

## Securities Regulation Daily Wrap Up, ENFORCEMENT—2d Cir.: Confusion persists over when SEC can re-start admin cases after ALJ wins, (Jun. 17, 2016)

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By Mark S. Nelson, J.D.

The Commission is on a roll lately, having won several appellate decisions finding that federal district courts cannot hear challenges to the validity of the agency's administrative law judges brought by respondents in SEC in-house proceedings. While the Eleventh Circuit handed the agency its latest victory, confusion persists in two related Second Circuit cases over whether the SEC can re-start those in-house cases immediately or if the agency must await issuance of mandates by the appellate panels (*Duka v. SEC*, June 16, 2016; *Tilton v. SEC*, June 16, 2016).

Most recently, the SEC asked a Second Circuit panel that was to hear an appeal in the agency's case against ex-Standard & Poor's Rating Services executive Barbara Duka to clarify its order vacating and remanding the matter due to another Second Circuit panel's decision siding with the SEC in a case against Lynn Tilton and Patriarch Partners, LLC. Previously, the SEC made a similar request of the *Tilton* panel.

The lower court in *Duka* had enjoined the SEC's administrative case, while the Second Circuit had stayed the in-house case against Tilton pending the appellate outcome. The two panels' orders used similar, but not identical language:

- *Duka* preliminary injunction—"IT IS HEREBY ORDERED that the order of the district court is VACATED, and the case is REMANDED for further proceedings consistent with *Tilton v. SEC*..."
- *Tilton* stay—"The judgment of the district court is AFFIRMED, and our stay on further proceedings by the SEC is VACATED."

In its *Duka* clarification request, the SEC argued that the appellate panel had already issued a certified order to the district court and that it is in the public interest to move forward with *Duka*'s in-house case. But the SEC also noted that it had received email from *Duka*'s lawyer who argued that the Federal Rules of Appellate Procedure specify the timing of the mandate and that clarification of the court's order is not required. *Duka* has said that she plans to join Tilton in asking the *Tilton* panel for panel and en banc rehearing.

Meanwhile, Patriarch Partners, LLC has filed an opposition to the SEC's clarification request in *Tilton*. Patriarch argued that the panel's order was not final and, thus, not immediately effective because it lacked traditional court language that would result in issuance of a mandate "forthwith." Patriarch also cited a Ninth Circuit opinion it said backed application of the mandate rule to the vacatur of a stay issued by either a circuit or district court. For its part, Patriarch would like to see the matter stayed pending the outcome of its rehearing petition.

The cases are Nos. 15-2103 and 15-2732.

Attorneys: Daniel Goldman (Petrillo Klein & Boxer LLP) for Barbara Duka. Mark B. Stern, U.S. Department of Justice, for the SEC. Susan E. Brune (Brune Law P.C.) for Lynn Tilton, Patriarch Partners, LLC and Patriarch Partners VIII, LLC. Megan Barbero, U.S. Department of Justice, for the SEC.

Companies: Standard & Poor's Rating Services; McGraw Hill Financial, Inc.; Patriarch Partners, LLC

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