

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4077/August 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17319

In the Matter of

JAN E. HELEN

ORDER ON MOTION

On June 28, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondent pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. A hearing is scheduled for November 14, 2016.

I denied Respondent's two affirmative defenses at a prehearing conference on July 26, 2016. Those defenses alleged that (1) the proceeding is invalid because the presiding administrative law judge was not appointed in conformity with the Appointments Clause of the United States Constitution, and (2) Respondent will be deprived of due process because of the paucity of procedural protections under the Commission's Rules of Practice. Answer at 4; Tr. 5-8; see *Jan E. Helen*, Admin. Proc. Rulings Release No. 4026, 2016 SEC LEXIS 2605 (ALJ July 27, 2016). In an order issued following the prehearing conference, I noted that while there was no basis for Respondent's due process defense at this stage, Respondent would be permitted to raise the issue in his post-hearing brief. *Jan E. Helen*, 2016 SEC LEXIS 2605, at *4-5.

On August 5, 2016, the Division of Enforcement wrote a letter to Respondent taking issue with my statement at the prehearing conference that the Commission has acknowledged I was appointed. The Division maintains that it has stipulated before the Commission that I was not hired with the approval of the Commissioners, citing "*Notice, OptionsXpress, Inc.* (July 23, 2015)," and that it did not "dispute that Chief ALJ Murray was not appointed by the President, the head of a department, or a court of law," referencing *J.S. Oliver Capital Management, L.P.*, Securities Act Release No. 10100, 2016 SEC LEXIS 2157, at *93 (June 17, 2016).

On August 10, 2016, Respondent filed a motion for reconsideration, arguing that it was improper for me to sua sponte dismiss the affirmative defenses without notice and opportunity for hearing, and that my ruling denies Respondent an opportunity to develop a factual record necessary to support his defenses. Motion at 2-3. Respondent also complained that as of August 10, 2016, the certificate I referenced at the prehearing conference "has not been made part of the public file of this proceeding which may be accessed by the Commission's website." *Id.* at 2.

On August 11, 2016, the Division filed an opposition to the motion arguing that reconsideration of the Appointments Clause defense is unwarranted in that the Commission has rejected this challenge in the past, and no factual development is necessary due to the Division's prior stipulation regarding my appointment. Opp. at 1. The Division also argues that Respondent will not be prejudiced by my order because he may raise his affirmative defenses in his post-hearing brief. *Id.* at 1-2.

Ruling

I take affirmative defenses to be “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” Defense – affirmative defense, *Black’s Law Dictionary* (10th ed. 2014). The intent of my ruling was that I would not grant these affirmative defenses at this stage of the proceeding; however, Respondent may present evidence in support of his arguments within the parameters of Rule 320 of the Rules of Practice, 17 C.F.R. § 201.320, and argue these issues in his post-hearing brief. Tr. 8; *Jan E. Helen*, 2016 SEC LEXIS 2605, at *4-5.

For the reasons stated, I DENY Respondent’s motion for reconsideration.

Brenda P. Murray
Chief Administrative Law Judge