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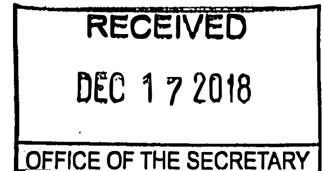

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: J.S. OLIVER CAPITAL MANAGEMENT, L.P., IAN O. MAUSNER, and DOUGLAS F. DRENNAN	Administrative Proceeding File No. 3-15446

MOTION OF RESPONDENTS J.S. OLIVER CAPITAL MANAGEMENT, L.P. AND IAN O. MAUSNER PURSUANT TO RULE OF PRACTICE 250(a) AND (c) FOR A RULING ON THE PLEADINGS AND, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION,
AND MEMORANDUM IN SUPPORT

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Pursuant to Rule of Practice 250(a), Respondents J.S. Oliver Capital Management, L.P. and Ian O. Mausner respectfully move to dismiss the Order Instituting Proceedings ("OIP") on the pleadings and, in the alternative, move for summary disposition of this matter pursuant to Rule of Practice 250(c).

INTRODUCTION AND OVERVIEW

This proceeding should be dismissed for four independent reasons: two based on violations of governing procedural statutes and regulations, and two based on continuing violations of the Appointments Clause.

First, the putative OIP in this matter never was an actual, valid OIP. To meet the definition of an OIP, an order must provide for a *lawful* hearing. But the Commission's initial order referred the matter to an *unlawful* hearing, before an unconstitutional administrative law judge, so the order failed this definitional requirement. Because the Commission never issued a valid OIP, it never "commenced" a proceeding. That defect mandates dismissal of the Commission's initial order. And because no proceeding ever was pending, much less pending in a forum with legal authority, the five-year statute of limitations never was tolled. It now bars a proceeding against these Respondents.

Second, even if the OIP was valid, it expired years ago. This is because, once the OIP was issued, the governing statutes and rule required a lawful hearing and a lawful decision by specific deadlines. These deadlines are not merely internal, like those that govern the Wells process; these deadlines govern active litigation between two parties. But by the time the deadlines passed, there had been no *lawful* proceedings. And once the Commission missed the deadlines, it no longer could proceed on the same OIP, which therefore should be dismissed. In fact, the continuing pursuit of this matter based on an expired OIP constitutes an ongoing

violation of the same statutory and regulatory deadlines. The OIP should be dismissed on that basis as well.

Third, this proceeding is unconstitutional because the assigned ALJ still has not been appointed in compliance with the Appointments Clause. The Commission's only response to the Supreme Court's ruling in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044, 2053-54 (2018), has been to try to "ratify" the same hiring process the *Lucia* court declared unconstitutional. This effort fails, however, because ratifying the ALJs' earlier hiring is not one of the "exclusive" methods of "appointment" recognized by the Appointments Clause. *See id.* at 2051 (identifying exclusive methods of appointment).

Fourth, this proceeding is unconstitutional for the additional reason that the tenure protection that SEC ALJs enjoy—two levels of for-cause protection—also violates the Appointments Clause.

These four grounds for dismissal rest on important principles that vindicate the rule of law in administrative agencies, advance Constitutional interests of paramount importance, and prevent palpable and illegal prejudice to these Respondents. For each of these reasons, the current OIP should be dismissed on the pleadings

PROCEDURAL BACKGROUND

The petitioners are J.S. Oliver Capital Management, L.P. ("J.S. Oliver"), a small investment-adviser firm, and Ian O. Mausner, the firm's Chief Executive. J.S. Oliver was a registered investment adviser and Mausner was J.S. Oliver's founder and president. See Release No. 9446 (Aug. 30, 2013) ("Commission's initial order" or "OIP") ¶¶ 4-5. The Enforcement Division charged Mausner and J.S. Oliver with violating the anti-fraud provisions of the securities laws by misusing client "soft dollars" and "cherry picking" profitable trades for

favored accounts. *Id. passim*. The last alleged violations took place in November 2011, *id.* ¶ 15, and the Commission issued the OIP in August 2013. The Commission assigned the proceeding to an ALJ. OIP § 4; AP Release No. 827 (Sept. 3, 2013). In January 2014, the ALJ conducted a five-day hearing. In August 2014, she issued an Initial Decision that imposed sanctions on the Respondents, including penalties, disgorgement, and permanent bars for Mausner and J.S. Oliver. Release No. ID-649 (Aug. 5, 2014), at 62-64.

The Respondents appealed to the Commission, arguing among other things that the entire proceeding was unconstitutional because the ALJ served in violation of the Appointments Clause. In June 2016, the Commission issued an opinion and order that, in addition to addressing other arguments, rejected the Appointments Clause challenge. Release No. 33-10100 (June 17, 2016).

The Respondents appealed to the United States Court of Appeals for the Ninth Circuit, making the Appointments Clause challenge as well as other arguments. *J.S. Oliver Capital Mgmt. v. SEC*, No. 16-72703 (filed Aug. 15, 2016). This case was pending in the Ninth Circuit when the United States Supreme Court issued *Raymond J. Lucia*, in which it held that "the Commission ALJs are 'Officers of the United States' subject to the Appointments Clause" and have not been appointed in compliance with that Clause. 138 S.Ct. at 2053-54. As a result of the *Lucia* decision, on July 13, 2018 the Ninth Circuit remanded the matter to the Commission. *J.S. Oliver Capital Mgmt. v. SEC*, No. 16-72703 (Order, July 13, 2018).

In turn, the Commission issued an order addressing all then-pending administrative proceedings including this case. Order, Securities Act Release No. 4993, 2018 WL 4003609 (Aug. 22, 2018). The order vacated all prior opinions in the matters, remanded all matters to the Office of Administrative Law Judges for a new hearing, requiring that each new hearing be

conducted by an ALJ who had not previously participated in that matter. *Id.* The Office of the Chief Administrative Law Judge then assigned this matter to the ALJ now conducting it. Order, Release No. 5955 (Sept. 12, 2018). The Commission is pursuing this proceeding based on the same OIP it issued in August 2013.

ARGUMENT

THE ORDER INSTITUTING PROCEEDINGS SHOULD BE DISMISSED

I. The Commission's Initial Order In This Matter Never Was A Valid OIP And Therefore Never "Commenced" A Valid Proceeding

A. The Commission's Initial Order Lacked A Required Element Of An OIP Because It Did Not Provide For A Lawful Hearing

The OIP should be dismissed because it never met the governing requirements for a valid order instituting proceedings. A Commission order is an OIP only if it provides for a lawful hearing, and this OIP failed to do so.

The Commission "commences" an administrative proceeding by issuing a valid OIP pursuant to Rule of Practice 200, "Initiation of Proceedings." *See* 17 C.F.R. § 201.101(4) (an enforcement proceeding is initiated by an order instituting proceedings), (7) (an OIP is an order "commencing" a proceeding); Rules of Practice, Release No. 35833, 1995 WL 368865, at *27 (June 9, 1995) ("The Commission commences proceedings ... laws by issuing an 'order instituting proceedings.'").[1] To constitute a valid OIP, an order must meet four requirements, which are imposed by various statutes and SEC Rule of Practice 200, "Initiation of Proceedings."

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[1] The securities statutes at issue in this matter require that, to impose sanctions, the Commission must provide respondents "notice and opportunity for [a] hearing." Securities Act § 8A, 15 U.S.C. § 77h-1(a); Securities Exchange Act § 21C, 15 U.S.C. § 78u-3(a); Investment Advisers Act of 1940 § 203A, 15 U.S.C. § 80b-3(e); Investment Company Act § 9A, 15 U.S.C. § 80a-9(b). *See* OIP § 1 (citing statutes).

17 C.F.R. § 201.200. (The cited SEC Rules of Practice have not been revised since the OIP was issued except as specifically noted below.)

In this case, the Commission's initial order violates one of those requirements, which is that an OIP must contain certain provisions for a lawful hearing. For example, the Securities Exchange Act requires that the "notice instituting proceedings . . . shall fix a hearing date" not "later than 60 days after service of the notice." 15 U.S.C. § 78u-3(b). The Investment Advisers act imposes the same requirement. 15 U.S.C. § 80b-3(k) (same). Similarly, the Administrative Procedure Act ("APA") mandates that "[p]ersons entitled to notice of an agency hearing shall be timely informed of [] the time, place, and nature of the hearing." 5 U.S.C. § 554(b). And SEC Rule of Practice 200 mandates that an "order instituting proceedings shall [] state the nature of [the] hearing." 17 C.F.R. § 201.200(b)(1).

Here, the initial order could have satisfied these requirements by providing for a hearing conducted by the agency itself or by one or more Commissioners, *see* 5 U.S.C. § 556(b); 17 C.F.R. § 201.110, but instead the order referred this matter to the Commission's system of ALJs. It provides for a "*public hearing ... before an Administrative Law Judge* to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110." OIP § IV (emphasis added). (The order also provides that the hearing shall take place in no more than 60 days. *Id.*)

This referral to a Commission ALJ is the order's fatal defect. At the time of the order there were not lawful ALJs, because every Commission ALJ was serving in violation of the Appointments Clause. *Lucia*, 138 S. Ct. at 2053-54. (They still are to this day, as explained below in sections III and IV.) Because there were no lawful ALJs, the Commission's order did not satisfy the requirements that an OIP must identify the nature of the hearing to be provided

and set a hearing date within a specific number of days. *See* 15 U.S.C. § 78u-3(b); 15 U.S.C. § 80b-3(k); 5 U.S.C. § 554(b); 17 C.F.R. § 201.200(b)(1).

These hearing-related requirements are so important they are imposed by two different securities statutes, by the Administrative Procedure Act itself, and by the Commission's regulation. And, it is safe to say, the repeated references in these statutes and regulation to a "hearing" require a *lawful* hearing.

The opposite reading would be hard to defend. Under that reading, the Commission could satisfy the statutory requirement to "fix a hearing date," Securities Exchange Act, 15 U.S.C. § 78u-3(b); Investment Advisers Act, 15 U.S.C. § 80b-3(k)), by fixing a date for an *unlawful* hearing. Also under that reading, the Commission could satisfy the Administrative Procedure Act's requirement to give notice of "the time, place, and nature of the hearing," 5 U.S.C. § 554(b), by giving notice of the time, place, and nature of an *unlawful* hearing.

These alternate arguments fail—badly—as colorable readings of the statutory term "hearing" and as plausible interpretations of Congressional intent. They would violate the basic rule that "[i]f the intent of Congress is clear," then "the agency [] must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (addressing an agency's interpretation of a statute). Surely the Commission cannot fob off its unconstitutional hearing process as providing the kind of "hearing" that Congress intended. Not only should statutes be construed to express Congressional intent, *id.*, they should not be construed to produce results that are absurd. *See In the Matter of Miller Energy Resources, Inc.*, SEC Release No. 3385, *2 (Dec. 10, 2015).

This conclusion—that an OIP must refer a matter to a *lawful* hearing—also is dictated by the well-established rule that an act in violation of the Appointments Clause has no legal effect.[2] Again and again, the Supreme Court has emphasized the Appointments Clause's paramount importance, *see, e.g., Edmond v. United States*, 520 U.S. 651, 659 (1997) (the Appointments Clause is one of the most "significant structural safeguards in the constitutional scheme"), including its role as a preventative, "prophylactic" protection for the Constitution's structure, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (the Appointments Clause provides "a *structural safeguard* rather than a remedy to be applied" after the fact (emphasis in original)), as well as for individual liberty, *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (collecting cases). *See also Freytag*, 501 U.S. at 878-79 (explaining the importance of the Appointments Clause). The Commission cannot reasonably contend that, by referring this matter to a "hearing" that violated this formidable constitutional bulwark, the Commission satisfied statutory requirements to refer the matter to a hearing. *See Ryder v. United States*, 515 U.S. 177, 182 (1995) (this Clause is a "bulwark" that preserves the Constitution's "structural integrity").

In sum, the Commission's initial order did not satisfy the requirement that an OIP must refer a matter to an appropriate hearing. The order thus failed to provide a definitional prerequisite to qualify as an order instituting proceedings. *See* 17 C.F.R. § 201.200(b). It is invalid and should be dismissed.

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[2] *See, e.g., Freytag v. Comm'r*, 501 U.S. 868, 79 (1991) (a defect in the appointment of an adjudicator "goes to the validity of the [administrative] proceeding"); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016) (an improper adjudicator's participation "affect[s] the ... whole adjudicatory framework"); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (failure to appoint an ALJ in compliance with the Administrative Procedure Act "was an irregularity which would invalidate a resulting order" so that the "order should be set aside as a nullity"); *see also Papasan v. Allain*, 478 U.S. 265, 276 (1986) (government action taken pursuant to unconstitutional authority is without legal effect, because the "authorization for such action is a nullity" (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)).

This is the only possible remedy, because the defect at issue cannot be cured on remand—that is, by continuing to rely on the same invalid OIP. This absence of a valid OIP distinguishes this matter from the usual remanded administrative proceeding, which rests on a valid OIP and which is remanded to address some issue that arose in the course of the valid proceeding. By contrast, in our case the issue is the *absence* of a valid OIP, and therefore the absence of a valid proceeding to begin with. That mistake cannot be corrected by continuing to rely on the same invalid OIP. If the Commission wants to pursue an enforcement action against these Respondents, it needs a valid OIP. To do that, the Commission first must cure the legal defect in the hearing process, after which it can issue the new OIP—if, that is, the statute of limitations has not expired.

B. No Proceeding Ever "Commenced"—And No Proceeding Ever Was Pending In A Lawful Tribunal—So The Statute Of Limitations Never Was Tolled

Here, though, the statute has expired. The governing statute required the SEC to "commence" a proceeding "within five years from the date the claim first accrued." 28 U.S.C. § 2462. Because the Commission has not issued a valid OIP in this matter, it has never "commenced" a lawful proceeding against these Respondents, *see* 17 C.F.R. § 201.101(4), (7); Release No. 35833, 1995 WL 368865, at *27, so it has never tolled the running of the statute.

Because the statute never has been tolled, it is too late to issue a valid OIP. A claim "accrues" on the date of the last conduct at issue, *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442, 448 (2013), and the last conduct at issue in the Commission's initial order occurred in November 2011, now more than seven years ago. *See* Release No. 9446 (Aug. 30, 2013). Section 2462 thus bars a new proceeding. *See* 28 U.S.C. § 2462.

The Division likely will contend that the statute was tolled because an ALJ actually went through the motions—however unconstitutional—of taking evidence and issuing a written

decision. But that argument literally begs the question: It skips over the actual problem, which is that under governing law no "order instituting proceedings" ever was issued. The fact that the ALJ conducted various unlawful activities relating to the matter is irrelevant. No lawful "proceeding" ever began.

It is not surprising that a Commission order that failed to "commence" a proceeding also failed to toll the statute of limitations. This is because, as just explained, this case is *not* like the typical administrative enforcement proceeding. That typical case is properly commenced with a valid OIP and, therefore, is pending in a valid administrative forum—which is why the pendency of the case tolls the statute of limitations. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965) (holding that statute of limitations was tolled where plaintiff "brought an action within the statutory period in the state court of competent jurisdiction"). Nor is this case like the common situation where a civil complaint, though containing a substantive defect, is filed in a court that has jurisdiction over it; there, again, the pendency of the case in a court with jurisdiction has the effect of tolling the statute of limitations. Our situation is different in at least two ways, each helping explain why the statute in our case was never tolled.

First, a plaintiff "commence[s]" a civil action "by *filing* a complaint with the court," Fed. R. Civ. P. 3 (emphasis added), but the Commission "commence[s]" an administrative proceeding by *issuing* an order that meets the statutory and regulatory requirements for an OIP, *e.g.*, 17 C.F.R. § 201.101(7)—no filing with a court is involved. And in our case, the Commission never issued an order that meets the statutory and regulatory requirements for an OIP, so no proceeding ever commenced and the statute never was tolled.

Second, in the pending civil case where the statute of limitations is tolled, the complaint is pending in a court that has jurisdiction; in our case, by contrast, no matter ever was pending in

a tribunal with authority over it. In our case the only tribunal mentioned in the initial order—the Commission's ALJ system—had no authority to hear the matter. So even if this matter somehow was considered pending in that tribunal, it could not have tolled the statute, because filing a complaint in a court that lacks jurisdiction generally does not toll the statute of limitations. *See, e.g., Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 634 (4th Cir. 2017); *Booth v. Carnival Corp.*, 522 F.3d 1148, 1152 (11th Cir. 2008); *Mangarino v. Welfare Fund of Local 771*, 21 F. Supp. 2d 284, 298 (S.D.N.Y. 1998). *Cf. Burnett*, 380 U.S. at 429. Indeed, in terms of failing to establish a pending proceeding in order to toll the statute, the Commission is worse off than the civil plaintiff who files a complaint in a court that lacks jurisdiction. The civil plaintiff is a litigant who chose the wrong court, and for that reason does not obtain the benefit of tolling. But the Commission played two roles and is responsible for two different legal defects: It litigated the matter, but without a valid OIP and in a tribunal without any authority, *and* it controlled the nature of the tribunal, so that the tribunal's lack of legal authority was the Commission's own doing.

In any event, in addition to suffering from the absence of a valid OIP, this case has the same critical flaw that prevents the civil case example from tolling the statute of limitations. Because that civil complaint was filed in a court without jurisdiction, the complaint never was pending in a court with the authority to hear it; likewise in our case, the OIP never was pending in any tribunal with the authority to hear this matter. In both contexts, no matter ever was pending in any lawful forum. In both contexts, the statute of limitations never was tolled.

II. If The Commission's Initial Order Is Treated As Valid OIP, It Should Be Dismissed Because The Ensuing Proceeding Violated Mandatory Deadlines That Govern Active Litigation

Even if the Commission's August 30, 2013 Order had been a valid OIP when it was issued, it still should be dismissed, because the proceeding itself violated the governing statutory deadlines. These deadlines required that, except for extensions properly obtained, the hearing must commence within 60 days of issuing the OIP, 15 U.S.C. § 78u-3(b) (Securities Exchange Act); 80b-3(k)(2) (Advisers Act), and under the version of the rule effective at the time, that lawful ALJ must issue an initial decision no later than 300 days after the hearing, *see* OIP § IV (citing 17 C.F.R. § 201.110 ; 201.360(a)(2) (effective 2006; superseded 2016). . See also OIP § IV (expressly imposing deadlines of 60 days to convene a hearing and 300 days for the initial decision).

The record in this proceeding shows that the Commission and its employees knew these deadlines could not be violated, because the Division of Enforcement, the ALJ, and the Commission took care to obtain or grant extensions when doing so was necessary to avoid violations. For example, early in this proceeding, the ALJ issued orders extending the hearing date by about 65 days. AP Rel. No. 942 (Oct. 8, 2013); AP Rel. No. 905 (Sept. 25, 2013) (citing Rule 360(a)(2).) After the hearing, the ALJ moved the Commission to extend the deadline for her decision by 30 days, and the Commission issue an order granting the extension. 1933 Act Rel. 9609 ((July 2, 2014) (citing Rule of Practice 360(a)(2)).)

It turned out, however, the deadlines were violated anyway, because before those deadlines expired no *lawful* hearing was begun and no *lawful* decision was issued. *Lucia*, 138 S. Ct. at 2049 (holding that SEC ALJs were serving in violation of the Appointments Clause). As we explained above in section I.A., the Commission could not satisfy these important

requirements by conducting proceedings that were unlawful. And once the deadlines passed, it was impossible to comply with them. In effect, the OIP expired, so that it should be dismissed.

Again, this outcome should not be surprising. Every attorney knows the harsh consequences that can follow from violating a procedural deadline in live litigation, and here the deadlines are straightforward and mandatory. *See* 15 U.S.C. § 78u-3(b); 80b-3(k)(2); 17 C.F.R. § 201.360(a) (2006). Nor do they govern merely internal, agency-only activities, like the deadlines that govern internal Commission decision-making during the Wells process. *See* 15 U.S.C. § 78d–5(a). To the contrary, these deadlines govern the progress of an active enforcement action. *Cf. Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 952 (D.C. Cir. 1986) (FCC's decision was invalid where the agency departed from regulatory deadline for competing parties to submit applications for licenses).

What is more, with these missed deadlines now years in the past, the Commission is violating these deadlines by continuing to pursue this matter based on the same OIP. This continuing violation flouts a precept "at the foundation of the modern administrative state," which is "that agencies must abide by their own rules and regulations." *Reuters*, 781 F.2d at 947. This is the precept identified in the familiar *Accardi* doctrine, under which agency actions that violate the law are invalid. *United State ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954). *See also Battle v. F.A.A.*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) (citing *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003)) (same). This requirement that agencies follow the law applies even if the agency's violations were unintentional, *see, e.g., Battle*, 393 F.3d at 1336 (stating that an agency must follow applicable law).)

This principle does not require a showing of prejudice where, as in this case, the rules the agency violated "confer important procedural benefits upon individuals." *Am. Farm Lines v.*

Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970); *see also Vitarellli v. Seaton*, 359 U.S. 535, 539 (1959) (without requiring prejudice, holding that agency must follow its procedural standards). That is the case here, where the deadlines were not imposed—by Congress and the Commission—to protect the Commission.

Even if prejudice were required, the Respondents could show it. By violating its own rules requiring it to conduct legally valid proceedings within a limited number of days, the Commission is forcing the Respondents to defend themselves now—years after the hearing to which they were entitled under Commission rules. The Supreme Court in *Gabellli* highlighted exactly this kind of prejudice, in this same context of SEC enforcement proceedings. Describing the prejudicial impact of the passage of more than five years since the conduct at issue, the Court explained that by that time, "evidence has been lost, memories have faded, and witnesses have disappeared." 568 U.S. at 448 (citation omitted). As the Supreme Court's explanation shows, the impact of such a lengthy delay is palpable prejudice to the affected respondents. The ongoing violations in this proceeding provide another reason to dismiss the OIP.

III. This Proceeding Is Unconstitutional Because The Assigned ALJ Has Not Been Appointed In Accordance With The Appointments Clause

This proceeding is back in this forum, on remand, because the Supreme Court held in *Lucia v. Securities and Exchange Commission* that SEC ALJs are "Inferior Officers" but have not been "appointed" in a manner that satisfies the Appointments Clause. 138 S. Ct. at 2049-50. The *Lucia* Court described the "permissible" methods "for "appointing" constitutional officers, *id.*, explaining that these methods are "exclusive," *id.* at 2051 (citing Art. II., § 2, cl. 2). Inferior officers can be appointed in one of three ways, with Congress choosing the specific method: by "the President alone, a court, or a department head." *Id.* at 2051 n.3. For ALJs at the SEC, the

Lucia Court noted, Congress has granted the appointment power to the Commission, as the "Head of Department." *Id.*

Turning to the facts of *Lucia*, the Court pointed out that "as all parties agree, none of those actors" with authority under the Appointments Clause "appointed" the SEC ALJ in that case. 138 S. Ct. at 2051. "[I]nstead," the Court went on, "SEC Staff members gave" the relevant ALJ "an ALJ slot." *Id.* The Commission's brief provided more detail about the process, explaining that the Office of Personnel Management conducted a "hir[ing]" process, in which the Commission's Chief ALJ selected the ALJs, subject to approval by the Commission's Office of Human Resources." Brief of the SEC, Nov. 29, 2017, at 3. This hiring process, the *Lucia* Court held, was unconstitutional—not one of the "permissible" means of "appointment" under the Appointments Clause. 138 S. Ct. at 2049.

The Supreme Court issued *Lucia* more than five months ago, and since then the Commission still has not "appointed" its ALJs in a manner that satisfies the Appointments Clause. Instead, the Commission is relying on a "Ratification Order" it issued a year ago, on November 30, 2017, in which it purported to "ratif[y]" the "agency's prior appointment" of its ALJs. Order, Securities Act Release No. 10,440, at *1 (Nov. 30, 2017) ("Ratification Order"). More recently, after the Supreme Court decided *Lucia*, the Commission issued a follow-up order that "reiterated" the Ratification Order. Order, Securities Act Release No.33-10536 (Aug. 22, 2018).

These orders did not remedy the Appointments Clause defect identified in *Lucia*. The orders refer to an earlier "appointment," but there was no earlier appointment—certainly not as the word is used in *Lucia* and the Appointments Clause. Indeed, there is no evidence the Chief ALJ ever made what she considered "appointments." Nor could she have done so if she tried,

because as *Lucia* states, the power to appoint inferior officers can belong only to the President, a court of law, and or the head of a department, 138 S. Ct. at 2051 (citing Article II, § 2, cl.2), and the SEC's Chief ALJ is not on this "exclusive" list, 138 S. Ct. at 2051. *Even Congress* cannot assign appointment authority to someone who is not on this list, *Lucia*, 138 S. Ct. at 2051 (citing Article II, § 2, cl.2), and the Commission does not have greater power under the Appointments Clause than Congress.

Nor do the permissible methods of appointment under the Appointments Clause permit a Head of Department's to "ratify" an earlier hiring made by an actor who lacks appointment authority. This "ratification" approach is the Commission's attempt, by authorizing the Chief ALJ to appoint inferior officers, to achieve indirectly the same end the Appointments Clause forbids it from achieving directly. The Commission's orders indicate that this—authorizing the Chief ALJ to make appointments—is exactly what the Commissions seeks to do, because those orders refer to the Chief ALJ's hiring of ALJs as "appointments." Order, Securities Act Release No.33-10536 (Aug. 22, 2018); Ratification Order (Nov. 30, 2017). But as we just explained, this indirect method cannot satisfy the Appointments Clause: The Commission does not have authority to grant appointment power to anyone, and the Chief ALJ is not one of the actors to whom even Congress could grant appointment authority. *Lucia*, 138 S. Ct. at 2049.

The Commission's effort also fails under the law of ratification, which is "governed by "principles of agency law." *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Under those principles, "[r]atification cannot ... give legal significance to an act which was a nullity from the start." *Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985). *See* RESTATEMENT (SECOND) OF AGENCY § 86 (Am. Law Inst. 2017) (a principal cannot ratify an act that would have been invalid even with the principal's authorization); 2A William M. Fletcher,

ENCYCLOPEDIA OF THE LAW OF CORPORATIONS, § 764 (2017) ("A void act cannot be validated by subsequent ratification"). These principles dictate that, because the Chief ALJ's selection of her fellow ALJs was a nullity under the Appointments Clause, the Commission cannot use "ratification" to give that nullity some legal effect.

In sum, in the wake of the Supreme Court's declaration that the Commission's process for hiring ALJs violates the Constitution, the Commission has responded by trying to "ratify" the very process the Court just struck down. 138 S. Ct. at 205. This ratification attempt had no effect. The Commission's ALJs still have not been constitutionally appointed.

IV. This Proceeding Is Unconstitutional Because The Assigned ALJ Enjoys Protection From Removal That Violates The Appointments Clause

This appointment defect is not the only remaining constitutional violation: The ALJ's statutory protection from *removal* also violates the Appointments Clause. The President's ability to remove constitutional officers is an important element of the Appointments Clause, because the "power to oversee executive officers through removal" is an important "traditional" means of ensuring accountability. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010)

To preserve the President's removal authority, the Supreme Court has held that a structure providing constitutional officers two-tier for-cause protection violates the Appointments Clause. That was the holding of *Free Enterprise Fund v. Public Company Accounting Oversight Board*, where the Supreme Court invalidated a statutory scheme that provided for two levels of for-cause protection against removal by the President: First, members of the Public Company Accounting Oversight Board could be removed by the SEC only for certain limited forms of wrongdoing, and second (the Court assumed), the SEC's Commissioners could themselves be removed only for "inefficiency, neglect of duty, or malfeasance in office." 561 U.S. at 487 (citation omitted).

This scheme, the court explained, denied the President sufficient control over the Board. *Id.* at 496.

Commission ALJs enjoy the same forbidden multiple levels of protection. First, they can be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. § 7521(a), and second, members of that Board can "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). In fact, worse than in *Free Enterprise Fund*, another level of decisionmaker, the members of the Commission, also is insulated from removal. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004); *see also Free Enter. Fund.*, 561 U.S. at 487 (assuming that SEC Commissioners can be removed only for certain cause).

It is true that *Free Enterprise Fund* declined to say whether its holding applied to ALJs, but the Court noted that limitation primarily because—at that time—whether ALJs were constitutional officers still was an open question. 561 U.S. at 507 n.10. But now, of course, the *Lucia* Court has resolved that question as it relates to SEC ALJs, holding that they are constitutional officers. 138 S. Ct. at 2052-54. *Free Enterprise Fund* dictates, therefore, that SEC ALJs—constitutional officers—cannot enjoy multiple levels of for-cause protection. Those ALJs continue to serve in violation of the Appointments Clause, rendering this proceeding unconstitutional. It should be dismissed.

CONCLUSION

For the reasons set out above, the "Order Instituting Administrative and Cease-and-Desist Proceedings" dated August 30, 2013 should be dismissed on the pleadings pursuant to Rule 250(a). In the alternative, summary disposition of this matter should be granted as a matter of law pursuant to Rule 250(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

In the Matter of J.S. Oliver Capital Management, L.P., et al.
Administrative Proceeding File No. 3-15446

Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. §201.151), I certify that the attached "Motion Of Respondents J.S. Oliver Capital Management, L.P. And Ian O. Mausner Pursuant To Rule Of Practice 250(a) And (c) For A Ruling On The Pleadings And, In The Alternative, For Summary Disposition, And Memorandum In Support" was served as follows:

Brent J. Fields, Secretary Securities and Exchange Commission 100 F. Street, N.E., Mail Stop 1090 Washington, DC 20549-1090 Facsimile: 703-813-9793	(By UPS and Facsimile) (Original and three copies)
Honorable Cameron Elliot Administrative Law Judge Securities and Exchange Commission 100 F. Street, N.E., Mail Stop 2557 Washington, DC 20549-2557 Email: alj@sec.gov	(By Email and UPS)
David J. Van Havermaat John B. Bulgozdy Ronnie B. Lasky Division of Enforcement Securities and Exchange Commission 444 South Flower Street, Suite 900 Los Angeles, CA 90071 (323) 965-3998	(By Email)

Dated: December 14, 2018

/s/Andrew J. Morris
Andrew J. Morris