



**U.S. Department of Justice**

Civil Division  
Federal Programs Branch  
20 Massachusetts Ave, N.W.  
Washington, DC 20530

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May 28, 2015

**VIA ECF**

The Honorable Richard M. Berman  
United States District Judge  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street  
New York, New York 10007

Re: *Duka v. SEC*, No. 15-cv-357 (RMB)

Dear Judge Berman:

The parties respectfully submit this joint letter to set forth their respective proposals regarding the further proceedings in this case.

On January 16, 2015, Plaintiff Barbara Duka filed the above-referenced action against Defendant the Securities and Exchange Commission (“SEC”) seeking declaratory relief and a permanent injunction. Following the SEC’s institution of an administrative proceeding against her (“AP”) on January 21, 2015, Ms. Duka also moved for a temporary restraining order and a preliminary injunction to enjoin the ongoing AP. This Court denied that motion on April 15, 2015. On the same day, in response to the SEC’s then pending request to extend its time to answer or otherwise respond to the Complaint, the Court also ordered the parties to meet and confer and advise the Court jointly regarding a proposed schedule. Because the parties cannot reach an agreement on a proposed schedule or how to proceed in this case, their respective positions are set forth below:

**Plaintiff’s Position:**

Plaintiff intends, based on newly learned information, to file an amended complaint seeking a permanent injunction of the AP and a declaratory judgment that the Appointments Clause has been violated because the SEC Commissioners have not appointed SEC ALJs, and on the grounds that the SEC has not adhered to 15 U.S.C. § 78d-1(a), requiring the SEC

Commissioners to delegate their authority under 15 U.S.C. § 78d(b)(1) to appoint SEC ALJs by “published order or rule.”

By way of background, on May 15, 2015, Plaintiff received a transcript of the oral argument that took place on May 11, 2015 before Judge Ronnie Abrams in connection a motion for a preliminary junction filed on behalf of respondents in a pending SEC administrative proceeding. *See Tilton v. SEC*, No. 15-cv-02472-RA, Dkt. No. 10. There, plaintiffs alleged that the Appointments Clause was violated because the SEC ALJ presiding over their administrative proceeding was not appointed by the Commissioners of the SEC. In the course of oral argument on plaintiffs’ motion for a preliminary injunction, the following exchanges occurred between the Court and counsel for the SEC:

THE COURT: Can I ask you the factual question that I asked of Mr. Gunther? Who exactly appoints SEC ALJs? Can you tell me more about the appointment process?

MS. LIN: Your Honor, those facts are not in the record here, but we acknowledge that the commissioners were not the ones who appointed, in this case, ALJ Foelk, who is the ALJ presiding --

THE COURT: There is no factual dispute, okay.

...

THE COURT: Let me just back up for a minute and ask you a question. If I find that the ALJs are inferior officers, do you necessarily lose?

MS. LIN: We acknowledge that, your Honor, if this Court were to find ALJ Foelk to be an inferior officer, that that would make it more likely that the plaintiffs can succeed on the merits for the Article II challenge, at least with respect to the appointments clause challenge.

Although it remains unclear who appoints SEC ALJs, to Plaintiff’s knowledge, this the **first time** the SEC has ever acknowledged that SEC Commissioners do not appoint SEC ALJs in some or all administrative proceedings. This information was not known to Plaintiff when she filed her Complaint, which, as the Court will recall, was filed before the SEC instituted its OIP. In light of this admission, Plaintiff intends to file an amended complaint asserting that the AP is unconstitutional because the SEC ALJ presiding over the AP has not been appointed in accordance with the Appointments Clause.

Additionally, in conjunction with the filing of an amended complaint, Plaintiff respectfully requests permission to file a motion for a temporary restraining order and a preliminary injunction against the SEC from continuing the AP, in which a trial is scheduled to commence on September 16, 2015. Plaintiffs would consent to the Court treating any decision on such a motion as a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

In its Decision & Order dated April 15, 2015, the Court acknowledged that “[t]he Supreme Court’s decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991) ... would appear to support the conclusion that SEC ALJs are also inferior officers.” Order at 16 (ECF No. 33) (April 15, 2015). Based on the SEC’s admissions cited above, a ruling by the Court that SEC ALJs are inferior officers would mean that Plaintiff is likely to succeed on the merits of her claim.

Although, in connection with Plaintiff’s motion based on the holding of *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010), the Court found that it was “likely” that Plaintiff could not “demonstrate that the public interest weighs in favor of granting a preliminary injunction,” *see id.* at 15 n.13, the circumstances that give rise to the amended complaint merit a different result. The absence of injunctive relief in connection with Plaintiff’s challenge under the Appointments Clause would not only reward the SEC for (a) not disclosing publicly and transparently how if at all it makes appointments, and, (b) as alleged, failing to follow the dictates of a Congressional enactment requiring the SEC to delegate authority to appoint SEC ALJs by “published order or rule,” but it would also effectively give the SEC license to violate the Appointments Clause without consequence.

**Defendant’s position:**

After the parties had been negotiating for a month regarding whether they can resolve this case without further litigation, Plaintiff indicated for the first time on May 19, 2015 that she intends to amend her complaint and file another motion for a preliminary injunction. The purported basis for the motion to amend and successive motion for a preliminary injunction is that Plaintiff has become aware of an argument raised by the plaintiff in a matter pending before Judge Ronnie Abrams, *Tilton v. SEC*, No. 15-cv-02472-RA, that Plaintiff failed to make in the instant case. Namely, Ms. Tilton has argued that, because it is undisputed that the SEC ALJ adjudicating Ms. Tilton’s administrative proceeding was not appointed by the Commissioners of the SEC, that the SEC ALJ was therefore not properly appointed pursuant to the Appointments Clause of the Constitution. The SEC has responded in that case, *inter alia*, that SEC ALJs are not Constitutional officers, and therefore the Appointments Clause is not applicable.

The SEC consents to Plaintiff’s proposed request to amend her complaint. But it does not believe that Plaintiff’s intent to add another claim against the SEC is good cause for another round of briefing and hearing on a second motion for a preliminary injunction. This is particularly so in light of this Court’s observation, when denying Plaintiff’s prior motion for emergency relief, that even had the Court not found that Plaintiff was unlikely to prevail on the merits, the Court nonetheless “would likely [have found] that she failed to demonstrate that the public interest weighs in favor of granting a preliminary injunction,” Order at 15 n.13 (ECF No. 33) (April 15, 2015), in light of the vital role the SEC plays in “protect[ing] investors and maintain[ing] the integrity of the securities markets,” *United States v. Wittig*, 575 F.3d 1085,

1105 (10th Cir. 2009). Accordingly, Defendant respectfully submits that following Plaintiff's amendment of her complaint, the parties proceed to briefing on the government's motion to dismiss. Specifically, if permitted by this Court, the government will file its motion to dismiss within 14 days after service of the amended complaint in accordance with Federal Rule of Civil Procedure 15(a)(3).

We thank you for your consideration of this joint letter.

Dated: May 28, 2015

Respectfully submitted

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