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 PRE-HEARING BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Respondent David F. Bandimere, through his undersigned attorneys, Davis Graham & Stubbs LLP, submits the following as his Prehearing Brief.

I. INTRODUCTION

The Division of Enforcement (the "Division") contends that Mr. Bandimere invested more than $1 million in two fraudulent schemes even though he knew, or must have known, that he was investing in fraudulent schemes. That contention flies in the face of common sense.

Mr. Bandimere was the victim of two related affinity fraud investment schemes. He was induced to invest more than $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 community. Dalton, in 2005, introduced Mr. Bandimere to Larry Michael Parrish, 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 $600,000 in the UCR scheme.

This action is unprecedented in several important respects. Mr. Bandimere has found no other case where the Division of Enforcement (the "Division") has contended (let alone proved) that an investor in Ponzi schemes was reckless in not understanding that he had been victimized, and was therefore a culpable participant in the scheme by bringing it to the attention of others who also invested. Mr. Bandimere also has found no other case where the Division has brought an administrative proceeding as the initial enforcement action against an alleged Ponzi schemer, thereby depriving the alleged schemer of the procedural protections, such as a jury trial and discovery that would have been available had the enforcement action been initiated in a federal court.

.The SEC has obtained injunctions and other relief against Parrish and Dalton for these fraudulent schemes. Parrish is under Federal indictment in Maryland for the IV Capital scheme, and is awaiting trial, which is scheduled to begin on June 17, 2013.[1] Dalton and his wife have pled guilty to federal charges in Colorado relating to UCR, and are awaiting sentencing.

The Division's beef with Mr. Bandimere arises from that fact that Mr. Bandimere got other people involved in 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 whom chose to invest. By doing so, 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 frequent ploy used by Ponzi scheme operators to perpetrate their fraud.[2] Now however, the Division is pursuing Mr. Bandimere for failing to recognize the fraudulent schemes which ensnared him.

II. SUMMARY OF DEFENSE

Because Mr. Bandimere brought the IV Capital and UCR investments to the attention of his family and friends to serve their financial interests and not his own, he was not a "seller" of a security within the meaning of the Securities Act of 1933 (the "Securities Act"). Mr. Bandimere was not in the business of effecting securities transactions for others, and, therefore was not a

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1 Mr. Bandimere has been informed by the Department of Justice that he will be subpoenaed as a prosecution witness in that case.

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.

broker within the meaning of the Securities Exchange Act of 1934 (the "Exchange Act"). Mr. Bandimere did not violate the anti-fraud provisions of the Securities Act or the Exchange Act because he did not make any material misrepresentations, either affirmatively or by omission, and did not act with *scienter*, or even negligence. The Division is judicially estopped from contending that Mr. Bandimere knew of Parrish's fraud, or was reckless or negligent in not knowing it, because Mr. Bandimere was alleged to be a victim of Parrish's lulling activities in the SEC's Complaint against Parrish, which allegations were referred to specifically in both the SEC's Motion for Judgment and in the Order granting judgment in favor of the SEC. Mr. Bandimere has been denied equal protection of the law, and due process, by being singled out to have these claims against him heard in an administrative proceeding where the protections of a jury trial and full civil discovery have been denied to him, but would have been available in a civil enforcement action filed in federal court.

III. LEGAL THEORIES

A. Mr. Bandimere Was Not a "Seller" of Unregistered Securities.

1. 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 Order Instituting Proceedings, (the "OIP"), Section II. E. 25, the operation of the limited liability companies (as the members were advised) involved no pooling of investments. Rather, each member directed where his or her money was to be placed, so that the return for each owner/member of the limited liability company had nothing to do with the return realized by any other member. *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.

2. Participation in a Joint Venture is Presumed Not to Involve a Security.

As is the case with participation in limited liability companies discussed above, interests in joint ventures or general partnerships are not identified in the definitional sections of the Securities Act, the Exchange Act, or the Advisers Act as being securities. Such interests can be securities, if at all, only where they are investment contracts under the *Howey* test.

However, because of the substantial management powers which general partners or joint venturers have under the law, there is a strong presumption against participation in joint ventures or general partnerships being considered investment contracts, and therefore, securities. *Banghart v. Hollywood General Partnership,* 902 F.2d 805, 807-8 (10th Cir. 1990); *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981) (one ". . . who claims his general partnership or joint venture interest is an investment contract has a difficult burden to overcome.").

That presumption exists even where a joint venturer delegates or acquiesces in a manager directing the affairs of the venture. What must be shown is that the non-managing venturer lacks the power to exercise management control. *Banghart*, 902 F.2d at 808, *Williamson*, 645 F.2d at 423-5.

3. 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 the Division mischaracterizes as transaction based compensation, 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.

B. Mr. Bandimere Was Not a Broker Within the Meaning of the Securities Laws.

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.

C. Mr. Bandimere Did Not Commit Securities Fraud.

For the SEC to establish violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, based on misrepresentations the SEC must prove 1) a material misrepresentation or omission; 2) in connection with the purchase or sale of a security; 3) with *scienter*; and 4) with use of the jurisdictional means. *SEC v. Wolfson,* 539 F.3d 1249, 1256-7 (10th Cir. 2008). The elements of a fraud claim based on misrepresentations under Section 17(a) of the Securities Act is essentially the same, with the primary difference being that a violation of Section 17(a)(2) can be established without proof of *scienter*. *Id.*

1. Mr. Bandimere Made no Factual Misrepresentations.

Securities fraud based misrepresentations can be committed both through affirmative misrepresentations of material fact, and by omitting material facts. The misrepresentations alleged in the OIP almost exclusively concern omissions. OIP, Sections II. E. 35 and 36.

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); *SEC v. True North Finance Corp.*, ___ F.Supp. 2d

___, 2012 WL 5471063, at *29 (D. Minn. Nov. 9, 2012); *SEC v. Reynolds*, 2008 WL 3850550, at *5 (N.D. Tex. Aug. 19, 2008).

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*, 131 S. Ct. 1309, 1321-22 (2011). As the court noted in *Richman v. Goldman Sachs Group*, 868 F.Supp.2d 261, 273-4 (S.D.N.Y. 2012), disclosure of even a material fact was not required simply because a reasonable investor would like to know it. *Accord, SEC v. St. Anselm Exploration Co.,* 2013 U.S. Dist. LEXIS 45547, at *34 (D. Colo. Mar. 29, 2013). The Division is now asking this Court to disregard settled law regarding when the omission of a material fact violates the securities laws, as evidenced by the failure of the OIP to identify a single statement made misleading by the failure to disclose any material fact.

2. Mr. Bandimere Did Not Act With Either *Scienter* or Negligence.

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 10b-5. *SEC v. Wolfson,* 539 F.3d at 1256-7; *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 Intrn'l Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010). Whether a person has acted recklessly has both a subjective and objective component. *Id.*

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 v. Fleming Companies, Inc.*, 264 F.3d 1245, 1261 (10th Cir. 2001); *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 the Division alleges should have been disclosed and knowing that the undisclosed facts were material so that the failure to disclose them rendered misleading something that was actually said, it cannot be found that Mr. Bandimere acted with *scienter*.

Ponzi schemes frequently fool many people, including sophisticated investors and trained SEC investigators. See, "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme – Public Version," available on the Commission's website. Persons claiming that those who made referrals to a Ponzi scheme knew or must have known about the Ponzi scheme must overcome a barrier not easily breached.

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.*, 2010 WL 363844 (S.D.N.Y. Feb. 2, 2010), the SEC claimed that a registered broker-dealer violated the anti-fraud provisions in the course of referring customers to the Bernard Madoff Ponzi scheme. The SEC argued that it pled a sufficient inference of *scienter* by alleging a generous compensation arrangement to the referring brokers (some of whom worked from Madoff's business premises), Madoff's secrecy, the broker's regulatory violations regarding a failure to disclose fully its relationship with Madoff, and the large but varying high returns paid by the Madoff scheme. The facts alleged purporting to show the defendants' *scienter* were all found to be insufficient to sustain a claim of fraud, with the court characterizing them as being essentially reflecting fraud by hindsight. *Id.* at *4.

The so-called "red flags" on which the Division relies here are less compelling than the ones found wanting in *SEC v. Cohmad.* Indeed, the fact that Mr. Bandimere had more than $1 million of his own invested in these schemes virtually precludes a finding that he knew or must have known that the schemes were fraudulent.

Setting a low bar for recklessness, or even negligence, for persons taken in by Ponzi schemes, is inconsistent with a vigorous enforcement effort against those person perpetrating Ponzi schemes. The argument that victims of Ponzi schemes were reckless for failing to recognize the warning signs of a Ponzi scheme suggests that the Ponzi schemers' misrepresentations or omissions were not material, since (according to the Division) any reasonable investor would know those misrepresentations to be false. Watering down the concept of recklessness in order to pursue a Ponzi scheme victim for fraud because he allegedly was reckless in not detecting the fraud will provide a defense to an alleged Ponzi schemer. Providing such a defense to the real culprit appears to be inconsistent with the Commission's avowed stepped-up enforcement efforts against Ponzi schemers.

3. Mr. Bandimere Did Not Employ a Scheme to Defraud.

Scheme liability is not established by calling a fraudulent misrepresentation a "scheme to defraud." *Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972, 987 (8th Cir. 2012). Rather, scheme liability requires proof of participation in an illegitimate, or sham, or inherently deceptive transaction where the defendant's conduct or role has the purpose and effect of creating a false appearance. *SEC v. St. Anselm Exploration Co.*, 2013 U.S. Dist. LEXIS 45547, at *43-44; *SEC v. Daifotis*, 2011 WL 2183314, at *9 (N.D. Cal. June 6, 2011); *SEC v. Lucent Technologies, Inc.*, 610 F.Supp.2d 342, 360 (D. N.J. 2009).

Prohibitions against making misrepresentations, and prohibitions against using a scheme to defraud arise from distinct language in the relevant provisions of the federal securities law.

Schemes to defraud are proscribed in Section 17(a)(1) and (3) of the Securities Act of 1933. The use of fraudulent schemes is likewise prohibited by SEC Rule 10b-5(a) and (c) [17 C.F.R. § 240.10b-5(a) and (c)]. In contrast, misrepresentations are prohibited by Section 17(a)(2) of the Securities Act and SEC Rule 10b-5(b).

The prohibition against the use of fraudulent schemes was intended to address conduct that was different from the conduct addressed by the prohibition against making misrepresentations. As the Eighth Circuit Court of Appeals noted in its recent decision in *KV Pharmaceutical Company*, 679 F.3d at 987, liability under a theory of a fraudulent scheme must be based on conduct that goes beyond misrepresentations or omissions actionable under Rule 10b-5(b).

The deceptive acts on which the Division relies in its theory of scheme liability are "taking money from investors, keeping commissions, setting up entities to act as a vehicle through which to place investor's funds into fraudulent 'investments' and hiding negative material facts from investors." Division of Enforcement's Brief in Opposition to Respondent's Motion for More Definite Statement, p. 4.

There is nothing inherently deceptive, illegitimate, or sham about accepting money from investors, keeping commissions, or setting up entities to use as a vehicle to make investments. Even though money (including Mr. Bandimere's own money) was placed in what turned out to be fraudulent schemes perpetrated by Parrish and Dalton, any contention that it was Mr. Bandimere's purpose to facilitate investments in a fraudulent scheme is without evidentiary support and flies in the face of common sense. To the extent that the Division's claim under a theory of scheme liability is premised on Mr. Bandimere allegedly hiding negative material facts, the Division is improperly trying to circumvent the law regarding when a material omission is actionable by mislabeling as a scheme claim a defective misrepresentation claim which it cannot prove.

Further, the Division 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. 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. Complaint, *SEC v. Parrish*, 1:11-cv-00558 (D. Colo.), ¶ 37. 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. The evidence will show that Mr. Bandimere was one of those investors referred to in the Complaint as having been lulled by Parrish. The Division's contention in this case that Mr. Bandimere was aware of so-called red flags that caused him to know 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 lulled by Parrish's actions.

The doctrine of judicial estoppel prevents a litigant from talking out of both sides of its mouth on factual issues, and is designed to prevent a situation where one court or another appears to have been misled by a litigant. 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); *In the Matter of*

Gordon Brent Pierce, I.D. Rel. No. 425, July 27, 2011, pp. 11-12. Here, the doctrine of judicial estoppel should apply. 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. Then, once the Parrish hay was in the barn, the SEC simply reversed its position and now claims that Mr. Bandimere had not been duped at all, because he knew or must have know that the IV Capital scheme was fraudulent. The Division either pulled a fast one on Judge Martinez in the Parrish case, or is attempting to pull a fast one on this Court now. Either way, the doctrine of judicial estoppel does not allow the Division to have it both ways.

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

The OIP alleges 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 was not effective until September 10, 2007. Therefore, conduct that preceded the effective date of the rule cannot be actionable as a violation of that rule. *SEC v. Daifotis*, at *12.

With respect to alleged conduct which post-dated the effective date of Rule 206(4)-8, the express language of the rule is clear that Mr. Bandimere can be found to have violated 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 because 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)(11). Further, there is no allegation (and no facts) that Mr. Bandimere provided investment advice to a pooled investment vehicle. The Division recognized in OIP Section II. E. 25 that the limited liability companies were not pooled investment vehicles, and there is no evidence that Mr. Bandimere provided investment advice to any of those limited liability companies. Further, there is no evidence that Mr. Bandimere provided investment advice to either IV Capital or UCR. Therefore, there has been no violation of Section 206(4) of the Advisers Act, or Rule 206(4)-8 thereunder.

E. Sanctions.

1. Penalties Cannot be Based on Conduct Pre-Dating December 6, 2007.

The recent decision by the United States Supreme in *SEC v. Gabelli,* 133 S. Ct. 1216, (2013) has established that the five-year period of limitations applicable to actions by the SEC for penalties begins to run from the time of the violation, and not its discovery by the SEC. The OIP was issued on December 6, 2012. Therefore, penalties for violative conduct occurring prior to December 6, 2007 are untimely.

2. Standards for Imposing Sanctions.

In the event that violations are proved, the appropriate sanction (if any) is based on a consideration of a number of factors, including: (1) the degree of *scienter* involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's profession or occupation, that future violations might occur; (5) the sincerity of the defendant's assurances against future violations; (6) the egregiousness of the violation; and (7) the existence of past violations. *In the Matter of Charles K. Seavy,* 2009 WL 1561440, at *6 (Release No. IA-2119 (March 27, 2003)). In considering whether to impose a cease and desist order, some likelihood of a future violation must be shown, which, in the absence of other evidence, may be established by proof of a past violation. *In the Matter of Alchemy Ventures, Inc.*, I.D. Rel. No. 473 (November 28, 2012). However an order imposing sanctions must explain how a reasonable application of the relevant factors supports the sanction imposed. *WHX Corp. v. SEC*, 362 F.3d 854, 859 (D.C. Cir. 2004).

3. Standards Governing Disgorgement.

Disgorgement is an equitable remedy by which a person or entity may be required to surrender ill-gotten gains obtained through the violation of federal securities laws. *SEC v. J.T. Wallenbrock & Associates*, 440 F.3d 1109, 1113 (9th Cir. 2006). 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, at *12 (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., SEC v. First City Financial Corp., Ltd.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989); *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., SEC v. DiBella,* 409 F.Supp. 2d 122, 127 (D. Conn. 2006). Therefore, 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 * 8-9. Further, all circumstances giving rise to a putative gain must be considered to determine whether a wrongdoer has realized gains. *SEC v. Hately, supra*, (where agreement forming the basis of a violation allowed defendant to retain only a portion of proceeds, disgorgement could not include proceeds which the agreement required to be paid to others).

In the context of a Ponzi scheme in which Mr. Bandimere invested more than $1 million of his own money, a return of a portion of that money as purported fees cannot be considered to be a "gain" for purposes of calculating disgorgement.

F. Constitutional Defenses.

Mr. Bandimere has been denied both equal protection of the law and due process of law.

Presumably because of their serious nature, the SEC brings claims against Ponzi schemers in the federal courts. Mr. Bandimere is the exception in that the claim against him has been brought, in the first instance, as an administrative proceeding. The upshot of Mr. Bandimere being forced to litigate a claim of serious wrongdoing in the administrative forum is that he has been denied the opportunity for a trial by jury, and has been denied discovery under the Federal Rules of Civil Procedure which would otherwise have been available to him. The denial of these important rights has impaired his ability to mount a full defense to the claims raised against him. As a consequence, Mr. Bandimere has been denied both equal protection of the laws, and due process, in contravention of the United States Constitution.

IV. 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.

Certification of Word Count

This brief contains 4,699 words, excluding the Table of Contents and Table of Authorities.

Dated this 11th day of April, 2013.

Respectfully submitted,

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