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ADMINISTRATIVE PROCEEDING
FILE NO. 3-16383

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of,

CHARLES L. HILL, JR.,

Respondent.

OPPOSITION TO RESPONDENT'S MOTION TO DE-INSTITUTE ADMINISTRATIVE PROCEEDING

Respondent Charles Hill has moved the Commission under Rule of Practice 100(c) to de-institute this administrative proceeding on the grounds that: (1) the proceeding violates Hill's rights to equal protection of the laws; (2) if the Commission were to bring this action today, it would file it in federal court; and (3) the administrative forum does not provide Hill a fair opportunity to defend himself. Hill's motion is meritless and should be denied.[1]

I. Hill's equal protection argument is meritless.

Hill argues that by bringing this action in the administrative forum rather than in federal court, the Commission violated his rights to equal protection of the laws. Mot.5-11. This claim

[1] As authority for his motion, Hill relies on Commission Rule of Practice 100(c), which provides: "The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary." This rule appears to be inapplicable on its face because Hill is not requesting that an "alternative procedure" apply in this proceeding, *id.*, but that the proceeding be dismissed outright. Regardless, Hill's arguments fail on the merits, as discussed below.

is foreclosed by Commission precedent holding that a "class of one" theory of equal protection is "not legally cognizable" in the context of the Commission's inherently discretionary decision to bring charges in one forum rather than another. *Mohammed Riad & Kevin Timothy Swanson*, Exchange Act Rel. No. 78049, 2016 WL 3226836, at *50 (July 7, 2016); *accord David F. Bandimere*, Exchange Act. Rel. No. 76308, 2015 WL 6575665, at *17-19 (Oct. 29, 2015); *Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *28-30 (Sept. 17, 2015).

Like Hill, the *Riad*, *Bandimere*, and *Timbervest* respondents asserted that they too were all singled out as a "class of one" and that the Commission's discretionary choice of an administrative forum disadvantaged them vis-à-vis purportedly similarly situated persons whom the Commission prosecuted in federal court. The Commission rejected these arguments as a matter of law, reasoning that a class-of-one theory of equal protection has "no place" in this context. *E.g.*, *Riad*, 2016 WL 3226836, at *50 (citing *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 594 (2008)). Hill ignores these decisions and relies (Mot.6) on *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011), for the proposition that "class of one" challenges are cognizable. But the Commission has rejected *Gupta*'s analysis in the *Timbervest* line of cases, and Hill has offered no reason for the Commission to reconsider those decisions.

Hill's argument also fails for two additional, independent reasons. *First*, Hill has failed to show "an extremely high degree of similarity" between himself and others purportedly similarly situated. *Timbervest*, 2015 WL 5472520, at *29 (internal quotation marks omitted).

Hill principally compares himself to the defendants in *SEC v. Avent*, No. 16-cv-2459 (N.D. Ga. July 7, 2016), because, he reasons, both cases involve allegations of insider trading "in the very same stock during the very same period." Mot.10. But the two cases involve different charges (the *Avent* defendants, unlike Hill, were charged with violating Section 10(b) of the Exchange Act), and different defendants with no apparent relationship to one another. Moreover, the inside information in this case and *Avent* was not alleged to have originated from the same source, and there is no overlap in the alleged tipping lines. Indeed, Hill himself distinguishes the underlying allegations, arguing that "the alleged conduct in *Avent* is much more serious, harmful to investors, culpable and longer-lasting than the ill-founded allegations against Mr. Hill." Mot.10. Thus, even on Hill's account, he has failed to show an "extremely high degree of similarity," *Timbervest*, 2015 WL 5472520, at *29 (internal quotation marks omitted), between himself and the *Avent* defendants. Hill also compares himself to *all* unregulated persons defending contested allegations of insider trading (Mot.2-3), but "[t]he mere fact that another case involves the same provisions of the [law] does not demonstrate that [Hill is] being treated differently from others similarly situated for purposes of equal protection." *Timbervest*, 2015 WL 5472520, at *29.

Second, Hill has not made a threshold showing that there is no rational basis for any difference in treatment. The Commission "takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings." *Harding Advisory LLC*, Securities Act Rel. No. 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). A choice of forum made even "solely for reasons of administrative convenience" is within the bounds of

prosecutorial discretion. *Timbervest*, 2015 WL 5472520, at *29 (internal quotation marks omitted). Contrary to Hill's argument (Mot.14-15, 17), there is nothing untoward about the Commission's instituting proceedings in the forum that Congress made available. *See Jarkesy v. SEC*, 805 F.3d 9, 12 (D.C. Cir. 2015) ("Nothing in Dodd–Frank or the securities laws explicitly constrains the SEC's discretion in choosing between a court action and an administrative proceeding when both are available."); *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 297 (2d Cir. 2014) (citing enforcement mechanisms available in administrative proceedings and holding that "to the extent that the S.E.C. does not wish to engage with the courts, it is free to eschew the involvement of the courts and employ its own arsenal of remedies instead"). Nor has Hill come close to presenting the evidence that is needed to dispel the presumption of regularity to which the Commission and the Division of Enforcement are entitled. *See Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967).

II. Hill's reliance on the Division's approach to forum selection in contested actions is unavailing.

Hill contends that "maintaining the case against Mr. Hill as an AP violates the SEC's own guidelines" setting forth factors for forum selection. Mot.11. This argument is meritless.

As a threshold matter, the document to which Hill refers is not a statement of *Commission* policy, as Hill argues; rather, it reflects a series of non-exhaustive factors that the *Division of Enforcement* considers in recommending to the Commission how it should exercise its discretion in selecting the forum in which to enforce the securities laws. *See* Division of

Enforcement Approach to Forum Selection in Contested Actions (available at https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf). Since Hill is mistaken to equate the Commission with its staff, *see Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989); *Gryl ex rel. Shire Pharm. Grp. PLC v. Shire Pharm. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002), his suggestion that the Commission has issued any guidelines constraining its forum choice is meritless.

Moreover, the Division's forum-selection approach on its face makes clear that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." Division of Enforcement Approach to Forum Selection in Contested Actions at 4. It adds that "[d]ecisions about particular individual investigations, cases, and charges are made based on the specific facts and circumstances presented." *Id.* Therefore, contrary to Hill's argument, the forum selection approach—which Hill concedes (Mot.11) was issued *after* the Commission instituted the proceeding against him—did not bind the Commission to select any particular forum in this case.

III. Hill has not shown that the administrative forum is unfair.

Finally, Hill contends that the proceeding is unfair for various reasons that have repeatedly been rejected by the Commission and the courts.

Hill first objects to the fact that the Commission both authorizes enforcement proceedings and, after an evidentiary hearing and review of the record, determines whether the law has been violated, Mot.14, but many administrative agencies perform both prosecutorial and adjudicative

functions, and it is well established that this arrangement does not violate due process. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (rejecting "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication"); *see also Richardson v. Perales*, 402 U.S. 389, 410 (1971) (upholding Social Security Administration system in which ALJs both investigate and decide claims); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.9, at 889 (5th ed. 2010) ("[T]he Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated"); 5 U.S.C. § 554(d)(2)(C) (contemplating that agency heads will perform both prosecutorial and adjudicatory functions). Hill cites several newspaper articles criticizing the Commission for using the administrative forum (Mot.15-16), but the Commission has already addressed and rejected bias arguments based on several of these articles. *Timbervest*, 2015 WL 5472520, at *22.

Hill also argues (Mot.14) that this proceeding is unfair on the ground that the Commission's Rules of Practice unfairly limit his ability to take discovery. But the Commission and the courts have repeatedly rejected "[s]uch broad attacks on the procedures of the administrative process." *Harding Advisory LLC*, Securities Act Release No 9561, 2014 WL 988532, at *8 (Mar. 14, 2014); *see also, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (recognizing that agencies "should be free to fashion their own rules of procedure"); *McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979) (federal procedural rules are inapplicable in administrative hearings).

Finally, Hill complains (Mot.14) that there is no right to trial by jury in administrative proceedings, but it is well settled that Congress "may assign th[e] adjudication" of cases involving "public rights" to "an administrative agency with which a jury trial would be incompatible[] without violating the Seventh Amendment[] ... even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977); *see also Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) ("[T]he Seventh Amendment is not applicable to administrative proceedings.").

CONCLUSION

For the foregoing reasons, the Commission should deny Hill's Motion to De-Institute Administrative Proceedings.

October 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned Counsel for the Division of Enforcement hereby certifies that on October 13, 2016, he caused to be served a copy of the foregoing by electronic mail and by United Parcel Service, addressed as follows:

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