IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES *ex rel.* LANDIS, Plaintiff - Appellant, v. TAILWIND SPORTS CORP. AND JOHAN BRUYNEEL, Defendants - Appellees.	)	Civil Action No. 18-7143

APPELLANT FLOYD LANDIS' MOTION TO DISMISS AND FOR ORDER DIRECTING THE UNITED STATES TO PROVIDE A CONSENT TO DISMISSAL BY THE PROPERLY AUTHORIZED ATTORNEY GENERAL OF THE UNITED STATES

Paul D. Scott, Bar. No. 41985
pdscott@lopds.com
Lani Anne Remick
(motion to be admitted pending)
laremick@lopds.com
LAW OFFICES OF PAUL D. SCOTT, P.C.
435 Pacific Avenue, Suite 200
San Francisco, California 94133
Tel: (415) 981-1212
Fax: (415) 981-1215
Attorneys for Appellant Floyd Landis

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I. INTRODUCTION

Appellant Floyd Landis hereby moves this Court for dismissal of his appeal and directing the United States Department of Justice ("DOJ") to advise the Court whether it consents. Counsel for the United States and appellant have reached a written settlement which requires appellant to dismiss this False Claims Act appeal and for the United States to give its consent to dismissal. *See* Settlement Agreement, Ex. 1 at ¶¶ 2 & 3. In addition, the United States took the position below that, pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(1), written consent of the Attorney General is also independently required in order to voluntarily dismiss a case under the Act, and the District Court agreed with that position. *United States ex rel. Landis v. Tailwind Corp.*, No. 1:10-cv-00976-CRC (D.D.C.), ECF 306 & 309. Here, written consent was provided to appellant on November 20, 2018 by counsel of record on DOJ's Civil Appellate Staff.[1] *See* Email from DOJ to Scott, Ex. 2. Shortly prior to that date, however, on November 7, 2018, while this appeal was pending, then-Attorney General Jefferson B. Sessions III resigned. Later that same day, the President appointed Sessions' Chief of Staff, Matthew Whitaker, as Acting Attorney General. *See* United States

[1] Litigation in which the United States is a party is "reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. §516.

Department of Justice, Office of Legal Counsel, Memorandum Re: Designating an Acting Attorney General (November 14, 2018) at 1, available at https://www.justice.gov/olc/file/1112251/download ("2018 OLC Memo"). After reviewing legal challenges to Mr. Whitaker's appointment, appellant has concluded that the appointment is invalid and unconstitutional, and by operation of law Deputy Attorney General Rod J. Rosenstein is the current Acting Attorney General, which undermines the validity of the consent to dismissal provided by the Department of Justice. Accordingly, appellant asks for a determination a) holding that the appointment of Mr. Whitaker as Acting Attorney General is invalid and that Mr. Rosenstein is, in fact, the Acting Attorney General; and b) directing Mr. Rosenstein, or the person to whom he has delegated his authority as Acting Attorney General, to advise the Court whether DOJ consents to the voluntary dismissal of this appeal pursuant to the Settlement Agreement.

II. ARGUMENT

A. Pursuant to the AG Succession Act, Rod Rosenstein Is the Acting Attorney General.

The Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not

herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." U.S. Const. art. II, § 2, cl. 2. The clause thus distinguishes between two types of officers for purposes of Presidential appointments: "inferior" officers, who may be appointed by the President, and "principal" officers, who must be confirmed by the Senate. *See United States v. Germaine*, 99 U.S. 508, 509, 511, 25 S. Ct. 482 (1879); *Edmond v. United States*, 520 U.S. 651, 660-63 (1997). There are currently more than 1200 principal officers who can only be appointed by the President, subject to the advice and consent of the Senate. *See* Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress* 7 & n.21 (2012). It is beyond dispute here that the Attorney General is a principal officer. 2018 OLC Memo at 1 ("[A]n Attorney General is a principal officer requiring Senate confirmation . . . .").

Anticipating that there would at times be vacancies in offices requiring Presidential appointment and Senate confirmation, Congress enacted various statutes delineating how such vacancies are to be filled. One such statute, first enacted in 1868, broadly deals with such offices generally. *See* Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3359d (hereinafter "Vacancies Act"). In the case of

a few critical and essential offices, however, Congress instead enacted specific statutes directing how a vacancy in that particular office is to be filled. *See, e.g.*, 10 U.S.C. § 132(b) (Secretary of Defense); 10 U.S.C. § 154(d) (Chairman of Joint Chiefs of Staff); 50 U.S.C. § 3026(a) (Director of National Intelligence); 50 U.S.C. § 3037(b)(2) (Director of CIA).

Of relevance here, the office of the Attorney General has its own, specific succession statute. *See* 28 U.S.C. § 508. This statute, originally passed in 1870 when the Department of Justice was created, has always contained mandatory language regarding the order of succession for the office of Attorney General[2] and has never provided for the President to deviate from such succession.[3] The Act currently provides as follows:

[2] The statute initially stated that, in the case of a vacancy in the office, or if the Attorney General was disabled or not available, the Solicitor General was to serve as Acting Attorney General. Act of July 20, 1870, ch. 150, § 2, 16 Stat. 162, 162, available at https://www.justice.gov/sites/default/files/jmd/legacy/2013/10/23/act-pl41-97.pdf. Over time, Congress modified the line of succession to name other (Senate-confirmed) successors, but the language remained mandatory. *See* Reorganization Plan No. 4 of 1953, Pub. L. No. 83-288, 67 Stat. 636, 636 (Solicitor General replaced by Deputy Attorney General as successor), available at https://www.gpo.gov/fdsys/pkg/STATUTE-67/pdf/STATUTE-67-Pg636.pdf; Pub. L. No. 95-139, 91 Stat. 1171, 1171 (1977) (creating Senate-confirmed position of Associate Attorney General and adding to line of succession), available at https://www.gpo.gov/fdsys/pkg/STATUTE-91/pdf/STATUTE-91-Pg1171.pdf. These laws are collectively referenced herein as the "AG Succession Act."

[3] *See id.* By contrast, certain other office-specific succession acts identify a default acting successor, but explicitly provide an option for the President to

> (a) *In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office,* and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

28 U.S.C. § 508 (emphasis added). Thus, the statute provides a plan for succession to the Deputy Attorney General and, if that person is unavailable, to the Associate Attorney General, with the Solicitor General and Assistant Attorneys General as additional possible successors. *Id.* Importantly, like the Attorney General, all of the officers named in the AG Succession Act as possible successors to the Attorney General also hold offices that are within DOJ and require Senate confirmation. *See* 28 U.S.C. §§ 504-506. In sum, the Act protects the critically important office of the Attorney General by ensuring that succession will occur automatically and that

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appoint someone else instead. *See, e.g.*, 38 U.S.C. § 304 (Deputy Secretary succeeds as Acting Secretary of Veterans Affairs "unless the President designates another officer of the Government"); 40 U.S.C. § 302(b) (in the event of vacancy, Deputy Administrator to be Acting Administrator of General Services "unless the President designates another officer of the Federal Government"); 42 U.S.C. § 902(b)(4) (in case of vacancy, Deputy Commissioner to be Acting Commissioner of Social Security "unless the President designates another officer of the Government as Acting Commissioner").

the successor will be a defined person, within the DOJ, who was appointed with the advice and consent of the Senate.

The current Deputy Attorney General is Rod J. Rosenstein. Accordingly, pursuant to the AG Succession Act, upon Mr. Sessions' resignation, Deputy Attorney General Rosenstein, by operation of law, became the Acting Attorney General.

B. The President's Putative Appointment of Matthew Whitaker Pursuant To the Vacancies Act Is Unlawful, As the AG Succession Act Governs the Appointment As a Matter of Statutory Construction.

1. The Specific AG Succession Act Takes Precedence Over the General Vacancies Act.

Notwithstanding the mandatory provisions of the AG Succession Act, the President has taken the unprecedented step of relying on the Vacancies Act to "appoint" Matthew Whitaker as Acting Attorney General. The Vacancies Act is a catch-all statute that is not specific to any particular office but rather by its terms applies "If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). Similar to the AG Succession Act, the Vacancies Act provides that, in the event of a vacancy, the "first assistant" to an officer may

perform the functions and duties of the office; this assignment of duties takes place by operation of law, without the need for any appointment. 5 U.S.C. § 3345(a)(1).

After this, however, the Vacancies Act diverges from the AG Succession Act. Specifically, it provides that, as an alternative to the "first assistant" automatically succeeding to the duties of the office, the President may appoint someone. That person must be either a person previously appointed with the advice and consent of the Senate (but not necessarily in the same Executive Agency), 5 U.S.C. § 3345(a)(2), or, a person from the same Executive Agency with at least 90 days on the job and a rate of pay equal to or greater than a GS-15 level employee (but not necessarily Senate-confirmed). 5 U.S.C. § 3345(a)(3). Moreover, the Vacancies Act imposes time limitations on how long any person appointed pursuant to that Act may serve in an acting capacity, 5 U.S.C. § 3346, whereas the AG Succession Act has no time limits. Finally, the Vacancies Act provides for no further automatic succession mechanism if the "first assistant" is unavailable, but simply provides that the office would remain vacant unless the President appoints someone. 5 U.S.C. § 3348(b).

Mr. Whitaker was formerly Chief of Staff to then-Attorney General Jeff Sessions, a position that does not require the advice and consent of the Senate and is not mentioned in the AG Succession Act. 2018 OLC Memo at 3. Nevertheless,

the DOJ contends that he was properly appointed Acting Attorney General pursuant to section 3345(a)(3) of the Vacancies Act. *Id.*

The DOJ's conclusion is incorrect as a matter of statutory construction. As detailed below, the DOJ's conclusion is also unconstitutional; however, the Court can decide the issue on the basis of statutory interpretation and need not reach the constitutional issue.

First, it is a well-accepted principle of statutory construction that when the provisions of two statutes conflict, the more specific statute controls. *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) ("more specific" statute that "represents Congress' detailed judgment" and is "specifically crafted" for its purpose governs); *see also Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (citing *Bulova Watch Co. v. United States*, 365 U. S. 753, 365 U. S. 758 (1961)). Here it is clear that the two statutes conflict: pursuant to the AG Succession Act, when available the Senate-confirmed Deputy Attorney General is the only proper Acting Attorney General; pursuant to the Vacancies Act, the President could instead choose to appoint any other Senate-confirmed person, even from another agency, or could appoint someone not Senate-confirmed (like Matthew Whitaker). The AG Succession Act was specifically enacted by Congress to address vacancies

in the Office of the Attorney General for the manifest reason that this particular office is vital to one of the most central functions of government -- the enforcement of law, making it critical that only properly qualified individuals vetted and confirmed by the Senate be allowed to serve in that capacity. *See* Memorandum from Alberto R. Gonzalez, Counsel to the President, Re: Agency Reporting Requirements Under the Vacancies Reform Act (March 21, 2001) at n. 2 ("because 28 U.S.C. § 508 governs who shall act as Attorney General in the case of a vacancy, the Vacancies Reform Act does not apply to the position of Attorney General unless there is no official serving in any of the positions designated by section 508 to act as attorney general in the case of a vacancy."), available at https://www.nrc.gov/docs/ML0108/ML010860191.pdf.

As an indication of how imperative it is that a properly qualified person be available to serve, the AG Succession Act identifies multiple qualified successors to the Attorney General and implicitly precludes the appointment of non-Senate approved individuals who are unqualified. 28 U.S.C. § 508; *cf.* 1 Pub. Papers of Pres. George W. Bush 752 (2002) (Executive order allowing for the appointments of U.S. Attorneys under the Vacancies Act as Acting Attorney General if the individuals provided for under the AG Succession Act were unavailable), https://www.gpo.gov/fdsys/pkg/PPP-2002-book1/pdf/PPP-2002-book1-doc-pg752.pdf. Moreover, succession occurs automatically, without the need to wait

for an appointment process. The Vacancies Act, by contrast, as interpreted by the Government, could potentially allow the President to appoint any one of the thousands of GS-15 level DOJ employees[4] (including, conceivably, a person not licensed as an attorney) as Acting Attorney General. Alternatively, it would permit the President to leave the position vacant, if he did not act, terminated an interim appointee, or permitted the time limit on an appointment to expire. 5 U.S.C. § 3348(b).

2. The Vacancies Act Provides That the AG Succession Act Takes Precedence.

Consistent with the principle that more specific statutes govern general ones, the Vacancies Act explicitly acknowledges that other more specific statutes such as the AG Succession Act take precedence: the Vacancies Act states that it is the "exclusive" means to authorize an acting officer to perform the functions and duties of a Senate-confirmed office, "unless" another statute "expressly . . . (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or (B) designates an officer or employee

[4] FedScope Federal Human Resources Data, Employment Cubes (Mar. 2018), https://www.fedscope.opm.gov/employment.asp (Department of Justice March 2018 pay scale).

to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(A) & (B).

Here, the AG Succession Act does both. Consistent with section 3347(a)(1)(B), it specifically designates the (Senate-confirmed) Deputy Attorney General and then the (Senate-confirmed) Associate Attorney General as temporary "acting" successors to the Attorney General, 28 U.S.C. § 508(a) & (b). In addition, consistent with section 3347(a)(1)(A), the AG Succession Act provides for the Attorney General (*i.e.*, the head of the Department of Justice) to designate the (Senate-confirmed) Solicitor General and the Assistant Attorneys General "in further order of succession." 28 U.S.C. § 508(b). Thus, the AG Succession Act is precisely the sort of statute which the Vacancies Act explicitly acknowledges as superseding its own provisions.[5]

[5] The only instance where the AG Succession Act would not govern is the exceptional circumstance where none of the individuals listed in the Act are available to serve. In such a scenario, the Vacancies Act might conceivably govern, but only insofar as it permitted the appointment of a Senate-approved officer whose duties were "germane" to the operation of the U.S. Department of Justice. *See* discussion *infra* re *Weiss v. United States*, 510 U.S. 163, 173-175 (1994).

3. This Court Should Not Adopt the Government's Interpretation, Because It Conflicts with the AG Succession Act and Renders It Effectively Surplusage.

The Department of Justice posits that the language of section 3347(a) merely means that the Vacancies Act is not "exclusive." But where avoidable, one statute should not be interpreted in a manner that is in "positive repugnance" to another, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), nor should it be read to render another statute superfluous. *Id.* Here, the Vacancies Act's "exclusivity" provision should not be interpreted to give the President a "choice" between the two statutes, as that would be in "positive repugnance" to the AG Succession Act's mandate that only qualified, Senate-confirmed candidates from within DOJ serve as Acting Attorney General. Indeed, the implication of such a reading would mean that the President is also free to ignore all of the other critical office-specific succession statutes (such as those listed *supra*), rendering them effectively meaningless as well. Rather, section 3347(a)(1) should be read to mean that the AG Succession Act will govern in accordance with its terms, and only under the exigent circumstance of no other successor being available, as defined by the AG Succession Act, would the more general Vacancies Act apply, to the extent

constitutionally permissible. This reading gives effect to both Acts and avoids any positive repugnance between them.[7]

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[7] Indeed, the history of the two statutes indicates that the AG Succession Act has consistently been given precedence and that the Vacancies Act was never intended to grant the President authority to make appointments in violation of the AG Succession Act. When the Vacancies Act was codified in 1873, the Office of Attorney General was excluded from the purview of the Act. Rev. Stat. § 179 (1st ed. 1875); Act of June 20, 1874, ch. 333, 18 Stat. 113. Likewise, at the time both statutes were codified in 1966, the Vacancies Act explicitly excepted the Attorney General from the portion of the Act allowing the President to make appointments. *See* 5 U.S.C. § 3347 (1966), Pub. L. 89-554, 80 Stat. 378, 426, http://api.fdsys.gov/link?collection=statute&volume=80&page=426 (allowing the President to appoint another Senate-confirmed person as successor instead of the "first assistant," but explicitly stating that "This section does not apply to a vacancy in the Office of Attorney General."). At that same time, the Deputy Attorney General was the only officer named as an automatic successor in the AG Succession Act, which cross-referred to the provision of the Vacancies Act providing for automatic succession of the "first assistant" (which still applied to the Attorney General). 28 U.S.C. § 508(a) (1966), Pub. L. 89-554, 80 Stat. 378, 612 ("In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5, the Deputy Attorney General is the first assistant to the Attorney General."). Thus, the two Acts were consistent as to automatic succession and the President was expressly not permitted to make alternative appointments under the Vacancies Act.

Later, the specific exclusion of the Attorney General from the provision allowing Presidential appointments under the Vacancies Act was replaced by the more general language stating that the Vacancies Act did not exclude application of existing succession statutes applicable to offices of the Government. *See* discussion of 28 U.S.C. § 3347, *supra*. Thus, the Vacancies Act does not apply when the AG Succession Act (or a similar statute for another office) applies, and the AG Succession Act's cross-reference that the Deputy Attorney General is the "first assistant" for purposes of section 3345 is no longer necessary. This surplusage, however, would be a slender reed indeed upon which to conclude that, contrary to the situation for its entire previous history, the Vacancies Act now

C. The Government's Interpretation Should Be Rejected For It Raises Constitutional Questions That Appellant's Interpretation Avoids.

It is a "cardinal principle" of statutory interpretation that when one possible interpretation of a statute raises "a serious doubt" as to its constitutionality, a court will "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," and it will adopt that interpretation. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

It is not necessary for appellant to show that his view regarding the application of the Appointments Clause to this case is correct. It is enough that his interpretation merely raises "serious" constitutional questions, problems, or doubts, *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001), in which case the Court may adopt an interpretation of the relevant statutes that is "plausible" or "fairly possible." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010) (quotation marks omitted). As set forth in detail below, the appointment of Mr. Whitaker presents more than just a serious constitutional question; it appears to be in clear violation of the Appointments Clause. Accordingly, pursuant to the canon

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allows the President to make appointments in contravention of the AG Succession Act.

of constitutional avoidance, the application of the AG Succession Act should be treated as mandatory under the circumstances of this case.

1. The Appointments Clause Was Intended to Act as A Check on Executive Power.

As noted *supra*, the Appointments Clause vests the United States Senate with the authority and responsibility to provide its advice and consent on the appointment of principal officers nominated by the President to serve in the United States government. The Founders' purpose in including this provision was to provide a "check upon a spirit of favoritism in the President" and "to prevent the appointment of unfit characters from State prejudice, from family connection, [or] from personal attachment . . . ." The Federalist No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also Weiss v. United Stat*es, 510 U.S. 163, 185 (1994) (Souter, J., concurring) ("Hamilton's Federalist Papers writings contain the most thorough contemporary justification for the method of appointing principal officers that the Framers adopted.").

2. No Exigency Justifies the Appointment of Mr. Whitaker as Acting Attorney General.

It is undisputed that Mr. Whitaker has not been confirmed by the Senate to act as Attorney General. 2018 OLC Memo at 3. Accordingly, his appointment to take over the duties and responsibilities of that office violates the Appointments Clause, unless some exception exists. DOJ relies on *United States v. Eaton*, 169

U.S. 331, 343 (1898) in support of its position. In *Eaton*, however, the Supreme Court made clear that, while it is permissible for a principal office to be filled temporarily by a non-Senate approved person in circumstances of genuine "exigency" for "a limited time," such appointments are only permissible "under special and temporary conditions." Specifically, in that case, a consular officer stationed in Siam (now Thailand) became seriously ill, and it was impossible for a Senate-confirmed consul to travel to that distant location and take his place in a timely manner. *Id.* Accordingly, an "inferior officer," *i.e.*, an individual not confirmed by the Senate, temporarily took on the duties of Consul and was paid as such for those services. *Id.*

But as Justice Thomas correctly observed in *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring), "the structural protections of the Appointments Clause can[not] be avoided based on [the] trivial distinction[]" of an official merely being appointed in an "acting" capacity. There is "nothing 'special and temporary' about [such an] appointment." *Id.* (quoting *United States v. Eaton*, 169 U.S. 331, 343, 18 S.Ct. 374, 42 S.Ct. 767 (1898)); *cf.* United States Department of Justice, Office of Legal Counsel, Officers of the United States Within the Meaning of the Appointments Clause (April 16, 2007) at 112 ("[t]he less fleeting and more enduring it is (or is likely to be), the more likely it is to be a continuing seat of power and thus an office").

https://www.justice.gov/olc/file/477046/download. Likewise, here, there were no unforeseen exigent circumstances that would justify the appointment of Mr. Whitaker for 210 days, or very possibly longer, under the Vacancies Act. 5 U.S.C. § 3346(a), (b). To the contrary, the circumstances of the appointment were specifically created by the President. It is undisputed that then-Attorney General Sessions submitted his resignation "[a]t [the President's] request." 2018 OLC Memo at 4, n. 1. It is further undisputed that the President chose to appoint Mr. Whitaker, a non-Senate confirmed employee at the time of his appointment, while numerous Senate-confirmed officers were available to serve as Acting Attorney General, including Deputy Attorney General Rosenstein. *Id.* at 4. The appointment of Mr. Whitaker as Acting Attorney General thus does not fit within the exception described in *Eaton* and is in direct violation of the Appointments Clause.

3. Mr. Whitaker Does Not Qualify to Serve as Acting Attorney General Because He is Not a Senate-Confirmed Officer and Does Not Have Duties Germane to the Position of Attorney General Such That It Would Be Foreseeable He Would be Appointed to That Position.

Barring the special circumstances described in *Eaton*, the only scenario under which someone may, consistent with the Constitution, temporarily be appointed to act as a principal officer is when that individual has previously been approved by the Senate and where their existing duties are "germane" to the

additional duties they would undertake in the new principal office. *See Shoemaker v. United States*, 147 U. S. 282, 300-301 (1893) (in a case where Congress statutorily increased the powers of an office held by two officers, the Court held that since "the two persons whose eligibility is questioned were . . . officers of the United States who had been theretofore appointed by the president and confirmed by the senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them . . . , it was necessary that they should be again appointed by the president and confirmed by the senate"); *see also Weiss v. United States*, 510 U.S. 163, 173-175 (1994) (quoting *Shoemaker*).

The exception set forth in *Shoemaker* and *Weiss* has never been applied to a situation in which someone's duties were increased as a result of being appointed to a higher position in an acting capacity, much less to the position of Acting Attorney General. Even assuming it would apply to that office, however, it would still not apply to Mr. Whitaker. In the instant case, the AG Succession statute identifies a number of individuals who satisfy the criteria identified in *Shoemaker* and *Weiss*. For example, the Deputy Attorney General was appointed by the President and approved by the Senate, and he has responsibilities similar in scope to the Attorney General; he simply sits a step lower in the chain of command. *See* Organization, Mission & Functions Manual: Attorney General, Deputy And Associate, available at https://www.justice.gov/jmd/organization-mission-and-

functions-manual-attorney-general. As his position is also referenced in the AG Succession Act as first in the line of succession, 28 U.S.C. § 508, the Senate could reasonably be assumed to have anticipated him serving as Acting Attorney General when giving advice and consent on his nomination.

Mr. Whitaker, by contrast, fails to meet the criteria set forth in *Shoemaker* and *Weiss*, because he was not serving in an officer position with the consent of the Senate at the time of his appointment to the position of Acting Attorney General. Moreover, his former position as "Chief of Staff" does not even appear in the DOJ Organization Chart, https://www.justice.gov/agencies/chart, DOJ's Organization Missions and Functions Manual, or the AG Succession Act, so his former duties cannot realistically be described as genuinely "germane" to the day-to-day business for which the Senate-confirmed officers of the DOJ are responsible. *See* https://www.justice.gov/jmd/organization-mission-and-functions-manual; 28 U.S.C. § 508.

4. Historical Precedent Does Not Support the Appointment.

The 2018 OLC Memo references one occasion in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. 2018 OLC Memo at 2. This appointment however, was never contested or approved by the Supreme Court and thus may well have violated the Appointments Clause. In any event, at that time, the Department of Justice did not even exist. In 1870,

Congress created the DOJ and enacted the first AG Succession Act, P.L.41-97, 16 Stat. 162 (1870), and since that time, as the Government concedes, no President has ever sought to designate a non-Senate confirmed individual as Attorney General, nor has anyone other than an existing Senate-approved DOJ official served as Acting Attorney General. *See* 2018 OLC Memo at 2; Marty Lederman, *A Quick Primer on the Legality of Appointing Matthew Whitaker as "Acting" Attorney General, and Whitaker's Power to Influence the Russia Investigation*, Just Security (Nov. 8, 2018), bit.ly/2z5b47z.

5. Allegations of Conflict and Bias Enhance the Need for Senate Consent.

A central purpose of the advice and consent provision is "to curb Executive abuses of the appointment power." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017); *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) ("'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism'") (quoting Gordon Wood, The Creation of the American Republic 1776–1787, at 143 (1969)). There are presently credible public allegations that, *inter alia*, Mr. Whitaker was installed in power after expressing strong bias against an ongoing investigation of the President and that he has nonetheless declined to recuse himself from that matter. *See* Complaint by U.S. Senators Blumenthal, Whitehouse, and Hirono v. Matthew G. Whitaker and

Donald J. Trump, No. 1:18-cv-02664 (U.S.D.C. November 19, 2018) at par. 25, ECF 1. Under these circumstances, the potential for abuse of power by the Executive is as great as it could possibly be. Putting aside the question of whether the allegations are accurate, the very existence of the allegations underscores the immediate need for the designation of Mr. Whitaker as Acting Attorney General to be held invalid. Assuming the President continues to wish that Mr. Whitaker serve as his Attorney General, then he could nominate him to that position and the Senate could be afforded the opportunity to examine Mr. Whitaker's credentials and provide its advice and consent on his appointment. Only through this means can the fundamental objectives of the separation of powers doctrine be safeguarded by the Court.

III. CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court a) hold that the appointment of Mr. Whitaker as Acting Attorney General is invalid and that Mr. Rosenstein is, in fact, the Acting Attorney General; and b) direct Mr. Rosenstein, or the person to whom he has delegated his authority as Acting Attorney General, to advise the Court whether DOJ approves of the Settlement Agreement and the related voluntary dismissal of this appeal. In the alternative, if it is concluded that Mr. Whitaker was properly appointed as Acting Attorney General, appellant requests that his appeal be dismissed.

Dated: November 26, 2018

Respectfully submitted,

_____/s/_____

Paul D. Scott, Bar. No. 41985
pdscott@lopds.com
Lani Anne Remick
(motion to be admitted pending)
laremick@lopds.com
LAW OFFICES OF PAUL D. SCOTT, P.C.
435 Pacific Avenue, Suite 200
San Francisco, California 94133
Tel: (415) 981-1212
Fax: (415) 981-1215
Attorneys for Appellant Floyd Landis

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2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word's Times New Roman 14-point font.

Dated: November 26, 2018

By: _____/s/_____
Paul D. Scott, Esq.
Attorney for Appellant Floyd Landis

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November 2018, I electronically filed the foregoing document in this matter with the Clerk of Court using the CM/ECF system to serve the following individuals:

Mr. Blair Gerard Brown: bbrown@zuckerman.com
Ms. Rebecca Anne Worthington: rebecca.worthington@squirepb.com
Ms. Melissa Patterson: melissa.patterson@usdoj.gov
Mr. Charles Scarborough: charles.scarborough@usdoj.gov

and that I further caused a copy of the foregoing document to be served upon defendant Johan Bruyneel by sending a copy to Johan Bruyneel's last known counsel of record by first-class mail to:

Thomas E. Zeno
SQUIRE PATTON BOGGS
2550 M Street, NW
Washington, DC 20037-1350

and by email to Johan Bruyneel's last known counsel Mike Morgan in the United Kingdom at: mike.morgan@morgansl.com

and to be served on Tailwind Sports Corporation by first-class mail at:

Tailwind Sports Corporation
c/o State of Delaware, Secretary of State Jeffery W. Bullock
Delaware Division of Corporations
ATTN: Service of Process
401 Federal Street, Suite 4
Dover, DE 19901

Dated: November 26, 2018

/s/
Paul D. Scott

EXHIBIT 1

SETTLEMENT AGREEMENT

Parties

This Agreement is entered by and between the United States of America, acting through the United States Department of Justice and the United States Attorney's Office of the District of Columbia, and Floyd Landis ("the Relator"). As a preamble to this Agreement, the United States and the Relator state:

Preamble

WHEREAS, a Second Amended Complaint was filed by the Relator, on behalf of the United States, in the U.S. District Court for the District of Columbia pursuant to 31 U.S.C. § 3730, *United States ex rel. Landis v. Tailwind Sports Corp., et al.*, Civil Action No. 1:10-cv-00976-CRC (D.D.C.) (the "Civil Action");

WHEREAS, the United States intervened and filed a Complaint in the Civil Action;

WHEREAS, on August 22, 2018, the U.S. District Court for the District of Columbia entered default judgment in favor of the United States and Relator against Defendant Johan Bruyneel and Tailwind Sports Corporation for $369,000 in civil penalties under the False Claims Act, 31 U.S.C. 3729, *et seq.* (the "Penalties Judgment"); and further in favor of the United States against Defendant Johan Bruyneel in the amount of $1,228,700 on the United States' claim for unjust enrichment (the "Unjust Enrichment Judgment");

WHEREAS, on August 22, 2018, the U.S. District Court for the District of Columbia denied Relator's motion for default judgment against Defendants Tailwind Sports Corporation and Bruyneel for False Claims Act damages, and the Relator filed a

Notice of Appeal from that decision on September 21, 2018, which appeal is currently pending before the United States Court of Appeals for the District of Columbia Circuit;

WHEREAS, the Relator claims, and the United States contests, that the Relator is entitled to a Relator's share, pursuant to 31 U.S.C. § 3730(c)(5) and (d), of the Unjust Enrichment Judgment;

WHEREAS, the United States and the Relator mutually desire to make a full, complete, and final settlement of Relator's claim to a share of the Unjust Enrichment Judgment proceeds pursuant to 31 U.S.C. § 3730(c)(5) and (d);

WHEREAS, the United States and the Relator wish to avoid the expense and uncertainty of further litigation concerning Relator's claim to a share of the Unjust Enrichment Judgment proceeds;

ACCORDINGLY, in reliance upon the representations contained herein and in consideration of the mutual promises, covenants and obligations in this Agreement and the resolution of the claims set forth below, and for good and valuable consideration, receipt of which is by each acknowledged, the United States and the Relator agree as follows:

Terms and Conditions

1. The United States agrees that Relator shall be awarded 10 percent (up to a total of $122,870) of any recovery on the Unjust Enrichment Judgment. Conditioned upon the United States receiving payments from Defendant Bruyneel, or otherwise recovering, on the Unjust Enrichment Judgment, the United States agrees that it shall pay to Relator by electronic funds transfer 10 percent of each such payment received as soon as feasible after receipt of the payment, pursuant to written instructions provided by Relator to the

United States Attorney's Office for the District of Columbia. The obligation to make the payment to the Relator is expressly conditioned on the United States receiving payment from Defendant Bruyneel, or otherwise recovering, on the Unjust Enrichment Judgment. Should the United States fail to recover on the Unjust Enrichment Judgment, the United States shall have no obligation to make a payment to the Relator.

2. Relator agrees to file with the U.S. Court of Appeals for the District of Columbia the papers necessary to secure dismissal of his appeal, within 5 (five) days of the execution of this Agreement.

3. Pursuant to 31 U.S.C. § 3730(b)(1), the United States will provide to Relator its written consent to dismissal of the appeal, within 5 (five) days of the execution of this Agreement.

4. Conditioned upon Relator's receipt of the payment(s) described in Paragraph 1, and except as expressly reserved in Paragraph 5 below, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims to a share of the proceeds of the Unjust Enrichment Judgment pursuant to 31 U.S.C. § 3730(c)(5) and (d) or otherwise.

5. Specifically excluded and reserved from those claims released under Paragraph 4 above is any dispute, claim, or defense which may arise between the Relator and Defendant Bruyneel regarding Relator's attorney's fees. Moreover, notwithstanding any other provision of this Agreement, Relator does not release any claims to a share of any recovery by the United States on the Penalties Judgment, nor

does this Agreement release any claims by the Relator for attorneys' fees or for the Penalties Judgment against any of the defendants in the Action, except with regard to the dismissal of the appeal specified herein.

6. This Agreement, together with all of the obligations and terms hereof, shall inure to the benefit of and shall bind assigns, successors-in-interest, or transferees of the United States and the Relator.

7. Each of the signatories to this Agreement represents that he or she has the full power and authority to enter into this Agreement.

8. This writing constitutes the entire agreement of the United States and the Relator with respect to the subject matter of this Agreement and may not be modified, amended or terminated except by a written agreement signed by the United States and Relator specifically referring to this Agreement.

9. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

10. This Agreement is effective on the date of signature of the last signatory to the Agreement.

11. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

In Witness Whereof, the parties, through their duly authorized representatives, hereunder set their hands.

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ON BEHALF OF THE UNITED STATES OF AMERICA

Dated: 11/20/18

Robert J. McAuliffe
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Darrell C. Valdez
Assistant U.S. Attorney
United States Attorney's Office for the
District of Columbia

ON BEHALF OF THE RELATOR

Dated: 11/19/18

Floyd Landis

Dated: 11/19/18

Paul D. Scott on behalf of
Law Offices of Paul D. Scott, P.C.
Counsel for Floyd Landis

EXHIBIT 2

Subject: RE: Relator Share
From: [redacted](CIV)" <[redacted]@usdoj.gov>
Date: 11/20/2018, 12:58 PM
To: "[redacted]@usdoj.gov>, "Paul D. Scott" <pdscott@lopds.com>, "Lani Anne Remick (laremick@lopds.com)" <laremick@lopds.com>
CC: [redacted]@usdoj.gov>, [redacted]@usdoj.gov>

Dear Mr. Scott,

The United States consents to your withdrawal of your appeal in *Landis v. Tailwind Sports Corporation*, No. 18-7143 (D.C. Cir.).

Regards,

[redacted]
Counsel of Record for the United States
Attorney, Civil Appellate Staff
U.S. Department of Justice
(202) 514-[redacted]

From:[redacted] (CIV)
Sent: Tuesday, November 20, 2018 10:44 AM
To: Paul D. Scott <pdscott@lopds.com>; Lani Anne Remick (laremick@lopds.com) <laremick@lopds.com>
Cc: [redacted]@usdoj.gov>; [redacted]@CIV.USDOJ.GOV>
Subject: RE: Relator Share

Paul
Attached is a signed version of the relator share Settlement Agreement. Pursuant to paragraph 3 of the Agreement, counsel of record for the United States in Relator's appeal, [redacted], will send you an email with the United States' written consent to dismissal of the appeal. I am copying [redacted] on this email.
Thank you.
[redacted]
