

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 9972 / October 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 76308 / October 29, 2015

Admin. Proc. File No. 3-15124

In the Matter of

DAVID F. BANDIMERE

OPINION OF THE COMMISSION

SECURITIES ACT PROCEEDING

EXCHANGE ACT PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Unregistered Offer and Sale of Securities

Unregistered Broker

Fraud

An individual, acting as an unregistered broker, offered and sold shares in securities in the form of investment contracts when no registration statement was filed or in effect as to those securities and no exemption from registration was available; in offering and selling those securities, the individual made positive statements about the securities while failing to disclose material information necessary to make his statements not misleading. *Held*, it is in the public interest to bar the respondent from associating with a broker, dealer, investment adviser, municipal securities dealer, or transfer agent; order the respondent to cease and desist from committing or causing any violations or future violations of the provisions violated; order disgorgement of \$638,056.33, plus prejudgment interest; and assess a civil money penalty of \$390,000.

APPEARANCES:

David A. Zisser, Jones & Keller, P.C., for David F. Bandimere.

Dugan Bliss and *Thomas J. Krysa*, for the Division of Enforcement.

Appeal filed: October 28, 2013

Last brief received: April 3, 2014

David F. Bandimere appeals from the initial decision of an administrative law judge¹ in a proceeding brought pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934² and based on allegations that Bandimere violated securities registration, broker registration, and antifraud provisions of the federal securities laws. The ALJ found that Bandimere operated as an unregistered broker and sold securities in the form of investment contracts when no registration statement was filed or in effect as to those investments and no exemption from registration was available. Additionally, the ALJ found that Bandimere presented only a positive view of the investments while failing to disclose potentially negative facts related to the investments, including the fact that he was receiving substantial payments based on the investments he had sold. In so doing, the ALJ found, Bandimere violated antifraud and registration provisions of the federal securities laws. The ALJ found it in the public interest to bar Bandimere from association with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization; to order that Bandimere to disgorge \$638,056.33 plus prejudgment interest; to impose a civil penalty of \$390,000; and to order Bandimere to cease and desist from committing or causing violations of the provisions in question.

We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. We find, as did the ALJ, that Bandimere violated Sections 5(a), 5(c), and 17(a) of the Securities Act; Sections 10(b) and 15(a) of the Exchange Act; and Exchange Act Rule 10b-5.³ Additionally, we reject as meritless both Bandimere's claim that the Commission violated his right to equal protection of the law when it brought this matter in an administrative forum, and that the proceeding is constitutionally defective because the presiding ALJ was not appointed in accordance with the Appointments Clause of the U.S. Constitution. We also reject Bandimere's challenge to evidentiary rulings by the ALJ and his request for additional discovery. Finally, we find that a bar, cease-and-desist order, disgorgement, and civil penalties are in the public interest, but we modify the bar imposed by the ALJ.

¹ *David F. Bandimere*, Initial Decision Release No. 507, 2013 WL 5553898 (Oct. 8, 2013).

² 15 U.S.C. §§ 77h-1, 78o(b), 78u-3. The proceeding was also brought pursuant to Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-9(b), and Sections 203(f) and (k) of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-3(f), (k). The Division decided not to pursue its alternative theory of liability under the Advisers Act.

³ 15 U.S.C. §§ 77e(a), 77e(c), 77q(a); 78j(b), 78o(a); and 17 C.F.R. § 240.10b-5.

I. BACKGROUND

The charges in this matter are based on Bandimere's involvement in selling investments in IV Capital LTD ("IVC") and Universal Consulting Resources LLC ("UCR"). Having received some funds from the sale of a family business, Bandimere mentioned to Richard Dalton, a friend of many years, that he was looking for a place to invest the money and would like to know if Dalton had heard of anything promising. Dalton told Bandimere that he had brought together some investors who were investing with Larry Michael Parrish, a principal of IVC, and that he was getting paid for handling distribution of checks and other tasks for Parrish. In late 2005, Bandimere began investing with Parrish, and by the middle of 2006, he began arranging for others to invest in IVC through his personal account, receiving fees from IVC based on their investments in compensation for his efforts. In 2007, working with an attorney who also had invested in IVC (and later in UCR), Bandimere formed limited liability companies through which people could invest in IVC, continuing to receive fees on a monthly basis based on the amounts they invested. Also in 2007, Dalton set up an investment vehicle of his own, UCR, and Bandimere began arranging for people to invest in it, also through the LLCs. As was the case with IVC, Bandimere received payments from UCR on a monthly basis based on the amounts people invested in UCR through him.

Although the OIP did not allege that Bandimere knew so at the time of his alleged misconduct, both IVC and UCR turned out to be Ponzi schemes, run by Parrish and Dalton respectively. Both men were charged with operating a Ponzi scheme and violating securities registration, antifraud, and broker-dealer registration provisions of the securities laws, and judgment was ultimately entered against both men in separate actions in federal district court. In those proceedings, Parrish and Dalton were permanently enjoined and ordered to disgorge millions of dollars in ill-gotten gains and to pay an equal amount in civil penalties.⁴

But this case is not about whether Bandimere was the perpetrator of a Ponzi scheme, nor does it turn on whether Bandimere had actual knowledge that IVC and UCR were Ponzi schemes. This case is about whether Bandimere (1) sold securities for which no registration statement was in effect (and no exemption from registration applied), (2) operated as an unregistered broker, and (3) fraudulently omitted from the representations he made to investors material information about IVC and UCR that he, in fact, did know—regardless of the fact that they were Ponzi schemes. For the reasons explained below, we find that Bandimere violated Section 5 of the Securities Act by offering and selling unregistered securities, violated Section 15

⁴ *SEC v. Parrish*, No. 11-cv-00558-WJM-MJW, 2012 WL 4378114 (D. Colo. Sept. 25, 2012) (order granting plaintiff's motion for default judgment); *SEC v. Universal Consulting Res. LLC*, No. 10-cv-02794-REB-KLM, 2011 WL 6012532 (D. Colo. Dec. 1, 2011) (order granting motion for default judgment against Richard Dalton and permanent injunction); *SEC v. Universal Consulting Res. LLC*, No. 10-cv-02794-REB-KLM, 2011 WL 6012536 (D. Colo. Dec. 1, 2011) (order granting motion for default judgment against Universal Consulting Resources LLC and permanent injunction). In a subsequent criminal action based on Dalton's involvement with UCR, Dalton plead guilty to one count of money laundering and was sentenced to a prison term of 120 months, to be followed by three years of supervised release. *United States v. Dalton*, 11-cr-00430-CMA-01 (D. Colo. June 30, 2013) (entry of amended judgment).

of the Exchange Act by acting as unregistered broker, and violated antifraud provisions of the Securities Act and Exchange Act by failing to disclose material information that was necessary to make his representations to investors not misleading.

II. REGISTRATION AND BROKERAGE VIOLATIONS

A. Facts

1. Bandimere invested his own money in IVC, then arranged for other to invest.

Bandimere, a resident of Golden, Colorado, has never been registered with the Commission as a broker, a dealer, or an investment adviser, nor has he been associated with a registered broker, dealer, or investment adviser. In 2005, Dalton, a long-time friend, introduced Bandimere to Parrish. As Bandimere understood it, Dalton was working for Parrish and was getting paid for his efforts to recruit investors to IVC, an off-shore company with operations in Nevis of which Parrish was a principal. Parrish told Bandimere that IVC traded primarily in securities, currencies, and commodities, that he personally had about \$22 million invested in IVC, and that those funds were tied into a hundred-million dollar trading block out of Hong Kong. Parrish also told Bandimere that funds sent to IVC would be held in escrow and used as collateral for a loan, with the loan proceeds, rather than the escrowed funds, being used for trading. Bandimere understood—and later told investors—that IVC would be using pooled investor funds for trading, that the efforts of IVC's traders would determine whether IVC was profitable or generated any returns for investors, and that investors would have no role in determining the trades that IVC made. Additionally, Parrish told Bandimere that IVC would earn at least a 5% return each month, which would be evenly divided between IVC and its investors. Bandimere made an initial investment of \$100,000 with IVC in November 2005, and then invested an additional \$100,000 in 2006.

Bandimere told some friends and family members about his IVC investments, and in 2006, he helped some of them invest in IVC under his name. IVC sent the purported returns to Bandimere, and Bandimere distributed them to the investors who had invested through him.

Parrish and Bandimere agreed that Parrish would compensate Bandimere for his involvement with IVC. Compensation was set at a rate of 10% of the monthly returns to investors. In addition to signing up investors for IVC, Bandimere (1) answered their questions about the investment and explained how it worked, (2) asked investors to fill out paperwork, (3) sent investor funds to IVC, (4) calculated returns due to investors,⁵ (5) received checks from IVC ostensibly representing IVC's returns, and (6) distributed those "returns" to investors. He also provided information about how to invest retirement funds in IVC.

⁵ Bandimere calculated returns for each investor based on the amount invested. The formula was generally 2% or 2.5% per month for IVC investors. The purported returns were calculated with reference to the amount invested rather than on any alleged profits.

Rather than continuing to facilitate investment in IVC under his own name, Bandimere worked with attorney Cameron Syke in early 2007 to form two LLCs, Exito Capital LLC⁶ and Victoria Capital LLC, which he began using to solicit investments in IVC. Bandimere was a co-managing member, together with Syke, of Exito,⁷ and was the managing member of Victoria. Bandimere subsequently formed a third LLC, Ministry Minded Investors LLC. Bandimere served as the managing member of Ministry Minded. Investors wrote their checks to one of Bandimere's LLCs, but the LLCs were merely means to get their investments into IVC.⁸ By the time the IVC scheme collapsed, the LLCs had collected over \$5.6 million in investor funds for IVC (excluding Bandimere's investment).

Bandimere introduced IVC to potential investors at social gatherings, such as church retreats, breakfasts, and club meetings. He also hosted several meetings for potential investors in his home.

2. Bandimere invested in, then helped others invest in, UCR.

In early 2008, Bandimere began investing in UCR and encouraging others to do so. UCR was a New Mexico limited liability company with its principal place of business at Dalton's home in Golden, Colorado. According to Dalton, UCR engaged in international trading in notes and diamonds. As Bandimere described the trading program to potential investors, it involved using the accumulated funds of multiple investors, which would allow leverage and increase buying power, so as to allow small investors to participate in deals that would otherwise not be available to them. As was the case with respect to IVC, Bandimere understood (and told investors) that UCR would pool investor funds to make investments, that the profitability of UCR depended on the traders' efforts, and that investors played no role in determining the investments that UCR made.

Initially, Bandimere offered only the opportunity to invest in UCR's trading program, but later he also began offering an opportunity to invest in UCR's diamond program. Bandimere's role in facilitating investments in UCR through the LLCs was essentially the same as his role in facilitating investment in IVC; he signed up investors, answered their questions about the investments and explained how they worked, sent investor funds to UCR, received checks ostensibly representing UCR's returns, distributed those "returns" to investors, and provided

⁶ Syke testified that he intended to limit membership in Exito to a small group of investors with a specified level of wealth. Syke understood that interests in the LLCs were securities, and he hoped that by structuring Exito this way he could avoid potential issues involving the unregistered sale of securities.

⁷ Syke testified that his role with respect to Exito primarily involved settling up the LLC, addressing legal matters, and overseeing tax treatment, and that Bandimere and Bandimere's wife managed the day-to-day operations, including interacting with Parrish and Dalton, receiving and depositing investor funds, and distributing investor returns. Syke and Bandimere split the fees Parrish paid for their efforts with respect to Exito.

⁸ None of the three LLCs was registered with the Commission as a broker, dealer, or investment adviser.

information about investing retirement funds in UCR.⁹ Dalton agreed to pay Bandimere 2% of the total amount of investor funds each month for his efforts in connection with UCR. Overall, investments in UCR's trading and diamond programs through the LLCs (excluding Bandimere's own investments) were over \$3.4 million.

B. Analysis

1. Bandimere violated Securities Act Sections 5(a) and (c) by offering and selling investments in securities in interstate commerce when no registration statement was in effect and no exemption from registration applied.

We find that Bandimere violated Sections 5(a) and 5(c) of the Securities Act by selling interests in the IVC and UCR programs, which were securities, when no registration statement was in effect for those securities and no exemption from registration applied.¹⁰ The elements necessary to establish a prima facie case against Bandimere for violating Sections 5(a) and (c) are that (1) Bandimere directly or indirectly sold or offered to sell securities; (2) through the use of interstate facilities or the mails; (3) when no registration statements was in effect or filed as to those securities.¹¹ There is no requirement to prove that Bandimere acted with scienter.¹² Once a prima facie case is established, the burden shifts to the respondent to show that an exemption from the registration requirements applies.¹³ In this case, Bandimere does not contend that any exemption to registration applies. We must therefore examine whether the elements of a prima facie violation have been established. As discussed below, we find that they have and that Bandimere is thus liable for violating Section 5.

a. The IVC and UCR investments were unregistered securities.

The interests Bandimere sold in IVC and UCR were investment contracts and thus securities. Both Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act

⁹ For UCR investors, Bandimere calculated returns of 4% per month for the UCR trading program. Returns in the UCR diamond program were projected to be higher, 15% of the amount invested or even more, but those returns were to be paid when a transaction was allegedly completed rather than on a monthly basis. As with IVC, the purported returns were calculated with reference to the amount invested.

¹⁰ See 15 U.S.C. §§ 77e(a), 77e(c); *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *7 (Jan. 6, 2012), *petition denied*, 739 F.3d 1243 (9th Cir. 2014).

¹¹ See *World Trade Fin. Corp.*, 2012 WL 32121, at *7; *SEC v. Cavanaugh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); *SEC v. Calvo*, 378 F.3d 1211, 1214-15 (11th Cir. 2004).

¹² See *Calvo*, 378 F.2d at 1215; *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1046-47 (2d Cir. 1976).

¹³ See *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1086 (9th Cir. 2010); *Cavanaugh*, 445 F.3d at 111 n.13 (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953)).

provide that an investment contract is a type of security.¹⁴ Although neither statute defines the term "investment contract," the Supreme Court in *SEC v. Howey* supplied a widely-used test for an investment contract: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."¹⁵ The Court in *Howey* explained that an investment contract typically involves a situation in which "[t]he investors provide the capital and share in the earnings and profits [while] the promoters manage, control and operate the enterprise."¹⁶ The *Howey* test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."¹⁷

The interests in IVC and UCR that Bandimere sold satisfy the *Howey* test because the investors supplied money to Bandimere—first through his personal account and later through the LLCs—to purchase investments in IVC and UCR and expected their financial return to come through the business activities of IVC and UCR, not through their own participation.¹⁸ Bandimere testified that he sent investor funds—first from his personal account and later from the LLCs—to a bank account for either IVC or UCR, as directed by investors.¹⁹ Bandimere understood at the time, and told investors that, IVC would use the pooled funds of investors in its trading program. He also told investors that UCR would use pooled investor funds in either its trading operation or its diamond operation. Bandimere also testified that he told investors that the efforts of IVC or UCR (or their traders) would determine whether the entities were profitable

¹⁴ 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). The Supreme Court has stated that although the definitions in the two acts use slightly different formulations, they are treated as "essentially identical in meaning." *SEC v. Edwards*, 540 U.S. 389, 393 (2004).

¹⁵ 328 U.S. 293, 301 (1946).

¹⁶ *Id.* at 300.

¹⁷ *Edwards*, 540 U.S. at 393 (quoting *Howey*, 328 U.S. at 299).

¹⁸ The investments Bandimere sold in IVC and UCR are, in fact, quite similar to the investment at issue in *People v. White*, 12 P.2d 1078, 1079 (Cal. Dist. Ct. App. 1932), a case cited in *Howey* as having correctly interpreted the term "investment contract." 328 U.S. at 298 n.4. In *White*, the promoter used the investor's \$5,000 to trade in securities and agreed to pay the investor the return of principal plus 50% annual interest. This is functionally identical to the interests Bandimere sold to investors. No pooling of funds from multiple investors was present in *People v. White* and we have previously held that a "common enterprise" – often established through pooling of multiple investors' funds – is not a distinct requirement under *Howey*. See, e.g., *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *8 n.55 (July 12, 2013); *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *6 n.40 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006); *Anthony H. Barkate*, Exchange Act Release No. 49542, 2004 WL 762434, at *3 n.13 (Apr. 8, 2004), *aff'd*, 125 F. App'x 892 (9th Cir. 2005). Nonetheless, if a common enterprise were a separate requirement for an investment contract, here pooling of investor funds establishes that a common enterprise was present. See *Clifton*, 2013 WL 3487076, at *8 n.55.

¹⁹ IRA funds went first to an intermediary, then to an LLC, then to IVC or UCR.

or generated any profits for investors; investors would have no role in determining the trades that IVC or UCR made. No investor testified that he or she played any role in the management of IVC or UCR, the entities' trading decisions or how profits were earned by either entity. In fact, all the investors who were asked about such involvement testified that they played no such role.

For these reasons, we conclude that the interests Bandimere sold in the IVC and UCR programs were investment contracts, and thus securities within the meanings of the Securities Act and the Exchange Act.²⁰ Bandimere does not dispute this conclusion. Furthermore, the parties stipulated that neither the IVC nor the UCR investments were ever registered with the Commission.

b. Bandimere used interstate facilities in the offer and sale of the IVC and UCR investments.

There is also no dispute that the jurisdictional nexus is satisfied in this case. The required interstate nexus is de minimis and is satisfied by even "tangential mailings or intrastate telephone calls."²¹ Bandimere wired money to IVC and UCR, sent checks representing investor returns through the mails, and used the telephone, faxes, and email to communicate with Parrish and with investors. Accordingly, we find that this conduct satisfied the Section 5 jurisdictional requirement of use of interstate commerce or of the mails.²²

²⁰ Our finding that the investments in IVC and UCR were securities also applies to our analyses in parts II.B.2 and III below.

²¹ *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997) (finding that defendant's telephone conversations with various brokerage firms and defendant's wire and mail transfers of funds satisfied the Section 5 jurisdictional requirement), *aff'd*, 159 F.3d 1348 (2d Cir. 1998); *see also United States v. Wolfson*, 405 F.2d 779, 784 (2d Cir. 1968) (finding that the use of the mails to "transmit an offer or other sales literature, to transport the securities after sale, to remit the proceeds to the seller, to send confirmation slips to the buyer," and perhaps even more tangential uses of the mails, can all satisfy the jurisdictional requirement of Section 5(a)(1) (quoting *United States v. Kane*, 243 F. Supp. 746, 750 (S.D.N.Y. 1965))); *McDaniel v. United States*, 343 F.2d 785, 787-88 (5th Cir. 1965) (noting that use of the mails to send a confirmation of a sale to a buyer of stock constituted a use of the mails within the meaning of Section 5); *SEC v. Reynolds*, No. 1:06-CV1801-RWS, 2010 WL 3943729, at *3 (N.D. Ga. Oct. 5, 2010) (finding that the jurisdictional requirements of section 5(a) and 5(c) were established where defendant used mail, telephone and internet to sell securities).

²² Bandimere's use of the phone, mail, fax, and email also satisfies the interstate commerce requirement for Sections 15(a), 17(a), 10(b), and Rule 10b-5. *See generally* T. Hazen, *Treatise on the Law of Securities Regulation* § 17.2 (available on WESTLAW at FEDSECREG) (noting that the jurisdictional requirements of the Securities Act and the Exchange Act are easily satisfied and that "[i]t is very difficult to imagine a securities transaction that does not in some respect involve an instrumentality of interstate commerce"). *See also, e.g., Softpoint*, 958 F. Supp. at 865 (stating that the defendant's use of the mails and facilities of interstate commerce, which satisfied the jurisdictional requirements of Section 5 of the Securities Act, also satisfied the jurisdictional requirements of Sections 17(a), 10(b) and Rule 10b-5); *Myzel v. Fields*, 386

c. Bandimere acted as a statutory seller in offering and selling the IVC and UCR investments.

Bandimere argues that he did not violate Section 5 because he was not a "seller" of securities for purposes of the Securities Act. Relying on the Supreme Court's decision in *Pinter v. Dahl*,²³ Bandimere argues that "a seller of securities [does] not include someone not motivated to serve the financial interest of either the issuer of the securities or his own financial interest," and that his motivation in informing potential investors about IVC and UCR was to benefit those potential investors rather than serve his own financial ends. This argument is both factually and legally flawed. The record shows that although a desire to help others may have played some part, Bandimere's actions were not motivated solely by a desire to help others. That Bandimere entered into agreements with Parrish and Dalton through which he earned nearly three-quarters of a million dollars by selling and managing IVC and UCR investments demonstrates a strong personal financial motive.²⁴

More fundamentally, however, *Pinter* is not controlling here. In *Pinter*, the Court construed Securities Act Section 12(1), which created a private right of action for violations of Section 5. Section 12(1) makes "[a]ny person who . . . offers or sells a security in violation of Section [5] . . . liable to the person purchasing such security from him."²⁵ The Court made clear that its holding on the liability of a "seller" was limited to the private action created by Section 12(1) and specifically relied on "the second clause of § 12(1), which provides that only a defendant 'from' whom the plaintiff 'purchased' securities may be liable, [thus] narrow[ing] the field of potential sellers."²⁶ By contrast, Section 5 lacks the "purchasing . . . from" language or any equivalent found in Section 12(1), imposing liability instead on those who "directly or indirectly" offer or sell securities. The greater reach of Section 5 in this regard makes the interpretation of "seller" in *Pinter* inapplicable to Bandimere's situation. As the United States Court of Appeals for the District of Columbia Circuit held in *SEC v. Zacharias*, "[a]s § 5 does

(...continued)

F.2d 718, 727-28 (8th Cir. 1967) (finding sufficient evidence of interstate transactions for purposes of Section 10 and Rule 10b-5 through telephone calls and the interstate delivery of checks); *Clifton*, 2013 WL 3487076, at *8 (holding that the jurisdictional requirements of § 17(a) are "interpreted broadly" and may be satisfied by "intrastate telephone calls and ancillary mailings").

²³ 486 U.S. 622 (1988).

²⁴ The Court in *Pinter* suggested that someone who "*received* a personal financial benefit from the sale" would qualify as a seller. 486 U.S. at 654 (emphasis added). The Court also questioned the Respondent's argument that he was "motivated entirely by a gratuitous desire to share an attractive investment opportunity with his friends and associates," and directed the court of appeals to examine the issue more closely on remand. *Id.* at 655. Bandimere here negotiated for and received substantial compensation for facilitating the investments of others in IVC and UCR, and we accordingly find that he was motivated by this financial interest.

²⁵ *Id.* at 627 (quoting Securities Act Section 12(1), 15 U.S.C. § 77l(1)).

²⁶ *Id.* at 643.

not include the 'purchas[e] . . . from' language or any equivalent, *Pinter* is plainly of no use" to an individual charged with a Section 5 violation.²⁷

Indeed, under both Commission and federal court precedents, Section 5 liability is based on whether a person is a substantial factor or a necessary participant in an offer or sale,²⁸ and *Pinter* did nothing to disturb this line of authority.²⁹ In light of his extensive involvement in the offer and sale of the IVC and UCR investments as set forth above, we find that for the sales at issue in this case Bandimere was both a substantial factor and a necessary participant for purposes of Section 5.

For the above reasons, we find that Bandimere violated Sections 5(a) and (c) of the Securities Act.

2. Bandimere violated Exchange Act Section 15(a) by acting as an unregistered broker.

We also find that Bandimere violated Section 15(a) of the Exchange Act³⁰ by selling and attempting to sell interests in the IVC and UCR programs, which were securities, when he was neither registered nor associated with a registered broker-dealer. Section 15(a)(1) makes it illegal for a broker to use the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (with limited exceptions not applicable here) unless the broker is either registered with the Commission or a natural person associated with a registered broker.³¹ Section 3(a)(4)(A) of the Exchange Act generally defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others."³² A finding of violation of Section 15(a) does not require proof of scienter.³³

²⁷ 569 F.3d at 466-67.

²⁸ See *John A. Carley*, Securities Exchange Act Release No. 57246 (Jan. 31, 2008), 2008 WL 268598, at *10; *Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009); *SEC v. Phan*, 500 F.3d 895, 906 (9th Cir. 2007); *Calvo*, 378 F.3d at 1215; *SEC v. Holschuch*, 694 F.2d 130, 139-40 (7th Cir. 1982).

²⁹ See *Phan*, 500 F.3d 895, 906 n.13 (noting that "Section 5 contains no language similar to the 'from him' language of Section 12," and thus "*Pinter* did not overturn" that court's "necessary participant"/"substantial factor" test for Section 5 liability).

³⁰ 15 U.S.C. § 78o(a).

³¹ *Id.* § 78o(a)(1).

³² 15 U.S.C. § 78c(a)(4)(A).

³³ See, e.g., *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); *SEC v. Interlink Data Network*, 1993 WL 603274, at *10 (C.D. Cal. 1993); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

Bandimere stipulated that he had never been registered with the Commission as a broker, dealer, or investment adviser and had never been associated with a broker, dealer, or investment adviser. Moreover, as we have already found, the investments in IVC and UCR were securities. Thus, whether Bandimere violated Section 15(a) depends on whether he engaged in the business of effecting transactions in the IVC and UCR investments for the accounts of others. As explained below, we find that Bandimere acted as a broker and thus violated Section 15(a).

a. Bandimere was engaged in the business of effecting securities transactions for others' accounts.

In determining whether a person is "engaged in the business" of effecting transactions for others' accounts, the courts and the Commission have considered a number of factors. A primary consideration is whether there has been regular participation in securities transactions at key points in the chain of distribution.³⁴ The number of customers at issue,³⁵ the dollar amount of transactions,³⁶ and the number of transactions effected³⁷ have all been recognized as indicia of regularity of participation. Bandimere was responsible for sales to more than 60 customers, involving more than \$9,000,000 in numerous transactions over three years. This conduct demonstrates regularity of participation.

³⁴ *SEC v. Bravata*, 2009 WL 2245649, at *2 (E.D. Mich. July 27, 2009); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, at *12 (D.D.C. 1998); see also *SEC v. Coplan*, 2014 WL 695393, at *6 (S.D. Fla. Feb. 24, 2014) (recognizing importance of regularity of participation in Section 15(a)(1) analysis); *SEC v. Bengner*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010) (same); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003) (same); *SEC v. Corporate Relations Grp.*, 2003 WL 25570113, at *17 (M.D. Fla. Mar. 28, 2003) (same); *SEC v. Interlink Data Network*, 1993 WL 603274, at *10 (C.D. Cal. Nov. 15, 1993) (same); *SEC v. Margolin*, 1992 WL 279735, at *5 (S.D.N.Y. Sept. 30, 1992) (same); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) (same); *UFITEC v. Carter*, 571 P.2d 990, 994 (Ca. 1977) (same); *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass) (same), *aff'd*, 545 F.2d 754 (1st Cir. 1976); *Wheat, First Sec. Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *11 n.49 (Aug. 20, 2003) ("A person 'effects' securities transactions by participating in such transactions 'at key points in the chain of distribution.'" (quoting *Mass. Fin. Servs.*, 411 F. Supp. at 415)).

³⁵ See *Kenton Capital*, 69 F. Supp. 2d at 13 (finding broker status established where those found to be brokers received pledges to invest from more than forty individuals and actually collected money from twelve investors).

³⁶ See *id.* (finding that individuals who received pledges to invest totaling \$17,450,000 and actually collected \$1,745,000 acted as brokers); *Nat'l Exec. Planners*, 503 F. Supp. at 1073 (finding regularity of participation established where sales totaled \$4.3 million); *UFITEC*, 571 P.2d at 994 (finding regularity of participation where sales totaled several million dollars).

³⁷ See *SEC v. Margolin*, 1992 WL 279735, at *5 (S.D.N.Y. 1992) (regularity of participation found where individual "participated in dozens of transactions for various clients").

Consistent with the practice of federal courts, we also consider a variety of additional factors in determining whether a person acted as a broker. Among the factors considered are whether the person actively solicited or recruited investors; advised investors as to the merits of an investment, or opined on its merits; or received commissions, transaction-based compensation, or payment other than a salary for selling the investments.³⁸ Other factors that have been viewed as relevant include whether the person was an employee of the issuer of the securities; was selling, or had previously sold, the securities of other issuers; or was involved in negotiations between the issuer and the investor.³⁹ Whether the individual handled customer funds and securities has also been viewed as important.⁴⁰ This is not an exhaustive list of the relevant factors, and no one factor is dispositive.⁴¹

In this matter, Bandimere's conduct is consistent with many of the factors recognized as important in the analysis of broker status. He solicited investors by informing them of the IVC and UCR investments, and talking about their merits, in a variety of contexts. Bandimere advised investors about the merits of the investments by emphasizing the rate and consistency of returns, the safety of principal, and the expertise of Parrish and Dalton,⁴² and by providing descriptions as to how the programs supposedly worked. He assisted investors with the paperwork involved in investing and obtained their signatures on documents,⁴³ and he answered investors' questions. He handled both money to be invested and returns to be paid to investors, and he helped investors put IRA funds in IVC and UCR.⁴⁴ At the hearing, he admitted that "from the beginning to the end, [he was] involved in the process of handling investments of [his] investors in [IVC] and UCR."

³⁸ See *SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); *Coplan*, 2014 WL 695393, at *6; *Corporate Relations Grp.*, 2003 WL 25570113, at *17.

³⁹ See *Hansen*, 1984 WL 2413, at *10 (citation omitted); *Benger*, 697 F. Supp. 2d at 944-45; *Martino*, 255 F. Supp. 2d at 283.

⁴⁰ See *SEC v. M&A West, Inc.*, 2005 WL 1514101, at *9 (N.D. Cal. June 20, 2005) (noting fact that no assets were entrusted to individual as factor of particular import in reaching conclusion that individual was not a broker); *Margolin*, 1992 WL 279735, at *5; *Benger*, 697 F. Supp. 2d at 945; *Martino*, 255 F. Supp. 2d at 283.

⁴¹ *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334-35 (M.D. Fla. 2011); *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010).

⁴² Cf. *Coplan*, 2014 WL 695393, at *6 (finding that individual who promised investors that their principal would be secure and that they would make guaranteed returns advised investors as to merits of investments).

⁴³ Bandimere asserts in his opening brief that he "did not handle investor paperwork or obtain signatures for either IVC or UCR." But Bandimere's testimony at the hearing shows that he "handled paperwork necessary for people to invest in" IVC and UCR.

⁴⁴ Bandimere admitted at the hearing that he accepted investors' money into the LLCs he managed or co-managed, that he sent money from the LLCs to IVC and UCR, that he sent money from the LLCs to the investors, and that he "handled" it when investors chose to channel IRA funds to IVC and UCR through another entity.

The receipt of transaction-based compensation in connection with the types of activities described above is often an indication that the recipient of that compensation is engaged in the business of effecting transactions in securities.⁴⁵ Although it is not required to establish broker status⁴⁶ and is not by itself determinative of broker status, we find that, here, Bandimere received transaction-based compensation because his compensation was based on the dollar amount of the original investment transactions (i.e., the amount he collected from investors to purchase interests in IVC and UCR). Bandimere calculated the amount owed to him either as a percentage of the transaction itself, or as a percentage of "returns." But even where the amount was supposed to be a percentage of returns, since Bandimere had no evidence of any actual returns, he calculated his compensation by reference to the transaction amount, and what he thought the returns should have been based on that amount. In records he kept at the time, Bandimere often referred to the payments he received from IVC and UCR as "broker fees" or "commissions," suggesting that when he was involved with IVC and UCR, he viewed the payments as sales-related rather than administrative. As he admitted at the hearing, "the more investor funds . . . that [he] brought in, the more that those fee payments would be."

Based on our consideration of the relevant factors, we find that Bandimere was engaged in the business of effecting securities transactions for the account of others, and that he therefore acted as a broker within the meaning of Section 3(a)(4)(A).

b. Bandimere's arguments against Section 15(a) liability are without merit.

Bandimere makes several arguments against finding that he was acting as a broker. We find none of them convincing. He argues first that a number of the factors relevant to broker status do not apply to him. But courts have recognized that not all of the factors that have been identified as relevant need be present in order for us to find that someone acted as a broker.⁴⁷ The underlying facts vary widely from case to case, and there is no requirement that all the factors that have been recognized as relevant be present in any given case. In addition, because the analysis requires looking at all the circumstances, the factors considered in reaching a determination as to broker status in a particular case do not purport to be an exclusive list.⁴⁸

⁴⁵ *Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration*, Exchange Act Release No. 61884, 2010 WL 1419216, at *2 (Apr. 9, 2010).

⁴⁶ *Warrior Fund*, 2010 WL 717795, at *3 n.8 ("[T]ransaction-based compensation is not a necessary element to determine whether someone is a broker."); *see also, e.g., SEC v. Imperiali*, 594 F. App'x 957, 961 (11th Cir. 2014) (finding that individual who spoke with investors, acted as the "closer" for his sales team, and drafted memoranda for potential investors acted as unregistered broker in violation of Section 15(a) without any reference to transaction-based compensation).

⁴⁷ *See, e.g., Corporate Relations Grp.*, 2003 WL 25570113, at *18 (recognizing seven factors that may be relevant, but basing finding on only three).

⁴⁸ *See Kramer*, 778 F. Supp. 2d at 1334; *Benger*, 697 F. Supp. 2d at 945.

Indeed, the court in *SEC v. Bengier*, on which Bandimere relies, rejected the argument that there is a binding and definitive set of factors needed to support a finding that a person acted as a broker. Rather, the court found that the Commission had sufficiently alleged broker status on facts similar to the facts we find in this matter: the individual collected investors' funds, received and processed documents related to the sale of the securities, communicated with the issuer about the receipt of funds and documents, and provided materials to the investors.⁴⁹

Bandimere also argues that deciding broker status on a case-by-case basis without any analytical structure that provides predictability would be arbitrary and capricious. But the standard we use to determine broker status provides the requisite analytical structure. Although that standard includes the consideration of a non-exhaustive list of relevant factors, none of which is determinative, this does not render a decision based on that standard arbitrary. Unlike *Chekosky v. SEC*,⁵⁰ cited by Bandimere, the standard we apply here is one of long-standing in our opinions as well as those of federal courts.

We also reject Bandimere's argument that sanctioning him for violations of Section 15(a) would deny him due process because uncertainty as to what activities require registration as a broker creates a lack of notice of what the law requires. As noted, our determination that Bandimere acted as a broker is grounded on well-established criteria. Moreover, Bandimere's references to payments he received from IVC and UCR as "broker fees" suggest that he thought of himself as a broker.

Bandimere further argues that he did not receive transaction-based compensation but was paid for performing recordkeeping or other administrative functions. Bandimere's compensation was not related to any of the recordkeeping functions he performed but to the amount of the investments. Bandimere insists that if he was compensated simply for finding investors, there would have been no reason for him to spend the time and incur expenses performing administrative functions for no compensation. Even if Bandimere was compensated for administrative as well as sales activities, the *amount* of the compensation was transaction-based, and raised the investor protection concerns inherent in such compensation.⁵¹

⁴⁹ 697 F. Supp. 2d at 945. The Commission had also alleged that the person found to have acted as a broker in *Bengier* received transaction-based compensation. *See id.*

⁵⁰ 23 F.3d 452 at 482 (D.C. Cir. 1994) (rejecting Commission's reliance on a negligence standard articulated in a Commission auditor disciplinary opinion on the basis that the opinion relied on was not published or publically available).

⁵¹ *See Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration*, 2010 WL 1419216, at *2 & n.13 ("Compensation based on transactions in securities can induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation under the [Exchange] Act." (quoting *Persons Deemed Not To Be Brokers*, Exchange Act Release No. 22172, 1985 WL 634795, at *4 (June 27, 1985))).

For all of the above reasons, we find that Bandimere violated Section 15(a) of the Exchange Act.

III. FRAUD VIOLATIONS

Bandimere is charged with violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Section 17(a)(2) makes it "unlawful for any person in the offer or sale of any securities . . . directly or indirectly . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."⁵² Section 10(b) makes it "unlawful for any person, directly or indirectly, . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules.⁵³ And Rule 10b-5(b) makes it unlawful, "in connection with the purchase or sale of any security," to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."⁵⁴ A violation of these provisions also requires the use of means or instrumentalities of interstate commerce.

We have already found that the investments in IVC and UCR at issue were securities, and that Bandimere used instrumentalities of interstate commerce to offer and sell them.⁵⁵ Bandimere does not deny that his statements about the IVC and UCR investments were made in connection with offers and sales of these investments. Moreover, he made the statements at issue directly to people who purchased, or who were offered the opportunity to purchase, those investments. This satisfies the "in connection with" requirement.⁵⁶ Accordingly, to find a violation of Section 17(a)(2) we must find that Bandimere "obtain[ed] money or property by

⁵² 15 U.S.C. § 77q(a).

⁵³ 15 U.S.C. § 78j(b).

⁵⁴ 15 U.S.C. § 78(j), 17 C.F.R. § 240.10b-5. Before the ALJ, the Division pursued liability under Section 17(a)(2) and Rule 10b-5(b), and not under Sections 17(a)(1) or (3) or Rule 10b-5(a) or (c). We limit our discussion here to the theories of liability pursued by the Division in this case. In addition, although the OIP also charged violations of Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser to a pooled investment vehicle, 15 U.S.C. § 80b-6(4), 17 C.F.R. § 275,206(4)-8, the Division stated in its post-hearing brief that it was not pursuing liability under the Advisers Act.

⁵⁵ See *supra* Sections II.B.1.a & b.

⁵⁶ See, e.g., *SEC v. Jabukowski*, 150 F.3d 675, 680 (9th Cir. 1998) (statement made to induce acceptance of securities transaction satisfies "in connection with" requirement). See also *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) (finding that Commission "has consistently adopted a broad reading" of "in connection with" language in Section 10(b) and reiterating that Section 10(b) should be construed "'flexibly to effectuate its remedial purposes.'" (quoting *Affiliated Ute Citizens of the United States*, 406 U.S. 128, 151 (1972))).

means of" a material misrepresentation or omission and acted with at least negligence.⁵⁷ And to find a violation of Section 10(b) and Rule 10b-5(b) we must find that Bandimere made a material misrepresentation or omission and acted with scienter.⁵⁸ We find by a preponderance of the evidence that these elements are satisfied.

A. Bandimere made materially misleading statements to investors.

As noted, Sections 17(a) and 10(b) and Rule 10b-5 may be violated by making untrue statements of material fact or by omitting a material fact necessary to make statements that are made, in light of the circumstances under which they were made, not misleading.⁵⁹ An omission is material if there is a substantial likelihood that a reasonable investor would have considered the omitted information important in deciding whether or not to invest and if disclosure of the omitted fact would have significantly altered the total mix of information available to the investor.⁶⁰ One who elects to disclose material facts "must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak,"⁶¹ and incomplete disclosures "implicate a duty to disclose whatever additional information is necessary to rectify the misleading statements."⁶² In addition, we have consistently recognized that making predictions and representations in connection with the offer or sale of a security, whether couched in terms of opinion or fact, which are without reasonable basis, violates the antifraud provisions of the securities laws.⁶³ Indeed, the Supreme Court recently recognized that a

⁵⁷ See, e.g., *Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *13 n.59 (Sept. 29, 2009) ("There is no scienter requirement for violations of Securities Act Sections 17(a)(2) or (3); negligence is sufficient.").

⁵⁸ See *id.* at *13.

⁵⁹ 15 U.S.C. §§ 77q(a)(2), 78j(b); 17 C.F.R. § 240.10b-5(b). Bandimere contends that the ALJ failed to identify either material facts that caused particular statements to be misleading or positive information that was rendered misleading by omissions. Once we granted Bandimere's petition for review, the initial decision, including the factual findings made there, ceased to have any force or effect. *Richard J. Adams*, Exchange Act Release No. 39645, 1998 WL 52044, at *1 n.1 (Feb. 11, 1998). The findings set forth below are made as part of our de novo review.

⁶⁰ *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992).

⁶¹ *SEC v. Curshen*, 372 F. App'x 872, 880 (10th Cir. 2010); see also *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 250-51 (2d Cir. 2014).

⁶² *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 944 (7th Cir. 1989).

⁶³ See *Robert G. Weeks*, 2004 WL 828, at *8-11 (baseless valuation of mining properties and mineral assets, baseless claims of revenue earned by smelter, and baseless representations that mines contained commercial values of ore all violated Section 17(a) and Section 10(b) and Rule 10b-5); *M.V. Gray Invs., Inc.*, Exchange Act Release No. 9180, 1971 WL 120492, at *3 (May 20, 1971) (president and principal shareholder of registered broker-dealer violated antifraud provisions when he made optimistic representations and predictions to customers without a reasonable basis, and knew, but did not tell customers to whom he recommended the

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statement of opinion may be understood by a reasonable investor "to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience."⁶⁴

1. Bandimere omitted material facts with respect to the IVC and UCR investments and obtained money by means of these omissions.

Bandimere made representations to investors about the investments in IVC and UCR that were materially misleading because he omitted facts that reasonable investors would have wanted to know when making the decision to invest. His positive representations about IVC included that Parrish was an expert trader with a professional and sophisticated trading organization, that the IVC investment principal would be deposited in a bank account and would be "borrowed against, but not at risk," that Bandimere had investigated IVC and was confident in the investment, and that investors could expect to receive returns of 2% to 2.5% per month. For UCR, Bandimere made similar representations: he told investors that the UCR programs involved professional organizations—including an experienced "secret" Singapore trader and a skilled diamond trader—and that UCR took care to safeguard investors' money. He also made representations about UCR's future returns, telling investors that their UCR trading program investment would yield 4% per month and that the UCR diamond program would have a 25% return within a few months. All of these statements were materially misleading in light of the context in which they were made because Bandimere failed to disclose specific material facts in his possession about the investments that would have cast doubt on his positive representations.

Significantly, Bandimere failed to disclose that he was getting compensated by IVC and UCR at the respective monthly rates of 10% of ostensible investor returns and 2% of funds invested.⁶⁵ Bandimere's statements to potential investors that he was confident in the success of

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stock, that the issuer had been losing money); *see also United States v. Ware*, 577 F.3d 442, 448-51 (2d Cir. 2009) (finding that issuance of press releases containing false and baseless statements supported findings of violation of Section 10(b) and Rule 10b-5); *SEC v. USA Real Estate Fund I, Inc.*, 30 F. Supp. 3d 1026, 1035 (E.D. Wash. 2014) (finding that violations of Section 17(a), Section 10(b), and Rule 10b-5 were established by evidence that individual "repeatedly made material statements to investors that had no basis in reality and which he knew lacked any support"); *SEC v. Gebben*, 225 F. Supp. 2d 921, 926-27 (C.D. Ill. 2002) (finding that internet poster violated Section 10(b) and Rule 10b-5 by writing glowingly and authoritatively about a stock while having no independent basis for his opinions, but merely reciting what he was paid to say).

⁶⁴ *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1328 (2015).

⁶⁵ Although the operating agreements for the Exito and Victoria LLCs contained a boilerplate provision that the managers of the LLCs would receive "reasonable compensation" for their services based on the "excess" of investor returns, Bandimere failed to tell investors that through explicit arrangements with Parrish and Dalton he was receiving significant payments

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the investments and that they could expect to receive returns of 2% to 2.5 % per month through IVC and 4% per month through UCR's trading program (as well as even greater returns through UCR's diamond program) were rendered materially misleading by his failure to disclose his own significant compensation, which was directly tied to the amount they invested. As we have noted, "[c]ourts have recognized that economic conflicts of interest, such as undisclosed compensation, are material facts that must be disclosed."⁶⁶

The disclosure in the LLC agreements was inadequate because it falsely suggested that Bandimere would be paid by the LLCs based on "excess" returns, not directly from IVC and UCR based on a pre-arranged percentage. It also failed to disclose the significant percentage Bandimere would receive of investors' purported returns and investments. This failure is a material omission because investors would have wanted to know, in order to properly assess Bandimere's positive representations about the investments' anticipated monthly returns, that Bandimere was being paid by IVC (10% of investor returns per month) and UCR (2% of total investments per month) for steering investors their way.

Bandimere's positive representations about the investments in IVC and UCR were also materially misleading because Bandimere failed to disclose negative facts which he knew about IVC, Parrish, UCR, and Dalton. Bandimere failed to tell investors specific negative information about Parrish. For example, Bandimere knew that Parrish had been sued by the Commission and failed to tell investors.⁶⁷ This made Bandimere's statements about Parrish's trading acumen—

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directly from IVC and UCR—over three-quarters of a million dollars altogether—based on the amount of investments that he brought in.

⁶⁶ *IMS/CPAs & Assocs.*, Exchange Act Release No. 45019, 2001 WL 1359521, at *8 (Nov. 5, 2001) (citing additional authority); *see also Curshen*, 372 F. App'x at 881 (finding that where statements posted on the internet appeared to be relaying information about a security, disclosure of the fact that the person making the postings was compensated as a promoter of the stock would be necessary to make the statements not misleading).

⁶⁷ Bandimere admitted only to knowing that Parrish had an unspecified regulatory issue in 2004 or 2005 and testified that he was unclear as to whether the Commission was involved. But the ALJ found that Bandimere knew the Commission had brought suit against Parrish. Based on our review of the evidence in the record, we agree with this finding

In its action against Parrish, brought in federal district court in 2005, the Commission alleged that he and others engaged in a fraudulent "prime bank" investment scheme that raised \$8.2 million from investors. *See generally SEC v. Parrish*, Litigation Release No. 20121, 2007 WL 1452643 (May 17, 2007) (describing litigation against Parrish). In May 2005, well before Bandimere had started investing with him or introducing other investors to UCR, Parrish had consented to a preliminary injunction and an asset freeze related to the "prime bank" scheme. *See SEC v. Z-Par Holdings, Inc.*, 05-CV-1031-JFM (D. Md. May 4, 2005) (preliminary injunction order); *SEC v. Z-Par Holdings, Inc.*, 05-CV-1031-JFM (D. Md. May 3, 2005) (notice of filing of agreed upon order). In April 2007, the court entered a final judgment against Parrish, imposing a permanent injunction by consent. *SEC v. Z-Par Holdings, Inc.*, 05-CV-1031-JFM (D. Md. Apr. 26, 2007) (final judgment as to defendant Larry Michael Parrish). In May 2007,

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that he was an "expert trader" and a "wizard at investing"—and that he ran a professional trading organization materially misleading. A reasonable investor would likely have found it significant that the federal regulatory agency charged with overseeing the securities industry found sufficient reason to charge the "expert trader" with violations of the federal securities laws and could have used the information to discover that Parrish had been charged with engaging in a fraudulent investment scheme, which in turn would have affected a reasonable investor's decision whether to invest in IVC.

Bandimere's representations about IVC as a professional trading organization were similarly misleading because he failed to qualify those representations with disclosures about IVC's failure to provide documents even after Bandimere asked for them and instances in which IVC sent less money than was due to the LLCs.⁶⁸ These omissions also rendered Bandimere's statements about the returns investors could expect to receive from IVC misleading—in part because IVC's failure to provide documents, or the right amount of money,⁶⁹ raised questions as to whether the alleged trades were taking place at all, much less yielding returns at the expected levels.

Despite Parrish's failure to provide Bandimere with basic documentation about IVC's operations, Bandimere told at least one investor that he had done some investigation into IVC and that he was confident in the investment. This statement was materially misleading because Bandimere failed to disclose that his so-called investigation was uncritically relying on unverified anecdotes from Parrish and others and that his confidence was largely baseless. For example, Bandimere testified that he had confidence in Parrish because he gave "a lot of credibility to a woman's sixth sense" and thus relied on Dalton's wife "comfort level" with Parrish. A reasonable investor would have wanted to know that Bandimere did almost nothing to investigate IVC and that he not only lacked a reasonable basis for the confidence he expressed

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Parrish settled an administrative proceeding brought against him based on his involvement in the same fraudulent scheme by consenting to the imposition of an order barring him from association with any broker or dealer, with a right to apply after at least five years. *Parrish*, 2007 WL 1452642.

⁶⁸ IVC did not provide account statements documenting investments made through the LLCs or purported monthly earnings of the LLCs. Even when Bandimere asked for documents confirming trading, IVC's traders, or other aspects of the investments, Parrish did not provide them. Yet Bandimere did not tell investors about these gaps in documentation, or Parrish's refusal to provide the information Bandimere requested.

⁶⁹ Bandimere contends that the "Division presented only a single instance of Parrish sending insufficient funds," but there is evidence in the record, including Bandimere's own testimony, that Parrish repeatedly wired funds that were insufficient to cover both investor returns and Bandimere's expected commissions. Even if Parrish subsequently corrected the shortages, as Bandimere claims, the sloppiness of Parrish's operation exemplified by these repeated mistakes—which were never disclosed to investors—significantly undermines Bandimere's contrary representations about the professionalism and sophistication of IVC.

but, in fact, knew facts that he did not share that would have seriously undermined that expression of confidence.

Bandimere also omitted material facts about UCR and Dalton, including concealing Dalton's identity from investors who knew Dalton personally. Bandimere's statements to Radke and Koch that UCR was headed by experienced and knowledgeable financiers and to Koch that the person in charge of UCR was a person of significant worldwide contacts and stature were materially misleading because he failed to identifying the head of UCR as Dalton—someone Bandimere knew they knew personally. Indeed, we find Bandimere's failure to tell Radke and Koch that Dalton was the person behind UCR highly material. Both Koch and Radke testified that they would have had concerns about investing with Dalton given his past, and Koch testified that he felt "betrayed" and that Bandimere "had not been straight" with him when he found out that the person behind UCR was Dalton. Bandimere's selective concealment of Dalton's involvement with UCR is itself strong evidence of the materiality of the information Bandimere chose to withhold.

To those investors who were unfamiliar with Dalton personally Bandimere failed to disclose specific facts he knew about Dalton's long history of unsuccessful business ventures. For example, Bandimere knew that Dalton had been involved in a failed investment venture involving debentures that resulted in investor losses of \$2 to \$3 million and a loss to Bandimere personally of over \$10,000. He also knew that Dalton had been involved in several unsuccessful multilevel marketing businesses, one of which Bandimere believed went bankrupt and from another of which Bandimere assumed Dalton to have been dismissed. These omissions rendered Bandimere's statements to Davis and other investors that UCR was a sophisticated and professional organization and that Dalton had connections with experienced traders materially misleading.

Bandimere also misled investors by failing to notify them of the fact that Dalton never showed him any documentation about UCR, that Bandimere himself calculated the so-called investment returns, and that Dalton had to ask Bandimere for the amounts invested in UCR by the LLCs. The facts Bandimere omitted, which demonstrated an obvious lack of professionalism and, at the very least, hinted at possible dishonesty with respect to the UCR programs, were material because a reasonable investor would have considered the questions raised by the omissions significant in deciding whether to invest in those programs.

Finally, we find that Bandimere obtained money by means of the omissions described above, as required to find a violation of Section 17(a)(2).⁷⁰ As we have explained, Bandimere's statements, which were rendered misleading by his omissions, were material in facilitating investments in IVC and UCR. Indeed, for those investors for whom Bandimere was the sole source of information about the investments, his misleading statements were the entire basis for their investment. Bandimere was compensated handsomely—receiving over three-quarters of a million dollars—based on the amount of money invested through him. This is more than

⁷⁰ See 15 U.S.C. § 77q(a)(2).

sufficient to satisfy the requirement that he "obtain[ed] money . . . by means of" the omissions.⁷¹ Accordingly, for all of the above reasons, we find that Bandimere's conduct satisfies the requirement for material misrepresentations or omissions under Securities Act Section 17(a)(2) and Exchange Act Section 10(b) and Rule 10b-5(b).

2. Bandimere's arguments that he did not materially mislead investors are without merit.

Bandimere argues that the OIP attributed to him only two representations about the IVC and UCR investments—that they were "low risk" and "very good investments." He asserts that there is no evidence that he made either statement, and that since the Division did not prove that he made either statement, any violations dependent on those statements must fail. We disagree.

The OIP alleges that Bandimere committed fraud because he

presented a one-sided view and highlighted only positive material characteristics: a) the consistent rate of return, b) the established track record of performance, c) the experienced and successful traders, d) his personal dealings with Dalton and Parrish which gave him confidence in their abilities, and e) with regard to Dalton, his long-standing personal relationship.

Other paragraphs of the OIP provide more details about some of these representations. For example, the OIP alleges that Bandimere told investors that (1) the investment manager of the UCR trading program had been a longtime personal friend, (2) they would earn a guaranteed annual return of 48% on investments in the UCR trading program, (3) the UCR diamond program promised potential returns of 10% per month, and (4) the operating agreements for the LLCs specified annual targeted returns of 24-30%. Thus, contrary to Bandimere's insistence, he was put on notice from the outset as to the types of representations, and many of the specific representations, he was charged with having made. Moreover, as the Division points out in its response, witness testimony supports finding that he characterized the investments as low risk and very good investments, even if he did not use those exact words.⁷² In addition, the OIP charged Bandimere with having "fail[ed] to disclose numerous red flags and potentially negative facts relating to those investments," specifically identifying fifteen instances of alleged failure to disclose.

⁷¹ See *Clifton*, 2013 WL 3487076, at *9 (individual who received "override" of commissions generated on sale of securities obtained money for purposes of Section 17(a)(2)).

⁷² See Tr. 305 (Loebe) ("I don't recall exact words. But the overall tone was that, here was a good investment."), Tr. 483 (Blackford affirmed that Bandimere told him that the "money was supposed to stay in some account, and then it would be borrowed against, but not at risk"), Tr. 537 (Davis) ("[H]e felt that it was a good investment and that he was—he was doing well with it."), Tr. 704 (when Bandimere "made the opportunity to known" to invest in IVC, he gave the impression to Radke "that it was a good investment"), Tr. 757 (Bandimere suggested to Syke that for the UCR diamond program "there was really no risk, because it was done through the government").

Rule 200(b) of our Rules of Practice requires that the OIP state the nature of the hearing, the legal authority for holding the hearing, "a short and plain statement of the matters of fact and law to be considered and determined," and the nature of any relief sought."⁷³ But the OIP need not allege all of the evidence on which the Division intends to rely.⁷⁴ In determining whether a respondent in an administrative proceeding had adequate notices of the charges, the question is "whether the respondent 'understood the issue' and was 'afforded full opportunity' to justify [his or her] conduct" during the course of the proceeding.⁷⁵

Here, the OIP satisfied the requirements of Rule 200(b), and Bandimere was provided additional information through the Division's supplemental statement submitted in response to his motion for a more definite statement and throughout the course of the proceeding.⁷⁶ At the hearing, the Division introduced ample evidence of specific statements that Bandimere made about IVC and UCR, as discussed above, that created a one-sided positive view of the IVC and UCR investments. Thus, we reject Bandimere's argument that the Division was somehow required to prove that Bandimere made verbatim representations to investors that the IVC and UCR investments were "low risk" or "very good."

Bandimere also asserts that the only proven representations that he made about IVC and UCR were statements about the investments' returns and that "[t]he accurate disclosure of historical financial results is not rendered misleading by failing to disclose facts which may raise questions about whether similar results will be achieved." But Bandimere made many statements about returns that were predictive rather than historic, telling investors that going forward they could expect to receive returns of 2% or 2.5% per month through IVC, and 4% per month through UCR. More importantly, there is no evidence that Bandimere disclosed accurate historical results for the investments. As discussed above, Bandimere had no visibility into the actual trading or returns at either IVC or UCR.

⁷³ 17 C.F.R. § 201.200(b).

⁷⁴ See *Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005) ("The OIP must inform the respondent of the charges in enough detail to allow the respondent to prepare a defense, but it need not disclose to the respondent the evidence upon which the Division intends to rely."), *petition denied*, 465 F.3d 780 (7th Cir. 2006); *M.J. Reiter Co.*, Exchange Act Release No. 6108, 1959 WL 59479, at *2 (Nov. 2, 1959) ("[A]ppropriate notice of proceedings is given when the respondent is sufficiently informed of the nature of the charges against him so that he may adequately prepare his defense[;] . . . he is not entitled to a disclosure of evidence."); *Charles M. Weber*, Exchange Act Release No. 4830, 1953 WL 44090, at *2 (Apr. 16, 1953) ("A respondent is not entitled to a disclosure of evidence in the order for hearing.").

⁷⁵ *Wendy A. McNeeley, C.P.A.*, Exchange Act Release No. 68431, 2012 WL 6457291, at *9 (Dec. 13, 2012) (quoting *Aloha Airlines v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979)).

⁷⁶ In its supplemental statement, the Division identified the individuals it claimed were defrauded, and specified when Bandimere allegedly knew the facts that the Division alleged should have been disclosed.

Finally, Bandimere claims that his omissions could not have been material because the ALJ found that he did not know, nor should he have known that the investments were Ponzi schemes. But this argument rests on a false premise: even if Bandimere was not negligent in failing to identify IVC and UCR specifically as Ponzi schemes, this does not mean that he was not aware of facts (which he failed to disclose) that called into question the legitimacy and quality of the investments. Bandimere was obliged to disclose negative facts that were known to him about the investments, which would have enabled investors to make informed decisions about investing. Therefore, we reject Bandimere's argument and find that his omissions were material.

B. Bandimere acted with scienter in offering and selling the IVC and UCR investments.

To find that Bandimere violated Exchange Act Section 10(b) and Rule 10b-5, we must find that he acted with scienter.⁷⁷ Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."⁷⁸ "Scienter may be established by recklessness," which has been defined as conduct that "presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it."⁷⁹ Negligence suffices to establish liability under Securities Act Section 17(a)(2),⁸⁰ and a finding of scienter more than satisfies this requirement.⁸¹ We find that Bandimere was reckless in making numerous and repeated statements to investors about IVC and UCR that lacked any reasonable basis and that were rendered materially misleading by his failure to disclose countervailing negative information.

⁷⁷ See *Bridge*, 2009 WL 3100582, at *13 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976)).

⁷⁸ *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (internal quotation marks omitted).

⁷⁹ *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *5 (Dec. 21, 2007) (bracketed language in original) (quoting *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003), and citing additional authority). Although Bandimere argues that proof of actual intent is required to establish scienter, we have repeatedly held that recklessness is sufficient. See, e.g., *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 n.37 (Dec. 12, 2013) (citing *Clifton*, 2013 WL 3487076, at *10 n.67), *petition denied*, 773 F.3d 89, 94 (D.C. Cir. 2014); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 n.47 (July 26, 2013) (citing *Disraeli*, 2007 WL 4481515, at *5). Bandimere asserts that the Supreme Court "has not yet accepted that recklessness satisfies the scienter standard," but the absence of a Supreme Court ruling is not an impediment to our deciding the issue.

⁸⁰ *Bridge*, 2009 WL 3100582, at *13 n.59 (citing *Aaron*, 446 U.S. at 697, 701-02); *Clifton*, 2013 WL 3487076, at *8.

⁸¹ See *Clifton*, 2013 WL 3487076, at *10 n.67 (finding negligence analysis unnecessary for purposes of Section 17(a)(3)—which, like Section 17(a)(2), does not require scienter—where evidence established scienter).

Bandimere misled investors by encouraging investment in IVC and UCR, ostensibly as a neutral party, while failing to disclose the generous fees that he was being paid.⁸² Bandimere took in fees of nearly three-quarters of a million dollars, more than half again as much as the \$477,898.93 he received in "earnings" on his own investments in IVC and UCR. Since the fees were based on amounts invested (or on returns, which were themselves based on amounts invested), there was an obvious danger that Bandimere's recommendations would be influenced by his personal financial stake. Bandimere falsely telling Loebe that excess profits would go to a Christian charity rather than to pay him is also evidence of intent to deceive.⁸³

Bandimere promoted IVC and UCR without a reasonable basis for the positive statements he made and while in possession of material negative information that he failed to disclose. This posed a danger of misleading investors that was so obvious that Bandimere must have been aware of it. He praised Parrish's expertise and emphasized the extent of the trading organization he allegedly managed, with more than \$20 million under management, a fifteen-year history of trading, a positive track record, and a consistent monthly return. But his positive representations about Parrish were based largely on anecdotal, second-hand information. Bandimere did not do any independent research on Parrish's trading organization and did not see any documents verifying Parrish's trading history. In addition, Bandimere knew that Parrish had been sued by the Commission, and Bandimere had even been warned by Dalton about dealing with Parrish.

Similarly, with regard to UCR, Bandimere touted Dalton's alleged high-level connections, talked about "mysterious" or "secret" people involved with the UCR programs, and emphasized the alleged safety of the investments. But these statements were based only on what Dalton had told him and were without a reasonable basis in fact. And Bandimere knew that Dalton had a long history of business failures and had reason to believe that Dalton was not keeping track himself of the amount the LLCs had invested in UCR.

Bandimere also made many statements to investors that were completely untrue. For example, with regard to UCR, Bandimere's statements to investors that the trading program involved a secret Singapore trader, that investor funds were placed in escrow and used as collateral for trading activities, and that a diamond trading program existed were all untrue

⁸² See *Curshen*, 372 F. App'x at 882 (finding scienter based on the "logical conclusion" that one who knew he was being compensated for promoting a stock also knew that the failure to disclose this compensation would mislead those reading his internet postings by making his opinions seem objective). See also *Gebben*, 225 F. Supp. 2d at 927 (internet poster who "knew that investors . . . would wrongly believe that his opinions represented independent research, rather than merely a recitation of what Issuers paid [his employing firm] to say" acted with scienter).

⁸³ Bandimere testified that he did not remember making this statement to Loebe, but the ALJ found Loebe's testimony more credible than Bandimere's as to this issue. An ALJ's credibility findings are entitled to considerable weight. *Steven Altman*, Exchange Act Release No. 63306, 2010 WL 5092725, at *4 n.10 (Nov. 10, 2010) (citing *Anthony Tricarico*, Exchange Act Release No. 32356, 1993 WL 1836786, at *3 (May 24, 1993)), *petition denied*, 666 F.3d 1322 (D.C. Cir. 2011).

statements of material fact. There was no secret trader, no funds in escrow, and no actual diamond trading because, as the court found in holding Dalton liable for his fraud, "the sole source of funds for profit payments was funds received from other investors."⁸⁴ But Bandimere passed on these false statements without any real effort to verify them and profited handsomely for his efforts. Even if, as Bandimere claims, he did not have actual knowledge of the falsity of such statements, we find that his reckless disregard for their truth is strong evidence of his scienter.

We also find that Bandimere's failure to identify Dalton by name to Koch and Radke, while describing UCR's head as a person of significant worldwide contacts and stature, was intentionally deceptive. Bandimere knew that both Koch and Radke knew Dalton. (This is especially true with respect to Radke, since Bandimere, Radke, and Dalton all served on the board of the same local ministry.) Instead of identifying Dalton as the head of UCR, Bandimere gave a description of the unnamed head of UCR that was so at odds with the Dalton known to Koch that Koch felt "betrayed" and thought that Bandimere "had not been straight" with him once he found out that the unnamed person was actually Dalton. The record evidence supports the conclusion that Bandimere intentionally concealed Dalton's identity from Koch and Radke out of fear that they otherwise would not invest. As Koch testified, Dalton "had never . . . been successful in anything financial or in employment I just didn't see him as a person who was doing well." Radke testified that he was "not necessarily comfortable investing with Dalton."

Bandimere argues that there is no evidence that he knew or believed that Koch or Radke would have viewed Dalton's involvement negatively. We disagree. We find that Bandimere's own knowledge of Dalton's questionable financial background, and the fact that he stressed his personal relationship with Dalton in his discussions with other investors provides ample circumstantial evidence to support our finding that Bandimere suspected that knowledge of Dalton's involvement in UCR could deter Koch and Radke from investing.⁸⁵

Bandimere argues that the undisputed fact that he had thousands of dollars of his own money invested in IVC and UCR when he was discussing those investments with others is evidence that he did not act with fraudulent intent. But by far the biggest part of his income from IVC and UCR was the hundreds of thousands of dollars he earned by getting others to invest. It was at least reckless that Bandimere did not reveal material negative information in his possession while using positive representations in order to solicit investments that directly benefited him financially—even if he was ignorant of the fraudulent nature of the investments.

⁸⁴ *Universal Consulting Res., LLC*, 2011 WL 6012536, at *2.

⁸⁵ Bandimere's reliance on *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 474 (2d Cir. 1976), is misplaced. That case holds that findings of fact must be based on reasonable inferences, and here it is perfectly reasonable to infer from the evidence in the record that Bandimere believed mentioning Dalton's involvement to Koch and Radke would make them less likely to invest.

Bandimere argues, citing *South Cherry Street LLC v. Hennessee Group*,⁸⁶ that where recklessness is alleged to be failing to recognize the fraud of others, that recklessness must approximate an actual intent to aid in the fraud. But the basis for the charges of fraud against Bandimere was not that he failed to recognize others' fraud, but rather that he failed to disclose material negative facts in his possession that would have let investors make informed decisions. Thus, Bandimere's reliance on *South Cherry Street* is misplaced. Our finding of scienter is entirely consistent with the standard applied by the court in *South Cherry Street*.⁸⁷

Similar to the argument he raised about the OIP providing insufficient notice of his fraudulent statements and omissions, Bandimere contends that he "had no notice that the facts found to prove scienter would be at issue." For the same reasons we rejected the earlier argument, we reject this one: there is no requirement for the OIP to allege all of the particular facts upon which an element of a violation may be founded.⁸⁸ The requirements of Rule 200(b) are satisfied here and the ALJ did not exceed his authority.⁸⁹

For the above reasons, we find that Bandimere violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IV. CONSTITUTIONAL CHALLENGES

A. Equal-Protection Defense

Bandimere argues that he was denied equal protection because the Commission proceeded against him administratively rather than in federal district court. The thrust of his equal-protection argument is that the Commission "sues Ponzi schemers in federal courts," but that his case, which he contends "alleg[es] he must have known he was getting investors involved in a Ponzi scheme," was brought as an administrative proceeding. He argues that he was "singled out and denied the opportunity for a trial by jury, presided over by an Article III judge, and denied discovery under the Federal Rules of Civil Procedure" and that this denial "impaired his ability to mount a full defense." We reject Bandimere's equal-protection defense for several reasons.

⁸⁶ 573 F.3d 98, 109-10 (2d Cir. 2009).

⁸⁷ Compare *supra* text accompanying note 79 (quoting recklessness standard used in *Disraeli*, 2007 WL 4481515, at *5), with *South Cherry Street*, 573 F.3d at 109 (quoting standard from *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000)).

⁸⁸ See *supra* note 74 and accompanying text.

⁸⁹ Contrary to Bandimere's insistence, his accepting Pickering's \$100,000 investment in the UCR diamond program in March 2010, following a warning from Syke about further investments, is within the scope of the OIP. See OIP ¶¶ 1, 2, 29. Nevertheless, unlike the ALJ, we do not rely on Bandimere's conduct with regard to Pickering's March 2010 diamond program investment in our finding of scienter. In addition, unlike the ALJ, we do not base our finding of scienter on Bandimere's alleged "bullying" of Koch. There is ample evidence of scienter without relying on these episodes.

First, an equal-protection claim is not legally cognizable in the context of an inherently discretionary governmental decision to bring charges in one forum rather than another. The Supreme Court held in *Village of Willowbrook v. Olech* that an individual who is not a member of a protected class may in some contexts assert a "class-of-one" equal-protection claim by establishing that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."⁹⁰ But the Supreme Court has subsequently made clear that *Olech*, which involved a landowner's challenge to a zoning decision, does not apply to every kind of government action. There are, the Court explained, "some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments."⁹¹ In such contexts, a "'class-of-one' theory of equal protection has no place" because "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."⁹² The Commission's choice to bring an action in an administrative forum is a decision committed to agency discretion.⁹³ Accordingly, Bandimere's class-of-one equal-protection challenge must fail.

Second, even if a class-of-one equal-protection claim were cognizable in this context, Bandimere has failed to make the requisite threshold showing that he was "treated differently from others similarly situated."⁹⁴ Individuals asserting such a claim "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves."⁹⁵ But Bandimere has merely pointed to the fact that most "alleged Ponzi schemers"

⁹⁰ 528 U.S. 562, 564 (2000).

⁹¹ *Engquist v. Oregon Dept. of Ag.*, 553 U.S. 591, 592, 603 (2008).

⁹² *Id.* at 603.

⁹³ See 17 C.F.R. § 202.5(b) ("After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanction, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution."); *Robert Radano*, Investment Advisors Act Release No. 2750, 2008 WL 2574440, at *8 n. 74 (June 30, 2008) (determination whether to proceed against some rather than others is committed to agency discretion); *Eagletech Commc'ns, Inc.*, Exchange Act Release No. 54095, 2006 WL 1835958, at *4 (July 5, 2006) (same). In the analogous context of federal prosecutors' decisions about charging defendants, courts have rejected class-of-one claims based on prosecutorial discretion. See, e.g., *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) (holding that "the discretion conferred on prosecutors in choosing whom and how to prosecute" precludes a class-of-one equal-protection claim in that context); *United States v. Green*, 654 F.3d 637, 650 (6th Cir. 2011) (rejecting a class-of-one claim premised on "government's decision to prosecute [the defendant] under MEJA in the civilian justice system while prosecuting his coconspirators under UCMJ in the military justice system").

⁹⁴ *Olech*, 528 U.S. at 564.

⁹⁵ *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006); see also *Cordi-Allen v. Conlon*, 494 F.3d 245, 250-51 (1st Cir. 2007) (explaining that the requirement of establishing a

in recent years have been subject to civil injunctive actions. He has not compared the facts and circumstances of those cases with his own to any degree of detail, much less shown that his case bears such an "extremely high degree of similarity" to those cases that he must have been "singled out." To the contrary, Bandimere acknowledges that a dozen other cases have in fact been brought against Ponzi schemers administratively, as was done here. While conceding this fact, Bandimere attempts to distinguish the administrative proceedings brought against Ponzi schemers, asserting that they were settled, involved licensed securities professionals, or did not allege that the respondents knowingly involved investors in a fraudulent scheme. But the fact that some of these cases may differ in some respects does not establish that Bandimere has been singled out. Bandimere has failed to "identify and relate specific instances where persons situated *similarly* in all relevant aspects were treated differently" from him.⁹⁶ Moreover, Bandimere was not charged with perpetrating a Ponzi scheme in the first place, so the idea that he was "singled out" from a group he does not belong to makes no sense. For these reasons, his equal-protection claim must fail.

Finally, contrary to Bandimere's contention, there was a "benign reason to proceed against Mr. Bandimere administratively." Thus, he has also failed to establish that "there is no rational basis for the [alleged] difference in treatment," even if any such difference exists.⁹⁷ Bandimere was alleged to have been, and we have found that he was, acting as an unregistered broker. This provided a jurisdictional basis for the remedy the Division sought, and that we have imposed, of an associational bar for the protection of investors in the public interest—a statutory remedy that Congress made available to the Commission in administrative proceedings. That Bandimere was acting as a broker without being a licensed securities professional in no way diminishes the appropriateness of seeking such a remedy. The statute does not distinguish, nor should it, between registered and non-registered brokers.⁹⁸

For all of the above reasons, we reject Bandimere's equal-protection defense.

B. Appointments Clause Challenge

Bandimere argues that ALJ Cameron Elliot—who presided over this matter and issued the Initial Decision—was not appointed in a manner consistent with the Appointments Clause of the Constitution. We find that the appointment of Commission ALJs is not subject to the requirements of the Appointments Clause.

(...continued)

“extremely high degree of similarity” includes demonstrating the absence of any “distinguishing or mitigating circumstances as would render the comparison inutile”).

⁹⁶ *Cordi-Allen*, 494 F.3d at 251 (emphasis added).

⁹⁷ *Olech*, 528 U.S. at 564; *cf. Campbell v. Rainbow City*, 434 F.3d 1306, 1314 n.6 (11th Cir. 2006) (requiring plaintiff asserting rational-basis challenge to "negativ[e] every conceivable basis which might support the government action") (quotation marks omitted).

⁹⁸ *See infra* note 156 and accompanying text.

Under the Appointments Clause, certain high-level government officials must be appointed in particular ways: "Principal officers" must be appointed by the President (and confirmed by the Senate), while "inferior officers" must be appointed either by the President, the heads of departments, or the courts of law.⁹⁹ The great majority of government personnel are neither principal nor inferior officers, but rather "mere employees" whose appointments are not restricted by the Appointments Clause.¹⁰⁰ It is undisputed that ALJ Elliot was not appointed by the President, the head of a department, or a court of law.¹⁰¹ Bandimere therefore contends that his appointment violates the Appointments Clause because, in his view, ALJ Elliot should be deemed an inferior officer. The Division counters that he is an employee and thus there was no violation of the Appointments Clause.

As we have recently explained,¹⁰² the D.C. Circuit's decision in *Landry v. FDIC* generally controls our resolution of this question.¹⁰³ *Landry* held that, for purposes of the Appointments Clause, ALJs at the Federal Deposit Insurance Corporation ("FDIC"), who oversee administrative proceedings to remove bank executives, are employees rather than inferior officers. *Landry* explained that the touchstone for determining whether adjudicators are inferior officers is the extent to which they have the power to issue "final decisions."¹⁰⁴ Although ALJs at the FDIC take testimony, conduct trial-like hearings, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, they "can never render the decision of the FDIC."¹⁰⁵ Instead, they issue only "recommended decisions" which the FDIC Board of Directors reviews de novo, and "[f]inal decisions are issued only by the FDIC Board."¹⁰⁶ The FDIC ALJs thus function as aides who assist the Board in its duties, not officers who exercise significant authority independent of the Board's supervision. Because ALJs at the

⁹⁹ The Clause provides that the President "by and with the advice and consent of the Senate, shall appoint . . . officers of the United States . . . 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.

¹⁰⁰ *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991)); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

¹⁰¹ The Commission constitutes the "head of a department" when its commissioners act collectively. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010).

¹⁰² *In the Matter of Raymond J. Lucia Companies*, Exchange Act Release No. 34-75837, 2015 WL 5172953, at *21-23 (Sept. 3, 2015); *In the Matter of Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *23-*26 (Sept. 17, 2015).

¹⁰³ 204 F.3d 1125 (D.C. Cir. 2000).

¹⁰⁴ *Id.* at 1133-34.

¹⁰⁵ *Id.* at 1133.

¹⁰⁶ *Id.*

FDIC "have no such powers" of "final decision," the D.C. Circuit "conclude[d] that they are not inferior officers."¹⁰⁷

The mix of duties and powers of the Commission's ALJs are very similar to those of the ALJs at the FDIC. Like the FDIC's ALJs, the Commission's ALJs conduct hearings, take testimony, rule on admissibility of evidence, and issue subpoenas. And like the FDIC's ALJs, the Commission's ALJs do not issue the final decisions that result from such proceedings. Just as the FDIC's ALJs issue only "recommended decisions" that are not final, the Commission's ALJs issue "initial decisions" that are likewise not final.¹⁰⁸ Respondents may petition the Commission for review of an ALJ's initial decision,¹⁰⁹ and it is our "longstanding practice [to] grant[] virtually all petitions for review."¹¹⁰ Indeed, we are unaware of any case in which the Commission has not granted a petition for review. Absent a petition, we may also choose to review a decision on our own initiative.¹¹¹ In either case, our rules expressly provide that "the initial decision [of an ALJ] shall not become final."¹¹² Even where an aggrieved person fails to file a timely petition for review of an initial decision and we do not order review on our own initiative, our rules provide that "*the Commission* will issue an order that the decision has become final," and it becomes final only "upon issuance of the order" by the Commission.¹¹³ Moreover, as does the FDIC, the Commission reviews our ALJs' decisions *de novo*.¹¹⁴ Upon review, we "may affirm,

¹⁰⁷ *Id.* at 1134.

¹⁰⁸ *See* 17 CFR 201.360(a)(1) & (d).

¹⁰⁹ 17 CFR 201.411(b).

¹¹⁰ Exchange Act Release No. 35833, 1995 WL 368865, at *80-81 (June 9, 1995); *see also* Exchange Act Release No. 33163, 1993 WL 468594, at *55-59 (Nov. 5, 1993) (explaining that we are "unaware of any case in which the Commission has declined to grant a petition for review"). We reiterated this policy in the context of amendments to our Rules of Practice in 2004 that eliminated the filing of oppositions to petitions for review. We deemed such oppositions pointless, "given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision." Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003).

¹¹¹ 17 CFR 201.411(c); *see also* 15 U.S.C. 78d-1(b) (providing that "the Commission shall retain a discretionary right to review the action of any . . . administrative law judge . . . upon its own initiative or upon petition").

¹¹² 17 CFR 201.360(d)(1).

¹¹³ 17 CFR 201.360(d)(2) (emphasis added). An initial decision does *not* become final simply "on the lapse of time" for seeking review. Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004).

¹¹⁴ We do not view the fact that we accord Commission ALJs deference in the context of demeanor-based credibility determinations to afford our ALJs with the type of authority that would qualify them as inferior officers. First, as we have repeatedly made clear, we do not accept such findings "blindly," and we will "disregard explicit determinations of credibility" when our *de novo* review of the record as a whole convinces us that a witness's testimony is credible (or not) or that the weight of the evidence warrants a different finding as to the ultimate

(continued...)

reverse, modify, set aside or remand for further proceedings, in whole or in part," any initial decision.¹¹⁵ And "any procedural errors" made by an ALJ in conducting the hearing "are cured" by our "thorough, *de novo* review of the record."¹¹⁶ We may expand the record by "hear[ing] additional evidence" ourselves or remanding for further proceedings before the ALJ, and may "make any findings or conclusions that in [our] judgment are proper and on the basis of the record."¹¹⁷

Bandimere suggests that our ALJs enjoy as much discretion as Article III trial judges. But that is not the case. A trial judge's factual findings are afforded significant deference by reviewing courts, while findings made by our ALJs are not. And although ALJs may oversee the taking and hearing of evidence, we have made clear that we have "plenary authority over the course of [our] administrative proceedings and the rulings of [our] law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief."¹¹⁸ This includes authority over all evidentiary and discovery-related rulings. We are not limited by the record that comes to us. As explained above, we may expand the record. The fact that our ALJs may rule on evidentiary matters and discovery issues (subject to our *de novo* review) does not distinguish them from the FDIC's ALJs in *Landry* who have the same authority.

Bandimere also objects to "the *Landry* court's reading" of a Supreme Court decision, *Freytag v. Commissioner*,¹¹⁹ which held that a "special trial judge" of the Tax Court was an inferior officer. Bandimere suggests that *Landry* was wrong to distinguish *Freytag*. But we agree with *Landry*'s analysis and the distinctions it identifies between ALJs and the special trial

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facts at issue. *Id.* at *10; *accord Francis V. Lorenzo*, Exchange Act Release No. 74836, 2015 WL 1927763, at *10 n.32 (Apr. 29, 2015); *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *8 n.46 (Nov. 3, 2006); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) ("The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge."). Second, our practice in this regard is no different from the FDIC's and so does not warrant a departure from *Landry*. *Compare [Redacted] Insured State Nonmember Bank*, FDIC-82-73a, 1984 WL 273918, at *5 (June 18, 1984) (stating, "as a general rule," that "the assessment of the credibility of witnesses" by the ALJ is given "deference" by the FDIC) *with Ramon M. Candelaria*, FDIC-95-62e, 1997 WL 211341, at *3-4 (Mar. 11, 1997) (noting that the FDIC ALJ found respondent to be "entirely credible" but rejecting respondent's testimony "in light of the entire record").

¹¹⁵ 17 CFR 201.411(a); *see also* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .").

¹¹⁶ *Heath v. SEC*, 586 F.3d 122, 142 (2d Cir. 2009); *see also, e.g., Anthony Fields*, Exchange Act Release No. 74344, 2015 WL 728005, at *20 (Feb. 20, 2015) ("[O]ur *de novo* review cures any evidentiary error that the law judge may have made.").

¹¹⁷ 17 CFR 201.411(a); 17 CFR 201.452.

¹¹⁸ *Michael Lee Mendenhall*, Release No. 4051 (March 19, 2015), 2015 WL 1247374, at *1.

¹¹⁹ 501 U.S. 868 (1991).

judges at issue in *Freytag*. As *Landry* recognized, ALJs are different from the special trial judges at issue in *Freytag*.¹²⁰ The greater role and powers of the special trial judges relative to Commission ALJs, in our view, makes *Freytag* inapposite here. First, unlike the ALJs whose decisions are reviewed de novo, the special trial judges made factual findings to which the Tax Court was required to defer, unless clearly erroneous.¹²¹ Second, the special trial judges were authorized by statute to "render the [final] decisions of the Tax Court" in significant, fully-litigated proceedings involving declaratory judgments and amounts in controversy below \$10,000.¹²² As discussed above, our ALJs issue initial decisions that are not final unless the Commission takes some further action. Third, the Tax Court (and by extension the court's special tax judges) exercised "a portion of the judicial power of the United States," including the "authority to punish contempts by fine or imprisonment."¹²³ Commission ALJs, by contrast, do not possess such authority.¹²⁴ And while Commission ALJs may issue subpoenas to compel noncompliance, they are powerless to enforce their subpoenas; the Commission itself would need to seek an order from a federal district court to compel compliance.¹²⁵ In this respect, too, our ALJs are akin to the FDIC's ALJs that *Landry* found to be "mere employees."¹²⁶

Based on the foregoing, we conclude that the mix of duties and powers of our ALJs is similar in all material respects to the duties and role of the FDIC's ALJs in *Landry*.¹²⁷

¹²⁰ *Landry*, 204 F.3d at 1133 (explaining that the special trial judges at issue in *Freytag* exercised "authority . . . not matched by the ALJs").

¹²¹ *See id.*

¹²² *Freytag*, 501 U.S. at 882.

¹²³ *Id.* at 891.

¹²⁴ *See* 17 CFR 201.180. The Commission's rules provide ALJs with authority to punish contemptuous conduct only in the following ways. If a person engages in contemptuous conduct before the ALJ during any proceeding, the ALJ may "exclude that person from such hearing or conference, or any portion thereof," or "summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding." *Id.* 201.180(a). If there are deficiencies in a filing, a Commission ALJ "may reject, in whole or in part," the filing, such filing "shall not be part of the record," and the ALJ "may direct a party to cure any deficiencies." *Id.* 201.180(b). Finally, if a party fails to make a required filing or to cure a deficiency with a filing, then a Commission ALJ "may enter a default, dismiss the case, decide the particular matter at issue against the person, or prohibit the introduction of evidence or exclude testimony concerning that matter." *Id.* 201.180(c). Any such ruling would, of course, be subject to de novo Commission review.

¹²⁵ *See* 15 U.S.C. § 78u(c).

¹²⁶ *See* 12 CFR 308.25(h), 308.26(c), 308.34(c) (providing that an aggrieved party must apply to a federal district court for enforcement of a subpoena issued by a FDIC ALJ).

¹²⁷ We do not find any relevance in the fact that the federal securities laws and our regulations at times refer to ALJs as "officers" or "hearing officers." There is no indication that Congress intended "officers" or "hearing officers" to be synonymous with "Officers of the United States," U.S. Const. art. II, § 2, cl. 2, and the word "officer" in our regulations has no such

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Accordingly, we follow *Landry*, and we conclude that our ALJs are not "inferior officers" under the Appointments Clause.¹²⁸

V. EVIDENTIARY ISSUES

Before the hearing in this matter, Bandimere asked the ALJ to issue a subpoena directed to the Commission for the production of various documents: (1) items related to a prior investigation and enforcement action against Parrish;¹²⁹ (2) parts of documents that had been withheld as attorney work product, including interview notes and memoranda; (3) training materials used by the Commission relating to facts or circumstances that may indicate the existence of a Ponzi scheme; and (4) portions of documents relating to the decision to institute an administrative proceeding rather than a civil enforcement action against Bandimere. The Division opposed Bandimere's request, and the ALJ denied it. Bandimere challenges the ALJ's decision as arbitrary and capricious.¹³⁰ Under Rule 232(b) of our Rules of Practice, the person to whom a request for a subpoena is directed may refuse to issue the subpoena if the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome.¹³¹ We agree with the ALJ's denial, pursuant to Rule 232, of Bandimere's request.¹³²

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meaning. We also note in this regard that the Administrative Procedure Act "consistently uses the term 'officer' or the term 'officer, employee, or agent'" to "refer to [agency] staff members." Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 615 & n.11 (1948). Cf. 5 U.S.C. §§ 556, 557 (referring to official who presides over evidentiary hearing as the "presiding employee").

¹²⁸ Beyond *Landry*, we believe that our ALJs are properly deemed employees (rather than inferior officers) because this is how Congress has chosen to classify them, and that decision is entitled to considerable deference. See *Burnap v. United States*, 252 U.S. 512, 516 (1920). For example, as we discussed above, Congress created and placed ALJ positions within the competitive service system, just like most other federal employees. Like such other employees, an ALJ who believes that his employing agency has engaged in a prohibited personnel practice can seek redress either through the Office of Special Counsel or the Merit Systems Protection Board. See 5 U.S.C. §§ 1204, 1212, 1214, 1215, 1221. And ALJs—like other employees—are subject to reductions-in-force. See *id.* § 7521(b).

¹²⁹ See *supra* note 67 (providing background about *SEC v. Z-Par Holdings, Inc.*).

¹³⁰ The parties and the ALJ refer to the ALJ's action as quashing the subpoena, but since the subpoena was not issued, there was nothing to quash. Bandimere also requested documents the Division had received from other federal agencies; he does not seek review of this aspect of the ALJ's denial.

¹³¹ 17 C.F.R. § 201.232(b).

¹³² Bandimere argues, citing an order issued by the ALJ in *Hector Gallardo*, Administrative Proceedings Rulings Release No. 667 (Feb. 25 2011), available at <http://www.sec.gov/alj/aljorders/2011>, that a party seeking to quash a subpoena cannot show that the subpoena is unreasonable, oppressive, or unduly burdensome within the meaning of Rule of Practice 232(e)(2) merely by contending that the subpoena seeks information that is not relevant,

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First, Bandimere failed to show that any of the documents he requested in relation to Parrish's prior involvement with a Ponzi scheme other than IVC had any relevance to Bandimere's alleged violations in this case. Bandimere's request was thus excessive in scope, and requiring the Division to produce those documents would have been unreasonable.

Second, Bandimere's request for factual portions of documents withheld as attorney work product was excessive in scope. Rule 230(b) permits the Division to withhold internal memoranda, notes, or writings prepared by Commission employees as well as attorney work product. The privilege protecting factual portions of work product may be overcome on a showing that the person seeking the materials has a substantial need for them and no way of obtaining their substantial equivalent without undue hardship.¹³³ Bandimere has not made such a showing, but instead asserts that materials withheld by the Division might be the only source of information with respect to certain issues. In addition to turning over the contents of its investigative file,¹³⁴ the Division, pursuant to Rule 230(b), gave Bandimere a list of possible material exculpatory evidence from withheld documents. This list contained summaries of statements made by investors, including two of the investors who testified at the hearing, Hunter and Moravec. The Division also submitted a declaration by its trial counsel in this matter describing the Division's review of documents in its withheld document list and representing that all identified possible material exculpatory evidence was included in the list it provided. Under these circumstances, we find no error in the ALJ's decision to refuse to issue the subpoena for the factual portions of the work product documents.¹³⁵

Bandimere argues that the ALJ's order in *Thomas R. Delaney II*¹³⁶ supports his argument that the Division did not adequately establish that certain documents were protected by the work product privilege. The ALJ in *Delaney* found that correspondence between the Division and the

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nor reasonably likely to lead to the discovery of relevant evidence. In this case the Division made particularized arguments as to why the ALJ should not require it to produce the documents Bandimere requested. Because the ALJ acted in accordance with Rule 232 in refusing to issue the subpoena, we find no basis to disturb his decision.

¹³³ See *United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 401 (D. Colo. 1992) ("[F]actual work product . . . is discoverable upon a showing that (a) the party seeking discovery has substantial need of the materials in the preparation of his case; and (b) he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (citation omitted)).

¹³⁴ The Division represented that it turned over nearly 3 GB of data, encompassing over 11,000 files.

¹³⁵ See, e.g., *optionsXpress, Inc.*, Exchange Act Release No. 70698, 2013 WL 5635987, at *6-8 (Oct. 16, 2013) (refusing to order Division to turn over internal work product where Division had already provided extensive discovery and had explicitly represented that it had turned over all *Brady* material).

¹³⁶ Administrative Proceedings Rulings Release No. 1652 (July 25, 2014), available at <http://www.sec.gov/alj/aljorders/2014/ap-1652.pdf>.

respondent did not establish that the work product privilege protected certain documents, and she ordered the Division to submit a more detailed privilege log for her review. In contrast, before making his decision on the subpoena in this proceeding the ALJ had already received a withheld document list from the Division; he found the list "generally acceptable," and asked for a more detailed log only with respect to one category of documents.¹³⁷ The ALJ's decision in *Delaney* requiring more detailed substantiation does not establish that the ALJ in this proceeding should have acted differently.¹³⁸

Third, Bandimere's request for training materials related to Ponzi schemes was also appropriately denied. Bandimere was not charged with having failed to recognize that IVC and UCR were Ponzi schemes. He was charged with failing to disclose material facts that reasonable investors would have wanted to consider in making investment decisions. Thus, the training materials were irrelevant to the issue with respect to which Bandimere sought them.

Finally, Bandimere was not entitled to the factual portions of documents related to the Commission's decision to proceed against him administratively, and we also deny his motion filed during the pendency of this appeal for a copy of the action memorandum submitted to the Commission before we issued the OIP in this matter. Before the ALJ and again before us, he argues that his interest in these materials "extends only as far as it may be relevant to his [equal protection] defense," i.e., that the Commission improperly singled him out by differentiating him from other respondents alleged to have engaged in Ponzi schemes by proceeding against him administratively. As we have previously stated, Bandimere's assertion that he was treated differently from other respondents is incorrect on several levels.¹³⁹ Thus, Bandimere has not shown that the action memorandum is relevant to the issue with regard to which he seeks it—establishing the equal-protection defense he asserts.

Moreover, as the Division has consistently maintained, the action memo is protected from disclosure by multiple evidentiary privileges.¹⁴⁰ Bandimere argues that the Division waived any applicable privilege related to the action memorandum by citing, in its response to Bandimere's

¹³⁷ The Division subsequently turned over the documents originally withheld in this category to Bandimere, thus mooted the need to submit a detailed log.

¹³⁸ ALJs' rulings are not precedential and are not binding on the Commission or on other ALJs. *See, e.g., Sands Bros. Asset Mgmt.*, Advisers Act Release No. 4083, 2015 WL 2229281, at *4 (May 13, 2015); *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 74345, 2015 WL 728006, at *3 & n.20 (Feb. 20, 2015); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014).

¹³⁹ *See supra* Section IV.A.

¹⁴⁰ Documents considered by the Commission in deciding whether and how to proceed against Bandimere are protected by the deliberative process privilege. *See Fox News Network LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 541 (S.D.N.Y. 2010) (stating that the deliberative process privilege "applies to materials that are part and parcel of the process of internal agency decision making" (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975))).

opening brief, the ALJ's statement that he had determined after in camera review that the contents of the memorandum were not helpful to Bandimere. Bandimere raised essentially the same argument before the ALJ—contending that the Division's citation in its post-hearing brief to the ALJ's statement effected a waiver of privilege. We reject Bandimere's waiver argument. The Division did not waive its claim that the action memorandum was privileged when it referred to the ALJ's statement. The Division neither cited the action memorandum nor offered it as evidence. Merely alluding to the ALJ's statement did not waive the privilege with respect to the underlying document.¹⁴¹ Accordingly, we deny Bandimere's request for the action memorandum to be turned over to him.¹⁴²

VI. SANCTIONS

The ALJ 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 cease and desist from committing or causing violations of Securities Act Section 5(a), 5(c), and 17(a), Exchange Act Sections 10(b) and 15(a), and Exchange Act Rule 10b-5; ordered Bandimere to disgorge \$638,056.33 plus prejudgment interest; and imposed a third-tier civil penalty of \$390,000. As discussed below, based on our consideration of the relevant factors, we impose the same sanctions as the ALJ, except that we will not bar Bandimere from association with a municipal advisor or a nationally recognized statistical rating organization.¹⁴³

A. Bar

Exchange Act Section 15(b)(6)(A) authorizes us to bar any person who, at the time of the misconduct, was associated with a broker or dealer, from "being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization" if we find "on the record after notice and opportunity for a hearing" that the person willfully violated the securities laws and the sanction is in the public interest.¹⁴⁴ In imposing an industry-wide bar, the ALJ included bars from associating with any nationally recognized statistical rating organization or municipal advisor based on the expanded relief authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Because the conduct at issue here occurred before Dodd-Frank authorized

¹⁴¹ We note that the ALJ's statement played no role in our analysis of Bandimere's equal-protection defense, which we have rejected for the reasons set forth above.

¹⁴² Because we do not order that Bandimere be given a copy of the action memorandum, we deny his motions that it be made part of the record and that he be permitted to file a supplemental brief based on its contents.

¹⁴³ Pursuant to Rule of Practice 411(d), 17 C.F.R. § 201.411(d), we determined on our own initiative to review what sanctions, if any, are appropriate in this matter.

¹⁴⁴ 15 U.S.C. § 78o(b)(6)(A).

complete industry bars, consistent with the D.C. Circuit's recent decision in *Koch v. SEC*,¹⁴⁵ we conclude that it is appropriate to modify the bar imposed by the ALJ to the extent that it bars Bandimere from associating with any nationally recognized statistical rating organization or municipal advisor but to maintain it in all other respects. Accordingly, we have determined to bar Bandimere from associating with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

1. Barring Bandimere is statutorily authorized.

Bandimere argues that Section 15(b) does not apply to him because he was neither a registered broker or dealer nor associated with a registered broker or dealer. But Section 15(b) does not limit us to proceeding administratively against registered brokers or dealers and their associated persons.¹⁴⁶ We have previously determined that we have authority under Section 15(b)(6) to discipline associated persons of unregistered broker-dealers,¹⁴⁷ and we have used that authority to impose a bar on an associated person of an unregistered broker.¹⁴⁸ Bandimere's status as an unregistered broker is therefore no impediment to our action here.

Bandimere further argues that, by its terms, Section 15(b)(6) applies only to a person associated with a broker or dealer, or who was seeking to become associated, or who was participating in a penny stock offering. He asserts that there was no allegation, nor any evidence, that he fit within any of these categories, and that therefore Section 15(b)(6) provides no authority to sanction him.

Bandimere misconstrues the statutory requirement. Under Section 3(a)(18) of the Exchange Act, "person associated with a broker or dealer" is broadly defined to include "any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer."¹⁴⁹ As discussed previously, we have found that Bandimere himself meets the

¹⁴⁵ 793 F.3d 147, 157-59 (D.C. Cir. 2015) (holding that municipal advisor and rating organization bars were retroactively applied to respondent for pre Dodd-Frank conduct).

¹⁴⁶ See *First Jersey Securities, Inc.*, Exchange Act Release No. 37259, 1996 WL 290276, at *2 n.7 (May 30, 1996); *John Kilpatrick*, Exchange Act Release No. 23251, 1986 WL 626187, at *4-5 (May 19, 1986); see also text accompanying note 156 *infra* (noting that Section 15(b) does not distinguish between registered and non-registered brokers and dealers).

¹⁴⁷ See *Victor Teicher*, Exchange Act Release No. 40010, 1998 WL 251823, at *3 (May 20, 1998), *affirmed in part and reversed in part*, 177 F.3d 1016 (D.C. Cir. 1999).

¹⁴⁸ See *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 WL 3299148 (Dec. 2, 2005), *reconsideration denied*, Exchange Act Release No. 52876, 2006 WL 985310 (Apr. 13, 2006).

¹⁴⁹ 15 U.S.C. § 78c(a)(18). Persons associated with a broker or dealer whose functions are solely clerical or ministerial are generally not included in the meaning of the term "person

definition of a broker under the Exchange Act.¹⁵⁰ We also find that he qualifies as a "person associated with a broker" and comes within the reach of Section 15(b)(6) because he directly controls his own actions as a broker. To hold otherwise would prevent the Commission from barring natural persons who themselves meet the definition of a broker but who are not otherwise associated with a broker—something that would be inconsistent with the Exchange Act's purpose of protecting investors. We therefore conclude that Bandimere may be barred under Section 15(b)(6).

2. Bandimere's violations of the securities laws were willful.

As noted, Exchange Act Section 15(b) authorizes us to bar individuals for willful violations of the securities laws. In this context, willfulness is shown where a person intends to commit an act that constitutes a violation; there is no requirement that the actor also be aware that he is violating any statutes or regulations.¹⁵¹ Bandimere does not contend that he did not know that he was committing the acts involved in offering and selling the interests in IVC and UCR. On the record before us, we find that he acted willfully.

Bandimere argues that the standard the ALJ used to determine willfulness—whether the person charged knows what he or she was doing—was not the proper standard and that under a proper standard the Division has failed to prove that his violations of Securities Act Section 5 and Exchange Act Section 15(a) were willful. But the standard the ALJ applied has been firmly established in our cases, as well as in federal court decisions, for half a century. In its 2000 opinion in *Wonsover v. SEC*, the United States Court of Appeals for the District of Columbia Circuit called it "our traditional formulation of willfulness for the purpose of [Exchange Act Section] 15(b)."¹⁵² The court quoted its 1965 statement in *Gearhart & Otis, Inc. v. SEC*, "[I]t has been uniformly held that "willfully" in this context means intentionally committing the act which constitutes the violation."¹⁵³ *Gearhart & Otis*, in turn, cited *Tager v. SEC*, a 1965 opinion of the United States Court of Appeals for the Second Circuit, as the source of the quoted

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associated with a broker or dealer" for purposes of Exchange Act Section 15, but they, too, are subject to Section 15(b)(6). *Id.*

¹⁵⁰ See *supra* Section II.B.2.a.

¹⁵¹ *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

¹⁵² *Id.* at 415. Bandimere contends that *Wonsover* did not "confirm the meaning of willful," or endorse the standard used by the ALJ in this proceeding, but rather held that the meaning of "willful" was unresolved. This is a misreading of the case. Although the court held that *Wonsover's* violations were willful under either the court's traditional formulation "or even under the subjective recklessness standard" that *Wonsover* pressed, there is nothing in the court's decision to support Bandimere's contention that the court regarded the question as unresolved, and it did nothing to back away from what it recognized was the "uniformly held" standard. See *id.* at 414-15.

¹⁵³ *Id.* at 414 (quoting *Gearhart & Otis*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

language.¹⁵⁴ Thus, as early as 1965, two different federal courts of appeals identified this interpretation of "willful" for purposes of Section 15(b) as "uniformly held." Bandimere has not identified any other standard used to determine willfulness in proceedings brought under Exchange Act Section 15(b). Although Bandimere argues that Congress must have intended a qualitative distinction between violations that are willful and those that are not, he points to no authority supporting his argument that willfulness, as applied to a violation under Section 15(b), means more than the standard articulated in *Wonsover*, and there is abundant authority to the contrary.¹⁵⁵

Bandimere further argues that unlike *Wonsover* he is not a licensed professional and that with respect to an unlicensed person willfulness requires at least negligence. But Section 15(b) speaks of willful conduct by persons associated with "any broker or dealer," making no distinction between registered and non-registered brokers and dealers.¹⁵⁶ And Congress's decision to make no such distinction makes sense: the effect of a broker's conduct on the investing public is the same whether he is registered or not, and allowing greater latitude for the misconduct of an unregistered broker would only encourage persons to forego the mandate of

¹⁵⁴ *Gearhart & Otis*, 348 F.2d at 803 (quoting *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965)).

¹⁵⁵ *See, e.g., Mathis v. SEC*, 671 F.3d 210, 217-18 (2d Cir. 2012) (reaffirming *Tager's* standard for willfulness—that "willfully" means "intentionally committing the act which constitutes the violation"—in the context of Exchange Act Section 15(b) and a related statutory provision); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (holding that "willfulness" in the context of Section 15(b) "means only that the act was a conscious, intentional action" and that the petitioner's conduct in violation of Securities Act Section 5 "[c]learly . . . fall[s] within this definition of 'willfulness'"); *Capital Funds, Inc. v. SEC*, 348 F.2d 582, 588 (8th Cir. 1965) (holding in the context of Section 15(b) "willfulness means only the intentional commission of the act, no intention to violate the law is necessary"); *SEC v. Martino*, 255 F. Supp. 2d 268, 285 (S.D.N.Y. 2003) ("The term 'willful' in the federal securities laws signifies merely that the defendant intended to commit the act which constitutes the violation.").

Bandimere points to our decision in *International Shareholders Serv. Corp.*, Exchange Act Release No. 12389, 1976 WL 160366 (Apr. 29, 1976), as support for his contention that he did not act willfully because he was unaware that his conduct violated the law. *International Shareholders* dealt with an exemption to the Section 5 registration requirements. The actions of the respondents in that case were consistent with the requirements of the exemption, but the exemption was rendered inapplicable (without the respondents' knowing it) by the acts of a third party. Under those very limited circumstances, we found that the respondents did not act willfully. *Id.* at *3-4. Here, Bandimere does not assert that any exemption applies, nor were his actions rendered illegal due to the actions of a third party. Thus, *International Shareholders* is inapposite.

¹⁵⁶ 15 U.S.C. § 78o(b)(4) (emphasis added).

registration. In any event, we have applied the *Wonsover* standard in other contexts,¹⁵⁷ including for violations that had no scienter or negligence requirement.¹⁵⁸

Bandimere contends that "[t]he Commission need not articulate a precise standard of culpability" for a willful violation because he "was not culpable at all." We disagree. Bandimere's testimony that he "tried to be very careful to let [investors] know that [IVC and UCR] were not registered securities," shows his awareness that registration was an important consideration, thus undercutting his contentions that he lacked any awareness of possible wrongdoing. We also reject Bandimere's argument that he "acted reasonably" and was not culpable with respect to either the Section 5 or the Section 15(a) violations charged because he discussed "the legality of his activities" with Syke, an attorney, who testified that he failed to see that these activities raised possible issues involving the sale of investment contracts or acting as a broker. The discussions on which Bandimere relies happened early in Bandimere's involvement with IVC and UCR, so Syke's understanding of Bandimere's involvement was not based on Syke's knowledge of the full scope of activities in which Bandimere ultimately took part. And, although Syke had advised Bandimere that it was important to consider whether offers and sales of the IVC and UCR investments complied with federal securities laws, the record does not show that Bandimere sought Syke's advice with respect to this issue as he became more involved. To the contrary, Syke testified that he did not advise Bandimere whether he would be acting as an unregistered broker when he offered IVC and UCR investments to investors, and that he did not advise Bandimere that the offerings through Exito were in compliance with Section 5.

Bandimere argues that the onus is not on the client to disclose everything the lawyer must know to give advice on which a client may rely. He also argues, citing *Howard v. SEC*,¹⁵⁹ that compliance with the securities laws is sufficiently difficult that laymen have no real choice but to rely on counsel. But here, Bandimere's discussions with Syke alerted him to possible securities laws implications of Bandimere's involvement with selling IVC and UCR, and Bandimere chose not to pursue the assistance of counsel. This demonstrates that his conduct was unreasonable, rather than otherwise. In any event, whether Bandimere acted reasonably is irrelevant to the

¹⁵⁷ See, e.g., *Robert G. Weeks*, Exchange Act Release No. 48684, 2004 WL 828, at *12-13, *16 (Oct. 23, 2003) (*Wonsover* standard applied against former de facto officer and director of mining company).

¹⁵⁸ See *Maria T. Giesige*, Exchange Act Release No. 60000, 2009 WL 1507584, at *6 n.10 (May 29, 2009) (applying *Wonsover* standard to find willfulness with regard to Securities Act Section 5 violations); *Weeks*, 2004 WL 828, at *12-13, *16 (same); *John D. Audifferen*, Exchange Act Release No. 58230, 2008 WL 2876502, at *4-7 (July 25, 2008) (finding that the respondent "was aware of what he was doing and was not coerced," and thus acted willfully, when he violated several statutory provisions by taking actions that were permitted only upon a showing of compliance with Regulation T promulgated by the Governors of the Federal Reserve System; and further finding that although the evidence showed that the respondent knew or should have known that certain conduct would not comply with Regulation T, no such showing was required to establish that respondent acted willfully).

¹⁵⁹ 376 F.3d 1136, 1148 n.20 (D.C. Cir. 2004).

issue of willfulness because, as discussed above, there is no negligence requirement for a finding of willfulness.

Finally, even if we accepted Bandimere's arguments that his violations of Securities Act Section 5 and Exchange Act Section 15(a) were not willful (which we do not), our finding that Bandimere acted with scienter in violating the antifraud provisions demonstrates willful violations sufficient to support our imposition of sanctions.

3. Barring Bandimere is in the public interest.

"In determining the need for sanctions in the public interest, we consider, among other things, (i) the egregiousness of the respondent's actions; (ii) the degree of scienter involved; (iii) the isolated or recurrent nature of the infraction; (iv) the respondent's recognition of the wrongful nature of his or her conduct; (v) the sincerity of any assurances against future violations; and (vi) the likelihood that the respondent's occupation will present opportunities for future violations."¹⁶⁰ We also consider whether the sanctions will have a deterrent effect.¹⁶¹ Our inquiry is flexible, and no single factor is dispositive.¹⁶²

On the record before us, these factors support the imposition of a bar. Bandimere's conduct involved serious wrongdoing, at least a reckless degree of scienter, and was recurrent. Bandimere acted as an unregistered broker, selling unregistered securities, in numerous transactions over more than three years. By the time IVC and UCR stopped paying returns, the LLCs that Bandimere managed or co-managed had collected more than \$9 million in investor funds, not including funds invested by Bandimere. Many of the investors who testified at the hearing stated that they lost most, if not all, of their investments in the two schemes, and that they were devastated by the outcome.¹⁶³

Bandimere shows virtually no recognition of the wrongfulness of his conduct. In his brief, he calls his violations of Sections 5 and 15(a) "inadvertent if they occurred," refers to the requirements of Sections 5 and 15(a) as "technical," and says that he was "trying to be cautious." By referring to himself as a "victim," he disavows the part he played in causing losses to the investors he recruited to IVC and UCR. Although Bandimere has never been involved in the

¹⁶⁰ *Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *20 (May 16, 2014) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)), *aff'd in relevant part*, 793 F.3d 147 (D.C. Cir. 2015).

¹⁶¹ *See Toby G. Scammell*, Investment Advisers Act Release No. 3961, 2014 WL 5493265, at *5 (Oct. 29, 2014) (citing additional authority).

¹⁶² *See KPMG Peat Marwick, LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

¹⁶³ Although Bandimere argues that he also lost money because he had invested \$1,145,419 in IVC and UCR programs, he in fact gained money as a result of his involvement because he received \$477,878.93 paid out to him as "earnings" or "profits" on those investments, and an additional \$734,996.33 in transaction-related compensation. We discuss Bandimere's gains and losses in more detail below.

securities industry as a licensed professional, he is just as well positioned as he was before to pitch investments to his network of friends and acquaintances, which shows a possibility that there will be opportunities for future misconduct.

Bandimere argues against the use of the public interest factors articulated in *Steadman*, and insists that the D.C. Circuit rejected the *Steadman* factors as a basis for determining sanctions in *PAZ Securities v. SEC*.¹⁶⁴ But the court in *PAZ*—a case involving the review of sanctions imposed by the NASD—did not hold that consideration of the *Steadman* factors was in any way inappropriate. To the contrary, it found that those factors "will often be relevant."¹⁶⁵ The court held that the Commission was not constrained in explaining itself by reference to any mechanical formula, including *Steadman*.¹⁶⁶ Since deciding *PAZ*, the D.C. Circuit has denied petitions for review in which the Commission applied the *Steadman* factors in proceedings before ALJs, without indicating any disapproval of our use of those factors.¹⁶⁷ Bandimere's attack on our use of the *Steadman* factors is thus without merit.¹⁶⁸

B. Cease-and-Desist Order

Section 8A(a) of the Securities Act and Section 21C(a) of the Exchange Act authorize us to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" those Acts or any rule promulgated thereunder.¹⁶⁹ In determining whether a cease-and-desist order is warranted, we consider not only the public interest factors discussed above, but also "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the

¹⁶⁴ 566 F.3d 1172, 1175 (D.C. Cir. 2009).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., *Peter Siris v. SEC*, 773 F.3d 89, 94, 97 (D.C. Cir. 2014) (noting Commission's application of "the multifactor test" set forth in *Steadman* and finding that Commission "cogently applied *Steadman's* multifactor test"); *Armstrong v. SEC*, 476 F. App'x 864, 865 (D.C. Cir. 2012) (finding that *Steadman* sets out factors to consider when Commission determines whether imposing an associational bar would serve the public interest); *Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011) (noting Commission's application of "the public interest standards set forth in *Steadman*").

¹⁶⁸ Bandimere argues that under *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989), "a failure to admit wrongdoing is not a legitimate consideration in determining appropriate relief." But *First City Financial* also noted that evidence that a defendant "did not feel bound by the law" was appropriately considered. Here Bandimere has characterized his serious violations as "technical" and has otherwise dismissed the seriousness of the conduct he admits, which makes us concerned that he is dismissive of the need to follow the law.

¹⁶⁹ 15 U.S.C. §§ 77h-1(a), 78u-3(a).

context of any other sanctions being sought in the same proceedings."¹⁷⁰ We also consider whether there is a reasonable likelihood of future violations, although the required showing of a risk of future violations in the context of a cease-and-desist order is significantly less than that required for an injunction, and "in the ordinary case, a finding of a past violation is sufficient to demonstrate a risk of future ones."¹⁷¹ Our inquiry is flexible, and no single factor is dispositive.¹⁷²

As we have already discussed, the application of the public interest factors demonstrates that Bandimere's conduct warrants significant sanctions. Turning to the additional factors relevant to cease-and-desist orders, we note that Bandimere's violations are relatively recent. Bandimere's conduct was harmful to investors: the testimony of investors Blackford and Moravec, each of whom lost about \$300,000, most vividly demonstrates the harm done to them by their investments in IVC and UCR through Bandimere and his LLCs,¹⁷³ but other investors also testified as to losses of tens of thousands, or even hundreds of thousands, of dollars.¹⁷⁴ While Bandimere asserts in his brief that the record does not show that he is likely to involve others with investments after the disastrous consequences he experienced as a result of his involvement with IVC and UCR, he continues to downplay the wrongfulness of his actions. We thus find sufficient risk of future violations to impose a cease-and-desist order in the public interest.

C. Disgorgement

In a cease-and-desist proceeding such as this one we "may enter an order requiring accounting and disgorgement, including reasonable interest."¹⁷⁵ Disgorgement is an equitable remedy that requires the violator to give up wrongfully obtained profits causally related to the wrongdoing at issue.¹⁷⁶ Because disgorgement is designed to return the violator to where he or

¹⁷⁰ *Koch*, 2014 WL 1998524, at *21 (citing *KPMG Peat Marwick, LLP*, 2001 WL 47245, at *24-26).

¹⁷¹ *KPMG Peat Marwick, LLP*, 2001 WL 47245, at *26.

¹⁷² *Id.*

¹⁷³ Blackford testified that the loss represented a high percentage of his retirement savings, and that the loss caused great stress in his marriage and his personal life. Moravec testified that the impact of his losses had been "unbearable, to say the least"; that his life had been "totally devastated" by his losses, and that his life had been "turned upside down," because he had gone from anticipating a "comfortable" retirement to living in a "600-square foot, single-room cabin" in which he could only afford to install indoor plumbing within the past year.

¹⁷⁴ For example, Davis lost \$20,000, and Radke lost \$240,000.

¹⁷⁵ 15 U.S.C. §§ 77h-1(e), 78u-3(e).

¹⁷⁶ *First City Fin.*, 890 F.2d at 1230 (citing additional authority). Ordering disgorgement may also deter others from violating the law. *Id.*

she would have been absent the violative conduct,¹⁷⁷ disgorgement should include all of the gains that flow from the illegal activity.¹⁷⁸ The Division, in seeking disgorgement, must present a reasonable approximation of profits connected to the violation.¹⁷⁹ Any risk of uncertainty in calculating the disgorgement amount then falls on the wrongdoer, whose misconduct created the need for disgorgement.¹⁸⁰

Bandimere does not take issue with the principle that one may be ordered to disgorge gains that are causally related to violative conduct. But he argues that he did not realize a "gain" subject to disgorgement because his involvement with IVC and UCR left him in a position of net financial loss. He claims that he should not be ordered to disgorge the management or brokerage fees he received, because even if he keeps them he will have lost money overall through his involvement with IVC and UCR. Disgorgement, he argues, would not deprive him of gains; it would merely increase his loss.

We are unwilling to offset the losses Bandimere incurred through his investments in IVC and UCR against the gains he made when IVC and Dalton paid him for his activities in brokering sales of the IVC and UCR investments. The "management fees" were paid to Bandimere to compensate him for his illegal activity in acting as an unregistered broker and selling unregistered securities. The fact that he lost funds that he invested in the fraudulent schemes does not persuade us that we should allow him to mitigate those losses by keeping the fees he got for his violative misconduct.¹⁸¹ In the context of determining the gains that flowed from his violations of the securities laws, it is appropriate to take the fees Bandimere received from his violative conduct as the measure of disgorgement.¹⁸²

¹⁷⁷ *Zacharias v. SEC*, 569 F.3d at 471 ("[D]isgorgement restores the *status quo ante* by depriving violators of ill-gotten profits.").

¹⁷⁸ *Koch*, 2014 WL 1998524, at *22 (citing *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (citing *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *10 n.35 (Apr. 5, 1999), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000)).

¹⁸¹ We are not persuaded by Bandimere's reliance on *SEC v. Hately*, 8 F.3d 653 (9th Cir. 1993) and *SEC v. McCaskey*, 2002 WL 850001 (S.D.N.Y. Mar. 26, 2002). In *Hately*, the court held that ordering the petitioners to disgorge all of the commissions received by their firm was inappropriate where they received only 10% of the commissions. 8 F.3d at 654. That is distinguishable from the situation here in which Bandimere alone received the relevant illegal gains from his conduct in the form of "management fees" but also lost money through his own investments in the schemes. Similarly, *McCaskey* dealt only with profits and losses in a series of trades, 2002 WL 850001, at *10, and shines no light on the question whether two types of payments, such as the "management fees" and "investment returns" at issue here, should be netted against each other in calculating disgorgement.

¹⁸² *Cf. William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *24 (July 2, 2013) (finding that disgorgement based on total commissions retained by the broker was

Bandimere argues that the compensation he received was too attenuated from any violation to be the proper subject of disgorgement because the compensation was for providing administrative services. Providing such services, he argues, was not illegal activity, so the remuneration does not represent ill-gotten gains and is therefore not subject to disgorgement. Bandimere further argues that the Division failed to provide the required reasonable approximation of the amount subject to disgorgement. He argues that the only record evidence regarding the amount of time he spent on such legitimate services as bookkeeping was his testimony that those services accounted for as much as 90% of the time he spent on matters related to IVC and UCR, and that thus at most 10% of the compensation he received should be subject to disgorgement.

We have already found that the fees Bandimere received were compensation for brokerage activity, and that Bandimere violated the federal securities laws by acting as an unregistered broker and selling unregistered securities. The administrative services Bandimere performed were in furtherance of his brokerage activity. His bookkeeping activities, for example, were integral to his transmission of customer funds to Parrish and Dalton and his calculation of "returns" to be paid to investors. The record does not show, and Bandimere does not contend, that any of the compensation at issue related to anything other than the IVC and UCR investments. Thus, we find that the disgorgement figure provided by the Division (which was itself furnished by Bandimere, in a summary of the fees he received) was a reasonable approximation of Bandimere's ill-gotten gains. In the exercise of our discretion, we subtract, as did the ALJ, certain payments that Bandimere made to investors, and order disgorgement of \$638,056.33, plus prejudgment interest.

D. Civil Money Penalties

Section 21B(a)(1) of the Exchange Act authorizes the Commission to impose a civil penalty in any proceeding instituted against a person pursuant to Exchange Act Section 15(b)(6) if it finds that the person has willfully violated any provision of the Securities Act or the Exchange Act or any rule thereunder.¹⁸³ We have found above that this proceeding was properly brought under Section 15(b)(6) and that Bandimere's violations were willful.¹⁸⁴ Second-tier penalties may be imposed if the violative act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and third-tier penalties may be imposed if the act or omission also directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.¹⁸⁵ Because Bandimere's conduct involved fraud and his activity resulted in substantial losses to others and substantial pecuniary gain to himself, third-tier penalties are authorized in this case.

(...continued)

appropriate even when this amount exceeded the client's net loss in the account), *petition denied sub nom.*, *Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

¹⁸³ 15 U.S.C. § 78u-2(a)(1).

¹⁸⁴ *See supra* Sections VI.A.1 & 2.

¹⁸⁵ 15 U.S.C. § 78u-2(b).

In considering under Section 21B whether a penalty is in the public interest, we may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior; (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in Exchange Act Section 15(b)(4)(B); (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require.¹⁸⁶

Over a multi-year period, in dealings with multiple investors, Bandimere made baseless representations about the unregistered securities he was selling while failing to disclose negative factors associated with those investments. Through Bandimere, investors put some \$9 million into the fraudulent schemes run by Parrish and Dalton, suffering losses that one investor described as devastating. Bandimere was unjustly enriched by the generous commissions he was paid for his work as an unregistered broker. Although we have determined that the imposition of an associational bar and a cease-and-desist order, as well as the assessment of disgorgement, are in the public interest, we find that imposing a civil penalty can have an additional deterrent effect beyond that of these other sanctions.¹⁸⁷

Under these circumstances, we find, as the ALJ did, that the imposition of three third-tier civil penalties, one for each of the investment programs at issue (IVC, UCR trading program, and UCR diamond program), is in the public interest. For violations occurring between February 15, 2005 and March 3, 2009, the maximum penalty per violation for a natural person is \$130,000 for a third-tier penalty; for violations occurring between March 4, 2009 and March 5, 2013, the maximum penalty for such a violation is \$150,000.¹⁸⁸ While we have identified a number of factors that support a penalty at the high end of the range, we also recognize several factors that could justify reducing the penalty: Bandimere made limited repayments to investors (although those sums are small in comparison to the generous commissions he received); he has not been previously found to have violated the laws; and he, together with Syke, brought Parrish's misconduct with respect to IVC to the attention of the Commission. Although Bandimere

¹⁸⁶ 15 U.S.C. § 78u-2(c).

¹⁸⁷ Bandimere argues that he lost approximately \$1 million in the IVC and UCR Ponzi schemes, and that no further deterrence is necessary. Those losses were a result of Bandimere's investment choices. The civil penalties serve the objective of deterrence from engaging in violations of the securities laws.

¹⁸⁸ See 17 C.F.R. §§ 201.1003, Table III (setting forth penalties for conduct occurring after February 14, 2005); 201.1004, Table IV (setting forth penalties for conduct occurring after March 3, 2009); 201.1005, Table V (setting forth penalties for conduct occurring after March 5, 2013).

testified that the imposition of a monetary sanction would change his economic position and probably cause him and his wife to seek employment, the financial impact of a disciplinary proceeding on the respondent is not a mitigating factor.¹⁸⁹

Taking all these factors into account, we find that each of the three third-tier penalties should be in the amount of \$130,000, for a total of \$390,000. Since Bandimere's violative conduct continued after the permissible maximum penalties were adjusted upwards in March 2009, our use of this figure reflects our consideration of the mitigating factors we have noted.

An appropriate order will issue.¹⁹⁰

By the Commission (Chair WHITE and Commissioners AGUILAR, STEIN, and PIWOWAR).

Brent J. Fields
Secretary

¹⁸⁹ *Clifton*, 2013 WL 3487076, at *16 n.116.

¹⁹⁰ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9972 / October 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 76308 / October 29, 2015

Admin. Proc. File No. 3-15124

In the Matter of
DAVID F. BANDIMERE

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that David F. Bandimere be barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and it is further

ORDERED that Bandimere cease and desist from committing or causing any violations or future violations of 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 Rule 10b-5 thereunder; and it is further

ORDERED that Bandimere disgorge \$638,056.33, plus prejudgment interest of \$128,367.47, such prejudgment interest calculated beginning from February 1, 2010, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Bandimere pay a civil money penalty of \$390,000.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur

Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary