UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RAJAT K. GUPTA,	:	
	:	11-cv-01900 (JSR)
Plaintiff,	:	
v.	:	
SECURITIES AND EXCHANGE COMMISSION,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

RICHARD M. HUMES (RH-2021)
Associate General Counsel

CHRISTOPHER M. BRUCKMANN (CB-7317)
Senior Counsel

Attorneys for Defendant
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5104 (Bruckmann)
Facsimile: (202) 772-9263

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In its opening memorandum, the SEC identified three instances where a plaintiff seeking judicial review of agency action might be able to overcome the jurisdictional bar of sovereign immunity: (1) the claim arises under the Administrative Procedure Act ("APA"); (2) the claim is wholly collateral to the agency's statutory review provision, is outside the agency's expertise, and is the only route to obtain meaningful judicial review; or (3) the claim comes within a narrow exception for claims of *ultra vires* agency action.

In his Opposition, Gupta effectively concedes that neither the APA nor the *ultra vires* route is available to him and appears to rely primarily on the second route identified by the SEC. That position suffers from the fatal flaw that Gupta can raise affirmative defenses in the administrative proceeding and seek judicial review if he does not prevail. In such situations, the Supreme Court has specifically rejected the argument that the expense and disruption associated with being a respondent in an administrative proceeding justifies immediate judicial review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980) ("SoCal"). Gupta also fails to provide a basis for finding that his claims are ripe for review and not subject to exhaustion requirements. Finally, Gupta does not contest the SEC's showing that he has failed to state a claim for injunctive relief, the only relief sought in the Complaint for his due process claim.

ARGUMENT

I. The APA's Waiver of Sovereign Immunity Does Not Authorize Gupta's Claims.

A. APA Section 702 does not waive the SEC's sovereign immunity to permit Gupta's claims.

Gupta seems to contend that Section 702 of the APA, 5 U.S.C. 702, effects an unrestricted, wholesale waiver of the government's sovereign immunity from claims seeking

declaratory and injunctive relief. In so doing, however, he ignores Section 702's limits on judicial review of agency action. Section 702 provides, in relevant part, that:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. . . . *Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought*.

(emphasis provided). The Second Circuit, interpreting this italicized language, held that Section 702 does not waive sovereign immunity when agency statutes expressly or impliedly limit judicial review. In *Sprecher v. Graber*, 716 F.2d 968 (2d Cir. 1983), a case cited by the SEC in its opening memorandum, the court reviewed the legislative history of Section 702 and concluded that it "demonstrates that Congress did not intend to waive sovereign immunity where a matter is statutorily committed to agency discretion or where 'another statute provides a form of relief which is expressly or impliedly exclusive.'" *Id*. at 974 (citation omitted). Thus, the court held that Section 702 has a limited impact on modern regulatory agencies (like the SEC) because:

> The legislation establishing the authority of such agencies usually defines the scope of judicial review over their actions and sovereign immunity will generally continue to bar other kinds of lawsuits against them as a consequence of the proviso to Section 702.

Id. at 974. In *Sprecher*, the court held that claims that "f[e]ll within the proviso to Section 702 preserving exiting limitations on judicial review" were "barred by sovereign immunity." *Id*.

In support of his argument that Section 702 waives sovereign immunity without any limits, Gupta relies primarily upon the D.C. Circuit's decision in *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006). Although *Trudeau* held that the second sentence of Section 702 contains a waiver of sovereign immunity, it did not address the issue presented here: whether Section 702's preservation of existing limits on judicial review circumscribes the waiver of sovereign immunity where the agency has a specific statutory review provision. It appears that in *Trudeau* the government did not contend that there was any statute under which the plaintiff could seek judicial review because the plaintiff was complaining about language in a press release and was not engaged in an ongoing administrative proceeding that could lead to judicial review.

That *Trudeau* does not support Gupta's argument is underscored by *Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005), a case decided shortly before *Trudeau* in which an agency did rely on the existence of a statutory review process. There the D.C. Circuit relied on *Sprecher* and rejected a claim that Section 702 waived sovereign immunity in light of Section 702's limiting language:

> "the APA excludes from its waiver of sovereign immunity . . . claims for which an adequate remedy is available elsewhere, and . . . claims seeking relief expressly or impliedly forbidden by another statute." *See also Sprecher v. Graber*, 716 F.2d 968, 974 (2d Cir. 1983).

416 F.3d at 66 (citation omitted). *Trudeau* did not claim to overrule or limit *Fornaro*; and there was no need to do so as they are not in conflict.

B. Even if the last sentence of Section 702 did not limit the waiver of sovereign immunity, Gupta could not obtain judicial review solely under the Declaratory Judgment Act.

Even if the last sentence of Section 702 were inapplicable here, Gupta could not avoid established limits on judicial review of agency activity by proceeding under the Declaratory Judgment Act, 28 U.S.C. 2201 ("DJA"). It is well-established that the DJA does not give rise to

an "independent cause of action; its operation is procedural only—to provide a form of relief previously unavailable." *In re: Joint E. and S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993). *Trudeau* illustrates this principle well because even though the *Trudeau* plaintiff sought both declaratory and injunctive relief, 456 F.3d at 182, the court found that outside of an APA challenge to agency action, plaintiffs could assert a cause of action only by claiming (1) that an agency action is *ultra vires*, *id.* at 189-190, or (2) that the misconduct alleged gives rise to a "direct cause of action" under the Constitution. *Id.* at 190. These claims are of the types that the SEC has previously identified and shown Gupta cannot rely on.

II. Gupta Must Rely on the Review Process Established in the Federal Securities Laws, Not on a Collateral Challenge in District Court.

Gupta contends that he should be excused from relying on the judicial review provisions of the securities laws for the same reasons the plaintiffs in *Free Enterprise v. PCAOB*, 130 S. Ct. 3138 (2010), were excused, but his case is easily distinguishable from *Free Enterprise* and closely analogous to cases such as *Thunder Basin*, 510 U.S. 200 and *SoCal*, 449 U.S. 232.

The plaintiffs in *Free Enterprise* claimed that the PCAOB's structure violated several constitutional provisions. They did not complain about any agency action. 130 S.Ct. at 3150. Indeed, it was precisely because there was no agency action, or even a legitimate prospect of one, that the Supreme Court found the district court had jurisdiction. The Supreme Court did not require the *Free Enterprise* plaintiffs to arbitrarily challenge a rule or incur a sanction to create an agency action from which they could then seek review. *Id.* at 3150-3151. The Court found such a requirement would be "odd" and not result in meaningful judicial review. *Id.* The Court also relied on the fact that the SEC was powerless to grant the relief the *Free Enterprise* plaintiffs sought: dismantling the PCAOB.

Gupta is in exactly the opposite situation. He is already a party to a proceeding in which he can—and has—raised all of his claims as affirmative defenses. *See* Answer of Respondent Rajat K. Gupta (attached as Exhibit 1). In the administrative proceeding, the SEC can grant the relief that Gupta seeks by finding that (1) it would be improper to apply certain provisions of Dodd-Frank retroactively and/or (2) the proceedings against Gupta should be dismissed on the ground that he was denied due process. At the conclusion of that administrative process, Gupta will have a final agency action that he can petition a court of appeals to review.

Gupta's situation is analogous to that of the plaintiffs in *Thunder Basin* and *SoCal*, who were respondents in anticipated or ongoing administrative proceedings. *See Thunder Basin*, 510 U.S. at 216; *SoCal*, 449 U.S. at 234-235. Those plaintiffs wanted to avoid litigating administrative proceedings, but the Supreme Court held that they had to go through the proceedings and then seek review in accordance with special statutory review provisions. *See* 510 U.S. at 216; 449 U.S. at 244-245. An analysis of the three factors that the Supreme Court set forth in *Thunder Basin* and *Free Enterprise*—(1) availability of meaningful judicial review, (2) agency expertise, and (3) whether the claim is wholly collateral to the review scheme—demonstrates that this case should be dismissed.

A. Gupta can obtain meaningful review in a court of appeals.

Gupta states that "[a]n administrative proceeding would provide no means of asserting the equal protection claim alleged in this action" and "any appellate review of the agency's ultimate determination would be severely truncated and largely meaningless." Opp. at 11. But this is not true. The primary relief Gupta seeks in this Court is dismissal of the administrative proceeding against him, which is within the power of the SEC and court of appeals to order.

Gupta's claim that the SEC's discovery provisions will render the court of appeals review ineffective is inaccurate. Gupta can ask the ALJ to issue subpoenas for relevant and non-

privileged documents and testimony to establish the factual basis for his affirmative defense.[1] 17 C.F.R. 201.232. Also, courts of appeals have the power to remand cases to the SEC for further factual findings. 15 U.S.C. 78y(a)(5). The Supreme Court explicitly rejected in *SoCal* virtually the precise argument that Gupta is making in light of analogous review provisions:

> Socal further contends that its challenge to the Commission's [basis for issuing a complaint] can never be reviewed unless it is reviewed before the Commission's adjudication concludes. . . . Socal also suggests that the unlawfulness will be 'insulated' because the reviewing court will lack an adequate record and it will address only the question whether substantial evidence supported the cease-and-desist order. We are not persuaded by this speculation. The Act expressly authorizes a court of appeals to order that the Commission take additional evidence. Thus, a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate. We also note that the APA specifically provides that a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

SoCal, 449 U.S. at 244-45 (citations, quotations and footnotes omitted). Thus, the relief Gupta is trying to obtain from this Court—avoidance of the pending administrative proceeding—is something to which he is not entitled. The Supreme Court held in *SoCal* that being subject to such a proceeding is not a legally cognizable harm. *Id.* at 244. Gupta must go through the proceeding, raising any objections along the way, and then petition a court of appeals if he is not satisfied with the result. *See also Thunder Basin*, 510 U.S. at 216 (neither complying with agency orders nor incurring potential civil penalties for violations constituted irreparable harm).

B. The SEC has expertise to decide due process and retroactivity issues in administrative proceedings.

The SEC has repeatedly addressed retroactivity concerns. *See* Opening Mem. at 17-18. And it has addressed selective prosecution claims in a number of cases. *See, e.g., In the Matter*

[1] SEC administrative proceedings comport with due process. *Sinclair v. SEC*, 444 F.2d 399, 401-02 (2d Cir. 1971). That they do not employ identical procedures to federal civil cases is not determinative. Different procedures may be employed to ensure due process. For example, there are generally no discovery depositions in criminal cases.

of the Application of Mission Sec. Corp., 2010 SEC LEXIS 4053, at *35-*36 (Dec. 7, 2010) (addressing selective prosecution claim and collecting past SEC cases doing same).

Although the SEC may not have a particular expertise in constitutional issues, that fact alone does not make interlocutory review appropriate. The Supreme Court has found that agencies can and should address constitutional issues relating to administrative proceedings, especially where there would be eventual review in a court of appeals. *Thunder Basin*, 510 U.S. at 215. In both *Thunder Basin* and *SoCal*, the Supreme Court required claims of improper institution of proceedings and constitutional violations to go through the special statutory review provisions. Although the Second Circuit found in *Touche Ross & Co. v. SEC* that the district court had jurisdiction over the plaintiff's challenge to the SEC's authority to promulgate a rule, it specifically rejected the notion that this jurisdiction extended to claims of bias or due process violations, such as Gupta makes here. 609 F.2d 570, 582 (2d Cir. 1979).

C. Affirmative defenses to charges in an administrative proceeding are not collateral to the review scheme for the proceeding itself.

Gupta does not dispute that the SEC is authorized by law to institute administrative proceedings for insider trading or to seek civil penalties. He only disputes whether it was proper to have done so in this instance. He can make all of his arguments regarding that claim in the administrative proceeding. *Cf. Thunder Basin*, 510 U.S. at 212-213 (discussing facts of multiple cases that were wholly collateral, none of which involved an ongoing enforcement or administrative proceeding).[2] This is particularly dispositive here since his claims are

[2] *See also Merritt v. Shuttle, Inc.* 245 F.3d 182, 187 (2d Cir. 2001) (holding that special statutory review provisions "that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are inescapably intertwined with review of such orders. A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order") (citations and quotations omitted). Gupta attempts to distinguish *Merritt* by arguing that that there is no final order in this case. But

inescapably intertwined with the specific facts of this case. Indeed, the SEC may not even impose penalties under any Dodd-Frank provisions if it (1) relies instead on penalties available against persons associated with a registered entity[3] or (2) finds that Gupta did not commit any violations. Thus, Gupta's affirmative defenses to the charges in the OIP are not wholly collateral to the statutory review scheme of the federal securities laws.

III. The Doctrines of Ripeness and Exhaustion Also Bar Gupta's Claims.

A. Gupta's claims are not ripe for review.

Even though Gupta's claims have not yet been addressed by the SEC, he contends that his claims are ripe because the SEC has brought an administrative proceeding against him but not against any other Galleon-related defendant. He claims that the SEC's act of initiating an administrative proceeding somehow represents its final determination on the retroactivity of Dodd-Frank. In fact, the SEC has not made any final determinations. The OIP specifically states that the "Division of Enforcement alleges that" Gupta committed antifraud violations and that the SEC must determine "[w]hat, if any, remedial action is appropriate." OIP at 1, 9.

None of the cases Gupta cites supports his assertion that merely bringing the administrative proceeding makes either the due process or retroactivity claim ripe because the cases all address situations in which agencies had made a final decision. For example, in *Aquavella v. Richardson*, 437 F.2d 397 (2d Cir. 1971), the Second Circuit held that the Secretary

---

Gupta does not—and cannot—explain why such a distinction is meaningful as *Merritt* focused on the need to defer to the process set by an agency's judicial review statute, and did not invite district courts to review agency actions in the middle of that process.

[3] Gupta alleges that he is not a regulated person, but the Order Instituting Proceedings ("OIP") charges that he is associated with one or more registered entities. *See* OIP (Docket Entry 13, Exh. 1) at ¶¶ 6, 9 (discussing that Gupta was a member of the Board of Directors of Goldman Sachs, whose subsidiaries include registered entities); *see also* OIP at ¶¶ 1, 4, 8. The SEC can consider in the administrative proceeding whether Gupta is an associated or regulated person.

of Health, Education and Welfare's decision to suspend payments to a nursing home under the Medicare Act was "final agency action," *id*. at 404, and therefore ripe for review. Similarly, in *Sharkey v. Quarantillo*, 541 F.3d 75 (2d Cir. 2008), the issues were ripe because the revocation of lawful-permanent-resident status "clearly constituted final agency action," giving rise to "a concrete dispute between the parties." *Id*. at 89. Finally, in *Atlantic Richfield Company v. United States Department of Energy*, 769 F.2d 771 (D.C. Cir. 1984), the agency had promulgated a final regulation that plaintiffs contended was in excess of statutory authority. *Id*. at 783.

B. Gupta must exhaust his administrative remedies.

As Gupta appears to recognize, exhaustion is mandatory where, as here, administrative remedies are statutory. *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co.*, 451 F.3d 44, 50 (2d Cir. 2006); *Hayden v. N.Y. Stock Exch*., 4 F. Supp. 2d 335, 337-338 (S.D.N.Y. 1998). Because the securities laws provide an administrative process that leads to judicial review, Gupta's failure to exhaust those remedies requires dismissal of his claim. Nonetheless, even if exhaustion were considered on a prudential basis, Gupta should not be excused from exhausting his administrative remedies.

Gupta relies primarily on *Athlone Industries, Inc. v. Consumer Product Safety Commission*, 707 F.2d 1485 (D.C. Cir. 1983), but it does not support his position. In *Athlone*, the court concluded that the doctrine of exhaustion would not prevent it from resolving the issue of whether an action to assess civil penalties could be brought in an administrative proceeding before the Consumer Production Safety Commission or only in court. But in that case, the agency had "unanimously ruled that it had the authority to assess civil penalties in an administrative proceeding." *Id*. at 1489. Given this and other "unique circumstances," the court decided not to require exhaustion. *Id*. at 1486. In the present case, in contrast, the administrative proceeding is explicitly authorized under the federal securities laws, and neither the ALJ nor the

Commission has ruled against Gupta. Exhaustion would not be futile here. The SEC has not made any final decision about the propriety of the issues Gupta raises in his Complaint.

IV. Gupta's Claim for Injunctive Relief Should Be Dismissed Pursuant to Rule 12(b)(6).

Gupta does not oppose the SEC's argument that he is not entitled to injunctive relief because he has an adequate remedy at law and has not identified cognizable irreparable harm. Rather, he summarily concludes that if he is awarded the declaratory relief he seeks, he will necessarily also be granted injunctive relief. Opp. at 6, n.3. However, Gupta's Complaint does not seek declaratory relief for his due process claim. Because Gupta has not articulated any explanation as to why injunctive relief is appropriate, he fails to state a claim upon which relief may be granted and has no other basis for seeking relief for his due process claim.

CONCLUSION

Accordingly, the SEC respectfully requests that the Court dismiss the Complaint.

Dated: April 15, 2011
Washington, D.C.

Respectfully submitted,

RICHARD M. HUMES (RH-2021)
Associate General Counsel

___s/_____
CHRISTOPHER M. BRUCKMANN (CB-7317)
Senior Counsel

Attorneys for Defendant
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5104 (Bruckmann)
Facsimile: (202) 772-9263
bruckmannc@sec.gov