

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BARBARA DUKA,

Plaintiff,

v.

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

No. 15-cv-357

DEFENDANT’S ANSWER TO AMENDED COMPLAINT

The Securities and Exchange Commission (the “SEC” or “Commission”) hereby states as follows for its answer to the amended complaint:

Preliminary Statement

1. This paragraph contains plaintiff’s characterization of her action against Defendant to which no answer is required.
2. This paragraph contains conclusions of law to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.
3. This paragraph contains conclusions of law regarding administrative law judges (“ALJs”) to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.
4. This paragraph contains conclusions of law regarding *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 561 U.S. 477 (2010) (“*Free Enterprise*”) to which no response is necessary, and Defendant respectfully refers this Court to that decision for a full and accurate statement of its holding.

5. This paragraph contains conclusions of law to which no answer is required, but insofar as an answer may be deemed necessary, Defendant admits that neither ALJ Elliot nor ALJ Grimes was hired through a process involving the approval of the individual members of the Commission and that SEC ALJs have more than one layer of tenure protection, and denies the remaining allegations.

6. This paragraph contains allegations and conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015, ECF No. 73.

7. This paragraph contains plaintiff's characterization of her requested relief to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies that plaintiff is entitled to the relief requested or to any other relief.

Jurisdiction, Venue, and Parties

8. This paragraph contains conclusions of law regarding the Court's jurisdiction over this lawsuit and venue to which no answer is required but insofar as an answer may be deemed required, Defendant denies that the Court has jurisdiction.

9. This paragraph contains conclusions of law regarding the Court's jurisdiction over this lawsuit to which no answer is required, but insofar as an answer may be deemed required, Defendant denies the allegations.

10. Defendant lacks knowledge as to the first sentence of the paragraph except to admit that plaintiff admitted in her answer to the Commission's Order Instituting Proceedings ("OIP") in the administrative proceeding, *In the Matter of Barbara Duka*, Exchange Act Release 74105 (Jan. 21, 2015), *available at* <http://www.sec.gov/litigation/admin/2015/33-9706.pdf>, that she is a citizen of the State of New York and resident of New York, New York. Defendant

admits that at all relevant times, plaintiff worked in New York as an employee of Standard & Poor's Rating Services ("S&P"), a division of McGraw Hill Financial, Inc., where her work concerned S&P's rating of commercial mortgage backed securities.

11. Admit.

Background

12. Defendant admits that plaintiff joined the CMBS group at S&P in 1998, and, in October 2008, was promoted to the position of Co-Manager of U.S. CMBS responsible for CMBS new issuance transactions.

13. Admit.

14. Defendant denies the allegations of this paragraph except to admit that plaintiff left the employ of S&P in early 2012.

The SEC's Investigation

15. Defendant admits that in August 2013, under an Order of Investigation captioned *In the Matter of Standard & Poor's CMBS Ratings* (D-3302), the Enforcement Division ("Division") served plaintiff with a subpoena for testimony and documents.

16. Defendant admits that from October 22, 2013 through October 25, 2013, plaintiff provided sworn testimony in response to questions posed by Division staff. The remainder of the paragraph contains characterizations of the testimony to which no response is required.

16 n.1. Defendant denies the allegations of this paragraph and respectfully refers this Court to the Commission's OIP, *In the Matter of Barbara Duka*, Exchange Act Release 74105 (including, without limitation, paragraphs 5, 28, 29, 35, and 45 of the OIP), which sets forth Defendant's allegations regarding the relationship between the Debt Service Coverage Ratio ("DSCR") and Credit Enhancement for particular ratings.

16 n.2. Defendant denies the allegations of this paragraph and respectfully refers this Court to the Commission's OIP, *In the Matter of Barbara Duka*, Exchange Act Release 74105 (including, without limitation, paragraphs 6, 13, 33, 34, 35, 36, and 43 of the OIP), which sets forth Defendant's allegations concerning S&P's CMBS Presale reports.

17. Admit.

17.a-g. These paragraphs contain plaintiff's characterization of communications between plaintiff's counsel and Division Staff to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

18. Admit.

19. Admit.

The Administrative Proceeding

20. Admit.

21. Admit.

22. Admit.

SEC Administrative Proceedings

23. This paragraph contains conclusions of law to which no response is necessary, and Defendant respectfully refers this Court to its Rules of Practice, 17 C.F.R. §§ 201.100 *et seq.*, and the Federal Rules governing civil litigation.

24. Defendant admits the first sentence of this paragraph and, as to the second sentence, denies except to admit that the SEC ALJ serves as the initial finder of fact and law, though ALJ initial findings are subject to the Commission's *de novo* review, and only the Commission issues final findings of fact and law. *Raymond J. Lucia Cos.*, Exchange Act

Release No. 75837, 2015 WL 5172953, at *22-23 (Sept. 3, 2015); *Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *24-25 (Sept. 17, 2015).

25. This paragraph contains conclusions of law to which no response is necessary, and Defendant respectfully refers this Court to its Rules of Practice, 17 C.F.R. §§ 201.100 *et seq.*, which govern the Commission's administrative proceedings, for a full and accurate statement of their contents.

26. This paragraph contains conclusions of law to which no response is necessary, but insofar as an answer may be deemed required, Defendant denies and respectfully refers this Court to its Rules of Practice, 17 C.F.R. §§ 201.100 *et seq.*, for a full and accurate statement of their contents.

27. This paragraph contains conclusions of law to which no response is necessary, but insofar as an answer may be deemed required, Defendant denies and respectfully refers this Court to its Rules of Practice, 17 C.F.R. §§ 201.100 *et seq.*, for a full and accurate statement of their contents.

28. As to the first sentence of this paragraph, Defendant admits that discovery in administrative proceedings is limited, as is discovery in federal district court under the Federal Rules of Civil Procedure. Defendant admits the second sentence.

29. Defendant admits that administrative hearings usually occur much sooner than trials in federal district court actions. The remainder of the paragraph contains conclusions of law to which no response is necessary, and Defendant respectfully refers this Court to Commission Rules of Practice 230 and 360, 17 C.F.R. §§ 201.230, 201.360, for a full and accurate statement of their contents.

30. This paragraph contains conclusions of law to which no response is necessary, but insofar as an answer may be deemed required, Defendant admits the first sentence and, as to the second sentence, denies and respectfully refers this Court to its Rules of Practice, 17 C.F.R. §§ 201.100 *et seq.*, for a full and accurate statement of their contents.

31. This paragraph contains conclusions of law to which no response is necessary, and Defendant respectfully refers this Court to 15 U.S.C. §§ 77i , 78y(a)(1), and Commission Rules of Practice 410 and 411, 17 C.F.R. §§ 201.410, 201.411, for a full and accurate statement of their contents.

The Powers of the Commission's ALJs

32. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

33. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

33.a-n. These paragraphs contains conclusions of law regarding the Commission's administrative proceedings to which no answer is required, and Defendant respectfully refers this Court to Commission Rules of Practice 111, 141, 155, 180, 200, 201, 220, 230, 232, 233, 234, 250, 322, and 326, 17 C.F.R. §§ 201.111, 201.141, 201.155, 201.180, 201.200, 201.201, 201.220, 201.230, 201.232, 201.233, 201.234, 201.250, 201.322, and 201.326, for a full and accurate statement of their contents.

34. This paragraph contains conclusions of law regarding the Commission's administrative proceedings to which no answer is required, and Defendant respectfully refers this

Court to Commission Rule of Practice 360, 17 C.F.R. § 201.360, for a full and accurate statement of its contents.

35. This paragraph contains conclusions of law regarding the Commission's administrative proceedings to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations, and respectfully refers this Court to Commission Rules of Practice 360, 410, and 411, 17 C.F.R. §§ 201.360, 201.410, 201.411, for a full and accurate statement of their contents.

36. Defendant denies and respectfully refers this Court to Commission Rules of Practice 410 and 411, 17 C.F.R. §§ 201.410, 411, for a full and accurate statement of their contents.

37. This paragraph contains conclusions of law regarding the Commission's administrative proceedings to which no answer is required, but insofar as an answer may be deemed required, Defendant denies the allegations and respectfully refers this Court to Commission Rules of Practice 410 and 411, 17 C.F.R. §§ 201.410, 411, for a full and accurate statement of their contents.

38. This paragraph contains conclusions of law regarding the Commission's administrative proceedings to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations and respectfully refers this Court to 15 U.S.C. § 78d-1(c) and Commission Rule of Practice 360, 17 C.F.R. § 201.360, 411, for a full and accurate statement of their contents.

The Position of SEC ALJ

39. This paragraph contains conclusions of law regarding the ALJ position to which no answer is required, and Defendant respectfully refers this Court to 5 U.S.C. § 3105 for a full and accurate statement of its contents.

40. This paragraph contains conclusions of law regarding the Administrative Procedure Act and the federal securities laws, to which no answer is required, and to the extent an answer is required, Defendant denies and respectfully refers this Court to 5 U.S.C. §§ 500 *et seq.*, in particular 5 U.S.C. §§ 556 and 557, as well as 15 U.S.C. § 78d-1, for a full and accurate statement of their contents.

41. This paragraph contains conclusions of law regarding Commission regulations to which no answer is required, and Defendant respectfully refers this Court to 17 C.F.R. §§ 200.14, 200.30-9, and 200.111 for a full and accurate statement of their contents.

42. This paragraph contains conclusions of law regarding ALJs across the federal government to which no answer is required, and Defendant respectfully refers this Court to 5 U.S.C. § 5372, 5 C.F.R. §§ 930.205 and 930.206, and the website for the United States Office of Personnel Management (<http://www.opm.gov/policy-data-oversight/payleave/pay-administration/factsheets/administrative-law-judge-pay-system/>) for a full and accurate statement of their contents.

43. This paragraph contains conclusions of law regarding ALJs across the federal government to which no answer is required, and Defendant respectfully refers this Court to 5 C.F.R. § 930.204 for a full and accurate statement of its contents.

44. This paragraph contains conclusions of law and characterizations about the statutory and regulatory regimes governing Commission ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

The Appointment Process for SEC ALJs

45. This paragraph contains a characterization of a Notice of Filing submitted by the Division to the Commission on June 4, 2015, in connection with the matter captioned *In the Matter of Timbervest, LLC et al.*, Admin. Proc. File No. 3-15519, to which no answer is required, and Defendant respectfully refers this Court to the filing, attached to plaintiff's amended complaint, for a full and accurate statement of its contents.

46. Defendant denies the allegations of this paragraph, except to admit that, as part of the submission referenced in paragraph 45, above, the Division submitted an Affidavit from Ms. Seidman that stated, in part, that “[b]ased on [her] knowledge of the Commission’s ALJ hiring process, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission.” Defendant respectfully refers this Court to that filing, attached to plaintiff's amended complaint, for a full and accurate statement of its contents.

**Plaintiff’s Allegation that the Appointment Process for SEC ALJs
Violates the Appointments Clause of Article II**

47. This paragraph contains conclusions of law regarding the Appointments Clause of Article II of the Constitution to which no answer is required, and Defendant respectfully refers this Court to the United States Constitution, Article II, Clause 2, as well as *Ryder v. United States*, 515 U.S. 177 (1995), for a full and accurate statement of their contents.

48. This paragraph contains conclusions of law regarding the Commission and *Free Enterprise*, 561 U.S. 477, to which no answer is required, and Defendant respectfully refers this Court to *Free Enterprise* for a full and accurate statement of its contents.

49. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

50. Defendant admits that neither ALJ Elliot nor ALJ Grimes was hired through a process involving the approval of the individual members of the Commission and further avers on information and belief that the same is true of the other SEC ALJs.

51. This paragraph contains conclusions of law regarding the administrative proceeding that is the subject of this action to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

Removal of SEC ALJs

52. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, and Defendant respectfully refers this Court to 5 U.S.C. § 7521 for a full and accurate statement of its contents.

53. This paragraph contains conclusions of law regarding the Commission's ALJs and *Free Enterprise*, 561 U.S. 477, to which no answer is required, but to the extent an answer is deemed needed, Defendant denies the allegations and respectfully refers this Court to that decision for a full and accurate statement of its contents.

54. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, and Defendant respectfully refers this Court to 5 U.S.C. § 7521 for a full and accurate statement of its contents.

55. This paragraph contains conclusions of law regarding the SEC Commissioners and *Free Enterprise*, 561 U.S. 477, to which no answer is required, and Defendant respectfully refers this Court to that decision and *MFS Sec. Corp. v. SEC*, 380 F.3d 611 (2d Cir. 2004), for a full and accurate statement of their contents.

56. This paragraph contains conclusions of law regarding members of the U.S. Merit Systems Protections Board to which no answer is required, but to the extent an answer is deemed needed, Defendant denies the allegations and respectfully refers this Court to 5 U.S.C. § 1202 for a full and accurate statement of its contents.

Plaintiff's Allegation that the Removal Regime Applicable to SEC ALJs Violates Article II's Conferral of Executive Power in the President of the United States

57. This paragraph contains conclusions of law regarding the Commission's ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations and respectfully refers this Court to *Free Enterprise*, 561 U.S. 477, for a full and accurate statement of its contents.

58. This paragraph contains conclusions of law regarding Article II of the Constitution and *Free Enterprise* to which no answer is required, and Defendant respectfully refers this Court to the United States Constitution, Article II, Clauses 1 and 3, as well as *Free Enterprise*, 561 U.S. 477, and 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939), for a full and accurate statement of their contents.

59. This paragraph contains conclusions of law regarding Article II of the Constitution to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations and to the extent the paragraph references *Free Enterprise*, 561 U.S. 477, Defendant respectfully refers this Court to that decision for a full and accurate statement of its contents.

60. Defendant denies the allegations.

61. This paragraph contains conclusions of law regarding Commission ALJs to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

61.a-c. These paragraphs contain conclusions of law regarding Commission ALJs to which no answer is required.

62. This paragraph contains conclusions of law regarding the removal scheme for Commission ALJs and *Free Enterprise*, 561 U.S. 477, to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations and respectfully refers this Court to that decision for a full and accurate statement of its contents.

63. This paragraph contains conclusions of law regarding the Commission's administrative proceeding to which no answer is required, but insofar as an answer may be deemed necessary, Defendant denies the allegations.

Plaintiff's Allegation that the Appointment Process for SEC ALJs Violates the SEC Commissioners' Duties Established by Congress

64. This paragraph contains conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015.

65. This paragraph contains conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015.

66. This paragraph contains conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015.

Plaintiff's Allegation that the SEC's Continuation of the Administrative Proceeding Will Cause Ms. Duka Severe and Irreparable Harm

67. Defendant denies the allegations in this paragraph.

68. Defendant denies the allegations in this paragraph.

69. Defendant denies the allegations in this paragraph.

70. Defendant denies the allegations in this paragraph except to aver that sovereignty immunity bars Ms. Duka from recovering damages from the SEC under these circumstances.

71. Defendant denies the allegations in this paragraph.

**PLAINTIFF'S APPLICATION FOR INJUNCTIVE RELIEF
(COUNT ONE)**

72. Defendant repeats its answers in all preceding paragraphs.

73. Defendant denies the allegations in this paragraph and denies that plaintiff is entitled to the relief requested or to any relief whatsoever.

**PLAINTIFF'S FIRST CLAIM FOR DECLARATORY JUDGMENT
(COUNT TWO)**

74. Defendant repeats its answers in all preceding paragraphs.

75. Defendant denies the allegations in this paragraph and denies that plaintiff is entitled to the relief requested or to any relief whatsoever

**PLAINTIFF'S SECOND CLAIM FOR DECLARATORY JUDGMENT
(COUNT THREE)**

76. Defendant repeats its answers in all preceding paragraphs.

77. Defendant denies the allegations in this paragraph and denies that plaintiff is entitled to the relief requested or to any relief whatsoever

**PLAINTIFF'S THIRD CLAIM FOR DECLARATORY JUDGMENT
(COUNT FOUR)**

78. Defendant repeats its answers in all preceding paragraphs.

79. Defendant denies the allegations in this paragraph and denies that plaintiff is entitled to the relief requested or to any relief whatsoever.

**PLAINTIFF'S FOURTH CLAIM FOR DECLARATORY JUDGMENT
(COUNT FIVE)**

80. Defendant repeats its answers in all preceding paragraphs.

81. This paragraph contains conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015.

82. This paragraph contains conclusions of law pertaining to plaintiff's claim under the Administrative Procedure Act, which was voluntarily dismissed on September 25, 2015.

PLAINTIFF'S PRAYER FOR RELIEF

No answer to the prayer is required. To the extent an answer is required, Defendant denies that plaintiff is entitled to the requested relief or to any other relief.

Every averment of the amended complaint not otherwise answered is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Subject matter jurisdiction is lacking as to all of the claims asserted in this action.

SECOND AFFIRMATIVE DEFENSE

As to all of the claims asserted in this action, plaintiff has failed to state a claim upon which relief can be granted.

Wherefore, plaintiff's requests for relief should be denied and the amended complaint should be dismissed with prejudice.

Dated: October 2, 2015

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United States Attorney

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Justin M. Sandberg
JUSTIN M. SANDBERG