

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No. 3-15168

In the Matter of

JOHN J. AESOPH, CPA, and  
DARREN M. BENNETT, CPA

Respondents.

:  
:  
: RESPONDENTS JOHN J. AESOPH'S  
: AND DARREN M. BENNETT'S JOINT  
: MOTION FOR LEAVE TO SUBMIT  
: SUPPLEMENTAL BRIEFING  
:  
:  
:  
:  
:

Pursuant to Rules 154 and 450(a) of the U.S. Securities and Exchange Commission's Rules of Practice, and for the reasons set forth in this Joint Motion, Respondents John J. Aesoph and Darren M. Bennett respectfully request leave to submit supplemental briefing in the above-captioned administrative proceeding regarding the unconstitutional manner in which presiding Administrative Law Judge ("ALJ") Foelak was appointed.

Federal district courts in the Southern District of New York and the Northern District of Georgia recently have held that SEC ALJs are inferior officers whose appointments are likely unconstitutional under the Appointments Clause of the Constitution. *See Duka v. SEC*, No. 15-cv-357, 2015 WL 4940083, at \*2-3 (S.D.N.Y. Aug. 12, 2015); *Gray Fin. Grp. v. SEC*, No. 15-cv-492, slip op. at 26-36 (N.D. Ga. Aug. 4, 2015); *Hill v. SEC*, No. 15-cv-1801, 2015 WL 4307088, at \*16-19 (N.D. Ga. June 8, 2015). In all three cases, the courts preliminarily enjoined ongoing SEC administrative proceedings pending rulings on the merits of the constitutional claims.

The Commission recently rejected the reasoning of these courts, ruling that its ALJs are “mere employees” rather than inferior officers, and thus, the Appointments Clause of the U.S. Constitution does not apply to their appointment. *In re Raymond J. Lucia Co. & Raymond J. Lucia, Sr.*, Admin. Proc. File No. 3-15006 at 3, 28-33 (Sept. 3, 2015) (rejecting Appointments Clause argument); *In re Timbervest et al.*, Admin Proc. File No. 3-15519 at 2, 41-46 (Sept. 17, 2015) (same).


The Commission’s decisions do not settle the issue of the constitutionality of these appointments. Rather, the decisions rely upon a misapplication of the Supreme Court’s holdings in *Freytag v. Commissioner of Internal Revenue*, including the Supreme Court’s ruling that “[a]ny appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States and must, therefore, be appointed in the manner prescribed” by the Appointments Clause. 501 U.S. 868, 881 (1991) (internal quotations omitted). Specifically, the Commission relies upon the D.C. Circuit’s decision in *Landry v. FDIC* in focusing on the alleged inability of SEC ALJs to render “final decisions” as support for the conclusion that SEC ALJs are employees rather than inferior officers. See *In re Lucia*, Admin. Proc. File No. 3-15006, at 29 (citing *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)); *In re Timbervest*, Admin. Proc. File No. 3-15519, at 41-46 (same). *Landry*’s focus on the “final decision” issue has been criticized as a misapplication of the “significant authority” rule applied by the Supreme Court in *Freytag*. See, e.g., *Landry*, 204 F.3d at 1142 (Randolph, J., concurring) (explaining that the *Freytag* opinion addressed the final decision issue only as an “alternative holding”); *Gray Fin. Grp.*, No. 15-cv-492, slip op. at 33 (finding the SEC’s argument that “final order authority” was the “most critical part” of *Freytag* is a “misreading of *Freytag*”).

In purporting to rely on *Landry*, the Commission failed to analyze this argument, noting that, even if the argument had merit, Respondents there would not be entitled to relief because they “suffered no prejudice from the manner of appointment of our ALJs.” *In re Lucia*, No. 3-15006 at 32 n. 115 (internal quotations omitted). The Commission’s argument ignores the rule of law that “an Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.” *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015).

The SEC has conceded in a separate action that ALJ Foelak was not appointed by the Commission. *See* Transcript of Hearing at 25-26, *Tilton v. SEC*, No 15-cv-2472 (S.D.N.Y. May 11, 2015) (“we acknowledge that the commissioners were not the ones who appointed, in this case, ALJ Foelk [*sic*]”). Thus, the appointment of ALJ Foelak suffers from the same constitutional defect as the ALJ appointments examined by the district courts in *Hill*, *Gray*, and *Duka*. Accordingly, Messrs. Aesoph and Bennett respectfully request the opportunity to submit supplemental briefing to address the unconstitutionality of the administrative proceeding below under the Appointments Clause, which, as a structural constitutional defect, requires that the Commission vacate the underlying proceedings and ALJ Foelak’s Initial Decision.

Dated: October 5, 2015

Respectfully submitted,



Monica K. Loseman  
GIBSON, DUNN & CRUTCHER LLP  
1801 California St., Ste. 4200  
Denver, CO 80202  
(303) 298-5784  
mloseman@gibsondunn.com

Mark A. Perry  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 887-3667  
mperry@gibsondunn.com

*Counsel for Respondent John J. Aesoph*



Gary F. Bendinger  
Kevin A. Burke  
Sidley Austin LLP  
787 Seventh Avenue  
New York, NY 10019  
Telephone: (212) 839-5300  
Facsimile: (212) 839-5599  
gbendinger@sidley.com  
kaburke@sidley.com

Paul J. Zidlicky  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, DC 20005  
Telephone: (202) 736-8013  
Facsimile: (202) 736-8711  
pzidlicky@sidley.com

*Counsel for Respondent Darren M. Bennett*

**Certificate of Service**

On October 5, 2015, the foregoing RESPONDENTS JOHN J. AESOPH'S AND DARREN M. BENNETT'S JOINT MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING and three copies were hand delivered to the following parties:

Securities and Exchange Commission  
Elizabeth Murphy, Secretary  
100 F Street, N.E.  
Mail Stop 1090  
Washington, D.C. 20549

On October 5, 2015, a courtesy copy of the foregoing RESPONDENTS JOHN J. AESOPH'S AND DARREN M. BENNETT'S JOINT MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING was delivered to the following via electronic and U.S. Mail:

Honorable Carol Fox Foelak,  
Administrative Law Judge  
100 F Street, N.E.  
Mail Stop 2557  
Washington, D.C. 20549  
(ALJ@sec.gov)

On October 5, 2015, the foregoing RESPONDENTS JOHN J. AESOPH'S AND DARREN M. BENNETT'S JOINT MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING was served upon counsel for the following parties by electronic mail, as follows:

Thomas J. Krysa, Esq.  
Nicholas Heinke, Esq.  
Gregory A. Kasper, Esq.  
Securities and Exchange Commission,  
Denver Regional Office  
1961 Stout Street, Suite 1700  
Denver, CO 80294  
krysat@sec.gov  
heinken@sec.gov  
kasperg@sec.gov

By: 