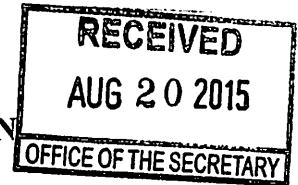


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549



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

**MOTION TO AMEND GORDON BRENT PIERCE'S MOTION TO VACATE
THE COMMISSION'S ORDER**

Pursuant to Rule 154 of the Rules of Practice of the Securities and Exchange Commission ("Commission"), 17 C.F.R. § 201.154 (2002), Gordon Brent Pierce ("Pierce") hereby moves to amend his previously filed Motion to Vacate the Commission's Order entered in *In Re Gordon Brent Pierce*, Securities Act Rel. No. 9050, Exchange Act Rel. No. 60263, 2009 WL 1953717 (July 8, 2009)("First Proceeding") to include a second order entered by the Commission following an initial decision *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Initial Decision Rel. No. 9205, 2011 SEC LEXIS 1669 (May 11, 2011)("Second Proceeding").¹ In support of his Motion to Amend, Pierce states as follows:

Procedural Background

The Motion To Vacate

Pierce filed a Motion to Vacate the First Proceeding, on the ground that the Administrative Law Judge ("ALJ") who issued the decision against him on which the order is based did not have the authority to preside over the proceedings, as her appointment violated the Appointments Clause of the United States Constitution. U.S. Const. art. II § 2, cl. 2. *See Exhibit*

¹ Counsel for Pierce has consulted with the Division staff who indicated that they do not oppose the procedure of amending the Motion To Vacate but will oppose the grounds asserted for vacating the Second Proceeding on the same basis as it opposed the Motion To Vacate.

A, Motion of Gordon Brent Pierce to Vacate the Commission's Order (the "Motion to Vacate"). Pierce was unable to include the Second Proceeding in the Motion To Vacate as jurisdiction over that proceeding resided with the Circuit Court of Appeals for the District of Columbia pending resolution of an appeal to that court. *Exhibit A*, Motion to Vacate, fn. 4. The Circuit Court for the District of Columbia recently denied Pierce's appeal, however, and the validity of the Second Proceeding is now ripe for adjudication by the Commission. Accordingly, Pierce now seeks to amend his previously filed Motion to Vacate to include a petition to the Commission to vacate the second order.²

Prior Proceedings

The First Proceeding was commenced against Pierce with an Order Instituting Proceedings ("OIP") in 2008. *See In Re Lexington Resources, Inc.*, Initial Decision Release No. 379 (June 5, 2009), 96 SEC Docket 17651. In 2009, the ALJ in that matter, Carol Fox Foelak ("ALJ Foelak"), found that Pierce had, *inter alia*, violated Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Act") in connection with unregistered sales of stock from his personal account. *Id.*

In 2010, approximately six months after ALJ Foelak issued her decision in the First Proceeding, the Commission instituted a Second Proceeding against Pierce and two other respondents seeking additional disgorgement. In 2011, the ALJ in that matter, Cameron Elliot ("ALJ Elliot"), issued a second decision against Pierce, relying on findings of fact issued by ALJ Foelak in the First Proceeding.³

² *See In Re Lexington Resources, Inc.*, Initial Decision Rel. No. 379, 96 SEC Docket 17651, 2009 WL 1684743 (June 5, 2009); and *In Re Gordon Brent Pierce*, Securities Act Rel. No. 9050, Exchange Act Rel. No. 60263, 2009 WL 1953717 (July 8, 2009). *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, (Securities Act Release No. 9125) (June 8, 2010).

³ *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Initial Decision Rel. No. 9205, 2011 SEC LEXIS 1669 (May 11, 2011). This matter was reviewed by the US Court of Appeals for the

Argument

As was noted in the Motion To Vacate, the SEC has previously acknowledged that both ALJ Elliot (Second Proceeding) and ALJ Foelak (First Proceeding) were not properly appointed. See, *Exhibit A*, Motion to Vacate, fn. 5. Therefore, in support of this Amended Motion to Vacate, Pierce relies on and incorporates by reference as if fully set herein, all arguments advanced in support his previously filed Motion to Vacate. *Id.* Allowance of the Motion To Amend will serve the interests of judicial/administrative economy as it will consolidate for resolution identical legal issues impacting two separate, but related, proceedings and will avoid the inefficiencies that will result in the event separate motions and reviews are required for each proceeding.

WHEREFORE, Pierce respectfully requests that this Motion to Amend Gordon Brent Pierce's Motion to Vacate the Commission's Order be allowed.

Respectfully submitted,

Gordon Brent Pierce
By his attorneys,



Dated: August 19, 2015

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EXHIBIT A

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	:	

**MOTION OF GORDON BRENT PIERCE TO VACATE THE COMMISSION'S
ORDER**

Pursuant to Rule 154 of the Rules of Practice of the Securities and Exchange Commission ("Commission"), 17 C.F.R. § 201.154 (2002), Gordon Brent Pierce ("Pierce") hereby moves the Commission to vacate its Order entered in the above-captioned matter.¹ As grounds therefore, Pierce asserts that the Administrative Law Judge (the "ALJ") did not have the authority to preside over the proceeding as his appointment violated U.S. Const. art. II § 2, cl. 2, the Appointments Clause.²

Procedural Background

In 2008, the Commission issued an Order Instituting Proceedings ("OIP") against Pierce (the "First Proceeding"). See *In Re Lexington Resources, Inc.*, Initial Decision Release No. 379 (June 5, 2009), 96 SEC Docket 17651. In 2009, the ALJ in that matter, Carol Fox Foelak ("ALJ Foelak"), found that Pierce had, *inter alia*, violated Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Act") in connection with unregistered sales of stock from his personal account. *Id.*

¹ *In Re Lexington Resources, Inc.*, Initial Decision Rel. No. 379, 96 SEC Docket 17651, 2009 WL 1684743 (June 5, 2009); and *In Re Gordon Brent Pierce*, Securities Act Rel. No. 9050, Exchange Act Rel. No. 60263, 2009 WL 1953717 (July 8, 2009).

² Pierce also asserts that the proceedings against him are unconstitutional because SEC ALJs enjoy a two-tiered layer of tenure protection, in violation of the Separation of Powers. See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511-512 (2010) (holding executive officers may not be separated from Presidential supervision and removal by more than one layer of tenure protection).

In 2010, approximately six months after ALJ Foelak issued her decision in the First Proceeding, the Commission instituted a second proceeding against Pierce and two other respondents seeking additional disgorgement from Pierce (the “Second Proceeding”). In 2011, the ALJ in that matter, ALJ Cameron Elliot (“ALJ Elliot”), issued a second decision against Pierce, relying on findings of fact issued by ALJ Foelak in the First Proceeding.³

Neither ALJ Foelak nor ALJ Elliot were appointed by the President, a Court of Law or a Department Head, in violation of Article II of the United States Constitution. Accordingly, Pierce hereby moves the Commission to vacate the initial decision against Pierce in the First Proceeding.⁴ While 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 such a challenge was not known to him. In May 2015, however, the SEC acknowledged that ALJ Foelak was not properly appointed.⁵ *Tilton v. SEC*, Docket No. 15-cv-02472 (2015). Moreover, in June 2015, the Northern District of Georgia found that the

³ *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Initial Decision Rel. No. 9205, 2011 SEC LEXIS 1669 (May 11, 2011). This matter was reviewed by the US Court of Appeals for the District of Columbia Circuit, *Pierce v. S.E.C.*, 786 F.3d 1027 (D.C. Cir. 2015), *petition for rehearing filed* on July 6, 2015.

⁴ Pierce contests the validity of the decisions issued against him in both the First Proceeding and the Second Proceeding due to their having been issued by ALJs who were not properly appointed. For the purposes of this Motion, however, Pierce moves only to vacate the order issued against him in the First Proceeding. This is because Pierce appealed the decision in the Second Proceeding, and the Circuit Court for the District of Columbia now retains exclusive jurisdiction as to the Second Proceeding. Given that ALJ Cameron Elliot suffers from the same appointment defect as ALJ Foelak, and because the decision issued against him in the Second Proceeding relied on collateral estoppel against Pierce from the First Proceeding, Pierce vigorously contests the validity of the decision in the Second Proceeding as well, but does not raise it here due to jurisdictional issues.

⁵ The SEC has previously acknowledged that ALJ Elliot and ALJ Foelak were not properly appointed. See *Timbervest, LLC et al. v. S.E.C.*, Docket No. 1:15-cv-02106, *Exhibit E to Plaintiffs’ Memorandum of Law in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, Affidavit of Deputy Chief Operating Officer of the Commission Jayne Seidman* (N. D. Ga. 2015), attached hereto as Exhibit A (“ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission”); *Tilton v. SEC*, Docket No. 15-cv-02472, *Transcript of Proceedings Re: Hearing Held On 5/11/2015 Before Judge Ronnie Abrams* (“THE COURT: Can I ask you the factual question that I asked of Mr. Gunther? Who exactly appoints SEC ALJs? Can you tell me more about the appointment process? MS. LIN: Your Honor, those facts are not in the record here, but we acknowledge that the commissioners were not the ones who appointed, in this case, ALJ Foelk [sic], who is the ALJ presiding-- THE COURT: There is no factual dispute, okay”).

appointment of ALJ James E. Grimes violated Article II of the Appointments Clause of the U.S. Constitution. *See Hill v. SEC*, No. 15-CV-1801 (June 8, 2015). Accordingly, Pierce now timely moves the Commission to vacate the initial decision issued against him in the First Proceeding.

Argument

I. THE 1ST PROCEEDING VIOLATED THE APPOINTMENTS CLAUSE OF ARTICLE II OF THE CONSTITUTION AS ALJ FOELAK IS AN INFERIOR OFFICER WHO WAS NOT APPOINTED, AS WAS CONSTITUTIONALLY REQUIRED, BY THE PRESIDENT, A COURT OF LAW OR A DEPARTMENT HEAD.

ALJ Foelak was not appointed by an SEC Commissioner, the President, a department head, or the Judiciary, and thus her appointment as an inferior officer is unconstitutional in violation of the Appointments Clause of the U.S. Constitution. Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause. *See* U.S. Const. art. II § 2, cl. 2; *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 880 (1991); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511-512 (2010) (finding that the SEC Commissioners jointly constitute the “head” of the SEC for appointment purposes).

ALJ Foelak is an inferior officer because, as an SEC ALJ, she carries out important functions and exercises significant discretion. The issue of whether an SEC ALJ is an inferior officer or employee for purposes of the Appointments Clause depends on the authority he has in conducting administrative proceedings. The Appointments Clause of Article II of the Constitution provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: 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. The Appointments Clause thus creates two classes of officers: principal officers, who are selected by the President with the advice and consent of the Senate, and inferior officers, whom “Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.” *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause applies to all agency officers including those whose functions are “predominately quasi judicial and quasi legislative” and regardless of whether the agency officers are “independent of the Executive in their day-to-day operations.” *Id.* at 133 (quoting *Humphrey’s Executor v. United States*, 295 U.S. 602, 625-26 (1935)). In short, “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].” *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126) (alteration in the original). For example, the Supreme Court has held that, “district court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon and a cadet-engineer, election monitors, federal marshals, military judges, Article I [Tax Court special trial] judges, and the general counsel for the Transportation Department are inferior officers.” Kent Barnett, Resolving the ALJ Quandary, 66 Vand. L. Rev. 797, 812 (2013) (citing *Free Enterprise*, 561 U.S. at 540 (Breyer, J., dissenting) (citing cases)).

The Supreme Court’s holding in *Freytag* makes clear that SEC ALJs are, as a matter of law, inferior officers. *See also Duka v. U.S. S.E.C.*, 2015 WL 1943245, at *8 (“The Supreme Court’s decision in *Freytag v. Commissioner*, 501 U.S. 868, 111 (1991), which held that a Special Trial Judge of the Tax Court was an ‘inferior officer’ under Article II, would appear to

support the conclusion that SEC ALJ s are also inferior officers”).

In *Freytag*, the Supreme Court was asked to decide whether special trial judges (“STJ”) in the Tax Court were inferior officers under Article II. 501 U.S. at 880. In rejecting the argument that STJs do “no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion,” and that they “lack authority to enter a final decision,” the Supreme Court held that STJs carry out important functions and exercise significant discretion. *Freytag*, 501 U.S. at 881-82.

Like the STJs in *Freytag*, SEC ALJs also exercise “significant authority.” The office of an SEC ALJ is established by law, and the “duties, salary, and means of appointment for that office are specified by statute.” *Id.*; *see supra* (setting out the ALJ system, to include the establishment of ALJs and their duties, salary, and means of appointment). ALJs are permanent employees - unlike special masters - and they take testimony, conduct trials, rule on the admissibility of evidence, and can issue sanctions, up to and including excluding people (including attorneys) from hearings and entering defaults. 17 C.F.R. §§ 200.14 (powers); 201.180 (sanctions). As a result, SEC ALJs are clearly inferior officers, and ALJ Foelak’s failure to be appointed by the appropriate party under Article II renders proceedings presided over by ALJ Foelak unconstitutional.

II. STRUCTURAL ERRORS COMMITTED IN VIOLATION OF THE U.S. CONSTITUTION ARE NOT WAIVED BY A PETITIONER’S FAILURE TO RAISE THE ISSUE BELOW.

Pierce’s failure to raise the Article II issue during the First Proceeding is irrelevant, as a party does not waive its right to raise a constitutional issue by failing to raise it previously when such a constitutional defense was not known or otherwise available to him at the time of the

proceedings. Long standing Supreme Court jurisprudence holds that the failure to raise an issue, unknown to Pierce at the time of the earlier proceedings, does not deprive him of the opportunity to raise the issue at this juncture.

Curtis Pub. Co. v. Butts, 388 U.S. 130, 135-37 (1967) is instructive here. *Curtis Pub. Co.* arose from an article published in petitioner's Saturday Evening Post which accused the athletic director of the University of Georgia of conspiring to 'fix' a football game. Butts brought a libel action and tried the case to completion before the Supreme Court handed down its decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a seminal case setting the standard for libel cases involving public officials, which holds that the First Amendment requires that statements about a public figure like Butts relating to his official conduct be made with "actual malice". The only defense raised by Curtis Pub. Co. during the action was one of substantial truth- Curtis Pub. Co. did not raise any constitutional defenses, even though it was aware of the pending *New York Times Co.* case, and had raised general constitutional defenses in a separate libel action.

Shortly after the case was tried, the Supreme Court rendered its decision in *New York Times Co. v. Sullivan*. The trial judge denied Curtis Pub. Co.'s motion for a new trial that had been filed promptly following the *New York Times Co.* decision. Curtis Pub. Co. appealed this denial and the Court of Appeals affirmed, holding that it had 'clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times.' *Curtis Pub. Co. v. Butts*, 351 F.2d 702, 713 (1965).

In *Curtis Pub. Co.*, the Supreme Court rejected the Court of Appeals holding and recognized, as it had done in the past, that the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later

invoking such a ground. *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669 (1996); *see Tehan v. United States ex rel. Shott*, 382 U.S. 406, 409, n. 3, 86 S.Ct. 459, 461 (1966) ; *Linkletter v. Walker*, 381 U.S. 618, 622-629, 85 S.Ct. 1731, 1733-1739 (1965); *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229 (1965); *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050(1963). For a waiver of a constitutional defense to be effective it must be one of a ‘known right or privilege.’” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

III. THERE IS AMPLE PRECEDENT SUPPORTING THE NOTION THAT THE COMMISSION SHOULD VACATE AN ORDER IF SUBSEQUENT EVENTS SO REQUIRE.

There is ample precedent demonstrating the Commission’s willingness to vacate an order when subsequent events support such a vacation. For example, the Commission has, on at least one occasion, vacated an order imposing damages based on practices that were no longer a violation following changes to the SEC’s rules. *See In the Matter of John Gardner Black and Devon Capital Management*, Admin. Proc. File. No. 3-9599 (granting petitioner’s 2010 Motion to Vacate a 1998 Order barring him from associating with any brokers, dealers, investment advisors or investment companies because revisions to the Commission’s valuation methods for certain securities were such that the valuation methods forming the basis for his 1998 charges were no longer in violation of SEC rules). The Commission allowed the motion to vacate the order as to its prohibition on the petitioner associating with any broker, dealer or municipal securities dealer, based on decisions issued after the order questioning the validity of “collateral bars” (“we . . . have determined to vacate that portion of the order prohibiting Black from association with a broker, dealer, or municipal securities dealer . . . in light of precedent issued subsequent to the Settled Order questioning the validity of the so-called “collateral bars” such as those involved here”). *In the Matter of John Gardner Black and Devon Capital Management*,

Admin. Proc. File. No. 3-9599. Like *Black*, precedent issued in this matter subsequent to the First Proceeding raises questions about the validity of the order.

Likewise, in *In the Matter of Linus N. Nwaigwe*, the petitioner successfully vacated a 2009 order issued against him that was based on a conviction for conspiracy to commit securities fraud, after the conviction was vacated in 2012. *In the Matter of Linus N. Nwaigwe*, Rel. No. 69967, 2013 WL 3477085 (July 11, 2013). The Commission agreed with the petitioner's argument that the basis for the order was his criminal conviction, and because he no longer stood convicted, there was no basis for the order. *See, e.g., Jimmy Dale Swink, Jr.*, Exchange Act Release No. 36042, 52 SEC 379, 1995 SEC LEXIS 2033, at *2 (Aug 1, 1995) (vacating findings and administrative bar order when an appellate court reversed the criminal conviction that was the basis for the proceeding); *cf. Terry Harris*, Investment Advisers Act Release No. 2622, 2007 SEC LEXIS 1645, at *7 (July 26, 2007) (ordering dismissal of administrative proceeding after finding that "none of the three bases for proceeding under Advisers Action Section 203(f) that were alleged in the [order instituting proceedings] remains valid on the record before us on appeal").

Conclusion

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

Respectfully submitted,
Gordon Brent Pierce
By his attorneys,

Dated: July 14, 2015



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EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of :

Timbervest, LLC, :
Joel Barth Shapiro, :
Walter William Anthony Boden, III, :
Donald David Zell, Jr., :
and Gordon Jones II, :

Respondents. :

AFFIDAVIT OF JAYNE L. SEIDMAN

Jayne L. Seidman, states that:

1. I am a Senior Officer at the Commission and Deputy Chief Operating Officer.
2. I make this Affidavit in response to the Commission's May 27, 2015, Order Requesting Additional Submissions and Additional Briefing.
3. In its May 27, 2015, Order, the Commission directed the Division to file and serve on Respondents by June 4, 2015, an affidavit and any supporting materials "setting forth the manner in which ALJ Cameron Elliot and Chief ALJ Brenda Murray were hired, including the method of selection and appointment."

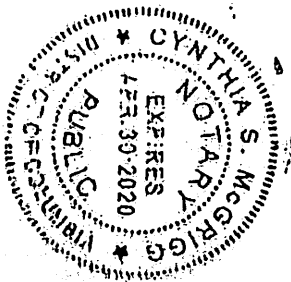
4. Based on my knowledge of the Commission's ALJ hiring process, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4th day of June, 2015.

Jayne L. Seidman

Jayne L. Seidman
Deputy Chief Operating Officer



District of Columbia: SS

Subscribed and sworn to before me, in my presence,

this 4th day of June, 2015

by Jayne L. Seidman

[Signature] Notary Public

My Commission Expires April 30, 2020

CERTIFICATE OF SERVICE

I, Juan Marcel Marcelino, hereby certify that an original and three copies of the Motion to Amend Gordon Brent Pierce's 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 19, 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

Steven D. Buchholz
John S. Yun
Division of Enforcement Securities
and Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, CA 94104

The Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Dated: August 19, 2105



Juan Marcel Marcelino

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August 19, 2015

BY FAX AND FEDERAL EXPRESS

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *In the Matter of Gordon Brent Pierce*
Administrative Proceeding File No. 3-13109

Dear Secretary Fields:

Enclosed for filing please find an original and three copies of the Motion to Amend Gordon Brent Pierce's Motion to Vacate the Commission's Order regarding the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Juan Marcel Marcelino".

Juan Marcel Marcelino

JMM/gr
Enclosures

cc: John S. Yun, Esq.
Steven D. Buchholz, Esq.
Carol Fox Foelak, ALJ
Cameron Elliot, ALJ