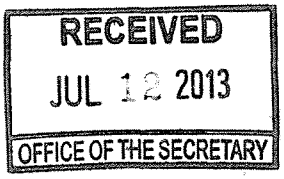
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15124

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



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Division's allegation. Nothing in the record supports the allegation that Mr. Bandimere, in specific language, characterized either IV Capital or UCR as "low risk" or "very good investments."

The Division's only alleged affirmative representations were not supported by any evidence. The Division has abandoned its claim for scheme liability, and admitted that its fraud claim under Section 206(4) of the Advisers Act and Rule 206(4)-8 also was not proved. Division Brief, pp. 14 and 16. The only remaining fraud claim is based on alleged omissions.

B. Mr. Bandimere Made no Statements that were Misleading Because of a Failure to Disclose a Material Fact

The Division's theory of fraud by omissions is fundamentally at odds with established law. Under the plain language of both Section 17(a)(2) and Rule 10b-5(b), failing to state a material fact is not a violation of either the statute or the rule. Rather, the failure to disclose a material fact is actionable only where the omission renders misleading a statement that was made. *E.g., Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-3 (2011).

The Division has never identified any statement made by Mr. Bandimere that was rendered misleading by any failure by Mr. Bandimere to disclose a material fact.[2] The Division's theory of violation, as stated in its Brief, implicitly disclaims the need to do so: " . . . 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 anti-fraud provisions by failing to make fair and complete disclosure." Division Brief, p. 19. The Division urges that all material facts must be disclosed, and fraud may be found even where only truthful statements are made if those statements could be characterized as merely

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[2] Whether a statement that the trading programs were "low risk" or "very good investments" could be rendered misleading by failing to disclose any other facts is of no consequence, since there is no evidence that Mr. Bandimere ever made those statements.

party that his experiences with the third-party had been satisfactory, but there was some sloppiness in its bookkeeping. In fact, the employee knew that the third-party had falsified accounting records. *First Virginia Bankshares*, 559 F.2d at 1310-11; 1317. Attributing deficiencies in recordkeeping to sloppiness, when the deficiencies were actually the result of intentional falsification is the type of half-truth which fraud by omission is intended to address. Nothing akin to the omissions in *First Virginia Bankshares* was proved here.

In *Rowe v. The Maremont Corp.,* 650 F. Supp. 1091, 1105 (N.D. Ill. 1986), the court stated "Maremont was under no obligation to disclose the possibility of a tender offer or the existence of the FTC consent decree absent statements which would be materially misleading without the disclosure of that additional information." The Division's contention that a misrepresentation by omission can exist without proof of a statement rendered misleading by the omission finds no support in *Rowe*.

In its non-precedential decision in *SEC v. Curshen*, 32 F. App'x 872, 880 (10th Cir. 2010), the court upheld a determination that a paid promoter who made positive internet postings about a stock under several false identities, and who was selling shares of the stock which he was promoting, committed fraud through omissions by failing to disclose his true identity as a paid tout. The court determined that the opinions expressed in the internet postings were misleading in the absence of disclosure that he was not a disinterested commenter, and was actually selling the stock at the same time he was recommending it. *Curshen* does not support the Division's argument, as it identified statements rendered misleading by the omission of a material fact.

In each case cited by the Division where the court found that an actionable omission had been properly pled, or sufficiently established by the evidence, the court identified a particular statement as being rendered misleading because of the omission of a material fact. In *Schlifke*,

consistency of return as negative information or something that caused them concern, the Division characterized those features as red flags. Division Brief, p. 20.

Another flaw in the theory that an unbalanced presentation is fraudulent is that the theory ignores that some facts are so basic that all reasonable investors are deemed to know them, which eliminated any obligation to disclose those facts. Failing to disclose a basic fact, such as a high return connotes substantial risk, does not make a presentation misleading. Certain facts are so basic that any reasonable investor is presumed to know them, a failure to disclose such facts is not actionable. *E.g., Zerman v. Ball*, 735 F.2d 15, 21 (2d Cir. 1984).

The wholly subjective nature of what might constitute negative information or cause someone concern renders the responses to the Division's questions meaningless in determining whether Mr. Bandimere committed securities fraud. Any finding based on such subjective evaluations would deprive Mr. Bandimere of due process. A legal standard governing whether a speaker committed fraud based upon the subjective evaluation by the listener provides insufficient notice of the location of the line between permissible and impermissible conduct.

C. The Division Failed to Prove That Mr. Bandimere Ignored Red Flags

The Division's drumbeat of referring to certain matters as a "red flag" begs numerous critical questions. Is the "red flag" really a fact? Was a fact characterized as a red flag was known to Mr. Bandimere? Was a fact characterized as a red flag was so obviously important to an investor that Mr. Bandimere knew or must have known that failing to disclose the fact would mislead a reasonable investor (for purposes of Rule 10b-5(b)), or was negligent in not knowing that failing to disclose it would mislead a reasonable investor. The Division has failed to prove that all its so-called red flags actually existed, were known to Mr. Bandimere, or were of a nature that he knew, must have known, or should have known that failing to disclose circumstances of which he was aware would mislead investors.

There is no evidence that Mr. Bandimere misrepresented the compensation he received, as suggested by the Division's Brief, p. 8. Not a single witness testified that Mr. Bandimere stated that he was receiving compensation in an amount different from that which he actually received. At most, witnesses testified that Mr. Bandimere did not disclose the amount of his compensation at all, or, that if he did, they could not recall what he had disclosed. Tr. 165:22-166:1[5]; 229:22-230:1; 293:25-294:7; 466:5-9; 507:5-10; 563:17-25; 591:19-23; 592:15-593:2; 680:11-14.

There is no evidence that Mr. Bandimere knew, must have known, or should have known that the compensation paid by IV Capital or UCR was unusual, or so large, that failing to disclose the amount of compensation would mislead a reasonable investor. To the contrary, Mr. Syke, a former registered representative, Mr. Bandimere's lawyer, and a highly experienced investor, raised no issue that the compensation received was inappropriate for the services provided, or that the specific amount of compensation should be disclosed.

The Division failed to prove that either Parrish or Dalton regularly violated their compensation agreements, or that they often wired insufficient funds to the limited liability companies. In support of its assertion that these were material facts, the Division points to some investor testimony to the effect that Mr. Bandimere never disclosed to them that compensation arrangements were violated, or that insufficient funds were sent to the limited liability companies. Division Brief, p. 8. The fact that Mr. Bandimere never made those disclosures has no bearing whatever on whether compensation violations had occurred or whether insufficient funds had been sent to the limited liability companies.

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[5] The Division's insistence on referring to Mr. Bandimere's management fees as "commissions" created a lack of clarity in the record. Since "commissions" are typically thought of as a percentage of a sale, investors who testified about what they were told about commissions were not necessarily saying anything about what they were told about other forms of compensation.

The Division also points to Mr. Bandimere's testimony relating to Exhibit 93, which reflects the amounts which Mr. Bandimere withdrew from the limited liability companies as compensation and not what was paid by Parrish. Mr. Bandimere's testimony, and the rebuttal exhibits which he prepared showing the compensation payments that were made, and the accounting records that the Division introduced, reflect that there were virtually no violations of the compensation agreement, and virtually no instances of insufficient funds being sent to the limited liability companies. Bandimere Brief, pp. 6-9; Tr. 1127:20-1164:4; Exhibits 236, 237 and 238.[6]

The Division, of necessity, abandoned at the hearing the claim made in the OIP, that Mr. Bandimere knew that Parrish had been sued by the SEC prior to discussing IV Capital with investors; there is no evidence that Mr. Bandimere had any knowledge of an earlier lawsuit. Rather, the Division advanced a new, unalleged contention that Mr. Bandimere knew that Mr. Parrish had some unspecified problem or issue with the SEC, that had been resolved. Tr. 165:17-21; 465:12-18; 553:4-8; 593:11-14; 678:10-24. Apart from the impropriety of trying to prove a fraudulent representation that had not been alleged, there is no evidence that Mr. Bandimere knew, must have known, or was negligent in not knowing, that failing to disclose what he had been told about Parrish's resolved regulatory issue would mislead investors. Mr. Hunter and Mr. Radke, both of whom were more knowledgeable than Mr. Bandimere in matters of finance and investments, were told by Mr. Bandimere what he knew about Parrish's regulatory issue, but neither reacted in a way that suggested that the information was of great significance. Exhibits 223 through 227 show that it is common for investment firms to solicit customers without disclosing regulatory issues with the SEC, including anti-fraud issues.

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[6] The Division did not identify Exhibit 93 in its Brief as support for its claim that Parrish and Dalton regularly sent insufficient funds to the limited liability companies, Division Brief, p. 8, apparently conceding that Exhibit 93 does not support its allegation.

The Division's assertion that neither IV Capital nor UCR ever provided account statements documenting investments is unsupported by the evidence. Mr. Bandimere testified that he had received account statements from IV Capital for approximately 15 months, and pointed to examples of the account statements which he had received. Tr. 904:5-12; 1113:1-25; Exhibit 131, p. 2364. Mr. Bandimere testified further that he had reviewed accounting records for UCR on UCR's computer when he met with Mrs. Dalton to go over accounting issues. Tr. 903:18-904:4; 904:13-21.

There is no evidence that Dalton had serious financial problems as a result of unsuccessful investments, or that Mr. Bandimere believed Dalton had problems due to unsuccessful investments. The Division's assertion that Dalton had been "involved" with unsuccessful investment programs omits the material fact that there was no evidence that Dalton's involvement was in any way managerial, or that the lack of success of those programs could be attributed to Dalton. See, Bandimere Brief, pp. 11-12.

The Division's assertion that Dalton told Mr. Bandimere that Dalton has stopped working with Parrish because Dalton had difficulty getting paid is unsupported by any evidence. Ms. [redacted] prepared an email, Exhibit 71, in which she claimed that Dalton told Mr. Bandimere to be careful doing business with Parrish, but did not attribute that warning to Dalton having difficulty in getting payment from Parrish. Her testimony about her conversation with Mr. Bandimere did not support the allegation that the problems between Parrish and Dalton related to payment. Tr. 232:16-238:10; 430:3-431:23.

The remaining circumstances the Division asserts should have been disclosed are examples of fraud by hindsight. *See, SEC v. Cohmad Securities Corp.*, 2010 WL 363844 (S.D.N.Y. Feb. 2, 2010). The Division has provided no evidence, in the form of expert

such as the failure to anticipate future events, is not reckless, and that an overly cautious picture of current performance and future prospects is not required to be disclosed, and that the duty to adequately monitor the fraudulent behavior of others is limited, provides more support to Mr. Bandimere than it does to the Division. *Novak*, 216 F.3d at 309.

In *SEC v. McNulty*, 137 F.3d 732 (2d Cir. 1998), a case involving whether the district court abused its discretion in refusing to vacate a default judgment, the court found that the defendant did not meet his burden to present a meritorious defense, where the defendant, who was responsible for disclosure of a company's financial transactions in its SEC filings failed to show his lack of *scienter*. That defendant did not disclose a transaction which he knew the controlling shareholder wanted to conceal, where he could not get information about what the transaction was represented to be, and where he was advised by counsel not to make the filing with the SEC. *McNulty* is not applicable, both because the facts there bear no resemblance to the facts here, and the Division here, in contrast to the procedural posture in *McNulty*, has the burden of proving *scienter*; Mr. Bandimere is not required to show a lack of *scienter*.

In *U.S. v. Ferguson*, 676 F.3d 260, 278 (2d Cir. 2011), the court, reversed a conviction for conspiracy, mail fraud, securities fraud and making false statements to the SEC because of improperly admitting evidence, but held that a willful blindness instruction was warranted in a financial fraud case where defendants had knowledge of secret side agreements, a fake offer letter and an accounting pretext for a transaction that led to a misstatement of a loss reserve. *Ferguson*, 676 F.2d at 278. The Division has not shown in this case the existence of any evidence of wrongdoing comparable to those that were proved in *Ferguson,* which could support the conclusion that Mr. Bandimere acted with willful blindness.

SEC v. Forte, 2012 WL 1719145 (E.D. Pa. May 16, 2012) does not address recklessness in the securities context at all. That decision related to a receiver's action to void certain transfers under the Uniform Fraudulent Transfer Act, and addressed recklessness for purposes of avoiding a transfer of assets.

The Division's inability to present any authority where recklessness (or even negligence) was found on facts similar to those here speaks loudly about the failure of its proof that Mr. Bandimere acted recklessly, or even negligently. The Division's burden is a heavy one, and it has failed to carry it.[8]

II. MR. BANDIMERE DID NOT WILLFULLY VIOLATE SECTION 5 OF THE SECURITIES ACT.

The Division Brief identified the securities which it contends that Mr. Bandimere sold in violation of Section 5 as the investments in IV Capital and UCR. However, there is no evidence that any investor bought IV Capital or UCR securities which were sold by Mr. Bandimere.

A. The IV Capital Joint Venture is not a Security.

The evidence showed that the limited liability companies managed or co-managed by Mr. Bandimere entered into a trading arrangement with IV Capital and UCR. The arrangement with IV Capital was a joint venture, which is presumed not to be a security. *Banghart v. Hollywood General Partnership*, 902 F.2d 805, 807-8 (10th Cir. 1990). The Division has not carried its burden to overcome the presumption of that those joint venture agreements are not securities. Bandimere Brief, pp. 30-31.

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[8] In *Gebhart v. SEC*, 595 F.3d 1034 (9th Cir. 2010), a case which the Division cites, though not in support of its *scienter* argument, the court affirmed the SEC's decision sustaining an NASD finding that two securities salesmen had committed fraud in connection with the sale of promissory notes. The recklessness element satisfied by the failure to do a proper investigation. The respondents in *Gebhart* were experienced securities professionals, subject to clear professional standards to perform due diligence, who made specific representations regarding the notes being secured by real estate, without investigating whether those representations were true. Their conduct was evaluated on the basis of what a reasonably prudent securities professional would have done under the circumstances. *Alvin W. Gebhart*, Rel. No. 53136 (January 18, 2006) p. 12. Mr. Bandimere was not a trained securities professional and was not alleged to have made similar misrepresentations.

B. Mr. Bandimere was not a Seller.

Assuming for purposes of argument that the trading arrangements between the limited liability companies and IV Capital and UCR were investment contracts, making them securities, none of the individual investors except [redacted] and the [redacted] were parties to those arrangements. The evidence is clear that [redacted] established her account with IV Capital directly with Parrish, after speaking with other investors, and [redacted], who represented Parrish. Mr. Bandimere did not even speak to Ms. [redacted] before she entered into a trading arrangement with Parrish and IV Capital. Ms. [redacted] added to her IV Capital account through direct deposits to Parrish's bank, which, also did not involve Mr. Bandimere. Tr. 204:24-209:16; 266:19-270:19. If Ms. [redacted] entered into an investment contract with Parrish and IV Capital, Mr. Bandimere did not sell that investment contract to her.

Further, Mr. Bandimere was not a seller of IV Capital or UCR securities to any investors because Mr. Bandimere was not motivated by his financial interests to have investors participate in those programs. In *Pinter v. Dahl*, 486 U.S. 622, 647 (1988), the Supreme Court held that a seller of securities did not include someone who was not motivated to serve the financial interest of either the issuer of the securities, or his own financial interest. Mr. Bandimere testified that his motivation in telling people about IV Capital and UCR was to provide a benefit to them, and not himself. That testimony is supported by the fact that Mr. Bandimere personally guaranteed the investments of two ministry foundations of which he was a director, invested $50,000 on behalf of his son, and funded an account for [redacted], a minister who Mr. Bandimere had known for many years. Tr. 1079:18-1083:8. It is supported further by the Division's failure to introduce evidence that Mr. Bandimere realized any benefit from the participation of investors in Blue Rose, another investment option available to members of the limited liability companies.

Mr. [redacted] testified that Mr. Bandimere mentioned an investment opportunity during a meeting of a car club to which they belonged, during a discussion among the members about what to do with $1,000 in cash that the club had i[redacted], and Mr. [redacted] all testified that Mr. Bandimere was not making a sales presentation, but rather, providing information that would benefit potential investors. Tr. 469:18-470:19; 704:8-23; 783:2-22. There was no evidence that Mr. Bandimere was soliciting strangers; [redacted] testified that Mr. Bandimere did not approach them about a potential investment, but they approached him based on information they had gotten from others. Tr. 286:19-287:21; 491:19-495:7.

The Division ignored that Mr. Bandimere's motivation to serve the financial interest of others took him out of the definition of a seller of securities under *Pinter v. Dahl*. Although the Division suggests that Mr. Bandimere wanted to increase the amount invested in order to increase his management fees, it points to no evidence to support that assertion, and it ignored that Mr. Bandimere, prior to the payment of any management fee by IV Capital, involved a number of people in IV Capital through his personal account, and received no compensation arising from those who invested in Blue Rose.

Although Mr. Bandimere's altruistic motivation may be uncommon, the depth of his faith, and his life-long commitment to his faith, are uncommon as well. The Division presented no evidence that Mr. Bandimere ever was motivated to have other people invest in either IV Capital or UCR to serve his financial interest rather than the interest of prospective investors. It is asking the Court to disbelieve Mr. Bandimere without any evidence that Mr. Bandimere testified untruthfully about his motivations, which were grounded in his religious beliefs.

C. Mr. Bandimere did not act Willfully.

The Division also failed to support its allegation that any violations by Mr. Bandimere of Section 5 of the Securities Act were "willful." In *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802-3 (D.C. Cir. 1965), in discussing what must be shown to establish an improper sale of unregistered securities that was "willful" within the meaning of Section 15(b) of the Exchange Act, the court noted that proof was complete ". . . when it is shown that the petitioners participated in the sale of stock knowing it was unregistered." There is no evidence that Mr. Bandimere knew that participation in the IV Capital or UCR programs was a security that was not registered. Without evidence that Mr. Bandimere had such knowledge, any improper sale of unregistered securities is not willful under *Gearhart & Otis, Inc.* Additional evidence demonstrating that Mr. Bandimere did not act willfully is found in the fact that he conferred with counsel, Cameron Syke, about securities law compliance, and Mr. Syke admitted that he failed to spot the issue that the IV Capital and UCR trading programs could be considered investment contracts, the sale of which would have to be pursuant to an effective registration statement, or an exemption. Tr. 804:10-805:13. If a willful violation of the law is to be given any meaning, actions taken after consultation with counsel who failed to provide proper advice cannot constitute a "willful" violation.

III. MR. BANDIMERE DID NOT ACT WILLFULLY AS AN UNREGISTERED BROKER

The Division contends that Mr. Bandimere violated Section 15(a) of the Exchange Act by acting as an unregistered broker in the offer and sale of securities in IV Capital and UCR. Brief, p. 13. The Division has failed to prove that contention.

The Division's argument suffers from the same shortcomings as the SEC's argument in *SEC v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005) *aff'd on other grounds*,

amount of management compensation were actually for something else, such as sales compensation.

The Division's lack of evidence that the management fees were really compensation for bringing in new investors is even more arresting when considered with its admission that there was no evidence that Mr. Bandimere was compensated for providing investment advice. Division Brief, p. 14, n.2. The Division was correct in its admission. However, there is no more evidence that management fees were compensation for attracting investors than there is for providing investment advice.

Not all persons who introduce investors to the sellers of securities are brokers who must be registered even where such persons are compensated by a fee representing a percentage of the transaction; such persons may be "finders." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1336-7 (M.D. Fla. 2011). The Division provides no analysis that shows that Mr. Bandimere was a "broker" rather than a "finder." An examination of the relevant factors shows that Mr. Bandimere was a finder.

Mr. Bandimere engaged in no negotiations. He did not evaluate the financial needs of the investors or the issuers. There is no evidence that he engaged in any advertising or that he approached anyone about investing other than family or close friends.[9] Therefore, Mr. Bandimere's activities do not constitute acting as a broker. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1340 (M.D. Fla. 2011) (solicitation of family members and intimate friends not broker activity).

There is no evidence that Mr. Bandimere had, or claimed to have, the ability to effectuate transactions in securities. Mr. Bandimere had to go through Parrish to participate in IV Capital,

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[9] [redacted] were all people who Mr. Bandimere had known for decades. Mr. [redacted] all approached Mr. Bandimere about investing. Ms. [redacted] was referred to Mr. Syke by Parrish.

and through Dalton to participate in UCR. The Commission has established that Parrish and Dalton were each acting as brokers in their activities on behalf of IV Capital and UCR. Exhibit 78; Exhibit 83. A person who does not have the ability to make a transaction in securities happen, and does not hold himself out as having such an ability, but who must go through a broker, does not engage in the business of effecting transactions in securities, and is not a broker. *See, In re Slatkin,* 525 F.3d 805, 817-8 (9th Cir. 2008).

Mr. Bandimere did not handle investor paperwork or obtain signatures for either IV Capital or UCR; there is no evidence that investor paperwork or signatures were required for those programs. The only investors who had any agreement with IV Capital or UCR were Ms. [redacted], through a trust, both of whom dealt directly with Parrish. There is no evidence that Mr. Bandimere "handled" the paperwork for the investments of either Ms. [redacted]s trust. Exhibit 120, p. 1480. Nor is there any evidence that Mr. Bandimere was "working with a self-directed IRA provider," or "managed investor funds in IV Capital and UCR."

The evidence in this record does not support a finding that Mr. Bandimere willfully violated Section 15(a) of the Exchange Act.

IV. THE DIVISION HAS NOT JUSTIFIED THE RELIEF IT HAS REQUESTED

A. Cease and Desist Order.

Every form of relief requested by the Division requires that it be in the public interest. Regarding a cease and desist order, there must be some showing of a likelihood of a future violation, although that showing need not be as great as the showing required for injunctive relief.

The Division has failed to show that Mr. Bandimere is likely to violate the securities laws in the future if not subject to a cease and desist order. The Division points to the recency and

harm to investors as reasons for the entry of a cease and desist order. Division Brief, p. 23. However, there is no logical connection between a violation that is recent or that resulted in harm to investors, and a future violation, nor does the Division suggest any. There is no evidence that Mr. Bandimere was, or is, indifferent to the harm suffered by all investors, including himself. The violations are some three years old, which is not particularly recent. Mr. Bandimere is 67 years old, has never worked in the securities industry, and his efforts to help his family and friends with financial matters did not end well, to say the least. The Division also ignored that Mr. Bandimere sought and obtained advice from Mr. Syke, an experienced securities attorney, and acted under that advice, which bears heavily on whether he is likely to violate the law in the future.

The Division's conclusory assertion that Mr. Bandimere's violation was egregious has no support. There is no suggestion, even by the Division, that Mr. Bandimere acted intentionally in misleading anyone. Even if one accepts the highly dubious proposition that Mr. Bandimere acted recklessly in light of the so-called "red flags" trumpeted by the Division, no facts or legal authority show his conduct was egregious. If the Division considers every violation of the securities laws to be egregious, then the egregiousness of a violation ceases to become a factor to be considered, since it would exist in every case where sanctions are an issue. The only theory that the Division pointed to in support of its assertion that Mr. Bandimere's conduct was egregious was that numerous investors were misled, causing significant loss. Division Brief, p. 23. However, those circumstances do not, alone, even establish a violation of the law let alone an egregious violation.

The Division ignores that Mr. Syke, an attorney, CPA, former registered representative, and experienced investor, who provided legal advice and guidance to Mr. Bandimere, admitted

he completely missed the issue of IV Capital and UCR being securities that could only be sold in compliance with Section 5 of the Securities Act, and completely missed the issue that a person engaged in the conduct in which Mr. Bandimere (and Mr. Syke) engaged could be considered a broker activity requiring registration. Mr. Syke's failure to see these issues is powerful evidence that Mr. Bandimere's failure to understand the potential implications of his conduct was not egregious.

That Mr. Bandimere's activities which the Division contends violated the law extended over time raises no inference he is likely to continue to engage in those activities in the future. Rather, the weight of the evidence supports the conclusion that Mr. Bandimere is an honest, law abiding citizen who, after consulting with counsel, engaged in conduct over time because he had no reason to believe the conduct was improper .

The Division's assertion that Mr. Bandimere's failure to admit any wrong-doing precludes this court from crediting assurances of future compliance with the law is baseless. In *SEC v. First City Financial Corp. Ltd.,* 890 F.2d 1215, 1229 (D.C. Cir. 1989), the court rejected a general "lack of remorse" as an appropriate factor in determining the likelihood of future violations, and limited that factor to defendants who previously violated court orders, or who otherwise indicated they did not feel bound by the law. No evidence suggests that "lack of remorse" is an appropriate factor to be considered in this case.

It is telling that the Division has not identified the wrongdoing which it contends Mr. Bandimere should have admitted. Should he have admitted to employing a scheme to defraud, even though the Division abandoned that claim shortly before the hearing? Should he have admitted to violations of the Advisers Act, even though the Division has admitted that Mr. Bandimere is not subject to that Act because there is no evidence he was compensated for

SEC v. Rockwell Energy of Texas, LLC, 2012 WL 360191, at *4 (S.D. Tex. Feb. 1, 2012), the SEC sought and obtained disgorgement arising from the fraudulent sale of unregistered securities which was calculated by subtracting from the total amount raised the amounts repaid to investors, as well as amounts recovered by a receiver, which would presumably be repaid to investors. Again, the Division does not explain why reductions appropriate in that case are not appropriate here.

The Division does not support its contention that Mr. Bandimere's management fees have nothing to do with his investment losses. It cites no authority in support of that assertion, and ignores cases where the SEC's efforts to inflate a claim for disgorgement by ignoring the economic realities of the defendants' entire course of conduct have been rejected by the courts.

In *Hately*, the court considered whether the SEC acted within its discretion by affirming a disgorgement order arising from a disciplinary proceeding conducted by the N.A.S.D. The N.A.S.D. determined that a registered broker entered into a solicitation agreement with an unregistered individual, in violation of N.A.S.D. rules, which agreement provided that the firm would retain 10% of the sales compensation in transactions conducted by the unregistered agent. The N.A.S.D. ordered that the firm disgorge all of the sales compensation attributed to the unregistered agent, rather than only 10% as provided in the agreement. The court rejected the SEC's argument that the firm received all the improper compensation and merely gave 90 percent of it away, and held that the SEC abused its discretion by ignoring the agreement which constituted the violation. *Hately*, 8 F.3d at 655-6.

In *SEC v. McCaskey*, 2002 WL 850001 (S.D.N.Y. Mar. 26, 2002), the SEC sought disgorgement from a defendant who manipulated the price of a stock through fraudulent matched orders. The court denied disgorgement of profits on certain trades during the period of

manipulation because those profits were more than offset by unprofitable trades during the period. The court would not allow the SEC to cherry pick parts of the overall conduct to obtain disgorgement when there was no actual gain. *McCaskey,* 2002 WL 850001 at *10.

The Division's effort to divorce Mr. Bandimere's management fees from his investment losses ignores the economic reality of the Ponzi schemes which ensnared him, along with other investors. Mr. Bandimere's contributions were not lost in legitimate investment activities. His money, and the money of other investors, was stolen through an inherently fraudulent scheme in which Mr. Bandimere was deceived into contributing funds which were not used not for legitimate investments, but to make payments either to himself or to other investors. *In re Slatkin*, 525 F.3d at 814-5. Mr. Bandimere was not paid real compensation through either investment returns or management fees.

To the extent Mr. Bandimere's invested funds were returned to him in management fees or investment returns, he realized no gains or profits up to the point of break even, Mr. Bandimere got his own money back. Even if some of the money he received came from other investors (which the Division has not shown), a portion of the money he paid in went to pay other investors through Ponzi payments to other victims, with the effect of reducing their losses. Mr. Bandimere's principal contributions are an inextricable part of the transactions about which the Division complains. They are not the type of business expenses incurred in perpetrating a fraud which some courts have held should not be offset against a wrongdoer's gains. Division Brief, p. 25, n.5.[10] Mr. Bandimere, who was a victim of a fraudulent scheme,

[10] Exhibit 200 shows that Mr. Bandimere did not claim offsets arising from operating expenses or overhead. Except for costs directly associated with trying to get payments from Parrish, and interest expenses related to funds he had borrowed to invest, the offsets related only to payments to investors. Even without the interest expense and the expenses incurred in connection with Parrish, Mr. Bandimere was a net financial loser.

should have at least the same benefit as the defendant in *McCaskey* to have his losses considered in determining whether he realized any improper gains.

Because Mr. Bandimere invested in a Ponzi scheme, his investments went either to pay himself or other investors. His investment, combined with payments he made directly to investors, exceeded the combined total of what he received as investment returns and management fees. Under these facts, ordering Mr. Bandimere make further payments is unwarranted.

Apart from disgorgement being inappropriate because Mr. Bandimere realized no gain, and was not unjustly enriched by the return of money that had been stolen from him, the amount requested is not a reasonable approximation of what Mr. Bandimere received from engaging in activities which violated the securities laws.

The Division has both the ultimate burden of proving an appropriate amount of disgorgement, and the initial burden of demonstrating a reasonable approximation of an amount to be disgorged. If the Division meets its initial burden to establish a reasonable approximation of what should be disgorged, a respondent then has the burden of demonstrating that the Division's claimed amount is not a reasonable approximation of unjust enrichment causally related to violative conduct. *First City Financial Corp.*, 890 F.2d at 1232.

The Division has failed to show that $734,996.33 is a reasonable approximation of unjust enrichment causally related to the violative conduct it has alleged. The Division's calculation of disgorgement obtained from Parrish and Dalton, which excludes amounts that went back to investors, shows that the Division knows that payments to other investors should not be disgorged. The Division's failure to exclude from its disgorgement request sums not subject to disgorgement shows that its proposed disgorgement figure is unreasonable on its face. Further,

the totality of the management fees received by Mr. Bandimere includes management fees calculated on his own investments, and on the investments made by Mr. Bandimere on behalf of his son, and George Stepan. There is no violative conduct flowing from Mr. Bandimere's contribution of his money to the IV Capital and UCR programs, but the Division, which has the accounting documents necessary to calculate management fees unrelated to any violations of the law, did not even try to estimate an amount not properly included in disgorgement because it related to Mr. Bandimere's own investments.

The amount claimed by the Division also includes fees earned from Ms. Pickering's account with IV Capital, even though the evidence is clear that Mr. Bandimere had nothing to do with her investments. The amount also includes management fees relating to Exito, even though (except for Mr. Loebe) there is no evidence that Mr. Bandimere (as opposed to Mr. Syke) sold or acted as a broker for the members of that limited liability company. Again, the Division failed to calculate, or even estimate, a portion of management fees not causally related to any violations of law which Mr. Bandimere is alleged to have committed.

The Division also assumes, without evidence, that all of Mr. Bandimere's management fee was a commission arising from illegal sales activity. However, the Division has not proved that any, let alone all, the management fees were compensation for illegal sales activity, as opposed to compensation for permissible administrative and management activities. It is well-established that compensation directly related to violative conduct is subject to disgorgement but compensation derived from legitimate activities is not. *E.g., Jay T. Comeaux*, I.D. Rel. No. 494, p. 4 (July 2, 2013). The failure of the Division to attempt to estimate an amount of compensation arising from permissible activities shows that it has not made a reasonable approximation of an appropriate amount of disgorgement.

The Division has not shown by a preponderance of the evidence that any, let alone all, the management fees were actually compensation for raising investor money. Mr. Syke and Mr. Bandimere both testified that the compensation was for management services. Tr. 745:3-22; 800:4-11; 927:20-928:3. Exhibit 35, which reflects Dalton's agreement to pay an unspecified compensation is called a "Management Commission Agreement," and provides no insight regarding the purpose of the compensation.

The Division is asking the Court to disbelieve Mr. Bandimere and Mr. Syke, apparently based on nothing more than Mr. Bandimere's reference to "commissions" or "brokerage" in certain internal documents meant compensation for sales activities. However, those internal references do not support the meaning that the SEC has inferred because implicit in the SEC's position is the proposition that Mr. Bandimere believed he was being paid for sales activities, but was willing to perform extensive management duties for no compensation. It is far more reasonable to conclude from the evidence that Mr. Bandimere did not seek, or believe he received, compensation for finding investors, since he got other investors involved before he was paid any management fees, but believed he should be compensated for the tremendous effort that went into to the administration and accounting for the limited liability companies.

C. Civil Penalties

The Division's request for civil penalties only for willful violations is a tacit admission that civil penalties are available , if at all, only under Section 21B(a)(1) of the Exchange Act. Civil penalties under Section 21B(a)(2), under which a willful violation need not be proved, are not available. Section 21B(a)(2) was added by the Dodd-Frank legislation and became law in July, 2010, and post-dates the conduct at issue here. The Division implicitly concedes that Section 21B(a)(2) cannot apply to conduct which preceded its enactment.

The Division's assumption that civil penalties are available is unwarranted.

purchase or sale of any security. The Division adduced no evidence that Mr. Bandimere, in advising people about IV Capital or UCR, intended to offer, sell, or effect, induce or attempt to induce any transaction in a "security." There is no evidence that Mr. Bandimere knew that participating in either of those trading programs could be a security. Mr. Syke, who advised Mr. Bandimere on the legality of the activities contemplated by the limited liability companies, admitted he missed entirely the issues of whether participation in the trading programs were securities, and whether his (and Mr. Bandimere's) activities could constitute acting as a broker. Even if Mr. Bandimere's discussions with counsel are not considered sufficient to lead to a finding in his favor on liability, the involvement of counsel remains relevant on sanction. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1109-11 (D.C. Cir. 1988). Mr. Bandimere's consultation with Mr. Syke should preclude a finding Mr. Bandimere acted in reckless disregard of a regulatory requirement necessary to impose second or third tier penalties.

The *Steadman* factors do not favor the Division, as discussed above in connection with the discussion of a cease and desist order. Mr. Bandimere did nothing involving fraud or deceit. There is no evidence that he deliberately aced with a deliberate or reckless disregard of a regulatory requirement. In fact, his consultation with Mr. Syke precludes such a finding. Nor is there a legitimate deterrent value of a fine. Persons who lack an understanding that involving friends and family in what turns out to be a fraudulent investment may themselves be violating the law are not likely to have any knowledge about the outcome of this case.

V. MR. BANDIMERE HAS BEEN DENIED EQUAL PROTECTION

The Division concedes in its Brief this Court has the authority to address Mr. Bandimere' affirmative defense based upon a denial of equal protection under the Constitution. However,

the Division claims that the equal protection defense must fail because of lack of evidence that Mr. Bandimere was singled out. Division Brief, pp. 21-22.[11] The Division is wrong.

The Division's contention there was no evidence that Mr. Bandimere has been singled out ignores the record. Exhibit 228 reflects a summary of actions involving Ponzi scheme enforcement actions brought since the actions against Bernard Madoff. That summary shows that virtually every action brought against individuals who the SEC claims were knowingly bringing investors into a Ponzi scheme were brought as a civil enforcement action in federal court. The few cases brought administratively were filed a settled cases, or involved allegations of a failure to investigate or conduct due diligence, or involved some other wrongdoing.

The Division's reference to the cases brought against Jay Young and David Smith, which arose from this investigation, which the Division claims are examples of evidence that Mr. Bandimere was not singled out showed the contrary. Mr. Smith was an unregistered sales agent for IV Capital. However, there was no claim that Mr. Smith knew, or must have known, that IV Capital was a Ponzi scheme. Rather, the allegation against Mr. Smith was he was negligent in not knowing that IV Capital was fraudulent. Mr. Bandimere was alleged to have been reckless in not knowing IV Capital and UCR were fraudulent schemes. Because acting recklessly means that the actor either knew or must have known, the allegations against Mr. Bandimere are far more serious than those against Mr. Smith. Also, the case against Mr. Smith was filed as a settled action, so there was no issue of whether Mr. Smith was deprived of procedural protections that would have been available to him in federal court to fight the allegations against him.

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[11] The Division does not contend that the administrative forum provided Mr. Bandimere with the procedural protections that would have been available in a federal court proceeding.

broker. Mr. Bandimere requests that an order be entered finding that the violations have not been proved, and that no sanctions are warranted.

Dated this 8th day of July, 2013.

Respectfully submitted,

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