

HARD COPY

RECEIVED
AUG 10 2016
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS
File No. 3-17319

In the Matter of

JAN E. HELEN,

Respondent.

**JAN E. HELEN'S MOTION FOR
RECONSIDERATION OF *SUA*
SPONTE DISMISSAL OF
AFFIRMATIVE DEFENSES**

Respondent Jan E. Helen, through his attorneys Jones & Keller, P.C., moves for reconsideration of the court's *sua sponte* denial of Mr. Helen's affirmative defenses, and in support thereof states as follows:

On July 26, 2016, the court held a prehearing conference in this matter. In the course of the prehearing conference, the court *sua sponte* dismissed two affirmative defenses raised by Mr. Helen in his Answer. Mr. Helen was given no notice that his affirmative defenses might be dismissed on this court's own motion.

Mr. Helen's first affirmative defense was based on the invalidity of these proceedings by virtue of the fact, on information and belief, that the presiding administrative law judge was not appointed in accordance with the Appointments Clause of the United States Constitution. This court, in the course of the prehearing conference, stated that she had been appointed in conformity with the Appointments Clause, and had a certificate to that effect. Counsel for Mr. Helen requested that the certificate be made part of the record, which the court agreed to do, by providing a copy to the Office of the Secretary of the Commission. As of the date of this Motion,

the certificate has not been made part of the public file of this proceeding which may be accessed by the Commission's website.

Notwithstanding the lack of public access to the certificate, the Division of Enforcement had access to materials sent to the Office of the Secretary which Mr. Helen's counsel lacked, and the Division of Enforcement provided a copy of the certificate to Mr. Helen's counsel on August 5, 2016. A review of the certificate shows that the appointment reflected by the certificate was not the appointment of the presiding officer as an Administrative Law Judge, but rather, the appointment of the presiding officer, who was at the time already an Administrative Law Judge, as the Chief Administrative Law Judge. Mr. Helen contends that there is a legitimate issue of fact as to whether the presiding officer's appointment as Chief Administrative Law Judge satisfied the Appointments Clause.

Although the Commission has rejected claims based on the Appointments Clause in the earlier proceedings, the rejection of those claims is the subject of Petitions for Reviews in at least the Circuit Court of Appeals for the District of Columbia and the Court of Appeals for the Tenth Circuit. *Raymond Lucia Cos., Inc., v. SEC*, Case No. 15-1345 (D.C. Cir.); *David F. Bandimere v. SEC*, Case No. 15-9586 (10th Cir.)

The *sua sponte* denial of Mr. Helen's affirmative defenses was improper. Nothing in the Commission's Rules of Practice authorizes the presiding officer to deny affirmative defenses (with the possible exception of a decision on a Motion for Summary Disposition seeking denial), let alone deny affirmative defenses *sua sponte* without notice and opportunity for hearing. Nor does due process of law allow Mr. Helen's affirmative defenses to be denied without notice and an opportunity for hearing.

Further, the denial of affirmative defenses will prejudice Mr. Helen. With respect to the affirmative defense based upon the Appointments Clause, the only avenue that Mr. Helen has to raise his Appointments Clause challenge is through this proceeding. *E.g., Hill v. SEC*, ___ F.3d ___, 2016 WL 3361478 (11th Cir. June 17, 2016)(collecting cases). Denying his affirmative defense at the outset deprives Mr. Helen of the opportunity of developing a factual record necessary to support his defense. Similarly, denial of Mr. Helen's affirmative defense based upon a deprivation of due process was premature. As the circumstances surrounding the court's denial of Mr. Helen's affirmative defenses demonstrates, there is at least room for argument as to whether Mr. Helen has had, and will have, and opportunity to address the claims against him, and raise appropriate defenses, consistent with the requirements of due process.

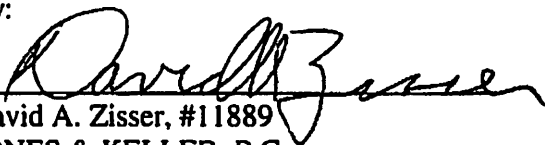
Counsel consulted with the Division of Enforcement regarding its position and it opposes the relief sought herein.

WHEREFORE, Respondent Jan E Helen prays that the court reconsider its denial of Mr. Helen's affirmative defenses, and reinstate those defenses to be considered as part of Mr. Helen's defense of this action.

Dated: August 8, 2016

Respectfully Submitted,

By:



David A. Zisser, #11889
JONES & KELLER, P.C.
1999 Broadway, Suite 3150
Denver, CO 80202
Telephone: 303.573-1600
Facsimile: 303.573-8133

Attorney for Respondent Jan E. Helen

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2016, a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** was served on the following as indicated:

By Facsimile and original and three copies by FedEx to:

US Securities & Exchange Commission
Attn: Brent J. Fields, Secretary
Office of the Secretary
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549
Fax: (703) 813-9793

Via Email to:

The Honorable Brenda P. Murray
Chief Administrative Law Judge
Securities & Exchange Commission
Chief Administrative Law Judge
100 F Street, N .E.
Mail Stop 2582
Washington, D.C. 20549
alj@sec.gov

Danielle R. Voorhees
Marc D. Ricchiute
Nichole Nesvig
Securities and Exchange Commission
Byron G. Rogers Federal Building
1961 Stout Street, Ste. 1700
Denver, CO 80294-1961
voorheesd@sec.gov; ricchiutem@sec.gov;
NesvigN@sec.gov


Kaydee Carson