U.S. Department of Justice

Civil Division
Federal Programs Branch
20 Massachusetts Ave, N.W.
Washington, DC 20530

June 10, 2015

VIA ECF

The Honorable Ronnie Abrams
United States District Court
Southern District of New York
40 Foley Square, Room 2203
New York, NY 10007

Re: *Tilton v. SEC*, No. 15-cv-2472 (RA)

Dear Judge Abrams:

We write on behalf of Defendant the Securities and Exchange Commission (the "SEC") to respond to the supplemental authority, a decision in *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), ECF No. 28, submitted by Plaintiff on June 8, 2015, ECF No. 22. We respectfully submit that *Hill* was wrongly decided and write to address two of the errors in that court's reasoning.

First, in finding that it had jurisdiction to enjoin the SEC's administrative proceeding against the plaintiff in *Hill*, the court conflated the SEC's choice of forum with the review scheme in the Exchange Act for the administrative proceedings that are the subject of the plaintiff's challenges in *Hill* and in this case. *See* slip op. at 13-14. According to the *Hill* court, because the SEC can pursue civil penalties in either a federal court or an administrative proceeding, it necessarily means that the statutory review provision governing administrative proceedings—which requires that challenges to such proceedings first be heard by the Commission and then in an appropriate federal court of appeals, 15 U.S.C. § 78y—is not an exclusive avenue for review for such challenges.[1] That reasoning is flawed because the fact that Congress gave the *SEC* a choice of forum by no means shows that Congress intended to give a *respondent* in an SEC administrative enforcement proceeding a similar choice. Indeed, the statutory review provision is to the contrary, as the Second Circuit has already held in *Altman v. SEC*, 687 F.3d 44, 46 (2d Cir. 2012) (*per curiam*) ("Section 25(a) [of the Exchange Act, 15 U.S.C. § 78y(a)] does, under this Circuit's precedent, supply the jurisdictional route that Altman must follow to challenge the SEC action."). And, the Supreme Court in *Thunder Basin Coal Co. v. Reich*, found the review scheme in that case—which is like the one here—to be exclusive despite the agency's ability to bring enforcement actions in district court in certain circumstances. 510 U.S. 200, 207, 209 (1994) (noting that "mine operators enjoy no

[1] This case involves different review provisions in the securities laws, 15 U.S.C. §§ 80a-42, 80b-13(a), but the language of those provisions is identical to that of 15 U.S.C. § 78y.

corresponding right [to proceed in district court] but are to complain to the Commission and then to the court of appeals").

The *Hill* court also relied on a 1979 Second Circuit decision, *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577 (2d Cir.), which found an exception to the administrative exhaustion requirement in the federal securities laws. *See* slip op. at 17. *Altman*, however, specifically held that the "exception identified in *Touche Ross* did not apply" in a case where, like here, a litigant sought to challenge in district court the SEC's constitutional authority to impose sanctions against him in an administrative proceeding. 687 F.3d at 46; *see also Altman v. SEC*, 768 F. Supp. 2d 554, 562 (S.D.N.Y. 2011) ("Courts have read *Touche Ross* narrowly . . . and found its application especially inappropriate when a litigant invokes it to avoid agency review procedures, or when the agency in question is not acting plainly beyond its jurisdiction." (quotation marks omitted)), *aff'd*, 687 F.3d 44. Instead, in *Altman*, the Second Circuit found that that "none of the factors in *Thunder Basin/Free Enterprise* militated in favor of district court jurisdiction." 687 F.3d at 46. As Defendant has already demonstrated in its brief in opposition to Plaintiffs' motion for preliminary injunction, the same is true here.

Second, after mistakenly concluding that it had jurisdiction, the *Hill* court incorrectly determined that SEC's administrative law judges ("ALJs") are likely inferior officers. Despite finding that SEC ALJs have no final decision-making authority, the court concluded that SEC ALJs' "powers" are "nearly identical" to that of the Tax Court's special trial judges ("STJs"), who were held to be inferior officers by the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868 (1991). *See* slip op. at 40. But that is not so. As Defendant has already explained, STJs exercise a portion of the judicial power of the United States; they closely resemble federal district court judges and have the power to punish contempt by fines or imprisonment. *See Freytag*, 501 U.S. at 891. SEC ALJs' powers pale in comparison. For example, while SEC ALJs may issue subpoenas, in cases of noncompliance, the agency would need to seek an order from a federal district court to compel compliance. *See* 15 U.S.C. § 78u(c). Moreover, SEC ALJs are subject to the Commission's plenary authority "over the course of [the] administrative proceeding. . . both before and after the issuance of the initial decision." *In the Matter of Michael Lee Mendenhall*, Securities Exchange Act of 1934 Release No. 74532, 2015 WL 1247374, at *1 (SEC Mar. 19, 2015). They are also subordinate to the agency on "matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989); *see also CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (EPA ALJs bound by an agency directive regarding agency policy contained in a press release). In sum, their authority in no way approaches that of STJs, even if they perform some of the same basic duties. And in concluding that SEC ALJs are nevertheless constitutional officers, the *Hill* court acknowledged that its reasoning conflicts with the only court of appeals decision to address the constitutional status of ALJs. *See* slip. op. at 38-41 (disagreeing with *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which concluded that ALJs of the Federal Deposit Insurance Corporation are not officers of the United States).

We thank you for your consideration of this letter.

Dated: June 10, 2015

Respectfully submitted,

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