UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of

PAUL EDWARD "ED" LLOYD, JR., CPA

Respondent.

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RESPONDENT'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW

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In the Matter of **PAUL EDWARD "ED" LLOYD, JR., CPA** **Respondent.**	**RESPONDENT'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW**

Respondent Paul Edward "Ed" Lloyd, Jr., CPA ("Respondent") hereby submits this brief in support of his Renewed Petition for Review of Initial Decision and respectfully requests that the Commission reverse the Initial Decision ("ID") issued by ALJ Elliot on July 27, 2015, substantially reaffirmed in the Order Ratifying in Part and Revising in Part Prior Actions, issued January 26, 2018. Consistent with the Commission's Supplemental Briefing Order of April 20, 2018, this brief will not repeat arguments made in the brief of November 9, 2015, nor in the Response and Reply Brief of December 28, 2015.

I. PROCEDURAL BACKGROUND

Following the Procedural History set forth in the Respondent's Brief in Support of Petition for Review dated November 9, 2015, the Commission issued an order dated November 30, 2017, Securities Act Release No. 16440, ratifying prior appointments of Administrative Law Judges and remanding this (and other) cases to Administrative Law Judges with direction to reconsider the record and all prior actions, and to issue an order memorializing any determination made.

On December 12, 2017, Administrative Law Judge Cameron Elliot ("ALJ Elliot") allowed Respondent's May 1, 2015 request that official notice be taken of certain statistics under Rule of Practice 323, 17 C.F.R. § 201.323, and allowed Respondent's Motion for a Protective Order dated April 30, 2015. *See* Administrative Proceedings Rulings Release No. 5370.

Following written submissions by Respondent and the Division of Enforcement, ALJ Elliot issued an Order Ratifying in Part and Revising in Part Prior Actions, dated January 26, 2018, Administrative Proceedings Rulings Release No. 5539. Both the Division of Enforcement and Respondent petitioned for review, and the Commission issued a Supplemental Briefing Order on April 20, 2018.

II. FACTUAL BACKGROUND

The facts of this matter have been reviewed in the prior brief. However, in light of the Order Taking Official Notice of certain statistics, Respondent notes the following additional facts.

As of 2015, when the hearing was held in this matter, and following the Dodd-Frank Act of 2010 that expanded the Commission's administrative enforcement authority, the Commission brought more than 80% of its enforcement proceedings in its in-house tribunal, where it has won over 90% of the time. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), http://tinyurl.com/o9vsozr (all Internet sites last visited May 19, 2018).

Contemporaneously with this case, the Enforcement Division won an astonishing 219 cases in a row, *see* Ryan Jones, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 509 (2015),

including 50 of its first 50 cases tried before ALJ Elliot, who conducted this proceeding, *see* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves* ("*SEC Judge*"), Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl.

In this case, the Commission could have sued Respondent in federal court, *see* 15 U.S.C. § 78d-1, but it chose not to. Instead, the Commission assigned the proceeding to ALJ Cameron Elliot, who had not ruled against the Enforcement Division once in his first fifty cases. *See* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves*, Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl.

Judge Elliot issued an associational Bar against Lloyd working as an investment adviser or associating with broker-dealers for the rest of his life, Initial Decision, p. 37, in keeping with his established practice of "never giv[ing] less than a permanent bar" as a sanction against an investment adviser in a contested proceeding, Transcript at 103:20, *In re W. Pac. Capital Mgmt.*, Admin. Proc. No. 3-14619 (Apr. 2, 2012).

III. ISSUES FOR REVIEW

A. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS FINDINGS OF FACT.

1. The finding that the membership units in the Maple Equestrian, Piney Cumberland Holdings, and Meadow Creek Holdings LLC's were issued pursuant to Regulation D.

2. The finding that Respondent's failure to inform LPL of the conservation easement transactions was inconsistent with LPL's compliance policies relating to selling away, outside business activities, and providing tax advice.

3. The finding that Respondent did not provide OCIE with the revised Schedule I listing 15 members of FC 2012, LLC.

4. The finding that Ray Branch and Respondent's attorneys discussed Respondent's fees.

5. The finding that Respondent had the opportunity to influence Mark Losby's memory of his FC 2012 participation.

6. The finding that Respondent had the opportunity to influence Larry Price's memory of his FC 2012 participation.

7. The finding that Respondent may have stolen $130,000.00 from his clients outright had he not been

8. The finding that Respondent possessed independent contractor-like autonomy while associated with LPL making him more like a controlling person of an investment adviser rather than an employee of same.

9. The finding that Respondent should not be able to avoid primary liability by selling away.

10. The finding that Respondent's failure to inform SFA and PCH of the identities of the ultimate consumers undermined those entities' compliance efforts and created the potential for a conflict of interest.

11. The finding that but for his deceit of SFA, none of Respondent's clients could have participated in FC 2012, and he would not have been entitled to any of his fees.

12. The finding that Respondent created a risk that SFA and PCH would violate the securities laws.

B. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS CONCLUSIONS OF LAW.

1. The finding that Respondent was an investment adviser and subject to the IAA.

2. The finding that Respondent did not qualify for the accountant's exception to the definition of investment adviser under the IAA.

3. The finding that Respondent committed a primary violation of Section 206(4) of the IAA.

C. REVIEW OF THE ID IS REQUIRED TO CORRECT DUE PROCESS VIOLATIONS OCCURRING IN THIS MATTER.

D. REVIEW OF THE ID IS REQUIRED BECAUSE THE ALJ IS NOT A PROPER "OFFICER" DESIGNATED BY THE COMMISSION. "RATIFICATION" IS INEFFECTIVE, AND DISMISSAL IS WARRANTED.

E. REVIEW OF THE ID IS REQUIRED TO CORRECT ERRORS IN THE IMPOSITION OF SANCTIONS.

1. A cease-and-desist order was moot and inappropriate.

2. The associational bar was inappropriate.

3. The calculation of disgorgement was erroneous.

4. The civil penalty assessed was excessive and unsupported by the evidence.

IV. ARGUMENT

A. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS FINDINGS OF FACT.

The arguments on these issues were developed in Respondent's prior briefs.

B. REVIEW OF THE ID IS REQUIRED TO CORRECT ERRONEOUS CONCLUSIONS OF LAW.

The arguments on these issues were developed in Respondent's prior briefs.

C. REVIEW OF THE ID IS REQUIRED TO CORRECT DUE PROCESS VIOLATIONS OCCURRING IN THIS MATTER.

ALJ Elliot's bias in favor of the Division was evident from the first day of the hearing, and it continued each and every day, through the issuance of the ID and its later ratification. From refusing to allow Respondent's expert to testify, to allowing the Division to examine wholly irrelevant issues, to allowing retrial of issues decided by ALJ Foelak, to sustaining practically every objection the Division made and overruling almost all of Respondent's, to overt statements made about Respondent, ALJ Elliot's bias permeated throughout the courtroom. In short, the Hearing was quite obviously one-sided.

While the arguments on this issue were well-developed in Respondent's previous brief, Respondent notes the additional facts showing ALJ Elliot's manifest bias, all of which are available through the official notice taken:

1. After rulings arguably favorable to Respondent by ALJ Carol Foelak, *see* Order re Summary Disposition, Administrative Proceedings Rulings Release No. 2366 (February 27, 2015); Order Regarding Expert Testimony, Administrative Proceedings Rulings Release No. 2416 (March 12, 2015), the Commission, through Chief Administrative Law Judge Brenda Murray, on the eve of the hearing, inexplicably removed ALJ Foelak and appointed ALJ Elliot. Administrative Proceedings Rulings Release No. 2425 (March 16, 2015).

2. ALJ Elliot had, at that time, not ruled against the Enforcement Division once. *See* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves*, Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl.

D. REVIEW OF THE ID IS REQUIRED BECAUSE THE ALJ IS NOT A PROPER "OFFICER" DESIGNATED BY THE COMMISSION. "RATIFICATION" IS INEFFECTIVE, AND DISMISSAL IS WARRANTED.

The ALJ had no authority to conduct a hearing. He is not an officer designated by the Commission. The IAA states: "Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept." 15 U.S.C. § 80b-12.

Because the Hearing may only be held by the Commission itself or an officer designated by it, this suggests that any hearing officer must be an officer who is empowered to exercise significant authority pursuant to the laws of the United States.

See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 486, 130 S. Ct. 3138, 3148, 177 L. Ed. 2d 706 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 125-26, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

This Hearing did not comply with the statutory requirement that it should be heard before "an officer of the Commission." The Division and the Commission itself have admitted that ALJs are not officers but are, in fact, employees of the Commission. *See* Mem. of Law in Opp'n to PL's Mot. for TRO and a Prelim. Inj. at 11-19, *Duke v. SEC*, No. 15-357 (S.D.N.Y. Jan 28, 2015), ECF No. 13 (". . . SEC ALJs are not constitutional officers. SEC ALJs are employees and thus their removal does not implicate Article II."); Div of Enforcement's Mem.of Law in Resp. to the Commission's Order Req. Supp. Briefing at 4-13, *In re Timbervest, LLC*, File No. 3-15519 (Feb. 12, 2015) ("SEC ALJs, however, are employees not constitutional officers, and thus the President's alleged lack of power to remove them does not implicate Article II.")

The Hearing in this matter is void because ALJ Elliot was not an appropriately appointed officer; he was an employee of the Commission at the time. The Order of November 30, 2017, appointing ALJ Elliot (and others) and ordering review of the previous decision does not correct the error, nor render valid that which was invalid. An improperly constituted hearing is void and cannot be ratified. *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 2035, 132 L. Ed. 2d 136 (1995). *See also Hill v. Securities and Exchange Commission*, Civil Action No. 1:15-CV-1801-LMM (N.D. Ga.) (order imposing a preliminary injunction on the administrative proceeding due to the unconstitutionality of the agency's in-house tribunal); *Gray Financial Group, Inc., et. al. v. Securities and Exchange Commission*, Civil Action No. 1:15-CV-0492-LMM (N.D.

Ga.) (order granting preliminary injunction as to the administrative proceeding due to the improper appointment of SEC judges by inferior officers of the agency thus violating the Appointments Clause of the U.S. Constitution). *See Freytag v. Commissioner,* 501 U.S. 868, 881-2, 111 S. Ct. 2631, 2640, 115 L. Ed. 2d 764 (1991); *Buckley v. Valeo,* 424 U.S. 1, 126, 96 S. Ct. 612, 685, 46 L. Ed. 2d 659 (1976); *Bandimere v. SEC,* 849 F.3d 1166, 1179, 1188 (10th Cir. 2016).

The November 30, 2017 Order, In re Pending Administrative Proceedings, Securities Act Release 10440 (November 30, 2017) does not address the invalidity of, nor prejudice from, the invalid proceeding. A proper appointment requires a vote of the Commission, an oath of office, and delivery of a Commission. U.S. Const. Article II, § 3; *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 157 (1803). The Commission's Order of November 30 purports to "ratify" a prior "appointment," but there is no appointment to ratify. *See also, Ryder v. United States,* 515 U.S. 177, 180-88, 115 S. Ct. 2031, 2034-2039, 132 L. Ed. 2d. 136 (1995) (defective appointment not excused by "de facto" doctrine, new hearing before proper panel required); *United States v. L.A. Tucker Truck Lines,* 344 U33, 38, 73 S. Ct. 67, 69-70, 97 L.Ed. 54 (1952) (defect in initial appointment voids any action taken). Because ratification is unavailing, because Mr. Lloyd has been subjected to the harms and cost of an invalid, defective multi-gear enforcement proceedings, the only proper remedy is dismissal of this administrative proceeding in its entirety.

E. REVIEW OF THE ID IS REQUIRED TO CORRECT ERRORS IN THE IMPOSITION OF SANCTIONS.

Should the Commission determine that the findings regarding Respondent's status as an investment adviser and the findings regarding the violations of Section 206(4) of the IAA were not in error, and should it reject Lloyd's arguments concerning the invalidity of this proceeding, the sanctions imposed on Respondent are nevertheless erroneous.

1. A Cease-and-Desist Order was inappropriate.

The ALJ erred in finding that a cease-and-desist order was warranted because the need for same is moot. Respondent is no longer an associated person of an investment adviser, and all of his securities licenses have since expired. In the alternative, the language of the order is overly broad and puts Respondent at risk for contempt for acts that are unrelated to the alleged harm to be prevented and/or deterred. ALJ Elliot modified the order to prohibit only violations of Rule 206(4). The Order is still erroneous and inappropriate.

Respondent resigned as a registered representative of LPL Financial in March 2013. He has not been associated with any broker-dealer since that time, and as a result, all of his securities licenses have expired. Thus, the entry of a cease-and-desist order was unnecessary because the issue is moot. As the ID pointed out on page 34, Respondent, quite literally, cannot violate the IAA because he is no longer an associated person of an investment adviser.

A cease-and-desist order is akin to an injunction because both seek to restrain future activity. "Rule 65(d) of the Federal Rules of Civil Procedure provides: 'Every

order granting an injunction . . . shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .'" *S.E.C. v. Washington Inv. Network*, 475 F.3d 392, 398 (D.C. Cir. 2007). An order that simply references "future violations" of certain sections of the IAA "fails to clarify 'the act or acts sought to be restrained.'" *Id.* In practice, this broad language "might subject defendants to contempt for activities having no resemblance to the activities that led to the injunction" making it "overly broad in its reach." *Id.*

2. An associational bar was inappropriate.

The arguments concerning the associational bar, disgorgement and the civil penalty were developed in previous briefs.

3. The calculation of disgorgement was erroneous.

The arguments concerning the associational bar, disgorgement and the civil penalty were developed in previous briefs.

4. The civil penalty assessed was excessive and unsupported by the evidence.

The arguments concerning the associational bar, disgorgement and the civil penalty were developed in previous briefs.

V. CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Commission reverse the Initial Decision ("ID") issued by ALJ Elliot on July 27, 2015, and dismiss this proceeding. Alternatively, the cease-and-desist order should be set aside,

the associational bar set aside, disgorgement limited to $20,500, and any civil penalty limited to a single, tier one penalty of $5,000.00.

This the 21st day of May, 2018.

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CERTIFICATE OF COMPLIANCE

The signature of respondent's attorney below certifies that, in compliance with the requirements of Securities Exchange Commission Rule 154(c) and the Briefing Order of April 20, 2108, the word count for the **RESPONDENT'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW** filed with the Securities and Exchange Commission on May 21, 2018, contains a total of 2542 words, as reported by the word processing program used to prepare the respondent's brief.

This the 21st day of May, 2018.

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CERTIFICATE OF SERVICE

I certify that **RESPONDENT'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW** was served upon the parties to this action as follows:

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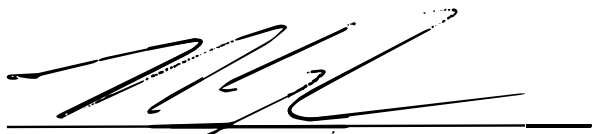
This the 21st day of May, 2018.



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