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Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of

RAYMOND J. LUCIA
COMPANIES, INC. and
RAYMOND J. LUCIA, SR,

Respondents.

RESPONDENTS' MOTION FOR AN ORDER DISMISSING THE PROCEEDINGS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

DATED: November 29, 2018

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In response to the October 2, 2018 Order issued by Administrative Law Judge Carol Fox Foelak, Respondents, Raymond J. Lucia, Sr. and Raymond J. Lucia Companies, Inc., object to the reinstituted proceeding in this case. Respondents move for an order dismissing this matter, pursuant to Rule 250(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(a), because the statutory deadline within which this case had to be tried has passed. See also 5 U.S.C. § 556(c)(9), (10) (powers of ALJs); 17 C.F.R. § 201.360(b) (initial decisions by ALJs). In the alternative, Respondents move for an order referring this matter for trial before the Securities and Exchange Commission, as this ALJ is barred from adjudicating this matter under Article II of the United States Constitution because of unconstitutional removal protections. Finally, and also in the alternative, Respondents move for an order staying this matter pending adjudication of constitutional objections raised in the United States District Court.

I. FACTS AND PROCEDURAL HISTORY

On September 5, 2012, the Commission filed an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), alleging that Respondents Raymond J. Lucia, Sr., and Raymond J. Lucia Companies, Inc. (RJL), had violated the Securities Exchange Act of 1934 ('34 Act) and the Investment Advisers Act of 1940 (Advisers Act). The alleged violations in the OIP all related to Respondents' use of promotional materials at investment seminars, the last of which occurred in 2010. In the OIP, the Commission ordered that "a public hearing for the purpose of taking evidence" "shall be convened not earlier than 30 days and not later than 60 days from service of this Order[.]" OIP at 10. The Commission also ordered that "the Administrative Law Judge [presiding over the hearing] shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice." Id.

A hearing was commenced on November 8, 2012, before Administrative Law Judge Cameron Elliot. At the time, ALJ Elliot had not been appointed by the Commission to act as a hearing officer. Furthermore, ALJ Elliot was protected by significant limitations on his ability to be removed from his post.

On July 8, 2013, ALJ Elliot issued an initial order, revoking Respondents' registrations, barring them from the industry and imposing substantial fines.

On September 3, 2015, the Commission entered an order imposing remedial sanctions. The Commission ordered that Mr. Lucia be "barred from association with any investment adviser, broker, or dealer," revoked Mr. Lucia's and RJL's investment adviser registrations, ordered both respondents to cease and desist from future violations of the relevant regulations and imposed a penalty of $250,000 on RJL and $50,000 on Mr. Lucia.

On October 22, 2015, the Commission stayed the civil penalties imposed on Respondents but refused to stay the industry bar or the revocation of their respective registrations.

On August 9, 2016, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order. Raymond J. Lucia Companies, Inc. v. S.E.C., 832 F.3d 277 (D.C. Cir. 2016).

On June 26, 2017, Respondents' petition for review was denied by the equally divided Court en banc. Raymond J. Lucia Companies, Inc. v. S.E.C., 868 F.3d 1021 (D.C. Cir. 2017) (en banc).

On June 21, 2018, the United States Supreme Court vacated all prior proceedings because "Judge Elliot heard and decided Lucia's case without the kind of appointment the [Appointments] Clause requires." Lucia v. S.E.C., 138 S. Ct. 2044, 2055 (2018). The Court

remanded for "another ALJ (or the Commission itself)" to "hold the new hearing to which Lucia is entitled." Id.

For the first time since July 8, 2013, this meant that the orders barring Respondents from the industry and revoking their registrations were no longer in effect.

The same day, the Commission issued an order staying "any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge," for 30 days. Order, Exchange Act Release No. 83495 (June 21, 2018). On July 20, 2018, the Commission extended the stay for an additional 30 days. Order, Exchange Act Release No. 83675 (July 20, 2018).

On August 22, 2018, the Commission lifted the stay in this matter, effective immediately. Order, Exchange Act Release No. 83907 (August 22, 2018). The Commission ordered that Respondents "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter," and "vacate[d] any prior opinions" issued in this matter. Id. at 1.

The Commission also said, "Any pending deadlines in each administrative proceeding currently pending before an ALJ or remanded to the Office of Administrative Law Judges, as described above, are hereby vacated and superseded by the procedures and deadlines set forth in this order." Id. at 2. Furthermore, the Commission said, "In all proceedings, the ALJ shall compute the deadlines for scheduling a hearing and issuing an initial decision as specified in amended Rule of Practice 360(a)(2) from the date the proceeding is assigned to a hearing officer pursuant to this order, rather than the date of service of the relevant order instituting proceedings." Id. at 2, n. 7. The Commission also said that all proceedings that had been instituted under the former timing rules in Rule 360, "shall be deemed proceedings" under the

amended rules. Id. The Commission then asserted that the "supersed[ing]" rules for deadlines outlined in the Order "confer no procedural or substantive rights on any party," and could be "modif[ied]" by the ALJ on her own initiative, notwithstanding any contrary provision in the rules of practice. Id.

The Commission did not set a deadline for either the new hearing to be held, or for the newly-assigned ALJ to issue an opinion. Instead, the Commission directed the ALJs to request "proposals" from the parties "for the conduct of further proceedings." Id. at 2.

On September 12, 2018, Chief Administrative Law Judge Brenda P. Murray assigned this matter to Administrative Law Judge Carol Fox Foelak.

On October 2, 2018, ALJ Foelak issued an order directing the parties to submit "a joint proposal for the conduct of further proceedings by November 30, 2018."

II. DISCUSSION

A. This Matter Must Be Dismissed Because the Commission Has Repeatedly Violated Mandatory Deadlines for Conducting a Merits Hearing.

1. The '34 Act, the Advisers Act and the Commission's Rules of Practice all impose mandatory deadlines on this action.

Both the '34 Act and the Advisers Act empower the Commission to institute administrative cease-and-desist proceedings against certain parties under the Act's supervision. 15 U.S.C. §§ 78u-3 (Securities Exchange Act of 1934), 80b-3 (Investment Advisers Act of 1940). Both Sections 78u-3(a) and 80b-3(k)(1) allow the Commission to issue remedial orders to regulated parties "[i]f the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder[.]" Notably, these administrative proceedings shall be commenced by a "notice instituting proceedings," which "shall fix a hearing date not earlier than 30 days nor

later than 60 days after service of the notice unless an earlier or a later date is set by the Commission *with the consent of any respondent so served.*" 15 U.S.C. §§ 78u-3(b), 80b-3(k)(2) (emphasis added).

These administrative proceedings were first authorized in 1990, by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, P.L. 101-429, Sections 203, 401, 104 Stat. 931, 939 (October 15, 1990), and were meant to allow administrative proceedings only in carefully limited ways. As described by a Senate committee in its Report on the 1990 legislation, the legislation was meant to "provide the SEC with an alternative remedy" to federal court litigation, "against persons who commit isolated infractions and present a lesser threat to investors." S. Comm. on Banking, Housing & Urban Affairs, Report on the Securities Law Enforcement Remedies Act of 1990, S. Doc. No. 101-337, at 18 (June 26, 1990) ("Committee Report"). This was also seen as a way of providing a "more timely" process than one found in federal court, "given the extremely congested nature of federal court dockets[.]" Id. The statute therefore "authorizes the SEC to assess money penalties in administrative proceedings," if the SEC "finds, on the record after notice and opportunity for hearing," that a respondent violated certain rules. Id. at 13. But, the Committee noted that the statute required the SEC to "provide a respondent with notice and opportunity for a hearing," which "*must* be set to commence no earlier than thirty days and no later than sixty days after issuance of the notice," "[b]efore the SEC may issue a permanent [cease-and-desist] order[.]" Id. at 19 (emphasis added). The Committee also noted that "SEC orders imposing a money penalty" are "like other final orders in administrative proceedings" and subject to identical judicial review provisions for all other administrative actions by the Commission. Id. at 16.

In 2010, Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended both the '34 Act and the Advisers Act to dramatically expand the Commission's power to impose money penalties in administrative cease-and-desist proceedings. PL 111-203, July 21, 2010, 124 Stat. 1376, 1864. Since Dodd-Frank became law, the Commission has significantly increased its use of administrative proceedings relative to district court actions. Alexander I. Platt, SEC Administrative Proceedings: Backlash and Reform, 71 Bus. Law. 1, 8 (Winter 2015-2016).

In addition to the statutory 60-day deadline, the Commission's rules of practice set forth timing requirements during which the hearing must be held and the hearing officer's initial decision must be issued following the filing of the order instituting proceedings. First, as applicable in 2012, when the OIP was filed in this case, the Rules of Practice affirmed the statutory limits for holding a hearing and imposed strict deadlines for the initial decision. The Rules took it as a given that the hearing officer would hold the hearing within the statutory period and addressed only ways in which an officer might grant a postponement. See 17 C.F.R. § 201.161 (Effective 2003).

With respect to deadlines for the initial decision, the Rules said, "In the order instituting proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary ... [, which] will be either 120, 210 or 300 days from the date of service of the order." 17 C.F.R. § 201.360(a)(2) (Effective 2003). The Rule also provided, "In the event that the hearing officer presiding over the proceeding determines that it will not be possible to issue the initial decision within the specified period of time," then the Chief Administrative Law Judge was permitted "to submit a motion to the Commission requesting an extension of the time period for filing." Id. at § 201.360(a)(3). Notably, any party

was permitted to file a statement in opposition, and the Commission was permitted to grant an extension only if it "determines that additional time is necessary or appropriate in the public interest." Id. Despite providing that this rule was mandatory, this rule said, "These deadlines confer no substantive rights on respondents." Id. at § 201.360(a)(2).

The former rules also empowered both the Commission or the hearing officer to grant requests by a "*party*" to delay the hearing or other relevant deadlines, but stressed that decisions concerning extensions must "adhere to a policy of strongly disfavoring such requests." 17 C.F.R. § 201.161(b) (Effective 2003) (emphasis added). Even then, such "adjournments" "shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary." Id. at § 201.161(c)(1).

As amended, Rule 360 continues to provide strict deadlines for both the hearing and the initial decision. Rule 360 provides that "the hearing officer shall issue an order scheduling the hearing" "to begin" either "one month" or "approximately 2 ½ months" "from the date of service of the order instituting proceedings." 17 C.F.R. § 201.360(a)(2)(ii). Further, the Commission must set out in the OIP that "the hearing officer's initial decision *must* be filed with the Secretary" "either 30, 75, or 120 days" after the completion of "post-hearing briefing." 17 C.F.R. § 201.360(a)(2)(i).

Like the old rule, Amended Rule 360 provides a mechanism by which the hearing officer may request an extension by the Commission for issuing the "initial decision," but not for holding the hearing. The Rule requires that either the "hearing officer presiding over the proceeding" or the Chief Administrative Law Judge file a written motion for an extension. Id. at §§ 201.360(a)(3)(i), (ii). If the hearing officer requests an extension, it must be filed "no later than 30 days prior to the expiration of the time specified for the issuance of an initial decision

and be served on the Commission and all parties in the proceeding." Id. at § 201.360(a)(3)(i). The Chief Administrative Law Judge's motion must be filed "no later than 15 days prior to the expiration of the time specified in the certification of extension, or if there is no certification of extension, 30 days prior to the expiration of the time specified in the order instituting proceedings," and must also "be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion." Id. at § 201.360(a)(3)(ii). These deadlines also purport to "confer no rights on respondents." Id. at § 201.360(a)(2)(i).

The Amended Rules conform to the old rules in allowing either the Commission or a hearing officer to delay the hearing only in limited circumstances. 17 C.F.R. § 201.161(a). With respect to postponements of a hearing, the Commission may grant a request by a "*party*" to delay the hearing but must still generally "adhere to a policy of strongly disfavoring such requests." Id. at § 201.161(b) (emphasis added). Even then, such "adjournments" "shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary." Id. at § 201.161(c)(1).

2. The Commission is required to follow these deadlines.

"A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations." Reuters Ltd. v. F.C.C., 781 F.2d 946, 947 (D.C. Cir. 1986); accord Columbia Broad. Sys. v. United States, 316 U.S. 407, 422 (1942); American Hosp. Ass'n v. Burwell, 812 F.3d 183, 190 (D.C. Cir. 2016). Indeed, "courts have long required agencies to abide by internal, procedural regulations even when those regulations provide more protection than the Constitution or relevant civil service laws." Lopez v. Fed. Aviation Admin., 318 F.3d 242, 246 (D.C. Cir. 2003) (internal citation and quotation marks omitted). If an agency disregards rules governing its behavior, this deprives an affected entity of the constitutionally

guaranteed "due process." United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954); see also Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32, 57 (D.D.C. 1998) (Green, J.) ("[H]istory, precedent, and application of the doctrine to all branches of government demonstrate that it is the fundamental concept of due process expressed in the Fifth and Fourteenth Amendments that gives life to the Accardi doctrine."). This constitutional guarantee is "most evident when compliance with the regulation is mandated by the Constitution or federal law[.]" United States v. Caceres, 440 U.S. 741, 749 (1979).

These principles, often referred to generally as the "Accardi doctrine," are so fundamental that an agency's disregard of rules that "afford greater procedural protections" upon parties will void agency action even without a showing of prejudice. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); see also Leslie v. Attorney Gen. of U.S., 611 F.3d 171, 180 (3d Cir. 2010) ("[When an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."); Lopez, 318 F.3d at 247 (agency may not modify its procedural rules if they are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion," regardless of prejudice) (quoting Am. Farm Lines v. Black Bell Freight Serv., 397 U.S. 532, 538-39 (1970)). Where "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." Morton v. Ruiz, 415 U.S. 199, 235 (1974). Thus, if an agency rule "confer[s] a procedural benefit to a class to which complainant belongs," then a court must

"invalidate" any action done in disregard of the rule. Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard, 788 F.2d 705, 708 (11th Cir. 1986).

Rules governing the time in which an agency must act are properly considered such procedurally protective rules. See, e.g., Reuters Ltd., 781 F.2d at 952 (departure from F.C.C. adjudication deadline was void regardless of prejudice); Garcia v. Johnson, No. 14-CV-01775-YGR, 2014 WL 6657591, at *8 (N.D. Cal. Nov. 21, 2014) (Gonzalez Rodgers, J.) (agency's 10-day deadline to conduct interview of alien was "not merely a procedural rule assisting the orderly transaction of business," and thus could not be disregarded, regardless of prejudice to the affected individual); Int'l Labor Mgmt. Corp. v. Perez, No. 1:14CV231, 2014 WL 1668131, at *10 (M.D. N.C. Apr. 25, 2014) (Osteen, J.) (regulation requiring agency to issue decision within seven days of receipt of application was designed to protect petitioners and was binding on agency regardless of prejudice to a petitioner). Notably, in Reuters Ltd., the Court prohibited the F.C.C.'s reconsideration of a licensing grant because it had been issued beyond a period set by the Commission's own rules, even though the Commission had acted to "achieve a fair resolution" of a dispute. 781 F.2d at 947, 952. The Court said, "*Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned[.]" Id. at 950.

Even lesser rules governing only the agency's "orderly transaction of business" may not be disregarded if it results in "substantial prejudice" to a party. Am. Farm Lines, 397 U.S. at 539. In such circumstances, the prejudicial administrative action must be vacated entirely. Lopez, 318 F.3d at 247.

3. The Commission's disregard of applicable deadlines runs afoul of the Accardi doctrine.

Here, the Commission has violated limits established by both statute and Commission rules for commencing the action against Respondents. These rules exist to safeguard

Respondents' rights, and due process requires the Commission adhere to them, regardless of prejudice. Of course, Respondents *have* been prejudiced by the Commission's disregard of its own process because they are forced to defend themselves despite the significant passage of time. Because of these violations, this proceeding may not continue without offending core due process protections.

a. The Commission has disregarded the applicable rules.

First, there is little doubt that the Commission has ignored statutory limits for holding an administrative hearing as well as Commission rules setting deadlines for both commencement of the hearing and issuance of an initial decision. As the OIP acknowledged when it was filed more than six years ago, both the '34 Act and the Advisers Act required that a hearing officer conduct a hearing to begin no later than November 2012, which was 60 days after service of the OIP. This time limit was a mandatory component of the 1990 reforms, which were designed to safeguard due process protections before the Commission instituted final administrative orders. Indeed, the Senate report on the statutes stressed that a hearing "*must* be set to commence no earlier than thirty days and no later than sixty days after issuance of the notice," "[b]efore the SEC may issue a permanent [cease-and-desist] order[.]" Committee Report, S. Doc. No. 101-337, at 19 (emphasis added).

And while this matter did proceed in some fashion in 2012, to date no hearing has ever been held before an appropriately appointed hearing officer. As the Supreme Court held, "Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires." Lucia, 138 S.Ct. at 2055. The Court recognized that all the proceedings to date were invalid, and said that the only way the Commission could remedy the Appointments Clause defect would be to "hold the new hearing to which Lucia is entitled." Id. The Commission's subsequent August

22nd order requires that Mr. Lucia "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter," "vacat[ing] any prior opinions" "issued in this matter." Order, Exchange Act Release No. 83907, at 1 (August 22, 2018). Thus, as of today, more than six years after the OIP was first filed, the Commission has not held an appropriate hearing before a hearing officer, in violation of the deadline set forth in 15 U.S.C. §§ 78u-3(b), 80b-3(k).

Beyond the statutory deadline, the Commission has also violated its own rules of practice in failing to bring the hearing and failing to have a hearing officer issue an initial decision. First, the Commission's failure to hold a valid hearing within 60 days of service of the OIP also violated Rule 360, which says the hearing officer "*shall*" order that a hearing begin no later than "approximately 2 ½ months" "from the date of service of the order instituting proceedings." 17 C.F.R. § 201.360(a)(2)(ii) (emphasis added). This language is mandatory and does not contemplate any equitable exceptions. And, as discussed, this 2 ½-month deadline has been exceeded by more than six years.

Next, the proceedings here have violated the rules pertaining to the issuance of the hearing officer's initial decision. As set out in the OIP, and consistent with then-applicable Rule 360(a)(2), the hearing officer in this case was required to issue an initial decision within 300 days from the date of service of the OIP. That deadline has long passed. And even applying the revised timeframe found in amended Rule 360, which allows up to 120 days after the hearing for the officer to file an initial decision, having never had a valid hearing, that mandatory deadline for a decision was violated years ago.

Critically, while these rules do allow for certain extensions, none of the procedures governing such extensions have been followed. Most significantly, the statutory deadline applies

"unless an earlier or a later date is set by the Commission *with the consent of any respondent so served.*" 15 U.S.C. §§ 78u-3(b), 80b-3(k)(2) (emphasis added). But Respondents have never consented to any extension of the deadlines and instead have insisted all along that they should have been tried within the statutory period.

The extension provisions in the rules are no different. A hearing may be adjourned for no more than 21 days only after a written request by a party and only in a formal order on the record in writing, but even then extensions are strongly disfavored. See 17 C.F.R. § 201.161. But no request has ever been filed by any party to this proceeding, and, at any rate, the adjournment has lasted much longer than the 21 days contemplated by the rules.

The waiver provisions for the initial decision deadlines have similarly been disregarded. In 2012 the rules required a written motion be filed by the Chief Administrative Law Judge, only if she determined in "her discretion" that such a request was warranted, and only if the hearing officer requested the extension prior to the expiration of time to file the decision. 17 C.F.R. § 201.360(a)(3) (Effective 2003). The rules also required that the hearing officer give the parties an opportunity to file any objections. Id. While these requirements have since been relaxed somewhat, to allow the hearing officer to file the written request for an extension, such a request must be made before the expiration of time and served on the parties so that they may have an opportunity to object. 17 C.F.R. § 360(a)(3). Here, of course, there was no such written request for an extension, and Respondents were never provided with an opportunity to object. As a result, no valid extension could have been issued.

Furthermore, the Commission's August 22, 2018 order, which purports to waive *all* of the normal rules discussed above, itself violates the Rules of Practice. Apparently recognizing that the deadlines set by the statute and the rules have been completely disregarded, the

Commission's order says, "In all proceedings, the ALJ shall compute the deadlines for scheduling a hearing and issuing an initial decision as specified in amended Rule of Practice 360(a)(2) from the date the proceeding is assigned to a hearing officer pursuant to this order, rather than the date of service of the relevant order instituting proceedings." Order, Exchange Act Release No. 83907, at 2 n. 7 (August 22, 2018).

But the Commission has no authority to reset its own deadlines in this way. First, the Commission can never contradict the clear and unambiguous statutory language found in Sections 78u-3(b) and 80b-3(k). See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Indeed, the statute speaks in terms that the hearing "shall" be held within 60 days, and "[t]he word shall is ordinarily the language of command." Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (internal quotation marks omitted). And there is no provision in these statutes that empowers the Commission to relax this mandatory deadline by order.

Second, the Commission's own rules provide limited ways to extend applicable deadlines, but none of these applies here. The Commission has formal avenues to grant extensions for both the time to hold the hearing and the officer's issuance of her initial decision, but it has not followed any of them here. See 17 C.F.R. §§ 201.161, 201.360. Because such rules exist, this suggests that the Commission has formally limited itself to the rules it has set out. After all, the rules of practice were passed after a notice and comment period, as an exercise of the Commission's formal rulemaking authority. See Amendments to the Commission's Rules of Practice, Release No. 34-78319 (July 13, 2016). But there is no catch-all provision in the rules that allows the Commission to simply restart the clock, or otherwise informally disregard the

rules that were formally adopted. Notably, the August 22nd order cites no authority in any statute or rule for its ability to disregard Rule 360. Instead it merely contends that the rules no longer apply. See Order, Exchange Act Release No. 83907, at 2 n. 7 (August 22, 2018). But "rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life." Reuters Ltd., 781 F.2d at 951.

Of course, what makes the Commission's disregard for the deadlines all the more egregious is that these deadlines applied in this case solely because of the *Commission's* decision to proceed in an administrative forum. Only the Commission can elect to proceed in this forum, which comes with these applicable deadlines. See 15 U.S.C. §§ 78u-3, 80b-3(k)(1). With the Commission having made that decision, Respondents have done nothing more than consistently insist that the Commission play by its own rules. Indeed, despite Respondents' years-long objections to this process, which were ultimately sustained by the Supreme Court, Respondents have also insisted all along that the Commission must, at least, follow its own deadlines. The Commission must live with its choice of forum and be bound by the rules it chose.

b. The Commission's violations of its own deadlines render this proceeding void.

Even if the Commission sanctions these violations of deadlines set by both statute and rules, the Constitution does not. Because the deadlines are derived from statutory guarantees and are designed to "afford greater procedural protections" to respondents in administrative proceedings, the Commission's attempts to disregard them are void. See Vitarelli, 359 U.S. at 539. Thus, this proceeding should be dismissed regardless of whether Respondents suffered prejudice from the delay. See Reuters Ltd., 781 F.2d at 952.

First, the violation of the statutory deadlines implicates core due process concerns and constitutes a direct violation of rules intended to protect respondents like Mr. Lucia and RJL. The due process concerns requiring an agency to follow its own rules are "most evident when compliance with the regulation is mandated by the Constitution or federal law." Caceres, 440 U.S. at 749. Sections 78u-3(b) and 80b-3(k) mandate that a hearing be held within 60 days of the order instituting proceedings. Moreover, this statutory command was intended to furnish core due process protections by allowing the Commission to institute administrative proceedings only if the Commission also promptly gave a respondent notice of the charges against him and provided him with a hearing within 60 days of that notice. See Committee Report, S. Doc. No. 101-337, at 18. This is precisely the kind of limit on agency action that is "intended primarily to confer important procedural benefits upon individuals" in administrative proceedings that an agency may not disregard at will. See Lopez, 318 F.3d at 247. Indeed, deadlines for agency action such as these must be generally followed, regardless of prejudice. See, e.g., Reuters Ltd., 781 F.2d at 952; Garcia, 2014 WL 6657591, at *8; Int'l Labor Mgmt. Corp., 2014 WL 1668131, at *10. Otherwise, the statute "would lack meaning if the agency had no obligation to comply with the deadline in the first place." American Hosp. Ass'n, 812 F.3d at 190.

Second, the deadlines set out in the rules are of a similar mandatory nature. Just as with the statutory deadline, Rule 360 says that a hearing officer "*shall*" schedule a hearing to begin no later than "approximately 2 ½ months" "from the date of service of the order instituting proceedings." 17 C.F.R. § 201.360(a)(2)(ii) (emphasis added). And "the hearing officer's initial decision *must* be filed with the Secretary" "either 30, 75, or 120 days" after the completion of "post-hearing briefing." 17 C.F.R. § 201.360(a)(2)(i) (emphasis added). These are premised in mandatory terms and the Commission may not simply disregard them.

Moreover, because the rules allow extensions, but only upon formal application and only for good cause, this suggests the rules are meant to protect important procedural rights for the benefit of respondents. Extensions for the timing of the initial hearing are "strongly disfavor[ed]" even upon a written application. See 17 C.F.R. § 201.161(b). And a hearing officer unable to comply with the deadlines for issuing an initial decision must still file an extension request in writing before the expiration of the deadline, and the parties may file objections. See 17 C.F.R. § 201.360(a). This suggests that the rules recognize that a prompt hearing and decision serve as important safeguards for respondents, which cannot be dispensed with by a Commission order.

Perhaps it is most telling to consider how the Commission has described these rules as being protective of respondents. In a prepared 2014 speech, then-Director of the SEC Enforcement Division Andrew Ceresney explained that the deadlines within the rules were meant to "produce prompt decisions" from hearings that were "held promptly." Andrew Ceresney, Director, SEC Division of Enforcement, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), available at https://www.sec.gov/news/speech/2014-spch112114ac ("Ceresney Remarks"). This was important to all the parties because "[p]roof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale." Id. Thus, in the Commission's own view, these mandatory deadlines protect a respondent's ability to defend against an enforcement action.

The presence of some disclaimers of rights in some of the rules does not alter their nature as procedurally protective rules. Most significantly, the *statutes* never disclaim a binding effect or the creation of any substantive rights. On the contrary the statutes say that the Commission "shall" hold a hearing within 60 days of the service of the "notice instituting proceedings," which, as discussed above, shows a Congressional purpose to hold the Commission to this

mandatory rule. See 15 U.S.C. §§ 78u-3(b), 80b-3(k). No subsequent disclaimer by the Commission can override this Congressional directive.

Furthermore, agencies may not "avoid application of Accardi by simply disclaiming any binding effect" in the procedural rule at issue. Abdi v. Duke, 280 F. Supp. 3d 373, 389 (W.D. N.Y. 2017) (Wolford, J.), order clarified sub nom. Abdi v. Nielsen, 287 F. Supp. 3d 327 (W.D. N.Y. 2018); see also Damus v. Nielsen, 313 F. Supp. 3d 317, 338 (D.D.C. 2018) (Boasberg, J.) (internal rules may be binding notwithstanding "disclaimer language" so long as the "function" of the rules is to benefit a party in an administrative proceeding). "To find otherwise would render the teachings of Accardi and its progeny meaningless. It is not the internal policy itself that creates (or eliminates) the rights of enforcement. Rather, the relevancy of the internal policy is to ascertain whether it pertains to individual rights." Abdi, 280 F. Supp. 3d at 389.

As these authorities suggest, the Commission's assertion that the mandatory deadlines in the Rules of Practice "confer no substantive rights on respondents," is irrelevant for the present analysis. What matters is the function of the rules, which are protective of the rights of respondents. Attempting to circumvent this function simply by labeling them as optional, but only for the Commission and its functionaries, and not for affected respondents, is just an improper effort to avoid the mandatory consequences of the Accardi doctrine. See id., at 389.

Thus, the Commission's actions, which violate these statutes and its own rules of practice are void. This means the Commission's order directing the matter to proceed notwithstanding the violations of the relevant deadlines has no effect, and the matter must be dismissed.

c. Alternatively, Respondents have been substantially prejudiced by these rule violations, and this matter must be dismissed.

Finally, even assuming the rule violations discussed above are more properly deemed merely to regulate the orderly transaction of business within the Commission, the Commission's

disregard for its rules has caused Respondents substantial prejudice, and thus violated their constitutional rights. See Am. Farm Lines, 397 U.S. at 539. As a result, the proceeding must be dismissed for this reason as well.

First, the concerns described by former Director of Enforcement Ceresney hold true here because Respondents have been substantially hampered in their ability to defend themselves by the passage of time. Respondents are currently asked to defend allegations of misrepresentation related to seminars that were conducted only until 2010. Not only must Mr. Lucia, himself, remember the substance of those seminars, Respondents must also attempt to locate witnesses who also remember those seminars, and in sufficient detail, to provide meaningful testimony about what happened more than eight years ago. Similarly, Respondents must find documentary evidence concerning these matters, and essentially reconstruct what, by now, has become a distant event. As is apparent here, "Proof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale." Ceresney Remark.

Next, Respondents have suffered significant prejudice in the litigation of this case. Being forced to defend themselves against an action that was brought in an unconstitutional forum, Respondents have litigated this matter all the way to the United States Supreme Court, where they prevailed, only now to be asked to start the entire defense anew. In the process though, Respondents have labored under a ban from even associating in the industry for more than *five years*, all while financing the defense in excess of a million dollars. Therefore, Respondents have been forced to expend tremendous resources in mounting this defense while not being allowed to work in the industry. Now, entering the sixth year of this enforcement matter, Respondents are truly facing litigation by attrition. In such a posture, Respondents are substantially prejudiced by their inability to devote appropriate resources, time and lost opportunities to the defense.

This conclusion becomes stronger when considering that a new enforcement action related to these events could not be brought today. The statute of limitations applicable to these matters requires all actions to be commenced "within five years" of when the claim accrued. 28 U.S.C. § 2462; see also Kokesh v. S.E.C., 137 S.Ct. 1635, 1640 (2017) (Section 2462 applies to any SEC action for penalties, which include disgorgement sanctions). This limitations statute is intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Gabelli v. S.E.C., 568 U.S. 442, 448 (2013) (quoting Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)). But those interests would not be served by allowing the Commission to restart, in violation of its own rules, an action brought *six years ago* when it clearly could not institute a new action as a matter of fundamental fairness.

B. The Commission's Statutory Violations Require a Remedy, Regardless of the Applicability of the Accardi Doctrine.

Alternatively, even if the rule violations discussed above were not to rise to the level of a constitutional violation under the Accardi doctrine, this ALJ must impose an appropriate statutory remedy.

Statutes that dictate that an agency "shall" abide by a particular deadline, suggest a "mandatory meaning" that an agency is not free to disregard as a matter of statutory interpretation. Am. Hosp. Ass'n, 812 F.3d at 190. This is particularly true when a deadline comes with a waiver provision, because the rule "would lack meaning if the agency had no obligation to comply with the deadline in the first place." Id. Thus, a court "cannot sanction" an agency's "walking away from the metes and bounds which otherwise constrain it." Reuters Ltd., 781 F.2d at 951.

To be sure, as explained by the Court in Brock v. Pierce County, 476 U.S. 253, 260 (1986), as a matter of statutory construction, an agency does not necessarily "lose its power to act" merely because it disregards a statutory deadline. Of course, this does not mean "that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute." Brock, 476 U.S. at 262, n. 9. A court may always fashion "equitable relief" and impose sanctions for an agency's noncompliance with a statute, "without intruding upon the administrative province," if "there are less drastic remedies [than jurisdictional bars] available." Sierra Pac. Indus. v. Lyng, 866 F.2d 1099, 1111-12 (9th Cir. 1989) (quoting Brock, 476 U.S. at 260).

Here, separate from the Accardi violation discussed above, the Commission should face a meaningful sanction for its violation of the statutory and rule deadlines.[1] As discussed above, the Commission has violated not only the 60-day statutory deadline for holding the hearing, but also the Commission's mandatory rules for holding a hearing and issuing an initial decision by a lawfully appointed hearing officer. These violations flout the purpose of the rules, which are to guarantee speedy adjudications and preserve available evidence. See Ceresney Remarks. Disregarding these rules must come with some meaningful sanction, such as dismissal, or else

[1] The constitutional due process principles protected by Accardi are wholly independent of any statutory penalties that might exist for an agency's noncompliance with deadlines, and the inapplicability of relief on one basis does not affect relief on the other. See Oy v. United States, 61 F.3d 866, 875 (Fed. Cir. 1995) (notwithstanding Brock, agency violation of procedural requirement would be invalid if it caused prejudice to a party under American Farm Lines, 397 U.S. at 538-39); Suntec Indus. Co., v. United States, 951 F. Supp. 2d 1341, 1353 (Ct. Int'l Trade 2013), aff'd by 857 F.3d 1363 (Fed. Cir. 2017) ("First asked is whether the relevant statute or implementing regulation states a remedy for failure to comply. If there is no stated remedy, the second question is whether the rule provides an important procedural benefit. If so, the third question is whether substantial prejudice can be demonstrated."); Garcia, 2014 WL 6657591, at *8 (rejecting an argument based on Brock because Accardi provides that "[p]rocedures in a regulation, or a requirement to act in a regulation, can be enforceable even where the statute preceding the regulation does not create a similar duty"); Int'l Labor Mgmt. Corp., 2014 WL 1668131, at *8, 10 (finding Brock did not impact application of "the Accardi doctrine").

the rules "would lack meaning." See Am. Hosp. Ass'n, 812 F.3d at 190. The matter should be dismissed based on this statutory violation.

C. This ALJ May Not Preside Over This Matter Without Violating Article II of the United States Constitution, and Thus This Case Must Be Referred to an Appropriate Member of the Commission.

Article II of the United States Constitution vests "[t]he executive Power ... in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, §§ 1 cl. 1, 3. At the same time, "[i]n light of 'the impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

"Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." Id. In some circumstances, "multilevel protection from removal" within an agency and between executive officers "is contrary to Article II's vesting of the executive power in the President." Id. If "the President cannot remove an officer who enjoys more than one level of good-cause protection," and "[t]hat judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him," then this will contravene the President's "constitutional obligation to ensure the faithful execution of the laws." Id. (internal citation and quotation marks omitted).

But the SEC's ALJs have precisely this kind of unlawful multilevel protection from removal. See Lucia, 138 S. Ct. at 2060 (Breyer, J., concurring). This is because, first, SEC ALJs are removable from their position by the SEC "only" for "good cause," which must be

"established and determined" by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). Second, the President may, in turn, remove members of the MSPB only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Third, the SEC Commissioners, who cannot act without approval from the MSPB, 5 U.S.C. § 7521, are themselves protected by tenure. They may not be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." Free Enterprise, 561 U.S. at 487; MFS Sec. Corp. v. SEC, 380 F.3d 611, 619-20 (2d Cir. 2004).

This creates a circumstance where the President cannot exercise his constitutional removal authority under Article II and is thus unconstitutional. If the President wished to hold any of the SEC ALJs, including this ALJ, directly accountable and remove them, he could not do so unless the MSPB first gave him permission. But the President also would be unable to hold the MSPB directly accountable if they disagreed. Thus, the President lacks "full control" over his own executive officers, and cannot hold the ALJs accountable for their conduct, in a way that the Constitution forbids. Free Enterprise Fund, 561 U.S at 496. The instant proceedings are therefore unlawful as commenced by the Commission before this ALJ, and they cannot proceed without, *yet again*, violating constitutional limitations on appointments.

Because this ALJ may not adjudicate this matter without violating constitutional protections, the appropriate remedy is to refer this matter for trial before an appropriate member of the Commission. See 15 U.S.C. §§ 78u (authority of the Commission under the '34 Act), 80b-9 (same for the Advisers Act). This ALJ should therefore issue an initial decision for the Commission's consideration declaring this proceeding invalid pursuant to Article II. See 17 C.F.R. § 201.360(d) (finality of initial decisions).

D. The Administrative Proceedings here Violate Procedural Due Process Guarantees, and Thus Must Be Stayed Pending their Constitutional Review in the United States District Court.

A tribunal "analyze[s] a procedural due process claim in two steps. The first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Vasquez v. Rackauckas, 734 F.3d 1025, 1042 (9th Cir. 2013). Mathews v. Eldridge, 424 U.S. 319, 335 (1976), sets out the test for constitutional sufficiency, and "generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

First, concerning the deprivations at issue, this enforcement action implicates several constitutionally protected interests. Initially, the Commission's ability to impose a punitive fine constitutes a quintessential deprivation of "property" that requires appropriate due process protection. See Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884) ("Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved."). And the Commission has the power to impose monetary penalties of up to $100,000 for Mr. Lucia and up to $500,000 for RJL for *each* alleged violation of the '34 Act, 15 U.S.C. §§ 78u (d)(3)(B)(i)-(ii), and the Advisers Act, 15 U.S.C. § 80b-3(i)(2)(C). These punitive sanctions are separate from, and in addition to, disgorgement of funds. See 15 U.S.C. §§ 78u-2, 80b-3(j).

Furthermore, the Commission's ability to impose an associational ban on Respondents implicates both First Amendment associational rights and property rights to engage in a chosen profession. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984). Separately, "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition," such that, once obtained, "cannot be arbitrarily taken from [U.S. citizens], any more than their real or personal property can be thus taken." Dent v. West Virginia, 129 U.S. 114, 121-22 (1889). But the Commission may permanently revoke a party's investment advisor registration with the Commission and forever bar a respondent's ability to even be "associated" with an investment advisor. 15 U.S.C. § 80b-3(f). This is not only a professional death sentence, but carries grave and enduring reputational harm and ostracism both within and outside of the investment industry.

These deprivations should be considered together, and the process due Respondents must account for their potential impact, which can often be more significant than even criminal sanctions. As Justice Gorsuch recently wrote,

> Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

Thus, on one side of the equation, Respondents face profound potential deprivations of constitutionally protected interests. They face punitive financial penalties that can be much more severe than typical fines even in criminal matters. They face limitations on their First Amendment right to associate with anyone involved in the industry. And they even face the potential to be barred for life from the industry and the associated professional and reputational harm. These interests are of the utmost concern.

On the other side of the equation come the appropriate safeguards, and the costs imposed on the Commission in affording them. In this unique context, one need not look far for the appropriate process, because an identical action could be brought in federal court, which would provide significant due process protections. The costs imposed on the Commission to provide appropriate protections are therefore minimal.

Several protections afforded in district court actions may not be dispensed with in this administrative proceeding, without violating due process. First, Respondents are entitled to a trial before a jury.

A trial by jury is a "fundamental" component of our system, "and remains one of our most vital barriers to governmental arbitrariness." Reid v. Covert, 354 U.S. 1, 9-10 (1957). Blackstone said, "[T]he most transcendent privilege which any subject can enjoy, or wish for [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." Id. (quoting 3 William Blackstone, Commentaries 379). "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

Had the Commission brought this same matter in federal court, Mr. Lucia would have been constitutionally entitled to a jury trial under the Seventh Amendment. See U.S. Sec. & Exch. Comm'n v. Jensen, 835 F.3d 1100, 1106 (9th Cir. 2016) (constitutional right to a jury trial in SEC enforcement action); S.E.C. v. Kopsky, 537 F. Supp. 2d 1023, 1025 (E.D. Mo. 2008), as amended (Mar. 21, 2008) (Sippel, J.) (same). This is because the Supreme Court has held that a government enforcement action is "clearly analogous to the 18th-century action in debt," which would have been tried in a court of law. Tull v. United States, 481 U.S. 412, 420, 422 (1987).

But, there is no right to a jury trial in this administrative proceeding, despite the significant consequences that Respondents could face, which denies them due process. The denial of a jury trial by itself can constitute a deprivation of due process. See, e.g., Duncan v. State of Louisiana, 391 U.S. 145, 149 (1968) ("[W]e hold that the Fourteenth Amendment [Due Process Clause] guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."); In re L.M., 186 P.3d 164, 170 (Kan. 2008) (due process guaranteed jury trial rights in juvenile delinquency proceedings because of its punitive nature, even though Sixth Amendment jury trial right did not apply). Given the historical need for a jury determination, the unequal treatment between the administrative and court proceedings, and the nature of the deprivations at issue, Respondents are constitutionally entitled to a jury trial.

Next, Respondents are entitled to a hearing in front a judge who is not beholden to the same entity that has not only promulgated the applicable rules but is also prosecuting the action.

A "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). "This applies to administrative agencies which adjudicate as well as to courts." Withrow v. Larkin, 421 U.S. 35, 46 (1975).

But these administrative proceedings suffer from profound structural biases. The Commission as a whole encompasses both the enforcement entity that investigates and prosecutes alleged violations and the Office of Administrative Law Judges. See 17 C.F.R. §§ 200.14 (Office of Administrative Law Judges), 200.19b (Director of the Division of Enforcement). Moreover, the Commission has the final say within the administrative proceeding concerning liability. 17 C.F.R. § 201.411. As described by Ronald J. Riccio, professor of constitutional law at Seton Hall Law School, "[I]t doesn't look good" that in Commission proceedings "you're investigated, prosecuted and judged by agency personnel." Gretchen Morgenson, At the SEC, a Question of Home-Court Edge, N.Y. Times (Oct. 5, 2013) available at http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html

Unsurprisingly, the Commission is much more likely to prevail in administrative proceedings. For example, The Wall Street Journal reported that the SEC enjoys a 90% success rate in its own hearings but has only a 69% success rate "against defendants in federal court." Jean Eaglesham, SEC Wins with in-House Judges, Wall St. J. (May 6, 2015) available at http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803. Likewise, the New York Times reported similar statistics reflecting a higher win percentage in SEC administrative hearings than in federal court. Morgenson, supra. Moreover, the Commission decided appeals from initial decisions "in their own agency's favor" 95% of the time between October 2010 and March 2015. Eaglesham, supra.

Given this structural bias, which statistically plays out in favor of enforcement and the imposition of liability, administrative adjudication in this forum runs afoul of the due process right to proceedings before a fair and impartial tribunal. For this reason as well, the instant proceeding cannot continue in this setting.

Third, the administrative proceedings violate due process because they deny Respondents appropriate discovery. "[T]he discovery allowed to defendants in SEC administrative tribunals is far more limited" than in federal court. Drew Thornley & Justin Blount, SEC in-House Tribunals: A Call for Reform, 62 Vill. L. Rev. 261, 279 (2017). In federal court actions litigants have broad discovery rights and can take multiple sworn depositions of witnesses, demand answers to interrogatories, and demand the production of documents and other evidence without leave of the court. See Fed. R. Civ. P. 26(b)(1), 30(a), 33, 34. But in administrative proceedings, discovery is severely limited, and, for example the Respondents here may conduct only five depositions as a matter of right, 17 C.F.R. § 201.233(a)(2), and have no right to demand answers to interrogatories or to compel the production of documents. Instead, Respondents are granted the limited opportunity of "inspecting and copying" enforcement documents held by the Commission but have no remedy if such evidence "is not made available by the Division of Enforcement." 17 C.F.R. §§ 201.230(a), (h). But a respondent's ability to defend himself depends on his ability to gather such evidence, and the limited discovery available here is not an adequate substitute. This also denies Respondents constitutionally required procedural protections.

Fourth, the administrative proceedings deny Respondents the right to fairly present evidence and limit irrelevant and prejudicial material. In federal court, of course, trials are conducted according to formal rules of procedure, in open court, and in accordance with the Federal Rules of Evidence. Fed. R. Civ. P. 43(a). By contrast, "[t]he ALJ has virtually unfettered discretion regarding what evidence will be admitted, including what witnesses will be allowed and even whether those witnesses can be cross examined." Thornley & Blount, 62 Vill. L. Rev. at 280. Indeed, the only standard is whether evidence is "relevant," as determined by the

Commission or hearing officer. 17 C.F.R. § 201.320(a). This allows the introduction of "hearsay" evidence, even if it would not be admissible in federal court. Id. at § 201.320(b). And the ALJ even has "discretion" to curtail the presentation of evidence, including opportunities for cross-examination. 17 C.F.R. § 201.326.

This informality comes at a price. The rules of evidence serve important purposes by not only excluding inappropriate materials but allowing predictable and orderly ways for proponents of evidence to ensure that it is considered. So too do normal rules of presentation and examination guarantee fair opportunities for presentation of evidence. By dispensing with these rules, the proceedings here deprive litigants of guaranteed procedures.

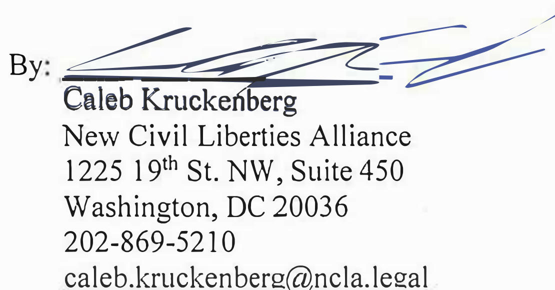
Finally, as illustrated in this case, there is no meaningful review of this agency ALJ's factfinding, despite the lack of procedural protections discussed above. Any facts found by the ALJ, and adopted by the Commission, are deemed "conclusive" so long as they are premised on "substantial evidence." Steadman v. SEC, 450 U.S. 91, 97 n. 12 (1981). But considering that these findings arise following proceedings without juries or rules of evidence, by judges employed by the prosecuting entity, and after only limited discovery, this deference compounds the deprivation of fair process. This proceeding violates due process guarantees and must not continue.

To remedy imminent constitutional defects in this proceeding, Respondents have filed a complaint for declaratory and injunctive relief in the United States District Court. While that matter is pending, this ALJ should stay the proceedings so that they may be appropriately adjudicated in a court of competent jurisdiction.

III. CONCLUSION

Respondents object to further proceedings in this forum. The mandatory deadlines related to the original OIP have been disregarded, and the action cannot proceed without violating statutory and constitutional requirements. This ALJ may not preside over this matter without violating Article II of the United States Constitution. This proceeding also may not continue without depriving Respondents of procedural due process protections. For these reasons, this ALJ should grant Respondents' motion.

DATED: November 29, 2018

By: 

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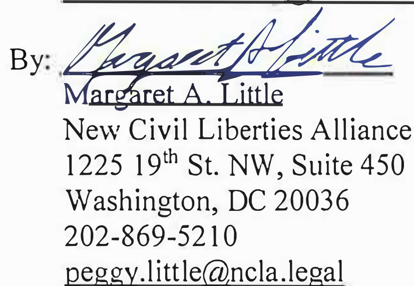
By: 

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CERTIFICATE OF SERVICE

This is to certify that this filing was sent by facsimile transmission, and that, contemporaneously, the original and three copies of the foregoing motion were mailed, first class, postage prepaid on this day to:

Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE, Mail Stop 1090
Washington, DC 20549
FAX: 703-813-9793

And that one copy of the foregoing motion was mailed first class, postage prepaid on this day to:

John B. Bulgozdy
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And that the foregoing motion was emailed on this day to:

Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
alj@SEC.GOV

DATED: November 29, 2018

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