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January 18, 2018

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

Re: *In the Matter of Donald J. Anthony, Jr., et al.*,
Administrative Proceeding File No. 3-15514

Rabinovich and Mayer Letter Brief

Dear Chief Judge Murray:

On behalf of Respondents Philip S. Rabinovich and Brian T. Mayer, we write regarding the Commission's order dated November 30, 2017 (the "Post Hoc Ratification Order"), in which the Commission (i) purports to "ratify" the alleged appointment of its ALJs nearly four years after the conclusion of hearings in this administrative proceeding and in the midst of Respondents' pending appeal to the Commission, which was fully briefed in 2015 and argued before the Commission on August 15, 2017, and (ii) remands this matter (and numerous others) for reconsideration of "the record, including all substantive and procedural actions taken by an administrative law judge." The record includes eighteen days of hearing testimony totaling more than 6,000 pages, nearly 1,000 unique exhibits, and more than 1,000 pages of

motions, pre- and post-hearing briefing, findings of fact and conclusions of law and related submissions.

We also write regarding the Order dated December 15, 2017, noting that you will reexamine the record and any challenged rulings, findings, or conclusions (the "Reexamination Order").

Rabinovich and Mayer object to this process in its entirety, and the submission of this letter should not be construed as consent to the Commission's purported "ratification" of the appointment of its ALJs or your Honor's "reexamination" of the record.

I. Dismissal Is The Only Appropriate Remedy To Cure The Constitutional Deprivation That Respondents Have Already Suffered

The Commission cannot, under the guise of "ratification" and "reconsideration," salvage this unconstitutional proceeding. Simply put, it is too little, too late. This administrative proceeding should now be dismissed with prejudice.

A. The "Ratification" Of An Unconstitutional Procedure Is Itself A Nullity

The Post Hoc Ratification Order purports to "ratif[y] the agency's prior appointment" of its ALJs notwithstanding the fact that the Commission never appointed those ALJs in the first place. As the government expressly admitted in its briefing before the United States Supreme Court in *Raymond J. Lucia v. SEC*, No. 17-130 (at p.19), the Commission "did not play any role in the selection" of its ALJs. Thus, there was no prior agency "appointment" to ratify.

B. Statutory Restrictions On The Removal Of The Commission's ALJs Violates the Constitution's Separation-of-Powers Principles

As "Officers of the United States," the Commission's ALJs must also be subject to removal in a manner that is consistent with the United States Constitution. *See Free Enterprise*

Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 492-93 (2010). As the government also admitted in *Lucia* (at p.20), ALJs are insulated by "at least two, and potentially three, levels of protection against presidential removal authority." These statutory restrictions on removal violate separation-of-powers principles and warrant dismissal. *See Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

C. "Reconsideration" Will Not Cure The Constitutional Defects In This Proceeding

In issuing the Post Hoc Ratification Order, the Commission acknowledges that its ALJs are inferior officers for purposes of the Appointments Clause. Consequently, the ALJs were without constitutional authority to take any action in this proceeding prior to the date of the Post Hoc Ratification Order. A "reexamination" of the record by the finder of fact years after hearings concluded and an initial decision was issued will not revive this unconstitutional proceeding. This action must be dismissed and started anew, either in an Article III forum (where it was required to have been brought in 2013 to afford Respondents equal protection) or before what the Commission now claims are constitutionally appointed ALJs. But any new proceeding, like the original proceeding, would be barred by the five year limitation period in 28 U.S.C. Section 2462.

Reconsideration, as opposed to a new hearing, is also inappropriate as it would deny Rabinovich and Mayer the substantive and procedural protections afforded to them under the Commission's current Rules of Practice, including the ability to depose up to five individuals prior to hearings and up to ten months to review the Division's gargantuan investigative record and prepare for hearings. In 2014, at the time this unconstitutional proceeding was heard,

Rabinovich and Mayer were unable to depose *any* witnesses and were given only four months to prepare for hearings (while the Division of Enforcement had four years).

D. Any New Proceeding Would Be Barred By Section 2462

Because Commission ALJs were without constitutional authority to hear this case until, at the earliest, November 30, 2017, any new proceeding would be barred by Section 2462. Thus, any new proceeding would be futile. Rabinovich or Mayer did not present any of the private placements at issue in this case after August 2009. There can be no dispute that any newly-filed proceeding would be barred by Section 2462, and no court or administrative tribunal would have jurisdiction to hear the matter.[1]

E. Prolonging This Proceeding Solely To "Make It Constitutional" Materially Prejudices Rabinovich and Mayer

Further administrative proceedings – either in the form of a new hearing *or* reconsideration – will materially prejudice Rabinovich and Mayer. Until the issuance of the Post Hoc Ratification Order, Rabinovich and Mayer were awaiting the issuance of a Commission Opinion – the final step in the administrative process before judicial review. They are now being directed to return to the starting line so the factual record can be reexamined. As a result, Rabinovich and Mayer must incur additional costs addressing the Post Hoc Ratification Order, await another decision from your Honor, and then return to the Commission for further proceedings which will likely include additional briefing and argument. This reexamination could take months, and possibly much longer. Meanwhile, the stigma that these ongoing

[1] As Respondents have repeatedly stated, every claim in the OIP "*first accrued*" before September 23, 2008 (i.e., more than five years prior to the date the OIP was filed). Thus, even if Commission ALJs had been constitutionally appointed prior to the filing of the OIP (and they were not), this action could not be "entertained" in any event. *See* 28 U.S.C. § 2462.

proceedings have caused Rabinovich and Mayer is prolonged. And pre-judgment interest potentially would continue to accrue.

The remand here is fundamentally different than an ordinary remand by the Commission. The sole purpose of the Post Hoc Ratification Order is to retroactively repair the constitutional defects in this proceeding. Rabinovich and Mayer should not be forced to incur additional time, resources, and expenses so that the Commission can "fix" its administrative forum.

Moreover, this case – filed in September 2013 and tried in January 2014 – is unlike any of the more than 100 other cases subject to the Post Hoc Ratification Order. Indeed, more than 80% of those cases were decided on default and without any hearing. Of the fewer than 20 cases in which ALJs did hold hearings, this case is one of only two that was heard four years ago, in 2014. Only this case, however, has been fully briefed and argued to the Commission. This case is also exceedingly complex, involving ten separate Respondents, twenty-six separate financial products, and included testimony from more than forty witnesses. The notion that, realistically, this case can now be appropriately "reexamined" four years later, is dubious at best.

The Commission has previously acknowledged the problems that an attempt at retroactively "fixing" the constitutional infirmities in its administrative proceedings might cause. Nearly three years ago, after a federal district judge suggested that any violation of the Appointments Clause might "easily be cured by having the SEC Commissioners issue an appointment,"[2] the Commission submitted a letter to Judge Berman of the Southern District of

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[2] *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015), *vacated and remanded by*, 825 F.3d 1326 (11th Cir. 2016).

New York addressing the issue. In the letter, the Commission wrote that it "should not act precipitously to modify its ALJ scheme," particularly "when the SEC has over 100 litigated proceedings at various stages of the administrative process." *See* Letter from the Commission to Hon. Richard M. Berman dated June 15, 2015, *Duka v. SEC*, No. 15-cv-357 (S.D.N.Y.), ECF No. 41, attached as Exhibit 1. These concerns should not be ignored here, especially as they uniquely and materially affect Rabinovich and Mayer.

II. If This Proceeding Is Not Dismissed, There Are Significant Legal Developments And Other Matters That Must Be Considered

In the four years since this matter was heard, there have been significant developments in the law and other matters that must be considered.

A. Disgorgement Is A "Penalty" Within The Meaning Of § 2462

On June 5, 2017, the United States Supreme Court held in *Kokesh v. SEC* that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues." 581 U.S. _(2017), slip op. at 1. The substantial effect that *Kokesh* has on the disgorgement awarded in the Initial Decision is set forth in full in our letters to the Commission dated July 10, 2017 and August 9, 2017 (the "2017 Letters"), which are publicly available on the administrative docket. Moreover, applying *Kokesh*, it is now clear that all of the relief sought by the Division is subject to Section 2462, and *no* evidence relating to the Four Funds and other events occurring prior to September 23, 2008 should have ever been considered. *See SEC v. Gentile*, Civ. Action No. 16-1619, 2017 U.S. Dist. LEXIS 204883, *8-11 (D. N.J. Dec. 13, 2017) (dismissing SEC complaint and holding that § 2462 bars injunctions and industry bars as punitive, not remedial).

B. A Collateral Bar Cannot Be Imposed Based On Pre-Dodd Frank Conduct

On January 17, 2017, the United States Court of Appeals for the District of Columbia in *Bartko v. SEC* (No. 14-1070) held that the Commission could not retroactively apply the Dodd Frank Act to impose a collateral bar on conduct that occurred prior to its passage in July 2010. The Commission has expressly agreed with the *Bartko* decision, inviting requests to vacate bars imposed based on conduct that occurred before July 22, 2010.

Here, all of Rabinovich's and Mayer's alleged conduct occurred from 2003 to 2009 and solely in their capacity as registered representatives of a broker-dealer. For the reasons addressed more fully in the 2017 Letters, the collateral suspensions imposed on Rabinovich and Mayer in the Initial Decision – which went beyond association with a broker-dealer – must be vacated.

C. All "Unreliable" Evidence Previously Admitted Cannot Be Considered

Recent amendments to Rule 320 of the Commission's Rules of Practice added "unreliable" to the list of evidence that is excluded. All prior evidentiary rulings must be reconsidered under the amended rule, and any "unreliable" evidence must be excluded.

By way of example only, David Smith's 1999 *never-sent* letter – pure hearsay and filled with prejudicial statements – was received into evidence over Respondents' objections. In seeking its admission, the Division claimed that the letter was "used as evidence in the criminal trial" of McGinn and Smith, *see* Tr. 4574:24-25, and thereafter read prejudicial and inflammatory portions of the 1999 letter into the record during the testimony of Mary Ann Cody, *see* Tr. 4577:21–4580:25. The Division's conduct – reading the letter into the record "under the guise of asking questions" – is precisely what the Second Circuit found in 2015 to be "manifestly erroneous," and "especially prejudicial and improper" in the criminal trial of McGinn and Smith.

See United States v. McGinn, 787 F.3d 116, 128 (2d Cir. 2015). Under the Commission's current Rules of Practice – and the law of the Second Circuit – such evidence should have never been admitted. Moreover, the admission of the 1999 letter indelibly prejudiced the ALJ against Respondents as evidenced by this statement on the record: "how do you square all that with ... the letter that Smith wrote in 1999 that said the whole thing was a sham." Tr. 5703:22-25. On the basis of that crucial error alone, the proceeding should be dismissed.

Further examples of "unreliable evidence" that must be excluded and erroneous rulings on motions and the law that should be reversed are set forth in Rabinovich's and Mayer's Appeal Briefs.[3]

D. Affidavits Previously Offered By Rabinovich and Mayer Should Be Considered

Rabinovich and Mayer previously moved to admit affidavits from many individuals who were subpoenaed to testify, but unable to attend the hearings. Motion dated January 15, 2014. The motion was denied. Under the Commission's current Rules of Practice – which would apply in any new hearing – Rabinovich and Mayer would have had the opportunity to depose at least five witnesses prior to any hearing and would have undoubtedly used it to depose at least some of these witnesses. The affidavits should be considered as part of the record on remand.

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[3] "Appeal Briefs" refer to: (1) Philip S. Rabinovich's Individual Brief dated July 17, 2015; (2) Philip S. Rabinovich's Individual Reply Brief dated October 27, 2015; (3) Brian T. Mayer's Individual Brief dated July 17, 2015; (4) Brian T. Mayer's Individual Reply Brief dated October 27, 2015; (5) Joint Brief Addressing Certain Legal Issues In Accordance With The Commission's Order dated July 17, 2015; and (6) Joint Reply Brief Addressing Certain Legal Issues In Accordance With the Commission's Order dated October 28, 2015.

E. The Incorrect And Prejudicial Statement In The Initial Decision That Mayer Settled A Customer Complaint With FINRA For $20,000 Should Not Be Considered

As set forth in the findings of fact submitted by Mayer (¶ 17) and acknowledged by the Division (¶ 522), Mayer was *not* personally accused of any wrongdoing in the complaint referenced in his Broker Check Report, and Mayer made no settlement contribution. It was error to include such a statement in the Initial Decision (at 48 n.3). This incorrect statement should *not* be considered.

F. Rabinovich and Mayer Pose No Threat To The Investing Public

In the four years since this proceeding was heard, Rabinovich and Mayer have continued to work in the securities industry running RMR Wealth Management, an SEC-registered investment advisory firm that offers no proprietary product and does not sponsor private placements or mutual funds. These facts further underscore that Rabinovich and Mayer pose no threat to the investing public. The suspension imposed by the Initial Decision is therefore unnecessary. The time has come to dismiss this proceeding.

G. Rabinovich and Mayer Expressly Adopt And Incorporate By Reference All Appellate Filings Before The Commission

Additionally, Rabinovich and Mayer expressly adopt and incorporate by reference all facts and arguments set forth in the Appeal Briefs, the 2017 Letters, and the transcript of oral argument before the Commission held on August 15, 2017. They also refer to and incorporate their proposed findings of fact and conclusions of law and post-hearing briefs. Please let us know if having any of these documents (electronically and/or hard copy) would assist your Honor, and we will provide them.

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Rabinovich and Mayer reserve all of their rights. We respectfully request that this letter be posted on the docket. Three copies are enclosed.

Based on the record, the Appeal Briefs, and this letter brief, the proceeding should be dismissed against Rabinovich and Mayer.

Respectfully submitted,

M. William Munno

M. William Munno

cc: Brent J. Fields, Secretary (by Federal Express)
David Stoelting, Esq. (by Federal Express and email)
All Respondents' counsel of record (by email)

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U.S. Department of Justice

Civil Division
Federal Programs Branch
20 Massachusetts Ave, N.W.
Washington, DC 20530

June 15, 2015

VIA ECF

The Honorable Richard M. Berman
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Duka v. SEC*, No. 15-cv-357 (RMB)

Dear Judge Berman:

We write on behalf of Defendant the Securities and Exchange Commission (the "SEC") in response to the Court's June 10, 2015 inquiry, ECF No. 40, regarding Judge Leigh Martin May's order granting a preliminary injunction in *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), and to Plaintiff's letter of June 10, 2015, ECF No. 39.

In *Hill*, Judge May found that the SEC administrative law judge ("ALJ") presiding in the administrative proceeding against the plaintiff in that case is likely an inferior officer under the Appointments Clause of the Constitution. Because the Appointments Clause permits Congress to vest the appointment of inferior officers, as relevant here, in Department heads, and because the government acknowledged in *Hill* that the SEC ALJ in that case was not appointed by the Commissioners of the SEC, Judge May concluded that the ALJ's appointment likely was unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (holding that Commissioners are the SEC's Department head for purposes of Appointments Clause). She noted that her conclusion "may seem unduly technical" because "the ALJ's appointment could easily be cured by having the SEC Commissioners issue an appointment or preside over the matter themselves." *Hill*, slip op. at 44.

This Court has asked what Judge May meant when she wrote that the "ALJ's appointment could easily be cured." Judge May appears to have been opining on the case of remedying the likely constitutional defect in the SEC ALJ's appointment identified in her opinion. Judge May apparently believes that the Commissioners could, with little difficulty and consistent with the Appointments Clause, appoint the ALJ as if he were an inferior officer, preside over the administrative proceeding themselves or assign an individual Commissioner to do so. *See* 17 C.F.R. §§ 201.101(a)(5), 201.110 (providing that administrative proceedings shall

be presided over by the Commission itself, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, an ALJ, or another duly authorized person); *see also* 5 U.S.C. § 556(b).

The government is likely to appeal the *Hill* preliminary injunction. Given the government's position that the SEC ALJ is a mere employee, and not an inferior officer who must be appointed in a manner consistent with the Appointments Clause, the government does not believe the SEC has any obligation to pursue the courses of action discussed by Judge May. Nor would the Commission be expected to do so at this time. Because appellate guidance on the propriety of the *Hill* injunction may be forthcoming if the Solicitor General approves the appeal, the government believes that the Commission should not act precipitously to modify its ALJ scheme. This is particularly the case when the SEC has over 100 litigated proceedings at various stages of the administrative process and the ALJ scheme has been in use for seven decades and is grounded in a highly-regulated competitive service system that Congress created for the selection, hiring and appointment of ALJs in the Executive Branch.

As to Plaintiff's June 10, 2015 letter, the government opposes Plaintiff's request that this Court enter a temporary restraining order enjoining the administrative proceeding, in which trial is scheduled to begin on September 16, 2015, pending adjudication of Plaintiff's anticipated motion for preliminary injunction. Plainly, there is no urgency here. And to the extent Plaintiff's request relies on Judge May's decision in *Hill*, we respectfully submit that *Hill* was wrongly decided. We will briefly address one of the errors in that court's reasoning.

The *Hill* court incorrectly determined that SEC ALJs are likely inferior officers. Despite finding that SEC ALJs have no final decision-making authority, the court concluded that SEC ALJs' "powers" are "nearly identical" to that of the Tax Court's special trial judges ("STJs"), who were held to be inferior officers by the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868 (1991). *See Hill*, slip op. at 40. But that is not so. As Defendant has already explained, STJs exercise a portion of the judicial power of the United States; they closely resemble federal district court judges and have the power to punish contempt by fines or imprisonment. *See Freytag*, 501 U.S. at 891. SEC ALJs' powers pale in comparison. For example, their power to punish contemptuous conduct is limited and does not include any ability to impose fines or imprisonment. *See* 17 C.F.R. § 201.180. And, while SEC ALJs may issue subpoenas, in cases of noncompliance, the agency would need to seek an order from a federal district court to compel compliance. *See* 15 U.S.C. § 78u(c). Moreover, SEC ALJs are subject to the Commission's plenary authority "over the course of [the] administrative proceeding . . . both before and after the issuance of the initial decision." *In the Matter of Michael Lee Mendenhall*, Securities Exchange Act of 1934 Release No. 74532, 2015 WL 1247374, at *1 (SEC Mar. 19, 2015). They are also subordinate to the agency on "matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989). In sum, their authority in no way approaches that of STJs, even if they perform some of the same basic duties. And in concluding that SEC ALJs are nevertheless constitutional officers, the *Hill* court acknowledged that its reasoning conflicts with the only court of appeals decision to address the constitutional status of ALJs. *See Hill*, slip op. at

38-41 (disagreeing with *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which concluded thate ALJs of the Federal Deposit Insurance Corporation are not officers of the United States).[1]

For the same reasons, the government further believes that there is no good cause for another round of briefing and hearing on a second motion for a preliminary injunction. Since the Court's ruling on Plaintiff's motion for a preliminary injunction on April 15, 2015, Plaintiff neither appealed from this Court's ruling nor pursued this case with any deliberate haste. Indeed, it was only after the parties had been negotiating for a month regarding whether they could potentially resolve this case without further litigation that Plaintiff indicated that she intended to amend the complaint (which she ultimately did on June 10, 2015) and seek to file another motion for a temporary restraining order and a preliminary injunction. This Court, however, has previously observed when denying Plaintiff's prior motion for emergency relief, that even had the Court not found that Plaintiff was unlikely to prevail on the merits, the Court nonetheless "would likely [have found] that she failed to demonstrate that the public interest weighs in favor of granting a preliminary injunction," Order at 15 n.13 (ECF No. 33) (April 15, 2015), in light of the vital role the SEC plays in '"protect[ing] investors and maintain[ing] the integrity of the securities markets," *United States v. Wittig*, 575 F.3d 1085, 1105 (10th Cir. 2009). The SEC submits that the same reasoning should apply now with respect to Plaintiff's requests for a temporary restraining order and a preliminary injunction.

We thank you for your consideration of this letter.

Dated: June 15, 2015

Respectfully submitted

[1] As to Plaintiff's submission to this Court of an affidavit by the SEC's Deputy Chief Operating Officer, Jayne L. Seidman, that the SEC's Division of Enforcement submitted to the Commission in another administrative proceeding, the government acknowledges that there is no factual dispute in this case regarding ALJ Elliot's appointment. Consistent with his status as an employee, and as described in the affidavit, Judge Elliot was not appointed by the Commissioners of the SEC.

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