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July 28, 2019

VIA EMAIL(ALJ@sec.gov)

Hon. James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-9303

Re: In the Matter of Christopher M. Gibson
File No. 3-17184

Dear Judge Grimes:

In accordance with the final prehearing conference on July 23, 2019 in the above-referenced proceeding, Respondent Christopher M. Gibson ("Respondent") hereby sets forth his constitutional challenges. As an initial matter, Respondent relies upon the affirmative defenses set forth in Respondent's Answer. In addition, as more fully discussed below, by proceeding before an administrative law judge ("ALJ"), Respondent has been denied the constitutional protections that he is entitled to, including his due process rights and Seventh Amendment right to a trial by jury in an Article III court. Moreover, because the removal status of the appointment of the current ALJs of the SEC violates the Appointments Clause of the U.S. Constitution, the upcoming hearing is constitutionally void. Finally, the Order Instituting Proceedings ("OIP") issued in this matter is barred by the statute of limitations.

I. Respondent Has Been Denied Due Process

Respondent has been denied his due process rights due to the misconduct of Division staff falsely advising witnesses that Respondent was engaging in personal securities transactions that were opposed to the interests of the Geier International Strategies Fund, LLC ("Fund") and turning essential witnesses against Respondent to such an extent that Respondent will never have a fair hearing. By having an SEC ALJ hear and adjudicate claims of misconduct of certain staff members of the same agency fundamentally unfairly prejudices Respondent and deprives him of his due process rights. The Commission's Rules of Practice do not permit counterclaims against the Commission, *see Jeffrey L. Feldman*, SEC Release No. 403, 1994 WL 23256 (Jan. 14, 1994), nor do the Rules of Practice permit discovery relevant to such claims. Further, the Commission not only approved the issuance of an OIP that contained Division staff's misstatements regarding Respondent's securities transactions, but also entered an order that permitted to have the OIP served again to commence new proceedings after its economist testified that Respondent did not maintain a short position. Under these circumstances, the Commission is operating under an



inherent conflict of interest and cannot proceed in a manner that would enable meaningful judicial review.

The Fifth Circuit addressed the tacit, fundamental expectation of government agency integrity:

We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably.... Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.

SEC v. ESM Gvmt. Securities, Inc., 645 F.2d 310, 316-317 (5th Cir. 1981). The misconduct by Division staff undermines and strikes at the very core of our jurisprudence whose overriding design and purpose is to determine the truth, and as such, Respondent has been denied his due process rights.

II. *The Appointment of the ALJ Violates the Removal Provisions*

Moreover, the appointment of the SEC's ALJs violates the removal provisions of the Constitution. The ALJ is impermissibly insulated by two layers of removal protection. Article II of the Constitution confers on the President administrative control over the United States, including the power to remove officers from their positions. In *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Supreme Court held that SEC ALJs were "officers of the United States" and that they were unconstitutionally appointed. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court held that inferior officers protected from removal by "dual for-cause limitations on the removal of [SEC appointed] board members contravene the constitutional separate of powers." *Id.* at 492. That constitutional infirmity applies to the current ALJs of the SEC.

The statutory scheme applicable to SEC ALJs provides for at least two levels of protection against presidential removal authority. An ALJ can only be removed from office for good cause as established and determined by the Merit Systems Protection Board ("MSPB"). See 5 U.S.C. § 7521(a). The President may, in turn, remove members of the MSPB "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1201(d). Even members of the Commission are not subject to the President's direct control as they serve terms of five years and may not be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise*, 561 U.S. at 487. See also 5 U.S.C. § 7521. This results in a situation where the President cannot exercise his constitutional removal authority under Article II of the Constitution and is therefore unconstitutional. With this structure, the President cannot hold any of the SEC ALJs directly accountable and remove them unless the MSPB first gives its permission. Moreover, the President also cannot hold the MSPB accountable if they disagreed. As such, the President does not possess "free control" over his own executive officers and is unable to hold the ALJs accountable for their conduct. Thus, the removal status of serving ALJs make their continued service unconstitutional under *Free*

Enterprise Fund. Pursuant to these authorities, the current OIP directing the upcoming hearing before such an ALJ violates the constitutional limitations on appointments.

III. Respondent is Entitled to a Trial by Jury

Because the SEC elected to proceed against Respondent in front of its own appointed ALJ, Respondent is deprived of his constitutional right to have a jury determine whether he violated the federal securities laws. Had this proceeding been brought in federal court, Respondent would be constitutionally entitled to a jury trial under the Seventh Amendment of the Constitution. The Seventh Amendment of the U.S. Constitution guarantees defendants the right to a jury trial on the merits in those actions that “are analogous to ‘[s]uits at common law[.]’” like civil enforcement actions. *Tull v. United States*, 481 U.S. 412, 417 (1987). *Tull* is the seminal case that establishes a right to a jury trial in civil enforcement actions. In *Tull*, a real estate developer was sued by the government for alleged violations of the Clean Water Act, and his request for a jury trial was denied by the district court. The district court found the defendant guilty of violating the Clean Water Act and imposed a monetary penalty, which was affirmed by the Fourth Circuit. *See id.*, at 416. The Supreme Court granted *certiorari* on the question of whether the Seventh Amendment guarantees a defendant the right to a jury trial on both liability and the amount of the penalty in an action instituted by the federal government seeking civil monetary penalties and injunctive relief. *See id.*, at 414. The Supreme Court reversed and held that, while the defendant was not entitled to a jury determination of the penalty, the defendant had a “constitutional right to a jury trial to determine his liability on the legal claims.” *Id.* at 425.

The right to a jury determination of liability for civil penalties has been applied to SEC enforcement actions by several Circuit Courts of Appeal. *See, e.g., SEC v. Life Partners Hldgs., Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017) (accepting SEC position that defendant entitled to jury determination of liability for aiding and abetting in violation of Section 13(a) of Exchange Act); *SEC v. Cap. Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354-55 (8th Cir. 2016) (recognizing defendant’s right to jury trial on liability in SEC enforcement action); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (holding defendant entitled to jury determination of liability). In an administrative proceeding, however, there is no right to a jury trial. The denial of a jury trial by itself can constitute a deprivation of due process. *See, e.g., Duncan v. State of Louisiana*, 391 U.S. 145, 149 (1968) (holding that Due Process Clause of Fourteenth Amendment guarantees right of jury trial in all criminal cases which would come within Sixth Amendment’s guarantee if tried in federal court).

Respondent’s Answer and Affirmative Defenses also asserted that the claims alleged in the OIP were barred, in whole or in part, because this administrative proceeding is the product of an impermissible delegation of legislative authority in contravention of Article I of the Constitution. Similarly, the claims in the OIP are barred, in whole or in part, because this administrative proceeding violates the doctrine of separation of powers. The claims in the OIP are further barred, in whole or in part, because this administrative proceeding violates Respondent’s right to equal protection of the laws under the Constitution.

IV. The OIP is Barred by the Statute of Limitations

The Commission's actions following *Lucia* perpetuate rather than cure its unconstitutional conduct with respect to Respondent. Initially, the SEC purported to ratify the "agency's prior appointment" of its ALJs in an Order dated November 30, 2017, rather than properly appoint its ALJs in accordance with the Appointments Clause of the Constitution. The Commission's ratification order was rendered meaningless by the *Lucia* decision. In response to the obvious note of caution signaled by the Supreme Court in *Lucia*, the SEC instead doubled down on the "ratification" in another single sentence in an Order dated August 22, 2018 reiterating its approval of the "ratification" when it could have prudently paused, addressed the appointment issue and filed actions in Article III courts while the removal issue was addressed.

On October 10, 2018, the Commission again served the OIP that it had entered on March 29, 2016 and commenced a second administrative proceeding against Respondent. By serving the OIP again, the Commission has acknowledged that it has commenced a new proceeding. However, the OIP was constitutionally defective and invalid when it was entered on March 29, 2016 because of *Lucia*, and the issuance and service of the OIP in March 2016 did not toll the statute of limitations. A consequence of the Commission's decision is that it failed to commence a valid proceeding within five years of the conduct at issue and as a result, the Commission is now time-barred from imposing sanctions against Respondent.

Sincerely,

MURPHY & MCGONIGLE P.C.

By: *Thomas A. Ferrigno*
Thomas A. Ferrigno

cc (via email):

Hon. James E. Grimes (ALJ@sec.gov)
Gregory Bockin (Bocking@sec.gov)
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