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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

EDWARD M. DASPIN,	:	
	:	Case No.
Plaintiff	:	
v.	:	VERIFIED
	:	COMPLAINT FOR DECLARATORY
U.S. SECURITIES AND EXCHANGE	:	AND INJUNCTIVE RELIEF
COMMISSION,	:	
	:	
	:	
Defendant	:	

Edward M. Daspin, Plaintiff, by way of Complaint against the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) alleges as follows:

PRELIMINARY STATEMENT

1. This action arises out of the SEC’s Administrative Proceeding No. 3-16509 (the “Administrative Proceeding” or the “Proceeding”) entitled *In the Matter of Edward M. Daspin a/k/a “Edward (Ed) Michael”; Luigi Agostini; and Lawrence R. Lux*¹, which was filed on April 23, 2015, and is scheduled to go to hearing on January 4, 2016 in New York, NY before an SEC Administrative Law Judge, “SEC-ALJ”.

¹ Lawrence Lux, having entered into a settlement with the SEC, is no longer a party to the Administrative Proceeding.

2. In the Order Instituting Administrative and Cease and Desist Proceedings (“OIP”) filed in the Administrative Proceeding, the SEC alleges that Plaintiff and other individuals violated the federal securities laws in connection with their activities related to the company Worldwide Mixed Martial Arts Sports, Inc. (“WMMA”) and its affiliates (the “WMMA Entities”). WMMA and the WMMA Entities were a group of start-up companies that focused on the worldwide telecasting of professional mixed martial arts fights and the related sale of advertising and sponsorships.

3. Mr. Daspin is not now and has never previously been registered with the SEC as a broker-dealer or associated with a registered broker-dealer. He now brings this action for declaratory and injunctive relief to prevent the SEC from continuing the Administrative Proceeding.

4. The Administrative Proceeding being conducted by the SEC-ALJ violates Article II of the U.S. Constitution, which states that the "executive Power shall be vested in a president of the United States of America," U.S. Const., art. II, Section 1, and that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, ... the Heads of Departments," Id. Section 2, cl. 2, hereinafter referred to as the "Appointments Clause".

5. SEC-ALJs in connection with their authority to oversee SEC administrative proceedings and their significant executive powers in connection therewith, are executive branch "officers" for purposes of Article II.

6. The Supreme Court has held that the Commission is a "Department" of the United States, and that the Commissioners collectively function as the "Head" of the Department with authority to appoint such "officers" as Congress authorizes through legislation. Free

Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 - 3164, 561 U.S. 477, 510-513 (2010) ("Free Enterprise").

7. In contravention of the Appointments Clause, SEC-ALJs have not been appointed by the SEC Commissioners. Accordingly, the Administrative Proceeding is unconstitutional because it violates Article II.

8. Declaratory and injunctive relief are necessary to prevent Mr. Daspin from continuing to be compelled to submit to the unconstitutional and unlawful Administrative Proceeding.

9. Confronted with the same claims as are at hand in this case the Federal District Courts in Hill v. SEC, 2015 WL 4307088, (N.D. Ga. 2015), Duka v. SEC, 2015WL 4940083 and Gray Financial Group, Inc., et al. v. SEC, Civil Action No. 1:15-CV-0492-LMM, have all issued injunctive relief enjoining the SEC from continuing administrative proceedings before SEC-ALJs who were placed in their positions in violation of the Appointments Clause. A copy of the August 4, 2015 Order in Gray Financial Group, Inc. is attached as Exhibit 1.

Jurisdiction, Venue and Parties

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 1651, 2201, and 5 U.S.C. §§ 702 and 706. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) (2) and (e)(1)(B) and (C).

11. Mr. Daspin is a natural person, citizen of the State of New Jersey, and resident of Boonton, N.J. The other respondent in the Administrative Proceeding Luigi Agostini is a natural person, citizen of the State of New Jersey, and resident of Jersey City, N.J. The headquarters of the WMMA and the WMMA Entities were in New Jersey at all relevant times and the facts and circumstances related to the OIP in the vast majority relate to activities which took place in the

State of New Jersey. The Defendant is an agency of the United States and substantial part of the events or omissions giving rise to the claim occurred in New Jersey thereby rendering venue appropriate under 28 U.S.C. 1391(b)(2) and (e)(1)(B). Venue is also appropriate under 28 U.S.C. 1391(e)(1)(C) because the Defendant is an agency of the United States, the Plaintiff is a resident of New Jersey and there is no real property involved in this action.

12. The SEC is an agency of the United States government, headquartered in Washington, D.C. The SEC's New York Regional Office, which is handling the Administrative Proceeding, is located in New York, NY.

13. It is appropriate and necessary for this Court to exercise jurisdiction over Plaintiffs' claims because: (a) without judicial review at this stage, meaningful judicial review will be foreclosed; (b) Plaintiff's claims are wholly collateral to the review provisions of the securities laws; and (c) Plaintiff's claims are not within the particular expertise of the SEC. *See Free Enterprise at* 130 S. Ct. 3138, 3150, 561 U.S. 477, 489-90 (2010). The constitutional claims brought by Plaintiffs invoke core federal questions over which a federal district court possesses original jurisdiction under 28 U.S.C. § 1331. These challenges have nothing to do with the merits of the allegations pending against the Plaintiff in the Administrative Proceeding. They are thus wholly collateral to the Administrative Proceeding. Plaintiff's Constitutional challenges also fall outside the domain of the SEC's expertise. These claims do not implicate the federal securities laws. Instead, they attack the existence and features of the SEC's administrative proceeding process itself.

COUNT I

Application for Injunctive Relief Premised upon SEC-ALJs having been Appointed in Violation of the Appointments Clause at Article II of the United States Constitution thereby Rendering the Administrative Proceeding Unconstitutional

14. Plaintiff repeats and realleges all allegations set forth in the Preliminary Statement and Jurisdiction, Venue and Parties' Sections above.

15. In or about October or November 2012 or before the SEC began conducting an investigation relating to the business of Worldwide Mixed Martial Arts Sports, Inc. The matter was designated in the Matter of Worldwide Mixed Martial Arts Sports, Inc., No. NY-8832.

16. Approximately eighteen months later on April 23, 2015 the SEC entered the OIP.

17. The OIP provided that a public hearing was to be held before an SEC-ALJ to determine amongst other things if cease and desist orders should be entered against Mr. Daspin and if he should be ordered to pay disgorgement and civil penalties pursuant to sections 8A of the Securities Act and Section 21C of the Exchange Act.

18. Before the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), the SEC could only bring an action against unregulated persons such as Mr. Daspin for civil penalties in a federal district court. Currently however, under Section 929P(a) of the Dodd-Frank Act, the SEC has authority to bring such civil-penalty actions in an SEC administrative proceeding before an ALJ.

19. The Administrative Proceeding however is unconstitutional because the SEC-ALJ presiding over it was placed in his position in violation of the Appointments Clause at Article II of the U.S. Constitution in that the Appointments Clause requires that appointments to the position he occupies were to have been made by the President, the Courts or the head of the SEC. Because the SEC-ALJ's appointment was not in accord with this constitutional requirement the Administrative Proceeding is unconstitutional. In addition it appears based upon information

presented to the Courts in other cases similar to this one by the Defendant all other SEC-ALJs were similarly appointed in violation of the Appointments Clause.

20. The Constitution's Article II, Section 2 states that only the following have authority to appoint "inferior officers" like ALJs: the President, the courts of law, or the "heads of departments." Art. II, § 2, cl. 2.

21. The SEC is a "Department" under Article II, and its Commissioners are the Department "heads." *Free Enterprise*, 561 U.S. at 511-13.

22. SEC-ALJs who preside over administrative proceedings exercise the type and degree of authority and discretion that render them officers for purposes of Article II of the U.S. Constitution.

23. SEC-ALJs are empowered with broad discretion to exercise significant authority regarding administrative proceedings. Under SEC Rules of Practice, an SEC-ALJ - referred to in the rules of practice as the "hearing officer" - is empowered, within his or her discretion, to perform the following functions, among other things:

(a) Regulate the course of a proceeding and the conduct of the parties and their counsel (Rules of Practice 111(d);

(b) Receive "relevant evidence" and rule upon "the admission of evidence and offers of proof" (Rules of practice 111(c));

(c) Issue subpoenas and order production of evidence (Rules of Practice 111(b), 230(a)2 and 232;

(d) Issue orders; including orders to show cause (Rules of Practice 141(b); see *In the Matter of China Everhealth Corp., Genovabiotherapeutics, Inc. Glacier enterprises, Inc. Green*

Asia Res., Inc., Jesup & Lamont, Inc. & Panoshan Mktg. Corp., Release No. 661 (September 2, 2014);

- (e) Rule on requests and motions, including pre-trial motions for summary disposition (See, e.g. Rules of Practice 250);
- (f) Amend the SEC's OIP (Rules of Practice 200(d)(2));
- (g) Impose sanctions on parties for contemptuous conduct (Rules of Practice 180(a));
- (h) Enter orders of default and rule on motions to set aside default (Rules of Practice 155);
- (i) Consolidate proceedings (Rules of Practice 201(a));
- (j) Require the SEC to file a more definite statement of specified matters of fact or law to be considered or determined (Rules of Practice 220(d));
- (k) Order depositions and act as the "deposition officer" (Rules of Practice 230(g));
- (l) Regulate the production of documents in the proceeding (Rules of Practice 230(g));
- (m) Issue protective orders governing confidentiality of documents (Rules of Practice 322); and
- (n) Regulate the scope of cross-examination (Rules of Practice 326).

24. At the close of the administrative proceeding the SEC-ALJ issues a decision referred to in the Rules of Practice as the "initial decision". Rules of Practice 360. The initial decision states the time period within which a petition for commission review of the initial decision may be filed.

25. The initial decision becomes the final decision of the SEC after the period to petition for review expires unless the Commission determines to review the SEC-ALJ's decision.

26. With certain exceptions that do not apply to this matter the Commission is not required to review any SEC-ALJ's decision.

27. As applied to this matter Commission review is entirely discretionary. The Commission may deny a petition for review for any reason after considering whether the petition for review makes a reasonable showing that (i) the decision embodies a clearly erroneous finding of material fact, an erroneous conclusion of law or an exercise of discretion or decision of law or policy that is "important"; (ii) a prejudicial error was committed during the proceeding. (Rules of Practice 411).

28. If no party requests review, and if the Commission does not undertake review on its own initiative, no Commission review occurs. Instead the Commission enters an order that the decision of the SEC-ALJ has become final, and "the action of the administrative law judge ... shall for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. Section 78d-1(c). The order of finality states the date on which sanctions imposed by the SEC-ALJ, if any, will become effective. Rules of Practice 360(d)(2).

29. The SEC-ALJ position is established by statute, which provides that each agency "shall" appoint as many administrative law judges as necessary for the agency's administrative proceedings. 5 U.S.C. Section 3105.

30. The Administrative Proceedings Act ("APA"), 5 U.S.C. Section 500, et seq. establishes administrative law judge powers with respect to adjudication. 5 U.S.C. Sections 556, 557. The securities laws empower the SEC to delegate certain functions to SEC-ALJs including those listed above at paragraphs 23(a) - (n). (Sec 15 U.S.C. Section 78(d)-1.0).

31. SEC regulation establishes the "office of Administrative Law Judges," and outlines their authority. See e.g. 17 C.F.R. Section 200.14; 17 C.F.R. Sections 200.3-9; 17

C.F.R. Section 201.111. Those regulations provide that SEC-ALJs' authority with respect to adjudications is to be as broad as the APA allows. 17 C.F.R. Section 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.").

32. SEC-ALJs are paid according to a statutorily prescribed pay schedule. 5 U.S.C. Section 5372, 5 C.F.R. Sections 930.205, 206, see also <http://www.opm/policy-data-oversight/pay-leave/pay-administration/factsheets/administrative-law-judge-pay-system/> (ALJ pay system).

33. All SEC-ALJs receive career appointments and are exempt from probationary periods that apply to certain other government employees. 5 C.F.R. Section 930.24(a). They do not serve time limited terms.

34. Under the statutory and regulatory regime governing their duties and authority, their salary, and their power, including, in certain instances, to issue the final decision of the agency, SEC-ALJs are "officers" of the United States.

35. The SEC-ALJ presiding over Mr. Daspin's case is SEC-ALJ James E. Grimes, Administrative Law Judge, hereinafter referred to as SEC-ALJ Grimes.

36. In a May 29, 2015 filing on behalf of the SEC in the matter, Charles L. Hill, Jr. v. U.S. Securities and Exchange Commission, Civil Action No. 15-cv-1801, entitled, "Defendant's Opposition to Plaintiff's Emergency Motion to Supplement Brief", the SEC acknowledged that SEC-ALJ Grimes also was not appointed by the SEC Commissioners stating:

... In *Tilton*, which plaintiff now attempts to emulate, the plaintiffs alleged in their complaint that the SEC ALJ adjudicating their administrative proceeding was not appointed by the SEC Commissioners, and that the SEC ALJ was therefore not properly appointed pursuant to the Appointments Clause of the Constitution. In opposing a motion for a TRO and/or PI, the SEC did not dispute the allegations in the Complaint regarding the process of appointing SEC ALJs,

but responded, *inter alia*, that SEC ALJs are not constitutional officers, and therefore the Appointments Clause is not applicable. At a hearing on May 11, 2015, the SEC also acknowledged that SEC Commissioners did not appoint the presiding ALJ in the *Tilton* plaintiffs' administrative proceedings.

2. In light of Plaintiff's intention to amend the Complaint to add an Appointments Clause claim, SEC now similarly acknowledges in this case that, consistent with SEC ALJ James E. Grimes's status as an agency employee and not a constitutional officer, he was not appointed by the SEC Commissioners. Indeed, the SEC's brief in opposition to Plaintiff's motion for a TRO/PI, filed on May 16, 2015, discussed in detail the statutes and regulations governing the hiring process of ALJs, including the statutory provision that provides that it is the agency, not the head of the Department, that appoints ALJs.

37. The SEC's discussion of its SEC-ALJ hiring process was discussed in its brief in opposition to Plaintiff Charles L. Hill, Jr.'s motion for a TRO/PI filed May 26, 2015 in a section entitled, "II. The SEC's Administrative Law Judges".² In this section at pages 7 and 8 of the brief the SEC stated:

... At the SEC, as throughout the federal government, ALJs are civil service employees in the "competitive service" system. 5 C.F.R. Section 930.201(b). The competitive service is the most basic category within the civil service; it includes positions such as corrections officers, human resource specialists, and paralegals, among others. See 5 U.S.C. Section 2102; 5 C.F.R. Section 212.101.

The Civil Service Reform Act of 1978 (the "CSRA"), 5 U.S.C. Sections 1101, et seq., governs federal civil-service employment, including SEC ALJs' employment. See, e.g. *Mahoney v. Donovan*, 721 F.3d 633,635 (D.C. Cir. 2013). The CSRA regulates SEC ALJs' employment as it does that of other federal employees by, *inter alia*: setting merit systems principles to guide agency personnel management, 5 U.S.C. Section 2301; describing the bases on which personnel actions against employees, including ALJs, are prohibited, *id.* Section 2302; and specifying the administrative and judicial remedies available in response to such prohibited personnel practices, *id.* Sections 1204, 1212, 1214, 1215, 1221.

The Office of Personnel Management ("OPM"), which oversees federal employment for ALJs and other civil servants, administers a detailed civil service system for selecting ALJs, including conducting examinations for ALJ candidates, *se id.* Sections 1104, 1302; 5 C.F.R. Sections 930.201(d)-(e), 930.203; ranking ALJ applicants for placement on a register of eligible candidates according to their qualifications and numerical ratings, 5 U.S.C. Section 3313; 5 C.F.R. Section 332.401' and issuing "certificate[s] of eligibles" from which federal agencies - including SEC - may select individuals to fill ALJ vacancies, 5

² The May 16, 2015 reference in the SEC papers was likely a typographical error as the actual filing is marked "Filed May 26, 2015".

U.S.C. Sections 3317, 3318; 5 C.F.R. Sections 332.402, 332.404. OPM oversees each agency's "decisions concerning the appointment, pay, and tenure" of ALJs, *id.* Section 930.201(e)(2), and establishes classification and qualification standards for ALJ positions, *id.* Section 930.201(e)(3). ...

A.

There is a substantial likelihood that Mr. Daspin will succeed on the merits of his claim that SEC-ALJ Grimes was appointed to his position in violation of the Appointments Clause thereby Rendering the Administrative Proceeding being Unconstitutional

38. There is a substantial likelihood that Mr. Daspin will succeed on the merits of his claim that SEC-ALJ Grimes was appointed to his position in violation of the Appointments Clause at Article II of the U.S. Constitution because SEC-ALJ Grimes was the SEC-ALJ presiding over the administrative proceedings at issue in the Hill v. SEC case. In Hill v. SEC with respect to SEC-ALJ Grimes and the precise issues at hand in Mr. Daspin's case, the Court in its Opinion Hill v. SEC, 2015 WL 4307088, at page 18 (N.D. Ga. 2015) made the following findings of facts and law:

b. Appointments Clause Violation

Because SEC ALJs are inferior officers, the Court finds Plaintiff has established a likelihood of success on the merits on his Appointments Clause claim. Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause.

The SEC concedes that Plaintiff's ALJ, James E. Grimes, was not appointed by an SEC Commissioner. *See* Def. Br., Dkt. No. [15] at 2; *see also Free Enterprise*, 561 U.S. at 511–512, 130 S.Ct. 3138 (finding that the SEC Commissioners jointly constitute the “head” of the SEC for appointment purposes). The SEC ALJ was not appointed by the President, a department head, or the Judiciary. Because he was not appropriately appointed pursuant to Article II, his appointment is likely unconstitutional in violation of the Appointments Clause.

39. The Appointments clause is a bulwark against one branch of the government aggrandizing its power at the expense of another branch," and "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." Ryder

v. United States, 515 U.S. 177, 182, 115 S. Ct. 2031, 2035 (1995) (internal quotation marks omitted).

40. The SEC is a "Department" of the Executive Branch of the U.S. Government. the Commissioners collectively function as the "Head" of the Department. *Free Enterprise* at 130 S. Ct. 3163, 561 U.S. at 512-513.

41. Because SEC-ALJs are "officers" of the United States, the Appointments Clause requires that SEC-ALJs be appointed by the SEC Commissioners.

42. The SEC Commissioners did not appoint SEC-ALJ Grimes who presides over the Administrative Proceeding against the Plaintiff. In fact, upon information and belief the SEC Commissioners did not appoint any of the other SEC-ALJs. On this point reference is made to the Amended Complaint for Declaratory and Injunctive Relief filed June 10, 2015 by Barbara Duka against the United States Securities and Exchange Commission, Civil Action No. 15-cv-00357, at paragraph 45 quoting a recent filing made by the SEC in connection with the matter captioned, In the Matter of Timbervest, LLC et al., (the "Timbervest Proceeding"), Admin. Proc. File No. 3-15519 describing the SEC-ALJ hiring process with respect to SEC-ALJs in general and the SEC-ALJ in particular in the Timbervest Proceeding, SEC-ALJ Cameron Elliot, as follows:

Pursuant to current statutes and regulations, the hiring process for commission ALJs is overseen by the U.S. Office of Personnel management ("OPM"), which administers the competitive examination for selection of all ALJs across the federal government. See 5 U.S.C. Sections 1104, 1302; 5 C.F.R. Section 930.201(d)-9e). As do other agencies, the Commission hires its ALJs through this OPM process. See 5 U.S.C. Section 3105; 5 C.F.R. Section 930.201(f). When the Commission seeks to hire a new ALJ, Chief ALJ Murray obtains from OPM a list of eligible candidates; a selection is made from the top three candidates on the list. See 5 U.S.C. Sections 3317, 3318; 5 C.F.R. Sections 332.402, 332.404, 930.204(a). Chief ALJ Murray and an interview committee then make a preliminary selection from among the available candidates. Their recommendation is subject to final approval and processing by the Commission's

Office of Human Resources. It is the Division's understanding that the above process was employed as to ALJ Elliot, who began work at the agency in 2011.

43. Attached to the Duka Amended Complaint was a copy of an Affidavit of Jayne L. Seidman, filed in the Timbervest Proceeding. In her affidavit Ms. Seidman stated she was a Senior Officer at the Commission and Deputy Chief Operating Officer and that "Based upon" her "knowledge of the Commission's hiring process, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission." (Seidman Affidavit, Paragraph 4).

44. The fact that SEC-ALJ Grimes was not appointed in accordance with the Appointments Clause renders the Administrative Proceeding constitutionally defective.

45. Mr. Daspin filed a motion in the Administrative Proceeding seeking dismissal of the Proceeding on the grounds, (and other reasons), that the method of appointing the SEC-ALJs violates Article II of the Constitution. By Order dated October 28, 2015 SEC-ALJ Grimes denied Mr. Daspin's motion citing the SEC's ruling in Timbervest, LLC, Investment Advisors Act of 1940 Release No. 4197, 2015 SEC LEXIS 3854, at *92-104 (Sept. 17, 2015).

46. SEC-ALJ Grimes' citation of the SEC ruling in Timbervest administrative proceeding before the SEC however ignores the findings of fact and law at pages 26 and 27 in the August 4, 2015 Order of the United States District Court, Northern District of Georgia in the case, Timbervest, LLC, et al. v. Securities and Exchange Commission, Civil Action No. 15-cv-2106. (See excerpt of Timbervest Fed. Ct. Order at Exhibit 2):

b. Appointments Clause Violation

Because SEC ALJs are inferior officers, the Court finds Plaintiffs have established a likelihood of success on the merits on their Appointments Clause claim. Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause.

The SEC concedes that Plaintiffs' ALJ, ALJ Elliot, was not appointed by

an SEC Commissioner. SEC Aff., Dkt. No. [3-7] paragraph 4; see also *Free Enterprise*, 561 U.S. at 511-512 (finding that the SEC Commissioners jointly constitute the "head" of the SEC for appointment purposes). The SEC ALJ was not appointed by the President, a department head, or the Judiciary. Because he was not appropriately appointed pursuant to Article II, his appointment is likely unconstitutional in violation of the Appointments Clause.

47. The ruling in *Duka v. SEC*, 2015WL 4940083 further supports the conclusion that there is a substantial likelihood that Mr. Daspin will succeed on the merits of his appointments Clause claim in this case. The *Duka* Opinion of August 12, 2015, 2015WL 4940083, held as follows:

II. Likelihood of Success on the Merits

Plaintiff asserts two claims under Article II of the Constitution: (1) that the ALJs' appointments violate the Appointments Clause because the ALJs, as "inferior officers" under Article II, may only so preside on due and proper appointment by a constitutional Officer, here, the Commission, and (2) that the ALJs' two levels of tenure protection violate the Constitution's separation of powers, specifically the President's power to appoint and remove Executive branch officers.

*2 Plaintiff's arguments turn on this Court's finding that an ALJ is an "inferior officer." See U.S. Const. art. II § 2, cl. 2 *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). As recognized in the Court's August Decision & Order, "the SEC ALJs are 'inferior officers' because they exercise 'significant authority pursuant to the laws of the United States.'" August Decision & Order at 3 (citing *Freytag*, 501 U.S. at 881, 111 S.Ct. 2631). This Court's findings were supported by determinations that (1) the SEC ALJs' positions are "established by law," including 5 U.S.C. §§ 556, 557 and 15 U.S.C. § 78d-1(a), (2) "the duties, salary, and means of appointment for that office are specified by statute," specifically 5 U.S.C. § 5372, and (3) in the course of carrying out their "important functions," ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881, 111 S.Ct. 2631; see 17 C.F.R. § 200.14(a). In so holding, the Court found persuasive the opinion of United States District Judge Leigh Martin May, who, in *Hill v. S.E.C.*, —F.Supp.3d —, No. 1:15-CV-1801-LMM, 2015 WL 4307088 (N.D.Ga. June 8, 2015), after reviewing facts strikingly similar to those presented here, concluded that "*Freytag* mandates finding that the SEC ALJs exercise 'significant authority' and are thus inferior officers" and, because ALJs are "not appropriately appointed pursuant to Article II, [their] appointment is likely unconstitutional in violation of the Appointments Clause. *Hill*, —F.Supp.3d at ——— – ———, 2015 WL 4307088, at *18-19.¹

¹²¹ Under the Appointments Clause in Article II: “[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” Constitution, Art. II, § 2, cl. 2. It is well-settled that the Appointments Clause provides the exclusive means by which inferior officers may be appointed. *See Buckley v. Valeo*, 424 U.S. 1, 138–9, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (“Congress may undoubtedly ... provide such method of appointment to those ‘offices’ as it chooses. But Congress’ power under that Clause is inevitably bounded by the express language of Art. II, s. 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be ‘Officers of the United States.’ They may, therefore, properly perform duties only ... in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’ ”). Therefore, as SEC AUs are inferior officers, their appointments must be made by the President, courts of law, or department heads.

Here, the Court has determined that the ALJs at issue were not appointed by the SEC Commissioners. *See* August Decision & Order at 5. As they were not appropriately appointed pursuant to Article II, their appointment is likely unconstitutional in violation of the Appointments Clause.

48. In Footnote 1 of its Opinion the Duka Court cited further support for its decision that the ALJ-SECs were appointed in violation of the Appointments Clause stating:

The Court further notes that more recently, in *Gray Financial Group, et al. v. S.E.C.*, 15–CV–492–LMM, Dkt. No. 56 (N.D.Ga. Aug. 4, 2015), Judge May reiterated that “*Freytag* mandates a finding that the SEC ALJs exercise ‘significant authority’ and are thus inferior officers,” and therefore held that “(b)ecause SEC ALJs are inferior officers, the Court finds Plaintiffs have established a likelihood of success on the merits of their Appointments Clause claim.” *Gray Financial*, 15–CV–492 at 33, 35.

B.

Without issuance of an Injunction Mr. Daspin will Suffer Irreparable Harm

49. Absent injunctive relief from this Court, Mr. Daspin will be required to continue to participate in an unconstitutional proceeding. This constitutional violation, standing alone, constitutes an irreparable injury.

50. Without an injunction, Plaintiff would not only be forced into an unconstitutional

proceeding, but would be unable to recover monetary damages from this harm as the SEC possesses sovereign immunity. See Duka v. SEC, 2015WL 4940083 at page 2 citing *Lipkin v. U.S. S.E.C.*, 468 F.Supp.2d 614, 625 (S.D.N.Y.2006); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F.Supp.2d 563, 572 fn. 6 (S.D.N.Y.2009) (“Plaintiff is unable to collect a judgment for monetary damages in this action because Defendant is ... entitled to sovereign immunity ... Thus, in addition to the actual and imminent harms established by the record, irreparable harm may be presumed here because the only relief available to the [Plaintiff] is injunctive.”).

51. Moreover, if the administrative proceeding is not enjoined, Plaintiff’s requested relief would be rendered moot as the Court of Appeals would be unable to enjoin a proceeding which has already occurred. See Duka v. SEC, 2015WL 4940083 at page 2 citing its April Decision & Order at 12 (citing *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir.1983) (“The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.”)).

52. See also Hill v. SEC, 2015 WL 4307088, page 17 (N.D. Ga. 2015) holding:

First, Plaintiff will be irreparably harmed if this injunction does not issue because if the SEC is not enjoined, Plaintiff will be subject to an unconstitutional administrative proceeding, and he would not be able to recover monetary damages for this harm because the SEC has sovereign immunity. See *Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1289 (11th Cir.2013) (“In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.”) (collecting cases); see also *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir.1987) (“An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.”). If the administrative proceeding is not enjoined, Plaintiff’s requested relief here would also become moot as the Court of Appeals would not be able to enjoin a proceeding which has already occurred.

53. The Plaintiff herein is subject to all of the same irreparable injuries as confronted the plaintiffs in *Duka* and *Hill* and as a result it is clear that irreparable harm will be suffered by Mr. Daspin if the Court does not enjoin the SEC Administrative Proceeding.

54. See also Hill v. SEC, 2015 WL 4307088, page 8 (N.D. Ga. 2015) citing multiple authorities:

“[I]t is established practice for [the Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.” *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n. 2, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). And “injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); see also 5 U.S.C. § 702 (stating that under the Administrative Procedure Act, any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof” and may seek injunctive relief).

55. By contrast the SEC will suffer no harm from a pause in the Administrative proceedings pending final resolution of the constitutional issue presented here. Indeed, any such harm would be fanciful, given that the SEC may proceed now in Federal Court.

56. The public interest favors entry of an Order enjoining the continuation of the Administrative Proceeding.

57. A balancing of the equities favors entry of an Order enjoining the continuation of the Administrative Proceeding.

58. Regarding the public interest and the balancing of the equities reference is made to Hill v. SEC, 2015 WL 4307088, pages 17 and 18 (N.D. Ga. 2015) stating:

Second, the Court finds that the public interest and the balance of equities are in Plaintiff’s favor. The public has an interest in assuring that citizens are not subject to unconstitutional treatment by the Government, and there is no evidence the SEC would be prejudiced by a brief delay to allow this Court to fully address Plaintiff’s claims. The SEC claims that the public interest weighs in its favor because the SEC is charged with “protect[ing] investors and maintain[ing] the integrity of the securities markets.” Def. Br., Dkt. No. [12] at 44 (citing *Duka*, — F.Supp.3d at — n. 13, 2015 WL 1943245, at *7 n. 13). But the Court does not find that it is ever in the public interest for the Constitution to be violated. The Supreme Court has held that the Appointments Clause “not only guards against [separation-of-powers] encroachment but also preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment

power.” *Freytag*, 501 U.S. at 878, 111 S.Ct. 2631. Both are important to the public interest. The Court further notes that the SEC is not foreclosed from pursuing Plaintiff in federal court or in an administrative proceeding before an SEC Commissioner, and thus any small harm which it might face could be easily cured by the SEC itself.

59. The considerations regarding the public interest and a balancing of the equities are at hand in Mr. Daspin's case as in the Hill case.

60. It is further of note that the SEC has appealed the ruling in the Hill case to the United States Court of Appeals for the Eleventh Circuit Court of Appeals. On October 29, 2015 the 11th Circuit entered an Order granting a motion of Mark Cuban for Leave to File Brief as Amicus Curiae in support of Plaintiff-Appellee Charles L. Hill, Jr. and Affirmance. A copy of the 11th Circuit Order and Mr. Cuban's brief is attached hereto as Exhibit 3. Mr. Cuban's brief provides a practical and personal perspective to the constitutional infirmities of the SEC administrative proceedings. It is submitted that by granting leave for the filing of the amicus curiae brief the 11th Circuit had cause to conclude that examination of the brief would assist the judges of that Court in considering the Hill case by providing ideas, arguments, facts and data that came to light through Mr. Cuban's experience in defending himself against SEC charges.

61. In sum:

(a) Mr. Daspin's constitutional rights will be irreparably harmed if (i) a temporary restraining order, (ii) a preliminary injunction order and (iii) a judgment providing for a permanent injunction enjoining the continuation of the SEC Administrative Proceeding are not all entered;

(b) Mr. Daspin has demonstrated a substantial likelihood of success on the merits of his claim that the SEC-ALJ presiding over his Administrative Proceedings was appointed to his position in violation of the Appointments Clause at Article II of the United States Constitution;

(c) Mr. Daspin will be irreparably injured without the temporary, preliminary and permanent injunctive relief requested, and the harm to Mr. Daspin, absent the temporary, preliminary and permanent injunctive relief requested, far outweighs any harm to the SEC (of which there can be none in this case) arising from the issuance of the temporary, preliminary and permanent injunctive relief enjoining the continuation of the Administrative Proceeding; and

(d) Finally, issuance of the temporary, preliminary and permanent injunctions requested will serve the public interest in protecting the rights of citizens under the U.S. Constitution and promoting respect for the law.

WHEREFORE, Plaintiff prays for judgment and relief as follows:

(1) An Order temporarily restraining the SEC from continuing the Administrative Proceeding against the Plaintiff;

(2) An Order granting a preliminary injunction enjoining the SEC from continuing the Administrative Proceeding against the Plaintiff;

(3) A judgment granting a permanent injunction enjoining the SEC from continuing to pursue its Administrative Proceeding against the Plaintiff; and

(4) Such other and further relief as this Court may deem just and proper.

Count II

Declaratory Judgment Regarding Unconstitutional Appointment of SEC-ALJ Grimes

62. Plaintiff repeats and realleges as if set forth at length herein all allegations stated in the Preliminary Statement, Jurisdiction, Venue and Parties' Sections and Count I set forth above.

63. Plaintiff respectfully requests a declaratory judgment that the appointment of SEC-ALJ Grimes was unconstitutional rendering the Administrative Proceeding unlawful.

WHEREFORE, Plaintiff prays for judgment and relief as follows:

(1) An order and judgment declaring that the Appointments Clause was violated with the appointment of SEC-ALJ Grimes; and

(2) Such other and further relief as this Court may deem just and proper.

Count III

Declaratory Judgment Regarding Unconstitutional Appointment of all other SEC-ALJs

64. Plaintiff repeats and realleges as if set forth at length herein all allegations stated in the Preliminary Statement, Jurisdiction, Venue and Parties' Sections, Count I and Count II set forth above.

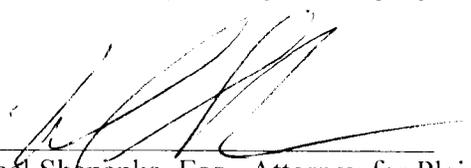
65. Plaintiff respectfully requests a declaratory judgment that the appointments of all other SEC-ALJs, in addition to SEC-ALJ Grimes, were unconstitutional rendering the Administrative Proceeding unlawful.

WHEREFORE, Plaintiff prays for judgment and relief as follows:

(1) An order and judgment declaring that the Appointments Clause was violated with the appointments all other SEC-ALJs, in addition to SEC-ALJ Grimes; and

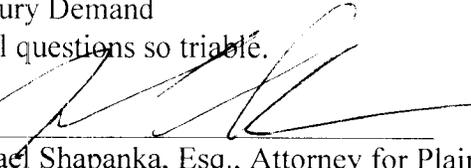
(2) Such other and further relief as this Court may deem just and proper.

Date: November 25, 2015

By: 
Michael Shapanka, Esq., Attorney for Plaintiff, Edward M. Daspin

Jury Demand
Plaintiff demands trial by jury on all questions so triable.

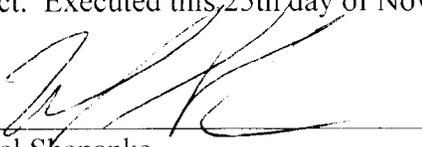
Date: November 25, 2015

By: 
Michael Shapanka, Esq., Attorney for Plaintiff, Edward M. Daspin

Verification

I declare I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 25th day of November 2015 at Somerville, New Jersey.

Date: November 25, 2015

By: 
Michael Shapanka

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