UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15124

DAVID F. BANDIMERE and
JOHN O. YOUNG

RESPONDENT DAVID F. BANDIMERE'S SUPPLMENTAL BRIEF IN SUPPORT OF HIS APPOINTMENTS CLAUSE CHALLENGE

Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C., and pursuant to the Commission's Order dated August 7, 2015 submits this Supplemental Brief in Support of Respond and's Appointments Clause Challenge.

I. INTRODUCTION AND BACKGROUND

While the opportunity to present a client's position to the Commission is always appreciated, the utility of another brief addressing the Appointments Clause challenge to the validity of an Initial Decision issued by Administrative Law Judge ("ALJ") Elliot appears to be marginal, at best.

Mr. Bandimere is one of several respondents in administrative proceedings brought before the Securities and Exchange Commission (the "Commission") who has challenged the validity of this proceeding on the ground that the ALJ hearing respondent's case was not appointed in accordance with the Appointments Clause of the Constitution of the United States. Mr. Bandimere did not learn that ALJ Elliot, who presided over the evidentiary hearing on the Order Instituting Proceedings against Mr. Bandimere, and who subsequently issued an Initial

Decision, was not appointed in accordance with the Appointments Clause until June 9, 2015. On June 10, 2015, Mr. Bandimere moved for leave to adduce the evidence of ALJ Elliot's appointment, and argued that ALJ Elliot was not properly appointed to his position and, as a result, the Initial Decision should be vacated.

Challenges to the validity of an administrative proceeding presided over by an ALJ whose appointment was not made in accordance with the Appointments Clause have been asserted both in administrative proceedings, and in civil actions brought to enjoin the administrative proceedings while the Appointments Clause issue was determined in the United States District Court. Although the Commission has not ruled on the Appointments Clause issue, the Commission's position is clear from its opposition to the injunctive actions that have been filed, and from the briefs filed by the Division of Enforcement in administrative proceedings where the issue has been raised. *E.g., Gray Financial Group, Inc., v. SEC* No. 15-cv-492-LLM (U.S.D.C.,N.D. Ga.), Defendant's Motion to Stay Preliminary Injunction Pending Appeal, Aug. 19, 2015, pp. 9-11.

That position, which is that administrative law judges hearing SEC administrative proceedings are "mere employees" whose appointment need not be made in accordance with the Appointments Clause, has been rejected by every court which has considered it. Nevertheless, it appears unlikely that the Commission will change its position based on arguments raised here.

II. ALJ ELLIOT EXERCISED SIGNIFICANT AUTHORITY MAKING HIM AN INFERIOR OFFICE WHOSE HIRING MUST BE IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE

If ALJ Elliot is an "inferior officer" within the meaning of the Appointments Clause, Mr. Bandimere's Appointments Clause challenge succeeds. If he is a "mere employee," as the

Commission and the Division of Enforcement contend, Mr. Bandimere's Appointments Clause challenge fails.

The analysis begins with the decision of the Supreme Court in *Freytag v. CIR,* 501 U.S. 868 (1991), where the court addressed whether special trial judges appointed by the chief judge of the Tax Court were inferior officers within the meaning of the Appointments Clause. In finding that the special trial judges were inferior officers, the court noted the significant duties and discretion exercised by those special trial judges, including their authority to take testimony, conduct trials, rule on the admissibility of evidence, enforce compliance with discovery orders, and, in carrying out these functions, to exercise significant discretion. *Freytag,* 501 U.S. at 881-2.

Administrative law judges presiding over SEC proceedings have the same authority and exercise similar discretion, and, for that reason, should be considered inferior officers.

The Commission relies on the United States Court of Appeals for the District of Columbia Circuit decision in *Landry v. FDIC,* 204 F.3d 1125 (D.C. Cir. 2000). That case construed *Freytag* as requiring as an essential element to finding that an administrative law judge is an inferior officer within the meaning of the Appointments Clause the ability of an administrative law judge to render a final decision. However, *Landry* cannot bear the weight which the Commission places on it.

First, the language of *Freytag* does not support the *Landry* court's reading that the ability to render in a final decision is necessary for a finding that an administrative law judge is an inferior officer. Judge Randolph, writing separately in *Landry,* made that point. Second, *Landry* can be distinguished because the authority of the administrative law judges at issue in *Landry* was less than the authority and discretion exercised by the ALJs hearing cases for the SEC.

The only courts which have considered whether an ALJ presiding over administrative proceedings authorized by the Commission are inferior officers have rejected *Landry* as controlling authority, and, instead, rely on the clear language of *Freytag.* In *Hill v. SEC,* ___ F.Supp.3d.___, 2015 WL 4307088 (N.D. Ga. June 8, 2015), the court found that the ALJ's appointment violated the Appointments Clause because the ALJ was an inferior officer who was hired in violation of the Appointments Clause. The court in *Gray Financial Group, Inc. v. SEC* Case No. 1:15-CV-0492-LLM, (U.S.D.C., N.D. Ga.) (August 4, 2015) reached the same conclusion. Most recently, in *Duka v. SEC*, Case no. 15 CV 357 (RMB)(SN), (U.S.D.C., S.D.N.Y.), the court denied the Commission's motion to dismiss an Amended Complaint raising an Appointments Clause challenge to an SEC administrative proceeding. Judge Berman in *Duka* found, as did Judge May in *Hill* and *Gray Financial Group*, that the Commission's administrative law judges were inferior officers whose appointments had to comply with the Appointments Clause.

The reasoning of *Hill, Gray Financial Group, and Duka* is sound and should be followed by the Commission.

The Commission's current position that its administrative law judges are "mere employees" is inconsistent with its historical position.

The Commission describes its administrative law judges as follows: "Administrative Law Judges are independent judicial officers who in most cases conduct hearings and rule on allegations of securities law violations initiated by the Commission's Division of Enforcement. They conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the Federal District courts." *See,* www.sec.gov/alj. This description, which is

inconsistent with the Commission's present contention, adds a patina of fairness to its administrative proceeding which it now disclaims.

Further, the Commission, when addressing challenges to the actions of an ALJ in the course of a review of an Initial Decision, frequently support the ALJ's actions by reference to authority exercised by Federal judges. *E.g., In the Matter of Pagel, Inc.,* 1985 WL 548387 at* 6, fn. 20 (SEC Rel. No. 22280, August 1, 1985); *In the Matter of Jay Houston Meadows*, 1996 WL 218638 at *7,fn. 28 (SEC Rel. No. 37156, May 1, 1996); *In the Matter of Gregory M. Dearlove, CPA*, 2008 WL 281105 at * 35, fn. 153 (SEC Rel. No. 57244, January 31, 2008). Analogizing the discretion of administrative law judges to that of Article III judges is inconsistent with the Commission's claim that its ALJ's do not exercise meaningful discretion.

ALJ Elliot adopted the trappings of a judge. The evidentiary hearing in this matter was held in a district court courtroom in Denver, Colorado. ALJ Elliot wore a judicial robe. The parties, counsel, and spectators in the courtroom rose when he entered and left the courtroom. He was addressed as "Your Honor." While he did not require the types of courtesies traditionally shown to judges, he did not discourage them. These practices also create an impression of independence and fairness of the administrative process which now seems to be misleading.

The authorities and facts discussed above point decisively in one direction: the Commission's administrative law judges are "inferior officers" within the meaning of the Appointments Clause.

III. JUDGE ELLIOT'S APPOINTMENT IN CONTRAVENTION OF THE APPOINTMENT CLAUSE INVALIDATES THE INITIAL DECISION

The unconstitutional appointment of administrative law Judge Elliot is a structural constitutional error that goes to the validity of the proceeding. *Freytag,* 501 U.S. at 878-9. That

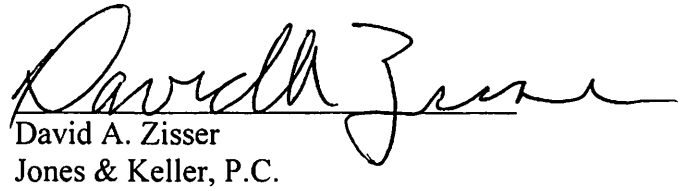
error cannot be cured by the Commission's *de novo* review. *Landry* 204 F.3d at 1132. Therefore, the Initial Decision must be vacated.

Mr. Bandimere had a right to a hearing before a properly appointed hearing officer. Through no fault of his own, and without his knowledge, he was deprived of that right. Mr. Bandimere incurred substantial expense in defending himself; he should not be required to do so again. The Appointments Clause requires that the Initial Decision be vacated. Due process and simple fairness require that this proceeding be dismissed.

Dated this 21st day of August, 2015.

Respectfully submitted:

JONES & KELLER, P.C.



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CERTIFICATE OF SERVICE

I certify that on this 21st day of August, 2015 I forwarded a true and correct copy of the foregoing Respondent David F. Bandimere's Supplemental Brief in Support of his Appointments Clause Challenge to the following as indicated:

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