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August 24, 2015

**VIA FACSIMILE 202-772-9324 AND UPS**

Brent J. Fields, Secretary  
Office of Secretary  
U.S. Securities and Exchange Commission  
100 F. Street, N.E., Mail Stop 2557  
Washington, DC 20549

Re: ***In the Matter of Timbervest, LLC, et al.,***  
**Administrative Proceeding File No. 3-15519**

Dear Mr. Fields:

Please find enclosed for filing in the above-referenced matter before the Commission the original and three (3) copies of Respondents' Motion Seeking Removal Of ALJ Elliot's Initial Decision From The Commission's Website Or, In The Alternative, Affixing Upon The Initial Decision The Label "*Null and Void.*"

Thank you for your attention to this matter.

Sincerely,

George Kostolampros

Enclosure

cc: Counsel of Record (via email and UPS)

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-15519

In the Matter of  
  
Timbervest, LLC,  
  
Joel Barth Shapiro,  
Walter William Anthony Boden, III,  
Donald David Zell, Jr.,  
and Gordon Jones II,  
  
Respondents.

**RESPONDENTS' MOTION SEEKING REMOVAL OF ALJ ELLIOT'S INITIAL  
DECISION FROM THE COMMISSION'S WEBSITE OR, IN THE ALTERNATIVE,  
AFFIXING UPON THE INITIAL DECISION THE LABEL "NULL AND VOID"**

Respondents have raised an Appointments Clause challenge to the authority of the SEC ALJs who presided over this matter and have argued that the Initial Decision issued by SEC ALJ Cameron Elliot is invalid and should be vacated. For the following reasons, Respondents request that the Commission remove from its website ALJ Elliot's Initial Decision in this matter or, in the alternative, label the Initial Decision as "null and void."

Since Respondents raised an Appointments Clause challenge to the authority of ALJ Elliot to preside over this matter and issue an Initial Decision, two federal district court judges, Judge Berman in the Southern District of New York and Judge May in the Northern District of Georgia, have agreed with Respondents and found it likely that SEC ALJs have not been properly appointed under the Appointment Clause. *See Duka v. S.E.C.*, 1-15-cv-00357 (S.D.N.Y. Aug. 3, 2015) (Judge Berman), *Hill v. S.E.C.*, Civil Action No. 1:15-cv-1801 (LMM),

2015 WL 4307088 (N.D. Ga. June 8, 2015) (Judge May), *Gray Financial Grp., Inc. v. S.E.C.*, Civil Action No. 1:15-cv-00492 (N.D. Ga. Aug. 5, 2015) (Judge May), and *Timbervest v. S.E.C.*, Civil Action No. 1:15-cv-02106 (N.D. Ga. Aug. 5, 2015) (Judge May). These courts are the only courts to have substantively addressed the Appointments Clause challenge to the authority of SEC ALJs and each found a substantial likelihood that SEC ALJs are inferior officers who have not been appointed by the Commission, the President or the Judiciary as required by the Constitution. Although Judge May denied Timbervest's request for a preliminary injunction upon finding it would not suffer irreparable harm, she agreed with Timbervest's position that the SEC ALJs who presided over this matter are inferior officers and the manner of their appointment likely violated the Appointments Clause. Judge May also indicated in her opinion that Timbervest could file a renewed motion for preliminary injunction to the extent the Commission finds against Timbervest and refuses to stay its order pending appeal.

Although the Commission is appealing Judge May's ruling in *Hill* and *Gray Financial Grp.* and it may appeal Judge Berman's ruling in *Duka*, the Commission must recognize that it has a serious problem with the structure of its administrative proceedings. Until these significant constitutional issues are resolved with finality in the appellate system, the Commission should remove the Initial Decision in this matter from its website at this time.

In the alternative, the Commission should affix a label or otherwise mark ALJ Elliot's Initial Decision as "**Null and Void**" on its website. On multiple occasions, Commission representatives have claimed the Initial Decision has no effect. The Division stated on the record during oral argument before the Commission in this matter that "the filing of the petition for review immediately renders the initial decision *null and void*." June 8, 2015 Transcript at 35-36 (emphasis added) (excerpt attached as **Exhibit A**).

Similarly, at the preliminary injunction hearing before Judge May, counsel representing the Commission argued that the Initial Decision is nothing more than a recommendation. Transcript of Proceedings Before the Honorable Leigh Martin May, United States District Judge, at 35-36. (“That’s a distinction without difference, your honor, whether you call it recommended decision or an initial decision.”) (excerpt attached as **Exhibit B**). Counsel for the Commission again repeated this argument in the closing argument before Judge May:

Just one final point about what the A.P.A. does and what the Attorney General's manual said. We submit that the – Your Honor look at the A.P.A. -- the Attorney General's manual and A.P.A. to read the actual meaning, because we disagree with the characterization. And the A.P.A. manual actually is quite clear talking about an agency can decide to have either initial decision or recommended decision, but the agency's not bound by either. **And it's just talking about initial decision and recommended decision as alternatives of the same thing.** So -- and that's clear under the language of the Attorney General's manual. I think that covers all of the points that I have, Your Honor.

*Id.*, at 82-83 (emphasis added) (excerpt attached as **Exhibit C**).

Most troubling, ALJ Elliot himself appears to believe that his decisions simply become a nullity when they are appealed. *See In re Bebo*, SEC Release No. 2510, note 2 (April 7, 2015) (stating that “upon the filing of a petition for review, or if a majority of Commissioners do not agree to a disposition, an initial decision becomes a nullity.”) (Attached as **Exhibit D**). ALJ Elliot’s view that his decisions simply become a nullity upon appeal may well explain the many errors in his Initial Decision because he did not appreciate his true role, which the Commission describes on its website as an “independent judicial officers.” *See* Respondents’ September 10, 2014 Petition for Review (identifying numerous errors in ALJ Elliot’s decision).

While these views of the Commission’s representatives are incorrect as a technical matter, they nevertheless appear to be genuinely held beliefs, and the view of ALJ Elliot that his

decisions become a nullity upon appeal infects the reliability and credibility of his Initial Decision. If an adjudicator believes that their opinions will be of no consequence if an adversely affected party simply appeals, there is a substantial risk that the adjudicator will not give the opinion the same level of carefulness or attention that they would knowing the opinion will have an impact on the parties. Without disclosure of these beliefs held by Commission representatives that the decision is merely a recommendation and that it becomes a nullity upon appeal, the continued publication of the Initial Decision is misleading. It should either be removed or, at a minimum, accompanied with an appropriate disclaimer.

The Commission and the Division may argue that an SEC's ALJ's role is limited to a recommendation, but to the outside world—as recognized by Judge Berman and Judge May in finding that SEC ALJs are inferior officers—an SEC ALJ's Initial Decision does not appear to be limited as the SEC and the Division suggest. Indeed, the Commission holds out its ALJs as “independent judicial officers who ... conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the federal district courts.” About the Office, Office of Administrative Law Judges, available at <http://www.sec.gov/alj>.

The Commission is continuously publishing the Initial Decision issued by ALJ Elliot in this case on its website for the whole world to access and the Initial Decision contains no disclaimer that a federal district court has found its ALJs to be improperly appointed under the Constitution. It also fails to disclose that the staff and ALJ believe that, upon the filing of a petition for review, the Decision is "null and void" or a “nullity.” It is inaccurate for the Commission to continue the publication of the Initial Decision in this matter without at least some form of disclaimer informing the general public that a federal district court has determined the decision is a product of an ALJ lacking constitutional authority. It is also inaccurate to fail to

disclose the staff's own view that the initial decision is merely a recommendation and "null and void" or the ALJ's view that it is a "nullity." The Commission frequently files cases based on analogous inconsistencies between public statements and internally held views or knowledge. *See, e.g., SEC v. Imaging3, Inc., et al.*, Case No. 2:13-cv-04616 (Dkt. No. 28) (July 25, 2014) (company charged and settled based on public statements inconsistent with its knowledge of FDA positions); *see also* Speech by Andrew Ceresney, "FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry," available at [http://www.sec.gov/news/speech/2015-spch030315ajc.html#\\_ftnref19](http://www.sec.gov/news/speech/2015-spch030315ajc.html#_ftnref19).

Respondents are suffering harm from the continued publication of ALJ Elliot's Initial Decision on the Commission's website without any indication that the Initial Decision is now merely a recommendation, a "nullity," or "null and void." As one example of such harm, Respondents were sued by AT&T and the allegations set forth in AT&T's complaint relies almost entirely on ALJ Elliot's Initial Decision. In fact, ALJ Elliot's Initial Decision is attached as Exhibit A to AT&T's complaint.

For the foregoing reasons, Respondents request that the Commission remove from its website ALJ Elliot's Initial Decision in this matter or, in the alternative, label the Initial Decision as "null and void."

This 24<sup>th</sup> day of August, 2015.



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*Counsel for Respondents*

*Counsel for Respondents*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a copy of the foregoing upon counsel of record in this matter by causing same to be delivered to the following as indicated below.

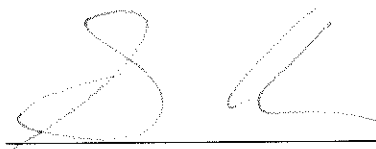
Via Facsimile (202) 772-9324  
and Overnight Delivery

Secretary Brent J. Fields  
Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E. Mail Stop 1090  
Washington, DC 20549  
*(original and three copies)*

Via Email and UPS

Robert K. Gordon  
Anthony J. Winter  
U.S. Securities and Exchange Commission  
950 East Paces Ferry Road, NE  
Suite 900  
Atlanta, Georgia 30236-1382  
GordonR@sec.gov  
WinterA@sec.gov

This 24th day of August, 2015.



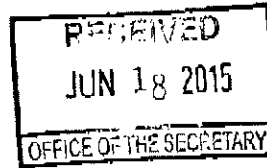
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George Kostolampros



## **EXHIBIT A**

3-15519



Page 1

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

ORAL ARGUMENT ON CROSS-PETITIONS OF TIMBERVEST, LLC,  
JOEL BARTH SHAPIRO, WALTER WILLIAM ANTHONY BODEN, III,  
DONALD DAVID ZELL, JR., AND GORDON JONES, II

Monday, June 8, 2015

1:03 p.m.

 ORIGINAL

Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C.

Diversified Reporting Service, Inc.  
(202) 467-9200

1 from the PCAOB.

2 But even apart from these important statements  
3 by the court, removal restrictions on ALJs do not create  
4 a separation of powers problem because SEC ALJs are not  
5 officers under the Constitution, and they're not officers  
6 because they do not exercise significant authority  
7 pursuant to the laws of the United States.

8 In the Landry case, the courts held that ALJs  
9 at the FDIC are agency employees and not inferior  
10 officers because they issue only recommended decisions  
11 and not final decisions for the agency. There's no basis  
12 for reaching a different result here for SEC ALJs.

13 First, SEC ALJs like FDIC ALJs issue only  
14 initial decisions and do not perform any final actions  
15 for the Commission. Second, the Commission exercises  
16 complete control over administrative proceedings. And  
17 third, the Commission does not even have to use ALJs.

18 To elaborate briefly on each of these points,  
19 on the lack of finality, even when there is no appeal  
20 granted in a case, an ALJ's initial decision is not  
21 final, and it has no legal force unless and until the  
22 Commission issues an order of finality, specifying the  
23 date on which sanctions, if any, take effect.

24 Of course, in any proceeding, the filing of a  
25 petition for review immediately renders the initial

Page 36

1 decision null and void. In Fiscal Year 2014, 16  
2 petitions for review were timely filed, and all 16  
3 petitions were granted by the Commission.

4 On the second point, control by the Commission  
5 over administrative proceedings, there's complete control  
6 regardless of whether an ALJ is designated as the hearing  
7 officer. Even before the ALJ issues an initial decision  
8 that the Commission then reviews de novo, the Commission  
9 can grant interlocutory appeal or direct that the whole  
10 case be submitted to it for review.

11 And third, the Commission doesn't have to use  
12 ALJs either generally or for any particularly proceeding.

13 The flexibility written into the Commission's rules of  
14 practice, the Exchange Act, and the Administrative  
15 Procedure Act makes clear that the ALJ serves as an aid  
16 to the Commission. The Commission chooses to use an ALJ  
17 only when the Commission decides that it will be useful  
18 and the Commission can discontinue using an ALJ for any  
19 function at any time.

20 And so for these reasons the Commission should  
21 conclude as the Landry court did for the FDIC that its  
22 ALJs are not inferior officers.

23 Respondents try to distinguish Landry on the  
24 theory that FDIC ALJs were supposedly subject to greater  
25 oversight by the FDIC board, specifically that all the

## **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

TIMBERVEST, LLC, ET AL.,	)	
	)	
PLAINTIFFS,	)	
	)	
VS.	)	
	)	DOCKET NUMBER
SECURITIES AND EXCHANGE	)	1:15-CV-2106-LMM
COMMISSION,	)	
	)	ATLANTA, GEORGIA
DEFENDANT.	)	JULY 13, 2015
	)	
	)	
	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LEIGH MARTIN MAY,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	STEPHEN COUNCILL & THOMAS MEW ROGERS & HARDIN, LLP ATLANTA, GEORGIA 30303
	GEORGE KOSTOLAMPROS DENTONS WASHINGTON, DC 20006
FOR THE DEFENDANT:	JEAN LIN UNITED STATES DEPART OF JUSTICE WASHINGTON, DC 20530

*MECHANICAL STENOGRAPHY OF PROCEEDINGS  
AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY*

OFFICIAL COURT REPORTER:	MONTRELL VANN, RPR, RMR, CRR 2160 UNITED STATES COURTHOUSE 75 SPRING STREET, SOUTHWEST ATLANTA, GEORGIA 30303 (404)215-1549
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1 WHETHER THE CLAIM WAS CONSTITUTIONAL OR STATUTORY, OR IN THAT  
2 CASE I BELIEVE IT WAS WHETHER IT WAS AN A.P.A. CASE. BUT WHAT  
3 IT STANDS FOR, WHICH HAS BEEN APPLIED BY NUMEROUS COURTS, IS THE  
4 IDEA THAT WE'RE CITING HERE FOR, ABOUT THE VERY QUESTION OF  
5 BEING SUBJECTED TO THE ADMINISTRATIVE PROCESS OR AN ENFORCEMENT  
6 PROCESS, THAT BY ITSELF CAN CONSTITUTE THE IRREPARABLE INJURY  
7 WHEN IT'S EXPENSIVE, WHEN IT'S NOT RECOUPABLE COST. SO FOR THAT  
8 REASON WE SUBMIT THAT THE FACT THAT STANDARD OIL DOESN'T INVOLVE  
9 A CONSTITUTIONAL CLAIM HAS NOTHING TO DO WITH WHAT WE'RE CITING  
10 IT FOR.

11 THE COURT: OKAY. I THINK THOSE WERE ALL THE  
12 QUESTIONS I HAVE ABOUT THE JURISDICTIONAL ISSUE, SO I THINK WITH  
13 THAT WE CAN MOVE ON TO THE INFERIOR OFFICER EMPLOYEE PART, IF  
14 YOU WANTED TO, OR IF YOU DIDN'T HAVE ANYTHING NEW TO ADD, I DID  
15 HAVE A COUPLE OF QUESTIONS, AND MAYBE I'LL JUST START WITH THAT.  
16 THERE WAS AN ARGUMENT IN THE PLAINTIFF'S BRIEF IN THIS CASE THAT  
17 TALKED ABOUT THE LANDRY CASE. AND I THINK IT DISTINGUISHED IT A  
18 LITTLE BIT DIFFERENTLY THAN THE GRAY PLAINTIFFS DID AND TALKED  
19 ABOUT HOW YOU CAN USE A.L.J.'S TO DO RECOMMENDED DECISIONS  
20 VERSUS INITIAL DECISIONS AND HOW THE A.L.J.'S THAT THE S.E.C.  
21 APPOINTS ARE DOING MORE BECAUSE THEY'RE DOING THE INITIAL  
22 DECISIONS INSTEAD OF THE RECOMMENDED DECISIONS, AND DIDN'T KNOW  
23 IF YOU WANTED TO ADDRESS THAT POINT.

24 MS. LIN: YES, YOUR HONOR. THAT'S A DISTINCTION  
25 WITHOUT DIFFERENCE, YOUR HONOR, WHETHER YOU CALL IT RECOMMENDED

1 DECISION OR AN INITIAL DECISION. THE F.D.I.C. A.L.J. FRAMEWORK  
2 AND THE S.E.C. A.L.J. FRAMEWORK -- A.L.J. FRAMEWORK ARE  
3 VIRTUALLY IDENTICAL IN ALL RESPECTS. THEY ISSUE DECISIONS THAT  
4 ARE SUBJECT TO THE APPROVAL OF THE RESPECTIVE HIGHER AGENCY  
5 AUTHORITY. THOSE REVIEWS WERE DE NOVO. THEY -- BOTH AGENCY  
6 AUTHORITIES, THE F.D.I.C. BOARD, THE COMMISSION HAS PLENARY  
7 AUTHORITY OVER ALL ASPECTS OF WHAT THE A.L.J. DOES IN THE  
8 F.D.I.C. CONTEXT, AS WELL AS IN THE S.E.C. CONTEXT. AND THE  
9 COMMISSION, AS WELL AS THE F.D.I.C. BOARD, IS NOT BOUND BY  
10 ANYTHING THAT THE A.L.J. DECIDES. SO IN THAT RESPECT THEY'RE  
11 IDENTICAL.

12 IN TERMS OF THE REVIEW OF ISSUES, THEY'RE ALSO IDENTICAL.  
13 IN THE F.D.I.C. CONTEXT, THEY REVIEW ISSUES THAT THE PARTIES  
14 PETITION OR THAT THE F.D.I.C. BOARD DECIDES TO HEAR. THE SAME  
15 THING IS TRUE IN THE S.E.C. CONTEXT. THE S.E.C. HEARS ISSUES  
16 THAT THE PARTIES PETITION OR THAT THE COMMISSION DECIDES TO  
17 HEAR. SO WE HAVE EXACT PARALLEL BETWEEN THE TWO FRAMEWORKS.  
18 AND SO WHETHER YOU CALL IT RECOMMENDED DECISION MAKES NO  
19 DIFFERENCE, BECAUSE IN LANDRY ITSELF, EVEN THE D.C. CIRCUIT HAS  
20 SAID IN THAT CASE THE F.D.I.C. BOARD JUST ADOPTED THE FACTUAL  
21 FINDINGS AND CONCLUSIONS OF LAW OF THE F.D.I.C. A.L.J. AND SO,  
22 YES, THE COMMISSION -- SORRY -- THE F.D.I.C. BOARD THERE  
23 REVIEWED DE NOVO AND THEN MAKES THAT CONCLUSION. SO THAT IS NO  
24 DIFFERENT FROM HOW THE S.E.C. A.L.J. FRAMEWORK OPERATES.

25 THE COURT: WELL, WHY DOES THE A.P.A. MAKE AGENCIES



## **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

TIMBERVEST, LLC, ET AL.,	)	
	)	
PLAINTIFFS,	)	
	)	
VS.	)	
	)	DOCKET NUMBER
SECURITIES AND EXCHANGE	)	1:15-CV-2106-LMM
COMMISSION,	)	
	)	ATLANTA, GEORGIA
DEFENDANT.	)	JULY 13, 2015
	)	
	)	
	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LEIGH MARTIN MAY,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	STEPHEN COUNCILL & THOMAS MEW ROGERS & HARDIN, LLP ATLANTA, GEORGIA 30303
	GEORGE KOSTOLAMPROS DENTONS WASHINGTON, DC 20006
FOR THE DEFENDANT:	JEAN LIN UNITED STATES DEPART OF JUSTICE WASHINGTON, DC 20530

*MECHANICAL STENOGRAPHY OF PROCEEDINGS  
AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY*

OFFICIAL COURT REPORTER:	MONTRELL VANN, RPR, RMR, CRR 2160 UNITED STATES COURTHOUSE 75 SPRING STREET, SOUTHWEST ATLANTA, GEORGIA 30303 (404)215-1549
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1 OBVIOUSLY WOULD ONLY FOLLOW IF THIS COURT DOES FIND THAT IT DOES  
2 HAVE JURISDICTION. BUT IF THE COURT DOES HAVE JURISDICTION,  
3 THEN THE IDEA ABOUT THE HARM TO THE S.E.C. IS THIS. THE S.E.C.  
4 HAS AN ESTABLISHED PROCESS ABOUT TRANSPARENCY, ABOUT POSTING --  
5 AND AS PART OF THAT TRANSPARENCY PROCESS, IT POSTS THE INITIAL  
6 DECISION OF THE A.L.J. WHAT THE PLAINTIFFS ARE ASKING THIS  
7 COURT TO DO IS, FOR THEIR CASE ONLY, THAT THE COMMISSION  
8 DEVIATES FROM THAT PROCESS OF TRANSPARENCY, AND WE THINK THAT IS  
9 AGAINST THE INTEREST OF S.E.C., AS WELL AS THE PUBLIC.

10 AND I JUST WANT TO ADDRESS A VERY SMALL POINT, BUT I  
11 THOUGHT IT RELEVANT BECAUSE I WAS COUNSEL IN THE SPRING HILL  
12 CASE. THERE WAS A SUGGESTION THAT SOMEHOW SPRING HILL -- THE  
13 SPRING HILL CASE IS HIGHLY DIFFERENT BECAUSE IT WAS TALKING  
14 ABOUT THE HARM OF WHAT HAPPENS IF THE S.E.C. BRINGS AN  
15 ENFORCEMENT ACTION IN THE FEDERAL DISTRICT COURT AS OPPOSED TO  
16 THE ADMINISTRATIVE PROCEEDING AND HOW THE HARMS WILL BE THE  
17 SAME. THE PRECISE RELIEF REQUESTED IN SPRING HILL IS VERY  
18 SIMILAR TO WHAT'S BEING REQUESTED HERE. IN SPRING HILL, THE  
19 PLAINTIFF WAS TRYING TO STOP THE A.L.J. FROM ISSUING ITS INITIAL  
20 DECISION. AND ONE PART OF THIS CASE IS, TOO, TRYING TO STOP THE  
21 COMMISSION FROM ISSUING THE FINAL DECISION OR THE ASSOCIATED  
22 SANCTIONS THAT COULD BE IMPOSED.

23 JUST ONE FINAL POINT ABOUT WHAT THE A.P.A. DOES AND WHAT  
24 THE ATTORNEY GENERAL'S MANUAL SAID. WE SUBMIT THAT THE -- YOUR  
25 HONOR LOOK AT THE A.P.A. -- THE ATTORNEY GENERAL'S MANUAL AND

1 A.P.A. TO READ THE ACTUAL MEANING, BECAUSE WE DISAGREE WITH THE  
2 CHARACTERIZATION. AND THE A.P.A. MANUAL ACTUALLY IS QUITE CLEAR  
3 TALKING ABOUT AN AGENCY CAN DECIDE TO HAVE EITHER INITIAL  
4 DECISION OR RECOMMENDED DECISION, BUT THE AGENCY'S NOT BOUND BY  
5 EITHER. AND IT'S JUST TALKING ABOUT INITIAL DECISION AND  
6 RECOMMENDED DECISION AS ALTERNATIVES OF THE SAME THING. SO --  
7 AND THAT'S CLEAR UNDER THE LANGUAGE OF THE ATTORNEY GENERAL'S  
8 MANUAL. I THINK THAT COVERS ALL OF THE POINTS THAT I HAVE, YOUR  
9 HONOR. UNLESS YOU HAVE OTHER QUESTIONS, WE REST ON THE PAPERS.

10 THE COURT: OKAY. THANK YOU VERY MUCH. I DON'T HAVE  
11 ANY OTHER QUESTIONS RIGHT NOW.

12 MS. LIN: THANK YOU.

13 THE COURT: THANK YOU.

14 MS. LIN: OKAY.

15 MR. COUNCILL: SO, YOUR HONOR, I'LL JUST TRY TO BE  
16 REAL BRIEF. THE POINT ABOUT THE INITIAL DECISION CAUSING THE  
17 HARM THAT IT CAUSED WHEN IT CAME OUT, IS TRUE. WE DON'T  
18 DISAGREE. WE'RE NOT DISPUTING THAT THAT CAUSED HARM, BUT IT  
19 MISSES THE POINT THAT WE'RE TALKING ABOUT, WHICH IS IT CONTINUES  
20 TO CAUSE HARM EVERY DAY. AND ALL WE'RE ASKING FOR IS A WAY TO  
21 ADDRESS THAT IN THE LEAST INVASIVE WAY. AND I THINK THE RELIEF  
22 THAT WE'VE ASKED FOR DOES THAT. OBVIOUSLY IF THE COURT IS  
23 CONCERNED THAT IT GOES TOO FAR, WE'D BE WILLING TO PROPOSE  
24 ALTERNATIVES. BUT WE THINK THAT IF WE GET THE RELIEF THAT WE'RE  
25 ASKING FOR, IT WOULD HAVE CONSIDERABLE POSITIVE EFFECT IN

## **EXHIBIT D**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 2510 / April 7, 2015

ADMINISTRATIVE PROCEEDING  
File No. 3-16293

In the Matter of

LAURIE BEBO and  
JOHN BUONO, CPA

ORDER ON RESPONDENT'S MOTION  
FOR DECLARATORY AND INJUNCTIVE  
RELIEF FOR CONSTITUTIONAL  
VIOLATIONS AND REQUEST FOR LEAVE  
TO FILE OVERLENGTH MOTION

The Securities and Exchange Commission (Commission) commenced this proceeding on December 3, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Securities Exchange Act of 1934 (Exchange Act) Sections 4C and 21C and Commission Rule of Practice 102(e).<sup>1</sup> The hearing in this proceeding is set to commence on April 20, 2015, in Milwaukee, WI.

On January 12, 2015, the parties filed a joint proposed prehearing schedule, which included a request by Respondent Laurie Bebo (Bebo) to file a motion for summary disposition. *Laurie Bebo*, Admin. Proc. Rulings Release No. 2208, 2015 SEC LEXIS 115 (Jan. 12, 2015). I ordered the filing of motions for summary disposition by February 6, 2015, and of motions in limine by April 3, 2015. *Id.* Neither Bebo nor the Division of Enforcement filed motions for summary disposition. However, on April 6, 2015, this Office received Bebo's overlength Motion for Declaratory and Injunctive Relief for Constitutional Violations (Motion), accompanied by her Request for Leave to File a Motion in Excess of 7,000 Words Pursuant to Commission Rule of Practice 154(c) (Request).

Because the Motion seeks dismissal of this proceeding, it is construed as a motion for summary disposition. It is therefore untimely, although Bebo's arguments may be renewed post-hearing.<sup>2</sup>

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<sup>1</sup> The proceeding has ended as to Respondent John Buono, CPA (Buono). *Laurie Bebo*, Exchange Act Release No. 74177, 2015 SEC LEXIS 347 (Jan. 29, 2015).

<sup>2</sup> Although I have not otherwise reached its merits, one assertion in the Motion warrants discussion. Bebo asserts that "unlike FDIC ALJs, [Commission] ALJs can issue final decisions under certain circumstances." Motion at 31 n.10 (citing *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)). To be sure, under the Administrative Procedure Act of 1946, when no party timely petitions for review and the Commission does not timely order review on its own initiative, an initial decision "becomes the decision of the agency without further proceedings." 5 U.S.C. §

It is therefore ORDERED that Bebo's Motion for Declaratory and Injunctive Relief for Constitutional Violations is DENIED WITHOUT PREJUDICE to Bebo's raising these issues in post-hearing filings.

It is FURTHER ORDERED that Bebo's Request for Leave to File a Motion in Excess of 7,000 Words Pursuant to Commission Rule of Practice 154(c) is DENIED as moot.

---

Cameron Elliot  
Administrative Law Judge

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557(b). This provision applies with equal force to the FDIC, as in *Landry*, and to the Commission, and so does not distinguish FDIC ALJs from Commission ALJs. More to the point, an initial decision that becomes "the decision of the agency" only through inaction does not thereby become legally enforceable. The FDIC Board must first issue that agency's "final decision." 12 C.F.R. § 308.40(c); see 12 U.S.C. § 1818(i) (permitting FDIC to seek enforcement only of "any effective and outstanding notice or order" in U.S. District Court). Similarly, the Commission must first "issue an order that the [ALJ's initial] decision has become final," which "order of finality shall state the date on which sanctions, if any, take effect." 17 C.F.R. § 201.360(d)(2); see *Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 WL 6173809, at \*2 (Oct. 17, 2013) (discontinuing the former practice of "default orders" issued by Commission ALJs); 17 C.F.R. § 201.601(a) (disgorgement and civil penalties "due pursuant to an order by a hearing officer shall be paid in accordance with the order of finality issued pursuant to 17 C.F.R. § 201.360(d)(2)"). Indeed, upon the filing of a petition for review, or if a majority of Commissioners do not agree to a disposition, an initial decision becomes a nullity. 17 C.F.R. § 201.411(a), (f); see *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at \*9 n.44, \*11 (Feb. 13, 2009) (noting Commission's *de novo* review), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 WL 281105, at \*10 n.42 (Jan. 31, 2008) ("The law judge's opinion ceased to have any force or effect once [petitioner] filed his petition for review."), *pet. denied*, 573 F.3d 801 (D.C. Cir. 2009). If in the end Bebo is dissatisfied with the initial decision in this proceeding, she may unilaterally render it null and void by the simple expedient of filing a petition for review of it.