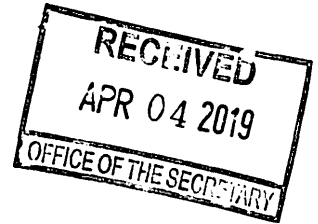


**UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING  
File No. 3-15124**

**In the Matter of**

**DAVID F. BANDIMERE and  
JOHN O. YOUNG**

**RESPONDENT DAVID F. BANDIMERE'S PETITION FOR  
INTERLOCUTORY REVIEW OF LAW JUDGE GRIMES' FAILURE TO  
RULE THAT THIS PROCEEDING IS NOT PENDING BEFORE THE  
COMMISSION AND SHOULD BE DISMISSED**

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Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C., and pursuant to Rule 400 petitions the Commission to review ALJ Grimes' decision failing to dismiss this proceeding on the grounds that it has been concluded by the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168 (10<sup>th</sup> Cir. 2016), which set aside the final order entered by the Commission, and did not remand to the Commission for further proceedings.

## **I. QUESTION PRESENTED**

This Petition for Interlocutory Review, which ALJ Grimes certified for interlocutory review pursuant to Commission Rule of Practice 400(c),<sup>1</sup> presents a single legal issue: whether this proceeding, which was initiated on December 6, 2012, was concluded by the December 27, 2016 decision of the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit"), which set aside the Opinion of the Commission issued on October 29, 2015, but which did not remand the case to the Commission for further proceedings. *Id.*

## **II. BACKGROUND**

The Order Instituting Proceedings (the "OIP") in this matter was issued on December 6, 2012.<sup>2</sup> The matter was assigned to ALJ Elliot, who presided over a six-day evidentiary hearing in May, 2013. ALJ Elliot issued his Initial Decision on October 8, 2013, finding that Mr. Bandimere violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and rules thereunder, and imposing monetary and nonmonetary sanctions. Mr. Bandimere petitioned the Commission for review of the Initial Decision, and raised numerous substantive and procedural issues, including a challenge to ALJ Elliot's authority to preside over the evidentiary hearing, and to issue an Initial Decision, because he was not appointed in conformity with Art. II, Section 2 of the United States Constitution (the "Appointments Clause").

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<sup>1</sup> A copy of Judge Grimes March 27, 2019 Order Certifying Ruling for Interlocutory Review is appended as Exhibit A.

<sup>2</sup> The proceeding initiated by the OIP is referred to as the "2012 Proceeding."

The Commission issued its Opinion (the “Opinion”) October 29, 2015, in which it rejected all of Mr. Bandimere’s contentions. *In the Matter of David F. Bandimere*, Rel. No. 9972, 2015 WL 6575665 (Oct. 29, 2015).

Mr. Bandimere filed a timely Petition for Review of the Opinion with the Tenth Circuit where he also raised a number of substantive and procedural challenges, including the challenge to ALJ Elliot’s authority based on the Appointments Clause. The Tenth Circuit granted Mr. Bandimere’s Petition on December 27, 2016, *Bandimere v. SEC, supra*, accepting Mr. Bandimere’s Appointments Clause argument. The Tenth Circuit set aside the Opinion without addressing any of Mr. Bandimere’s other challenges.

The Commission unsuccessfully sought rehearing and rehearing *en banc* of the panel decision. *Bandimere v. SEC*, 855 F.3d 1128 (10<sup>th</sup> Cir. 2017). The Commission petitioned the Supreme Court for a writ of certiorari, which was denied on June 28, 2018. *SEC v. Bandimere*, 138 S. Ct. 2706 (2018).

Neither the Tenth Circuit, nor the Supreme Court, remanded the 2012 Proceeding to the Commission. Nor did the Commission ever seek a remand.

While Mr. Bandimere’s Petition for Review was being considered by the Tenth Circuit, the Court of Appeals for the District of Columbia considered a Petition for Review of the Commission’s Decision and Order in *In the Matter of Raymond J. Lucia Companies*, Rel. No. 4190, 2015 WL 5172953 (Sept. 3, 2015). That petition, like Mr. Bandimere’s, included a challenge to ALJ Elliot’s authority under the Appointments Clause. The Court of Appeals in *Lucia* rejected the challenges to the Commission’s Decision, including the argument under the Appointments Clause. *Raymond J. Lucia Companies, Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) *petition for en banc review denied by equally divided court* 868 F.3d 1021 (D.C. Cir.

2017). The decision in *Lucia* created a split between the Courts of Appeals for the District of Columbia and the Tenth Circuit regarding whether ALJ Elliot was an inferior officer within the meaning of the Appointments Clause.

The Supreme Court granted certiorari in *Lucia* on the Appointments Clause issue and in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) reversed the Court of Appeals, finding that administrative law judges working for the Commission were inferior officers of the United States who had to be appointed in conformity with the Appointments Clause.

Even before the Supreme Court decided *Lucia*, the Solicitor General, as the Commission's counsel in *Lucia*, essentially confessed error in that case, and took the position that the Commission's administrative law judges were "inferior officers" whose appointments were required to conform to the Appointments Clause. As a result, the Commission issued an Order in *In re Pending Administrative Proceedings*, Rel. No. 10440 (November 30, 2017). That Order purported to cure the Appointments Clause violations for the Commission's sitting administrative law judges by ratifying their appointments. In addition, the Order set out a process by which cases that were "pending" before the Commission would be re-decided. The Order remanded to the administrative law judges matters "pending" before the Commission for which an Initial Decision had been issued, and included a list of such "pending" matters. Although an Initial Decision in the 2012 Proceeding had been issued, and the Tenth Circuit had denied the Commission's petition for rehearing more than six months earlier, the 2012 Proceeding was not included in the list of "pending" matters.

The 2012 Proceeding was not identified as a "pending" matter until more than nine months later in an order issued by the Commission on August 22, 2018, which established the process by which "pending" administrative proceedings would be processed for decision in light

of *Lucia*. Order, *In re Pending Administrative Proceedings*, Rel. No. 33-10536 (August 22, 2018). The 2012 Proceeding was identified as a pending proceeding by its inclusion in a list of 126 matters attached to the Order. No explanation was provided regarding the criteria used to include the 2012 Proceeding in a list of pending proceedings.

Both before, and for months after, the August 22, 2018 Order, the 2012 Proceeding was identified by the Commission to the public as a closed case. The Commission discloses to the public on its website a list of proceedings that are closed and archived. “Closed Administrative Proceedings Cases.” [www.sec.gov/litigation/apdocuments/ap-closed-filenos-asc.xrr](http://www.sec.gov/litigation/apdocuments/ap-closed-filenos-asc.xrr). The 2012 Proceeding was included on that list of closed administrative cases until on or about February 15, 2019. Although the circumstances surrounding the removal of the 2012 Proceeding from the list of closed cases are not known to Mr. Bandimere, that removal came almost a month after Mr. Bandimere filed his Motion for Ruling on the Pleadings, in which he pointed to the inclusion of the 2012 Proceeding on the list of closed cases as evidence supporting his argument that the 2012 Proceeding was not a pending case.<sup>3</sup>

### **III. THERE IS NO PENDING CASE AGAINST MR. BANDIMERE BECAUSE THE 2012 PROCEEDING HAS BEEN RESOLVED**

Although the 2012 Proceeding was identified by the Commission as a “pending” proceeding on August 22, 2018, it is not “pending” before the Commission and has not been for years.

#### **A. The 2012 Proceeding was Concluded When the Court of Appeals Vacated the Decision and Chose Not to Exercise Its Discretion to Remand for Further Proceedings**

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<sup>3</sup> The Commission has not disclosed the criteria used to list proceedings as either open or closed, or who determines the proper status of a proceeding. In the absence of such disclosure, it must be assumed that the 2012 Proceeding was properly described as closed. Changing the status of the 2012 Proceeding from a closed case to an open one only *after* Mr. Bandimere argued that the 2012 Proceeding was closed is, on its face, arbitrary and capricious.



**1. The Power to Remand for Further Proceedings Exists in the Courts, Not the Commission**

The 2012 Proceeding has run its full course. An OIP was issued and served, an evidentiary hearing (albeit, an unconstitutional one) was held on that OIP, legal and factual issues were briefed, an Initial Decision was issued, a petition for review by the Commission was filed, and further briefing was made to the Commission, which issued its Opinion. The Opinion was a final order.

The Tenth Circuit acquired exclusive jurisdiction over the 2012 Proceeding when Mr. Bandimere filed a timely petition for review and the Commission filed the administrative record with the Court of Appeals. Exchange Act, Section 25(a)(3). When the Tenth Circuit set aside the Opinion without ordering a remand (which the Commission never requested), the 2012 Proceeding was concluded, a conclusion that necessarily flows from the meaning of a remand.

“When a court remands a case, it sends the case back to the place from which it came for the purposes of having some further action taken in the tribunal of origin.” *Etape v. Chertoff*, 497 F.3d 379, 384 (4<sup>th</sup> Cir. 2007). In the context of an administrative adjudication, a remand to the agency represents a continuation of the case. *New Mexico ex rel. Richardson v. Bureau of Land Mgt.*, 565 F.3d 683, 698 (10<sup>th</sup> Cir. 2009) *citing Caesar v. West*, 195 F.3d 1373, 1374 (Fed. Cir. 1999). When the Tenth Circuit set aside the Opinion, a final order by the Commission, without ordering a remand for further proceedings, it did not provide for a continuation of the 2012 Proceeding. Rather, the Tenth Circuit concluded the 2012 Proceeding without returning the matter to the Commission for further proceedings.

The Tenth Circuit, if it believed that a remand for further proceedings were warranted, could have remanded the 2012 Proceeding to the Commission. It is well established that a court of appeals has the equitable power to remand a case to an administrative agency. *Ford Motor*

*Company v. N.L.R.B.* 305 U.S. 364, 373 (1939). But, the existence of the power to remand means that a remand to the administrative agency is not automatic; rather, a remand must be ordered as a matter of equitable discretion. If all cases were automatically remanded to an agency when a review by a court of appeals has been completed, the power to remand a case to an agency would be superfluous. And, Mr. Bandimere is aware of nothing that gives the Commission the power to remand a case to itself after a Court of Appeals grants a petition for review, but does not order a remand for further proceedings.

A recent Order by the Commission establishes that Mr. Bandimere's position is correct. In *In the Matter of Bennett Group Financial Services, LLC*, Rel. No. 33-10606, 2019 WL 653706 (February 15, 2019), the Commission denied as unnecessary a motion by the Division of Enforcement to lift a stay of sanctions imposed on a respondent and close a proceeding after the respondent's Petition for Review had been denied, and the mandate of the court had issued. The Commission held "... because the Tenth Circuit's mandate dismissing respondent's appeal did not direct additional proceedings before the Commission and because further appellate consideration is not available, *there is no pending proceeding to be 'closed.'*" (emphasis added.)

That is exactly Mr. Bandimere's position. The 2012 Proceeding was completed when the Tenth Circuit set aside the Commissioner's Opinion and did not remand for additional proceedings before the Commission. The Tenth Circuit did not continue the 2012 Proceeding by remanding the case to the Commission for further action; it concluded the 2012 Proceeding.<sup>4</sup>

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<sup>4</sup> Of course, setting aside the Opinion because of a procedural defect was not a determination on the merits. The Commission may issue a new OIP raising the same claims as were raised in the 2012 OIP, if it chooses to do so, without being vulnerable to the affirmative defense of *res judicata*. E.g., *Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981). However, the period of limitations will not be tolled by the 2012 Proceeding. *Hawkins v. McHugh*, 46 F.3d 10, 12 (5<sup>th</sup> Cir. 1995).

And, the fact that the 2012 Proceeding was identified in the Commission's publicly disclosed records as a "closed" case only strengthens Mr. Bandimere's argument. Identifying a proceeding as closed is inconsistent with characterizing that proceeding as pending.

## **2. There is No Applicable Exception to the Remand Rule**

In arguing that a remand was unnecessary to continue the 2012 Proceeding after the Tenth Circuit set aside the Commission's Opinion, the Division of Enforcement relied on a series of cases involving the National Labor Relations Board. However, those cases, at most, created a narrow exception to the remand rule and are not applicable here.

In *Noel Canning v. NLRB*, 823 F.3d 76, 80 (D.C. Cir. 2016), the court allowed the NLRB to consider again the merits of an alleged improper labor practice after the Court initially denied enforcement of an NLRB order. The Court denied enforcement of the NLRB order because the NLRB lacked a quorum when it issued the order, but did not include language remanding the matter to the NLRB. The Court explained that it did not order a remand because there was no properly constituted NLRB to which the Court could remand the proceedings. *Id.* That unusual circumstance led the Court to construe its earlier mandate to allow the NLRB, once it had obtained a quorum, to consider the case on the merits again. But, the Court made clear that its failure to order a remand was due only to the lack of a properly constituted agency by pointing out that once the NLRB had a quorum, the Court remanded more than a dozen other cases which challenged NLRB orders issued without a quorum. *Id.* Here, in contrast, the Commission was properly constituted when the Tenth Circuit set aside the Commission's Opinion. There always was an agency to which the 2012 Proceeding could have been remanded, if the Tenth Circuit believed that a remand should be ordered.

*Big Ridge, Inc. v. NLRB*, 808 F. 3d 705, 711(7th Cir. 2015) is similar to *Noel Canning*. There, the Court denied enforcement of an NLRB order for lack of a quorum, but did not remand to the NLRB because there was no properly constituted NLRB to which the matter could be remanded. And, the Court stated that it anticipated that the NLRB would, in fact, reconsider the case once a quorum was obtained. But, nothing in the Tenth Circuit opinion suggests that the Tenth Circuit anticipated that the Commission would reconsider the 2012 Proceeding.

*NLRB v. Whitesell Corp.*, 638 F.3d 883, 889 (8<sup>th</sup> Cir. 2011) is similar: an initial petition by the NLRB to enforce an order was denied because the order was issued when the NLRB lacked a quorum. Although the Court did not explain why it denied a request for remand, it stated that it expected that the NLRB would, in fact, revisit the merits of the case again.

In *Huntington Ingalls Inc. v. NLRB*, 631 Fed. Appx. 127, 131 (4<sup>th</sup> Cir. 2015), the Court denied enforcement of an order finding violations of the labor laws because the NLRB lacked a quorum when the order was issued. Unlike here, the NLRB requested that the court include a remand provision because that decision anticipated further proceedings. However, in upholding the ability of the NLRB to revisit its decision when it had a quorum, the court essentially agreed that its decision based on the lack of a quorum anticipated further action once a quorum was obtained.

Importantly, *Huntington Ingalls Inc. v. NLRB* characterized the NLRB cases that allowed the agency to reconsider cases for which no remand was ordered as having "... carved out a very narrow exception to the remand rule where the court disposes of the case on the basis that the Board issued a quorumless decision." Therefore, the line of NLRB "quorum" cases which allowed a reconsideration of the merits after setting aside the original orders, even in the absence of a remand, have no relevance here. The Commission should honor *Huntington Ingalls'*

characterization of the NLRB line of authority as being a narrow exception to the remand rule necessitated by the absence of a quorum.

Further, the argument that these NLRB cases establish a rule of general application, rather than a “very narrow exception to the remand rule,” renders superfluous the concept of a court ordered remand, and a court’s authority to order a remand. Nothing in the NLRB cases suggests that any of the courts intended to create a new rule that cases automatically return to an agency for further proceedings whenever a court concludes its judicial review function. And, those cases are inconsistent with any argument that an automatic remand rule existed. If cases were automatically remanded to an agency for further proceedings after a court performs its judicial review function, the courts in the NLRB cases could have simply relied on such a rule, and would not have had to explain the special circumstances that created the narrow exception to the remand rule.

Further, nothing suggests that the Commission, at the time the Tenth Circuit vacated the Opinion arising from the 2012 Proceeding, intended to reconsider Mr. Bandimere’s case. It never expressed such an intention, and, if the Commission actually intended to retry Mr. Bandimere under the 2012 OIP after its final order was set aside, its failure to seek a modification or clarification of the Tenth Circuit’s mandate to include a remand to allow it to do is inexplicable.

Regardless of its intention regarding the reconsideration of Mr. Bandimere’s case, the Commission’s failure to request a remand operates as a waiver of that relief. Mr. Bandimere sought, and obtained, an order from the Tenth Circuit setting aside the Commission’s decision in its entirety. The failure of the Commission to seek a remand, either in its initial briefing to the Tenth Circuit, or in its subsequent petitions for rehearing, or even in its Petition for Writ of Certiorari to the Supreme Court, prevented Mr. Bandimere from arguing against a remand to the

only bodies with authority to grant or deny that relief. By failing to present to the Tenth Circuit (or the Supreme Court) the issue of whether the 2012 Proceeding should be remanded, but simply taking the position that it effectively has been, the Commission has usurped the authority of the courts to exercise their discretionary authority to order a remand.

If the Commission adheres to its position that the 2012 Proceeding is pending before it even though the Tenth Circuit did not order a remand, and simply disregards its contrary conclusion in *Bennett Group Financial Services, LLC*, Mr. Bandimere will be forced to undergo yet another improper administrative proceeding before he can vindicate his rights before the Tenth Circuit in what would be his second Petition for Review. Such a result would be manifestly unjust, and would constitute prejudice to Mr. Bandimere sufficient to support his argument that the Commission has waived any ability to seek a remand which it might otherwise have had.

#### **IV. CONCLUSION**

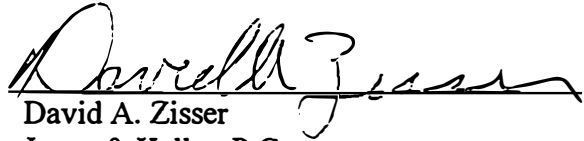
The proceeding initiated against Mr. Bandimere in 2012 was concluded by the Court of Appeals, which set aside the Commission's final order and did not order a remand to the Commission for further proceedings. That conclusion is supported by the Commission's recent decision as well as judicial precedent.

If the Commission believes there is a public interest in proceeding against Mr. Bandimere, it may do so, but it must initiate a new proceeding.

Dated this 3rd day of April, 2019.

Respectfully submitted:

JONES & KELLER, P.C.

A handwritten signature in black ink, appearing to read "David A. Zisser". The signature is written in a cursive style and is positioned above the printed name and contact information.

David A. Zisser  
Jones & Keller, P.C.  
1999 Broadway, Suite 3150  
Denver, Colorado 80202  
(303) 573.1600 - main  
(303) 785-1689 – Direct  
(303) 573.8133 - Fax  
Email: dzisser@joneskeller.com

*ATTORNEY FOR  
DAVID F. BANDIMERE*

**CERTIFICATE OF SERVICE**

I certify that on this 3<sup>rd</sup> day of April, 2019 I forwarded a true and correct copy of the foregoing **RESPONDENT DAVID F. BANDIMERE'S MOTION FOR RULING ON THE PLEADINGS** to the following as indicated:

Securities and Exchange Commission (Original and three copies by Federal Express)  
Elizabeth Murphy, Secretary  
100 F Street, N.E.  
Mail Stop 1090  
Washington, D.C. 20549

Honorable James E. Grimes (courtesy copy via email at [alj@sec.gov](mailto:alj@sec.gov))  
Administrative Law Judge  
100 F Street, N.E.  
Mail Stop 2557  
Washington, D.C. 20549

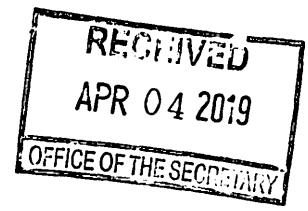
Nicholas Heinke  
Terry R. Miller  
Securities and Exchange Commission  
1961 Stout Street, Suite 1700  
Denver, CO 80294  
(courtesy copy via email at [millerte@sec.gov](mailto:millerte@sec.gov)  
and [HeinkeN@SEC.GOV](mailto:HeinkeN@SEC.GOV), and US mail)



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Emily Morse-Lee





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

Administrative Proceedings Rulings  
Release No. 6520 / March 27, 2019

Administrative Proceeding  
File No. 3-15124

In the Matter of  
  
David F. Bandimere and  
John O. Young

**Order Certifying Ruling  
for Interlocutory Review**

Respondent David F. Bandimere has asked that I certify for interlocutory review my order denying a portion of his motion for a judgment on the pleadings. Bandimere's motion for certification is granted because he has shown that my "ruling involves a controlling question of law as to which there is substantial ground for difference of opinion."<sup>1</sup>

*Background*

The Securities and Exchange Commission initiated administrative proceedings against Bandimere in 2012, and a previously assigned administrative law judge issued an initial decision in 2013.<sup>2</sup> Bandimere sought review before the Commission, which issued a decision adverse to him in 2015.<sup>3</sup>

Bandimere then filed a petition for review with the United States Court of Appeals for the Tenth Circuit.<sup>4</sup> That court granted his petition in

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<sup>1</sup> 17 C.F.R. § 201.400(c)(2)(i).

<sup>2</sup> *David F. Bandimere*, Initial Decision Release No. 507, 2013 WL 5553898 (ALJ Oct. 8, 2013).

<sup>3</sup> *David F. Bandimere*, Securities Act of 1933 Release No. 9972, 2015 WL 6575665 (Oct. 29, 2015).

<sup>4</sup> *Bandimere v. SEC*, No. 15-9586 (10th Cir. filed Dec. 22, 2015).

December 2016, holding that the Commission's administrative law judges are inferior officers who should have been, but were not, appointed by the Commission itself.<sup>5</sup> Finding that the administrative law judge previously assigned to this proceeding "held his office unconstitutionally when he presided over Mr. Bandimere's hearing," the court granted Bandimere's petition for review and "set aside the SEC's opinion."<sup>6</sup> Unlike in other instances in which it granted a petition for review of an agency's decision, the court did not expressly order Bandimere's case remanded "for proceedings consistent with [its] opinion."<sup>7</sup>

In May 2017, the Tenth Circuit denied the Commission's petition for panel rehearing and en banc reconsideration.<sup>8</sup> The court's mandate, which issued soon after that denial, did not mention remand.<sup>9</sup>

The Commission sought review with the Supreme Court in September 2017.<sup>10</sup> In November 2017, the Commission ratified the appointments of its administrative law judges.<sup>11</sup> But in June 2018, following the decision in *Lucia v. SEC*, in which the Court held that the Commission's administrative law judges are inferior officers,<sup>12</sup> the Supreme Court denied review of the Tenth Circuit's decision in Bandimere's case.<sup>13</sup>

In August 2018, the Commission issued an order "reiterat[ing] [its] approval of" its administrative law judges' "appointments as [its] own under

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<sup>5</sup> *Bandimere v. SEC*, 844 F.3d 1168, 1181–82 (10th Cir. 2016).

<sup>6</sup> *Id.* at 1188.

<sup>7</sup> Compare *id.*, with *Razkane v. Holder*, 562 F.3d 1283, 1289 (10th Cir. 2009) ("we reverse the decision of the [agency] and remand for proceedings consistent with this opinion").

<sup>8</sup> *Bandimere v. SEC*, 855 F.3d 1128 (10th Cir. 2017).

<sup>9</sup> *Bandimere*, No. 15-9586 (filed May 11, 2017).

<sup>10</sup> *SEC v. Bandimere*, No. 17-475 (U.S. filed Sept. 29, 2017).

<sup>11</sup> *Pending Admin. Proc.*, Securities Act Release No. 10440, 2017 WL 5969234, \*1 (Nov. 30, 2017).

<sup>12</sup> 138 S. Ct. 2044 (2018).

<sup>13</sup> *SEC v. Bandimere*, 138 S. Ct. 2706 (2018).

the Constitution.”<sup>14</sup> The Commission also remanded to the office of administrative law judges all pending cases listed in an appendix attached to its order.<sup>15</sup> This case was among those listed.<sup>16</sup>

On remand, this proceeding was assigned to another administrative law judge.<sup>17</sup> Bandimere later filed a motion for judgment on the pleadings. Among other arguments, Bandimere asserted that this proceeding is not actually pending because the Tenth Circuit granted his petition but did not order his case remanded to the Commission.<sup>18</sup>

Bandimere’s proceeding was reassigned to me in March 2019, and I held a telephonic conference with the parties on March 13, 2019.<sup>19</sup> During the conference, I denied portions of Bandimere’s motion, including the portion in which he argued that this proceeding is not pending.<sup>20</sup> I explained that on the face of its August 2018 order, the Commission declared that this is a pending proceeding and ordered a new hearing.<sup>21</sup> Because the Commission has not empowered its administrative law judges to second-guess its orders and decisions, I ruled that I lack the authority to grant Bandimere’s motion.<sup>22</sup> I

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<sup>14</sup> *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at \*1 (Aug. 22, 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*4.

<sup>17</sup> *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (ALJ Sept. 12, 2018).

<sup>18</sup> Mot. at 8–13.

<sup>19</sup> *See David F. Bandimere*, Admin. Proc. Rulings Release No. 6497, 2019 SEC LEXIS 496, at \*1 (ALJ Mar. 15, 2019).

<sup>20</sup> *Id.*; Prehearing Tr. 20. Because interlocutory review of an administrative law judge’s ruling would be considered by the Commission on an expedited basis, consistent with its other responsibilities, 17 C.F.R. § 201.400(b), I am giving expedited consideration to Bandimere’s motion for certification. I am therefore issuing this order before issuing an order correcting the transcript of the prehearing conference. Citations in this order are thus to the uncorrected transcript.

<sup>21</sup> Prehearing Tr. 20.

<sup>22</sup> *Id.*

did not address the merits of his argument.<sup>23</sup> Bandimere then filed a timely motion asking that I certify for interlocutory review “the question of whether the 2012 proceeding has been concluded.”<sup>24</sup> The Division filed an opposition.

### *Discussion*

Requests for certification of rulings for interlocutory review are governed by Rule of Practice 400.<sup>25</sup> That rule provides that petitions for interlocutory review are “disfavored” and the Commission will grant a petition “prior to its consideration of an initial decision only in extraordinary circumstances.”<sup>26</sup> It also prohibits an administrative law judge from certifying a ruling for interlocutory review unless, as is applicable here, the motion for certification is timely and the administrative law judge determines that:

- (i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; *and*
- (ii) an immediate review of the order may materially advance the completion of the proceeding.<sup>27</sup>

Bandimere’s motion is timely and a decision on whether this proceeding is actually pending would likely materially advance the completion of it. Indeed, a determination that the proceeding is not pending would end it. Further, Bandimere presents a colorable argument that this proceeding is not pending because the court of appeals did not order his case remanded. And there are substantial grounds for disagreement. In opposing judgment on the pleadings, the Division relied on decisions supporting the idea that continued

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<sup>23</sup> In an order issued two days later, I stated that “with the exception of the portion of Bandimere’s motion for a ruling on the pleadings arguing that the order instituting proceedings fails to state a claim for securities fraud, the motion [was] denied for the reasons stated during the prehearing conference.” *Bandimere*, 2019 SEC LEXIS 496, at \*1.

<sup>24</sup> Mot. at 6.

<sup>25</sup> See 17 C.F.R. § 201.400.

<sup>26</sup> 17 C.F.R. § 201.400(a).

<sup>27</sup> 17 C.F.R. § 201.400(c) (emphasis added).

proceedings at the agency level are appropriate after a court grants a petition for review even absent specific language ordering remand.<sup>28</sup>

Notably, however, I never ruled on the question Bandimere wants certified. I did not deny his motion for judgment on the pleadings based on the determination that this proceeding is properly pending before me. I denied it because I determined that (1) the Commission determined in its August 2018 order that this is a pending proceeding and remanded it to this office, and (2) I lack the authority to reconsider the Commission's decision.<sup>29</sup> And although he mentions the basis for my decision,<sup>30</sup> Bandimere does not argue that I erred in concluding that I lack the authority to reconsider the Commission's decision.

Nonetheless, Rule 400 asks whether the ruling in question "*involves* a controlling question of law."<sup>31</sup> And the term *involves* has an expansive meaning.<sup>32</sup> In that light, it is not difficult to conclude that the ruling that I lack the authority to reconsider the Commission's apparent determination that this proceeding is pending *involves* the question of whether this proceeding is pending.

### *Ruling*

Because Bandimere has shown that my "ruling involves a controlling question of law as to which there is substantial ground for difference of opinion," his motion is granted.<sup>33</sup> I certify to the Commission "the question of

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<sup>28</sup> Opp'n to Judgment on the Pleadings at 6; Opp'n to Mot. for Certification at 2.

<sup>29</sup> Prehearing Tr. 20.

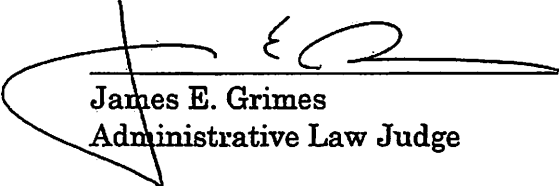
<sup>30</sup> Mot. at 4.

<sup>31</sup> 17 C.F.R. § 201.400(c)(2)(i) (emphasis added).

<sup>32</sup> See *United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008) ("The word 'involving' is an exceedingly broad term for a statute."); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995) ("[T]he word 'involving' is broad and is indeed the functional equivalent of 'affecting.'"); *United States v. Seher*, 562 F.3d 1344, 1369 (11th Cir. 2009) ("The 'term 'involved in' has consistently been interpreted broadly . . .").

<sup>33</sup> See 17 C.F.R. § 201.400(c)(2)(i).

whether [Bandimere's] proceeding has been concluded." The parties' briefs on Bandimere's motion for judgment on the pleadings, the transcript of the March 13 prehearing conference, the Tenth Circuit's panel decision, denial of rehearing, and mandate, and the Commission's order dated August 22, 2018, are "the material relevant to the ruling involved."<sup>34</sup>



James E. Grimes  
Administrative Law Judge

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<sup>34</sup> *Id.* § 201.400(c); *see supra* at 1–3.