

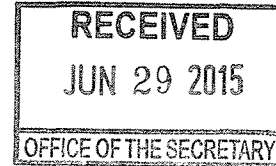
DAVID A. ZISSER

**JONES & KELLER**

dzisser@joneskeller.com

ATTORNEYS AT LAW

June 19, 2015



**By Facsimile (202) 772-9324 and U.S. Mail**

**HARD COPY**

Brent J. Fields, Secretary  
Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-2557

Re: In the Matter of David F. Bandimere and John O. Young  
Administrative Proceeding File No. 3-15124  
Reply of David F. Bandimere to the Division of Enforcement's Response to  
Motion for Submission of Additional Evidence  
Dated: June 19, 2015

Dear Mr. Fields:

This office represents David F. Bandimere in the above-referenced matter. I enclose for filing with the Commission the original and three copies of the Reply of David F. Bandimere to the Response of the Division of Enforcement to Motion for Submission of Additional Evidence..

Please call or email if you have any questions or require anything further.

Very truly yours,

JONES & KELLER, P.C.

A handwritten signature in black ink, appearing to read "David A. Zisser".

David A. Zisser

DAZ:  
Enclosures

cc: David F. Bandimere (w/enc.)

{JK00698926.1 }



2. The Division of Enforcement (the “Division”) filed its response (the “Response”) to Mr. Bandimere’s motion on June 17, 2015.<sup>1</sup>

3. The Response did not object to Mr. Bandimere’s Motion to submit additional evidence, did not dispute that ALJ Elliot’s appointment failed to comply with the Appointments Clause, and did not contest Mr. Bandimere’s contention that if ALJ Elliot’s appointment violated the Appointments Clause, this proceeding should be dismissed. Rather, the Division argued that ALJ Elliot was a mere employee of the Commission, and not an “inferior officer” whose appointment is subject to the requirements of the Appointments Clause.

4. Judge May’s conclusion in *Hill v. SEC* that administrative law judges presiding over SEC administrative proceedings were “inferior officers” within the meaning of the Appointments Clause relied on the Supreme Court’s decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991), which held that special trial judges in the Tax Court were inferior officers within the meaning of the Appointments Clause. In reaching its decision in *Freytag*, the Court noted the substantial authority exercised by special trial judges in the Tax Court, such as taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders. Judge May found, correctly, that administrative law judges in SEC proceedings exercised “significant authority” similar to the special trial judges in the Tax Court, and concluded that, like those special trial judges, SEC administrative law judges were “inferior officers.” Order, pages 37 through 38. Because it is not disputed that ALJ Grimes, who was appointed to preside over an administrative proceeding initiated against the Plaintiff, was not appointed in accordance with the Appointments Clause, Judge May concluded that the proceeding was likely unconstitutional, and preliminarily enjoined it.

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<sup>1</sup> The Division’s Response did not comply with Commission Rule of Practice 152 (e), and should be stricken. Notwithstanding this objection, and without waiver thereof, Mr. Bandimere will respond to the substance of the Response.

5. In opposing the merits of Mr. Bandimere's Appointments Clause claim, the Response relies on the decision of the Court of Appeals for the District of Columbia in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which held that administrative law judges conducting proceedings for the Federal Deposit Insurance Company were not "inferior officers." The *Landry* court distinguished *Freytag* by reading that case as establishing as an essential requirement for an "inferior officer" the authority to issue a final decision. Because administrative law judges working for the FDIC, under that agency's rules, could issue only recommendations, the *Landry* court concluded that such administrative law judges were not "inferior officers" and need not be appointed consistent with the Appointments Clause.

6. Even if one accepts the *Landry* Court's reading of *Freytag*, but see Judge Randolph's separate opinion in *Landry*, concurring in part and concurring in the judgment, *Landry* can be distinguished. Under the rules of the FDIC, administrative law judges make only a "recommended decision." 12 C.F.R. §308.38. Regardless of whether any party to a proceeding files an exception to the recommendation, the record of the proceeding and the administrative law judge's recommendation, in all cases, are forwarded to the Board of Directors of the FDIC for its final decision. 12 C.F.R. §308.40(a).

7. In contrast, an administrative law judge in an SEC proceeding does not make a mere recommendation, but issues an Initial Decision. A recommendation and an Initial Decision are not the same, and are not treated as equivalents under the Administrative Procedure Act. *Sokoloff v. Saxbe*, 501 F.2d 571, 576 (2<sup>nd</sup> Cir. 1974). In contrast to a recommendation, an Initial Decision automatically becomes the decision of the SEC unless the SEC determines to review the Initial Decision, either on its own initiative, or by granting a Petition for Review filed by a party. Commission Rule of Practice 360(d)(2). However, with exceptions not applicable to a

typical administrative enforcement proceeding, review of an Initial Decision is not a matter of right; review is discretionary with the Commission. Commission Rule of Practice 411. Therefore, an ALJ in an SEC administrative enforcement proceeding makes a final determination, subject only to the Commission's decision whether to review the Initial Decision either on its own initiative, or by exercising its discretion to grant a Petition for Review.<sup>2</sup>

8. Because administrative law judges in SEC proceedings, in fact, have the authority to issue final determinations, *Landry* is both distinguishable, and supportive of the conclusion that administrative law judges working for the SEC are "inferior officers."

9. The Division's arguments to the effect that Congress intended that administrative law judges not be considered "inferior officers," and that intention should receive deference, are unavailing. As the Division noted in its Response, the intention of Congress is not determinative of whether an administrative law judge is an "inferior officer." Response, page 7, fn. 1. Judge May recognized in *Hill*, "Congress may not 'decide' that an ALJ is an employee, but then give him the powers of an inferior officer; that would defeat the separation-of-powers protections the Clause was enacted to protect." Order, page 41.

10. No less importantly, Congress did not express an intention that administrative law judges were not to be considered "inferior officers." In 5 U.S.C. § 3105, Congress authorized the hiring of the administrative law judges by an "agency." However, an agency, here, the SEC, constitutes the head of the department for purposes of the Appointments Clause. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138 (2010). Therefore, there is nothing in Congress's grant of authority to the Commission to appoint administrative law

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<sup>2</sup> The Division argued, unsuccessfully, that the Commission should deny Mr. Bandimere's Petition for Review. See, Division of Enforcement's Motion for Summary Affirmance, filed November 18, 2013. Had the Division prevailed, the Initial Decision would have become a Final Order in this very case.

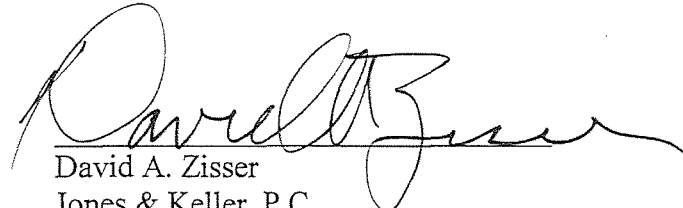
judges that is inconsistent with compliance with the Appointments Clause, and no expression by Congress that administrative law judges should not be considered “inferior officers.”

Wherefore, for the reasons stated in the June 8, 2015 Order in *Hill v. Securities & Exchange Commission*, and here, Mr. Bandimere prays that this proceeding be dismissed.

Dated this 19th day of June, 2015.

Respectfully submitted:

JONES & KELLER, P.C.

A handwritten signature in black ink, appearing to read "David A. Zisser", written over a horizontal line.

David A. Zisser  
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ATTORNEYS FOR DAVID F. BANDIMERE

**CERTIFICATE OF SERVICE**

I certify that on this 19<sup>th</sup> day of June, 2015 I forwarded a true and correct copy of the foregoing Respondent David F. Bandimere's Reply in Support of Motion for Submission of Additional Evidence to the following as indicated:

Via U.S. Mail (Original and 3 copies) and facsimile to:

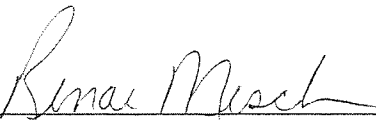
Brent J. Fields, Secretary  
Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-2557  
(202) 772-9324

Via Email to:

The Honorable Cameron Elliot  
Administrative Law Judge  
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Washington, D.C. 20549-2557  
[alj@sec.gov](mailto:alj@sec.gov)

Via Email and U.S. Mail to:

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Renae Mesch