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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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January 4, 2018



Honorable Carol Fox Foelak
Administrative Law Judge
100 F Street, N.E.
Room 2557
Washington, D.C. 20549

**Re: AP File No. 3-18129
In the Matter of Brian Michael Berger**

Dear Judge Foelak:

On November 30, 2017, the Commission issued an order ratifying the prior appointment of its administrative law judges to preside over administrative proceedings. *See In re: Pending Administrative Proceedings*, Securities Act Release No. 10440 (Nov. 30, 2017). As applied to this proceeding, the order directs the administrative law judge to determine, based on a de novo reconsideration of the full administrative record, whether to ratify or revise in any respect all prior actions taken by any administrative law judge during the course of this proceeding. *Id.* at 1-2.

It is well established that subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996). And that principle applies whether or not the ratifying authority is the same person who made the initial decision, so long as “the ratifier has the authority to take the action to be ratified,” and, “with full knowledge of the decision to be ratified,” makes a “detached and considered affirmation of th[at] earlier decision.” *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016).

Accordingly, to implement this remedy, the administrative law judge should conduct a de novo review of the administrative record, engage in an independent evaluation of the merits through the exercise of detached and considered judgment, and then determine whether prior actions should be ratified and thereby affirmed. This process ensures “that the ratifier does not blindly affirm the earlier decision without due consideration.” *Advanced Disposal Services East*, 820 F.3d at 602-03.

The Division submits that the previous decisions issued by an administrative law judge in this proceeding, including the initial decision issued on October 25, 2017, were well-founded and respectfully requests that they be ratified. To that end, the Division attaches a proposed draft order to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Schiff", written over the typed name.

Andrew O. Schiff
Regional Trial Counsel

Enclosure

cc: Brian Michael Berger

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18129



In the Matter of

BRIAN MICHAEL BERGER,

Respondent.

**ORDER RATIFYING PRIOR
DECISION**

After a de novo review and reexamination of the record in these proceedings, I have reached the independent decision to ratify and affirm all prior actions made by an administrative law judge in these proceedings, including the initial decision issued on October 25, 2017. This decision to ratify and affirm is based on my detached and considered judgment after an independent evaluation of the merits.

Carol Fox Foelak
Administrative Law Judge