UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17210

In the Matter of

PAUL LEON WHITE, II,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION FOR THE DISQUALIFICATION AND WITHDRAWAL OF THE HEARING OFFICER, AND FOR TRANSFER OF PROCEEDINGS AND TO RESPONDENT'S LETTER SUBMISSION

DIVISION OF ENFORCEMENT
Alexander Janghorbani
Margaret Spillane
New York Regional Office
Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281
(212) 336-0177 (Janghorbani)
(703) 813-9504 (fax)

September 19, 2016

ARGUMENT

The Division of Enforcement opposes Respondent's Motion for the Disqualification and Withdrawal of the Hearing Officer Pursuant to Rule 112(b) and Transfer of Proceedings to the U.S. District Court for the Southern District of New York ("Motion"). In his motion, Respondent makes a number of challenges to this proceeding, which fail for the reasons discussed below.[1] Respondent has also submitted a letter ("Respondent's Letter Submission") requesting certain relief, which the Court should also deny.[2]

1. On July 7, 2016, the Court held Respondent in default as a result of his failure to answer the Order Instituting Proceedings ("OIP"). (*See* Order Finding Respondent in Default, July 7, 2016 ("Default Order"), at 1.) Despite making multiple submissions subsequent to the Court's Order, in none of them has Respondent attempted to show good cause why his default should be set aside. In Respondent's Letter Submission, he acknowledges that he is readily able to answer the OIP. Rather than doing so, however, he again comes before the Court with the current submissions raising various constitutional and procedural claims, but his arguments are meritless.

2. Respondent argues (*see, e.g.*, Motion at 1-13) that the Commission's method of hiring of administrative law judges (ALJs) and the manner for their removal violate the Appointments Clause of the Constitution, *see* U.S. Const. art. II, § 2, cl. 2. These arguments fail because, as the Commission has held, the Commission's ALJs are

[1] This motion is dated August 3, 2016, but bears a postmark of September 1, 2016 and was received by the Division on September 9, 2016.
[2] This letter is dated August 1, 2016 but bears a postmark of September 12, 2016 and was received by the Division on September 15, 2016.

employees, not constitutional officers, and thus are not subject to Article II's requirements. *See, e.g.*, *Raymond J. Lucia Cos., Inc., et al.*, Exchange Act Rel. No. 75837, 2015 WL 5172953, at *21 (Sept. 3, 2015), *aff'd*, *Raymond J. Lucia Cos. v. SEC*, --- F.3d ---, 2016 WL 4191191 (D.C. Cir. Aug. 9, 2016); *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015).

3. There is no basis for Respondent's request that the Court "transfer the AP to the United States District Court, Southern District of New York, for the purpose of adjudication." (Motion at 4, ¶9; *see also* Motion at 36 ("Relief Requested").) There is no provision in the governing statutes or in the Commission's Rules of Practice for transfer of an administrative proceeding to a federal district court. Moreover, Respondent is mistaken insofar as he suggests, *see* Motion at 32-34, that constitutional challenges to an ongoing administrative proceeding are outside the Commission's expertise and, therefore, must be prosecuted in federal district court. The courts of appeals have rejected this precise argument and have unanimously held that federal district courts lack subject-matter jurisdiction to consider claims such as those that Respondent makes here. *See Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015).

4. Respondent argues that this proceeding violates the separation of powers because the ALJ is "acting in both capacities as a Judge (i.e. Hearing officer), a Judicial Branch function and prosecutor, an Administrative Branch function." (Motion at 19.) This assertion is incorrect because Commission ALJs "perform adjudicative rather than enforcement or policymaking functions." *Timbervest LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *27 (internal quotation marks omitted).

Insofar as Respondent's argument is that this proceeding is constitutionally infirm on the ground that the Commission both authorizes enforcement proceedings and, after an evidentiary hearing and review of the record, determines whether the law has been violated, that argument is likewise unavailing. Many administrative agencies perform both prosecutorial and adjudicative functions, and it is well established that this arrangement does not violate due process. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (rejecting "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication"); *see also Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955) (upholding deportation scheme in which agency head performs both prosecutorial and adjudicative functions); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (upholding Social Security Administration system in which ALJs both investigate and decide claims); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 917 (5th ed. 2002) (noting that "most commissions both issue the complaint that initiates the hearing process and decide the resulting case on appeal"); 5 U.S.C. § 554(d)(2)(C) (contemplating that agency heads will perform both prosecutorial and adjudicatory functions).

5. Respondent also appears to argue that the presiding ALJ is biased (*see* Motion at 14), but this argument lacks merit. Judges—including ALJs—are presumed to be unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow*, 421 U.S. at 47 (applying "a presumption of honesty and integrity in those serving as [agency] adjudicators"); *FTC v. Cement Institute*, 333 U.S. 683, 701 (1948). This presumption creates a heavy burden for those seeking to establish bias: they must make "a showing of conflict of interest or some other specific reason for disqualification." *Schweiker*, 456 U.S.

at 195-96; *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1222 (D.C. Cir. 1989) (allegations of bias must show that the "judge's mind was 'irrevocably closed' on the issue"). To overcome that presumption, Respondent must show "that the ALJ's behavior, in the context of the whole case, was 'so extreme as to display clear inability to render fair judgment.'" *Rollins v. Massanari,* 261 F.3d 853, 858 (9th Cir. 2001) (quoting *Litesky v. United States,* 510 U.S. 540, 551 (1994)). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555 (citations omitted); *accord Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) ("The mere fact that a decision was reached contrary to a particular party's interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune."). Respondent has not met his burden of establishing that the ALJ in this case was biased.

6. Respondent, although he does not state it directly, also appears to be requesting that the ALJ issue a subpoena to the Commission requesting a host of documents concerning a purported No Action Letter, all Commission documents concerning Tenant-in-Common investment vehicles, and all documents concerning the Respondent himself. (*See* Exhibit D to Motion and Respondent's Letter to the Court, August 3, 2016, at 1.) As Respondent is in default, this request should be denied. In addition, in its June 6, 2016, Order Denying Issuance of Subpoenas without Prejudice ("June 6 Order"), the Court noted that any request to issue subpoenas must be supported by a showing of the relevance and reasonable scope of the evidence sought. (*See* June 6 Order at 3.) Respondent has made no such showing here. Moreover, the Division has already produced its entire investigative file to Respondent as required by Rule of Practice 230 and

Respondent has not (and cannot) explain why more is required, or would be relevant to this follow-on proceeding. (*See* Order on Respondent's Motion, May 26, 2016 (noting the Division's compliance with Rule of Practice 230(a)).)

7. Respondent, in his Letter Submission, states that he has not filed a motion to set aside his default but requests that the Court, nonetheless, "vacate" its Default Order. (*See* Respondent's Letter Submission at 2 and 10.) To the extent that the Court construes Respondent's request as a motion to set aside default, the motion should be denied. The Default Order sets out the requirements to set aside default pursuant to Rule of Practice 155, and Respondent has not satisfied those requirements. Indeed, Respondent admits that he has failed to submit an Answer, despite acknowledging that he has been "adequately and effectively" able to do so for months (at minimum). (*See* Respondent's Letter Submission at 2.) As Respondent has made no showing that merits setting aside his default, and has made no attempt to cure the default, the Court should deny Respondent's request.

8. Respondent also requests that the Court issue a host of subpoenas to his victims as well as to various government agencies. (*See* Respondent's Letter Submission at 2 and 10.) Respondent's justification for the subpoena request is largely duplicative of his earlier reasoning, *i.e.*, to permit him to re-litigate his conviction. For the reasons set out in the June 6 Order—and because his requests are "unreasonable, oppressive, excessive in scope, [and] unduly burdensome" and irrelevant to these proceedings (*see* Rule of Practice 232(b))—the Court should likewise deny this request to issue subpoenas.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court deny the Respondent's Motion for the Disqualification and Withdrawal of the Hearing Officer Pursuant to Rule 112(b) and Transfer of Proceedings as well as Respondent's Letter Submission.

Dated: September 19, 2016
New York, New York

Respectfully submitted,

Alexander Janghorbani
Margaret Spillane
Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281
Tel. (212) 336-0177 (Janghorbani)
Fax (703) 813-9504
Email: JanghorbaniA@sec.gov

DIVISION OF ENFORCEMENT

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17210

In the Matter of

PAUL LEON WHITE, II,

Respondent.

Certificate of Service

I hereby certify that I served the Division of Enforcement's Response to Respondent's Motion for the Disqualification and Withdrawal of the Hearing Officer, and for Transfer of Proceedings and to Respondent's Letter Submission on this 19th day of September, 2016, on the below parties by the means indicated:

Paul Leon White
Dept. Identification No. [redacted]
[redacted] – Annex
[redacted]
Inmate Mail: [redacted] Zip[redacted]
Dannemora, New York [redacted]
(By UPS)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-2557
(By UPS (original and three copies))

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(By Email and UPS)

Margaret Spillane
Senior Counsel