

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT

ROBINHOOD FINANCIAL, LLC,)
)
Plaintiff,)
)
 v.)
)
 WILLIAM F. GALVIN, SECRETARY OF)
 THE COMMONWEALTH, in his official)
 capacity, AND THE MASSACHUSETTS)
 SECURITIES DIVISION OF THE OFFICE)
 OF THE SECRETARY OF THE)
 COMMONWEALTH,)
)
Defendants.)
)
)

Civil Action No.
2184 cv 00884 BLS2

**BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF A STAY**

INTEREST OF AMICUS CURIAE

Formed in 1919, the North American Securities Administrators Association, Inc. (“NASAA”) is the non-profit association of state, provincial and territorial securities regulators in the United States, Canada and Mexico. NASAA’s U.S. members are responsible for administering state securities laws. The principal activities of NASAA’s U.S. members include registering local securities offerings, licensing the brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to combat fraud and other violations of state securities laws. The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA supports its members and the investing public by promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulations, and other issues related to investor protection.

In this case, NASAA writes in support of the common interest of state securities regulators to ensure that their administrative processes are given appropriate deference, and that unnecessary judicial intervention is avoided.¹

¹ No party or counsel for a party authored this brief in whole or in part, and no person other than NASAA or its counsel has made monetary contributions intended to fund this brief’s preparation or submission.

SUMMARY

On May 27, 2021, the Court denied the motion of Plaintiff Robinhood Financial LLC (“Robinhood”) for a preliminary injunction and requested further briefing to help “decide whether this case should move forward to a declaration as to whether the fiduciary duty regulation² is valid, or whether it should be stayed until the Division’s pending action is concluded.” Memorandum and Order Denying Plaintiff’s Motion for a Preliminary Injunction (the “May 27 Order”) at 7.

A stay of the proceedings in this Court is appropriate. Massachusetts common law is in accord with a consensus among fellow states that courts should defer to legislative grants made to administrative agencies to oversee the laws entrusted to them and to promulgate rules and regulations thereunder. Courts recognize that by allowing administrative proceedings to precede judicial actions, administrative staff with expertise in the laws and regulations at issue add value to a controversy by building an appropriate factual record.

Further, given the Court’s recognition that the majority of the administrative proceeding brought by the Massachusetts Securities Division (the “Division”) should continue regardless of the Court’s handling of Robinhood’s challenge to the fiduciary duty rule, a stay here would give the Court the benefit of a comprehensive administrative record. The administrative hearing officer’s findings could also limit or eliminate the need for court action, which would avoid unnecessary judicial intervention.

² NASAA refers to 950 MASS. CODE REGS. § 12.207(1)(a) as the “fiduciary duty rule.”

ARGUMENT

I. The Court Should Defer to the Administrative Proceeding to Respect Legislative Intent and to Allow the Administrative Record to Develop.

A. Massachusetts and Fellow State Courts Defer to Legislative Grants to Administrative Agencies to Interpret and Enforce the Laws and Regulations Entrusted to Them.

When the Division brings administrative charges alleging violations of the Massachusetts Uniform Securities Act, Massachusetts statutory law provides for adjudication in an administrative forum, and for judicial review after a final order is issued. MASS. GEN. LAWS ch. 110A, §§ 407A, 411. Further, statutory law protects the Secretary’s orders during judicial review by stating that “[t]he commencement of proceedings [to appeal an administrative order] does not, unless specifically ordered by the court, operate as a stay of the secretary’s order.” *Id.*, § 411(b).

The Appeals Court of Massachusetts (Suffolk) has stated that “[w]here the Legislature has provided an administrative process for the resolution of disputes in the first instance, the courts must respect that choice.” *Puorro v. Commonwealth*, 59 Mass. App. Ct. 61, 64 (2003). Other states give similar deference to administrative proceedings. *See, e.g., Ass’n of California Ins. Cos. v. Jones*, 386 P.3d 1188, 1199 (Cal. 2017) (“Where an agency has been granted both the power to adjudicate and to promulgate rules, the Supreme Court generally defers to the agency’s choice of how to proceed”); *Texas Utilities Elec. Co. v. Public Citizen, Inc.*, 897 S.W.2d 443, 446 (Tx. Ct. App. 1995) (“The Legislature’s grant of authority to an administrative agency requires that a court refrain from the premature interruption of the administrative process”) (citations and internal quotations omitted); *Feiler v. New Jersey Dental Ass’n*, 467 A.2d 276, 280 (N.J. Sup. Ct. 1983) (“A suitor may not bring to a court matters entrusted by the Legislature to the expertise of an administrative agency created for the purpose”) (citations omitted); *Furnitureland v. Comptroller*, 771 A.2d 1061, 1065 (Md. 2001) (“[W]here the Legislature has provided an administrative remedy

for a particular matter or matters, there is a presumption that the Legislature intended such remedy to be primary and intended that the administrative remedy must be invoked and exhausted before resort to the courts”). Given the consensus that courts should recognize and defer to legislative grants of authority to administrative agencies, coupled with the general admonition of the Supreme Judicial Court of Massachusetts against “transfer[ring] to the courts the determination of questions which the Legislature has left in the first instance to [an administrative agency],” *Wilczewski v. Commissioner of the Dept. of Env'tl. Quality Engr.*, 404 Mass. 787, 792 (1989), the Court should act with restraint in this case by limiting intrusion into the administrative proceeding as much as possible. It can do so by imposing a stay until the Division makes findings and reaches conclusions. Further, as the Court recognized, Robinhood will suffer no irreparable harm if the Court declines to enjoin the administrative proceeding. *See* May 27 Order at 7.

B. The Administrative Process Is Best Suited to Develop the Record and Advance Resolution of the Dispute.

By staying this case, the Court would benefit in any subsequent court action from the factual record developed in the administrative proceeding. A common reason legislatures grant primary jurisdiction over regulatory disputes to administrative agencies is to allow experts in the laws and regulations at issue to make findings. *See, e.g., Halici v. City of Gaithersburg*, 949 A.2d 85, 94 (Md. Ct. Spec. App. 2008) (“[I]n general, statutes should be interpreted in the first instance in contested cases by the administrative agency, especially in those instances in which the agency possesses specialized knowledge or expertise regarding the underlying subject matter”) (citations and internal quotations omitted); *New Jersey Coalition of Health Care Professionals, Inc. v. New Jersey Dept. of Banking and Ins., Div. of Ins.*, 732 A.2d 1063 (N.J. Super. Ct. App. Div. 1999) (“[T]he basic purpose of establishing administrative agencies to promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with the

staff, resources, and expertise to understand and solve specialized problems”) (citations and internal quotations omitted). Indeed, allowing an administrative proceeding to run its course prior to judicial review achieves a number of purposes, including:

“(1) insur[ing] against premature interruption of the administrative process; (2) allow[ing] the agency to develop the necessary factual background on which to base a decision; (3) allow[ing] exercise of agency expertise in its area; (4) provid[ing] for a more efficient process; and (5) protect[ing] the administrative agency’s autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.”

Citizens for Mount Vernon v. City of Mount Vernon, 947 P.2d 1208, 1211 (Wash. 1997) (citing *McKart v. United States*, 395 U.S. 185, 193-94 (1969)); *see also Voight v. Snowden*, 923 P.2d 778, 781 (Alaska 1996). Massachusetts statutory law likewise recognizes the value of administrative proceedings to subsequent judicial review by providing that reviewing courts “shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” MASS. GEN. LAWS ch. 30A, § 14(7). Premature action in this case will upset all of these recognized purposes of the administrative process. The best way to preserve those purposes is to allow the administrative process to run its course. *See Assuncao’s Case*, 372 Mass. 6, 8-9 (1977) (“[A]llowing the administrative process to run its course before permitting full appellate review gives the administrative agency in question a full and fair opportunity to apply its expertise to the statutory scheme which, by law, it has the primary responsibility of enforcing”) (citations omitted).

The generally recognized benefits and purposes of administrative proceedings apply with particular force in this case because the securities industry is highly regulated and the Division’s

allegations against Robinhood involve multiple regulations consisting of multiple elements in a specialized and nuanced area of the law. An experienced administrative hearing officer will ask the right questions to make salient fact findings. The administrative fact finding process will be valuable regardless of whether the ensuing legal conclusions are drawn by the Division, or ultimately by the Court. Administrative fact finding would also be of particular value to the Court in this case because, as the Court recognizes, the issue before it “is not a pure question of law, because it turns at least in part on the exact nature of Robinhood’s communications and interactions with its clients.” May 27 Order at 7-8. No matter how much of this dispute the Court may ultimately take up, any potential future deliberations can only benefit from an expertly-derived record.

II. The Court Has Already Recognized Reasons to Stay This Case.

A. The Majority of the Administrative Proceeding Will Continue Regardless of Any Decision in This Case.

In its Order denying Robinhood’s motion for a preliminary injunction, the Court found that “[e]njoining the Securities Division from adjudicating the two claims unrelated to the fiduciary duty rule would not be in the public interest.” May 27 Order at 6. In other words, a significant portion of this matter would remain in the administrative forum. The Court therefore rightly asks whether there is value in allowing both matters to proceed simultaneously. *Id.* at 7. The answer is no. Given that the administrative proceeding must continue regardless, and given that administrative fact finding is best suited to develop an appropriate factual record, the Court should stay this case to let the administrative process run its course. Otherwise, the administrative proceeding may proceed simultaneously, entailing unnecessary burdens for both parties and the possibility of diverging factual records, which could then become yet another issue that the Court would be called upon to resolve. Indeed, another reason to wait for the administrative process to

run its course in this case is to “spar[e] the judiciary the burden of reviewing administrative proceedings in a piecemeal fashion.” *Lumbermens Mut. Cas. Co. v. Workers’ Compensation Trust Fund*, 88 Mass. App. Ct. 183, 187 (2015) (quoting *Murphy v. Administrator of Div. of Personnel Admin.*, 377 Mass. 217, 220 (1979)). Given the possibility that Robinhood could seek judicial review of other aspects of the Division’s proceeding, the Court should stay this case in order to ensure that it reviews the entirety of Robinhood’s potential challenges at one time.

B. Many of the Factual Allegations Are Common to Multiple Counts.

As pleaded, the Division’s allegations apply to all counts of the Amended Administrative Complaint. *See* Am. Admin. Compl., ¶¶ 109, 113 and 116. Further, allegations concerning Robinhood’s communications and interactions with its clients will contribute to conclusions regarding the alleged violation of the fiduciary duty rule as well as other alleged dishonest and unethical business practices. Similarly, Robinhood’s alleged failures to follow its own policies will contribute to conclusions regarding alleged dishonest and unethical business practices as well as alleged supervisory failures. Therefore, the same fact finding that will enhance the non-fiduciary duty rule counts in the administrative proceeding will contribute to determinations regarding the alleged violation of the fiduciary duty rule.

C. A Stay Will Promote Judicial Economy and May Limit or Eliminate the Need for the Court to Act.

In its Order denying Robinhood’s request for a preliminary injunction, the Court recognized that it might not need to act “[i]f the Division were to find or conclude that Robinhood’s conduct did not constitute the providing of investment advice or recommendations,” or “[i]f the Division were to find or conclude that Robinhood engaged in unethical or dishonest conduct even assuming that it owed no fiduciary duty to its customers then the fiduciary duty rule would not be

implicated.” May 27 Order at 7-8. Another possibility is that the parties might settle this matter during the administrative proceeding.

Given these possibilities, a stay would be appropriate for multiple reasons. As the Court recognized, Robinhood’s challenge to the fiduciary duty rule is at least partially a question of fact. *See id.* Any administrative fact finding will ease the Court’s burden. Further, as the Supreme Judicial Court has recognized, waiting for the resolution of an administrative process is sound because “[w]ith the benefit of an agency’s factual determinations, understanding of its regulated industry, and statutory construction, a court can then decide whether the agency’s determinations were made in compliance with or ‘[i]n violation of constitutional provisions.’” *Branch v. Commonwealth Emp. Rels. Bd.*, 481 Mass. 810, 816 n.11 (2019), *cert. denied sub nom. Branch v. Massachusetts Dep’t of Lab. Rels.*, 140 S. Ct. 858, 205 L. Ed. 2d 456 (2020) (quoting MASS. GEN. LAWS ch. 30A, § 14) (citations omitted).

It may also be the case that, as applied to these circumstances, the Division will conclude that the fiduciary duty rule is not implicated, which would render the declaratory judgment action moot. A stay is therefore appropriate because it is generally sound judicial practice to avoid adjudicating questions unnecessarily. *See, e.g., Massachusetts Gen’l Hosp. v. C.R.*, 484 Mass. 472, 488-89 (2020); *see also Branch*, 481 Mass. at 816 (“It is a general rule that courts decide only actual controversies ... and normally do not decide moot cases”) (citations omitted).

Finally, the enforceability of the fiduciary duty rule is a matter of significant public interest. If and when it is adjudicated, it should be done in a context where the established facts join the question squarely for a court to decide. Unless and until the Court is certain that the alleged conduct joins that question, it should not weigh in on the enforceability of the fiduciary duty rule.

CONCLUSION

For the reasons described above, the Court should stay this case until the administrative proceeding has concluded, and it should at that time determine whether the factual findings, legal conclusions and/or settlement render the declaratory judgment action abridged or moot and therefore unnecessary to adjudicate.

Respectfully submitted,

NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC.

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