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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,

Respondents.

**Division of Enforcement's Opposition to Respondent's  
Petition for Interlocutory Review**

The Division of Enforcement ("Division") opposes Respondent David F. Bandimere's petition for interlocutory review of the Administrative Law Judge's ("ALJ") decision not to dismiss this proceeding on the ground that it is no longer pending. The petition should be denied because the ALJ ruling it disputes does not "involve[] a controlling question of law as to which there is substantial ground for difference of opinion." 17 C.F.R. § 201.400(c)(2)(i). On the contrary, arguments virtually identical to Bandimere's have been rejected in every appellate court in which they have been raised. If the Commission nonetheless grants the petition, it should follow those courts in holding that when an agency order is vacated due to a constitutional defect unrelated to the order's merits, an express remand is not a prerequisite to further agency action in the same proceeding.

**I. PROCEDURAL BACKGROUND**

On December 6, 2012, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Respondents Bandimere and John O. Young.

ALJ Cameron Elliot was designated to preside over a public hearing, which was held over six days from April 22 to May 2, 2013. On July 8, 2013, ALJ Elliot issued an Initial Decision finding that Bandimere had violated securities registration, broker registration, and antifraud provisions of the federal securities laws and that it was in the public interest to sanction Bandimere for his misconduct. Bandimere sought Commission review of the Initial Decision.

On October 29, 2015, after an independent review of the record, the Commission unanimously ruled that Bandimere had violated Section 5 of the Securities Act of 1933 by offering and selling unregistered securities, Section 15(a) of the Securities Exchange Act of 1934 by acting as an unregistered broker, and antifraud provisions of the Securities Act and Exchange Act by failing to disclose material information necessary to make his statements to investors not misleading. For his misconduct, the Commission imposed an industry bar, disgorgement of Bandimere's ill-gotten gains (plus pre-judgment interest), and civil penalties. The Commission also rejected Bandimere's constitutional challenges to the proceeding, including his argument that it was unlawful because the ALJ was not appointed in a manner consistent with the Appointments Clause.

Bandimere filed a petition for review in the Tenth Circuit, which, on December 27, 2016, ruled that ALJ Elliot had not been properly appointed and set aside the Commission's opinion. *Bandimere*, 844 F.3d 1168. The court denied the Commission's petition for rehearing or rehearing en banc on May 3, 2017, and issued the mandate on May 11, 2017.

On September 29, 2017, the Solicitor General, on behalf of the Commission, filed a petition for certiorari in the Supreme Court, arguing that the Appointments Clause question warranted review by the Court in light of the split between the Tenth Circuit in this case and the D.C. Circuit in *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017). The Solicitor General urged the

Court to hold the petition “pending [its] consideration of the petition for a writ of certiorari in *Lucia v. SEC*, No. 17-130, and then dispose[] of [it] as appropriate.”

On January 12, 2018, the Supreme Court granted certiorari in *Lucia*. On June 21, 2018, the Court held that the Commission’s ALJs are inferior officers and that ALJ Elliot had not been appointed in the manner required by the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044 (2018). The Court stressed that “the appropriate remedy” for that violation was “a new hearing before a properly appointed official.” *Id.* at 2055 (quotation omitted). It further directed that “another ALJ (or the Commission itself) must hold the new hearing.” *Id.*<sup>1</sup> On June 28, 2018, one week after it decided *Lucia*, the Supreme Court denied the petition for certiorari in this case.

Immediately following the release of the Supreme Court’s decision in *Lucia* on June 21, 2018, the Commission issued an order staying for thirty days “any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the Commission.” *Pending Admin. Proc.*, Securities Act Rel. No. 10510 (June 21, 2018). The following month, it extended the stay until August 22, 2018. *Pending Admin. Proc.*, Securities Act Rel. No. 10522 (July 20, 2018). On August 22, 2018, the Commission ended the stay, ordering that Bandimere and respondents in over 100 other pending matters “be provided with the opportunity for a new hearing before an ALJ who did not previously

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<sup>1</sup> The Court remanded the case to the D.C. Circuit for further proceedings consistent with its opinion. *Lucia*, 138 S. Ct. at 2056. On remand, the D.C. Circuit granted the petition for review, set aside the Commission’s decision and order, and remanded the case to the Commission “for a new hearing either before another [ALJ] or before the Commission, in accordance with *Lucia*.” *Lucia v. SEC*, No. 15-1345 (D.C. Cir. Aug. 15, 2018); *see also Harding Advisory LLC et al. v. SEC*, No. 17-1070 (D.C. Cir. Sept. 19, 2018) (order stating that language in *Lucia* concerning remand to Commission for a new hearing “must be treated as authoritative”) (quotation omitted), *pet. for rehearing en banc denied* (Jan. 9, 2019).

participate in the matter” and vacating “any prior opinion” it had issued in those matters.

*Pending Admin. Proc.*, Securities Act Rel. No. 10536 (Aug. 22, 2018). The order thus left the OIP in this case intact.

Shortly thereafter, this case was reassigned to a different ALJ. On January 16, 2019, Bandimere filed a motion seeking dismissal of this proceeding under Rule 250(a) of the Commission’s Rules of Practice, arguing, among other things, that the proceeding is no longer pending because the Tenth Circuit vacated the Commission’s order without remanding the case to the Commission. In March 2019, the case was reassigned to ALJ James E. Grimes. ALJ Grimes denied Bandimere’s motion, ruling that he lacked authority to second-guess the Commission’s August 22, 2018 order declaring this a pending proceeding. But he granted Bandimere’s request to certify that portion of his ruling for interlocutory review by the Commission. *Order, Admin. Proc. Rulings Rel. No. 6520* (Mar. 27, 2019).

## II. ARGUMENT

### A. **The absence of an express remand by the Tenth Circuit does not preclude the Commission from conducting further proceedings on the merits.**

Bandimere erroneously contends that the Tenth Circuit’s decision setting aside the Commission’s order deprives the Commission of jurisdiction to conduct a new hearing on the merits of the OIP’s allegations before a properly appointed ALJ because the court did not expressly remand the case. Multiple federal appellate courts have held that when, as here, a court vacates an agency order for reasons unrelated to the merits, the agency may conduct further proceedings on the merits even in the absence of an express remand.

Most recently, the D.C. Circuit considered whether a properly constituted NLRB could reconsider (as part of the same underlying administrative proceeding) the merits of an order the court had previously vacated on the ground that three of the NLRB’s five members had been

improperly appointed under the Recess Appointments Clause. *Noel Canning v. NLRB*, 823 F.3d 76, 78-79 (D.C. Cir. 2016). The petitioner argued that the NLRB had no jurisdiction to do so because in vacating the order, the Court’s opinion, judgment, and mandate made “no mention of remand.” *Id.* at 79. The Court nonetheless held that the NLRB’s decision to reconsider the merits of the case and issue a new decision “was not only consistent with [the Court’s] mandate, but also reasonable and in furtherance of justice.” *Id.* at 80. More generally, the Court observed that the notion that vacatur of an agency decision “for reasons unrelated to the merits” forecloses further agency proceedings “is not totally consistent with common sense.” *Id.*

The Fourth, Seventh, and Eighth Circuits have all reached similar conclusions, even though the courts in those cases had specifically denied agency requests for a remand. *See Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 712 (7th Cir. 2015) (explaining that because its prior decision vacating the NLRB’s order “did not reach the merits of the unfair labor practices issue,” the NLRB “was not precluded from conducting further proceedings and having a properly constituted Board decide the case on the merits”); *Huntington Ingalls Inc. v. NLRB*, 631 F. App’x 127 (4th Cir. 2015) (holding that the absence of an explicit remand did not preclude the NLRB from “revisit[ing] the cases with a proper quorum” because it was not seeking “to revisit a merits determination made by this court”); *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011) (holding that the court’s previous denial of the NLRB’s application of enforcement based on lack of a proper quorum, not on the merits, did “not preclude the Board, now properly constituted, from considering this matter anew”); *see also NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011) (considering the merits of an NLRB decision entered after the court denied enforcement for lack of a proper quorum but did not expressly remand).

Bandimere’s argument (Pet. 12) that those cases “have no relevance” outside of the Recess Appointments Clause context is unavailing. Their holdings did not turn on the absence of a “properly constituted agency” at the time of the decision, as Bandimere erroneously asserts (Pet. 11), but on the fact that the previous order was vacated “for reasons unrelated to the merits.” *Noel Canning*, 823 F.3d at 79-80 (discussing cases). In that circumstance, it is reasonable—indeed, basic “common sense”—to interpret the court’s earlier mandate as permitting the agency “to reconsider the merits of the case and issue a new decision.” *Id.* at 80.

The same rationale applies here. The Tenth Circuit set aside the Commission’s order on constitutional grounds unrelated to the merits, and its opinion contains no suggestion that the Commission is prohibited from reconsidering the OIP’s allegations once the defect is addressed. Nor would such a prohibition make sense given that the court’s decision to vacate the Commission’s order was unrelated to the merits of the violations the Commission found Bandimere to have committed. The Commission’s decision to order a new hearing now that its ALJs have been properly appointed is thus consistent with the Tenth Circuit’s opinion, and also follows the Supreme Court’s instruction in *Lucia* that such a hearing is the “appropriate remedy” for an Appointments Clause violation. 138 S. Ct. at 2055.

Bandimere responds that the Tenth Circuit did not affirmatively suggest that it anticipated further Commission action (Pet. 12), but the same was true in *Noel Canning*, *Big Ridge*, *Whitesell*, and *Huntington Ingalls*. In those cases, the opinions vacating the agency’s previous orders were silent on the permissibility of further proceedings. See *Big Ridge, Inc. v. NLRB*, 561 F. App’x 563 (7th Cir. 2014); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 613-14 (4th Cir. 2013); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); *NLRB v. Whitesell, Corp.*, 385 F. App’x 613 (8th Cir. 2010). In subsequently rejecting requests for an

express remand, the courts likewise gave no indication that they expected the agency to reconsider the merits. *See Big Ridge*, No. 12-3120 (7th Cir. Aug. 14, 2014); *Enterprise Leasing*, No. 12-1514 (4th Cir. Sept. 5, 2013); *Whitesell*, No. 08-3291 (8th Cir. July 9, 2010). But as discussed above, the courts nonetheless concluded that those decisions contemplated further agency action because they were not based on the merits.

Contrary to Bandimere's assertion (Pet. 13), the Division does not argue that a case "automatically return[s] to an agency for further proceedings whenever a court concludes its judicial review function." When a court disposes of an agency order on the merits and does not order a remand, the agency may be precluded from revisiting the merits. *See, e.g., Noel Canning*, 823 F.3d at 79-80; *Big Ridge*, 808 F.3d at 712; *Huntington Ingalls*, 631 F. App'x at 130-31. But under the same cases, that general rule does not apply if the order has been vacated on grounds unrelated to the merits. For that reason, there is also no merit to Bandimere's contention (Pet. 13) that the Commission waived its ability to conduct a new hearing by not requesting an express remand. Because an express remand is not a prerequisite to further agency proceedings under the circumstances here, the Commission was under no obligation to request one. Bandimere's waiver argument is inconsistent with *Noel Canning*, in which the NLRB also did not request an express remand, as well as *Big Ridge*, *Whitesell*, and *Huntington Ingalls*, which make clear that even if the Tenth Circuit had summarily denied a Commission request for an express remand, such a denial would not have foreclosed this proceeding.

Finally, the Commission's recent order in *In the Matter of Bennett Financial Services, LLC*, Rel. No. 33-10606, 2019 WL 653706 (Feb. 15, 2019), does not support Bandimere's petition. In that case, the Tenth Circuit had dismissed the respondent's appeal for lack of prosecution. *See Bennett v. SEC*, No. 17-9524 (10th Cir. Aug. 13, 2018). It is well established

that a dismissal for lack of prosecution is 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”); Fed. R. Civ. P. 41(b) (noting that dismissal for lack of prosecution “operates as an adjudication on the merits”). Consequently, the case law discussed above was not implicated and general remand principles applied.

\* \* \* \*

For the foregoing reasons, the Commission should deny Bandimere’s petition for interlocutory review. If it grants the petition, it should hold that the Tenth Circuit’s opinion does not foreclose this proceeding.

This 10th day of April, 2019.

Respectfully submitted,



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**Certificate of Service**

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