UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79459 / December 2, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of CHARLES L. HILL, JR.	ORDER DENYING MOTION TO DE-INSTITUTE ADMINISTRATIVE PROCEEDING

Motion filed: October 5, 2016
Last brief received: October 18, 2016

Respondent Charles L. Hill, Jr. has filed a motion to de-institute this administrative proceeding. For the following reasons, the Commission denies Hill's motion.

I. Background

The Commission instituted this proceeding in February 2015, alleging that Hill, an unregistered person, engaged in insider trading in connection with securities of Radiant Systems, Inc. in violation of Exchange Act Section 14(e) and Exchange Act Rule 14e-3.[1] In response, Hill filed an action in federal district court seeking injunctive relief on the grounds, *inter alia*, that his Seventh Amendment right to a jury trial was violated and that the presiding administrative law judge had not been appointed in a manner consistent with the Appointments Clause of the United States Constitution. While Hill was pursuing his civil suit, this administrative proceeding was stayed. Subsequently, the U.S. Court of Appeals for the Eleventh Circuit ordered the dismissal of Hill's suit for lack of subject matter jurisdiction, concluding that Congress intended that constitutional claims such as those raised by Hill must first be pursued through the exclusive administrative remedial scheme.[2] On October 5, 2016, a few weeks after the stay was lifted and proceedings before the law judge resumed, Hill filed the instant motion.

---

1 *Charles L. Hill, Jr.*, Exchange Act Release No. 74249, 2015 WL 547332 (Feb. 11, 2015).

2 *Hill v. SEC*, 825 F.3d 1236, 1237-38 (11th Cir. 2016).

II. Analysis

Hill seeks the Commission's intervention with respect to the conduct of an ongoing administrative proceeding before the law judge has issued an initial decision. Thus, "no matter how styled,"[3] it "is in substance a petition for interlocutory review and, as such, governed by Rule 400 of the Rules of Practice,"[4] which provides the "exclusive remedy" for interlocutory Commission review prior to the issuance of an initial decision.[5]

Because the Commission has "plenary authority over the course of its administrative proceedings and the rulings of its law judges,"[6] it may at any time, whether on its own initiative or at a party's urging, intervene in an ongoing proceeding.[7] The Commission's "emphatic preference—which embodies the 'general rule' disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review after 'the entire record [has been] developed' and 'after issuance by the law judge of an initial decision.'"[8] Rule 400 provides that petitions for interlocutory review are "'disfavored' and will be granted only in 'extraordinary circumstances'" to make clear that requests for interlocutory Commission review "rarely will be granted,"[9] especially when, as here, the party neither sought nor obtained certification from the law judge that interlocutory review was appropriate.[10] Such review is appropriate "only in a truly unusual case, where serious and prejudicial error [is] plainly apparent upon even a cursory

---

3 *Kevin Hall*, Exchange Act Release No. 55987, 2007 WL 1892136, at *2 (June 29, 2007).

4 *John Thomas Capital Mgmt. Grp., LLC*, Exchange Act Release No. 73375, 2014 WL 5282156, at *2 (Oct. 16, 2014); *see also Lynn Tilton*, Exchange Act Release No. 32236, 2016 WL 4447011, at *1 n.1 (Aug. 24, 2016) (construing pre-hearing "petition directly to the Commission" as a petition for interlocutory review).

5 Rule of Practice 400(a), 17 C.F.R. § 201.400(a); *Kevin Hall*, 2007 WL 1892136, at *1.

6 *Michael Lee Mendenhall*, Exchange Act Release No. 74532, 2015 WL 1247374, at *1 (Mar. 19, 2015).

7 *Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513, at *3-4 (June 14, 2016); *see also* 15 U.S.C. § 78d-1(b).

8 *Gary L. McDuff*, 2016 WL 3254513, at *5 (quoting *John Thomas Capital Mgmt. Grp., LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013)).

9 *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (internal quotation marks omitted).

10 *Gary L. McDuff*, 2016 WL 3254513, at *5-6. Although the absence of certification is not a barrier to Commission consideration, "issues that do not satisfy Rule 400(c)['s standards for certification] will almost never be appropriate" for interlocutory review. *Id.* at *5; *accord Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012).

review of the record, and where deferring review until issuance of an initial decision" would only postpone an "inevitable later vacatur and remand."[11]

Hill argues that the Commission's decision to bring this proceeding in an administrative forum as opposed to federal court violates the Equal Protection Clause, the Commission's own guidelines for forum selection, and fundamental fairness. These arguments do not constitute extraordinary circumstances that justify interlocutory review.

The Commission's ordinary review process will offer an adequate forum for Hill to present these claims.[12] The denial of interlocutory review at this juncture in no way precludes him from renewing them on the basis of the full record developed before the law judge if and when he petitions the Commission for review of the initial decision.[13] In the course of review, the Commission could, if warranted, provide any necessary relief, including by ordering the taking of additional evidence, vacating the initial decision, or discontinuing proceedings altogether.[14] Hill has failed to identify any extraordinary circumstances that would warrant interruption of the normal administrative process to resolve his claims now. The Supreme Court long has recognized the "expense and disruption of defending" against "adjudicatory

---

[11] *Lynn Tilton*, 2016 WL 4447011, at *3 (internal quotation marks and citation omitted).

[12] If the law judge issued an initial decision that was favorable to Hill on the merits, and the Commission declined to review it, his constitutional and procedural claims might be moot as a practical matter. The fact "[t]hat [the respondent's] challenge . . . [has] constitutional implications does not support his argument for accelerated and unorthodox . . . review. Indeed, it substantially weakens it." *Deaver v. Seymour*, 822 F.2d 66, 71 (D.C. Cir. 1987); *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 n.11 (1980) ("[T]he possibility that [the petitioner's] challenge may be mooted in adjudication warrants the requirement that [it] pursue adjudication, not shortcut it.").

[13] *See, e.g.*, *Gary L. McDuff*, 2016 WL 3254513, at *6; *cf. Marine Mammal Conservancy, Inc. v. USDA*, 134 F.3d 409, 413 (D.C. Cir. 1998) ("An agency, like a court, may alter or modify its position in response to persuasive arguments . . . ."); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1078-79 (9th Cir. 1988) (holding that the law of the case doctrine does not apply to discretionary denials of interlocutory appellate review).

[14] *See, e.g.*, *John Thomas Capital Mgmt. Grp., LLC*, Exchange Act Release No. 74345, 2015 WL 728006, at *4 & nn.30-35 (Feb. 20, 2015) (collecting cases holding that challenges to a forum on "prejudgment, due process, equal protection, Seventh Amendment, separation of powers, or some other venue or jurisdictional ground" should typically be "deferred until the proceeding has come to an end") (footnote omitted); *Harding Advisory LLC*, Exchange Act Release No. 9561, 2014 WL 988532, at *5-6 (Mar. 14, 2014) (explaining that equal protection and due process claims "can be effectively handled by the Commission post-hearing").

proceeding[]" does not constitute irreparable harm, even when a party takes issue with the institution or lawfulness of the proceedings.[15]

Moreover, upon review of the limited record presently before the Commission, Hill has failed to demonstrate a "serious and prejudicial error" that is so "plainly apparent" that further proceedings before the law judge would be futile.[16]

Hill first argues that the Commission violated the Equal Protection Clause on a "class-of-one" theory, under which someone who is not a member of a protected class nonetheless may assert an equal protection claim by showing that he or "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[17] Here, "[n]othing in Dodd-Frank or the securities laws explicitly constrains the [Commission's] discretion in choosing between a court action and an administrative proceeding."[18] The Commission has previously held its inherently discretionary decision to enforce the securities laws in one forum rather than another is not, as a matter of law, susceptible to attack on a class-of-one theory.[19] It relied on the Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, which made clear that a class-of-one claim does not apply to "forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments."[20] And it followed the Sixth and Seventh Circuits in holding that *Engquist* precludes such challenges to prosecutors' decisions about whom, how, and where to prosecute.[21] Hill has supplied no persuasive reason for the Commission to revisit these decisions.

---

15 *Standard Oil Co.*, 449 U.S. at 244.

16 *Cf. Gary L. McDuff*, 2016 WL 3254513, at *5 (quotation marks omitted).

17 *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

18 *Jarkesy v. SEC*, 805 F.3d 9, 12 (D.C. Cir. 2015); *see also SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 297 (2d Cir. 2014) (noting that the Commission "is free to eschew the involvement of the [district] courts and employ its own arsenal of remedies instead").

19 *Mohammed Riad*, Exchange Act Release. No. 78049, 2016 WL 3226836, at *50 (July 7, 2016); *accord David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *17-19 (Oct. 29, 2015); *Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *28-30 (Sept. 17, 2015).

20 553 U.S. 591, 603 (2008)

21 *United States v. Green*, 654 F.3d 637, 650 (6th Cir. 2011) (rejecting class-of-one claim premised on "decision to prosecute [defendant] . . . in the civilian justice system while prosecuting his coconspirators . . . in the military justice system"); *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) (rejecting class-of-one challenge brought by defendant who was prosecuted in federal court while allegedly similarly situated defendants were prosecuted in state court).

Hill's next argument is that maintaining the administrative proceeding against him violates "[c]urrent SEC [p]olicy" as reflected in the Division of Enforcement's "Approach to Forum Selection in Contested Actions."[22] This document is not, however, a statement of *Commission* policy, as Hill incorrectly asserts. Instead, it sets forth a non-exhaustive list of "potentially relevant" factors that the *Division of Enforcement* considers in making "forum recommendations," which "in all cases are subject to review and approval by the Commission." The "Approach to Forum Selection in Contested Actions" does not constrain the Commission's ultimate choice of forum.[23] Moreover, the document states that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." Accordingly, contrary to Hill's contention, the Commission has not violated any self-imposed or otherwise enforceable guidelines regarding forum selection.

Finally, Hill asserts that the administrative forum deprives him of a fair opportunity to defend himself. He cites the absence of a jury, the scope of discovery available under the Rules of Practice as compared with the Federal Rules of Civil Procedure, and the fact that the "prosecutor, judge, and appellate body are all instruments or employees of the SEC."[24] Such broad "attacks on the procedures of the administrative process have been repeatedly rejected by the courts."[25] As the Supreme Court has made clear, the "Seventh Amendment is not applicable to administrative proceedings."[26] Nor does the "combination of investigative and adjudicative functions" in an agency "create[] an unconstitutional risk of bias in administrative adjudication,"

---

22 Division of Enforcement, *Division of Enforcement Approach to Forum Selection in Contested Actions*, *available at* https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf (last visited Dec. 2, 2016).

23 *See, e.g.*, *Bd. of Trade of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (observing that staff recommendations are not binding on the Commission).

24 In a footnote, Hill also complains that recent amendments to the Rules of Practice will not apply to his administrative proceeding because the initial prehearing conference has already occurred. In fact, many of the Amended Rules will apply to this proceeding, such as the amendments to Rules 232, 235, and 320 (governing subpoenas, prior sworn statements, and the admissibility of evidence, respectively), because the hearing will begin after their effective date. *See Lynn Tilton*, 2016 WL 4447011, at *4. Other Amended Rules, for example concerning the timing of proceedings, depositions and expert discovery, and dispositive motions, will not apply because the Commission has determined that would not be "'just and practicable.'" *Id.* at *5 (quoting *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 78319, 2016 WL 3853756, at *31 (July 13, 2016)).

25 *See, e.g.*, *Harding Advisory LLC*, 2014 WL 988532, at *8 (citing *Blinder, Robinson, & Co., Inc. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988)).

26 *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987).

"violate the Administrative Procedure Act," or "violate due process of law."[27] Likewise, the fact that the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply in administrative proceedings is not a violation of due process.[28] To the contrary: "[C]ourts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings,"[29] and that "agencies should be free to fashion their own rules of procedure."[30]

Hill's attacks on the fairness of the administrative process are premature, without merit, and do not warrant interlocutory Commission consideration.

*** * ***

Accordingly, it is ORDERED that Hill's motion to de-institute this administrative proceeding is DENIED.[31]

By the Commission.

Brent J. Fields
Secretary

---

[27] *Withrow v. Larkin*, 421 U.S. 35, 56-58 (1975); *see also Richardson v. Perales*, 402 U.S. 389, 410 (1971) (upholding Social Security Administration's system for resolving contested benefit determinations, in which ALJs investigate and decide claims).

[28] *See, e.g.*, *Bernard E. Young*, Exchange Act Release No. 774421, 2016 WL 1168564, at *19 n.84 (Mar. 24, 2016); *Del Mar Fin. Servs., Inc.*, Exchange Act Release No. 48691, 2003 WL 22425516, at *8 (Oct. 24, 2003).

[29] *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

[30] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978) (internal quotation marks omitted).

[31] In light of our disposition of Hill's motion, his letter request for a stay is also denied.