UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TIMBERVEST, LLC; JOEL BARTH SHAPIRO; WALTER WILLIAM ANTHONY BODEN, III; DONALD DAVID ZELL, JR., and GORDON JONES II, Plaintiffs, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	CIVIL ACTION FILE NO. 1:15-CV-2106

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for a temporary restraining order and preliminary injunction.

It is difficult to imagine a more basic defect in a hearing than a presiding judge without lawful authority. For this reason, the Supreme Court has held that where a judge serves in violation of the Appointments Clause of the U.S. Constitution, the error is "structural;" the aggrieved party need not show prejudice in the manner the proceeding was otherwise conducted; and the error can be raised even by a party who consented to trial before that judge. *See Freytag v. Comm'r*, 501 U.S. 868, 878-90 (1991); *see also Ryder v. United States*, 515 U.S. 177, 182-83 (1995). The role of judge – particularly one acting as finder of *both* fact *and* law – is too profoundly essential to be treated otherwise.

Plaintiffs endured an eight-day hearing before an SEC ALJ, after the SEC conducted an investigation that lasted over three years. Recently, Plaintiffs became aware that the Commission did not properly appoint the ALJs that presided over Plaintiffs' hearing. The Supreme Court has held that the SEC Commissioners, themselves, collectively hold the power to appoint "inferior Officers" within the meaning of the Clause. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010). Yet, the Commissioners have not appointed the SEC

ALJs and, thus, the SEC ALJs that presided over this matter had no authority to preside over this matter and the underlying proceeding and the Initial Decision, that is currently under review by the Commission, is invalid. *See Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012) (vacating and remanding decision by judges improperly appointed).

There is a second, independent defect in the SEC's ALJ program. In *Free Enterprise*, the Supreme Court also held that Officers of the United States – charged with executing the laws, a power vested by the Constitution solely in the President – may not be separated from Presidential supervision and removal by more than one layer of tenure protection. SEC ALJs enjoy at least two, and likely more, layers of tenure protection, and hearings before them therefore violate Article II and are unconstitutional.

This Court has subject matter jurisdiction over Plaintiffs' claims that the SEC may not lawfully proceed against them in an administrative proceeding in which an improperly-appointed ALJ presided over the hearing. To be sure, the federal securities laws provide for review of final SEC orders in the United States Courts of Appeals. But a facial challenge under Article II, such as this, meets the criteria for District Court jurisdiction.

The inherently unconstitutional proceeding before the SEC poses a significant risk of irreparable harm to their interests. This Court is the Plaintiffs' only vehicle for meaningful judicial relief from a fundamentally unconstitutional

proceeding. Plaintiffs request a temporary restraining order and preliminary injunction: (1) enjoining the United States Securities and Exchange Commission "SEC" from public dissemination and/or publication, in written or other form, of the SEC ALJ's Initial Decision in the administrative proceeding, including directing the removal of the SEC ALJ's Initial Decision from the following link: https://www.sec.gov/alj/aljdec/2014/id658ce.pdf; (2) enjoining the SEC from public dissemination and/or publication, in written or other form, of any final order from the SEC in the administrative proceeding, or, in the alternative, staying the administrative proceeding; and (3) staying the effect of any relief entered against Plaintiffs in the administrative proceeding, pending resolution of this matter.

PROCEDURAL BACKGROUND

Plaintiff Timbervest is a registered investment advisor with its headquarters in Atlanta, Georgia. Timbervest manages timberland and other environmental assets on behalf of various investment funds. Plaintiffs Shapiro, Boden, and Zell are the current owners of Timbervest, through a wholly-owned holding company, Ironwood Capital Partners, LLC ("Ironwood"). Ironwood is a Georgia limited liability company. Plaintiff Shapiro is a 50% owner of Ironwood and Plaintiffs Boden and Zell each own 25%.

The underlying case in this matter concerns property transactions that took place in 2006 and 2007. On September 24, 2013, after three years of investigation, the SEC instituted this action against Plaintiffs. (Declaration of Stephen D.

Councill, Ex. A.) The SEC alleged that Timbervest violated § 206 of the Investment Advisers Act by (1) failing to disclose fees earned from selling two properties, and (2) selling one of these properties to a third party and then later purchasing the property on behalf of a separate Timbervest fund. (*Id.*) The SEC's theories of liability turned on what was said in two separate conversations in 2005 and 2006, respectively; witnesses had different and conflicting recollections about these conversations. The SEC originally ordered that Chief Judge Brenda P. Murray preside at the hearing of the matter. (*Id.* Ex. B.) On December 16, 2013, Chief Judge Murray designated ALJ Cameron Elliot to preside over the matter. (*Id.* Ex. C.) ALJ Elliot presided over the hearing, which took place over the course of eight non-consecutive days.

On August 20, 2014, ALJ Elliot issued an Initial Decision, finding that Timbervest violated §§ 206(1) and (2) of the Investment Advisers Act and that the individual Plaintiffs acted with scienter in aiding and abetting and causing those violations.[1] ALJ Elliot ordered the Plaintiffs to cease and desist from committing or causing violations of §§ 206(1) and (2) and ordered disgorgement of approximately $1.9 million, plus additional prejudgment interest. Given the age of the case and the conflicting testimony of witnesses with faded memories, ALJ

[1] As noted, the ALJ's Initial Decision is currently available online at the following link: https://www.sec.gov/alj/aljdec/2014/id658ce.pdf. Plaintiffs have not attached the decision to their motion to avoid compounding the irreparable harm from its publication.

Elliot's decision turned heavily on credibility determinations, all of which went against Plaintiffs.

On October 30, 2014, Timbervest appealed ALJ Elliot's decision to the SEC. (*Id.* Ex. D.)

STATEMENT OF FACTS

The constitutionality of the administrative proceeding turns on whether ALJ Elliot was properly appointed. He was not.

On May 20, 2015, Plaintiffs asked the Commission to order the Division to produce documents and information related to how the SEC ALJs that presided over this matter were appointed because, in another matter pending before the Southern District of New York, attorneys for the SEC conceded that the SEC ALJ in that matter was not appointed properly. On May 27, 2015, the Commission ordered the Division to file an affidavit setting forth the manner in which ALJ Cameron Elliot and Chief ALJ Brenda Murray were hired, including the method of selection and appointment.

On June 4, 2015, the Division provided Plaintiffs with an affidavit and information admitting that the ALJs that presided over this matter were not appointed by the Commissioners. (*Id.* Ex. E.) On June 8, 2015, Respondents appeared before the Commission for oral argument, and later that day, the court in *Hill v. SEC*, Civil Action No. 1:15-CV-1801-LMM (N.D. Ga. June 8, 2015), which is pending in the Northern District of Georgia and asserts the very same

Appointments Clause argument, granted a preliminary injunction for the plaintiff finding that there was a substantial likelihood of success on the merits of plaintiff's Appointments Clause argument and enjoined the SEC's administrative proceeding.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE PLAINTIFFS' CONSTITUTIONAL CHALLENGES.

A. Subject Matter Jurisdiction Is Proper Under 28 U.S.C. § 1331.

Federal district courts "have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S .C. § 1331. A case arises under the Constitution or federal law within the meaning of this statute if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiffs' right to relief necessarily depends on resolution of a substantial question of federal law." *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 734-35 (2d Cir. 2007) (quoting *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 690 (2006)). Subject only to applicable preclusion-of-review statutes, § 1331 confers jurisdiction on district courts to review agency action. *See Califano v. Sanders,* 430 U.S. 99, 104-07 (1977). With few exceptions, in cases of actual controversy within its jurisdiction, a federal district court may "declare the rights and other legal relations of any interested party" upon the filing of an appropriate motion. 28 U.S.C. § 2201.

B. The SEC's Review Scheme Does Not Deprive This Court of Jurisdiction.

The Investment Advisers Act of 1940, 15 U.S. C. §§ 80b-1 – 80b-21 (the "Advisers Act"), provides that persons or parties aggrieved by a final SEC order may obtain review of the order in the United States Court of Appeals for the circuit in which they reside or their principal place of business or for the District of Columbia Circuit. 15 U.S.C. § 80b-13(a).

The Supreme Court has held that it is presumed that Congress did *not* intend to limit jurisdiction to an administrative scheme where, as here, (1) the suit is "wholly collateral to a statute's review provisions"; (2) the claims are "outside the agency's expertise"; and (3) "a finding of preclusion could foreclose all meaningful judicial review." *Free Enterprise*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212-13). Under this standard, jurisdiction exists for Plaintiffs' Article II challenge.

1. The Plaintiff's Facial Constitutional Challenges Are Wholly Collateral to the Review Provisions of the Securities Laws

As one United States District Judge has explained:

> There is an important distinction between a claim that an administrative scheme is unconstitutional in all instances – a facial challenge – and a claim that it violates a particular plaintiff's rights in light of the facts of a specific case—an as-applied challenge. As between the two, courts are more likely to sustain pre-enforcement jurisdiction over 'broad facial and systematic challenges,' such as the claim at issue in *Free Enterprise Fund.*

Chau v. SEC, 2014 WL 6984236 at *6 (S.D.N.Y. Dec. 14, 2014).

Plaintiffs' challenges to the constitutionality of SEC ALJs' appointment and tenure are "facial," rather than "as-applied" challenges, and are thus wholly collateral to the administrative proceeding. These claims do not depend upon the facts of this particular case — that is, liability or lack of liability for the securities violations alleged. The Supreme Court long has recognized that facial, structural constitutional challenges, like those asserted here, are collateral to statutory review mechanisms.[2] This principle was reiterated in *Free Enterprise,* where the Court deemed petitioners' constitutional challenge to the PCAOB's existence as collateral to any SEC orders or rules from which review might be sought. 561 U.S. at 490.

In *Hill*, the district court found that the plaintiff's claim to enjoin the SEC's administrative proceeding against him was collateral because the plaintiff was not challenging an agency decision but "challenging whether the SEC's ability to *make* that decision was constitutional." *Hill* Order at 20.

Likewise, here, Plaintiffs do not challenge whether the ALJ's Initial Decision was correct but challenge only whether the ALJ was constitutionally entitled to issue its Initial Decision.

[2] *See, e.g.*, *McNary v. Haitian Refugee Ctr. Inc.,* 498 U.S. 479, 492 (1991) (finding judicial review provisions for the denial of individual Special Agricultural Work ("SAW") applications applied to "the process of direct review of individual denial of SAW status," not "general collateral challenges to unconstitutional practices and policies used by the agency").

2. The Plaintiffs' Claims are Beyond the SEC's Expertise.

The Supreme Court in *Free Enterprise* plainly held that petitioners' constitutional arguments, identical to those here – specifically, that the agency violated the Appointments Clause and the restrictions on tenure protection in Article II – were "outside the Commission's competence and expertise." 561 U.S. at 491. That is because administrative review is "designed to permit agency expertise to be brought to bear on particular problems," such as when technical or industry expertise is required, *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411,420 (1965), but constitutional questions, by contrast, "are particularly suited to the expertise of the judiciary." *Adkins v. Rumsfeld*, 389 F. Supp. 2d 579, 588 (D. Del. 2005).

Appointments Clause challenges and Article II challenges are not peculiarly within the SEC's competence or expertise. *Thunder Basin*, 510 U.S. at 215 ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *Hill* Order at 21-22 (finding that Plaintiff's Article II claims were outside the SEC's expertise).

The SEC Administrative Law Judge that was presiding over the SEC's administrative proceeding against Hill recognized that the Commission "has repeatedly held that it lacks the authority 'to invalidate the very statutes that Congress has directed [it] to enforce." *In the Matter of Charles L. Hill, Jr.*, Release No. 3-16383 (May 14, 2015) at 2 (internal citations omitted). The SEC ALJ in Hill

recognized that "[i]t would be incongruous" for him to be able to address the constitutionality of other laws or statutes and doubted that he had the authority to address the separation of powers issue but nevertheless addressed it. *Id.* at 5.

3. Plaintiffs Cannot Otherwise Obtain Meaningful Judicial Review

If this Court determines that it lacks jurisdiction to hear these constitutional claims and requires Plaintiffs to follow the review procedure set out by statute, Plaintiffs will be deprived of all meaningful judicial review and will be forced to endure the impact of the rulings and order emanating from the very procedure they allege is inherently unconstitutional.

Although Plaintiffs have asserted their constitutional challenges before the Commission, they are unable to meaningfully litigate these constitutional claims in that forum. The Commission is the very body that failed to properly appoint the ALJ. It would be inherently difficult for the Commission to consider Plaintiffs' constitutional claims in a neutral and objective way, given its responsibility for its own administrative proceedings, its allowance of improper ALJ designations, the fact that it sent this matter to an ALJ for resolution, and the fact that it has argued in other district court cases that its administrative proceeding is constitutionally valid.

Moreover, in *Hill*, the court held that the plaintiff, who challenged the constitutionality of the SEC administrative forum due to, *inter alia*, Appointments Clause violations, would be foreclosed from any *meaningful* judicial review if

forced to proceed in the administrative forum because "delayed judicial review . . . will cause an allegedly unconstitutional *process* to occur." *Hill* Order at 18. Likewise, here, Plaintiffs' "claims rise or fall regardless of what has occurred or will occur in the SEC administrative proceeding; Plaintiff[s] do[] not challenge the SEC's conduct in that proceeding or the allegations against [them]—[they] challenge[] the proceeding *itself*." *Id.* at 17. In conducting its appellate review, the Commission relies on the underlying record. A review by the Commission does not cure the underlying constitutional violation. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972).

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION TO ENJOIN THE SEC'S ADMINISTRATIVE PROCEEDING AGAINST IT.

A preliminary injunction is warranted if the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) irreparable harm absent injunctive relief; (3) that the balance of equities is in its favor; and (4) that an injunction would not be against the public interest. *See Siegel v. LePore*, 234 F. 3d 1163, 1176 (11th Cir. 2000). As demonstrated below, Plaintiffs satisfy each of these elements.

A. Plaintiffs Are Likely To Succeed on the Merits.

The Appointments Clause provides as follows:

> [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other

> Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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.

U.S. Const., art. II, sec. 2, cl. 2 (emphasis added).

In *Free Enterprise*, the Supreme Court ruled that for purposes of the Appointments Clause, 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 "inferior Officers." 561 U.S. at 511-13. *Free Enterprise* also held that, under Article II of the Constitution, such officers may lawfully be insulated from Presidential removal by no more than one layer of tenure protection. The Commission's use of ALJs fails both requirements.

First, the Commissioners have not appointed SEC ALJs as constitutionally required. (Councill Decl., Ex. E (Affidavit of Jayne L. Seidman ¶ 4 (stating that "ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission")).) Because SEC ALJs were not hired by the President or by the Commissioners directly, their hiring violates the Appointments Clause. *See Hill* Order at 41-42 (finding that Plaintiff had established a likelihood of success on the merits because SEC ALJs were "not appropriately appointed pursuant to Article II").

Second, SEC ALJs are protected from removal by at least two layers of good-cause tenure protection. SEC ALJs are removable from their position by the

SEC "only" for "good cause," which must be "established and determined" by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a). And the SEC Commissioners, who exercise the power of removal, may not be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." *See, e.g.*, *Free Enterprise*, 130 S. Ct. at 3148; *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004). Moreover, members of the MSPB, who determine whether sufficient "good cause" exists to remove an SEC ALJ, are themselves protected by tenure. They are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Thus, SEC ALJs are protected by more than one layer of good-cause tenure protection, in violation of Article II.

The only remaining question, then, is whether SEC ALJs are "inferior Officers." If they are "inferior Officers" then the SEC's use of them violates the Appointments Clause and the Presidential removal power under Article II. As described below, Plaintiffs are likely to succeed on this question.

1. The Broad Powers Exercised by SEC ALJs

In determining whether administrative officers qualify as "inferior Officers" subject to the restrictions imposed by Article II, courts have repeatedly quoted the general rule of *Buckley v. Valeo*: that "[a]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' . . . ." 424 U.S. 1, 126 (1976). Under this standard, the Supreme "Court

has held that district-court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon, a cadet-engineer, election monitors, federal marshals, military judges, Article I [Tax Court special trial] judges, and the general counsel for the Transportation Department are inferior officers." Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 812 (2013) (citing *Free Enterprise*, 561 U.S. at 540 (Breyer, J., dissenting) (citing cases)).

The Commission's own description of the role played by its ALJs in administrative proceedings easily satisfies this test, illustrating the broad range and scope of responsibilities of an SEC ALJ:

> Administrative Law Judges are independent judicial officers who in most cases conduct hearings and rule on allegations of securities law violations initiated by the Commission's Division of Enforcement. They conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the federal district courts. Among other actions, they issue subpoenas, conduct prehearing conferences, issue defaults, and rule on motions and the admissibility of evidence. At the conclusion of the public hearing, the parties submit proposed findings of fact and conclusions of law. The Administrative Law Judge prepares an Initial Decision that includes factual findings, legal conclusions, and, where appropriate, orders relief.
>
> The Commission may seek a variety of sanctions through the administrative proceeding process. An Administrative Law Judge may order sanctions that include suspending or revoking the registrations of registered securities, as well as the registrations of brokers, dealers, investment companies, investment advisers, municipal securities dealers, municipal advisors, transfer agents, and nationally recognized statistical rating organizations. In addition, Commission Administrative Law Judges can order disgorgement of ill-gotten

> gains, civil penalties, censures, and cease-and-desist orders against these entities, as well as individuals, and can suspend or bar persons from association with these entities or from participating in an offering of a penny stock.

See S.E.C., Office of Administrative Law Judges, About the Office, *available at* www.sec.gov/alj (emphasis added).

Indeed, as the *Hill* Court explained, SEC ALJs are inferior officers, given that "ALJs are permanent employees—unlike special masters—and they take testimony, conduct trial[s], rule on the admissibility of evidence, and can issue sanctions, up to and including excluding people (including attorneys) from hearings and entering default." *Hill* Order at 38.

2. *SEC ALJs are Indistinguishable from Other Judges Who Are Deemed "Officers"*

The SEC ALJs at issue in this case are indistinguishable from Officers as described by the Supreme Court in *Freytag*, where it determined that the special trial judges appointed by the Tax Court qualified as "inferior Officers." First, the Supreme Court in *Freytag* found that "the office of special trial judge is established by law. . . ." 501 U.S. at 881 (quotation marks and citations omitted). The position of an SEC ALJ is similarly established by law. *See* 5 U.S.C. § 556; 15 U.S.C. § 78d-l. Next, *Freytag* found that "the duties, salary, and means of appointment for [special trial judges] are specified by statute. 501 U.S. at 881 (citations omitted). Again, the same is true for SEC ALJs . *See* 5 U.S.C. §§ 556(c), 557 (setting forth responsibilities and powers of administrative law judges under

Administrative Procedure Act); 5 U.S.C. §§ 5311, 5372 (governing salaries available to administrative law judges); 5 U.S.C. § 3105 (governing appointment of administrative law judges by federal agencies).

Regarding the responsibilities performed by special trial judges, the Supreme Court found that they were authorized to take sworn testimony. 501 U.S. at 881. SEC ALJs can also take testimony. *See* 5 U.S.C. §§ 556(c)(1), (4). The Supreme Court found that the special trial judges could conduct trials. 501 U.S. at 881-82. The same is true of SEC ALJ s, *see* 17 CFR § 201.111, and the Commission itself compares the hearings conducted by its ALJs to "non-jury trials in the federal district courts." *See supra* at 15. The Court in *Freytag* found that special trial judges were authorized to rule on the admissibility of evidence, 501 U.S. at 881-82, as are SEC ALJs. 17 CFR § 201.320. Finally, the Supreme Court found that special trial judges had "the power to enforce compliance with discovery orders." 501 U.S. at 881-82. Similarly, SEC ALJs have the authority to oversee discovery efforts, 17 CFR § 201.230; to issue, quash or modify subpoenas, 17 CFR § 201.232; and to oversee depositions, 17 CFR § 201.233. In short, ALJs are indistinguishable, for purposes of the Appointments Clause, from the judges found to be inferior Officers in *Freytag*.

3. The Finality of SEC ALJ Decisions

The Supreme Court, in *Freytag*, determined that the special trial judges were inferior officers because they exercised "significant authority"—not because they

issued "final orders." *Freytag*, 501 U.S. at 880; *see also Hill* Order at 40-41. Nevertheless, the SEC has, in other cases, sought to avoid the plain ruling of *Freytag* by relying on *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). In *Landry*, the D.C. Circuit found that FDIC ALJs were not inferior officers because they did not have the authority to render a final decision. *Id.* at 1133-34.

Landry is distinguishable, however, because the FDIC's administrative process is different than the SEC's administrative process. An FDIC ALJ is required to issue a "recommended decision," not an "Initial Decision." *See* 12 C.F.R. § 308.38. All "recommended decisions" by FDIC ALJs are reviewed by the Commission *de novo*. *Id.* §§ 308.39; 308.40. In contrast, the SEC does not review and render its own decision after a review of the record of every case and, in those instances, an Initial Decision becomes the final decision of the Commission. Thus, on the facts, an SEC ALJ's authority is much different from an FDIC ALJ and more like the special trial judge in *Freytag*.

The D.C. Circuit's decision in *Landry* is specific to and limited to FDIC ALJs. As the Solicitor General of the Department of Justice wrote in opposition to Landry's cert petition argument that the D.C. Circuit's decision "will have a wide ranging effect on 'a class of judges numbering over 1,000" –"That assertion considerably overstates the significance of the court of appeals' decision. The court's decision directly addresses the constitutional status only of the ALJ . . . who presided at the administrative hearing in this case." (Declaration of Stephen

D. Councill, Ex. F (Brief For Respondent In Opposition, *Landry v. F.D.I.C.*, No. 99-1916 (Aug. 28, 2000) at 7.)

To the extent the SEC argues that *Landry* stands for the proposition that finality is determinative, such a finding is directly contrary to the Supreme Court's decision in *Freytag*. *See Freytag*, 501 U.S. at 881 (stating that the argument that STJs are not inferior officers "because they lack authority to enter final decisions . . . . ignores the significance of the duties and discretion that Special Trial Judges possess"). An inferior officer, by its very definition, "is one whose work is directed and supervised at some level by others who were appointed by the Presidential nomination." *Edmond v. United States*, 520 U.S. 651, 663 (1997). That is exactly what we have here—an SEC ALJ issues orders and initial decisions that can only be reviewed by the Principal Officers of the Agency-- the Commissioners and the Commission.

Moreover, if an SEC ALJ could issue a final decision, SEC ALJs would not be inferior officers, they would be Principal Officers. *See Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1342 (D.C. Cir. 2012) (finding that Copyright Royalty Board judges were Principal Officers, as opposed to inferior officers, because they could issue final decisions and could not be terminated without a showing of good cause). As Justice Alito stated in a concurring opinion in *Department of Transportation v. Association of American Railroads*, "One would think that anyone who has the unilateral authority to tip a

final decision one way or the other cannot be an inferior officer." 135 S.Ct. 1225, 1240 (2015). This is consistent with Department of Justice's Office of Legal Counsel's own guidance. In a memorandum concerning Department of Education Administrative Law Judges, DOJ's Office of Legal Counsel stated that "[a]n ALJ whose decision could not be reviewed by the Secretary, however, would appear to be acting as a principal officer of the United States." 15 U.S. Op. Off. Legal Counsel 8, 1991 WL 499882 (OLC January 31, 1991).

Even if the ability to issue a final order is a factor, SEC ALJs are, in fact, able to issue findings and orders that become final without the requirement of any further review by the Commission itself. Under the relevant provisions of the APA, an SEC ALJ is authorized to issue an "initial decision" that "becomes the decision of [the Commission] without further proceedings" unless the Commission affirmatively decides to review the decision and take action. 5 U.S.C. § 557(b). The SEC's Rules of Practice also provide that the Commission is not required to review an initial decision issued by an SEC ALJ, and that if the Commission declines to do so, the initial decision will be promulgated by the Commission as a final decision. 17 CFR § 201.360(d)(1) , 17 CFR § 201.410, 17 CFR § 201.411. Once this process is complete, the federal securities laws provide that ''the action of the . . . administrative law judge . . . shall, for all purposes, including appeal or review therefore, be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). Given the practical realities of litigation in front of SEC ALJs – where the

majority of initial decisions issued by SEC ALJs become final decisions without additional Commission review – this structure grants additional plenary powers to SEC ALJ s beyond those described above.

B. Plaintiffs Will Be Irreparably Harmed If the SEC Proceedings Are Not Enjoined.

A "presumption of irreparable injury . . . flows from a violation of constitutional rights" *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (issuing a preliminary injunction in case involving alleged Eighth Amendment violation and holding that no further showing of irreparable injury was required), overruled on other grounds by *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, "[m]ost courts have granted preliminary injunctive relief in cases where a deprivation of constitutional rights has been alleged and a strong probability of success on the merits has been established without requiring additional proof of irreparable harm." *Rhodes v. Gwinnett Cnty., Ga.*, 557 F. Supp. 30, 33 (N.D. Ga. 1982) (finding that plaintiff showed a likelihood of success on First Amendment claim and therefore concluding that "the requisite threat of irreparable harm has been shown"). *See also Alexandre v. New York City Taxi & Limousine Comm'n*, 2007 WL 2826952, at *5 (S.D.N.Y. Sept. 28, 2007) (noting in dicta that "[w]here there is a deprivation of a constitutional right, no separate showing of irreparable harm is necessary") (citing *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999)).

In addition, absent preliminary injunctive relief, Plaintiffs will suffer irreparable harm because they will remain subject to the publication of the ALJ's Initial Decision. Plaintiffs will be subject to irreparable reputational and financial harm, as investors and potential referral sources send business in other directions. *Kishner v. Nev. Standing Comm. on Judicial Ethics & Election Practices*, 2010 WL 436591, at *7 Case No. 2:10-cv-01858-RLJ-RJJ (D. Nev. October 28, 2010) (enjoining further publication and dissemination of administrative decision based on rule that was likely unconstitutional and finding that continued publication and dissemination of the decision would constitute irreparable harm because the decision violated plaintiff's constitutional rights).

Plaintiffs will further suffer irreparable harm if the Commission issues a ruling affirming the findings and rulings of the ALJ or issues an order providing for any other relief sought by the SEC, which includes a bar and suspension. Once the Commission issues its ruling, it is only then that the remedies go in effect. Here, that could include a cease-and-desist order that will prohibit Plaintiffs from raising any monies for any new funds for five years. Moreover, if the Commission were to order that bars or suspensions are applicable, Plaintiffs will be directly prohibited from conducting business as an investment adviser. Finally, they will be subject to the publication of a final decision instantly made available world-wide. Any final decision will necessarily be infected by the constitutional infirmities in the administrative proceeding. This includes the ALJ's many credibility findings

that the SEC accepts unless there is "overwhelming evidence to the contrary." Clawson, 2003 WL 21539920, at *2 (July 9, 2003).

The consequences of an unconstitutional final decision cannot be fully remedied through appeal to a Circuit Court of Appeals. Even if Plaintiffs were to appeal the Commission's ruling to a Circuit Court of Appeals, that appeal would be based upon an underlying record that is invalid, requiring a Court of Appeals to remand for a new hearing. But, by the time a Court of Appeals would hear and rule on Plaintiffs' appeal, Plaintiffs would have suffered irreparable harm—the financial and reputational harm from the continued publication of the Initial Decision, any issuance of s final order, the prohibition from raising monies for new funds, and possible bars and suspensions.

Finally, Plaintiffs will not be able to recover money damages given the governmental immunity doctrines that apply to actions taken by the SEC. *Le v. SEC,* 542 F. Supp. 2d 1318, 1324 (N.D. Ga. 2008). "[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F. 3d 1268, 1289 (11th Cir. 2013). *See also Hill* Order at 42 (finding irreparable harm if an injunction did not issue because plaintiff would be subject to an unconstitutional administrative proceeding without the ability to recover monetary damages for this harm).

C. The Balance of Equities and Considerations of the Public Interest Weigh Strongly in Favor of Granting a Preliminary Injunction.

The two remaining factors to consider in regard to Plaintiffs' request for a preliminary injunction – whether (1) the balance of equities tips in their favor and (2) the public interest weighs in favor of granting the injunction – also strongly counsel in favor of the requested relief.

In stark contrast to the severe consequences that would befall the Plaintiffs should the requested relief be denied, the SEC will suffer no harm from temporarily enjoining the proceeding pending resolution of the constitutional issue presented here. Further, it is indubitably in the public interest for SEC enforcement proceedings to comport with the Constitution. *See Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993); *White v. Baker*, 696 F. Supp. 1289, 1313 (N.D. Ga. 2010) (injunction would advance the public interest "because a constitutional right is at issue").

CONCLUSION

Plaintiffs respectfully request that the Court issue an injunction: (1) enjoining the SEC from public dissemination and/or publication, in written or other form, of the SEC ALJ's Initial Decision in the administrative proceeding, including directing the removal of the SEC ALJ's Initial Decision from the following link: https://www.sec.gov/alj/aljdec/2014/id658ce.pdf; (2) enjoining the SEC from public dissemination and/or publication, in written or other form, of any final order from the SEC in the administrative proceeding, or, in the

alternative, staying the administrative proceeding; and (3) staying the effect of any relief entered against Plaintiffs in the administrative proceeding, pending resolution of this matter.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TIMBERVEST, LLC; JOEL BARTH SHAPIRO; WALTER WILLIAM ANTHONY BODEN, III; DONALD DAVID ZELL, JR., and GORDON JONES II, Plaintiffs, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	CIVIL ACTION FILE NO. 1:15-CV-2106

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing has been prepared in Times New Roman 14 point font.

This 12th day of June, 2015.

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