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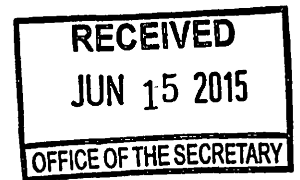
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of

Gregory T. Bolan, Jr. and
Joseph C. Ruggieri,

Respondents.

Division of Enforcement's Response to Respondent Ruggieri's Constitutional Objection

On May 28, 2015, the Court issued an Order stating that it would consider Respondent Joseph C. Ruggieri's ("Ruggieri's") contention that the pending administrative proceeding is unconstitutional. Although Ruggieri has never articulated the precise grounds for his claim, the Division submits the following in response to what it takes to be his possible arguments:

1. *Due Process* – To the extent Ruggieri contends that it violates due process to require him to proceed in an administrative forum because such proceedings are "inherently unfair" (Tr. 3058), that argument fails. As the Commission recently observed, "[s]uch broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts." *Harding Advisory LLC*, Sec. Act Rel. No 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). Those courts have correctly recognized that to accept such challenges "would do considerable violence to Congress['s] purposes in establishing" specialized administrative agencies and would "work a revolution in administrative (not to mention constitutional) law." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988). Due process requires only "the opportunity to be heard 'at a meaningful time

and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and here Ruggieri has been afforded such opportunity.

To the extent Ruggieri's claim is, instead, that it constitutes an abuse of discretion—and thus a due process violation—for the Commission to have authorized this action in an administrative forum rather than in district court, that argument also fails. In the Securities Exchange Act of 1934, Congress granted the Commission discretion to address potential violations of the Act by filing an enforcement action in either district court or administrative proceedings. *See, e.g.*, 15 U.S.C. §§ 78u(d), 78u-1, 78u-2, 78u-3. It is well established that where the law affords such a choice, prosecutors may exercise their discretion in selecting the forum in which to bring an action. *E.g.*, *United States v. Haynes*, 985 F.2d 65, 69 (2d Cir. 1993); *see also Hartman v. Moore*, 547 U.S. 250, 263 (2006) (prosecutorial decision-making is accorded a strong "presumption of regularity"). And, as the Commission has recently explained, its decision to authorize an action in an administrative forum, rather than federal district court, is a discretionary decision based on various subjective assessments that are specific to each case. *Harding Advisory LLC*, 2014 WL 988532, at *8.

In order to show such discretion has been abused in a particular case, the respondent must present "clear evidence" that the decision to proceed in a particular forum was based on impermissible grounds. *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996). For example, to establish that he has been irrationally singled out for disparate treatment, Ruggieri would need to show an "invidious" motive on the Division's part, which he has not done. *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008); *Armstrong*, 517 U.S. at 464–65 (decision to prosecute must "not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'"); *China-Biotics, Inc.*, Exchange Act Rel. No. 70800, 2013 WL 5883342, at *15 (Nov. 4, 2013). Accordingly, his due process challenge fails.

2. *Non-delegation* – To the extent Ruggieri contends that Congress impermissibly delegated legislative power to the Executive Branch by authorizing the Commission to seek penalties either in district court or through administrative proceedings without specifying when the Commission should use which forum, that argument also fails. The Constitution vests authority to *enforce* the law in the Executive Branch, U.S. Const. art. II, § 3, and grants Congress only "*legislative* Powers," *id.*, art. I, § 1 (emphasis added). The success of any delegation challenge thus turns on whether Congress has impermissibly "delegated legislative power to [an] agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). But abundant case law confirms that the Executive acts in an executive—not legislative—capacity when selecting the forum in which to enforce a law; such authority is an inherent part of the Executive power. *E.g.*, *Haynes*, 985 F.2d at 69; *United States v. Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992). Thus, any non-delegation challenge necessarily falls short.

3. *Seventh Amendment* – To the extent Ruggeri contends that the pending action is unconstitutional because he has been improperly denied a jury trial, that argument also fails. It is well established that Congress "may assign th[e] adjudication" of cases involving so-called "public rights" to "an administrative agency with which a jury trial would be incompatible[ ] without violating the Seventh Amendment[ ] . . . even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977). Here, in pursuing civil penalties against Ruggieri, the Commission is acting in the government's "sovereign capacity under an otherwise valid statute creating enforceable public rights," *id.* at 458, and thus, Congress's choice of the administrative forum is proper.

4. *Article II* – Respondent has alleged, in his Affirmative Defense No. 7, that "[t]he statutory and regulatory provisions providing for the position and tenure position of SEC

Administrative Law Judges are unconstitutional." To the extent his claim is that Commission ALJs are constitutional officers and that restrictions on their removal infringe on the President's exercise of executive powers, that argument fails for two reasons: the Commission's ALJs are not constitutional officers, and, even if they were, their tenure protections do not raise separation-of-powers concerns.[1]

The Appointments Clause provides that the President shall appoint all "Officers of the United States," whose appointments are not otherwise provided for in the Clause, "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 Appointments Clause speaks exclusively to "officers," a category that includes only persons who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976), and does not include "lesser functionaries subordinate to officers of the United States," *id.* at 126 n.162.

ALJs plainly fall into the category of "lesser functionaries subordinate to officers of the United States." *See id.* Indeed, the only court of appeals to have directly addressed the constitutional status of ALJs determined that the ALJs in question there were employees, not officers. *Landry v. FDIC*, 204 F.3d 1125, 1132–34 (D.C. Cir. 2000). The same holds true here. The Commission employs ALJs in its discretion, the functions assigned to its ALJs are limited, and the Commission retains plenary authority to review any functions it delegates to an ALJ. *See* 15 U.S.C. § 78d-1; 5 U.S.C. § 3105. Critically, all final agency determinations are also those of the Commission, not of its ALJs. *See* 17 C.F.R. §§ 201.101(a)(5), 201.110, 201.360(a)(2), 201.410(a),

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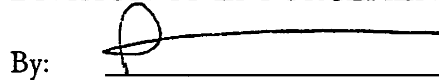
[1] To the extent Ruggieri challenges as well the method by which the presiding law judge was hired, such challenge also fails because Commission ALJs are employees, not officers that must be appointed pursuant to the requirements of Article II. *See Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. May 29, 2015) (ECF No. 15) (explaining that, consistent with his status as an agency employee, Commission ALJ was not appointed by the Commissioners).

201.411. Moreover, to the extent there is any doubt that ALJs are employees rather than officers, this Court should defer to Congress's long-standing judgment—as reflected in Congress's specified method of appointing ALJs, as well as Congress's placement of ALJs within the competitive service system—that ALJs are employees. *See* 5 U.S.C. § 2102; 5 C.F.R. § 930.201(b); *see also Weiss v. United States*, 510 U.S. 163, 194 (1994) (Souter, J., concurring) (counseling "deference to the political branches' judgement" on employee/officer question).

Even if Commission ALJs were constitutional officers, their tenure protections do not violate Article II. In cases where the President's removal authority is challenged, the constitutional question is whether the President retains adequate control over the Executive power, *see Humphrey's Executor v. United States*, 295 U.S. 602, 628–32 (1935); here, he does. As noted, Commission ALJs possess only the limited adjudicative authority that the Commission has delegated to them, and they play only a part in a process over which the Commission retains control from start to finish. As ALJ Grimes recently concluded, these factors (among others) distinguish this case from *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), in which the Supreme Court deemed unconstitutional a statutory framework that restricted the President's power to remove the members of a newly created enforcement agency that possessed broad enforcement and policymaking authority and that operated with little supervision. *See Charles L. Hill, Jr.*, Admin. Proc. No. 3-16383 (May 14, 2015), at 5–8.

Dated: New York, New York
June 12, 2015

DIVISION OF ENFORCEMENT

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served true copies of the Division of Enforcement's Response to Respondent Ruggieri's Constitutional Objection on this 12th day of June, 2015, on the following by the specified means of delivery:

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