UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding File No. 3-17228

In the Matter of

Michelle L. Helterbran Cochran, CPA,

Respondent

RESPONDENT HELTERBRAN'S LETTER IN OBJECTION OF RATIFICATION OF ALL PRIOR ACTIONS

History

In his petition to the Tenth Circuit, David Bandimere challenged the Securities and Exchange Commission's ("SEC") opinion as a whole, on a constitutional argument, contending that the Administrative Law Judge ("ALJ") that presided over his hearing had been appointed in violation of Appointments Clause. (Bandimere v. U.S. SEC, No. 15-9586 (10th Cir. 2016). The Tenth Circuit's decision with respect to this argument "relieves Mr. Bandimere of all liability." During the SEC's review, the agency addressed petitioner's argument that the ALJ was an "inferior officer," as was contemplated by the Federal Constitution. The SEC conceded the ALJ had not been constitutionally appointed, but rejected petitioner's argument because, in its view, the ALJ was not an inferior officer.

Ultimately, the matter was appealed to the Tenth Circuit Court of Appeals, which held that the SEC's ALJs are not "employees" but are "inferior officers" that must be appointed by the president in accordance with the Appointments Clause. **Accordingly, the court ruled that the ALJ presiding over the in-house enforcement proceeding against Bandimere held the office unconstitutionally, and the administrative body's opinion was set aside.**

As the SEC ALJ held his office unconstitutionally when he presided over Mr. Bandimere's hearing, ALJ Cameron Elliot ("ALJ Elliot") did the same when presiding over Michelle L. Helterbran Cochran's ("Helterbran") hearing. **Therefore, the SEC's decision against Helterbran must be set aside as well.**

On November 30, 2017, the SEC issued an order ratifying the "prior appointment" of the SEC ALJ's.

Although the government now agrees that petitioners were tried before an unconstitutionally appointed official, petitioners remain subject to egregious sanctions resulting from those proceedings.

On January 12, 2018, a petition for writs of certiorari was granted to Raymond Lucia, et. al in his appeal to the Supreme Court on his argument that administrative law judges were unconstitutionally appointed at the Securities and Exchange Commission. The Supreme Court said it would review the Securities and Exchange Commission's in-house judicial system, agreeing to decide whether the commission's judges were selected in a way that violates the Constitution.

The Appointments Clause embodies both separations of powers and checks and balances. Ryder v. United States, 515 U.S. 177, 182 (1995) ("The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch . . . ."). By defining unique roles for each branch in appointing officers, the Clause **separates power.** It also **checks and balances** the appointment authority of each branch by providing (1) the President may appoint principal officers only with Senate approval and (2) Congress may confer appointment power over inferior officers to the President, courts, or department heads but may not itself make appointments."

SEC ALJ's Were Not Properly Appointed

November 30, 2017's "ratification" of the hiring of the ALJ's by the SEC is invalid as the SEC cannot ratify an action they did not initially perform. The ALJ's were hired by The Office of Personnel Management and therefore, unconstitutionally presided over Helterbran's proceedings. If the ALJ was not property appointed at the time the ALJ made decisions about the hearing motions, potential liabilities and sanctions, then the ALJ was acting with unconstitutional incentives and loyalties.

With their November 30, 2017 "ratification", the SEC to trying to circumvent the constitutional protections of the Appointments Clause. It is unlikely that within 24 hours from the DOJs ruling that the Commission had adequately vetted and determined they would have appointed the exact same people under the Appointments Clause.

Even if the ratifications were deemed to be valid on November 30, 2017, this action indicates that the ALJ's clearly violated the Constitution from the time of their appointment until November 30, 2017. The proceedings in which Helterbran was a respondent were conducted entirely during the time in which ALJ Elliot unconstitutionally held his position.

The relevant time to examine is the time the ALJ acted on a particular case. Telling an ALJ to go back and reconsider their record, motion and possible liabilities and sanctions,

now the SEC believes they are an officer, is simply not adequate. The ALJ's have been immersed in the proceedings prior to their ratification and it is unrealistic to think an ALJ would reconsider their past decisions now they have been anointed by the Commission and now see and think differently. This premise is not realistic and should not be accepted by the law. Reconsideration will be superficial and not meaningful. After being so immersed in these proceedings, it will be impossible for an ALJ to be *detached* from their previous thoughts, ideas, decisions, rulings, etc. and proceed with a de novo remand, as if no prior hearing had occurred.

ALJ Elliot should not reconsider this case unless he is persuaded that the Commission has the legal authority to appoint and ratify the Appointment of ALJs.

A ratification of an unconstitutional appointment is in itself unconstitutional.

The move to retroactively appoint the ALJs and reevaluate all pending matters, represents a total reversal of the SECs prior position. Not only did the SEC argue in both Bandimere and Lucia that the Appointments Clause was inapplicable, but the ALJs themselves have issued decisions highlighting this position. This total 180 degrees turn for the SEC should give the ALJs the precedent and confidence to boldly take a totally opposite stance versus their preliminary decisions in the *Initial* Orders.

Proceedings are Constitutionally Defective

By attempting to ratify the unconstitutionally-serving SEC ALJ's on November 30, 2017, the SEC has conceded that its proceedings were constitutionally defective, and therefore, this case should be DISMISSED. To bring upon an additional suit against Helterbran would further violate her constitutional rights and deny due process.

Assuming that the ratifications were valid, the appointments of its Administrative Law Judges and acknowledging that SEC ALJs are officers of the United States, there are certain Constitutional requirements that apply to ALJ's, such as separation of powers requirements that prohibit Congress from placing restrictions on the president's power to remove officers of the United States from their positions.

"Article II confers on the President the general administrative control of those executing the laws," the president must have the power to remove officers who carry out executive functions. Accordingly, Congress is forbidden from creating statutory schemes that grant inferior officers two layers of protection from presidential removal authority because such schemes allow an agency to exercise executive authority without meaningful presidential oversight.

SEC ALJs currently enjoy two layers of tenure protection. SEC ALJs may only be removed by the Commission for good cause established by the Merit Systems Protection Board, the members of which may only be removed by the president for good cause. The Supreme Court invalidated a similar scheme in Free Enterprise Fund, in which the members of the Public Company Accounting Oversight Board could only be removed for

good cause established by the SEC, whose members themselves could only be removed by the president for good cause.

Now that SEC ALJs are officers of the Unites States, they are unconstitutionally insulated from presidential removal. SEC **ALJ's decisions are infirm because the ALJ remains unconstitutionally protected from removal and therefore immediate DISMISSAL of this case is the only Constitutional remedy.**

Documentation of De Novo Review, Reexamination and Reconsideration

The SEC has ordered each ALJ to determine, based on a de novo reconsideration of the full administrative record, whether to ratify or review in any respect all prior actions taken by the ALJ during the course of each proceeding.

In order for the Commission and for each respondent, for whom due process is ensured, and cannot be denied, to conclude on the adequacy of each de novo review that has been instructed by the Commission, the following should be made publicly available:

- a list of actions taken by each ALJ on each of the 163 files under remand, including:
    - a list of all documents reviewed including the proper documentation for each point reviewed, reexamined and reconsidered,
    - the analysis of each piece of additional evidence submitted,
    - support for each conclusion reached and
    - the ALJ's signature, including date and time each action was performed and/or concluded.
    - any other considerations made

As per *Advanced Disposal Services East, Inc. v NLRN 820 F.3d 592, 602-03 (3d Cir. 2016)* the same person who made the initial decision can be the ratifying authority so long as:

- "the ratifier has the authority to take the action to be ratified" and
- "with full knowledge of the decision to be ratified" makes a
- "detached and considered affirmation of that earlier decision"

Therefore, each ALJ should also document how on each file under remand:

- how they have the authority to take the action to be ratified,
- the steps they took to have **full knowledge** of the decision to be ratified and
- **how they consider themselves detached from the original decisions.**

Detached: ***adjective.***

Someone who is detached is not personally involved in something or has no emotional interest in it.
(HarperCollins Advanced English Dictionary)

Not Detached – in Fact or In Appearance

The ALJ has a constitutionally unacceptable risk of being biased in favor of the SEC. The ALJ and the SEC have an extensive relationship with many different facets. The risk of bias has been increased with the SEC's claim that it has the power to appoint the ALJ.

SEC 213 RESPONDENTS 0

In fact, between October 2013 and January 2015, the SEC won *EVERY ONE* of the 219 administration decisions they issued. 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).*

As administrative proceedings before ALJs differ from federal court cases in several ways that meaningfully impact the ability of defendants to present a full defense. Defendants have limited ability to obtain pre-hearing discovery, have a short period of time to prepare for a hearing, are not protected by the evidentiary safeguards of the Federal Rules of Evidence, and no right to a jury trial. See Joseph A. Grundfest, *Fair or Foul*? SEC Administrative Proceeds and Prospects for Reform Through Removal Legislation, 85 FORDHAM L. REV> 1143, 1156-65, 1169-74 (2016) ("Grundfest"); see also H.R. Rep. No. 114-697, at 3; U.S. Chamber of Commerce, Examining U.S. Securities and Exchange Commission Enforcement: Recommendation on Current Processes and Practices (2015).

The SEC may take years to investigate and develop a case, during which time it has essentially unfettered authority to request documents and interview witnesses. See Grundfest at 1158. The imbalance between the SEC and defendants in administrative proceedings has raised concerns about the fairness of such proceedings, which further underscores the importance of transparency and accountability in the conduct of the proceedings. For individuals such as Helterbran, the time and expense of these proceedings becomes impossible. Helterbran is no longer able to afford counsel and must fight to prove her innocence alone. In May 2018, it will be five years since Helterbran resigned from The Hall Group CPAs, although the nightmare of the hostile work environment has followed her every day since then. Despite being innocent until proven guilty (in a court of law), upon disclosing to General Counsel at the company where she was subsequently employed, the mere existence of this proceeding caused Helterbran to lose a job she loved and was stripped of an excellent salary, accrued bonuses and equity compensation.

The SEC's own internal guidance on forum selection recommends bringing an enforcement action as an administrative proceeding before an in-house ALJ, as opposed to a civil action in court if it "is likely to raise unsettled and complex legal issues under the federal securities laws or interpretation of the Commission's rules.". SEC, Division of Enforcement Approach to Forum Selection in Contested Actions.

By utilizing Administrative Law Judges, such as ALJ Elliot, who are "employed" by or even appointed by the SEC, they are no way independent in fact **or in appearance**, when they preside over cases brought forward to them by the SEC's Department of Enforcement.

The rights to due process and a "fair trial" have been taken away from Helterbran by having the SEC as the prosecutor AND the judge in the proceedings against her.

Utilizing a judge who is not independent in fact or in appearance, violates the core values of the SEC and deprives respondents such as Helterbran with due process and the right to a fair trial.

Facts were Ignored – There is Insufficient Evidence

Judge Elliot does not (and will not during his remand) have full knowledge of the decisions to be ratified in Helterbran's Initial Order, as **the DOE did not present sufficient evidence to counter alternative theories presented in the hearing that are consistent with Helterbran's innocence.**

For example, there was no evidence presented by the DOE that showed beyond a preponderance of the evidence that Cisneros was an employee of the firm and therefore, subject to the requirement of being a Certified Public Accountant. The DOE did not present sufficient evidence to counter the fact that she was indeed a contractor and not required to be a CPA.

This Case was Decided on Opinion and Not Fact.

The ALJ unfairly judged Cisneros during the hearing on her ability to cite accounting guidance related to "complex equity transactions" several years after the audits and reviews were issued. Cisneros also alerted the DOE and ALJ prior to her testimony that she had recently been in a coma and in intensive care for an extended period, and suffered from other serious medical conditions. As a result, she had significant problems being able to recall details from several years of her life. She offered to provide private medical records as necessary to affirm her condition. The DOE and ALJ took advantage of Cisneros' medical situation and drilled her with questions on accounting for complex equity transactions at the hearing, then deemed her unqualified when she did not provide them immediately with responses satisfactory to them.

The SEC and ALJ have been relying on inference, speculation and opinion rather than actual evidence.

Alternative Situations were Not Considered

In the Initial Order, the DOE failed to present sufficient facts to prove its theory of the case and to counter alternative theories that were consistent with Helterbran's innocence.

It was clear in the Initial Order that alternative situations were not considered. For example, during the hearing, Helterbran and Cisneros both gave numerous examples of where documentation was made outside of a non-required/optional checklist. It is obvious by the Initial Order that these alternative situations were dismissed, not considered and no facts have been presented to counter the alternative theories presented during the hearing. For this reason alone, this case should be dismissed.

Failure to Prove Scienter

The DOE also failed to prove scienter, the facts of which too, were disregarded in the Initial Order and no actual evidence presented.

- the allegations against Helterbran are purely administrative and procedural in nature and **not egregious.**

  From Dictionary.com -

  Egregious: Outstandingly bad; shocking.

  Synonyms: shocking, appalling, terrible awful, horrendous, frightful, atrocious, abominable, abhorrent, outrageous, monstrous, heinous, dire, unspeakable, shameful, unforgivable, intolerable, dreadful, grievous.

- **Neither the DOE or ALJ have not shown, provided any evidence or even suggested, that Helterbran has done anything that is "egregious" (as defined above).**

- **Neither the DOE or ALJ have not shown, provided any evidence or even suggested, that anyone has been harmed by Helterbran in the allegations.**

- As the DOE has noted over the last five years dealing directly with Helterbran in this matter, there is absolutely no scienter involved. Helterbran never has intended harm or tried to deceive anyone with her actions. **The DOE has not provided any**

evidence that Helterbran had any intent to defraud, deceive or manipulate anyone or has any intention of doing so in the future.

- Five years later there still are no restatements or any issues with Helterbran Filings.

- These are all examples of the DOE's "**Investigate to Litigate**" mantra in which they have a **failure to present sufficient facts to prove the theory of their case and to counter alternative theories that are consistent with Helterbran's innocence.**

- There is no proof that alternative situations were considered that confirmed Helterbran's innocence. In the Initial Order, Helterbran has been deemed guilty until proven innocent. The DOE has the burden of proof on this, and the other matters, which they have not met.

Preponderance Hurdle Not Cleared

Similar to *In the Matter of Barbara Duka*, the SEC (both the DOE and ALJ) has ignored the context of the record that Helterbran had intended to produce sound and complete workpaper analyses.

As *In The Matter of Lynn Tilton*, the SEC (both the DOE and ALJ) has failed to equate the lack of clarity with intentional fraud.

Additionally, similar to *In the Matter of Equity Trust Company*, in which the ALJ dismissed proceedings because the respondent was unaware that they were dealing with an individual who would be convicted of fraud, Helterbran did not know the extent of David S. Hall's infractions until after the PCAOB and SEC had issued their Order Instituting Proceedings – over a year after Helterbran had resigned from the The Hall Group CPAs.

These decisions highlight the SEC's failure to develop evidence in scienter as well as their reliance too heavily of individual pieces of circumstantial evidence that tell an incomplete story or are negated by equally plausible and persuasive evidence. The SEC's circumstantial evidence is not sufficient to clear the preponderance hurdle, particularly when countered by Helterbran and Cisneros' explanations for their conduct. This evidence, when viewed in context **and independent,** can demonstrate a completely different, plausible and innocent story.

I urge ALJ Elliot, should it be determined that he has the authority to proceed with these remands, to strongly consider this evidence in his *detached* and independent de novo review, reexamination and reconsideration of the record and earlier decisions.

For any cases in which no changes are made to the Initial Order and sanctions are recommended by the ALJ, a de novo review by the entire Commission is warranted for each Respondent.

In Closing

"The glory of justice and the majesty of law are created not just by the Constitution – nor by the courts – nor by the officers of the law – nor by the lawyers – but by the men and women who constitute our society – who are the protectors of the law as they are themselves protected by the law." -- Robert Kennedy

"The liberties of our country, the freedom of our civil constitution, are worth defending against all hazards: And it is our duty to defend them against all attacks". – Samuel Adams

"The Constitution is the guide which I never will abandon". – George Washington

A ratification of an unconstitutional appointment is in itself unconstitutional.

CONCLUSION

For the reasons stated herein, the only remedy is to DISMISS this case.

Dated: January 10, 2018

Respectfully submitted,

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SERVICE LIST

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing was served on the following on January 12, 2018 via FedEx Overnight Mail and/or Email:

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ORDER DISMISSING

After a de novo review and reexamination of the record in these proceedings, I have reached the independent decision to DISMISS all prior sanctions, penalties or claims, made by an administrative law judge in these proceedings, including nullifying the initial decision issued on March 7, 2017.

This decision to DISMISS is based on my detached and considered judgement after an independent evaluation of the merits.

Cameron Elliot
Administrative Law Judge