IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV,	)	
Plaintiffs,	)	
v.	)	Civil Action File No. 1:15-cv-0492-LMM
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV respectfully submit this Memorandum of Law in support of their motion to preliminarily enjoin the United States Securities and Exchange Commission from prosecuting the administrative proceeding brought against them (the "Administrative Proceeding"), captioned *In the Matter of Gray Financial Group, Inc., Laurence O. Gray and Robert C. Hubbard, IV*, Administrative Proceeding File No. 3-16554, including the pre-hearing conference scheduled for June 30, 2015 and the final hearing to be scheduled.

PRELIMINARY STATEMENT

Plaintiffs challenge the authority of the SEC ALJ to preside over the Administrative Proceeding on constitutional grounds, under the Appointments Clause of Article II and Article II's vesting of executive power in the President, as well as on statutory grounds. It is difficult to imagine a more basic defect in a hearing than a presiding judge without lawful authority. For this reason, the United States Supreme Court has held that where a judge serves in violation of the Appointments Clause of the U.S. Constitution, the error is "structural," in part because the role of judge – particularly one acting as finder of both fact and law – is too profoundly essential to be treated otherwise. *See Freytag v. Comm'r of*

Internal Revenue, 501 U.S. 868, 878-80 (1991); *see also Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

Last week, this Court preliminarily enjoined the SEC administrative proceeding in *Hill*, finding that SEC ALJs are inferior officers and their appointment is likely in violation of Article II. *Hill v. SEC*, 1:15-cv-1801-LMM, at 35-42 (N.D. Ga. June 8, 2015) ("*Hill* Order"). Your Honor also found that the *Hill* plaintiff satisfied the other three criteria for granting a preliminary injunction, a finding that is equally applicable to Plaintiffs here. *See id.* at 42-43. Plaintiffs ask for the same relief as the Court granted in *Hill*.

The SEC instituted the Administrative Proceeding against Plaintiffs, to be presided over by SEC ALJ Cameron Elliot, who began working for the SEC in 2011 and has issued 51 straight wins for the SEC and none for a respondent. *See* Declaration of Terry R. Weiss ("Weiss Decl."), ¶¶ 3-5, Ex. 1, Order Instituting Admin. Proceedings (May 21, 2015); Ex. 2, Order Scheduling Hearing and Designating Presiding Judge (May 22, 2015); Ex. 3, Sarah N. Lynch, *SEC Judge Who Took on the 'Big Four' Known for Bold Moves*, Reuters, Feb. 2, 2014. This Administrative Proceeding violates Article II of the U.S. Constitution. In contravention of the Appointments Clause and of statutory requirements, SEC ALJs, including the one presiding over Plaintiffs' administrative process, have not

been appointed by the SEC Commissioners. And, contrary to the Supreme Court's holding in *Free Enterprise,* SEC ALJs enjoy at least two layers of tenure protection. Accordingly, the Administrative Proceeding against Plaintiffs is unconstitutional and should be enjoined.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. §1331 BECAUSE CONGRESS HAS NEITHER EXPLICITLY NOR IMPLICITLY PRECLUDED JUDICIAL REVIEW.

This matter presents the same subject matter jurisdiction question as in *Hill*, where Your Honor correctly analyzed the question and properly found that this Court has original subject matter jurisdiction under 28 U.S.C. § 1331 to resolve the plaintiff's constitutional challenges. *See* 28 U.S.C. § 1331; *Hill* Order at 11-22. Both the *Hill* plaintiff and Plaintiffs in this case bring the very same claims under Article II of the Constitution: 1) that the appointment process for SEC ALJs, including the ALJ presiding in Plaintiffs' Administrative Proceeding, violates the Appointments Clause of Article II because the ALJs were not appointed by the SEC Commissioners; and 2) that the SEC ALJs' two-layer tenure protection violates Article II's vesting of executive power in the President. *See* Second Am. Compl. ¶¶ 1-5, 41-54; 60-70 (June 3, 2015) (Dkt. No. 28); *Hill* Order at 34.

In *Hill*, this Court found that "because Congress created a statutory scheme which expressly included the district court as a permissible forum for the SEC's claims, Congress did not intend to limit § 1331 and prevent [p]laintiff from raising his collateral constitutional claims in the district court." *Hill* Order at 14; *see also id.* at 3 (citing 15 U.S.C. § 78u-2); *cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994) (Mine Act authorized district court forum only for two specific claims). Your Honor also found that even in the absence of Congress's express choice not to restrict district court jurisdiction, "jurisdiction would be proper as Congress's intent can be presumed based on the [three-factor] standard articulated in Thunder Basin, Free Enterprise, and Elgin." *Hill* Order at 14; *see also Touche Ross & Co. v. SEC*, 609 F.2d 570, 575, 577 (2nd Cir. 1979) (where plaintiffs challenge the authority of the agency to act and there is no need for agency expertise, they need not "submit to the very procedures which they are attacking").

For the reasons stated in the *Hill* Order and for the reasons in Plaintiffs' Opposition to Defendant's Motion to Dismiss in this case, this Court should assert subject matter jurisdiction over Plaintiffs' claims. *See Hill* Order at 11-22; Pls.' Opp. to Def.'s MTD at 4-24 (June 3, 2015) (Dkt. No. 24) ("Pls.' MTD Opp.").

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION TO ENJOIN THE SEC'S ADMINISTRATIVE PROCEEDING AGAINST THEM.

To obtain a preliminary injunction, Plaintiffs must demonstrate: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury to the movant outweighs the damage to the opposing party; and (4) granting the injunction would not be adverse to the public interest." *Hill* Order at 22 (citing *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003)). Plaintiffs meet each of the elements for a preliminary injunction and are thus entitled to preliminary injunctive relief against the SEC on the basis of the same Article II Appointments Clause challenge that the plaintiff in *Hill* successfully raised under identical circumstances. *See Hill* Order at 34-45; Second Am. Compl. ¶¶ 41-47. Moreover, Plaintiffs herein make a similar multi-layer tenure protection argument as in *Hill*, and Plaintiffs respectfully request the opportunity to develop those arguments more thoroughly through discovery, as the Court correctly permitted in *Hill*. *See Hill* Order at 45.

A. Plaintiffs are Likely to Succeed on the Merits that the SEC Administrative Proceeding is Unconstitutional Because the Appointment of SEC ALJs Violates Article II's Appointments Clause and Statutory Law, and SEC ALJs' Dual For-Cause Removal Scheme Violates Article II.

The *Hill* plaintiff and these Plaintiffs present identical Article II challenges based on SEC ALJs being inferior officers and not mere employees. *See Hill* Order at 34-35. Because SEC ALJs are inferior officers under the Constitution, the SEC Commissioners themselves, as "Head of Department" under the Appointments Clause, must appoint the ALJs, and the ALJs cannot be insulated from presidential control by two levels of tenure protection.

1. This Court Correctly Held in *Hill* that SEC ALJs are Inferior Officers.

In *Hill*, Your Honor thoroughly analyzed the question of whether SEC ALJs are inferior officers, including the arguments of the SEC, and found that "*Freytag* mandates a finding that the SEC ALJs exercise 'significant authority' and are thus inferior officers." *Hill* Order at 41; *see Freytag*, 501 U.S. 868 (considering the types of tasks performed by STJs, which the Supreme Court found were "more than ministerial tasks," and evidence of the significant discretion STJs exercised, thus making them inferior officers and not lesser functionaries). For the reasons stated in the *Hill* Order and for the reasons in Plaintiffs' Opposition to Defendant's

Motion to Dismiss in this case, this Court should find that SEC ALJs are inferior officers. *See Hill* Order at 35-41; Pls.' Opp. to MTD at 22-31.

2. This Court Found, Under the Same Circumstances, that there is a Substantial Likelihood of Success on the Appointments Clause Violation.

In *Hill*, Your Honor found that the plaintiff "has established a likelihood of success on the merits on his Appointments Clause claim." *Hill* Order at 41. Plaintiffs make the same Appointments Clause challenge herein.

The Appointments Clause of the Constitution provides that as to "inferior officers," "Congress may by Law vest the Appointment of such inferior Officers … in the President alone, in the Court of Law, or in the Heads of Department." U.S. Const. art. II, § 2, cl. 2. Embedded in these express limitations is a structural goal of guarding against "the diffusion of the appointment power." *Freytag*, 501 U.S. at 878. In so limiting the power of appointment, the Constitution ensures that those who wield it remain "accountable to political force and the will of the people." *Id.* at 884.

The Supreme Court, in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.* ("*Free Enterprise*") held that the SEC Commissioners jointly hold the power to appoint inferior officers under the Appointments Clause. 561 U.S. 477, 512-13 (2010). The Supreme Court specifically held that the Commission is a "Department" for purposes of the Appointments Clause and that the

Commissioners jointly constitute the "Head" of that "Department." *See id*. at 511-13.

The SEC has conceded that its Commissioners did not appoint the ALJ presiding over Plaintiffs' Administrative Proceeding. *See* Notice of Filing Suppl. Evidence, at 1-2 & Exhibit 1 (June 9, 2015) (Dkt. No. 35) ("ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission"). The same is true of the other SEC ALJs. *See Hill* Order at 41 (SEC concedes that ALJ Grimes was not appointed by SEC Commissioner); Second Am. Compl. ¶ 51 (SEC acknowledges Commissioners did not appoint ALJ Foelk). There is no reason to believe the remaining two SEC ALJs were appointed in a different manner.

In fact, the U.S. Department of Justice, as counsel for the SEC, recently conceded that if SEC ALJs are "inferior officers," administrative proceedings like the one involving Plaintiffs would probably violate Article II:

> THE COURT: Let me just back up for a minute and ask you a question. If I find that the ALJs are inferior officers, do you necessarily lose?
>
> MS. LIN: We acknowledge that, your Honor, if this Court were to find ALJ Foelk to be an inferior officer, that that would make it more likely that the plaintiffs can succeed on the merits for the Article II challenge, at least with respect to the appointments clause challenge.

Second Am. Compl. ¶ 51 & Exhibit A thereto, Hearing Transcript, *Tilton v. S.E.C.*, 15 CV 2472(RA) (S.D.N.Y.), at 29:10-17 (May 11, 2015).

By abdicating its constitutionally allocated responsibility, the Commission has impermissibly delegated the appointment power to others. This has created a defect that goes to the very core of the administrative proceeding. That is, the SEC ALJ presiding over Plaintiffs' Administrative Proceeding lacks the lawful authority to do so. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (stating that any "'Officer of the United States' … must ... be appointed in the manner prescribed by" the Appointments Clause); *Freytag*, 501 U.S. at 879 ("The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation."); *see also Ryder*, 515 U.S. at 188 (holding that Appointments Clause violation involving two of three judges sitting on an intermediate military appellate court panel entitled petitioner to a hearing before a properly appointed panel of that court); *United States v. Lane*, 64 M.J. 1, 7 (2006) (concluding that the unconstitutional assignment of a Member of Congress to serve as a judge on a military court of appeals rendered the petitioner's proceeding before that court invalid and void). What is more, by not appointing the SEC ALJs, the Commission remains unaccountable for the ALJs' actions.

These are structural infirmities of the first order that render Plaintiffs' Administrative Proceeding unconstitutional.

Because the SEC has admitted that it did not appoint the presiding SEC ALJ, this Court's previous findings that SEC ALJs are inferior officers and that the manner of ALJ appointment is "likely unconstitutional in violation of the Appointments Clause" apply equally to this case. *See Hill* Order at 42.

3. SEC ALJs were Appointed in Violation of Statutory Requirements.

Although not raised as an argument in *Hill,* the manner of appointment of the SEC ALJs is also a violation of statutory law. Unlike the constitutional Appointments Clause claim, the statutory challenge does not depend on a finding that ALJs are constitutional officers. Congress has mandated that the "Commission," defined in 15 U.S.C. § 78d(a) as the SEC Commissioners, "shall appoint and compensate officers, attorneys, economists, examiners, and other employees." 15 U.S.C. § 78d(b)(l). Further, by statute the SEC "shall appoint as many administrative law judges as are necessary." *See* 5 U.S.C. § 3105. Because the SEC has admitted that the Commissioners did not appoint the SEC ALJs, Plaintiffs have established a substantial likelihood of success on the merits of their statutory claim.

4. The Administrative Proceeding is Unconstitutional Under Article II Because It is Presided Over by an Executive Inferior Officer Shielded from Removal by at Least Two Layers of Tenure Protection.

In *Free Enterprise*, the Supreme Court held that if, like here, an inferior officer can only be removed from office upon a showing of good cause, then the decision to remove that officer cannot be made by another official who is also shielded from removal by good-cause tenure protection. 561 U.S. at 484. This arrangement violates Article II because it impairs the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 1, cl. 1; *id.* § 3. *Free Enterprise* is dispositive on this issue.

SEC ALJs, including the presiding ALJ, are insulated from presidential removal by at least two layers of good-cause tenure protection. First, an SEC ALJ may be removed by the SEC only upon a finding of good cause by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a)-(b). Second, both SEC Commissioners and members of the MSPB can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise*, 561 U.S. at 487; 5 U.S.C. § 1202(d). Thus, an SEC ALJ is protected from removal by at least two layers of good-cause tenure protection, possibly three.

In *Hill*, Your Honor did not decide whether there was a likelihood of success on the merits that the SEC ALJs' dual for-cause removal provisions

violate Article II. *Hill* Order at 42 n.12. Although the Court raised doubts about this challenge, Your Honor likewise permitted the plaintiff in *Hill* the opportunity to develop the factual record supporting this argument through discovery. *Id.* at 45. Plaintiffs believe that upon a factual examination of the scope of SEC ALJs' roles and uses within the Commission, the Court will find that the ALJs' multi-layer tenure protection interferes with the President's constitutional obligation to ensure the faithful execution of the laws.

Indeed, even if SEC ALJs perform primarily adjudicatory functions, the constitutional infirmity is not eliminated. The Supreme Court in *Morrison v. Olson* rejected the theory that the President's removal authority operates less stringently for quasi-judicial and quasi-legislative officers, than for officers with "purely executive" functions: "[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" 487 U.S. 654, 689 (1988). Similarly, in *Freytag*, the concurring opinion noted that ALJs, "whose principal statutory function is the conduct of adjudication . . . are all *executive* officers" and that "'[a]djudication,' in other words, is no more an 'inherently' judicial function than the promulgation of rules governing primary

conduct is an 'inherently' legislative one." 501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy & Souter, JJ) (emphasis in original); *see also Kuretski v. Comm'r,* 755 F.3d 929, 936 (D.C. Cir. 2014) (even though Tax Court Judges exercise quasi-judicial power, they are officers of the Executive Branch and their removal at will by the President creates no separation of powers problem), *cert. denied*, 2015 WL 2340860 (May 18, 2015); *Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Bd.,* 684 F.3d 1332, 1340-42 (D.C. Cir. 2012) (tenure protections of Copyright Royalty Judges found unconstitutional). It follows that Congress may not create a class of executive adjudicators for the SEC operating outside the constraints of executive authority over other Commission officers. The board members in *Free Enterprise* had quasi-judicial authority over certain matters, but this fact did not justify their exemption from presidential oversight. *See Free Enterprise*, 561 U.S. at 485.

Further, the Supreme Court has held that the SEC can make policy – an undoubtedly core executive function – through adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 201-04 (1947). Addressing an SEC order, the Supreme Court ruled: "There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or

by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203; *see also NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 293 (1974) (choice between announcing policy through rulemaking or adjudication is in agency's discretion).

Thus, it is not surprising that the SEC does develop policy through administrative adjudications. The SEC recently acknowledged the critical policy-making and enforcement roles that SEC ALJs play in the Division of Enforcement Approach to Forum Selection in Contested Actions (the "SEC Memo"). Weiss Decl. ¶ 6, Ex. 4, Division of Enforcement Approach to Forum Selection in Contested Actions. In the SEC Memo, the SEC emphasized that SEC ALJs "develop extensive knowledge and expertise concerning the federal securities laws and complex or technical securities industry practices or products." *Id.* at 3. The SEC also acknowledged that if a matter "is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission's rules," the agency is more likely to proceed through the administrative process, before an SEC ALJ, in order to "facilitate development of the law." *Id.* Thus, the SEC has demonstrated that the nature of its ALJs' authority is solidly executive.

Moreover, the Department of Justice, whose counsel represent the SEC in this case, concluded that Department of Education ALJs are inferior officers

because of their executive policy-making role. *See Sec. of Ed. Review of Admin. Law Judge Decisions*, 15 U.S. Op. Off. Legal Counsel 8, 14, 1991 WL 499882 (Jan. 31, 1991). "By deciding a series of cases, the ALJ presumably would develop interpretations of the statute and regulations and fill statutory and regulatory interstices comprehensively with his own policy judgments." *Id*. This analysis applies equally to SEC ALJs, who also "decid[e] a series of cases," and likewise have tremendous opportunity to formulate executive policy.

In sum, as an inferior officer in the Executive Branch, an SEC ALJ wields executive power when presiding over enforcement actions brought by the Commission. Exercising this power, an ALJ's protection from removal by dual layers of tenure impairs the President's ability to ensure that the laws are faithfully executed. *Free Enterprise*, 561 U.S. at 484, 498. While a dual-layer removal regime protecting ALJs was not before the Supreme Court in *Free Enterprise*, the Court's holding necessarily reaches such a scheme. *See id.* at 507 n. 10; 542-43 (Breyer, J., dissenting); Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 800 (2013). This dual-layer removal scheme is thus unconstitutional.

B. The Court Already Found that There is Irreparable Harm if the SEC's Administrative Proceeding Is Not Enjoined.

In *Hill*, this Court determined that the plaintiff "will be irreparably harmed if this injunction does not issue because if the SEC is not enjoined, [p]laintiff will be

subject to an unconstitutional administrative proceeding, and he would not be able to recover monetary damages for this harm because the SEC has sovereign immunity." *Hill* Order at 42 (citing *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable"). Your Honor also found that in the absence of a preliminary injunction, the requested relief of enjoining the SEC administrative proceeding would be "moot as the Court of Appeals would not be able to enjoin a proceeding which has already occurred." *Id.* at 42-43. The Court's finding of irreparable harm applies equally to Plaintiffs here.

Plaintiffs are in the same position as the *Hill* plaintiff. Plaintiffs must file an Answer to the SEC's Order Instituting Proceedings by June 17, 2015, and a pre-hearing conference is scheduled for June 30, 2015. Weiss Decl. ¶¶ 7-8, Ex. 5, Order on Consent Motion (June 9, 2015); Ex. 6, Order Postponing Hearing and Scheduling Pre-Hearing Conference (June 5, 2015). The final hearing must take place no later than September 21, 2015, but may occur earlier. *See* 17 C.F.R. § 201.360(a)(2). Absent injunctive relief, Plaintiffs will be subjected to the very

proceeding that they claim is unconstitutional. Plaintiffs have thus shown that they will suffer irreparable injury if the injunction does not issue.

C. The Court Also Found that the Remaining Preliminary Injunction Factors Weigh in Favor of Granting the Motion.

Your Honor's findings in *Hill* "that the public interest and the balance of equities" are in favor of granting a preliminary injunction govern Plaintiffs' Motion as well. *See Hill* Order at 43. For the reasons stated in the *Hill* Order, Plaintiffs have met these preliminary injunction factors, and the Court should halt the SEC's Administrative Proceeding.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the SEC from continuing the Administrative Proceeding against them.

Dated: June 15, 2015.

Respectfully submitted,

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Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing document was prepared using Times New Roman 14 point type as provided in Local Rule 5.1.

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FOR THE NORTHERN DISTRICT OF GEORGIA
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Plaintiffs,	)	
v.	)	Civil Action File No. 1:15-cv-0492-LMM
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** via the Court's ECF electronic filing system which will automatically send email notification of such filing to all counsel of record, as follows:

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This 15th day of June, 2015.

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