Appeal No. 16-1149

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

BERNERD E. YOUNG,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

On Appeal from the

Securities and Exchange Commission

Agency No. 3-15003

APPELLANT'S OPENING BRIEF

Bernerd E. Young

5111 Oxbow Circle E,

Fulshear, TX 77441

(281) 863-6150

byoung@mglconsulting.com

Pro Se Appellant

Certificate as to Involved Parties, Rulings, and Related Cases

Pursuant to Circuit Rule 28(a), Appellant hereby provides the following information:

1. Parties

The Appellant is Bernerd E. Young ("Appellant" or "Young"), who is representing himself in this matter, *pro se*. This document was drafted in part by Jason Dillingham. The Appellee is the Securities and Exchange Commission ("SEC" or "Commission"), represented by Lisa Helvin and Dina Mishra. There are no other parties.

Lisa K. Helvin

Office of the General Counsel

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549

helvinl@sec.gov

and

Dina B. Mishra

Office of the General Counsel

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549

mishrad@sec.gov

2. Ruling Under Review

The ruling under review in this case is the final decision and order of the Commission, captioned *In the Matter of Bernerd E. Young*, Opinion of the Commission, File No. 3-15003, Release No. 10060 (March 24, 2016).

3. Related Cases

This matter has not previously been before this Court. Appellant is aware of many related cases currently pending in this Court as well as in other courts within the meaning of Circuit Rule 28(a)(1)(C). Of appellant's key issues to be raised several have been, or are being, examined in this Court or other United States Courts of Appeals Circuits throughout the land.

Appellant particularly notes that issues of constitutionality of the method of appointment of the Commission's administrative law judges has been raised in a number of proceedings, both before this court and in others, that have resulted in a "circuit-split" not yet settled by the United States Supreme Court. The cases in which this issue has been raised include the following:

- *Bandimere v. SEC*, No. 15-9586 (10th Cir.)
- *Lucia v. SEC*, No. 15-1345 (D.C. Cir.)

The cases previously identified by either petitioners, or the Commission in which this issue has been raised include the following:

- *Pierce v. SEC,* No. 15-901 (U.S.)
- *Timbervest, LLC v. SEC*, No. 15-1416 (D.C. Cir)
- *Chau v. SEC*, No. 15-461 (2nd Cir.)
- *Duka v. SEC*, No. 15-2732 (2nd Cir.)
- *Tilton v. SEC,* No. 15-2103 (2nd Cir.)
- *Bennett v. SEC*, No. 15-2584 (4th Cir.)
- *Feathers v. SEC*, No. 15-7012 (9th Cir.)
- *Gray Financial Group Inc. v. SEC*, No. 15-7012 (11th Cir.)
- *Hill v. SEC*, No. 15-12831 (11th Cir.) (consolidated with *Gray Financial*, No. 14-13738, *supra*)
- *Imperato v. SEC*, No. 15-11574 (11th Cir.)
- *Ironridge Global IV, Ltd. v. SEC*, No. 15-CV-2512 (N.D. Ga. Nov. 17, 2015) (stayed pending Eleventh Circuit decisions in *Gray* and *Hill*, *supra*)
- *In the Matter of John J. Aesoph, CPA and Darren M. Bennett, CPA,* File No. 3-15168)

- *In the Matter of Bama Biotech, Inc.*, File No. 3-16456
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- *In the Matter of Paul Edward "Ed" Lloyd, Jr., CPA*, File No. 3-16182
- *In the Matter of Miller Energy Resources, Inc., et al.*, File No. 3-16729

- *In the Matter of Steven J. Muehler, et al.*, File No. 3-16836
- *In the Matter of Natural Blue Resources, Inc., et al.*, File No. 3-15974
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- *In the Matter of Lynn Tilton, et al.,* File No. 3-16462

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- *Curtis v. Loether*, 415 U.S. 189 (1974)
- *Ross v. Bernhard*, 369 U.S. 531 (1970)
- *United States v. Regan*, 232 U.S. 37 (1914)
- *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B 1789)
- *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830)
- *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)
- *Konig v. Fair Employment & Housing Commission, 28 Cal. 4th 743*
- *Janus Capital Group, Inc v. First Derivative Traders*, 564 U.S. 135
- *Pentagon Capital Mgmt. PLC v. SEC*, 2014 U.S. LEXIS 4577
- *SEC v. Graham*, 823 F.3d 1357
- *Rapoport v. SEC*, 682 F.3d 98

B. Other Authorities

- Note, De Novo Jud. Rev. Admin., 88 Colum. L. Rev. 1483 (1988).
- "The Constitution of the United States," Amendment 7.
- *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282 (1942)
- 5 U.S. Code § 706
- *Duke Law Journal*, Vol 65:527
- 15 U.S.C. 80b-3(f)

JURISDICTIONAL STATEMENT

This is an appeal of the Commission's final decision, File No. 3-15003, Release No. 10060 issued on March 24, 2016, ordering a cease-and-desist industry bar, authorizing disgorgement of salary and other compensation, and imposing two third-tier punitive civil penalties. Appellant's petition for review was accepted by this Court, which has jurisdiction under 15 U.S.C. §78y.

STATEMENT OF ISSUES

Appellant Young, a securities industry veteran of 33 years (19 of which were served as a decorated securities regulator), has been accused of:

1. Willfully aiding and abetting in the commission of a fraud by "wholly failing to carry out his professional due diligence responsibilities and approving false and misleading reassurances in response to red flags about SIB and the CDs." Young is accused of "playing a central role in maintaining the legitimacy necessary to perpetuate Stanford's scheme for several years". In doing so, the Commission found that Young demonstrated extreme recklessness and obvious unfitness for employment in the securities industry."

Young was employed by Stanford Group Company ("SGC"), a dually registered broker-dealer and investment adviser, which was 1 of approximately 130 companies controlled by Robert Allen Stanford ("Stanford"). Young was employed with SGC beginning in 2006, for 2 years, 6 months and 17 days, not "several years". Young never served as CCO of Stanford International Bank ("SIB") nor did he ever serve as Global Compliance Officer for Stanford Financial Group ("SFG") which had ultimate responsibility over SFG and its affiliates. Young's role with SGC, was that of Chief Compliance Officer ("CCO"), as set forth in SGC's written supervisory procedures. Such role is *advisory* in nature, not *supervisory*. The distinction here is important, because as an advisor, Young was not delegated with, and in fact was proscribed from having, responsibility for frontline oversite of the day to day sales activities and or sales practices of SGC. Young was supported as CCO by a 25 person, Compliance Department comprised of experienced professionals. In fact, Doug Shaw, a 20-year veteran of the securities industry, and one of the Commission's own witnesses, testified that Young ran one of the best compliance departments he had ever seen in his career, "on the street".

Young's role as CCO included reviewing sales materials to be used by SGC's sales staff, to ensure such documents did not contain violative language, and that they instead contained the disclosures as requested by FINRA, and/or as crafted and provided by internal and external legal counsel. Young's role was not to validate, verify, or approve the factual content of SGC's or SIB's marketing materials, as his field of expertise was not accounting or law. Instead SGC and SFG, employed numerous internal accountants and attorneys as well as numerous external accountants and attorneys, which included notable law firms such as Proskauer Rose and Chadbourne Parks, to advise SGC and provide guidance to its Board, and its executive team, including Danny Bogar, SGC's President, Young and others inside SGC's compliance department. Young's role as CCO was never to be the final authority on all legal and or accounting matters or disclosures. Notwithstanding this fact, the Record reflects, that when Young was told by Bogar that legal counsel had told him that the offering documents needed additional disclosures, Young immediately advised Bogar that all sales of the SIB CDs should stop, and the offering documents should be returned to SGC's Home Office, under the oversite of Young's Compliance Department, until the offering documents could be appropriately revised by legal counsel.

2. "Engaging in egregious and repeated violations throughout his years at the Firm, resulting in substantial investor losses." "Young evidences a lack of remorse and places all blame on others. In addition, Young's efforts to thwart regulatory investigations of SGC demonstrates hostility and indifference to regulatory oversight. Young's troubling attitude and failure to explain how he would respond differently in the future support our conclusion that he presents an unacceptable risk if permitted to return to industry-related employment." The Commission's final order makes statements regarding Young's state of mind and character which are unsupported by the Record in this case, Young's reputation amongst his peers, and his professional track record. Young has never attempted to "thwart any regulatory investigations of SGC" and the Commission cites no part of the record to support these findings. Rather Young has always treated Commission staff and others with the utmost of respect and professional courtesies. Young has

never harbored any indifference or hostility toward regulatory oversight rather, if anything, Young's attitude is one of frustration and heartfelt disappointment in the actions of the Commission staff, that they would malign his character and mischaracterize testimony in the apparent attempt to disparage him publicly.

The Commission goes on to state that "Our findings, establishing numerous instances of misconduct over a multi-year period, amply justify such orders in this case." As noted previously, such findings are unsupported by the record and in fact Young was employed by SGC for a little more than 2.5 years, of his 33-year professional career. The Commission however seeks to have the Court believe that Young, who was 1 of 14 hand-picked senior regulators, would willfully turn his back on everything he had dedicated his professional life to. The Commission offers no evidence to support their assertions with regard to Young's character or his state of mind. Rather the Commission sole intent in this regard appears to be to disparage Young's character, and in the process, obscure their own failings and willful negligence by accusing Young of that which it grossly failed to stop, despite its Congressional mandate to protect investors. In fact, the Commission's own Office of Inspector General Report concluded in March 2010 (ref. Case No. OIG-526) that the Commission's Fort Worth office was aware, since 1997, that SGC was likely operating a Ponzi scheme; yet the Commission willfully chose not to act for 12 years, choosing instead to allow the potential fraud to continue and grow, exponentially from $250 million to $1.5 billion. Young however did not join SGC until August of 2006, and thereafter acted proactively and in good faith in the performance of his job, to the best of his abilities. While testimony reflects that Young had no knowledge of the fraud being committed by Stanford, Young, nonetheless, is being held to a higher standard, than the Commission, which had knowledge, has been held to.

This case turns on the following issues:

1. Did Young willfully aid and abet in the commission of a fraud by wholly failing to carry out his professional due diligence responsibilities and approving false and misleading reassurances in response to red flags about SIB and the CDs?

No, the undisputed record reflects that Young, in fact, carried out the requisite due diligence responsibilities to the best of his ability and in conformance with the applicable standards of the industry, at the time. Young went beyond any of his predecessors and met with SIB's regulator in an honest effort to understand the regulatory environment in which SIB operated, the privacy laws of the country in which it was operated, and the extent to which the regulator monitored SIB and its activities. Young, at all times acted in good faith, with due care and with reasonable reliance on: i) the extensive training and experience he received over a course of 19 years as an examiner and senior regulator with NASD/FINRA; ii) the knowledge and legal counsel which he received while at the NASD from both NASD staff attorneys and meetings he attended with SEC Staff, as an NASD District Director which included opinions that bank issued certificates of deposit were not securities and thus not regulated by the Commission or FINRA; and iii) the knowledge and counsel which he received from Stanford's internal and external legal counsel each of which were seasoned securities attorneys, the latter of which was a former high-ranking enforcement lawyer at the SEC. In fact, during his tenure at NASD, Young was never informed of the SEC's concerns regarding Stanford in any of the interagency meetings he had with the Commission's senior staff, as an NASD District Director - the purpose of which meetings were to discuss regulatory concerns which NASD and the Commission's staff had regarding firms within Young's assigned District. In opposition to the Commission's position, the Court should instead consider the fact that for a period of 6 years, beginning in 2004, 2 years before Young joined Stanford, and continuing until May of 2010, for more than a year after Young left Stanford, Young served, *at the request* of the Commission, as the Court Appointed Independent Distribution Consultant ("IDC") for a Fair Funds Distribution[1]. As the IDC, Young oversaw the return of almost 100% of all investor funds governed by the Fair Funds Distribution, to customers. (As required, the remaining unclaimed investor funds were delivered to the U.S. Treasury). Young was asked to serve in such capacity and the record reflects that he continued to serve in such capacity, with the Commission's approval, during his entire tenure at Stanford[2]. Hardly the actions of an individual who is hostile or indifferent to regulatory oversite. Indeed, if the Commissions' findings against

[1] SEC v Bridgeway Capital Management, Inc. and John Noland Ryan Montgomery; Administrative Proceeding File No. 3-11659.

[2] In May of 2006, concerned about any potential for conflicts of interest and or other concerns by Commission Staff, Young proactively sought approval, and obtained clearance, from the Commission before accepting the CCO position with Stanford Group Company.

Young are upheld and he is found liable then it will be an indictment of the entire securities regulatory structure and program of these United States.

2. Does the scope and power of the Commission's Administrative Law Judges ("ALJ") effectively categorize those judges as inferior officers under the Constitution, and does the Commission's method of selecting and removing those judges therefore violate Article II, Section 2, Clause 2 ("Appointments Clause") of the United States Constitution?

3. Was appellant's right to substantive and procedural Due Process violated by the Commission and those actors under its influence, both before and during the Administrative Law Judge Proceedings??

4. Whether the Commission erred in its decision to deny appellant's request for a Federal District Court trial by jury, by inappropriately withdrawing this case from Article III Courts and placing it in an administrative forum?

5. Whether the Commission's determinations as to both liability and sanctions are contrary to law, arbitrary or capricious, or unsupported by substantial evidence?

STATEMENT OF THE CASE

A. Procedural History

The SEC is a federal agency with authority to bring enforcement actions for violations of federal securities laws. 15 U.S.C. §§ 77h-1, 78d, 78o, 78u-3. An enforcement action may be brought as a civil action in federal court or as an administrative action before an ALJ.

On August 31, 2012 the Commission brought action with their Order Instituting Administrative and Cease-and-Desist Proceedings in the matter of Daniel Bogar, Bernerd E. Young, and Jason T. Green. Appellant Young gave notice of appearance of Counsel on October 1, 2012. Shortly afterwards, on October 12th, Young's Answer was submitted to the record. Along with his co-defendants, appellant's counsel, J. Randle Henderson, proceeded through the back-and-forth prehearing motions process; organizing subpoena issuances, developing witness and exhibit lists, and attempting to contest the Motions to Quash Subpoenas and Consolidated Motions in Limine filed by the Commissions' Enforcement Division ("Division").

Between February 11 and March 1, 2013 the parties met for a fifteen-day hearing, in which twenty-six witnesses testified and numerous exhibits were admitted. After which post hearing briefs were exchanged until May 20, 2013.

The ALJ's Initial Decision, dated August 2, 2013, concluded that all three co-defendants violated the anti-fraud provisions of the federal securities laws while employed at SGC, which was owned and controlled by convicted Ponzi-schemer Robert Allen Stanford ("Stanford"). ALJ Carol Fox Foelak then *ordered* the defendants, including appellant Young, to cease-and-desist, *ordered* disgorgement of a portion of their salaries, and *ordered* them each to pay a third-tier civil penalty.*

The Initial Decision made it clear that the Commission did not allege Young to have either known or operated the Ponzi scheme, but rather that he was only culpable in relation to his approval of "the use of the brochures and the disclosure statement" which contained information on SIB assets and insurance coverage, as prepared by the bank and it's legal counsel, and reviewed by qualified outside counsel (who himself was a former senior SEC Enforcement official).

Appellant Young filed a Petition for Review to the Commission, on September 25, 2013. On October 22, Young's Petition was granted. After a series of motions and briefs were filed by Young and the Division, there was a delay of sixteen months before appellant finally received an Order Scheduling Oral Argument, dated January 21, 2016. That order allowed only for eleven business days of preparatory time. During which time, Young, a non-attorney, was forced to represent himself *pro se* due to the sanctions imposed by the Initial Decision which resulted in Lloyds of London's denial of further insurance coverage for his legal defense. The Opinion of the Commission and Order Imposing Remedial Sanctions was released March 24, 2016. It is noteworthy that the nearly three years which transpired between the Initial Decision and the final Opinion, was greater than his entire term of employment at SGC, and came more than seven years after the SEC's raid on SGC offices, in 2009. On February 17, 2009, the Receiver upon being appointed promptly seized all of Stanford's records, including Young's SGC records and notes. As of this date, despite repeated requests made by Young's legal counsel, which continued for 5 years leading up to the Initial Decision, Young has been denied access to his SGC compliance records and Due Diligence files, thus forcing him to defend himself throughout the entirety of the SEC's ALJ proceedings without the ability to review any of his original files.

In May of 2016, Young filed his Civil Notice of Appeal with this Court and on September 22, 2016 he received the Brief Filing Schedule. Thereafter he filed an unopposed motion for a sixty-day extension of these deadlines, with the understanding that he would do the same were the Commission's counsel to seek a comparable extension. That motion was accepted by this Court and represents the most current procedural event before this document, Appellant's Opening Brief.

B. Statement of Facts

a. General Facts

As stated previously, appellant Young worked at SGC for a relatively short period of time, from August 2006 to mid-February of 2009. Young had worked as a senior regulator with NASD (nka, Financial Industry Regulatory Authority ("FINRA")) for 19 years, rising to the position of Director of the Dallas District Office. He was well respected by his peers and earned the NASD's "Excellence in Service" Award twice, most recently in November, 2001. During his tenure as a regulator, Young spoke at numerous industry conferences and both taught and developed examiner training programs for NASD examiners, thus, providing great service in the interest of the American public. The fact that appellant devoted the majority of his working life at a financial industry regulator, and was only hired on to oversee compliance at SGC a relatively short time before its collapse, should not be lost upon this Court while it considers the most proper determination of this appeal.

There is no question that this case revolves around the Ponzi scheme carried out by Stanford and his closest associates and that no case would exist but for the fraudulent actions of that small "band of five". A fact to which FBI Special Agent Vanessa Walther testified to during the trial. Walther led the FBI's investigation into SGC's fraud for 4 years and, had 18 years' experience at the Bureau, 10 years of which was directly related to investigating securities/financial fraud. Walther testified she had one meeting with Young and as a result of that meeting she had no reason to follow up on any matters related to Young.

Similarly, uncontested is the fact that the center of Stanford's scheme are Certificates of Deposit ("CDs") issued by SIB, which was established under Antiguan banking law. SGC, was a Houston-based SEC registered investment adviser and broker-dealer, which was also a member of FINRA, and the CDs in question represented only a portion of the broker/dealer's revenues. During Young's tenure at SGC, no CD's were sold to investment advisory accounts, yet he was found guilty of violating the Investment Advisors Act. Additionally, following Young's arrival at SGC, he proactively restructured the compliance department's compensation program such that their bonuses and other compensation were in no way tied or effect by sales of the SIB CD. Additionally, SGC's business mix increased such that the percentage of revenues SGC derived from the sale of the SIB CDs declined.

There is also no doubt that Stanford, and his close-knit inner circle, financed their lavish lifestyles off of the revenues generated by the sale of these CDs. This revenue also served to benefit a small handful of participants in the scheme, pay back earlier investors, and lastly, unbeknownst to Young or anyone inside SGC, to bribe the CEO of SIB's Antiguan bank regulator, the Financial Services Regulatory Commission (the "FSRC") - the SEC's equivalent in Antigua, as well as SIB's auditor, C.A.S. Hewlett & Co. ("Hewlett"). Stanford's bribes to these two individuals ensured that no issues would arise with FSRC examinations of SIB's books and that Hewlett would dishonestly audit SIB's financial condition. Stanford's bribing of these two main touchpoints for independent accountability is unprecedented. To be clear, it is an undisputed fact that Young, a relative outsider who had only recently been hired into a compliance position, was never a knowing member of Stanford's scheme.

It is also critical to the Courts review of Young's Appeal to note that Young, in the performance of his duties, relied on qualified and competent legal counsel, both inside and outside of Stanford, as well as several independent SIB Board members, one of whom was a former justice on the Eastern Caribbean Court of Appeals and the other of whom was the former head of the Central Bank of Barbados. Finally, Young also relied on the senior staff of SIB and other Stanford affiliates, none of whom have been indicted by the legal system or even deposed by the Commission.

Also, critical to understanding the situation at that time is the fact that nation of Antigua had *never had a reported criminal prosecution of government officials, nor any reported investigation into Antiguan corruption by domestic, Caribbean, or British units established for that purpose*, such as had occurred in other U.K. dependencies. This also occurred before the reality of the 2008 financial crisis[3], which was unprecedented in recent American history, was fully uncovered. In other words, this was not a case of obvious red flags of an un-regulated, un-audited entity at every turn as the Commission would have this Court believe. This was a well-calculated, well-concealed fraudulent scheme devised and executed for over a decade by one of the nation's brightest, and most deceitful, financiers. Young, as a lifelong financial industry regulator who had only recently begun his work as SGC's CCO, was a direct threat to Stanford's entire scheme and it was critical to that scheme that Young be deliberately misled about the true nature of SIB's financial well-being.

During his tenure, as CCO, and later beginning in 2007 as SGC Due Diligence Officer, Young met with various SIB officials and senior Stanford staff on a regular basis. These meetings included phone calls with such staff, external legal counsel, in-person meetings at SIB in Antigua and others. This conduct began at the onset of his employment at SGC and continued throughout his tenure at SGC. In December, 2008, during the U.S. Credit crisis, Young, unlike his predecessors, met with the

[3] Per the Federal Deposit Insurance Corporation's Failed Bank List, 29 U.S. banks failed between September 1, 2008 and February 20, 2009. During the two-year period beginning January 1, 2008 and ending December 31, 2009, 165 U.S. banks failed.

FSRC's CEO, Leroy King in Antigua. During this meeting, Young and King discussed the FSRC's regulatory model, the breadth and depth of FSRC's reviews, including annual on-site reviews, SIB's required quarterly reporting, various risk factors used by the FSRC when determining the safety and soundness of a financial institution under their jurisdiction. Although no longer a regulator, Young's conversation covered areas that regulators were interested in, in light of the on-going credit crisis. Young confirmed the FSRC's enforcement capabilities included expulsion or other disciplinary actions against a financial institution. Young confirmed that since the FSRC has not taken any such actions against SIB, that it was in compliance with applicable Antiguan regulations. King replied that SIB was one of the safest banks on the island. This proactive conversation with an independent touch point was exactly the type of due diligence that the Commission was advocating, yet they completely disregarded Young's interactions, in their ruling.

If the Court permits the SEC ruling to stand, it will have a chilling effect on Due Diligence Officers and Chief Compliance Officers, in that, if something goes wrong with an investment, they will not be able to rely on any of the sources described above when defending their actions.

b. Young's Roles and Responsibilities at Stanford

Young was initially hired as the Managing Director of Compliance for Stanford Group Holdings, Inc. ("SGH"), the holding company for all of Stanford's North American entities, including SGC. Young became the CCO for SGC, shortly thereafter. As CCO he had approximately 25 employees reporting to him, all of whom worked within the Compliance Department. Young reported directly to Bogar, President of both SGC and SGH. He had a lateral reporting responsibility to Lena Stinson, SFG's Global Director of Compliance. Young's supervisory responsibilities were limited to only those employees of SGC's Compliance Dept.

SGC established a clear separation of duties and responsibilities between compliance and supervisory functions, before Young joined SGC as evidenced by SGC's written supervisory procedures and the trainings Young conducted as a third-party consultant, for SGC's Branch Managers in 2005. Young continued to maintain this separation of responsibilities after joining SGC as CCO.

Young consistently sought guidance of SFG's legal counsel. On those instances where SGC employees sought guidance from Young or his staff regarding the SIB CD, Young referred, or instructed his staff to refer, the individual to their respective branch office manager or the President of the Private Client Group.

With respect to regulatory inquiries received, it was Young's practice to inform both Stinson and SFG's Legal Dept., led by Mauricio Alvarado ("Alvarado"), SFG's General Counsel. This practice of oversight by Stinson and SFG's Legal, was firmly established before Young joining SFG. Alvarado made known to Young his expectations of Young's close cooperation with SFG's Global Compliance (Stinson), and SFG's Legal Dept. Normal protocol was that Young would be supplied a list of documents to produce which was approved by Alvarado and outside counsel.

c. SIB and Young's Due Diligence [4]

When Young became CCO, he immediately began familiarizing himself with SIB by discussing the Bank and its products with Jane Bates, SGC's former CCO and Due Diligence Officer, and Stinson, also a former CCO for SGC. Stinson was continuously registered with SGC since 1997 and held "C-Level" positions within SGC and SFG since their inception, so she had an extensive knowledge of Stanford's operations. Young was informed by Bates and Stinson that SFG Global Compliance and SFG Legal Dept. were involved in the review and approval of all SIB-related materials that would be disseminated to advisors and clients. It was reasonable for Young to rely on the experience and expertise of both Bates and Stinson as both had more than 20 years of experience (individually) and both were current or former NASD Committee Members.

Bates, Stinson and Alvarado informed Young, under no uncertain terms, would he be unable to obtain detailed information relating to the SIB investment portfolio, such as money managers used and specific investments held by SIB. This

[4] An exhaustive detailing of Young's Due Diligence would cause this brief to surpass its word limit, therefore please refer to Young's Wells Response in the Record if a more detailed listing is desired.

was confirmed to Young by Tom Sjoblom, external legal counsel, and by King, the CEO of the FSRC, because of the privacy provisions of Antiguan laws.

In his testimony before the Committee on Banking, Housing, and Urban Affairs, United States Senate on August 17, 2009, Daniel M. Sibears, Executive Vice-President, Member Regulation Programs stated:

> **"FINRA was limited in its review as it could not, despite repeated attempts by both FINRA and the SEC, compel the necessary evidence from the foreign bank affiliates of the broker-dealer."**

If neither FINRA nor the SEC was able to obtain "necessary" evidence from SIB, is it not unreasonable to understand why Young was also unable to obtain SIB information and was forced to rely on the representations of Bates, Stinson, Sjoblom, and Antiguan officials with regards to this issue. In fact, FBI Special Agent Vanessa Walther, who lead the FBI's four-year investigation into Stanford, testified during Young's trial that "…there was nothing the Respondents could have done to uncover the fraud, or to prevent the fraud…"

Young also visited the bank in Antigua on at least five where he met with Senior Bank Officials, including Juan Tolentino-Rodriguez, SIB's President, Pedro Rodriguez, SIB's Chief Compliance Officer, SIB's Operations Manager, and SIB's Senior Investment Officer, among others. Young also reviewed banking guidelines issued by the FSRC and Antiguan laws which governed International Banks domiciled in Antigua. Young reviewed the International Monetary Fund ("IMF") Report, dated Dec. 2004, entitled "Antigua and Barbuda: Detailed assessment of

Compliance with Basel Core Principles for Effective Banking Supervision – Offshore Banking.

Young reasonably believed that the Board of Directors of SIB were "fit and proper" since the FSRC had not required the removal and/or replacement of any director, as outlined in Section 65, and he was not aware of any information to suggest otherwise.

Nothing came to the attention of Young during his tenure at SGC which caused him or should have caused him to doubt the composition and qualification of the members of the SIB Board of Directors. Young reasonably relied on his findings and conclusions as a part of his extensive due diligence review.

In April 2007, Young had a meeting in his office in Houston with LeRoy King, CEO of the FSRC, and Mauricio Alvarado, SFG General Counsel. During this meeting, Alvarado introduced King to Young, and, King explained his position, role and responsibilities with the FSRC. During this meeting, Young and King discussed SGC, its operations and activities and Young's responsibilities as Chief Compliance Officer for SGC. Young also met with King at the SIB headquarters in Antigua on Dec. 4, 2008. King discussed his professional background, the FSRC's role, responsibilities, examination program and priorities, enforcement capabilities, and staffing. During this meeting, King explained the FSRC surveillance program, which included SIB providing the FSRC with monthly summary reports, quarterly reports of each investment position, and annual on-site examination program. Young was informed that Antiguan law required an annual on-site review of SIB, regardless of the findings on previous exams. King explained that he was drafting legislation that would transition the FSRC exam program to a "risk-based" program. Young then asked King about his staff, particularly the size and their qualifications. King stated that he had eight professional staffers to review seventeen IBC chartered institution firms, and that he typically recruited those who were educated in the United States and held advanced degrees in Finance or Accounting. He also discussed that every entity the FSRC was responsible for regulating would be classified as Tier 1 (annual on-site), Tier 2 (bi-annual on-site), or Tier 3 (on-site review every 3 years). Upon further questioning, Young was told that, under the proposed system, SIB would be categorized as a lowest-risk Tier 3 firm. King further stated that SIB was one of the safest institutions on the island. Young requested copies of the FSRC exam reports covering SIB but was told that they could not be provided pursuant to Antiguan privacy laws. Young then asked King was the FSRC examination priorities were and was told that, based upon recent events in the U.S., the FSRC was concentrating on risk and proper pricing of investments. Young then asked what recourse the FSRC had, should SIB fail to provide any requested information, or should the FSRC find material violations during its surveillance of SIB. King responded that the FSRC has the same range of enforcement capabilities as the SEC, including both informal and formal actions. He stated the formal enforcement action could entail fines on either the institution or the officer, and could include expulsion of the company. He also stated that the FSRC had criminal enforcement capabilities.

Young did not have any basis to doubt King's representations. Young acted within industry standards of conduct when he reasonably relied on these representations in connection with his due diligence reviews of SIB.

During the course of his due diligence reviews of SIB, Young asked for and received a copy of "LIST OF REQUESTED DOCUMENTATION AND INFORMATION", for SIB, dated May 27, 2007. (See requested documentation and information from SIB, including, but not limited to, Trial Balances, Financial Statements, bank reconciliations, and other information. Young noted that one item requested:

> **"An inventory in spreadsheet format of the bank's investment portfolio statements as at March 31, 2007, March 31, 2006, June 30, 2006, Sept. 30, 2006, and Dec. 31, 2006. This should be broken down into the following categories by aggregate totals for each category: (a) Name of broker or issuer, (b) location of broker or issuer, (c) Type of investment (Treasury Bills, Gov't Bonds, Corporate Bonds, Mutual Funds), (d) Effective date of investment, (e) Original amount of investment, (f) Market value of investments as at March 31, 2007, (g) Gains or Losses on investments, (realized and unrealized), and (h) Maturity date of investment".**

Also requested were:

> **"Copies of reports used to manage the bank's risk management process as at March 31, 2007, and March 31, 2006, June 30, 2006, Sept. 30, 2006, and Dec. 31, 2006. Risks include liquidity risk, interest rate risk, and operational risk."**

It should be noted that SIB had never been the subject of a disciplinary action by the FSRC for failure to prepare or produce requested information.

Young attended various meetings and participated in various conference calls relating to SIB. Members of SIB senior executive staff, including the CFO and CIO were typically participants on these calls and routinely discussed the Bank's overall investment portfolio, its performance, and the asset allocation methodology used by the Bank. Not once during these meetings and conference calls did Young learn that the CIO did not oversee the entire portfolio.

SUMMARY OF ARGUMENTS

The Securities and Exchange Commission, particularly the Enforcement Division, exercises extraordinary authority over the lives of American citizens with few meaningful limits on its ability to charge, adjudicate, and sanction those citizens. The Commission, with its Office of Administrative Law Judges, exerts this authority free from the concern of Federal Rules of Civil Procedure that serve to ensure fair and expedient trials for all citizens equally. The constitutionality of these 'in-house' judges has been repeatedly questioned, leading to a split within the opinion of the Circuit Courts. While the appellant's claim does call for this examination, it also asks this Court to evaluate whether others under the influence of the Commission have infringed upon appellant's constitutional rights in regards to the restriction of access to key exculpatory evidence. Further, appellant Young also asks this Court to consider the precedent of the United States Supreme Court holding in *Tull v. United States* in its evaluation of appellant's lack of access to a jury trial for punitive sanctions, as well as the equitable sanctions that were bundled together in the same Commission decision. Finally, appellant asks this Court to consider, under the appropriate standard of review, whether the Commission's determination of liability is legally supportable, on its own merits, and following consideration of the previously presented Constitutional complaints.

STANDARD OF REVIEW

Less deference to administrative fact-finding that extends to determinations that implicate Constitutional Rights. Note, De Novo, Jud. Rev. Admin., 88 Colum. L. Rev. 1483 (1988). "The reviewing court shall-- … (2) hold unlawful and set aside agency action, findings, and conclusions found to be-- … (B) contrary to constitutional right, power, privilege, or immunity… or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459.

Appellant also argues that in reference to Auer defense, or Seminole Rock, this Court should take the opportunity to see it on its way out the door and thereby reduce the agency deference in interpretation. Appellant argues that agency interpretations are more similar to subjective rules to which courts need not defer.

ARGUMENTS

1. Does the scope and power of the Commission's Administrative Law Judges effectively categorize those judges as inferior officers under Article II of the United States Constitution, and does the Commission's method of selecting and removing those judges therefore violate the Appointments Clause in Article II of the Constitution?

The most recently decided Circuit-level case related to this matter of law is *Bandimere v. SEC*, in the United States Court of Appeals Tenth Circuit, and along with consideration of this Court's earlier holdings, will represent the majority of appellant's argument. The *Bandimere* Court's holding is based heavily on *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and may need reconciling with previous opinions of this Court.

> "When the Framers drafted the Appointments Clause of the United States Constitution in 1787, the notion of administrative law judges ("ALJs") presiding at securities law enforcement hearings could not have been contemplated. Nor could an executive branch made up of more than 4 million people, most of them employees. Some of them are "Officers of the United States," including principal and inferior officers, who must be appointed under the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. In this case we consider whether the five ALJs working for the Securities and Exchange Commission ("SEC") are employees or inferior officers.
>
> Based on *Freytag*, we conclude the SEC ALJ who presided over an administrative enforcement action against Petitioner David Bandimere was an inferior officer. Because the SEC ALJ was not constitutionally appointed, he held his office in violation of the Appointments Clause Exercising jurisdiction under 15 U.S.C. §§ 77i(a) and 78y(a)(1), we grant Bandimere's petition for review." *Bandimere,* 10th Cir. Holding, Initial Summary

In *Bandimere* the Commission conceded the ALJ had not been constitutionally appointed in a manner required of an Article II inferior officer, but upheld their opinion that the ALJ's categorization as an employee was appropriate, and not an Article II inferior officer. The 10th Circuit accepts *Freytag*'s definition of the parameters of the Appointments Clause, just as this Court is bound to do.

> This holding serves the purposes of the Appointments Clause. The current ALJ hiring process whereby the OPM screens applicants, proposes three finalists to the SEC, and then leaves it to somebody at the agency to pick one, is a diffuse process that does not lend itself to the accountability that the Appointments Clause was written to secure. In other words, it is unclear where the appointment buck stops. The current hiring system would suffice under the Constitution if SEC ALJs were employees, but we hold under *Freytag* that they are inferior officers who must be appointed as the Constitution commands. As the Supreme Court said in *Freytag*, "The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." 501 U.S. at 880.

The SEC position in *Bandimere*, and the one they are expected to take here, is that the Court should accord significant weight to supposed Congressional intent that would have its ALJs categorized as mere employees that lack any power to make final decisions. However, evidence of such intent is convoluted, at best, and as of yet the SEC has not been able to cite statutory language of any kind expressly stating ALJs are employees for the purposes of the Appointments Clause, nor has it been able to cite any legislative history indicating Congress has specifically addressed the question of ALJs as inferior officers. Appellant urges this Court to adopt the conclusion of the Tenth Circuit, namely, that "ALJs 'are more than mere aids' to the agency" *Samuels v. IRS*, 930 F.2d at 986. That "they perform more than ministerial tasks." *Freytag*, 501 U.S. at 881. That governing statutes and regulations assign them duties on par with those of the STJs described in *Freytag*. SEC ALJs carry out important functions and "exercise significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1 at 126.

It is further argued that the Commission's power to review its ALJs does not somehow reduce them to lesser functionaries. In fact, that process of review does more to establish the ALJs as inferior officers subordinate to the commissioners. *Edmond v. United States*, 520 U.S. at 663.

So adamantly did Concurring Judge Briscoe support the rationale of the majority opinion above that she sought to proactively defend it from the dissenting opinion by including her own concurrence. Judge Briscoe doubts the legitimacy of the SEC's review process, calling it a faux "*de novo"* review. "Rather, whether the SEC disagrees with its ALJs' credibility determinations triggers its own rule that an ALJ's evaluation of a witness's live testimony is entitled to "considerable weight." 2015 SEC LEXIS 4472 [WL] at *15 n.83.. This fact means that, at a minimum, the ALJs exercise significant discretion over issues of credibility that receive little more than a *faux de novo* review.

Further, Judge Briscoe states that the Dissent's speculative fear of repercussions to have been reached erroneously, and that the Dissent applied "a truncated legal framework to a misstated version of the facts of record." *Bandimere* at 34.

Appellant argues that this Court set aside the SEC's opinion and find the SEC ALJ to have unconstitutionally served in the role of an inferior officer when she presided over Young's hearing.

2. Was Appellant's Right to Substantive and Procedural Due Process Violated by the Commission, and Those Actors Under its Influence, Both Before and During the Administrative Law Judge Proceedings?

The second Constitutional challenge that this brief makes is that appellant has had his Constitutional right to Due Process violated at numerous steps of the SEC's ALJ and Enforcement Division's processes.

(i) Commission and Receiver Harmfully, and in Bad Faith, Suppressed Young's Access to Key Exculpatory Records in Their Possession, Limited Access to other Records which were Made 'Available', and Outright Prevented Young, a *Pro Se* Defendant for his Commission Appeal, from Accessing any of his Records Personally, All in Violation of his Due Process.

The Receiver's File Index directly states that Young's SIB files, specifically his SIB-DUE DILIGENCE files have a Current Status of "OUT". Suspiciously, these all-important Due Diligence files (Barcodes: 7961, 7962, 7967), along with a handful of other Compliance department files (Barcodes: 4836, 4839, 4840, 4844, 4847-4856) are the only files with a Current Status of "OUT". The charges against appellant Young are based around his failure to do his Due Diligence and that "Because Applicants have failed to establish what information they were denied and how that denial prejudiced their case, we reject Applicant's argument that the proceedings against them were procedurally flawed."[5] Appellant argues that this Court should easily find that the suspiciously missing files are those that would naturally be categorized as vital to the defense of his proper Due Diligence efforts.

This strange disappearance of the files most critically related to Young's ability to defend himself against the charges levied by the SEC Enforcement Division is without a doubt a most harmful error. Within the SEC's own Rules of Practice and Rules on Fair Fund and Disgorgement Plans is Rule 230(a)(1) stating that "the Division of Enforcement shall make available within 7 days for inspection and copying by any party documents obtained by the Division before the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings.[6] Within Rule 230(a)(1)(v) is a catch-all clause serving to include in the above "any other documents obtained from persons not employed by the Commission. Rule 230(b) goes on to state the Documents that May Be Withheld, with none of the exceptions applicable to these Due-Diligence files that would have made up the very cornerstone of appellant's defense. Further,

[5] Commission Final Decision In the Matter of Bernerd Young, footnote 89, at 33.

[6] Rule230(d)

Rule 230(b)(2) explicitly states that nothing authorizes the Division to withhold documents contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87, which is exactly the behavior that appellant argues the Division exhibited in its failure to provide these most critical and likely exculpatory documents.

To finish the analysis of these withheld documents according to the SEC Rules of Practice and Rules on Fair Fund and Disgorgement Plans appellant must satisfy the harmless error requirement of Rule 230(h). Given that withholding of documents has been held as a Constitutional violation of Due Process, appellant argues that the *Chapman v. California*, 386 U.S. 18, holding that before a federal Constitutional error can be held harmless, the Court must declare belief beyond reasonable doubt.

> "Such a machine gun repetition of a denial of Constitutional rights, designed and calculated to make petitioner's version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences. *Chapman, at* 26.

In respect to spoliation of evidence, appellant argues that an adverse inference is to be drawn from the Commission and Receiver's failure to preserve evidence as the absence of evidence was predicated on bad faith, as required by *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). Such bad faith is evidenced at least twice in the Record, first in the ignored emails requesting clarification as to the chain of custody of the seized Stanford documents, and second, when Young was repeatedly denied access to numerous seized Stanford records based on the premise of privilege. The first instance proved particularly harmful, as this chain of custody was at the heart of the reason why Young's most vital Due Diligence records were marked 'OUT' on the Receiver's index with no indication as to when, or by whom they were removed. The second instance, where Young was denied access to any records beyond his and his secretary's that were seized, particularly Rebecca Hamric's, was in direct contradiction to the Receiver's waiver of privilege as evidenced in the SEC's handwritten interview notes of Danny Bogar. Further evidence supporting the required finding of bad faith exist in the unsupported barring of Young from the warehouse where his seized Due Diligence and Compliance files were being stored, which is highly questionable in an administrative proceeding, as well as being evidenced by the negligent bulk sale of an entire pallet of Stanford tapes and digital documents held by the receiver, over a year in advance of the issuance of the OIP against Young. How could he possiby mount a legally satisfactory defense within the limited confines of the ALJ proceeding when his exculpatory evidence was mysteriously going missing, being denied access to, or being sold to the highest bidder at a public auction?

(ii) SEC's Selection of an ALJ to Adjudicate Cases in which it is a Party Violated Defendant's Due Process

The Commission's decision to bring action in either Federal District Court or in front of its own administrative tribunal is, publicly, arbitrary and without guidelines. Even the Commission's Director of Enforcement Andrew Ceresney, when pressed on the issue at a March 19, 2015 Congressional hearing regarding the fairness of the SEC's administrative proceedings, was unable to answer whether or not guidelines of any kind have been official put on paper, telling Rep. Scott Garrett that, "he would have to consult with his staff and get back to them." This lack of transparency is certainly not the hallmark of the fair, unbiased judicial system that has fostered the growth of our nation since its founding.

The selection process for ALJs violates Due Process because it is designed to allow the Commission to select the adjudicator who will serve as the sole fact-finder for hearings in which the Commission will be a party. Such a process creates "fears of bias [that] can arise when – without the consent of other parties – a man chooses the judge in his own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). In order for this Court to find a lack of due process it need not uncover proof of actual bias. *Id.* At 883. Instead, this Court must ask whether "under a realistic appraisal of psychological tendencies and human weakness" there is "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

"Congress has recognized that the appearance of impartiality is as important as actual impartiality in maintain the public confidence in" adjudication. *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F2d 388, 395 (1983).

It is not just selection process bias that causes concern over potential violations of appellant's Due Process, but legitimate speculation that the current administrative tribunal structure has already compromised the ability of ALJs to function appropriately. An article appearing in the *Wall Street Journal* included several serious allegations regarding the impartiality of the SEC's ALJs. Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J., May 6, 2015. Appellant does not argue that allegations within a newspaper article are sufficient for a finding of actual bias, but in light of the *Withrow* and *Verniero* holdings, the severity of the allegations does indicate an appearance of bias that undercuts the legitimacy of the ALJ's fact finding in the case at hand. *Caperton*, 556 U.S. at 884.

(iii) Issues with Timing, Both Before and During the Enforcement Process, Sufficiently Represent a Violation of Appellant's Due Process on their Own Right, Particularly the Mandated Timeframes of (1) the Wells-Enforcement Action and (2) the OIP-Initial Decision

A purported advantage that is often publicly cited in support of the Commission's increasing use of administrative proceedings is the rapid timeline by which ALJ regulations would have a case decided. Another commonly raised argument in support of their use is that Federal District Courts' dockets are too full to appropriately adjudicate SEC enforcement actions in a timely fashion. The handling of appellant's case raises speculation over both of those claims, as well as speculation over violations of appellant's Due Process as a result of the proceedings' regulated timeline.

(1) The Division's enforcement process has a mandated timeframe of 180 days to file an enforcement action, or provide notice to the Division of its intent not to file, after the issuance of a Wells notification.[7] In the *Montford* case, where the Division missed the action window by a mere 7 days, this Court held that that such a clearly stated deadline does not actually function in that manner[8]. However, appellant argues that the case at hand is dissimilar, and should not be ruled by the *Montford* precedent. Where this Court determined it appropriate to not jurisdictionally bar the Division's action after it missed the 180-day deadline by just one week, appellant's case differs in that it **sat without meaningful action for a period of <u>821 days</u> between the Wells notification and the issuance of the Order Instituting Proceedings ("OIP").** That period lasted more than four and a half times the statutory limit provided by the Founding Document of the Securities and Exchange Commission. Appellant argues that, while 187 days may not satisfy this Court's *Chevron*-based interpretation, the inordinate and offensive period of inaction of 821 days should override whatever ambiguity that this Court finds, and urges this Court to interpret the statute naturally, that is, if action is not brought within the statutory timeframe, that the action should not be brought *excessively* outside that timeframe.

(2) The condensed timeframe mandated by the Commission's rules directs the presiding law judge to issue an initial decision no later than 300 days from the date of service of the OIP. Within this limited window of time a great many things occur,

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[7] Section 4E of the Securities Exchange Act of 1934

[8] *Montford & Co. v. SEC*, No. 14-1126 (D.C. Cir. July 10, 2015)

including, but not limited to: ordering the ALJ as Presiding Judge, file notices of appearance of counsel, a prehearing ordering, respondent's answer to the OIP, Division's response to that answer, file motions for More Definite Statements, organization and submission of exhibit lists, organization and submission of witness lists, file motions for the Issuances of Subpoenas, filing Expert Witness reports, motions to quash subpoenas, Consolidated Motions in Limine, revision of exhibit or witness lists, Response to the Motions in Limine and Motions to Quash Subpoenas, supplemental exhibit lists, requests for Prehearing Conferences, various orders from the Commission, Letters back and forth to third-parties, Motions for Rule 322 Protective Orders, Post-hearing Briefs, Proposed Findings of Fact and Conclusions of Law, Post-hearing Reply Briefs, Responses to the Post-hearing Reply Briefs, Letters to the ALJ from parties' counsels, preparation of a Record Index, potentially Commission extensions, and finally, the Initial Decision by the ALJ. These various filings, often more than once, were all featured in the administrative proceeding against Bogar, Green, and Young. In a District Court proceeding this would be considered a breakneck pace, moving along much too quickly to guarantee a preservation of a defendant's rights and entirely inadequate to mount an exhaustive defense. Also of note is that the Division failed to abide by its own Rules of Practice in failing to "commence making documents available to a respondent for inspection and copying pursuant to this rule no later than seven days after service of the [OIP]." The first note of this commencement from B. David Fraser, is dated September 12, 2012, which is after the September 7th deadline (or September 1st deadline given the TRO in this case), called for by Rule 230(d).

Additionally, the 300-day limit can be extended only if supported by a motion from the Chief ALJ and if the Commission determines that "additional time in necessary or appropriate in the public interest."[9] Such motion was filed by ALJ Brenda P. Murray ("Murray") "out of an abundance of caution," noting that "the Office is very busy" and expressed "concern that something unforeseen will occur that will cause a slight delay." It is unknown whether such weak grounds for an extension would have been granted by an unaffiliated party, but the Commission did find it appropriate to do so in Murray's case. Either way, that Murray noted her office being "very busy" raises questions as to the Commission's claimed advantage of the ALJs, namely, that District Court dockets were too full to properly adjudicate enforcement actions. It seems that in appellant's case, and in light of the rising use of their tribunals, that it is the ALJ's docket that appears overfull.

(iv) Restrictions Throughout the ALJ Process, including (1) Severely Curtailed Discovery, (2) Severely Limited Defendant Depositions, (3) Lack of Jury Trial, (4) Lack of Adherence to Federal Rules of Civil Procedure and Evidence, and (5) Exhaustion of *De Novo* Fact Finding and Review

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[9] 17 C.F.R. § 201.360(a)(3)

(1) The limits that SEC administrative proceedings place on a defendant's right to perform meaningful discovery absolutely prevent a defendant, particularly a *pro se* defendant, from reviewing the Division's files in a sufficiently thorough manner by which they could mount a reasonably effective defense within the expedited ALJ process. Beyond these severe time constraints, Commission Rules of Practice in place at the time of defendant Young's proceedings allowed the Division to withhold, among other things, privileged documents, work product, internal memoranda, notes and certain other writings prepared by SEC employees, as well as documents that would disclose the identity of a confidential source.[10] Beyond a party's right to serve subpoenas, when done in accordance with Rule 232, no other meaningful discovery is permitted in an administrative proceeding. This limitation on discovery begets commensurately limited motion practice, irrespective of the ALJs' bar on pre-trial dispositive motions. These restrictions, and those outlined below, all support a finding that the ALJ process, at least as it stood at the time of appellant's proceedings, is an unconstitutional one.

(2) Defendant's right to depose witnesses in ALJ proceedings is severely limited, and completely at the discretion of the Commission or hearing officer. Commission Rules of Practice contemporaneous to appellant's hearing limit this allowance only to situations where a prospective material witness will be unable to attend the hearing, with their reason also subject to ALJ determination. In order for a defendant to be allowed to depose a witness under these limited circumstances, they must make

[10] SEC Rules of Practice – 2006 – Rule 230(b)

a detailed written motion to the ALJ, and wait for that motion to be ruled on. The nature of the expedited ALJ proceedings further curtails any potential use of depositions that may support a defendant's case due to the drawn out process of obtaining the right to depose, and then actually arranging the deposition. The fact that the Commission has since found it necessary to update their Rules of Practice to allow for parties to take a limited number (3-5) of depositions is a substantial indicator that the version of the process in which appellant Young was subjected to was insufficient in providing a fair hearing for his case.

(3) The ALJs' denial of a civil defendant's right to a jury trial in situations when identical proceedings in the appropriate Federal District Court would preserve this fundamental constitutional right should be a major concern for this Court. While appellant briefs this Seventh Amendment right in detail later in Argument #3 of this brief, it is also appropriately included here as yet another strike against the Commission's claim that its ALJs do not violate the Due Process Clause of the Fourteenth Amendment.

(4) The Commission's departure from widely understood and accepted Federal Rules of Civil Procedure ("FRCP") and Federal Rules of Evidence is so vast that the administrative tribunal replacement fails to comport with the minimum requirements of constitutionality. Further, the Commission, a federal agency, fails to provide credible support for such deviation from these rules. Note that these FRCP are promulgated by the U.S. Supreme Court pursuant to the Rules Enabling Act and represent a system that has suitably provided adjudication since 1938. The

Commission has made claims of expedited proceedings being a primary advantage of the ALJs, however the above sub-argument **(iii)** directly contradicts this claim. In addition, the rules of evidence in the Commission's administrative proceedings are so warped from the Federal Rules of Evidence, that a defendant's chance at fair proceeding should be placed under severe doubt by this Court. The low threshold of admissibility is based on the premise that the ALJ and the Commission are capable of assigning appropriate weight to marginally relevant evidence, while retaining the subjective right to deny a defendant's submission. A system that allows for the admission of hearsay as legitimate and potentially damning evidence is a system that indicates a clear disregard for the preservation of a defendant's right to Due Process, as is guaranteed in the Fourteenth Amendment for Criminal, Civil, and administrative proceedings.

(5) Complete exhaustion of appellant's opportunity for *de novo* fact finding and review occurs entirely within the boundaries of the Commission's administrative proceedings, where the restrictions detailed in this argument serve to severely limit appellant's right to a fair trial. Meaningful judicial review cannot occur at any point when this Court is forced to adhere to the high standard of review called for by 5 U.S.C. § 706 following the low burden required to establish culpability in the Commission's ALJ process, particularly a process which appellant believes this court will find unconstitutional. For any appellant to escape a finding of guilt they must simultaneously limbo under the ALJs' low bar while high jumping over the lofty standards of review that are only appropriate when a decision originates out of a trial that respects the Federal Rules of Civil Procedure. This Court, then, also fails to provide appellant access to a judicial system that adheres to the Federal Rules of Civil Procedure as it forced to bend its knee to the self-determined rules of an Article II tribunal. Nor does this fact support the existence of any legitimate separation of powers as called for by the Articles of the Constitution.

3. Whether the Commission erred in its decision to deny appellant's request for a Federal District Court trial by jury, by inappropriately withdrawing this case from Article III Courts and placing it in an administrative forum?

Appellant Young does not contest that Congress has been allowed "create new public rights" and to "commit their enforcement, if it chose, to a tribunal other than a court of law such as an administrative agency in which facts are not found by juries." *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 460 (1977). However, appellant asserts that Congress' ability to assign enforcement actions to administrative tribunals, when brought in the case of fraud, is limited by the Seventh Amendment's preservation of the right to jury trial, as well as by the separation of powers established in the Constitution.

"Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty…. When a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (internal quotations omitted). Further, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In other words, the work of the drafters of the Constitution and Bill of Rights should not so lightly be cast aside, as some courts have casually, and mistakenly, done in a limited number of opinions such as *Atlas Roofing* and *NLRB v. Jones & Laughlin* (1937).

Thankfully, those 1937 and 1977 decisions have not stood unchallenged and more recent holdings, such as *Stern v. Marshall* (2011), *Tull v. United States* (1989), and *Konig v. FEHC* (2002) have lent support for greater preservation of a civil defendant's 7th Amendment ("7A") right to jury trial. In the span of time from the writing of the 7A through today, the U.S. courts repeatedly affirmed the importance of the jury trial system to America's application of justice, both within and outside of administrative proceedings. The modern test of the application of the 7A right to trial by jury was established in *Curtis v. Loether*, 415 U.S. 189 (1974), stating that the 7A is only inapplicable in specific administrative proceedings "where jury trials would be incompatible with the *whole concept* (emphasis added) of administrative adjudication and would substantially interfere with the [federal agency]'s role in the statutory scheme." Appellant argues that no such substantial interference would occur were the SEC to allow jury trials in its ALJ proceedings, and that the Commission is unable to provide convincing evidence to the contrary.

The *Curtis* opinion further states that "But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law."[11] That is, that "The approach must be to discard the jury only where necessary, not whenever convenient…" *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282 at 294 (1942). Another case that served to enlarge the right to a jury trial is *Ross v. Bernhard*, 369 U.S. 531 (1970), wherein the Supreme Court held that "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[12] This supports appellant's claim that nature of the issue at hand, resulting in both equitable and punitive sanctions, is one that requires a trial by jury.

The *Tull v. United States* also supports the distinction that appellant's alleged violations are analogous to actions in law at the time of the Constitution and Bill of Rights and thus belong to the judiciary, holding that, "[a]ctions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury." *Tull* also references

[11] *Curtis v. Loether*, at 195.
[12] *Ross v. Bernhard*, at 538.

United States v. Regan, 232 U.S. 37 (1914), stating that "the Court [rightly] assumed that a jury trial was required in civil penalty actions."

A. The Appellant's Alleged Violations Are Analogous to Actions in Law at the Founding and Thus Belong to the Judicial Branch

The alleged violations have an analogous common law cause of action that existed at the time when the Constitution and Bill of Rights were established. The analogous cause of action to fraud was deceit, which is sufficiently similar for all purposes in appellant's case at hand. Given the direct analogous relation between the causes of action this case cannot be assigned to administrative proceedings, and doing so would be in direct violation of the concept of separation of powers embodied throughout the Articles of the Constitution.

As the cause of action in the present case has this close analogy to a long-established common law cause it therefore does not constitute a new "public right" against the government created by Congress. Therefore, the case must be adjudicated by an Article III judge in an Article III Court to preserve the separation of powers between the legislative and judicial branches that the Founders so clearly called for throughout the Constitution.

The Commission may question such closeness of analogy between the causes of action, however appellant's claim is supported by statute, case precedent, and legal definitions. The Commission's ALJ found Young to be liable under § 206(2) of the Investment Advisers Act of 1940 which forbids "employing any device, scheme, or artifice to defraud any client" and "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." The English common law effective at the time of the Constitution's drafting contained an action in deceit in which a person was liable for, "[a] false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage." *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B 1789). Analogously, appellant's alleged violation of § 206(2) required a finding that petitioner made a material misstatement or omission (or engaged in some other fraudulent activity), and that in so doing, it acted with the requisite level of culpability.

In rejecting the dissent in Stern v. Marshall, the Supreme Court cited the dissent's claim regarding Northern Pipeline as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue biding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." Stern, 564 U.S. at 494. Importantly to appellant's argument, the majority opinion stretched this further to cover the situation at hand, noting that "[s]ubstitute 'tort' for 'contract,' and that statement directly covers this case." Id. In the same way that Stern involved a common-law tort, a cause of action in deceit, being inappropriately adjudicated by a non-Article III tribunal, this case also suffered such inappropriate adjudication. Appellant argues, and is entirely supported by the precedent established in Stern, that removal of this case from an Article III court represents an impermisSIBe violation of the concept of separation of powers so fundamental to the governance of our union.[13]

B. The Relief Sought Implicates a Legal Right and Therefore Petitioners Have a Right to a Jury Trial

The Supreme Court, in *Tull v. United States*, concluded that if appropriate analogies could have been heard in either a court of equity or a court of law at the time of the enactment of the Bill of Rights, then that would be sufficient for a requirement of the preservation of the right to a trial by jury. In order to determine whether a modern right to jury trial exists for a cause of action "characterizing the relief sought is more important than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Tull* at 421 (citing *Curtis v. Loether*, 415 U.S. 189, 196 (1974)). In the case at hand, appellant has been barred from associating with a broad swath of persons. This prohibition, in essence, serves to limit his First Amendment right of association. Jury trials must be available for any "suit in which legal rights were to be ascertained and determined." *Parsons*, 28 U.S. at 434.

In the Matter of Bernerd E. Young the Commission ordered that he be barred from association with any broker, dealer, investment adviser, municipal securities

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[13] *Id*. at 495.

dealer, or transfer agent. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The appellant has had his legal right to associate with brokers, dealers, investment advisers, municipal securities dealers, and transfer agents for the advancement of beliefs and ideas eradicated, far beyond any intended effect of a license revocation or working relationship ban. This elimination of appellant's constitutionally provided right must be a "suit in which legal rights were to be ascertained and determined" which requires the option of a jury trial. *Parsons*, 28 U.S. at 434. Unlike the approved administrative tribunal found in *Konig v. Fair Employment & Housing Commission, 28 Cal. 4th 743*, the Securities and Exchange Commission administrative proceedings do not provide any such option of a jury trial to defendants, rather it is, like most other important matters, inappropriately left to the discretion of the Commission alone. Certainly, Young has not freely elected to resolve his case before the SEC ALJ, and the record affirms this.

4. Whether the Commission's determinations as to both liability and sanctions are contrary to law, arbitrary or capricious, or unsupported by substantial evidence?

A clearly reversible error in the Commission's decision exists in the Order Imposing Remedial Sanctions where "Young is prohibited, permanently, from serving or acting as an…officer or director…" wherein Section 21(d)(2) of the '34 Act allows such a sanction only to be levied in a District Court, not in an administrative proceeding as the Commission has erroneously chosen to do here. To remedy such an error, appellant argues that this Court remand this case in its entirety to a Federal District Court or a complete reversal of error.

The Commission's finding that Young's acts and omissions contributed to the distribution of misleading disclosures to SGC's clients is false, and incorrectly draws this contribution by extending duties and responsibilities to Young beyond what the industry accepts as belonging to members of compliance departments. Young's direction that the FAs provide the Disclosure Statement to potential investors should only be viewed through the lens of a compliance officer, that is, that Young made this direction based on the required distribution of such materials under Reg. D of the 1934 Act. While the Commission seeks to assign Young liability from this directed distribution, the alternative of not distributing such disclosures would be of an outright illegal nature, and directly in opposition to the accepted responsibilities of a compliance officer. Young had no role in validating, verifying, or approving the factual content of those training materials, but merely informing the FAs of their regulatory duty to provide disclosures to potential investors. Further, the Commission fails to draw any causation between Young's actions and loss by investors, which would be required for a finding of liability warranting a sanction or penalty.

The Commission claims Young's 'acceptance' of SIB's lack of transparency establishes his negligence on its own right, however, this finding is completely dismissive of the entirety of Young's Due Diligence actions and investigations. From the moment Young assumed the responsibilities of compliance at Stanford he vigorously sought to carry those out beyond what was required by regulation, and certainly well beyond what his role at Stanford called for. The Commission would have this Court believe that Young was negligent in his duties, within his role as a compliance officer, when in truth, Young not only fulfilled those duties, he sought to ensure that those whom he trained would also fulfill all of their regulatory compliance requirements. All claims of Young's negligence are predicated on duties and responsibilities well outside the purview of compliance, and therefore, contrary to law.

The Commission's continued rejection of Young's reasonable reliance on internal and external legal counsel's acceptance of legitimate Antiguan privacy laws either indicates its lack of research into the matter or its disinterest in non-American regulatory systems in an arbitrary and capricious manner. The Commission similarly elects to disregard Young's reliance on vetted Antiguan financial experts who supported the interpretation of such Antiguan laws in line with all other opinions on their nature. While it has since come to light during various criminal investigations that Young's primary Antiguan contacts on whom he was directed to rely were receiving bribes from Allen Stanford in order to perpetuate his fraudulent schemes, there is no way the Commission could have reasonably expected Young to know, or uncover that fact on his own at that time. These men directly lied to Young's on multiple occasions and was paid to do so long before Young was hired to conduct Due Diligence on SIBL. Young completely agrees with the holding's claim that "when the facts known to a person place him on notice of a risk" of fraud "he cannot ignore the facts and plead ignorance of the risk." However, this was not at all the actuality of the circumstances in which Young underwent his Due Diligence investigations. He was directed to coordinate with bribed liars by the executives who were the other members of this fraudulent artifice. Therefore, the Commission points to no facts based in the reality of the unique situation that would reveal to Young that he himself was caught in the middle of Allen Stanford's web of deceit. In fact, appellant finds it beyond bizarre that the Commission would allege such obviousness of scheme for a compliance officer when they, and various other American financial regulatory agencies, failed to uncover such deception when they subjected SIBL to roughly 17 regulatory exams and inspections over the previous decade. If those whose mandate it is to uncover such fraud were duped, then how could they imagine that one lone compliance officer, still acclimating to a new and complex position, would have reason to have known of the fraud? Certainly these facts make it entirely contrary to law and reveal no support for the Commission's finding that Young ever could have possibly knowingly made or authorized misleading statements to FAs, and certainly never to potential or current investors, thereby preventing any of the Commission's findings of causation of substantial loss, or risk of substantial loss.

The administrative tribunal findings towards appellant's violations in reference to his industry bar and disgorgement require "cause of violation due to at or omission the person *knew or should have known*," is a holding that the Commission is unable to support in light of the truth of appellant's maximum possibility to have known at the time that the Commission alleges the violations to have occurred. In addition, Commission's finding that Young's industry bar and disgorgement were unsupported by substantial evidence in its application of the Public Interest test. That is that when considering the six factors[14] the Commission failed to indicate with significance, how it came to its decision, and that any decision finding those factors to weigh against appellant are sufficiently unfounded so as to encourage this Court to overturn that ruling. Barring a complete dismissal of sanctions, appellant argues that a more appropriate sanction for the first violation of

[14] Egregariousness of the respondent's actions, degree of scienter, isolated v. recurrent nature of infraction, defendant's recognition of wrongful nature of actions, assurances against further action, and employment opportunities for future violations. [15 U.S.C. 80b-3(f)]

a lifelong, publicly trusted (trusted by major American financial regulatory agencies to handle fair fund distributions) financial regulator would be monitoring. Appellant also argues that the Commission's calculation of disgorgement is unsupported by law as it extends to salary outside of the five years allowed by the statute of limitations. *Pentagon Capital Mgmt. PLC v. SEC*, 2014 U.S. LEXIS 4577, and *SEC v. Graham*, 823 F.3d 1357. Additionally, *Rapoport v. SEC*, 682 F.3d 98, would suggest a complete throwing out of the administrative penalties due to superficial ALJ analysis, particularly in Young's Tier 3 sanctions that merely have one paragraph, with little to no meaningful analysis.

Young's sterling reputation garnered throughout his long career as a regulator preceded his arrival to SGC, and the fraudsters at Stanford knew he would not hesitate to report their actions to regulatory agencies were he to uncover them. In light this reputation, this Court should understand that the secrecy and bribery were designed to enshroud the bank's fraudulent actions from the internal scrutiny of the compliance division that Young had recently inherited. Appellant sought to perform his due diligence as rigorously as he had throughout his entire career as a regulator, but was rebuffed at every end, either by internal obstruction or with outright lies by the bribed officials and those in on the scheme.

Further, appellant seeks to clarify for this Court that it is industry practice to rely on audited financial statements when those statements are prepared in accordance with the regulatory environment in which they are prepared. Also, it is industry practice to rely on the regulatory authorities, such as the SEC, FINRA, or the FSRC to conduct examinations and ferret out wrong-doing. Young is neither a lawyer nor an accountant, nor did his role at SGC ever call upon him to make judgments that industry norms place on those types of actors.

In final, regardless of the above dispositions, it is important to note that appellant was at no point the 'maker' of the complained documents according to a *Janus Capital Group, Inc v. First Derivative Traders*, 564 U.S. 135, interpretation of the term. There, Justice Clarence Thomas stated that "liability under 10(b) and 10b-5 requires person to have ultimate authority over the statement," and that liability could not arise simply because a [person] was "significantly involved." "Janus definition of "maker" should apply to the SEC in addition to private actions, and this narrow interpretation should also extend to Section 17(a)(2) violations given that both provisions are designed to perform the same function, albeit at different stages of security dealings." *Duke Law Journal*, Vol 65:527, at 530. As such, Young cannot be found to be the ultimate authority, and any of the Commission's holdings that Young violated 10(d)-5, or similarly, 17(a)(2), should be dismissed outright. Further, in response to the February Talking Points, the ultimate authority lies in the speaker, not the speechwriter, and even the Commission cannot directly attribute those to Young, as they were transmitted by FAs directly to clients.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the court dismiss all violations, penalties, sanctions, disgorgements, and assessments of liability against appellant. Barring that, appellant also urges this Court to find his Constitutional rights as having been repeatedly trampled by the actions of the Commission and its associated actors, and to remand the case to the originally requested forum of the appropriate United States Federal District Court. Were the Court to fail to enact either of the above prayed resolutions, appellant respectfully requests that a reduction in disgorgement and penalties to a level more appropriate for a first-time violator who has spent the majority of his career serving the public interest in the realm of financial regulation, whom even the Commission has not accused of having any degree of scienter.

Respectfully submitted,

(s)____________________

Bernerd E. Young, Pro Se Petitioner

Ms. Lisa K. Helvin

U.S. Securities and Exchange Commission

Office of the General Counsel
100 F Street N.E.
Washington, DC 20549

Ms. Dina B. Mishra
U.S. Securities and Exchange Commission
Office of the General Counsel
100 F Street N.E.
Washington, DC 20549

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(s)____________________________

BERNERD E. YOUNG, *pro se*

CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Initial Brief was served upon Appellee via personal delivery on January 13^{th}, 2017.

Appellee:

Dina Mishra
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
mishrad@sec.gov

Lisa K. Helvin
Office of the General Counsel
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
helvinl@sec.gov

By: ______________________
BERNERD E. YOUNG, *pro se*