UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17674

In the Matter of

ALEXANDER KON,

Respondent.

RESPONDENT ALEXANDER KON'S MOTION FOR A RULING ON THE PLEADINGS AND SUPPORTING MEMORANDUM OF LAW

The Respondent, by and through undersigned counsel, respectfully moves this Court to dismiss the Securities and Exchange Commission's ("Commission" or "Plaintiff") Order Instituting Proceedings ("OIP") pursuant to Rules 250(a) motion for a ruling on the pleadings. Even accepting all of the Commission's factual allegations as true and correct and drawing all reasonable inferences in the Commission's favor, the Respondent is entitled to a ruling as a matter of law as the Commission fails to state a claim for which relief may be granted. The grounds for this Motion are set forth below in the accompanying Memorandum of Law.

I. INTRODUCTION

The Commission's Order Instituting Proceedings ("OIP") alleges the Respondent violated Section 17(b) of the Securities Act of 1933 ("Securities Act"). It appears from the OIP, the Commission believes the Respondent published paid for publications without adequately disclosing compensation received. The few factual allegations in the OIP are the culmination of a thorough regulatory investigation that has failed to adequately demonstrate the Respondent's purported transgressions. Moreover, the OIP evidences a total lack of understanding of the plain language of Section 17(b) of the Securities Act as well as the jurisprudence interpreting the same. As set forth below, the OIP is fatally vague and unspecific, not only failing to meet the heightened pleading requirement mandated by Rule 9(b) of the Federal Rules of Civil Procedure ("Rule 9(b)"), but also the requirements of Rule 12(b)(6).

Additionally, the ALJ in this matter appointed by the Commission lacks the constitutional authority to rule in this matter under the Appointments Clause.

II. FACTUAL BACKGROUND

The following facts are drawn from the Commission's OIP issued in this matter (although certain below facts will be disputed by the Respondent).

Alexander Kon is a 38 year-old resident of Overland Park, Kansas. During the relevant time period, Mr. Kon, for compensation, published information on the Internet concerning public companies.

In February 2010, the Respondent received $25,000 as compensation from a third-party for publishing his views on The Public Company. The Respondent made at least one publication concerning The Public Company. The Respondent's publication fully disclosed that it received $25,000. Specifically, the Respondent's publication stated:"Stockchat LLC has received twenty five thousand dlrs for the awareness of CBGI from a third party Casey Cummings."

III. ARGUMENT

1. THIS MATTER SHOULD BE DISMISSED AS, SEC ADMINISTRATIVE LAW JUDGES LACK THE CONSTITUTIONAL AUTHORITY UNDER THE APPOINTMENTS CLAUSE TO ISSUE A DECISION IN THIS MATTER.

The Appointments Clause states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2, cl. 2.

The Appointments Clause identifies specific public officials who may appoint officers and restricts others from making appointments. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." Freytag, 501 U.S. at 884.

In a recent 10th circuit decision, the Appeals Court held that an SEC Administrative Law Judge was not constitutionally appointed and therefore holding his office in violation of the Constitution and his prior decision was set aside.[1] Bandimere v. SEC, No. 15-9586 (10th Cir. 2016).

Here, the Respondent resides in Kansas, a 10th Circuit state, in which *Bandimere* controls and where it has been determined that this court and presiding ALJ in particular, does not have the authority to issue a decision in this matter.

2. THE CLAIM AGAINST THE RESPONDENT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

The Commission's sparse factual allegations lodged against the Respondent do not support the claims brought against him pursuant to Section 17(b) of the Securities Act. In fact, the allegations described in the Commission's OIP specifically undermine the Commission's

[1] The Administrative Law Judge who presided in the initial *Bandimere* decision is ALJ Cameron Elliot, the same ALJ appointed in this matter. The various penatlies requested by the Commission is similar, if not the same, as in *Bandimere.*

allegations of a Section 17(b) violation. For the following reasons, the OIP against the Respondent should be dismissed insofar as it alleges violation of Sections 17(b) of the Securities Act.

A. THE SEC IS AN ORDINARY LITIGANT WHEN INVOKING THE PROCESS OF THE COURTS.

As a preliminary matter, although the Commission is a governmental agency, once it becomes a litigant and seeks redress from the court, it is subject to the same pleading and discovery standards as any other litigant. See SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 414 (S.D.N.Y. Jan. 13, 2009). This requirement applies to both procedural matters as well as substantive pleading requirements, such as the heightened standards for alleging fraud.

The Supreme Court has held that the text of a securities law controls and that violations of the antifraud provisions should be interpreted consistent with the statute, whether the plaintiff invoking the statute as a private litigant or the Commission. Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994). In interpreting the securities laws, the Supreme Court has instructed that the plain language of a statute must be adhered to and is the starting point in constructing a statute. Id. at 172. "Thus, if language of a provision of the securities laws is sufficiently clear in its context, it is unnecessary to 'examine the additional considerations of the "policy" that may have influenced lawmakers in their formulation of the statute.'" Aaron v. SEC, 446 U.S. 680 (1980), quoting Ernst & Ernst v. Hochfelder, 425 U.S.185, 214 n. 33 (1976). Therefore, in construing the securities laws, it is appropriate that the Commission be judged by the same standards for pleadings as any other litigant.

B. STANDARD OF REVIEW- MOTIONS TO DISMISS UNDER RULE 12(B)(C)

Pursuant to Rule 12(b)(6), a court must dismiss a complaint if the complaint fails to state a cognizable claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the well-pleaded factual allegations in the complaint as true, but will not accept unsupported conclusions, unwarranted inferences, or sweeping conclusions cast in the form of factual allegation. See Miree v. DeKalb County, Ga., 433 U.S. 25, 27 n.2 (1977); Oxford Asset Mgmt. Ltd. v. Jaharis , 297 F3d 1182,1188 (11th Cir. 2002). If a complaint does not plead facts that state a claim as a matter of law, it must be dismissed. See Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1253(11th Cir. 2005) (commending district court "for remembering that some minimal pleading standard does still exist . . ." and finding that "bald assertions" and "unwarranted deductions of facts" are not accepted as true and will not survive a Rule 12(b)(6) motion to dismiss).

The Supreme Court has stated that a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact). Bell Atl. Corp. v. Twombly, 127 S.Ct. at 1964-65 (addition in original) (internal citations omitted). See also In re Managed Care Litig., 2009 U.S. Dist. LEXIS 25427 at *22 (S.D. Fla.Mar. 26, 2009); City of Winter Haven v. Cleveland Indians Baseball Co., LP, No. 809-CV-00190-T-17EAJ, 2009 U.S. Dist. LEXIS

38708 at *2-3 (M.D. Fla. Apr. 22, 2009) (both following Twombly and dismissing the matters under 12(b)(6)).[2]

A complaint that alleges fraud must also meet the heightened pleading requirements of Rule 9(b), which provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." See Fed. R. Civ. P. 9(b). The provisions of Rule 9(b) apply both to the scienter-based and to the negligence-based anti-fraud provisions of the federal securities laws. See MeterLogjc, Inc. v. Copier Solutions, Inc., 126 F.Supp. 2d 1346, 1360 n.10 (S.D. Fla. Sept. 27, 2000); Rhodes v. Omega Research, Inc. , 38 F.Supp. 2d 1353, 1359-60 (S.D. Fla. March 1, 1999). As touched on above, complaints filed by the Commission are not exempt from the heightened pleading requirements of Rule 9(b), and must plead sufficient detail to alert the defendant as to the precise misconduct with which he is charged. See SEC v. Dunlap,2002 U.S. Dist. LEXIS 10769, at *6 (S.D. Fla. Mar. 27, 2002); SEC v. Gold, 2006 U.S. Dist. LEXIS 87042,at *5 (E.D.N.Y. Aug. 18, 2006); SEC v. Blackman , 2000 U.S. Dist. LEXIS 22358, at *13 (M. D. Tenn., May 26, 2000). Dismissal of the Commission's complaint is appropriate when the Commission fails to meet Rule 9(b)'s requirements. See SEC v. Tambone, 417 F. Supp. 2d 127,131 (D. Mass. Jan. 27, 2006) (applying Rule 9(b) particularity requirements to SEC fraud complaint and granting motions to dismiss complaint); SEC v. Yuen, 221 F.R.D. 631, 634-36(C.D. Cal. June 10, 2004) (dismissing Commission's complaint based on Rules 12(b)(6) and 9(b) where Commission failed to plead elements of fraud with requisite particularity). This heightened standard is fitting because the

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[2] It should be noted that if the Plaintiff had brought a 17(a) claim against the Respondent, then the Commissioner would be required to act under the higher pleading standard in section 9(b). As no 17(a) claim has been brought there should be no requirement for a 9(b) analysis.

Commission has mandatory investigative, pre-suit subpoena power. Accordingly, in order to satisfy the particularity requirement under Rule 9(b), the Commission must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state when and where the statements were made, and (4) explain why the statements were fraudulent." SEC v. Apolant, 411 F. Supp. 2d 271, 276 (E.D.N.Y. Jan. 31, 2006) (internal citation omitted). Stated differently, Rule 9(b) mandates that the Commission's OIP must "answer the familiar questions of 'who, where, when, why, and how.'" SEC v. Digital Lightwave, 196 F.R.D. 698, 700 (M.D. Fla. Sept. 7, 2000) (internal citation omitted). Conclusory allegations do not satisfy Rule 9(b)'s heightened pleading standards. Miller v. Lazard, Ltd., 473 F. Supp. 2d 571, 588 (S.D.N.Y. Feb. 7, 2007).

As described more fully below, the Commission has failed to meet the standards articulated by Rules 12(b)(6) and 9(b)and, as a result, dismissal of its OIP in its entirety is appropriate.

C. THE CLAIM AGAINST THE RESPONDENT SHOULD BE DISMISSED FOR FAILURE TO MEET RULE 12(B)(6) STANDARDS AS WELL AS THE HEIGHTENED PLEADINGS STANDARD OF RULE 9(B)

The OIP alleges the Respondent violated Section 17(b) of the Securities Act of 1933. Section 17(b) of the Securities Act makes it unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof. 15 U.S.C. § 77q(b). Thus, "[i]n order to violate Section 17(b), a person must (1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which describes a security), (3) for consideration received (past, currently, or prospectively, directly or indirectly), (4) without full disclosure of the consideration received and the amount." SEC v. Gorsek, 222 F. Supp. 2d 1099, 1105 (C.D. Ill. 2001).

Here, with respect to the fourth element—the requirement of full disclosure —the Commission alleges the source of the consideration was misidentified as a "non-affiliated third party," when in fact the source should have been identified as the Issuer and CEO. Thus, the OIP alleges that the Respondent did not "fully disclos[e] the receipt . . . of such consideration . . . ." 15 U.S.C. § 77q(b). The Respondent, however, argues that he fully complied with the mandates of Section 17(b) when he disclosed the "consideration received and the amount." Gorsek, 222 F. Supp. 2d at 1105. Specifically, The Publications contained the following language: "Stockchat LLC has received twenty five thousand dlrs for the awareness of CBGI from a third party Casey Cummings."

The specific issue here—i.e, whether misidentifying the source of the consideration received violates Section 17(b)'s requirement of "fully disclosing the receipt . . . of such consideration and the amount thereof"—appears to be one of first impression. By its plain language, Section 17(b) does not require affirmative disclosure of the source of the consideration received. "Section 17(b) contains only two forms of disclosure: (1) that a promoter disclose his status as such, and (2) that a promoter disclose how much he is paid for his promotions." U.S. v. Wenger, 427 F.3d 840, 849-50 (10th Cir. 2005); see also Gorsek, 222 F. Supp. 2d at 1106 ("Section 17(b) calls for the disclosure of the receipt of compensation and the amount"). The Commission has identified no authority, claiming that the source of the consideration must be identified. Despite allegedly misidentifying the source of the consideration, the Respondent's respective publication disclaimers complied with the plain language of Section 17(b) and honored its intent. "Section 17(b) was designed to protect the public from publications that 'purport to give an unbiased opinion but which opinions in reality are bought and paid for.'" Gorsek, 222 F. Supp. 2d at 1105 (quoting U.S. v. Amick, 439 F.2d 351, 365 (7th Cir. 1971) (citing Committee on Interstate and Foreign Commerce. H.R.Rep. No. 85, at 24 (1933))). The Respondent's disclaimer leaves no doubt that he received $25,000 "as compensation." In short, the disclaimers "fully disclos[e] the receipt . . . of such consideration and the amount thereof" as required by statue. 15 U.S.C. § 77q(b). That is all the statute requires.

Additionally, the at-issue disclaimers fully advise the readership that Respondent's opinions were "bought and paid for," Amick, 439 F.2d at 365 (citing Committee on Interstate and Foreign Commerce. H.R.Rep. No. 85, at 24 (1933)), i.e., that they were not unbiased. The OIP alleges that Respondent intentionally misstated the source of consideration as part of a larger scheme to defraud consumers. However, even if that allegation is true, it is not a claim upon which relief can be granted under Section 17(b). Whereas "material misrepresentations or materially misleading omissions" are necessary elements of a Section 17(a) violation, SEC v. Merch. Capital, 483 F.3d at 747, 766 (11th Cir. 2012), they are not elements of a Section 17(b) violation. As noted, Section 17(b) "calls for the disclosure of the receipt of compensation and the amount," Gorsek, 222 F. Supp. 2d at 1106, and aims to ensure that consumers are fully advised when a promoter's opinion is "bought and paid for," and therefore not unbiased. Amick, 439 F.2d at 365 (citing Committee on Interstate and Foreign Commerce. H.R.Rep. No. 85, at 24 (1933)).

Here, The Commission has failed to state a cause of action in its Complaint under Rule 12(b)(6), Fed. R. Civ. P., because there is no requirement to identify the source of consideration received for publishing a newsletter or to update previously-published newsletters to reflect sales of stock received as consideration for publishing the newsletter. The Respondent's disclaimers fully complied with the plain language of Section 17(b) when he disclosed the receipt of compensation as well as the amount.

D. IT HAS BEEN PREVIOUSLY DECIDED THAT THE FAILURE TO DISCLOSE WHO PAID CONSIDERATION IS NOT A VIOLATION OF SECTION 17(b).

The issue of whether misidentifying the source of consideration received violates Section 17(b)'s requirement of "fully disclosing the receipt of such consideration ... and the amount thereof" has already been decided by the District court Florida. See SEC v. Recycle Tech., No. 12-21656 (S.D.Fla. 2013)]. The Court in *Recycle Tech* specifically states "By it's plain language, Section 17(b) does not require affirmative disclosure of the source of consideration received." Id. at 20. The court further states that even if the Defendant had intentionally misstated the source of consideration to defraud consumers no relief could be granted under Section 17(b). Id. at 21.

In the present matter, the Commission admits that the Respondent disclosed he received consideration as well as the amount he received. In fact, the Commission's only allegation against the Respondent is that he failed to disclose who paid him the consideration that he received. The Honorable Judge Lenard's sound analysis in SEC v. Recycle Tech clearly demonstrate that the Respondent's alleged actions are not in violation of Section 17(b). As such, the claim against him should similarly be dismissed with prejudice.

IV. CONCLUSION

disqualification."

In support of this Motion, relevant new case law was published by the 10th circuit on December 27, 2016. See Bandimere v. U.S. Securities and Exchange Commission, 10th U.S. Circuit Court of Appeals, 15-9586 December 27, 2016. In *Bandimere*, the 10th Circuit holds that SEC Administrative Law Judges ("ALJ") are appointed in violation of the appointments clause of the U.S. Constitution. In particular, SEC ALJs are classified as "inferior officers" rather than "employees" and must be constitutionally appointed. Id at 30. Further, the SEC ALJ's decision in Bandimere was set aside as the ALJ was not constitutionally appointed.[1]

In light of the *Bandimere* decision, Respondent in this matter respectfully requests the Hearing Officer withdraw from the above captioned proceedings. The SEC ALJ was not appointed by the President, a department head, or the Judiciary. Because he was not appropriately appointed pursuant to Article II, his appointment is unconstitutional in violation of the Appointments Clause.

Respectfully Submitted,

January 4, 2017

Todd S. Feinstein
Direct Line: [redacted]
Todd@feinsteinlawfirm.com

Feinstein Law, P.C.
[redacted]
Sequim, Washington [redacted]

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[1] The Administrative Law Judge who presided in the initial *Bandimere* decision is ALJ Cameron Elliot, the same ALJ appointed in this matter. The various penalties sought by the Commission in *Bandimere* were almost exactly the same as here. The Respondent resides within the coverage area of the 10th Circuit.

TABLE OF AUTHORITIES

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FEDERAL COURT DECISIONS

FEDERAL RULES AND STATUTES

CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing Motion for Ruling on the Pleadings was filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by U.S. Mail and email, on this 3rd day of January, 2017, on the following persons entitled to notice:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E. Room 2557
Washington, D.C. 20549
(also via email to alj@sec.gov)

Russell Koonin, Esq.
Senior Trial Attorney
Division of Enforcement
Securities and Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, FL 33131
(also via email to kooninr@sec.gov)

Todd Feinstein