

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 4625/February 23, 2017

ADMINISTRATIVE PROCEEDING

File No. 3-17716

In the Matter of

ROBERT L. BAKER,
JACOB B. HERRERA,
MICHAEL D. BOWEN and
TERRENCE A. BALLARD

ORDER DENYING RESPONDENT
HERRERA'S MOTION TO
DISMISS

On December 8, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) in this matter. Respondent Jacob B. Herrera submitted a preliminary answer, motion to dismiss, or alternatively, motion to abate on January 12, 2017. The Division submitted a response on January 20, 2017.

Herrera, citing the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), argues that this proceeding must be dismissed for lack of jurisdiction because the undersigned was not properly appointed under the Appointments Clause of the United States Constitution, U.S. Const. art. II, § 2, cl. 2. But *Bandimere* is not binding here. Commission precedent holds that the Appointments Clause does not apply to Commission administrative law judges. See *Harding Advisory LLC*, Securities Act Release No. 10277, 2017 SEC LEXIS 86, at *67-69 & nn.82, 90 (Jan. 6, 2017); *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *76-89 (Sept. 3, 2015), *pet. denied*, 832 F.3d 277 (D.C. Cir. 2016), *panel decision vacated and pet. for reh'g en banc granted*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017); *Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 SEC LEXIS 3854, at *92 (Sept. 17, 2015). Moreover, Herrera resides in Texas, which is not in the Tenth Circuit, and he does not indicate how this case could fall under the Tenth Circuit's jurisdiction on any appeal. See, e.g., 15 U.S.C. § 78y(a)(1) ("A person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit . . ."). The Commission, exercising its authority under the doctrine of circuit non-acquiescence, has declined to follow *Bandimere* in a case that was not appealable to the Tenth Circuit. *Harding Advisory LLC*, 2017 SEC LEXIS 86, at *69 n.90. Therefore, I DENY Herrera's motion to dismiss.

Herrera argues in the alternative that this proceeding be “abated,” or in other words indefinitely delayed, until the U.S. Supreme Court rules on the constitutionality of administrative law judges adjudicating cases such as this one. But my limited authority to stay this proceeding does not include the type of relief requested by Herrera. *See* 17 C.F.R. §§ 201.161(c)(2), .210(c)(3), .400(d). In any event, an indefinite stay is unwarranted. The U.S. Supreme Court has not granted certiorari in a case that presents the Appointments Clause issue. Thus, Herrera is essentially asking to delay this case until an unknown date when and if the Supreme Court may address the issue, which goes against the public interest in resolving administrative proceedings expeditiously. *See* 17 C.F.R. § 201.161(b) (strongly disfavoring requests for postponement, adjournment, and extension); *John Roger Faherty*, Exchange Act Release No. 41454, 1999 SEC LEXIS 1067, at *5-6 & n.12 (May 26, 1999) (denying a request for indefinite postponement until completion of a state court trial). Herrera’s motion to abate is therefore DENIED.

Accordingly, I ORDER Respondent Herrera to file an answer that complies with Rule of Practice 220(c), 17 C.F.R. § 201.220(c), by March 6, 2017.

Jason S. Patil
Administrative Law Judge