

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

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DAWN J. BENNETT and BENNETT GROUP :  
FINANCIAL SERVICES, LLC, :  
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 Plaintiffs :  
 :  
 -against- :  
 :  
 U.S. SECURITIES AND :  
 EXCHANGE COMMISSION, :  
 :  
 Defendant. :

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No.:

**COMPLAINT FOR  
DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

Dawn J. Bennett and Bennett Group Financial Services, LLC (“Bennett Group” and with Ms. Bennett “Plaintiffs”), by and through undersigned counsel, for their complaint against the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) allege as follows:

**Preliminary Statement**

1. The SEC’s program for administrative enforcement proceedings violates Article II of the United States Constitution, which states that the “executive Power shall be vested in a President of the United States of America,” U.S. Const. art. II, § 1, and that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments,” *id.* § 2, cl.

2. An SEC Administrative Law Judge (“SEC ALJ”) presides over SEC administrative proceedings. Statutes and regulations make clear that SEC ALJs are executive branch “officers” within the meaning of Article II. The United States 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, 561 U.S. 477 (2010) (“*Free Enterprise*”).

3. The Supreme Court also has held that such officers—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. In particular, if an officer can be removed from office only for good reason, then the decision to remove that officer cannot be vested in another official who also enjoys good-cause tenure. *Id.*

4. Yet SEC ALJs have not been appointed by the SEC Commissioners, as the Constitution requires. And SEC ALJs enjoy at least two—and likely more—layers of tenure protection. The SEC Administrative proceedings therefore violate Article II and are unconstitutional.

5. The SEC Division of Enforcement investigated Plaintiffs for more than three years—beginning at least as early as January 2012. On or about September 9, 2015, the SEC issued an Order Instituting Proceedings (“OIP”) commencing an administrative proceeding against Plaintiffs. The OIP recited the Division of Enforcement’s allegation of violations of the federal securities laws, and ordered that a public hearing for the taking of evidence be convened within 60 days before an SEC ALJ. The OIP further ordered that the SEC ALJ issue an initial decision within 300 days addressing whether the allegations in the OIP are true; what if any remedial action is appropriate and in the public interest; and whether Plaintiffs should be subject to injunctive relief and ordered to pay monetary penalties and disgorgement.

6. Declaratory and injunctive relief is necessary to prevent Plaintiffs from being compelled to submit to an unconstitutional proceeding and from suffering irreparable reputational and financial harm—all without meaningful judicial review. Moreover, the

Commission retains lawful authority to commence an enforcement action against Plaintiffs in a constitutional forum—namely, the U.S. District Court.

**Jurisdiction, Venue and the Parties**

7. 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) and (e).

8. Ms. Bennett is a natural person, and a citizen and resident of Maryland.

9. Bennett Group Financial Services, LLC is a limited liability company organized and existing under the laws of Delaware and having its principal place of business in Washington, D.C. Ms. Bennett is the majority owner of Bennett Group.

10. The SEC is an agency of the United States government, headquartered in Washington, D.C.

11. It is appropriate and necessary for this Court to exercise jurisdiction over Plaintiffs' claim because, as discussed below, (a) without judicial review at this stage, meaningful judicial review of the claims asserted herein will be foreclosed; (b) Plaintiffs' claim is wholly collateral to the review provisions of the securities laws; and (c) Plaintiffs' claim is not within the particular expertise of the SEC.

12. First, the SEC's administrative machinery does not provide a reasonable mechanism for raising or pursuing Plaintiffs' claims. The SEC's Rules of Practice do not permit counterclaims against the SEC, nor do they allow the kind of discovery of the SEC personnel necessary to elicit admissible evidence of such claims, such as interrogatories and requests for admissions. Meaningful judicial review cannot await appeal to the U.S. Court of Appeals following a final Commission decision. The curtailed ALJ proceeding is unlikely to create a full

record on Plaintiff's claims adequate for review in the Court of Appeals. Moreover, the SEC ALJ is not in a position to rule that he or she has been unconstitutionally appointed and has no legal authority whatsoever. And the Commission, having ordered the administrative proceedings and directed action by the SEC ALJ, is in no position to take a fresh look at the constitutional infirmities of its own ALJ program.

13. Second, Plaintiffs' claims are wholly collateral to the review provisions of the federal securities laws. Plaintiffs challenge the constitutionality of the SEC ALJ program on its face, and their claims do not depend upon the facts of this particular case (the liability or lack of liability for the securities violations alleged). Their claim is that they should not stand trial in an unconstitutionally structured forum.

14. Finally, Plaintiffs' constitutional claims are not within the particular expertise of the SEC. The particular expertise of the SEC is the federal securities laws. Plaintiffs here raise claims under Article II of the Constitution, provisions of which do not ordinarily, if ever, present issues for adjudication by the Commission. Indeed it would be inherently difficult for the Commission to consider the claims here in a neutral way given its responsibility for its own administrative proceedings, its allowance of improper designations, and the fact that it sent this complex matter to an ALJ for resolution.

#### **Background**

15. Ms. Bennett is a twenty-seven year veteran of the securities industry. Throughout her career, she has been employed at various investments firms as a Senior Vice President and Investment Officer, including Wheat First Butcher Singer and Legg Mason Wood Walker, Inc. ("Legg Mason").

16. Bennett Group began as a branch office of broker dealer Legg Mason in or around August 1996. Since 1996, Bennett Group has been almost entirely engaged in the broker-dealer business, providing advice as in incident of its brokerage activities conducted through several registered broker-dealers.

17. After Legg Mason sold its distribution business in early 2006, Ms. Bennett established Bennett Group as an independent firm that offered securities through Royal Alliance Associates, Inc. Bennett Group remained with Royal Alliance through October 2009, during which time Royal Alliance also served as Bennett Group's supervisory broker.

18. From approximately October 2009 to the present, Bennett Group has offered securities through Western International Securities ("Western"), and its brokerage assets are custodied at J.P. Morgan. Western also serves as Bennett Group's supervisory broker, and oversees all of Bennett Group's compliance practices and the recordkeeping for Bennett Group's brokerage clients. Ms. Bennett founded Bennett Group in or around early 2006.

19. As a registered representative of a broker-dealer, Bennett Group makes recommendations to 100% of its nondiscretionary brokerage account clients based on a standard investment approach, and those clients are free to implement those recommendations fully, partially, or not at all. Bennett Group's compensation from these clients consists entirely of transaction-based brokerage commissions.

20. Bennett Group was, at one point, registered with the SEC as an investment adviser, for the sole purpose of registering its mutual funds. During the time it was registered, Bennett Group had only one individual investment advisory client, and also advised four mutual funds that Bennett Group formed. For business reasons, those funds were wound down in September 2013, and Bennett Group deregistered as an investment adviser that same month.

### **The SEC Investigation**

21. The Commission has long acknowledged that “[t]he power to investigate carries with it the power to defame and destroy.” 17 C.F.R. § 200.66. Based upon information and belief, the SEC Staff commenced its inquiry into Plaintiffs in or around January 2011 and focused on conduct that dated back to 2009. Between January 2011 and April 2011, examiners from the Staff’s Philadelphia office conducted a rigorous examination of Bennett Group, which included numerous requests for documents and an on-site inspection of Bennett Group’s office.

22. Based upon information and belief, the examiners also contacted many of Bennett Group’s top clients and inquired about those clients’ brokerage transactions.

23. After the examination, in or around June 30, 2011, Bennett Group received a deficiency letter from the Staff of the SEC. Bennett Group responded by letter dated July 30, 2011. Bennett Group received no further communication from the Staff until it received a Formal Order of Investigation in or around January 2012.

24. The Division of Enforcement’s investigation took more than three years, during which the Staff requested and received additional documents and took testimony from Bennett Group employees, including two days of testimony from Ms. Bennett and Bennett Group’s Managing Director of Research.

25. In or around July 2015, the Staff of the Enforcement Division issued a Wells Notice indicating that it had reached a preliminary conclusion that Ms. Bennett and Bennett Group had violated the securities laws. Based upon information and belief, the Staff’s theory was that from 2009 through early 2011, Bennett Group and Ms. Bennett made material misrepresentations related to Bennett Group’s Assets Under Management (“AUM”) and the performance of its client accounts.

26. In or around July 2015, Plaintiffs provided a written submission in response to the SEC's Wells Notice setting forth the reasons why such charges would be unwarranted and why the evidence contradicts the Staff's theory. Plaintiffs also submitted a supplemental submission to the Commission in or around August 2015.

27. On or about September 9, 2015, the SEC initiated an internal administrative proceeding against Ms. Bennett and Bennett Group through the issuance of its OIP. Specifically, the OIP alleges that, among other things, Ms. Bennett and Bennett Group violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Section 206(1) and (2) of the Investment Advisers Act based on certain purportedly false or misleading statements Plaintiffs allegedly made regarding AUM and clients' investment returns.

#### **The SEC's Chosen Forum**

28. The securities laws provide the SEC with the discretion—guided by no statute, regulation, or established practice—to bring an enforcement action either in a U.S. District Court or in an internal SEC administrative proceeding.

29. As one of the Commissioners recently observed:

Our enforcement program could . . . benefit from a look through the lens of fairness. In order to ensure that the Commission does not engage in arbitrary or capricious conduct in enforcement matters, the Commission should formulate and adhere to a consistent set of guidelines.

....

To avoid the perception that the Commission is taking its tougher cases to its in-house judges, and to ensure that all are treated fairly and equally, the Commission should set out and implement guidelines for determining which cases are brought in administrative proceedings and which in federal courts.

Commissioner Michael S. Piwowar, *A Fair, Orderly, and Efficient SEC*, Remarks at the "SEC Speaks" Conference 2015.

30. Before an oversight committee of Congress on March 19, 2015, the Director of Enforcement testified that over the last fiscal year the Division tried a majority (57%) of its cases in District Courts, with the rest before ALJs. But the question remains how it was decided to send a minority of contested proceedings to ALJs. Pressed to explain the standards for choosing a forum, the Director's response was largely rhetorical. "We use the forum that we think is appropriate for the goals of investor protection," he testified, later adding "I have not heard criticism from investors about the administrative law judges procedure." Of course, investors are not respondents in those proceedings, do not have their careers at stake and have access to the U.S. District Courts to pursue federal securities law claims as plaintiffs.

31. The Commission's history does not support an administrative proceeding in this case. The Commission has continued to go to District Courts routinely with complex cases.

32. The limited discovery available before an ALJ and the speedy hearing required by Commission Rules are fundamentally inconsistent with the type of wide-ranging and in-depth investigation carried out by the Staff for more than four years in this particular case. The discovery available in administrative proceedings is nothing like the discovery available in U.S. District Courts. Under the most extended schedule permitted by Commission Rules, an ALJ must issue an initial decision within 300 days of the Order Instituting Proceedings ("OIP"). Rule 201.360(a)(2). To allow time for drafting an initial decision in that time frame, SEC rules contemplate that the hearing will take place approximately four months after the OIP.

33. This schedule and format are unworkable in a case of this age, depth and complexity. It would be difficult for Ms. Bennett and Bennett Group to digest the investigative file in this case, assembled by the Staff over the course of more than four years, so as to prepare adequately for trial in approximately four months.

***The Administrative Proceeding***

34. An administrative proceeding before an SEC ALJ is markedly different from a civil action litigated in federal court.

35. An administrative proceeding is an internal SEC hearing, litigated by SEC trial attorneys and governed by the SEC's Rules of Practice ("Rules of Practice" or "RoP"), in which an SEC ALJ serves as finder of fact and of law.

36. Unlike federal court, administrative proceedings do not afford juries to litigants.

37. The Federal Rules of Civil Procedure do not apply in an administrative proceeding; they do in federal court.

38. Similarly, the Federal Rules of Evidence do not apply in an administrative proceeding as they do in federal court. Any evidence that "can conceivably throw any light upon the controversy," including hearsay, "normally" will be admitted in an administrative proceeding. *In the Matter of Jay Alan Ochanpaugh*, Exchange Act. Rel. No. 54363, 2006 SEC LEXIS 1926, \*23 n.29 (Aug. 25, 2006).

39. Discovery is limited in administrative proceedings. Unlike in federal court, depositions are generally not allowed. Rules of Practice 233, 234.

40. The SEC Rules of Practice do not provide respondents the opportunity to test the SEC's legal theories before trial via motions to dismiss, which are available in federal court.

41. The SEC Rules of Practice do not allow respondents to assert counterclaims against the SEC. Federal court defendants may assert counterclaims against their adversaries.

42. The SEC Rules of Practice require the hearing take place, at most, approximately four months from the issuance of the SEC's OIP. In its discretion, the SEC can require the hearing to occur as early as one month after the OIP is issued. The SEC does not need to start

making available the limited discovery afforded to administrative proceedings until seven days after the OIP is issued.

43. Some observers have found that the SEC has succeeded much more often in administrative proceedings, where it enjoys the procedural advantages described above, than in federal district courts. Gretchen Morgenson, *At the S.E.C., A Question of Home-Court Edge*, N.Y. Times, Oct. 5, 2013.

44. Any appeal from the SEC ALJ's decision goes to the SEC itself: the very body which, prior to the administrative proceeding, determined that an enforcement action was warranted—and the SEC is empowered to decline to hear the appeal, or to impose even greater sanctions. Rules of Practice 410, 411. A final order of the Commission, after becoming effective, may then be appealed to a United States Court of Appeals.

#### **SEC ALJs**

45. SEC ALJs, who preside over administrative proceedings, exercise the type and degree of authority and discretion that renders them officers for the purpose of Article II of the U.S. Constitution.

#### ***Broad Discretion to Exercise Significant Power***

46. SEC ALJs enjoy broad discretion to exercise significant authority with respect to administrative proceedings. Under the 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 (Rule of Practice 111(d));
- b. Take testimony (Rule of Practice 111);

- c. Conduct trials (*id.*);
- d. Rule on admissibility of evidence (Rule of Practice 320);
- e. Order production of evidence (Rules of Practice 230(a)(2), 232));
- f. Issue orders, including show-cause orders (*see, e.g.*, 17 C.F.R. 201.141(b); *In the Matter of China Everhealth Corp.*, Admin Proc. Rel. No. 1639, 2014 SEC LEXIS 2601 (July 22, 2014));
- g. Rule on request and motions, including pre-trial motions for summary disposition (*see, e.g.*, Rule of Practice 250(b));
- h. Grant extension of time (Rule of Practice 161);
- i. Dismiss for failure to meet deadlines (Rule of Practice 155(a));
- j. Reconsider their own or other SEC ALJ's decisions (Rule of Practice 111(h));
- k. Reopen any hearing prior to the filing of a decision (Rule of Practice 111(j));
- l. Amend the SEC's OIP (Rule of Practice 200(d)(2));
- m. Impose sanctions on parties for contemptuous conduct (Rule of Practice 180(a));
- n. Reject filings that do not comply with the SEC's Rules of Practice (Rule of Practice 180(b));
- o. Dismiss the case, decide a particular matter against a party, or prohibit introduction of evidence when a person fails to make a required filing or cure a deficient filing (Rule of Practice 180(c));
- p. Enter orders of default, and rule on motions to set aside default (Rule of Practice 155);
- q. Consolidate proceedings (Rule of Practice 201(a));
- r. Grant law enforcement agencies of the federal or state government leave to participate (Rule of Practice 210(c)(3));
- s. Regulate the appearance of amici (Rule of Practice 210(d));
- t. Require amended answers to amended OIPs (Rule of Practice 220(b));
- u. Direct that answers to OIPs need not specifically admit or deny, or claim insufficient information to respond to, each allegation in the OIP (Rule of Practice 220(c))

- v. Require the SEC to file a more definitive statement of specified matters of fact or law to be considered or determined (Rule of Practice 220(d));
- w. Grant or deny leave to amend an answer (Rule of Practice 220(e));
- x. Direct the parties to meet for prehearing conferences, and preside over such conferences as the ALJ “deems appropriate.” (Rule of Practice 221(b));
- y. Order any party to furnish prehearing submissions (Rule of Practice 222(a));
- z. Issue subpoenas (Rule of Practice 232);
- aa. Rule on applications to quash or modify subpoenas (Rule of Practice 232(e));
- bb. Order depositions, and act as the “deposition officer” (Rules of Practice 233, 234);
- cc. Regulate the SEC’s use of investigatory subpoenas after the institution of proceedings (Rule of Practice 230(g));
- dd. Modify the Rules of Practice with regard to the SEC’s document production obligations (Rule of Practice 230(a)(1));
- ee. Require the SEC to produce documents it has withheld (Rule of Practice 230(c));
- ff. Disqualify himself or herself from considering a particular matter (Rule of Practice 112(a));
- gg. Order that scandalous or impertinent matter be stricken from any brief or pleading (Rule of Practice 152(f));
- hh. Order that hearings be stayed while a motion is pending (Rule of Practice 154(a));
- ii. Stay proceedings pending Commission consideration of offers of settlement (Rule of Practice 161(c)(2));
- jj. Modify the Rules of Practice as to participation of parties and amici (Rule of Practice 210(f));
- kk. Allow the use of prior sworn statements for any reasons, and limit or expand the parties intended use of the same (Rule of Practice 235(a), (a)(5));
- ll. Express views on offers of settlement (Rule of Practice 240(c)(2));
- mm. Grant or deny leave to move for summary disposition (Rule of Practice 250(a));
- nn. Order that hearings not be recorded or transcribed (Rule of Practice 302(a));

- oo. Grant or deny the parties' proposed corrections to hearing transcript (Rule of Practice 302(c));
- pp. Issue protective orders governing confidentiality of documents (Rule of Practice 322);
- qq. Take "official notice" of facts not appearing in the record (Rule of Practice 323);
- rr. Regulate the scope of cross-examination (Rule of Practice 326); and
- ss. Certify issues for interlocutory review, and determine whether proceedings should be stayed during pendency of review (Rule of Practice 400(c), (d)).

***The SEC ALJ's Decision***

47. At the close of an administrative proceeding, the SEC ALJ issues his or her decision, referred to in the Rules of Practice as the "initial decision." Rule of Practice 360. The initial decision states the time period within which a petition for Commission review of the initial decision may be filed. The SEC ALJ exercises his or her discretion to decide that time period.

48. The initial decision becomes the final decision of the SEC after the period to petition for review expires, unless the Commission takes the SEC ALJ's decision up for review. With certain exceptions, none of which apply here, the Commission is not required to take up any SEC ALJ's decision for review.

49. As applied to this matter, Commission review is entirely discretionary. The Commission can 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"; or (ii) a prejudicial error was committed during the proceeding.

50. Indeed, the vast majority of initial decisions are not reviewed by the Commission. For the period from April 1, 2014 through March 31, 2015, SEC ALJs issued 150 initial

decisions. For that same period, the Commission reviewed at most 20 of the ALJs' initial decisions—thus, more than 86% of ALJ initial decisions do not get reviewed by the Commission and become final. *See* Report on Administrative Proceedings for the Period April 1, 2014 through September 30, 2014 (Oct. 29, 2014); Report on Administrative proceedings for the Period October 1, 2014 through March 31, 2015 (Apr. 30, 2015), *available at* <http://www.sec.gov/reports?TheYear=&TheSubtype=&TheDivision=>.

51. 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 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. § 78d-1(c). The order of finality states the date on which sanctions imposed by the SEC ALJ, if any, will become effective. Rule of Practice 360(d)(2).

52. Nothing in the rules or statutes prevents the Commission from making the ALJ's sanction effective before the respondent has had an opportunity to appeal the Commission's order, and in fact the Commission routinely makes sanctions effective immediately. *See, e.g., In the Matter of Mark Andrew Singer*, Exchange Act Rel. No. 72996, 2014 SEC LEXIS 3139 (Sept. 4, 2014).

### **The Appointment Process for SEC ALJs Violates the Appointments Clause of Article II**

53. The ALJ position is established by statute, which provides that each agency “shall” appoint as many ALJs as necessary for the agency's administrative proceedings. 5 U.S.C. § 3105.

54. In *Free Enterprise Fund v. Public Company Accounting oversight Board*, 561 U.S. 477, 130 S. Ct. 3138 (2010), the United States 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 such “inferior Officers” as Congress authorizes through legislation.

55. SEC ALJs are “officers” of the United States due, among other things, to the significant authority they exercise; the broad discretion they are afforded; their career appointments; the statutory and regulatory requirements governing their duties, appointment, and salary; the statutory authority creating their positions; and their power, in the majority of matters they hear, to issue the final decision of the agency.

56. The Commissioners have not appointed ALJs, as constitutionally required. SEC ALJs are hired by the SEC’s Office of Administrative Law Judges, with input from the Chief Administrative Law Judge, human resource functions and the Office of Personnel management. In some cases, ALJs have been simply transferred to the Commission from FERC and other federal agencies. The Commissioners themselves are not involved in the appointment of ALJs.

57. Improper appointments are a structural defect in the ALJ program. The Commissioners are sworn to faithfully carry out the executive authority entrusted to them, including the power to appoint key officers. Governing regulations provide:

The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws which they are charged with administering. 17 C.F.R. § 200.54

58. Commissioners have the power and responsibility to ensure that the office of ALJ—an office wielding significant authority—is filled by an individual whom Commissioners collectively have evaluated and deemed appropriate to this critical function. Without the scrutiny and approval inherent in collective appointment by Commissioners, ALJs lack the imprimatur of the Department Head necessary to carry out such a sensitive and powerful role. It

is one thing for Commissioners appointed by the President and confirmed by the Senate to use their collective judgment to appoint individuals who preside over important administrative proceedings. It is quite different, and constitutionally infirm, to fill that crucial presiding role through bureaucratic means far removed from our elected President and Congress.

59. The Administrative Procedure Act (“APA”), 5 U.S.C. § 500 et seq., establishes ALJ’s powers with respect to adjudication. 5 U.S.C. §§ 556, 557. The securities laws empower the SEC to delegate certain functions to SEC ALJs, including many of those listed above. 15 U.S.C. § 78d-1.

60. SEC regulation establishes the “Office of Administrative Law Judges,” and outlines their authority. *See, e.g., 17 C.F.R. § 200.14; 17 C.F.R. § 200.30-9; 17 C.F.R. § 201.111.* Those regulations provide that SEC ALJs’ authority with respect to adjudication is to be as broad as the APA allows. 17 C.F.R. § 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.”).

61. The salary of SEC ALJs is specified by statute. There are eight levels of basic pay for ALJs, the lowest of which may not be less than 65% of the rate of basic pay for Level IV of the Executive Schedule, and the highest of which may not be more than the rate of basic pay for level IV of the Executive Schedule. 5 U.S.C. § 5372 (The Executive Schedule is a system of salaries given to the highest-ranked appointed positions in the executive branch of the U.S. government. 5 U.S.C. § 5311.)

62. The means of appointing an ALJ is specified by statute. Appointments are made by agencies based on need. 5 U.S.C. § 3105. By regulation, ALJs may be appointed only from a list of eligible candidates provided by the Office of Personnel Management (“OPM”) or with

prior approval of OPM 5 C.F.R. § 930.204. OPM selects eligible candidates based on a competitive exam, which OPM develops and administers.

63. All ALJs receive career appointments and are exempt from probationary periods that apply to certain other government employees. 5 C.F.R. § 930.204(a). They do not serve time-limited terms.

**The SEC ALJ's Removal Scheme Violates Article II's  
Vesting of Executive Power in the President**

64. 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).

65. This removal procedure involves two or more levels of tenure protection.

66. First, as noted, SEC ALJs are protected by statute from removal absent “good cause.” 5 U.S.C. § 7521(a).

67. Second, the SEC Commissioners, who exercise the power of removal, are themselves protected by tenure. They 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.

68. Third, members of the MSPB, who determine whether sufficient “good cause: exists to remove an SEC ALJ, are also 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).

69. As executive officers, SEC ALJs may not be protected by more than one layer of tenure.

70. Article II of the U.S. Constitution vests “[t]he executive Power . . . in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.”

U.S. Const. art. II, § 1, cl. 1; *id.*, §3. In light of “[t]he impossibility that one man should be able to perform all the great business of the State.” The Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939); *see also Free Enterprise*, 561 U.S. 477, 130 S. Ct. at 3146.

71. Article II’s vesting authority requires that the principal and inferior officers of the Executive Branch be answerable to the President and not be separated from the President by attenuated chains of accountability. Specifically, as the Supreme Court held in *Free Enterprise*, Article II requires that executive officers, who exercise significant executive power, not be protected from being removed by their superiors at will, when those superiors are themselves protected from being removed by the President at will.

72. The SEC ALJs’ removal scheme is contrary to this constitutional requirement because SEC ALJs are inferior officers for the purposes of Article II, Section 2 of the U.S. Constitution, and because:

- a. SEC ALJs are protected from removal by a statutory “good cause” standard; and
- b. The SEC Commissioners who are empowered to seek removal of SEC ALJs—within the constraints of the “good cause” standard—are themselves protected from removal by an “inefficiency, neglect of duty, or malfeasance in office” standard; and
- c. The MSPB members who are empowered to effectuate the removal decision—again limited by a “good cause” standard—are themselves protected from removal by an “inefficiency, neglect of duty, or malfeasance in office” standard.

73. Under this attenuated removal scheme, “the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President’s determination, and

whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise*, 130 S. Ct. at 3147 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

74. Because the President cannot oversee SEC ALJs in accordance with Article II, SEC administrative proceedings violate the Constitution.

**The SEC's Chosen Course Will Cause Plaintiffs Severe and Irreparable Harm**

75. Without injunctive relief from this Court, Plaintiffs will be required to submit to an unconstitutional proceeding. This violation of a constitutional right, standing alone, constitutes irreparable injury. The lack of traditional procedural safeguards in SEC administrative proceedings further exacerbates that harm.

76. Allowing the SEC to pursue an administrative proceeding while the instant complaint is pending would require the expenditure of substantial legal fees defending against an unconstitutional action. Moreover, plaintiffs cannot assert counterclaims or seek declaratory relief in an administrative proceeding, foreclosing any possibility of review until an appeal to a federal circuit court of appeals. The burdens incurred during an administrative proceeding would be for naught, because such administrative proceeding is unconstitutional and the SEC likely would try to reprise its case in a lawful setting, such as federal district court. However, forcing Plaintiffs to litigate twice would compound costs, lost time, and reputational risk.

77. Furthermore, if Plaintiffs were to lose in an administrative proceeding, the damage could be severe and irreversible, well before Plaintiffs could obtain meaningful judicial review of the Article II claim.

78. This severe harm, which threatens to damage Ms. Bennett and Bennett Group, is irreparable. The availability of an appeal after an administrative proceeding to a federal circuit court of appeals does not address this harm, because any administratively-imposed sanction already may take effect—and the damage therefore already substantially and harmfully done—by the time the appellate court made a ruling.

79. Likewise, the harm cannot be remedied after the fact by money damages. Various immunity doctrines substantially constrain Plaintiffs' ability to seek damages from the SEC. Furthermore, even if damages were procedurally available, the reputational harm to Ms. Bennett and Bennett Group should the SEC impose administrative sanctions would be impossible to monetize.

80. By contrast, the SEC will suffer no harm from a pause in an administrative proceeding against Plaintiffs pending final resolution of this important constitutional issue. The Commission has spent more than four years investigating this matter. Any claim of harm by the SEC would be particularly fanciful because the SEC maintains the option of bringing its enforcement action against Ms. Bennett and Bennett Group in federal court.

**COUNT ONE**  
**APPLICATION FOR INJUNCTIVE RELIEF**

81. Plaintiffs repeat and reallege paragraphs 1-80 as if fully set forth herein.

82. Plaintiffs' constitutional rights will be irreparably harmed if a permanent injunction (and, if necessary, a preliminary injunction and temporary restraining order) are not issued against the SEC's administrative proceeding. Plaintiffs have a substantial likelihood of success on the merits of their claim. Plaintiffs will be irreparably injured without injunctive relief, as described above, and the harm to Plaintiffs, absent injunctive relief, far outweighs any

harm to the SEC if they are granted. Finally, the grant of an injunction will serve the public interest in the protection of parties' constitutional rights.

**COUNT TWO**  
**DECLARATORY JUDGMENT**

83. Plaintiffs repeat and reallege paragraphs 1-80 as if fully set forth herein.

84. Plaintiffs request a declaratory judgment that (i) the appointment of SEC ALJs has been unconstitutional, rendering proceeding before those ALJs unlawful; and (ii) the statutory and regulatory provisions for the position and tenure protections of SEC ALJs are unconstitutional.

**JURY DEMAND**

85. Plaintiffs hereby demand a trial by jury on all issues so triable.

WHEREFORE, Plaintiffs pray for judgment and relief as follows:

- A. An order and judgment declaring unconstitutional the statutory and regulatory provisions and practices for selecting and designating SEC ALJs;
- B. An order and judgment declaring unconstitutional the statutory and regulatory provisions providing for the position of SEC ALJ and the tenure protection for that position;
- C. An order and judgment enjoining the Commission from carrying out an administrative proceeding against Plaintiffs; and
- D. Such other and further relief as this Court may deem just and proper, including reasonable attorneys' fees and the costs of this action.

Dated: October 30, 2015  
Washington, D.C.

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