

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 9512 / January 16, 2014

SECURITIES EXCHANGE ACT OF 1934  
Release No. 71333 / January 16, 2014

Admin. Proc. File No. 3-15124

In the Matter of  
DAVID F. BANDIMERE

ORDER DENYING MOTION FOR  
SUMMARY AFFIRMANCE,  
GRANTING PETITION FOR REVIEW,  
AND SCHEDULING BRIEFS

On October 8, 2013, an administrative law judge issued an initial decision finding that David F. Bandimere willfully violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 (the "Initial Decision").<sup>1</sup> The Initial Decision barred Bandimere from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, ordered Bandimere to disgorge \$638,056.33 plus prejudgment interest, imposed a civil penalty of \$390,000, and ordered Bandimere to cease and desist from committing or causing violations of the above-listed provisions.<sup>2</sup> Bandimere filed a petition for review of the Initial Decision, and the Division of Enforcement filed a motion for summary affirmance of that decision. Bandimere opposes the motion. We have determined to deny the Division's motion, grant Bandimere's petition for review, and establish a briefing schedule for the review proceeding.

After a six-day hearing with testimony by an expert witness and fact witnesses, including investors, the law judge issued an eighty-nine page opinion finding that Bandimere violated antifraud and registration provisions of the Securities and Exchange Acts while operating as an unregistered broker when he misled potential investors about investments in two Ponzi schemes,

<sup>1</sup> *David F. Bandimere*, Initial Decision Release No. 507, 2013 SEC LEXIS 3142 (Oct. 8, 2013).

<sup>2</sup> *Id.* at \*234-55.

IV Capital Ltd. ("IV Capital") and Universal Consulting Resources ("UCR").<sup>3</sup> The law judge found that Bandimere acted with scienter when he presented a one-sided, positive view of the IV Capital and UCR investments and failed to disclose red flags and potentially negative facts relating to those investments.

Bandimere filed a timely petition for review, arguing, among other things, that the findings of violation were not supported by a preponderance of evidence in the record taken as a whole and were clearly erroneous, and that some of those findings were based upon improper legal standards. Bandimere also argued that he "was not given adequate notice of the facts and law on which the violations found in the Initial Decision were based, thereby depriving him of his rights to notice under the Commission's Rules of Practice (including specifically Rule 20(b)(3)), the Administrative Procedure Act, and due process of law, and a fair opportunity to defend himself"; that he was deprived of equal protection because he was "singled out by having the claims against him brought administratively to deprive him of procedural rights that would have assisted his defense, that otherwise would have been available to him"; that he was "deprived of his rights under the Commission's Rules of Practice, the Administrative Procedure Act, and due process of law" to have documents produced that were relevant to his defense and to have irrelevant evidence excluded at the hearing; and that the Initial Decision "found that [Bandimere] violated standards of conduct as to which he was not given notice, in violation of his rights under the Administrative Procedure Act and due process of law." Finally, Bandimere argued that the sanctions imposed and the disgorgement ordered were arbitrary, capricious, inconsistent with legal (and in some instances statutory) standards, and not supported by the record.

The Division argues that summary affirmance is warranted because "there was no prejudicial error committed in the conduct of the proceeding, and the Initial Decision does not embody an exercise of discretion or decision of law or policy that is important and that the Commission should review." With respect to most of the issues Bandimere raised in his petition for review, the Division states that they were "thoroughly considered, and properly rejected, by

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<sup>3</sup> The law judge also found that Bandimere failed to establish that an exemption to the registration requirements of the Securities Act applied to the sales at issue. *Id.* at \*138 n.32.

The Commission had taken action against the perpetrators of the Ponzi schemes before the order instituting proceedings against Bandimere was issued. *See id.* at \*7-10 (discussing proceedings against Richard Dalton and UCR, and against Larry Michael Parrish in connection with his activities related to IV Capital).

The Order Instituting Proceedings in this matter contained allegations against both Bandimere and John O. Young. However, the law judge issued a separate initial decision as to Young. *David F. Bandimere*, Initial Decision Release No. 506, 2013 SEC LEXIS 3135 (Oct. 4, 2013). The initial decision as to Young has now become final. *John O. Young*, Securities Act Release No. 9483, 2013 SEC LEXIS 3696 (Nov. 22, 2013). Young is not a party to this proceeding.

the ALJ," that the law judge made his findings "based on the evidence at the hearing," and that the law judge further found, based on the evidence at the hearing, that Bandimere's "legal and factual arguments [that contradicted or were inconsistent with those findings] were meritless." The Division asserts that, because the law judge made those findings, these issues do not merit consideration by the Commission.<sup>4</sup>

The Division further contends that Bandimere was given adequate notice of the facts and law on which the violations found in the Initial Decision were based, as well as the standards of conduct on which those violations were based; that the law judge, in the Initial Decision, "meticulously analyze[d], for nearly 90 pages, on a point-by-point basis, whether the Division proved the specific allegations of the OIP"; that the law judge "limited his findings of violation to those alleged in the OIP"; and that the law judge considered and rejected Bandimere's due process argument. Finally, the Division contends that Bandimere's argument that he was deprived of his rights because the Division did not produce evidence that was relevant to his defense was thoroughly considered and rejected by the law judge, both in a pre-hearing order and during the hearing.<sup>5</sup> Thus, the Division asserts, none of these issues merits review by the Commission.

Bandimere opposes the motion, contending that his petition raises issues that the Commission should decide on appeal. He emphasizes that the Commission has found that summary affirmance is appropriate only in rare circumstances and argues that the circumstances here are not appropriate for summary affirmance. Bandimere contends that the Division did not prove its securities fraud claim, that the law judge misconstrued the term "willful" in concluding that Bandimere willfully violated Sections 5 and 15(a), and that the law judge incorrectly found, for purposes of Section 5, that he was a "seller" within the meaning of the Securities Act. For purposes of Section 15(a), Bandimere "disputes that he was engaged in the business of effecting securities transactions for the accounts of others, and therefore, he disputes that he was acting as an unregistered broker." Bandimere repeats his assertion that he was denied equal protection and argues that he was deprived of due process because he was not given timely notice of the theory of scienter that was used against him. Bandimere characterizes several of the issues he raises as important ones that the Commission should decide, including "whether a law judge has the authority to afford a respondent relief on [an equal protection] defense [such as the one he asserts], and if so, whether the Commission's decision to proceed administratively is reviewable at all, and the circumstances under which a claim asserting a violation of equal protection can be

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<sup>4</sup> The Division addresses in this way Bandimere's arguments that he did not willfully violate Securities Act Sections 5 and 17(a), Exchange Act Sections 10(b) and 15(a), and Exchange Act Rule 10b-5; that he established certain affirmative defenses; and that the imposition of a cease-and-desist order, civil penalties, and an associational bar and the order to pay disgorgement were inappropriate.

<sup>5</sup> The Division points out that the law judge "conducted an in camera review of otherwise privileged material to determine whether that material contained any material exculpatory evidence" and concluded that it did not.

presented and proved in [an] administrative proceeding," whether his consultation with counsel should have precluded a finding that he acted willfully, and whether the law judge properly used his discretion in imposing the sanctions at issue on Bandimere and on ordering disgorgement in the amount specified.

Commission Rule of Practice 411(e) governs our review of motions for summary affirmance.<sup>6</sup> Rule 411(e) permits the Commission to grant summary affirmance if it finds "that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument," but summary affirmance is not to be granted "upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review."<sup>7</sup> We have previously observed that "[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters"<sup>8</sup> although it may be appropriate when it is clear that "submission of briefs by the parties will not benefit us in reaching a decision."<sup>9</sup> In our 2011 decision in *Eric S. Butler*, we recognized that "[a]lthough we generally have limited application of this rule in conducting our reviews, we may apply it in the future where . . . the relevant facts are undisputed and the initial decision does not embody an important question of law or policy warranting further review by the Commission."<sup>10</sup>

Based on our preliminary review of the record and the parties' submissions, we do not view this case to be an appropriate vehicle for the abbreviated summary affirmance process. An extensive record was developed below, and the process culminated in a detailed and lengthy decision by the law judge. The petitioner has raised multiple issues based on facts developed in the record and permissible inferences to be drawn from those facts. This matter thus differs from *Butler*, where we recognized the potential appropriateness of summary affirmance in a follow-on proceeding in which the petitioner was "precluded from challenging the underlying convictions" on which the proceeding was based, rendering key factual issues not open to challenge on

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<sup>6</sup> 17 C.F.R. § 201.411(e).

<sup>7</sup> *Id.*

<sup>8</sup> *Theodore W. Urban*, Order Denying Motion for Summary Affirmance, Securities Exchange Act Release No. 63456, 2010 SEC LEXIS 4054, at \*6 (Dec. 7, 2010) (citing *Richard Cannistraro*, Exchange Act Release No. 39521, 1998 SEC LEXIS 15, at \*4 n.3 (Jan. 1, 1998)); see also *Terry T. Steen*, Exchange Act Release No. 38675, 1997 SEC LEXIS 1157, at \*3 (May 27, 1997) (denying summary affirmance and noting that such action is appropriate only where there are "compelling reasons").

<sup>9</sup> *Cannistraro*, 1998 SEC LEXIS 15, at \*4 n.3.

<sup>10</sup> *Eric S. Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at \*2 n.2 (Aug. 26, 2011).

appeal.<sup>11</sup> In this matter, our *de novo* review of the record will include resolution of the multiple factual challenges raised by Bandimere's petition.<sup>12</sup> Moreover, the appeal raises issues as to which we have an interest in articulating our views, including the interpretation of frequently litigated antifraud and registration provisions of the securities laws and potentially the selection of appropriate sanctions.

We believe that the submission of briefs, with discussion of relevant parts of the record and analysis of the issues, will aid us in reaching a decision in this case.<sup>13</sup> We therefore deny the Division's motion, though our denial should not be construed as suggesting any view as to the outcome of this case.

Pursuant to Commission Rule of Practice 411,<sup>14</sup> Bandimere's petition for review of the Initial Decision is granted. Pursuant to Rule of Practice 411(d),<sup>15</sup> the Commission has determined on its own initiative to review what sanctions, if any, are appropriate in this matter.

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<sup>11</sup> *Id.*, 2011 SEC LEXIS 65204, at \*23. The initial decision in *Butler* was decided by summary disposition, pursuant to Rule of Practice 250, 17 C.F.R. § 201.250. Since deciding *Butler*, we have granted summary affirmance in several proceedings charging failure to make required periodic findings, where the factual issues on review were also by nature limited in scope. See *A-Power Energy Generation Sys., Ltd.*, Exchange Act Release No. 69439, 2013 SEC LEXIS 1204, at \*1-4 (Apr. 24, 2013); *Andover Holdings, Inc.*, Exchange Act Release No. 68966, 2013 SEC LEXIS 548, at \*1-3 (Feb. 21, 2013). These matters had also been decided below by summary disposition. We declined to grant summary affirmance in a proceeding, in which, as here, "an extensive record was developed," with eleven days of hearings and approximately 500 exhibits, and "a lengthy decision" was issued by the law judge. *John P. Flannery*, Securities Act Release No. 9307, 2012 SEC LEXIS 1024, at \*7 (Mar. 30, 2012).

<sup>12</sup> See Rule of Practice 411(a), 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record."). Although we grant "considerable weight and deference" to credibility determinations of law judges and other initial factfinders, we judge those determinations against the weight of the evidence. *E.g.*, *Guy P. Riordan*, Securities Act Release No. 4166, 2009 SEC LEXIS 4166, at \*44 (Dec. 11, 2009), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010); *Leslie A. Arouh*, Exchange Act Release No. 50889, 2004 SEC LEXIS 3015, at \*33 n.40 (Dec. 20, 2004); *Anthony Tricarico*, Exchange Act Release No. 32356, 1993 SEC LEXIS 1346, at \*7 (May 24, 1993).

<sup>13</sup> In accordance with Rule 411(e), we have delayed issuance of a briefing schedule order pending determination of the motion for summary affirmance. 17 C.F.R. § 201.411(e).

<sup>14</sup> 17 C.F.R. § 201.411.

<sup>15</sup> 17 C.F.R. § 201.411(d).

Accordingly, IT IS ORDERED that the motion for summary affirmance filed by the Division of Enforcement be, and it hereby is, denied; and it is further

ORDERED, pursuant to Rule 450(a) of the Rules of Practice,<sup>16</sup> that a brief in support of the petition for review shall be filed by February 18, 2014. A brief in opposition shall be filed by March 20, 2014, and any reply brief shall be filed by April 3, 2014.<sup>17</sup> Pursuant to Rule of Practice 180(c),<sup>18</sup> failure to file a brief in support of the petition may result in dismissal of this review proceeding.

By the Commission.

Elizabeth M. Murphy  
Secretary

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<sup>16</sup> 17 C.F.R. § 201.450(a).

<sup>17</sup> As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rules 150-53, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rules of Practice 450(b) and (c), 17 C.F.R. §§ 201.450(b), 201.450(c), with respect to content and length limitations. Requests for extensions of time to file briefs and for additional words are disfavored.

<sup>18</sup> 17 C.F.R. § 201.180(c).