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

In the Matter of	:	Administrative Proceeding
	:	File No. 3-13109
GORDON BRENT PIERCE	:	

REPLY OF GORDON BRENT PIERCE TO DIVISION OF ENFORCEMENT'S OPPOSITION TO MOTION TO VACATE THE COMMISSION'S ORDER

Introduction

Hard-pressed to argue that ALJ's are not inferior officers, the Division of Enforcement ("Division") skirts the issue entirely in its opposition, opting instead to shift responsibility for the Appointments Clause violation from the Commission for committing it to Pierce for not discovering it. The critical issue, when properly framed, is not whether Pierce should have known about long-standing precedent establishing that ALJ's were inferior officers who could only be appointed by an SEC Commissioner, the President, a department head, or the Judiciary, but whether he bore the burden to discover that the Commission had violated this long-standing precedent. The question is not, as the Division argues, whether Pierce could have discovered the violation had he looked for it, but rather, whether the Commission, an agency that rests on the foundation of ensuring accurate and comprehensive disclosure in our nation's securities markets, should be held accountable for not disclosing it.

Thus, while it is true that Pierce did not raise a constitutional challenge to the ALJ's authority to proceed either prior to or during the course of the First Proceeding, his failure to do so was justified as it was reasonable for him to presume that the agency asserting authority over him would do so without violating the constitution.

Argument

I. THE COMMISSION SHOULD BE PRESUMED TO ACT IN ACCORDANCE WITH THE CONSTITUTION AND LONG-STANDING PRECEDENT IN THE MANNER IN WHICH IT APPOINTS ITS INFERIOR OFFICERS. A LITIGANT WHO IS NOT GIVEN NOTICE AND THE OPPORTUNITY TO CONSENT SHOULD NOT BE CONSIDERED TO HAVE FORFEITED HIS RIGHT TO CHALLENGE AN APPOINTMENTS CLAUSE VIOLATION.

Existing USSC decisions and Circuit Court opinions provide considerable insight into the question of whether and under what circumstances a petitioner should be deemed to have waived (or alternatively forfeited) his right to challenge the validity of a proceeding based upon an Appointments Clause violation.[1] When addressing the issue of waiver or forfeiture, the Courts have focused on three primary factors: (1) whether the failure to raise the issue was an intentional waiver or an unintentional forfeiture; (2) a weighing of the importance of the constitutional issue against a disruption to sound appellate process; and (3) on the opportunity provided to the agency to correct its own mistake. Thus, cases wherein either a constitutional issue was not raised or where the agency was deprived of an opportunity to correct its own error, are not applicable here and the Division's reliance on those cases, including *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), *Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d. 748, 755-56 (D.C. Cir. 2009) and *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) is misplaced. *L.A. Tucker Truck Lines* did not involve a constitutional violation, but

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[1] As Justice Scalia noted in his dissent in *Freytag v. C.I.R.*, "Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, see, *e.g., Levine v. United States*, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (right to public trial); *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right against double jeopardy), cert. denied *sub nom. Hobson v. United States*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Whitten*, 706 F.2d 1000, 1018, n. 7 (CA9 1983) (right to confront adverse witnesses), cert. denied, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984), but others may not, see, *e.g., Johnson, supra* (right to counsel); *Patton v. United States*, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930) (right to trial by jury). A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true." *Freytag v. C.I.R.*, 501 U.S. 868, 895 (1991).

merely a claim that the examiner had not been appointed pursuant to § 11 of the Administrative Procedure Act. As a result, there was no discussion in that case implicating either Article II or any other issue of constitutional significance and thus no need to weigh important constitutional issues against a disruption to sound appellate process. *Intercollegiate Broadcast Sys.* does not support the Division's position either. In that case, the Appeals Court found waiver based upon the appellants failure to raise the issue in its opening appellate brief, not based upon its failure to raise the issue during the administrative proceedings. *In re DBC* is similarly unavailing. That case, citing to *L.A. Tucker Truck Lines*, and quoting from *Woodford v. Ngo*, 548 U.S. 81, 89 (2006), stands for the proposition that an agency "be first given the opportunity to correct its own mistakes . . . before it is haled into federal court . . ." Pierce is not haling the Commission into Federal Court before giving it the opportunity to correct its mistake. Pierce's Motion to Vacate presents the Commission with that opportunity.

The Division cites to *United States v. Olano*, 507 U.S. 725, 731 (1993) for the proposition that a constitutional right may be forfeited by a failure to raise the issue before the tribunal having jurisdiction to determine it. *Olano* involved a determination of the meaning of Rule 52 of the Federal Rules of Criminal Procedure, to the extent it defined harmless and plain error. In *Olano*, the court recognized the distinction between waiver as "an intentional relinquishment or abandonment of a known right" and forfeiture as the failure to make the timely assertion of a right. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnston v. Zerbst*, 304 U.S. 458, 464 (1938)). Recognizing that the issues surrounding the sufficiency of a waiver depend on the right at stake, the court in *Olano* wrote that "If a legal rule was violated . . . and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-734. If error is shown, then the

court, in evaluating Rule 52(b), must determine whether the error was plain and affected "substantial rights." *Id.* If that is the case, then *Olano* concludes that the reviewing court should correct a forfeited error if it "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 737. In contrast, intentional waiver necessarily extinguishes the claim altogether. *Olano*, 507 U.S. at 733; *see also U.S. v. Nelson*, 277 F. 3d 164 (2002). While the distinction made in *Olano* between intentional waiver and unintentional forfeiture is somewhat helpful, the analysis applied there involved an interpretation of a criminal rule that, unlike the violation here, did not involve a structural error or even a violation of substantial rights. In contrast, the court in *Nelson*, citing to *Freytag,* defined a structural error as an error that requires automatic reversal unless intentionally waived. *Nelson*, 277 F.3d at 206.

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991), which the Division notes has been on the books for decades, is instructive here. In that case, a tax proceeding was initially assigned to a properly appointed judge but later reassigned to a "special trial judge" with the consent of the parties after Congress authorized the Chief Judge of the Tax Court to appoint special trial judges to hear certain proceedings. The Commissioner argued that the petitioners waived their right to challenge the constitutional propriety of [the enabling statute] by failing to raise a timely objection to the assignment to a special trial judge, and by consenting to it. *Id.* at 877. After noting that Appointments Clause objections to judicial officers are in the category of nonjurisdictional, structural, constitutional objections that could be considered on appeal whether or not they were ruled upon below, the Court in *Freytag* held that, even where consent was given, the defect in the appointment of the special trial judge spoke to the validity of the proceeding itself and that the "disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong

interest of the Federal Judiciary in maintaining the constitutional plan of separation of powers.'" *Id.* at 878-879 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). Thus, *Freytag* teaches that although an Appointments Clause challenge may be waived, such a challenge meets the test of "one of those rare cases in which [the court] should exercise [its] discretion to hear petitioner's challenge." *Id.* at 879. Where, in this case as in *Freytag*, the violation undermines the validity of the proceedings and implicates the important protections envisioned by the separation of powers, form will not prevail over substance and waiver will not apply.[2] The holding in *Freytag* also suggests that if an intentional waiver (by consent) does not preclude review of a structural error, then an unintentional forfeiture certainly would not.

On the issue of notice, the Division cannot have it both ways. Either *Freytag* put all parties on notice that ALJ appointments were to be made in conformity with the Appointments Clause or it did not. Nonetheless, and at a minimum, the Commission had the obligation after *Freytag* to ascertain whether its procedures violated the Appointments Clause and, if so, to appoint its ALJ's in accordance with it. *Freytag* imposed no corresponding obligation on Pierce. To do so would be to impose an obligation on Pierce to presume that the Commission was ignoring *Freytag*, was violating the Appointments Clause, was not disclosing the violation to him and that *Freytag* required him to raise the issue below. Such an obligation would be completely inconsistent with the standard for review of structural, constitutional errors as laid out in *Freytag*.

In sum, Pierce had no reason to know that the ALJ assigned to preside over his proceeding was appointed in violation of the Appointments Clause and every right to expect that

[2] In *Freytag*, the petitioner consented to the use of the special trial judge. Pierce did not consent to the use of the ALJ in his proceeding.

she was not.[3] Finally, *Freytag* makes clear that an Appointments Clause error, such as that present here, is structural and speaks to the very integrity of the proceeding at issue. Particularly where forfeiture, as opposed to waiver is at issue, that error requires that the proceedings be vacated.

Conclusion

Based on the foregoing, the Motion to Vacate should be allowed.

Respectfully submitted,
Gordon Brent Pierce
By his attorneys,

Dated: August 10, 2015

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[3] The manner in which the ALJ's were appointed after *Freytag* seems to have varied. Some SEC ALJ's appear to have been appointed by the SEC while others, like the ALJ who sat on Pierce's matter, appear to have gone through the process set forth in 5 CFR 930.204. (*See* Exhibit A, *Duka v. U.S. Securities And Exchange Commission*, 1:15-cv-00357-RMB (SDNY), Decision & Order filed on August 3, 2015, footnote 1).

CERTIFICATE OF SERVICE

I, Juan Marcel Marcelino, hereby certify that an original and three copies of the foregoing Reply of Gordon Brent Pierce to Division of Enforcement's Opposition to Motion to Vacate the Commission's Order , was sent by facsimile to (202) 772-9324 and 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 August 10, 2015, on the following persons entitled to notice:

The Honorable Carol Fox Foelak
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Dated: August 10, 2015

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