UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9561 / March 14, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3796 / March 14, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 30892 / March 14, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of HARDING ADVISORY LLC and WING F. CHAU	ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW AND EMERGENCY MOTION TO STAY THE HEARING AND PREHEARING DEADLINES

Pending before a law judge are administrative proceedings against Harding Advisory LLC, a registered investment adviser, and its principal, Wing F. Chau, who now petition the Commission for an order granting interlocutory review and staying the hearing and prehearing deadlines. The Division of Enforcement opposes respondents' petition.[1] For the reasons below, the petition is denied.

BACKGROUND

The Commission issued its Order Instituting Proceedings on October 18, 2013.[2] The order alleges that Harding and Chau violated the federal securities laws in their role as investment managers for certain collateralized debt obligation transactions ("CDOs"). As collateral manager to a CDO named Octans I CDO Ltd., Harding and Chau are alleged to have compromised their independent judgment in order to accommodate trades requested by a hedge fund firm, Magnetar Capital LLC, "whose interests were not aligned with the debt investors in

[1] Harding and Chau's petition for review is governed by the Commission's Rule of Practice 400. 17 C.F.R. § 201.400. Unlike Rule 154, which governs motions, Rule 400 does not provide for the filing of opposition or reply briefs. Therefore, once a petition is filed pursuant to Rule 400, any further filings should be made only upon request of the Commission.

[2] *Harding Advisory LLC*, Securities Act Rel. No. 9467, 2013 WL 5670841 (Oct. 18, 2013).

Octans I." According to the OIP, respondents failed to disclose to investors that Harding entered into an agreement with Magnetar and certain subsidiaries of Merrill Lynch & Co., Inc. (collectively "Merrill"), that allowed Magnetar to "exercise[] significant control over the composition of the portfolio." Harding and Chau also allegedly breached their obligations as collateral manager "by purchasing, for inclusion in several other CDOs managed by Harding, tens of millions of dollars' worth of notes from a troubled Magnetar-related CDO underwritten by Merrill." The OIP alleges that Harding and Chau breached these obligations "because they wanted fees that could be earned only if Magnetar agreed to close the Octans I transaction, and because they were seeking to please Merrill and Magnetar."

The law judge set a hearing for March 31, 2014. On December 20, 2013, Harding and Chau moved the law judge for an order (i) extending time and granting a six-month adjournment; (ii) providing that the proceedings would be governed by certain Federal Rules of Civil Procedure pertaining to discovery and pretrial motions; and (iii) requiring the Division to "provide any tags, labels, file folders or other means of keeping materials into which the Division has organized" relevant documents. In support, respondents claimed that the Division had produced an investigative file containing more than 11.5 terabytes of data, which, "in printed form, would exceed the entire printed Library of Congress." Respondents further asserted that the data was provided in a format that "render[ed] even the most basic forms of document searching and sorting impracticable." Because of this, respondents claimed, they were unable to adequately prepare in time for the hearing. In the event that the law judge denied any aspect of their requested relief, respondents also requested that he certify that denial for interlocutory review pursuant to Rule of Practice 400(c).[3]

The law judge denied respondents' motion on January 24, 2014. Although he was "sympathetic to Respondents' situation," the law judge concluded that respondents' desire for extra time did not outweigh the "policy of strongly disfavoring" adjournments enunciated in Rule of Practice 161(b)(1).[4] In doing so, the law judge found "it dispositive that a six-month adjournment will make it impossible for me to complete the proceeding within the [300 days] specified by the Commission" pursuant to Rule 360(a)(2).[5] He considered the difficulties that respondents claimed they would have in adequately examining the Division's document production before the hearing, but concluded that, while "there may one day be an administrative proceeding where the difficulties of preparing for [a] hearing within the time specified by Rule 360(a) are found to warrant some of the extraordinary relief Respondents request . . . this is not

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[3] 17 C.F.R. § 201.400(c) (setting forth criteria that the hearing officer must satisfy before certifying a ruling for interlocutory review).

[4] *Id.* § 201.161(b)(1) (stating that the hearing officer "should adhere to a policy of strongly disfavoring" requests for adjournments or extensions).

[5] *See id.* § 201.360(a)(2) (stating that the Commission "will specify a time period in which the hearing officer's initial decision must be filed with the Secretary . . . [i]n the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors").

that proceeding." The law judge also rejected respondents' other requests by observing that the Federal Rules of Civil Procedure did not apply in administrative proceedings and that the Division's "open file" production satisfied its disclosure obligations.[6] The law judge also denied respondents' request for certification of his decision for interlocutory review, finding that "[t]he law is crystal clear on the issues presented, and there is no ground at all for difference of opinion on it, much less substantial ground."

Three weeks later, on February 14, 2014, Harding and Chau filed an emergency motion seeking reconsideration of the law judge's order or, in the alternative, a stay of the proceedings pending their petition for interlocutory review. Respondents' motion asserted, for the first time, that denying their requested relief would violate their constitutional rights to equal protection and due process. They argued, for example, that the Division was attempting to put respondents at a disadvantage by bringing the present case as an administrative proceeding, instead of bringing a federal district court action, as the Division had done in three previous contested CDO cases. Respondents also argued that the Division's investigation was biased because it had been staffed with a Senior Structured Products Specialist who, respondents allege, had a deep-seated bias against Chau and Harding and a personal stake in the investigation's results because the specialist had "joined the [Division] shortly after having served as ABS portfolio manager for a CDO hedge fund that (i) invested in and lost $10 million in Octans I, and (ii) fired him shortly after losing a client based on a negative evaluation that an affiliate of Harding performed with respect to investments [the specialist] had recommended."

The law judge denied Harding and Chau's motion for reconsideration on February 19, 2014. He concluded that, because most of respondents' arguments "pertain to issues they did not present in the Motion for Adjournment, . . . there is nothing for me to 'reconsider.'" The law judge also found that respondents had not identified any decision or data that the law judge had overlooked that would warrant reconsideration of his original decision and that their new arguments were not appropriate for review in a motion for reconsideration. Nevertheless, the law judge briefly addressed the merits of respondents' new arguments, observing that due process did not entitle respondents to a neutral prosecutor in administrative proceedings[7] and that, in any event, the Commission's decision to institute proceedings was "wholly unaffected by any

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[6] *Harding Advisory LLC*, Admin. Proc. Rulings Rel. No. 1195, 2014 SEC LEXIS 280, at *5–6 (Jan. 24, 2014) (citing *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Rel. No. 69208, 2013 WL 6384275, at *6 (Dec. 6, 2013) (denying request for interlocutory review of respondents' complaint that the Division had not identified certain exculpatory materials or "at the very least" provided a "roadmap" for those documents, and observing that the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings)).

[7] *Harding Advisory LLC*, Admin. Proc. Rulings Rel. No. 1252, 2014 SEC LEXIS 606, at *4 (Feb. 19, 2014) (citing *Jean-Paul Bolduc*, Exchange Act Rel. No. 43884, 54 SEC 1195, 2001 WL 59123, at *4 (Jan. 25, 2001) ("Due process does not require a neutral prosecutor.")).

possible bias" by its staff.[8] The law judge also rejected respondents' argument that the Division had treated them differently from other similarly situated CDO defendants by concluding that such "class of one" claims are unavailable in federal civil enforcement proceedings.[9]

On February 27, 2014, Harding and Chau filed with the Commission the instant petition for interlocutory review and an emergency stay of the hearing and prehearing deadlines. Although respondents requested only that the law judge certify the order denying their initial December motion for adjournment, the instant petition for interlocutory review largely focuses on the constitutional arguments Harding and Chau made for the first time in their February motion for reconsideration, the denial of which respondents did *not* ask the law judge to certify for interlocutory review.

ANALYSIS

A. Respondents' petition for interlocutory review was not certified by the law judge.

Commission Rule of Practice 400(a) provides that "'[p]etitions by parties for interlocutory review are disfavored'" and will be granted by the Commission "'only in extraordinary circumstances.'"[10] Furthermore, the "Commission generally does not consider petitions for interlocutory review where," as here, "the law judge has 'declined to certify [the] petition for interlocutory review.'"[11] In this case, the law judge declined to certify his January order denying

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[8] *Id.* at *4–5 (*citing C.E. Carlson, Inc.*, Exchange Act Rel. No. 23610, 48 SEC 564, 1986 WL 72650, at *4 (Sept. 11, 1986) (stating that, "[e]ven assuming that our staff was motivated by bias," respondents "must not only show that these proceedings were instituted because they engaged in constitutionally protected activities, but also that they were singled out from others who were allowed to commit similar violations with impunity"), *aff'd*, 859 F.2d 1429 (l0th Cir. 1988)).

[9] *Id.* at *5 (citing *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 808 (S.D. Ohio 2003) (finding no precedent to support defendants' claim that being "singled out" by an administrative agency violated their equal protection rights "without [a defendant] also claiming membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights")).

[10] *Warren Lammert*, Exchange Act Rel. No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting 17 C.F.R. § 201.400(a)). In adopting this language, the Commission "ma[d]e clear that petitions for interlocutory review . . . rarely will be granted." *Id.* (quoting *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Rel. No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)).

[11] *Eric David Wagner*, Exchange Act Rel. No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co., Inc.*, Investment Advisers Act Rel. No. 3311, 2011 WL 5434023, at *2 (Nov. 9, 2011)); *accord* 17 C.F.R. § 201.400(c) (stating that any ruling that a

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respondents' request for postponement and other procedural relief, and respondents did not request certification of the law judge's February order denying respondents' request for reconsideration, in which most of respondents' constitutional arguments now before the Commission were first made. These failures to seek or obtain certification are basis enough for the Commission to deny Harding and Chau's petition for interlocutory review.[12]

As for the January ruling for which respondents did seek certification, the law judge's decision not to certify was consistent with the applicable standard for certification. Rule 400(c) states that a law judge "shall not certify a ruling unless," among other things, "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) An immediate review of the order may materially advance the completion of the proceeding."[13] A central issue that respondents asked the law judge to certify, and now continue to press in their petition to the Commission, is whether, on the facts of this case, the law judge abused his discretion in denying their requests for a six-month adjournment and other procedural accommodations. In rejecting respondents' argument that the extraordinary relief they were seeking was warranted in light of claimed impediments to their reviewing the investigative file before the hearing, the law judge assessed the relevant facts in light of established legal standards regarding extensions of time and adjournments, the applicability of the Federal Rules of Civil Procedure to administrative proceedings, and the method by which the Division must produce investigative files. The law judge's fact-bound, discretionary procedural rulings did not involve controlling questions of law and an immediate review would not materially advance the completion of the proceeding; rather, the rulings all presented the law judge with plainly "mixed [questions] of law and fact" that were inappropriate for certification.[14]

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party "submit[s] to the Commission for interlocutory review *must* be certified in writing" by the law judge as satisfying certain criteria (emphasis added)).

[12] *See, e.g.*, *John Thomas Capital Mgmt. Group LLC*, Exchange Act Rel. No. 71415, 2014 WL 294551, at *1 (Jan. 28, 2014) (denying petition for interlocutory review where respondents had not obtained certification from the law judge); *Vincent Poliseno*, Exchange Act Rel. No. 38770, 1997 WL 346154, at *1 (June 25, 1997) (denying petition for interlocutory review where the law judge did not certify his ruling). Even when a law judge certifies a petition for interlocutory review, the Commission will grant such petitions "only in extraordinary circumstances." 17 C.F.R. § 201.400(a).

[13] 17 C.F.R. § 201.400(c).

[14] *Montford & Co.*, 2011 WL 5434023, at *2; *accord Century Pac. Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 371 (S.D.N.Y. 2008) (finding that a "'question of law' certified for interlocutory appeal 'must refer to a "pure" question of law that the reviewing court 'could decide quickly and cleanly without having to study the record.'" (quoting *In re WorldCom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. 2003))); *SEC v. First Jersey Sec.*, 587 F. Supp. 535, 536 (S.D.N.Y. 1984) (holding that, although "an immediate interlocutory appeal would advance the ultimate termination of this litigation," an appeal "would necessarily present a mixed
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B. Respondents' requests for an extension of time and other procedural relief do not warrant directing interlocutory review on the Commission's own motion.

The Commission may also direct interlocutory review on its own motion, but we see no basis for the Commission to do so here.[15] As the Commission has stated, "the Commission's emphatic preference—which embodies the 'general rule' disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review after 'the entire record [has been] developed' and 'after issuance by the law judge of an initial decision.'"[16] That a party "may disagree with the law judge's determination" does not make a ruling appropriate for interlocutory review.[17]

Harding and Chau argue that this case nevertheless presents the type of "extraordinary circumstances" that warrant immediate review. In support, they cite *Clarke T. Blizzard*, in which the Commission granted interlocutory review to consider the "serious potential for prejudice to the integrity of the proceeding" if the Commission were to allow the same counsel to represent both the respondent and witnesses that could be called against him.[18] Harding and Chau's arguments about obtaining various procedural relief do not provide similarly extraordinary circumstances warranting interlocutory review.

The Commission's Rules of Practice grant law judges broad authority to "regulate the proceeding."[19] Because of this, the Commission typically defers to the law judge's management of the proceedings, including decisions about whether to postpone those proceedings. As the Commission has observed, a decision not to postpone the proceedings "is one of several that the hearing officer must make as part of his regulation of the course of the proceeding and, absent

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question of law and fact, not a controlling issue of pure law," and the district court's order was therefore "not appropriate for certification"); *City of Anaheim*, Exchange Act Rel. No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999) (denying petition for interlocutory appeal of certified ruling because the ruling did not involve a "question of law that controls the outcome").

[15] The "discretion to grant interlocutory review" exists even when the law judge has declined to certify the ruling in question. *Wagner*, 2012 WL 1037682, at *2; *see also City of Anaheim*, 1999 WL 1034489, at *1 n.3 (explaining that Rule 400 "in no way limits the Commission's discretion to direct that matters be submitted to it"); 17 C.F.R. § 201.400(a) (stating that the Commission may "at any time, on its own motion, direct that any matter be submitted to it for review"); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, 2004 WL 503739, at *12 ("[T]he Commission retains discretion to undertake such [interlocutory] review on its own motion at any time.").

[16] *John Thomas Capital*, 2013 WL 6384275, at *2 (footnotes omitted).

[17] *Montford & Co.*, 2011 WL 5434023, at *3.

[18] Advisers Act Rel. No. 2032, 2002 WL 714444, at *2 (Apr. 24, 2002).

[19] 17 C.F.R. § 201.111(d).

extraordinary circumstances, should not be immediately appealable to the Commission."[20] Post-initial decision review of such procedural decisions, along with other aspects of the law judge's handling of the case, are therefore generally sufficient to protect a party's rights.[21] The Commission has thus emphasized that interlocutory review is rarely appropriate for "pre-trial discovery orders" and that "complaints about production of documents" will not ordinarily "warrant . . . interference with the orderly hearing process."[22]

In particular, the Commission has declined to review uncertified rulings in cases where, as here, the respondent claimed that he would be deprived of due process if forced to go forward with the hearing given the "voluminous investigatory files" produced by the Division.[23] The Commission has similarly declined to grant interlocutory review of complaints that the Division did not identify exculpatory material or otherwise provide some type of "roadmap" for the produced material.[24] Harding and Chau contend that interlocutory review of their request for procedural relief would nevertheless materially advance completion of the proceeding; but based on the record before us, the law judge appears to have been reasonably managing these proceedings.[25] To grant review of his pre-hearing decisions at this point is likely to only delay

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[20] *Gregory M. Dearlove*, Exchange Act Rel. No. 12064, 58 SEC 1077, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006) (denying petition for interlocutory review).

[21] *See, e.g.*, *Kevin Hall, CPA*, Exchange Act Rel. No. 55987, 2007 WL 1892136, at *1–2 (June 29, 2007) (denying petition for interlocutory review of law judge's decision not to postpone the proceeding where the Division was alleged to have been "tardy" in producing its investigative file); *Dearlove*, 2006 SEC LEXIS 3191, at *6 (stating that law judge's decision not to postpone the proceedings "will be subject to review, along with other aspects of the law judge's handling of the case, after issuance by the law judge of an initial decision"); *cf. Lammert*, 2007 WL 2296106, at *7 (denying petition for interlocutory review where respondents alleged that the Division failed to "preserve crucial evidence").

[22] *Michael Sassano*, Exchange Act Rel. No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007) (quotation marks omitted) (declining to review uncertified discovery ruling).

[23] *Dearlove*, 2006 SEC LEXIS 3191, at *6; *see also Hall*, 2007 WL 1892136, at *2 (declining to review law judge's decision not to postpone the proceeding and noting that the Rules of Practice grant law judges "broad authority" to regulate proceedings).

[24] *John Thomas Capital*, 2013 WL 6384275, at *6 (stating that the Federal Rules of Civil Procedure do not apply in administrative proceedings and rejecting respondents' contention that the Division must specifically identify certain materials within a production or otherwise provide a "roadmap" for those documents).

[25] Respondents argue that the law judge erred as a matter of law by finding it to be "*dispositive* that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission" (emphasis added). Respondents contend that, by using this language, the law judge signaled that he had failed to properly consider each of the factors governing requests for postponement because he believed that he "lack[ed] authority to rule otherwise." That interpretation of the law judge's order ignores that his order does, in fact, weigh

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the proceedings further. And if, *arguendo*, the law judge's refusal to grant respondents their requested procedural relief is incorrect, the denial of that relief can '"be effectively reviewed post-judgment'" by vacatur and remand.[26]

C. Respondents' equal protection and due process arguments do not warrant directing interlocutory review on the Commission's own motion.

Our precedent declining to grant interlocutory review where the law judge has not certified the ruling necessarily counsels against granting interlocutory review of rulings that a respondent does not even ask the law judge to certify. This impediment to interlocutory review applies to respondents' equal protection and due process arguments, which they raised for the first time in their motion for reconsideration, the denial of which they did not ask the law judge to certify. Nor have Harding and Chau identified any extraordinary circumstances surrounding those claims that would warrant the Commission interrupting the normal administrative hearing process on its own motion to call this matter up for interlocutory review.

1. Respondents' alleged constitutional injuries could be remedied in any subsequent appeal to the Commission.

Courts and the Commission have long held that parties are not entitled to an interlocutory appeal merely because their claims are premised on a constitutional right or guarantee.[27] That

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the various factors for postponement; considers the alleged impediments to respondents' ability to adequately review the Division's document production before the hearing; and expressly notes that there might be some case that would "warrant some of the extraordinary relief Respondents request," but ultimately concludes that "this is not that proceeding." In their briefs to the Commission, the parties continue to engage in various factual disputes about respondents' ability to adequately prepare for the hearing, but respondents have not shown why those disputes cannot be resolved or, if necessary, remedied at that yet-to-be-held hearing or any subsequent Commission review.

[26] *Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7 (quoting *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004)); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (determining that, even though a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal," that possibility "has never sufficed" to warrant immediate interlocutory review (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994))); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of "[o]rders relating to discovery matters . . . must usually wait until a final judgment is entered").

[27] *E.g.*, *Flanagan v. United States*, 465 U.S. 259, 266–67 (1984) (holding that a claim "based on the Due Process Clause of the Fifth Amendment" was not subject to interlocutory appeal); *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010) (stating that "Fourth or Sixth Amendment violations . . . have long been held unamenable to interlocutory appellate review");
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Harding and Chau couch their requests for procedural relief as implicating equal protection and due process rights thus does not in itself change the analysis about whether to call this matter for interlocutory review. The issue remains whether any extraordinary circumstances exist that would lead the Commission to conclude that respondents will suffer irreparable harm if resolution of their claims is delayed until the end of these proceedings. Respondents have identified no such harm here, nor can we find any, that could not be remedied post-hearing by vacatur and remand.[28]

Respondents make the vague, unsubstantiated claim that, without granting their requested relief, "the Commission will be unable effectively to address the equal protection violations." To the contrary, Commission precedent described herein makes clear that respondents' claims can be effectively handled by the Commission post-hearing. Respondents are "entitled to make a good-faith argument for a change in the law," but are "obligated to acknowledge that they were doing just that and to deal candidly with the obvious authority that is contrary to [their] position."[29] Here, respondents have failed to address, much less establish, a reason for departing from the Commission precedent discussed herein.

2. Respondents' constitutional claims are facially defective.

Respondents' failure to seek and obtain certification and to show a need for immediate review of their constitutional claims leads us to conclude that there is no basis for the Commission to grant interlocutory review. We also observe that respondents have not made even a colorable showing of the violations they allege. Respondents, for example, identify no evidence to support their allegations that, by bringing this case as an administrative proceeding, the Division intentionally deprived them of procedural safeguards afforded to similarly situated persons, thus violating their equal protection rights. In their petition, Harding and Chau allege that, in recommending that this case be brought as an administrative proceeding, the Division failed to inform the Commission (i) that the Division intended to prevent respondents "from preparing a defense by burying them in documents"; (ii) that the Division investigation "was tainted by a conflict of interest"; (iii) that the Division's position in this case "flatly contradict[ed] positions that the Commission had taken in *SEC v. Torre*"; or (iv) that bringing this case administratively would subject respondents to unequal treatment.

Respondents' speculations in this regard are based solely on the Division's brief in opposition to the present petition for interlocutory review, which states that "the Commission

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Dearlove, 2006 SEC LEXIS 3191, at *5 (denying interlocutory review notwithstanding respondent's argument that the "matter at hand presents extraordinary circumstances with due process implications").

[28] *See also supra* notes 23–26 and accompanying text.

[29] *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012); *see also* 17 C.F.R. § 201.153(b)(1)(ii) (setting forth effect of party's or counsel's signature on papers).

presumably considered the complexity of this case when it set a 300-day deadline for issuance of the initial decision." Respondents interpret the use of the word "presumably" as implying that the Division failed to inform the Commission of the Division's allegedly improper reasons for bringing this matter as an administrative proceeding. But the Division's vague wording in a brief is not evidence of the Division's communications with the Commission. Respondents do not know what the Division told the Commission in recommending that these proceedings be brought, and the Division cannot know all the factors the Commission considered when it made its decision to institute these proceedings.

In fact, respondents' allegations "ignore[] the independence of the Commission's decision-making process."[30] As Harding and Chau themselves acknowledge, the *Commission*, not the Division, authorized and instituted these proceedings based on its "own consultations, deliberations and conclusions with respect to [the Division's] recommendations."[31] Harding and Chau's failure to appreciate the independence of the Commission's decision-making process appears to be based on their misperception of the Division's role in these proceedings. As participants in the investigative process, Harding and Chau "[we]re not entitled to an uncritical or even a neutral Division assessment of their asserted defenses."[32] Instead, the Division's fact-finding investigation into respondents' conduct fell "squarely within the scope of the prosecutorial discretion that it routinely exercises in conducting multi-party investigations, and it is well established that such investigations do not trigger 'the full panoply' of safeguards that are required during an adjudication."[33]

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[30] *Kevin Hall, CPA*, Exchange Act Rel. No. 61162, 2009 WL 4809215, at *22 (Dec. 14, 2009) (rejecting respondents' claim that the Division's allegedly biased investigation tainted the Commission's decision to institute proceedings).

[31] *Edward H. Kohn*, Freedom of Information Act Rel. No. 19, 1975 SEC LEXIS 1217, at *2 (July 15, 1975); *accord* 17 C.F.R. § 202.5(b) ("After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution.").

[32] *Hall*, 2009 WL 4809215, at *22 (citing *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980) (stating that the neutrality requirements "designed for officials performing judicial or quasi-judicial functions . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity")); *accord SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744–45 (1984) (recognizing the propriety of affording Commission staff "considerable discretion in determining when and how to investigate possible statutory violations").

[33] *Hall*, 2009 WL 4809215, at *22 (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (holding that, for purposes of due process, it is not necessary for a general fact-finding investigation to use the "full panoply of judicial procedures")).

Particularly unavailing is respondents' allegation that the Division's investigation was infected by a subordinate staff member who allegedly had "a deep-seated bias against Mr. Chau and Harding and a personal stake in the investigation's results." As noted earlier, Harding and Chau claim that this staff member "infected the integrity" of the Division's investigation, "up to and including" the Division's recommendation to the Commission about these proceedings. But respondents have no support for this assertion other than to speculate that the Commission's decision to bring this case as an administrative proceeding was somehow influenced by a specialist who was removed from the investigation more than a year before the OIP was issued.[34] Moreover, as part of the administrative process, respondents made certain "Wells" submissions, in which they could set forth their defenses and any other information they believed pertinent for the Commission to review during its deliberations.[35] Harding and Chau thus had an opportunity to present arguments to the Commission concerning the institution of these administrative proceedings.[36] But respondents have not identified any claims that they were prevented from including in those submissions, and interlocutory review is not meant to provide respondents with a second bite at the Wells process.[37]

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[34] In a letter dated August 2, 2012, the Division represented to respondents' counsel that the allegedly biased staff member joined the Commission's staff in mid-February 2012 and had since been removed from the investigative team. The Division also informed respondents' counsel that, "[i]n the event that we reconsider this decision . . . [to remove the staff member from the investigation], we will advise you before consulting [that staff member] on matters relating to these investigations so that you have an opportunity to provide us with any additional information relevant to potential conflicts that you deem appropriate."

[35] Title 17, Part 202 of the Code of Federal Regulations provides that persons involved in preliminary or formal Commission investigations may request that the Division inform them of the general nature of the investigation and "may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation." 17 C.F.R. § 202.5(c). The Division forwards such submissions to the Commission if it recommends that the Commission commence an enforcement proceeding. *Id.* This is commonly known as the "Wells" process. *See generally Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations*, Exchange Act Rel. No. 9796, 1972 WL 128568 (Sept. 27, 1972).

[36] Indeed, the Division represented in its opposition to respondents' December 20 motion that, "[i]n February 2012 and during the first half of 2013, [respondents' counsel] made four separate [Wells and "white-paper"] submissions comprising 112 pages of argument and analysis with a total of 251 exhibits, plus a 32-page PowerPoint presentation."

[37] *Cf. United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270 (1982) (holding in a criminal case that the denial of a motion to dismiss based on vindictive prosecution was not immediately appealable, stating that the right to be free from prosecutorial vindictiveness "is simply not one that must be upheld prior to trial if it is to be enjoyed at all").

In making their equal protection arguments, Harding and Chau also oversimplify the Commission's choice of forum for this CDO enforcement action. Respondents claim they are being treated differently than similarly situated parties by comparing the facts and legal theories of their case to three previous CDO cases, noting that, of those cases, the Division withdrew all of its charges and consented to dismissal of its complaint in one case;[38] a jury found against the Division on all of its charges in a second case;[39] and the Division won at trial in a third case.[40] While these cases may share some similarities, there are notable differences, including that two of the three district court cases involved allegations against parties who, unlike Harding, were not registered investment advisers.[41] And regarding the third case, respondents themselves spend a significant portion of their petition distinguishing the facts and legal theories in that matter from their own case.

Simply put, the Commission takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings. And respondents' superficial comparisons to a few other proceedings fall short of establishing a colorable equal protection violation, let alone a violation that, if established, would be irremediable absent interlocutory review.[42] Instead, respondents' references to those other cases appear, at their core, to be more about the evidence and theories of liability. Such questions were not meant to be resolved by the Commission's decision to institute proceedings or through a petition for

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[38] *SEC v. Steffelin*, No. 11-CV-4204-MGC (Nov. 11, 2012 S.D.N.Y) (stipulation of dismissal with prejudice).

[39] *SEC v. Brian Stoker*, No. 11-Civ.-7399-JSR (Aug. 3, 2012 S.D.N.Y) (judgment dismissing complaint based on jury verdict in favor of defendant).

[40] *SEC v. Tourre*, 10-CIV-3229-KBF (S.D.N.Y. Aug. 1, 2013) (entry of jury verdict).

[41] *See Stoker*, No. 11-Civ.-7399-JSR (S.D.N.Y Oct. 19, 2011) (Complaint); *Steffelin*, No. 11-CV-4204-MGC (S.D.N.Y. June 21, 2011) (Complaint).

[42] *Compare Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. July 11, 2011) (declining to dismiss complaint alleging an equal protection violation where there existed "a well-developed public record of Gupta being treated substantially disparately from *28 essentially identical* defendants" (emphasis added) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–66 (2000) (per curiam) (holding that a "successful equal protection claims [may be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment")) *with Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 603 (2008) (limiting *Village of Willowbrook* by holding that "[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking [and] . . . [i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise").

interlocutory review. They instead form the very basis for holding the hearing authorized by the OIP.[43]

Respondents similarly fail to establish that it would be a separate due process "violation to force Respondents to go to trial without an adjournment and other remedies necessary to ensure fundamental fairness in this 22-million document contested CDO case." Such broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts.[44] As the Supreme Court has explained, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[45] And, as noted above, it appears from the record here that respondents are being afforded a meaningful opportunity to be heard.[46]

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[43] *Cf. Hall*, 2009 WL 4809215, at *22 (stating that disagreements about the evidence "are best left to be resolved at the hearing authorized by the OIP" (citing *Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations*, 1972 WL 128568, at *2 (noting that disputes about facts underlying the institution of proceedings "likely . . . can be resolved in an orderly manner only through litigation"))); *accord Withrow v. Larkin*, 421 U.S. 35, 57–58 (1975) (recognizing the "different bases and purposes" for a charging decision and a subsequent adjudication and stating that "there is no incompatibility between [an] agency filing a complaint based on probable cause and a subsequent decision . . . that there has been no violation").

[44] *See, e.g., Blinder, Robinson, & Co., Inc. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988) (rejecting petitioners' due process attack against the Commission's decision to bring administrative proceedings by noting that the initiating of such procedures was "expressly ordained by Congress" and that "to accept petitioners' broadside would do violence to the core value of flexibility (coupled with appropriate procedural protections) that has been the hallmark of the modern administrative process").

[45] *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[46] Respondents also assert, without further explanation, that the institution of administrative proceedings has deprived them of their Seventh Amendment right to a jury trial, but "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977).

Accordingly, it is ORDERED that Harding and Chau's petition for interlocutory review and emergency stay is denied. For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Lynn M. Powalski
Deputy Secretary