aff'd*, *Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000). In that case, the SEC confronted a challenge to its position that a "willful" violation required only that a respondent intended to commit the act that constituted a violation. To support the reasonableness of that position, the Commission interpreted Section 15(b)(4) to apply only to *registered* securities professionals, who were obligated to know the securities laws, and stated "Wonsover--***like anyone else subject to a Section 15(b)(4) proceeding***—is a registered professional in an industry suffused with regulation." (emphasis added) The OIP alleges in ¶ 32 that Mr. Bandimere was not a registered securities professional. Therefore, Section 15(b)(4) does not apply to him.

Section 15(b)(6) is not implicated by any of the allegations in the OIP. There are no allegations that Mr. Bandimere is, or was, a person associated with a broker or dealer, or that he ever sought to become associated with a broker or dealer, or that he was engaged in a penny stock offering. By its terms, Section 15(b)(6) does not apply to Mr. Bandimere either. Indeed, since there are no allegations that Mr. Bandimere engaged in any actions that could bring him within Section 15(b)(6), the OIP did not authorize this proceeding to make any findings regarding Section15(b)(6).

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

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

The OIP does not allege that Mr. Bandimere engaged in misconduct as an investment adviser in order to implicate either Section 203(e) or 203(f) because, as discussed above, Mr. Bandimere did not provide investment advice to any pooled investment vehicle, which puts him outside scope of Rule 206(4)-8.

V. THE FULL AMOUNT OF ALLEGED COMMISSIONS RECEIVED BY MR. BANDIMERE IS NOT SUBJECT TO DISGORGEMENT

Disgorgement is a form of restitution which may be imposed as a penalty in an SEC enforcement action. *Kokesh v. SEC,* 137 S.Ct. 1635, 1640 (2017) Disgorgement is measured by a defendant's wrongful gain. *Id.* Disgorgement is intended to act as a deterrent against violations of the securities laws by depriving violators of the securities laws of the profits causally related to those violations. *Id; SEC v. First City Financial Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989). "But for" causation is not the test; profits that are attenuated from the wrongdoing should not be disgorged. *Id.* at 1232. Disgorgement is not available as a mechanism by which a person can be forced to pay money that is not a "gain." *SEC v. Hately,* 8 F.3d 653, 655-656 (9th Cir. 1993); *SEC v. Miller,* 2006 WL 2189697 (N.D. Ga. July 31, 2006).

The SEC has the burden of proving both that disgorgement is appropriate, and that the amount of disgorgement sought is at least a reasonable approximation of wrongfully obtained profits. *E.g., First City Financial Corp.,* 890 F.2d at 1231; *SEC v. Miller, supra; SEC v. Collins,* 2003 WL 21196236, at *5 (N.D. Ill. May 21, 2003).

For purpose of disgorgement, "gains" are equivalent to "profits." *E.g., Kokesh, id., SEC v. AbsoluteFuture*.com, 393 F.3d 94, 96 (2d Cir. 2004); *SEC v. DiBella,* 409 F.Supp. 2d 122, 127 (D. Conn. 2006). Funds received as a reimbursement for expenses advanced, or the repayment of loans, are not considered to be "gains" because such payments merely restore a person to a previous financial condition. *SEC v. Collins*, supra at * 9. Further, all circumstances giving rise to a putative gain must be considered to determine whether a wrongdoer has realized gains. *SEC v. Hately, supra.*

Three principles limit the amount of disgorgement that Enforcement can obtain here.

First, disgorgement cannot include profits flowing from wrongdoing which occurred prior to December 6, 2007. In *Kokesh* 137 S. Ct. at 1642, the Supreme Court held disgorgement was a penalty within the meaning of 28 U.S.C. §2462, which established a 5-year period of limitation for bringing actions for penalties. In *SEC v. Gabelli,* 568 U.S. 442 (2013), the Supreme Court established that the five-year period of limitations in § 2462, which is applicable to actions by the SEC for penalties, begins to run from the time of the violation, and not its discovery by the SEC. *Gabelli,* 568 U.S. at 454. The OIP was issued on December 6, 2012. Therefore, claims for disgorgement arising from conduct occurring prior to December 6, 2007 are untimely, and must be excluded from any disgorgement claim.

Second, disgorgement can be calculated only on profits received which flow from Mr. Bandimere's proven violation of the law. Mr. Bandimere contends that compensation the limited liability companies received from IV Capital and UCR were not commissions for acting as a broker, but management fees to compensate those entities for performing various services, such as record keeping and preparing tax information. To the extent that Mr. Bandimere received fees calculated on monies that are not shown to have been the product of any violations of the securities laws by Mr. Bandimere, those fees must be excluded from the disgorgement calculation. *SEC v. Revolutions Medical Corp.,* 2018 WL 2057357 *3 (N.D. Ga. March 16, 2018);

Third, the only profits received by Mr. Bandimere are the amounts he may have received that exceeded the return of the full amount that he invested in the two fraudulent schemes. In the context of a Ponzi scheme in which Mr. Bandimere invested approximately $1 million of his own money, a return of a portion of that money from the Ponzi scheme promotor as purported fees is not a "profit" for purposes of calculating disgorgement. Rather, Mr. Bandimere's investment in the fraudulent schemes made him a tort creditor of the schemes, up to the amount he invested.

E.g., In re Bayou Group, LLC, 439 B.R. 284, 297-8 (S.D.N.Y. 2010) The creditor/debtor relationship between Mr. Bandimere on the one hand, and IV Capital, UCR, Parrish and Dalton arose at the time he was fraudulently induced to make his investments. *Id.,* at 335. Payments made to Mr. Bandimere on the antecedent debt that arose when he was defrauded are not subject to disgorgement because the payments did not represent profits, but, rather, represented repayment of debt which tended to restored Mr. Bandimere to the *status quo ante. SEC v. Collins,* 2003 WL 21196236, at *9.

To show a "reasonable approximation" of an amount received by Mr. Bandimere that is subject to disgorgement, it must exclude any amounts derived from conduct which occurred prior to December 6, 2007, must exclude any amount not shown to have been causally connected to any securities law violation committed by Mr. Bandimere, and must exclude payments up to the amount of his investment. If Enforcement fails to provide proof of a reasonable approximation of an amount subject to disgorgement, it cannot obtain that relief. *SEC v. Mapp*, 2018 WL 3570920 *8 (E.D. Tex. July 25, 2018)(SEC does not meet its burden by proving a violation and asserting that all compensation were profits); *SEC v. Life Partners Holdings, Inc.* 2018 WL 5733137 *3 (W.D. Tex., Sept. 8, 2018) *adopting recommendation and report of Magistrate Judge SEC v. Life Partners Holdings, Inc.*, 2018 WL 3913800 *7 (W.D. Tex., Aug. 15, 2018).

VI. CONCLUSION

Mr. Bandimere was a victim of fraudulent schemes, and not a culpable participant. The Court should apply settled legal principles and common sense to the evidence and find that the Division has failed to prove the violations alleged in the OIP.

Dated this 26th day of August 2019.

Respectfully submitted,

JONES & KELLER, P.C.

David A. Zisser
1999 Broadway, Suite 3150
Denver, Colorado 80202
(303) 573 -1600 Main
(303) 785-1689 Direct
(303) 573-8133 - Fax
Email: dzisser@joneskeller.com

ATTORNEYS FOR DAVID F. BANDIMERE

CERTIFICATE OF SERVICE

On August 26, 2019, the foregoing **RESPONDENT DAVID F. BANDIMERE'S PRE-HEARING BRIEF** 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