UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **BENNETT GROUP FINANCIAL SERVICES, LLC and DAWN J. BENNETT,** Respondents-Petitioners.	**Administrative Proceeding** **File No. 3-16801**

REPLY BRIEF OF PETITIONERS BENNETT GROUP FINANCIAL SERVICES, LLC AND DAWN J. BENNETT IN SUPPORT OF PETITION FOR REVIEW

MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett

November 7, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ARGUMENT

Respondent utterly failed to address the *only* issue that Petitioners raised on appeal, which was whether the appointment of the ALJ who presided over Petitioners' Administrative Proceeding violated the Appointments Clause of the U.S. Constitution. U.S. Const. art. II. Petitioners filed a twenty-page brief on this sole issue. Respondent filed a twenty-six-page Opposition Brief. Yet that brief spent all of *two paragraphs* discussing the question Petitioner's presented. *See* Respondent's Opposition Brief at 16-7. In other words, Respondent did not address any of Petitioners' arguments.

Within Respondent's two paragraph response, Respondent cited to one decision, and urged that the Commission follow that precedent. *Id.* Respondent's argument, if it can be so characterized, conducted no analysis of the Constitutional issue, made no argument as to why Petitioners' position is wrong, and offered no support for its own position. As such, the Commission should ignore in its entirety the remainder of the Respondent's Opposition Brief as it is irrelevant and designed merely to cast Petitioners in a negative light, and distract the Commission from the sole question at issue: the constitutionality of the ALJ appointment.

Although stretched over a two paragraphs, the Respondent's Opposition Brief boils its position down to one sentence: "*Petitioners argue that the Commission and the D.C. Circuit are both wrong, but they have not offered any basis for the Commission to reconsider its conclusions and instead merely repeated arguments that the Commission has already rejected,*" and cited to one authority, *John J. Aesoph, CPA*, Exchange Act Rel. No. 78490, 2016 WL 4176930 (Aug. 5, 2016).[1] *Id.*

[1] Petitioners note for the Commission's convenience that Petitioners believe that Respondent erred when it pincited to *19-21 in *John J. Aesoph*, and instead meant to pincite to *27-31.

Respondent has either misread or intentionally disregarded Petitioners' arguments. Contrary to Respondent's claim, Petitioners set forth multiple arguments and rationales as to why the Commission should find ALJ Grimes' appointment unconstitutional. Respondent cited to *Aesoph* as the definitive answer to this complex question. In *Aesoph*, the Commission upheld its past reliance on *Landry* due to the ALJs' power to issue final decisions. *Aesoph* at 27. The principal argument offered by the *Aesoph* Respondents was an objection to the ALJs' "final authority" because "an ALJ's initial decision 'by the Commission is not mandatory or automatic.'" *Id.* at 28.

While Petitioners made similar arguments in the Initial Brief,[2] Petitioners also argued, and renew such argument here, that the Commission should decide in Petitioners' favor not because the ALJ initial decisions are in-reality final orders (although they are), but because the D.C. Circuit in *Landry* fundamentally misinterpreted the Supreme Court's decision in *Freytag*. This argument, to Petitioners' knowledge, has not been previously considered by the Commission. But whether or not it has been considered, the Commission should respect the argument, even where Respondent does not, because it accurately sets forth the view of the Supreme Court of the United States.

In the Supreme Court's decision in *Freytag*, the Government contended that special trial judges, or "STJs," were not "officers" under the Appointments Clause. 501 U.S. at 870. The Government argued that STJs were not officers because they did not have authority to issue final

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[2] *See* Petitioner's Initial Brief at 9 (For the 2014 calendar year, 93% of ALJ decisions became final orders without substantive review by the Commission; for the 2015 calendar year, 91%. *See* U.S. Securities and Exchange Commission, *ALJ Initial Decisions: Administrative Law Judges*, http://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2014.shtml (last visited July 24, 2016) and U.S. Securities and Exchange Commission, *ALJ Initial Decisions: Administrative Law Judges*, http://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2015.shtml (last visited July 24, 2016), respectively.).

decisions for their agency. *Id.* at 881. But the Supreme Court rejected the Government's "final authority" argument. *Id.* at 881-82. The High Court made it clear that final authority to render final decisions might be a *sufficient* ground to make an official an inferior officer "even if" the official's duties were not otherwise sufficiently significant, but final authority is not a *necessary* ground. *Id.* The Court then held that, whether or not the STJs had the "authority to enter a final decision," they were "officers" because of the "*significance of the duties and discretion that [they] possess*." *Id.* (emphasis added). Respondent did not address this argument.

The Supreme Court based its conclusion on three features of the STJ role. First, the office of STJ was "established by Law," *id.*; second, "the duties, salary, and means of appointment for that office are specified by statute," *id.* (quotations and citations omitted); and third, the STJs "perform more than ministerial tasks." *Id.* The Court stated, "[t]hey take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders" and, in the course of carrying out these duties, they "exercise significant discretion." *Id.* Respondent did not address this argument.

ALJs satisfy each criterion for an "officer" that the Supreme Court identified in *Freytag*, yet the Commission has staked its "mere employees" position entirely on one divided, unpersuasive D.C. Circuit case, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). *Landry* addressed ALJs at the FDIC and concluded that they are not "officers." *Id.* at 1134. But *Landry* misread *Freytag*—as evidenced by the fact that, in the 15 years since *Landry* was issued, only one court has relied on it as authority about the constitutional status of ALJs. *See Lucia v. SEC*, No. 15-1345, 2016 WL 4191191 (D.C. Cir. Aug. 9, 2016). Respondent did not address this issue.

Even *Landry* itself includes a concurrence (by Judge Randolph) insisting that, under

Freytag, FDIC ALJs are indeed "officers." *Landry* at 1141. And when the Commission has cited *Landry* in recent Appointments-Clause litigation about the Commission's ALJs, courts have refused to follow it. *See Gray Financial Group, Inc. v. SEC*, No. 15-cv-00492, slip op. at 35 (N.D. Ga. Aug. 4, 2015) (issuing preliminary injunction), *vacated with instructions to dismiss for lack of jurisdiction*, 825 F.3d 1236 (11th Cir. June 17, 2016); *Hill v. SEC*, No. 15-01810-LMM, 2015 WL 4307088, at *19 (N.D. Ga. June 8, 2015) (same), *vacated with instructions to dismiss for lack of jurisdiction*, 825 F.3d 1236 (11th Cir. June 17, 2016); *Duka v. SEC*, No. 15-cv-00357, 2015 WL 4940083, at *1 (S.D.N.Y. Aug. 12, 2015) (same), *abrogated for lack of jurisdiction by Tilton v. SEC*, 824 F.3d 276 (2d Cir. June 1, 2016). Because the D.C. Circuit wrongly interpreted *Freytag* in *Landry*, it also wrongly relied on *Landry* in *Lucia*. Respondent did not address this argument.

Petitioners raised more than simply *Freytag*. Petitioners argued that ALJs enjoy two or more levels of protection from removal. *See* Petitioners Initial Brief at 11-12. The Supreme Court addressed a nearly identical situation in *Free Enterprise* and noted that a multilevel removal regime, as exists for the ALJ in the instant matter, is unconstitutional because it is "contrary to Article II's vesting of executive power in the President". *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). Respondent did not address this argument.

Rather than address the issue raised on this appeal by addressing Petitioners' many arguments, Respondent airily dismissed the only appellate issue and chose instead to reargue uncontested facts.[3] In place of a cogent constitutional analysis and argument, Respondent

[3] In order to preserve the focus on the constitutionality claim without distraction, and to avoid subjecting themselves to an unconstitutional process, Petitioners informed the Respondent that they would not participate in the Administrative Proceeding other than to assert their

simply asserted that the Commission should stand by its previous decision, without addressing the substance of any of the arguments (new or old) that Petitioners placed before the Commission. This inexplicable decision displays either a profound arrogance, or a misplaced belief that the Commission will rubber-stamp Respondent's assertions without question.

Petitioners submit that the ALJ who conducted the proceeding against Petitioners is an "inferior officer" of the United States, not a mere employee. The Appointments Clause requires the head of the agency to appoint "inferior officers," and provides that such officers may be insulated from Presidential removal by no more than one layer of tenure protection. *Free Enter. Fund*, 561 U.S. 477 (2010). ALJ Grimes was not appointed by the Commission and does not enjoy only one level of protection from Presidential removal. As a result, he was not appointed in a manner consistent with the U.S. Constitution and thus, the proceeding he conducted was unconstitutional. Respondent did not address this argument.

The only appropriate remedy for the constitutional appointment error is for the Commission to dismiss the OIP filed against the Petitioners. If Respondent wishes to bring a claim against the Petitioners, it must do so in front of a properly-appointed ALJ or in district court. Only at that time will the Petitioners be subject to a fair and constitutional proceeding, and can properly defend themselves on the merits of the allegations, which the Petitioners continue to deny.

CONCLUSION

The administrative proceeding in this case violated the United States Constitution. To

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constitutional objection. The Administrative Proceeding to which Respondent devotes twenty-five pages of its brief, and the purported facts it asserts therein, was comprised of Respondent's selection and presentation of documents in a completely unopposed, uncontested one-sided proceeding, and selected witnesses not subject to cross-examination; and reflects a misleading and distorted presentation of the "facts."

CERTIFICATE OF SERVICE

I, Eugene Ingoglia, Esq., hereby certify that pursuant to Rule 150 of the Securities and Exchange Commission's Rules of Practice, I caused a true and correct copy of PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW to be filed on November 7, 2016, and served, on November 6, 2016, upon the following persons according to the method specified for each:

VIA FACSIMILE AND OVERNIGHT FEDEX
Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Fax (202) 772-9324

VIA E-MAIL AND OVERNIGHT FEDEX
Julia Green (greenju@sec.gov)
Counsel for the Division of Enforcement
United States Securities and Exchange Commission
1617 JFK Boulevard, Suite 520
Philadelphia, PA 19103

November 7, 2016

Respectfully submitted,

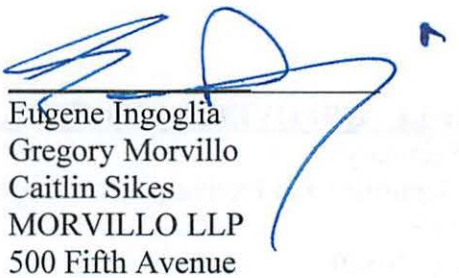
Eugene Ingoglia
Gregory Morvillo
Caitlin Sikes
MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6330

Counsel for Respondents-Petitioners Bennett Group Financial Services, LLC, and Dawn J. Bennett

remedy that structural constitutional violation, Petitioners request that the Commission dismiss this proceeding as constitutionally defective. *See Ryder v. United States*, 515 U.S. 177, 188 (1995) (reversing and remanding for proceedings consistent with the Appointments Clause).

November 7, 2016

Respectfully submitted,



Eugene Ingoglia
Gregory Morvillo
Caitlin Sikes
MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett

500 Fifth Avenue
43rd Floor
New York, NY 10281
(212) 796-6330

MORVILLO LLP

1101 17th Street, NW
Suite 705
Washington, DC 20036
(202) 470-0330

www.morvillolaw.com

CAITLIN SIKES
(212) 796-6346
csikes@morvillolaw.com

November 10, 2016

VIA OVERNIGHT FEDEX

Office of the Secretary
United States Securities and Exchange Commission
Attn: Brent J. Fields
100 F. Street, NE
Washington, DC 20549
(P) 202-551-5400
(F) 202-772-9324

Re: Administrative File No. 3-16801 – Bennett Group Financial Services, LLC, and Dawn J. Bennett

To whom it may concern:

As requested by the Office of the Secretary, please find enclosed a hand-signed copy of the Reply Brief previously submitted by Petitioners.

Very truly yours,

Caitlin Sikes