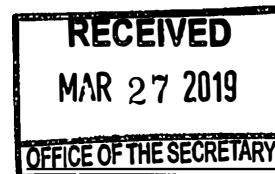


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of

DAVID F. BANDIMERE and
JOHN O. YOUNG

DIVISION OF ENFORCEMENT'S
RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION FOR
CERTIFICATION FOR
INTERLOCUTORY REVIEW

The Division of Enforcement (“Division”) hereby files this response in opposition to Respondent David F. Bandimere’s Motion for Certification for Interlocutory Review of Denial of Motion for Ruling on the Pleadings Contending that the Proceeding Initiated in 2012 has Been Concluded (“Motion”). The Motion should be denied.

The Commission’s rules and precedent make clear that “[p]etitions by parties for interlocutory review are disfavored and will be granted only in extraordinary circumstances.” *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (quotation marks omitted; alteration in original). Certification for interlocutory appeal is appropriate only if the law judge determines that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion” and that “immediate review of the order may materially advance the completion of the proceeding.” Rule of Practice 400(c)(2)(i)-(ii), 17 C.F.R. § 201.400(c)(2)(i)-(ii).

Here, Respondent seeks interlocutory review of the law judge’s denial of the portion of his motion for a ruling on the pleadings arguing that the proceeding was

terminated when the Tenth Circuit disposed of Respondent's appeal without expressly remanding the matter. However, as the Division pointed out in its opposition to Respondent's motion for a ruling on the pleadings, there is no ground for difference of opinion – much less a substantial one – on this issue, as every appellate court to have considered this argument has rejected it. *See* Div.'s Opp. to Resp.'s Mtn. for Ruling on the Pleadings at 5-9 (filed Feb. 13, 2019). Those decisions did not turn on the absence of a "properly constituted agency" at the time of the decision, as Respondent erroneously asserts, but on the fact that the previous order was vacated "for reasons unrelated to the merits." *Noel Canning v. NLRB*, 823 F.3d 76, 80 (D.C. Cir. 2016); *see also Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 712 (7th Cir. 2015) (similar).

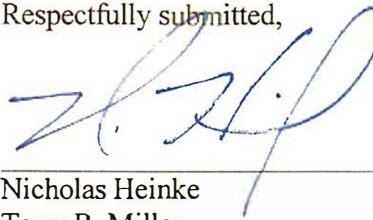
Further, Respondent can find no support in the Commission's recent order in *In the Matter of Bennett Financial Services, LLC*, Rel. No. 33-10606, 2019 WL 653706 (Feb. 15, 2019), since that case dealt with an entirely different procedural scenario. In *Bennett Financial Services*, the Court of Appeals dismissed the respondent's appeal for lack of prosecution – a dismissal that serves as an adjudication on the merits. *See Petty v. Manpower, Inc.*, 591 F.2d 615, 617 (10th Cir. 1979) (noting that dismissal for lack of prosecution "go[es] to the merits of appellant's complaint itself rather than a procedural problem which amendment of a complaint might rectify"); *cf.* Fed. R. Civ. P. 41(b) (noting that dismissal for lack of prosecution "operates as an adjudication on the merits"). Here, in contrast, the Tenth Circuit did not purport to resolve the merits of respondent's appeal, but rather found a procedural defect in the appointment of the hearing officer. Under these circumstances, and for the reasons outlined in the Division's opposition to Respondent's motion for ruling on the pleadings, the law is clear that the absence of an

express remand does not deny the Commission jurisdiction over further proceedings. In short, there is no “substantial ground for difference of opinion” on this issue, and thus the extraordinary remedy of interlocutory appeal is inappropriate.

For these reasons, Respondent’s Motion should be denied.

Dated: March 26, 2019

Respectfully submitted,



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Certificate of Service

On March 26, 2019 the foregoing was sent to the following parties and other persons entitled to notice as follows:

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By 