UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17674

In the Matter of

ALEXANDER KON,

Respondent.

MOTION FOR INTERLOCUTORY REVIEW

NOW COMES Counsel for the above-mentioned Respondent to respectfully request that he be granted the opportunity for immediate Interlocutory review of the ADMINISTRATIVE PROCEEDINGS RULINGS Release # 4501 ORDER REGARDING RESPONDENT'S MOTION FOR JUDGEMENT ON THE PLEADINGS AND MOTION FOR WITHDRAWAL (the "Order").

It is surprising and most unfortunate, The ALJ and the Commission acknowledges yet outright refuses to follow the 10th circuit, the law which applies to the Respondent, a resident of Kansas. Under 15 U.S.C. §§ 77i(a)and 78y(a)(1), an aggrieved party may obtain review of an SEC order in any circuit court where the party "resides or has his principal place of business." This means a person in the United States should be able to rely on the appellate courts in his or her region of the country to decide the law, and for that law to apply to them.

In a recent 10th circuit decision, the Appeals Court held that an SEC Administrative Law Judge was not constitutionally appointed and therefore holding his office in violation of the Constitution and his prior decision was set aside. *Bandimere v. SEC*, No. 15-9586 (10th Cir. 2016). Here, the Respondent, a resident of Kansas, well within the 10th circuit, would like to rely upon this decision but is being refused by the Commission. The 10th circuit opinion in *Bandimere* is the most recent decision, and the court in the *Bandimere* case undertook a lengthy analysis of *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, 832 F.3d 277 (D.C.Cir. 2016) making a well-reasoned and sound departure from its holding. The Commission has simply chosen to follow the opinion they like better, regardless of the implications for the Constitution or the erosion of justice for our citizens.

The Commission also refused to follow the 10th Circuit in recent Release No. 10277, the SEC *Matter of HARDING ADVISORY LLC and WING F. CHAU*; the ALJ stated, "the government is considering options for further review. In this case, the record indicates that Respondents may appeal to the D.C. Circuit but not to the Tenth Circuit." See 15 U.S.C. 78y(a). Accordingly, we adhere to the D.C. Circuit's decision in Lucia." By contrast, in this Respondent's matter the ALJ wrote in its order, " The two United States Circuit Courts of Appeal that would likely have jurisdiction over any petition for review from a final Commission action arising from this proceeding are currently split on the applicability of the Appointments Clause to Commission ALJs." By this logic, it would appear the ALJ, either believes 15 U.S.C. 78y(a) does not apply to the Respondent, or there is no person in the United States who may be able to look to the 10th Circuit as having any influence over the SEC or, rather the SEC is not beholden to the 10th Circuit.

In Release No. 10277 *Matter of Harding Advisory and Wing Chau* the ALJ characterizes outright disregard for the 10th circuit as "non aquiesence." For authority for this "non-aquiesence" or disregard for the rule of law; the Commission improperly uses half a quote "Non-Aquiesence is acceptable, especially when the law is unsettled" *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996). But that quotation is actually from another great case called *Johnson v United States Railroad Retirement Board.* The DC Circuit gave solid guidance in *Johnson v US Railroad Retirement Board* as follows, "We also think that the ... unapologetic policy of nonacquiescence is inconsistent with ..... jurisdictional arguments and troubling on statutory and constitutional grounds. If the Board continues to deny benefits after our decision today, we expect that the policy itself can be directly challenged in an appropriate action before this court. *Johnson v United States Railroad Retirement Board* United States Court of Appeals, DC Circuit 969 F.2d 1082 (1992)." The SEC's refusal to acquiesce to the 10th circuit in this instance defies congresses plan in making the Commission's orders reviewable by the Circuit Courts *Id.* at 1091. Circuit courts, for their part, have compared the nonacquiescence of federal agencies to the defiance of Governor Faubus at Little Rock, noting that "[w]hat the [Cooper] Court said with regard to the Constitution applies with full force with regard to federal statutory law." *Lopez*, 725 F.2d at 1497 n. 5. Defenders of nonacquiescence argue that the Cooper analogy is inexact. Although Cooper speaks not of the Supreme Court but of "the federal judiciary [as] supreme in the exposition of the law of the Constitution," 358 U.S. at 18, 78 S.Ct. at 1410 (emphasis added), the decision seems to assume that "the law forming the basis for the obligation to acquiesce is no longer in flux." *Estreicher & Revesz*, 98 YALE L.J. at 725. Supreme Court decisions, the argument goes, should be followed in the interests of national uniformity; but until the Supreme Court has spoken, agencies have argued that their

responsibility to formulate "uniform and orderly national policy in adjudications" allows them to refuse to acquiescence in the conflicting views of U.S. Courts of Appeals. See, e.g., *S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1278 (5th Cir. Unit B Oct.1981).

But even if we assume, for the sake of argument, that an interest in national uniformity might justify nonacquiescence in some cases, the sincerity of the SEC's interest in uniformity is open to question, since the Commission has discretion in every matter whether to bring the matter to a district court or through its own administrative tribunal. Rather than continuing what has been decided as an unconstitutional tribunal by the 10th Circuit. The Commission can bring its current matters before a District Court and apply for Certiorari from the United States Supreme Court for a decision on the Circuit Court Split. The Commission appears, as a result, to be less interested in national uniformity than in denying due process, violating the Appointments Clause, and maintaining the status quo one way or another. The SEC, in the end, can hardly defend its policy of nonacquiescence by invoking national uniformity. The policy has precisely the opposite effect, since it results in very different treatment for those who seek and who do not seek judicial review. It is a peculiar view of fairness, however, that treats all claimants equally poorly by depriving them of benefits of discovery and due process they will eventually receive if they have the fortitude to run an administrative gauntlet. This looks uncomfortably like the frivolous and obstructionistic litigation that the Supreme Court has severely criticized in the context of habeas corpus. See, e.g., *McCleskey v. Zant,* U.S. , 111 S.Ct. 1454, 1468-69, 113 L.Ed.2d 517 (1991).

In Release No. 10277 *Matter of Harding Advisory and Wing Chau* The Commission further rationalized non acquiescence quoting *Samuel Estreicher and Richard Revesz,*

Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679, 687, 735 (1989) (stating that an agency engages in "intercircuit nonacquiescence" by declining to follow "the case law of a court of appeals other than the one that will review the agency's decision"). But here, in the respondent's matter, as a resident of Kansas, it is clear the 10th circuit court of appeals will review the agency's decision.

The DC Court in the *Johnson v. Railroad Board* opinion was also instructive in its warning which could directly be applied to the recent position of the Commission, "In light of our decision today, we hope that the Board will choose to abandon its policy of intracircuit non-acquiescence, as the Social Security Administration did after being severely criticized by the Courts and by Congress. See, e.g., H.R.CONF.REP. No. 1039, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3038, 3080, 3096. But if the Board persists, we expect that the policy of non-acquiescence itself could be considered a "final decision of the Board" under 45 U.S.C. § 355(f) that could be challenged by a spouse or widow in an appropriate action before this court. *Cf. Bowen v. City of New York,* 476 U.S. 467, 486, 106 S.Ct. 2022, 2033, 90 L.Ed.2d 462 (1985); Hyatt, 807 F.2d at 380."

Like in the instance above, if the Commission does not acquiesce to the ruling of the 10th circuit, then the non-aquiesence in and of itself should be considered a "final decision" by the district and appellate courts obligated to uphold the law. Although, there are circumstances where intracircuit non-acquiescence may be justified. Here, the Respondent's reliance on the 10th Circuit decision in *Bandimere* is the natural tide of common law and not avoidable by the Commission.

Wherefore, Counsel requests the Commission grant this Motion for Interlocutory Review in the interest of justice.

Respectfully Submitted,

January 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing Motion for Interlocutory Review was filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by U.S. Mail and email, on this 11th day of January, 2017, on the following persons entitled to notice:

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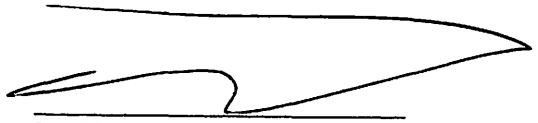

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