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.

DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENT MICHELLE L. HELTERBRAN'S LETTER IN OBJECTION OF RATIFICATION OF ALL PRIOR ACTIONS

The Division of Enforcement files this Response in Opposition to Respondent's January 12, 2018 submission, which challenges the validity of the Commission's November 30, 2017 Order, maintains that her case should be dismissed on Appointments Clause and separation-of-powers grounds, and contends that the proceedings violate due process. These arguments are meritless and contrary to binding Commission precedent.

I. Respondent's Appointments Clause and separation of powers claims are meritless.

The Commission's November 30 Order itself forecloses Respondent's challenge to the Commission's ratification of the appointment of its ALJs. *See* Resp. Br. 2 3. It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. *See* U.S. Const. Art. II, § 2, Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. National Labor Relations Board*, 857 F.3d 364, 370 71 (D.C. Cir. 2017). The Commission's order exercising that authority and ratifying the appointment of its ALJs is, moreover, binding on those ALJs. The scope of the inquiry before *this* Court is therefore limited to whether having had his

appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect his prior actions in this proceeding.

Even if this Court could consider the validity of the Commission's ratification of its ALJs' appointments, Respondent's claim that the ratification was invalid falls short. She asserts, incorrectly, that the act being ratified is a hiring decision made by the Office of Personnel Management (OPM) and insists that the Commission may not ratify that decision. Resp. Br. 2. But the Commission's order does not ratify actions taken by *OPM*[1]; rather, it ratifies the decisions by *its own staff* to appoint the ALJs to their current positions. And the Commission's staff members, unlike OPM officials, are indisputably agents of the Commission. Thus, any defect in the initial appointment process was remedied by the Commission's November 30 Order. *See, e.g.*, 1 Mechem § 533 (ratification of an act "render[s] it good from the beginning and the same as though he had originally authorized or made it"); *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (ratification "retroactively give[s]" an agent's acts "validity").

Respondent also errs in attacking the procedures set forth in the Order as inadequate to remedy her alleged injury. Br. 2-3, 4. She suggests that that the Commission's ratification of its ALJs' appointments was insufficiently deliberative and that the presiding ALJ will be unable to make sufficiently considered and detached reconsideration decisions. Both of those claims are wrong. The Commission made the considered decision to ratify the appointment of its ALJs and, having done so, it remanded this proceeding to the ALJ with instructions to reconsider the entire

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[1] Indeed, OPM does not make ALJ hiring decisions on behalf of federal agencies. It administers the competitive examination process for ALJs, ranks the candidates, and prepares a list of eligible candidates for agencies to appoint. *See, e.g.*, 5 U.S.C. § 1104(a)(2); 5 C.F.R. §§ 332.401, 332.402, 930.201; *see also* 5 U.S.C. § 3105 (specifying that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title").

existing record. The Commission also specified that Respondent would have the opportunity to introduce new evidence and submit new briefing which she has now done.

That process and the procedures prescribed by the Commission's Order are more than sufficient to allow for valid ratification. Courts have consistently not hesitated to uphold ratification decisions made after a de novo review of the existing administrative record. *See, e.g., Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118-19 (D.C. Cir. 2015) (de novo review of the record allows for a valid ratification decision, which does not require "a new hearing."); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (holding ratification valid where the ratifying authority acted with "full knowledge of the decision to be ratified" and made "a detached and considered affirmation of the earlier decision"). And, in fact, courts have routinely upheld ratification decisions made after far less rigorous process than that afforded here. *See CFPB v. Gordon*, 819 F.3d 1179, 1186, 1192 (9th Cir. 2016) (upholding ratification after Director issued a "Notice of Ratification" stating, in part: "To avoid any possible uncertainty [about decisions made during recess appointment]. . . I hereby affirm and ratify any and all actions I took during that period."), *cert. denied*, 137 S. Ct. 2291 (2017); *FEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996) (finding no basis to invalidate ratification even though respondent "may well be right in arguing that the Commission's 'review'" for purposes of ratification "was nothing more than a 'rubberstamp'").

Respondent's separation-of-powers challenge likewise misses the mark. The Commission's decision in *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), forecloses her claim that the manner of removing ALJs is unconstitutional. *See* Resp. Br. 3-4. And her suggestion that the government's change of position in *Lucia v. SEC*, No. 17-130 (S. Ct.), compels a different result is also wrong. Although

the Commission had concluded in *Timbervest* that its ALJs were employees, the Commission also expressly stated that "*even if* the Commission's ALJs are considered officers," the method of their removal does not offend separation-of-powers principles because of the long-standing and circumscribed adjudicatory functions that ALJs exercise. *Id.* at *27 (emphasis added). Indeed, in *Free Enterprise Fund v. PCAOB*, the Court expressly declined to extend to ALJs its holding that the dual for-cause structure for removing Public Company Accounting Oversight Board members was unconstitutional, explaining that "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." 561 U.S. 477, 507 n.10 (2010).

II. Respondent's due process claims also fail.

Respondent is equally unsuccessful in her efforts to show that the proceeding against her violates due process. She alleges that she is "unable to present a full defense" in the administrative forum and has been denied the procedural safeguards afforded by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Resp. Br. 5. But it is well settled that the Federal Rules do not apply in the Commission's administrative proceedings, *Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *10 & n.66 (May 29, 2015), and any suggestion that this fact renders an administrative proceeding unfair has been consistently rejected by the courts. *See, e.g.*, *Cunanan v. INS*, 856 F.2d 1373, 1374 (2d Cir. 1988). Nor have Respondents shown how the application of the Commission's Rules of Practice in this proceeding has caused, or will cause, them 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) ("In the absence of any suggestion of prejudice, we cannot conclude that Horning was deprived ... of procedural due process.").

To the extent Respondent's complaint is, more broadly, that the administrative process is lacking and, thus, it violates due process to require her to proceed in an administrative forum that too fails. As the Commission has observed, "[s]uch broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts." *Harding Advisory LLC*, Securities Act Release No 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). And 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). Due process requires only "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and here Respondent has been afforded such opportunity.

To the extent Respondent's claim is, instead, that it violates due process for the Commission to have authorized this action in an administrative forum, rather than in district court (*see* Resp. Br. 6), she is also mistaken. In the Securities Exchange Act of 1934, Congress granted the Commission discretion to address potential violations of the Act by filing an enforcement action in either district court or administrative proceedings. *See, e.g.*,15 U.S.C. §§ 78u(d), 78u-1, 78u-2, 78u-3. It is well established that where the law affords such a choice, prosecutors may exercise their discretion in selecting the forum in which to bring an action. *E.g.*, *United States v. Haynes*, 985 F.2d 65, 69 (2d Cir. 1993); *see also Hartman v. Moore*, 547 U.S. 250, 263 (2006) (prosecutorial decision-making is accorded a strong "presumption of regularity").

Respondent also mistakenly alleges that it violates due process for the Commission to both authorize enforcement proceedings and, after an evidentiary hearing and review of the

record, determine whether the law has been violated. *See* Resp. Br. 6. The Supreme Court has rejected "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Indeed, it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." *Id.* at 56; *see also, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (upholding Social Security Administration system in which ALJs both investigate and decide claims); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.9, at 889 (5th ed. 2010) ("[T]he Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated.").

III. Helterbran's arguments present no basis for the Court to revise any of its prior actions.

Helterbran argues that there was insufficient evidence to show that Cisneros was an employee of The Hall Group. This ignores the fact that "Cisneros considered herself to be Hall's employee and was under Halls' general supervision." *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*, Initial Decision Release No. 1114 (Mar. 7, 2017), 116 SEC Docket 05, 2017 WL 894965 ("Initial Decision") at 16. And even if there were a question of whether Cisneros was an employee, it would not be dispositive of the issue. The relevant question was whether Cisneros was "from the firm." Auditing Standard No. 7, PCAOB Release No. 2009-004, ¶ 3; Initial Decision at 15-17. The Initial Decision undertakes a thorough examination of the facts and legal analysis underlying the determination that Cisneros was "from the firm" for purposes of certain engagements, and

Helterbran offers no basis or new evidence to justify changing this analysis. Initial Decision at 15-17.

Helterbran next argues, with no new evidence, that the Division and the Court considered Cisneros unqualified to act as an engagement quality reviewer only because she was unable to answer questions about accounting guidance. Letter at 6. But Helterbran ignores Cisneros's admission that she was uncomfortable with complicated equity transactions. Initial Decision at 6, 17. The Court properly considered that admission in the Initial Decision. Initial Decision at 17-18.

Helterbran's argument that the Initial Decision ignored the possibility that there was additional documentation not presented to the Court is baseless. The Initial Decision directly addressed this issue. In response to arguments in Helterbran's post-hearing briefing that the Division chose to ignore work papers in presenting its case, the Court found that the Division presented sufficient evidence to meet its burden and that Helterbran could have, but failed to, present such evidence to support her argument. Initial Decision at 13. And despite having another opportunity to present new evidence here, she has failed to do so.

Helterbran contends that the Division and the Court have not shown that she acted egregiously or with an intent to defraud. But none of the allegations required such a showing. The Division alleged that Helterbran engaged in "improper professional conduct," aided and abetted violations, and caused violations. None of these allegations require a showing of fraud or egregious conduct. Initial Decision at 25 ("To be liable for aiding and abetting, a respondent must provide substantial assistance to the primary violator and do so at least recklessly."); 26 ("'Causing' liability requires only a mental state of negligence."); 27 (noting that improper professional conduct can be shown by "'repeated instances of unreasonable conduct'"). And in

considering the appropriate sanctions, the Court stated that "Helterbran's misconduct was not otherwise egregious, because there is no evidence of monetary harm to clients or investors, and her misconduct was not proven to constitute fraud." Initial Decision at 28. Thus, the Court has already taken into account Helterbran's argument in considering the appropriate sanctions, and there is no reason the Initial Decision should be overturned.

Finally, Helterbran baldly asserts that the Division's evidence does not show that she violated the law by a preponderance of the evidence. But that is the precise standard used by the Court when considering the evidence and discussed at length in the Initial Decision. Initial Decision at 2-3.

Helterbran has presented no new evidence to the Court and makes no showing of how or why the existing evidence is deficient. Because the Initial Decision is well-supported by the evidence, the Court should ratify the Initial Decision and all prior actions.

Dated: January 23, 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 23, 2018 via United Parcel Service, Overnight Mail:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
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Cc:	ALJ; Michelle Helterbran [redacted]; [redacted]; Evans, Timothy; Whipple, David; Shields, Kathy Moore; Fraser, B. David
Subject:	In the Matter of David S. Hall, PC dba The Hall Group CPAs, No. 3-17228
Attachments:	Hall Group-Brief in Opposition to Motion re Ratification - FINAL.pdf; Ltr to Secretary Office.DOE's Rsp to Resp Obj to Ratification.1.23.18.pdf

Please find attached the *Division of Enforcement's Brief In Opposition to Respondent Michelle L. Helterbran's Letter in Objection of Ratification of All Prior Actions* in the above matter. Original hard copies will be forwarded via UPS Overnight Delivery as noted in the attached letter.

Respectfully,

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