



specific reason for disqualification. Schweiker, 456 U.S. at 195-96; see also SEC v. First City Fin. Corp., 890 F.2d 1215, 1222 (D.C. Cir. 1989) (allegations of bias must show that the “judge’s mind was ‘irrevocably closed’ on the issue”).

Respondents have not even attempted to make such a showing here; they identify no conflict of interest or other “specific reason” that ALJ Elliot was incapable of presiding fairly and impartially over the proceeding below. See Schweiker, 456 U.S. at 195-96. Rather, they simply speculate that statements by a former Commission ALJ—who served at the Commission from 1995 to 2006,<sup>2</sup> and whose comments are necessarily confined to that period—bear on an administrative proceeding initiated years later and tried before ALJ Elliot. But such speculation “amount[s] to nothing more than a fishing expedition” and does not warrant further discovery. Bastin v. Fed. Nat’l Mortgage Ass’n, 104 F.3d 1392, 1396 (D.C. Cir. 1997).

Moreover, the Commission’s independent review of the record renders it unnecessary for Respondents to adduce additional evidence about the ALJ who presided below (or Commission ALJs, generally). Indeed, the Administrative Procedure Act specifically contemplates that upon disqualification of an ALJ for bias or any other reason, the appropriate remedy is that “the agency” consider the record and issue a “decision in the case.” 5 U.S.C. § 556(b). And the Commission has consistently found that its *de novo* review on appeal adequately addresses any claims that the presiding ALJ was biased. In re Thomas C. Bridge, SEC Release No. 9068, 2009 WL 3100582, at \*18 n. 77 (Sept. 29, 2009) (Commission “review of this matter dissipates the possibility of bias” by the ALJ); In re Monetta Financial Services, Inc., SEC Release No. 2136, 2003 WL 21310330, at \*8 n. 55 (Jun 9, 2003) (same); In re Robert D. Potts, SEC Release No. 39126, 1997 WL 690519, at \* 11 (Sept. 24, 1997) (same).

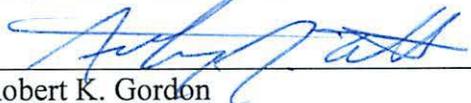
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<sup>2</sup> “Administrative Law Judge Lillian McEwen to Retire from SEC,” Release No. 2006-221 (Dec. 28, 2006).

Finally, certain information sought by Respondents is publicly available. For example, information about ALJ compensation is governed by 5 U.S.C. § 5372 and 5 C.F.R. §§ 930.205, 930.206. See also <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/> (ALJ pay system) and <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2015/executive-senior-level/> (salary data for ALJs effective January 2015). And information about ALJ performance evaluations is governed by 5 C.F.R. § 930.206 (prohibiting “[a]n agency” from “rat[ing] the job performance of an administrative law judge”). See also 5 U.S.C. § 7521 (addressing actions against ALJs seeking reductions in pay); 5 C.F.R. § 930.211(a) (same).<sup>3</sup>

This 28th day of May, 2015.

Respectfully submitted,



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<sup>3</sup> Should the Commission nevertheless find further briefing on Respondents’ motion warranted, the Division requests that it be afforded the opportunity to assert specific objections to Respondents’ discovery requests.

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing document by electronic mail and by UPS overnight mail this day addressed as follows:

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