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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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By Email (alj@sec.gov)

The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Re: In the Matter of Donald F. ("Jay") Lathen, Jr., Admin. Proc. File No. 3-17387

Dear Judge Patil:

We write in response to Respondents' constitutional objections to this proceeding.

Respondents' Appointments Clause Arguments Lack Merit

The Court should reject Respondents' argument (Ltr. 1-5) 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. The Commission has consistently held that the requirements of the Appointments Clause apply only to officers of the United States, not employees, and that its ALJs are employees. *See, e.g., Bennett Gr. Fin. Serv, LLC. & Dawn J. Bennett*, Rel. No. 33-10331, 2017 WL 1176053, at *5 (Mar. 30, 2017), *pet. filed* May 26, 2017 (10th Cir. No. 17-9524). And it has reiterated that holding in two decisions that post-date the Tenth Circuit's contrary determination in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), on which Respondents rely. *Bennett*, 2017 WL 1176053, at *5; *Harding Advisory LLC & Wing F. Chau*, Securities Act Rel. No. 10277, 2017 WL 66592, at *19 & n.90 (Jan. 6, 2017), *pet. filed* Mar. 6, 2017 (D.C. Cir. No. 17-1070). The Commission's position remains correct, and Respondents have offered no compelling reason why the Commission should depart from its carefully considered and established approach.

Respondents' Due Process Claims Lack Merit

Respondents claim (Ltr. 5) that their due process rights were violated when the Commission authorized proceedings in an administrative forum rather than in federal district court. They suggest that the administrative forum is not sufficiently "impartial" and take issue

generally with the Commission's Rules of Practice.[1] To the extent Respondents intend to suggest that certain of the Commission's rules are constitutionally flawed—perhaps because they differ from the Federal Rules of Evidence and the Federal Rules of Civil Procedure—that claim has been consistently rejected by both the Commission and the courts. *See, e.g.*, *Cunanan v. INS*, 856 F.2d 1373, 1374 (2d Cir. 1988) ("[A]dministrative proceedings are not controlled by strict rules of evidence; the law requires only that [the respondent] be afforded due process."); *Bernerd E. Young*, Rel. No. 33-10060, 2016 WL 1168564, at *19 n.84 (Mar. 24, 2016) (noting that the Commission has "long rejected" arguments that administrative proceedings deny respondents due process because federal rules do not apply); *see also, e.g.*, *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (recognizing that agencies "should be free to fashion their own rules of procedure") (internal quotations omitted). Moreover, and in any event, Respondents have failed to show how application of the Commission's rules caused the type of prejudice sufficient to establish a due process violation. *See, e.g.*, *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009).

To the extent Respondents' complaint is, more broadly, that the administrative adjudicatory process is itself constitutionally deficient—and, thus, it violates due process to require them to proceed in an administrative forum—that too fails. Again, the Commission and the courts have repeatedly rejected "[s]uch broad attacks on the procedures of the administrative process." *See Harding Advisory LLC & Wing F. Chau*, Securities Act Rel. No. 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). Indeed, courts have correctly recognized that to accept such challenges "would do considerable violence to Congress['s] purposes in establishing" specialized administrative agencies and would "work a revolution in administrative (not to mention constitutional) law." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988).

Respondents' Equal Protection Claims Lack Merit

Respondents' equal protection claims are similarly meritless. They suggest that it was improper for the Commission to proceed against them in an administrative forum while simultaneously proceeding against "other individuals and entities in federal district court." Ltr. 5. To the extent Respondents thus are attempting to allege a "class of one" equal protection violation, such a claim is foreclosed by Commission precedent holding that a "class of one" theory of equal protection is "not legally cognizable" in the context of the Commission's inherently discretionary decision to bring charges in one forum rather than another. *Mohammed Riad & Kevin Timothy Swanson*, Exchange Act Rel. No. 78049, 2016 WL 3226836, at *50 (July 7, 2016), *pet. filed* (D.C. Cir. No. 16-1275); *Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *28-30 (Sept. 17, 2015), *pet. filed* (D.C. Cir. No. 15-1416). Indeed, just as Respondents do here, the *Riad* and *Timbervest* respondents asserted that the Commission's discretionary choice of an administrative forum disadvantaged them vis-à-vis

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[1] On July 13, 2016, the Commission adopted amendments to its Rules of Practice that took effect September 27, 2016. *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212 (July 29, 2016). For proceedings initiated between those dates, the Commission provided that parties could elect to apply the amended rules. *See id.* at 50228-29 & n.184. The parties here did not elect to apply the amended rules. *See Order Following Prehearing Conference* (Sept. 13, 2016) at 1 & n.1.

purportedly similarly situated persons whom the Commission prosecuted in federal court. The Commission rejected these arguments as a matter of law, reasoning that a class-of-one theory of equal protection has "no place" in this context. *E.g.*, *Riad*, 2016 WL 3226836, at *50 (citing *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 594 (2008)). Respondents offer no reason for the Commission to reconsider those decisions.

A "class of one" argument also fails for two additional, independent reasons. First, Respondents have failed even to allege, let alone prove, "an extremely high degree of similarity" between themselves and others purportedly similarly situated. *Timbervest*, 2015 WL 5472520, at *29 (internal quotation marks omitted). Nor do they even explain what criteria this Court might use to determine who might be similarly situated.

Second, Respondents have made no threshold showing that the Commission lacked a rational basis for its decision to proceed here in an administrative forum rather than in federal court. The Commission "takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings." *Harding*, 2014 WL 988532, at *8. A choice of forum made even "solely for reasons of administrative convenience" is within the bounds of prosecutorial discretion. *Timbervest*, 2015 WL 5472520, at *29 (internal quotation marks omitted). And, contrary to Respondents' suggestion, there is nothing untoward about the Commission instituting proceedings in the forum that Congress made available. *See Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015) ("Nothing in Dodd–Frank or the securities laws explicitly constrains the SEC's discretion in choosing between a court action and an administrative proceeding when both are available."); *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 297 (2d Cir. 2014) (citing enforcement mechanisms available in administrative proceedings and holding that "to the extent that the S.E.C. does not wish to engage with the courts, it is free to eschew the involvement of the courts and employ its own arsenal of remedies instead"). Nor have Respondents come close to presenting the evidence that is needed to dispel the presumption of regularity to which the Commission is entitled. *See Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967).

Respondents fare no better in alleging (Ltr. 5-6) that when "selecting" an administrative forum, the Division violated its internal forum selection guidelines—and that this violation, in turn, gave rise to constitutional concerns. The forum selection guidance to which Respondents refer is merely a series of non-exhaustive factors that the Division considers when recommending *to the Commission* how it should exercise *its* discretion in selecting the forum in which to enforce the securities laws. *See* Division of Enforcement Approach to Forum Selection in Contested Actions (available at https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf). Thus, the exercise of discretion about which Respondents complain was wholly the Commission's, not the Division's.

Moreover, the guidance itself makes clear that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *Id.* at 4. It adds that "[d]ecisions about particular individual investigations, cases, and charges are made based on the specific facts and circumstances

presented." *Id.* Therefore, contrary to Respondents' suggestions, the forum selection guidance did not bind the Commission to select any particular forum in this case.[2]

Sincerely,

Judith Weinstock

cc: Paul Hugel, Esq.
Christina Corcoran, Esq.
Harlan Protass, Esq.

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[2] The one case referenced by Respondents in this regard, *SEC v. Staples*, does nothing to alter this analysis. *Staples*, moreover, is distinguishable from this case. The *Staples* defendants were not registered Investment Advisers, as Respondent Eden Arc Capital Management was in this case, and were not charged with any violations of the Investment Advisers' Act, as Respondents are here. *Cf.* Division of Enforcement Approach to Forum Selection in Contested Actions (available at https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf).