

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

In the Matter of

HARDING ADVISORY LLC and

WING F. CHAU,

Respondents.

Administrative Proceeding

File No. 3-15574



**RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR SUPPLEMENTAL
BRIEFING REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS**

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Respondents respectfully submit this Reply Brief in Support of Their Supplemental Briefing Regarding Their Appointments Clause Claims.

In their October 23, 2015 brief, Respondents argued that the Division of Enforcement had erred when it told the Commission that Congress did not intend SEC ALJs to be Constitutional officers. Respondents also argued that the errors in the Division's arguments have infected Commission decisions on the relevant issues and have found their way into Commission briefing in federal courts, including the Second and Eleventh Circuit Courts of Appeal.¹

For example, the Division argued to the Commission that there was “*no indication that Congress intended ‘officers’ or ‘hearing officers’ to be synonymous with ‘Officers of the United States’*” when it commanded that hearings must be held by the Commission, one of the Commissioners, or an officer or officers designated by the Commission. (Div. Memorandum of Law in Response to the Commission's May 27, 2015 Order Requesting Suppl. Br. at 4 & n.3, *In re Timbervest*, No. 3-15519 (July 1, 2015).) As the Respondents showed in their October 23 brief, however, the legislative history of the Securities Act and the Exchange Act makes plain that Congress used the word officer deliberately after significant debate about both the magnitude of the powers it was delegating and the qualifications and status of the persons who would exercise these powers.

Similarly, the Division argued that references to “presiding employees” in the APA, as well as the definition of the term “officer” under the APA displayed Congressional intent that SEC ALJs were to be mere employees of the Commission. In response, the Respondents were able to show that when Congress replaced the words “presiding officers” with the words

¹ See Opinion of the Commission at 28-33, *In re Raymond J. Lucia Companies*, No. 3-15006 (Sept. 3, 2015); Opinion of the Commission at 41-46, *In re Timbervest*, No. 3-15519 (Sept. 17, 2015); Opinion of the Commission at 28-33, *In re Bandimere*, No. 3-15124 (Oct. 29, 2015); Defendant-Appellant Reply Br. at 17-24, *Gray v. SEC*, No. 15-13738 (11th Cir. Oct. 13, 2015); Defendant-Appellant Opening Br. at 30-39, *Duka v. SEC*, No. 15-2732 (2d Cir. Oct. 21, 2015).

“presiding employees” in the relevant sections of the APA, it stated explicitly that the change was not substantive and was made in light of the APA’s definition of “employees,” which subsumes Constitutional officers, including Cabinet Secretaries. Indeed, Respondents were able to show that SEC ALJs fit the APA’s definition of employees only because officers are included within the scope of that definition and SEC ALJs fit within the definition of officers. Finally, the Respondents were able to show that legislative history of the APA supports this conclusion because Congress left the appointment of ALJs to each individual agency precisely because Congress wanted to make sure that their appointments comported with the Appointments Clause of Article II of the Constitution.

In addition to quoting relevant statutory provisions, Respondents supported their arguments with quotations from legislative history and other materials shedding light on Congressional intent and how it was understood at the time the relevant legislation was adopted. Respondents attached approximately 2,000 pages of legislative history and other quoted materials to their brief in order to document each of their assertions and arguments and to make it easy for the Division and the Commission to confirm their accuracy.

In response, the Division failed to offer any substantive refutation of any of these points and authorities, effectively conceding that Respondents’ assertions and arguments are true and correct.^{2,3} Instead, the Division again asserted in conclusory fashion that, “[n]othing in the

² The Division notes that, as Respondents said in their October 23 brief, briefing in this matter has been closed. However, it does not oppose Respondents’ motion to file their brief on this subject. (*See, e.g.*, Response of the Div. to Resp’ts Mot. to Submit Suppl. Briefing in Support of Resp’ts Appeal Regarding Their Appointments Clause Claims and Suppl. Briefing in Support of Those Claims (Oct. 30, 2015) (“Div. Resp. to Suppl. Briefing”).)

³ The Division incorrectly asserts that previously Respondents only argued that SEC ALJs were not properly appointed or designated as an “officer of the Commission,” as required by the securities laws, and that Respondents did not argue that SEC ALJs were “inferior officers” who were not appointed in accordance with the Appointments Clause. (Div. Resp. to Suppl. Briefing at 1.) The record does not support this assertion. In fact, Respondents had made it clear to the Division that it was making this precise argument in earlier briefing. (*See, e.g.*, Resp’ts Reply Br. at 14-15) (“Respondents argue that the ALJ was not properly appointed or designated as an ‘officer of the

legislative history that Respondents cite undermines the Commission's analysis." (Div. Resp. to Suppl. Br. at 1 n. 2.) There is silence from the Division in response to Respondents' reading of the relevant provisions of the APA, including its definitions. There is silence as to the Respondents' recitation of APA's legislative history. There is silence as to the Respondents' recitation of the legislative history of the securities laws. This silence speaks volumes. It is an admission that the Division cannot defend the assertions it made to the Commission on these topics.

As we noted in the October 23 brief, the Division made its arguments about Congressional intent in response to the Commission's request for briefing of the question of consequences of failure to appoint ALJs properly. As also noted, the Division responded by claiming primarily that the Commission need not bother getting answers to that question because Congress did not intend SEC ALJs to be anything other than mere employees under the APA. The Commission accepted the Division's arguments. But now that the Respondents have debunked these arguments, the Division is inviting the Commission to ignore legislative language and intent and simply stick with its earlier opinions despite this new information. The Commission should decline this invitation and give the legislative history and the statutory language and definitions their full effect. To do otherwise would be unfair and would constitute a legal error and a failure to adjudicate fully all relevant issues.

For all of the foregoing reasons, the reasons stated in Respondents' Supplemental

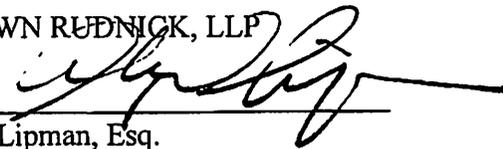
Commission,' as required by the securities laws, separate and apart from whether they are also constitutional officers. Division has conceded that the Commission did not appoint ALJs as officers of the Commission That brings us to Respondents' next, independent argument. One reason that SEC ALJs are required to be officers under the securities laws is that they exercise executive or sovereign power, such as compelling attendance and document production (like the subpoenas issued in this matter). This exercise of sovereign power also means that SEC ALJs are inferior officers under Article II of the Constitution." (internal citation omitted.)

Brief in Support of their Appointments Clause Claims, and the reasons stated in Respondents' Opening Brief and Reply Brief in Support of Their Appeal, Respondents respectfully request that the Commission find that (i) SEC ALJs are "inferior officers" of the United States, who must be appointed in accordance with the Appointments Clause of the Constitution; and that (ii) therefore, the Hearing and all related proceedings and orders in this matter are void.

Dated: November 4, 2015

Respectfully submitted,

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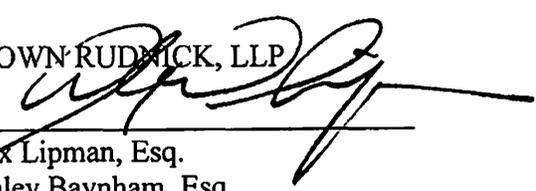
CERTIFICATE OF SERVICE

Pursuant to Commission Rule of Practice 150, I hereby certify that on November 4, 2015, a true and correct copy of RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR SUPPLEMENTAL BRIEFING REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS was served via electronic mail on:

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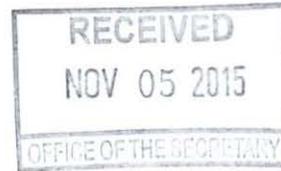
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November 4, 2015



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RE: In the Matter of Harding Advisory LLC, et al.,
Administrative Proceeding File No. 3-15574

Dear Mr. Fields:

This firm represents Respondents Harding Advisory LLC and Wing F. Chau in the above-referenced proceeding. Enclosed for filing, please find Respondents' Reply Brief in Support of Their Supplemental Briefing Regarding Their Appointments Clause Claims.

Thank you for your attention to this matter.

Sincerely,

BROWN RUDNICK LLP



Alex Lipman

Enclosures

cc: Andrew M. Calamari, Esq. (via e-mail)
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