UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of

HARDING ADVISORY LLC and

WING F. CHAU,

Respondents.

File No. 3-15574

EMERGENCY EXPEDITED CONSIDERATION REQUESTED

RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW AND EMERGENCY MOTION TO STAY THE HEARING AND PREHEARING DEADLINES

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Respondents, Harding Advisory LLC ("Harding") and Wing F. Chau, by and through their counsel, Nixon Peabody LLP, respectfully submit this Petition for Interlocutory Review pursuant to Rule of Practice ("Rule") 400, seek emergency consideration, and respectfully move the Commission, pursuant to Rule 401, to issue a stay of the March 31, 2014 hearing and all prehearing deadlines—including, most immediately, the March 3 deadline for filing exhibit lists and expert reports—until such time as appropriate remedies for ongoing violations of Respondents' equal protection and due process rights have been implemented.

This petition is required because recent orders by the Administrative Law Judge ("ALJ") require Respondents to defend this case in a timeframe and with an absence of procedural safeguards that will erase any possibility of a fair hearing. This is the fourth contested SEC enforcement action relating to the structuring and marketing of CDOs (a "contested CDO case"). But it is the first and only contested CDO case to be brought administratively, and is thus the first and only contested CDO case in which any party has been required to prepare for trial within four months. Absent relief from the recent ALJ orders, the continuation of this proceeding will irrevocably violate Respondents' rights to equal protection and due process of law.

PRELIMINARY STATEMENT

Respondents received 22 million documents from the Division of Enforcement ("Division") in three batches: roughly 7 million on November 6, 2013; 13 million on November 15, 2013; and 2 million on December 12, 2013. The trial date is set for March 31, 2014. That is approximately four months from the date on which the Order Instituting Proceedings ("OIP") was served on November 18, 2013. There were three major federal holidays between then and now: Thanksgiving, Christmas and New Year's. In fact, when Respondents moved for an adjournment seeking additional time to deal with the Division's massive document dump, the Division asked for a month to respond in light of the intervening Christmas and New Year holidays. The documents—roughly equivalent to the printed documents of the entire Library of Congress—were produced in 131 separate databases and were not (and still are not) searchable across the databases.

Most of the documents produced, approximately 19.9 million, came from productions originally made to the Division by third parties, *i.e.*, they were not available to Respondents until after the Division produced them. Respondents cannot (as the Division has suggested) simply ignore these documents and focus on testimony exhibits and evidence aired in the white paper and Wells processes together with roughly 2.1 million documents originally produced by Respondents. This is because, among other reasons, (1) the Division has represented (without identifying specific documents) that each of the databases is from a file that, at minimum, may have been "meaningfully consulted" during the investigation of this matter and, separately, (2) the 19.9 million documents from third-party productions were not reviewed by Respondents' counsel or any party for information that is relevant or exculpatory only as to Respondents. Indeed, Respondents' review has already resulted in discovery of a number of highly exculpatory documents that were not addressed in any testimony, white paper, or Wells submission in this matter.

There is no conceivable way that Respondents can adequately prepare for trial in the timeframe currently permitted. But what makes the document dump particularly egregious is that it appears to have been done deliberately for the purpose of improving the Division's odds in a very weak case, and to hide improper conduct by SEC Staff and irreconcilable contradictions with positions taken by the Commission in another highly publicized CDO-related case, *SEC v. Tourre*. Further, the Division either knew or recklessly disregarded the fact that burying Respondents in 22 million documents in an administrative proceeding would violate Respondents' constitutional rights to due process and equal protection. We have grave doubts that the Commission itself was aware of the Division's conduct or intent before it authorized the Division to bring this case administratively.

Respondents were denied relief by the ALJ because, in large part, the ALJ did not think he had the power to grant the relief sought and did not believe that Respondents' constitutional claims are justiciable in an administrative proceeding. We therefore make this appeal to the Commission for relief without which this proceeding will not comport with the most basic principles of due process, equal protection, and fundamental justice.

BACKGROUND

As soon as each of the three multimillion-document productions was received, Respondents' counsel began working diligently to process the materials for review. But the enormity of the investigative file, exacerbated by the unorganized manner in which it was produced, meant that fully two months of Respondents' trial preparation were spent simply processing electronic data. Recognizing that they could not adequately prepare for trial without a significant adjournment and without sufficient means to identify relevant facts and materials, Respondents moved the ALJ on December 20, 2013 for an order (1) extending time and granting a six-month adjournment; (2) providing that proceedings would be governed by certain Federal Rules of Civil Procedure; and (3) requiring the Division to provide or identify certain materials (the "Dec. 20 Motion").

The ALJ denied the Dec. 20 Motion in its entirety on January 24, 2014 (the "Jan. 24 Order"). As the trial date and significant pretrial deadlines approached, it remained impossible, despite ongoing diligent efforts, to complete a meaningful review of even one percent of the Division's investigative file. As a result, on February 14, 2014, Respondents submitted an emergency motion requesting that the ALJ address the ongoing violations of Respondents' equal protection and due process rights by reconsidering the Jan. 24 Order or staying the hearing and prehearing deadlines pending this petition for interlocutory review (the "Feb 14 Motion"). The Feb. 14 Motion was denied in an order dated February 19, 2014 (the "Feb. 19 Order"). (The Jan. 24 Order and the Feb. 19 Order are attached hereto as Exs. A and B.)

Because the Jan. 24 Order and the Feb. 19 Order denied all aspects of relief requested, there currently exists no mechanism to allow Respondents to review a critical mass of the documents in the Division's investigative file before the March 3 deadline for filing exhibit lists and expert reports, or before the March 31 trial date. This has severely undermined, and continues to undermine Respondents' ability to engage in trial preparation. It will be impossible, for example, to prepare an adequate exhibit list having seen only a tiny fraction of the relevant subset of the documents. And while Respondents have been ordered to file an expert report on March 3, they have not been able to segregate documents relevant to an expert, much less take the additional steps necessary to obtain and file a report. This harm is compounded by the fact that the ALJ recently ruled that Respondents cannot subpoena documents that form the basis for a key allegation in the OIP and that this allegation "is best established by expert evidence." (*See* Order Granting in Part Respondents' Subpoena Request, dated February 24, 2014, attached hereto as Ex. C; Order Setting Prehearing Schedule, dated November 18, 2013, attached hereto as Ex. D.) The harm to Respondents caused by the Division's document dump—including the inability to file an adequate exhibit list or file an expert report—is immediate and will be irreparable absent interlocutory review and a stay of proceedings.

A constitutionally sound administrative proceeding is possible in this case only if Respondents receive the relief requested in their Dec. 20 Motion and the Commission issues a stay of the hearing and prehearing deadlines until other appropriate remedies are implemented.

ARGUMENT

I. THERE EXISTS NO CONSTITUTIONALLY SOUND BASIS FOR DEPRIVING RESPONDENTS OF PROCEDURAL SAFEGUARDS AFFORDED TO EVERY SIMILARLY SITUATED PERSON.

An arbitrary and irrational government decision to impose disparate treatment on a respondent violates the respondent's equal protection rights under the Constitution. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-66 (2000)). Successful equal protection claims may be brought by a "class of one" where a person has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. *Id.*

Mr. Chau and Harding have been intentionally treated differently from all others similarly situated, and no rational basis for this differing treatment is apparent. Prior to issuing the OIP, the Commission brought three contested CDO cases: (1) *SEC v. Steffelin*, No. 11 Civ. 4204 (S.D.N.Y. June 21, 2011) ("*Steffelin*"); (2) *SEC v. Stoker*, No. 11 Civ. 7388 (S.D.N.Y. Oct. 19, 2011) ("*Stoker*"); and (3) *SEC v. Goldman Sachs & Co.*, No. 10 Civ. 03229 (S.D.N.Y. Apr.

16, 2010) ("*Tourre*"). The Commission brought all three cases in the United States District Court for the Southern District of New York. When we asked the Division for the reasons why the case against Mr. Chau and Harding was brought in this forum, and not in federal court like *Steffelin*, *Stoker*, and *Tourre*, we did not receive an answer. But the reasons seem apparent, and have all of the hallmarks of a deliberate attempt by the Division to put Respondents at a disadvantage.

First, the success rate of the Division's forays into federal court in these cases has been mixed at best. Of the three contested CDO cases brought prior to this one, the Division withdrew all of its charges and consented to dismissal of its complaint in one case, and a jury found against the Division on all of its charges in another case. The Division won at trial in the third case, but based on proof, legal theories, and assertions about industry standards that govern the conduct of collateral managers and the structuring and marketing of CDOs that are, quite simply, diametrically opposed to the Division's assertions of fact and law in this case.

Second, we suspect that the Division wished to avoid discovery concerning a conflict of interest that infected the integrity of the Staff's investigation. During a crucial period of the investigation, the Staff's personnel included a Senior Structured Products Specialist, Daniel J. Nigro, with a deep-seated bias against Mr. Chau and Harding and a personal stake in the investigation's results. Mr. Nigro joined the Staff shortly after having served as ABS portfolio manager for a CDO hedge fund that (i) invested in and lost $10 million in Octans I CDO Ltd. ("Octans I"), the deal at issue in the OIP, and (ii) fired him shortly after losing a client based on a negative evaluation that an affiliate of Harding performed with respect to investments he, Mr. Nigro, had recommended.

Although the Commission issued the OIP, it is unclear whether the Division fully apprised the Commission of all facts and circumstances concerning the disparate treatment of Respondents in comparison to every other similarly situated party. The obvious reasons for the disparate treatment are unlawful. The reasons that the Division wanted to avoid federal court include: (a) its dismal track record in that forum; (b) the fact that it is asserting one thing in this case but has previously said quite the opposite in the other forum; (c) it wants to bury defects in the integrity of its investigation by avoiding pretrial discovery (such as a deposition of Mr. Nigro); and (d) it wishes to improve its odds by burying Respondents in paper, knowing that the Commission requires ALJs to issue an initial decision within 300 days of the service of the OIP.

A. <u>Avoidance of Federal Court Due to Track Record</u>

Like the three contested CDO cases that preceded it, this case was brought after a lengthy investigation by the Division. Like each of the other contested CDO cases, this case involves synthetic CDOs and other highly complex derivative investments; allegations concerning billion-dollar transactions and trading strategies relating to those complex investments; massive amounts of documents; and key witnesses located outside of the United States. Given the nature and complexity of those cases, it made perfect sense that they were brought in federal district court.

1. <u>SEC v. Edward Steffelin</u>

The case that is most like the case against Respondents is *SEC v. Steffelin*. The Commission commenced the *Steffelin* case on June 21, 2011 by filing a complaint in the United States District Court for the Southern District of New York against Edward Steffelin, a former employee of GSC Capital Corp., which, like Harding, served as collateral manager in various CDO transactions. That case, like this one, was based on allegations concerning the undisclosed "involvement" of Magnetar Capital LLC ("Magnetar") in the portfolio selection process for a $1.1 billion CDO. (*See* Complaint in *Steffelin* at ¶¶ 2, 9, attached hereto as Ex. E.) Two months later, on August 30, 2011, Mr. Steffelin moved to dismiss the complaint. After hearing oral argument on October 25, 2011, United States District Judge Miriam Goldman Cedarbaum dismissed the Commission's claim under Section 17(a)(3) of the Securities Act of 1933, and Mr.

Steffelin filed an answer regarding the remaining claims. Judge Cedarbaum held a status conference on April 24, 2012 during which she, *inter alia*, called into question the merits of the Commission's theories of liability. On November 8, 2012, prior to the completion of discovery, the Commission voluntarily dismissed the remainder of its claims. Judge Cedarbaum then executed the parties' stipulation of dismissal with prejudice on November 16, 2012, seventeen months after the Commission's complaint had been filed. (*See* Docket Sheet, attached hereto as Ex. F; Stipulation of Dismissal with Prejudice in *Steffelin*, attached hereto as Ex. G.)

2. SEC v. Brian Stoker

The Commission filed its complaint in the *Stoker* case in the United States District Court for the Southern District of New York (Rakoff, J.) on October 19, 2011. Brian Stoker was a Citigroup employee who had served as a director in the bank's CDO structuring group. The Commission alleged that Stoker, in connection with the offering of Class V Funding III, a $1 billion CDO, failed to disclose Citigroup's "influence" over the CDO asset selection process being performed by collateral manager Credit Suisse Alternative Capital, LLC. (*See* Complaint in *Stoker*, at ¶¶ 2, 9, attached hereto as Ex. H.) After discovery and motion practice, the parties proceeded to trial on July 16, 2012, eight months after the filing of the Commission's complaint. On July 31, 2012, the jury found Stoker not liable for any of the securities law violations that had been alleged. (*See* Docket Sheet, attached hereto as Ex. I; Judgment in *Stoker*, attached hereto as Ex. J.)

3. SEC v. Fabrice Tourre

The *Tourre* case was commenced when the Commission filed a complaint in the Southern District of New York on April 16, 2010; the Commission filed an amended complaint on November 22, 2010. The amended complaint alleged that the offering circular and marketing materials for a CDO, ABACUS 2007-AC1 ("Abacus"), failed to disclose that a hedge fund, Paulson & Co. ("Paulson"), had played a significant role in the portfolio selection process undertaken by the collateral manager, ACA Management LLC ("ACA"). The amended complaint further alleged that Paulson's interests were directly adverse to investors in Abacus because Paulson shorted the portfolio it had helped select, and that neither Paulson's adverse interests nor its role in the portfolio selection process had been disclosed to investors. (*See* Amended Complaint in *Tourre* at ¶¶ 2-3, attached hereto as Ex. K.)

On December 9, 2010, Tourre moved to dismiss the amended complaint; United States District Judge Barbara Jones granted the motion in part and denied it in part on June 10, 2011. After substantial pretrial discovery, including discovery of persons located overseas, both parties moved for partial summary judgment on March 1, 2013. Trial began on July 15, 2013, some 27 months after the Commission had filed its amended complaint and more than three years after the initial complaint was filed. On August 1, 2013, the jury found Tourre liable on six claims. (*See* Docket Sheet in *Tourre*, attached hereto as Ex. L.) However, the Commission secured its victory against Tourre by eliciting proof and making factual and legal arguments that directly contradict its theory of liability in this case. The facts alleged in the OIP to constitute fraud and failure to comply with relevant standards of care by Mr. Chau and Harding are the very same facts that the Division, on behalf of Commission, elicited in *Tourre* as proof of comportment with the relevant standards of care by ACA.

One of the allegations in *Tourre* was that Tourre defrauded ACA by leading it to believe that Paulson was an equity investor in Abacus. This allegation became a key issue at trial because the Division knew that it was not unusual for equity investors to have input into assets that went into a portfolio, and that it was not unusual for equity investors to hedge their long equity position by shorting some portion of the capital structure of the same portfolio. In fact, as the Division knew, ACA served as collateral manager on other deals with investors who were both long and short and who had involvement in portfolio selection. In one of those deals, ACA Aquarius 2006-1 ("Aquarius"), which closed 14 days before Octans I, Magnetar bought the equity, took on warehouse risk, had the right to veto certain collateral, and shorted a higher tranche of the collateral structure as a hedge to its equity position. Magnetar's participation in that deal was not disclosed in deal documents. By way of background, in the case against Respondents, the Division alleges that Magnetar bought the equity, took on warehouse risk, had the right to veto certain collateral, and shorted a higher tranche of the collateral structure as a hedge to its equity position in Octans I.

During the *Tourre* trial, the Division, on behalf of the Commission, used the facts concerning Aquarius—facts identical to Octans I—to illustrate comportment with relevant standards of care, and to draw a contrast with the scenario in the Abacus deal, where portfolio selection was alleged to have been influenced by a "purely short" investor. Specifically, the Division elicited testimony (primarily from Laura Schwartz, the ACA employee responsible for asset selection in Abacus) and argued to the jury in its summation that: (a) it was common for hedge funds to be long and short in CDO deals; (b) having equity was enough "skin in the game" to align Magnetar's interests with those of note purchasers despite Magnetar's short positions; (c) Magnetar's veto rights in the warehouse were explained by the fact that it took warehouse risk; (d) Magnetar's participation in asset selection was not uncommon as it was an equity investor; (e) although certain assets might not have been included in the portfolio but for input from the equity investor, the collateral manager still selected the portfolio; and (f) what mattered as to the collateral manager's understanding of the equity buyer's investment strategy was knowledge relating to the specific deal, not what was available in the public domain.

For example, the then head of the trial unit of the Division said in summation and rebuttal:

> Mr. Tourre and his colleagues at Goldman Sachs misled ACA into believing that Paulson was a long investor, an equity investor, that it had skin in the game so that ACA would agree to serve as the portfolio selection agent. Mr. Tourre then told investors the half-truth, that the ABACUS 2007-AC1 portfolio had been selected by ACA when the whole truth – the whole truth – was that ACA had selected the portfolio together with Paulson. Paulson, who was **purely** short investor who is attempting to identify assets for the portfolio that were more likely to default, that was a conflict of interest that Mr. Tourre hid from investors.
>
> ***
>
> **There is nothing inconsistent about hedging. There is nothing inconsistent about even in the same portfolio taking corresponding positions. It is hedging, they're hedge funds. But you haven't seen any evidence, none, that . . . Ms. Schwartz knew or that ACA knew that Paulson didn't have an equity position.** And you heard the testimony that mattered.
>
> ***
>
> I mean, think about it. If you are willing, this equity tranche on this transaction, 10 percent on $2 billion, is $200 million. Mr. Roseman said if common sense tells you it is important if the person you are working with is willing to take a $200 million risk that if a single asset goes bad they start incurring losses.
>
> Now, maybe Mr. Coffey would do his investments different. Maybe in his world 40 minus 10 equals 30 and that's all you care about. Let's not talk about what Mr. Coffey thinks is important and his math ... Three witnesses thought this was important -- that a **purely** short investor was involved, Dean Atkins, Alan Roseman and Laura Schwartz, and the documents back them up because from January of 2007 through May of 2007 there is a stream of documents inside ACA repeatedly stating that Paulson was an equity investor.

(Emphasis added.)[1]

The Division, on behalf of the Commission, is still making the same arguments in the *Tourre* post-trial briefing. On October 30, 2013, twelve days after issuing the OIP against

[1] It is undisputed that Magnetar was $94,000,000 long equity of Octans I. It is also undisputed that Magnetar hedged that position by shorting only $10 million worth of the mezzanine tranches of Octans I two weeks after the deal closed. The OIP does not allege that Respondents knew or even suspected at the time the deal was being ramped up that Magnetar would hedge its long position by shorting the capital structure of the same deal, even in such a small amount.

Respondents, the Division submitted a memorandum in opposition to Tourre's motion for a directed verdict and new trial, stating:

> ACA believed it was working with Paulson as a long or equity investor. Equity investors occasionally had input on ACA's portfolios because they were the first long investor to lose money if an asset in the portfolio failed. But the trial testimony established that ACA would not have worked with Paulson to select a portfolio if it had known that Paulson was a *purely* short investor.

In stark contrast to the Commission's proof and arguments in *Tourre*, there is no allegation in the OIP that Magnetar was purely short in Octans I. There is no allegation that anybody was misled into believing that Magnetar was the equity investor because, as in the Aquarius CDO discussed in *Tourre*, Magnetar was in fact the equity investor. (OIP ¶¶ 23-25). Indeed, the crux of the case against Mr. Chau and Harding, as alleged in the OIP, is that they selected assets for Octans I in precisely the same manner that was said to be acceptable according to the Division's proof and argument in *Tourre.* The core allegation in the OIP is that:

> Chau understood that Magnetar was interested in investing as the equity buyer in a series of potential CDO transactions. Chau also understood that Magnetar's strategy included "hedging" its equity positions in CDOs, potentially by taking short positions on RMBS or certain tranches of CDOs, including the CDOs it was investing in. Chau therefore understood that, because Magnetar stood to profit if the CDOs failed to perform, Magnetar's interests were not aligned with those of potential investors in the debt tranches of Octans I, whose investment depended solely on the CDO performing well.

(OIP at ¶ 25; *see also* ¶¶ 24, 27, 28, 29.) In other words, what the Division argued on behalf of the Commission to be alignment of interests in Tourre, it now argues to be *misalignment* of interests with respect to identical facts involving Respondents in a deal with the same hedge fund and identical structure and purpose.[2]

[2] Although it is not the subject of this appeal, the Commission would be judicially estopped in district court from pursuing this inconsistent theory. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

4. SEC v. Wing Chau and Harding Advisory LLC

Less than three months after trial in the *Tourre* case, the Commission sued Mr. Chau and Harding based on the very conduct that the Commission had embraced and trumpeted as the industry standard at trial in *Tourre*. But unlike all of the other contested CDO cases, the Division brought suit against Mr. Chau and Harding in an administrative proceeding. As a result, this is the only contested CDO case in which any party has been required to mount a defense within approximately four months, *see* Rule 360(a)(2), as opposed to the seventeen months that preceded dismissal in *Steffelin*, the eight months that preceded trial in *Stoker*, or the more than three years that preceded the *Tourre* trial. This is also the first contested CDO case in which any party was denied the ability to conduct pretrial depositions of trial witnesses, *see* Rule 233, and the first to proceed without the other procedural safeguards requested in the Dec. 20 Motion.[3]

B. Avoidance of Pretrial Discovery

In mid-February 2012, a Senior Structured Products Specialist, Daniel J. Nigro, joined the Division's investigative Staff. Mr. Nigro was the ABS Portfolio Manager from 2005 to 2009 for Dynamic Credit Partners ("Dynamic Credit"), a CDO collateral manager and hedge fund active in the subprime market. Based on a review of relevant materials and correspondence, it appears clear that, at Dynamic Credit, Mr. Nigro managed portfolios, and analyzed and traded RMBS and ABS securities for CDOs and hedge funds. Moreover, Mr. Nigro and Dynamic Credit, as investment advisors, chose to invest $10 million in Octans I, the very CDO that is at the center of the OIP against Respondents. Dynamic Credit, like many investors in the CDO market, lost virtually the entire investment when the CDO market imploded. (*See* Letter, dated

[3] As a result, Respondents have also been deprived of their right to a jury trial in violation of the Seventh Amendment.

August 2, 2012, from Steven G. Rawlings to Mark S. Mandel; Letter, dated August 6, 2012, from Robin M. Bergen to Steven G. Rawlings; Letter, dated September 20, 2012, from Giovanni P. Prezioso and Robin M. Bergen to Robert Khuzami and George Canellos; and Letter, dated March 1, 2013, from Joseph J. Frank to Steven G. Rawlings, attached hereto as Exs. M-P.)

In addition to his personal involvement in Octans I, we understand that Mr. Nigro had a personal and professional history with Harding. In late 2008, a Harding affiliate was hired by a hedge fund, MatlinPatterson, to evaluate its investments in a multi-billion dollar REIT; those investments had been recommended by Mr. Nigro at Dynamic Credit. (*See* Ex. P.) Harding personnel, including one of Harding's managing directors, evaluated the investments and determined that, when marked to market, MatlinPatterson had lost hundreds of millions of dollars. Mr. Nigro disputed this analysis. Within months, the REIT that Mr. Nigro had recommended filed for bankruptcy. MatlinPatterson then fired Dynamic Credit and Dynamic Credit in turn fired Mr. Nigro. (*See* Ex. P.)

Mr. Nigro was openly hostile toward Harding during the Division's investigation. On more than one occasion, Mr. Nigro stood up and derisively rejected a particular Harding point with arguments and statements unsupported by explanation or record evidence. During one meeting in 2012, counsel explained that Harding's decision to subordinate its fees was a concession to CDO equity investors that resulted from arms-length negotiations. In response, Mr. Nigro stood up and angrily asserted that he personally "know[s] where they really get their money from"—apparently reflecting Mr. Nigro's biased, completely unsupported (and false) view that Harding somehow received secret payments aside from its disclosed management fees. (*See* Ex. P.)

Having discovered that a biased, conflicted investigator was involved in the investigation, as well as in response to Mr. Nigro's outbursts, various counsel raised concerns regarding

Mr. Nigro's participation in the Division's investigation. (*See* Exs. N-P.) In or about early August 2012, an Assistant Regional Director at the Division, Steven G. Rawlings, informed counsel, via letter, that Mr. Nigro had been removed from future participation in the relevant investigative teams. (*See* Ex. M.) The letter stated, "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 [Mr. Nigro's] recusal from these matters." (*Id.*) The letter stated that nonetheless, "in the interest of obviating any potential concern, we have elected to remove Mr. Nigro from the investigative teams." (*Id.*) The letter did not describe what was meant by "remov[ing] Mr. Nigro from the investigative teams," nor did it specify what level of contact Mr. Nigro was permitted to have with investigative Staff after having been removed from the teams.[4]

After being informed of Mr. Nigro's removal from the investigation, counsel for Respondents and others asked the Division to explain the remedial steps taken to remove Mr. Nigro's prejudicial impact on the investigation, including confirmation that factual assertions conveyed by Mr. Nigro would not form the basis of any recommendation to the Commission. (Exs. O-P.) We have seen nothing to indicate that such an explanation was provided, or that such remedial steps were taken.

[4] The Division's assertion that it found "no actual or apparent conflict of interest or bias" is ironic to say the least. In connection with an investigation into whether there were undisclosed conflicts by collateral managers and others in the CDO market, the Division concluded that someone with a clear and demonstrated personal and professional animus against people and entities under investigation did not need to be recused from conducting investigative testimony, analyzing evidence, participating on the Division's behalf in Wells-type meetings, and advising the Division on whether to bring charges. Indeed, as we understand it, Mr. Nigro's participation was somewhat surreptitious: he did not participate in taking the testimony of anyone who could recognize him, and his identity was determined only after his antics in meetings with counsel raised questions and led to inquiries among the defense teams about who he was and why he was present at the meetings. Doubtless, his participation infected the entire investigative team with animus against Respondents, which is why counsel tried unsuccessfully to persuade the Division to have an untainted team look over the evidence as part of its decision about whether to recommend any charges.

It appears that Mr. Nigro's animus toward Respondents may have had a significant and lasting impact on the investigation and the Staff handling it, up to and including the Staff's recommendation to the Commission concerning a proceeding against Mr. Chau and Harding. Mr. Nigro was both a fact witness and potential alleged victim of the conduct being investigated, yet he participated in key aspects of the Division's investigation and was in a position to significantly influence the Staff's deliberations at a critical stage. He was actively involved in investigative testimony, was designated to receive materials produced by parties pursuant to subpoenas, and participated in meetings with counsel. (*See* Cover Page, SEC Investigative Testimony Transcript of Jung Lieu (Feb. 22, 2012); Excerpt, Letter, dated April 11, 2012, from Brenda Wai Ming Chang to Standard & Poor's Financial Services LLC, attached hereto as Exs. Q, R; *see also* Ex. P.) Indeed, the Staff's core allegations came to focus on Octans I with Mr. Nigro's assistance. (*See* Ex. P.)

In federal court, Mr. Chau and Harding would obtain pretrial discovery relating to Mr. Nigro, including but not limited to a pretrial deposition under Rule 30 of the Federal Rules of Civil Procedure. The ability to avoid such discovery and prevent Respondents from developing additional facts relating to Mr. Nigro cannot justify a decision to single out Respondents for treatment that differs from all other similarly situated persons.

II. ABSENT ANY OF THE RELIEF REQUESTED IN THE DEC. 20 MOTION, RESPONDENTS' DISPARATE TREATMENT CONSTITUTES A SEPARATE DUE PROCESS VIOLATION.

Even if bringing this enforcement action administratively did not violate Respondents' equal protection rights, it would be a separate 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. Upon receipt of the investigative file, counsel worked diligently to process documents for review, so that "keyword" and "metadata" searches could be performed to identify relevant materials. However, the sheer volume of the electronic production, combined with numerous problems with the manner of production, combined to make meaningful review impossible. The 131 separate databases included inconsistent metadata fields, rendering even the most basic forms of document searching and sorting impracticable. Weeks were spent devising the best available means of searching, locating, and reviewing documents in advance of trial, but these efforts succeeded only to the extent of fixing some discrete problems. Counsel continues to be unable to perform basic "keyword" searches across the databases, and document review and trial preparation remains severely hampered. (Declaration of John Roman in Support of the Dec. 20 Motion ("Roman Decl.") ¶¶ 25-37, attached hereto as Ex. S; Declaration of Ashley Baynham in Support of Respondents' Petition for Interlocutory Review, dated February 25, 2014 ("Baynham Decl.") ¶ 3.)

To offer a basic example, the allegations in the OIP focus on Harding's analysis of CDO assets on or around May 31, 2006 and Harding's communications with third parties about that analysis. However, counsel cannot simply segregate all communications related to relevant Harding personnel for those dates. What should be a single, straightforward search turns into, at minimum, 131 separate searches. As a result, counsel gets the results for each search in days instead of hours. Due to inherent problems with housing so many documents, moreover, the databases cannot handle concurrent search and review; it is thus necessary to store search results separately for review, requiring additional time to export data to a review database. (Baynham Decl. ¶ 4)

To be clear, Respondents do not contend that trial must be delayed until each of the 22 million documents is reviewed. Such a page-by-page review is of course impossible regardless of any adjournment or procedural safeguards, and the Dec. 20 Motion described a process for reviewing a reasonable subset of a voluminous document production in a contested CDO case.

(*See* Declaration of Ashley Baynham in Support of the Dec. 20 Motion ¶¶ 24-25, attached hereto as Ex. T.) But without an adjournment and other relief, Respondents' counsel will be able to review only approximately 1.1% of the documents before the March 31 trial, and will be required to file an exhibit list and expert report on March 3 having reviewed less than one percent of the investigative file. (*See* Baynham Decl. ¶ 5.)

The "smaller" document universe suggested by the Division is still massive—it exceeds 2.1 million documents—and in no way comprises the full set of core documents in this case. Even the limited document review that Respondents have been able to perform demonstrates conclusively that documents of core importance exist outside of the 2.1 million documents that Respondents theoretically could have accessed prior to issuance of the OIP, which is perhaps not surprising since the "other" 19.9 million documents include materials from a variety of key persons. Documents of core importance also exist outside of the exhibits to testimony elicited during the Division's investigation and evidence aired during the white paper and Wells processes. (*See* Baynham Decl. ¶ 6.)

III. THIS CASE PRESENTS EXTRAORDINARY CIRCUMSTANCES MANDATING INTERLOCUTORY REVIEW.

The Commission has the "discretionary authority to review rulings of hearing officers on an interlocutory basis." *Clarke T. Blizzard*, Admin Proc. File No. 3-10007, 2002 SEC LEXIS 3406, at *3 (Apr. 24, 2002). Interlocutory review should be granted when there are "extraordinary circumstances," such as those present here. *See* 17 C.F.R. § 201.400(a). In *Blizzard*, the Commission granted interlocutory review to consider whether counsel should be disqualified because of a conflict of interest, stating, "We have an obligation to ensure that our administrative proceedings are conducted fairly in furtherance of the search for the truth and a just determination of the outcome." 2002 SEC LEXIS 3406 at *7.

The circumstances of this case present the type of extraordinary circumstances that warrant interlocutory review pursuant to Rule 400(a). This is the only contested CDO case to be brought administratively, and the disparate treatment directly impacts the fundamental fairness of the upcoming trial. Absent interlocutory review of the Jan. 24 Order and the Feb. 19 Order, the Commission will be unable effectively to address the equal protection violations. The ALJ has expressed doubt concerning his authority to adjudicate these issues, and has indicated that a "class of one" equal protection claim is unavailable in a civil enforcement proceeding.

Accordingly, once the ALJ issues an initial decision, any appeal to the Commission would occur without additional factual development concerning the rationality or irrationality of the disparate treatment of Mr. Chau and Harding. For the same reason, a motion to submit additional evidence pursuant to Rule 452 would provide no remedy. Accordingly, the equal protection violations can be corrected only by providing relief in advance of what will otherwise be a constitutionally defective trial, and there can be no application of the principle that "review following issuance of an initial decision is sufficient to protect the parties' rights." *Cf. John Thomas Capital Management Group LLC*, Admin Proc. File No. 3-15255, 2013 SEC LEXIS 3860, at *12 (Dec. 6, 2013).

This is a case where certification for interlocutory review is also appropriate pursuant to Rule 400(c)(2) because the ALJ's orders involve "a controlling question of law as to which there is substantial ground for difference of opinion," and immediate review may materially advance the completion of the proceeding. 17 C.F.R. § 201.400(c)(2). The orders squarely present a controlling question of law as to whether Rule 360(a)(2) is intended to require that every administrative proceeding—regardless of complexity, volume of evidence, or any other factor—be tried no more than approximately four months from service of the OIP. In the Jan. 24 Order, the ALJ referenced three factors that *favored* an adjournment under Rule 161(b)(1), but nevertheless found it "*dispositive* that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission." Ex. A at 1 (emphasis added).

The Commission has previously denied interlocutory review based on a due process challenge relating to the size of a (much smaller) investigatory file but, in doing so, held that the Rule 360(a)(2) deadlines "are not barriers to requests for postponements" but are rather to be considered "as one among other factors." *Gregory M. Dearlove*, Admin. Proc. File No. 3-12064, 2006 SEC LEXIS 3191, at *7 n.10 (Jan. 6, 2006). When the D.C. Circuit affirmed the rejection of Dearlove's due process argument, it was because "[t]he ALJ considered each of the five factors specified in the rules *and treated none as dispositive.*" *Dearlove v. SEC*, 573 F.3d 801, 807 (D.C. Cir. 2009) (emphasis added). In contrast, the ALJ here explicitly stated that the Rule 360(a)(2) deadline *was* dispositive notwithstanding that each of the other cited factors favored an adjournment. Ex. A at 1.

When the Commission adopted Rule 360, it recognized that "a 'one-size-fits-all' approach to timely disposition is not feasible" in light of the wide variation of subject matter, complexity and urgency of administrative proceedings. Rules of Practice, 68 Fed. Reg. 35,787, 35,787 (June 17, 2003). As a result, Rule 360(a)(2) provided that the time for completion of the hearing and issuance of the initial decision could be either 120, 210 or 300 days from service of the OIP. When the overall deadline is 300 days, Rule 360(a)(2) provides that there shall be approximately four months until the hearing, approximately two months for the parties to obtain the transcript and submit briefs, and approximately four months after briefing for the ALJ to issue an initial decision. 17 C.F.R. § 201.360(a)(2).

It does not appear that the Commission adopted any standards for identifying cases in which the maximum 300-day deadline for issuing an initial decision, or the approximately four-month deadline for proceeding to trial, may be insufficient. Nor does it appear that the Commission addressed the potential for disparate treatment among similarly situated parties in highly complex cases to violate respondents' equal protection rights. Interlocutory review will allow the Commission to address these issues.

IV. A STAY PENDING THE COMMISSION'S INTERLOCUTORY REVIEW IS WARRANTED.

A stay pending interlocutory review of the Jan. 24 Order and the Feb. 19 Order will allow the Commission to determine the proper remedy for Respondents' disparate treatment in light of the size and nature of the Division's investigative file; the corresponding impact on Respondents' ability to prepare for trial within a timeframe that comports with Rule 360(a)(2); and the intentional avoidance of the forum in which every comparable case had been brought.

CONCLUSION

The adverse impact of the decision to single out Mr. Chau and Harding as the first and only persons required to defend a contested CDO case in an administrative proceeding is significant. Absent an adjournment and other relief requested in the Dec. 20 Motion, the prejudice to Respondents continues, and is quickly approaching the point where it will become irrevocable. Respondents respectfully request that the Commission grant this petition for interlocutory review, stay proceedings before the ALJ, set oral argument, and grant Respondents relief sufficient to protect their rights to equal protection and due process of law.

Dated: New York, New York
February 26, 2014

Respectfully Submitted,

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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.**	**CERTIFICATE OF COMPLIANCE**

I, Alex Lipman, hereby certify that Respondents Harding Advisory LLC and Wing F. Chau's Petition for Interlocutory Review and Emergency Motion To Stay the Hearing and Prehearing Deadlines, dated February 26, 2014, contains a total of 6,932 words, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents and table of authorities, and is thereby in compliance with the length limitation set forth in Rule 154(c) of the U.S. Securities and Exchange Commission's Rules of Practice.

New York, New York
Dated: February 26, 2014

Respectfully submitted,

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