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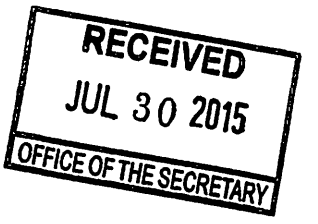
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



Administrative Proceeding
File No. 3-13109

In the Matter of

Gordon Brent Pierce,

Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT GORDON BRENT PIERCE'S MOTION TO VACATE

Opposition to Motion to Vacate Final Commission Order

The Division of Enforcement hereby files this opposition to Gordon Brent Pierce's untimely July 14, 2015 motion to vacate the Commission's 2009 final order against him. *See Gordon Brent Pierce*, Securities Act Release No. 9050, 2009 WL 1953717 (July 8, 2009). For the reasons explained below, Pierce has forfeited the constitutional arguments that he wishes to bring by failing to timely present them to the Commission, and the Commission should deny Pierce's untimely motion on that basis.

In an initial decision entered more than six years ago, administrative law judge ("ALJ") Carol Fox Foelak ordered Pierce to cease and desist from violating Section 5 of the Securities Act of 1933 and Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder, and ordered Pierce to disgorge ill-gotten gains in the amount of $2,043,362.33, plus prejudgment interest. *See Lexington Resources, Inc.*, Initial Decision Release No. 379, 2009 WL 1684743 (June 5, 2009). After Pierce failed to petition for review and the Commission declined to review the decision on its own initiative, the Commission entered an order making the initial decision effective and final. 2009 WL 1953717. Pierce did not file a motion for reconsideration of the finality order as he was permitted to do. *See* Rule of Practice 470; Exchange Act Section 25(a). Rather, he waited six years to file the instant motion

to vacate the Commission's order, arguing that the Commission's use of ALJs to preside over the initial stages of administrative proceedings violates Article II of the Constitution because Commission ALJs are improperly appointed and are insulated from Presidential control by two tiers of "for cause" removal.

Nothing warrants the Commission's consideration of Pierce's untimely challenge. Pierce has never attacked the grounds for the findings of violation or imposition of sanctions in the Initial Decision and finality order. And his challenge to ALJ Foelak's appointment and removal could have—and should have—been raised while his administrative proceeding was pending. By failing to timely raise his Article II challenges, Pierce has forfeited the arguments. The Commission thus need not reach the merits of his claims.[1]

ARGUMENT

As the Commission has recognized, a respondent wishing to challenge an initial decision in a Commission administrative proceeding must petition the Commission to review the initial decision, and, if he remains aggrieved, seek judicial review from the Commission's finality order. *See Walter V. Gerasimowicz*, Securities Act Release No. 9583, 2014 WL 1826641 (May 8, 2014). Since Pierce has done neither, his challenge is forfeited. *See id.* at *2.

This result does not change simply because Pierce challenges the ALJ's appointment and removal under Article II of the Constitution. Rather, "'[n]o procedural principle is more familiar . . . than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)); *see also, e.g.*, *Puckett v. United States*, 556 U.S.

[1] As the Division has demonstrated in recent filings, Article II challenges to Commission ALJs fail because Commission ALJs are employees and not constitutional officers. *See, e.g.*, *Timbervest*, Administrative Proceeding File No. 3-15519. The Division would welcome an opportunity to brief these issues on the merits if the Commission believes that further briefing would aid its decisional process.

129, 134 (2009) ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited."). Thus, even when a direct appeal was properly noticed, courts routinely reject Article II and other constitutional challenges as forfeited if they were not timely brought before the district court. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (district court erred in treating an alleged defect in the appointment of an agency examiner as a jurisdictional question that could be raised for the first time on judicial review); *Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (holding that court "need not resolve" Appointments Clause challenge raised after close of briefing on appeal because challenge was "untimely" and there was no reason "to depart from our normal forfeiture rule"); *In re DBC*, 545 F.3d 1373, 1378-81 (Fed. Cir. 2008) (refusing to entertain an untimely Appointments Clause challenge to administrative patent judges' appointment). This result is all the more justified in this case, as the Commission is faced with an attempt to upend a final order years after the time to do so has lapsed.

Rejecting Pierce's belated challenge as forfeited is not inconsistent with the cases (cited in Pierce's motion at 7) in which the Commission has vacated certain types of remedial relief after subsequent changes in the law. Pierce does not identify a change in the law that would merit the Commission's attention in this matter, nor does he challenge a specified form of relief which has been subsequently invalidated.

Nor does Pierce demonstrate that he could not have raised his Article II challenges during the administrative proceeding itself. He points to a recent Northern District of Georgia decision in which the court concluded that Commission ALJs are inferior officers who must be appointed by the President, a department head, or a court of law. *See Hill v. SEC*, No. 1:15-cv-1801, 2015 WL 4307088 (N.D. Ga. June 8, 2015), *appeal pending*, No. 15-12831 (11th Cir.). But in

concluding that Commission ALJs are inferior officers, *see id.* at *16-19, the district court in *Hill* relied on *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which had been on the books for decades; and, as demonstrated by the recent Appointments Clause challenges to Commission ALJs, the fact that Commission ALJs are not appointed by the Commissioners was readily ascertainable. Similarly, although the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), came down after the Commission's order against Pierce, the removal issue the Court decided therein had been litigated for years before that, *see* No. 06-cv-217, 2007 WL 891675 (D.D.C. Mar. 21, 2007). In any event, no rule of law provides that legal arguments may only be forfeited once others have successfully raised them; indeed, that the petitioners in *Free Enterprise* were able to make the removal argument there conclusively demonstrates that the underpinnings of that legal argument were available to Pierce as well.

CONCLUSION

For the foregoing reasons, the Commission should reject Pierce's belated challenge to the Commission's 2009 final order.

Dated: July 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Janet L. Johnston, hereby certify that a copy of the foregoing DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT GORDON BRENT PIERCE'S MOTION TO VACATE was sent by facsimile to (202) 772-9324, and an original and three copies were sent by overnight delivery for filing with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549, and that a true and correct copy of the foregoing has been served by overnight delivery on July 29, 2015, on the following persons entitled to notice:

The Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

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