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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of:	)	**REPLY BRIEF IN SUPPORT OF MOTION OF RESPONDENT CHARLES L. HILL, JR. TO DE-INSTITUTE ADMINISTRATIVE PROCEEDING**
CHARLES L. HILL, JR.,	)	
Respondent.	)	

Respondent Charles L. Hill, Jr. hereby files his Reply Brief in support of his Motion to De-Institute Administrative Proceeding (the "Motion"). As previously demonstrated, Mr. Hill is in a "class-of-one"; excluding cases that were later de-instituted and cases that are otherwise distinguishable, the present case is the only contested administrative proceeding ("AP") alleging insider trading against an unregulated person that the Commission has filed since the enactment of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in July 2010.[1] Stated another way, **the SEC has sued a total of 461 individuals for alleged insider trading during the relevant time period and Mr. Hill is the only unregulated individual whose litigated case was filed as an AP and has remained an AP over the respondent's objection.**[2]

In its Opposition, the Division fails to challenge these or any of Mr. Hill's other factual assertions. On their face, these overwhelming statistics make out a case that Mr. Hill has been treated unfairly, in an arbitrary and irrational way. It is doubtful that any other respondent will

[1] (Motion at 1-4.)
[2] (*Id.*)

ever be able to demonstrate "class-of-one" treatment by the SEC in the clear and convincing way that Mr. Hill has. The Commission thus has the discretion and the freedom to do the right thing in this case without concern that it might be "opening the floodgates."

The Opposition essentially concedes the two key points from Mr. Hill's Motion to De-Institute: (1) that the Division believes it is proper—or at least that there is no legal remedy—for the Commission to give more deference and respect to the rights of a recidivist securities law violator/manipulator, perjurer and convicted felon than to the rights of a private citizen and retail investor with a totally clean record like Mr. Hill; and (2) that it is proper for the Division to choose to bring a case in the Commission's administrative forum precisely because it knows it could not win the case in federal court. The Commission should think long and hard before it endorses such an extreme and repellent view of its own discretion. Such views are contrary to considerations of fundamental fairness and will bring disrepute on the Commission in the view of the public and, perhaps, Congress. In the long run, and even in the intermediate run, granting the Motion will best serve the institutional and reputational interests of the Commission.

Mr. Hill acknowledges that the Commission has made seemingly contrary rulings in a few recent opinions, such as *Bandimere*, *Riad* and *Timbervest*, which the Division relies on in its Opposition. These opinions are flawed because they rely on the U.S. Supreme Court's opinion in *Engquist*, when it is the Supreme Court's opinion in *Olech* that is controlling. To the extent the Commission agrees with the Division that these opinions apply to Mr. Hill, the Commission can and should reconsider these holdings, at least in the context of this case, in which exponentially stronger evidence of disparate treatment exists. There is no jurisdictional or jurisprudential barrier to the Commission reconsidering its choice of forum for Mr. Hill's case:

the Commission need not even explain its reasons for de-instituting. Mr. Hill thus respectfully requests that the Commission do the right thing and grant the Motion.

A. The Commission's Opinions in *Riad*, *Bandimere* and *Timbervest* Are Not Controlling and Mr. Hill Has a Legally Cognizable Equal Protection Claim.

The Division argues that Mr. Hill's equal protection claim 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."[3] Each of the opinions of the Commission that the Division cites, however—*Riad*, *Bandimere* and *Timbervest*—gave an impermissibly overbroad reading to the U.S. Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008). No federal court has ever reviewed or approved the Commission's erroneous interpretation of *Engquist*. In contrast, at least one federal district court judge has ruled against the Commission on a motion to dismiss the "class-of-one" equal protection claim.[4]

In *Engquist*, the Supreme Court carefully circumscribed its decision, explicitly stating that "all we decide" is "that the class-of-one theory of equal protection has no application ***in the public employment context***."[5] In so holding, the Court affirmed the Ninth Circuit, which interpreted Supreme Court cases to "have routinely afforded government greater leeway when it acts as employer rather than ***regulator***."[6] The Court distinguished its prior precedent as follows:

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[3] (Opposition at 2.)

[4] *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011); *see also Arjent LLC v. SEC*, 7 F. Supp. 3d 378, 384–85 (S.D.N.Y. 2014) (applying *Gupta* but dismissing implausibly pleaded equal protection claim).

[5] 553 U.S. 591, 607 (2008) (emphasis added).

[6] *Id.* at 596 (emphasis added); *see also id.* at 598 ("Our traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique *(cont'd)*

"Unlike the context of arm's-length regulation, such as in [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)], treating seemingly similarly situated individuals differently in the employment context is par for the course."[7] In other words, when the government acts as an arm's-length regulator, the Supreme Court's decision in *Olech* controls. Here, there is no question that the Commission is acting as an arm's-length regulator. Accordingly, a class-of-one equal protection claim remains viable.

Nonetheless, despite the Supreme Court's limiting language, the Commission has extended *Engquist*, as argued by the Division, to preclude all equal protection claims based on the Commission's "choice of forum in pursuing a civil enforcement action for a violation of the securities laws."[8] Because choice of forum is "inherently discretionary," the Commission views its forum choice as unassailable.[9]

Mr. Hill does not dispute that the Commission has discretion, pursuant to Dodd-Frank, to bring an AP against an unregulated individual accused of insider trading. Rather, Mr. Hill argues

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considerations applicable when the government acts as employer ***as opposed to sovereign***, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.") (emphasis added).

[7] *Id.* at 604.

[8] *Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *29 (Sept. 17, 2015).

[9] *See Mohammed Riad & Kevin Timothy Swanson*, Exchange Act Rel. No. 78049, 2016 WL 3226836, at *50 (July 7, 2016) ("the Commission's decision to bring charges in one forum rather than another is an inherently discretionary one"); *David F. Bandimere*, Exchange Act. Rel. No. 76308, 2015 WL 6575665, at *18 (Oct. 29, 2015) ("an equal-protection claim is not legally cognizable in the context of an inherently discretionary governmental decision to bring charges in one forum rather than another").

that the Commission's exercise of this discretion has been used arbitrarily and irrationally ***only*** against Mr. Hill.[10] Accordingly, Mr. Hill's case is controlled by *Olech* rather than *Engquist.*[11]

In *Olech*, a property owner had asked the Village of Willowbrook to connect her property to the municipal water supply. Although the Village had required only a 15-foot easement from other property owners seeking access to the water supply, the Village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the Village, claiming that the Village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. Although Olech had not alleged that the Village had discriminated against her based on membership in an identifiable class, the Court held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[12]

As the Court in *Engquist* observed, "[w]hat seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter."[13] Rather, the complaint alleged that the

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[10] *See Gupta*, 796 F. Supp. 2d at 513.

[11] *See* Michael Dvorak, *SEC Administrative Proceedings and Equal Protection "Class of One" Challenges: Evaluating Concerns About SEC Forum Choices*, 2015 Colum. Bus. L. Rev. 1195, 1218 ("[T]he SEC's conduct in the types of cases discussed above is more like that in *Olech* than that in *Engquist*. Individuals like Gupta, Jarkesy, Chau, and Peixoto should be able to bring equal protection challenges against the SEC's choice of forum under the class of one doctrine.").

[12] *Olech*, 528 U.S. at 564 (citations omitted).

[13] *Id.* at 602.

board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement.[14] This differential treatment raised a concern of arbitrary classification, and the Court therefore required that the government provide a rational basis for it. *Id.*

The Division argues that "there is nothing untoward about the Commission's instituting proceedings in the forum that Congress made available," citing the D.C. Circuit's ruling that "[n]othing in Dodd-Frank or the securities laws explicitly constrains the SEC's discretion" in choosing between an AP and federal court.[15] While the Division's argument could be true if the Commission had a standard of instituting contested APs against unregulated persons accused of insider trading, the Commission's standard is, in fact, the opposite—it brings all contested enforcement actions against unregulated individuals accused of insider trading in federal court, with the sole exception of the case against Mr. Hill.[16] In terms of *Olech*, the Commission proposes subjecting Mr. Hill to "a 33-foot easement," while it consistently requires only a "15-foot easement" from all others.[17]

Moreover, each of *Riad*, *Bandimere* and *Timbervest* is distinguishable from Mr. Hill's case. In *Riad*, the Commission noted both (1) the failure of the respondents to show "that the Commission otherwise has a practice of pursuing large and complex cases only in federal court," and (2) "it was particularly rational for us to pursue this enforcement matter in the administrative

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[14] *Id.* at 603.
[15] (Opposition at 4.)
[16] *See Gupta*, 796 F. Supp. 2d at 513.
[17] *See* 2015 Colum. Bus. L. Rev. at 1218 ("[T]he SEC undoubtedly exercises a great deal of discretion in conducting its affairs; the enforcement of securities law generally involves a degree of subjectivity. Yet, just as the zoning decisions in *Olech* departed from the typical subjectivity and operated in a seemingly automatic and non-individualized way, the forum decisions by the SEC arguably lack many markers of truly discretionary or particularized thought.").

forum because the proceedings involved a request for an associational bar."[18] Similarly, in *Bandimere*, (1) the respondent undercut his equal protection claim by acknowledging "a dozen other cases have in fact been brought against Ponzi schemers administratively," including his case, and (2) the Commission had "a jurisdictional basis for the remedy the Division sought, and that we have imposed . . . an associational bar for the protection of investors in the public interest—a statutory remedy that Congress made available to the Commission in administrative proceedings."[19] In *Timbervest*, the Commission noted that (1) respondents "allege only vaguely that the Commission 'has brought cases, including cases against investment advisers in federal court,'" and (2) "it was particularly rational to pursue this enforcement matter in the administrative forum because the proceedings involved a request for an associational bar."[20]

In other words, the *Riad*, *Bandimere* and *Timbervest* opinions all addressed situations lacking the very sort of convincing evidence of disparate treatment that Mr. Hill has presented here. Those respondents alleged general equal protection claims not supported by clear evidence of disparate treatment and the Commission could point to a rational basis for the forum selection, i.e., the need for an associational bar, which has no possible application in this case. Further, no respondent in those cases or otherwise has shown the overwhelming statistical evidence of an equal protection violation as Mr. Hill has presented in the Motion. To place Mr. Hill's evidence in context, among respondents who have brought "class-of-one" equal protection claims, the sample size of "similarly situated" individuals put forth as *prima facie* evidence of disparate

[18] 2016 WL 3226836, at *51.
[19] 2015 WL 6575665, at *18-19.
[20] 2015 WL 5472520, at *29.

treatment is as follows: Hill—461[21]; Peixoto—156; Gupta—28, Jarkesy—9; and Chau—4.[22] And, the Commission has never come forward with any rational basis for its disparate treatment of Mr. Hill.

B. Mr. Hill Has Made a *Prima Facie* Showing of Arbitrary and Disparate Treatment Sufficient to Establish an Equal Protection Claim.

The Division argues that Mr. Hill has failed to show "an extremely high degree of similarity" by comparing himself to "all unregulated persons defending contested allegations of insider trading."[23] It is difficult to fathom what more the Division would have Mr. Hill show. He has already presented evidence that of all the proceedings against 461 individuals for alleged insider trading since Dodd-Frank, his case is the only contested AP against an unregulated individual. Furthermore, he has presented evidence that *SEC v. Avent*, a case alleging insider trading in the very same stock during the very same period, is proceeding in federal court. Accordingly, Mr. Hill has more than met his threshold burden.[24]

Attempting to undermine this showing, the Division points to the fact that the Commission has not brought a Section 10(b) claim against Mr. Hill as evidence that the *Avent*

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[21] (*See* Motion at 2-4.)

[22] *See* 2015 Colum. Bus. L. Rev. at 1212 ("[E]vidence that twenty-eight similar individuals faced a different forum or that only three out of 156 similar cases have gone through administrative proceedings would lend credibility to [equal protection claims]. This evidence is especially convincing given the significant differences between administrative proceedings and action in federal court and the complete absence of explanation for the SEC's forum decisions.").

[23] (Opposition at 2-3.)

[24] *See Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) ("While the applicable standard does not require that there be an exact correlation, there must be sufficient proof on the relevant aspects of the comparison to warrant a reasonable inference of substantial similarity."), cited by *Myriad Interactive Media, Inc.*, Exchange Act. Rel. No. 75791, 2015 WL 5081238, at *9 (Aug. 28, 2015).

defendants and Mr. Hill are not sufficiently similar.[25] However, the choice of statute for an insider-trading claim is a distinction without a difference, at least for purposes of equal protection claims. Both *Avent* and this case allege insider trading, regardless of how denominated, in the same stock during the same time period. Further, while the SEC brought insider-trading claims under both Section 10(b) and Section 14(e) against Defendants Avent and Pirrello in *Avent*, the Division fails to mention that the SEC brought **only** a Section 14(e) claim against Defendant Penna, the only alleged tippee who traded of the three Defendants in *Avent*, which is identical to the sole charge against Mr. Hill, who, like Penna, is alleged to have been a tippee who traded.[26] The Division's opposition essentially concedes disparate and adverse treatment against Mr. Hill.

The Division's Opposition fails to put forth the rational basis for its disparate treatment of Mr. Hill. Rather, the Division states that "administrative convenience" could suffice as a rational basis for the disparate treatment and faults Mr. Hill for not "presenting the evidence that is needed to dispel the presumption of regularity to which the Commission and the Division of Enforcement are entitled."[27] While the Division cites "administrative convenience," it provides no explanation as to how pursuing Mr. Hill's case is more convenient in the administrative forum or that the Commission, in fact, chose to pursue Mr. Hill's case in the administrative forum for that reason. Furthermore, the Division is perfectly aware of the regularity with which the Commission and Division have pursued contested insider-trading cases against unregulated

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[25] (Opposition at 3.)
[26] *See* Complaint, *SEC v. Avent*, No. 1:16-CV-02459-SCJ (N.D. Ga. July 7, 2016).
[27] (Opposition at 3-4.)

individuals in ***federal court.*** Regardless, the evidence that Mr. Hill has presented overwhelmingly proves his case.

C. Fundamental Fairness and Justice Require that the Commission De-Institute the AP.

Regardless, even if the Division were correct on its constitutional arguments regarding application of the Equal Protection Clause and the viability of a "class-of-one" claim, which Mr. Hill denies, its Opposition misses the larger point. The Motion goes beyond constitutional claims to rely on considerations of fundamental fairness and the interests of justice. *See* SEC Rule of Practice 100(c).[28]

Consistent with fundamental fairness, and in the interests of justice, the Commission certainly enjoys the discretion to accord Mr. Hill the same treatment that hundreds of other unregulated individuals charged with insider trading have enjoyed—being able to defend themselves in federal court, including the right to full discovery and a trial by a jury of his peers. The Division's Opposition makes no serious argument to refute the existence of this discretion, which the Commission can and should exercise in this case.

For all these reasons, and for the reasons set forth in the Motion, this Court should de-institute this AP.

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[28] The Division's arguments against the application of Rule 100(c) are hyper-technical and misplaced. The Motion specifically contemplates the dismissal of one proceeding (this AP) in favor of an alternative procedure, i.e., refiling the case in federal court.

Dated: October 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I filed an original and three copies of the foregoing REPLY BRIEF IN SUPPORT OF MOTION OF RESPONDENT CHARLES L. HILL, JR. TO DE-INSTITUTE ADMINISTRATIVE PROCEEDING with the Office of the Secretary, Securities and Exchange Commission, Attn: Secretary of Commission Brent J. Fields, 100 F Street NE, Mail Stop 1090, Washington, DC 20549, by Federal Express overnight delivery and filed a copy by facsimile transmission to (202) 772-9324, and served a true and correct copy upon the following by electronic mail, as follows:

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