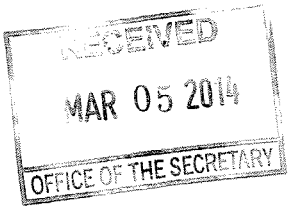
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15574



In the Matter of

HARDING ADVISORY LLC and

WING F. CHAU,

Respondents.

OPPOSITION OF THE DIVISION OF ENFORCEMENT TO RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW AND EMERGENCY MOTION TO STAY HEARING AND PREHEARING DEADLINES

DIVISION OF ENFORCEMENT
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The Division of Enforcement ("Division") respectfully submits the following Opposition ("Opposition") to the Petition of Respondents Harding Advisory LLC ("Harding") and Wing F. Chau ("Chau" and together with Harding, "Respondents") for Interlocutory Review and Emergency Motion To Stay Hearing and Prehearing Deadlines (the "Petition"). For the reasons that follow, the Petition should be denied.

INTRODUCTION

This is an uncertified interlocutory appeal. The Order Instituting Proceedings ("OIP") was served on November 18, 2013; a hearing is scheduled for March 31, 2014. Respondents' motion – the latest in a series of maneuvers aimed at avoiding a hearing, seemingly at all costs – presents no serious issue warranting the Commission's attention, much less the sort of "extraordinary circumstances" that might warrant Commission intervention at this unripe stage. *See* Commission Rule of Practice ("Rule") 400(a).

BACKGROUND

The OIP in this matter was filed on October 18, 2013. It alleges a fraud in which investment manager Harding and its owner Chau made misrepresentations to investors and breached their obligations to act in the best interests of the Collateralized Debt Obligation (CDO) portfolios for which Harding was collateral manager. The OIP explains in detail how Harding's desire to please an undisclosed third party (the hedge fund Magnetar) as well as the investment bank responsible for much of Harding's business led Respondents to make problematic selections for the CDOs, including assets that Harding's own personnel disfavored.

The Division complied in a timely fashion with all of its production obligations under Rules 230(a), 230(b)(2), and 230(c), and there has never been any suggestion to the

contrary. In fact, the Division produced most of the materials, including testimony transcripts and exhibits and the great bulk of the investigative file, a log of withheld documents, and a Brady letter, well *ahead* of the time frame required by the Rules and the law judge's instructions, including his November 18, 2013 scheduling order.

Beyond that, the Division (a) produced all of the files in the manner in which they were produced to the Division and / or electronically maintained by the Division, as applicable, (b) produced the large collections of electronic documents in searchable databases, and (c) produced materials, such as subpoenas and cover letters, that would allow Respondents to understand which parties had produced documents and prioritize their review. The Division has also (d) advised Respondents that certain of the productions were not likely to be germane to the case, and, perhaps most importantly, (e) noted to Respondents and the law judge that the core documents relevant to the allegations in the OIP were in the relatively tiny universe of documents exhibited in investigative testimony or aired in intensive "Wells" and Wells-style exchanges with Respondents and other parties that preceded the institution of these proceedings.

Nevertheless, almost from the day, now more than four months past, that Respondents' current counsel (who did not represent Respondents during the investigation that led to these proceedings) first appeared on Respondents' behalf, they have complained about the burdens of getting up to speed on this case. On December 20, 2013, Respondents filed with the law judge an application seeking to postpone by six months the hearing date in this matter, to somehow replace the procedural and disclosure regime of the Rules with the discovery rules of the Federal Rules of Civil Procedure, and to compel the production (over and above the Division's timely disclosures) of the

Division's protected work product for organizing documents. The Division opposed the motion; its memorandum and supporting declaration review the above issues in detail and are being submitted with this Opposition as Exhibits 1 and 2. On January 24, 2014, the law judge denied this application, and further ruled that Respondents' request in the alternative for certification of an interlocutory appeal "is meritless. The law is crystal clear on the issues presented, and there is no ground at all for difference of opinion on it, much less substantial ground." (Petition Ex. A at 3) (the "January 24 Order").

Respondents waited twenty-one days after the January 24 Order, and then, on February 14, moved for reconsideration, essentially raising two new arguments not presented in the initial application for an adjournment: (a) that Respondents are the victims of an arbitrary and irrational decision to treat them differently from other individuals in the same line of business (namely CDO management) who were sued in federal court; and (b) that the Division's investigation was tainted by the bias of an industry specialist briefly assigned to this matter.[1]

The law judge denied this motion on February 19 (Petition Ex. B) (the "February 19 Order"). He noted that these arguments were new and therefore not a proper basis for the reconsideration motion but, in the interest of judicial economy, addressed – and rejected – them anyway.

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[1] The specialist joined the investigation in the middle of February, 2012. After defense counsel raised concerns about him, the Division, in consultation with the Commission's ethics office, determined that there was no actual or apparent conflict of interest or bias warranting the specialist's recusal, but nevertheless, in August 2012, removed the specialist from the investigation in the interest of obviating any potential concern. *See* Petition Ex. M. His brief involvement, moreover, ceased long before the Division prepared its recommendation to the Commission. Respondents have never seen fit to raise this supposed issue in any of the three "white papers" or Wells submissions that they submitted during the first six months of 2013.

Respondents now bring all of their arguments to the Commission. Their application should be denied.

ARGUMENT

The Rules "impose a threshold requirement that any order submit[ted] to the Commission for interlocutory review *must* be certified by the law judge." *John Thomas Capital Mgmt. Group LLC*, Securities Act Release No. 9519, 2014 WL 294551, at *1 (Jan. 28, 2014) (emphasis in original, citation and internal quotation marks omitted) ("*John Thomas II*"). "The law judge's denial of certification by itself presents a sufficient basis for denying . . . interlocutory review." *Id.* (citation and internal quotation marks omitted).

The reason for this requirement is that petitions for interlocutory review "are disfavored and will be granted only in extraordinary circumstances." *John Thomas Capital Mgmt. Group LLC*, Securities Act Release No. 9492, 2013 WL 6384275, at *2 (Dec. 6, 2013) (internal quotation marks omitted) ("*John Thomas I*"). "In all but the most unusual of circumstances, claims should be presented in a single petition for review after the entire record [has been] developed and after issuance by the law judge of an initial decision." *John Thomas II*, 2014 WL 294551, at *3 (citing *John Thomas I*) (internal quotation marks omitted).

This case does not come close to meeting the standards for certified interlocutory review, let alone uncertified review. Respondents' complaints about the burdens associated with reviewing the investigative file are no different in character from those rejected in *John Thomas I* and *Gregory M. Dearlove*, A.P. File. No. 3-12064, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006). "Many Commission [administrative] proceedings

involve complicated issues resulting in voluminous files," and the Commission presumably considered the complexity of this case when it set a 300-day deadline for issuance of the initial decision. *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *36 (Jan. 31, 2008). S*ee also Dearlove v. SEC*, 573 F.3d 801, 807 (D.C. Cir. 2009) (agreeing with Commission that four-month period to review massive record assembled over several years and prepare for trial was not a violation of due process).

As the law judge noted, citing *John Thomas I*: "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." January 24 Order, at 2. The law judge continued (*id.*, citation omitted):

> I am sympathetic to Respondents' situation, and 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 this is not that proceeding. Given the manner in which the Division has produced the investigative file, including files from other investigations, and given the representations the Division has made regarding them, Respondents should be able to meaningfully prioritize their review. For example, if it is true that the investigative file is larger than the entire printed Library of Congress, as Respondents assert, it stands to reason that the Division did not actually review every page in all the investigative files it produced, and/or that there is substantial duplication within and among those files. This fact alone should permit Respondents to focus their review efforts on a small subset of investigative files.

As for Respondents' newly raised arguments, they are equally unavailing. As an initial matter, Respondents' failure to raise these arguments in their initial motion prevents them from relying on "such arguments as a basis for urging interlocutory review." *John Thomas II*, 2014 WL 294551, at *2.

On the merits, Respondents' "class of one" equal protection claim (see Petition at 5 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)) is exceptionally weak, if it is even cognizable at all. *See United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 808 (S.D. Ohio 2003) (declining to recognize "class of one" constitutional claims in federal civil enforcement proceedings). Commission enforcement actions are routinely filed administratively and in district court; the choice lies soundly within the Division's and Commission's discretion. There is no reason to treat "CDO manager in contested case" as a distinct category requiring uniformity of treatment, let alone uniformity of adjudicative forum. It may also be worth noting that the Commission has brought a series of actions against CDO managers administratively, albeit in settled orders,[2] and, of course, innumerable contested administrative actions against other investment advisers, including advisers of complex investment vehicles.[3]

Nor is there anything to the argument about supposed bias of the industry specialist. The specialist ceased to participate in this matter in 2012, long before the Division began preparing its enforcement recommendation. Had Respondents thought this matter worth bringing to the Commission's attention, they could have done so in their June 2013 Wells submission (or in the white papers that preceded it earlier in 2013). In any case, in an administrative context, "due process does not require a neutral

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[2] *E.g.*, *Credit Suisse Alternative Capital, LLC, Credit Suisse Asset Mgmt. and Samir H. Bhatt*, Securities Act Release No. 9268 (Oct. 19, 2011); *Joseph G. Parish III and Scott Shannon*, Investment Advisers Act Release No. 3735 (Dec. 12, 2013); *Joseph A. Schlim*, Securities Act Release No. 9375 (Dec. 17, 2012); *Delaware Asset Advisers and Wei (Alex) Wei*, Securities Act Release No. 9339 (July 18, 2012); *Aamer Abdullah*, Securities Act Release No. 62635 (Aug. 4, 2010).

[3] *See, e.g.*, *John P. Flannery and James D. Hopkins*, Initial Decision Release No. 438, 2011 WL 5130058 (ALJ Oct. 28, 2011) (Initial Decision finding for Respondents and against Division).

prosecutor," *Jean-Paul Bolduc*, 54 S.E.C. 1195, 1202 (2001), and the Commission's decision to institute proceedings is independent of "any possible bias" on the part of a member of its staff. *C.E. Carlson, Inc.*, 48 S.E.C. 564, 568 (1986), *aff'd*, 859 F.2d 1429 (10th Cir. 1988).

Ultimately, Respondents do not come close to explaining why any of these claims needs to be considered now, as opposed to after issuance of the initial decision. "A party is not entitled to an interlocutory appeal merely because he or she presses a claim premised on a constitutional right or guarantee." *John Thomas I*, 2013 WL 6384275, at *4; *see also Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *5 (Jan. 6, 2006). Moreover, granting a stay and interlocutory review here would merely "delay rather than materially advance the ultimate termination of this proceeding." *John Thomas II*, 2014 WL 294551, at *3.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Dated March 4, 2014
New York, New York

DIVISION OF ENFORCEMENT

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EXHIBIT 1

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.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION FOR A SIX-MONTH ADJOURNMENT AND OTHER EXTRAORDINARY RELIEF

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The Division of Enforcement ("Division") respectfully submits this memorandum of law and the accompanying declaration of Daniel R. Walfish in opposition to Respondents' December 20, 2013 motion for a six-month adjournment and other extraordinary relief ("Motion").

INTRODUCTION

Respondents seek a complete upending of the rules and procedures governing Administrative Proceedings. Without any applicable precedent, they ask (1) to adjourn the hearing six months, or well past the time frame for the issuance of a decision within 300 days pursuant to SEC Rule of Practice 360; (2) to substitute wholesale the Federal Rules of Civil Procedure for the SEC Rules of Practice (Rules"); and (3) to obtain the Division attorneys' internal file organization system.

Central to all of Respondents' arguments is the claim that they are hindered from vigorously defending against the allegations in the Order Instituting Proceedings ("OIP") due to the size and complexity of the investigative file (the components of which were produced to Respondents in the form in which the Division obtained them). Respondents complain that they will have insufficient time to follow the electronic discovery protocols of their choosing, at a cost they are comfortable with. But much of this situation is of Respondents' own making (for instance, by hiring new counsel to reinvent the wheel), and in any case their submissions to the Court and the parties' dealings not only strongly suggest that Respondents *could* adequately prepare for trial in the time allotted, but demonstrate that they actually *are* in the process of doing so.

Large investigative files are nothing new. "Many Commission [administrative] proceedings involve complicated issues resulting in voluminous files," and the Commission presumably considered the complexity of the case when it set a 300-day deadline for issuance of

the initial decision. *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *36, 2008 SEC LEXIS 223, at *138 (Jan. 31, 2008). Respondents have what they need to mount a vigorous defense. As set forth in greater detail below, there is no basis or need for a six-month adjournment, let alone a wholesale importation of federal-court discovery practice or the production of the Division's protected work product.

BACKGROUND

A. Respondents Retain Brand-New Counsel at the Thirteenth Hour

For the three years that preceded the filing of this action, Respondents were represented by counsel intimately familiar with this case. Specifically, beginning at the inception of the investigation in 2010, Respondents were represented by attorneys at the law firm of MoloLamken LLP ("Molo"). In approximately the third quarter of 2012, the law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick") took over the representation – but it did so *with two former Molo attorneys who were working on this case before they left Molo for Orrick* (the "Common Attorneys"). Prior counsel, as a result of discussions with the Division about the evidence in the case, made extensive, detailed Wells and "white paper" submissions and presentations concerning the very allegations set forth in the OIP. In February 2012 and during the first half of 2013, they made four separate submissions comprising 112 pages of argument and analysis with a total of 251 exhibits, plus a 32-page PowerPoint presentation. The Common Attorneys' names were on each of these submissions.

Approximately one week before the filing of the OIP, Molo briefly took over again from Orrick, and on October 28, more than a week *after* the filing of the OIP, new counsel at Nixon Peabody LLP contacted us for the first time as Respondents' representatives. On November 1, four Nixon Peabody attorneys, complete strangers to the case, filed notices of appearance.

B. The Division Fulfills Its Production Obligations Substantially Ahead of Schedule

Service of the OIP took place on November 18, 2013, as confirmed by the parties and the Court at the prehearing conference of that date. Tr. of Nov. 18, 2013 Pre-hearing Conference ("Tr.") 5-6. While under Rule 230(d), the Division was required to commence making its files available seven days thereafter – in other words on November 25 – the Division commenced making its files available one month earlier than required.

On October 25, 2013, the Division had sent Respondents' then-current counsel, at that counsel's specific request, *see* Walfish Decl. ¶ 2 & Ex. A, a production ("Production 1")[1] that included (a) transcripts and exhibits organized in clearly labelled folders for all of the testimony taken in the investigation that led to this matter ("Investigation"), (b) all of the electronic databases from the Investigation, and (c) certain electronic databases from the files of other matters – including databases of Respondents' own documents – that may have been meaningfully consulted in connection with the Investigation.[2]

On November 15, 2013 – or three days ***before*** the OIP was served – the Division substantially completed its production, sending to new counsel, in clearly labelled folders, all of the correspondence (subpoenas, cover letters, Wells and related submissions, emails, and so on) from the Investigation, along with additional electronic databases from other investigations that may have been meaningfully consulted in connection with this one ("Production 2"). Walfish Decl. ¶ 3.

[1] In order to expedite the discovery, the Division pro-actively copied all the data onto drives and disks and sent them to Respondents.

[2] Molo received this production on October 28 (according to UPS records), but for reasons that remain unclear, new counsel at Nixon Peabody apparently did not obtain it until November 6.

On December 10, the Division supplemented its prior productions with a set of emails from a non-party in a different investigation that was handled by a different SEC office ("Production 3").[3] As we have advised Respondents (but as Respondents do not advise the Court), although this set of emails was consulted in the course of the Investigation, it played at most an ancillary role in it. The Division produced these materials out of an abundance of caution, but they are unlikely to impact these proceedings. For instance, the Division does not anticipate using any of those documents to support the allegations in the OIP.[4]

With these productions, Respondents have the universe of documents obtained or meaningfully consulted by the Division during this investigation, in the form in which the Division itself received it. But Respondents also possess, clearly labelled as such, the body of documents that the Division focused on in questioning witnesses in testimony over the course of the investigation. And they have (again, clearly labelled) the exhibits and citations used in

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[3] Walfish Decl. ¶ 4. The December 10 production included a comparatively tiny amount of "clean-up" from prior productions that is not relevant here. *Id.*

[4] *See* Walfish Decl. Ex. B at 1 n.1. The Division made similar points in a voice mail left for Respondents' counsel shortly before turning over Production 3. Walfish Decl. ¶ 4. (To the extent that Respondents, who claim to be in "triage" mode, are devoting resources to processing a peripheral production that we have expressly advised them is probably irrelevant, they have not sought to meet and confer with us about Production 3, and their Motion papers contain no meaningful information about the burden supposedly associated with it.) Even less likely to be relevant will be an anticipated "Production 4" containing materials from a separate case file in the New York office that was created to investigate a different Merrill Lynch CDO transaction known as "Auriga." Auriga, like Respondents' "Octans I" transaction, was cited in a recent omnibus settled action against Merrill Lynch. *See generally Merrill Lynch, Pierce, Fenner & Smith Inc.*, Securities Act Release No. 9493, AP File No. 3-15642 (Dec. 12, 2013). When the Division recently advised Respondents of the existence of the Auriga investigative material, saying that it was highly unlikely to have any relevance to this matter (since the antifraud charges against Respondents based on Octans I have nothing to do with books-and-records charges that were asserted against Merrill Lynch based on Auriga), Respondents requested production of the Auriga material anyway. In addition, Respondents have requested that the Division produce, from yet other case files, documents indicating how collateral managers in *unrelated CDO transactions* supposedly satisfied the required standard of care in those transactions. Walfish Decl. Ex. C at 6-7. The Division replied that the SEC's investigation of other collateral managers in other cases is irrelevant to the standard of care that Harding is alleged to have violated in this case, Walfish Decl. Ex. B at 4, and Respondents have not sought to raise this issue with the Court.

"Wells" and "white paper" submissions made to the Division by Respondents (and other parties involved in the events described in the OIP) in response to previews, "reverse proffers," or "Wells calls" in which the Division gave notice to Respondents (and to other parties) of the potential allegations against them and of specific evidence supporting those allegations. Most of the evidence cited in the OIP, if it was not used in testimony, was aired in these "Wells" and Wells-style communications.

On December 19 – two weeks ahead of the date ordered by the Court and the day before Respondents filed this motion – the Division produced to Respondents its log of withheld documents. *See* Walfish Decl. Ex. D.[5] This log contained, among other things, a particularized list of witnesses interviewed off the record. The Division, moreover, specifically advised Respondents (although Respondents' Motion is silent about it) that the Division was in the process of reviewing its "records of witness interviews for purposes of *Brady* and potential eventual production pursuant to Rule 231(a), and *expect[s] to begin making such disclosures early in the new year*." *Id.* at 1. The Division anticipates commencing these disclosures within the next week or so, notwithstanding that the Court has not yet set a date for doing so.

C. The Electronic Databases, Which As Relevant to the OIP Consist Overwhelmingly of Respondents' Own Documents, Are All Searchable

The total volume of the electronic databases in Productions 1 and 2 is approximately 9.6 terabytes, or roughly 20 million documents. Of that volume, somewhere around 10% (about 2.1 million documents) consists of files that were originally produced to the Division by Respondents themselves. The Division's allegations rest principally on these documents. An additional percentage consists of communications produced by third parties (such as Harding's

[5] The Division did not know that Respondents were preparing to file this Motion the next day.

predecessor, its counsel, a former employee, counterparties, and so on) but to which Respondents were party – in other words, documents that overlap with Respondents' documents.

The Division has produced all of the databases in the form in which they were produced to us. No data was stripped out, and nothing was withheld or altered. On the contrary, despite what Respondents say (Motion 6), for most of the 127 databases, the Division *also produced, in addition to the "original" data it received, a so-called "index" file generated by the Division that makes text searching possible.*[6] Following telephone calls on December 2 and 4 in which (i) Respondents complained only generally that searchability was lacking and (ii) the Division asked Respondents to specify in writing which databases they were talking about, Respondents identified just sixteen databases lacking an "index" file (also known as a "dictionary" file). Respondents stated that to create index files for those databases would take them "at least a full week." *See* Walfish Decl. Ex. C at 3. After consulting with our database support personnel, the Division informed Respondents that it was not in a position to generate indices for those databases, and that we understood Respondents could easily generate the index files themselves at least as quickly as we could create them.[7] Respondents ultimately created the indices for the sixteen databases, which by their own account took merely "four full days." Roman Decl. ¶ 18.

[6] During the telephone calls discussed above, in which Respondents complained in general terms about a lack of index files, undersigned counsel stated that while they would check with their database support personnel, it was their current understanding that indices are generally not provided. As discussed above in text, Respondents eventually identified just sixteen databases lacking an index. After consulting with their litigation support personnel, undersigned counsel learned that the general practice is in fact to provide, not withhold, indexes – in other words, that the Division's general practice, observed in this case, has been to provide *more* than undersigned counsel originally thought. Walfish Decl. ¶¶ 7, 8. To the extent Respondents' papers suggest anything to the contrary, they are mistaken or misleading.

[7] To have originally included these indexes would have substantially delayed the production.

Between the index files supplied by the Division, and the sixteen created by Respondents themselves, all of the databases in the Productions should now be text-searchable.[8] Walfish Decl. ¶¶ 7, 8, 10. Respondents complain that the databases have "inconsistent metadata fields," but the Division has no control over the form in which producing parties give their documents and data to the Division, nor over whether that form complies with the SEC's data delivery standards.

ARGUMENT

The relief requested by Respondents is utterly unprecedented. It is also unnecessary.

I. There Is No Basis or Need for A Six-Month Extension

Respondents are seeking to abrogate the Rules governing Commission administrative proceedings, and have the ***hearing*** in this matter held outside the 300-day timeframe for the issuance of the Initial Decision. The Court selected the current hearing date with due regard for the need for meaningful post-trial briefing and for time to prepare a decision, all within the 300-day time frame ordered by the Commission when it issued the OIP.[9] *See* Tr. 22, 26. Respondents

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[8] Respondents nevertheless assert (Motion 5) that "a portion of the documents in Productions 1 and 2 are not text searchable." The Division has asked Respondents, who did not meet and confer with the Division before making that representation, to specify which remaining portions of Productions 1 and 2 were not text-searchable so the Division could meaningfully address that issue. Walfish Decl. Ex. E at 1. Respondents answered by: (1) repeating their complaint, long since mooted, that they had to generate an index for sixteen of the databases to make them searchable; (2) pointing out that some documents were apparently produced in their "native" spreadsheet or image format without the contents of these files having been "extracted"; and (3) repeating their complaint, which has nothing to do with whether any particular database is text-searchable, that the databases have "inconsistent metadata fields." Walfish Decl. Ex. F at 2-3. Items (1) and (3) are not responsive and are addressed elsewhere in this Memorandum. As to item (2): Respondents are correct that a very small percentage of the documents consists of spreadsheets and images whose contents were not produced in text-searchable form. But in those instances, the Division did not *have* searchable text to give Respondents; the Division is thus in the same position as Respondents. In any case, the documents are not entirely unsearchable. Metadata (including, depending on the file, the name of the document's custodian, author, filename, sender and recipient, etc.) were produced for these files. In addition, Respondents could, if they chose, isolate the documents in question and "extract" or "OCR" the text.

[9] The Division is not wedded to any particular hearing date and in principle would not object to the hearing taking place several weeks later than the currently scheduled date, provided such an extension left

marshal no rationale for reconsideration that was not already aired at the November 18 conference – aside from the intervening Production 3, which (as we have expressly advised Respondents) is highly unlikely to contain anything relevant.

Under Rule 161(b)(1), requests for an extension of the hearing date are "strongly disfavor[ed]." In evaluating such a request, the Court should consider, as relevant here, "the impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission." Rule 161(b)(1)(iv). In this case, this factor is dispositive: with a six-month extension, the hearing – let alone the preparation and issuance of the initial decision – would take place approximately two weeks *after* the date that is 300 days after the service date.

Nor do Respondents cite any precedent for such a lengthy extension. The only case they point to in which an ALJ granted an extension concerned wholly inapposite facts, and anyway was decided by an ALJ under a *prior version of the rules in which the 300-day limit was advisory only*. *See Harrison Securities, Inc.*, AP Rulings Release No. 611, 2003 WL 22514505, at *2 n.1, 2003 SEC LEXIS 2687, at *5 n.1 (ALJ Oct. 7, 2003) ("The revised Rules of Practice impose strict deadlines on the length of time an Administrative Law Judge may take to complete a hearing and issue an initial decision. The prior [and in this case operative] Rules of Practice contained guidelines, but not deadlines.").

Indeed, recent precedent makes clear that a six-month extension is unwarranted. "[M]any Commission [administrative] proceedings involve complicated issues resulting in voluminous files," and the Commission presumably took that into account in setting a 300-day deadline for the initial decision here. *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL

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appropriate time for post-hearing briefing and for the Court to prepare its decision. We respectfully submit, however, that there is no need for such an extension.

281105, at *36, 2008 SEC LEXIS 223, at *138 (Jan. 31, 2008), *pet'n for review denied*, 573 F.3d 801, 807 (D.C. Cir. 2009) (agreeing with Commission that four-month period to review massive record assembled over several years and prepare for trial was not a violation of due process); *see also* Rule 360(a)(2) (giving Commission option of 120 days, 180 days, or 300 days, according to "the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter . . .").

Defendants and respondents commonly seek to postpone hearings, and sometimes they cite a change of counsel as the reason for doing so. In this case, it was Respondents who chose, after the case was filed, to replace their prior counsel with a brand-new law firm. Granting the relief sought here would reward Respondents for their last-minute switch of counsel, and potentially encourage other respondents to behave the same way to obtain tactical delays.

In any event, Respondents have not come close to showing that they lack adequate time to prepare. Particularly when the unspecified "Production 3" issues are stripped away, but even without that, their submissions, read closely, show nothing other than highly sophisticated counsel with the wherewithal to handle the e-discovery in this matter.[10] *See also* Tr. 7

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[10] *See, e.g.*, Roman Decl. ¶ 2 (respondents' counsel employs a 28-person data processing and e-discovery team). Mr. Roman has elsewhere pointed out that having an in-house workforce makes it possible for counsel to expeditiously handle time-sensitive e-discovery matters. John Roman, Jr., *Panic Panacea: Bring E-Discovery Inside Your Law Firm*, Law Technology News (Sept. 11, 2013) ("Agility and Responsiveness. Internal [e-discovery] departments are available to attorneys and clients 24/7/365. They are much better at responding *to an emergency or last-minute requests* than outsourced providers. *Say it's 4 p.m. Friday and a request arrives to load a client's electronically stored information into a platform for review by 8 a.m. Saturday. A law firm with an internal [e-discovery] department is in a better position to meet this requirement than a firm that has outsourced this function.*" (emphasis added)), available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202618773011. *See also* Roman Decl. ¶¶ 27, 29 (counsel's data processing team has spent a relatively manageable 150 man hours on processing data, resulting in a partial "normalization" of the metadata in Productions 1 and 2), ¶ 30 ("machine time" involved in processing Productions 1 and 2 has been trivial, apart from two weeks that Respondents chose to spend copying data from internal hard drives that the Division supplied at the agency's expense to Respondents' own external hard drives); Baynham Decl. ¶ 18 (counsel is working on a production index using the production letters that the Division supplied in neatly organized folders).

(Respondents' counsel: "We will be ready for trial whenever that is."). Indeed, this is far from the first time (whether in an SEC administrative proceeding, a civil trial in a "rocket docket" district court, a preliminary injunction hearing, corporate takeover litigation, and so on) that a large law firm has entered a case with a voluminous underlying data set and faced a hearing date five or six (or even fewer) months away.

Respondents' complaints at bottom are that they would have preferred that the data had existed in a more convenient format, and that they would now like more time to be able to conduct more search and review protocols on more data.[11] But it is always possible to do more. *See, e.g.*, footnote 4, *supra*. The Rules of Practice (let alone fundamental fairness or constitutional due process) do not require accommodating a law firm's e-discovery wish list. The Division has delivered, ahead of schedule, a properly organized "open file" production in electronically searchable form, plus a log of withheld documents, complete with witnesses interviewed, and the promise of shortly forthcoming *Brady* disclosures. No more is required, or needed. *John Thomas Capital Mgmt. Group LLC*, Securities Act Release No. 9492, 2013 WL 6384275, at *6, 2013 SEC LEXIS 3860, at *23 (Dec. 6, 2013) ("open-file" production in searchable form satisfies Division's production obligations).

[11] *See., e.g.*, Baynham Decl. ¶ 7 ("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. . . . [M]y *preference* has also been, if possible, to have the review conducted by associates of the firm" as opposed to contract attorneys), ¶ 9 ("I use a *small group* of contract attorneys with the requisite experience to conduct a first level review."), ¶¶ 15, 25 ("*Assuming a similar rate of review to the Other CDO Matter*, it would take over six months for a *similarly-sized team* to review these documents" without a clear explanation why the review team could not be larger and therefore faster) (emphases added).

II. The Federal Rules of Civil Procedure Are Inapplicable

Respondents' apparent effort to import the Federal Rules of Civil Procedure wholesale into this proceeding should be rejected, not only because there is no legal basis for such an importation, but because it would create more layers of procedure and costs for all parties.

As the Commission has repeatedly noted, the Federal Rules "do not apply in administrative proceedings." *John Thomas*, 2013 WL 6384275, at *6, 2013 SEC LEXIS 3860, at *26; *accord Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at *16 & n.17 (May 20, 2008); *Jay Alan Ochanpaugh*, Exchange Act. Release No. 54363, 2006 WL 2482466, at *5 n. 24 (Aug. 25, 2006); *see also Kelly v. U.S. E.P.A.*, 203 F.3d 519, 523 (7th Cir. 2000) ("[T]here is no constitutional right to pretrial discovery in administrative proceedings. The Administrative Procedure Act contains no provision for pretrial discovery in the administrative process and the Federal Rules of Civil Procedure do not apply to administrative proceedings." (citations omitted)); *Sloan v. SEC*, 547 F.2d 152, 155 (2d Cir. 1976) ("[A]dministrative proceedings are not bound to follow the Federal Rules of Civil Procedure").

In addition, efficiency militates against such a radical importation. At the same time that Respondents complain of the burdens imposed on them, they seek to add additional layers of unnecessary work and expense for all parties. Respondents, for instance, appear to want to move to dismiss for failure to state a claim and to allege fraud with particularity – in addition to their recent motion for a more definite statement. Pure makework: The OIP already spells out in clear detail the nature, theory, and basis for the Division's allegations.[12]

[12] Nor would there be any logic to a motion to dismiss. As is common in an administrative proceeding, the full Commission has already determined, following an adversary-style "Wells" process (in which Respondents argued against the institution of these very claims) and full internal review, that "in view of the allegations made by the Division of Enforcement," proceedings should be instituted, an ALJ assigned, and evidence gathered, in order to assess the truth of the allegations in the OIP and to allow Respondents

Equally unnecessary (and unsupported) is Respondents' vague and probably frivolous request for the panoply of federal civil discovery tools. The Commission's Rules already contain discovery mechanisms that in some ways go beyond what is required in federal court: The Division, of course, is required to disclose automatically the entirety of its non-privileged investigative file (including transcripts and exhibits, subpoenas, and production letters), plus "*Brady*" material and, at an appropriate time, "*Jencks*" material. Respondents may also request subpoenas for discovery from third parties. Respondents are not also entitled to full-blown Federal Rules-style discovery. *See, e.g.*, *David Henry Disraeli*, Securities Act Release No. 8824, 2007 SEC LEXIS 1514, at *2 (July 11, 2007) (Rule 233 "specifies the particular, limited circumstances in which a party may obtain testimony from a witness by deposition in lieu of at the hearing."); *Anthony J. Negus*, AP Rulings Release No. 522, 1996 SEC LEXIS 2979, at *2 (ALJ Oct. 7, 1996) ("The use of depositions in Commission proceedings is more restricted than in courts of law."). In demanding such discovery (and a six-month extension) *in addition* to *Brady* and *Jencks* material *and* the Division's internal file organization system, Respondents are asking to have their cake, eat it too, and take home a third baked by the Division.

III. Respondents Are Not Entitled to Division Attorneys' Internal Work Product

Respondents also move, again without meaningful support, for production of the Division's "tags, labels, file folders and/or other means of organizing relevant documents." To the extent this request is intelligible, it is hard to see how it differs from a request to see the Division's collections of "hot documents," which even Respondents have acknowledged would likely invade work product production. The Division is not required to provide Respondents with

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to defend against them. OIP 13-14. In these circumstances, a motion to dismiss would be equivalent to a request to overrule or reconsider the Order Instituting Proceedings. We respectfully submit that an ALJ cannot (and the Commission surely will not) grant such relief.

a "roadmap" to the evidence, to "specifically identify material exculpatory or impeaching evidence within the [open-file] production," or otherwise "to prepare respondents' case for them." *John Thomas*, 2013 WL 6384275, at *6. Respondents cite *Brady* and Rule 230(b)(2), but "[i]t is settled that the government is not required to direct a defendant to specific items of potentially exculpatory evidence within a larger body of disclosed material" and that"[n]othing in either Rule 230(b)(2) or *Brady* requires the Division to go further [than providing an 'open file' production] and prepare a 'roadmap' of the documents for the respondent's benefit." *Id.* Respondents' only supporting citations were decided under different requirements and circumstances (such as document requests under the Federal Rules).[13]

Nor do Respondents need the help they keep asking for. The OIP is clear. Respondents know the allegations. They also presumably know (but the Division has pointed it out anyway, *see* Walfish Decl. Ex. B at 3 n.3) that most of the core documents in the case are in the comparatively tiny universe of testimony exhibits and other evidence aired in the white paper and Wells processes – during which, prior to the institution of these proceedings, the Division previewed the allegations in the OIP, and prior counsel made extensive factual and legal presentations in response. There should be little mystery about the identity and location of the core documents in this case.

[13] *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) does not support Respondents. There the Fifth Circuit specifically found that the government's "open file" production did *not* violate *Brady* – in part because the file was electronic and searchable (as the Division's databases are), in part because the government provided Skilling with a set of relevant documents and indices to same (here Respondents have a detailed OIP, testimony exhibits, and Wells and Wells-style exchanges), and in part because the government provided access to databases concerning prior Enron litigation (here the Division produced databases from other case files, as described above). *Id.* at 577. *Skilling*, of course, is not a holding on what *would* constitute a *Brady* violation, but even so, it is hard to see how this case differs meaningfully from that one.

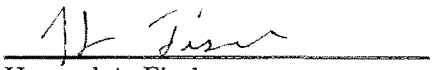
Beyond all of this, the Court should not be distracted by Respondents' constant reference to the number of documents or terabytes, and not only because all of the electronic databases are in a searchable format.[14] This is a case purely about Respondents' own conduct, of which the contemporaneous evidence consists in the main of documents from Respondents' own files as well as other communications to which Respondents were party. On top of all that, Respondents, to whom their counsel has unfettered access, lived through the events recounted in the OIP and presumably can help their counsel locate relevant documents.

CONCLUSION

Respondents have everything they need to mount a vigorous defense in the time frame contemplated by the Rules of Practice, the OIP, and this Court's scheduling order. The Motion should be denied.[15]

Dated: January 13, 2014
New York, New York

DIVISION OF ENFORCEMENT



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[14] *Compare* Motion 9 ("[I]t will be impossible to review every one of the 22 million documents produced in advance of trial.") *with John Thomas*, 2013 WL 6384275, at *5 n.37 ("[Respondents'] estimates for how long it would take to conduct a page-by-page review of the materials are irrelevant; they can use Concordance's search capabilities to home in on the documents that they need to prepare for the hearing.").

[15] As discussed above in footnote 9, the Division is amenable to, but sees no need for, a modest adjournment of several weeks.

EXHIBIT 2

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.

DECLARATION OF DANIEL R. WALFISH
IN OPPOSITION TO RESPONDENTS' MOTION

I, Daniel R. Walfish, hereby declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a Senior Attorney with the United States Securities and Exchange Commission's Division of Enforcement ("Division"). I submit this declaration on personal knowledge.

2. On October 25, 2013, my co-counsel Howard Fischer and I spoke with Steven Molo of the MoloLamken LLP law firm, who at that time was counsel for the Respondents in this matter. Mr. Molo informed us that he might be replaced as counsel for Respondents, but nevertheless requested that the Division send its first production to him. The Division did so on October 25, 2013 ("Production 1"). A true and correct copy of the cover letter is attached hereto as **Exhibit A**. I confirmed on the UPS web site that Mr. Molo's law firm received Production 1 on October 28, 2013. Production 1 included (a) transcripts and exhibits organized in clearly labelled folders for all of the testimony taken in the investigation that led to this matter

("Investigation"), (b) all of the electronic databases from the Investigation, and (c) certain electronic databases from the files of other matters – including databases of Respondents' own documents – that may have been meaningfully consulted in connection with the Investigation.

3. On November 15, 2013, the Division substantially completed its production, sending to Respondents' current counsel at Nixon Peabody, in clearly labelled folders, all of the correspondence (subpoenas, cover letters, Wells and related submissions, emails, and so on) from the Investigation, along with additional electronic databases from other investigations that may have been meaningfully consulted in connection with this one ("Production 2").

4. On December 10, 2013, the Division sent a small number of databases containing a voluminous set of emails produced by a third party in a different investigation ("Production 3"). My co-counsel Howard Fischer advised Nixon Peabody in a voice mail that Production 3 was not likely to be relevant to this matter. In our December 12 letter, a true and correct copy of which is appended as **Exhibit B** hereto, we advised Respondents that the materials in Production 3 "played at most an ancillary role in" the investigation and that we produced them "out of an abundance of caution, not because we think they are likely to impact these proceedings." See page 1 n.1. On December 10, we produced as well a relatively tiny volume of "clean up" materials from previous productions.

5. I am informed by the Division's Litigation Support personnel ("Lit Support") that the Division produced its electronic databases to Respondents in the form in which the Division maintains these documents, which in turn reflects the form in which the documents were produced to the Division. I am further informed by Lit Support that the Division, in producing its electronic databases, withheld nothing that the Division itself had received from the outside world.

6. I am informed by Lit Support that the Division produced most of the electronic databases with a dictionary file, also known as an "index" file, even when the Division did not originally receive such a file from the producing party.

7. Following telephone calls on December 2 and 4 in which Respondents' counsel complained in largely general terms about searchability issues and Mr. Fischer asked Respondents' counsel to put the specific issues in writing so the Division could meaningfully consider them, Respondents sent us a December 6, 2013 letter, a true and correct copy of which is attached hereto as **Exhibit C**. The letter (page 3) identified sixteen databases lacking an index, noting that it would take Respondents "at least a full week" to generate the index files themselves.

8. After receiving the letter, I consulted with Lit Support, which informed me that as a technological matter, Respondents could generate the needed files at least as quickly as the Division could create and provide them. In the end, according to paragraph 18 of John Roman's Declaration, Nixon Peabody created the sixteen indices in "four full days." I am informed by Lit Support that these databases did not originally come to the Division with an index file. In other words, the Division, in not supplying an index file with those sixteen databases, withheld nothing that the Division itself had received.

9. Attached as **Exhibit D** hereto is a true and correct copy of the Division's December 19, 2013 log of withheld documents and cover letter enclosing same.

10. I understand from Lit Support that all of the electronic databases in Productions 1, 2, and 3 are in searchable format. In an email exchange with us, true and correct copies of which are attached as **Exhibits E and F** hereto, Respondents' counsel have identified limited instances in which the contents of individual files within certain databases are not searchable because they

were produced to Respondents exclusively in "native" format, in particular as spreadsheets (and, in one instance that Respondents identified to us, as a .pdf file) without so-called "extracted" text. I am informed by Lit Support that in these instances, the Division never received the extracted text from the producing party and never created it in-house. In other words, the contents of these particular files have never been text-searchable for the Division, either. However, at a minimum the metadata (such as the name of the document's author, custodian, sender and receiver, etc.) of these files is searchable, and Respondents could, if they chose, extract the text from the native files.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 13, 2014
New York, New York

Daniel R. Walfish

Daniel R. Walfish

EXHIBIT A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER SUITE 400
NEW YORK, N.Y. 10281

WRITER'S DIRECT DIAL AND EMAIL
(212) 336-0127
walfishd@sec.gov

October 25, 2013

Via UPS overnight

Steven F. Molo
MoloLamken LLP
540 Madison Avenue
New York, NY 10022

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

Dear Mr. Molo:

Following up on our discussion earlier today, and pursuant to Rule 230(a)(1) of the Commission's Rules of Practice, 17 C.F.R. § 201.230(a)(1), the Division of Enforcement will be making available for your inspection and copying the documents (except for documents withheld on privilege grounds) collected or used in the investigation that led to this matter.

Enclosed please find the following media containing copies of some of those documents:

Item label	**Contents**	**Approximate Volume of Data**
SEC-Harding HD 1	Documents obtained in NY-8306	1 Tb
SEC-Harding HD 2	Documents obtained in HO-10776	1 Tb
SEC-Harding HD 3	Documents obtained in HO-11075	500 Gb
SEC-Harding HD 4	Documents obtained through the New York compliance program	227 Gb
SEC-Harding HD 5	Documents obtained through the New York compliance program	115 Gb
SEC-Harding DVD 1	Testimony transcripts and exhibits	211 Mb

The drives each have a password; I will send those under separate cover.

As discussed on our call, we expect to be sending copies of additional materials in the near future.

The hard drives are federal property that we are providing to you as a courtesy, as a means of ensuring that you have access to a substantial amount of the relevant materials as quickly as possible. We would appreciate the return of the drives to us when the proceeding is concluded.

Sincerely yours,

Daniel R. Walfish

Daniel R. Walfish

EXHIBIT B

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER SUITE 400
NEW YORK, N.Y. 10281

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).

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[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 C

NIXON PEABODY

ATTORNEYS AT LAW

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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

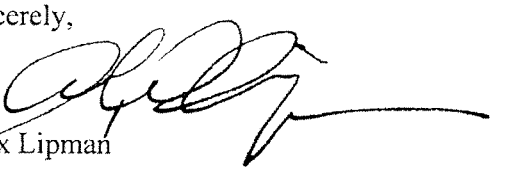
are certainly entitled to such information, inasmuch as the crux of the allegations against them is that they failed to act in a manner consistent with customary standards. We are aware, based on publicly available information, that the SEC has investigated a number of collateral managers in connection 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 D

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER SUITE 400
NEW YORK, N.Y. 10281

WRITER'S DIRECT DIAL AND EMAIL
(212) 336-0127
walfishd@sec.gov

December 19, 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:

Enclosed pursuant to Rule 230(c) of the Commission's Rules of Practice ("Rules") and Judge Elliot's November 18, 2013 Scheduling Order (the "Order"), please find enclosed the Division's log of withheld documents. As you can see, we are submitting this to you two weeks earlier than required under the Order.

We are continuing to review our records of witness interviews for purposes of *Brady* and potential eventual production pursuant to Rule 231(a), and expect to begin making such disclosures early in the new year.

Sincerely yours,

Daniel R. Walfish

Daniel R. Walfish

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.

WITHHELD DOCUMENTS LIST

Documents Not Produced	**Basis**
Communications between and among Securities and Exchange Commission ("SEC") staff members.	Law Enforcement Privilege ("LE Privilege"), Attorney-Client Privilege ("AC Privilege"), Work Product Protection ("WP"), Deliberative Process Privilege ("DP")
Drafts and final versions of internal SEC memoranda and outlines.	LE, WP, AC, DP
Drafts of SEC external correspondence, litigation papers, and settlement papers.	LE, WP, AC
SEC staff analyses of documents and data.	LE, WP, AC
Communications between the SEC staff and potential experts.	LE, WP
Communications concerning background research into potential experts.	LE, WP
Communications between the SEC staff and representatives of law enforcement agencies, including the Department of Justice, the New York Attorney General, and the Securities Division of the Massachusetts Secretary of the Commonwealth.	LE, WP, AC
Communications between the SEC staff and representatives of the Cayman Islands Monetary Authority, the UK Financial Services Authority, and the China Securities Regulatory Commission.	LE, WP, AC

Inadvertently produced document from IKB Deutsche Industriebank AG (together with affiliates, "IKB") or an affiliated entity concerning the Auriga transaction, attached to a November 22, 2011 email from Sheron Korpus to SEC staff.	Withheld pursuant to request from attorney for IKB.
Notes created by SEC attorneys of preliminary or non-substantive conversations with witnesses or their counsel (for example, concerning the logistics of an interview or testimony session).	LE, WP, AC
Notes and memoranda authored by SEC attorneys or others working at their direction concerning substantive witness interviews – see attached appendix for names and dates.	LE, WP, AC
Other notes or notations created by SEC attorneys or others working at their direction, including but not limited to notes of internal communications, notes of presentations by counsel for witnesses and producing parties, and notes of communications with or concerning potential experts.	LE, WP, AC

Dated December 19, 2013
New York, New York

/s/ Howard A. Fischer

Howard A. Fischer
Daniel R. Walfish
Elisabeth L. Goot
Brenda W. M. Chang
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, NY 10281
Tel: 212.336.0589
Email: fischerh@sec.gov

Appendix: Witness Interviews and Attorney Proffers

Name	Date	Note
Jung Lieu	7/30/2010	
Ken Lee	8/4/2010	
Maria Ivanova	8/17/2010	
Theo Pan	8/31/2010	
Uta Kubis, Klaus Bauknecht	11/4/2010	
Keith Borelli	11/18/2010	
Sharon Eliran	12/14/2010	
Jim Coder	12/15/2010	
John Niblo	12/15/2010	
David Salz	12/22/2010	
Yvonne Fu	2/10/2011	
Ranodeb Roy	2/28/2011	
Ed Fitzgerald	3/1/2011	
Miles Draycott	3/10/2011, 3/14/2011, 3/17/2011, 3/22/2011, 3/23/2011	
Catherine Chao	4/18/2011	
Joe Naggar	4/25/2011	
Aiden Mittra	5/9/2011	
Michael Edman	5/10/2011	
Tom Reese	5/12/2011	
Judith Sciamma	6/1/2011	
Kevin Kendra	6/6/2011	
Belinda Ghetti	6/20/2011	
Doug Jones	6/21/2011	
Yuri Yoshizawa	6/23/2011	
Chu Toh Chieh, Simon Flood, Kon Chee Keat	8/10/2011	
Imran F. Khan	8/18/2011	
Don Puglisi	9/27/2011	
John Cullinane	10/24/2011	
Paul Watterson	10/27/2011	
Eric Kolchinsky	11/10/2011	
Gina Carbone	10/2/2012, 10/3/2012	Attorney proffer
Alison Wang	12/5/2012, 1/30/2013	Attorney proffer
Paolo Pelligrini	5/9/2013	
Charles Sorrentino	5/22/2013	

Julie Kestenman	6/13/2013	
Julie Holzer	6/20/2013	
Tom Reese	9/26/2013	
Lin Shu	10/1/2013	
Aiden Mittra	10/1/2013	
Ken Doiron	10/7/2013	
Imran F. Khan	10/13/2013	

EXHIBIT E

Walfish, Daniel R.

From: Walfish, Daniel R.
Sent: Thursday, January 02, 2014 5:18 PM
To: Lipman, Alex (alipman@nixonpeabody.com); Baynham, Ashley (abaynham@nixonpeabody.com) (abaynham@nixonpeabody.com); Haran, Sean
Cc: Fischer, Howard
Subject: Harding/Chau AP

Alex, Ashley:

In their December 20 motion, Respondents assert (p.5) that "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." Nixon Peabody's IT Director John Roman makes the identical statement in his Declaration. See Roman Decl. para. 24.

Could you kindly let us know which databases in Productions 1 and 2 are still not text-searchable?

Our understanding of this matter, at least as it relates to Productions 1 and 2, is as follows:

(1) We now believe that the Division did in fact produce most of the electronic databases with an index.
(2) In response to Respondents' generalized complaint in our December 4 teleconference that indices were missing, we asked you to give specifics in writing so that we could discuss the issue with our database support personnel.
(3) You then identified 16 databases (out of a much larger total that had been produced) that did not have an index, saying that it would take you "at least a full week" to generate the indices. Baynham Decl. Ex. A at 3.
(4) After consulting with our database support personnel, we replied that the Division did not have the resources to generate these indices, and that we thought you could generate the indices at least as quickly as we could provide them. Baynham Decl. Ex. B at 2.
(5) Nixon Peabody ultimately generated the indices for those databases, a process that took four days. Roman Decl. para. 18.

Since our understanding is that the key to searchability is an index, and since it appears that all databases in Productions 1 and 2 either came with an index or (to the extent you were able to identify databases missing indices) that you generated one yourselves, we do not understand why portions of Productions 1 and 2 are still not text-searchable. We would appreciate it if you could identify the portions in question so that we can respond meaningfully.

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 F

Walfish, Daniel R.

From: Baynham, Ashley <abaynham@nixonpeabody.com>
Sent: Friday, January 10, 2014 1:43 PM
To: Walfish, Daniel R.
Cc: Haran, Sean; Feldman, David; Lipman, Alex; Fischer, Howard
Subject: RE: Harding/Chau AP

Follow Up Flag: Follow up
Flag Status: Completed

Dan:

Please find the corrected bates numbers below.

COHEN-NIR-00150124 should be COHEN-NIR-00150214: Other examples are COHEN-NIR-00150215,216,217,218, and 225199
ML-SEC2E-0081471789 should be ML-SEC2E-008147178,9; meaning ML-SEC2E-008147178 and ML-SEC2E-008147179

The Wachovia documents are missing a "2"

WACH02592461
WACH02592463
WACH02592464
WACH02592480

Ashley

From: Walfish, Daniel R. [mailto:WalfishD@SEC.GOV]
Sent: Thursday, January 09, 2014 3:34 PM
To: Baynham, Ashley
Cc: Haran, Sean; Feldman, David; Lipman, Alex; Fischer, Howard
Subject: RE: Harding/Chau AP

Ashley:

Could you double-check the following codes from your email below? They don't seem to correspond to the beginning of any document, and we believe that the documents that they are in the middle of were produced in a text-searchable format:

COHEN-NIR-00150124

WACH0259461
WACH0259463
WACH0259464
WACH0259480

Note that one of the other codes you listed -- "ML-SEC2E-0081471789" -- was likely a typo, since there seems to be an extra digit. Perhaps something similar happened with the above codes. Please let us know.

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

From: Baynham, Ashley [mailto:abaynham@nixonpeabody.com]
Sent: Wednesday, January 08, 2014 6:35 PM
To: Walfish, Daniel R.; Fischer, Howard
Cc: Haran, Sean; Feldman, David; Lipman, Alex
Subject: RE: Harding/Chau AP
Importance: High

Dan:

In addition to the issues posed by the volume and disorganization of the productions, we addressed three main searchability issues in our motion and affidavits. While we have resolved one of the issues (discussed below), the other two issues have not been fixed. Therefore, even though we undertook the time and expense to create an index for certain productions and documents, we still cannot reliably search the documents. As we noted, it is essential that the documents be searchable so that Respondents can attempt to identify, review, and analyze the key documents before trial.

Missing Index for Certain Productions

The first dealt with the fact that over 6 million documents were produced to us without an index, which took almost a full working week to fix. While we were able to eventually resolve this issue by manually creating an index for those documents, it took valuable time and resources away from other projects to do so. Time that we frankly did not have.

Documents without Text Files (or inadequate text files)

The second has to do with the fact that some of the documents were produced as Tiff files without accompanying text files or natively with text files that merely state "produced natively" without including the text of the native file. The practical result is that, 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.

As an example, this issue exists in the following productions:

- RIA-PROD-002, Merrill 2 (e.g. ML-SEC2E-003041001,1673,1675,7802)
- Merrill 5 (e.g. ML-SEC2E-008122699,008132871,0081471789)
- Merill 6 (e.g. ML-SEC2E-009154206,9161300,9202812)
- Cohen 1 (e.g. COHEN-NIR-00150124)
- Cohen 0.0 (e.g. COHEN-NIR-00000001)
- Cohen 2 (Cohen-NIR-01275493)
- Magnetar (e.g. MAG-SEC 07094035)
- Wachvoia (e.g. WACH0259461,463,464,480)

We understand that more examples exist, but we cannot know the full extent of the problem unless we review every single document in the database. Our litigation support estimates that, even with three people working on this full time, it would take approximately 4-6 weeks just to ascertain how many documents have this issue. That time does not even

include the additional time necessary to fix this issue. Given the current schedule we are on and given the other difficulties of processing, loading, and searching 22 million documents contained in 131 databases, we cannot redirect our resources to identifying the full extent of this problem. We therefore cannot run searches with any confidence that we are picking up all of the documents responsive to those search terms.

Inconsistent Metadata Fields

The third issue has to do with the fact that the Division produced 131 separate databases with inconsistent metadata fields, and some are missing the "date" field entirely, making simple sorting and searchability very difficult. We have spent a significant amount of time and expense "normalizing," or making certain fields consistent, for the date and Bates range fields, across the database. This process is still ongoing. The practical result is that we cannot run basic searches across all of the databases that require metadata fields, *i.e.*, all emails where a certain person is in the to, from, cc, bcc, author, and source fields.

Please let me know if you require additional information.

Ashley Baynham
Senior Associate
abaynham@nixonpeabody.com
T 212-940-3188 | C 202-492-1948 | F 877-501-8520
Nixon Peabody LLP | 437 Madison Avenue | New York, NY 10022-7039
nixonpeabody.com | @NixonPeabodyLLP

From: Walfish, Daniel R. [mailto:WalfishD@SEC.GOV]
Sent: Thursday, January 02, 2014 5:18 PM
To: Lipman, Alex; Baynham, Ashley; Haran, Sean
Cc: Fischer, Howard
Subject: Harding/Chau AP

Alex, Ashley:

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Our understanding of this matter, at least as it relates to Productions 1 and 2, is as follows:

(1) We now believe that the Division did in fact produce most of the electronic databases with an index.
(2) In response to Respondents' generalized complaint in our December 4 teleconference that indices were missing, we asked you to give specifics in writing so that we could discuss the issue with our database support personnel.
(3) You then identified 16 databases (out of a much larger total that had been produced) that did not have an index, saying that it would take you "at least a full week" to generate the indices. Baynham Decl. Ex. A at 3.

(4) After consulting with our database support personnel, we replied that the Division did not have the resources to generate these indices, and that we thought you could generate the indices at least as quickly as we could provide them. Baynham Decl. Ex. B at 2.
(5) Nixon Peabody ultimately generated the indices for those databases, a process that took four days. Roman Decl. para. 18.

Since our understanding is that the key to searchability is an index, and since it appears that all databases in Productions 1 and 2 either came with an index or (to the extent you were able to identify databases missing indices) that you generated one yourselves, we do not understand why portions of Productions 1 and 2 are still not text-searchable. We would appreciate it if you could identify the portions in question so that we can respond meaningfully.

Daniel Walfish
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3 World Financial Center, Suite 400
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walfishd@sec.gov