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June 14, 2018

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SENT BY FACSIMILE AND COURIER

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Mr. Fields:

Re: In the Matter of Laurie Bebo and John Buono, CPA, AP File No. 3-16293

I enclose for filing in the above-referenced matter an original and three copies of Respondent Laurie Bebo's Brief in Response to the Division of Enforcement's Opposition to Her Appeal of the Administrative Law Judge's Order Ratifying Actions, and Certificate of Service.

Thank you for your assistance.

Yours very truly,

Ryan S. Stippich

39779816

Encs.

cc Benjamin J. Hanauer, Esq. (w/encs.)
Scott B. Tandy, Esq. (w/encs.)
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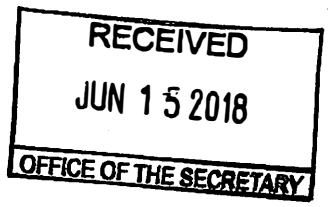
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA

Respondents.

RESPONDENT LAURIE BEBO'S BRIEF IN RESPONSE TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO HER APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S ORDER RATIFYING ACTIONS

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Respondent, by her counsel Reinhart Boerner Van Deuren s.c., submits this brief in response to the Division of Enforcement's Brief in Opposition to Respondent Laurie Bebo's Appeal of the Administrative Law Judge's Order Ratifying Actions (the "Division's Brief"). This response brief is submitted pursuant to the Securities and Exchange Commission's (the "Commission") May 1, 2018 order in the above referenced case (the "Supplemental Briefing Order").

The Division's Brief argues, as it did during the limited remand proceedings before the ALJ, that the Commission's attempt to retroactively cure and rehabilitate the Constitutional violations at issue in this case via ratification was successful. The Division's arguments do not change the nature of the Constitutional violations, however. First, the Commission's purported ratification of the prior "appointment" of SEC administrative law judges ("ALJs") is unavailing. Second, the Division's Brief provides no basis to refute the natural result flowing from the government's admission that Commission ALJs are inferior officers under Article II—that two layers of for-cause removal protection means they continue to be unconstitutional under the Supreme Court's decision *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). For these reasons, this administrative proceeding should be immediately dismissed.

ARGUMENT

1. The Commission's Purported Ratification of the "Prior Appointment" of the Administrative Law Judges is Unavailing.

The Division's Brief first addresses the Commission's attempt to cure the Appointments Clause violations via ratification of the ALJ's prior "appointment." The Division's arguments are ineffective, however, because it cites no authority supporting the ratification of an entire adjudication (from the decision to institute proceedings through the initial decision) and because there is no appointment to be ratified by the Commission.

(a) The Division cites no authority approving ratification of adjudicatory proceedings.

Although it cites no precedent for ratification of entire adjudicatory proceedings, the Division's Brief asserts "[r]atification is an age-old doctrine permitting the adoption and affirmance by one person of an act of another, without authority, has previously assumed to do for him." (Division's Brief at 1) (internal quotation marks and citation omitted). In so arguing, the Division outlines black letter law regarding ratification of agency actions. But the treatise materials that the Division cites says nothing about ratification of an entire adjudicatory proceeding. (*See* Division's Brief at 1-2 (citing 1 Floyd R. Mechem, *A Treatise on the Law of Agency* (2d ed. 1914); *Black's Law Dictionary* (10th ed. 2014); and Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (1890)).) Therefore, the Division's description of the age-old doctrine of ratification is inapposite. Bebo does not argue that ratification is never appropriate. Instead, she argues that ratification is ineffective here. The Division's recitation of general concepts of ratification in scenarios unlike Bebo's simply have no bearing on the disposition of this issue.

(b) The Commission's attempt to ratify the prior delegation of authority to hire ALJs is unsuccessful.

To properly effectuate a ratification, it is "essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998); *see also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (same). The Division asserts that this requirement is satisfied here, as the party ratifying, or the principal, (the Commission) was authorized to appoint ALJs both at the time the ALJs were initially hired and at the time the November 30, 2017 Order (the "Ratification Order") was issued. (*See* Division's Brief at 2.)

However, the Division, yet again, ignores one important fact – the ALJs were hired, not appointed, so there is no appointment to ratify. None of the SEC ALJs were "appointed" by the Commission. Instead, the ALJs currently employed by the Commission were selected by the Chief ALJ and were subject to approval by the Commission's Office of Human Resources. (*See* Brief for Respondent Supporting Petitioners, *Lucia, et al. v. SEC*, No. 17-130 at 3.) For that reason, there is no appointment to be ratified. And the Division does not explicitly argue, nor could it, that the ratification doctrine operates to convert an unconstitutional hiring into a constitutional appointment of an inferior officer.

The cases cited by the Division do not dictate a different result. First, the Division relies on *Edmond v. United States*, 520 U.S. 651 (1997). *Edmond* provides no support for the Division's position, however. In *Edmond*, the Court considered the propriety of an appointment of military judges by the Secretary of Transportation. *See id.* More specifically, the Court considered whether the military judges assigned to the Coast Guard Court of Criminal Appeals may be appointed by Judge Advocates General or the Secretary of Transportation. *See*

generally, id. Ultimately, the Court held that these military judges were inferior officers that may be appointed by the Secretary of Transportation, that any such appointment was in conformity with the Appointments Clause, and that Judge Advocates General could not appoint military judges to the Coast Guard Court of Criminal Appeals. *See id.* at 658, 666.

Importantly, however, the Court did not address the issue of ratification. In fact, neither the word "ratification" nor any derivation of that word appears in this decision.[1] Rather, the adjudication at issue in *Edmond* took place—in the first instance—before properly appointed inferior officers. For this reason alone, *Edmond* provides no support for the Division's proposition that "[c]ourts have uniformly endorsed ratification in analogous circumstances."[2] It is telling that the Division's Brief fails to cite a single authority permitting ratification in an adjudicatory context like the present one.

Edmond does provide support for Bebo's ratification argument though. In *Edmond*, the Court discussed at length the importance of the Appointments Clause and the distinction between an "appointment" and an "assignment." *See id.* at 657-659. In particular, the Court recognized that 'the Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme.' *Id.* at 659. Here, the Commission attempts to convert an unconstitutional hiring of ALJs into an appointment that may be ratified. But the significant structural safeguards provided to Bebo, and others like her, via Article II of the Constitution cannot be discarded so easily.

---

[1] The appointment at issue in *Edmond* was effectuated via a memorandum issued by the Secretary of Transportation that "adopt[ed]" the 'General Counsel's assignments to the Coast Guard Court of Military Review as "judicial appointments of my own."' *See Edmond*, 520 U.S. at 654. However, this appointment applied prospectively and was not considered at all in terms of a ratification of a prior act.

[2] Further, any implication that the Court in *Edmond* subsequently blessed retroactive ratification of Ryder's conviction without a new proceeding is false. *See United States v. Ryder*, 44 M.J. 9, 11-12 (1996).

The Division further relies on *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2012), cert. denied, 137 S.Ct. 2291 (2017), *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015), *Doolin*, 139 F.3d 203, and *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). But none of these cases address the ratification of an entire adjudication (from the decision to charge or institute proceedings through an initial decision). In *CFPB*, the Court considered ratification of the decision to bring a case against the defendant, Gordon. *See CFPB*, 819 F.3d at 1191. Next, *Intercollegiate* involved an Appointments Clause challenge to Copyright Royalty Board judges that was "cured" by invalidating the statutory provision that made the judges' appointment unconstitutional, vacating and remanding the determination made by the unconstitutionally appointed officers, and then appointing three new judges to preside over the vacated and remanded matters. *See Intercollegiate*, 796 F.3d at 115-116. In *Doolin*, the legal validity of a Notice of Charges against a bank in proceedings before the OTS was challenged. *See Doolin*, 139 F.3d at 204-05. And, finally, the *FEC* Court considered whether a probable cause finding and decision to initiate an enforcement proceeding could be ratified after the fact. *See FEC*, 75 F.3d at 707. In other words, none of these cases are like this one.

Rather, as set for in Bebo's opening brief, the Supreme Court has held, in a long line of precedent, that the appropriate remedy where an adjudication has taken place before an unconstitutional judge or hearing officer is a new proceeding, if it would not be time-barred (as it is here).

2. Even if the Ratification is Deemed Proper, the ALJs' Removal Protections Violate Article II of the Constitution.

As fully described in Bebo's Brief in Response to the Commission's May 1, 2018 Order, even if the ratification of the SEC ALJs is deemed proper, the ALJs remain in violation of Article II of the Constitution because they enjoy two layers of tenure protection. *See* Bebo's Brief in Response to the Commission's May 1, 2018 Order at 11-13. For the first time, the Division now argues the two levels of "for cause" protection are constitutional as long as the term "good cause" is properly construed. *See* Division's Brief at 5-6. The Division further asserts that SEC ALJs may enjoy dual for-cause protection because they exercise quasi-judicial functions, not "quintessential executive" functions. Neither of these arguments should prevail here.

(a) The Division attempts to rewrite statutes in arguing the ALJs' removal protections can be constitutional if construed narrowly.

The Administrative Procedure Act (the "APA") provides that an ALJ may be removed by an agency head "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a). The Merit Systems Protection Board ("MSPB") members are, in turn, removable by the President "only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. § 1202(d). As further described in Bebo's Brief in Response to the Commission's May 1, 2018 Order, this dual for-cause removal structure violates Article II of the Constitution. (*See* Bebo's Brief in Response to the Commission's May 1, 2018 Order at 11-13.)

Rather than accept the unconstitutional nature of this dual for-cause removal structure, the Division argues, for the first time, that a sufficiently narrow interpretation of the ALJs' removal protection would comport with "constitutional constraints." (Division's Brief at 5.) This argument suffers for two reasons: (1) The Division waived this argument because it failed

to raise it before filing its May 31, 2018 Brief in Opposition to Respondent Laurie Bebo's Appeal of the Administrative Law Judge's Order Ratifying Actions; and (2) the Division's argument impermissibly rewrites the clear language of Section 7521.

First, the Division waived this argument. An argument or defense is waived if it is not raised in the initial appellate brief but only in the reply brief. *See FEC v. Legi-Tech*, 75 F.3d at 707 (citing *LaRouche v. FEC*, 28 F.3d 137, 139-40 (D.C. Cir. 1994).) Here, the Division failed to raise this argument in its initial brief to the Commission or in its briefs to the ALJ pursuant to the Ratification Order. Instead, it waited to raise this argument until filing its brief pursuant to the Commission's May 1, 2018 Supplemental Briefing Order. Because these proceedings involve an appeal from the ALJ's initial decision and because the Division failed to timely raise this argument, the Division waived this argument.

Even if the Commission considers the Division's argument, it must still fail. As recognized by the United States Supreme Court, the starting point for statutory construction "must be the language employed by Congress" and courts must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotation marks omitted). Therefore, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (internal quotation marks omitted). Stated differently, "it is simply not part of [the] function [of] judges to re-write, in the guise of statutory construction, unambiguous statutory language in order to cure what to us seems to be statutory deficiencies." *U.S. v. M/V Big Sam*, 693 F.2d 451, 454-55 (5th Cir. 1982).

Section 7521 states that an action may be taken against an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after

opportunity for hearing before the Board." 5 U.S.C. § 7521(a). The statute does not explicitly define "good cause," but Black's Law Dictionary defines the term as "[a] legally sufficient reason." Black's Law Dictionary (10th ed. 2014) (definition of "cause"). In asking the Commission to construe this term in a narrower or different fashion, the Division asks the Commission to rewrite Section 7521. It asks the Commission to do so in an effort to "comport[] with constitutional constraints." (See Division's Brief at 5.) In other words, the Division asks the Commission to write the constitutional concerns out of the removal provision. But this unconstitutional removal structure cannot be "cured" by effectively rewriting Section 7521 through statutory interpretation.

(b) The Division mischaracterizes the holding in Free Enterprises in arguing dual for-cause removal is acceptable for inferior officers that perform quasi-judicial functions.

Even if Section 7521 could be re-written, it would not eliminate the Constitutional infirmity of the layers of for-cause removal that would still exist.[3] The Division's hyper-technical reading of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 483-84 (2010), is improper and fails to recognize core holding of the case – that inferior officers may not be protected from removal by a dual for-cause removal structure.

In *Free Enterprise*, the Court opened its opinion by setting forth the core question presented and the answer to that question. Specifically, the Court stated the issue as: "May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?" *Id.* The Court's holding was unequivocal – "We hold

[3] Indeed, the "cause" standard urged by the Division is not materially different than the "cause" standard applicable to members of the Commission, *Free Enterprise*, 561 U.S. at 487, and so the purported narrow should make no difference. Cause is cause, and where an officer is insulated from the President by two layers, it is unconstitutional. *Id.* at 495.

that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President." *Id.* at 484. The Court later recognized that it had "previously upheld limited restrictions on the President's removal power" where there was "only one level of protected tenure separated the President from an officer exercising executive power." *Id.* at 495. However, the statute at issue "not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists [which] is vested instead in other tenured officers—the Commissioners...." *Id.* In finding this unconstitutional, the Court concluded: "The added layer of tenure protection makes a difference." *Id.*

Despite this clear holding, the Division now argues that *Free Enterprise* is limited to the removal protections afforded to inferior officers who exercise "quintessential executive functions." (*See* Division's Brief at 6.) The Division goes so far as to argue that 'the Court refused to extend its holding to ALJs, who "of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers."' (*Id.*) *Free Enterprise* decision actually provides, however, that "our holding also does not address that subset of independent *agency employees* who serve as administrative law judges..." *Free Enterprise*, 561 U.S. at 507, n. 10 (emphasis added).

Thus, *Free Enterprise* holds inferior officers cannot be protected by a dual for-cause removal structure, but refuses to extend its holding to agency *employees*. The court drew no distinction between inferior officers who exercise purely executive functions and those who exercise quasi-judicial or adjudicatory functions.[4] As SEC ALJs are now admittedly inferior

[4] The Division also asserts that its reading of Free Enterprise is supported by the "Supreme Court's longstanding recognition that Congress's ability to enact limited removal protections without violating the separation of powers depends in some part on the functions of the office it has created." (Division's Brief at 7.) But each of the cases cited by the Division in support of this argument addresses a single layer of limited or for cause removal. Therefore,

officers, *Free Enterprise's* holding applies, and the Commission should find that the dual for-cause removal structure employed here violates Article II of the Constitution.

CONCLUSION

For the reasons stated above and in Bebo's opening brief, this administrative proceeding should be immediately dismissed.

Dated: June 14, 2018

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these cases do nothing to support the Division's restrictive reading of *Free Enterprise*. 561 U.S. at 501 (stating "the point is not to take issue with for-cause limitations in general ... [but] two layers are not the same as one.")

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Laurie Bebo's Brief In Response To The Commission's May 1, 2018 Order contains 2,817 words (as calculated by the Microsoft Word count feature), exclusive of the caption, table of contents, table of authorities, signature block and this certification.

Dated: June 14, 2018

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

CERTIFICATE OF SERVICE

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on June 14, 2018, he caused a true and correct copy of Respondent Laurie Bebo's Brief in Response to the Division of Enforcement's Opposition to Her Appeal of the Administrative Law Judge's Order Ratifying Actions to be served on the following by e-mail and United States mail:

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Dated this 14th day of June, 2018.

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