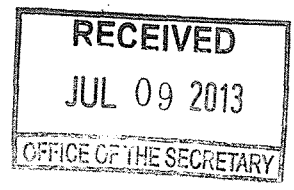
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of **DAVID F. BANDIMERE and JOHN O. YOUNG**	**DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT DAVID F. BANDIMERE'S POST-HEARING BRIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Bandimere's post-hearing brief mischaracterizes the evidence presented at the hearing, as well as the law applicable to this action. Contrary to Bandimere's arguments, the evidence at the hearing established that Bandimere acted as an unregistered broker in selling over $9 million in unregistered securities in two fraudulent schemes: IV Capital and UCR. Additionally, Bandimere defrauded investors by telling them material positive facts about IV Capital and UCR, while hiding material negative red flags. Bandimere profited in the amount of $735,000, and in addition to full disgorgement, should be subject to the maximum penalties and other relief available under the law. The Division hereby rebuts Bandimere's arguments in the order raised by him.

II. ARGUMENT

1. Bandimere committed fraud by omission by disclosing positive material facts while hiding negative material facts.

Bandimere claims that because he correctly represented the historical returns of IV Capital and UCR, his failure to disclose other material facts is not misleading, relying on cases standing for the unremarkable proposition that "[f]actual recitations of past earnings, so long as they are accurate, do not create liability under Section 10(b)." In re Advanta Corp. Sec. Litig., 180 F.3d 525, 538 (3d Cir. 1999). But this is not a case of Bandimere stating historical returns and failing to disclose some minor facts that may call into question the likelihood of future performance meeting past performance. Bandimere was aware of – and hid – material red flags that called into question whether the "investments" offered by Parrish and Dalton were legitimate at all. By emphasizing only positive facts, and hiding material red flags, Bandimere committed fraud by omission. See, e.g., Rule 10b-5 ("It shall be unlawful…to omit to state a material fact necessary in order to make the statements

made, in the light of the circumstances under which they were made, not misleading"); SEC v. Curshen, 372 Fed. App'x 872, 880 (10th Cir. 2010) ("where a party without a duty elects to disclose material facts, he must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.") (citation omitted).

2. Bandimere was shorted commission payments by Parrish and Dalton.

Bandimere now argues that with only a few exceptions, he was not shorted his commissions from Parrish and Dalton. But this is contrary to his hearing testimony, during which he admitted that in certain months Parrish and Dalton sent insufficient funds to pay both his investors and his commissions. Hearing 906:2-25. Furthermore, Bandimere's contemporary records indicate numerous shortages of funds and other errors in payment by Parrish and Dalton. See, e.g., Exh. 111 (records re Parrish payments) at 598 ("errors"), 599 ("errors"), 614 ("short"), 624 ("shortage"); Exh. 130 (records re Dalton payments) at 2280 ("short"), 2282 ("short"), 2291 ("shortage").

Hearing Exhibit 93 also demonstrates repeated shortages in payment of commissions. Bandimere now claims in his brief that Exhibit 93 merely reflects withdrawals, but that is not what the face of the document shows and not what he testified to during the hearing, when he admitted that the document represents his effort to differentiate between funds received as earnings and funds received as commissions (or "management fees"). Hearing 11:26:18-1127:13. The document shows that on a month-by-month basis, Bandimere kept the excess returns beyond his investment earnings for his commissions; for each month the total amount received from Parrish and Dalton is the same as the combined amount paid for earnings plus commissions. Exh. 93

at 30, 33, 38, 41, 42, 45, 48. The document evidences numerous occasions on which commissions were shorted, as admitted by Bandimere during the hearing. Hearing 888:16-895:16.

Thus, the evidence at the hearing established that Bandimere was routinely shorted commissions, and as detailed in the Division's opening brief, that he hid this material fact from investors.

3. Bandimere knew about the SEC's regulatory action against Parrish while he was offering IV Capital securities.

Bandimere disputes that he knew of Parrish's prior regulatory enforcement by the SEC resulting from another investment scam that Parrish operated. But the evidence during the hearing established that Bandimere selectively told some investors about Parrish's "SEC problem" during 2004 or 2005, which Bandimere knew about while offering IV Capital securities. Exh. 71, 143; Hearing 165:16-21, 232:16-238:10, 430:3-431:23, 465:12-21, 553:4-557:13, 592:11-14, 909:9-910:13, 911:5-9. In addition, Bandimere specifically told one investor that there had been an "SEC complaint problem." Exh. 71; Hearing 232:16-238:10. Given these facts, any argument by Bandimere that he did not specifically know about an SEC lawsuit is self-serving, not credible, and misses the mark. He clearly knew enough material negative facts about Parrish's SEC problem to disclose those facts to each of his investors, but failed to do so.

4. Bandimere knew that Dalton stopped working with Parrish due to problems he had with Parrish, including getting paid.

Bandimere claims there was a lack of evidence that he knew that Dalton stopped working with Parrish because of problems getting paid. But the evidence at the hearing was clear that Dalton had a high discomfort level with Parrish, that Dalton could not get

contracts from Parrish, that Parrish ignored Dalton's calls, that Parrish took forever to get things done, and that they had an acrimonious separation. Exhs. 71; Hearing 232:16-238:10, 430:3-431:23, 912:2-913:3, 913:6-16. Furthermore, Bandimere did not tell investors about these facts. Id.

5. Bandimere knew that IV Capital and UCR had no financial statements and he never saw any evidence that they were audited.

Bandimere now tries to assert that he did not know that IV Capital and UCR did not have financial statements and were not audited. But Bandimere admitted that he never received any financial statements from either entity, despite asking for such statements repeatedly, and it appeared to Bandimere that IV Capital and UCR had no accounting records whatsoever. Hearing 297:23-298:7, 507:20-508:2, 903:9-11, 903:18-905:6. Bandimere admits in his brief that he was aware of no evidence of an audit.

6. Bandimere knew of Dalton's failed investments and financial problems.

Contrary to Bandimere's claim in his brief, the hearing was replete with evidence of his knowledge of Dalton's prior unsuccessful investments. Specifically, Bandimere knew that Dalton was previously involved in a debenture project that suffered $2 to $3 million in losses, including $50,000 in personal losses by Bandimere, and Bandimere also knew that Dalton was involved in another investment in the Philippines, in which Bandimere also lost $50,000. Hearing 245:3-5, 298:8-15, 508:3-6, 875:24-876:21, 877:14-878:4, 1243:18-1244:12, 1245:5-1246:14. Bandimere further knew that Dalton had serious financial problems as a result of these unsuccessful investments. Bandimere had loaned Dalton money to participate in a multilevel marketing program after Dalton lost his money in a different multilevel marketing program that had gone bankrupt, and Bandimere also found Dalton an inexpensive apartment in a complex he owned which

Dalton rented for several years, a living situation which was inconsistent with the high level of income Dalton claimed to be earning from his UCR investments. Hearing 166:18-20, 467:16-20, 874:12-875:6, 878:5-879:10.

7. Bandimere told investors material positive information regarding the IV Capital and UCR securities, while failing to disclose any negative information, let alone material negative information.

Bandimere now claims that he did not materially mislead any investors who testified at trial. This is simply false. Bandimere told investors materially positive information about IV Capital and UCR, while omitting any negative information, including the materially negative information identified in the OIP, as the many defrauded investors who testified at trial clearly stated. Hearing 157:12-17, 161:4-8, 164:4-11 ([redacted]); 221:2-223:16, 242:22-243:15, 244:25-245:2 ([redacted]); 297:2-4, 304:7-305:13 ([redacted]); 438:24-442:10 ([redacted]); 495:23-496:7, 504:24-505:18, 507:5-508:6 ([redacted]); 581:25-583:14, 587:15-20 ([redacted]; 669:6-671:8 ([redacted].

8. Bandimere acted with scienter regardless of whether he knew that IV Capital and UCR were fraudulent schemes.

Bandimere's scienter is not tied to any claim by the Division that he knew or must have known that IV Capital and UCR were fraudulent investment programs, as Bandimere claims in his brief. The background section in the OIP alleged that "numerous material red flags and negative facts cited above should have alerted Bandimere to the fact that IV Capital and UCR were likely frauds." OIP ¶ 36. And indeed they should have. But the Division's case is not based on any assertion that Bandimere is liable because he should have known that IV Capital and UCR were Ponzi schemes. Rather, Bandimere did not speak the full, material truth about what he knew about the investments – regardless of whether he should have known they were Ponzi schemes – and thus violated the antifraud

provisions by failing to make fair and complete disclosures. Bandimere's scienter may be established by extreme recklessness, including ignoring such red flags, as Bandimere did: "[a]n egregious refusal to see the obvious, or to investigate the doubtful, may in some cases give rise to an inference of recklessness." Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000).

As to the materiality of the omitted red flags, "[t]he requirement of knowledge in this context may be satisfied under a recklessness standard by the defendant's knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." City of Philadelphia v. Fleming Companies, Inc., 264 F.3d 1245, 1261 (10th Cir. 2001); accord Dolphin and Bradbury, Inc. v. SEC, 512 F.3d 634, 639 (D.C. Cir. 2008). It is plainly obvious that red flags such as regulatory action by the SEC against Parrish, prior failed investments by Dalton and his poor financial condition, inconsistent and incorrect payments from both, the lack of financial statements and accountings, the amount of commissions made by Bandimere, and lack of trading records were material. And, indeed, the investors at trial testified that the information not disclosed by Bandimere would have been important to their investment decisions. Hearing 298:16-300:7, 457:10-458:10, 465:12-466:4, 466:20-467:11, 508:7-509:1. Thus, by failing to disclose these obvious red flags, Bandimere acted with scienter.

9. The involvement of attorney Syke provides no defense to Bandimere.

Bandimere attempts to claim that the involvement of Syke – an attorney – somehow absolves Bandimere of scienter. As an initial matter, scienter is not required for the Division to prove violations of Section 5 of the Securities Act and Section 15(a) of the

Exchange Act, so any type of reliance on advice of counsel defense is irrelevant. See SEC v. Friendly Power Co. LLC, 49 F. Supp. 2d 1363, 1368 (S.D. Fla. 1999) ("neither a good faith belief that the offers or sales in question were legal, nor reliance on the advice of counsel, provides a complete defense to a charge of violating Section 5 of the Securities Act.") (citing SEC v. Holschuh, 694 F.2d 130, 137 n. 10 (7th Cir. 1982); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314–15 n. 28 (D.C. Cir. 1981)); see also U.S. v. Ragsdale, 426 F.3d 765, 778 (5th Cir. 2005) (where violation of a statute "does not require an intent to violate the law, [defendant] could not assert as a defense that he relied on advice from counsel. . . .").

Furthermore, the testimony of Syke at the hearing confirmed that he did not act as Bandimere's attorney in relation to any of the issues here, other than the formation of the Exito and Victoria LLCs. Hearing 720:13-16, 721:4-723:17. Syke testified that he did not provide legal advice to Bandimere as to whether taking certain measures related to the LLCs would result in compliance with the securities laws. Hearing 734:4-736:12. More specifically, Syke did not advise Bandimere whether the securities offerings and Bandimere's activities were in compliance with Section 5 of the Securities Act and Section 15(a) of the Exchange Act. Hearing 736:23-737:21.

Syke was also unaware of the operations of Victoria and Ministry Minded, and did not know key facts about IV Capital and UCR that Bandimere did not disclose to him, such as Parrish's prior regulatory action by the SEC, lack of financial statements, problems with payments, and Dalton's past failed investments. Hearing 744:10-745:2, 777:13-780:5. Thus, in any case, Syke could not have provided meaningful legal advice to Bandimere about his offerings, since Bandimere kept Syke in the dark about the same material red

flags that Bandimere hid from investors. See Zacharias v. SEC, 569 F.3d 458, 467 (D.C. Cir. 2009) (reliance on advice of counsel requires complete disclosure to counsel). Thus, Syke's involvement in no way supports Bandimere's defense.

10. Negligence suffices to prove a violation of Section 17(a)(2) of the Securities Act and to obtain a cease and desist order.

Regardless of Bandimere's scienter, under Section 17(a)(2) the SEC may prove a violation by showing that a respondent acted with negligence. Securities Act Section 17(a)(2). Negligence also suffices to support a cease and desist order. Securities Act Section 8A; Exchange Act Section 21C. And, as stated previously, scienter is not required for the Division to prove violations of Section 5 of the Securities Act and Section 15(a) of the Exchange Act.

11. Judicial estoppel does not apply here.

Bandimere claims that the Division's claims are barred by judicial estoppel. This is nonsense. Bandimere falsely states that the Division referred to Bandimere as a "victim" in a prior lawsuit against Parrish. In fact, the complaint against Parrish referred to the fact that Bandimere, as an unidentified investor in IV Capital, was the recipient of lulling statements by Parrish. Hearing 1097:14-17; Exh. 306 ¶ 37. These are simply facts, the complaint stated nothing more, and the complaint in no way impacts or limits this action. Thus, there is no basis for Bandimere's judicial estoppel defense.

12. The Division does not contend that interests in the LLCs were securities.

The Division does not contend that interests in the LLCs were securities. Rather, as Bandimere admitted, the LLCs operated as a "pass through" so that investors could invest their funds with IV Capital and/or UCR. Exh. 96 at 4. Investors likewise understood that

their money was invested with IV Capital or UCR, not the LLCs. Hearing 294:17-22, 499:2-17, 548:7-10.

13. The interests in IV Capital and UCR offered by Bandimere were securities, not joint ventures, because the substance of the agreements was an investment contract and investors had no role in determining profits.

Bandimere attempts to argue that the IV Capital and UCR investments offered by Bandimere were joint ventures and thus not securities. The only support for this contention is that the IV Capital agreements were labeled as "joint venture agreements" or "investment structure and joint venture agreements."[1] Exhs. 2, 23, 220. But a "scheme which sells investments to inexperienced and unknowledgeable members of the general public cannot escape the reach of the securities laws merely by labeling itself a general partnership or joint venture." Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981). Whether the investments were investment contracts, and thus securities, depends on whether they involved "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). Economic reality governs this determination. SEC v. Merchant Capital, LLC, 483 F.3d 747, 755 (11th Cir. 2007).

The economic reality of the IV Capital and UCR agreements is that the agreements themselves provided no management responsibilities to investors. The only responsibility given to investors was to send money to IV Capital or UCR, then IV Capital or UCR would purportedly use the funds to make profitable trades; IV Capital and UCR had all management responsibilities. Exhs. 2 at 5, 23 at 4, 130 at 2305, 220 at 4. Bandimere

[1] The UCR agreements were labeled as "investment structure agreements," not joint venture agreements. Exh. 130 at 2301.

himself admitted during the hearing that IV Capital and UCR pooled investor funds and purportedly used them to make profitable trades, with the efforts of IV Capital and UCR resulting in any purported profits, with no role by investors in generating those profits. Hearing 849:8-853:3. Investors similarly testified that they had no role in generating profits, but rather it was the efforts of IV Capital and UCR that resulted in any profits. Hearing 168:5-13, 227:13-228:6, 293:23-295:7, 455:2-14, 505:19-506:6, 548:7-16, 682:16-24. Thus, the economic reality – and the substance of the investment contracts – demonstrate that the IV Capital and UCR investments were investment contracts, not joint ventures. See Merchant Capital, 483 F.3d at 755 (joint venture or general partnership agreements involve active management by the venturer or partner, while investment contracts involve passive investors who have little ability to control the profitability of their investments).

Finally, two federal judges already found the IV Capital and UCR investments to be securities. SEC v. Parrish, No. 11–cv–00558, 2012 WL 4378114 (D. Colo. Sept. 25, 2012); SEC v. Universal Consulting Resources LLC, No. 10–cv–02794, 2011 WL 6012532 (D. Colo. Dec. 1, 2011).

14. Bandimere sold IV Capital and UCR to benefit his own financial interests, in the amount of $735,000.

Bandimere argues that he did not sell the IV Capital and UCR securities to advance his own economic interests. This is demonstrably false. Bandimere profited in the amount of approximately $735,000 in commissions. Exh. 200. He received transaction-based compensation that increased with the amount of investor money he brought to the schemes. Hearing 869:25-870:17. The more investors Bandimere brought into the IV Capital and

UCR investments, the more money he made, to the tune of $735,000. Thus, Bandimere advanced his own economic interests considerably.

15. Bandimere willfully sold IV Capital and UCR securities because he knew what he was doing when he sold the securities.

Bandimere argues that he did not "willfully" sell the IV Capital and UCR securities. But as he recognized in his brief, the D.C. Circuit held long ago that "[i]t is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949). Bandimere appears to argue that he did not know what he was doing because he did not know the IV Capital and UCR securities were not registered. But he testified to the opposite during the hearing, admitting that he "tried to be very careful to let [investors] know that [IV Capital and UCR] were not registered securities. . . ." Hearing 856:12-16. Finally, Bandimere attempts to eschew liability by casting blame at Syke. But Bandimere cannot rely on advice of counsel for the reasons stated above, and Syke's involvement in any case does not excuse Bandimere's legal violations. See Wonsover v. SEC, 205 F.3d 408, 415 (D.C. Cir. 2000) (a broker's reliance on other professionals does not excuse his legal violations). Bandimere knew what he was doing in selling unregistered securities and therefore did so willfully.

16. Bandimere was a broker for IV Capital and UCR securities.

Bandimere claims that he was not a broker, either because he did not receive transaction-based compensation or because he was a finder. The evidence at the hearing was to the contrary. Bandimere did far more than a finder, who merely connects parties. Bandimere was involved throughout the entire investment process with investors, and met

with investors, explained investments, answered questions, handled paperwork, obtained signatures, facilitated investments, handled invested funds, calculated and sent returns, maintained investor records, and otherwise from beginning to end handled investors' investments. Hearing 844:12-849:5. For this, Bandimere received transaction-based compensation in the form of set percentage monthly "commissions"[2] or "broker fees," in his words; the more investments he sold, the more money he made. Hearing 869:25-870:23; Exhs. 6, 14, 16, 110. Bandimere's commissions ultimately totaled $735,000. Exh. 200. Thus, Bandimere received transaction-based compensation and was a broker. See, e.g., SEC v. Benger, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (Section 15(a) claim adequately alleged where defendant received transaction-based compensation, collected and held investor funds, received and processed investment documents, and sent investors their share certificates); SEC v. Margolin, No. 92 Civ. 6307, 1992 WL 279735, at *5 (S.D.N.Y. Sept. 30, 1992) (SEC demonstrated substantial likelihood of success on the merits where the defendant provided clearing services, received transaction-based compensation, advertised for clients, and possessed client funds and securities."); SEC v. Hansen, 1984 WL 2413 at *10, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,426 (S.D.N.Y. 1984) ("Among the factors listed as relevant to a determination of whether an individual acted as a broker within the meaning of [Section 15(a)] [is] whether that person . . . is involved in negotiations between the issuer and the investor . . . .").

17. The Division is not pursuing its alternative theory of relief.

Given the evidence admitted during the hearing, the Division is not pursuing its alternative theory of liability under the Investment Advisers Act of 1940 at this time. See

[2] Bandimere cites Financial Planning Association v. SEC, 482 F.3d 481, 488 (D.C. Cir. 2007) for the proposition that his compensation was not transaction based but was "special." The case is inapposite and deals with special compensation for providing investment advice.

OIP ¶ 51. Bandimere's advice to investors was solely incidental to his brokering activities. See 15 U.S.C. § 80b-2(11).

18. Bandimere is subject to civil penalties under the Exchange Act.

Bandimere claims that because his violations pre-dated Dodd Frank, he may not be held liable for civil penalties. This is not true. Violations of the Securities Act and Exchange Act in proceedings brought under Exchange Act Section 15(b) have long been punishable by civil penalties. See 15 U.S.C. § 78u-2. Thus, Bandimere is subject to civil penalties in this proceeding.

19. The maximum relief should be ordered against Bandimere; he is not entitled to offset any personal investment losses because his profits from brokering were separate and distinct.

As detailed in the Division's post-hearing brief, the maximum relief against Bandimere is warranted. The recency of Bandimere's violations as well as the significant resulting harm to investors, support this relief. Bandimere's violations were egregious. He misled numerous investors causing significant losses. His violations were recurrent in nature, occurring over a lengthy period of time and involving numerous transactions and unregistered sales. Bandimere acted with a high degree of recklessness, exhibited by his repeated and continued sale of IV Capital and UCR securities despite the red flags that he encountered. Bandimere has not acknowledged any wrongdoing, so any assurance that he will not commit violations in the future cannot be considered sincere. Finally, given Bandimere's past investment history, his willingness to act as an unregistered broker, and his proclivity for recruiting and involving others in his investments, there exists a significant probability that he will commit securities violations again in the future.

Bandimere should not be allowed to "discount" his IV Capital and UCR investment losses from his disgorgement figure. Bandimere's personal investment returns and commission are entirely separate. Bandimere's commissions were profits to him that other investors did not receive. It would unjustly enrich Bandimere to allow him to keep these illegally obtained returns when other investors suffered such substantial losses. See SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (disgorgement is designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws). The maximum relief should be ordered against Bandimere to deter him, personally, and other brokers, generally, from future violations of the securities laws.

20. Bandimere's constitutional rights were not violated by the Division's bringing an administrative proceeding against him.

Bandimere was not denied equal protection and due process under the securities laws by being sued in an administrative proceeding. As an initial matter, it is well-established that administrative proceedings comport with the due process requirements of the Constitution. See Jonathan Feins, 54 S.E.C. 366, 378 (1999) (holding that "[a]dministrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding").

Furthermore, "[t]o prevail on a claim of improper selective prosecution, a respondent must establish that it was singled out for enforcement action while others similarly situated were not, and that its prosecution was motivated by arbitrary and unjust considerations, such as race, religion, or a desire to prevent the exercise of a constitutionally-protected right." In re Indigenous Global Dev. Corp., Release No. 325, 89

S.E.C. Docket 2452 (January 12, 2007). Bandimere was not singled out; the Division filed administrative actions against two other respondents resulting from the same investigation: John O. Young (in this action) and David R. Smith (in a settled action, Release No. 9373). Bandimere has identified no protected class to which he belongs or even alleged the basis of his selective prosecution. And Bandimere himself identified a dozen other Ponzi-related cases that were brought as administrative proceedings. Additionally, there was no improper motive in bringing the case, as the law judge recognized after his in camera review of the action memorandum. Hearing 1106:10-1107:1. Thus, Bandimere's selective prosecution defense fails.

III. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the law judge find that Bandimere violated the relevant provisions alleged and order the relief requested.

Respectfully submitted this 8th day of July, 2013.

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