UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	Administrative Proceeding File No. 3-15574 ALJ Cameron Elliot

SUPPLEMENTAL BRIEFING IN SUPPORT OF RESPONDENTS' APPEAL REGARDING THEIR DUE PROCESS CLAIMS

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INTRODUCTION

Due process requires fairness and the appearance of fairness.[1] *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases . . . . justice must satisfy the appearance of justice.") (internal citations and quotations omitted); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962) ("[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.")

Recently, the Commission invited the ALJ in Respondents' case to file an affidavit, "addressing whether he has had any communications or experienced any pressure similar to that alleged in the May 6, 2015 The Wall Street Journal article, "SEC Wins With In-House Judges," and whether he is aware of any specific instances in which any other Commission ALJ has had such communications or experienced such pressure." *In the Matter of Timbervest LLC*, File No. 3-15519, Order Concerning Additional Submission and Protective Order (Jun. 4, 2015).

Respondents respectfully submit that the Commission asked the wrong questions. Even in the absence of direct, explicit pressure from anyone, as employees of the Commission, consciously or unconsciously, ALJs cannot be expected to be as hard on their colleagues at Division as they can be on Respondents and their counsel. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) (explaining that the Due Process Clause does not require "proof of actual bias," and instead, the Court asks "whether, 'under a realistic appraisal of

[1] This Brief does not deal with Respondents' equal protection claim. As discussed in previous filings, Respondents have asserted that the Commission violated Respondents' right to equal protection by bringing this case in its in-house administrative proceedings rather than in Federal Court. (*See* Resp'ts Petition for Interlocutory Review and Emergency Motion to Stay the Hearing at 5-6 (Feb. 267, 2014) (hereinafter "Resp'ts Pet. for Interlocutory Review")) However, Respondents were prevented all avenues of developing a record on this issue.

psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"); *cf. SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 188 (1963) ("An investment adviser should continuously occupy an impartial and disinterested position, as free as humanly possible from the subtle influence of prejudice, conscious or unconscious; he should scrupulously avoid any affiliation, or any act, which subjects his position to challenge in this respect."). In other words, because ALJs and Division lawyers are both employees of the Commission, there is a substantial danger that the Division does not see ALJs as sufficiently removed and independent to conduct itself appropriately and a substantial danger that the ALJ cannot possibly be completely neutral. In this case, Division treated the administrative proceeding ("AP") with contempt and the ALJ failed to police Division adequately.

I. DIVISION DID NOT SEE THE ALJ AS SUFFICIENTLY REMOVED AND INDEPENDENT TO CONDUCT ITSELF APPROPRIATELY

Perhaps the starkest illustration of Division's contempt for the AP was its total disregard of any decorum and rules with respect to handling the official hearing transcript.

During a break in a witness' testimony, Respondents' counsel found one of Division lawyers in front of the court reporter's computer manipulating her keyboard. The only people in the courtroom at the time were the four Division lawyers. When challenged, the Division lawyer claimed that the court reporter gave him access (outside of the Respondents' counsels' presence and without their knowledge) because the search function on his computer was not working. That explanation, even if true, obviously completely misses the point. What is astounding is that neither that lawyer nor the three other Division attorneys understood how inappropriate this was.

Similarly, after the hearing, the same government attorneys submitted changes to the hearing transcripts directly to the court reporting service bypassing both Respondents' counsel and the ALJ. When challenged on this practice, Division again failed to comprehend how immensely inappropriate its actions were. Instead, Division asserted that these actions were par for the course: "It is not our practice to obtain written consent from Respondents before seeking corrections to transcripts." (Resp'ts Corr. with Div., attached hereto as EX. A.)

This practice stopped only when Respondents stressed repeatedly to Division *and* the court reporting service that such conduct violates Rule 302(c) of the Commission's Rules of Practice, 17 C.F.R. 201.100 *et. seq.* (2006) (hereinafter "SEC Rules of Practice"). Even then, Division initially refused to provide a complete list of all corrections it sent to the reporting service and did so only after repeated requests. Those emails showed that the same government attorney routinely sent corrections directly to the court reporter during the hearing and, in one instance, obtained an amended transcript, all without Respondents' knowledge. (*See* Dec. In Further Support of Brief of Plaintiffs-Appellants at ¶¶ 8-17 [Dkt. 21], *Chau v. S.E.C.*, 14-cv-1903 (S.D.N.Y. Jun. 4, 2014).)

What is even more astounding is that even though Respondents detailed this conduct in a filing in federal court, (Brief of Plaintiffs-Appellants [Dkt. 20], *Chau v. S.E.C.*, 14-cv-1903 (S.D.N.Y. Jun. 4, 2014)), not a single member of Division's team has been disciplined to Respondents' knowledge. Had the situation been reversed—had counsel for Respondents engaged in the same conduct—, Division would have recommended Rule 102(e) proceedings to bar those attorneys from practicing before the Commission.

It is hard to imagine Division engaging in the same course of conduct in federal court. There, Division risked a neutral arbiter, a federal district court judge, making a criminal

obstruction of justice referral. The fact that Division felt safe engaging in this conduct in an AP speaks volumes about how those proceedings are conducted and policed.

A. The Disorganized and Gigantic Investigative File.

Division knew the size of its investigative file, and yet, it decided that this case should be brought administratively where the case had to proceed to a hearing within four months after service of the OIP. *See* 17 C.F.R. 201.360(a)(2). As a practical matter, this meant that while Division had over 1,095 days to build its case and locate key documents, Respondents had 130 days from the first production of the investigative file to search and review a reasonable subset of the over 11 terabytes of data (a file the size of entire printed record of the Library of Congress) before the scheduled exchange of exhibits and witness lists. This meant also that Respondents would be denied application of the Federal Rules of Civil Procedure and developed case law on how to deal with large sets of electronically stored information.

Division deliberately took advantage of a forum ill-designed to handle large sets of data. It produced the investigative file in a largely unusable format, requiring close to two months of effort to render it meaningfully searchable and leaving Respondents just two months to review, search, and identify exhibits. Briefly, to understand the issues, the documents had already gone through an e-discovery process, where the original producing party to Division used search terms, date restrictions, predictive coding, and similar tools to separate responsive documents from non-responsive and privileged documents. Consequently, any search terms by themselves had only limited utility for narrowing the number of documents to review. Thus, Respondents needed to be able to reduce the population by limiting the review set by producing party, date, author, source, etc. (Resp'ts Mtn. for Adj. at 5-6 (Dec. 20, 2013).) However, these basic mechanisms of searching and sorting data initially were unavailable to Respondents.

- The investigative file production contained over 131 individual electronic databases, which in simple terms did not talk to each other. More specifically, the metadata fields, such as date, author, or source, were not consistent across the databases. (Dec. of JR in Support of Resp'ts Mtn. for an Adj. ¶¶25-29, attached as EX. B.) Respondents, therefore, had to spend significant time and expense "normalizing" the data. (*Id.* at ¶¶25-31; Resp'ts Mtn. for Adj. at 6 (Dec. 20, 2013).)

- Division refused to provide a detailed index to its document productions, which would have alleviated some this disorganization. Respondents, in other words, could not reliably segregate the data by producing party.[2] (Dec. of AB in Support of Resp'ts Mtn. for an Adj., EX. D ¶¶ 18-19.)

- A portion of the documents were not text searchable; that is, even if a particular word or phrase appears in the document, a search for the documents containing the word or phrase would not identify the documents within the electronic review tool. (EX. B ¶24.)

None of these problems were news to Division. When asked for assistance with some of these data problems, Division informed Respondents' counsel that it was its practice to only provide Respondents with the documents as originally received, even in instances where Division created various tools—such as an index, optical character recognition, or processing product files—to use and search the data. (Dec. of MM in Support of Resp'ts Mtn. for an Adj. ¶¶ 5-8, attached hereto as EX. C.) Division also took the position that it produced most of the documents in an abundance of caution; the relevant universe of documents was much smaller. In other words, Division recognized the high likelihood that the files it produced contained relevant, exculpatory evidence and did not want to risk being accused of withholding evidence.[3]

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[2] For example, it was only by happenstance that Respondents' counsel identified certain (but not all) productions from the Octans investors, by searching a large database titled "Staff Emails." Some of the documents proved important. For example, Ms. Lieu testified that while she did not remember the events, she would not have relied on the defective cash flow analysis. (Resp'ts Opp. Br. at 8-9.) She believed that she ran additional cash flow runs, which, utilizing the correct assumptions, would not have resulted in any write-downs. (*Id.*) That point was corroborated, in part, by HIMCO, an Octans Investor. Using standard industry assumptions, HIMCO performed cash flow runs on the assets prior to investing which showed 0% or low write-downs on the relevant assets. (RX 611-612, 728.) Respondents do not know what other favorable or exculpatory material they lacked the time, ability, or resources to locate.

[3] Of course, burying Respondents in 22 million documents in an AP allowed Division to claim that it complied with its disclosure obligations while simultaneously crippling Respondents' preparation.

Division also knew that the ALJ would not give credence to Respondents' complaints about the data. Crediting Division's assertions that the relevant universe was small, the ALJ told Respondents to focus their review on the factual allegations in the OIP. (Order Denying Resp'ts Mtn. for Adj. at 2. (Jan. 24, 2014).) He denied all of their requests for relief. To wit:

- Respondents asked for an adjournment of six months due to the size of the investigative file and the complexity of the issues.[4] That request was summarily denied by ALJ. (Order Denying Resp'ts Mtn. for Adj. (Jan. 24, 2014).)

- Respondents requested that the proceeding be governed by certain Federal Rules of Civil Procedure. Those rules not only allow litigants to narrow and focus the issues, but also have been repeatedly amended to address issues related to electronically stored information. (Resp'ts Mtn. for Adj. at 9-11 (Dec. 20, 2013).) That request too was denied. (Order Denying Resp'ts Mtn. for Adj. (Jan. 24, 2014).)

- Respondents requested that Division provide a means of organizing the relevant documents, such as its tags, labels, file folders, and/or other means of organizing relevant documents. (Resp'ts Mtn. for Adj. at 11-12 (Dec. 20, 2013).) The ALJ refused. (Order Denying Resp'ts Mtn. for Adj. (Jan. 24, 2014).)

- Respondents requested that they be provided (i) a *detailed* initial list of withheld documents and (ii) *Brady* and *Jencks* material as soon as possible, which the ALJ denied. (Pre-Hearing Tr. 8:16-18:7 (Nov. 18, 2013).)

- Respondents requested that Division provide its exhibit and witness list before Respondents, which the ALJ also denied. (*Id.* at 41:18-42:25.)

- Respondents asked again for more time to prepare for the hearing, which the ALJ denied. Respondents then filed a petition for interlocutory review and an emergency stay of the hearing and prehearing deadlines, which was denied. (Resp'ts Pet. (Feb. 27, 2014).)

- Respondents asked for more time for post-hearing briefing due to the complexity of the issues, including Division's new theory. The ALJ refused; instead, Respondents were forced to give up their opening brief and file just an opposition brief in order to have very limited additional time. (*See* Post-Hearing Scheduling Order (May 1, 2014); Order Amending Post-Hearing Scheduling Order (Jun. 6, 2014).)

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[4] Respondents made the requisite showing that a denial of its motion would substantially prejudice the defense, (*see* 17 C.F.R. § 201.161(b)), as the hearing deadline forced Respondents to massively divert time and resources away from trial preparation. (*See* Resp'ts Mtn. for Adj. (Dec. 20, 2013).)

In siding with Division, the ALJ stated that if there were ever a case that justified departure from the 300-day straightjacket of Rule 360, this was not it. (Order Denying Resp'ts Mtn. for Adj. at 2 (Jan. 24, 2014).) Nonetheless, following the hearing and his denial of a request for more time to brief the issues, the ALJ asked for ***and received a four month extension*** of the time in which to issue an initial decision. (Mtn. for Ext. of Time to Issue ID (Aug. 11, 2014).) The request was based on the size of the record and the complexity of the issues. (*Id.* ("[t]he record includes nearly 5,000 pages of transcript, nearly 1,400 exhibits, and more than 500 pages of post-hearing briefs").) Note that the ALJ's universe had already been limited and organized to 17 days of testimony and a set number of exhibits. Moreover, Respondents had further assisted by providing the ALJ with a version of its brief that hyperlinked to the cited exhibits.

The harm to Respondents was very real, indeed. First, counsel was forced to divert substantial resources to looking for relevant documents and trying to understand them even after the hearing started. More importantly, as we discussed elsewhere, the ALJ effectively shifted the burden of proof from Division to the Respondents by treating absence of evidence of review of assets as evidence of absence of review. For example, counsel was unable to locate a complete file showing review of all Octans' assets before the hearing started.[5] This problem became especially acute once it became clear that the ALJ and Division were departing from the allegations in the OIP and propounding a theory of fraud predicated on negligent selection of assets. (*See* Resp'ts Opp. Br. at 6-7.) It became imperative then to find files showing that Harding reviewed all assets in the normal course.

Respondents eventually found – purely by accident -- what they believed to be the relevant files. Of course, Division knew about their existence. Division then objected to these

[5] It is worth remembering that, in the wake of the credit crisis, Harding's business had dried up and its staff reduced to two employees, and the conduct at issue dates back to 2006 and 2007. No one knew exactly where the relevant documents were stored.

documents, as it was clearly prepared to do, on the basis that their metadata indicated that they were created after Ms. Lieu's asset review. Respondents then had to scramble to try to understand the metadata on the fly. The ALJ, for his part, faulted Respondents for being unable to produce credit analysis dated exactly May 2006. (ID at 39-43, 65.)[6]

It should come to no surprise that producing millions of documents that are incapable of being searched reliably is akin to not producing documents at all. *See, e.g.*, *Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co.*, No. 2:05-cv-01318-BES-GWF, 2006 WL 1582122, at *2 (D. Nev. June 5, 2006) ("The Court does not endorse a method of document production that merely gives the requesting party access to a document production that merely gives the requesting party access to a document dump, with an instruction to go fish . . . ." (internal quotations omitted).) Indeed, it is axiomatic that due process requires the opportunity for discovery. *Ballard v. Hunter*, 204 U.S. 241, 255 (1907).

B. Untimely Disclosure of *Brady* Information

Given the size of the investigative file, Respondents requested early disclosure of *Brady* material. (Resp'ts Mtn. for Adj. at 13 (Dec. 20, 2013).) Not only was that request denied (Order Denying Resp'ts Mtn. for Adj. at 3 (Jan. 24, 2014)), but Division then affirmatively held key *Brady* material back until the eve of or after trial and failed to identify certain *Brady* materials altogether. For example:

- A central issue in this case was whether Harding allowed Magnetar to pick bad assets to facilitate shorting the capital structure of Octans. Therefore, Division asked its expert, Ellson, to determine whether there was adverse selection of the ABX Index assets. (Resp'ts Reply Br. at 3.) Rather than affirming Division's theory that the assets were "disfavored," Ellson concluded that he could not show adverse selection. Division obtained this opinion at least six weeks prior to the hearing. (Tr. 1104:10-18.) Yet,

[6] To this day, Respondents cannot be certain that they have located all of the relevant credit files or if earlier versions of RX 966-67, dated May 30 and 31, 2006, exist.

Division did not share this information with Respondents until ***four days*** before the hearing commenced. (RX 884.)

- Division argued that Harding caved to pressure and bought the BBB Norma bonds in order to curry favor with Merrill. (OIP ¶¶ 60-69.) Division, however, waited until *after* the hearing, *after* the ALJ issued his initial decision, and *after* the record was closed to admit that Merrill did not know that it was being accommodated. (Div. Opp. Br. at 32.) As we explained before, if Merrill did not know that Harding was accommodating it, then logically Harding could not have been buying the bonds to curry favor with Merrill. (Resp'ts Reply Br. at 8-9.) This may explain why Division did not to call a single Merrill witness on the Norma allegations.

- Division knew about but failed to identify the spreadsheets showing analysis and approval of all Octans assets, including the assets included on DX 53. (Tr. 3848:13-3856:23.) No doubt, Division will claim that it was under no obligation to point out to Respondents exculpatory documents that were in Respondents own files. That would certainly be true in a normal case, but a case in which the investigative file is 22 million documents is far from normal.

Division acts as if its *Brady* obligations are recommended, rather than required. It waited, until Respondents could do very little with the information, to disclose it. It knows that there will be no repercussions for late disclosure.

C. Selective Application of the Federal Rules of Civil Procedure ("FRCP")

Division selectively picked and convinced the ALJ to apply only those parts of the FRCP that favored it. As background, Respondents were concerned that Division withheld additional *Brady* material regarding their experts' conclusions under the pretense that these communications were protected by privilege. (Resp'ts Mtn. to Exclude the Expert Testimony of Wagner, (Mar. 21, 2014).) Respondents, therefore, sought Division's communications with their experts' conclusions under the pretense that these communications were protected by privilege. (*Id.* 3-7.)

Even though the ALJ had denied Respondents' request that certain rules of the FRCP apply to this proceeding, (*see* above), and even though Division objected strenuously to that

request, both the ALJ and Division, when faced with Respondents' request found religion, albeit limited and one-sided. Division now argued that the FRCP should apply to limit expert disclosures. (Tr. 96:18-97:18.) Respondents objected strenuously to selective application of the FRCP. (*Id.*) The ALJ, in response, stated that: (i) he had the discretion to decide which portions of the FRCP would apply to the hearing; and (ii) he personally disagreed with Rule 26(b)(4)(B)'s prohibition of discovery of draft expert disclosures and communications between counsel and the expert. (Tr. 101:16-102:7.)

Nonetheless, the ALJ then changed course and ruled in Division's favor, applied Rule 26(b)(4)(B), foreclosing any possibility of Respondents uncovering additional exculpatory evidence regarding Division's experts. Though seemingly obvious, justice is violated when arbiters, required to be neutral, make piecemeal procedure decisions solely in favor one party. *Jaeger v. Cellco P'ship*, 2010 WL 965730, at *13 (D. Conn. Mar. 16, 2010) *aff'd*, 402 F. App'x 645 (2d Cir. 2010) ("Due process demands strict impartiality on the part of those who function in judicial or quasi-judicial capacity.")

D. Division's Summary Witness' Misleading Testimony

As we have explained and as the ALJ found, Division had a fundamental problem with its charged theory. Magnetar was not betting on Octans to fail because its short position was smaller than its long equity position 2 to 1, *i.e.* Magnetar's interests were aligned with those of other long investors. (ID at 75-77.) Division knew this, so it used the AP to engage in a series of sleights of hand in an attempt to convince the ALJ that Magnetar sold off part of its equity position in Octans and became net short.

Division offered a summary exhibit and the testimony of its summary witness, an SEC Staff Accountant (hereinafter "DS"). DS testified that as of a certain date Magnetar sold its

equity position in Octans and became "net short." (Tr. 2224:7-2227:17, 2231:2-15.) Specifically, DS testified that on March 15, 2007, Magnetar "finally got rid" of $64 million of its $94 million equity position and thereafter had a ***net short*** position in the Octans deal:

> Q. And in the last entry, what does that section show?
> A. The last section is Magnetar's trading in Octans 1 equity post-closing. There is a series of transactions that net out and there is a final sell of one of the classes of Octans equity for 64 million. ***So they sell 64 million.***
>
> ***
>
> THE COURT: Can I ask you about the bottom set of rows, the post September 26, 2006 trades? Am I reading this correctly? It looks like they just bought and sold in the same day.
> THE WITNESS: Yeah. I don't know —
> THE COURT: Except for the last one.
> THE WITNESS: Right. Exactly.
> THE COURT: Very well.
> THE WITNESS: ***That is when they finally get rid of it.***
>
> ***
>
> Q. If we could turn back to Division Exhibit 248A? It is up on the screen. That is your compilation with respect to the Magnetar trade blotter. Based on your review and the results shown here, what was ultimately Magnetar's net position in Octans 1?
> A. As of what date?
> Q. As of March 15, 2007.
> A. ***18 million.***
> Q. 18 million, short or long?
> A. ***Short.***

(Tr. 2224:7-2227:17; 2231:2-15 (emphasis added).) This testimony was false, as we have discussed elsewhere and as the ALJ found.[7]

After eliciting this false testimony, Division passed the witness to Respondents for cross-examination and the hearing broke for lunch. When the hearing resumed, Division asked the ALJ if they could ask a couple more follow-up questions. Presumably, Division realized that DS had

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[7] Briefly, Magnetar did not sell off its equity in Octans, but merely transferred part of its equity position in Octans to another vehicle in which Magnetar also bought the equity. (ID at 30-31, 76; *see also* Tr. 2475:19-2487:18.) Put differently, its economic risk with respect to its long exposure in Octans portfolio did not materially change. (ID at 30-31, 76.)

gone too far—in his assertion that Magnetar completely got rid of the $64 million, and thus Division sought to fix that part of the testimony without disturbing the misleading impression that Magnetar's interests were adverse to the other investors in Octans. (Tr. 2234:9-2236:25.) Division asked him a series of leading questions regarding whether he knew of a transaction called Tigris (the Magnetar-owned financing vehicle into which Magnetar moved the $64 million portion of its Octans equity). (*Id.*) DS replied that he knew about Tigris and that a portion of Magnetar's equity stake in Octans was moved into it. (*Id.*)

On cross-examination, in an about-face, DS now denied saying that Magnetar "finally got rid" of its equity position. (Tr. 2267:25-2296:21.) Respondent counsel reminded him that he took an oath and asked DS to confirm that his direct testimony was truthful. (*Id.*) In response, DS looked visibly uncomfortable: his face red, his speech halting, his demeanor weak and uncertain. He was then directed by Respondents' counsel to his previous testimony right after the break about Tigris. (Tr. 2272:18-2273:6.) In response, DS started to volunteer an answer about Magnetar's short positions (*id.*), when Division interrupted and asked for a break and to speak to its witness (Tr. 2273:7-2274:19). The ALJ allowed the break (without requiring DS to finish his answer), but instructed Division not to communicate with DS. (*Id.*) During the break, DS was observed typing on his mobile device.[8] After the break, DS seemed reinvigorated, his demeanor greatly improved, and he gave a series of uniform answers that sounded coached. (Tr. 2275:25, 2277:10, 2278:5, 2278:10, 2278:21-23.) For example, he said "based on this compilation" six times immediately after the break. (*Id.*) Eventually, however, DS was forced to admit that, contrary to his earlier testimony for Division, that he knew nothing at all about Tigris. (Tr. 2280:20-2281:3.)

[8] Respondents requested that the ALJ issue a subpoena for the relevant email records of DS in order to ascertain whether he had violated the ALJ's order and communicated with Division's lawyers during the break in his cross examination. (*See* Tr. 3205:8-3218:4.) The ALJ refused to issue the subpoena. (*Id.*)

On re-direct, Division again sought to pull back part of his testimony (by trying to lead him again to state that he understood that Magnetar took an equity position in Tigris), without disturbing the misleading impression that Magnetar's interests were adverse to the other note-holders. DSh, however, did not comply. He testified that he did not know anything about Magnetar's interest in Tigris, "[o]ther than what defense said." (Tr. 2300:7-17.)

DS' credibility was called further into question when it became apparent that the summary exhibit he referenced during testimony was itself misleading. The exhibit purported to be an extract of the Magnetar Octans trades. (*See* Tr. 2255:10-2258:11.) However, if one were to look at those trades in the format in which they appeared in the blotter, one would see clearly that, according to the blotter, Magnetar's short positions were decreased at one point. This fact is inconsistent with Division's theory that Magnetar's primary interest in Octans was to put on short positions. Apparently, Division solved that problem by altering the order of the trades to make the removal of hedges less obvious. (*See* Tr. 2481:4-11; 2487:4-18.) When DS testified about how he created the exhibit, he said he moved each line of information from the blotter by hand; he even gesticulated to illustrate his point. (Tr. 2255:10-2258:11.)

In fact, the information in the exhibit was sorted by spread. (Tr. 2481:4-11; 2487:4-18.) However, in order for the exhibit to have been sorted in this manner, someone would have had to have gone into the original blotter exhibit and altered one of the line items deliberately; otherwise that line item would have appeared out of spread order. This would not have been a huge alteration, to be sure, and not substantive in and of itself, but it would have been deliberate. In fact, the statistical chances that the hedges were originally displayed as sorted by "spread," as a result of randomly transposing the hedge-related lines from the blotter, are 1 in over 360,000. If the original exhibit had been altered, the chances would be zero.

When Respondents' counsel addressed this issue, the ALJ said, "I don't care." (Tr. 3217:1-8) The ALJ went so far as to state, that even if Division put its accountant up to lying under oath, he "did not care," because he would not rely on the testimony. (Tr. 3217:14-18.) The ALJ's response, in other words, to false testimony from a Division witness was to ignore it.

E. Other Examples of Misleading Testimony & Assertions

In fact, Division's manipulation of the AP was not an isolated event, but rather a course of conduct that infected the entire proceeding rendering it thoroughly bankrupt of constitutional protections. Notably and as discussed in previous filings:

- Division's expert, Wagner, testified and opined that Harding's credit team failed to perform any analysis for eleven of the relevant assets. (Resp'ts Reply Br. at 9-12.) The documents that Wagner reviewed in connection with his report, however, showed that cash flow analyses were performed for every single one of those asset. (*Id.* at 10-11.)

- Division's expert, Ellson, testified that the ABX Index trade had a net negative economic impact. (Resp'ts Reply Br. 2-4.) Again, his opinion and testimony was false: he failed to account for the fact that the mix of BBB to BBB- assets in the ABX Index was materially different to the mix in the rest of the portfolio. (*Id.*; *see also* ID at 77.)

- Division took one number out of a document about Norma to argue that the BBB bonds were impaired at the time Harding purchased them, even though logic and the evidence demonstrated that the bonds could not have been so impaired. (Resp'ts Post-Hearing Br. at 264-67; Resp'ts Br. at 18-20; Resp'ts Reply Br. at 10-12.)

Division engaged in this behavior because even if its false assertions failed to carry the day, there would be no consequences. No jury would punish them for putting on misleading testimony. No federal judge would hold them to account. That, in and of itself, robbed Respondents of due process: a hearing that had just the appearance (much less the actual) of fairness. *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) ("[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of

liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured . . . .") (internal quotations omitted).

F. Improper Use of Expert Testimony

Division used the administrative proceeding in order to introduce improper and inadmissible expert testimony. As we have explained, Wagner's testimony would have been kept out in federal court under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). For example, in the *SEC v. Tourre*, Division unsuccessfully sought to use Wagner in much the same way as here. (*See, e.g.*, Resp'ts Mtn. to Exclude the Expert Testimony of Wagner, (Mar. 21, 2014) (citing *SEC v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013).)

In any event, Wagner was not much of an expert. He could not, as the ALJ found, even articulate what the standard of care was.[9] Wagner's reports and testimony were little more than an attempt to introduce selective portions of the investigative testimony (which Respondents never had the opportunity to confront or cross-examine) into the record (Resp'ts Reply Br. at 1 n.2, 6.)

Division's use of Wagner's testimony offends the very notion of due process because it deprives Respondents a fair hearing. *Ballard*, 204 U.S. at 255 (holding that Due Process requires an opportunity for confrontation and cross-examination.) Note that Division failed to call seemingly critical witnesses. Rather than call the other Harding analyst, Jamie Moy, Division chose to rely on Wagner's review of her investigation testimony. Similarly, Wagner made all manner of factual assertions about Harding's review of Norma, but Division did not call the relevant Harding employee who reviewed Norma.

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[9] Of course, that did not stop Wagner from opining that the standard of care was violated or the ALJ from accepting his opinion wholesale and making it the basis of his findings.(Resp'ts Mtn. to Exclude the Expert Testimony of Wagner (Mar. 21, 2014); Resp'ts Br. at 6 n.5, 10-11; Resp'ts Reply Br. at 1 n.2, 6.) (*See, e.g.*, ID at 55, 65-67, 70, 73; *see also* Resp'ts Br. at 6 n.5, 10-11; Resp'ts Reply Br. at 1 n.2, 6.)

G. Improper and Misleading Reading of the Investigative Testimony into the Record

The record is, in fact, littered with examples of Division reading portions of the investigative testimony (often purposely leaving out sections of that testimony in order to alter the meaning of the testimony) without any proper evidentiary foundation, such as an inconsistent statement. The ALJ affirmatively ruled that Division did not even have to show that the prior statement was inconsistent in order to read it into the record. He allowed Division to read passages of the investigative testimony into the record as long as it was "sufficiently different" than the hearing testimony. (*See, e.g.*, Tr. 755:18-21, 1456:16-19, 1469:5-19.) And, when Respondents' counsel objected to the fact that Division was leaving out portions of the relevant questions and answers in order to change the meaning of the testimony, he remained unmoved. (Tr. 2131:8-10.) He counseled Respondents to wait until their case-in-chief to clarify any portions of the investigative testimony being read into the record. (*Id.*)

Before Respondents' counsel had an opportunity to fix the misuse of prior investigative testimony with Chau , the ALJ made credibility determinations about Chau's testimony on the record. (*See* Tr. 1566:22-1567:4.) Not only was the ALJ making decisions about Chau before Respondents had a chance to address how Division was using the prior testimony, but the ALJ made decisions about Chau and his actions before he understood how the CDOs worked. (Resp'ts Br. at 20 n.20.) That negative view of Chau persisted. (*See, e.g.*, ID at 7, 84-86.) Indeed, as we explained, the ALJ predicated most of his finding of liability on Norma on his view that he did not credit Chau's testimony of certain hearsay emails, even though no one else testified about their meaning. (*See, e.g.*, Resp'ts Br. at 20-21(citing to ID at 6, 51, 83-84.) He did so, as we explained, although in several instances Chau was asked, over objections, to speculate about what others meant in emails. (*Id.*)

II. THE ENTIRE PROCEEDING WAS TAINTED FROM THE BEGINNING BY A CONFLICT OF INTEREST

This case was tainted from its beginning by a conflict of interest. During a crucial period of the investigation, Division's personnel included a Senior Structured Products Specialist, Daniel Nigro, who had a deep-seated bias against Respondents, and a personal stake in the investigation's results. Prior to being an investigator for the SEC, Nigro worked, during the relevant time period, as the portfolio manager for a CDO collateral manager, Dynamic Credit, that invested $10 million in Octans. (Letter to Robert Khuzami (Sept. 20, 2012), EX. L to Resp'ts Mtn. to Reconsider or Stay (Feb. 14, 2014), attached hereto as EX. E.) Nigro's conflict and bias were further deepened by the connection between the loss of his position at Dynamic Credit and an evaluation of assets performed by a Harding affiliate. (Letter to Steven Rawlings (Mar. 1, 2013), EX. M to Resp'ts Mtn. to Reconsider or Stay (Feb. 14, 2014), attached hereto as EX. F.)

It was undisputed that during Division's investigation, Nigro was openly hostile toward parties that had a role in Octans, including Harding. (EXs. E, F) Nigro certainly participated in key aspects of Division's investigation, including asking questions during Lieu's investigative testimony (whose actions ended up becoming the sole basis for the ALJ's finding of liability on Octans), and was in a position to significantly influence the Staff's deliberations at a critical stage. (DX 1022 (Feb. 22, 2012 Investigative Testimony of Ms. Lieu); EX. E, F; Letter to Steven Rawlings (Aug. 6, 2012), EX. K to Resp'ts Mtn. to Reconsider or Stay (Feb. 14, 2014), attached hereto as EX. G.)

When various counsel, however, raised concerns during the investigation about his involvement, Division responded by concluding that: (i) "no actual or apparent conflict of

interest or bias exists that presents a basis for [Nigro's] recusal from these matters," but (ii) Division nevertheless elected to remove Nigro from the investigative teams. (Letter from Steven Rawlings (Aug. 2, 2012), EX. J to Resp'ts Mtn. to Reconsider or Stay (Feb. 14, 2014), attached hereto as EX. H.) It is curious that Division takes the position that the involvement of a person who had a personal interest in the outcome and animus against the subjects of the investigation does not create a conflict or the appearance of bias. *Cf. Capital Gains*, 375 U.S. at 188 ("An investment adviser should continuously occupy an impartial and disinterested position, as free as humanly possible from the subtle influence of prejudice, conscious or unconscious; he should scrupulously avoid any affiliation, or any act, which subjects his position to challenge in this respect.").

III. THE CASE WAS PREJUDGED BEFORE THE HEARING COMMENCED

None of the above is surprising when one looks critically at how the proceedings are structured. Consider how this proceeding started. Following the investigation, Division summarized its view of the evidence, from portions of the investigative testimony and certain documents, and argued to the Commission that Respondents had violated certain provisions of the securities laws. The Commission agreed that the facts as presented by Division constituted a violation of law and issued an order instituting an AP. (OIP at I.) That order set forth what the Commission believed to be the factual predicate for its conclusion that an enforcement proceeding is warranted.

At that point, the Commission had Division present its evidence to one of its other employees, an ALJ. The ALJ was tasked with looking at the same set of allegations and telling the Commission whether the Commission's previous conclusion that there had been a violation of law was correct. In other words, the Commission reviewed evidence presented by one set of

its employees to come to the conclusion that a violation was committed and then had another of its employees review the same evidence and its findings to tell it whether it was wrong.

It appears that this danger was realized in the instant proceedings. For example, as we have discussed, the Commission previously found in relation to a settled order that the statements regarding the warehouse agreements in the Octans Offering Circular and Pitch Book were "material misstatement[s] in that [they] made no mention of Magnetar's rights." (*See, e.g.*, RX 129 at ¶¶ 4, 5.) Although that settled order contains the boilerplate disclaimer that the findings "are not binding on any other person or entity in this or any other proceeding," that order manifestly expressed the opinions and conclusions of the Commission. Following the Commission's lead, the ALJ too found that failure to mention Magnetar's rights in the warehouse was material. (ID at 68-69.) However, that finding made no sense in light of the evidence and his other findings. (*See* Resp'ts Opposition Br. at 7 n.6.)

In fact, notwithstanding the evidence or arguments, the ALJ complied with what was generally expected of him, notably: (i) he found liability on the basis of a theory not charged in the OIP; (ii) he adopted Wagner's opinion on the ultimate issue that Respondents violated the standard of care, even though, as he acknowledged, Wagner could not articulate the standard of care; (iii) he discredited Chau's testimony about certain hearsay emails involving the purchase of the BBB Norma bonds, even though no one else testified about those emails, Chau was asked to speculate on what others meant, and it was equally probable that the emails had an innocuous meaning; and (iv) he accepted, without any critical review of the evidence, that the BBB Norma bonds were impaired at the time of purchase. Again, we do not raise these issues in order to prevail on anything other than the merits of the law and evidence. We raise these issues because Respondents were never afforded its due process rights to have a fair and impartial hearing.

CONCLUSION

These various violations of Respondents' due process rights had a significant effect. Among other things, the ALJ (i) found liability on the basis of a theory not charged in the OIP; (ii) adopted Wagner's opinion on the ultimate issues in the case despite the fact that Wagner's opinion was largely the product of his review of investigative testimony; (iii) formed a credibility opinion of Chau before understanding the transactions at issue and largely on the basis of improper and misleading use of investigative testimony as impeachment or refreshing recollection; and (iv) predicated liability Division's interpretation of rank hearsay despite Division's failure to call a single relevant witness. Respondents' ability to defend themselves was also severely hampered.

The ALJ's findings of liability should be reversed for all of the substantive reasons set forth in the other briefs filed by the Respondents. In addition, the due process violations described herein, provide other independent reasons why all findings of violations of law and all remedies orders contained in the initial decision must be reversed.

Dated: June 8, 2015

Respectfully submitted,

BROWN RUDNICK, LLP

By: _____

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Attorneys for Respondents
Harding Advisory LLC and Wing F. Chau

EXHIBIT A

From: Walfish, Daniel R. <WalfishD@SEC.GOV>
Sent: Monday, May 05, 2014 6:21 PM
To: Baynham, Ashley; Haran, Sean
Cc: Fischer, Howard
Subject: Harding AP -- April 25 Transcript
Attachments: Corrections to April 25, 2014 Tr.docx

Attached are a set of errata for April 25, 2014 that we plan to send to Diversified. It is not our practice to obtain written consent from Respondents before seeking corrections to transcripts, but we are happy to give you a heads-up before we transmit errata. And you are of course welcome to let us and Diversified know if you find any errors in your own review.

We plan to send the attached in around noon tomorrow.

Daniel Walfish
U.S. Securities and Exchange Commission
New York Regional Office
3 World Financial Center, Suite 400
New York, NY 10281-1022
212.336.0127
walfishd@sec.gov

EXHIBIT B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	**DECLARATION IN SUPPORT**

DECLARATION OF JOHN ROMAN IN SUPPORT OF RESPONDENTS' MOTION

JOHN ROMAN states as follows under penalty of perjury:

1. I submit this declaration in support of Respondents Harding Advisory LLC and Wing F. Chau's Motion to Adjournment.

2. I am the Director of IT Firm Operations & E-discovery Services at Nixon Peabody, LLP. I manage Nixon Peabody's Information Technology Operations and Electronic Discovery team of 28 employees, overseeing a broad range of Nixon Peabody's data processing, loading, production, and review needs from the firm's technology headquarters in Rochester, New York.

3. I have 29 years of experience in information technology, data security, and E-discovery, where I have developed skills and knowledge in E-discovery operations management, data collection, planning, and matter management. I have been published in leading legal technology publications and have spoken at industry events including LegalTech and the

International Legal Technology Administrators conferences on various electronic discovery topics.

4. The majority of the electronic discovery matters I am involved with are typically matters that involve the collection, filtering, review, and production of millions of electronic documents.

5. During my time at Nixon Peabody, I have managed and supervised eDiscovery specialists on the production of electronic documents for a multitude of government entities, including the U.S. Securities and Exchange Commission ("SEC").

6. These productions required Nixon Peabody's E-discovery team to comply with the "Data Delivery Standards," an SEC document detailing a set of technical requirements for productions to the SEC. A true and correct copy of the SEC's Data Delivery Standards, updated as of January 17, 2013, (the "SEC Data Delivery Standards") is annexed hereto as Exhibit A.

7. The SEC Data Delivery Standards assist the SEC "by preparing data in a format that . . . enable[s] [SEC staff] to use the data efficiently." Ex. A at 1.

8. The SEC Data Delivery Standards include specifications regarding aspects of the production, such as electronic format, custodians, Bates labeling, data fields, and delivery format. *See generally* Ex. A.

9. The SEC Data Delivery Standards closely resemble the general practices in the E-discovery field as to the default requirements of the technical standards for production.

10. In my experience, deviation from these standards results in delays related to the processing (preparation of electronic documents for review), loading, searchability, and review of data and can severely hamper the ability of attorneys to access and review data.

11. On October 25, 2013, the SEC's Division of Enforcement (the "Division") sent hard drives containing approximately 2.8 terabytes of data to Respondents' former counsel, and we received those materials on November 6, 2013 ("Production 1").

12. Production 1 consisted of 10 pieces of external media, including hard drives that were not encased in hardware allowing for immediate connection to a computer system, containing 50 databases of roughly 7 million documents.

13. Due to the volume of data and the external media containing the data, it took Nixon Peabody approximately seven full days to copy the data to Nixon Peabody's external hard drives.

14. Once the data was copied, and my team began to assess the databases, load files, native files, and images which the Division provided, it became immediately clear to me that the processing, loading, searching, and review of the database would prove problematic.

15. For instance, the common industry practice, as implied by the description of the singular "Concordance data file," in the SEC Data Delivery Standards, is to produce a single Concordance load file and a single Concordance database, whereas here, Production 1 alone contained over 50 databases and 50 separate load files. Several load files were not associated with a produced database. As such, my team had to manually create Concordance databases, assign the load files, and load the associated documents provided by the Division.

16. On November 15, 2013, Nixon Peabody received an additional 6.7 terabytes of data containing an additional 77 databases with an estimated 13 million documents ("Production 2").

17. While attempting to load Production 2, which is still ongoing, my team discovered that approximately 6.2 million documents lacked an index, therefore making them unsearchable.

18. After unsuccessful attempts to receive an index from the Division, my team undertook the time and expense to re-index this set of documents. This process took an additional four full days to complete.

19. On December 10, 2013, Nixon Peabody received an additional 2.15 terabytes of data consisting of four databases and an additional 1.89 million documents ("Production 3").

20. Productions 1, 2, and 3, (collectively the "Dataset") contain approximately 11.65 terabytes of data, consisting of 131 databases, containing 22 million documents. This makes processing, searching, and review difficult and time consuming.

21. To put this volume of documents into context, 10 terabytes of data, significantly below the size of the full Dataset, is equivalent to the printed documents of the entire Library of Congress.

22. Assuming 10 attorneys reviewing eight hours per day, five days per week, it would take over two years to perform an initial review of all of these documents.

23. Due to the enormous volume of documents, it is essential that the documents be searchable, so that Nixon Peabody can attempt to identify, review, and analyze the key documents before trial.

24. However, a portion of the documents in Productions 1 and 2 are not text searchable; that is, even if a particular keyword or phrase appears in such a document, a search for documents containing that keyword or phrase would not identify the documents within Concordance.

25. Additionally, the 131 separate databases in the Dataset have inconsistent metadata fields, and some are missing the key "date" field entirely, making simple sorting and searching very difficult. The SEC Data Delivery Standards detail the text and metadata fields that should be contained in the Concordance file. Ex. A at 4-5.

26. Metadata fields are essential because they are comprised of each document's key identifying information, such as the author, document type, Bates number, and date. These fields are used to conduct searches across a population of data to segregate out a particular set of documents conforming to these fields. For instance, one of the most effective and commonly used means of reducing a large data set is to use a date range search

27. However, due to the varying metadata fields, a date and bates number search across all of the databases in the Dataset at once was impossible. To contend with this issue, my team has undertaken the significant time and expense of partially "normalizing," or making certain fields consistent, for the date and Bates range fields, across the 127 databases in Productions 1 and 2; but other key metadata fields such as "custodian," "from," and "to" remain inconsistent across the databases. We have not yet undertaken this process with respect to Production 3. To normalize all metadata fields across all productions will require a minimum of four additional weeks.

28. Given the errors and issues in the Dataset, my team, despite working diligently for six weeks, has been unable to fully load and repair all databases contained in both of the Division's productions as of today's date, such that the attorneys can run reliable keyword searches across the documents.

29. To date, the processing, loading, and partially normalizing the dataset produced has required 150 man hours by the Nixon Peabody E-Discovery team.

30. This time and labor does not take into account the following "machine time" or time required by computers to perform mandatory tasks prior to electronic document review. The following is a breakdown of machine time delays:

a. With respect to Production 1:

i. 36 hours to unencrypt the data;

ii. 5 days to copy electronic documents to external disk drives;

iii. 24 hours to load the data; and

iv. 14 hours to convert Concordance images to Case Logistix (roughly 20,000 images per hour).

b. With respect to Production 2:

i. 10 days to copy electronic documents to external disk drives;

ii. 4 days to index and verify 6 million documents; and

iii. An unknown amount of time to convert Concordance image to Case Logistix. We have not started this process yet, but typically the conversion rate is roughly 20,000 images per hour.

c. With respect to Production 3:

i. Production 3 is still being processed and loaded so delays are to be determined.

31. I estimate that it will take my E-discovery team an additional four to six weeks to complete the remainder of the loading, processing, and normalizing of documents so that the databases are sufficiently searchable and reviewable.

32. However, even when the partial normalizing process has been completed and the databases are functioning as best they possibly can, the sheer volume and basic organization of the material prevents an efficient review of the documents in the requisite time period.

33. This is due to the difficulties with searching the non-normalized metadata fields as discussed above and the fact that there are 22 million documents in the databases.

34. Furthermore, given the problems with the databases, the version of Concordance the Division supplied the databases in, and the size of each individual production, the databases cannot handle concurrent search and review.

35. To attempt to remedy this situation, a Case Logistix database (the "CLX Database") has been created to segregate sets of the overall Dataset for contract attorney and trial team review.

36. Preparing and loading the files for review into the CLX Database is also a lengthy process. The conversion process from Concordance and subsequent upload of approximately 10,000 documents for review has taken over one week, in part due to the number and overall size of Excel spreadsheets in the production, which attorneys on the trial team have explained to me, may be key documents with information essential to the Respondents' defense.

37. Based on my experience, I do not see how from a technological and logistical standpoint, my E-discovery support team will be able to provide these documents to the trial team in such a way that they will be able to perform a meaningful review of the Dataset before the March 31, 2014 hearing date.

Dated: Dec 19, 2013
New York, New York

John Roman

EXHIBIT A

U.S. Securities and Exchange Commission

Data Delivery Standards

The following outlines the technical requirements for producing scanned paper collections, email and electronic document/ native file collections to the Securities and Exchange Commission. The SEC uses *Concordance*® 2007 v9.58 and *Concordance Image*® v4.53 software to search, review and retrieve documents produced to us in electronic format. Any proposed production in a format other than those identified below, the proposed use of *Predictive Coding*, *computer-assisted review* or *technology-assisted review* (TAR), or the use of de-duplication during the processing of documents, must be discussed with and approved by the legal and technical staff of the Division of Enforcement (ENF) and the methodology must be disclosed in the cover letter. We appreciate your efforts in assisting us by preparing data in a format that will enable our staff to use the data efficiently.

General Instructions

1. A cover letter should be included with each production. *This letter MUST be imaged and provided as the first record in the load file.*
   The following information should be included in the letter:
   a. List of each piece of media (hard drive, thumb drive, DVD or CD) included in the production by the unique number assigned to it, and readily apparent on the physical media.
   b. List of custodians, identifying:
      1) The Bates range (and any gaps therein) for each custodian
      2) Total number of records for each custodian
      3) Total number of images for each custodian
      4) Total number of native files for each custodian
   c. List of fields in the order in which they are listed in the data file.
   d. Time zone in which emails were standardized during conversion (email collections only).
2. Documents created or stored electronically MUST be produced in their original electronic format, not printed to paper or PDF.
3. Data can be produced on CD, DVD or hard drive; *use the media requiring the least number of deliverables.*
4. Label all media with the following:
   a. Case number
   b. Production date
   c. Bates range
   d. Disk number (1 of X), if applicable

5. Organize productions by custodian, unless otherwise instructed. All documents from an individual custodian should be confined to a single load file.
6. All productions should be checked and produced free of computer viruses.
7. All produced media should be encrypted.
8. Passwords for documents, files, compressed archives and encrypted media should be provided separately either via email or in a separate cover letter from the data.

Delivery Formats

I. ***Concordance*® Production**

All scanned paper, email and native file collections should be converted/processed to TIFF files, Bates numbered, and include fully searchable text. Additionally, email and native file collections should include linked native files.

Bates numbering documents:
The Bates number must be a unique, consistently formatted identifier, i.e., an alpha prefix along with a fixed length number for EACH custodian., i.e., ABC0000001. This format MUST remain consistent across all production numbers for each custodian. The number of digits in the numeric portion of the format should not change in subsequent productions, nor should spaces, hyphens, or other separators be added or deleted.

The following describes the specifications for producing image-based productions to the SEC and the load files required for *Concordance*® and *Concordance Image*®.

1. **Images**
   a. Images should be single-page, Group IV TIFF files, scanned at 300 dpi.
   b. File names cannot contain embedded spaces.
   c. Bates numbers should be endorsed on the lower right corner of all images.
   d. The number of TIFF files per folder should not exceed 500 files.
   e. Rendering to images PowerPoint, AUTOCAD/ photographs and Excel files:
      1) PowerPoint: All pages of the file should be scanned in full slide image format, with any speaker notes following the appropriate slide image.
      2) AUTOCAD/ photographs: If possible, files should be scanned to single page JPEG (.JPG) file format.
      3) Excel: TIFF images of spreadsheets are not useful for review purposes; because the imaging process can often generate thousands of pages per file, a placeholder image, named by the *IMAGEID* of the file, may be used instead.

2. ***Concordance Image*® Cross-Reference File**

The image cross-reference file is needed to link the images to the database. It is a comma-delimited file consisting of seven fields per line. There must be a line in the cross-reference file for every image in the database.

The format is as follows:
ImageID,VolumeLabel,ImageFilePath,DocumentBreak,FolderBreak,BoxBreak,PageCount

ImageID: The unique designation that *Concordance*® and *Concordance Image*® use to identify an image. ***Note:*** *This imageID key* ***must*** *be a unique and fixed length number. This number will be used in the .DAT file as the ImageID field that links the database to the images. The format of this image key must be consistent across all productions. We recommend that the format be a 7 digit number to allow for the possible increase in the size of a production.*

VolumeLabel: Optional

ImageFilePath: The full path to the image file.

DocumentBreak: The letter "Y" denotes the first page of a document. If this field is blank, then the page is not the first page of a document.

FolderBreak: Leave empty

BoxBreak: Leave empty

PageCount: Optional

Sample

```
IMG0000001,,E:\001\IMG0000001.TIF,Y,,,
IMG0000002,,E:\001\IMG0000002.TIF,,,,
IMG0000003,,E:\001\IMG0000003.TIF,,,,
IMG0000004,,E:\001\IMG0000003.TIF,Y,,,
IMG0000005,,E:\001\IMG0000003.TIF,Y,,,
IMG0000006,,E:\001\IMG0000003.TIF,,,,
```

3. ***Concordance*® Data File**

The data file (.DAT) contains all of the fielded information that will be loaded into the *Concordance*® database.

a. The first line of the .DAT file must be a header row identifying the field names.
b. The .DAT file must use the following *Concordance*® default delimiters:

Comma	¶	ASCII character (020)
Quote	þ	ASCII character (254)
Newline	®	ASCII character (174)

c. Date fields should be provided in the format: mm/dd/yyyy
d. All attachments should sequentially follow the parent document/email.
e. All metadata associated with email, audio files, and native electronic document collections must be produced (see pages 4-5).

f. The .DAT file for scanned paper collections must contain, at a minimum, the following fields:
   1) FIRSTBATES: Beginning Bates number
   2) LASTBATES: Ending Bates number
   3) IMAGEID: Image Key field
   4) CUSTODIAN: Individual from whom the document originated
   5) OCRTEXT: Optical Character Recognition (file path, or text)

Sample of .DAT file (when text files are provided separately)

```
þFIRSTBATESþ¶þLASTBATESþ¶þIMAGEIDþ¶þCUSTODIANþ¶þOCRTEXTþ
þPC00000001þ¶þPC00000002þ¶þIMG0000001þ¶þSmith, Johnþ¶þE:\TEXT\PC00000001.TXTþ
þPC00000003þ¶þPC00000003þ¶þIMG0000003þ¶þSmith, Johnþ¶þE:\TEXT\PC00000003.TXTþ
þPC00000004þ¶þPC00000005þ¶þIMG0000004þ¶þSmith, Johnþ¶þE:\TEXT\PC00000004.TXTþ
```

Sample of .DAT file (with text)

```
þFIRSTBATESþ¶þLASTBATESþ¶þIMAGEIDþ¶þCUSTODIANþ¶þOCRTEXTþ
þPC00000001þ¶þPC00000002þ¶þIMG0000001þ¶þSmith, Johnþ¶þ*** IMG0000001 ***®®The world of
investing is fascinating and complex, and it can be very fruitful. But unlike the banking
world, where deposits are guaranteed by the federal government, stocks, bonds and other
securities can lose value. There are no guarantees. That's why investing is not a spectator
sport. By far the best way for investors to protect the money they put into the securities
markets is to do research and ask questions.®® *** IMG0000002 ***®®The laws and rules that
govern the securities industry in the United States derive from a simple and
straightforward concept: all investors, whether large institutions or private individuals,
should have access to certain basic facts about an investment prior to buying it, and so
long as they hold it. To achieve this, the SEC requires public companies to disclose
meaningful financial and other information to the public. This provides a common pool of
knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a
particular security. Only through the steady flow of timely, comprehensive, and accurate
information can people make sound investment decisions.þ
þPC00000003þ¶þPC00000003þ¶þIMG0000003þ¶þSmith, Johnþ¶þ***IMG0000003 ***®®The result of this
information flow is a far more active, efficient, and transparent capital market that
facilitates the capital formation so important to our nation's economy.þ
þPC00000004þ¶þPC00000005þ¶þIMG0000004þ¶þSmith, Johnþ¶þ *** IMG0000004 ***®®To insure that
this objective is always being met, the SEC continually works with all major market
participants, including especially the investors in our securities markets, to listen to
their concerns and to learn from their experience.®® *** IMG0000005 ***®®The SEC oversees
the key participants in the securities world, including securities exchanges, securities
brokers and dealers, investment advisors, and mutual funds. Here the SEC is concerned
primarily with promoting the disclosure of important market-related information,
maintaining fair dealing, and protecting against fraud.þ
```

The text and metadata of Email and the attachments, and native file document collections should be extracted and provided in a .DAT file using the field definition and formatting described below:

Field Name	Sample Data	Description
FIRSTBATES	EDC0000001	First Bates number of native file document/email
LASTBATES	EDC0000001	Last Bates number of native file document/email **The LASTBATES field should be populated for single page documents/emails.
ATTACHRANGE	EDC0000001 - EDC0000015	Bates number of the first page of the parent document to the Bates number of the last page of the last attachment "child" document
BEGATTACH	EDC0000001	First Bates number of attachment range
ENDATTACH	EDC0000015	Last Bates number of attachment range
PARENT_BATES	EDC0000001	First Bates number of parent document/Email **This PARENT_BATES field should be populated in each record representing an attachment "child" document
CHILD_BATES	EDC0000002; EDC0000014	First Bates number of "child" attachment(s); can be more than one Bates number listed depending on the number of attachments **The CHILD_BATES field should be populated in each record representing a "parent" document
CUSTODIAN	Smith, John	Email: mailbox where the email resided Native: Individual from whom the document originated
FROM	John Smith	Email: Sender Native: Author(s) of document **semi-colon should be used to separate multiple entries
TO	Coffman, Janice; LeeW [mailto:LeeW@MSN.com]	Recipient(s) **semi-colon should be used to separate multiple entries
CC	Frank Thompson [mailto: frank_Thompson@cdt.com]	Carbon copy recipient(s) **semi-colon should be used to separate multiple entries
BCC	John Cain	Blind carbon copy recipient(s) **semi-colon should be used to separate multiple entries
SUBJECT	Board Meeting Minutes	Email: Subject line of the email Native: Title of document (if available)
DATE_SENT	10/12/2010	Email: Date the email was sent Native: (empty)
TIME_SENT	07:05 PM	Email: Time the email was sent Native: (empty) **This data must be a separate field and cannot be combined with the DATE_SENT field
LINK	D:\001\ EDC0000001.msg	Hyperlink to the email or native file document **The linked file must be named per the FIRSTBATES number
MIME_TYPE	MSG	The content type of an Email or native file document as identified/extracted from the header
FILE_EXTEN	MSG	The file type extension representing the Email or native file document; will vary depending on the email format
AUTHOR	John Smith	Email: (empty) Native: Author of the document
DATE_CREATED	10/10/2010	Email: (empty) Native: Date the document was created

TIME_CREATED	10:25 AM	Email: (empty) Native: Time the document was created **This data must be a separate field and cannot be combined with the DATE_CREATED field
DATE_MOD	10/12/2010	Email: (empty) Native: Date the document was last modified
TIME_MOD	07:00 PM	Email: (empty) Native: Time the document was last modified **This data must be a separate field and cannot be combined with the DATE_MOD field
DATE_ACCESSD	10/12/2010	Email: (empty) Native: Date the document was last accessed
TIME_ACCESSD	07:00 PM	Email: (empty) Native: Time the document was last accessed **This data must be a separate field and cannot be combined with the DATE_ACCESSD field
PRINTED_DATE	10/12/2010	Email: (empty) Native: Date the document was last printed
FILE_SIZE	5,952	Size of native file document/email in KB
PGCOUNT	1	Number of pages in native file document/email
PATH	J:\Shared\SmithJ\October Agenda.doc	Email: (empty) Native: Path where native file document was stored including original file name.
INTFILEPATH	Personal Folders\Deleted Items\Board Meeting Minutes.msg	Email: original location of email including original file name. Native: (empty)
INTMSGID	<000805c2c71b75977050cb8306d1@MSN>	Email: Unique Message ID Native: (empty)
MD5HASH	d131dd02c5e6eec4693d9a0698aff95c2fcab58712467eab4004583eb8fb7f89	MD5 Hash value of the document.
TEXT	From: Smith, John Sent: Tuesday, October 12, 2010 07:05 PM To: Coffman, Janice Subject: Board Meeting Minutes Janice; Attached is a copy of the September Board Meeting Minutes and the draft agenda for October. Please let me know if you have any questions. John Smith Assistant Director Information Technology Phone: (202) 555-1111 Fax: (202) 555-1112 Email: jsmith@xyz.com	Extracted text of the native file document/email

4. **Text**
Searchable text of the entire document must be provided for every record, at the document level.

a. Extracted text must be provided for all documents that originated in electronic format. The text files should include page breaks that correspond to the 'pagination' of the image files. Note: Any document in which text cannot be extracted must be OCR'd, particularly in the case of PDFs without embedded text.

b. OCR text must be provided for all documents that originated in hard copy format. A page marker should be placed at the beginning, or end, of each page of text, e.g. *** IMG0000001 *** whenever possible. The data surrounded by asterisks is the *Concordance*® ImageID .

Sample page markers with OCR text:

*** IMG0000001 ***

The world of investing is fascinating and complex, and it can be very fruitful. But unlike the banking world, where deposits are guaranteed by the federal government, stocks, bonds and other securities can lose value. There are no guarantees. That's why investing is not a spectator sport. By far the best way for investors to protect the money they put into the securities markets is to do research and ask questions.

*** IMG0000002 ***

The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.

c. For redacted documents, provide the full text for the redacted version.

d. Delivery
The text can be delivered two ways:
1) As multi-page ASCII text files with the files named the same as the ImageID field. Text files can be placed in a separate folder or included with the .TIF files. The number of files per folder should be limited to 500 files.
2) Included in the .DAT file.

5. **Linked Native Files**
Copies of original email and native file documents/attachments must be included for all electronic productions.
a. Native file documents must be named per the FIRSTBATES number.
b. The full path of the native file must be provided in the .DAT file for the LINK field.
c. The number of native files per folder should not exceed 500 files.

II. Audio Files

Audio files from telephone recording systems must be produced in a format that is playable using Microsoft Windows Media Player™. Additionally, the call information (metadata) related to each audio recording MUST be provided. The metadata file must be produced in a delimited text format. Field names must be included in the first row of the text file.

The metadata must include, at a minimum, the following fields:

1)	Caller Name:	Caller's name or account/identification number
2)	Originating Number:	Caller's phone number
3)	Called Party Name:	Called party's name
4)	Terminating Number:	Called party's phone number
5)	Date:	Date of call
6)	Time:	Time of call
7)	Filename:	Filename of audio file

III. Video Files

Video files must be produced in a format that is playable using Microsoft Windows Media Player™.

IV. Electronic Trade and Bank Records

When producing electronic trade and bank records, provide the files in one of the following formats:

1. MS Excel spreadsheet with header information detailing the field structure. If any special codes exist in the dataset, a separate document must be provided that details all such codes. If details of the field structure do not fit in the header, a separate document must be provided that includes such details.

2. Delimited text file with header information detailing the field structure. The preferred delimiter is a vertical bar "|". If any special codes exist in the dataset, a separate document must be provided that details all such codes. If details of the field structure do not fit in the header, a separate document must be provided that includes such details.

V. Electronic Phone Records

When producing electronic phone records, provide the files in one of the following formats:

1. MS Excel spreadsheet with header information detailing the field structure. If any special codes exist in the dataset, a separate document must be provided that details all such codes. If details of the field structure do not fit in the header, a separate document must be provided that includes such details. Data must be formatted in its native format (i.e. dates in a date format, numbers in an appropriate numerical format, and numbers with leading zeros as text).

2. Delimited text file with header information detailing the field structure. The preferred delimiter is a vertical bar "|". If any special codes exist in the dataset, a separate document must be provided that details all such codes. If details of the field structure do not fit in the header, a separate document must be provided that includes such details.

The metadata must include, at a minimum, the following fields in separate columns:

1)	Account Number:	Caller's telephone account number
2)	Originating Number:	Caller's phone number
3)	Terminating Number:	Called party's phone number
4)	Connection Date:	Date of call
5)	Connection Time:	Start time of call
6)	End Time:	End time of call
7)	Elapsed Time:	Duration in minutes of the call

Each field of data must be loaded into a separate column. For example, Connection Date and Connection Time must be produced in separate columns and not combined into a single column containing both pieces of information. Any fields of data that are provided in addition to those listed here must also be loaded into separate columns.

VI. Email Native File Production

When approved, Outlook (.PST) and Lotus Notes (.NSF) email files may be produced in native file format. A separate folder should be provided for each custodian.

EXHIBIT C

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	**DECLARATION IN SUPPORT**

DECLARATION OF MICHAEL MEHLTRETTER IN SUPPORT OF RESPONDENTS' MOTION

MICHAEL MEHLTRETTER states as follows under penalty of perjury:

1. I submit this declaration in support of Respondents Wing F. Chau and Harding Advisory LLC's Motion for Adjournment.

2. I am an E-Discovery Specialist in the New York, New York office of Nixon Peabody, LLP. I perform a broad range of e-discovery assistance, including data processing, loading, and production.

3. On December 4, 2013, I participated in a call with colleague and Nixon Peabody LLP attorney, Ashley Baynham, and Daniel Walfish and Howard Fischer of the Securities and Exchange Commission's Division of Enforcement (the "Division").

4. Ms. Baynham raised with Messrs. Walfish and Fischer concerns regarding 6.2 million documents of the Division's production which lacked an index and were therefore unsearchable.

5. Both Messrs. Walfish and Fischer stated that it was their "current understanding" that the Division produced to Respondents what it received in productions from third parties, but that the Division did not produce to Respondents an index, OCR (optical character recognition), or processing product/files that the Division created in order to use and search the data. .

6. Ms. Baynham asked that if this information existed it be produced to Respondents as soon as possible. Mr. Walfish responded that it was not Division practice to produce this information.

7. Mr. Walfish stated that Respondents would be able to do anything that the Division could do in terms of building an index. Ms. Baynham stressed that it takes weeks to undertake these projects and given the current schedule, Respondents did not have weeks to undertake these projects and asked again that the Division provide this data.

8. Mr. Fischer stated that the Division may not have undergone the process of indexing, and stated, "As you might imagine, when we receive 15 million documents, we do not review document by document and we do not review each page."

9. The Division stated that Respondents needed to send a particularized letter with their requests, at which time they would consult with their litigation support.

Dated: December 19, 2013
New York, New York

Michael Mehltretter

EXHIBIT D

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	**DECLARATION IN SUPPORT**

DECLARATION OF ASHLEY BAYNHAM IN SUPPORT OF RESPONDENTS' MOTION

ASHLEY BAYNHAM states as follows under penalty of perjury:

1. I submit this declaration in support of Respondents Harding Advisory LLC and Wing F. Chau's Motion for Adjournment.

2. I am a senior litigation associate at Nixon Peabody LLP, and will become a partner of the firm in February 2014. Throughout my career, I have participated in and managed the review and trial preparation for many governmental investigations including a recent action by the U.S. Securities and Exchange Commission's Division of Enforcement (the "Division") involving a Collateral-Debt Offering and a collateral manager of a transaction similar to this one in the Southern District of New York (the "Other CDO Matter").

General Process for a Noteworthy Review of Produced Material

3. Any effective review must consider the population of documents on which the review will be conducted. Here, where the Division is producing document productions from third parties, an effective review must consider that the documents have already gone through an

E-discovery process, where the producing party used search terms, date restrictions, predictive coding, and similar tools to separate the responsive documents from the non-responsive and privileged documents.

4. Because search terms and similar tools have already been applied to these documents, any application of search terms has limited utility for narrowing down the set of documents to review. In addition, because traders often use shorthand terms, abbreviations, and internal jargon, search terms often miss many key documents.

5. Unlike with an initial responsiveness review, in a noteworthy review, the attorney must make a more nuanced determination of whether the document advances or detracts from the central themes and defenses based on a thorough understanding of the allegations and possible defenses.

6. Thus, unlike with a responsiveness review, when there is a large volume of documents, a noteworthy review cannot be completed in a shorter time frame merely by increasing the number of document review attorneys. Rather, the document review team – even if it contains, in part, contract attorneys – must consist of individuals with the requisite knowledge and background in both the law and facts of the present case.

7. When conducting such a review, therefore, my preference has been, if possible, for document reviewers to perform a noteworthiness analysis on all of the documents or at least all of the documents for the custodians who could potentially be witnesses at a trial or hearing. Given the complexity of the substantive issues, my preference has also been, if possible, to have the review conducted by associates of the firm, who are intimately familiar with the case and the corresponding claims and defenses.

8. If the data is too voluminous to allow such a review, I then devise a reasonable method to segregate the documents most likely to be noteworthy. Because, as referenced above, search terms have limited effectiveness in a noteworthiness review, I generally limit the review population to those documents that fall within a defined date range, which corresponds to the key allegations.

9. I use a small group of contract attorneys with the requisite experience to conduct a first level review of those documents. The associate team then performs a second-level review, which is designed to identify those documents that will later be marked as exhibits.

10. Next, I task the associate team with performing targeted searches designed to identify key documents outside of the defined date range. I have found that these targeted searches often uncover a significant amount of key documents, and therefore, the ability to run them is essential.

The Review of Documents in this Matter

11. In this case, after receipt of the first production, received November 6, 2013 ("Production 1") and the second production, received November 15, 2013 ("Production 2"), I attempted an initial tight date range search across the two productions of May 1, 2006 to October 31, 2006.

12. The litigation support team informed me that this date range search could not be run reliably until the date and bates label fields in the metadata have been fixed. This work is on-going.

13. As a temporary measure, I limited the date range search to certain producing parties. That search was run across the text-searchable documents in Production 1, and yielded over 500,000 documents ("the temporary search").

14. The temporary search in this case only captures approximately 3% of the overall documents, an extremely narrow sampling. The risk of missing key documents here is exacerbated by the fact that due to inconsistent metadata fields and the volume of data, we cannot run reliable targeted searches across the entire population of documents.

15. Even if the temporary search contained all of the key documents in this case, which it does not as described below, a meaningful review and processing of the data in time for the March 31, 2014 hearing would be impossible. Assuming a similar rate of review to the Other CDO Matter (see below), it would take over six months for a similarly-sized team to review these documents.

16. It is important to note that the temporary search does not contain: (i) any documents related to the Division's allegations about Harding Advisory LLC's decision to invest in Norma CDO I, as the relevant time period for those allegations is January 1, 2007 through April 1, 2007; (ii) key documents related to Octans I CDO, such as early documents discussing the structuring of this deal and analysis of the portfolio post-closing; (iii) any documents from certain key producing parties and custodians, such as the investors, the issuer, and co-issuer for Octans I CDO; and (iv) any documents from Productions 2 or from additional documents produced on December 12, 2013 ("Production 3"). In sum, many additional searches would have to be run in order to be certain that a reasonable population of documents is reviewed.

17. Expanding the date search is not a feasible option because it would expand the review population to millions of documents, and we simply do not have time to review millions of documents.

18. The Division has not provided an index to the productions. It is difficult therefore to identify the additional documents we need to review in order to prepare a defense.

The only information the Division has provided as a window into these documents are the subpoenas the Division issued and the production letters that the third parties sent to the Division. In order to make sense of the information in the production letters, we had to index and analyze more than 400 production letters and attempt to locate those documents in the data set. We have been working on this project since November 18, 2013 and have not yet finished. Furthermore, while some letters provide detailed information about what has been produced, many other production letters merely state that responsive documents have been produced or just provide a list of bates numbers with no identifying information.

19. Respondents' counsel has addressed these issues with the Division, including in an exchange of letters dated December 6, 2013 and December 12, 2013. Those letters are attached as Exhibits A and B, respectively.

Diversion of Associate Resources

20. The large volume of documents and flaws in the database have resulted in a massive diversion of the associate team's resources to the logistical difficulties associated with attempting to meaningfully process and review the dataset, hampering the trial team's availability to fully engage in the traditional tasks of gathering additional evidence, synthesizing key documents, and developing themes and defenses.

Need for the Extension Now

21. Now is the only time when an extension of deadlines might potentially allow for a fair proceeding. If an extension is granted later – for example shortly before the current February 18 deadline for exchanging witness lists – Respondents will have already spent another two months following a particular "triage" strategy of document review and trial preparation designed to make the best of the situation created by the Division. To then recreate the trial

preparation that Respondents should have been able to perform in the first place would mean two months of work and associated monetary costs have been wasted.

22. Moreover, recreating the trial preparation strategy if given more time to prepare is not as simple as adding additional documents to the review queue. If additional time is granted at a later date, the document review and trial preparation plan, which was designed to achieve certain milestones by certain dates, and tackle certain issues in specific ways given the time constraints, would have to be overhauled in order to investigate more nuanced and/or different arguments and defenses. The new strategy would necessarily involve redoing work on issues that had been closed out under the more limited review plan, but may now be reopened and expanded. For example, search terms designed to bring back an amount of documents which can feasibly be reviewed in one to two months would have to be redesigned and rerun. The results of these new searches would then have to be de-duplicated against documents that had previously been reviewed, leaving a scattershot review population. Redesigning, rerunning, and de-duplicating searches not only takes considerable time when applied to the population of 22 million documents received from the Division, but more importantly, this approach eliminates the benefit of institutional knowledge reviewers have previously gained or could gain from reviewing cohesive sets of documents.

23. Likewise, contract attorneys hired for a one to two month review may be unavailable or unwilling to extend their contracts for additional time. Where this is the case, new contract attorneys would have to be screened, hired, trained, and brought up to speed on the complex issues involved in this case at the expense of attorney time which otherwise be spent focusing on substantive issues in preparation for the hearing.

The Other CDO Matter and Application of the Federal Rules of Civil Procedure

24. By way of comparison, the amount of data and the difficulty presented by its format vastly exceeds that experienced in other similar investigations. In the Other CDO Matter, the Division produced a large volume of documents from previous productions of third parties. There I used a reasonable date range restriction in order to identify a set of documents reasonably likely to contain most of the noteworthy documents. In particular, I started with 3.2 million previously produced documents and used a date range search to reduce the review set to 460,489 documents. Therefore, of the total dataset, 14% were actually reviewed by contract attorneys. I also had the associate team perform targeted searches across the 3.2 million documents.

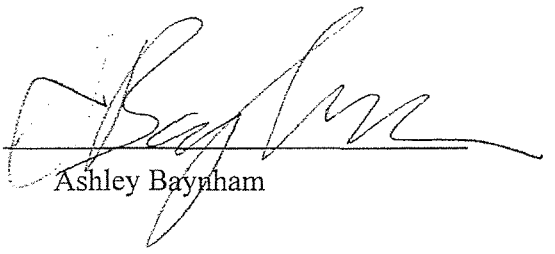
25. In the Other CDO Matter, 15 contract attorneys took approximately four months to complete their first level review of the documents for noteworthiness which resulted in 25,011 documents identified for second level review and analysis by the associate team.

26. In past cases, I have expedited and limited the review by application of the Federal Rules of Civil Procedure.

27. In the Other CDO Matter, as part of the initial disclosures under Rule 26, the Division produced an index with the following information: (i) producing party; (ii) description of documents produced; (iii) beginning and ending bates number; and (iv) database name. For a point of comparison, in the current matter, we only received the database name. In the Other CDO Matter, we also received as part of the initial disclosures: (i) a list of individuals likely to have discoverable information, which included a description of the types of documents each witness would have; and (ii) transcripts of investigative testimony. Again, in this case, we have only received the latter.

28. With an index and list of individuals likely to have discoverable information, the noteworthy review within the allotted time frame would still remain next to impossible. However, it would allow us to reduce the review population to a set of documents that could be reviewed in a matter of months rather than years.

Dated: New York, New York
Dec 19, 2013



Ashley Baynham

EXHIBIT A

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December 6, 2013

VIA EMAIL

Howard A. Fischer, Esq.
Daniel R. Walfish, Esq.
Securities and Exchange Commission
New York Regional Office
Brookfield Plaza, 200 Vesey Street, Suite 400
New York, NY 10281

RE: In the Matter of Harding Advisory LLC and Wing F. Chau, File No. 3-15574

Dear Messrs. Fischer and Walfish:

We represent Harding Advisory LLC and Wing Chau ("Respondents") in connection with the referenced matter. To date, the Division of Enforcement has produced more than 9½ terabytes of data—*i.e.*, approximately 20 million documents—pursuant to Rule 230(a)(1) of the Commission's Rules of Practice. On October 25, 2013, the Division sent hard drives containing approximately 2.8 terabytes of data (roughly 7 million documents) to Respondents' former counsel, and we received those materials on November 6, 2013 ("Production 1"). On November 15, 2013, the Division delivered additional hard drives and disks containing approximately 6.7 terabytes of data (roughly 13 million documents) ("Production 2").

When we became aware of the size of the Division's "investigatory file," we were immediately concerned that Respondents would be unable to prepare adequately for trial within the deadlines set forth in Rule 360 of the Commission's Rules of Practice. The problems, however, go well beyond the sheer volume of documents. It has now been a month since we received Production 1, and we have worked diligently to process the terabytes of data and review the information received. Unfortunately, however, we remain unable to perform a reliable keyword search across the documents, much less review them meaningfully. The Division's materials have been provided in 127 separate databases, each of which has varying characteristics and some of which have unsearchable text, denying Respondents any reasonable means of locating relevant documents. The appallingly unorganized manner in which the 20

million documents were provided means that immediate steps must be taken if the parties are to maintain any possibility of a fair proceeding that accords with due process.

I spoke to you about such steps on Monday and Ms. Baynham discussed the same topic with you on Wednesday. In each instance, your response was to tell us to prepare a letter enumerating the issues. While I have done so below, please realize that even your agreement to address all of these issues immediately will likely prove insufficient to afford Respondents a fair opportunity to prepare for trial under the current schedule; it would, however, enable Respondents to be ready sooner than they otherwise would be. Also, as I am sure you are aware, electronic document productions cannot be reviewed until loaded onto a review database such as Concordance. When terabytes of data are involved, it takes weeks following receipt of materials before documents can be processed so as to make them functionally searchable. We have loaded Production 1 onto Concordance, but we are still in the process of loading Production 2. Accordingly, additional issues beyond those described here may exist.

Respondents request that the Division of Enforcement provide the following materials. Because time is of the essence, we request that the Division provide these materials, in their entirety, no later than the end of Thursday, December 12, 2013:

1) Adequate means of locating relevant documents;

2) Tags, labels, and/or file folders into which the Division has organized documents;

3) Witness list;

4) Jencks material and Brady/Giglio material;

5) Withheld document list; and

6) Additional information that was not provided and/or not identified within Production 1 or Production 2.

These requests are set forth in more detail below.

1. Adequate Means of Locating Relevant Documents

It is of course impossible to review every one of the 20 million documents produced in advance of trial. It is thus crucial that the documents be made available in a reasonably organized and searchable format. We request that the Division provide all documents in a manner that allows word searches to be run against the entire population of data. More specifically, we request that each of the items below be provided no later than the end of the day on Thursday.

a. Searchable Documents

A significant portion of the documents we received are not searchable; that is, even if a particular keyword or phrase appears in such a document, a search for documents containing that keyword or phrase would not identify the document within Concordance. In Production 2, we have identified approximately 6.2 million documents that lack an index/dictionary, and thus are not searchable until an index and dictionary of the documents is built, a process that I understand would take Respondents at least a full week to complete. These 6.2 million documents are located within the following databases/document sets: "Cohen 2"; "Merrill"; "Merrill 2" through "Merrill 7"; "Merrill 9" through "Merrill 15"; and "Merrill Natives."

Providing documents without the ability to conduct reliable searches is the functional equivalent of requiring Respondents to review materials on a document-by-document basis. Producing millions of documents incapable of being searched reliably is no better than refusing to produce documents at all. Large, haphazard document productions are routinely held to violate the Federal Rules of Civil Procedure and, when 20 million documents are involved, the implicit instruction to "go fish" also violates fundamental fairness. *Cf. Residential Contractors, LLC v. Ace Prop. & Cas. Ins. Co.*, No. 2:05-01318-BES-GWF, 2006 U.S. Dist. LEXIS 36943, at *7 (D. Nev. June 5, 2006) ("The Court does not endorse a method of document production that merely gives the requesting party access to a 'document dump,' with an instruction to 'go fish'") (internal citations omitted); *Mizner Grand Condo. Ass'n v. Travelers Propr. Cas. Co. of Am.*, 270 F.R.D. 698, 700-01 (S.D. Fla. 2010) (granting defendants' motion to compel after plaintiff offered for inspection approximately 10,000 unsegregated and uncategorized documents that essentially required defendants to "examine and sort through each individual file folder").

Accordingly, for all documents produced without a dictionary/index, including but not limited to the documents from Production 2 listed above, Respondents request that a dictionary/index be provided. This request applies to all documents, regardless of whether or not the Division has yet created a dictionary/index. In the event that the Division has not engaged in this work, please inform us promptly.

b. "Normalized" Metadata Fields

The 127 databases that comprised Production 1 and Production 2 contained varying metadata fields. Without having the metadata fields "normalized" across databases, an attorney cannot perform a simple date range search within the review database, but must instead either run separate searches within each database or rely on technical support to run searches that would take many hours, if not days, to complete. We have already spent significant time and expense normalizing the date and Bates range fields across the 127 databases, but other key metadata fields such as "custodian, "from," and "to" remain inconsistent across the databases. Accordingly, Respondents request that the Division provide the corrected metadata field load file for each of the databases in Production 1 and Production 2 in order to enable Respondents to

correct the metadata field inconsistencies. This request applies to all databases regardless of whether or not the Division has yet normalized the applicable metadata fields itself. In light of the amount of data produced in this matter, a request essentially asking the Division to adhere to requirements set forth in the Commission's own data delivery standards, *U.S. Securities and Exchange Commission Data Delivery Standards*, rev. Jan. 17, 2013, is certainly reasonable.

c. **Missing Date Coding**

The documents in one of the databases—"COHEN-RIA"—was produced with no date coding. Thus, even having spent significant time and expense normalizing the date fields as noted above, Respondents remain unable to capture documents from this database when performing date searches or sorting documents chronologically. Respondents request that date coding be provided for the "COHEN-RIA" database, and for any additional databases that were produced without date coding.

2. **Tags, Labels, and/or File Folders**

While searchability is essential, the documents also must be provided in a useful manner if Respondents are to have any semblance of a fair opportunity to prepare for trial. While the documents most relevant to the Division's allegations may exist somewhere in the 20 million documents produced, those documents are nowhere identified as such, nor have Respondents been provided with any means to identify those documents except by sifting through the Division's wholesale document dump. Searchable or not, 20 million unorganized documents cannot be adequately reviewed in time to prepare for a trial scheduled for March 31, 2014.

In analogous circumstances, federal courts have required parties producing voluminous documents to also produce their tags, labels, file folders, and/or other means of organizing relevant documents. In *SEC v. Collins & Aikman Corp.*, the court required the Commission to produce 175 file folders created by its litigation attorneys. 256 F.R.D. 403, 413 (S.D.N.Y. 2009). In reasoning applicable here, the court stated, "While the responsive documents exist somewhere in the ten million pages produced by the SEC, the production does not respond to the straightforward request to identify documents that support the allegations in the Complaint, documents [defendant] clearly must review to prepare his defense." *Id.* at 410. *See also CFTC v. American Derivatives Corp.*, No. 1:05-CV-2492-RWS, 2007 U.S. Dist. LEXIS 23681 (N.D. Ga. Mar. 30, 2007), at *13-18 (requiring defendants to provide "some reasonable assistance" to the CFTC in locating responsive documents, rather than "merely opening their files, and leaving Plaintiff to sift through documents in an effort to locate those documents that are responsive to its requests") (citing *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051-RWS, 2006 U.S. Dist. LEXIS 47255 (N.D. Ga. June 30, 2006)).

Therefore, Respondents request that the Division provide any tags, labels, file folders or other means of keeping materials into which the Division has organized any documents relevant to the allegations in its Order Instituting Proceedings ("OIP"); the location of documents referenced directly or indirectly in the OIP should be identified specifically. By way of illustration only and without limitation, this request applies to any means by which the Division has segregated or identified documents according to relevance (for example, documents relating to the OIP), subject matter (for example, documents relating to Octans I), or individual (for example, documents relating to James Prusko). In the unlikely event that the Division filed the OIP without having tagged, labeled, filed or organized any documents in this fashion, please so specify.[1]

3. Witness List

As noted during the November 18, 2013 prehearing conference, the Division's investigation in this matter lasted at least three years. Unlike the Division, Respondents were unable to use those years to issue subpoenas. Given the overwhelming amount of information that Respondents must review in order to prepare for a trial, fundamental fairness dictates that the Division provide its witness list now in order to provide Respondents with some means of conducting a targeted document review in preparation for a trial. The need for current production of the Division's witness list is particularly acute in this matter because there are several potentially key witnesses in foreign jurisdictions that may possess important information. Respondents need to be able to ascertain as soon as possible whether such potential witnesses will be made available at trial or whether Respondents must seek their testimony through letters rogatory or otherwise.

According to Judge Elliot's Order Setting Prehearing Schedule, the Division need not provide its witness list until February 18, 2014, the same date that Respondents must provide their witness lists and less than six weeks before trial commences. While such a schedule may be reasonable in a typical Commission administrative proceeding, it is not reasonable in a proceeding involving 20 million documents, a significant portion of which are not searchable, and potentially key witnesses located abroad. We accordingly request that the Division provide its witness list by December 12, with an opportunity to amend it by February 18 if warranted by intervening circumstances.

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[1] Production letters sent to Division staff during the investigation of this matter cannot substitute for such organizational material. More than 100 such letters have been produced; most of them do not describe the contents of the production and some do not identify documents by Bates range.

4. Jencks Material; Brady/Giglio Material

The basis for our request that the Division provide its witness list by December 12 applies equally to our request that Jencks material, Brady material, and Giglio material be produced by that date. To the extent that Jencks, Brady, and/or Giglio material is contained within documents that have been produced, we ask that it be identified as such. Judge Elliot denied our application for the turnover of such material without prejudice, pending production of the Division's withheld document list. Without earlier production of the material, however, Respondents will be denied a fair chance to locate and make meaningful use of relevant materials in preparation for trial. Given the issues identified above, production of Brady/Giglio material within the current timeframe does not accord with the requirement that such material be turned over "at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.), *cert denied*, 429 U.S. 924 (1976).

5. Withheld Document List

Ms. Baynham informed me that during Wednesday's telephone call, you assented to Respondents' motion for an extension of time to file their Answer and made an independent, reciprocal request for an agreement extending the Division's January 2, 2014 deadline for filing a withheld document list. Under normal circumstances, we would agree to such a request without hesitation. Based on current circumstances, however, we cannot do so without severely prejudicing our clients' interests. Faced with the task of reviewing 20 million haphazardly produced documents, Respondents simply cannot afford to shrink the time between receipt of the withheld document list and the various pretrial deadlines; to the contrary, it has become abundantly clear that that the current January 2 deadline is too close to the pretrial deadlines to allow for adequate resolution of any issues that may arise upon receipt of the withheld document list. A withheld document list received significantly in advance of trial is the only way for Respondents to make a determination as to what key documents are absent from the productions, so that they can undertake to obtain missing evidence, if necessary. Thus, with all due appreciation for your agreement to extend Respondents' time to answer, Respondents must request that the Division provide them with a withheld document list earlier than January 2, as you indicated you would endeavor to do during the November 18 prehearing conference. Respondents request that the Division provide them with a withheld document list by Thursday, December 12.

6. Additional Information Not Provided or Identified

a. Standard of Care

Currently absent from the productions or not yet identified in the documents provided is information identifying or describing the standard of care applicable in this case. Respondents

are certainly entitled to such information, inasmuch as the crux of the allegations against them is that they failed to act in a manner consistent with customary standards. We are aware, based on publicly available information, that the SEC has investigated a number of collateral managers in connection with their participation in CDO deals. We therefore request that you produce from files in those investigations documents sufficient to determine what constitutes a collateral manager's selection of collateral with reasonable care (i) using a degree of skill and attention no less than that which the collateral manager would exercise with respect to comparable assets that it manages for itself and (ii) in a manner consistent with the customary standards, policies and procedures followed by institutional managers of national standing relating to assets of the nature and character of the pertinent collateral. Without limiting the foregoing, we request that the Division provide all documents or information indicating how ACA Management LLC satisfied the applicable standard of care in connection with its participation in CDO offerings for which it acted as collateral manager, including, but not limited to, Abacus 2007-ACI and ACA ABS 2007-02.

b. Remaining Productions

At the November 18 prehearing conference, Mr. Fischer indicated that Production 1 and Production 2 comprised about 98 to 99 percent of the Division's investigatory file. Respondents request that the remainder of the file be produced by Thursday, December 12, in a manner consistent with the requests described above.

Please contact me if you have any questions, or would like to discuss any aspect of Respondents' requests.

Sincerely,

Alex Lipman

EXHIBIT B

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
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WRITER'S DIRECT DIAL AND EMAIL
(212) 336-0127
walfishd@sec.gov

December 12, 2013

Via email

Alex Lipman
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022

Re: *In re Harding Advisory LLC and Wing F. Chau*, AP File No. 3-15574

Dear Alex:

We write in response to your letter of December 6, 2013 ("Letter"), which raises various disclosure-related issues in the above-captioned administrative proceeding. As always, we will make ourselves available should you wish to discuss any of the following in greater detail. For ease of reference, our response follows the organizational structure used in your letter.

A. Your request for "Adequate Means of Locating Relevant Documents"

As an initial matter, we have produced the electronic databases in the manner in which they are maintained in the files of the Division of Enforcement ("Division") – which is what the Commission's Rules of Practice require.[1] *See, e.g., John Thomas*

[1] We note that the production of the Division's investigative file was made well in advance of what the Rules of Practice require. Service of the Order Instituting Proceedings (OIP) took place on November 18, 2013, as confirmed by the parties and Judge Elliot at the prehearing conference on that date. Under Rule 230(d) of the Commission's Rules of Practice, the Division was required to commence making its files available seven days thereafter. The Division made its first production – to Respondents' then-current counsel, *at that counsel's specific request* – on Friday, October 25, 2013, and UPS records confirm that the production arrived on Monday, October 28. (You apparently did not receive this production until November 6, 2013, but the delay in transferring files from old to new counsel is surely not the Division's responsibility.) The Division then substantially completed its Rule 230(a) production on November 15, 2013, well before the seven days after the service date. The Division made its third and probably final Rule 230(a) production on December 10, 2013. This production contained (a) a comparatively tiny amount of "clean up" materials omitted from prior productions, and (b) a voluminous set of emails from a non-party in a different investigation that was handled by a different SEC office. The latter were consulted during the course of, and played at most an ancillary role in, the *Harding* investigation. We have included these materials out of an abundance of caution, not because we think they are likely to impact these proceedings.

Capital Mgmt. Group LLC, Securities Act Release No. 9492, 2013 WL 6384275, at *6 (Dec. 6, 2013) ("'open file'" production satisfies Division's Rule 230 disclosure obligations). Your complaint is that you would prefer that they were produced in a manner more convenient for your purposes, but the Division is under no obligation to convert the materials it received during the investigation into a format that other counsel might prefer.

We recognize that reviewing these voluminous databases on a document-by-document basis may be impractical, and that as a result electronic searches might be necessary. You have identified 16 Concordance databases that you say will not be searchable "until an index and dictionary of the documents is built, a process that [you] understand would take Respondents at least a full week to complete." Letter at 3. We understand from our database support personnel that creating a dictionary or index is a standard operation that is easy for Respondents to perform in Concordance or any other document-review application, that for us to have provided dictionaries for these databases would have significantly delayed the production, and that it would take the Division just as long as Respondents, if not longer, to create the dictionaries, burn them to media, and send them over to you. Given our limited resources, we are unable to create the dictionary files for you, and encourage you to generate them yourself.

Next, you request that "the Division provide the corrected metadata field load file for each of the databases in Production 1 and Production 2." Letter at 3. Unfortunately, there is no such thing. We have provided load files for all of the databases that reflect the form in which the documents are maintained on our systems, which in turn reflects the form in which the documents were received from the various producing parties.[2] Relatedly, the "date coding" you request for the COHEN-RIA database does not exist; we have already given Respondents all the metadata we originally received for that (and all the other) databases.

B. Your request for "Tags, Labels, and/or File Folders"

You have requested "that the Division provide any tags, labels, file folders or other means of keeping materials into which the Division has organized any documents relevant to the allegations in its Order Instituting Proceedings." Letter at 5. Even if such material exists, it is difficult to see how this differs from a request to see our collections of "hot documents," which would invade work product protection. You have cited no precedent, and we are aware of none, requiring the Division in an administrative proceeding to go beyond Rule 230 and provide respondents with a road map to the

[2] As we have explained to you, producing parties do not always adhere to the SEC's Data Delivery Standards, and the standards themselves may have changed over the years.

relevant evidence or otherwise "to prepare respondents' case for them." *John Thomas*, 2013 WL 6384275, at *6.[3]

C. Your request for premature production of the Division's witness list, Jencks material, *Brady* material, and log of withheld documents

Judge Elliot, after a vigorous discussion in which Respondents made basically the same arguments repeated in your Letter, has already ruled on the timing of the production of these items. The Division intends to adhere to the schedule set forth in the Judge's rulings. We will endeavor to produce the withheld-document log ahead of schedule if that is feasible.

D. Your request for "Additional Information" from unrelated cases

The OIP charges Respondents with failing to fulfill clearly specified standards of care in clearly specified Collateral Management Agreements that Respondents themselves signed. *See* OIP ¶¶ 6, 68. Despite having acknowledged that Respondents have not yet begun to search, let alone review, the contents of databases containing nearly a third of the documents produced thus far (*see* Letter at 3), you assert that "currently absent from the productions or not yet identified in the documents provided is information identifying or describing the standard of care applicable in this case." You further request that we produce from *other* case files (Letter at 6):

> documents sufficient to determine what constitutes a collateral manager's selection of collateral with reasonable care (i) using a degree of skill and attention no less than that which the collateral manager would exercise with respect to comparable assets that it manages for itself and (ii) in a manner consistent with the customary standards, policies and procedures followed by institutional managers of national standing relating to assets of the nature and character of the pertinent collateral.

This is a vague request, and attempting to fulfill it would be burdensome to the point of total impracticality. The Division has no obligation to conduct an open-ended search of unrelated case files simply because respondents speculate that those files might contain material that is "reasonably calculated to lead to the discovery of admissible evidence." *David F. Bandimere*, AP Rulings Rel. No. 746, slip op. 4 (Feb. 5, 2013).

---

[3] That said, it may be worth noting that your tone of despair at the prospect of locating "the documents most relevant to the Division's allegations . . . somewhere in the 20 million documents produced" (Letter at 4) is wide of the mark. As you must realize by now, most or all of the evidence cited in the OIP was used as testimony exhibits (which we produced in a labelled folder on October 25) or aired in the Wells process (the communications surrounding which we produced in labelled folders on November 15). There should be little mystery about the identity of the core documents in this case, nor where to find them.

In any event, the fact that the SEC has investigated other collateral managers is irrelevant: It plainly has no bearing on the "degree of skill and attention that *[Harding itself]* would exercise with respect to comparable assets that it manages for itself," *see* OIP ¶ 6, and is also irrelevant to the "customary standards, policies and procedures followed by institutional managers of national standing relating to assets of the nature and character of the pertinent collateral," *id.* The Division investigates possible *mis*conduct; its investigative files in unrelated cases cannot possibly serve as some kind of normative compass for "good" behavior by a collateral manager in the particular circumstances of *this* case.

* * *

Once again, we are available to confer about any of this.

Sincerely yours,

Daniel R. Walfish

Daniel R. Walfish

EXHIBIT E

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September 20, 2012

BY FEDEX

Robert Khuzami, Esq., Director
George Canellos, Esq., Deputy Director
Division of Enforcement
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In the Matter of Harding Advisory LLC (NY-8306)
In the Matter of 250 Capital, LLC (NY-8424)
In the Matter of NIR Capital Management, LLC (NY-8382)

[redacted]

Confidential Treatment Requested by Merrill Lynch

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

The enclosed information is being provided to you on behalf of Merrill solely for the SEC's use in the above-referenced inquiry with the understanding that Merrill believes that confidentiality pertains to each page.

Therefore, in accordance with the SEC's procedures with respect to Freedom of Information Act ("FOIA") requests (17 C.F.R. 200.83(c)(2)), the undersigned hereby requests confidential treatment of the information contained herein. This material bears the legend "Confidential Treatment Requested by Merrill Lynch" and all information contained herein is intended to be maintained as confidential to the extent allowed by law.

This letter is submitted with the further request that it be kept in a non-public file and that access to it by any third party who is not a member of the SEC or its staff be denied, except as provided by the Privacy Act of 1974, or unless such access is specifically permitted by existing law. In addition, Merrill requests that any materials provided be returned to the undersigned when the above-referenced inquiry is completed. Merrill understands that upon receipt of any FOIA requests for the enclosed materials, the SEC's staff will make an initial determination as to whether access to the information should be granted. If no ground appears to the staff to exist which would justify the withholding of the information, the staff will ask that within ten (10) days of receipt of the FOIA requests, Merrill submit substantiation for affording continued confidential treatment and for withholding of the information. Under such circumstances, please contact the undersigned immediately. Confidential treatment of this letter is also requested.

[redacted]

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March 1, 2013

Joseph J. Frank
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By Email & Hand Delivery

Steven G. Rawlings, Esq.
Assistant Regional Director
U.S. Securities & Exchange Commission
New York Regional Office
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New York, New York 10281

Re: In the Matter of Harding Advisory LLC (NY-8306)

[redacted]

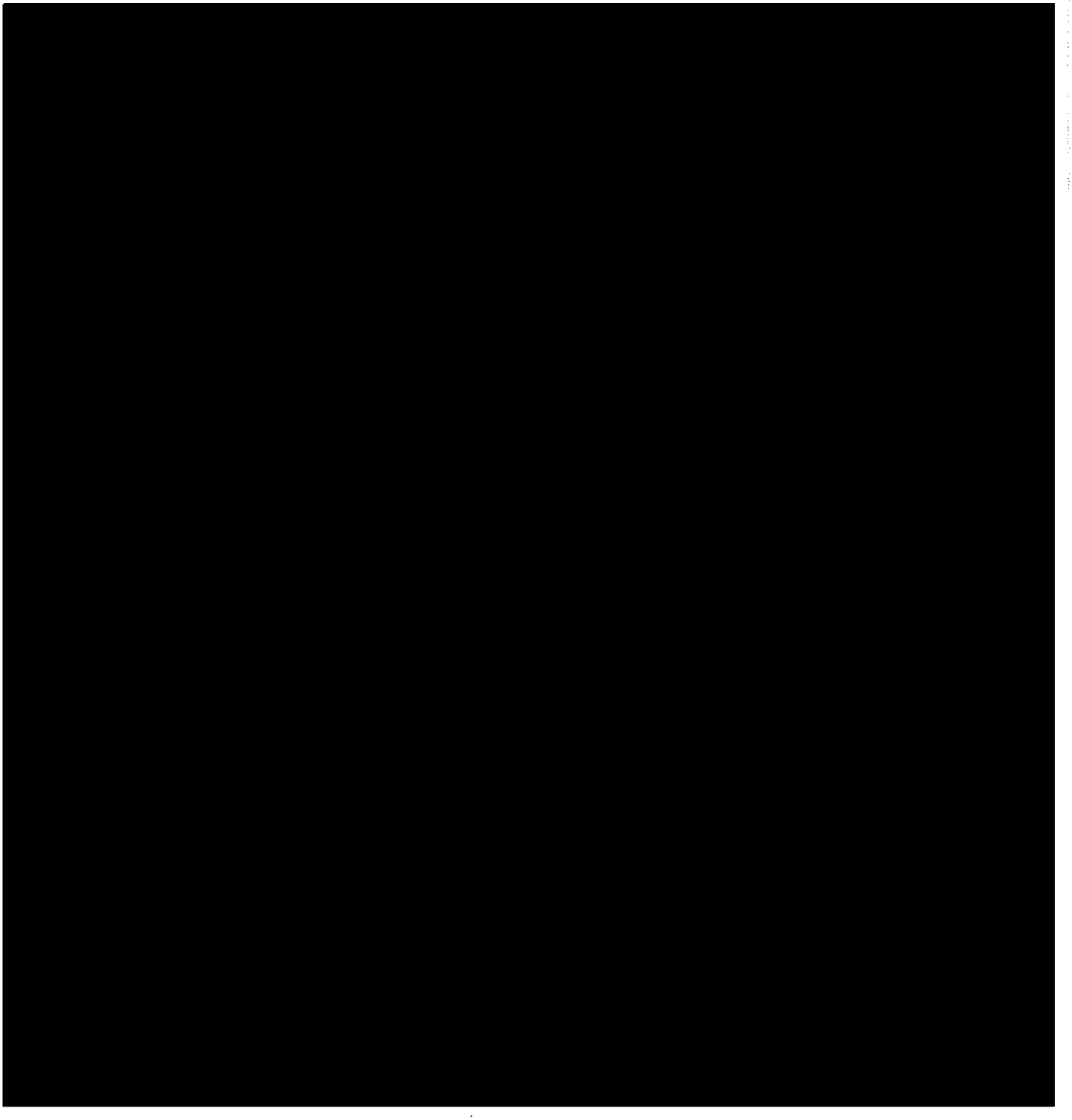
FOIA Confidential Treatment Requested by Harding Advisory, LLC and Wing Chau

ORRICK

[redacted]

FOIA Confidential Treatment Requested by Harding Advisory, LLC and Wing Chau

ORRICK



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ERIK WITTMAN
LARRY WORK-DEMBOWSKI
VERONICA YEPEZ
ASSOCIATES

* ADMITTED ONLY TO A BAR OTHER THAN THAT OF THE DISTRICT OF COLUMBIA. WORKING UNDER THE SUPERVISION OF PRINCIPALS OF THE WASHINGTON OFFICE.

Writer's Direct Dial: (202) 974-1514
E-Mail: rbergen@cgsh.com

August 6, 2012

BY FEDEX

Steven G. Rawlings, Esq.
Assistant Regional Director
U.S. Securities and Exchange Commission
Division of Enforcement
New York Regional Office
3 World Financial Center, Suite 400
New York, NY 10281-1022

Re: In the Matter of Harding Advisory LLC (NY-8306)
In the Matter of 250 Capital, LLC (NY-8424)
In the Matter of NIR Capital Management, LLC (NY-8382)

[redacted]

Confidential Treatment Requested by Merrill Lynch

[redacted]

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Therefore, in accordance with the SEC's procedures with respect to Freedom of Information Act ("FOIA") requests (17 C.F.R. 200.83(c)(2)), the undersigned hereby requests confidential treatment of the information contained herein. This material bears the legend "Confidential Treatment Requested by Merrill Lynch" and all information contained herein is intended to be maintained as confidential to the extent allowed by law.

This letter is submitted with the further request that it be kept in a non-public file and that access to it by any third party who is not a member of the SEC or its staff be denied, except as provided by the Privacy Act of 1974, or unless such access is specifically permitted by existing law. In addition, Merrill requests that any materials provided be returned to the undersigned when the above-referenced inquiry is completed. Merrill understands that upon receipt of any FOIA requests for the enclosed materials, the SEC's staff will make an initial determination as to whether access to the information should be granted. If no ground appears to the staff to exist which would justify the withholding of the information, the staff will ask that within ten (10) days of receipt of the FOIA requests, Merrill submit substantiation for affording continued confidential treatment and for withholding of the information. Under such circumstances, please contact the undersigned immediately. Confidential treatment of this letter is also requested.

[redacted]

[redacted]

EXHIBIT H

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
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NEW YORK, NEW YORK 10281-1022

WRITER'S DIRECT DIAL LINE
STEVEN G. RAWLINGS
(212) 336-0149

August 2, 2012

VIA EMAIL (PDF) and U.S. Mail

Robin M. Bergen, Esq.
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

Re: Harding Advisory LLC (NY-8306)
NIR Capital Management, LLC (NY-8382)
250 Capital, LLC (NY-8424)

Dear Ms. Bergen:

This letter responds to your inquiry relating to a claimed potential conflict of interest or bias concerning the participation of Senior Specialized Examiner Daniel Nigro in the above matters. We have conducted an inquiry into each of the specific issues you cited, and also issues raised by counsel for a former Merrill Lynch, Pierce, Fenner & Smith Inc. employee. In consultation with our ethics office, we have determined that no actual or apparent conflict of interest or bias exists that presents a basis for his recusal from these matters. We note that Mr. Nigro joined the staff in mid-February 2012, two months after the staff requested your client to address particular issues of concern to the staff.

Nonetheless, in the interest of obviating any potential concern, we have elected to remove Mr. Nigro from the investigative teams. In the event that we reconsider this decision, however, we will advise you before consulting Mr. Nigro on matters relating to these investigations so that you have an opportunity to provide us with any additional information relevant to potential conflicts that you deem appropriate.

Very truly yours,

Steven G. Rawlings

Steven G. Rawlings
Assistant Regional Director

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	Administrative Proceeding File No. 3-15574 **CERTIFICATE OF COMPLIANCE**

Pursuant to Commission Rule of Practice Rule 450(d), I hereby certify that the Supplemental Briefing in Support of Respondents' Appeal Regarding their Due Process Claims complies with the length limitation set forth in Commission Rule of Practice 450(c). According to the Word Count function of Microsoft Word, this brief contains 6,811 words, exclusive of table of contents, table of authorities and cover page.

Dated: June 8, 2015

BROWN RUDNICK LLP

By: _____

Ashley Baynham, Esq.
Seven Times Square
New York, NY 10036
Telephone: (212) 209-4991
Facsimile: (212) 938-2957
abaynham@brownrudnick.com

Attorneys for Respondents
Harding Advisory LLC and Wing F. Chau

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	Administrative Proceeding File No. 3-15574 **CERTIFICATE OF SERVICE**

Pursuant to Commission Rule of Practice 150, I hereby certify that on June 8, 2015, a true and correct copy of the SUPPLEMENTAL BRIEFING IN SUPPORT OF RESPONDENTS' APPEAL REGARDING THEIR DUE PROCESS CLAIMS was served via electronic mail on:

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Howard A. Fischer
Securities and Exchange Commission
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Brookfield Place, 200 Vesey Street, Suite 400
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Tel: (212) 336-1100
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Dated: June 8, 2015

BROWN RUDNICK LLP

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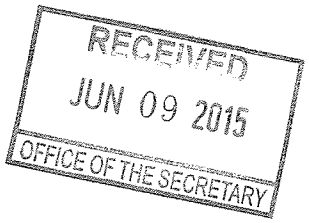
June 8, 2015



VIA FACSIMILE AND FEDERAL EXPRESS

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Fax: 202-772-9324

RE: In the Matter of Harding Advisory LLC, et al,
Administrative Proceeding File No. 3-15574

Dear Mr. Fields:

This firm represents Respondents Harding Advisory LLC and Wing F. Chau in the above-referenced proceeding. Enclosed for filing, please find the Supplemental Briefing in Support of Respondents' Appeal Regarding their Due Process Claims.

Thank you for your attention to this matter.

Sincerely,

BROWN RUDNICK LLP

Ashley Baynham

Enclosures

cc: Andrew M. Calamari, Esq. (via e-mail)
Howard A. Fischer, Esq. (via e-mail)