

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
ADMINISTRATIVE PROCEEDING
File No. 3-21790

IN THE MATTER OF

ERIC CHRISTOPHER CANNON,

RESPONDENT.

**RESPONDENT ERIC
CHRISTOPHER CANNON'S
MOTION FOR AN ORDER
DISMISSING OR STAYING THE
PROCEEDINGS AND
MEMORANDUM OF LAW IN
SUPPORT THEREOF**

In response to the October 31, 2023 Order Instituting Administrative Proceedings (the “OIP”) issued by the Securities and Exchange Commission (“SEC” or “Commission”), Respondent Eric Christopher Cannon (“Mr. Cannon”) objects to the OIP and moves for an order dismissing or staying this matter, pursuant to Rule 250(a) of the Commission’s Rules of Practice, 17 C.F.R. § 201.250. Whereas staying or dismissing this action pending resolution of an appeal of the underlying federal court judgment would not prejudice the Commission or be contrary to the public interest, permitting the proceeding to go forward would harm Mr. Cannon. This motion is not the sort of “routine” and “noncontroversial” matter that may be decided by the Office of General Counsel pursuant to delegated authority. The Commission itself, and not the staff, should decide this motion to avoid an unconstitutional delegation of legislative power by Congress to the Commission that fails to provide an intelligible principle by which the Commission would exercise the delegated power, in violation of Article I of the U.S. Constitution’s vesting of “all” legislative power in Congress. *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022).

I. Procedural History

On October 31, 2023, the Commission instituted this proceeding against Mr. Cannon pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”).¹ The OIP asserts that “In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest” that proceedings be instituted to determine whether the Enforcement Division’s allegations are true and what remedial action is appropriate and in the public interest against Mr. Cannon. OIP ¶ II, B, 3.

¹ *Eric Christopher Cannon*, Exchange Act Release No. 98827, 2023 WL 7180201 (Oct. 31, 2023).

Although the OIP purports to describe a related federal court litigation, *Securities and Exchange Commission v. Pacific West Capital Group, Inc., et al.*, Civil Action Number 2:15-CV02563-DDP-ASx (the “PacWest Case”), the description is factually inaccurate, incomplete, and misleading. The OIP falsely asserts, “The Commission’s complaint alleged that from 2010 to 2015, Respondent effected transactions . . .” The Commission’s complaint alleges no such thing. Similarly, the OIP falsely states, “As alleged by the Commission’s complaint, Respondent received \$485,000 in commissions . . .” Again, the Complaint alleges no such thing. When describing the Commission’s own complaint in a public document, the Commission should not create facts out of whole cloth.

But the OIP’s errors in describing the federal court action do not end there. The OIP states, “On August 10, 2023, a final judgment was entered against Respondent.” While accurate as far as it goes, the OIP fails to acknowledge that the August 10 final judgment contained an error caused by the staff that required the federal court to issue an amended final judgment on December 13, 2023. And, more pertinent to the current proceedings, the OIP makes no mention of the fact that on October 6, 2023, Mr. Cannon filed a notice of appeal of the final judgment (and later filed an amended notice of appeal to address the amended final judgment) to the United States Court of Appeals for the Ninth Circuit (“9th Circuit Appeal”). The “Entry of the Injunction” on which the OIP is based is very much still in active litigation.

On November 14, 2023, the SEC Enforcement Division and Mr. Cannon filed a joint stipulation to stay (“Stay Stipulation”) the proceeding “until 30 days after the earlier of the Supreme Court’s decision in *SEC v Jarkesy* or July 31, 2024.”² On December 28, 2023, the SEC Office of the General Counsel (“OGC”), “pursuant to delegated authority,” denied the Stay

² *Eric Christopher Cannon*, Exchange Act Release No. 99249 (Dec. 28, 2023).

Stipulation reached by the SEC Enforcement Division and Respondent in part on the basis that “this proceeding has never been assigned to an administrative law judge.”³ On January 17, 2024, Respondent filed an Answer to the OIP.

II. The SEC Should Dismiss or, in the Alternative, Stay This Proceeding Until the 9th Circuit Appeal is Resolved

Nothing about Section 15(b) of the Securities Exchange Act of 1934 required the Commission to initiate this proceeding on October 31, 2023. The conduct alleged in the underlying federal complaint dates back over 13 years, and the Commission elected not to initiate this proceeding at any time during those 13 years. Apparently, although it could have done so, the Commission perceived no imperative public interest requiring initiation of this proceeding against Mr. Cannon during those many years. Instead, the Commission waited until the federal court entered a final judgment in the PacWest Case in 2023, and indeed the OIP relies heavily on the “Entry of the Injunction” as a basis for this proceeding.

When, as here, the Commission initiates an administrative proceeding premised on the entry of a federal court injunction that is later overturned on appeal, the Commission routinely dismisses the administrative proceeding even after discipline has been imposed.⁴ To be sure, the

³ *Id.*

⁴ See, *Jilaine H. Bauer, Esq.*, Exchange Act Release No. 70631 (October 8, 2013) (dismissing proceeding after ALJ entry of initial decision was followed by federal appellate court reversal of district court judgment upon which SEC had premised OIP); *Richard L. Goble*, Exchange Act Release No. 68651 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that served as basis for OIP); *Evelyn Litwok*, Investment Advisers Act Release. No. 3438, 2012 SEC LEXIS 2328, at *3-4 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which served as basis for proceeding); *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals vacated criminal conviction that provided basis for proceeding after Commission had issued bar order).

OGC, through delegated authority, has in the past denied respondents' motions to stay proceedings pending appeal, citing the "strong public interest in the prompt enforcement of the federal securities laws."⁵ However, the pace of the Commission's administrative proceedings is not normally "prompt" enough to be resolved more quickly than the federal court appeal process.⁶ In the *Donald J. Fowler* administrative proceeding, for example, in 2020 the OGC (through delegated authority) denied Fowler's request for stay pending his appeal of the underlying federal court injunction citing the public interest in "prompt enforcement." More than 3 years later in 2023, after Fowler's appeal had concluded, the Commission issued its opinion. Clearly, the public interest in "prompt enforcement" would not have suffered from staying Fowler's administrative proceeding to allow him the opportunity to pursue his appeal of the federal court injunction upon which the Commission ultimately based its opinion.

Moreover, the OGC, through delegated authority, routinely stays administrative proceedings pending the outcome of related court proceedings when, for example, a proceeding was instituted less than a year from the time of the request, fact discovery has not closed, and no evidentiary hearings have been held.⁷ The public interest in "prompt enforcement" apparently does not suffer in such instances, and all of those circumstances are present here: this proceeding was instituted less than a year ago, fact discovery is not closed, and no evidentiary hearings have been held.

⁵ *Donald J. Fowler*, Exchange Act Release No. 89226 (July 6, 2020) (OGC denying motion to stay proceedings, citing strong public interest in "prompt" enforcement).

⁶ *Donald J. Fowler*, Exchange Act Release No. 99084 (December 5, 2023) (Commission issues opinion more than 3 years after OGC denied respondent's request for stay and after federal court appeal had been resolved).

⁷ See, e.g., *Joshua Abrahams*, Exchange Act Release No. 98122 (August 14, 2023) (order postponing proceeding until "the earlier of 30 days after the Supreme Court issues its mandate in *Jarkesy* or July 31, 2024").

The public interest in prompt enforcement will not suffer if the Commission permits Mr. Cannon to pursue his 9th Circuit appeal. The Commission waited more than 10 years from the underlying conduct to initiate this proceeding; there can be no assurance that this proceeding will be concluded in the time necessary for Mr. Cannon to pursue his appeal; and if Mr. Cannon prevails on his appeal, the Commission will surely vacate any order that is entered on the basis of the federal court injunction. On the other hand, Mr. Cannon will suffer greatly if he must expend time and resources to defend himself in the proceeding, or potentially be barred from associating with a broker, before the injunction on which the Commission has based this proceeding can be tested in the 9th Circuit Appeal. The Commission should dismiss or stay this proceeding pending the resolution of Mr. Cannon’s 9th Circuit Appeal.

III. The Commission Should Not Unconstitutionally Delegate the Dismissal or Stay Decision to the OGC

The OGC has in the past taken the position that the Commission has delegated it authority to decide motions to stay pending appeal of underlying federal court injunctions.⁸ However, even assuming Congress authorized the Commission to delegate such authority to the OGC, such Congressional authorization and delegation is limited on its face and does not extend to the circumstance presented by this motion.⁹

Under Article I of the U.S. Constitution, all legislative powers are vested in Congress. U.S. Const. Art. I, § 1. Congress cannot delegate to the courts or to any other tribunals “powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. 1, 42 (1825). If

⁸ See, e.g., *Donald J. Fowler*, Exchange Act Release No. 89226 (July 6, 2020).

⁹ 17 CFR § 200.30-14(i)-(k) (delegating authority to, e.g., “determine procedural requests or similar prehearing matters” and “rule upon non-dispositive, prehearing matters.”) See also, Release No. 33-10537 (August 22, 2018) (describing delegation of authority to OGC as limited to those “prehearing matters that are typically of a routine or non-controversial nature” authorized by Congress in Public Law No. 87-592, 76 Stat. 394, 15 U.S.C. 78d–1(a)).

Congress grants regulatory authority to another entity, it must do so with “an ‘intelligible principle’ by which the recipient of the power can exercise it.” *Jarkesy*, 34 F. 4th at 461 (citation omitted). While Congress has granted the SEC some authority to delegate some functions to employees such as the OGC, Congress has provided no intelligible principle limiting such delegation. *Id.* at 461-63.

“Government actions are legislative if they have the purpose and effect of altering the legal rights and duties and relations of persons . . . outside the legislative branch.” *Jarkesy*, 34 F. 4th at 461 (internal quotation marks omitted) (alteration in original) (citation omitted). “The Supreme Court has noted that the power to assign disputes to agency adjudication is ‘peculiarly within the authority of the legislative department.’” *Id.* (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). If the OGC is correct that the Commission has delegated (and Congress has granted the Commission the authority delegate) decisions about whether to stay or dismiss administrative decisions pending appeal of federal court final judgments, then Congress has granted the SEC legislative power. *Jarkesy*, 34 F. 4th at 461; *see also Crowell v. Benson*, 285 U.S. 22, 50 (1932) (finding ability to determine whether cases are brought before administrative tribunals is “completely within congressional control”). However, Congress has provided no intelligible principle to guide the Commission as to when to make such decisions itself and when to delegate those decisions to the OGC as the OGC believes the Commission has done. *Jarkesy*, 34 F.4th at 462. The Supreme Court has held that “a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). “The constitutional question is whether Congress has

supplied an intelligible principle to guide the delegee's use of discretion." *Id.*

Here, the OGC has in the past taken the position that the Commission has delegated (and Congress has authorized the Commission to delegate) to the OGC the ability to decide motions to stay pending appeal of underlying federal court actions. Whether or not it had the authority to do so, the OGC has already exercised such authority in this proceeding in rejecting the joint stipulation and appears likely to do so again in response to the instant motion without intervention by the Commission.¹⁰ The question of whether to stay or dismiss this proceeding or to permit it to proceed is not "routine," is not "non-controversial," and will have a tangible impact on Mr. Cannon. *Cf. Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 2010 WL 817519, at *6 (M.D. Pa. Mar. 9, 2010) (loss of customer good will and reputation weigh in favor of staying an injunction), *aff'd*, 477 F. App'x 740 (Fed. Cir. 2012) (per curiam); *Nat'l Instruments Corp. v. Mathworks, Inc.*, 2003 WL 24049230, at *6 (E.D. Tex. June 23, 2003) (financial harm weighs in favor of staying an injunction), *aff'd*, 113 F. App'x 895 (Fed. Cir. 2004). The Commission itself should determine the instant motion to stay or dismiss this proceeding to avoid an improper grant of legislative power.

¹⁰ *Eric Christopher Cannon*, Exchange Act Release No. 99249 (Dec. 28, 2023).

Conclusion

For at least the foregoing reasons, the Commission should dismiss this action in its entirety, or, in the alternative, stay the action to permit Mr. Cannon the ability to complete his 9th Circuit Appeal.

Dated: January 19, 2024

Respectfully submitted,

/s/ Nicolas Morgan _____

Nicolas Morgan
PAUL HASTINGS LLP
515 South Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
Attorneys for Respondent,
Eric Christopher Cannon

CERTIFICATE OF SERVICE

In accordance with 17 C.F.R. §§ 201.150, 201.151, I certify that a copy of Respondent Eric Christopher Cannon's Motion For An Order Dismissing Or Staying The Proceedings was served on the following on January 19, 2024, via the method indicated below:

VIA EMAIL

Donald W. Searles, Esq.
Kathryn Wanner, Esq.
Securities and Exchange Commission
444 Flower Street, Suite 900
Los Angeles, CA 90071
Email: searlesd@sec.gov
wannerk@sec.gov
Telephone: (323) 965-3245

Dated: January 19, 2024

/s/ Nicolas Morgan

Nicolas Morgan