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November 5, 2014

VIA OVERNIGHT DELIVERY
The Honorable Cameron Elliot
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

RE: **In the Matter of Jordan Peixoto, AP File No. 3-16184**

Dear Judge Elliot:

This law firm represents Respondent Jordan Peixoto in the above-referenced administrative proceeding ("AP").

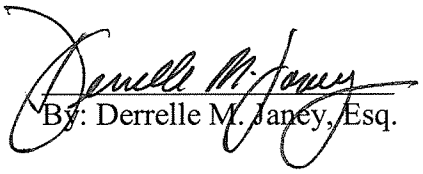
We write to inform Your Honor that, in connection with the above-referenced AP, Mr. Peixoto has commenced an action against the Securities and Exchange Commission (the "Commission") in the District Court for the Southern District of New York requesting injunctive and declaratory relief. *See Peixoto v. Securities and Exchange Commission*, Civil Case No. 1:14-cv-08364-WHP (S.D.N.Y.). Enclosed is a copy of the filed complaint and exhibits that we provide for background information about this matter, even though, in the first instance, the matters being litigated in the District Court action are not directly related to this proceeding.

We also wish to inform Your Honor that, on or before November 14, 2014, we intend file a motion to stay this AP, pursuant to the Commission's Rules of Practice Rules 400(d) and 401, in light of a pertinent and outstanding question of law currently before the Second Circuit. Specifically, the question of whether an alleged insider-trading tippee must have knowledge of the tipper's benefit is currently before the Second Circuit in *United States v. Newman*, No. 13-1837, and *United States v. Newman (Chiasson)*, No. 13-1917. *See also United States of America v. Newman (Steinberg)*, No. 14-2141 (granting motion to hold appeal in abeyance pending the disposition of *Newman* and *Chiasson*). Because the resolution of this question of law directly impacts the above-referenced AP, we will move Your Honor to stay the AP, pending the outcome of the Second Circuit's decision.

We have conferred with the Division of Enforcement ("Division") staff who have expressed that the Division will oppose the motion to stay.

Respectfully submitted,

GOTTLIEB & GORDON LLP



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JUDGE PAULEY

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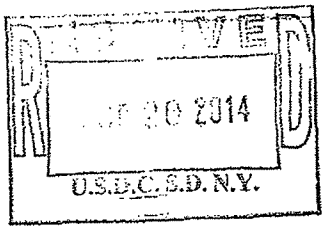


UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JORDAN PEIXOTO,	:	14-cv-
Plaintiff,	:	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL**
-against-	:	
SECURITIES AND EXCHANGE COMMISSION,	:	
Defendant.	:	

Jordan Peixoto, for his complaint against the Securities and Exchange Commission (the "Commission" or "SEC"), alleges as follows:

Introduction

1. Mr. Peixoto brings this action for declaratory and injunctive relief to avoid being required to submit to an unconstitutional proceeding, to prevent the Commission from violating his due process rights and his rights of equal protection under the law afforded by the Constitution of the United States of America, and from suffering irreparable reputational and financial harm—all without meaningful judicial review.

2. On September 30, 2014, the Commission formally alleged that Mr. Peixoto engaged in insider trading in connection with the securities of Herbalife Ltd. by serving Mr. Peixoto with an Order Instituting Cease-and-Desist Proceedings pursuant to Section 21C of the Securities and Exchange Act of 1934 (the "OIP") (*In the Matter of Jordan Peixoto*, Administrative Proceeding File No. 3-16184) before an SEC Administrative Law Judge ("SEC ALJ") at the Commission to determine, *inter alia*, whether Mr. Peixoto should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act and whether Mr. Peixoto should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Act.

3. Pursuant to the Commission's Rules of Practice, Mr. Peixoto is required to submit an Answer to the OIP on or about November 23, 2014. Mr. Peixoto has not served an Answer at this time.

4. SEC administrative proceedings violate Article II of the U.S. Constitution, which states that the "executive Power shall be vested in a President of the United States of America."

5. An SEC ALJ, appointed for a life-term tenure, presides over an administrative proceeding. Statutes and regulations make clear that SEC ALJs are executive branch "officers" within the meaning of Article II. SEC ALJs are not mere recommenders to the Commission or mere employees performing fact-gathering exercises for final review by the Commission; rather, they have enormous and practically unchecked authority. Moreover, there is no obvious constitutional warrant for such unchecked and unbalanced administrative power. *See S.E.C. v. Citigroup Global Markets Inc.*, 11-CV-7387 JSR, 2014 WL 3827497 (S.D.N.Y. Aug. 5, 2014).

6. The SEC ALJ position is established by law and the duties, salary, and means of appointment for the office are specified by statute. They have the power to take testimony, conduct hearings, rule on the admissibility of evidence, and have the power to enforce

compliance with discovery orders. The SEC ALJ can render punishment, including civil money penalties and ban an individual for life from the securities business. In the course of carrying out those functions, the SEC ALJs exercise significant discretion.

7. They cannot be removed "at will" by the Commission but can only be removed for "good cause." The SEC's own Rules of Practice provide the SEC ALJs with enormous authority over Mr. Peixoto in this proceeding and the Commission's review of the SEC ALJs' decision affords that judgment with tremendous deference. In effect and practice, the SEC ALJ renders the decision of the Commission in administrative proceedings. An appointee exercising significant authority pursuant to the laws of the United States is an officer of the United States. *Landry v. FDIC.*, 204 F.3d 1125, 1133, 340 U.S. App. D.C. 237, 245 (2000) (citing *Buckley v. Valeo*, 424 U.S. 1, 216 n. 162, 96 S. Ct. 612 (1976)).

8. The Supreme Court has held that such officers – charged with executing the laws, a power vested by the Constitution solely in the President – may not be separated from Presidential supervision and removal by more than one layer of tenure protection. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 561 U.S. 477 (2010) ("*Free Enterprise*"). In particular, if an officer can only be removed from office for good cause, then the decision to remove that officer cannot be vested in another official, who, too, enjoys good-cause tenure. *Id.*

9. Yet, SEC ALJ's enjoy at least two (and potentially more) layers of tenure protection. The SEC administrative proceedings therefore violate Article II and are unconstitutional.

10. Additionally, as discussed herein, the Commission has singled out Mr. Peixoto for disparate treatment in comparison to similarly situated persons, and there is no rational relationship between the disparate treatment and a legitimate government interest.

11. Without any rational basis, the Commission seeks, among other things, civil penalties from Mr. Peixoto in an administrative proceeding rather than a federal court action, an approach that the Commission has not taken against any other non-regulated person in a litigated proceeding for insider trading since Rajat Gupta (Admin. Proc. File No. 3-14279) in 2011, whose case the Commission ultimately transferred to district court following his attorneys commencing an action alleging violation by the Commission of his equal protection and due process rights. In so doing, the Commission has unfairly and unconstitutionally singled out Mr. Peixoto. With the exception of Gupta and arguably one other settling defendant, the Commission has filed all litigated insider trading proceedings against non-regulated defendants in district court since the passage of Dodd-Frank in July 2010. This means the Commission has gone to district court to make allegations against 156 non-regulated insider trading defendants since Dodd-Frank.[1]

12. Mr. Peixoto denies all allegations of wrongdoing and stands ready to mount a defense against each and every one of the Commission's allegations. Yet, under current Commission rules, Mr. Peixoto would be deprived of a jury trial, the right to use the discovery procedures of the federal court to shape his defense, and the protections of the Federal Rules of Evidence which were crafted to bar unreliable evidence. The Commission is denying Mr. Peixoto these rights, even though the General Counsel of the Commission, Anne K. Small, specifically acknowledged in a public forum merely four months ago speaking to members of the

[1] Section 929P of Dodd-Frank amended Section 8A of the Securities Act of 1933, Section 21B(a) of the Securities Exchange Act of 1934, Section 9(d)(l) of the Investment Company Act of 1940 and Section 203(i)(l) of the Investment Advisers Act of 1940 to permit the Commission prospectively to seek civil penalties against non-regulated persons in administrative cease-and-desist proceedings under those statutes.

District of Columbia bar that the current administrative proceeding rules are inadequate for an insider trading case. In a question and answer session between Small and members of the District of Columbia Bar, Small stated that it was fair for attorneys to question whether the SEC's rules for administrative proceedings were still appropriate, with the rules last revised "quite some time ago," especially as the rules do not consider complex matters such as insider trading cases. *See* Daniel Wilson, *SEC Administrative Case Rules Likely Out Of Date, GC Says*, Law360, June 17, 2014, attached hereto and incorporated herein as Exhibit A.

13. Mr. Peixoto, unlike other non-regulated defendants charged by the SEC in insider trading cases, faces a proceeding where the rules prevent the administrative law judge from setting a reasonable trial schedule and issuing other appropriate rulings given the nature and complexity of the case. The case against Mr. Peixoto is a highly complex insider trading action, which, by all account, involves a broad, multi-year investigation of Herbalife and trading activity surrounding the stock in that company.

14. Counsel for Mr. Peixoto has conferred with representatives of the Commission and they have offered no explanation as to why Mr. Peixoto is being singled out for disparate treatment, even when presented with clear data showing disparate treatment, or to articulate a reason why it was proper to bring the case against Mr. Peixoto in the AP rather than in district court. In the absence of an explanation, we are left with the Commission's apparent motives and they are improper.

15. In fact, we do not need to look far to discern those motives because the Commission has publicly indicated them. In a "Discussion with Andrew Ceresney," Director of Enforcement, SEC, moderated by Larry Ellsworth, Partner, Jenner & Block, to members of the D.C. Bar in June 2014, regarding the administrative process, Mr. Ceresney stated: "I will tell you

that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other we were going to do and they settled." *See* Brian Mahony, *SEC Could Bring More Insider Trading Cases In-House*, Law360, June 11, 2014, attached hereto and incorporated herein as Exhibit B. In other words, the Commission itself unashamedly and, importantly, unlawfully wields the sword of an improper proceeding against defendants to compel settlement. The Commission is fully aware and has acknowledged that the administrative process is a star chamber where only the Commission emerges as the victor and the defendant is defenseless. The mere specter of the process renders submission from the defendant because the process is rigged against him. Here, the Commission is consciously doing exactly what the SEC Director of Enforcement indicated, by attempting to unfairly force Mr. Peixoto to settle, despite his case for innocence and without regard to the disparate treatment established by the data, thus, establishing discriminatory intent and impact.

16. In short, the Commission intentionally and strategically singled out Mr. Peixoto by bringing this case as an AP and effectively tying his hands behind his back. The best evidence that the Commission's case against Mr. Peixoto belongs in this Court is that the Commission has otherwise brought every comparable case in federal district court.

17. Furthermore, the Commission intentionally is commencing an action against Mr. Peixoto in a forum that it has every reason to know violates Article II of the Constitution of the United States of America.

Jurisdiction, Venue, and Parties

18. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 1361 and 2201, and 5 U.S.C. §§ 702 and 706. Venue is proper in this district pursuant to 28 U.S.C. 1391(b) and (e).

19. It is appropriate and necessary for this Court to exercise jurisdiction over Plaintiff's claims because, *inter alia*, Plaintiff alleges constitutional violations. Additionally, this Court's jurisdiction is necessary because: (a) without this Court's review at this stage, meaningful judicial review will be foreclosed; (b) Plaintiff's claims are wholly collateral to the review provisions of the securities laws; and (c) Plaintiff's claims are not within the particular expertise of the SEC. *See Free Enterprise,* 139 S. Ct. at 3150.

20. Mr. Peixoto is a natural person, a resident of Toronto, and a Canadian citizen. During December 2012 (the "Relevant Time Period"), Mr. Peixoto resided in New York, New York on a H-1B visa. During the Relevant Time Period, Mr. Peixoto was employed as a senior consultant at Deloitte Consulting LLP ("Deloitte") in New York.

21. The SEC is an agency of the United States government, headquartered in Washington, D.C.

Background

22. Mr. Peixoto is a 30 year-old resident of Toronto and a Canadian citizen. In 2006, Mr. Peixoto obtained his undergraduate degree in Commerce from the University of Manitoba. In 2007, Mr. Peixoto moved to New York and accepted a consulting position with Deloitte, consulting healthcare industry clients. In or about 2011, through a mutual friend, Mr. Peixoto socially met Filip Szymik ("Szymik"). The two lived near each other and formed a friendship, and would occasionally meet for drinks on weekend nights. In September 2013, Mr. Peixoto,

seeking to pursue a career in finance, enrolled in the Rotman School of Management's MBA program, in Toronto, Canada, where he is currently matriculated.

The Order Instituting Proceedings' Allegations Against Mr. Peixoto

23. On September 30, 2014, the Commission issued an OIP through which the Commission commenced an administrative proceeding against Mr. Peixoto, before a SEC ALJ, seeking a cease-and-desist order, disgorgement, and civil penalties. Attached hereto and incorporated herein as Exhibit C is the OIP.

24. The OIP alleges that Mr. Peixoto engaged in insider trading by purchasing options in advance of a public presentation by a hedge fund, Pershing Square Management, L.P. ("Pershing"), indicating the reasons it was betting against the stock of Herbalife Ltd. ("Herbalife"). The OIP alleges, in particular, that a Pershing analyst (the "Analyst"), in violation of Pershing's internal confidentiality policy, disclosed to his roommate, Filip Szymik ("Szymik"), that Pershing had a negative view of Herbalife, which it would soon publicly disclose in a presentation. Szymik, who was a social friend of Mr. Peixoto, is said to have breached a "duty of trust" to the Analyst by conveying this information to Mr. Peixoto. The OIP concludes that Mr. Peixoto committed insider trading by purchasing Herbalife put options while in possession of this "material nonpublic information," which he had "reason to know . . . had been improperly obtained." Mr. Peixoto unequivocally denies all charges.

25. The SEC's insider trading case against Mr. Peixoto is highly attenuated on both the law and the facts. The case represents the SEC's attempt to expand the boundaries of existing insider trading law. Never before has the SEC charged an individual with trading in advance of a private hedge fund's disclosure of its investment plan. The SEC's theory of liability hinges upon a view that Mr. Peixoto is liable because the purported intimate relationship

of trust and confidence between the Analyst and Szymik created a duty imposed on Mr. Peixoto that would have forbidden any such trading. The SEC has failed to charge the Analyst who disclosed the purported material inside information. Instead, the SEC has charged Mr. Peixoto, who the SEC fails to allege was ever told and, we submit, had no reason to believe that the information was confidential.

26. The SEC brings these insider trading charges administratively, rather than in district court, because it could not carry its burden of proving to a jury the required elements of an insider trading offense in this matter. The SEC could not prove, by Federal Rules of Evidence standards, that Mr. Peixoto possessed the requisite scienter. The SEC could not prove that Mr. Peixoto knew or should have known that Szymik and the Analyst had the type of intimate friendship which gives rise to a duty of confidentiality, or that Szymik breached any such purported duty. Nor could the SEC establish that Mr. Peixoto knew or should have known that whatever information Szymik conveyed to him was confidential.

27. Similarly, the SEC cannot prove the existence of a duty of trust and confidence—another required element of insider trading charges. Szymik and the Analyst provided conflicting, and self-serving, testimony as to whether Szymik promised to keep information he learned from the Analyst confidential. Similarly, the SEC has scant, if any, evidence that Szymik and the Analyst shared the type of intimate friendship that gives rise to a duty of confidentiality. And if Szymik was under no legal duty to keep the information confidential, Mr. Peixoto cannot be held liable for insider trading as a matter of law.

28. Additionally, the SEC cannot prove that the information in question was material. The OIP alleges that Szymik told Mr. Peixoto that Pershing was preparing a public presentation about Herbalife, and that the presentation was negative. However, during his SEC investigation

testimony, Szymik repeatedly emphasized that the Analyst did not specify that Pershing's view was negative. The mere fact that a private hedge fund intends to take a position in the market, without knowing the direction of that position, is hardly material information sufficient to support an insider trading charge.

29. The SEC's flawed case against Mr. Peixoto rests upon the unreliable evidence of conflicting, self-serving testimonies of Szymik and the Analyst, the occurrence of phone calls between Mr. Peixoto and Szymik, and ambiguous text messages. The case does not involve the minutiae of securities laws or the inner workings of the securities industry—areas in which SEC ALJs, arguably, have expertise. Rather, the charges against Mr. Peixoto primarily depend on credibility and other fact-finding determinations that are the primary function of jury trials. Nevertheless, the SEC chose to charge Mr. Peixoto in an administrative proceeding. In light of the SEC's meager and inconsistent evidence against Mr. Peixoto, this is no surprise.

The SEC's Chosen Forum Violates the Appointments Clause of the Constitution

30. On or about September 30, 2014, the SEC staff indicated to undersigned counsel for Mr. Peixoto the Commission's intent to file charges against him immediately and likely within twenty-four hours. The only alternative for Mr. Peixoto would have been to agree to draconian settlement terms that, in effect, undermine his case for innocence and destroy his career in business and finance.

31. During the same September 2014 conversation, the SEC staff also informed counsel that the Commission would do so in an SEC administrative proceeding, rather than in federal district court.

The Administrative Proceeding

32. An administrative proceeding is an internal SEC hearing, litigated by SEC trial attorneys and governed by the SEC's Rules of Practice ("Rules of Practice," or "RoP"), in which an SEC ALJ serves as finder of fact and of law.

33. Unlike federal court, administrative proceedings do not afford juries to litigants.

34. The Federal Rules of Civil Procedure do not apply in an administrative proceeding; they do apply in federal court.

35. Similarly, the Federal Rules of Evidence do not apply in an administrative proceeding as they do in federal court. Any evidence that "can conceivably throw any light upon the controversy," including hearsay, "normally" will be admitted in an administrative proceeding. *In the Matter of Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363, 2006 SEC LEXIS 1926, *23 n.29 (Aug. 25, 2006).

36. Discovery is limited in administrative proceedings. Unlike in federal court, depositions are generally not allowed. RoP 233, 234.

37. The SEC Rules of Practice do not provide respondents the opportunity to test the SEC's legal theories before trial via motions to dismiss, which are available in federal court.

38. The SEC Rules of Practice do not allow respondents to assert counterclaims against the SEC. Federal court defendants may assert counterclaims against their adversaries.

39. The SEC Rules of Practice require the hearing to take place, at most, approximately four months from the issuance of the SEC's OIP. In its discretion, the SEC can require the hearing to occur as early as one month after the OIP is issued. The SEC does not need to start making available the limited discovery afforded to administrative proceeding respondents until seven days after the OIP is issued.

40. Some observers have found that the SEC has succeeded much more often in administrative proceedings, where it enjoys the procedural advantages described above, than in federal district courts. Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES, Oct. 5, 2013.

41. Any appeal from the SEC ALJ's decision goes to the SEC itself: the very body which, prior to the administrative proceeding, determined that an enforcement action was warranted – and the SEC is empowered to decline to hear the appeal, or to impose even greater sanctions. A final order of the Commission, after becoming effective, may then be appealed to a United States Court of Appeals.

SEC ALJs

42. SEC ALJs, who preside over administrative proceedings, exercise authority and discretion that makes them officers for the purposes of Article II of the U.S. Constitution.

Broad Discretion to Exercise Significant Power

43. SEC ALJs enjoy broad discretion to exercise significant authority with respect to administrative proceedings. Under the SEC Rules of Practice, an SEC ALJ – referred to in the Rules of Practice as the "hearing officer" – is empowered, within his or her discretion, to perform the following, among other things:

a. Take testimony. RoP 111.

b. Conduct trials. *Id.*

c. Rule on admissibility of evidence. RoP 320.

d. Order production of evidence. RoP 230(a)(2), 232.

e. Issue orders, including show-cause orders. *See, e.g.*, 17 CFR 201.141 (b); In the Matter of China Everhealth Corp., Admin. Proc. Rel. No. 1639, 2014 SEC LEXIS 2601 (July 22, 2014).

f. Rule on requests and motions, including pre-trial motions for summary disposition. *See, e.g.*, RoP 250(b).

g. Grant extensions of time. RoP 161.

h. Dismiss for failure to meet deadlines. RoP 155(a).

i. Reconsider their own or other SEC ALJs' decisions. RoP 111 (h).

j. Reopen any hearing prior to the filing of a decision. RoP 111 G).

k. Amend the SEC's OIP. RoP 200(d)(2).

l. Impose sanctions on parties for contemptuous conduct. RoP 180(a).

m. Reject filings that do not comply with the SEC's Rules of Practice. RoP 180(b).

n. Dismiss the case, decide a particular matter against a party, or prohibit introduction of evidence when a person fails to make a required filing or cure a deficient filing. RoP 180(c).

o. Enter orders of default, and rule on motions to set aside default. RoP 155.

p. Consolidate proceedings. RoP 201(a).

q. Grant law enforcement agencies of the federal or state government leave to participate. RoP 210(c)(3).

r. Regulate appearance of amici. RoP 210(d).

s. Require amended answers to amended OIPs. RoP 220(b).

t. Direct that answers to OIPs need not specifically admit or deny, or claim insufficient information to respond to, each allegation in the OIP. RoP 220(c)

u. Require the SEC to file a more definite statement of specified matters of fact or law to be considered or determined. RoP 220(d).

v. Grant or deny leave to amend an answer. RoP 220(e).

w. Direct the parties to meet for prehearing conferences, and preside over such conferences as the ALJ "deems appropriate." RoP 221(b).

x. Order any party to furnish prehearing submissions. RoP 222(a).

y. Issue subpoenas. RoP 232.

z. Rule on applications to quash or modify subpoenas. RoP 232(e).

aa. Order depositions, and act as the "deposition officer." RoP 233, 234.

bb. Regulate the SEC's use of investigatory subpoenas after the institution of proceedings. RoP 230(g).

cc. Modify the Rules of Practice with regard to the SEC's document production obligations. RoP 230(a)(l).

dd. Require the SEC to produce documents it has withheld. RoP 230(c).

ee. Disqualify himself or herself from considering a particular matter. RoP 112(a).

ff. Order that scandalous or impertinent matter be stricken from any brief or pleading. RoP 152(f).

gg. Order that hearings be stayed while a motion is pending. RoP 154(a).

hh. Stay proceedings pending Commission consideration of offers of settlement. RoP 161 (c)(2).

ii. Modify the Rules of Practice as to participation of parties and amici. RoP 210(f).

jj. Allow the use of prior sworn statements for any reason, and limit or expand the parties' intended use of the same. RoP 235(a), (a)(5).

kk. Express views on offers of settlement. RoP 240(c)(2).

ll. Grant or deny leave to move for summary disposition. RoP 250(a).

mm. Order that hearings not be recorded or transcribed. RoP 302(a).

nn. Grant or deny the parties' proposed corrections to hearing transcript. RoP 302(c).

oo. Issue protective orders governing confidentiality of documents. RoP 322.

pp. Take "official notice" of facts not appearing in the record. RoP 323.

qq. Regulate the scope of cross-examination. RoP 326.

rr. Certify issues for interlocutory review, and determine whether proceedings should be stayed during pendency of review. RoP 400(c), (d).

The SEC ALJ's Decision

44. At the close of an administrative proceeding, the SEC ALJ issues his or her decision, referred to in the Rules of Practice as the "initial decision." RoP 360. The initial decision states the time period within which a petition for Commission review of the initial decision may be filed. The SEC ALJ exercises his or her discretion to decide that time period.

45. The initial decision becomes the final decision of the SEC after the period to petition for review expires, unless the Commission takes the SEC ALJ's decision up for review. With certain exceptions that do not apply to this matter, the Commission is not required to take up any SEC ALJ's decision for review.

46. As applied to this matter, Commission review is entirely discretionary. The Commission can deny a petition for review for any reason, after considering whether the petition for review makes a reasonable showing that (i) the decision embodies a clearly erroneous finding of material fact, an erroneous conclusion of law, or an exercise of discretion or decision of law or policy that is "important"; or (ii) a prejudicial error was committed during the proceeding.

47. If no party requests review, and if the Commission does not undertake review on its own initiative, no Commission review occurs. Instead, the Commission enters an order that the decision has become final, and "the action of [the] administrative law judge ... shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. § 78d-l(c). The order of finality states the date on which sanctions imposed by the SEC ALJ, if any, will become effective. RoP 360(d)(2).

48. Nothing in the rules or statutes prevents the Commission from making the ALJ's sanction effective before the respondent has had an opportunity to appeal the Commission's order, and in fact the Commission routinely makes sanctions effective immediately. *See, e.g., In the Matter of Mark Andrew Singer*, Exchange Act Rel. No. 72996, 2014 SEC LEXIS 3139 (Sept. 4, 2014).

The Position of SEC ALJ

49. The SEC is a "Department" of the Executive Branch of the U.S. Government. The individual Commissioners are the "heads" of the Department. *Free Enterprise*, 130 S. Ct. at 3163. The Commissioners appoint SEC ALJs.

50. The ALJ position is established by statute, which provides that each agency "shall" appoint as many ALJs as necessary for the agency's administrative proceedings. 5 U.S.C. § 3105.

51. The Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq., establishes ALJs' powers with respect to adjudication. 5 U.S.C. §§ 556, 557. The securities laws empower the SEC to delegate certain functions to SEC ALJs, including those listed above at paragraphs 42.a through 42.rr and 43 through 46. 15 U.S.C. §78d-l.

52. SEC regulation establishes the "Office of Administrative Law Judges," and outlines their authority. *See, e.g.*, 17 C.F.R. § 200.14; 17 C.F.R. § 200.30-9; 17 C.F.R. § 201.111. Those regulations provide that SEC ALJs' authority with respect to adjudications is to be as broad as the APA allows. 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.").

53. The salary of SEC ALJs is specified by statute. There are eight levels of basic pay for ALJ s, the lowest of which may not be less than 65% of the rate of basic pay for level IV of the Executive Schedule, and the highest of which may not be more than the rate of basic pay for level IV of the Executive Schedule. 5 U.S.C. § 5372. (The Executive Schedule is a system of salaries given to the highest-ranked appointed positions in the executive branch of the U.S. government. 5 U.S.C. § 5311.)

54. The means of appointing an ALJ is specified by statute. Appointments are made by agencies based on need. 5 U.S.C. § 3105. By regulation, ALJs may be appointed only from a list of eligible candidates provided by the Office of Personnel Management ("OPM") or with prior approval of OPM. 5 C.F.R. § 930.204. OPM selects eligible candidates based on a competitive exam, which OPM develops and administers. The SEC, like other agencies, selects ALJs from OPM's list of eligible candidates, based on the SEC's need. 5 U.S.C. § 3105; 5 C.F.R. § 930.204.

55. All ALJs receive career appointments and are exempt from probationary periods that apply to certain other government employees. 5 C.F.R. § 930.204(a). They do not serve time-limited terms.

56. SEC ALJs are "officers" of the United States due, among other things, to the significant authority they exercise; the broad discretion they are afforded; their career appointments; that they are appointed by the heads of an Executive Department; the statutory and regulatory requirements governing their duties, appointment, and salary; the statutory authority creating their position; and their power, in certain instances, to issue the final decision of the agency.

Removal of SEC ALJs

57. SEC ALJs are removable from their position by the SEC "only" for "good cause," which must be "established and determined" by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a).

58. This removal procedure involves two or more levels of tenure protection.

59. First, as noted, SEC ALJs are protected by statute from removal absent "good cause." 5 U.S.C. § 7521(a).

60. Second, the SEC Commissioners, who exercise the power of removal, are themselves protected by tenure. They may not be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." *See, e.g., Free Enterprise*, 130 S. Ct. at 3148; *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004).

61. Third, members of the MSPB, who determine whether sufficient "good cause" exists to remove an SEC ALJ, are also protected by tenure. They are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

The SEC ALJs' Removal Scheme Violates Article II's Vesting of Executive Power in the President

62. As executive officers, SEC ALJs may not be protected by more than one layer of tenure.

63. Article II of the U.S. Constitution vests "[t]he executive Power ... in a President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.*, § 3. In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939); *see also Free Enterprise*, 561 U.S. 477, 130 S. Ct. at 3146.

64. Article II's vesting authority requires that the principal and inferior officers of the Executive Branch be answerable to the President and not be separated from the President by attenuated chains of accountability. Specifically, as the Supreme Court held in *Free Enterprise*, Article II requires that executive officers, who exercise significant executive power, not be protected from being removed by their superiors at will, when those superiors are themselves protected from being removed by the President at will.

65. The SEC ALJs' removal scheme is contrary to this constitutional requirement because SEC ALJs are inferior officers for the purposes of Article II, Section 2 of the U.S. Constitution, and because:

a. SEC ALJs are protected from removal by a statutory "good cause" standard; and

b. The SEC Commissioners who are empowered to seek removal of SEC ALJs - within the constraints of the "good cause" standard – are themselves protected from removal by an "inefficiency, neglect of duty, or malfeasance in office" standard; and

c. The MSPB members who are empowered to effectuate the removal decision - again limited by a "good cause" standard - are themselves protected from removal by an "inefficiency, neglect of duty, or malfeasance in office" standard.

66. Under this attenuated removal scheme, "the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise*, 130 S. Ct. at 3147 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

67. Because the President cannot oversee SEC ALJs in accordance with Article II, SEC administrative proceedings violate the Constitution.

The Commission's Disparate and Unlawful Treatment of Mr. Peixoto

68. The SEC is treating Mr. Peixoto differently from all other non-regulated persons, from whom it sought civil penalties for insider trading, in a litigated proceeding[2] since the passing of Dodd-Frank by depriving Mr. Peixoto of the most fundamental rights to suitably defend against the insider trading charges.

69. Since the July 2010 effective date of Dodd-Frank, which empowered the SEC to seek civil penalties against non-regulated persons in administrative proceedings, the SEC has filed every litigated insider trading case against non-regulated persons in district court, with only two exceptions. In the first exception, the SEC withdrew the administrative case after the

[2] We distinguish between cases in which a defendant agrees to settle with the insider trading charges prior to the issuance of an OIP, resulting in an SEC Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions ("settled proceeding"), from those where the defendant litigates the charges ("litigated proceeding").

defendant challenged the SEC's choice of forum in an action such as this one. In the second exception, the defendant settled the SEC's charges before the matter went to a hearing. **Critically, the remaining 156 non-regulated persons charged with insider trading and from whom the SEC sought civil penalties were all sued in district court.**

70. These 156 non-regulated persons against whom the SEC sought civil penalties on insider trading charges constitute a class of persons similarly situated to Mr. Peixoto. Yet, without any rational basis, the SEC singled out Mr. Peixoto. While the 156 similarly-situated persons were sued in district court—where they received a jury trial, broad discovery rights and the right to counterclaim—Mr. Peixoto received disparate treatment and was sued administratively, in a forum that significantly, if not unconstitutionally, curtails his ability to defend the charges against him, as explained below.

71. There is no rational basis for the SEC's disparate treatment of Mr. Peixoto. A review of the SEC's post-Dodd-Frank insider trading cases reveals that the legal theory of insider trading liability upon which the SEC charges are based ("classical theory" or "misappropriation theory") does not establishes a basis for whether the matter against a non-regulated defendant was filed in district court instead of administratively. Indeed, as mentioned, all (but two) of the insider trading cases seeking civil penalties against non-regulated persons were filed in district court, regardless of the SEC's legal theory of insider trading liability.

72. Similarly, a defendant's citizenship does not explain the SEC's decision whether to file an insider trading case in district court. In fact, since Dodd-Frank, the SEC has brought approximately 11 insider trading cases against non-U.S. defendants, such as Mr. Peixoto, and filed them all in district court.

73. A review of the SEC's insider trading cases against the similarly-situated 156 non-regulated persons reveals virtually identical cases that the SEC filed in district court. A list of SEC post Dodd-Frank litigated insider trading cases is attached hereto and incorporated herein as Exhibit D. For example, in just the last two years, the SEC has charged four non-regulated persons in district court with insider trading in cases that are nearly identical to the case against Mr. Peixoto in terms of scope, complexity, legal theories involved, amounts of money at issue, categories of witnesses, violations alleged, and penalties sought. Indeed, one of the four non-regulated persons was a foreign citizen, like Mr. Peixoto. The similarity between the SEC allegations against the four other persons and against Mr. Peixoto is plainly apparent. A chart illustrating those similarities is attached hereto and incorporated herein as Exhibit E. These four cases are described below.

74. In *SEC v. Cedric Canas Maillard*, Civ. Action No. 13-cv-5299 (S.D.N.Y.), the SEC charged Julio Marin Ugedo ("Ugedo"), a non-regulated, Spanish citizen, with insider trading. Under facts strikingly similar to those alleged against Mr. Peixoto, the SEC's complaint alleged that Ugedo learned of a proposed corporate acquisition from a friend who was employed at an investment bank. The friend, in violation of a duty to his employer, misappropriated the information by providing it to Ugedo. The complaint further alleged that Ugedo committed insider trading by trading in anticipation of the acquisition, from which he profited in an amount of $43,566. The SEC's complaint relied on the occurrence of certain phone calls and the transmission of text messages prior to Ugedo's trading. For these alleged violations, the SEC sought civil penalties from Ugedo in district court.

75. Similarly, in *SEC v. Walter D. Wagner*, Civ. Action No. 14-cv-01036-PJM (D. Md.), the SEC charged Alexander J. Osborn ("Osborn"), a non-regulated person, with insider

trading. The SEC alleged that Osborn learned of a future corporate acquisition from an investment banking friend. The friend, in violation of a duty to his employer, misappropriated the information by providing it to Osborn. Osborn allegedly committed insider trading by trading in anticipation of the acquisition, from which he profited in an amount of $439,830. Much like in the case against Mr. Peixoto, the SEC's complaint relies upon the occurrence of phone calls between Osborn and his friend and the transmission of text messages prior to Osborn trading. The SEC sought civil penalties from Osborn, and did so in district court.

76. In *SEC v. Eric J. McPhail*, Civ. Action No. 14-cv-12958 (D. Mass.), the SEC charged, *inter alia*, Douglas A. Parigian ("Parigian") and Jamie A. Meadows ("Meadows"), two non-regulated persons, with insider trading, in district court. The complaint alleged that a friend (the "Misappropriator") of Parigian and Meadows provided them with certain material nonpublic information he had received in breach of a duty of trust he owed to his friend. Much like in the case against Mr. Peixoto, the scienter requirement against Parigian and Meadows depended upon the interpretation of certain written communications as between the co-defendants. The SEC sought civil penalties from Parigian and Meadows in district court.

77. Here, the SEC, without a legitimate purpose, singles out Mr. Peixoto and treats him differently than similarly-situated persons. The SEC seeks to try Mr. Peixoto administratively where he would be deprived of guaranteed application of the Federal Rules of Evidence, which preclude unreliable evidence, such as multiple layers of hearsay evidence that the SEC would seek to offer in an administrative proceeding. As a practical matter, the combination of multiple hearsay evidence offered by the SEC and constricted discovery for Mr. Peixoto lowers the burden for the SEC to prove its allegations.

78. Moreover, instead of having the claims determined by a jury, Mr. Peixoto faces an administrative proceeding where appellate review in the first instance is by the Commission itself, before any judicial review. Mr. Peixoto would be forced to meet an accelerated schedule that excludes depositions and other discovery essential to a defense against insider trading charges. The administrative proceeding—by denying the opportunity to conduct full discovery—hampers the ability to test and challenge the inferences to be drawn from conversations, phone records, text messages and Gmail chats—the very type of "evidence" on which insider trading cases, including this one, are based. This is precisely the prejudice suffered by Mr. Peixoto, as mentioned by the SEC's General Counsel, and is contrary to the treatment afforded similarly situated persons.

79. As reviewed against the 156 insider trading cases brought by the SEC against non-regulated persons, there is no legitimate purpose for the SEC's disparate treatment of Mr. Peixoto. Indeed, when asked by undersigned counsel, the SEC failed to provide even the most basic, legitimate purpose for filing the action against Mr. Peixoto administratively, rather than in district court. Given the overwhelming data of similarly situated persons and the SEC's reticence, the only plausible inference is that the SEC is treating Mr. Peixoto differently for the bad faith purpose of disarming an adversary from defending against a flawed case.

The Compelling Need for Judicial Review

80. Mr. Peixoto has commenced this action in prompt response to the OIP, which affords him limited time to answer and to prepare for the administrative hearings and, as a practical matter, no viable administrative process to obtain a fair resolution of the constitutional issues implied in the OIP. In these circumstances, the Court should address the merits of this Complaint without requiring Mr. Peixoto to first challenge the order administratively.

81. More specifically, exhaustion of administrative remedies should be excused in this case because the government interests that might be served by exhaustion do not outweigh the interests to be served by immediate judicial review of the legal issues being presented. Mr. Peixoto has compelling need for immediate judicial review: He would be forced to expend time and money in an administrative appeal process—while his public image is being tarnished and his career prospects diminished—with no assurance that the administrative proceeding against him would be stayed by the Commission pending agency determination of the constitutional issues. The constitutionality of the SEC Administrative Law Judges is strictly a legal issue and Plaintiff's equal protection claim is entirely independent of the merits of the insider trading charges. As such, no factual development or application of agency expertise will aid the Court's decision of either of Plaintiff's claims. Nor will a decision by the Court invade the field of SEC expertise or discretion. The statutory interpretation and constitutional claim in this case are the type of issues that courts regularly address and are more expert in adjudicating than agencies.

82. Moreover, the futility of exhausting the administrative remedies in this case is evident by the various ongoing actions against the SEC echoing the sentiment of an inadequate SEC ALJ process and expending significant monies on seeking interlocutory appeals. These cases demonstrate that defendants' requests for review fall on deaf ears or that the SEC ALJ process and rules are ill-equipped for review of claims of this kind.

83. For example, in *In the Matter of Harding Advisory LLC and Wing F. Chau*, Admin. Proc. File No. 3-15574, respondents requested that the SEC ALJ issue an order: (1) extending time and granting a six-month adjournment; (2) providing that proceedings would be governed by certain Federal Rules of Civil Procedure; and (3) requiring the SEC Division of

Enforcement to provide or identify certain materials. After the ALJ denied that motion, respondents submitted an emergency motion requesting that the ALJ address the ongoing violations of respondents' equal protection and due process rights by reconsidering his order or staying the hearing and prehearing deadlines pending a petition for interlocutory review by the Commission. The ALJ denied that motion, attached hereto and incorporated herein as Exhibit F. **In fact, the ALJ stated that he was not sure that constitutional due process and equal protection issues were justiciable in the administrative process, and the ALJ did not allow the respondents to develop the record in that regard.** *See* Transcript of Proceedings at 9 (Docket Entry No. 6), *Harding Advisory LLC and Wing F. Chau v. SEC*, Civ. Action No. 14-cv-01903-LAK (S.D.N.Y.). Respondents then submitted a petition for interlocutory review of the ALJ's orders, attached hereto and incorporated herein as Exhibit G. On March 14, 2014, the Commission issued its Order Denying Petition, attached hereto and incorporated herein as Exhibit H. *See* Complaint at ¶51 (Docket Entry No. 2), *Harding Advisory LLC and Wing F. Chau v. SEC*, Civ. Action No. 14-cv-01903-LAK (S.D.N.Y.).

84. The ALJs and the Commission have thereby demonstrated that the SEC administrative proceeding is not a forum in which a defendant's equal protection and other constitutional claims can be heard. The ALJs and the Commission have thereby also demonstrated that the procedural protections afforded to similarly situated defendants are not available in a SEC administrative proceeding. It would be futile for Mr. Peixoto to repeat these efforts and expect different results.

The SEC's Chosen Course Will Cause Mr. Peixoto Severe and Irreparable Harm

85. Without injunctive relief from this Court, Mr. Peixoto will be required to submit to an unconstitutional proceeding and a situation where the Commission has intentionally and

specifically, in purpose and effect, deprived him of his rights of equal protection under the law. The violation of a constitutional right, standing alone, constitutes irreparable injury. The lack of traditional procedural safeguards in SEC administrative proceedings further exacerbates that harm.

86. Allowing the SEC to pursue an administrative proceeding while the instant complaint is pending would require the expenditure of substantial legal fees defending against an unconstitutional action. Moreover, Mr. Peixoto cannot assert counterclaims or seek declaratory relief in an administrative proceeding, foreclosing any possibility of review until an appeal to a federal circuit court of appeals. *See In the Matter of Jeffrey L. Feldman*, Admin. Proc. File No. 3-8063, 1994 SEC LEXIS 186, at *4-5 (Jan. 14, 1994), attached hereto and incorporated herein as Exhibit I. The burdens incurred during an administrative proceeding would be for naught. Forcing Mr. Peixoto to litigate parallel proceedings would compound costs and reputational risk.

87. Furthermore, if Mr. Peixoto were to lose in an administrative proceeding, the damage could be severe and irreversible, well before Mr. Peixoto could obtain meaningful judicial review of the Article II and equal protection claims.

88. This severe harm, which threatens to damage Mr. Peixoto's candidacy as an applicant in finance and business is irreparable. The availability of an appeal to an administrative proceeding to a federal circuit court of appeals cannot avoid it, because the administratively-imposed sanction already may take effect – and the damage therefore already substantially and harmfully done – by the time the appellate court made a ruling.

89. Likewise, the harm cannot be remedied after the fact by money damages. Various immunity doctrines substantially constrain Mr. Peixoto's ability to seek damages from the SEC. Furthermore, even if damages were procedurally available, the reputational harm to Mr. Peixoto

– permanent and devastating to his business school effort and his career and life thereafter – should the SEC impose administrative sanctions would be impossible to monetize. Calculating the value of the damage to his life and career, including lost opportunities that would result from an unfavorable ruling in an unconstitutional administrative proceeding would be well-nigh impossible.

90. By contrast, the SEC will suffer no harm from a pause in an administrative proceeding against Mr. Peixoto pending final resolution of these important constitutional issues. Any claim of harm by the SEC would be particularly fanciful because the SEC maintains the option of bringing its enforcement action against Mr. Peixoto in federal court, as it routinely does with other non-regulated persons charged with insider trading. Moreover, this is not a case where investors would be adversely affected by injunctive relief from this Court.

COUNT ONE
APPLICATION FOR INJUNCTIVE RELIEF

91. Mr. Peixoto repeats and re-alleges paragraphs 1 - 90 as if set forth in full.

92. Mr. Peixoto's constitutional rights will be irreparably harmed if a permanent injunction (and, if necessary, a preliminary injunction and temporary restraining order) are not issued against the SEC's administrative proceeding. Mr. Peixoto has a substantial likelihood of success on the merits of his claim. Mr. Peixoto will be irreparably injured without injunctive relief, as described above, and the harm to Mr. Peixoto, absent injunctive relief, far outweighs any harm to the SEC if they are granted. Finally, the grant of an injunction will serve the public interest in the protection of Mr. Peixoto's constitutional rights.

COUNT TWO
DECLARATORY JUDGMENT

93. Mr. Peixoto repeats and re-alleges paragraph 1 - 92 as if set forth in full.

94. Mr. Peixoto requests a declaratory judgment that the statutory and regulatory provisions providing for the position and tenure protections of SEC ALJs are unconstitutional.

95. Mr. Peixoto also requests a declaratory judgment that (i) the Commission's decision to initiate and pursue administrative proceedings against Mr. Peixoto violated and is violating his right to equal protection under the law, and the (ii) the Commission violated and is violating Mr. Peixoto's right to due process.

JURY DEMAND

96. Mr. Peixoto hereby demands a trial by jury on all issues so triable.

WHEREFORE, Mr. Peixoto's prayer for judgment and relief are as follows:

(a) A declaration that (i) the Commission's decision to initiate and pursue administrative proceedings against Mr. Peixoto violated and is violating his right to equal protection under the law, and (ii) the Commission violated and is violating Mr. Peixoto's right to due process.

(b) A declaration that the statutory and regulatory provisions providing for the position and tenure protections of SEC ALJs are unconstitutional.

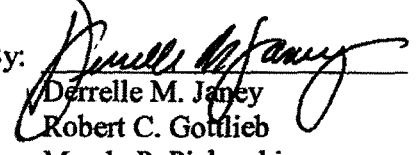
(c) A permanent injunction, enjoining the Commission from pursuing its OIP against Mr. Peixoto administratively.

(d) Such other and further relief as this Court may deem just and proper, including reasonable attorneys' fees and the costs of this action.

Dated: October 20, 2014
New York, NY

Respectfully submitted,

GOTTLIEB & GORDON LLP

By: 

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SEC Administrative Case Rules Likely Out Of Date, GC Says

By **Daniel Wilson**

Law360, Washington (June 17, 2014, 5:55 PM ET) -- U.S. Securities and Exchange Commission General Counsel Anne K. Small on Tuesday acknowledged attorneys' concerns about the increasing complexity of insider-trading and other administrative cases being brought before the commission, saying suggestions to explore changing the rules for these proceedings were "entirely reasonable."

In a question-and-answer session between Small and members of the District of Columbia Bar, the GC — noting she was speaking only for herself and not on behalf of the commission — said that it was fair for attorneys to question whether the SEC's rules for administrative proceedings were still appropriate, with the rules last revised "quite some time ago."

At that time, the SEC's administrative proceedings dealt with different kinds of cases than the more complex administrative matters it now takes on or expects to take on — given the commission's expanded authority under the Dodd-Frank Act — such as insider-trading actions, she said.

As such, it was "entirely reasonable to wonder" if those rules should be updated to reflect the changed situation, for instance by allowing more flexibility on current limits to trial preparation time or allowing for depositions to be taken, she said.

"We want to make sure the process is fair and reasonable, so [changing] procedures to reflect the changes makes a lot of sense," she said, noting the commission was open to petitions on the issue.

As part of the wide-ranging discussion, Small also spoke on a number of recent court cases involving the commission where she believed courts' guidance had been useful, including the Second Circuit's recent ruling **overturning** U.S. District Judge Jed Rakoff's refusal to sign off on a "no-admit, no-deny" settlement made with Citigroup Inc.

This ruling had put in place "clear lines" on how district courts within that circuit assess SEC settlement deals, Small said, while recognizing — even as the SEC pursues more admissions of wrongdoing under its leader, Mary Jo White — the importance that it has the discretion to not seek admissions when helpful for resolving certain cases.

Earlier decisions from the D.C. Circuit, stretching back to 2005, had also been useful in shaping work her office has done in conjunction with the commission's division of economic and risk analysis on the economic analyses attached to the SEC's rule-making process, according to Small.

These analyses have become "more coherent and systematized" since those decisions, which took the commission to task for deficiencies in its analyses and prompted the SEC to take a

hard look at how it assesses the economic effects of its rule-making, the GC said.

This more coherent approach had allowed the commission to put in place a set of best practices that provide a level of certainty — available publicly as a guidance document — ensuring that it provides a consistent approach to economic analysis from rule to rule while also recognizing that each rule is different, according to Small.

"We're trying to stick to the guidance and provide a robust assessment of the impact of rules as much as we can ... not just some after-the-fact rationalization, but from the beginning," she said.

Although only a small number of rules have come from the agency since the process in the guidance had begun to be applied, the tweaks the agency made appear to have had the desired result, with recent court challenges to SEC regulations focusing less on purportedly faulty economic analyses, Small said.

In addition to providing input on economic analyses, the GC said that her office has also given broader attention to providing legal advice on the commission's rule-writing efforts, such as the legal authority the commission has to implement various approaches commissioners are considering.

Further, it spends a significant amount of time helping to provide advice on enforcement cases that the commission is involved in, she said, but she noted that its role in these cases should not be conflated to that of a "shadow enforcement effort."

We're "not out there investigating issues," she said. "[We give] legal advice on cases providing novel claims, or on case with issues [the SEC Enforcement Division] should be aware of."

Small was coy, however, on when the commission would complete its mandatory Dodd-Frank Act rule-making, saying that White was hoping to move forward with the rules as quickly as possible but declining to estimate a date for when this would occur.

She also demurred on questions on potential rule-making on high-frequency trading and "dark pools," saying that the SEC's Division of Trading and Markets was kicking around potential regulatory ideas and the specifics of any such proposals would be up to that unit to make public.

--Editing by Katherine Rautenberg and Jeremy Barker.

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SEC Could Bring More Insider Trading Cases In-House

By **Brian Mahoney**

Law360, Washington (June 11, 2014, 6:53 PM ET) -- The U.S. Securities and Exchange Commission plans to bring in-house administrative proceedings against some alleged insider traders rather than take those cases to federal court, the agency's enforcement chief said Wednesday, while defending the SEC's recently lackluster trial record.

Andrew Ceresney, the head of the SEC's Division of Enforcement, said that it's just a matter of time before the SEC files an administrative proceeding against an insider trading defendant, and said he thinks the agency will choose the in-house venue more often for other types of cases.

"I think you are seeing us use the administrative proceeding more and it's a venue that has a sophisticated trier of fact, and one where it's a more streamlined proceeding," he said. "So it has great benefit to us and I think you have seen that in the last year or two, and I think you'll see that more and more in the future.

"I don't think you're going to see us move completely away from what we've done in the past but I think you are going to start to see on occasion those being used," Ceresney said at a Washington, D.C., bar event at K&L Gates LLP's offices, referring to administrative proceedings.

Even threatening in-house proceedings gives the agency a leg-up in negotiating settlements, he added.

"I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled," Ceresney said.

Ceresney made clear that bringing insider trading trials in-house was not a reaction to the agency's recent string of losses in federal court. The agency is under fire after losing two recent trials against hedge fund manager Nelson Obus and Manouchehr Moshayedi, the founder of computer storage device maker STEC Inc.

"I don't think it's a reaction to the recent trials," Ceresney said. "In fact, it's something that we've been talking about for at least since I got there, probably before I got there. So it's not a reaction to that."

The agency now has a 4-5 record in jury trials in the 2014 fiscal year, with mixed verdicts in four additional cases, according to an **analysis** of court records and SEC releases. By comparison, the SEC won two of three jury trials in the 2013 fiscal year.

"I would put our trial attorneys up against any defense attorney any day," Ceresney said. "I

don't think this is a question of trial skills or expertise.

"I don't expect us to have a perfect record in court," he added. "If we're winning every case, we're not being aggressive enough."

Many of the SEC's recent trial losses have been hard-to-prove insider trading cases, Ceresney said. He believes juries apply a higher standard than is required when deliberating about the liability of an insider trading defendant.

"Frankly, I think juries, while they're instructed that we have a preponderance standard, I think apply a higher standard to us than preponderance," he said.

The SEC take very few cases to trial, Ceresney added, saying the SEC's enforcement agenda should be reviewed from its activities inside and outside the courtroom.

"The vast majority of our cases settle, which means that we get the remedies that we want," Ceresney said. "So what you're really looking for when you talk about trials is you're looking at very small subset of cases that don't settle. And I think you've got to view our program much more broadly."

--Additional reporting by Max Stendahl. Editing by Andrew Park.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73263 / September 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16184

In the Matter of **JORDAN PEIXOTO** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Jordan Peixoto ("Peixoto" or the "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Peixoto engaged in insider trading in connection with securities of Herbalife Ltd. ("Herbalife").

2. In 2012, Peixoto's friend, Filip Szymik ("Szymik"), was a close friend and the roommate of an analyst employed at Pershing Square Management, L.P. ("Pershing"). Pershing was a hedge fund headed by well-known activist investor William Ackman ("Ackman"). Prior to December 19, 2012, Szymik's roommate ("the Analyst") informed Szymik of an upcoming Pershing public presentation regarding its negative view of Herbalife (the "Pershing Presentation"). The Analyst also told Szymik, and Szymik understood and agreed, that any information that Szymik might learn from the Analyst concerning Pershing (including concerning the Pershing Presentation) was highly confidential and that Szymik should not trade securities on the basis of any such information.

3. Nonetheless, in breach of his duty of trust or confidence with the Analyst, Szymik informed his friend Peixoto of the essential substance and date of the upcoming Pershing Presentation, which ultimately took place on December 20, 2012. Peixoto and Szymik knew or recklessly disregarded that that information was material and nonpublic, and both understood that, once publicized, Pershing's negative view of Herbalife likely would cause Herbalife's stock price to fall.

4. On December 19, 2012, prior to any such public announcement, Peixoto purchased a number of Herbalife put options. Later that day, CNBC reported Pershing would be announcing publicly a negative view of Herbalife in a presentation the following day. Immediately following both the CNBC announcement and the Pershing Presentation the following day, Herbalife's stock price dropped considerably, falling a total of 39% by the close of trading on December 24. The market value of Peixoto's Herbalife's put options increased by approximately $339,421 (as of December 21, 2012), and he ultimately obtained $47,100 in actual profits from Herbalife options that he purchased prior to the CNBC report.

5. By purchasing Herbalife put options while in possession of material nonpublic information -- when he knew or had reason to know that that information had been improperly obtained -- Peixoto violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. RESPONDENT

6. **Peixoto**, age 30 and a resident of Toronto, is a Canadian citizen. During December 2012, Peixoto was employed as a research analyst at Deloitte in New York, New York. Peixoto has never been registered with the Commission.

C. OTHER RELEVANT INDIVIDUALS AND ENTITIES

7. **Szymik**, age 28 and a resident of New York City, is a Polish citizen. Since 2008, Szymik has worked as a consultant or senior consultant at a consulting firm. Szymik has never been registered with the Commission.

8. **The Analyst**, age 28 and a resident of New York City, is a Polish citizen. The Analyst began working for Pershing in April 2010, as an intern, and later became a research analyst. The Analyst left Pershing in September 2013.

9. **Pershing**, a limited partnership, was formed in New York, New York. Pershing was founded by William Ackman in 2004 and operates as a hedge fund. Pershing is registered with the Commission as an investment adviser. As of December 2012, it had approximately $11 billion in assets under management.

10. **Herbalife**, a Cayman Islands corporation, is headquartered in Los Angeles, California. Herbalife's common stock is registered with the Commission pursuant to

Section 12(b) of the Exchange Act and is traded on the New York Stock Exchange. Herbalife common stock options are traded on various exchanges.

D. BACKGROUND

11. The Analyst began working at Pershing as an intern in April 2010 and became a research analyst and full-time employee in March 2011. Pershing's employee compliance manual states in part that "[Pershing] generates, maintains and possesses information that we view as proprietary, and it must be kept confidential by our Employees"; and that such information includes "investment positions that have not otherwise been publicly disclosed; research analyses that have not otherwise been publicly disclosed ..." Pershing's written compliance policies further state: "Employees may not disclose proprietary information to anyone outside the Firm ..." Upon becoming a full-time Pershing employee, the Analyst acknowledged to Pershing in writing that he had received, read, and understood Pershing's compliance manual and confidentiality policy.

12. As a Pershing employee, the Analyst also attended routine mandatory training seminars hosted by Pershing, which included training concerning Pershing's compliance manual, code of ethics, and insider trading.

13. Beginning in the first quarter of 2012, through at least September 2013, the Analyst was a member of Pershing's investment team assigned to research Herbalife. In that capacity, prior to December 2012, the Analyst learned that Pershing had concluded that Herbalife was operating an illicit pyramid scheme and that Pershing had acquired a substantial short position in Herbalife stock. The Analyst also knew that Pershing intended to publicly disclose its Herbalife thesis through a presentation at the Sohn Conference Foundation (the Pershing Presentation) ultimately scheduled for, and which occurred on, December 20, 2012.

14. All information concerning Pershing's Herbalife research -- including its negative view of Herbalife, its thesis that Herbalife was operating as an illicit pyramid scheme, its short position in Herbalife stock, and the timing of its disclosure of that information -- constituted material nonpublic information. As a Pershing employee, the Analyst knew that such information was nonpublic and highly confidential.

E. THE ANALYST'S RELATIONSHIP WITH SZYMIK

15. In 2012, the Analyst and Szymik were very close friends who had grown up together in Poland. From 2008 to April 2013, they shared an apartment as roommates in New York, New York. The Analyst and Szymik had a relationship of mutual trust or confidence in which they shared both personal and professional confidences.

16. In 2012, Szymik knew that the Analyst was a Pershing research analyst and that his work there was highly confidential.

17. Prior to December 2012, the Analyst expressly cautioned Szymik, and Szymik understood, that all of the Analyst's work at Pershing was highly confidential; that Szymik should not disclose anything regarding Pershing that he might hear or learn from the Analyst to anybody else; and that Szymik should not trade securities using any such information. Prior to December 2012, Szymik explicitly promised the Analyst that he would neither trade on any information he learned from the Analyst concerning Pershing nor disclose such information to anyone else.

18. Prior to December 19, 2012, in violation of Pershing's confidentiality policy, the Analyst disclosed material nonpublic information about his work regarding Herbalife to Szymik. The Analyst told Szymik, at the least, that he was researching Herbalife for Pershing and that Pershing had a negative view of Herbalife. The Analyst also told Szymik that Pershing would present its thesis concerning Herbalife at the Pershing Presentation, and he informed Szymik of the date of the presentation. As described in the preceding paragraph, Szymik had agreed with the Analyst to maintain the confidentiality of such information. Furthermore, given Szymik's and the Analyst's history, pattern, and practice of sharing confidences, Szymik knew or reasonably should have known that the Analyst expected Szymik to maintain the confidentiality of such information.

F. SZYMIK TIPPED PEIXOTO

19. In 2012, Szymik and Peixoto were close friends who lived within a block of each other in New York, New York and spent time socializing together nearly every weekend.

20. Peixoto knew that Szymik and the Analyst were roommates and very close friends, having known each other since childhood. Peixoto also knew that the Analyst worked at Pershing as a research analyst, and Peixoto knew or had reason to know that the Analyst's work at Pershing was highly confidential.

21. In a series of communications prior to December 19, 2012, Szymik breached his duty of trust or confidence to the Analyst by telling Peixoto, at the least, that the Analyst was researching Herbalife for Pershing; that Pershing had a negative view of Herbalife; that Pershing would publicly disclose its Herbalife thesis; and the date that disclosure would occur. At the time of those communications, both Szymik and Peixoto either knew or recklessly disregarded that the information was material and non-public.

22. When Szymik gave Peixoto the confidential information concerning the Pershing Presentation described in paragraph 21 above, Szymik knew or recklessly disregarded both that he was violating his duty of trust or confidence to the Analyst and that Peixoto intended to trade Herbalife securities based on that information. Szymik received a personal benefit by gifting confidential information to his friend, Peixoto.

23. When Peixoto received the confidential information from Szymik described in paragraph 21 above, Peixoto knew or had reason to know that Szymik provided the information to him improperly, in breach of a duty of trust or confidence.

G. PEIXOTO TRADED HERBALIFE OPTIONS

24. On the basis of the confidential information that Szymik had provided to him, Peixoto purchased Herbalife put options in advance of the Pershing Presentation. On December 19, 2012, from approximately 12:00 p.m. to 1:23 p.m. Peixoto purchased eight out-of-the-money Herbalife put options (the "Herbalife Options"). Peixoto previously had never traded options or Herbalife securities, and he sold several other securities to fund his purchase of the Herbalife Options. Szymik did not trade in Herbalife securities.

25. At 1:58 pm EST on December 19, 2012, after Peixoto had purchased the Herbalife Options, CNBC reported that Pershing had acquired a significant short position in Herbalife stock and that Pershing would present its thesis -- that Herbalife was operating an illegal pyramid scheme -- at a conference the next day (the "CNBC Report"). At 2:04 p.m. on December 19, the New York Stock Exchange temporarily halted Herbalife stock trading due to its high volatility in the wake of the CNBC Report.

26. At the December 20, 2012 Pershing Presentation -- a three-hour, 334-slide presentation entitled "Who wants to be a Millionaire?" -- Ackman publicly accused Herbalife of operating an illegal pyramid scheme and disclosed that Pershing held a $1 billion short position in Herbalife stock.

27. Following the CNBC Report, the price of Herbalife stock decreased approximately 12%, from $42.50 per share at the close on December 18, 2012, to $37.34 per share at the close on December 19, 2012.

28. After the CNBC Report and the Pershing Presentation, Herbalife's stock price declined by approximately 39%, from $42.50 per share at the close on December 18, 2012, to a low of $26.06 per share at the close on December 24, 2012.

29. As of the market close on Friday, December 21, 2012, the market value of Peixoto's Herbalife Options had increased by approximately $339,421, and he ultimately obtained $47,100 in actual profits from his illicit trading in Herbalife Options. Peixoto requested that his brokerage firms permit a number of his profitable Herbalife Options to expire without exercising them. However, one of Peixoto's securities brokers refused his request, resulting in the exercise of certain of the Herbalife Options and his obtaining $47,100 in illicit trading profits.

H. VIOLATIONS

30. As a result of the conduct described above, Peixoto violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it

is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Exhibit D

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
1	Peixoto	AP	2014	No	10(b)	Yes
2	Gregory T. Bolan	AP	2014	Yes	10(b); 17(a)	Yes
3	Joseph C. Ruggieri	AP	2014	Yes	10(b); 17(a)	Yes
4	Dimitry Braverman	SDNY	2014	No	10(b); 14(e)	Yes
5	Michael Anthony Dupre Lucarelli	SDNY	2014	No	10(b); 14(e); 17(a)	Yes
6	Patrick O'Neill	D. Mass	2014	No	10(b)	Yes
7	Robert Bray	D. Mass	2014	No	10(b)	Yes
8	Donald S. Toth	NDGa	2014	No	10(b); 14(e)	Yes
9	James A. Nash	NDGa	2014	No	10(b); 14(e)	Yes
10	Blair G. Schlossberg	MDFL	2014	No	10(b); 14(e)	Yes
11	Moshe Manoah	MDFL	2014	No	10(b); 14(e)	Yes
12	Kevin McGrath	SDNY	2014	No	10(b); 17(a)	Yes
13	Eric McPhail	D. Mass	2014	No	10(b)	Yes
14	Douglas A. Parigian	D. Mass	2014	No	10(b)	Yes
15	Jamie A. Meadows	D. Mass	2014	No	10(b)	Yes
16	john J. Gilmartin	D. Mass	2014	No	10(b)	Yes
17	Douglas Clapp	D. Mass	2014	No	10(b)	Yes
18	ames A. "Andy" Drohen	D. Mass	2014	No	10(b)	Yes
19	John C. Drohen	D. Mass	2014	No	10(b)	Yes
20	Roshanlal Chaganlal	NDCal	2014	No	10(b)	Yes
21	Saleem Khan	NDCal	2014	No	10(b)	Yes
22	Ranjan Mendonsa	NDCal	2014	No	10(b)	Yes
23	Ammar Akbari	NDCal	2014	No	10(b)	Yes
24	Glenn Cohen	SDNY	2014	No	10(b)	Yes
25	Craig Cohen	SDNY	2014	No	10(b)	Yes
26	Marc Cohen	SDNY	2014	No	10(b)	Yes
27	Steven Cohen	SDNY	2014	No	10(b)	Yes
28	Laurie Topal	SDNY	2014	No	10(b)	Yes
29	Franklin Chu	CDCal	2014	No	10(b); 17(a)	Yes
30	Daniel Lama	CDCal	2014	No	10(b); 17(a)	Yes
31	Derek Cohen	SDCal	2014	No	10(b)	Yes
32	Robert Herman	SDCal	2014	No	10(b)	Yes
33	Michael Fleischli	SDCal	2014	No	10(b)	Yes

***Note:** Defendants contained in a box represent co-defendants in a single action.*

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
34	Herbert Richard Lawson	NDCal	2014	No	10(b); 17(a)	Yes
35	William Lawson	NDCal	2014	No	10(b); 17(a)	Yes
36	John Cerullo	NDCal	2014	No	10(b); 17(a)	Yes
37	Christopher Saridakis	EDPa	2014	No	10(b)	Yes
38	Jules Gardner	EDPa	2014	No	10(b)	No
39	Loretta Itri	DNJ	2014	No	10(b); 17(a)	Yes
40	Neil Moskowitz	DNJ	2014	No	10(b); 17(a)	Yes
41	Mathew Cashin	DNJ	2014	No	10(b); 17(a)	Yes
42	Keith A Seilhan	EDLa	2014	No	10(b); 17(a)	Yes
43	Walter D. Wagner	DMD	2014	No	10(b)	Yes
44	Alexander J. Osborn	DMD	2014	No	10(b)	Yes
45	Tyrone Hawk	NDCal	2014	No	10(b)	Yes
46	Ching Hwa Chen	NDCal	2014	No	10(b)	Yes
47	Steven Metro	DNJ	2014	No	10(b); 14(e); 17(a)	Yes
48	Vladimir Eydelman	DNJ	2014	Yes	10(b); 14(e); 17(a)	Yes
49	Frank Tamayo	DNJ	2014	No	10(b); 14(e); 17(a)	Yes
50	Frank "Perk" Hixon Jr.	WDTX	2014	No	10(b); 14(e)	Yes
51	Steven M. Dombrowski	NDIll	2014	No	10(b); 17(a)	Yes
52	Brian Jorgenson	WDW	2013	No	10(b)	Yes
53	Sean Stokke	WDW	2013	No	10(b)	Yes
54	Charles Raymond Langston	SDFL	2013	No	10(b); 17(a)	Yes
55	Mark Megalli	NDGA	2013	No	10(b); 17(a)	Yes
56	Jing Wang	SDCA	2013	No	10(b); 16(a)	Yes
57	Gary Yin	SDCA	2013	Yes	10(b)	Yes
58	Lawrence Robbins	SDNY	2013	No	10(b); 14(e)	Yes
59	Tibor Klein	SDFL	2013	Yes	10(b); 14(e)	Yes
60	Michael Shechtman	SDFL	2013	Yes	10(b); 14(e)	Yes
61	Chad McGinnis	D. Conn.	2013	No	10(b); 17(a)	Yes
62	Sergey Pugach	D. Conn.	2013	No	10(b); 17(a)	Yes
63	Cedric Cañas Maillard	SDNY	2013	No	10(b); 14(e)	Yes
64	Julio Marín Ugedo	SDNY	2013	No	10(b); 14(e)	Yes
65	Stephen B. Gray	SDTX	2013	No	10(b); 17(a)	Yes
66	Badin Rungruangnavarat	NDIL	2013	No	10(b)	Yes
67	Michael B. Bartoszek	SDNY	2013	No	10(b); 17(a)	Yes
68	Mark D. Begelman	SDFL	2013	No	10(b)	Yes

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
69	Richard Bruce Moore	SDNY	2013	No	10(b)	Yes
70	Scott London	CDCA	2013	No	10(b)	Yes
71	Bryan Shaw	CDCA	2013	No	10(b)	Yes
72	David Riley	SDNY	2013	No	10(b); 17(a)	Yes
73	Matthew Teeple	SDNY	2013	Yes	10(b); 17(a)	Yes
74	John Johnson	SDNY	2013	No	10(b); 17(a)	Yes
75	Ronald N. Dennis	SDNY	2013	Yes	10(b); 17(a)	Yes
76	Michael Steinberg	SDNY	2013	Yes	10(b); 17(a)	Yes
77	Chris Choi	SDNY	2013	No	10(b); 17(a)	Yes
78	Michel Terpins	SDNY	2013	No	10(b)	Yes
79	Rodrigo Terpins	SDNY	2013	No	10(b)	Yes
80	Kevin L. Dowd	DNJ	2013	Yes	10(b); 14(e)	Yes
81	Sung Kook "Bill" Hwang	DNJ	2012	Yes	10(b); 17(a); 206	Yes
82	Raymond Y.H. Park	DNJ	2012	Yes	10(b); 17(a); 206	Yes
83	John W. Femenia	WDNC	2012	Yes	10(b)	Yes
84	Shawn C. Hegedus	WDNC	2012	Yes	10(b)	Yes
85	Matthew J. Musante	WDNC	2012	No	10(b)	Yes
86	Aaron M. Wens	WDNC	2012	No	10(b)	Yes
87	Roger A. Williams	WDNC	2012	No	10(b)	Yes
88	Kenneth M. Raby	WDNC	2012	No	10(b)	Yes
89	Frank M. Burgess, Jr.	WDNC	2012	No	10(b)	Yes
90	James A. Hayes, IV	WDNC	2012	No	10(b)	Yes
91	Danielle C. Laurenti	WDNC	2012	No	10(b)	Yes
92	Anthony C. Musante	WDNC	2012	No	10(b)	Yes
93	Trent Martin	SDNY	2012	Yes	10(b)	Yes
94	Thomas C. Conradt	SDNY	2012	Yes	10(b)	Yes
95	David J. Weishaus	SDNY	2012	Yes	10(b)	Yes
96	Benjamin Durant III	SDNY	2014	Yes	10(b)	Yes
97	Daryl M. Payton	SDNY	2014	Yes	10(b)	Yes
98	Dr. Sidney Gilman	SDNY	2012	No	10(b); 17(a)	Yes
99	Mathew Martoma	SDNY	2012	Yes	10(b); 17(a)	Yes
100	John Lazorchak	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
101	Mark S. Cupo	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
102	Mark D. Foldy	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
103	Michael Castelli	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
104	Lawrence Grum	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
105	Michael T. Pendolino	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
106	James N. Deprado	DNJ	2012	No	10(b); 14(e); 17(a)	Yes

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
107	Jauyo "Jason" Lee	NDCal	2012	No	10(b); 14(e)	Yes
108	Victor Chen	NDCal	2012	No	10(b); 14(e)	Yes
109	Waldyr Da Silva Prado Neto	SDNY	2012	Yes	10(b); 14(e)	Yes
110	Igor Cornelsen	SDNY	2012	No	10(b); 14(e)	Yes
111	H. Thomas Davis, Jr.	EDNC	2012	No	10(b)	Yes
112	Mark W. Baggett	NDGA	2012	No	10(b)	Yes
113	Kenneth F. Wrangell	EDNC	2012	No	10(b)	Yes
114	Renee White Fraser	CDCal	2012	No	10(b)	Yes
115	Thomas D. Melvin	NDGA	2012	No	10(b); 14(e)	Yes
116	Michael S. Cain	NDGA	2012	Yes	10(b); 14(e)	Yes
117	Joel C. Jinks	NDGA	2012	No	10(b); 14(e)	Yes
118	Peter C. Doffing	NDGA	2012	No	10(b); 14(e)	Yes
119	R. Jeffrey Rooks	NDGA	2012	No	10(b); 14(e)	Yes
120	C. Roan Berry	NDGA	2012	No	10(b); 14(e)	Yes
121	Ashley J. Coots	NDGA	2012	No	10(b); 14(e)	Yes
122	Casey D. Jackson	NDGA	2012	No	10(b); 14(e)	Yes
123	James V. Mazzo	CDCal	2012	No	10(b); 14(e)	Yes
124	Eddie Murray	CDCal	2012	No	10(b); 14(e)	Yes
125	David L. Parker	CDCal	2012	No	10(b); 14(e)	Yes
126	Robert D. Ramnarine	DNJ	2012	No	10(b); 14(e); 17(a)	Yes
127	Ren Feng	SDNY	2012	No	10(b)	Yes
128	Manouchehr Moshayedi	CDCal	2012	No	10(b); 17(a)	Yes
129	Apparao Mukkamala	EDMich	2012	No	10(b)	Yes
130	Suresh Anne	EDMich	2012	No	10(b)	Yes
131	Jitendra Prasad Katneni	EDMich	2012	No	10(b)	Yes
132	Rao A.K. Yalamanchili	EDMich	2012	No	10(b)	Yes
133	Mallikarjunarao Anne	EDMich	2012	No	10(b)	Yes
134	Tai Nguyen	SDNY	2012	No	10(b); 17(a)	Yes
135	Robert W. Kwok	SDNY	2012	No	10(b)	Yes
136	Reema D. Shah	SDNY	2012	Yes	10(b)	Yes
137	Mohammed Mark Amin,	CDCal	2012	No	10(b)	Yes
138	Robert Reza Amin	CDCal	2012	No	10(b)	Yes
139	Michael Mahmood Amin	CDCal	2012	No	10(b)	Yes
140	Sam Saeed Pirnazar	CDCal	2012	No	10(b)	Yes
141	Mary Coley	CDCal	2012	No	10(b)	Yes
142	Ali Tashakori	CDCal	2012	No	10(b)	Yes

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
143	Timothy J. McGee	EDPA	2012	Yes	10(b)	Yes
144	Michael W. Zirinsky	EDPA	2012	Yes	10(b)	Yes
145	Robert Zirinsky	EDPA	2012	No	10(b)	Yes
146	Paulo Lam	EDPA	2012	No	10(b)	Yes
147	Marianna sze wan Ho	EDPA	2012	No	10(b)	Yes
148	John Kinnucan	SDNY	2012	No	10(b)	Yes
149	Douglas F. Whitman	SDNY	2012	Yes	10(b); 17(a)	Yes
150	Sandeep "Sandy" Goyal	SDNY	2012	Yes	10(b); 17(a)	Yes
151	Jesse Tortora	SDNY	2012	Yes	10(b); 17(a)	Yes
152	Todd Newman	SDNY	2012	Yes	10(b); 17(a)	Yes
153	Spyridon "Sam" Adondakis	SDNY	2012	Yes	10(b); 17(a)	Yes
154	Anthony Chiasson	SDNY	2012	Yes	10(b); 17(a)	Yes
155	Jon Horvath	SDNY	2012	Yes	10(b); 17(a)	Yes
156	Danny Kuo	SDNY	2012	Yes	10(b); 17(a)	Yes
157	Hyung Lim	SDNY	2012	No	10(b); 17(a)	Yes
158	Spencer Mindlin	AP	2011	Yes	10(b); 17(a)	Yes
159	Alfred C. Mindlin	AP	2011	No	10(b); 17(a)	Yes
160	Gupta	AP	2011	No		Yes
161	Scott Allen	SDNY	2011	No	10(b);14(e)	Yes
162	John Michael Bennett	SDNY	2011	No	10(b);14(e)	Yes
163	Scott A. Vollmar	DNJ	2011	No	10(b); 17(a); 14(e)	Yes
164	James F. Turner II	DNJ	2011	Yes	10(b); 17(a); 14(e)	Yes
165	Mark A. Durbin	DNJ	2011	No	10(b); 17(a); 14(e)	Yes
166	Scott A. Robarge	DNJ	2011	No	10(b); 17(a); 14(e)	Yes
167	H. Clayton Peterson	SDNY	2011	No	10(b)	Yes
168	Drew Peterson	SDNY	2011	Yes	10(b)	Yes
169	Doug DeCinces	CDCal	2011	No	10(b); 14(e)	Yes
170	Joseph J. Donohue	CDCal	2011	No	10(b); 14(e)	Yes
171	Scott Jackson	CDCal	2011	No	10(b); 14(e)	Yes
172	Roger A. Wittenbach	CDCal	2011	No	10(b); 14(e)	Yes
173	Donald L. Johnson	SDNY	2011	No	10(b)	Yes
174	Dr. Joseph F. Skowron	SDNY	2011	Yes	10(b)	Yes
175	Matthew Kluger	DNJ	2011	No	10(b); 14(e)	Yes
176	Garrett Bauer	DNJ	2011	Yes	10(b); 14(e)	Yes
177	Kenneth T. Robinson	DNJ	2011	No	10(b); 14(e)	Yes
178	Cheng Yi Liang	DMD	2011	No	10(b); 17(a)	Yes

Post Dodd-Frank Litigated Insider Trading Cases

	Defendant	Forum	Year	Associated Person	Alleged Violations	Penalties
179	Mark Anthony Longoria	SDNY	2011	No	10(b); 17(a)	Yes
180	Daniel L. DeVore	SDNY	2011	No	10(b); 17(a)	Yes
181	Winifred Jiau	SDNY	2011	No	10(b); 17(a)	Yes
182	Walter Shimoon	SDNY	2011	No	10(b); 17(a)	Yes
183	Bob Nguyen	SDNY	2011	Yes	10(b); 17(a)	Yes
184	James Fleishman	SDNY	2011	Yes	10(b); 17(a)	Yes
185	Samir Barai	SDNY	2011	Yes	10(b); 17(a)	Yes
186	Jason Pflaum	SDNY	2011	Yes	10(b); 17(a)	Yes
187	Noah Freeman	SDNY	2011	Yes	10(b); 17(a)	Yes
188	Donald Longueuil	SDNY	2011	Yes	10(b); 17(a)	Yes
189	George Holley	DNJ	2011	No	10(b); 14(e)	Yes
190	Steven Dudas	DNJ	2011	No	10(b); 14(e)	Yes
191	Phairot Iamnaita	DNJ	2011	No	10(b); 14(e)	Yes
192	Jeffery J. Temple	DDE	2010	No	10(b); 14(e)	Yes
193	Benedict M. Pastro	DDE	2010	No	10(b); 14(e)	Yes
194	Yves Benhamou,	SDNY	2010	No	10(b); 17(a)	Yes
195	James W. Self, Jr.	EDPA	2010	No	10(b)	Yes
196	Stephen R. Goldfield	EDPA	2010	No	10(b)	Yes
197	Juan Jose Fernandez Garcia	NDIL	2010	No	10(b);14(e)	Yes
198	Luis Martin Caro Sanchez	NDIL	2010	No	10(b);14(e)	Yes
199	Thomas P. Flanagan	NDIL	2010	No	10(b);14(e)	Yes
200	Patrick T. Flanagan	NDIL	2010	No	10(b);14(e)	Yes
201	Samuel E. Wyly	SDNY	2010	No	10(b); 17(a); 14(e)	Yes
202	Charles J. Wyly, Jr	SDNY	2010	No	10(b); 17(a); 14(e)	Yes
203	Michael C. French	SDNY	2010	No	10(b); 17(a); 14(e)	Yes
204	Louis J. Schaufele III	SDNY	2010	Yes	10(b); 17(a); 14(e)	Yes

Exhibit E

COMPARATOR CHART

Allegation/ Characteristic	***Ugedo***	***Osborn***	***Parigian***	***Meadows***	***Peixoto***
Defendant	Non-regulated person	Non-regulated person	Non-regulated person	Non-regulated person	Non-regulated person
Charges	Insider Trading	Insider Trading	Insider Trading	Insider Trading	Insider Trading
Theory of Liability	Misappropriation	Misappropriation	Misappropriation	Misappropriation	Misappropriation
Time of Alleged Offense	August 2010	July 2012	April 2011	April 2011	December 2012
Breach of Duty of Confidence	Investment banking employee's breach of duty of confidence to employer	Investment banking employee's breach of duty of confidence to employer	Breach of duty of confidence between friends	Breach of duty of confidence between friends	Hedge fund employee's breach to employer and breach of duty of confidence between friends
Alleged Insider Trading Profit	$43,566	$439,830	$278,289	$191,521	$47,000
Statutes Allegedly Violated	Exchange Act §10(b) and §14(e)	Exchange Act §10(b)	Exchange Act §10(b)	Exchange Act §10(b)	Exchange Act §10(b)
Prayer for Relief	Injunctive relief, disgorgement of profits and civil penalties	Injunctive relief, disgorgement of profits and civil penalties	Injunctive relief, disgorgement of profits and civil penalties	Injunctive relief, disgorgement of profits and civil penalties	Disgorgement of profits, civil penalties, and cease-and-desist order
Forum	United States District Court for the Southern District of New York	United States District Court for the District of Maryland	United States District Court for the District of Massachusetts	United States District Court for the District of Massachusetts	SEC Administrative Proceeding

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1195/January 24, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of HARDING ADVISORY LLC AND WING F. CHAU	ORDER DENYING RESPONDENTS' MOTION FOR ADJOURNMENT

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on October 18, 2013, pursuant to Section 8A of the Securities Act of 1933, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940. A hearing is scheduled to commence on March 31, 2014.

On December 23, 2013, Respondents filed a Motion for an Order (1) Extending Time and Granting an Adjournment; (2) Providing that Proceedings Will be Governed by Certain Federal Rules of Civil Procedure; and (3) Requiring the Division to Provide or Identify Certain Materials (Motion). They attached three declarations in support of the Motion. The Division of Enforcement (Division) timely filed an opposition (Opposition), to which was attached the Declaration of Daniel R. Walfish (Walfish Decl.) and Exhibits A through F, and Respondents timely filed a reply (Reply), to which were attached eight exhibits.

Respondents seek a six-month adjournment of all prehearing dates and the hearing date, which I have considered in light of the factors recited in Commission Rule of Practice (Rule) 161(b)(1). See 17 C.F.R. § 201.161(b)(1). The OIP was served relatively recently, on November 18, 2013, there have been three extensions granted so far, all relating to the filing of various papers, and we are still at an early stage of the proceedings; these factors weigh generally in favor of an adjournment. However, I find it dispositive that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission. See OIP at 14; 17 C.F.R. § 201.360(a)(2). Extending the deadline for my issuance of an initial decision is not a ministerial formality. I must consult with the Chief Administrative Law Judge, and she has the discretion to file a motion for extension with the Commission, which makes the final determination. 17 C.F.R. § 201.360(a)(3). Also, to accommodate Respondents, I have already deviated from my usual practice, by: (1) setting the hearing date more than four months after service of the OIP; (2) requiring the exchange of witness lists more than four weeks in advance of the hearing; and (3) requiring the exchange of exhibits, exhibit lists, and expert

reports more than three weeks in advance of the hearing. See 17 C.F.R. § 201.360(a)(2) (requiring a hearing date "approximately 4 months" after service of the OIP).

I have also considered whether the prejudice to Respondents arising from lack of an adjournment constitutes an exception to the "policy of strongly disfavoring" such adjournments enunciated in Rule 161(b)(1). 17 C.F.R. § 201.161(b)(1). 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. Indeed, the argument that the size of the investigative file renders complete review of it prior to the hearing "not feasible," such that relief is justified, was recently rejected by the Commission. John Thomas Capital Mgmt. Grp. LLC, Advisers Act Release No. 3733, 2013 WL 6384275, at *5 (Dec. 6, 2013).

One basis for the holding in John Thomas was that the Division produced its files in the same form in which it maintained them, or in which they had been produced to the Division. 2013 WL 6384275, at *5. The same is true here, and Respondents apparently do not dispute this. Opposition at 4, 6; Reply. Another basis for the holding in John Thomas was that the Division produced its files entirely in an electronically searchable database, which the Division admits was not the case here. John Thomas, 2013 WL 6384275, at *5 & n.37; Opposition at 7 n.8. But Respondents have not refuted the Division's contention 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." Opposition at 13; see Reply. At most, the evidence attached to the Reply shows that there are some potentially core documents that fall outside that universe.

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 files, including files from other investigations, and given the representations the Division has made regarding them, Respondents should be able to meaningfully prioritize their review. 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. Motion at 2. This fact alone should permit Respondents to focus their review efforts on a small subset of the investigative files.

Respondents' other requested forms of relief are also generally foreclosed by John Thomas. Respondents argue that certain Federal Rules of Civil Procedure pertaining to discovery and pretrial motions should apply in this proceeding. Motion at 9-11. John Thomas holds that the Federal Rules of Civil Procedure do not apply in administrative hearings. 2013 WL 6382475, at *6 & n.44 (citing Jay Alan Ochanpaugh, Exchange Act Release No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 n.24). Respondents argue that the Division should be required to "provide any tags, labels, file folders or other means of keeping materials into which the Division has organized" relevant documents, and that failure to do so is tantamount to concealing material exculpatory evidence. Motion at 11-14 (citing Brady v. Maryland, 373 U.S.

83 (1963), and Rule 230(b)(2)). The provision of such a "roadmap" was rejected in John Thomas. 2013 WL 6382475, at *6.

Inasmuch as the Motion constitutes a request for Brady material under Rule 230(b)(2), the Division represents that a Brady disclosure is "shortly forthcoming." 17 C.F.R. § 201.230(b)(2); Opposition at 10. I therefore deny the request for Brady material but note that the Division has a continuing duty under Rule 230 to produce material exculpatory evidence. See 17 C.F.R. § 201.230(b)(2). Inasmuch as the Motion constitutes a request for Jencks Act material pursuant to Rule 231(a), the Division agrees that it must produce such material "at an appropriate time" but otherwise does not oppose the Motion. 17 C.F.R. § 201.231(a); Opposition at 12. Because it would be impractical at this time for the Division to produce Jencks Act material not already produced without first knowing who its witnesses will be, I deny the request without prejudice.

Respondents request that I certify this Order for interlocutory review. Motion at 15. The request 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. See 17 C.F.R. § 201.400(c).

Lastly, I have reviewed the Division's Withheld Documents List and find it to be in order. Walfish Decl., Ex. D.

It is HEREBY ORDERED that Respondents' Motion for an Order (1) Extending Time and Granting an Adjournment; (2) Providing that Proceedings Will be Governed by Certain Federal Rules of Civil Procedure; and (3) Requiring the Division to Provide or Identify Certain Materials is DENIED.

Cameron Elliot
Administrative Law Judge

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

HARDING ADVISORY LLC and

WING F. CHAU,

Respondents.

File No. 3-15574

EMERGENCY EXPEDITED CONSIDERATION REQUESTED

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

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

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

This petition is required because recent orders by the Administrative Law Judge ("ALJ") require Respondents to defend this case in a timeframe and with an absence of procedural safeguards that will erase any possibility of a fair hearing. This is the fourth contested SEC enforcement action relating to the structuring and marketing of CDOs (a "contested CDO case"). But it is the first and only contested CDO case to be brought administratively, and is thus the

first and only contested CDO case in which any party has been required to prepare for trial within four months. Absent relief from the recent ALJ orders, the continuation of this proceeding will irrevocably violate Respondents' rights to equal protection and due process of law.

PRELIMINARY STATEMENT

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

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

counsel or any party for information that is relevant or exculpatory only as to Respondents. Indeed, Respondents' review has already resulted in discovery of a number of highly exculpatory documents that were not addressed in any testimony, white paper, or Wells submission in this matter.

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

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

BACKGROUND

As soon as each of the three multimillion-document productions was received, Respondents' counsel began working diligently to process the materials for review. But the enormity of the investigative file, exacerbated by the unorganized manner in which it was produced, meant that fully two months of Respondents' trial preparation were spent simply

processing electronic data. Recognizing that they could not adequately prepare for trial without a significant adjournment and without sufficient means to identify relevant facts and materials, Respondents moved the ALJ on December 20, 2013 for an order (1) extending time and granting a six-month adjournment; (2) providing that proceedings would be governed by certain Federal Rules of Civil Procedure; and (3) requiring the Division to provide or identify certain materials (the "Dec. 20 Motion").

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

Because the Jan. 24 Order and the Feb. 19 Order denied all aspects of relief requested, there currently exists no mechanism to allow Respondents to review a critical mass of the documents in the Division's investigative file before the March 3 deadline for filing exhibit lists and expert reports, or before the March 31 trial date. This has severely undermined, and continues to undermine Respondents' ability to engage in trial preparation. It will be impossible, for example, to prepare an adequate exhibit list having seen only a tiny fraction of the relevant subset of the documents. And while Respondents have been ordered to file an expert report on March 3, they have not been able to segregate documents relevant to an expert, much less take the additional steps necessary to obtain and file a report. This harm is compounded by the fact

that the ALJ recently ruled that Respondents cannot subpoena documents that form the basis for a key allegation in the OIP and that this allegation "is best established by expert evidence." (*See* Order Granting in Part Respondents' Subpoena Request, dated February 24, 2014, attached hereto as Ex. C; Order Setting Prehearing Schedule, dated November 18, 2013, attached hereto as Ex. D.) The harm to Respondents caused by the Division's document dump—including the inability to file an adequate exhibit list or file an expert report—is immediate and will be irreparable absent interlocutory review and a stay of proceedings.

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

ARGUMENT

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

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

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

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

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

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

Although the Commission issued the OIP, it is unclear whether the Division fully apprised the Commission of all facts and circumstances concerning the disparate treatment of Respondents in comparison to every other similarly situated party. The obvious reasons for the

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

A. Avoidance of Federal Court Due to Track Record

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

1. SEC v. Edward Steffelin

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

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

2. **SEC v. Brian Stoker**

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

3. **SEC v. Fabrice Tourre**

The *Tourre* case was commenced when the Commission filed a complaint in the Southern District of New York on April 16, 2010; the Commission filed an amended complaint on November 22, 2010. The amended complaint alleged that the offering circular and marketing materials for a CDO, ABACUS 2007-AC1 ("Abacus"), failed to disclose that a hedge fund,

Paulson & Co. ("Paulson"), had played a significant role in the portfolio selection process undertaken by the collateral manager, ACA Management LLC ("ACA"). The amended complaint further alleged that Paulson's interests were directly adverse to investors in Abacus because Paulson shorted the portfolio it had helped select, and that neither Paulson's adverse interests nor its role in the portfolio selection process had been disclosed to investors. (*See* Amended Complaint in *Tourre* at ¶¶ 2-3, attached hereto as Ex. K.)

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

One of the allegations in *Tourre* was that Tourre defrauded ACA by leading it to believe that Paulson was an equity investor in Abacus. This allegation became a key issue at trial because the Division knew that it was not unusual for equity investors to have input into assets that went into a portfolio, and that it was not unusual for equity investors to hedge their long equity position by shorting some portion of the capital structure of the same portfolio. In fact, as the Division knew, ACA served as collateral manager on other deals with investors who were

both long and short and who had involvement in portfolio selection. In one of those deals, ACA Aquarius 2006-1 ("Aquarius"), which closed 14 days before Octans I, Magnetar bought the equity, took on warehouse risk, had the right to veto certain collateral, and shorted a higher tranche of the collateral structure as a hedge to its equity position. Magnetar's participation in that deal was not disclosed in deal documents. By way of background, in the case against Respondents, the Division alleges that Magnetar bought the equity, took on warehouse risk, had the right to veto certain collateral, and shorted a higher tranche of the collateral structure as a hedge to its equity position in Octans I.

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

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

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

(Emphasis added.)[1]

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

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

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

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

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

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

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

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

4. SEC v. Wing Chau and Harding Advisory LLC

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

B. Avoidance of Pretrial Discovery

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

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

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

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

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

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

Mr. Nigro's participation in the Division's investigation. (*See* Exs. N-P.) In or about early August 2012, an Assistant Regional Director at the Division, Steven G. Rawlings, informed counsel, via letter, that Mr. Nigro had been removed from future participation in the relevant investigative teams. (*See* Ex. M.) The letter stated, "In consultation with our ethics office, we have determined that no actual or apparent conflict of interest or bias exists that presents a basis for [Mr. Nigro's] recusal from these matters." (*Id.*) The letter stated that nonetheless, "in the interest of obviating any potential concern, we have elected to remove Mr. Nigro from the investigative teams." (*Id.*) The letter did not describe what was meant by "remov[ing] Mr. Nigro from the investigative teams," nor did it specify what level of contact Mr. Nigro was permitted to have with investigative Staff after having been removed from the teams.[4]

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

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

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

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

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

Even if bringing this enforcement action administratively did not violate Respondents' equal protection rights, it would be a separate due process violation to force Respondents to go to trial without an adjournment and other remedies necessary to ensure fundamental fairness in this 22-million document contested CDO case. Upon receipt of the investigative file, counsel worked diligently to process documents for review, so that "keyword" and "metadata" searches could be

performed to identify relevant materials. However, the sheer volume of the electronic production, combined with numerous problems with the manner of production, combined to make meaningful review impossible. The 131 separate databases included inconsistent metadata fields, rendering even the most basic forms of document searching and sorting impracticable. Weeks were spent devising the best available means of searching, locating, and reviewing documents in advance of trial, but these efforts succeeded only to the extent of fixing some discrete problems. Counsel continues to be unable to perform basic "keyword" searches across the databases, and document review and trial preparation remains severely hampered. (Declaration of John Roman in Support of the Dec. 20 Motion ("Roman Decl.") ¶¶ 25-37, attached hereto as Ex. S; Declaration of Ashley Baynham in Support of Respondents' Petition for Interlocutory Review, dated February 25, 2014 ("Baynham Decl.") ¶ 3.)

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

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

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

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

III. THIS CASE PRESENTS EXTRAORDINARY CIRCUMSTANCES MANDATING INTERLOCUTORY REVIEW.

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

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

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

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

nevertheless found it "*dispositive* that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission." Ex. A at 1 (emphasis added).

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

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

It does not appear that the Commission adopted any standards for identifying cases in which the maximum 300-day deadline for issuing an initial decision, or the approximately four-

month deadline for proceeding to trial, may be insufficient. Nor does it appear that the Commission addressed the potential for disparate treatment among similarly situated parties in highly complex cases to violate respondents' equal protection rights. Interlocutory review will allow the Commission to address these issues.

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

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

CONCLUSION

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

Dated: New York, New York
February 26, 2014

Respectfully Submitted,

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WING F. CHAU

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of **HARDING ADVISORY LLC and WING F. CHAU,** **Respondents.**	**CERTIFICATE OF COMPLIANCE**

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

New York, New York
Dated: February 26, 2014

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9561 / March 14, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3796 / March 14, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 30892 / March 14, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of HARDING ADVISORY LLC and WING F. CHAU	ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW AND EMERGENCY MOTION TO STAY THE HEARING AND PREHEARING DEADLINES

Pending before a law judge are administrative proceedings against Harding Advisory LLC, a registered investment adviser, and its principal, Wing F. Chau, who now petition the Commission for an order granting interlocutory review and staying the hearing and prehearing deadlines. The Division of Enforcement opposes respondents' petition.[1] For the reasons below, the petition is denied.

BACKGROUND

The Commission issued its Order Instituting Proceedings on October 18, 2013.[2] The order alleges that Harding and Chau violated the federal securities laws in their role as investment managers for certain collateralized debt obligation transactions ("CDOs"). As collateral manager to a CDO named Octans I CDO Ltd., Harding and Chau are alleged to have compromised their independent judgment in order to accommodate trades requested by a hedge fund firm, Magnetar Capital LLC, "whose interests were not aligned with the debt investors in

[1] Harding and Chau's petition for review is governed by the Commission's Rule of Practice 400. 17 C.F.R. § 201.400. Unlike Rule 154, which governs motions, Rule 400 does not provide for the filing of opposition or reply briefs. Therefore, once a petition is filed pursuant to Rule 400, any further filings should be made only upon request of the Commission.

[2] *Harding Advisory LLC*, Securities Act Rel. No. 9467, 2013 WL 5670841 (Oct. 18, 2013).

Octans I." According to the OIP, respondents failed to disclose to investors that Harding entered into an agreement with Magnetar and certain subsidiaries of Merrill Lynch & Co., Inc. (collectively "Merrill"), that allowed Magnetar to "exercise[] significant control over the composition of the portfolio." Harding and Chau also allegedly breached their obligations as collateral manager "by purchasing, for inclusion in several other CDOs managed by Harding, tens of millions of dollars' worth of notes from a troubled Magnetar-related CDO underwritten by Merrill." The OIP alleges that Harding and Chau breached these obligations "because they wanted fees that could be earned only if Magnetar agreed to close the Octans I transaction, and because they were seeking to please Merrill and Magnetar."

The law judge set a hearing for March 31, 2014. On December 20, 2013, Harding and Chau moved the law judge for an order (i) extending time and granting a six-month adjournment; (ii) providing that the proceedings would be governed by certain Federal Rules of Civil Procedure pertaining to discovery and pretrial motions; and (iii) requiring the Division to "provide any tags, labels, file folders or other means of keeping materials into which the Division has organized" relevant documents. In support, respondents claimed that the Division had produced an investigative file containing more than 11.5 terabytes of data, which, "in printed form, would exceed the entire printed Library of Congress." Respondents further asserted that the data was provided in a format that "render[ed] even the most basic forms of document searching and sorting impracticable." Because of this, respondents claimed, they were unable to adequately prepare in time for the hearing. In the event that the law judge denied any aspect of their requested relief, respondents also requested that he certify that denial for interlocutory review pursuant to Rule of Practice 400(c).[3]

The law judge denied respondents' motion on January 24, 2014. Although he was "sympathetic to Respondents' situation," the law judge concluded that respondents' desire for extra time did not outweigh the "policy of strongly disfavoring" adjournments enunciated in Rule of Practice 161(b)(1).[4] In doing so, the law judge found "it dispositive that a six-month adjournment will make it impossible for me to complete the proceeding within the [300 days] specified by the Commission" pursuant to Rule 360(a)(2).[5] He considered the difficulties that respondents claimed they would have in adequately examining the Division's document production before the hearing, but concluded that, while "there may one day be an administrative proceeding where the difficulties of preparing for [a] hearing within the time specified by Rule 360(a) are found to warrant some of the extraordinary relief Respondents request . . . this is not

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[3] 17 C.F.R. § 201.400(c) (setting forth criteria that the hearing officer must satisfy before certifying a ruling for interlocutory review).

[4] *Id.* § 201.161(b)(1) (stating that the hearing officer "should adhere to a policy of strongly disfavoring" requests for adjournments or extensions).

[5] *See id.* § 201.360(a)(2) (stating that the Commission "will specify a time period in which the hearing officer's initial decision must be filed with the Secretary . . . [i]n the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors").

that proceeding." The law judge also rejected respondents' other requests by observing that the Federal Rules of Civil Procedure did not apply in administrative proceedings and that the Division's "open file" production satisfied its disclosure obligations.[6] The law judge also denied respondents' request for certification of his decision for interlocutory review, finding that "[t]he 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."

Three weeks later, on February 14, 2014, Harding and Chau filed an emergency motion seeking reconsideration of the law judge's order or, in the alternative, a stay of the proceedings pending their petition for interlocutory review. Respondents' motion asserted, for the first time, that denying their requested relief would violate their constitutional rights to equal protection and due process. They argued, for example, that the Division was attempting to put respondents at a disadvantage by bringing the present case as an administrative proceeding, instead of bringing a federal district court action, as the Division had done in three previous contested CDO cases. Respondents also argued that the Division's investigation was biased because it had been staffed with a Senior Structured Products Specialist who, respondents allege, had a deep-seated bias against Chau and Harding and a personal stake in the investigation's results because the specialist had "joined the [Division] shortly after having served as ABS portfolio manager for a CDO hedge fund that (i) invested in and lost $10 million in Octans I, and (ii) fired him shortly after losing a client based on a negative evaluation that an affiliate of Harding performed with respect to investments [the specialist] had recommended."

The law judge denied Harding and Chau's motion for reconsideration on February 19, 2014. He concluded that, because most of respondents' arguments "pertain to issues they did not present in the Motion for Adjournment, . . . there is nothing for me to 'reconsider.'" The law judge also found that respondents had not identified any decision or data that the law judge had overlooked that would warrant reconsideration of his original decision and that their new arguments were not appropriate for review in a motion for reconsideration. Nevertheless, the law judge briefly addressed the merits of respondents' new arguments, observing that due process did not entitle respondents to a neutral prosecutor in administrative proceedings[7] and that, in any event, the Commission's decision to institute proceedings was "wholly unaffected by any

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[6] *Harding Advisory LLC*, Admin. Proc. Rulings Rel. No. 1195, 2014 SEC LEXIS 280, at *5–6 (Jan. 24, 2014) (citing *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Rel. No. 69208, 2013 WL 6384275, at *6 (Dec. 6, 2013) (denying request for interlocutory review of respondents' complaint that the Division had not identified certain exculpatory materials or "at the very least" provided a "roadmap" for those documents, and observing that the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings)).

[7] *Harding Advisory LLC*, Admin. Proc. Rulings Rel. No. 1252, 2014 SEC LEXIS 606, at *4 (Feb. 19, 2014) (citing *Jean-Paul Bolduc*, Exchange Act Rel. No. 43884, 54 SEC 1195, 2001 WL 59123, at *4 (Jan. 25, 2001) ("Due process does not require a neutral prosecutor.")).

possible bias" by its staff.[8] The law judge also rejected respondents' argument that the Division had treated them differently from other similarly situated CDO defendants by concluding that such "class of one" claims are unavailable in federal civil enforcement proceedings.[9]

On February 27, 2014, Harding and Chau filed with the Commission the instant petition for interlocutory review and an emergency stay of the hearing and prehearing deadlines. Although respondents requested only that the law judge certify the order denying their initial December motion for adjournment, the instant petition for interlocutory review largely focuses on the constitutional arguments Harding and Chau made for the first time in their February motion for reconsideration, the denial of which respondents did *not* ask the law judge to certify for interlocutory review.

ANALYSIS

A. Respondents' petition for interlocutory review was not certified by the law judge.

Commission Rule of Practice 400(a) provides that "'[p]etitions by parties for interlocutory review are disfavored'" and will be granted by the Commission "'only in extraordinary circumstances.'"[10] Furthermore, the "Commission generally does not consider petitions for interlocutory review where," as here, "the law judge has 'declined to certify [the] petition for interlocutory review.'"[11] In this case, the law judge declined to certify his January order denying

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[8] *Id.* at *4–5 (*citing C.E. Carlson, Inc.*, Exchange Act Rel. No. 23610, 48 SEC 564, 1986 WL 72650, at *4 (Sept. 11, 1986) (stating that, "[e]ven assuming that our staff was motivated by bias," respondents "must not only show that these proceedings were instituted because they engaged in constitutionally protected activities, but also that they were singled out from others who were allowed to commit similar violations with impunity"), *aff'd*, 859 F.2d 1429 (10th Cir. 1988)).

[9] *Id.* at *5 (citing *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 808 (S.D. Ohio 2003) (finding no precedent to support defendants' claim that being "singled out" by an administrative agency violated their equal protection rights "without [a defendant] also claiming membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights")).

[10] *Warren Lammert*, Exchange Act Rel. No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting 17 C.F.R. § 201.400(a)). In adopting this language, the Commission "ma[d]e clear that petitions for interlocutory review . . . rarely will be granted." *Id.* (quoting *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Rel. No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)).

[11] *Eric David Wagner*, Exchange Act Rel. No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co., Inc.*, Investment Advisers Act Rel. No. 3311, 2011 WL 5434023, at *2 (Nov. 9, 2011)); *accord* 17 C.F.R. § 201.400(c) (stating that any ruling that a

(continued . . .)

respondents' request for postponement and other procedural relief, and respondents did not request certification of the law judge's February order denying respondents' request for reconsideration, in which most of respondents' constitutional arguments now before the Commission were first made. These failures to seek or obtain certification are basis enough for the Commission to deny Harding and Chau's petition for interlocutory review.[12]

As for the January ruling for which respondents did seek certification, the law judge's decision not to certify was consistent with the applicable standard for certification. Rule 400(c) states that a law judge "shall not certify a ruling unless," among other things, "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) An immediate review of the order may materially advance the completion of the proceeding."[13] A central issue that respondents asked the law judge to certify, and now continue to press in their petition to the Commission, is whether, on the facts of this case, the law judge abused his discretion in denying their requests for a six-month adjournment and other procedural accommodations. In rejecting respondents' argument that the extraordinary relief they were seeking was warranted in light of claimed impediments to their reviewing the investigative file before the hearing, the law judge assessed the relevant facts in light of established legal standards regarding extensions of time and adjournments, the applicability of the Federal Rules of Civil Procedure to administrative proceedings, and the method by which the Division must produce investigative files. The law judge's fact-bound, discretionary procedural rulings did not involve controlling questions of law and an immediate review would not materially advance the completion of the proceeding; rather, the rulings all presented the law judge with plainly "mixed [questions] of law and fact" that were inappropriate for certification.[14]

(...continued)
party "submit[s] to the Commission for interlocutory review *must* be certified in writing" by the law judge as satisfying certain criteria (emphasis added)).

[12] *See, e.g., John Thomas Capital Mgmt. Group LLC*, Exchange Act Rel. No. 71415, 2014 WL 294551, at *1 (Jan. 28, 2014) (denying petition for interlocutory review where respondents had not obtained certification from the law judge); *Vincent Poliseno*, Exchange Act Rel. No. 38770, 1997 WL 346154, at *1 (June 25, 1997) (denying petition for interlocutory review where the law judge did not certify his ruling). Even when a law judge certifies a petition for interlocutory review, the Commission will grant such petitions "only in extraordinary circumstances." 17 C.F.R. § 201.400(a).

[13] 17 C.F.R. § 201.400(c).

[14] *Montford & Co.*, 2011 WL 5434023, at *2; *accord Century Pac. Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 371 (S.D.N.Y. 2008) (finding that a "'question of law' certified for interlocutory appeal 'must refer to a "pure" question of law that the reviewing court 'could decide quickly and cleanly without having to study the record.'" (quoting *In re WorldCom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. 2003))); *SEC v. First Jersey Sec.*, 587 F. Supp. 535, 536 (S.D.N.Y. 1984) (holding that, although "an immediate interlocutory appeal would advance the ultimate termination of this litigation," an appeal "would necessarily present a mixed
(continued . . .)

B. Respondents' requests for an extension of time and other procedural relief do not warrant directing interlocutory review on the Commission's own motion.

The Commission may also direct interlocutory review on its own motion, but we see no basis for the Commission to do so here.[15] As the Commission has stated, "the Commission's emphatic preference—which embodies the 'general rule' disfavoring piecemeal, interlocutory appeals—is that 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.'"[16] That a party "may disagree with the law judge's determination" does not make a ruling appropriate for interlocutory review.[17]

Harding and Chau argue that this case nevertheless presents the type of "extraordinary circumstances" that warrant immediate review. In support, they cite *Clarke T. Blizzard*, in which the Commission granted interlocutory review to consider the "serious potential for prejudice to the integrity of the proceeding" if the Commission were to allow the same counsel to represent both the respondent and witnesses that could be called against him.[18] Harding and Chau's arguments about obtaining various procedural relief do not provide similarly extraordinary circumstances warranting interlocutory review.

The Commission's Rules of Practice grant law judges broad authority to "regulate the proceeding."[19] Because of this, the Commission typically defers to the law judge's management of the proceedings, including decisions about whether to postpone those proceedings. As the Commission has observed, a decision not to postpone the proceedings "is one of several that the hearing officer must make as part of his regulation of the course of the proceeding and, absent

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(...continued)
question of law and fact, not a controlling issue of pure law," and the district court's order was therefore "not appropriate for certification"); *City of Anaheim*, Exchange Act Rel. No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999) (denying petition for interlocutory appeal of certified ruling because the ruling did not involve a "question of law that controls the outcome").

[15] The "discretion to grant interlocutory review" exists even when the law judge has declined to certify the ruling in question. *Wagner*, 2012 WL 1037682, at *2; *see also City of Anaheim*, 1999 WL 1034489, at *1 n.3 (explaining that Rule 400 "in no way limits the Commission's discretion to direct that matters be submitted to it"); 17 C.F.R. § 201.400(a) (stating that the Commission may "at any time, on its own motion, direct that any matter be submitted to it for review"); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, 2004 WL 503739, at *12 ("[T]he Commission retains discretion to undertake such [interlocutory] review on its own motion at any time.").

[16] *John Thomas Capital*, 2013 WL 6384275, at *2 (footnotes omitted).

[17] *Montford & Co.*, 2011 WL 5434023, at *3.

[18] Advisers Act Rel. No. 2032, 2002 WL 714444, at *2 (Apr. 24, 2002).

[19] 17 C.F.R. § 201.111(d).

extraordinary circumstances, should not be immediately appealable to the Commission."[20] Post-initial decision review of such procedural decisions, along with other aspects of the law judge's handling of the case, are therefore generally sufficient to protect a party's rights.[21] The Commission has thus emphasized that interlocutory review is rarely appropriate for "pre-trial discovery orders" and that "complaints about production of documents" will not ordinarily "warrant . . . interference with the orderly hearing process."[22]

In particular, the Commission has declined to review uncertified rulings in cases where, as here, the respondent claimed that he would be deprived of due process if forced to go forward with the hearing given the "voluminous investigatory files" produced by the Division.[23] The Commission has similarly declined to grant interlocutory review of complaints that the Division did not identify exculpatory material or otherwise provide some type of "roadmap" for the produced material.[24] Harding and Chau contend that interlocutory review of their request for procedural relief would nevertheless materially advance completion of the proceeding; but based on the record before us, the law judge appears to have been reasonably managing these proceedings.[25] To grant review of his pre-hearing decisions at this point is likely to only delay

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[20] *Gregory M. Dearlove*, Exchange Act Rel. No. 12064, 58 SEC 1077, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006) (denying petition for interlocutory review).

[21] *See, e.g.*, *Kevin Hall, CPA*, Exchange Act Rel. No. 55987, 2007 WL 1892136, at *1–2 (June 29, 2007) (denying petition for interlocutory review of law judge's decision not to postpone the proceeding where the Division was alleged to have been "tardy" in producing its investigative file); *Dearlove*, 2006 SEC LEXIS 3191, at *6 (stating that law judge's decision not to postpone the proceedings "will be subject to review, along with other aspects of the law judge's handling of the case, after issuance by the law judge of an initial decision"); *cf. Lammert*, 2007 WL 2296106, at *7 (denying petition for interlocutory review where respondents alleged that the Division failed to "preserve crucial evidence").

[22] *Michael Sassano*, Exchange Act Rel. No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007) (quotation marks omitted) (declining to review uncertified discovery ruling).

[23] *Dearlove*, 2006 SEC LEXIS 3191, at *6; *see also Hall*, 2007 WL 1892136, at *2 (declining to review law judge's decision not to postpone the proceeding and noting that the Rules of Practice grant law judges "broad authority" to regulate proceedings).

[24] *John Thomas Capital*, 2013 WL 6384275, at *6 (stating that the Federal Rules of Civil Procedure do not apply in administrative proceedings and rejecting respondents' contention that the Division must specifically identify certain materials within a production or otherwise provide a "roadmap" for those documents).

[25] Respondents argue that the law judge erred as a matter of law by finding it to be "*dispositive* that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission" (emphasis added). Respondents contend that, by using this language, the law judge signaled that he had failed to properly consider each of the factors governing requests for postponement because he believed that he "lack[ed] authority to rule otherwise." That interpretation of the law judge's order ignores that his order does, in fact, weigh

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the proceedings further. And if, *arguendo*, the law judge's refusal to grant respondents their requested procedural relief is incorrect, the denial of that relief can "'be effectively reviewed post-judgment'" by vacatur and remand.[26]

C. Respondents' equal protection and due process arguments do not warrant directing interlocutory review on the Commission's own motion.

Our precedent declining to grant interlocutory review where the law judge has not certified the ruling necessarily counsels against granting interlocutory review of rulings that a respondent does not even ask the law judge to certify. This impediment to interlocutory review applies to respondents' equal protection and due process arguments, which they raised for the first time in their motion for reconsideration, the denial of which they did not ask the law judge to certify. Nor have Harding and Chau identified any extraordinary circumstances surrounding those claims that would warrant the Commission interrupting the normal administrative hearing process on its own motion to call this matter up for interlocutory review.

1. Respondents' alleged constitutional injuries could be remedied in any subsequent appeal to the Commission.

Courts and the Commission have long held that parties are not entitled to an interlocutory appeal merely because their claims are premised on a constitutional right or guarantee.[27] That

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the various factors for postponement; considers the alleged impediments to respondents' ability to adequately review the Division's document production before the hearing; and expressly notes that there might be some case that would "warrant some of the extraordinary relief Respondents request," but ultimately concludes that "this is not that proceeding." In their briefs to the Commission, the parties continue to engage in various factual disputes about respondents' ability to adequately prepare for the hearing, but respondents have not shown why those disputes cannot be resolved or, if necessary, remedied at that yet-to-be-held hearing or any subsequent Commission review.

[26] *Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7 (quoting *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004)); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (determining that, even though a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal," that possibility "has never sufficed" to warrant immediate interlocutory review (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994))); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of "[o]rders relating to discovery matters . . . must usually wait until a final judgment is entered").

[27] *E.g.*, *Flanagan v. United States*, 465 U.S. 259, 266–67 (1984) (holding that a claim "based on the Due Process Clause of the Fifth Amendment" was not subject to interlocutory appeal); *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010) (stating that "Fourth or Sixth Amendment violations . . . have long been held unamenable to interlocutory appellate review");
(continued . . .)

Harding and Chau couch their requests for procedural relief as implicating equal protection and due process rights thus does not in itself change the analysis about whether to call this matter for interlocutory review. The issue remains whether any extraordinary circumstances exist that would lead the Commission to conclude that respondents will suffer irreparable harm if resolution of their claims is delayed until the end of these proceedings. Respondents have identified no such harm here, nor can we find any, that could not be remedied post-hearing by vacatur and remand.[28]

Respondents make the vague, unsubstantiated claim that, without granting their requested relief, "the Commission will be unable effectively to address the equal protection violations." To the contrary, Commission precedent described herein makes clear that respondents' claims can be effectively handled by the Commission post-hearing. Respondents are "entitled to make a good-faith argument for a change in the law," but are "obligated to acknowledge that they were doing just that and to deal candidly with the obvious authority that is contrary to [their] position."[29] Here, respondents have failed to address, much less establish, a reason for departing from the Commission precedent discussed herein.

2. Respondents' constitutional claims are facially defective.

Respondents' failure to seek and obtain certification and to show a need for immediate review of their constitutional claims leads us to conclude that there is no basis for the Commission to grant interlocutory review. We also observe that respondents have not made even a colorable showing of the violations they allege. Respondents, for example, identify no evidence to support their allegations that, by bringing this case as an administrative proceeding, the Division intentionally deprived them of procedural safeguards afforded to similarly situated persons, thus violating their equal protection rights. In their petition, Harding and Chau allege that, in recommending that this case be brought as an administrative proceeding, the Division failed to inform the Commission (i) that the Division intended to prevent respondents "from preparing a defense by burying them in documents"; (ii) that the Division investigation "was tainted by a conflict of interest"; (iii) that the Division's position in this case "flatly contradict[ed] positions that the Commission had taken in *SEC v. Torre*"; or (iv) that bringing this case administratively would subject respondents to unequal treatment.

Respondents' speculations in this regard are based solely on the Division's brief in opposition to the present petition for interlocutory review, which states that "the Commission

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Dearlove, 2006 SEC LEXIS 3191, at *5 (denying interlocutory review notwithstanding respondent's argument that the "matter at hand presents extraordinary circumstances with due process implications").

[28] *See also supra* notes 23–26 and accompanying text.

[29] *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012); *see also* 17 C.F.R. § 201.153(b)(1)(ii) (setting forth effect of party's or counsel's signature on papers).

presumably considered the complexity of this case when it set a 300-day deadline for issuance of the initial decision." Respondents interpret the use of the word "presumably" as implying that the Division failed to inform the Commission of the Division's allegedly improper reasons for bringing this matter as an administrative proceeding. But the Division's vague wording in a brief is not evidence of the Division's communications with the Commission. Respondents do not know what the Division told the Commission in recommending that these proceedings be brought, and the Division cannot know all the factors the Commission considered when it made its decision to institute these proceedings.

In fact, respondents' allegations "ignore[] the independence of the Commission's decision-making process."[30] As Harding and Chau themselves acknowledge, the *Commission*, not the Division, authorized and instituted these proceedings based on its "own consultations, deliberations and conclusions with respect to [the Division's] recommendations."[31] Harding and Chau's failure to appreciate the independence of the Commission's decision-making process appears to be based on their misperception of the Division's role in these proceedings. As participants in the investigative process, Harding and Chau "[we]re not entitled to an uncritical or even a neutral Division assessment of their asserted defenses."[32] Instead, the Division's fact-finding investigation into respondents' conduct fell "squarely within the scope of the prosecutorial discretion that it routinely exercises in conducting multi-party investigations, and it is well established that such investigations do not trigger 'the full panoply' of safeguards that are required during an adjudication."[33]

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[30] *Kevin Hall, CPA*, Exchange Act Rel. No. 61162, 2009 WL 4809215, at *22 (Dec. 14, 2009) (rejecting respondents' claim that the Division's allegedly biased investigation tainted the Commission's decision to institute proceedings).

[31] *Edward H. Kohn*, Freedom of Information Act Rel. No. 19, 1975 SEC LEXIS 1217, at *2 (July 15, 1975); *accord* 17 C.F.R. § 202.5(b) ("After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution.").

[32] *Hall*, 2009 WL 4809215, at *22 (citing *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980) (stating that the neutrality requirements "designed for officials performing judicial or quasi-judicial functions . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity")); *accord SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744–45 (1984) (recognizing the propriety of affording Commission staff "considerable discretion in determining when and how to investigate possible statutory violations").

[33] *Hall*, 2009 WL 4809215, at *22 (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (holding that, for purposes of due process, it is not necessary for a general fact-finding investigation to use the "full panoply of judicial procedures")).

Particularly unavailing is respondents' allegation that the Division's investigation was infected by a subordinate staff member who allegedly had "a deep-seated bias against Mr. Chau and Harding and a personal stake in the investigation's results." As noted earlier, Harding and Chau claim that this staff member "infected the integrity" of the Division's investigation, "up to and including" the Division's recommendation to the Commission about these proceedings. But respondents have no support for this assertion other than to speculate that the Commission's decision to bring this case as an administrative proceeding was somehow influenced by a specialist who was removed from the investigation more than a year before the OIP was issued.[34] Moreover, as part of the administrative process, respondents made certain "Wells" submissions, in which they could set forth their defenses and any other information they believed pertinent for the Commission to review during its deliberations.[35] Harding and Chau thus had an opportunity to present arguments to the Commission concerning the institution of these administrative proceedings.[36] But respondents have not identified any claims that they were prevented from including in those submissions, and interlocutory review is not meant to provide respondents with a second bite at the Wells process.[37]

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[34] In a letter dated August 2, 2012, the Division represented to respondents' counsel that the allegedly biased staff member joined the Commission's staff in mid-February 2012 and had since been removed from the investigative team. The Division also informed respondents' counsel that, "[i]n the event that we reconsider this decision . . . [to remove the staff member from the investigation], we will advise you before consulting [that staff member] on matters relating to these investigations so that you have an opportunity to provide us with any additional information relevant to potential conflicts that you deem appropriate."

[35] Title 17, Part 202 of the Code of Federal Regulations provides that persons involved in preliminary or formal Commission investigations may request that the Division inform them of the general nature of the investigation and "may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation." 17 C.F.R. § 202.5(c). The Division forwards such submissions to the Commission if it recommends that the Commission commence an enforcement proceeding. *Id.* This is commonly known as the "Wells" process. *See generally Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations*, Exchange Act Rel. No. 9796, 1972 WL 128568 (Sept. 27, 1972).

[36] Indeed, the Division represented in its opposition to respondents' December 20 motion that, "[i]n February 2012 and during the first half of 2013, [respondents' counsel] made four separate [Wells and "white-paper"] submissions comprising 112 pages of argument and analysis with a total of 251 exhibits, plus a 32-page PowerPoint presentation."

[37] *Cf. United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270 (1982) (holding in a criminal case that the denial of a motion to dismiss based on vindictive prosecution was not immediately appealable, stating that the right to be free from prosecutorial vindictiveness "is simply not one that must be upheld prior to trial if it is to be enjoyed at all").

In making their equal protection arguments, Harding and Chau also oversimplify the Commission's choice of forum for this CDO enforcement action. Respondents claim they are being treated differently than similarly situated parties by comparing the facts and legal theories of their case to three previous CDO cases, noting that, of those cases, the Division withdrew all of its charges and consented to dismissal of its complaint in one case;[38] a jury found against the Division on all of its charges in a second case;[39] and the Division won at trial in a third case.[40] While these cases may share some similarities, there are notable differences, including that two of the three district court cases involved allegations against parties who, unlike Harding, were not registered investment advisers.[41] And regarding the third case, respondents themselves spend a significant portion of their petition distinguishing the facts and legal theories in that matter from their own case.

Simply put, the Commission takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings. And respondents' superficial comparisons to a few other proceedings fall short of establishing a colorable equal protection violation, let alone a violation that, if established, would be irremediable absent interlocutory review.[42] Instead, respondents' references to those other cases appear, at their core, to be more about the evidence and theories of liability. Such questions were not meant to be resolved by the Commission's decision to institute proceedings or through a petition for

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[38] *SEC v. Steffelin*, No. 11-CV-4204-MGC (Nov. 11, 2012 S.D.N.Y) (stipulation of dismissal with prejudice).

[39] *SEC v. Brian Stoker*, No. 11-Civ.-7399-JSR (Aug. 3, 2012 S.D.N.Y) (judgment dismissing complaint based on jury verdict in favor of defendant).

[40] *SEC v. Tourre*, 10-CIV-3229-KBF (S.D.N.Y. Aug. 1, 2013) (entry of jury verdict).

[41] *See Stoker*, No. 11-Civ.-7399-JSR (S.D.N.Y Oct. 19, 2011) (Complaint); *Steffelin*, No. 11-CV-4204-MGC (S.D.N.Y. June 21, 2011) (Complaint).

[42] *Compare Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. July 11, 2011) (declining to dismiss complaint alleging an equal protection violation where there existed "a well-developed public record of Gupta being treated substantially disparately from *28 essentially identical* defendants" (emphasis added) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–66 (2000) (per curiam) (holding that a "successful equal protection claims [may be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment")) *with Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 603 (2008) (limiting *Village of Willowbrook* by holding that "[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking [and] . . . [i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise").

interlocutory review. They instead form the very basis for holding the hearing authorized by the OIP.[43]

Respondents similarly fail to establish that it would be a separate due process "violation to force Respondents to go to trial without an adjournment and other remedies necessary to ensure fundamental fairness in this 22-million document contested CDO case." Such broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts.[44] As the Supreme Court has explained, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[45] And, as noted above, it appears from the record here that respondents are being afforded a meaningful opportunity to be heard.[46]

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[43] *Cf. Hall*, 2009 WL 4809215, at *22 (stating that disagreements about the evidence "are best left to be resolved at the hearing authorized by the OIP" (citing *Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations*, 1972 WL 128568, at *2 (noting that disputes about facts underlying the institution of proceedings "likely . . . can be resolved in an orderly manner only through litigation"))); *accord Withrow v. Larkin*, 421 U.S. 35, 57–58 (1975) (recognizing the "different bases and purposes" for a charging decision and a subsequent adjudication and stating that "there is no incompatibility between [an] agency filing a complaint based on probable cause and a subsequent decision . . . that there has been no violation").

[44] *See, e.g., Blinder, Robinson, & Co., Inc. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988) (rejecting petitioners' due process attack against the Commission's decision to bring administrative proceedings by noting that the initiating of such procedures was "expressly ordained by Congress" and that "to accept petitioners' broadside would do violence to the core value of flexibility (coupled with appropriate procedural protections) that has been the hallmark of the modern administrative process").

[45] *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[46] Respondents also assert, without further explanation, that the institution of administrative proceedings has deprived them of their Seventh Amendment right to a jury trial, but "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977).

Accordingly, it is ORDERED that Harding and Chau's petition for interlocutory review and emergency stay is denied. For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Lynn M. Powalski
Deputy Secretary

Release No. 403 (S.E.C. Release No.), Release No. APR - 403, 55 S.E.C. Docket 2477, 1994 WL 23256

S.E.C. Release No.
Administrative Proceedings Rulings

IN THE MATTER OF JEFFREY L. FELDMAN

Administrative Proceeding File No. 3-8063
January 14, 1994

RULING ON MOTION

*1 There are several matters that remain unresolved after the conference call on August 12.

I.

Respondent's Motion for Summary Judgment (styled Cross Motion for Summary Judgment Dismissing the Administrative Proceeding) dated July 23 contains an affidavit by counsel making factual and legal assertions and two exhibits: copies of a Foreign Bearer Certificate, and a letter to the Commission and notes by Mr. Saeed Akhtar, Senior Executive Vice President of the National Bank of Pakistan. The Division of Enforcement (Division) also filed a Motion for Summary Judgment dated August 6 with an appendix containing many exhibits from Respondent's investigative testimony, portions of the investigative testimony and documents from Respondent's files. The Division filed in opposition to Respondent's Motion on August 6, and Respondent filed in opposition to the Division's motion on September 1.

With respect to the Motions for Summary Judgment, under Rule 11 of the Commission's Rules of Practice the first opportunity I have to rule on a motion which would dispose of a proceeding is at the conclusion of the Division's direct case (17 C.F.R. 201.11(e)). In this situation where the parties have not entered a factual stipulation and there are material issues of fact to be resolved, I have no authority to rule on the motions at this stage of the proceeding.

II.

Respondent's answer contained eight affirmative defenses and a counterclaim which demands an order holding the Commission liable for damages to Respondent by this allegedly meritless proceeding. On July 14, the Division moved to strike all but the first of Respondent's defenses and to dismiss his counterclaim. In his filing which I received July 30, Respondent withdrew his fourth defense.

Judge Regensteiner in an Order in Kingsley, Jennison, McNulty & Morse, Inc., Administrative Proceeding No. 3-7446 (April 9, 1991) stated:

> Under the Commission's Rules of Practice, an answer need only respond to the allegations in the order for proceedings (Rule 7(c)). Unlike the Federal Rules of Civil Procedure, which require the pleading of affirmative defenses, the Commission's Rules make no provision for such pleading, either as a requirement or permissively. On the other hand, there is nothing in those Rules that prohibits such pleading as part of an answer. Indeed, a respondent's pleading of an affirmative defense can be useful in giving the Division as well as the administrative law judge notice in advance of the hearing that the respondent may seek to introduce evidence bearing on that defense. If, however, an affirmative defense would not constitute a valid defense under any facts proved, so that evidence in support would be irrelevant, a motion to strike the defense should be granted so as to avoid unnecessary argument and delay once the hearing begins.

*2 I rule as follows on the Division's Motion to Strike the defenses in Respondent's Answer:

I strike Respondent's second Defense that the offer and sale of Foreign Exchange Bearer Certificates did not involve securities requiring registration with the Commission. An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it (Black's Law Dictionary, 5th ed. 1979). Respondent's statement that the certificates did not require registration is not an affirmative defense.

I strike Respondent's third defense because the Division is correct that proof of damages is not required to establish a prima facie case for a Section 5 violation. Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680, 686 (5th Cir.1971)

I grant the motion to strike Respondent's fifth defense which is that he never intended to violate any law, never aided or abetted any other person or entity to violate any law and did not recklessly disregard the law because again these are not affirmative defenses.

I strike Respondent's sixth defense. Whether the banks made full disclosure to purchasers is irrelevant to whether or not the securities should have been registered.

I strike Respondent's seventh defense which is that the allegations are baseless and that the Commission has perpetrated an abuse of process by bringing this action against him. The Commission's reasons for initiating the proceeding are beyond the purview of this proceeding. Absent compelling allegations which are accompanied by supporting materials, I will not exercise whatever authority I have to entertain such charges.

I strike Respondent's eighth defense that the action violates the statute of limitations. The Commission's ability to litigate to protect investors is not subject to a time limitation. United States v. Summerlin, 310 U.S. 414, 416 (1940).

The Commission's Rules of Practice do not provide for a counterclaim. In addition, consideration of the Equal Access to Justice Act, which is the only statute of which I am aware that provides the kind of relief Respondent seeks, is untimely. I therefore grant the Division's motion and dismiss the counterclaim.

III.

In making future filings, it would be helpful if Respondent followed the Commission's Rules of Practice, 17 C.F.R. 201, rather than the Federal Rules of Civil Procedure.

Brenda P. Murray
Administrative Law Judge

Release No. 403 (S.E.C. Release No.), Release No. APR - 403, 55 S.E.C. Docket 2477, 1994 WL 23256

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