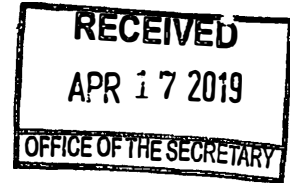


**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING**  
**FILE NO. 3 15124**

**In the Matter of**

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

**RESPONDENT DAVID F. BANDIMERE'S**  
**REPLY IN SUPPORT OF PETITION FOR**  
**INTERLOCUTORY REVIEW**

Respondent David F. Bandimere, through his attorneys, Jones & Keller, P.C., submits his Reply in Support of Interlocutory Review.

**I. INTRODUCTION**

The issue presented by Mr. Bandimere's Petition for Interlocutory Review (the "Petition") is narrow and discrete: whether the proceeding against him initiated by the Order Instituting Proceedings filed on December 6, 2012 (the "2012 Proceeding") was concluded by the decision of the United States Court of Appeals for the Tenth Circuit in *Bandimere v. SEC*, 844 F.3d 1168 (10<sup>th</sup> Cir. 2016), which set aside the Commission's final order entered in the 2012 Proceeding because of a procedural defect unrelated to the merits, but which did not expressly remand the case to the Commission for further proceedings. Mr. Bandimere contends that by setting aside the Commission's final order and not remanding the case to the Commission for further proceedings, the Court of Appeals ended the 2012 Proceeding. The Division of Enforcement, in its Opposition to Respondent's Petition for Interlocutory Review (the "Opposition") contends that the 2012 Proceeding has not been concluded.

As anticipated at pages 11 through 13 of Mr. Bandimere's Petition for Interlocutory Review, the sole basis for the position of the Division of Enforcement are several cases involving judicial review of orders by the National Labor Relations Board (the "NLRB") which found that unfair labor practices had been committed.

However, for the reasons stated in the Petition, and below, the narrow exception to the remand rule on which the NLRB cases rely is inapplicable here.

## **II. THE MANDATE OF THE TENTH CIRCUIT CANNOT REASONABLY BE CONSTRUED AS CONTAINING AN IMPLICIT REMAND TO THE COMMISSION**

Under the "mandate rule," strict compliance with the mandate of a court of appeals is required. *Huffman v. Saul Holdings Ltd.*, 262 F.3d 1128, 1132 (10<sup>th</sup> Cir. 2001); *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1520-1 (10<sup>th</sup> Cir. 1997). The Tenth Circuit in *Bandimere v. SEC*, *supra*, set aside the Commission's final order issued in the 2012 Proceeding, but apparently determined not to remand the case to the Commission for further proceedings. Importantly, the Commission never asked for a remand. Therefore, under the mandate rule, there is no basis to conclude that the 2012 Proceeding was remanded for further proceedings.

The Division of Enforcement seeks to invoke a "narrow exception" to the mandate rule by relying exclusively on *Noel Canning v. NLRB*, 823 F.3d 76 (D.C. Cir. 2016), *Big Ridge, Inc. v. NLRB*, 808 F.3d 705 (7<sup>th</sup> Cir. 2015), *Huntigton Ingalls, Inc. v. NLRB*, 631 F. App'x 127 (4<sup>th</sup> Cir. 2015), *NLRB v. Whitsell Corp.*, 638 F.3d 883 (8<sup>th</sup> Cir. 2011) and *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2<sup>nd</sup> Cir. 2011) to support its contention that the 2012 Proceeding was not concluded when the Court of Appeals set aside the Commission's final order without a remand. In each of those cases the court vacated a final order of the NLRB finding an unfair labor

practice because the order was issued without a quorum of board members, did not expressly remand to the NLRB for further proceedings, but allowed the NLRB to re-hear the cases once a quorum was obtained. Determining whether those cases can apply here must begin with a review of why the courts deciding those cases decided them in the way that they did.

The court in *Noel Canning* provided the fullest rationale for its decision. First, the court recognized that it was being asked to interpret its earlier mandate. *Noel Canning v. NLRB*, 823 F.3d at 79. Therefore, *Noel Canning* cannot be said to hold that the court's mandate was irrelevant to whether the NLRB could rehear the matter; the mandate had to be interpreted in a way that allowed the rehearing to occur. Next, the court explained that it did not remand the *Noel Canning* case to the NLRB because at the time the court set aside the NLRB's order, there was no properly constituted NLRB to which a remand could be made. *Id* at 80. And, to emphasize the importance to its decision of the lack of a properly constituted NLRB, the court noted that when the NLRB was properly constituted, the court "... remanded more than a dozen pending cases." *Id*. Thus, the court made clear that there was a specific and unusual circumstance that prevented a remand order to be included in the mandate. Last, the court noted that it would not be "totally consistent" with common sense to construe its mandate in a way that the merits could never be decided. *Id*.

The factors which led the *Noel Canning* court to interpret its mandate to allow the NLRB to rehear a matter do not exist in this case. On December 27, 2016, the day that *Bandimere v. SEC, supra*, was decided, Chair White and Commissioners Stein and Piwower were properly acting as the Commission, and voted on at least six separate matters. See, [www.sec.gov/about/commission-votes/commission-votes-2016](http://www.sec.gov/about/commission-votes/commission-votes-2016). There was a properly constituted Commission to which the Tenth Circuit could have remanded the 2012 Proceeding had it chosen

to do so. And, concluding the 2012 Proceeding would not prevent the merits of that proceeding from being decided. The Commission, if it deemed it to be in the public interest, could simply initiate a new proceeding against Mr. Bandimere alleging exactly the same issues alleged in the 2012 Proceeding. Although the statute of limitations would impact the availability of monetary relief in the form of disgorgement or civil penalties in a re-filed action, a cease and desist order and certain associational bars would be available. In contrast, the merits of an alleged unfair labor practice could not be revived by initiating a new proceeding by the NLRB. Under 29 U.S.C. § 160(b), which was the basis for the action in *Noel Canning*, a proceeding may be initiated only by a complaint to the NLRB made by a purported victim of an unfair labor practice, which must be filed no more than six months after the practice complained of.

Because the factors on which the *Noel Canning* court based the interpretation of its mandate do not exist here, that case provides no basis to read a remand provision into the mandate issued in *Bandimere v. SEC*.

Nothing in *Big Ridge, Inc. v. NLRB, supra*, provides any support for the Division of Enforcement's position. The court in *Big Ridge* explained that, when it set aside the NLRB's order because it was issued without a quorum, it denied the NLRB's request for a remand because there was no properly constituted agency to which a remand could be made. 808 F.3d at 711. And, the court noted that its inability to remand should not preclude a decision on the merits. 808 F.3d at 712. Therefore, the court held that the NLRB properly reconsidered its earlier order. But, as stated in connection with *Noel Canning*, nothing in *Big Ridge* warrants inferring a remand order in *Bandimere v. SEC*.

*NLRB v. Whitesell Corporation, supra*, and *NLRB v. Domsey Trading Corporation, supra*, are similar to *Noel Canning* and *Big Ridge* in that both courts allowed a rehearing after

setting aside an order issued without a quorum even in the absence of a remand because of an expectation that the matter would be reheard. The basis of that expectation was not explained, but nothing indicates that the Tenth Circuit had a similar expectation. If it had, it would have made an express remand provision.

The Division of Enforcement points to nothing that warrants an extension of the NLRB cases to the 2012 Proceeding. The Commission never requested a remand in *Bandimere v. SEC*, the court's mandate did not order a remand, and following the remand rule to allow the 2012 Proceeding to be completed would not prevent the merits from being decided in a new proceeding alleging the same violations that were alleged in the 2012 Proceeding.

Therefore, Mr. Bandimere's Petition for Interlocutory Review should be granted and the Commission should deem the 2012 Proceeding to be completed. To the extent it believes that the public interest demands a determination of the allegations in the 2012 Proceeding, it may issue a new Order Instituting Proceedings.

**WHEREFORE**, Respondent David F. Bandimere prays that his Petition for Interlocutory Review be granted.

. Dated this 15th day of April, 2019.

Respectfully submitted:

JONES & KELLER, P.C.

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

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**CERTIFICATE OF SERVICE**

On April 15, 2019, the foregoing **RESPONDENT DAVID F. BANDIMERE'S REPLY IN SUPPORT OF PETITION FOR INTERLOCUTORARY REVIEW** was sent to the following parties and other persons entitled to notice as follows:

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  
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Denver, CO 80294  
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and [HeinkeN@SEC.GOV](mailto:HeinkeN@SEC.GOV), and US mail)

  
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Emily Morse-Lee