UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

FILE NO. 3-15141

In the Matter of MOHAMMED RIAD AND KEVIN TIMOTHY SWANSON Respondents.	)	BRIEF IN SUPPORT OF MOTION TO DISMISS

Dated: November 19, 2015

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Pursuant to Rules 154(a) and 411(d) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, Respondents Mohammed Riad and Kevin Timothy Swanson (collectively, the "Respondents") hereby petition the Commission to dismiss this matter on the basis that:

1. This matter was tried before an Administrative Law Judge who was not properly appointed, in violation of the Appointments Clause of the United States Constitution, Article II, Section 2, clause.

2. Respondents were deprived of equal protection of the law, in contravention of the Fifth Amendment of the United States Constitution, because the Commission proceeded against them administratively rather than in federal district court.

I. The Administrative Law Judge Before Whom this Case Was Tried Was Not Properly Appointed

The Appointments Clause of Article II of the Constitution provides:

> [The President] shall nominate, and by and with the Advice and Consent Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. The Appointments Clause thus creates two classes of officers: principal officers, who are selected by the President with the advice and consent of the Senate, and inferior officers, whom "Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause applies to all agency officers including those whose functions are "predominately quasi judicial and quasi legislative" and regardless of whether the agency officers are "independent of the Executive in their day-to-day operations." Id. at 133 (quoting

Humphrey's Executor v. United States, 295 U.S. 602, 625-26 (1935)). "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Freytag v. Commissioner*, 501 U.S. 868 at 881 (1991)(quoting *Buckley*, 424 U.S. at 126) (alteration in the original).

In *Hill v. SEC*, CIVIL ACTION NO. 1:15-CV-1801-LMM (N.D. Ga., June 8, 2015), Federal District Court Judge May found that the manner in which SEC administrative law judges are appointed violates the Constitutional requirement:

> this Court concludes that the Supreme Court in Freytag found that the STJs powers—which are nearly identical to the SEC ALJs here—were independently sufficient to find that STJs were inferior officers. See also *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("There can be little doubt that the role of the . . . administrative law judge . . . is ' functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions."); see also *Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."). Only after it concluded STJs were inferior officers did Freytag address the STJ's ability to issue a final order; the STJ's limited authority to issue final orders was only an additional reason, not the reason. Therefore, the Court finds that Freytag mandates a finding that the SEC ALJs exercise "significant authority" and are thus inferior officers.
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> Because SEC ALJs are inferior officers, the Court finds Plaintiff has established a likelihood of success on the merits on his Appointments Clause claim. Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause. . . . The SEC ALJ was not appointed by the President, a department head, or the Judiciary. Because he was not appropriately appointed pursuant to Article II, his appointment is likely unconstitutional in violation of the Appointments Clause.

In *Duka v. SEC*, 15 Civ. 357 (RMB)(SN) (S.D.N.Y., August 3, 2015), Federal District Court Judge Berman agreed with this conclusion:

> The Court stated in its Decision & Order that "[t]he Supreme Court's decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991), which held that a Special Trial Judge of the Tax Court was an ' inferior officer' under Article II, would appear to support the conclusion that SEC ALJs are also inferior officers." (Decision & Order, at 16.) The Court here concludes that SEC ALJs are "inferior officers" because they exercise "significant authority pursuant to the laws of the United States." Freytag, 501 U.S. at 881. (See Decision & Order, at 16.) The SEC ALJs' positions are "established by [l]aw," including 5 U.S.C. §§ 556, 557 and 15 U.S.C. § 78d-1(a), and "the duties, salary, and means of appointment for that office are specified by statute." Id.; see also 5 U.S.C. § 5372. And, ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." Freytag, 501 U.S. at 881. "In the course of carrying out these important functions, the [ALJ s] exercise significant discretion." Id.; see also *Hill*, 2015 WL 4307088, at *17 ("like the STJs in Freytag, SEC ALJs exercise 'significant authority.'"). The Court is aware that *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) is to the contrary. The Appointments Clause in Article II provides: "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Constitution, Art. II,§ 2, cl. 2. It is well-settled that the Appointments Clause provides the exclusive means by which inferior officers may be appointed. See *Buckley v. Valeo*, 424 U.S. 1, 138-9 (1976) ("Congress may undoubtedly ... provide such method of appointment to those 'offices' as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of Art. II, s 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.' They may, therefore, properly perform duties only ... in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'"). For purposes of the Appointments Clause, the SEC is a "Department" of the Executive Branch, and the Commissioners function as the "Head" of that Department. See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-513 (2010).

Similarly, in *Gray Financial Group, Inc. v. SEC*, No. 1:15-cv-00492-LMM (N.D. Ga., Aug. 4, 2015) and *Timbervest, LLC, et al. v. SEC*, No. 1:15-cv-2106-LMM (N.D. Ga., Aug. 4, 2015), Judge May further elaborated upon the analysis:

> The Court concludes that the Supreme Court in Freytag found that the STJs powers-which are nearly identical to the SEC ALJs here-were independently sufficient to find that STJs were inferior officers. See also *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("There can be little doubt that the role of the . . . administrative law judge . . . is ' functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing,

> and make or recommend decisions."); see also Freytag, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy, & Souter, JJ.) (finding that all ALJs are "executive officers"); *Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."). Only after it concluded STJs were inferior officers did Freytag address the ST J's ability to issue a final order; the ST J's limited authority to issue final orders was only an additional reason, not the reason. Therefore, the Court finds that Freytag mandates a finding that the SEC ALJs exercise "significant authority" and are thus inferior officers.

Significantly, in these most recent decisions, Federal District Court Judge May expressly rejected the Commission's arguments against application of the Appointments Clause to its Administrative Law Judges:

> At the hearing, the SEC argued Freytag's finding that ST J's limited final order authority supported their inferior officer status was not an alternative holding but a "complimentary" one. The SEC also stated the Supreme Court's finding that the ST J s had final order authority was the "most critical part" of the Freytag decision. The Court finds that understanding is based on a misreading of Freytag. First, the Supreme Court explicitly rejected the Government's argument in Freytag that "special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision." Freytag, 501 U.S. at 881. Second, the Supreme Court only discussed the STJs limited final order authority as being an additional reason for their inferior officer status. Id. at 882 ("Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged.") (emphasis added). It was only after the Supreme Court found STJs were inferior officers that it discussed their limited final order authority as being another ground for inferior officer status. The Court also does not find persuasive the SEC's argument that SEC ALJs are not inferior officers because they cannot issue "certain injunctive relief' as could the Special Trial Judges in Freytag. Def. Br., Dkt. No. [48] at 33. It is undisputed that the SEC Commissioners themselves-who are indisputably officers of the United States-cannot issue injunctive relief without going to the district court. Thus, the Court finds this a distinction without consequence. The SEC also argues that this Court should defer to Congress's apparent determination that ALJs are inferior officers. In the SEC's view, Congress is presumed to know about the Appointments Clause, and it decided to have ALJs appointed through OPM and subject to the civil service system; thus, Congress intended for ALJs to be employees according to the SEC. See Def. Br. [48] at 34-38. But "[t]he Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." Freytag, 501 U.S. at 880. Even if the SEC is correct that Congress

> determined that ALJs are inferior officers, Congress may not "decide" an ALJ is an employee, but then give him the powers of an inferior officer; that would defeat the separation-of-powers protections the Clause was enacted to protect. In response to the SEC's argument that classifying ALJs as civil servants informs their constitutional status, the Court notes that competitive civil service by its terms also includes officers within its auspices. "Competitive [civil] service" includes with limited exceptions "all civil service positions in the executive branch," 5 U.S.C. § 2102, and "officers" are specifically included within competitive service. 5 U.S.C. § 2104. Thus, under the SEC's reasoning, all officers are now mere employees by virtue of Congress's placement of them in civil service. Such an argument cannot be accepted.

The Commission's recent decision in the Lucia case[1] does not persuasively address this analysis. In that decision, the Commission argues the following:

> The mix of duties and powers of the Commission's ALJs are very similar to those of the ALJs at the FDIC. Like the FDIC's ALJs, the Commission's ALJs conduct hearings, take testimony, rule on admissibility of evidence, and issue subpoenas. And like the FDIC's ALJs, the Commission's ALJs do not issue the final decisions that result from such proceedings. Just as the FDIC's ALJs issue only "recommended decisions" that are not final, the Commission's ALJs issue "initial decisions" that are likewise not final. Respondents may petition us for review of an ALJ's initial decision, and it is our "longstanding practice [to] grant[] virtually all petitions for review." Indeed, we are unaware of any cases which the Commission has not granted a timely petition for review. Absent a petition, we may also choose to review a decision on our own initiative, a course we have followed on a number of occasions. In either case, our rules expressly provide that "the initial decision [of an ALJ] shall not become final." Even where an aggrieved person fails to file a timely petition for review of an initial decision and we do not order review on our own initiative, our rules provide that "the Commission will issue an order that the decision has become final," and it "becomes final" only "upon issuance of the order" by the Commission. Under our rules, no initial decision becomes final simply "on the lapse of time" by operation of law; instead, it is "the Commission's issuance of a finality order" that makes any such decision effective and final. Moreover, as does the FDIC, the Commission reviews its ALJs' decisions de novo. Upon review, we "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part," any initial decision. And "any procedural errors" made by an ALJ in conducting the hearing "are cured" by our "thorough, de novo review of the record." We may also "hear additional evidence" ourselves, and may "make any findings or conclusions that in [our] judgment are proper and on the basis of the record." For this reason, although ALJs may play a significant role in helping to shape the

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[1] *In re Raymond J. Lucia Companies, Inc.*, Admin. Pro. No, 3-15006 Sept. 3, 2015); *accord, In the Matter of Timbervest, LLC, et al.*, Admin. Pro. No. 3-15519 (Sept. 17, 2015).

> administrative record initially, it is the Commission that ultimately controls the record for review and decides what is in the record. As we have explained before, we have "plenary authority over the course of [our] administrative proceedings and the rulings of [our] law judges—before and after the issuance of the initial decision and irrespective of whether any party has sought relief."
> Notwithstanding the direct relevance of Landry, Respondents claim that the decision should not control here because, in their view, it "was wrongly decided." They claim that Landry "is inconsistent with" *Freytag v. Commissioner*, in which the Supreme Court deemed a Tax Court special trial judge" to be an inferior officer. But, as Landry recognized, ALJs are different from those special trial judges. The far greater role and powers of the special trial judges relative to Commission ALJs, in our view, makes Freytag inapposite here.
> First, unlike the ALJs whose decisions are reviewed de novo, the special trial judges made factual findings to which the Tax Court was required to defer, unless clearly erroneous. Second, the special trial judges were authorized by statute to "render the [final] decisions of the Tax Court" in significant, fully-litigated proceedings involving declaratory judgments and amounts in controversy below $10,000. As discussed above, our ALJs issue initial decisions that are not final unless the Commission takes some further action. Third, the Tax Court (and by extension the court's special tax judges) exercised "a portion of the judicial power of the United States," including the "authority to punish contempts by fine or imprisonment." Commission ALJs, by contrast, do not possess such authority.
> Based on the foregoing, we conclude that the mix of duties and powers of our ALJs is similar in all material respects to the duties and role of the FDIC's ALJs in Landry. Accordingly, we follow Landry, and we conclude that our ALJs are not "inferior officers" under the Appointments Clause.

Significantly, two of the five Commissioners who participated in this decision dissented, noting that "[e]ven though the Commission is free to express its views on Constitutional issues, we recognize and believe it is appropriate that Article III federal judges ultimately resolve this issue.[5] *See Duka v. SEC*, 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015); *Hill v. SEC*, 2015 WL 4307088 (N.D. Ga. June 8, 2015)."

The Commission's analysis of the Appointments Clause issue in the Lucia case is unpersuasive. The Commission essentially offers three reasons why its Administrative Law Judges are "employees" and not "inferior officers." First the Lucia decision argues that the Administrative Law Judges issue only "initial decisions," not "final" ones. Second, the Lucia decision argues that the Commission's "de novo" review on appeal evidences that the

Administrative Law Judges are inferior officers. Third, while other judges can punish parties by holding them in contempt, the Commission's Administrative Law Judges do not have such power. None of these arguments is persuasive.

First, the fact that an Initial Decision is not final until reviewed on appeal proves nothing. Decisions of federal judges and even of the courts of appeals are not final until reviewed on appeal.[2] It would be absurd to allege that a federal district court or appellate judge is merely an employee of the United States simply because their decisions are not final until reviewed on appeal. Indeed, the Commission's own decisions are not final until reviewed on appeal, yet it is undisputed that the Commissioners are subject to the Appointments Clause.

As for de novo review by the Commission, such review exists only in theory and does not exist in practice. For example, the Commission defers to the Administrative Law Judge's determinations of credibility.[3] The Commission also defers to the Administrative Law Judge on

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[2] For example, Section 25(a)(1) of the Exchange Act provides that: "[a] person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part." See also Section 213(a) of the Advisers Act: "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the court of appeals of the United States within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part." See also Section 43(a) of the Investment Company Act.

[3] *In re Michael R. Pelosi*, Admin. Pro. No. 3-14194 (March 27, 2014)("The Commission gives "considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor. Such determinations can be overcome only where the record contains substantial evidence for doing so." 7 *E.g., Robert M. Fuller*, Securities Exchange Act Rel. No. 48406, 56 SEC 976, 2003 WL 22016309, at *7 (Aug. 25, 2003) (internal quotation marks and citation omitted), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004).").

the admissibility of expert opinions and expert reports.[4] The Commission also defers to the Administrative Law Judge's determinations on the admissibility of evidence.[5]

In this case, the sham of de novo review is particularly revealed. As Respondents noted in their appeal, the Administrative Law Judge completely ignored the testimony and report of one of the Respondents' experts, mentioned a second expert's testimony and report in one sentence in a footnote in the Initial Decision without in any way commenting on the content of that expert's conclusions, and erroneously found that the Respondents had not asserted an advice of counsel defense, thereby ignoring pre-trial and post-trial briefing as well as testimony of several witnesses relevant to this defense, including the attorney who gave the advice and the Respondents' understanding of the advice. On appeal, well over a year after briefing has been concluded on the appeal, there is no indication the Commission intends to correct these manifest errors by the Administrative Law Judge by hearing additional testimony. Indeed, if de novo review was a reality here, which the Commission indicates in its Lucia decision is a prime reason why the Appointments Clause does not apply to its Administrative Law Judges, there would be a

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[4] See Brief of Division of Enforcement, *In re Airtouch Communications, Inc., et al.*, Admin Pro. No. 3-16033 (Dec. 24, 2014)("Rule 320 of the Commission Rules of Practice give hearing officers wide latitude in determining the admissibility of evidence. Thus, hearing officers "have broad discretion in determining whether to admit or exclude evidence, and 'this is particularly true in the case of expert testimony.'" *In re Pagel, Inc.*, 48 S.E.C. 223, 1995 SEC Lexis 988, at *15, *aff'd, Pagel, Inc. v. SEC*, 803 F.2d 942 (8th Cir. 1986)*(quoting Hamling v. US.*, 418 U.S. 87, 108 (1974)); *see also, e.g., In re IMSICPAS & Assoc.*, Rei. No. 8031,76 S.E.C. Docket 504,2001 WL 1359521, at *10 (Nov. 5, 2001) (holding that ALJ "did not commit error" in excluding expert testimony under Rule 320).").

[5] *In re Del Mar Financial Services, Inc., et al.*, Admin Pro. No. 3-9959 (Oct. 24, 2003)("we believe that the law judge should have admitted the investigative transcripts insofar as they contained evidence that was relevant to the issues in this case. That said, when the Division sought to introduce these transcripts, it did not identify those portions of the investigative transcripts that it viewed as relevant to the case. Our law judges are not required to evaluate these transcripts on an all or nothing basis. The law judge would have been within her discretion in requiring the Division to specify the specific statements that it was relying on and in excluding irrelevant, immaterial, or unduly repetitious evidence under Rule of Practice 320.").

new trial before the Commission so that critical evidence is not simply ignored, as it was by the Administrative Law Judge.

Finally, with respect to the power of the Administrative Law Judge to punish a party with contempt, the Lucia decision derives its emphasis on this factor from the following dictum in the Supreme Court's decision in the Freytag case:

> The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempts by fine or imprisonment, 26 U. S. C. § 7456(c); to grant certain injunctive relief, § 6213(a); to order the Secretary of the Treasury to refund an overpayment determined by the court, § 6512(b)(2); and to subpoena and examine witnesses, order production of documents, and administer oaths, § 7456(a). All these powers are quintessentially judicial in nature.[6]

No other decision on the Appointments Clause even mentions the contempt power as a factor. More important, this reliance on this passage from Freytag is misplaced for several reasons. First, this passage is taken from a longer discussion of whether tax court judges, the officers at issue in Freytag, are acting as "courts of law," which would preclude them from being characterized as mere "employees." This analysis does not preclude SEC Administrative Law Judges from being characterized as "inferior officers" even if they are not acting as "courts of law." More important, the reference to the contempt power is offered as simply one illustration of the role of tax court judges. Freytag does not state that the power to punish with contempt is a critical or defining attribute that makes an officer subject to the Appointments Clause. Indeed, there is no logical reason why this should be the case. Finally, it should be noted that the Commission itself has acknowledged that its Administrative Law Judges have many powers akin

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[6] *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991).

to the contempt power.[7] Indeed, the Commission itself does not have the power to hold a party in contempt, as does a federal district judge, although it is undisputed that the Commissioners are "officers" and therefore subject to the Appointments Clause.

II. The Institution of this Action as an Administrative Proceeding Violated the Equal Protection Clause

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that equal protection of the law is guaranteed by the Fifth Amendment to the United States Constitution.[8]

In *Gupta v. SEC*, 11 Civ. 1900 (JSR)(S.D.N.Y. July 11, 2011), Federal District Court Judge Rakoff found that the Commission's decision to proceed against a respondent in an administrative forum, rather than in federal district court, could violate the Equal Protection Clause:

> The Complaint alleges that the SEC intentionally, irrationally, and illegally singled Gupta out for unequal treatment in a bad faith attempt to deprive him of constitutional and other rights, in retaliation for his strenuous assertion of his innocence. See, e.g., Gupta Compl. ~ 16. These allegations, which, if adequately pleaded, must be taken as true for purposes of this motion, would state a claim even if Gupta were entirely guilty of the charges made against him in the OIP.

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[7] *In re David F. Bandimere*, Admin. Pro. No. 3-15124, n. 124 (Oct. 29, 2015)(" The Commission's rules provide ALJs with authority to punish contemptuous conduct only in the following ways. If a person engages in contemptuous conduct before the ALJ during any proceeding, the ALJ may "exclude that person from such hearing or conference, or any portion thereof," or "summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding." Id. 201.180(a). If there are deficiencies in a filing, a Commission ALJ "may reject, in whole or in part," the filing, such filing "shall not be part of the record," and the ALJ "may direct a party to cure any deficiencies." Id. 201.180(b). Finally, if a party fails to make a required filing or to cure a deficiency with a filing, then a Commission ALJ "may enter a default, dismiss the case, decide the particular matter at issue against the person, or prohibit the introduction of evidence or exclude testimony concerning that matter." *Id.* 201.180(c).").

[8] "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

> See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (discussing requirements for demonstrating selective prosecution). Indeed, even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-66 (2000) (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").

Here, the institution of this action as an administrative proceeding had the effect of depriving the Respondents and their counsel of adequate time to prepare for trial and to try this action, when adequate time would have been available if this action had been filed in federal district court. This is unfair treatment of the Respondents for which there is no adequate justification.

The nearly unique size and complexity of this case is evidenced by the following statistics. Since 2007, the administrative law judges have issued over 600 initial decisions. During this period, Respondents have located only twenty-three instances in which the Commission has granted an extension of time for issuance of the initial decision. Of these twenty-three instances, Respondents have located eighteen instances in which the extension was granted for reasons such as protracted settlement discussions, the illness of the administrative law judge, or other factors unrelated to the size and complexity of the case.[9] Respondents have

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[9] 1. *In the Matter of RELIANCE FINANCIAL ADVISORS, LLC, et al.*, Admin Proc. File Nos. 3-16311, 3-16312 (Oct. 1, 2015).

2. *In the Matter of BDO CHINA DAHUA CPA CO., LTD., et al.*, Admin. Proc. File Nos. 3-14872, 3-15116 (March 8, 2013)

3. *In the Matter of DONALD J. ANTHONY, JR., et al.*, Admin. Proc. File No. 3-15514 (Aug. 7, 2014); second extension January 26, 2015

4. *In the Matter of OX TRADING, LLC, OPTIONSXPRESS, INC., and THOMAS E. STERN*, Admin. Proc. File No. 3-14853 (Aug. 7, 2013)

identified only four instances, other than this case, in which the Commission granted the extension because of the size and complexity of the case.[10] These statistics dramatically

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5. *In the Matter of JOSEPH C. RUGGIERI*, Admin. Proc. File No. 3-15124 (Aug. 5, 2015)

6. *In the Matter of JOHN J. AESOPH, CPA, and DARREN M. BENNETT, CPA*, Admin. Proc. File No. 3-15168 (Dec. 30, 2013)

7. *In the Matter of ZPR INVESTMENT MANAGEMENT, INC., and MAX E. ZAVANELLI*, Admin. Proc. File No. 3-15263 (Feb. 5, 2014)

8. *In the Matter of NATURAL BLUE RESOURCES, INC., et al.*, Admin. Proc. File No. 3-15974 (May 6, 2015)

9. *In the Matter of LAWRENCE M. LABINE*, Admin. Proc. File No. 3-15967 (May 6, 2015)

10. *In the Matter of TOTAL WEALTH MANAGEMENT, INC., et al.*, Admin. Proc. File No. 3-15842 (Feb. 23, 2015)

11. *In the Matter of RAYMOND JAMES FINANCIAL SERVICES, INC. and J. STEPHEN PUTNAM*, Admin. Proc. File No. 3-11692 (July 29, 2005).

12. *In the Matter of JOHN P. FLANNERY, et al.*, Admin. Proc. File No. 3-14081 (July 18, 2011)

13. *In the Matter of MICHAEL R. PELOSI*, Admin. Proc. File No. 3-14194 (Oct. 24, 2011).

14. *In the Matter of Laminaire Corp. (n/k/a Cavico Corp.), et al.*, Admin. Proc. File No. 3-12658 (Dec. 5, 2007)

15. *In the Matter of SAND BROTHERS ASSET MANAGEMENT, LLC, et al.*, Admin. Proc. File No. 3-16223 (Aug. 19, 2015)

16. *In the Matter of MICHAEL BRESNER, et al.*, Admin. Proc. File No. 3-15015 (July 5, 2013)

17. *In the Matter of WARREN LAMMERT, et al.*, Admin. Proc. File No. 3-12386 (Dec. 19, 2007)

18. *In the Matter of DANIEL BOGAR, et al.*, Admin. Proc. File No. 3-15003 (July 9, 2013)

[10] 1. *In the Matter of HARDING ADVISORY LLC and WING F. CHAU*, Admin. Proc. File No. 3-15574 (Aug. 21, 2014)

demonstrate how exceptionally large and complex this action was for trial before an administrative law judge. These statistics also demonstrate that the Commission almost never brings a case of great size and complexity, such as this case, before its administrative law judges. The uniqueness of this case in the administrative forum demonstrates Respondents' unequal treatment.

It is also clear that the filing of this case in the administrative forum, rather than in federal district court, significantly disadvantaged the Respondents. This matter was commenced by the filing of an Order Instituting Proceedings ("OIP") on December 19, 2012, over four years after the Staff commenced its inspection and investigation of the Respondents. Trial commenced on April 22, 2013. The speed with which this matter had to be prepared for trial was dictated by the OIP itself, which ordered the administrative law judge to issue an Initial Decision no later than 300 days from the date of service of the Order. Because of this deadline, and the provisions of Rule 161(b) of the Rules of Practice,[11] Respondents believed that it would have been fruitless to request additional time to prepare for trial.

Nonetheless, on the eve of the deadline for the issuance of the Administrative Law Judge's Initial Decision, the Chief Administrative Law Judge requested a six month extension of

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2. *In the Matter of RONALD S. BLOOMFIELD, et al.*, Admin. Proc. File No. 3-13871 (March 22, 2011)

3. *In the Matter of DAVID W. BALDT*, Admin. Proc. File No. 3-13887 (Feb. 22, 2011)

4. *In the Matter of the Application of MIGUEL A. FERRER and CARLOS J. ORTIZ*, Admin. Proc. File No. 3-14862 (Feb. 25, 2013)

[11] This Rule provides that "the Commission or the hearing officer should adhere to a policy of strongly disfavoring . . . requests" for additional time, postponements or adjournments; Rule 161(b)(iv) of the Rules of Practice further provides that in considering requests for extensions a factor to be considered is "[t]he impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission."

the time to issue the decision. In the motion requesting the extension, filed on September 16, 2013, one of the stated reasons for the request was that "[i]t would not be possible to issue an Initial Decision within the time specified due to the size and complexity of the proceeding. . . . The hearing occurred over eleven days and produced over 3,600 pages of transcript. The parties presented testimony from seventeen lay witnesses and three expert witnesses, and 352 exhibits were admitted into evidence." On February 5, 2014, the Commission granted the requested six month extension, noting the complexity of the case and the size of the record. These factors are further evidenced by the fact that the Administrative Law Judge used almost the entire six month extension that was granted, issuing the Initial Decision on April 21, 2014.

On September 24, 2015, the Commission proposed amendments to the Rules of Practice to permit much greater flexibility in permitting parties to have adequate time to prepare for trial.[12] As the Commission noted in the proposing release, "[s]ignificantly, the amendment doubles the maximum length of the current rule's prehearing period. This is intended to provide additional flexibility during the prehearing phase of a proceeding . . . . It also would allow respondents more time to review electronic documents in cases involving an electronic production from the Division."[13] Respondents were effectively deprived of this opportunity because of the time periods under which the case was forced to move to trial.

As the Supreme Court observed in *Powell v. Alabama*, 287 U.S. 45 (1932):

> a defendant . . . must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. As the court said in *Commonwealth v. O'Keefe, 298 Pa. 169, 173*; 148 Atl. 73:

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[12] Release 34-75976.

[13] *Id.* at p. 5.

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Similarly, as the Supreme Court noted in *Unger v. Sarafite*, 376 U.S. 575 (1964), "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

In this case, the Rules of Practice in effect at the time the case was tried dictated a hasty and unfair schedule imposed on the Respondents. It is striking to consider the time line under which this entire matter has been handled:

Inspection and investigation – over four years

Pretrial preparation for trial and trial – approximately four months

Preparation of Initial Decision by Administrative Law Judge – approximately one year

Review by Commission on appeal – at least one and half years, and perhaps longer

It cannot possibly be fair to permit the prosecutor and judges to take years to investigate, decide, and review this case, then to let the Respondents have only four months to prepare for trial and to try the case. This inequity is highlighted by the acknowledgement by both the Chief Administrative Law Judge and the Commission itself that this case is exceptionally large, complex, and time consuming to master.

It might be asked why the Respondents did not seek additional time from the Administrative Law Judge prior to trial. The answer is that the system under the current Rules of Practice would have rendered such a request fruitless; but this bias created by the Commission's Rules of Practice is no reason to deny the Respondents a fair trial. The Rules of Practice impose

a deadline on the Administrative Law Judge to issue an Initial Decision.[14] Neither the parties to the proceeding nor the Administrative Law Judge is authorized to request an extension of that deadline. Only the Chief Administrative Law Judge can request such an extension and only the Commission can grant such an extension.[15] In addition, as noted above, even brief requests for additional time by the Respondents made to the Administrative Law Judge are "strongly disfavored."[16] These Rules, taken together, make it essentially impossible for the Respondents to request the time needed properly to prepare for trial.

In this case, the size and complexity of the case was acknowledged, first by the Chief Administrative Law Judge and then by the Commission, only a few days before the Initial Decision was due to be issued. Now that the Commission has taken so long to consider the appeal and has acknowledged that the current Rules of Practice simply do not afford respondents ample time to prepare for trial and to trial large, complex cases,[17] Respondents have concluded

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[14] Rule 360(a)(2): "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. . . . Under the 300-day timeline, the hearing officer shall issue an order providing that there shall be approximately 4 months from the order instituting the proceeding to the hearing, approximately 2 months for the parties to obtain the transcript and submit briefs, and approximately 4 months after briefing for the hearing officer to issue an initial decision."

[15] Rule 360(a)(3): " 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, the hearing officer should consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. . . . If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision."

[16] See Rule 161(b), quoted at note 11.

[17] See note 2.

that if this action is to be litigated at all it should be litigated in federal district court, with ample time afforded to prepare for trial.

In the recent Bandimere decision,[18] the Commission rejected an equal protection challenge to its selection of the administrative forum:

> First, an equal-protection claim is not legally cognizable in the context of an inherently discretionary governmental decision to bring charges in one forum rather than another. The Supreme Court held in Village of *Willowbrook v. Olech* that an individual who is not a member of a protected class may in some contexts assert a "class-of-one" equal-protection claim by establishing that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." But the Supreme Court has subsequently made clear that Olech, which involved a landowner's challenge to a zoning decision, does not apply to every kind of government action. There are, the Court explained, "some forms of state action . . . which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments." In such contexts, a "'class-of one' theory of equal protection has no place" because "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." The Commission's choice to bring an action in an administrative forum is a decision committed to agency discretion. Accordingly, Bandimere's class-of-one equal-protection challenge must fail.
>
> Second, even if a class-of-one equal-protection claim were cognizable in this context, Bandimere has failed to make the requisite threshold showing that he was "treated differently from others similarly situated." Individuals asserting such a claim "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." But Bandimere has merely pointed to the fact that most "alleged Ponzi schemers" in recent years have been subject to civil injunctive actions. He has not compared the facts and circumstances of those cases with his own to any degree of detail, much less shown that his case bears such an "extremely high degree of similarity" to those cases that he must have been "singled out." To the contrary, Bandimere acknowledges that a dozen other cases have in fact been brought against Ponzi schemers administratively, as was done here. While conceding this fact, Bandimere attempts to distinguish the administrative proceedings brought against Ponzi schemers, asserting that they were settled, involved licensed securities professionals, or did not allege that the respondents knowingly involved investors in a fraudulent scheme. But the fact that some of these cases may differ in some respects does not establish that Bandimere has been singled out. Bandimere has failed to "identify and relate specific instances where persons situated similarly in

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[18] *In re David F. Bandimere*, Admin. Pro. No. 3-15124 (Oct. 29, 2015).

> all relevant aspects were treated differently" from him. Moreover, Bandimere was not charged with perpetrating a Ponzi scheme in the first place, so the idea that he was "singled out" from a group he does not belong to makes no sense. For these reasons, his equal-protection claim must fail.
>
> Finally, contrary to Bandimere's contention, there was a "benign reason to proceed against Mr. Bandimere administratively." Thus, he has also failed to establish that "there is no rational basis for the [alleged] difference in treatment," even if any such difference exists. Bandimere was alleged to have been, and we have found that he was, acting as an unregistered broker. This provided a jurisdictional basis for the remedy the Division sought, and that we have imposed, of an associational bar for the protection of investors in the public interest—a statutory remedy that Congress made available to the Commission in administrative proceedings. That Bandimere was acting as a broker without being a licensed securities professional in no way diminishes the appropriateness of seeking such a remedy. The statute does not distinguish, nor should it, between registered and non-registered brokers.

Thus, the Commission rejects an equal protection challenge to its selection of the administrative forum for three reasons. First, the Commission claims that since the relevant statutes afford wide discretion to the Commission in selecting a forum, the Commission is essentially free to select the forum it prefers. Second, the Commission argues that an equal protection challenge must be rejected unless the challenger can show that he was "treated differently from others similarly situated." Third, the Commission argues that there was a "benign reason" for proceeding administratively, that is the desire to seek associational bars which are only available in the administrative forum. All of these arguments are unpersuasive.

With respect to the argument that a statutory grant of discretion to the Commission in selecting a forum protects the Commission from any equal protection challenge, this argument was rejected by Judge Rakoff in the Gupta case and is illogical; a grant of discretion cannot be abused. Obviously, for example, the Commission would not be protected from equal protection challenges if it elected to sue all women administratively and all men in Federal district court. With respect to the evidence Respondents were treated differently from similarly situated targets,

the evidence set forth above establishes this. Here, the evidence shows that the Commission almost never brings cases of great size and complexity as administrative proceedings. This case has been acknowledged by the Administrative Law Judge, the Chief Administrative Law Judge, and the Commission to be of exceptional size and complexity. The Commission almost always brings such cases in federal district court, where ample time is afforded to prepare to try and to try such cases. This is required by the Supreme Court, which has repeatedly recognized that an unseemly "race to judgment" deprives the target of due process and adequate representation by counsel, themselves Constitutional guarantees. Thus, Respondents have shown that they were "treated differently from others similarly situated" and, indeed, were harmed by being treated differently. Finally, the supposed "benign" reason to bring this case in an administrative forum is illusory. Had the Commission filed this case in federal district court and obtained an injunction, it could have used that injunction to obtain associational bars with virtually no additional time or effort.[19] Indeed, Respondents would have stipulated to associational bars if they were enjoined in federal district court.

Conclusion

For the foregoing reasons, Respondents respectfully urge the Commission to dismiss this action.

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[19] See, for example, *In re John W. Layton*, Admin. Pro. No. 3-14162 (Dec. 13, 2012)("Advisers Act Section 203(f) authorizes the Commission to initiate administrative proceedings against a person who is, among other things, enjoined from 'engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security,' and who was, at the time of the misconduct underlying the injunction, associated with or seeking association with, an investment adviser.")

November 19, 2015

Respectfully submitted,

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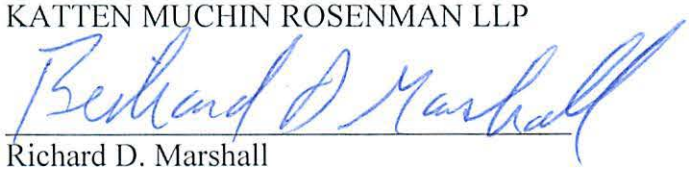

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CERTIFICATE OF COMPLIANCE WITH RULE 450(d)

I, Richard Marshall, certify that this brief complies with the word limitation set forth in Commission Rule of Practice 450(c), as it contains 6,153 words, excluding the parts of the brief exempted by the Rule.[1]

Richard D. Marshall

[1] 17 C.F.R. §201.450 (c).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15141

In the Matter of

MOHAMMED RIAD AND KEVIN TIMOTHY SWANSON

Respondents.

CERTIFICATE OF SERVICE

Richard D. Marshall, an attorney, certifies that on November 19, 2015, he caused true and correct copies of his Notice of Appearance and Respondents' Motion to Dismiss and Brief in Support of Motion to Dismiss to be served by mail on the following:

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Re: In the Matter of Mohammed Riad and Kevin Timothy Swanson, File No. 3-15141

Dear Mr. Fields

Enclosed please find the original and three copies of the Notice of Appearance of Richard D. Marshall and the Respondents' Motion to Dismiss, Brief in Support of Motion to Dismiss, and Certificate of Service for filing with the Securities and Exchange Commission in the above-captioned matter.

Very truly yours,

Richard D. Marshall

RDM: