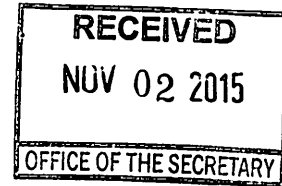


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

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'
MOTION TO SUBMIT SUPPLEMENTAL BRIEFING IN SUPPORT OF
RESPONDENTS' APPEAL REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS
& SUPPLEMENTAL BRIEFING IN SUPPORT OF THOSE 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

October 30, 2015

The Division of Enforcement respectfully submits this response to the Motion to Submit Supplemental Briefing in Support of Respondents' Appeal Regarding Their Appointments Clause Claims & Supplemental Briefing in Support of Those Claims that was submitted by Respondents Harding Advisory LLC and its principal, Wing F. Chau on October 23, 2015.¹ The arguments advanced in this filing are without merit.

As the Commission is aware, certain respondents in Commission administrative proceedings have argued that the Commission's ALJs are "inferior officers" who were not appointed in a manner consistent with the Appointments Clause of the Constitution. *See generally In re Lucia*, 2015 WL 5172953 (Sept. 3, 2015); *In re Timbervest*, 2015 WL 5472520 (Sept. 17, 2015); *In re Bandimere*, Exchange Act Rel. No. 76308 (Oct. 29, 2015). Respondents' argument regarding the appointment of ALJs is different: they assert that, under the federal securities laws, Commission ALJs must be "officer[s] ... of the Commission," and thus the Commission has failed to adhere to its organic statutes by hiring mere employees as ALJs. *See Respondents' Reply Brief in Further Support of Their Petition for Review 14* (May 22, 2015) ("Respondents argue that the ALJ was not properly appointed or designated as an 'officer of the Commission,' *as required by the securities laws*, separate and apart from whether they are also constitutional officers.") (emphasis in original); Mot. 1.²

The Commission has squarely rejected this argument. As the Commission has held, there is no "relevance in the fact that the federal securities laws and [the Commission's] regulations at times refer to ALJs as 'officers' or 'hearing officers.'" *In re Lucia*, 2015 WL 5172953, at *23 n.

¹ As Respondents concede, Mot. 1, n.2, briefing in this matter has been closed for months.


² To the extent that Respondents contend that Commission ALJs are inferior officers who were not appointed in a manner consistent with the Appointments Clause, that argument is foreclosed by *Bandimere*, *Lucia*, and *Timbervest*. Nothing in the legislative history that Respondents cite undermines the Commission's analysis in those decisions.

122. This is because there is “no indication that Congress intended ‘officers’ or ‘hearing officers’ to be synonymous with ‘Officers of the United States,’ U.S. Const. art. II, § 2, cl. 2, and the word ‘officer’ in [the Commission’s] regulations has no such meaning.” *Id.* Moreover, the Administrative Procedure Act “‘consistently uses the term ‘officer’ or the term ‘officer, employee, or agent’ to ‘refer to [agency] staff members.’” *Id.* (quoting Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 615 & n.11 (1948)); accord *In re Timbervest*, 2015 WL 5472520, at *26 n.165; *In re Bandimere*, Exchange Act Rel. No. 76308, at 33 n.122; see also *Opposition of the Division of Enforcement to Respondents’ Appeal 33-35* (May 8, 2015) (addressing this argument).

Respondents’ supplemental filing does not detract from the Commission’s sound conclusion. In particular, the legislative history that Respondents cite does not show that only constitutional officers may serve as Commission ALJs. Therefore, and for the reasons discussed in the Division’s *Opposition to Respondents’ Appeal*, there is no merit to Respondents’ argument that the ALJ who presided over the hearing was not an “officer of the Commission” within the meaning of the federal securities laws.

Dated: October 30, 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

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.

Certificate of Service

I hereby certify that, on October 30, 2015, I caused true and correct copies of the Division of Enforcement's October 30, 2015 Response Of The Division Of Enforcement To Respondents' Motion To Submit Supplemental Briefing In Support Of Respondents' Appeal Regarding Their Appointments Clause Claims & Supplemental Briefing In Support Of Those Claims in the above-captioned matter to be served by UPS and/or email on the following:

By UPS and Fax (202-772-9324)

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

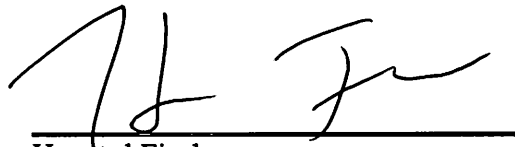
The Honorable Cameron Elliot
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington D.C. 20549
ALJ@SEC.Gov

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

A handwritten signature in black ink, appearing to read 'H Fischer', written over a horizontal line.

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