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.

RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION ON
HIS CONSTITUTIONAL AFFIRMATIVE DEFENSES
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Stephen E. Hudson
Hillary D. Rightler
KILPATRICK TOWNSEND &
STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Telephone: (404) 815-6500
Facsimile: (404) 815-6555
shudson@kilpatricktownsend.com
hrightler@kilpatricktownsend.com

Counsel for Respondent, Charles L. Hill, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

Pursuant to United States Securities and Exchange Commission ("Commission") Rule of Practice 250, Respondent, Charles L. Hill, Jr. ("Mr. Hill"), respectfully moves for summary disposition and dismissal of the February 11, 2015 Order Instituting Cease-And-Desist Proceedings ("OIP") against him. This motion is based on Mr. Hill's constitutional affirmative defenses.[1] Mr. Hill is filing a separate motion on the merits of the claim against him.[2]

I. PRELIMINARY STATEMENT

Mr. Hill is an ordinary citizen unregistered with the Commission. However, he has been compelled to participate in an Administrative Proceeding – that he contends is unconstitutional as to him – through which the Commission seeks to impose substantial civil penalties against him. This proceeding contravenes Article II of the U.S. Constitution because it is overseen by an Administrative Law Judge ("ALJ") who is protected from removal by two layers of good-cause tenure protection. *See* Answer and Affirmative Defenses of Respondent Charles L. Hill, Jr. ("Hill Ans."), Third and Fourth Affirmative Defenses. This proceeding is also the product of a Congressional delegation of authority, through the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), which lacks any intelligible principle and thus violates Article I of the U.S. Constitution. *See* Hill Ans., Second and Fourth Affirmative Defenses. The conferral of such unlimited authority is also constitutionally invalid because it abridges Mr. Hill's Seventh Amendment right to a jury

[1] Mr. Hill has asserted several affirmative defenses. This motion only addresses certain of those affirmative defenses. Mr. Hill does not waive and expressly reserves his right to assert the other affirmative defenses.

[2] This motion incorporates the facts contained in the accompanying Motion for Summary Disposition on the Merits of the Claim Asserted Against Him and Memorandum and Points of Authorities in Support Thereof, to the extent they are relevant herein, which is being filed contemporaneously with this motion.

trial. *See id.*, Seventh Affirmative Defense. For these reasons, and for the reasons explained below, this Administrative Proceeding should be dismissed in its entirety.

II. ARGUMENT[3]

A. The Administrative Proceeding Is Unconstitutional Under Article II of the U.S. Constitution Because It Is Presided Over by an Inferior Officer Who Is Protected From Removal by Two Layers of Good-Cause Tenure Protection.

Article II of the Constitution vests the executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II § 1, cl. 1; *id.* § 3. In discharging this duty, the Constitution authorizes the President to rely on the assistance of executive officers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

To hold such officers accountable, the Constitution authorizes the President to exercise the executive power to remove these officers, subject to certain limitations. One of these limitations is that Congress may under certain circumstances create independent agencies, run by principal officers appointed by the President, who can be removed only for good cause. *Id.* These principal officers can be similarly constrained from removing their inferior officers. *Id.*

However, when an agency, like the Commission here, employs a scheme that combines both of these layers of good-cause tenure protection, the President's power to faithfully execute the laws is undermined and Article II is violated. That is precisely the situation here with respect to the Commission's ALJs who handle Administrative Proceedings, such as this one.

[3] Rule of Practice 250(b) provides that a hearing officer "may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b).

1. An ALJ Is an Inferior Officer Appointed by the Heads of a Department for the Purposes of the Appointments Clause.

Article II's Appointments Clause provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II § 2, cl. 2. Thus, by its terms, the Appointments Clause sets forth two categories of executive officers. First, there are "[p]rincipal officers. . . selected by the President with the advice and consent of the Senate." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). Second, there are inferior officers, whom "Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Id.*

The Commission is a "Department" for the purposes of the Appointments Clause, *see Free Enter.*, 561 U.S. at 511 ("Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause"), and the Commissioners jointly constitute the "Head" of that "Department." *See id.* at 512-13 (finding that, "[a]s a constitutional matter, we see no reason why a multimember body [like the Commission] may not be the 'Hea[d]' of a 'Departmen[t]'"). In this capacity, the Commissioners appoint an ALJ to preside over the Administrative Proceeding under the Administrative Procedure Act. *See* 5 U.S.C. § 3105.

Where, as here, an "appointee exercis[es] significant authority pursuant to the laws of the United States," that person "is an 'Officer of the United States.'" *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991). In *Freytag*, the Supreme Court concluded that Special Trial

Judges ("STJs") who were appointed by the Chief Judge of the Tax Court constituted inferior officers under the Appointments Clause. *Id.* In so holding, the Court focused on the "significance of the duties and discretion that special trial judges possess":

> The office of special trial judge is 'established by Law,' and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Id. at 881-82. SEC ALJs share these same characteristics and are thus inferior officers.

Like the STJ in *Freytag*, the office of administrative law judge is "established by Law." An ALJ's duties, salary, and means of appointment are all set forth by statute. *See* 5 U.S.C. § 556 (setting forth powers and duties of ALJs presiding over administrative hearings), § 557(b) (providing that an administrative law judge shall, subject to agency rules to the contrary, "initially decide the case"), § 5372 (setting forth the salary of ALJs), § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for the proceedings required to be conducted in accordance with sections 556 and 557 of this title").[4]

The Securities Exchange Act of 1934 and Commission regulations similarly set forth an ALJ's broad authority. *See* Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78d-1(a) (providing that the SEC "shall have the authority to delegate . . . any of its functions to . . . an

[4] Federal regulations further specify the means of an ALJ's appointment. For instance, the Commission may appoint its ALJs "only with prior approval of [the Office of Personnel Management ("OPM")], except when it makes its selection from the list of eligibles provided by OPM." 5 C.F.R. § 930.204. Moreover, this regulation specifies that an ALJ receives a career appointment and is exempt from having to proceed through a probationary period. *Id.*

administrative law judge . . . including functions with respect to hearing . . . any . . . matter"); 17 C.F.R. § 200.14 (concerning the "Office of the Administrative Law Judges" and setting forth an ALJ's powers in proceedings instituted by the Commission); 17 C.F.R. § 200.30-9 (describing the delegation of authority from the Commission to each ALJ, including the authority to make an initial decision in an Administrative Proceeding); 17 C.F.R. § 200.30-10 (describing the delegation of authority from the Commission to the Chief Administrative Law Judge); 17 C.F.R. § 201.111 (setting forth the authority of the hearing officer and noting that "[n]o 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").[5]

ALJs perform more than ministerial tasks. Like the STJs in *Freytag*, ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." 501 U.S. at 881-82; 17 C.F.R. § 200.14 (providing that an ALJ "conducts hearings in proceedings instituted by the Commission[,] . . . [is] responsible for the fair and orderly conduct of the proceedings and ha[s] the authority to: (1) Administer oaths and affirmations; (2) Issue subpoenas; (3) Rule on offers of proof; (4) Examine witnesses; (5) Regulate the course of a hearing; (6) Hold-pre-hearing conferences; (7) Rule upon motions; and (8) Unless waived by the parties, prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order"); *see also* Rule of Practice 111 (setting forth similar powers); Rule of Practice 180 (authorizing ALJ to impose sanctions for contemptuous conduct). Indeed, that ALJs are conferred with the authority to "regulate the

[5] The Commission's Rules of Practice ("Rules of Practice") are set forth in 17 C.F.R. §§ 201.101-201.550, and are also accessible on the Commission's website, http://www.sec.gov/about/rulesprac2006.pdf (last visited Apr. 10, 2015). The Federal Regulations capture each rule number. For instance, the regulation cited above, 17 C.F.R. § 201.111, corresponds to Rule of Practice 111. This brief will hereinafter cite to the applicable Rule of Practice.

course of a hearing" demonstrates that, similar to their STJ counterparts, ALJs exercise "significant discretion" in "carrying out the[ir] important functions." *Freytag*, 501 U.S. at 882.

ALJs are similar to STJs in another important respect: both may render final decisions. In *Freytag*, the Supreme Court noted, as an alternative holding, that STJs were inferior officers because they could render decisions of the Tax Court in certain classes of cases, subject to whatever conditions and review the Tax Court may provide. *Freytag*, 501 U.S. at 882; 26 U.S.C. §§ 7443A(b) and (c). ALJs may also render final decisions of the Commission under certain circumstances. *See* 5 U.S.C. § 557(b) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule"); 15 U.S.C. § 78d-1(c) (noting that if the Commission does not exercise its discretion to review a decision of the ALJ, "then the action of [the] . . . administrative law judge . . . shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission"); Rule of Practice 360(d)(2) (noting that if a respondent in an Administrative Proceeding does not file a petition for review, and "if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision [of the ALJ] has become final").

Subject to certain exceptions that are inapplicable here, the SEC exercises significant discretion in determining whether even to review an ALJ's decision.[6] *See* Rule of Practice

[6] Rule of Practice 411(b)(1) requires the Commission to review any initial decision of an ALJ that: (1) "denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78l(d);" (2) "suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78l(k)"; or (3) "is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a)(1) through (6))."

411(b)(2) (stating that the Commission may decline to review any decision other than those arising in contexts that are inapplicable here).[7]

Although *Freytag* did not directly address whether ALJs constitute inferior officers, Justice Scalia addressed this question in a concurring opinion and answered it in the affirmative:

> Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 554, 3105. They are all *executive* officers.

501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy & Souter, JJ) (emphasis in original). Justice Breyer acknowledged the same in his dissent in *Free Enterprise*, stating that "[a]s Justice SCALIA has observed, administrative law judges (ALJs) 'are all executive officers.'" 561 U.S. at 542 (Breyer, J., dissenting, joined by Stevens, Ginsburg & Sotomayor, JJ).

Indeed, as the citations above demonstrate, five current Supreme Court Justices have concluded that ALJs are inferior officers. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 800 (2013) (citing Justice Scalia's *Freytag* concurrence and Justice Breyer's *Free Enterprise* dissent while noting that "five current Supreme Court Justices have now suggested . . . that ALJs are 'inferior Officers' (not mere employees)").

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[7] Rule of Practice 411(b)(2) provides that, in determining whether to grant a petition for review, "the Commission shall consider whether the petition makes a reasonable showing that:

(i) a prejudicial error was committed in the conduct of the proceeding; or

(ii) the decision embodies:

(A) a finding or conclusion of material fact that is clearly erroneous; or

(B) a conclusion of law that is erroneous; or

(C) an exercise of discretion or decision of law or policy that is important and that the Commission should review."

Respondent anticipates that the Division of Enforcement will rely on *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000), to oppose Respondent's argument. However, *Landry* does nothing to alter the conclusion that SEC ALJs are inferior officers under the Appointments Clause. In *Landry*, the majority opinion construed the holding in *Freytag* as resting on the fact that an STJ could render a final decision of the Tax Court. 204 F.3d at 1134 ("[W]e believe that the STJs' power of final decision in certain classes of cases was critical to the Court's decision [in *Freytag*]"). Because FDIC ALJs "never render[ed]" the final decision of the FDIC, the D.C. Circuit held that they were not inferior officers. *Id.* at 1133-34.

However, the majority opinion in *Landry* rests on a misinterpretation of the core holding in *Freytag*. After discussing *Freytag's* consideration of an STJ's ability to render a final decision, Judge Randolph pointed out the flaw of the *Landry* majority in a concurring opinion:

> What the majority neglects to mention is that the Court clearly designated this [the STJ's power to render a final decision] as an alternative holding. The Court introduced its alternative holding thus: "Even if the duties of special trial judges [just described] were not as significant as we and the two courts have found them to be, our *conclusion* would be unchanged." What "conclusion" did the Court have in mind? The conclusion it had reached in the preceding paragraphs -- namely, that although special trial judges may not render final decisions, they are nevertheless inferior officers of the United States[.]

204 F.3d at 1142 (Randolph, J. concurring in part and concurring in judgment) (emphasis in original) (internal citations omitted); *see also Dep't of Transp. v. Assoc. of Am. R.R.'s*, 135 S.Ct. 1225, 1239 (2015) (Alito, J., concurring) (noting that "[i]nferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it," and that "[o]ne would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer"). Also, as explained above, unlike the FDIC ALJs in *Landry*, SEC ALJs may render the final decision of the Commission

under certain circumstances, as explained above. *Compare* 12 C.F.R. § 308.38(a) (providing that FDIC ALJs may render a "*recommended* decision, recommended findings of fact, recommended conclusions of law, and proposed order") (emphasis added) *with* Rule of Practice 360(b) and (d)(2) (stating that SEC ALJs render an "initial decision" that, under certain circumstances, shall "become *final*") (emphasis added). Thus, *Landry* is inapposite.

2. The ALJ Presiding Over This Proceeding Is Shielded From Removal by Two Layers of Good-Cause Tenure Protection.

The Administrative Proceeding is presided over by an inferior officer (an ALJ) who is insulated from removal by two layers of good-cause tenure protection. First, an SEC ALJ may be removed by the Commission only upon a finding of good-cause by the Merit Systems Protection Board ("MSPB").[8] 5 U.S.C. § 7521(a)-(b). Second, SEC Commissioners and members of the MSPB can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Free Enter.*, 561 U.S. at 487; 5 U.S.C. § 1202(d). This multi-layer good-cause protection is analogous to the tenure structure that was held to violate Article II in *Free Enterprise*.

At issue in *Free Enterprise* was the removal protections enjoyed by members of the PCAOB, which was established by the Sarbanes-Oxley Act of 2002. *Free Enter.*, 561 U.S. at 484. SEC Commissioners have the authority to appoint PCAOB members and to remove them "for good cause shown" in accordance with certain statutory procedures. *Id.* at 486. The Commissioners themselves can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487. Finding that this dual-layer removal scheme precludes the President from exercising any oversight of executive officers, the Supreme Court held it unconstitutional:

[8] An MSPB decision to remove an ALJ is subject to judicial review. 5 U.S.C. § 7703.

> The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here 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."

Id. at 484 (citations omitted).

The same structural infirmity existing in *Free Enterprise* is also present here and mandates a similar result. While a dual-layer removal regime protecting ALJs was not before the Supreme Court in *Free Enterprise*, 561 U.S. at 507, n.10, the Court's holding necessarily reaches such a scheme. *See id.* at 542-43 (Breyer, J., dissenting) ("The potential list of those whom today's decision affects is yet larger. As Justice SCALIA has observed, administrative law judges (ALJs) 'are all executive officers' . . . [a]nd ALJs are each removable 'only for good cause established and determined by the Merit Systems Protection Board,' . . . But the members of the Merit Systems Protection Board are themselves protected from removal by the President absent good cause") (internal citations omitted); Barnett, 66 VAND. L. REV. at 800. The dual-layers of tenure protection shielding SEC ALJs from removal impairs the President's ability to ensure that the laws are faithfully executed. *Free Enterprise*, 561 U.S. at 498.

Accordingly, for these reasons, the Administrative Proceeding unduly infringes the constitutional separation of powers as a matter of law. Therefore, since this Administrative Proceeding is unconstitutional, it must be dismissed as a matter of law.

B. Congress' Delegation of Power to the Commission to Select an Administrative Forum for Proceedings Seeking Civil Penalties Against Unregulated Individuals Contravenes Article I of the Constitution.

In addition to violating Article II, this Administrative Proceeding also contravenes the constitutional separation of powers because, contrary to the delegation doctrine of Article I, Congress has failed to articulate any guiding criteria as to when the Commission is to bring enforcement actions against unregulated individuals in an administrative, rather than judicial, forum. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." U.S. CONST. art. I, § 1. As such, the Supreme Court has long insisted that "'the integrity and maintenance of our system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

Despite this general prohibition, Congress may confer decisionmaking authority on an executive agency, so long as it provides an intelligible principle to which that agency is to conform. *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001). While the Dodd-Frank Act delegates decisionmaking authority to the Commission to institute an Administrative Proceeding for civil penalties against unregulated individuals, it does so without any intelligible principle as to when the Commission is to bring an enforcement action against an unregulated individual in an administrative forum. It is thus unconstitutional as a violation of Article I.

1. The Dodd-Frank Act's Transfer of Administrative Enforcement Authority to the Commission to Seek Civil Penalties From Unregulated Individuals Constitutes a Delegation of Legislative Power.

The constitutional inquiry in a delegation challenge is "whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472. The Dodd-Frank Act's conferral of administrative enforcement authority to the Commission to seek civil penalties against

unregulated individuals constitutes such a delegation. Those government actions that "ha[ve] the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch" constitute legislative action. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (citing *Chadha* for same proposition).

The Supreme Court has found that delegations of decisionmaking authority analogous to the delegation made to the Commission here had the purpose and effect of altering such individuals' rights, duties, and legal relations. *See Chadha*, 462 U.S. at 952-54 (involving delegation of legislative authority to Attorney General to determine whether an alien held to be deportable following a deportation proceeding should nevertheless be allowed to remain in the country); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (observing that legislatively created administrative adjudicatory proceedings "surely determine liabilities of individuals").

Before the enactment of the Dodd-Frank Act, enforcement actions against unregulated individuals for civil penalties had to be brought exclusively in an Article III court.[9] However, by virtue of the Dodd-Frank Act, the Commission now also possesses the authority to bring the same action in an administrative proceeding that lacks the same procedural safeguards, such as the Seventh Amendment right to a jury trial, that are found in its Article III counterpart. *See* Pub. L. No. 111-203 §§ 929P(a)(1), (a)(2)(E), (a)(3)(e), and (a)(4)(e) (allowing the Commission to seek civil penalties against "any person" in an administrative cease-and-desist proceeding initiated under the Securities Act, the Exchange Act, the Company Act, and the Investors Act).

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[9] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub L. 101-429 (1990) §§ 101, 201, 302, 402 (authorizing the Commission to bring suit against "any person" in a federal district court to seek civil penalties); *see also* 15 U.S.C. § 78u-1 (authorizing the Commission to bring an action in federal district court to seek civil penalties for insider trading).

In other words, the Commission has expanded authority to alter the rights, duties, and legal relations of individuals. Accordingly, under *Chadha*, this delegation of authority was legislative.

2. The Dodd-Frank Act Lacks Any Intelligible Principle to Guide the Commission's Decisionmaking in Commencing Enforcement Actions in any Forum, Let Alone an Administrative One.

The Supreme Court has insisted repeatedly that "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis in original); *see also Mistretta*, 488 U.S. at 372-73 (stating that Congress is to "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority"). The degree of discretion afforded to an agency to exercise decisionmaking authority is contingent upon the scope of the power congressionally delegated. *Whitman*, 531 U.S. at 475. However, where, as here, Congress confers authority upon the Commission to institute enforcement actions for civil penalties against "any person" in an administrative forum that lacks the procedural safeguards found in an Article III court, the need for substantial congressional direction is required. *See id.*

Yet, despite the broad scope of power delegated to the Commission, the Dodd-Frank Act lacks any "intelligible principle" as to when an enforcement action for civil penalties against an unregulated individual should be brought in an administrative, rather than a judicial, forum. *See* Pub. L. No. 111-203 §§ 929P(a)(1), (a)(2)(E), (a)(3)(e), and (a)(4)(e). The relevant legislative history is also silent on this matter. *See* H.R. Rep. No. 111-517, at 870-71 (2010) (Conf. Rep.); H.R. Rep. No. 111-687, pt. 1, at 78 (2010).

Even the Commission's attorneys and Commissioners have admitted the lack of *any* congressional principal guiding the Commission's selection of a forum in which to bring an enforcement action. When previously asked by a court to articulate "the criteria that the SEC uses to determine whether a matter is referred to court, criminally or civilly, versus referred for administrative proceeding," a Commission attorney responded:

> To start with, Congress gave the SEC two distinct paths that it can follow in pursuing a civil action: You can go into Federal District Court; you can bring it in an administrative proceeding. *It did not provide any criteria as to when the Commission would or should do one versus the other.* It's entirely left to the Commission's discretion. The Commission decides – does not have formal criteria.
>
> The Commission decides on a case-by-case basis, based on everything before it, which route it might want to follow.

Tr. of Mot. for TRO at 66-67, *Jarkesy v. United States Sec. and Exchange Comm'n*, No. 1:14-cv-00114-BAH (D.D.C. June 11, 2014) (No. 22) (emphasis added).[10] A Commissioner acknowledged the need to establish guidelines to determine which enforcement actions should be brought in an administrative forum and which actions should be brought in federal court:

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

[10] These statements from the Commission's attorneys, made in open court during a prior judicial proceeding, may be officially noticed. *See* Rule of Practice 323 ("Official notice may be taken of any material fact which might be judicially noticed by a district court."). They also constitute admissions of a party opponent.

Commissioner Michael S. Piwowar, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), http://www.sec.gov/news/speech/022015-spchcmsp.html (last visited Apr. 14, 2015).[11] The admitted absence of a guiding principle from Congress renders the Dodd-Frank Act's delegation of expanded administrative enforcement authority unconstitutional as a violation of Article I.

The Commission now possesses limitless authority to institute enforcement actions for civil penalties against "any person." By its plain terms, the Dodd-Frank Act offers no check on the expanded administrative enforcement authority delegated to the Commission. Without any intelligible standard to speak of, it is impossible for a court to determine whether the Commission is obeying the will of Congress when it exercises boundless discretion to decide where to pursue an enforcement action against an unregulated individual for civil penalties. *See Chadha*, 462 U.S. at 953, n. 16 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Yakus v. United States*, 321 U.S. 414, 425 (1944); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (separate statement of Leventhal, J.), *cert denied*, 426 U.S. 941 (1976); L. Jaffe, Judicial Control of Administrative Action 320 (1965)).

Indeed, the legislative scheme now subjects an unregulated individual's constitutional and procedural rights to the whims of the Commission. Congressional conferral of such unprincipled discretion to the Commission violates Article I and contravenes the separation of powers. It is thus unconstitutional. Because this Administrative Proceeding is the byproduct of an unconstitutional delegation of power, it must be dismissed.

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[11] The Commissioner's statements, available on the Commission's website, may also be officially noticed under Rule of Practice 323.

C. The Dodd-Frank Act's Conferral of Unlimited Authority to the Commission to Institute Administrative Proceedings Against Unregulated Individuals for Civil Penalties Also Violates the Seventh Amendment of the U.S. Constitution.

In a similar vein, Congress' delegation of limitless authority to the Commission to bring administrative proceedings against unregulated individuals is also constitutionally invalid because it infringes upon Mr. Hill's Seventh Amendment right to a jury trial.

The Seventh Amendment states that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST., amend VII. The Supreme Court has "consistently interpreted the phrase 'suits at common law' to refer to suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (internal quotation marks and citations omitted). The Seventh Amendment also extends to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Id.* at 42.

To determine whether the Seventh Amendment applies here, the hearing officer must use the following analytical framework: First, the hearing officer must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Granfinanciera, S.A.*, 492 U.S. at 42. Second, and more importantly, the hearing officer must analyze "the remedy sought and determine whether it is legal or equitable in nature." *Id.* If, all things considered, both of the preceding factors show that a party is entitled to a jury trial pursuant to the Seventh Amendment, the court must then "decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative

body that does not use a jury as factfinder." *Id.* An application of these factors demonstrates that the Dodd-Frank Act violates the Seventh Amendment.

1. An Administrative Enforcement Action for Civil Penalties Is Analogous to the 18th Century Common Law Cause of Action in Debt.

The Supreme Court has observed that a civil penalty suit was treated by English courts before the enactment of the Seventh Amendment as "a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull v. United States*, 481 U.S. 412, 418 (1987). Indeed, it has historically viewed government enforcement actions seeking civil penalties as a type of action in debt that requires a trial by jury. *Id.* at 418-19. Thus, in *Tull*, the Supreme Court held that an enforcement action for civil penalties under the Clean Water Act "is clearly analogous to the 18th-century action in debt, and federal courts have rightly assumed that the Seventh Amendment required a jury trial." 481 U.S. at 420. The same result holds here.

2. The Remedy of a Civil Penalty Is Legal in Nature.

In *Tull*, the Supreme Court observed that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." 481 U.S. at 422. The Court elaborated that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* The Court concluded that the civil penalties sought by the government in its Clean Water Act enforcement action were of this character and thus required a trial by jury. *Id.* at 422-23.

The civil penalties sought by the Commission in this administrative enforcement action are of the same nature as those in *Tull*. Indeed, like the penalty regime at issue in *Tull*, the statutory scheme here authorizes the Commission to consider "the need for retribution and deterrence, in addition to restitution, when it impose[s] civil penalties." 481 U.S. at 422; 15

U.S.C. § 78u-2(c). For instance, the Commission may consider, among other things, the seriousness of the violations, the number of prior violations, and the need to deter an individual and others from committing violations in the future. 15 U.S.C. § 78u-2(c). Because the civil penalty remedy sought by the Commission in this enforcement action was traditionally available only in a court of law, the Seventh Amendment attaches to this type of proceeding.

3. Because the Dodd-Frank Act Did Not Create New Public Rights, Congress May Not Assign Resolution of This Enforcement Action to an Administrative Proceeding Where the Right to a Jury Trial Is Absent.

The Supreme Court has recognized that "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders." *Granfinanciera, S.A.*, 492 U.S. at 51. However, before the passage of the Dodd-Frank Act in 2010, the Commission was required to institute enforcement actions for civil penalties against unregulated individuals in federal court. *See supra* note 7. Thus, even if such enforcement actions involved a public right created by Congress, *see Atlas Roofing Co. v. Occupational Safety and Health Comm'n*, 430 U.S. 442, 452 (1977) (referring to "public rights" as "aris[ing] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments") (quoting *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932)), until 2010, Congress had exclusively assigned the adjudication of such rights to an Article III court, in which a jury trial right attached.

When enacted in 2010, the Dodd-Frank Act did not *create a new* public right. Indeed, it created neither a new cause of action nor remedies therefor. *See Granfinanciera, S.A.*, 492 U.S. at 60 ("The decisive point is that [Congress did not] 'creat[e] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem") (quoting *Atlas Roofing*, 430 U.S. at 452).

Rather, the Dodd-Frank Act simply authorized the Commission to institute a preexisting type of government enforcement action that was once the exclusive province of an Article III court in an administrative forum as well.

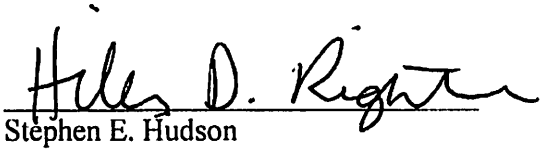
Thus, without creating any new public rights, Congress has eliminated the exclusivity of the federal forum where civil penalty enforcement actions against unregulated individuals like Mr. Hill were adjudicated subject to constitutional safeguards, such as the Seventh Amendment right to a jury trial. As explained, the Dodd-Frank Act now places an unregulated individual's once guaranteed right to a jury trial in the unprincipled hands of the Commission. Yet, a party's Seventh Amendment right cannot be altered merely by allowing the statutory cause of action to which it attaches to also be brought in an administrative forum. *Cf. Granfinanciera, S.A.*, 492 U.S. at 60-61 (noting that Congress' reclassification of a preexisting cause of action was a "purely taxonomic change [that] cannot alter our Seventh Amendment analysis" namely, that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity").

Accordingly, because the Dodd-Frank Act did not create a new public right, Congress contravened the Seventh Amendment when it authorized the Commission to bring civil penalty enforcement actions against unregulated individuals in an administrative forum. Therefore, the Commission's pursuit of civil penalties against Respondent in this Administrative Proceeding violates his Seventh Amendment rights and must be dismissed as matter of law.

III. CONCLUSION

For all of the foregoing reasons, Mr. Hill respectfully requests that this hearing officer grant the Motion for Summary Disposition Regarding Affirmative Defenses and dismiss this proceeding on account of its unconstitutionality.

Dated: April 15, 2015.



Stephen E. Hudson
Hillary D. Rightler

KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Telephone: (404) 815-6500
Facsimile: (404) 815-6555
shudson@kilpatricktownsend.com
hrightler@kilpatricktownsend.com

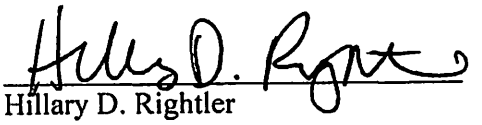
Counsel for Respondent, Charles L. Hill, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2015, I filed an original and three copies of the foregoing RESPONDENT'S MOTION FOR SUMMARY DISPOSITION ON HIS CONSTITUTIONAL AFFIRMATIVE DEFENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 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 hand delivery, and served a true and correct copy upon counsel and The Honorable James E. Grimes by electronic mail and by Federal Express, as follows:

M. Graham Loomis: loomism@sec.gov
Harry B. Roback: robackh@sec.gov
Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road, Suite 900
Atlanta, GA 30326

The Honorable James E. Grimes: alj@sec.gov
Administrative Law Judge
Jessica Neiterman: neitermanj@sec.gov
Securities and Exchange Commission
100 F Street NE, Room 2557
Washington, DC 20549-2557



Hillary D. Rightler

KILPATRICK STOCKTON LLP
1100 Peachtree St., Ste. 2800
Atlanta, GA 30309-4530
(404) 815-6500
Fax: (404) 815-6555
hrightle@kilpatricktownsend.com

Counsel for Respondent