UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of,

David Pruitt, CPA

Respondent.

REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONDENT DAVID PRUITT'S MOTION TO STAY PENDING SUPREME COURT REVIEW OF APPOINTMENTS CLAUSE CHALLENGE

The Division of Enforcement (the "Division") contends that this Court should not stay this proceeding because Supreme Court review of the Appointments Clause question is speculative. This ignores the fact that the Securities and Exchange Commission ("SEC" or the "Commission") itself has now conceded that "[t]he courts of appeals are divided over the question whether administrative law judges who act as hearing officers in SEC enforcement proceedings are inferior officers who must be appointed in accordance with the Appointments Clause." Petition for a Writ of Certiorari at 7, *SEC v. Bandimere*, No. 17-475 (Sept. 29, 2017). As a result, the Commission, through the Solicitor General, has now taken the position in its petition for a writ of certiorari in *Bandimere* that "[t]he Appointments Clause question at issue in [*Bandimere*] and in *Lucia* warrants review by this Court." *Id.* at 9. The Commission further stated that it "intends to address more fully in its response to the petition in *Lucia* why the Court should review the Appointments Clause question presented here." *Id.*

Having conceded that there is a split in the circuits on the issue—a split only exacerbated in recent months with the Fifth Circuit's holding in *Burgess v. Fed. Deposit Ins. Corp.*, No. 17-60579, 2017 WL 3928326 (5th Cir. Sept. 7, 2017)—and having specifically petitioned the Supreme Court to take the issue, the Division cannot now contend that Supreme Court review this term is speculative. The Solicitor General only files petitions for certiorari in approximately 10-15 cases per year, and the Supreme Court "grants the Solicitor General's petitions for writ of certiorari at a rate of several orders magnitude higher than anyone else's—about 70% of the time compared to less than 3-4% for others." Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493 (2008); *see also* Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725 (2011).

Moreover, the Division does not deign to explain why a stay here is any less appropriate than in the Tenth Circuit, where the Commission has stayed all administrative proceedings. At this point, seeking Supreme Court review of both *Bandimere* (which decided against the Commission) and *Lucia* (which decided for the Commission), there are simply no grounds for the Commission to treat other respondents differently. Indeed, the Commission had the right to proceed before administrative law judges ("ALJ") in the Tenth Circuit under the principle of intracircuit nonacquiescence after *Bandimere*. Yet it did not do so. And the factors that warranted that stay—that the Commission intended to challenge *Bandimere* at the Supreme Court and could well lose, and that failing to stay the proceedings in that circumstance would lead to duplicative proceedings and unnecessarily prejudice respondents and witnesses—apply with equal force here. Moreover, now that the Commission has stated its intention to agree that the Supreme Court should hear *Lucia*, any grounds for intercircuit nonacquiescence falls away as well.

The Division does not seriously address Mr. Pruitt's contention that he should not have to litigate this case twice, wasting limited resources—both personal and financial—in the process. The Division cannot credibly argue that requiring Mr. Pruitt to potentially litigate this matter twice (once in a forum that may not be constitutional) would be anything but a significant burden and prejudice to him. As the circuit split demonstrates, this case involves a colorable claim that this proceeding is unconstitutional until and unless this Court is constitutionally appointed. Indeed, at this point, more judges have opined that SEC ALJs have not been appointed consistently with the Constitution than have held to the contrary, and the D.C. Circuit's reading of *Freytag* in *Lucia* has been roundly rejected by every other court to consider the matter. The

Division identifies absolutely no prejudice whatsoever from a temporary adjournment of this proceeding.

A stay is also warranted because of the significant civil penalty and career-ending bar the Division seeks. In *Burgess*, the Fifth Circuit granted a stay for just such a reason. It held that the respondent had shown a likelihood of success on his Appointments Clause challenge, and that "a decision pursuant to a constitutionally infirm hearing that injured petitioner's reputation and ability to procure comparable employment was sufficient to satisfy irreparable injury." 2017 WL 3928326, at *4 (internal quotation marks and alterations omitted). The same is true here.

In the end, this unique and outcome-determinative constitutional issue is likely to be decided this term at the Commission's behest, and it is likely to be decided in a manner that would render this proceeding unconstitutional. A temporary adjournment is thus warranted, avoiding prejudice and irreparable harm to Mr. Pruitt, and conserving judicial resources in the process.

CONCLUSION

Mr. Pruitt respectfully requests that the Court grant the adjournment staying this action pending Supreme Court review of *Bandimere* and/or *Lucia*.

Dated: October 4, 2017
New York, New York

By: _____

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