

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6520 / March 27, 2019

Administrative Proceeding
File No. 3-15124

In the Matter of

**David F. Bandimere and
John O. Young**

**Order Certifying Ruling
for Interlocutory Review**

Respondent David F. Bandimere has asked that I certify for interlocutory review my order denying a portion of his motion for a judgment on the pleadings. Bandimere's motion for certification is granted because he has shown that my "ruling involves a controlling question of law as to which there is substantial ground for difference of opinion."¹

Background

The Securities and Exchange Commission initiated administrative proceedings against Bandimere in 2012, and a previously assigned administrative law judge issued an initial decision in 2013.² Bandimere sought review before the Commission, which issued a decision adverse to him in 2015.³

Bandimere then filed a petition for review with the United States Court of Appeals for the Tenth Circuit.⁴ That court granted his petition in

¹ 17 C.F.R. § 201.400(c)(2)(i).

² *David F. Bandimere*, Initial Decision Release No. 507, 2013 WL 5553898 (ALJ Oct. 8, 2013).

³ *David F. Bandimere*, Securities Act of 1933 Release No. 9972, 2015 WL 6575665 (Oct. 29, 2015).

⁴ *Bandimere v. SEC*, No. 15-9586 (10th Cir. filed Dec. 22, 2015).

December 2016, holding that the Commission’s administrative law judges are inferior officers who should have been, but were not, appointed by the Commission itself.⁵ Finding that the administrative law judge previously assigned to this proceeding “held his office unconstitutionally when he presided over Mr. Bandimere’s hearing,” the court granted Bandimere’s petition for review and “set aside the SEC’s opinion.”⁶ Unlike in other instances in which it granted a petition for review of an agency’s decision, the court did not expressly order Bandimere’s case remanded “for proceedings consistent with [its] opinion.”⁷

In May 2017, the Tenth Circuit denied the Commission’s petition for panel rehearing and en banc reconsideration.⁸ The court’s mandate, which issued soon after that denial, did not mention remand.⁹

The Commission sought review with the Supreme Court in September 2017.¹⁰ In November 2017, the Commission ratified the appointments of its administrative law judges.¹¹ But in June 2018, following the decision in *Lucia v. SEC*, in which the Court held that the Commission’s administrative law judges are inferior officers,¹² the Supreme Court denied review of the Tenth Circuit’s decision in Bandimere’s case.¹³

In August 2018, the Commission issued an order “reiterat[ing] [its] approval of” its administrative law judges’ “appointments as [its] own under

⁵ *Bandimere v. SEC*, 844 F.3d 1168, 1181–82 (10th Cir. 2016).

⁶ *Id.* at 1188.

⁷ Compare *id.*, with *Razkane v. Holder*, 562 F.3d 1283, 1289 (10th Cir. 2009) (“we reverse the decision of the [agency] and remand for proceedings consistent with this opinion”).

⁸ *Bandimere v. SEC*, 855 F.3d 1128 (10th Cir. 2017).

⁹ *Bandimere*, No. 15-9586 (filed May 11, 2017).

¹⁰ *SEC v. Bandimere*, No. 17-475 (U.S. filed Sept. 29, 2017).

¹¹ *Pending Admin. Proc.*, Securities Act Release No. 10440, 2017 WL 5969234, *1 (Nov. 30, 2017).

¹² 138 S. Ct. 2044 (2018).

¹³ *SEC v. Bandimere*, 138 S. Ct. 2706 (2018).

the Constitution.”¹⁴ The Commission also remanded to the office of administrative law judges all pending cases listed in an appendix attached to its order.¹⁵ This case was among those listed.¹⁶

On remand, this proceeding was assigned to another administrative law judge.¹⁷ Bandimere later filed a motion for judgment on the pleadings. Among other arguments, Bandimere asserted that this proceeding is not actually pending because the Tenth Circuit granted his petition but did not order his case remanded to the Commission.¹⁸

Bandimere’s proceeding was reassigned to me in March 2019, and I held a telephonic conference with the parties on March 13, 2019.¹⁹ During the conference, I denied portions of Bandimere’s motion, including the portion in which he argued that this proceeding is not pending.²⁰ I explained that on the face of its August 2018 order, the Commission declared that this is a pending proceeding and ordered a new hearing.²¹ Because the Commission has not empowered its administrative law judges to second-guess its orders and decisions, I ruled that I lack the authority to grant Bandimere’s motion.²² I

¹⁴ *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018).

¹⁵ *Id.*

¹⁶ *Id.* at *4.

¹⁷ *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (ALJ Sept. 12, 2018).

¹⁸ Mot. at 8–13.

¹⁹ *See David F. Bandimere*, Admin. Proc. Rulings Release No. 6497, 2019 SEC LEXIS 496, at *1 (ALJ Mar. 15, 2019).

²⁰ *Id.*; Prehearing Tr. 20. Because interlocutory review of an administrative law judge’s ruling would be considered by the Commission on an expedited basis, consistent with its other responsibilities, 17 C.F.R. § 201.400(b), I am giving expedited consideration to Bandimere’s motion for certification. I am therefore issuing this order before issuing an order correcting the transcript of the prehearing conference. Citations in this order are thus to the uncorrected transcript.

²¹ Prehearing Tr. 20.

²² *Id.*

did not address the merits of his argument.²³ Bandimere then filed a timely motion asking that I certify for interlocutory review “the question of whether the 2012 proceeding has been concluded.”²⁴ The Division filed an opposition.

Discussion

Requests for certification of rulings for interlocutory review are governed by Rule of Practice 400.²⁵ That rule provides that petitions for interlocutory review are “disfavored” and the Commission will grant a petition “prior to its consideration of an initial decision only in extraordinary circumstances.”²⁶ It also prohibits an administrative law judge from certifying a ruling for interlocutory review unless, as is applicable here, the motion for certification is timely and the administrative law judge determines that:

- (i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; *and*
- (ii) an immediate review of the order may materially advance the completion of the proceeding.²⁷

Bandimere’s motion is timely and a decision on whether this proceeding is actually pending would likely materially advance the completion of it. Indeed, a determination that the proceeding is not pending would end it. Further, Bandimere presents a colorable argument that this proceeding is not pending because the court of appeals did not order his case remanded. And there are substantial grounds for disagreement. In opposing judgment on the pleadings, the Division relied on decisions supporting the idea that continued

²³ In an order issued two days later, I stated that “with the exception of the portion of Bandimere’s motion for a ruling on the pleadings arguing that the order instituting proceedings fails to state a claim for securities fraud, the motion [was] denied for the reasons stated during the prehearing conference.” *Bandimere*, 2019 SEC LEXIS 496, at *1.

²⁴ Mot. at 6.

²⁵ See 17 C.F.R. § 201.400.

²⁶ 17 C.F.R. § 201.400(a).

²⁷ 17 C.F.R. § 201.400(c) (emphasis added).

proceedings at the agency level are appropriate after a court grants a petition for review even absent specific language ordering remand.²⁸

Notably, however, I never ruled on the question Bandimere wants certified. I did not deny his motion for judgment on the pleadings based on the determination that this proceeding is properly pending before me. I denied it because I determined that (1) the Commission determined in its August 2018 order that this is a pending proceeding and remanded it to this office, and (2) I lack the authority to reconsider the Commission’s decision.²⁹ And although he mentions the basis for my decision,³⁰ Bandimere does not argue that I erred in concluding that I lack the authority to reconsider the Commission’s decision.

Nonetheless, Rule 400 asks whether the ruling in question “*involves* a controlling question of law.”³¹ And the term *involves* has an expansive meaning.³² In that light, it is not difficult to conclude that the ruling that I lack the authority to reconsider the Commission’s apparent determination that this proceeding is pending *involves* the question of whether this proceeding is pending.

Ruling

Because Bandimere has shown that my “ruling involves a controlling question of law as to which there is substantial ground for difference of opinion,” his motion is granted.³³ I certify to the Commission “the question of

²⁸ Opp’n to Judgment on the Pleadings at 6; Opp’n to Mot. for Certification at 2.

²⁹ Prehearing Tr. 20.

³⁰ Mot. at 4.

³¹ 17 C.F.R. § 201.400(c)(2)(i) (emphasis added).

³² See *United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008) (“The word ‘involving’ is an exceedingly broad term for a statute.”); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995) (“[T]he word ‘involving’ is broad and is indeed the functional equivalent of ‘affecting.’”); *United States v. Seher*, 562 F.3d 1344, 1369 (11th Cir. 2009) (“The ‘term ‘involved in’ has consistently been interpreted broadly . . .”).

³³ See 17 C.F.R. § 201.400(c)(2)(i).

whether [Bandimere’s] proceeding has been concluded.” The parties’ briefs on Bandimere’s motion for judgment on the pleadings, the transcript of the March 13 prehearing conference, the Tenth Circuit’s panel decision, denial of rehearing, and mandate, and the Commission’s order dated August 22, 2018, are “the material relevant to the ruling involved.”³⁴

James E. Grimes
Administrative Law Judge

³⁴ *Id.* § 201.400(c); *see supra* at 1–3.