UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
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November 2, 2015

RE: *Bennett v. U.S. Securities & Exchange Commission*
PWG-15-3325

LETTER ORDER

On September 9, 2015, the U.S. Securities and Exchange Commission (the "Commission") issued an Order Instituting Administrative and Cease-and-Desist Proceedings with regard to Plaintiffs Dawn J. Bennett and Bennett Group Financial Services, LLC, to be overseen by an administrative law judge for the Commission ("SEC ALJ"). Pls.' Mem. 1, ECF No. 5. A hearing before the ALJ is scheduled to begin January 25, 2016. *Id.* at 2. In response, Plaintiffs filed a two-count complaint in this Court for injunctive relief and a declaratory judgment against the Commission, seeking an order (1) "enjoining the Commission from carrying out an administrative proceeding against Plaintiffs" and (2) declaring unconstitutional both "the statutory and regulatory provisions and practices for selecting and designating SEC ALJs," and "the statutory and regulatory provisions providing for the position of SEC ALJ and the tenure protection for that position." Compl. 22, ECF No. 1. Plaintiffs also filed a proposed Order to Show Cause for Preliminary Injunction and Temporary Restraining Order, ECF No. 3; a Declaration of Andrew J. Morris in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 4, with accompanying exhibits, ECF Nos. 4-1 – 4-6; and a Memorandum in support of their motion, ECF No. 5. Considering these filings, although Plaintiffs have not filed an actual motion for a temporary restraining order ("TRO") and preliminary injunction, I construe their proposed order as a motion for a TRO and preliminary injunction. *See* Fed. R. Civ. P. 1. Because Plaintiffs failed to comply with the procedural and notice requirements for a TRO, the TRO is denied as procedurally defective, without prejudice to Plaintiff's ability to move forward with a preliminary injunction once the Commission has received notice and the Court has an opportunity to hold a status conference with counsel regarding the expeditious scheduling of the motion for a preliminary injunction.

The purpose of a TRO or a preliminary injunction[1] is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, ultimately to preserve the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). Notice is not required for a TRO, but the moving party's

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[1] A preliminary injunction is distinguished from a TRO only by the difference in notice to the nonmoving party and by the duration of the injunction. *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1 (4th Cir. 2006) (comparing Fed. R. Civ. P. 65(a) with Fed. R. Civ. P. 65(b)). A preliminary injunction cannot issue without notice to the nonmovant. *See* Fed. R. Civ. P. 65(a)(1).

attorney must "certif[y] in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1)(B). Moreover, the moving party must "clearly show" by "specific facts in an affidavit or verified complaint" that "immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A).

To obtain a TRO, the plaintiff must "establish that [1] he is likely to succeed on the merits, [2] he is likely to suffer irreparable harm in the absence of preliminary relief, [3] the balance of equities tips in his favor, and [4] an injunction is in the public interest." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). The plaintiff must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009). As a TRO is "an extraordinary remedy, it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

To meet the first requirement, the plaintiff must "clearly demonstrate that he will *likely succeed* on the merits," rather than present a mere "grave or serious question for litigation." *Id.* at 346–47 (emphasis from the original). Simply "providing sufficient factual allegations to meet the [Fed. R. Civ. P.] 12(b)(6) standard of *Twombly* and *Iqbal*" does not meet the rigorous standard required under the *Winter* and *Real Truth* decisions. *Allstate Ins. Co. v. Warns*, No. CCB-11-1846, 2012 WL 681792, at *14 (D. Md. Feb. 29, 2012). To establish irreparable harm, the plaintiff must show that he is suffering actual and imminent harm, not just a mere possibility, and that harm is truly irreparable and cannot be remedied at a later time with money damages. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991). Irreparable harm "is suffered when monetary damages are difficult to ascertain or are inadequate." *Multi–Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275,* 479 F.2d 1033, 1037 (2nd Cir. 1973)). When a TRO will "adversely affect a public interest . . . the court may . . . withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312–13 (1982). In fact, "courts . . . should pay particular regard for the public consequences in employing th[is] extraordinary remedy." *Id.* at 312. In addition to the public interest determination, the balance of equities must tip in favor of the movant in order for a TRO to be granted. *Winter*, 555 U.S. at 20. Not only must courts weigh any potential harm to the nonmoving party, but also the chance of harm to any interested person, as well as any potential harm to the public. *Continental Group Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 356–57 (3d Cir. 1980).

Plaintiffs have not shown that the Commission received notice of the pending motion. *See* Fed. R. Civ. P. 65(a)(1). As for a TRO, Plaintiffs have not complied with Rule 65's requirement that they certify that they made an effort to notify the Commission of the pending motion or that notice should not be required. *See* Fed. R. Civ. P. 65(b)(1)(B). Nor have they complied with Rule 65(b)'s requirement that they provide "specific facts in an affidavit or a verified complaint clearly show[ing] that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." *See* Fed. R. Civ. P. 65(b)(1)(A). Indeed, given that the hearing is not scheduled to take place until January 25,

2016,[2] any alleged injury will not be immediate, and there is no basis for granting relief to Plaintiffs without first notifying the Commission and affording it an opportunity to be heard. *See* Fed. R. Civ. P. 65(b)(1)(A).

Moreover, it is far from clear that Plaintiffs have shown that they can meet the requirements for an *ex parte* TRO. Plaintiffs have not provided sufficient basis in the law for their belief that they are likely to prevail in their lawsuit. Notably, Plaintiffs cite recent cases in other federal district courts in which the courts have "exercised jurisdiction over plaintiff's Article II challenge to the tenure protection of SEC ALJs," *see* Pls.' Mem. 6, but they do not identify even one case in which this Court or any other federal court has concluded that the Commission's use of administrative law judges is unconstitutional, *see id.* at 11–19; *see also id.* at 12 n.3 (noting that in *Duka v. U.S. S.E.C.*, --- F. Supp. 3d ----, 2015 WL 1943245 (S.D.N.Y. 2015), "Judge Berman held that the tenue protections of SEC ALJs did not violate Article II because they carry out 'solely adjudicatory functions, and are not engaged in policymaking or enforcement"). They assert that they "will be imminently required to submit to an unconstitutional proceeding" and that they "will be required to expend time and resources preparing for the Administrative Proceeding by reviewing discovery and otherwise preparing for the hearing," *see* Pls.' Mem. 20, but the hearing before the SEC ALJ is not scheduled to begin until January 25, 2016, *see id.* at 2. Thus, the hearing is not imminent and the alleged harm, consequently, is not irreparable. *See Direx Israel*, 952 F.2d at 811. Plaintiffs have not carried their burden at this juncture, and therefore, Plaintiffs' motion for a TRO IS DENIED without prejudice to seeking a preliminary injunction in conformance with the notice requirements of Rule 65(a). *See Winter*, 555 U.S. at 20. In this regard, once the notice requirement for a preliminary injunction has been met, I will schedule an expedited telephone conference to discuss a schedule for addressing the motion for a preliminary injunction. Counsel for Plaintiffs shall take responsibility for notifying the Court when the Commission has been served and the identity of counsel for the Commission, at which time an order will be issued scheduling a telephone conference to address Plaintiffs' request for a preliminary injunction.

Although informal, this is an Order of the Court and shall be docketed as such.

Sincerely,

/S/
Paul W. Grimm
United States District Judge

[2] I also note that Plaintiffs learned of the hearing on September 9, 2015, but waited until October 30, 2015 to seek injunctive relief.