

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17228

In the Matter of

David S. Hall, P.C.
d/b/a The Hall Group CPAs,
David S. Hall, CPA,
Michelle L. Helterbran
Cochran, CPA, and
Susan A. Cisneros,

Respondents.

**MOTION TO RECONSIDER
AND AMEND THE FINAL ORDER**

Respondent Michelle L. Helterbran Cochran respectfully moves pursuant to SEC Rule of Practice 470, 17 C.F.R. § 201.470 for reconsideration and amendment of the Commission’s June 2, 2023 *In re Pending Administrative Proceedings* Order¹ (the “Dismissal Order”), which dismissed this proceeding and certain others, to clarify that the dismissals were *with prejudice*.

BACKGROUND

On April 14, 2023, the United States Supreme Court unanimously ruled that the district court in which Michelle Cochran is challenging the constitutionality of this enforcement proceeding has jurisdiction to hear her constitutional claims before she must submit to further proceedings in this action and remanded her case to the district court. When ruling in Michelle Cochran’s favor, Justice Kagan described these challenges as “fundamental, even existential. They

¹ *In re Pending Admin. Proceedings*, Exchange Act Release No. 97640 (June 2, 2023), <https://www.sec.gov/litigation/opinions/2023/33-11198.pdf>.

maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work.” *Axon v. FTC*, 143 S. Ct. 890, 897 (2023),

On June 2, 2023, *before* Ms. Cochran could proceed on the merits of her claims in district court, the SEC unilaterally issued an unprecedented administrative order dismissing, *sua sponte*, 42 proceedings then pending on its administrative adjudication docket, including this administrative adjudication against Ms. Cochran as the first-listed proceeding. *See* Dismissal Order at Exhibit A.² The Dismissal Order characterized the dismissals “as a matter of discretion” due to an internal “control deficiency” that had allowed SEC prosecution staff to access the internal memoranda of the agency’s adjudicative staff—a clear violation of the separation-of-functions that purportedly legitimizes administrative adjudication. SEC has not disclosed whether any personnel has been disciplined for inappropriately accessing the shared database. The Dismissal Order claimed the dismissals were “appropriate to preserve the Commission’s resources.” *Id.* at 3. Five days later, on June 7, 2023, the SEC served Ms. Cochran with the Dismissal Order.

The Dismissal Order was silent as to whether the dismissals were being sought with or without prejudice, although it disavowed adjudication of the merits of any of the dismissed cases:

[W]e take no view of the merits of Enforcement’s allegations or claims or any defenses raised by the respondents, including the extent to which statutes, Commission Rules, and other precedent would be determinative or relevant to those allegations, claims, or defenses.

Id.

ARGUMENT

The Dismissal Order, while a welcome reprieve from the reputational harm these public proceedings have inflicted on Ms. Cochran since 2016, leaves her at unacceptable continued risk

² All other proceedings are listed in chronological order by their respective Administrative Proceeding Numbers. *See id.*

of further prosecution. Specifically, although she is cautiously optimistic that the Commission intended to dismiss the proceedings with prejudice, the Dismissal Order is silent on that issue, leaving open the possibility that the Division of Enforcement might seek to reinstate the dismissed proceedings or file a complaint in federal court alleging substantially similar claims. The Dismissal Order's express disavowal of any adjudication of the merits, provides the Commission or its staff leeway to claim the dismissals were without prejudice and to either reinstate the dismissed proceedings or file complaints in federal court alleging substantially similar violations and seeking substantially similar remedies. The Dismissal Order provides no assurance that SEC would not seek those remedies again in a reinstated or new proceeding against Ms. Cochran or any of the other dismissed respondents.

Nor is the prospect of reinstated SEC proceedings unrealistically speculative here. The judge in Ms. Cochran's district court action noted with concern the pattern of serial, to-be-vacated proceedings in the very action to which she has been remanded:

The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed. She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

Cochran v. SEC, No. 4:19-CV-066-A, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019) (McBryde, J.).

After the Supreme Court held in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that SEC's administrative law judges were unconstitutionally appointed, SEC could have dismissed with prejudice its proceeding against Ms. Cochran (and those against similarly situated litigants), but it chose instead to relitigate the proceeding and force her to go through a second adjudication by a second administrative law judge—even though the Solicitor General had conceded in *Lucia* that

*SEC ALJs enjoyed unconstitutional multiple layers of removal protection.*³ Nonetheless, SEC insisted upon prosecuting Ms. Cochran before a second administrative law judge who was unconstitutionally insulated from removal, and then vehemently fought her claim to Article III jurisdiction at every level of the federal courts. As Justice Gorsuch recently observed with respect to this very proceeding:

[The respondent] might have thought [the *Lucia* decision] would bring her own case to a close. But the SEC chose instead to take a mulligan. In 2018, the agency vacated the initial decision against Ms. Cochran and assigned a different, properly appointed ALJ to retry the case. So two years after her administrative proceedings began, they began again.

Axon Enter., 143 S. Ct. at 916-17 (2023) (Gorsuch, J., concurring in judgment).

Absent a dismissal with prejudice, there is no certainty that SEC will not take yet another mulligan in its pursuit of Ms. Cochran.⁴ To quote then-Judge Kavanaugh responding to a sister agency's assurances of exercising responsible prosecutorial discretion in the absence of a statute of limitations, "'trust us' is ordinarily not good enough." *PHH Corp. v. CFTC*, 839 F.3d 1, ___, vacated, 2017 U.S. App. LEXIS 2733 (D.C. Cir 2017) (en banc), reinstated in relevant part, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc). SEC's order should be amended to protect her and the other

³ Although the *Lucia* Court declined to address the embedded removal question, the government argued that the status of ALJs as inferior officers meant they were unconstitutionally protected from removal and urged the Court to address removal to "avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Lucia v. SEC*, Brief for Resp't 2017 WL 5899983 (U.S.), 21. The government asserted SEC's "statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." *Id.*

⁴ In past cases, the Commission has insisted that no statute of limitations applies to proceedings, such as this one, that seek to impose industry bars and suspensions. See, e.g., *In re Grossman*, Securities Act of 1933 Rel. No. 10227, at 20-25 (Sept. 30, 2016); *In re Moscowitz*, Securities Act of 1934 Rel. No. 45609 (March 21, 2002). Moreover, even the recently enacted 10-year statute of limitations for "equitable remedies," 15 U.S.C. § 78u(d)(8)(B), if applicable, may not yet have fully expired because the Order Instituting Proceedings alleged facts concerning events that occurred as late as 2013. Thus, the Dismissal Order leaves Respondent at unacceptable risk of having the Division of Enforcement reallege its dismissed charges and forcing Respondent to defend herself again from Square One.

respondents from further or renewed SEC prosecution and provide that SEC's claims are dismissed with prejudice.

CONCLUSION

Respondent therefore respectfully requests that the Commission amend the Dismissal Order to make clear that the dismissal of this proceeding is *with prejudice*.

June 20, 2023

Respectfully submitted,

/s/ Margaret A. Little

Margaret A. Little

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CERTIFICATE OF SERVICE

This is to certify that the original and three copies of the foregoing was mailed, first class, postage prepaid on June 20, 2023 to:

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And that a courtesy copy of the foregoing was emailed to:

Jason S. Patil

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/s/ Margaret A. Little