

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent



MOTION TO STAY PROCEEDING

March 10, 2017

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INTRODUCTION

Respondent Christopher M. Gibson requests the entry of an order staying this proceeding pending the issuance of a decision by the Court of Appeals for the District of Columbia Circuit regarding the constitutionality of the appointment of the Commission's Administrative Law Judges ("ALJs"). On August 9, 2016, the Court of Appeals for the District of Columbia Circuit, in *Raymond J. Lucia Companies, Inc. v. Securities and Exchange Commission*, 832 F.3d 277 (D.C. Cir. 2016), held that the Commission's ALJs are not inferior officers whose appointments must conform with the Appointments Clause of the Constitution. However, following the issuance of an opinion by the Court of Appeals for the Tenth Circuit in *Bandimere v. Securities and Exchange Commission*, 844 F.3d 1168 (10th Cir. 2016) holding that SEC ALJs are inferior officers whose appointments must conform with the Appointments Clause, the District of Columbia Circuit entered an order granting petitions for rehearing *en banc* filed by Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, and vacating its prior judgment, setting a briefing schedule and scheduling oral argument. *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017).

As SEC ALJs are not appointed in accordance with the Appointments Clause, *Bandimere*, 844 F. 3d at 1176-77, and would hold their positions unconstitutionally if ALJs are determined to meet the definition of "inferior officer," it is in the interest of the parties to stay this administrative proceeding pending the issuance of a decision by the D.C. Circuit following rehearing *en banc* in *Raymond J. Lucia Cos., Inc.*

BACKGROUND

On March 29, 2016, the Commission entered an Order Instituting Administrative and Cease-and-Desist Proceedings in this matter. *Christopher M. Gibson*, Exchange Act Release No. 77466, 2016 WL 1213259 (Mar. 29, 2016). A hearing was held in this matter during the period from September 12, 2016 through September 16, 2016. On January 25, 2017, an ALJ issued an initial decision in this matter. *Christopher M. Gibson*, Initial Decision Release No. 1106, 2017 WL 371868 (ALJ January 25, 2017). On February 14, 2017, Respondent Gibson filed a petition for review of the initial decision. The Commission granted the petition for review on March 6, 2017.

ARGUMENT

The Appointments Clause of the United States Constitution provides that Congress may vest the appointment of inferior officers in the President, the courts of law or the heads of the departments. U.S. Const. art. II, § 2, cl. 2. The Supreme Court, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), determined that the term “inferior officer” includes government officials whose position is established by law; whose duties, salary, and means of appointment are specified by statute; and who exercise significant authority.

On September 5, 2012, the Commission entered an order instituting proceedings against Raymond J. Lucia Companies, Inc. and Raymond J. Lucia and ordered an administrative law judge to conduct a public hearing. *Raymond J. Lucia Cos., Inc.*, Exchange Act Release No. 67781, 2012 WL 3838150 (Sep. 5, 2012). The ALJ issued an initial decision, *Raymond J. Lucia Cos., Inc.*, Initial Decision Release No. 495, 2013 WL 3379719 (ALJ July 8, 2013), finding that the respondents violated the Investment Advisers Act and imposing sanctions. The ALJ subsequently issued an order on a motion to correct manifest errors of fact, *Raymond J. Lucia*

Cos., Inc., Administrative Proceeding Rulings Release No. 780 (Aug. 7, 2013) and the Commission, sua sponte, remanded the case for further findings of fact on charges not addressed by the ALJ. On December 6, 2013, the ALJ issued a revised initial decision. *Raymond J. Lucia Cos., Inc.*, Initial Decision Release No. 540, 2013 WL 6384274 (ALJ Dec. 6, 2013). The Commission granted petitions for review and issued a decision finding that respondents violated antifraud provisions and imposing sanctions. *Raymond J. Lucia Cos., Inc.*, Exchange Act Release No. 75837, 2015 WL 5172953 (Sept. 3, 2015). The Commission's decision rejected respondents' argument that the administrative proceeding was unconstitutional because the presiding ALJ was not appointed in accordance with the Appointments Clause.

Following the entry of the Commission's decision, Raymond J. Lucia Companies, Inc. and Raymond J. Lucia petitioned the Court of Appeals for the District of Columbia Circuit for review of the Commission's decision. In its opinion, *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, 832 F.3d 277 (D.C. Cir. 2016), the D.C. Circuit noted that the Supreme Court explained that generally an appointee is an officer if the appointee exercises "significant authority pursuant to the laws of the United States." The D.C. Circuit further stated

"[o]nce the appointee meets the threshold requirement that the relevant position was 'established by law' and the position's 'duties, salary and means of appointment' are specified by statute, *Landry*, 204 F.3d at 1133-34 (quoting *Freytag*, 501 U.S. at 881) 'the main criteria for drawing the line between inferior officers and employees not covered by the appointments clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions,' *Tucker*, 676 F.3d at 1133; see *Landry* 204 F. 3d at 1133-34."

Id. at 284. With respect to whether the SEC's ALJs are inferior officers whose appointments must conform to the Appointments Clause, the D.C. Circuit stated that the parties disagreed about whether Commission ALJs issue final decisions of the Commission and that the court's analysis begins and ends there. *Id.* at 285. The D.C. Circuit then stated that an initial decision

issued by an ALJ becomes final only when the Commission issues a finality order and not before then. The D.C. Circuit added “[p]ut otherwise, the Commission’s ALJs neither have been delegated authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit.” *Id.* at 286. The D.C. Circuit determined that SEC ALJs are not inferior officers and denied the petition for review.

In late December 2016, the Court of Appeals for the Tenth Circuit, in *Bandimere v. Securities and Exchange Commission*, 844 F.3d 1168 (10th Cir. 2016) held that the Commission’s ALJs are inferior officers and appointed unconstitutionally. The Tenth Circuit began its analysis by noting that the Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), defined an officer as “any appointee exercising significant authority pursuant to the laws of the United States.” The Tenth Circuit then discussed the Supreme Court’s opinion in *Freytag v. Commissioner*, 501 U.S. 868 (1991) in which the Supreme Court held that Special Trial Judges appointed by the Tax Court were inferior officers as the position was established by law; the duties, salary and means of appointment for the office were specified by statute; and the tasks performed by the government official were not ministerial, but rather involved the exercise of significant discretion. The Tenth Circuit then stated that it must consider the creation and duties of SEC ALJs in order to determine whether they are inferior officers and stated that the ALJ position was created by the Administrative Procedure Act 5 U.S.C. § 556(b)(3); statutes enacted by Congress set forth SEC ALJs’ duties, salaries and means of appointment; and SEC ALJs exercise significant discretion in performing “important functions.” The Tenth Circuit held that SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause and set aside the Commission’s opinion.

On February 16, 2017, the States Court of Appeals for the District of Columbia Circuit entered an order in *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017) in which it granted petitioners' petition for rehearing *en banc* and vacated the court's judgment filed on August 9, 2016.

CONCLUSION

Based upon the foregoing, an order staying the proceedings should be entered.

March 10, 2017

Respectfully submitted,


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CERTIFICATE OF SERVICE

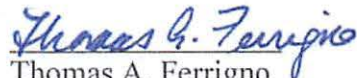
I hereby certify that on this 10th day of March, 2017:

(i) an original and three copies of the foregoing Motion To Stay Proceeding were filed with the Office of the Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-9303;

(ii) a copy of the foregoing Motion To Stay Proceeding was sent by email to SemlerM@SEC.gov and sent by courier to the following:

H. Michael Semler
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, N.E.
Washington, DC 20549
(202) 551-4429
Counsel for Division of Enforcement

(iii) a copy of the foregoing Motion To Stay Proceeding was provided to Brenda P. Murray, Chief Administrative Law Judge, via email, to ALJ@sec.gov.


Thomas A. Ferrigno