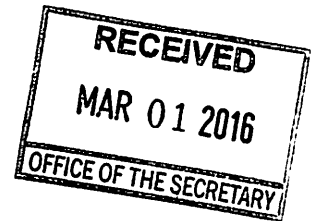


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549



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

**REPLY OF GORDON BRENT PIERCE TO DIVISION OF ENFORCEMENT'S
FEBRUARY 19, 2016 RESPONSE TO MOTION TO AMEND HIS MOTION TO
VACATE THE COMMISSION'S ORDER**

Introduction

This memorandum is submitted in reply to the Division of Enforcement's ("Division") February 19, 2016 response to Pierce's motion to amend his motion to vacate which incorporated the arguments advanced in Pierce's motion to vacate and in his reply to the Division's opposition to his motion to vacate.¹

First, Pierce contends for the reasons advanced in the incorporated pleadings that he did not waive or forfeit his Article II challenge. The Division makes no claim that Pierce intentionally forfeited his right to raise an Article II challenge or that the Division placed Pierce on notice that the ALJ's assigned to his proceedings were appointed in violation of the Constitution. Absent such a showing, waiver will not apply as the, ". . . violation undermines the validity of the proceedings and implicates the important protections envisioned by the separation of powers. . ." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 879 (1991).

¹ The motion to amend seeks to include the second proceeding *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). A copy of the *Motion of Gordon Brent Pierce to Vacate the Commission's Order* and the *Reply of Gordon Brent Pierce to Division of Enforcement's Opposition to Motion To Vacate the Commission's Order* are attached hereto.

With respect to the merits of the Article II challenge, the Division relies wholesale on the Commission's decisions in *David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665 (October 29, 2015); *Timbervest, LLC, Investment Advisers Act*, Exchange Act Release No. 4197, 2015 WL 5472520 (Sept. 17, 2015) and *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 WL 5172953 (Sept. 3, 2015), in which the Commission determined that the D.C. Circuit's decision in *Landry v. FDIC* generally controls its resolution of this question. *Landry* held that, for purposes of the Appointments Clause, ALJs at the Federal Deposit Insurance Corporation ("FDIC") are employees rather than inferior officers. In ruling that *Landry* applies, the Commission focused almost exclusively on the question whether the ALJ's have the power to render final decisions. The Commission's reliance on *Landry* is in error. Pierce's Motion to Vacate and Amended Motion to Vacate present the Commission with the opportunity to correct that error.

In *Freytag*, the Internal Revenue Commissioner argued that a special trial judge (STJ) assigned under § 7443A(b)(4) acted only as an aide to the Tax Court judge responsible for deciding the case, doing no more than assisting the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner reasoned in *Freytag*, that special trial judges may be deemed employees because, with some exceptions, they lacked authority to enter a final decision. As a result, the Commissioner in *Freytag* argued that STJ's acting pursuant to § 7443A(b)(4) are employees rather than "Officers of the United States." *Freytag* at 881.

In determining that the above argument, "ignores the significance of the duties and discretion that special trial judges possess," the Supreme Court in *Freytag* held instead that, "[A]ny 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].” [citations omitted].

Moreover, the Supreme Court in *Freytag* made it abundantly clear that Article II applied without regard to the question whether under certain circumstances the STJ's had the power to render final decisions. Rather the Supreme Court relied on the fact that the STJ's, like the ALJ's here, perform, "more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion." *Freytag*, at 881-882.

Thus, the Commission's reliance on what the ALJ's *do not do* in rendering final decisions amounts to error. The proper focus should be on the functions the ALJ's actually perform. Those functions involve the exercise of significant duties and discretion and can hardly be described as ministerial in nature.

Conclusion

Based on the foregoing, the Motion to Vacate, as amended to include both the 1st and 2nd proceedings should be allowed.

Signature on the next page

Respectfully submitted,
Gordon Brent Pierce
By his attorneys,



Dated: February 29, 2016

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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 February 29, 2016, 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

Dated: February 29, 2016



Juan Marcel Marcelino



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February 29, 2016

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 Reply of Gordon Brent Pierce to Division of Enforcement's February 19, 2016 Response to Motion to Amend His Motion to Vacate the Commission's Order regarding the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

Juan Marcel Marcelino

JMM/gr
Enclosures

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