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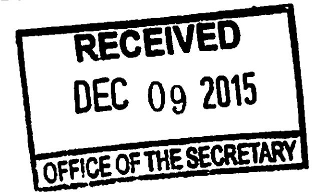
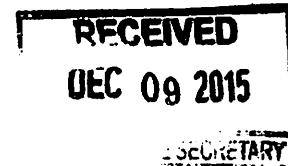
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15141



In the Matter of

MOHAMMED RIAD AND
KEVIN TIMOTHY SWANSON

Respondents.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Respondents have moved to dismiss the proceeding on the grounds that (1) the proceeding violates the Appointments Clause of Article II because the ALJ who presided over the hearing was not properly appointed, and (2) by proceeding administratively, rather than in federal court, the Commission deprived Respondents of equal protection of the law. Those arguments both fail.

I. The appointment of Commission ALJs is not unconstitutional.

Respondents contend that this proceeding violates the Appointments Clause of Article II because the ALJ who presided over the hearing was not properly appointed. *See* U.S. Const. art. II, § 2, cl. 2. But, as Respondents acknowledge, the Commission has repeatedly and unequivocally rejected that argument because the Commission's ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *See David F. Bandimere*, Securities Act Rel. No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015); *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015); *Raymond J. Lucia Cos., Inc., et al.*, Exchange Act Rel. No. 75837, 2015 WL

5172953, at *21 (Sept. 3, 2015). Nevertheless, Respondents insist that the Commission's prior decisions were wrong because (they claim): the Commission's de novo review of the record "exists only in theory and does not exist in practice"; the question of finality of ALJ decisions has no bearing on the Appointments Clause analysis; and the Commission's emphasis on the differences between Commission ALJs and the special trial judges of the Tax Court found to be inferior officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991), is "misplace[d]." None of Respondents' arguments warrant Commission reconsideration of the decisions in *Bandimere, Timbervest*, or *Lucia.*[1]

II. The administrative proceeding does not deny Respondents equal protection.

Respondents claim that the Commission's decision to proceed administratively, rather than in federal court, violates the Equal Protection Clause. But, as Respondents recognize, the Commission has rejected analogous challenges, explaining that a "class-of-one" 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." *Bandimere*, 2015 WL 6575665, at *18. That determination is well supported by established Supreme Court precedent, and the Commission should decline Respondents' invitation to reconsider prior Commission decisions.

Respondents vastly over read the Commission's statement, quoted above, when arguing that, under the Commission's logic, the Commission would be immune "from *any* equal protection challenge." Br. 18 (emphasis added). As the Commission's opinion—as well as the Supreme Court cases on which it relies—makes clear, the Commission's holding applies only to

[1] In particular, as to Respondents' claim that the Commission's de novo review is not meaningful, the Commission has expressly noted that its independent review of the record is quite "thorough." *Bandimere*, 2015 WL 6575665, at *20; *Timbervest*, 2015 WL 5472520, at *24 & n.151. And, in fact, on several occasions the Commission has wholly disagreed with an ALJ's findings on liability (*e.g.*, *Michael R. Pelosi*, Investment Advisers Act Rel. No. 3805, 2014 WL 1247415 (Mar. 27, 2014)) and/or reached different conclusions about the kinds of sanctions that were warranted (*e.g.*, *Wendy McNeeley*, Exchange Act Rel. No. 68431, 2012 WL 6457291 (Dec. 13, 2012)).

class-of-one equal-protection claims, *Bandimere*, 2015 WL 6575665, at *18-19, and *not* to claims alleging arbitrary government classification of a protected class (*e.g.*, claims of discriminatory treatment on the basis of race or sex). *See Engquist v. Oregon Dept. of Ag.*, 553 U.S. 591, 603-05 (2008). Such classifications would "implicate basic equal protection concerns" and could give rise to a cause of action. *Id.* at 604. But this is not such a case. Here, Respondents' class-of-one theory is precisely the sort that the Supreme Court has found lacking: that an inherently "subjective, individualized decision" was in fact made in a "subjective and individualized" manner. *Engquist*, 553 U.S. at 604. Indeed, as the Commission has explained, the selection of the forum in which to bring a case necessarily reflects "a highly individualized assessment of the facts and circumstances of [that] case." *Timbervest*, 2015 WL 5472520, at *29. That Respondents here would prefer the Commission to have made a different choice does not render its decision an equal protection violation.

Respondents further contend that—assuming their claim were cognizable, which, as explained above, it is not—they can demonstrate that they were treated differently than others similarly situated. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (an individual who is not a member of a protected class may, under some circumstances, assert a "class-of-one" equal protection claim by showing that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). They argue, in effect, that because the Commission rarely extends the deadline for issuing an initial decision, the fact that it did so here proves that this case must be unusually large and complex and therefore should not have been brought administratively. Br. 13.

Respondents misunderstand the Commission's precedent. As the Commission has repeatedly observed, "many Commission proceedings involve complicated issues resulting in

voluminous files." *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *36 (Jan. 31, 2008); *e.g.*, *John Thomas Capital Mgmt. Grp. LLC*, Securities Act Release No. 9492, 2013 WL 6384275, at *6 (Dec. 6, 2013). The Commission's decision to extend the deadline for issuing an initial decision in this case reflected a multitude of factors, including the presiding ALJ's "issuance of six initial decisions" in other cases in the months preceding the extension and her obligation to submit "initial decisions in three other proceedings with hearings in recent months." Order Granting Extension at 2 (Feb. 5, 2014). The extension order does not, however, establish that this case is necessarily any larger or more complex than others in which the Commission has declined to extend a deadline or grant a continuance. Moreover, as Respondents note, the Commission *has* granted extensions in several other cases, in part, because of those cases' size and complexity. Br. 12-13. Therefore, even under their own theory—that an extension proves that a case is unusually complex—Respondents cannot show that they have been "singled out" from a group of others similarly situated. *See Bandimere*, 2015 WL 6575665, at *18.

Finally, Respondents challenge the Commission's statement in *Bandimere* that the Commission's interest in obtaining an associational bar is a legitimate reason to proceed administratively. *See id.* at *19. Respondents suggest that because the Commission could obtain equivalent relief through other means—namely, an injunction in federal court followed by an associational bar in a separate administrative proceeding—the decision to proceed administratively in the first instance is somehow invalid. This argument misses the point. Congress has specifically authorized the Commission to proceed administratively when it determines that doing so would protect investors and is in the public interest. 15 U.S.C. § 78o-7(d)(1). The two-step enforcement approach that Respondents would prefer would not only

present all of the logistical challenges of litigating two separate actions, but it could also delay the potential imposition of an associational bar. The Commission is entitled to make its forum selection decision, in part, based on the speed and efficiency advantages that inhere in resolving all of its claims in a single proceeding.

Indeed, in creating authority for administrative cease-and-desist proceedings in 1990, Congress recognized the importance of "enabl[ing] the SEC to move quickly in administrative proceedings, particularly in those situations where investor funds are at risk." S. Rep. No. 101-337, at 8 (1990); *see The Securities Law Enforcement Remedies Act of 1989: Hearings on S. 647 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 34, 56-7 (1990) (statement of Richard C. Breeden, Chairman, Securities and Exchange Commission) (explaining the need for "a more streamlined administrative procedure," which is "important because of the significant delays that the Commission often faces in seeking a judicial remedy"). Congress's creation of these proceedings reflected a significant concern regarding the public interest in the administration of the securities laws, and the allegations at issue here illustrate the need for such provisions.

* * *

For the foregoing reasons, the Commission should deny Respondents' Motion to Dismiss.

Dated: December 8, 2015.

Respectfully submitted:

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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**

Robert M. Moye, an attorney, certifies that on December 8, 2015, he caused the Division of Enforcement's Response to Respondents' Motion to Dismiss to be served by email delivery upon:

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December 8, 2015

VIA OVERNIGHT DELIVERY

Jill M. Peterson, Assistant Secretary
Office of the Secretary
U.S. Securities & Exchange Commission
100 F Street NE, Mail Stop 1090
Washington, DC 20549

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

Dear Ms. Peterson:

Enclosed for filing in the above-referenced matter please find the original and three copies of the Division of Enforcement's Response to Respondents' Motion to Dismiss, which was faxed to the Office of the Secretary on Tuesday, December 8th.

If you have any questions, please call me at (312) 353-1051.

Sincerely,

Robert M. Moye

Enclosures

Copy to: Richard Marshall, Esq. (by email)