UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15124

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

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June 14, 2013

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

I. INTRODUCTION

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 victimized in Ponzi schemes was reckless in not understanding 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, 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 evidence adduced showed that Mr. Bandimere was the victim of two related affinity fraud investment schemes. Mr. Bandimere is a devout Christian who, for his entire life, has been an active participant in Christian ministry activities. Richard Dalton, who Mr. Bandimere knew for many years through board memberships in organizations active in the Denver evangelical Christian community, solicited Mr. Bandimere to invest with 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.

The Division obtained injunctions and other relief against Parrish and Dalton for these fraudulent schemes.[1] Parrish and Dalton, and Dalton's wife, have pled guilty to federal criminal charges in Maryland and Colorado, respectively, relating to IV Capital and UCR. Parrish awaits sentencing. On June 10, 2013, Richard Dalton received a sentence of 120 months incarceration. Dalton's wife was sentenced to 60 months incarceration.

After months of validation of the representations made by Parrish and Dalton through the regular receipt of the high returns they promised, Mr. Bandimere discussed these apparently advantageous investment programs with members of his family, and close friends, some of whom invested in the fraudulent schemes. By doing so, Mr. Bandimere played an unwitting but not unusual 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] Nevertheless, the Division alleges that Mr. Bandimere must have known IV Capital and UCR were fraudulent schemes when he got other investors involved, and that he willfully violated Sections 5 and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5. Order Instituting Proceeding (the "OIP"), ¶¶ II. G. 48-50.

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1 For Parrish, it was his second SEC injunction; he was subject to an anti-fraud injunction entered by consent in Maryland shortly before he began defrauding Mr. Bandimere.

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.

II. THE DIVISION HAS FAILED TO PROVE THAT MR. BANDIMERE VIOLATED THE ANTI-FRAUD PROVISIONS

A. Legal Standards.

To establish violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) based on misrepresentations the Division must prove 1) a misrepresentation of material fact; 2) in connection with the purchase or sale of a security; 3) with *scienter*; and 4) 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)(2) of the Securities Act are essentially the same, with the primary difference violating Section 17(a)(2) can be established without proof of *scienter*. *Id.*[3]

The Division's burden of proof for all its claims is preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 1004-5 (1981).

B. Mr. Bandimere Made no Material Factual Misrepresentations.

Securities fraud arising from misrepresentations can be committed through both affirmative misrepresentations of material fact, and by omitting material facts which render misleading statements made. The misrepresentations alleged in the OIP almost exclusively concern omissions. OIP, ¶¶ II. E. 35 and 36.

1. Affirmative Misrepresentations.

The only affirmative misrepresentation attributed to Mr. Bandimere is he characterized IV Capital and UCR as "low risk" or "very good investments." OIP, ¶ II. 36. Even if said (which Mr. Bandimere disputes), these generalized statements would have been non-actionable opinions or "puffing." *Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119-20 (10th Cir. 1997);

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[3] Although the Division alleged a theory of scheme liability, which would have implicated Sections 17(a)(1) and (3) of the Securities Act, and Rule 10b-5(a) and (c), it abandoned the scheme liability theory prior to the hearing. SEC Trial Brief, p. 19, n.1.

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).

Further, the Division introduced no evidence that Mr. Bandimere represented the investments to be "low risk" or "very good investments." Even if some investors inferred the investments were good or low risk, from Mr. Bandimere's truthful disclosure of the consistent high returns received in the past, the Division has not met its burden of proof for the allegation that Mr. Bandimere made those representations.

2. Misrepresentation by Omission.

Omissions of a material fact are actionable only where the omitted material 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) ("Rule 10b-5 do[es] not create an affirmative duty to disclose any and all material information."). 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 because a reasonable investor would like to know it. *Accord, SEC v. St. Anselm Exploration Co.*, 2013 WL 1313765, at *11 (D. Colo. Mar. 29, 2013). The OIP does not identify a single statement rendered misleading by the alleged omissions of material fact.[4] The OIP asserts the omissions were material because they "seriously called into question the legitimacy and quality of IV Capital and UCR." OIP, ¶ 36. However, there is no evidence that Mr. Bandimere made any express statements regarding the legitimacy and quality of either IV Capital or UCR rendered misleading by the allegedly omitted material facts.

[4] Mr. Bandimere sought the identification of statements allegedly rendered misleading by material omission of fact in his Motion for a More Definite Statement but that request was denied. Order on Motion for More Definite Statement, February 11, 2013, p. 3.

The investor witnesses to whom Mr. Bandimere described investments were unanimous that the most important factor was the returns the investments provided. There is no claim, and no evidence, that Mr. Bandimere misrepresented the historical returns. The accurate disclosure of historical financial results is not rendered misleading by failing to disclose facts which may raise questions about whether similar results will be achieved in the future; reasonable investors do not believe that historical success connotes the absence of potential problems that could affect future success. *Findwhat Investors Group v. Findwhat.com*, 658 F.3d 1282, 1306 (11th Cir. 2011); *In re Advanta Corp. Sec. Lit.*, 180 F.3d 525, 538 (3d Cir. 1999) (abrogated on other grounds); *Serabian v. Amoskeag Bankshares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994).

The Division otherwise has failed to prove alleged omissions were factual, or material, or that any statement made was rendered misleading by any alleged factual omission. Further, the Division failed to show that Mr. Bandimere acted with *scienter*.

a. The evidence does not show that Mr. Bandimere failed to disclose material facts

"Shorting" Management Fees: The Division asserts as a fact that Parrish and Dalton often wired insufficient funds to Victoria, Exito and Ministry Minded and they regularly violated their agreement to pay promised compensation. OIP, II ¶ 35. l. and m. The Division failed to meet its burden of proving insufficient funds were often wired, or that compensation agreements were regularly violated.

The Division relied primarily on Exhibit 93 to demonstrate that Parrish failed to make full payment of amounts due to the limited liability companies. Exhibit 93 is an analysis prepared by Mr. Bandimere during the investigation at the request of the Division, reflecting the management fees which Mr. Bandimere had received from the limited liability companies. However, Exhibit 93 does not show the management fees paid by Parrish to the limited liability

companies; rather, it shows only what Mr. Bandimere withdrew and when he withdrew it. Tr. 1126:14-1129:8.

The Division attempted to prove that Mr. Bandimere was regularly "shorted" on his management fees by referring to an entry on p. 33 of Exhibit 93 reflecting Mr. Bandimere received $7.00 in management fees for Victoria relating to June, 2008 earnings received in July, 2008,[5] an entry on p. 38 of Exhibit 93 reflecting Mr. Bandimere received no management fees for Exito for June, July, and August 2008, an entry on p. 42 of Exhibit 93 reflecting Mr. Bandimere received minus $300 in management fees for Victoria for earnings paid in July, 2009, and an entry on p. 45 reflecting Mr. Bandimere received minus $281 in management fees for earnings paid in January, 2009. Tr. p. 891:19-892:5; 894:4-19: 895:4-16; 895:17-23. However, these entries do not show that Parrish sent inadequate funds.

Mr. Bandimere prepared calculations for payments due from IV Capital including payments for both earnings and fees, which are in evidence in Exhibits 14 and 111. A comparison between the amounts requested (Exhibit 111, pp. 582 and 586; Exhibit 14, p. 429) for the months that the Division claims Exhibit 93 shows were underpaid, and the amounts received as reflected in general ledgers of Victoria (Exhibit 137, p. 46) and Exito (Exhibit 138, p. 16) establishes that for each of those months, Parrish sent exactly the amount that Mr. Bandimere said was due. The only evidence of an instance where Parrish did not send the amounts that were requested occurred in May, 2008, when a payment of $36,472 for Victoria and $44,136 for Exito were made by IV Capital for April earnings and fees instead of $38,520 and $46,850, respectively, which had been requested. (Exhibit 111, p. 580; Exhibit 137, p. 100; Exhibit 138, p. 16). However, those discrepancies were caused by Parrish's use of the

[5] Although the Division asserted in its Supplemental Statement in purported compliance with this Court's Order requiring a more definite statement that Mr. Bandimere knew no later than June, 2007, that Parrish was sending insufficient payments, the earliest evidence it offered was more than a year later.

calculation sheet sent for the prior month, resulting in the same amounts being sent to Victoria and Exito in successive months, Exhibit 111, p. 614, and were corrected days after they were brought to Parrish's attention. Exhibit 138, p. 16.

As shown by the accounting records which the Division had for years before the OIP was filed, but apparently never analyzed, Parrish did not send inadequate funds or violate any compensation arrangement.

The Division attempted to show that Dalton "shorted" Mr. Bandimere by reference to Exhibit 130, which contained notes made by Mr. Bandimere of payments due from UCR, and the payments received.[6] However, that attempt failed.

Exhibit 130 does not support the Division's claim that Dalton frequently "shorted" the compensation paid; Exhibit 130 reflects some sloppy bookkeeping by UCR whereby UCR sent the correct amounts, but did not allocate the amounts correctly among the limited liability companies. February, 2009 earnings for all three entities were paid in full to Victoria by two payments dated March 6, 2009 and March 10, 2009. Exhibit 130, p. 2274; Exhibit 137, p. 99. Exhibit 130, p. 2283 reflects an underpayment to Ministry Minded of $2,639, but an overpayment to Victoria of $2,640 in April, 2009. Similarly, an underpayment to Ministry Minded of $2,640, but an overpayment in like amount to Victoria was made in May, 2009. Exhibit 130, p. 2283. Victoria was underpaid $1,440 and Ministry Minded was underpaid $2,640 in June, 2009, Exhibit 130, p. 2282; however, those underpayments were made up by payments on June 29, 2009. Exhibit 13, pp. 2198 and 2200. There were no underpayments from October, 2009, to March 2010, after which payments stopped entirely.

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[6] Although the Division contended that Mr. Bandimere knew that he was receiving insufficient funds from UCR no later than September, 2008, the first claimed insufficient payment occurred on September, 2009, a year later.

The only underpayment not promptly made up occurred in September, 2009, when UCR paid the same amount it had paid in August, resulting in a total underpayment of $24,157.00. Exhibit 130, p. 2280. That underpayment was partially made up by repayments in November, 2009, and February, 2010. Exhibit 137, p. 98, Exhibit 138, p. 15; Exhibit 139, p. 38. There was $8,596.50 unpaid when UCR stopped making payments after March, 2010.

The Division did not present other evidence that Parrish or Dalton paid significantly less in management fees than they promised. Rather than call a staff accountant to present a forensic analysis, the Division counsel, during its direct examination of Mrs. Bandimere, made a general, seat of the pants calculation which purported to show that Mr. Bandimere should have received approximately $100,000 more in management fees than he received. Mrs. Bandimere, who was a prop to allow Division counsel to present a summary analysis which should have been presented by a witness, under oath and subject to cross-examination, did not accept that analysis as accurate. Tr. 1041:6-1053:12.

That calculation was flawed, notwithstanding the Division's insistence its numbers were conservative. The Division again erroneously equated what Mr. Bandimere withdrew as management fees with what was paid as management fees. But, Mr. Bandimere did not take all the fees paid to the entities. The Division's calculation did not consider there were exceptions to the general management fee arrangement, such as the fact that Mr. Bandimere was not entitled to a management fee for the first $200,000 which he had contributed.

Mr. Bandimere's rebuttal analysis, which is embodied in Exhibits 236, 237, and 238, reflects that the actual management fee shortfall was approximately $10,000, or slightly above 1% of the management fees received. Almost all of that is due to the single incorrect payment

made by Dalton in September, 2009, that was only partially made up by the time UCR collapsed.[7]

The Division failed to prove that either Mr. Parrish or Mr. Dalton "often" wired insufficient funds to the limited liability companies, or that either "regularly violated their agreements to compensate Bandimere, and Bandimere was paid significantly less than he was promised . . . ." Therefore, failing to make those disclosures was not omitting a material fact.

Mr. Bandimere did not know that Parrish had been sued by the SEC. The Division failed to prove that Mr. Bandimere knew, or even believed, that Parrish had been sued by the SEC in 2005, as alleged in OIP ¶ II. E. 35. a. Mr. Bandimere does not dispute he was told that Parrish had an unspecified regulatory issue in 2004 or 2005, which Mr. Bandimere was told had been resolved. However, there is no evidence that Mr. Bandimere had any knowledge that the issue rose to the level of a lawsuit brought by the SEC. Although the Division alleged that Mr. Bandimere admitted to an unidentified investor he knew that the SEC had previously sued Parrish, the Division called no witness to support that allegation.

[redacted], an investor witness called by the Division, testified that after Parrish had disappeared, Mr. Bandimere told her he knew in 2005 that Mr. Parrish had had an issue with the SEC resolved and was not considered a problem, but she did not testify that Mr. Bandimere said that Mr. Parrish had been sued by the SEC. Tr. 285:24 to 287:24. [redacted], investor witnesses called by the Division, each testified that prior to their investments, Mr. Bandimere had volunteered to them that Parrish had had an issue with the SEC resolved; neither testified that Mr. Bandimere said that Parrish had been sued by the SEC.

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[7] Because the Division's calculation was not embodied in an exhibit, Mr. Bandimere's rebuttal analysis was prepared in the limited time available after Mrs. Bandimere's testimony.

The Division abandoned its allegation during the hearing and asked investor witnesses whether Mr. Bandimere had informed them that Parrish had prior SEC "problems." Tr. 165:16-21; 465:12-18; 553:4-6; 592:11-13; 777:13-15. However, the Division cannot establish a violation through proof of conduct not alleged in the OIP. *Charles M. Weber*, 1953 WL 44090, at *2 (Rel. No. 34-4830, Apr. 16, 1953). Allowing a *de facto* post-hearing amendment to the claims would be an improper denial of proper notice to Mr. Bandimere of the allegations against which he had to defend. *Jaffee & Co. v. SEC,* 446 F.2d 387, 393-4 (2d Cir. 1971). Also, amending the OIP after the Division has failed to prove what it alleged could establish the undesirable implication that the Division can get a mulligan when needed for it to win. *See*, *Carl L. Shipley*, 174 WL 161761, at *5 (Rel. No. IA 419, June 21, 1974).

Reason that Dalton Stopped Working with Parrish: The OIP alleges that Mr. Bandimere was told by Dalton that Dalton stopped working with IV Capital and Parrish because of problems getting paid commissions. OIP, ¶ II. E. 35. b. No evidence was offered to support that allegation. Mr. Bandimere testified he understood that Parrish and Dalton had disagreements, but the nature of the disagreements was not specified. Tr. 934:10-15. [redacted] contends that Mr. Bandimere told her that Dalton stopped doing business with Parrish because of a difficulty in getting unspecified "contracts" and Parrish's general unresponsiveness. Tr. 237:9-16; Exhibit 71, p. 2. Mr. Syke testified he heard that Dalton stopped having money with Parrish but did not know the details regarding the reason. Tr. 778:6-15. However, there is no evidence that Parrish and Dalton stopped doing business because of a dispute over commissions, or that Mr. Bandimere believed that to be the case.

Mr. Bandimere Knew That Neither IV Capital nor UCR Had Any Financial Statements and Were Not Audited: The OIP at ¶ II. E. 35. g alleges that Mr. Bandimere knew that neither

IV Capital nor UCR had financial statements and were not audited. No evidence supports this allegation. Mr. Bandimere testified he did not receive financial statements from IV Capital or UCR, and did not know whether they had been audited. Tr. 903:9-904:4; 1112:8-11.

Dalton Had Financial Problems because of Unsuccessful Investments: The OIP alleges that Mr. Bandimere knew that Dalton had serious financial problems because of his unsuccessful investments. OIP, ¶ II. E. 35. o. No evidence supports this allegation. While there is evidence that Dalton experienced serious financial problems, and rented an apartment for $800 per month in an apartment complex owned by Mr. Bandimere, there is no evidence those financial difficulties resulted from unsuccessful investments. There is evidence that Dalton worked for, but did not own, a multi-level marketing venture, that Mr. Bandimere assumed went bankrupt, and a second such company from which he had been dismissed. Tr. 874:12-875:6. However, there is no evidence that Dalton was an investor in either of those enterprises,[8] that Dalton's financial difficulties related to those enterprises, and even if they did, that the difficulties were caused by losing an investment rather than failing to receive compensation he had earned because of the bankruptcy. Mr. Bandimere perceived that Dalton had succeeded financially in multi-level marketing. Tr. 1119:10-21. Further, because Dalton rented an apartment from Mr. Bandimere from approximately 2004 through 2006, Tr. 879:5-9, and UCR began in 2007, Exhibit 58, p. 4, there is no inconsistency between Dalton's living circumstances when he was Mr. Bandimere's tenant and whatever income which Dalton may have claimed to have earned from UCR. Also, there is no evidence that Dalton made any representations to Mr. Bandimere (or anyone else) about his earnings from UCR.

[8] The only evidence that Dalton "invested" anything in any multi-level marketing enterprise was the payment of a $500 or $600 membership fee. Tr. 1243:18-1244:12.

Even if Mr. Bandimere understood that Dalton had not previously managed a successful investment program, that lack of experience was not material. Dalton was not held out as managing anything. Rather, he was described as a liaison. Tr. 418:11-419:9.

b. There is no evidence that Mr. Bandimere made statements to investors rendered misleading by omissions of material fact as alleged.

[redacted]: Mr. [redacted] knew Mr. Bandimere from a car club in which they were each members. Tr. 154:10-18. At a car club meeting in late December 2007, during a discussion of club finances, Mr. Bandimere indicated he knew of an investment where the club could earn 30% annually on $1,000 of excess funds in the club's treasury. Tr. 155:4-24. Mr. [redacted] sought out Mr. Bandimere to obtain additional information regarding the investment opportunity, which Mr. [redacted] was interested in making for himself. Tr. 156:10-24.

Mr. [redacted] and his wife met with Mr. Bandimere, but Mr. [redacted] had little recollection of what was said by Mr. Bandimere. Tr. 157:12-17. Mr. [redacted] clearest recollection related to the return, which was represented to be 2.5% per month. Tr. 160:7-18. Mr. [redacted] made an initial investment, which he later increased after seeing the initial investment performed as he was led to believe it would. Tr. 187:15-188:6.

Nothing in Mr. [redacted] testimony supports the allegation that Mr. Bandimere made any representation rendered misleading by a failure to disclose the matters alleged in ¶ II. E. 35 of the OIP. The only specifics recalled from Mr. Bandimere's discussion with Mr. [redacted] regarding the investments related to returns and the need to diversify. Tr. 189:15-23. However, the information provided by Mr. Bandimere to Mr. [redacted] regarding historical returns was accurate; Mr. Bandimere had for almost a year had been receiving returns of at least 2.5% per month. Although the Division alleged that the matters it contends were facts would have called

into question the "legitimacy and quality" of the investments, OIP ¶ II. E. 36, even if true, no misleading statement or misrepresentation by omission has been shown. It is well-established that the accurate disclosure of historical financial results is not rendered misleading by failing to disclose facts which may indicate that the same results may not be achieved in the future. *Findwhat Investors Group v. Findwhat.com*, *supra*; *In re Advanta Corp. Sec. Lit.*, *supra*; *Serabian v. Amoskeag Bankshares, Inc.*, *supra*.

The Division has failed to prove that Mr. Bandimere represented anything to Mr. [redacted] that was rendered misleading by a failure to disclose matters alleged as material facts in ¶ II. E. 35 of the OIP.

[redacted]: The testimony of [redacted], an investor witness called by the Division, provides no support for the Division's fraud claims. Ms. [redacted]'s introduction to IV Capital, and the investments she made, were not the result of anything said by Mr. Bandimere. According to [redacted], her physician introduced her to someone who claimed to have had a positive investment experience with IV Capital and Parrish. Ms. [redacted] discussed those experiences with that person, who then referred her to [redacted] to obtain more information. After speaking with Mr. [redacted], Ms. [redacted] spoke directly with Parrish, and based on those discussions, made substantial investments in IV Capital. Tr. 204:24-206:21; 203:23-209:16. Her initial investment of $750,000, which the Division alleged was induced by Mr. Bandimere's misrepresentations, was transmitted by her to Mr. Parrish's Bermuda bank account before she ever spoke to Mr. Bandimere. Tr. 266:19-267:10; 273:2-8.

The only other investment which the Division contends Ms. [redacted] made because of misrepresentations made by Mr. Bandimere occurred in April, 2008, when Ms. [redacted] invested $500,000 of funds in her IRA account with IV Capital. However, Ms. [redacted] did not

testify to any discussion with Mr. Bandimere regarding Parrish or IV Capital for that investment. Tr. 320:25-326:7. Rather, she testified only that Mr. Bandimere told her that IV Capital could accept funds from IRAs, which she then verified with Parrish. Tr. 221:2-223:16.

Ms. [redacted] did not testify to any discussion she had with Mr. Bandimere in which he made any representations relating to the two investments identified by the Division. Therefore, Ms. [redacted]s testimony does not support the Division's fraud claim.

[redacted]: Mr. [redacted], a former employee of the Boeing Company, is a self-employed dealer in real estate. Tr. 285:20 to 286:9. Mr. [redacted] was introduced to Mr. Bandimere by [redacted], a carpenter who he had hired, who had also done work for Mr. Bandimere. Tr. 286:19-287:6. Mr. [redacted] informed Mr. [redacted] of Mr. Bandimere's apparently successful investments, and arranged a meeting between them. Tr. 287:17-24.

Mr. [redacted]'s recollection of his meetings with Mr. Bandimere was imprecise. He testified that Mr. Bandimere discussed several types of investments, and that one of the investments, in which Mr. [redacted] participated, was supposed to pay 2% per month. Tr. 287:25-288:11. Mr. [redacted] provided no further details on anything that he was told by Mr. Bandimere. Mr. [redacted] got the impression that the investment was safe because Mr. Bandimere had some of his money and money from some of his friends in the investment. Tr. 304:22-305:4.

Mr. [redacted]s testimony provides no evidence of a statement made by Mr. Bandimere rendered misleading by omitting matters alleged (and established as facts) in the OIP, ¶ II. 34.

[redacted]: Mr. [redacted] had been employed as a securities professional, and licensed to sell mutual funds and limited partnerships. Tr. 437:5-11. He met Mr. Bandimere in January, 2008 at a religious retreat in California. Mr. Bandimere, in a discussion about significant developments in his life, mentioned the investment success which he had been

having. Tr. 438:11-23. Mr. [redacted] followed up with Mr. Bandimere about the possibility of getting involved in those same investments. Mr. [redacted]'s recollection of the discussions he had with Mr. Bandimere was general, and he recalled discussions about the minimum investments, and the possible returns. Tr. 439:25-440:11. When Mr. Bandimere advised Mr. [redacted] of possible investment returns, he advised Mr. [redacted] what the investments had been returning for Mr. Bandimere and others up to that point. Tr. 480:11-18. Mr. [redacted] understood that historical returns would not necessarily continue to be realized in the future. Tr. 482:10-14.

The Division failed to show that Mr. Bandimere had said anything to Mr. Blackford rendered misleading by failing to disclose the matters alleged (and proved) in OIP, ¶ II. E. 35.

John Davis: John Davis was referred to Mr. Bandimere by Dalton. Mr. Davis had met with Dalton to explore the possibility of investing with him at the suggestion of a friend of Mrs. Davis' wife, who claimed to have had a successful experience with investments arranged by Dalton. According to Mr. Davis, Dalton said he was not interested in having Davis as an investor because Davis was willing to invest only $20,000. However, Dalton stated that Mr. Bandimere might assist him, and suggested that Davis contact Mr. Bandimere.

Mr. Davis contacted Mr. Bandimere and Mr. Davis and his wife met with Mr. Bandimere. Mr. Bandimere explained various investments that could be made. As was the case with other investors, Mr. Davis' recollection of what Mr. Bandimere told him about any specific investment was general. However, nothing that Davis claimed he was told by Mr. Bandimere was rendered materially misleading by failing to disclose the matters alleged (and proved) in OIP, ¶ E. 35.

Harley Hunter: Harley Hunter was a long-time friend of Mr. Bandimere, and a securities industry professional. Tr. 544:3-10. Mr. Hunter had been a broker-dealer for over 20 years who dealt primarily in tax shelters. Tr. 545:3-10. According to Mr. Hunter, Mr. Bandimere mentioned to Mr. Hunter in a telephone conversation what he had been doing in making investments. The statement by Mr. Bandimere which Mr. Hunter recalled that was most important to him was that Mr. Bandimere himself had made a large investment. Tr. 546:22-547:4. Mr. Bandimere in subsequent conversations told Mr. Hunter he had invested in IV Capital, which was run by a trader named Michael Parrish. Mr. Hunter testified the percentage of compensation to be paid to Victoria, was disclosed to him. Tr. 562:13-23. Mr. Hunter's wife, through a family trust, invested $350,000 in IV Capital through a Joint Venture Agreement made directly with IV Capital. Tr. 561:3-24; Exhibit 220. Mr. Hunter testified that Mr. Bandimere had disclosed to him that Mr. Parrish had had some problem with the SEC in the past. Tr. 555:1-4.

Mr. Hunter engaged in substantial due diligence regarding Mr. Parrish, including several conversations with Mr. Parrish, both over the telephone and in person. Mr. Hunter advised Mr. Bandimere he was familiar with Parrish's trading strategy, and that it was a viable strategy. Tr. 558:7-559:10. The only statements made by Mr. Bandimere to which Mr. Hunter testified were disclosing Mr. Parrish's earlier SEC issue, the amount of the management fee, that Parrish was a professional trader, that he had a long-term track record, and that Mr. Bandimere had invested with him for a long period of time. Nothing in Mr. Hunter's testimony supports the Division's assertion that Mr. Bandimere said anything to Mr. Hunter rendered misleading by omitting matters alleged in ¶ II. E. 34 of the OIP.

Mr. Hunter's testimony provided no evidence that any statement made by Mr. Bandimere was misleading due to any omitted material fact know by Mr. Bandimere.

James Koch: Mr. Koch has known Mr. Bandimere for almost 40 years. Tr. 579:25-580:1. He testified he would have breakfast with Mr. Bandimere from time to time, and that at one such breakfast in late 2008 or earlier 2009, Mr. Bandimere raised investments. Tr. 581:13-582:9. Mr. Koch is the only investor called about which there is a factual dispute regarding how, and by whom, investments were raised; Mr. Bandimere's recollection is that Mr. Koch raised the issue. Tr. 1237:25-1238:13. Mr. Koch admitted, albeit reluctantly, that by the time of the meeting at which he discussed investments first with Mr. Bandimere, two of Mr. Koch's sisters, Kathleen Abbas and Sue Deebe had been investors with Mr. Bandimere, and were pleased with the results of their investments. Tr. 615:14-618:21; 621:11-25.[9]

Mr. Koch has a master's degree in education from Colorado University, Tr. 610:3-20, and had served as a school principal. Tr. 611:7-19. Mr. Koch also, at various times, had worked for Mr. Bandimere in some Bandimere family's automotive businesses. Tr. 612:11-613:3.

Mr. Koch testified that Mr. Bandimere told him that one of the investments was run by Michael Parrish, and returned 2% a month. He said that another company returned 4% a month, but did not identify who ran that program. Tr. 584:17-585:21.

Mr. Koch spoke to several people regarding the investments that Mr. Bandimere had discussed prior to making any investment. Those people included Shaun Pearman, Mr. Bandimere's attorney, who had attended the initial meeting between Mr. Bandimere and

[9] Mr. Bandimere's testimony is more credible on this point. Because Mr. Koch knew that family members had invested profitably with Mr. Bandimere, it is reasonable that he would inquire about the opportunities. By the time Mr. Koch claims that Mr. Bandimere raised the issue of investments, Mr. Bandimere had been involved in making investments for years, but never raised the issue with Mr. Koch. Further, Mr. Koch expressed animosity toward Mr. Bandimere during his testimony. Further, Mr. Koch's evidence was inconsistent in important respects, particularly where he claimed in Exhibit 144 that he had asked Mr. Bandimere specifically about Dalton's involvement before making the investment then admitted that he had not, Tr. 654:16-656:2, but then later reaffirmed the correctness of Exhibit 144. Tr. 665:5-14.

Michael Parrish, and Mr. Bandimere's brother. Tr. 585:22-586:20. According to Mr. Koch, he asked Mr. Bandimere the identity of the person running the Universal Consulting program, but Mr. Bandimere declined to identify that person. Tr. 598:1-6.

Nothing in Mr. Koch's testimony supports the Division's contention that Mr. Bandimere made any statements rendered misleading by failing to disclose the matters alleged in ¶ II. E. 34 of the OIP. Nor did Mr. Bandimere make any misrepresentation when he declined to identify the person running Universal Consulting in response to Mr. Koch's inquiry. In *Jensen v. Kimble*, 1 F.3d 1073, 1077 (10th Cir. 1993), the court held that failing to identify a person involved in a transaction in response to an inquiry was not misleading within the meaning of the securities laws.

Sam Radke: Mr. Radke and Mr. Bandimere have been friends for 50 years. Tr. 667:17-19. Mr. Radke has an undergraduate degree in accounting and an MBA. His career has focused on the financial aspects of hospital administration. Tr. 701:15-702:4.

Mr. Radke first heard of the possibility of an investment through Mr. Bandimere at a meeting of the Board of Directors of the Abbas Ministries on which both Mr. Radke and Mr. Bandimere served. Tr. 667:23-668:23. Mr. Bandimere, in a board discussion about a possible investment of cash held by the ministry identified the investments in IV Capital. *Id.* Mr. Radke was tasked with following up with Mr. Bandimere to get more details regarding that investment. Tr. 669:6-18. Because of those discussions, both the Abbas Ministries, and Mr. Radke himself, invested with IV Capital. Tr. 671:9-22. Mr. Radke testified that Mr. Bandimere told him that over a period of years, IV Capital had a targeted return, and it had consistently achieved that return. Tr. 669:19-670:9. Mr. Radke testified further that Mr. Bandimere

informed him that Michael Parrish, who ran IV Capital, had prior problems with the SEC that had been resolved. Tr. 678:6-679:9.

Nothing in Mr. Radke's testimony supports the Division's contention that Mr. Bandimere told him anything that was rendered misleading by omitting the statements alleged in ¶ 34 of the OIP.[10]

Cameron Syke: Cameron Syke is an attorney, a certified public accountant, and a former registered representative of a securities brokerage firm. Tr. 718:10-23; 738:6-24; 781:8-782:4. He was a licensed real estate broker and had engaged in futures trading. Tr. 727:3-19. He had known Mr. Bandimere for several years from their involvement in several Christian humanitarian activities. Both Mr. Syke and Mr. Bandimere served on the board of an entity called Global Connection International, a Christian humanitarian organization. Tr. 719:8-18.

Mr. Syke first heard about investments in IV Capital from Mr. Bandimere, during a board meeting of GCI where the board was discussing possible investments for cash held by GCI. Mr. Syke met with Mr. Bandimere to inquire further about IV Capital, both on behalf the GCI board, and on his own behalf. Tr. 721:4-24; 723:23-724:18. He also conducted substantial due diligence, including meetings and discussions with Mr. Parrish. Tr. 765:15-768:4; 768:25-769:24; 25-769:24; 775:11-777:12; 786:4-788:17; 805:15-806:25. Mr. Syke testified that Mr. Bandimere had described IV Capital as a professional trading organization that Mr. Bandimere had learned about from Dalton. Tr. 724:19-725:5. Mr. Bandimere also told Mr. Syke that the IV Capital investment had produced income every month, and was very dependable. Tr. 725:20-726:5: Mr. Syke testified that Mr. Bandimere described the diamond program as involving

[10] Mr. Radke testified that in approximately April, 2008, he was informed of the fees that he would be charged, but did not recall the percentage that he was told. Tr. 687:22-703:6-22; Exhibit 126, p. 1838.

contacts that Dalton had in Africa who could purchase diamonds on a wholesale basis and resell them in the United States. Tr. 757:22-758:18.

Mr. Syke was told of the fees paid by IV Capital. Tr. 745:3-19. He was also aware from his own due diligence that Parrish would not provide supporting documentation, such as financial statements and trading records. Tr. 775:11-20.

Although Mr. Syke did not recall being told that the fees paid by UCR were 24% annually, Tr. 751:2-21, that is not an accurate description of the fee arrangement, which was 2% per month of money placed with UCR. Because the amount of money placed with UCR changed over time, expressing a monthly fee on an annualized basis (to make the fee sound higher) is both inaccurate and misleading. Mr. Bandimere testified that Mr. Syke knew of the UCR management fees, which testimony is corroborated by Exhibit 9, p. 1, which is an earnings report provided to Mr. Syke which reflects a 6% return on Mr. Syke's investment with UCR, which represents both the investment return and the management fee.

Nothing in Mr. Syke's testimony supports the Division's contention that Mr. Bandimere made representations rendered misleading by failing to disclose the matters alleged in ¶ II. 34 of the OIP.

c. 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.[11] 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.* Recklessness means that the propensity to mislead was so obvious that the actor must have known it.

Knowledge of undisclosed facts cannot establish *scienter* absent knowledge that the undisclosed facts are material, so failing 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 regarding both knowing the facts that the Division alleges should have been disclosed and knowing the undisclosed facts were material so failing to disclose them rendered misleading what was said, it cannot be found that Mr. Bandimere acted with *scienter.*

The Division's ability to prove that Mr. Bandimere acted with *scienter* is inextricably tied to its ability to prove that Mr. Bandimere knew or must have known IV Capital and UCR were fraudulent investment programs. This is true notwithstanding the Division's last minute argument in its trial brief, to the contrary, and this Court's apparent acceptance of that argument. The link between Mr. Bandimere's *scienter* and knowledge that IV Capital and UCR were frauds is set out expressly in OIP, ¶ II. E. 36. The purpose of this hearing, as authorized and directed by the Commission, is to determine whether the allegations of Section II of the OIP are true. OIP, ¶ III. A. The Commission did not authorize a hearing to determine whether the Division could

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[11] The Supreme Court has not yet accepted that recklessness satisfies the *scienter* element. Mr. Bandimere's position is that it does not, and that proof of actual intent is required. However, Mr. Bandimere recognizes that recklessness suffices in the District of Columbia Circuit, and, without waiver of his position, addresses the recklessness standard.

prove any set of facts not alleged in the OIP that could support a finding of violations. Further, Mr. Bandimere would be prejudiced if the Division may demonstrate recklessness under a theory not identified in the OIP. Mr. Bandimere presented expert testimony on the recklessness alleged. He would have offered evidence on other theories of recklessness had they been put in issue.

There is no mystery why the Division is running away from the allegations of OIP ¶ II. E. 36: no unbiased, reasonable finder of fact is likely to accept the proposition that Mr. Bandimere, who had invested large amounts of his personal wealth in these schemes, [12] would have done so had he known (either under the "actual knowledge" standard, or the "must have known" standard arising from severe recklessness) that the schemes were fraudulent. *In re Merkin and BDO Seidman Sec. Lit.*, 817 F.Supp. 2d 346, 357, n.8 (S.D.N.Y. 2011) (". . . Merkin's significant personal exposure to Madoff's fraud also belies any inference of intent.").

It is difficult to prove knowledge of a Ponzi scheme even where a defendant does not have skin in the game. Fraudulent investment programs such as Ponzi schemes fool many people, including sophisticated investors and trained SEC investigators. *See* Exhibit 239. Persons claiming 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 failing to understand that an apparently legitimate investment is actually a fraudulent scheme. In *SEC v. Cohmad Securities Corp.*, 2010 WL 363844 (S.D.N.Y.

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[12] The OIP dramatically understated the amount of Mr. Bandimere's personal investment; did not mention that Mr. Bandimere invested substantially in UCR (both the trading and diamond programs) or that he guaranteed investments made by others. It also dramatically understated the investments Mr. Bandimere made in IV Capital, and referred only to those investments made in 2005 and 2006 (arguably prior to the time it claims that he knew of the fraud), but did not refer to the substantial investments which he made later. Compare, OIP, ¶ II. E. 19 and Exhibit 201, pp. 3-4, and references. Once the Division was aware that the true extent of Mr. Bandimere's personal investment would come out at the hearing, it abandoned the theory that the Commission authorized. It has yet to articulate the replacement.

Feb. 2, 2010), the SEC claimed that a registered broker-dealer violated the anti-fraud provisions while referring customers to the Bernard Madoff Ponzi scheme. The SEC argued 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 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.* The fact that Mr. Bandimere had more than $1 million of his own invested in these schemes virtually precludes a finding he knew or must have known that the schemes were fraudulent. *In re Merkin and BDO Seidman Sec. Lit.*, 817 F.Supp. 2d at 357, n.8.

Private litigation against those who recommended investments in what proved to be Ponzi schemes are not easily sustained. In *South Cherry Street LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009), a claim under Rule 10b-5 was dismissed for failure to allege facts establishing *scienter* against an investment advisor who recommended an investment in a hedge fund which turned out to be a Ponzi scheme. Although the advisor held itself out as an industry leader in evaluating hedge funds, and failed to do promised due diligence, sufficient facts alleging *scienter* were not present. *South Cherry Street LLC*, 573 F.3d at 113. The court also addressed the high standard to be met in basing recklessness on an alleged failure to investigate obvious signs of fraud, noting recklessness for failing to monitor the fraud of another must approximate an actual intent to aid in the fraud. *South Cherry Street*, 573 F.3d at 109-110.

The Division did not introduce evidence, through expert witnesses or otherwise, that the allegedly omitted "facts" were obvious signs of fraud or were otherwise so material to a reasonable investor that Mr. Bandimere must have known that failing to disclose them would mislead potential investors. Nor is there any evidence that Mr. Bandimere acted with a state of mind which approximated an actual intent to aid in the fraud being perpetrated.

The Division failed to prove that Mr. Bandimere knew that Parrish had been sued by the SEC in 2005, as alleged in OIP, ¶ II. E. 35. a. Even if the OIP had alleged Mr. Bandimere's knowledge of an earlier SEC problem, which had been resolved, was an omitted material fact, there is no evidence that Mr. Bandimere knew, or must have known, that a failure to disclose that fact would deceive investors. As shown by Exhibits 223, 224, 225, 226 and 227, public solicitations for brokerage and mutual fund customers are made routinely without disclosing past regulatory histories. The reactions of two investors to whom Mr. Bandimere disclosed that Parrish had had a prior problem with the SEC, Mr. Radke and Mr. Hunter, (both of whom, by education or experience, were more insightful on investment and financial matters than Mr. Bandimere) to that disclosure suggested that Parrish's previous problem with the SEC was not an obvious sign of fraud, or even a particularly important matter. As recognized by Mr. Hunter, himself a securities professional, capable and reputable people in the securities industry have had problems with the SEC, and the existence of such problems does not suggest that wrongdoing had occurred. Tr. 564:18-565:2.

There is no evidence that Dalton told Mr. Bandimere he stopped doing business with Parrish because of a failure to pay commissions, as alleged in OIP ¶ II. E. 34. b. Even if the OIP alleged that Mr. Bandimere was told that Parrish and Dalton ended their relationship because of a business dispute, no evidence suggests the termination was a material fact at all, let alone an

obvious sign of fraud, or a fact so significant that Mr. Bandimere knew, must have known, or even should have known that omitting that fact would mislead investors. Business divorces because of disputes over many things, including payments are common. Whatever falling out between Parrish and Dalton occurred after Mr. Bandimere had enjoyed some 18 months of uninterrupted, highly profitable experience with Parrish, and there is nothing in the record to suggest that Mr. Bandimere knew, must have known, or even should have known, that whatever dispute may have existed between Parrish and Dalton would affect IV Capital's continued viability, or would otherwise have interested any investor. The Division has introduced no evidence that suggests Mr. Bandimere knew, or must have known, that investors would have been misled if they were not informed that Parrish and Dalton had gone separate ways.

Failing to disclose large commissions for IV Capital, the UCR Trading Program, and the UCR Diamond Program, as alleged in OIP, ¶ II. E. 34. c, d and e all suffer from the same deficiencies.

The Division introduced no evidence that the compensation paid was unusually large for the type of transactions which Mr. Bandimere understood to be occurring. The record is silent on the level of compensation paid by private trading programs to those who may refer investors, or who perform the management services provided by Mr. Bandimere and Mr. Syke. Further, there is no evidence that Mr. Bandimere had any understanding the compensation paid by IV or UCR was "large" within industry standards.

It is in compensation disclosure that Mr. Syke assumes center stage. Reliance on the involvement of counsel is powerful evidence that conduct does not constitute extreme recklessness. *Howard v. SEC*, 376 F.3d 1136, 1148 (D.C. Cir. 2004). Nor does the ability to rely on counsel require the satisfaction of any specific elements. *SEC v. Snyder*, 292 Fed.Appx.

391, 405-6 (5th Cir. 2008) (not selected for publication). There is no evidence that Mr. Syke, a former registered representative, futures trader, and user of professional investment services, believed, or suggested to Mr. Bandimere, that the compensation paid to the limited liability companies was so large that disclosure of the amounts had to be made to avoid misleading investors. As the attorney who prepared the operating agreements for Victoria and Exito (used as the template for Ministry Minded), Mr. Syke drafted the compensation disclosure for those entities. Mr. Bandimere's reliance on Mr. Skye to have prepared proper disclosures was neither reckless or negligent. *SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011).

That IV Capital and UCR, as alleged in the OIP ¶ II. E. 34 f, did not provide written documentation of its receipt of additional funds from investors is immaterial. Mr. Bandimere could document additional investments through bank records of the wire transfers to the IV Capital and UCR bank accounts. There is no evidence that Mr. Bandimere knew, or must have known, or should have known, that investors would be misled that Mr. Bandimere could look only to bank records to establish the investments sent to IV Capital or UCR. Similarly, the failure of IV Capital and UCR to provide account statements, as alleged in OIP ¶ II. E. 34. j was not material in light of the ability to verify investments by bank records, and to verify earnings through the cash payments received from IV Capital and UCR. There is no evidence that Mr. Bandimere knew or must have known, that investors would be misled if they were not informed that IV Capital and UCR did not send account statements when the information reflected in such statements could be, and was, verified by bank records and the receipt of funds.

The SEC failed to prove that Mr. Bandimere knew that either IV Capital or UCR had no financial statements and were not audited as alleged in OIP ¶ II. E. 34. g. Mr. Bandimere testified only that he did not receive financial statements from IV Capital or UCR, and that he

did not know whether those entities had been audited. Tr. 903:9-904:4; 1112:8-11. However, that Mr. Bandimere did not receive financial statements from IV Capital or UCR or verification from third party service providers or other documentation confirming the legitimacy of IV Capital and UCR, as alleged in OIP ¶ II. E. 34. h, i, and j, or Dalton's alleged, but unproved, history of business failures or lack of management experience, as alleged in OIP, ¶ II. E. 34. n and o, bears on *scienter*, or negligence, only with the benefit of hindsight. The lack of an audit is not an obvious sign of fraud, and, as recent experience has shown, the existence of audited financial statements does not preclude fraud. By the time other investors got involved with IV Capital, Mr. Bandimere had substantial experience with Parrish in which Parrish had demonstrated the legitimacy of IV Capital through performance. Mr. Bandimere had known Dalton for over 30 years as an honest businessman with potentially valuable connections in the business world. Failing to insist on receiving audited financial statements, or third party verification, in light of all the circumstances, does not satisfy the stringent requirements of severe recklessness in not detecting the fraud of another.

Setting a low bar for recklessness, or even negligence, for persons taken in by Ponzi schemes will frustrate a vigorous enforcement effort against those person perpetrating Ponzi schemes. If victims of Ponzi schemes were reckless for failing to recognize the warning signs of a Ponzi scheme, meaning they must have known the investment was a fraudulent scheme, the misrepresentations of the actual schemers were not material, since (according to the Division) any reasonable investor must have known those misrepresentations to be false. Watering down the concept of recklessness to pursue people like Mr. Bandimere, a Ponzi scheme victim, for fraud because he allegedly was reckless in not detecting the fraud will provide a defense to actual

Ponzi schemers, and impair the Commission's avowed stepped-up enforcement efforts against Ponzi schemers.

C. The Fraud Claims are Barred by Judicial Estoppel.

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 tribunal 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 succeeded, and whether the party asserting the position would gain an unfair advantage. The doctrine of judicial estoppel protects 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. The doctrine of judicial estoppel should apply here.

When it served its purpose to claim that Mr. Bandimere was a victim duped by Parrish, the SEC, in its enforcement action against Parrish, alleged that Mr. Bandimere was the victim of Parrish's lulling activities. Tr. 1097:14-17; Exhibit 206, p. 13; Exhibit 207, p. 7; Exhibit 208, p. 1. The SEC then pointed to those lulling activities in its motion for judgment, and Judge Martinez referred to the lulling activities in his Order granting judgment. Once the Parrish hay was in the barn, the SEC reversed its position and claims that Mr. Bandimere had not been duped at all, because he knew or must have known the IV Capital scheme was fraudulent.

The Division failed to introduce any evidence that would render judicial estoppel inapplicable, although it had the opportunity to do so. Tr. 1100:10-1102:13.

Having alleged that Mr. Bandimere was a Parrish victim, with Judge Martinez relying on that allegation in entering judgment in favor of the SEC, the Division cannot now claim that Mr. Bandimere must have known Parrish was running a fraudulent scheme.

III. THE DIVISION FAILED TO PROVE THAT MR. BANDIMERE WAS A SELLER OF SECURITIES IN VIOLATION OF SECTION 5 OF THE SECURITIES ACT.

A. The Existence of a Security.

The first step in determining whether Mr. Bandimere violated the law by selling unregistered securities is to ascertain what Mr. Bandimere sold and whether it constitutes a security. The Division is unclear on this point, which underscores the complexity of the issue. *See*, OIP, ¶ II. 4, where the securities are alleged to be "UCR and IV Capital and/or the three LLCs . . . ." However, the evidence shows that the Division failed to prove that Mr. Bandimere was a seller of an unregistered security.

1. Interests in the Limited Liability Companies are not Securities.

The definition of "security" under the Securities Act does not identify 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 the members retained control over the deployment of the funds used to purchase their interests. The only purpose of the limited liability companies was to provide administrative services. As recognized in the OIP, ¶ 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 placed, so 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 regarding the sale or distribution of the interests in those limited liability companies are outside the scope of the federal securities laws.

The Division appears to concur, characterizing the limited liability companies as being mere pass throughs to an investment in the IV Capital and UCR schemes.[13]

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 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 *Howey*.

Because joint venturers, as a matter of law, have substantial management powers over the joint venture, there is a strong presumption against participation in joint ventures being investment contracts. *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 against a joint venture interest being a security 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.

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[13] As the Division notes, if the interests in the limited liability companies are the securities, then its fraud claims proceed on its "alternative theory" that Mr. Bandimere violated section 206(4) of the Advisers Act. However, that claim must fail because there is no evidence that Mr. Bandimere was compensated for providing investment advice, and, therefore, was not an investment adviser within the meaning of the Advisers Act.

The arrangements with IV Capital were joint ventures. *See*, Exhibits 23 and 220. Nothing in those joint venture agreements limited the substantial management powers which joint venturers have. The Division presented no evidence suggesting any joint venturer lacked the legal power to affect the management of the joint venture.[14] Therefore, the joint venture agreements are not securities.

Further, there is no evidence that Mr. Bandimere sold participations in either IV Capital or UCR, with the sole exception of the Jean Hunter Trust, which entered into a separate joint venture agreement with IV Capital. *See*, Exhibit 220. However, because the Division has failed to prove the joint venture agreement is a security, Mr. Bandimere's role in arranging for the Jean Hunter Trust to enter into a joint venture agreement with IV Capital does not constitute a sale of a security.

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 decision affirmed by the Supreme Court, *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.

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[14] Questions posed to various members of the limited liability companies regarding their reliance on trading decision made by others were irrelevant. The members of the limited liability companies were not themselves joint venturers. Further, simply acquiescing in the decisions made by a co-joint venturer under delegated authority does not constitute proof that the co-joint venturers lacked authority to affect management.

The Supreme Court accepted the Fifth Circuit's view of the law, but recognized that whether the advice 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 shows that Mr. Bandimere did not tell people about his investments or play a role in others making their own investments, to advance his own economic interests.

This is not a case where sales compensation is hidden by characterizing the compensation as for other services, where no other services were performed. There is overwhelming evidence that Mr. and Mrs. Bandimere provided extensive administrative services. Nor is there evidence that Mr. Bandimere sought to increase his compensation for administrative services by raising money. Only Mr. Koch claimed that Mr. Bandimere sought him out to become an investor. No one claimed that Mr. Bandimere urged them to increase their investment. Mr. Blackford testified that Mr. Bandimere suggested he take money out of IV Capital and put the money in a money market fund, which had the effect of reducing Mr. Bandimere's administrative compensation.

4. Mr. Bandimere did not act Willfully

The allegation made in the OIP regarding the sale of unregistered securities was that Mr. Bandimere "willfully" violated Section 5(a) and (c) of the Securities Act. OIP, ¶ II. g. 50. However, there is no evidence that Mr. Bandimere acted "willfully" in selling unregistered securities.

The meaning of a "willful" violation within the meaning of Section 15(a) of the Exchange Act is not clear, and has been made less clear since enactment of the Dodd-Frank securities reform legislation.

In *Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949), the court found that a stockbroker who had continued certain business practices in the face of repeated advice from the Commission Staff that those practices were unlawful, acted willfully within the meaning of Section 15(b) of the Exchange Act. 174 F.2d at 976–77. After that holding, the court, in dicta, disclaimed interpreting the word "willful" as requiring knowledge that a defendant was breaking the law.

In *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802-3 (D.C. Cir. 1965), the court rejected a contention that "willfully" under Section 15(b) of the Exchange Act did not require a specific intent to violate the law. However, the court noted that the concept of willfully involved more than knowing that one was doing a physical act; it also required some understanding of legal concepts surrounding the act. In talking about when a sale of unregistered securities violates Section 15(b) the court stated ". . . proof of a violation of Section 15(b) by participating in the sale of unregistered stock is complete when it is shown that the petitioners participated in the sale of stock *knowing it was unregistered.*" 348 F.2d at 803 (emphasis added).

The court again addressed the meaning of willfully within the context of Section 15(b) in *Wonsover v. SEC*, 205 F.3d 408, 415 (D.C. Cir. 2000). The Commission in the decision under review supported its finding a stockbroker willfully violated Section 5 on the failure of the broker to conduct a sufficient inquiry as required by a Commission release. It did not base its finding on merely doing an act which constituted participating in a sale. The court in *Wonsover* found that the SEC's determination that the stockbroker had acted willfully when he failed to conduct an appropriate investigation was supported by substantial evidence.

Therefore, notwithstanding the court's reference to a definition of willfulness which, taken out of context, could support an argument that willfulness exists where a defendant does an

act while not in a trance, willfulness requires some knowledge by the defendant that the act being performed was, in some sense, wrongful.

Although the Commission pays lip service to the concept of willfulness being mere knowledge of performing the act "constituting the violation," in practice, as shown in *Wonsover*, the Commission bases its determination of willfulness on facts reflecting some culpability. *E.g. Joseph S. Amundsen*, Rel. No. 69406, April 18, 2003 (willfulness found when he omitted information called for on the form when he knew of the information); *Robert D. Tucker*, Rel. No. 60210, November 9, 2012 (same); *Eric J. Brown*, Rel. No. 9299, February 27, 2012 (willfulness found where broker made unauthorized trades).

When Congress added Section 21C to the Exchange Act and expanded the authority of the Securities and Exchange Commission to bring administrative proceedings against virtually anyone, it did not include the term "willful" in describing the conduct which could be the subject of an administrative proceeding. Therefore, Section 21C(a) underscores that the meaning of a willful violation must involve something more than engaging in the conduct which constitutes the violation.

No evidence supports a conclusion that Mr. Bandimere, in any sense, understood his actions were wrongful. Therefore, no evidence could support a finding Mr. Bandimere acted willfully in selling securities that were neither registered nor exempt.

Regardless of the precise meaning of "willfully," Mr. Bandimere's reliance on the advice he got from Mr. Syke is a defense to a "willful" violation of Section 5 of the Securities Act.[15] There is no suggestion that Congress intended that a "willful" violation of Section 5 of the Securities Act to operate as a trap for the unwary. A person who obtains and, in good faith,

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[15] That issue remains open in the District of Columbia Circuit. *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009).

follows the advice of counsel should not be found to have acted "willfully," whatever the precise meaning of that term might be. Mr. Bandimere obtained advice from Mr. Syke regarding permissible sales of unregistered securities, which advice he followed. Mr. Bandimere's reliance on Mr. Syke is important regarding the SEC's primary theory that the securities sold in violation of Section 5 were investment contracts with IV Capital and UCR. Mr. Syke admitted he missed that issue entirely. Tr. 804:10-805:13.

The Division's efforts to minimize Mr. Syke's role in advising Mr. Bandimere or the reliability of his advice do not hold water. That Mr. Syke testified he did not consider himself to be an expert or even knowledgeable on securities is incredible in light of Mr. Syke's previous employment in the securities industry, and his co-authorship of written materials which advise clients regarding the definition of securities, and how unregistered securities may be sold in conformity with the law. *See*, Exhibit 215.[16] There is no evidence that Mr. Bandimere had any reason to believe that Mr. Syke was not sufficiently knowledgeable about the securities laws to constitute a reliable source of information.

Mr. Bandimere obtained and relied on Mr. Syke's advice that limiting the investors and not engaging in a general solicitation would allow him to conduct his activities in conformity with the law. Therefore, he did not act willfully if his conduct was not permitted.

IV. 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

[16] Mr. Skye has an obvious motive to downplay his role, and curry favor with the Division, since he engaged in exactly the same conduct as Mr. Bandimere which the Division asserts violated Section 5 of the Securities Act and Section 15(a) of the Exchange Act.

of both definitions is 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 Exchange Act does not define what it means to be ". . . engaged in the business of effecting transactions in securities for the account of others." Rather, a non-exclusive number of factors are considered, none of which is dispositive. *E.g. SEC v. Kramer*, 778 F.Supp. 2d 1320, 1334-5 (M.D. Fla. 2011) (appeal pending).

The uncertainty surrounding the activities that may cause a person being found a broker creates a clear due process problem, since a person of reasonable intelligence cannot differentiate between activities permissible for anyone, and activities which require registration as a broker. Transaction based compensation has been held to be the "hallmark" of acting as a broker. *SEC v. Sky Way Global, LLC*, 2010 WL 5058509 (M.D. Fla. Dec. 6, 2010). However, a "finder," who simply bring together parties to a transaction, may receive transaction based compensation without being considered a broker. *Kramer*, 778 F.Supp. 2d at 1339; *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, at * __ (S.D. Miss. Dec. 11, 2009). A person who is "facilitating" transactions in a security is not necessarily "effecting" transactions within the meaning of Section 3(a)(4) or 3(a)(5). *SEC v. M&A West, Inc.*, 2009 WL 1514101, at *9 (N.D. Cal. June 20, 2005), affirmed on other grounds 538 F.3d 1043 (9th Cir. 2008). Even Mr. Syke, an experienced lawyer and former stockbroker, did not see the activities in which he and Mr. Bandimere engaged as implicating the need to register as a broker. Tr. 802:4-14. Punishing Mr. Bandimere for not understanding a legal concept so unclearly defined would violate due process due to a lack of notice of what the law requires.

As with the alleged violation of Section 5, Mr. Bandimere's reliance on Mr. Skye, who missed the issue he (and Mr. Bandimere) might be brokers precludes a finding that Mr. Bandimere acted willfully.

Under all the factors that should be considered, the Division did not carry its burden of showing by a preponderance of evidence that Mr. Bandimere acted as a broker.

Because 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, the Division focused on trying to prove that Mr. Bandimere received "commissions." However, Mr. Bandimere received no such compensation. The only remuneration which he received was for performing recordkeeping and other administrative functions.

The Division argued that Mr. Bandimere received transaction based compensation, and pointed to references in Mr. Bandimere's notes where he referred to management fees received from IV Capital as "commissions." The evidence establishes that the compensation that Mr. Bandimere received was not compensation for effecting transactions, but, rather, was compensation for providing management services. Mr. Bandimere received nothing from IV Capital for allowing new investors to participate in the limited liability companies, and directing funds to IV Capital. He received nothing when existing investors increased the money directed to IV Capital. Mr. Bandimere's management fees were calculated as a percentage of profit realized by the IV Capital investors. If IV Capital's returns did not exceed the targeted returns for the limited liability companies, none of the monthly payments to the limited liability companies by IV Capital would have been allocated as management fees.

Similarly, for UCR, the management fees were calculated as a percentage of assets under management. However, that type of compensation is not considered part of a broker's normal sales commission, but is special compensation. *Financial Planning Association v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007).

Ms. Pickering provided further evidence that the management fees paid to the limited liability companies were for administrative services, and not sales compensation. Ms. Pickering became an investor with IV Capital with no involvement of Mr. Bandimere or Mr. Syke. Mr. Syke became involved with Ms. Pickering because Ms. Pickering wanted administrative services, including tax advice, for her investment which Mr. Parrish could not provide. Tr. 209:25-211:11; 260:2-14; 261:15-264:14. Although Ms. Pickering provided no evidence she was ever solicited or encouraged by Mr. Bandimere to make either her initial investment with IV Capital, or her subsequent investments, Exito was paid a management fee for Ms. Pickering's contributions.

Besides the lack of transaction based compensation, Mr. Bandimere did not negotiate the terms of any arrangement between investors and IV Capital or UCR. He did not analyze the financial needs of any investor, and recommended no investment, or any amount that should be invested. He directed funds as instructed by investors to money managers who had either entered into a joint venture agreement or account management agreement with the limited liability companies. He did not hold himself out as having any investment expertise, and did not actively solicit investors through any type of promotional materials or activities.

V. 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. 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 is not actionable. *SEC v. Daifotis*, 2011 WL 2183314, at *12 (N.D.Cal. June 6, 2011).

Regarding 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) he was in the business of and compensated for, giving 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 evidence) that Mr. Bandimere provided investment advice to a pooled investment vehicle. The Division recognized in OIP ¶ 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 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.

VI. SANCTIONS.

A. Civil Penalties.

Civil penalties may be awarded under Section 8A(g) of the Securities Act, Section 21B(a)(1) and (2) of the Exchange Act, and Section 203(i) and (k) of the Advisers Act. The penalty provisions of Section 8A(g), Section 21B(a)(2) and 203(k) were added by the Dodd-Frank legislation, which was enacted on July 21, 2010. The Division has offered no evidence that Mr. Bandimere committed any violations before the Dodd-Frank amendments became effective. The amendments adding the penalty provisions cannot be applied retroactively.

Prior to the Dodd-Frank amendments, the SEC had no authority to impose penalties against a non-regulated person. *Teicher v. SEC*, 177 F.3d 1016, 1018 (D.C. Cir. 1999); *Wallach v. SEC*, 202 F.2d 462 (D.C. Cir. 1953); *Gupta v. SEC*, 796 F.Supp. 2d 503, 507 (S.D.N.Y. 2011). Mr. Bandimere was neither a registered broker (or associated person) nor a registered investment adviser. Therefore, civil penalties are not available.

B. Standards for Imposing a Cease and Desist Order.

There is no formula for determining an appropriate sanction. Although this Court typically relies on the *Steadman* factors, *e.g., David E. Ruskjer*, IDR No. 489 (June 3, 2013), those factors have not been accepted in the District of Columbia Circuit as authoritative, and are in some respects contrary to the law of the Circuit.

In *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989), the court considered the analogous question of the relief that would be appropriate when violations of the securities laws were found in an enforcement action brought in federal court. In doing so, the court held that a lack of remorse, as evidenced by the decision to defend the case and the arguments raised by counsel, was not a legitimate consideration in determining the appropriate relief, because a person should not be punished for contesting the government's accusations. *First City Financial*, 890 F.2d at 1229.

The court in *First City Financial*, 890 F.2d at 1228, held further that ". . . whether the violation was flagrant or deliberate or merely technical in nature . . ." were appropriate factors to consider. The *Steadman* factors do not encompass these important considerations.

In considering whether to impose a cease and desist order, some likelihood of a future violation must be shown, which, absent other evidence, may be established by proof of a past violation. *Alchemy Ventures, Inc.*, I.D. Rel. No. 473 (Nov. 28, 2012). An order imposing sanctions must explain how a reasonable application of the factors deemed relevant supports the

sanction imposed. *Saad v. SEC*, __ F.3d __; 2013 WL 2476807 (D.C. Cir. June 11, 2013); *WHX Corp. v. SEC*, 362 F.3d 854, 859 (D.C. Cir. 2004).

No cease and desist order is warranted on the facts even if violations are found. Mr. Bandimere is 67 years old and his brief foray into the securities world ended disastrously, causing him to lose both money and personal relationships. The only thing accomplished by imposing a cease and desist order would be to provide the Division with a statistic.

C. Standards Governing Disgorgement.

Disgorgement is an equitable remedy by which a person or entity may be required to surrender ill-gotten gains that are causally related to violations of the federal securities laws. *First City Financial Corp.*, 890 F.2d at 1231. The purpose of disgorgement is not to punish, or to compensate others. Rather, disgorgement avoids unjust enrichment, and deters violations. The causation is not "but for" causation, since profits attenuated from the wrongdoing should not be disgorged. *First City Financial Corp.*, 890 F.2d 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, at *12 (N.D. Ga. July 31, 2006). An order of disgorgement is not required always where a violation is found.

The Division must prove both that disgorgement is appropriate, and that the disgorgement sought is at least a reasonable approximation of wrongfully obtained profits. *E.g., SEC v. 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 purposes 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 establishing a putative gain must be considered to determine whether a wrongdoer has realized gains. *SEC v. Hately*, *supra* (where agreement establishing 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).

Disgorgement is not proper under the facts. Mr. Bandimere did not realize a "gain" which is subject to disgorgement. As shown in Exhibits 200 and 201, Mr. Bandimere's net financial outcome from his activities with IV Capital and UCR was a loss over $76,000. Any order of disgorgement would increase that loss; it would not deprive him of any gain. Because disgorgement should force no one to pay money that is not a gain, disgorgement is not available. Requiring disgorgement on the facts here will serve neither a legitimate purpose of preventing unjust enrichment, or deterrence.

Even if disgorgement could be used to increase Mr. Bandimere's loss by ordering him to pay the compensation he received from IV Capital or UCR, that compensation is too attenuated from any violation to be the proper subject of disgorgement. All the violations alleged related to the circumstances under which investors contributed funds to participate in either IV Capital or UCR. However, Mr. Bandimere retained none of those funds. Instead, he transmitted them, under the investors' instructions, to IV Capital or UCR. The compensation he received was not for raising funds, but for providing substantial administrative services. However, providing those services does not violate the law. Therefore, his compensation was not causally connected to an alleged violation, and is not subject to disgorgement. *SEC v. Perry*, 2012 WL 1959566, at *6 (C.D. Cal. May 31, 2012), *citing SEC v. Resnick,* 604 F.Supp. 2d 773, 783 (D. Md. 2009) (compensation earned for performing valuable functions that did not violate the law should not be disgorged).

If it is found that some compensation paid to Mr. Bandimere related to raising money, only that amount may be ordered to be disgorged. The Division did not differentiate between compensation received for legitimate administrative activities, and compensation paid for improper activities. As a consequence, it failed in its initial burden to present evidence of a reasonable approximation of an amount subject to disgorgement. The only evidence that provides a basis for an allocation came from Mr. Bandimere, who estimated that as much as 90 percent of the time spent on IV Capital and UCR related to bookkeeping and administrative matters. Tr. 1211:18-1212:11. Based on that evidence, only 10 percent of what Mr. Bandimere received as compensation is subject to disgorgement.

VII. MR. BANDIMERE HAS BEEN DENIED EQUAL PROTECTION OF THE LAW.

The SEC sues Ponzi schemers in the federal courts. Exhibit 228. Mr. Bandimere is the exception in that a claim alleging he must have known he was getting investors involved in a Ponzi scheme has been brought as an administrative proceeding. The result is he has been denied the opportunity for a trial by jury, presided over by an Article III judge, and has been singled out in being denied discovery under the Federal Rules of Civil Procedure which would have been available to him if the SEC had sued him in federal court. 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.

A. This Court has the Authority to Address Mr. Bandimere's Equal Protection Defense and Rule in Mr. Bandimere's Favor.

This Court has the authority to rule on Mr. Bandimere's equal protection defense.[17] Rule 220(c) of the Commission's Rules of Practice provides that ". . . any other matter constituting an affirmative defense shall be asserted in the answer." Nothing in Rule 220(c) limits the type or nature of affirmative defenses that must be asserted. Rule 360(b) of the Rules of Practice provides that the initial decision ". . . shall include: findings and conclusions, and the reasons or basis therefore, as to *all* the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof." (emphasis added). Nothing in Rule 360(b) limits the authority of an administrative law judge to address only certain kinds of affirmative defenses.

Paragraph III. A of the OIP provides the Commission's direction to initiate a public administrative and cease and desist proceeding affording a respondent an opportunity to establish *any* defenses to the allegations (emphasis added). In OIP ¶ III, B. through E, the Commission directs that the administrative law judge determine whether violations of the law occurred, and if so, whether sanctions should be imposed. It is well-established that sanctions cannot be imposed on an individual deprived of his constitutional rights. *E.g., Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996); *Jaffee & Co.*, 446 F.2d at 393-4.

None of the authorities referred to in the May 7, 2013 Post-hearing Order suggest that Mr. Bandimere's constitutional defenses cannot be addressed in the administrative process. While Judge Rakoff in *Gupta* determined that the equal protection claim raised by Mr. Gupta fell within an exception to the doctrine of exhaustion of administrative remedies, and that the administrative process might be inadequate to resolve those issues, he did not suggest that the

[17] The Court requested the parties to address whether it had the authority to dismiss this proceeding on the grounds of selective enforcement. *See*, Post-Hearing Order, May 7, 2013.

SEC lacked the authority to address the equal protection defense. The SEC claimed in *Gupta* it had the exclusive power to determine the equal protection defense in the first instance. *Gupta*, 796 F.Supp. 2d at 510.

Mr. Bandimere did not request the OIP be dismissed before the hearing; he is asking instead that an order be entered in his favor, after an evidentiary hearing, in part because sanctions cannot be entered against him in a proceeding where his constitutional rights were violated.

U.S. v. Armstrong, 517 U.S. 456 (1996) is not to the contrary. Mr. Bandimere did not seek a pre-hearing dismissal of the OIP on a procedural ground; therefore, whether a dismissal would have been appropriate is of no consequence. That Mr. Bandimere's equal protection claim is not related to the merits is also of no consequence. The selective prosecution claim in *Armstrong* being unrelated to the merits was significant because the issue before the Supreme Court was whether Rule 16 of the Federal Rules of Criminal Procedure allowed discovery of facts related to an affirmative defense not based on the merits. Rule 16 is not applicable, and there is nothing in the SEC's procedural rules discussed above limiting affirmative defenses that can be evaluated to those that are related to the merits.

Mr. Bandimere's equal protection defense should cause an order in his favor on all claims, and not only the claims based on fraud. Because all the claims in the OIP arose from a common nucleus of facts, the Commission could not have split its causes of action by bringing a fraud claim as a civil injunctive action, and its sale of unregistered securities and unregistered broker-dealer claim as an administrative proceeding. *See*, *Lodavina Grosnickle*, IDR No. 441, November 10, 2011, p. 6. By depriving Mr. Bandimere of the procedural rights which he should have enjoyed in a civil injunctive proceeding that would have encompassed all the claims that

the Commission could have brought arising from these facts, Mr. Bandimere was damaged regarding his ability to defend every claim.

B. Mr. Bandimere Established His Equal Protection Defense.

Mr. Bandimere has met his burden of proof through Exhibit 228, which summarizes enforcement actions brought against alleged perpetrator of Ponzi schemes in civil injunctive actions, and in administrative proceedings since December, 2008 through March 2013.[18] That summary shows that during that time period, the Commission initiated 198 civil injunctive actions against alleged Ponzi schemers, but only 13 Ponzi scheme cases which were brought, in the first instance, as administrative proceedings. One of the 13 cases brought administratively was the case against Mr. Bandimere.

Of the 12 administrative proceedings brought against those other than Mr. Bandimere, nine were filed as settled actions. (*Thomas Blackwell, Dustin J. Lunt, Paul H. Heckler, Jack W. Luna, Jeffrey A. Lindsey, Dominic O'Dierno, Benjamin R. Daniels, Steve Persad, and David R. Smith*). Cases brought as a settled case implicate no deprivation of a respondent's procedural rights since the respondent, by the settlement, has determined not to contest the allegations. Of the three cases, other than the case brought against Mr. Bandimere, that were not brought as settled cases, all three were brought against respondents licensed securities professionals, and two cases, *Capital Financial Services* and *Daniel Bogar*, did not allege that the respondents knowingly involved investors in a fraudulent scheme. Mr. Bandimere has been singled out for special treatment.

Nothing in the record suggests a benign explanation for this special treatment. The Division declined to explain the Commission's decision to proceed against Mr. Bandimere in the

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[18] The analysis began in December, 2008, because that was when the Madoff scheme came to light, and began an enforcement initiative at the SEC against Ponzi schemes.

administrative forum. Although the Division claimed that the reason for suing as an administrative proceeding was privileged, that claim was groundless. The reasons for an agency's decision are not protected by either the deliberative process privilege or the attorney/client privilege. *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1203-4 (D.C. Cir. 1991). Therefore, the fact that the Division could have provided an innocent explanation but did not supports an inference that there was no innocent explanation. Nor does an innocent explanation otherwise appear on the record. This case does not involve complicated and technical issues under the securities laws, resolving which by a lay judge and jury, even with the help of expert testimony, would be difficult. There was no apparent advantage to using the administrative process to obtain a more expeditious resolution of the case, or to obtain remedies that would not be available in a civil injunctive action.

The lack of benign reasons to proceed against Mr. Bandimere administratively contrasts with the improper reasons that are obvious. A respondent's ability to defend against the charges is greatly reduced from what is available in a court proceeding. The Division must provide only the skimpiest of notice of the claims in an administrative proceeding. A respondent cannot obtain additional information regarding the claims that must be defended through written discovery, as he could do in a civil enforcement action. A respondent cannot be informed of any evidence that the Division may offer against him until shortly before the hearing. A respondent can take no depositions, although the Division can take unlimited investigative testimony before the administrative proceeding is initiated. A respondent has no right to a jury trial.

The many advantages that the Division has in an administrative proceeding, as compared with a civil injunctive action are well known, as are the results of administrative proceedings. The Division virtually never loses in the administrative forum.

These factors all combine to raise an inference this case was brought as an administrative proceeding to impair Mr. Bandimere's ability to defend himself against serious charges, where others, who were charged with similar misconduct had the advantage of defending themselves in a court proceeding, with attendant procedural safeguards.

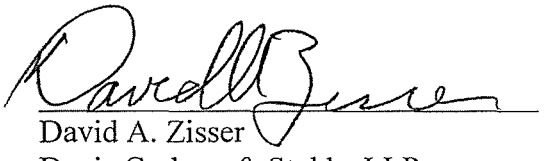
VIII. CONCLUSION

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 14th day of June, 2013.

Respectfully submitted,

DAVIS GRAHAM & STUBBS LLP



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