

COPY
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-17716

In the Matter of

ROBERT L. BAKER,
JACOB B. HERRERA
MICHAEL D. BOWEN, and
TERRENCE A. BALLARD,

Respondents.

DIVISION OF ENFORCEMENT'S
RESPONSE IN OPPOSITION TO
RESPONDENT JACOB B. HERRERA'S
MOTION TO DISMISS OR ABATE
PROCEEDING

The Division of Enforcement (the "Division") files this Response in Opposition to Respondent Jacob B. Herrera's "Preliminary Answer, Motion to Dismiss, or Alternatively, Motion to Abate" (the "Motion") this administrative proceeding. The Court should reject Respondent Herrera's request that the Court either dismiss or "abate" this proceeding. Respondent Herrera argues that this Court lacks jurisdiction over the proceeding in light of the Tenth Circuit's divided decision in *Bandimere v. SEC*, No. 15-9586, 2016 WL 7439007 (10th Cir. Dec. 27, 2016), which held that Commission Administrative Law Judges ("ALJs") are "inferior officers" who must be appointed in a manner consistent with the requirements of the Appointments Clause. But a unanimous panel of the Court of Appeals for the District of Columbia Circuit held that the Commission's ALJs are not constitutional "[o]fficers." *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) *pet. for reh'g en banc filed*, No. 15-1345 (Sept. 23, 2016). And, as the Commission has recognized in a post-*Bandimere* ruling, the D.C. Circuit's decision was correct, and the Tenth Circuit majority's contrary ruling is wrong. *See*

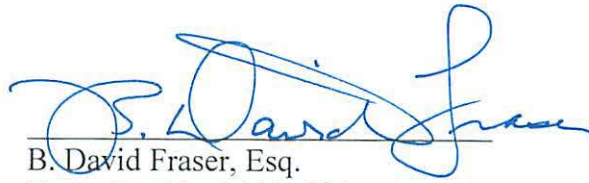
Harding Advisory LLC & Wing F. Chau, S.E.C. Rel. No. 4600, 2017 WL 66592, at *19 n.90 (Jan. 6, 2017).

Moreover, the Tenth Circuit issued its decision in *Bandimere* on December 27, 2016, and the mandate has yet to issue in that case. *See* FED. R. APP. P. 41(b). The government is also presently considering options for further review of the Tenth Circuit's decision.

For the foregoing reasons, the Division respectfully requests that this Court deny Respondent Herrera's Motion and specifically order him to comply with: (a) Section IV of the Commission's December 8, 2016 Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 and Notice of Hearing ("OIP") [OIP, at p. 6]; and (b) Rule 220(c) of the Commission's Rules of Practice. Rule 220(c) requires that "an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings." *See* 17 C.F.R. § 201.220(c). Respondent Herrera's Motion does not comply with Rule 220(c).

DATED: January 20, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

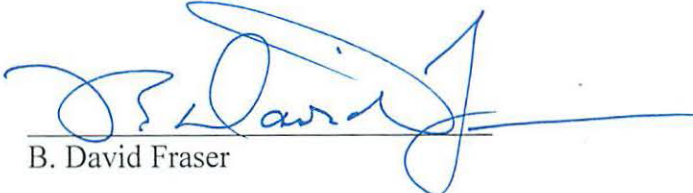
In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that true and correct copy of the foregoing *Division of Enforcement's Response in Opposition to Respondent Jacob B. Herrera's Motion to Dismiss or Abate Proceeding* was sent via UPS on January 20, 2017 to the individuals listed below:

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