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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of

CHARLES L. HILL, JR.,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION IN LIMINE TO PRECLUDE THE TESTIMONY OF MATTHEW McNAMARA

Respondent seeks to call Matthew McNamara at the hearing in this matter. Mr. McNamara is a member of the Commission staff, an attorney, and is the Assistant Regional Director involved in the investigation that preceded this litigation. Hill has articulated several subject matters that he intends to have Mr. McNamara testify about. None of these topics, however, have anything to do with the substantive merits of the case – i.e. Hill's trading in Radiant shares. Instead, the subject matters on which Hill wants McNamara to testify apparently relate to Hill's Equal Protection and Due Process claims, as well as the Commission's charging decisions. As discussed more fully below, there is no basis for Mr. McNamara to testify on any of the proposed subject matters identified by Hill. As such, the Court should not issue a subpoena to McNamara. In addition, the Division previously moved to exclude Mr. McNamara's testimony, but Hill filed no opposition to that motion. The Court should deny Hill's renewed request to call Mr. McNamara as a witness on that ground as well.

I. Mr. McNamara Is Not a Percipient Witness

As a general matter, courts have repeatedly rejected efforts to subpoena Commission staff to testify on the factual basis for the Commission's allegations, because the Commission has no independent knowledge of facts and such knowledge is derived solely from investigation that staff attorneys take in anticipation of litigation. See SEC v. Monterosso, 2009 WL 8708868 at *1-2 (S.D. Fla. June 2, 2009); SEC v. Jasper, 2009 U.S. Dist. LEXIS 46678 (N.D. Cal. May 25, 2009); SEC v. SBM Inv. Certificates, 2007 WL 609888 at *22-23 (D. Md. Feb. 23, 2007); SEC v. Buntrock, 2004 WL 1470278 (N.D. Ill. June 29, 2004); SEC v. Rosenfeld, 1997 U.S. Dist. LEXIS 13996 at *5 (S.D.N.Y. Sep. 16, 1997); SEC v. Morelli, 143 F.R.D. 42, 46-47 (S.D.N.Y. 1992). Accordingly, when evaluating Hill's request to compel staff testimony, the Court should start with a high degree of skepticism.

II. The Rationale for the Commission's Charging Decisions Is Privileged and Irrelevant

Hill seeks testimony from Mr. McNamara regarding the Commission's rationale for certain charging decisions in this case. Specifically, he seeks to elicit testimony regarding:

(i) The Commission's decision to bring insider trading claims against Mr. Hill in an administrative proceeding solely under Section 14(e) of the Securities Exchange Act of 1934 and Rule 14e-3 promulgated thereunder. (Respondent's Amended Witness List at 5.)

(ii) The Commission's decision to select an administrative, as opposed to judicial, forum for bringing this enforcement action against Mr. Hill. (*Id.*)

(iii) The process employed by the Commission in determining whether to institute an enforcement action against an unregulated individual in an administrative proceeding or in federal district court. (*Id.*)

(iv) The standards, guidelines, or criteria applied by the Commission in determining the forum in which to bring an enforcement action. (*Id.*)

(v) The decision not to pursue insider trading claims against Todd Murphy or Andrew Heyman. (*Id.*)

(vi) The Commission's knowledge regarding any administrative enforcement proceedings or actions commenced in federal court against an unregulated individual for insider trading brought solely under Section 14(e). (*Id.*)

The Commission's factual basis for charging Hill under Section 14(e) and Rule 14e-3 is adequately set forth in the Order Instituting Proceedings in this matter. The additional information sought by Hill is privileged and not relevant.

A. The Commission's Rationale for Charges Is Privileged

The staff 's rationale for not recommending, and the Commission's rationale for not bringing additional charges against Hill, not charging other parties, and proceeding in an administrative forum, is protected by the deliberative process and attorney client privileges, as well as the work product doctrine.

1. The Attorney Client Privilege

The testimony sought by Hill is protected by the attorney-client privilege, which shields confidential communications made between attorneys and their clients when the communications are made for securing legal advice or services. In re Sealed Case, 737 F. 2d 94, 98-99 (D.C. Cir.

1984). The privilege applies to "legal advice, legal analysis, and recommendations" that an agency lawyer provides to the agency. Linder v. Calero-Portocarrero, 183 F.R.D. 314, 324 (D.D.C. 1998). The attorney-client privilege "helps improve the quality of agency decision making by safeguarding the free flow of information that is a necessary predicate for sound [legal] advice." Judicial Watch, Inc. v. Dept of Justice, 306 F. Supp. 2d 58, 74 (D.D.C. 2004) (quoting Murphy v. Tenn. Valley Auth., 571 F. Supp. 502, 506 (D.D.C. 1983)).

The staff's rationale for recommending an enforcement action, including the charges that should be brought, the persons who should be charged and the appropriate forum, are protected from disclosure by the attorney-client privilege. The categories of information that Hill seeks from Mr. McNamara would disclose analysis and legal advice by Commission attorneys on individual investigations and litigation, including regarding legal claims, the appropriate fora for particular matters, and whether an action should be pursued at all. See, e.g., U.S. v. Peitz, 2002 WL 31101681, at *9 (N.D. Ill. Sep. 20, 2002); accord, Somers, 2013 WL 4045295, at *2; SEC v. Merlon, 2012 WL 2568158, at *1 (S.D. Fla. Jun. 29, 2012).

2. The Deliberative Process Privilege

The deliberative process privilege is "predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl," and it protects information that concerns the internal deliberative processes of a government agency. Dow Jones & Co. v. Dept of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990) (quotations omitted); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975). The privilege extends to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer

rather than the policy of the agency." Coastal States Gas Corp. v. Dept of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

A decision whether to pursue an action, including the specific legal claims under consideration, necessarily involves Commission decision making and deliberation. The testimony Hill seeks from Mr. McNamara thus would disclose exactly the type of information the deliberative-process privilege is intended to protect. See, e.g., SEC v. Somers, 2013 WL 4045295 at * 2 (W.D. Ky. Aug. 8, 2013) (deliberative process privilege protects from disclosure information reflecting "the opinions of SEC attorneys about the viability and wisdom of bringing a particular action against a defendant.").

3. The Work Product Doctrine

The attorney work-product doctrine protects from disclosure "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." Schiller v. NLRB, 964 F. 2d 1205, 1208 (D.C. Cir. 1992). These protected documents can include "the files and the mental impression of an attorney . . . reflected of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

Here, any testimony related to the decision to bring an action in a specific forum or to pursue an action at all would necessarily have been prepared in anticipation of litigation, and therefore fall squarely within the doctrine. See Somers, 2013 WL 4045295, at *2; Merlon, 2012 WL 2568158, at * 1; SEC v. Cavanaugh, 1998 WL 132842, at *2 (S.D.N.Y. Mar. 23, 1998) (information provided to the Commission "so that it could make the determination whether to proceed with litigation in this matter" falls "squarely within the protections of the work-product

doctrine.") Moreover, such testimony would inevitably require Mr. McNamara to testify about the merits of the claims against Hill, an area that courts have found to be immune from discovery. Bush Dev. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1363 (E.D.Va.1986) ("Counsel's statements concerning the claim's likely success . . . are prime examples of the types of materials entitled to near absolute protection . . . .")[1]

B. The Commission's Rationale for Charges Is Not Relevant

Hill offers nothing to show how testimony explaining the decision not to charge Murphy and Heyman, or the decision not to bring other charges against Hill, would be relevant to his constitutional claims. For example, he offers nothing suggesting that these decisions flow from an invidious motive. To the extent Hill seeks such testimony to defend the merits of the case, such testimony is also irrelevant. Decisions to charge certain individuals, and the appropriate charges to bring, are judgments vested in the Commission's discretion and are not probative of the merits of the insider trading claims against Hill. See U.S. v. Delgado, 903 F.2d 1495, 1499 (11th Cir. 1990) (evidence regarding government's decision not to charge others is not relevant to defendant's guilt); U.S. v. Ramos, 169 Fed. App'x. 865, 866 (5th Cir. 2006) (same). As such, the testimony Hill seeks is irrelevant to this proceeding and should not be allowed. Because this Court cannot consider staff testimony regarding the merits of the claims against Hill, such testimony is not relevant.

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[1] Hill will undoubtedly claim that he can pierce these privileges by showing a substantial need to prove his constitutional claims. However, Hill cannot show substantial need simply by asserting constitutional claims. Instead, he must make a threshold *prima facie* showing of a constitutional violation before possibly piercing these privileges. See infra at Section III. Hill has failed to make such a showing.

III. Hill Has Not Made the Requisite Initial Showing of an Equal Protection or Due Process Violation

Hill apparently seeks to elicit testimony from Mr. McNamara to develop his Equal Protection and Due Process claims. These claims appear to be based on the Commission's decision to (1) charge him only with violations of Section 14(e) of the Exchange Act (and not Section 10(b)), (2) not charge Andrew Heyman and Todd Murphy, (the other parties that Division alleges were involved in the flow of material nonpublic information to Hill), and (3) prosecute this case in an administrative proceeding rather than in a district court action. But Hill has not met the heavy threshold burden that courts have imposed before allowing evidence on such issues.

The Supreme Court has consistently cautioned that courts must typically defer to prosecutorial decisions:

> So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.

Wayte v. U.S., 470 U.S. 598, 607-08 (1985)

Given the substantial judicial deference to prosecutorial discretion, Hill is not automatically entitled to probe into the Division's or the Commission's prosecutorial decisions simply by reciting the magic words "Equal Protection" or "Due Process." Instead, before he may adduce evidence on these issues, Hill must make "some initial showing" of a constitutional violation. U.S. v. Bohrer, 807 F.2d 159, 161 (10th Cir. 1986); U.S. v. Ness, 652 F.2d 890, 892 (9th Cir. 1981). See also U.S. v. Armstrong, 517 U.S. 456, 464 (1996) ("the showing necessary

to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.") The initial showing requires Hill to "present facts sufficient to create a reasonable doubt about the constitutionality of a prosecution." U.S. v. Silien, 825 F.2d 320, 322 (11th Cir1987). This demanding burden applies equally to defendants in civil enforcement actions. CE Carslon, Inc. v. SEC, 859 F.2d 1429, 1437-38 (10th Cir. 1988), citing Bohrer, 807 F.2d at 161. Hill has not met this important preliminary burden.

A. Hill Has Not Articulated a Viable Equal Protection Claim

1. No Prima Facie Showing of Selective Prosecution

Hill has advised previously that his "Equal Protection Defense is that he is the only unregulated person who the SEC has both (i) accused of violating only § 14(e) and (ii) forced to proceed in the SEC's in-house adjudicative process." Hill's Response to Opposition to Request for the Issuance of a Subpoena Duces Tecum ("Hill Duces Tecum Brief") at 3. But Hill has not made the requisite *prima facie* showing of a selective prosecution that would entitle him to discovery or warrant allowing him to present testimony at trial on this issue.

To prove selective prosecution, Hill must show that he "is a member of a constitutionally protected class, that prosecutors acted with bad intent, and that similarly-situated [individuals] outside of the protected category were not charged." China-Biotics, Exchange Act Rel. No. 70800, 2013 WL 5883342 at * (Nov. 4, 2013), citing Fog Cutter Capital Group v. SEC, 474 F3d 822, 826-27 (Dc Cir. 2007). Hill offers nothing, however, to show that he falls within a constitutionally protected class. Indeed, another ALJ rejected a substantially similar selective prosecution claim based on the same defect. David Bandimere, Initial Decision No. 507, 2013 WL 5553898 at * 73 (Oct. 8, 2013) (no selective prosecution in an administrative proceeding,

rather than a district court action, because, among other things, respondent "failed to identify a protected class of which he is a member."). See also, U.S. v. American Elec. Power Service, 258 F.Supp.2d 804, 808 (S.D. Ohio 2003) (rejecting selective prosecution claim where defendant was not "claiming membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights.")

2. No Prima Facie Showing of Arbitrary Treatment

Hill also appears to assert an Equal Protection claim on a theory that the Commission "arbitrarily" decided to sue him in an administrative proceeding. Hill Duces Tecum Brief at 4. But the Supreme Court has cautioned:

> There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be treated alike, under like circumstances and conditions is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Engquist v. Oregon Dept. of Agr., 553 U.S. 591, 603 (2008).

Thus, for claims where the plaintiff alleges that he or she is being irrationally singled out for disparate treatment by the government, the Enquist Court distinguished between cases where "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed," and cases where the agency "exercis[es] discretionary authority based on subjective, individualized determinations." Id. at 602. The latter type cases are not viable absent some showing of an invidious motive. U.S. v. Moore, 543, F3d 891, 900 (7th Cir. 2008) ("[A]n exercise of prosecutorial discretion cannot be successfully challenged merely on the ground that

it is irrational or arbitrary; in the realm of prosecutorial charging decisions, only invidious discrimination is forbidden."); Virgin Islands v. Harrigan, 791 F.2d 34, 36-37 (3d Cir.1986) (denying selective prosecution claim because a prosecutor's unexplained change of charging policy is not unconstitutional arbitrariness).

The decision to pursue claims in an administrative forum, rather than a district court is a discretionary decision based on an array of subjective, individualized assessments. Harding Advisory LLC, Securities Act Rel. No 9561, 2014 WL 988532 at *8 (Mar 14, 2014) ("the Commission takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings" rather than a district court action.) Hill makes no allegation that this decision stemmed from some invidious motive by the Commission. Hill Duces Tecom Brief at 4 (Commission's charging decision was arbitrary because the Commission "had no meaningful guidance for making such a forum selection.") Accordingly, this Court should not permit Hill to inquire into the Commission's rationale for selecting an administrative forum in this matter.

Even assuming *arguendo* that Hill can challenge the Commission's decision to prosecute him in an administrative forum, he still has not made the requisite threshold showing that would entitle him to present evidence at trial on this issue. Hill must show a high similarity between himself and those who he claims to have been treated differently. See, e.g., John Thomas Capital Management Group, Initial Decision No. 693, 2014 WL 5304908 at *5 (Oct. 17 2014) (no selective prosecution where "there are no other defendants, connected to the same allegations of wrongdoing, against whom litigation was brought in a judicial instead of administrative proceeding.") Cf. Gupta v. SEC, 796 F. Supp. 2d 503, 514 (S.D.N.Y. July 11, 2011) (finding

there were "28 *essentially identical* defendants" that had previously been sued in district court in connection with the Galleon insider trading investigation) (emphasis added). Hill's purported class, all unregistered entities charged with only Section 14(e) violations, does not share the requisite high degree of similarity.[2]

B. Hill Has Not Articulated a Viable Due Process Claim

Hill's Due Process claim "is based on the lack of procedural safeguards for adjudicating a complex case like this one, compared to those available in a federal court, such as the right to a trial by jury." Hill Duces Tecum Brief at 3. Hill's motion for a subpoena to Mr. McNamara, however, does not explain how the testimony sought from Mr. McNamara, such as the reasons for bringing the case in an administrative forum, the reasons for alleging 14(e) claims only, and the reasons for not charging other individuals, have any bearing on his perceived lack of procedural safeguards in administrative proceedings. More importantly, the Commission has ruled on several occasions that "[a]dministrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding." Jonathan Feins, 54 S.E.C. 366, 378 (1999); see also William C. Piontek, 57 S.E.C. 79, 90 (2003).

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[2] Hill seeks Mr. McNamara to testify on the "Commission's knowledge of administrative or enforcement proceedings commenced in federal court against an unregulated individual for insider trading brought solely under Section 14(e)." To the extent he seeks to explore the Commission's rationale for those prosecutions, the request suffers from the defects discussed herein, i.e. insufficient *prima facie* showing of a constitutional violation, privilege, etc. If Hill only seeks Mr. McNamara to identify such cases, no such testimony is necessary as this information has already been provided to Hill.

IV. The Staff Cannot Testify Regarding the Views of the Commission

Hill's request to have Mr. McNamara testify regarding (a) the "Commission's decision" to select an administrative proceeding rather than a district court proceeding, and the "Commission's decision" to pursue a claim against Hill solely under Section 14(e) and Rule 14e-3 of the Exchange Act is also objectionable because Mr. McNamara, as a member of the staff, cannot speak for the Commission. In re Steven Altman, Exchange Act Rel. No. 63306, 2010 5092725 (Nov. 10 2010) ("Under the Commission's regulations, staff opinions 'do not constitute an official expression of the [Commission's] views.'"). While Mr. McNamara was involved in the staff's decision to recommend charges against Hill, those recommendations do not necessarily reflect the reasons why the Commission decided to charge Mr. Hill or the Commission's reasons for selecting an administrative forum. Harding Advisory LLC, 2014 WL 988532 at *7 ("the Division cannot know all the factors the Commission considered when it made its decision to institute these proceedings."); SEC v. Nat'l Student Mktg. Corp., 68 F.R.D. 157, 160 (D.D.C. 1975) ("While the Commissioners may in fact respect the staff's recommendations, they are not bound by them nor do such recommendations necessarily reflect the position of the agency itself on any given topic."), aff'd. 538 F.2d 404 (D.C. Cir. 1976).[3]

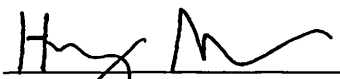
[3] Hill's anticipated subpoena also seeks testimony regarding the Commission's process of selecting an administrative or district court forum for enforcement actions, and the standards, guidelines and criteria applied in selecting the forum. As a member of the staff, Mr. McNamara also cannot testify as to those items.

V. Conclusion

For the foregoing reasons, the Court should not issue the subpoena to Matthew McNamara.

November 16, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

On November 16, 2016, I served the foregoing by causing to be sent true and correct copies as shown below in sealed envelopes, postage prepaid, for overnight delivery addressed to:

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