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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of

HARDING ADVISORY LLC and
WING F. CHAU,

Respondents.

RESPONSE OF THE DIVISION OF ENFORCEMENT TO RESPONDENTS' SUPPLEMENTAL BRIEFING IN SUPPORT OF THEIR APPEAL REGARDING THEIR DUE PROCESS CLAIMS

DIVISION OF ENFORCEMENT
Howard A. Fischer
New York Regional Office
Securities and Exchange Commission
Brookfield Place, 200 Vesey Street, Suite 400
New York, NY 10281
Tel. (212)-336-0589
FischerH@SEC.gov
Attorney for the Division of Enforcement

July 2, 2015

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The Division of Enforcement ("Division") respectfully submits this response to the Supplemental Briefing in Support of Respondents' Appeal Regarding Their Due Process Claims, which was submitted by Respondents Harding Advisory LLC ("Harding") and its principal, Wing F. Chau ("Chau") on June 8, 2015 ("Resp. Supp. Br.").[1]

INTRODUCTION

In their Supplemental Briefing, Respondents raise a litany of unsupported challenges to the fairness of Commission administrative proceedings in general as well as specific claims of inequities in the administrative process in this case and alleged bias of the Administrative Law Judge ("ALJ") who presided over the initial stages of this proceeding. None of Respondents' claims has merit.

The Commission and the courts have previously rejected such generalized attacks on the fairness of administrative proceedings, and, indeed, the Commission has already rejected a number of these arguments in this very proceeding. And Respondents' unsupported allegations of bias are false and cannot satisfy the heavy burden necessary to overcome the well-established presumption that adjudicators serve with honesty and integrity. Indeed, the ALJ's purported bias against Respondents is directly refuted by the ALJ's partial findings in favor of Respondents in his January 12, 2015 Initial Decision ("Initial Decision" or "ID")—findings that the Division challenges on appeal to the Commission and that Respondents rely on in their appellate briefs. Finally, rather than present further due process challenges, the remainder of Respondents' arguments inappropriately attack the weight and credibility that should be given to various witnesses and documentary evidence. In addition to mischaracterizing the record, these issues

[1] For ease of reference, this memorandum of law will refer to the Division's April 1, 2015 Appeal as "Div. App."; to the Respondents' May 8, 2015 Opposition as "Resp. Opp. Br."; to Respondents' April 1, 2015 Appeal as "Resp. App."; and to the Division's May 8, 2015 opposition thereto as "Div. Opp. Br."

are not properly raised at this point in the proceeding since they have no bearing on the fairness of Respondents' administrative proceeding and should have been—and in some cases were—raised in Respondents' merits briefs. Since Respondents are free to—and have—argued these points to the ALJ and the Commission on review, Respondents cannot establish how they were improperly prejudiced by the proceedings against them.

ARGUMENT

A. Respondents Fail To Demonstrate That the ALJ Was Biased or That the Administrative Proceeding Was Unfair

1. Respondents' challenges to the structure and rules of the Commission's administrative proceedings have been consistently rejected by the Commission and the courts.

The Commission and the courts have consistently rejected the type of generalized due process challenges to agency administrative proceedings that Respondents raise here. Respondents' principal contention is that Commission administrative proceedings deprive Respondents of their due process rights since, they assert, "ALJs cannot be expected to be as hard on their colleagues at Division as they can be on Respondents and their counsel." Resp. Supp. Br. at 1. Respondents believe that administrative proceedings are necessarily prejudged because the Commission determines whether to institute proceedings based on its employees' presentation of evidence and then has another employee "review the same evidence and its findings to tell it whether it was wrong." *Id.* at 18–19. As more fully discussed in the Division's opposition to Respondents' appeal (Div. Opp. Br. at 35–38), the Commission has already noted in this proceeding that "[s]uch broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts." *Harding Advisory LLC*, Securities Act Release No. 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). Most significantly, the Supreme Court has rejected "[t]he contention that the combination of investigative and adjudicative functions

necessarily creates an unconstitutional risk of bias in administrative adjudication." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).[2]

Respondents also contend that the ALJ improperly denied their request that the "proceedings be governed by certain Federal Rules of Civil Procedure." Resp. Supp. Br. at 6. The Commission, however, has repeatedly confirmed that the Federal Rules of Civil Procedure "do not apply in administrative proceedings." *John Thomas Capital Mgmt. Grp. LLC*, Securities Act Release No. 9492, 2013 WL 6384275, at *6 (Dec. 6, 2013) ("*John Thomas I*"); *accord Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 n.24 (Aug. 25, 2006). Thus, Respondents cannot base a due process claim on the mere refusal to apply the Federal Rules of Civil Procedure. Instead, they must establish that the ALJ's decision not to apply a particular rule in this case denied them due process. Respondents fail to make such a showing.

Nor is there any merit to Respondents' contention that the ALJ selectively applied the Federal Rules of Civil Procedure to benefit the Division by disallowing discovery of the Division's communications with its experts. *See* Resp. Supp. Br. at 9–10. Respondents present no case law that would permit the discovery of such communications in this case under either the

[2] The propriety of this proceeding's structure is unimpaired by the fact that the Commission has previously entered a settled order in another matter in which the Commission discusses statements that are relevant to the Division's claims against Respondents. *See* Resp. Supp. Br. at 19. While Respondents assert that this prior order raises prejudgment concerns, the Commission has rejected such arguments "in an unbroken line of decisions." *John Thomas Capital Mgmt. Grp. LLC* ("*John Thomas II*"), Securities Act Release No. 9519, 2014 WL 294551, at *2 (Jan. 28, 2014) (collecting Commission and court decisions). As Respondents themselves note, the settled order specifically states that the order's findings "are not binding on any other person or entity in this or any other proceeding." Resp. Supp. Br. at 19. The Commission has found that such language demonstrates that there are no prejudgment concerns in this proceeding and instead that the Commission's findings regarding Respondents will be "based solely on the record adduced before the law judge and will in no way be influenced" by the Commission's findings in the prior settled order. *John Thomas II*, 2014 WL 294551, at *2 (citation and quotation marks omitted).

Federal Rules of Civil Procedure or the Commission's Rules of Practice. Further, while the Federal Rules do not apply to administrative proceedings, "in certain circumstances [the Commission is] guided by the principles of the Federal Rules." *Ochanpaugh*, 2006 WL 2482466, at *5 n.24 (citing *Carl Shipley*, 45 S.E.C. 589, 596 n.16 (1974)).

2. The ALJ's conduct in this proceeding does not create an inference of bias against Respondents and did not violate Respondents' due process rights.

Respondents' assertions that the ALJ was biased and "failed to police Division adequately" during the hearing, Resp. Supp. Br. at 2, are equally infirm. It is well established that agency adjudicators—including ALJs—are presumed to be unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow*, 421 U.S. at 47 (applying "a presumption of honesty and integrity in those serving as [agency] adjudicators"). This presumption creates a heavy burden for those seeking to establish bias: they must make "a showing of conflict of interest or some other specific reason for disqualification." *Schweiker*, 456 U.S. at 195–96; *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1222 (D.C. Cir. 1989) (allegations of bias must show that the "judge's mind was 'irrevocably closed' on the issue"). Grounds for disqualification include those cases in which the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. *Withrow*, 421 U.S. at 47.

Respondents have failed to identify any conflict of interest or other "specific reason" to overcome the presumption that ALJ Elliot fairly and impartially presided over the proceeding below. *See Schweiker*, 456 U.S. at 195–96. Instead, Respondents' arguments as to ALJ Elliot's alleged bias all stem from the same assumption: ALJs cannot be fair and impartial because they—like the prosecuting attorneys from the Division—are employees of the Commission. As

discussed above, however, such an arrangement has been consistently upheld by the courts and is insufficient to overcome the presumption of the ALJ's impartiality.

Indeed, in this proceeding, any allegations that the ALJ was biased against Respondents are directly refuted by the ALJ's Initial Decision, in which the ALJ made multiple findings adverse to the Division and in favor of Respondents. The Division has cross-appealed the ALJ's Initial Decision because, among other things, the ALJ erroneously concluded that the Division had failed to sustain its fraud claims under Section 17(a)(1) and (a)(3) of the Securities Act and because the ALJ failed to award the proper measure of disgorgement and civil penalties. In their opposition to the Division's appeal, Respondents laud parts of the ALJ's Initial Decision, using language such as "the ALJ correctly found," "the ALJ did not err," and "the ALJ properly concluded." Resp. Opp. Br. at 16–21. Similarly, in the opening brief in their appeal, Respondents affirmatively cite multiple holdings in the ALJ's Initial Decision as correctly decided in their favor. *See* Resp. App. at 3–4. While the Division disagrees with many of these findings, such findings in favor of Respondents belie their assertion that the ALJ was acting as some mere "rubber stamp" of approval on the Division's allegations or that the ALJ was driven by a single-minded bias against Respondents.

Respondents' other complaints are also belied by the record, which establishes that the Division conducted itself professionally and in good faith at all times and the ALJ made fair and impartial rulings during the proceeding.

a. Respondents' allegations of misconduct related to the official transcript are false and do not implicate Respondents' due process rights.

Respondents challenge certain innocuous incidents related to the official hearing transcript—incidents that in no way affected the accuracy of the transcript. That Respondents consider these incidents to be the "starkest illustration of Division's contempt for the AP [and]

its total disregard of any decorum and rules," Resp. Supp. Br. at 2, highlights the weakness of Respondents' due process arguments.

At one point in the hearing, the Division's live feed of the testimony transcript went off-line. After alerting the court reporter to the problem and requesting personnel from the reporting service to fix or replace the live feed, the reporter suggested that the Division use the search function on her laptop during the lunch break. In a similar vein, when the Division noticed obvious typographical errors in the transcript, it brought them to the reporter's attention and asked that the tape recordings be checked to ensure the transcription was accurate. Inadvertently, the Division neglected to simultaneously copy Respondents on these proposed corrections.

As is evident from the full circumstances of these inconsequential acts, the Division did not act with "total disregard of any decorum and rules." Further, even if these acts were improper, Respondents have provided no authority explaining how such trivial acts could violate due process. They do not allege that the Division incorrectly changed or manipulated the substance of the official transcript, or that Respondents were otherwise prejudiced. Instead, the record is clear that, after the hearing concluded, the parties mutually conferred and submitted a joint list of proposed corrections to the ALJ, who then made the ultimate determination on which corrections were to be made to the transcript. *See Harding Advisory LLC*, Order on Joint Motion to Correct Transcript, Release No. AP-1670 (Aug. 5, 2014).

b. The ALJ appropriately considered Respondents' requested continuances.

Respondents complain about the size of the investigative file and assert that they were deprived of due process because the ALJ declined to grant them a six-month adjournment, as well as other, similar requests, to further review the file. Resp. Supp. Br. at 4–8. There is nothing in the record, however, indicating that the ALJ denied Respondents' requests out of bias or prejudice. Instead, as the Commission has already found, the ALJ appropriately and

reasonably applied the Commission's rules and precedent to each of Respondents' requests. There was no denial of due process.

The Supreme Court in *Ungar v. Sarafite*, articulated the standard for analyzing a due process challenge to the denial of a continuance. *See* 376 U.S. 575 (1964). The Court noted that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589–90. The Commission has adopted *Ungar*'s analytical framework and reviews such denials to determine "whether the denial constituted 'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'" *Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 WL 281105, at *35, *37 (Jan. 31, 2008) (quoting *Richard W. Suter*, 47 S.E.C. 951, 963 (1983)), *aff'd* 573 F.3d 801 (D.C. Cir. 2009).

In denying Respondents' request for a continuance, the ALJ appropriately considered all the factors that are specified in Commission Rule of Practice 161(b). *See* 17 C.F.R. § 201.161(b). The ALJ found that while certain factors favored the requested adjournment, "Respondents do not cite to a single case, nor am I aware of any, where a Commission administrative hearing was adjourned for six months or more solely to give Respondents a longer time to review the investigative file." Order Denying Respondents' Motion for Adjournment at 2, Release No. AP-1195 (Jan. 24, 2014) ("Adjournment Order"). Instead, the ALJ noted that "the argument that the size of the investigative file renders complete review of it prior to the hearing 'not feasible,' such that relief is justified, was recently rejected by the Commission." *Id.* (citing *John Thomas I*, 2013 WL 6384275, at *5). The ALJ further stated that he was "sympathetic to Respondents' situation" and that "there may one day be an administrative proceeding where the difficulties of preparing for hearing within the time specified by Rule

360(a) are found to warrant some of the extraordinary relief Respondents request," but found that "this is not that proceeding." *Id.*

This conclusion was well justified. While Respondents complain about the size of the investigative file, the Commission has previously noted that "[m]any Commission [administrative] proceedings involve complicated issues resulting in voluminous files . . . ." *Dearlove*, 2008 WL 281105, at *36. Indeed, it was the Commission that adopted the 300-day deadline for the ALJ's initial decision when it instituted proceedings against Respondents. In doing so, the Commission determined that such a deadline was appropriate based on the "nature, *complexity*, and urgency of the subject matter, and with due regard for the public interest and the protection of investors." *See* 17 C.F.R. § 201.360(a)(2) (emphasis added).

Further, when Respondents sought an uncertified interlocutory appeal of the ALJ's order denying their request for adjournment and other extraordinary relief, the Commission considered the very arguments Respondents' raised in their supplemental brief and confirmed that the hearing schedule and the ALJ's order did not deny Respondents their right to due process. *Harding Advisory LLC*, 2014 WL 988532, at *6. The Commission found Respondents' constitutional claims to be "facially defective" and observed that "respondents have not made even a colorable showing of the violations they allege." *Id.* Specifically, the Commission found that Respondents failed to "establish that it would be a . . . due process violation to force Respondents to go to trial without an adjournment and other remedies necessary to ensure fundamental fairness in this 22-million document contested CDO case.'" *Id.* at *8 (quoting Respondents' brief). Instead, the Commission found that "it appears from the record here that respondents are being afforded a meaningful opportunity to be heard," which is all that due

process requires. *Id.*[3] This holding is consistent with Commission precedent rejecting arguments that large case files warrant extraordinary relief. *John Thomas I*, 2013 WL 6384275, at **5–6 (Dec. 6, 2013) (rejecting argument that the Division should provide a "roadmap" of material exculpatory or impeaching evidence because it was "not feasible for [respondents] to go through all of the [700 GB of electronic data produced by the Division] in advance of the hearing"); *Dearlove*, 2008 WL 281105, at **34–36 (rejecting argument that time frame for administrative proceeding and size and complexity of record constituted a due process violation).

Respondents' related arguments are similarly unavailing. Respondents' request for the addition of labels and tags to the production of the investigatory file would have invaded the Division's work product protections. Commission precedent makes clear—and Respondents have not cited any contrary authority—that the Division is not required to provide Respondents with a road map to the relevant evidence or otherwise "to prepare respondents' case for them." *John Thomas I*, 2013 WL 6384275, at *6. Further, the Division produced electronic databases in the manner in which they were maintained by the Division—the method specifically required by the Commission's Rules of Practice—and predominantly in an electronic, text-searchable format. *See, e.g., id.* ("open file" production satisfies Division's obligations under Rule 230).

Not only are Respondents' arguments refuted by consistent Commission precedent, but Respondents also omit certain facts that establish the absence of any due process violation. Respondents assert that they were unfairly prejudiced because the Division had multiple years to review relevant documents and prepare its case, while Respondents had a little over four months. Resp. Supp. Br. at 4. This misleading assertion critically ignores the fact that Respondents were

[3] Judge Kaplan of the U.S. District Court of the Southern District of New York reached a similar conclusion when Respondents filed a petition for a preliminary injunction in federal district court. Judge Kaplan found no denial of due process as the ALJ's ruling "did not turn on a mechanistic application of SEC rules, but rather on an analysis of the facts at hand." *Chau v. SEC*, 1:14-cv-01903-LAK, --- F. Supp. 3d ---, 2014 WL 6984236, at *7 (Dec. 11, 2014).

represented by experienced counsel since the beginning of the Division's investigation in 2010. Indeed, Respondents' prior counsel had sufficient understanding of the relevant facts and documents to create four separate Wells and "white paper" submissions concerning the very allegations set forth in the OIP—and before the entry of the OIP—comprising 112 pages of argument and analysis with a total of 251 exhibits, plus a 32-page PowerPoint presentation. Clearly, Respondents and their counsel understood the relevant universe of documents and were capable of mounting their defense.

Respondents also ignore the fact that the vast majority of the relevant materials—and almost the entirety of the most relevant evidence during the hearing—came from Respondents' own productions. Respondents presumably had access to these documents for an even longer time period than the Division. Moreover, Respondents had access to the key witnesses at trial, Chau and Lieu, the latter of whom refused to meet with the Division after meeting for several days with Respondents. Furthermore, the Division produced materials, such as subpoenas and cover letters, to allow Respondents to understand which parties had produced documents and thereby prioritize their review.

The Division also advised Respondents that certain of the productions were not likely to be germane to the case, and, perhaps most importantly, noted to Respondents and the ALJ that the majority of the core documents relevant to the allegations in the OIP were in the relatively smaller universe of documents used as exhibits in investigative testimony or aired in the "Wells" and Wells-style exchanges with Respondents and other parties that preceded the institution of these proceedings. The ALJ thus accurately concluded that "[g]iven the manner in which the Division has produced the investigative files, including files from other investigations, and given the representations the Division has made regarding them, Respondents should be able to meaningfully prioritize their review." Adjournment Order at 2.

c. *An allegedly conflicted staff member's brief involvement in the investigation did not violate Respondents' due process rights.*

Respondents attempt to resurrect the previously rejected argument that they were deprived of due process because a Commission staff member with an alleged conflict of interest briefly participated in the underlying investigation. Resp. Supp. Br. at 17–18. The Commission has already considered this very argument and rejected it as "particularly unavailing." *Harding*, 2014 WL 988532, at *7. The Commission correctly found that Respondents had "no support" for their assertion that the Division's recommendation to the Commission was "infected" by this individual's participation and that Respondents could only "speculate that the Commission's decision to bring this case as an administrative proceeding was somehow influenced by a specialist who was removed from the investigation more than a year before the OIP was issued." *Id.* at *7.

The Commission's prior decision was correct and need not be disturbed. Respondents do not contest that the relevant individual was involved in the investigation for less than six months and ceased his involvement long before the Division prepared its recommendation to the Commission. It cannot be argued that such a fleeting participation could have violated Respondents' due process rights, especially given that it is the "*Commission*, not the Division, [that] authorized and instituted these proceedings," *Harding*, 2014 WL 988532, at *7, and there is no argument that the relevant individual had any interaction with the Commission regarding this case. *See Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 WL 4809215, at *22 (Dec. 14, 2009) (rejecting respondents' claim that the Division's allegedly biased investigation tainted the Commission's decision to institute proceedings); *C.E. Carlson, Inc.*, 48 S.E.C. 564, 568, 1986 WL 72650, at *4 (Sept. 11, 1986), *aff'd*, 859 F.2d 1429 (10th Cir. 1988) (finding that

the Commission's decision to institute proceedings is independent of "any possible bias" on the part of a member of its staff).

Respondents have presented no new facts or legal authority that would warrant reconsideration of this decision. Indeed, Respondents' lone authority relates to the standard of impartiality owed by investment advisers, Resp. Supp. Br. at 18, a wholly different standard than that imposed on investigators in administrative cases, in which it is well established that "[d]ue process does not require a neutral prosecutor." *Jean-Paul Bolduc*, Exchange Act Release No. 43884, 2001 WL 59123, at *4 (Jan. 25, 2001) (rejecting argument that statements made by enforcement personnel evidenced the Commission's bias against the respondent).

d. The Division properly disclosed all **Brady** *material.*

Respondents' assertion that the Division held back key *Brady* material "until the eve of or after trial and failed to identify certain Brady materials altogether," Resp. Supp. Br. at 8–9, is simply untrue. The Division made its *Brady* disclosures well before they were due, and the current complaint, raised now for the first time, is based either on Respondents' mischaracterization that certain arguments in post-trial briefing constitute *Brady* material, or Respondents' misrepresentation that certain disclosed documents are exculpatory and thus subject to special identification by the Division. Leaving aside the fact that these documents were not actually exculpatory (and in fact the ALJ rejected Respondents' arguments to this effect (*see, e.g.*, ID at 41–43), there is no obligation under *Brady* for the Division to specifically identify disclosed documents that it believes might be most effective when highlighted by the defense. *John Thomas I*, 2013 WL 6384275, at *6 (holding that the Division had no obligation under the Due Process clause, *Brady*, or otherwise to "specifically identify material exculpatory or impeaching evidence within the production or, at the very least, provide a 'roadmap' for those documents").

Finally, it is clear from the record that Respondents received any *Brady* material in time to make effective use of it, which is all that due process requires. *United States v. Blackwell*, 459 F.3d 739, 759 (6th Cir. 2006); *United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001) ("[A]s long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law."); *see also United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996) ("Where the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady* is not violated."). Respondents' first and third asserted categories of *Brady* material were available to Respondents for the hearing. Respondents' second asserted category of *Brady* material is a legal argument—not evidence that needed to be disclosed under *Brady*—and regardless, was affirmatively cited in Respondents' Reply Brief in support of their appeal and can be considered by the Commission. *See* Resp. Supp. Br. at 8–9.

B. Respondents' Improper Use of a Due Process Brief to Argue the Weight that Should Be Given Certain Evidence Should Be Rejected

The Commission permitted Respondents to file this supplemental brief to address the alleged constitutional due process violations referenced in Respondents' opening brief, which Respondents represented could not be detailed in that brief "[b]ecause of space limitations." Resp. App. at 37 n.34. Respondents have improperly exploited this permission to make a series of arguments challenging the credibility and merit of certain witnesses and evidence. Resp. Supp. Br. at 10–16. Such challenges should have—and in some instances were—submitted as part of Respondents' merits briefing. The inclusion of these factually incorrect arguments[4] now

[4] For example, Respondents consume almost four pages discussing the analysis and credibility of the Division's summary witness (Resp. Supp. Br. at 10–14), a witness whose testimony the ALJ found, as Respondents concede, to be of marginal importance. *Id.* at 14. As made clear by the record, the summary witness was understandably perplexed on cross-examination by Respondents' counsel's confusing and irrelevant questions, and Respondents' allegation that the

as part of a "due process" brief, however, appears to be little more than an attempt to circumvent the word limits for Respondents' merits appeal.

In any event, Respondents do not and cannot argue that the challenged evidence was inadmissible under the Commission's Rules of Practice. *See* 17 C.F.R. § 201.320 (allowing for admission of all evidence except that which is "irrelevant, immaterial or unduly repetitious"); *Del Mar Fin. Servs., Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *8 (Oct. 24, 2003) ("[O]ur administrative proceedings ... favor liberality in the admission of evidence."). The greater liberality in the admission of evidence in Commission administrative proceedings applies to factual evidence and testimony as well as expert testimony. *See Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *11 (May 29, 2015) (noting that "*Daubert* does not apply because the Federal Rules of Evidence are inapplicable in our administrative proceedings").

Moreover, it is hard to fathom how the admission of certain evidence—which the ALJ was free to credit or discredit—could possibly constitute the type of prejudice sufficient to establish a due process violation. *See Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) ("In the absence of any suggestion of prejudice, we cannot conclude that Horning was deprived either of procedural due process or of appropriate "notice and opportunity for a hearing." (citing 15 U.S.C. § 78*o*(b)(6)(A))); *see also Gateway Stock & Bond, Inc.*, 43 S.E.C. 191, 1966 WL 84124,

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Division coached the witness during a break in testimony is false and unfounded. Similarly, the ALJ did not predetermine Chau's credibility as Respondents allege. *Id.* at 16. Instead, the record makes clear that the ALJ helpfully afforded Respondents the chance to address some of the problems caused by Chau's discursive, non-responsive answers. The ALJ thus provided Respondents' counsel the highly unusual opportunity to meet with Chau in the middle of the Division's examination and advise him to more directly respond to the Division's questions. *See, e.g.*, Tr. 1566:5–1567:16; *see also* Tr. 1535:2–7. The ALJ told counsel that he "may find [Chau] credible overall if he shapes up. That is why I am telling you this now. I want to give you an opportunity to sort of recover the situation." *Id.* at 1568:19–22. As this full record makes clear, the ALJ took extraordinary measures in order to ensure the fairness of the proceeding.

at *3 (Dec. 8, 1966) (rejecting applicants' argument that they were denied due process because "[a]pplicants have not shown that they were prejudiced by the manner in which evidence was presented"). Indeed, the ALJ indicated that he would ignore the summary witness's challenged testimony (*see* Resp. Supp. Br. at 14), and the ALJ—incorrectly—agreed with Respondents' contention that the Division expert's testimony that the ABX Index trade had a net negative economic impact was incorrect (*see id.*; Initial Decision at 77).[5] Clearly, there can be no prejudice to Respondents, and thus no due process violation, if the challenged evidence had no bearing on the ALJ's Initial Decision. Finally, in conducting its *de novo* review of the record, the Commission will make its own determinations as to the merits of the challenged evidence. *See* 17 C.F.R. §§ 201.360(d), 201.411, 201.452; *cf. Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not ... binding" on the Commission); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014) (recognizing that the Commission is "not bound by a law judge's initial decision").

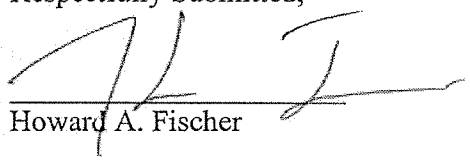
[5] *See also* Tr. 3217:17–22 ("He's just a summary witness. He's not that important. I'm sure he's a perfectly fine fellow but, you know, basically he was up there just sitting there answering questions for over an hour under cross-examination that to me didn't have really much to do with anything."); *id.* at 3220:12–17 (ALJ stating that neither the summary witness nor Ellson "had testimony that was particularly probative").

CONCLUSION

The Division respectfully requests that the Commission find that there has been no violation of Respondents' due process rights.

Dated: July 2, 2015

Respectfully Submitted,



Howard A. Fischer

New York Regional Office
Securities and Exchange Commission
Brookfield Place, 200 Vesey Street, Suite 400
New York, NY 10281
Tel. (212)-336-0589
FischerH@SEC.gov
Attorney for the Division of Enforcement

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Respondents.

Certificate of Service

I hereby certify that, on July 2, 2015, I caused true and correct copies of the annexed July 2, 2015 Response of the Division of Enforcement to Respondents' Supplemental Briefing In Support of Their Appeal Regarding Their Due Process Claims in the above-captioned matter to be served by UPS and/or email on the following:

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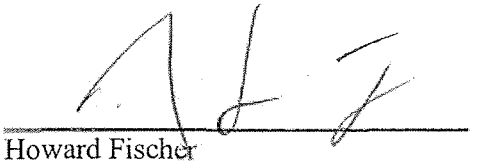
Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington D.C. 20549

By UPS and email
The Honorable Cameron Elliot
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington D.C. 20549
ALJ@SEC.Gov

By Email
Ashley Baynham, Esq.
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
Telephone: (212) 209-4991
Facsimile: (212) 938-2957

abaynham@brownrudnick.com

Alex Lipman, Esq.
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
Telephone: (212) 209-4919
Facsimile: (212) 209-4801
alipman@brownrudnick.com



Howard Fischer
Securities and Exchange Commission
Brookfield Place, Suite 400
200 Vesey Street
New York, NY 10281
T: 212.336.0589
FischerH@SEC.gov

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In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	**Certificate of Compliance with SEC Rule of Practice 450(d)**

I hereby certify that the annexed July 2, 2015 Response of the Division of Enforcement to Respondents' Supplemental Briefing In Support of Their Appeal Regarding Their Due Process Claims in the above-captioned matter complies with SEC Rule of Practice 450(d) and that, as per the word counting program of the Word software, it contains approximately 4967 words.

Howard Fischer
Securities and Exchange Commission
Brookfield Place, Suite 400
200 Vesey Street
New York, NY 10281
T: 212.336.0589
FischerH@SEC.gov