ORAL ARGUMENT HAS NOT BEEN SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARDING ADVISORY, LLC AND WING F. CHAU, Petitioners, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 17-1070

PETITIONER'S OPPOSITION TO THE SECURITIES AND EXCHANGE COMMISSION'S MOTION TO REMAND TO THE COMMISSION AND CROSS-MOTION FOR A JUDGMENT AND DECREE SETTING ASIDE THE COMMISSION'S ORDERS

Petitioners Harding Advisory, LLC and Wing F. Chau ("Harding") respectfully submit this opposition to the U.S. Securities and Exchange Commission's (the "Commission") motion, which requests that this Court "remand" the matter to the Commission for a new hearing. Under the governing statutes, "remand" is not one of the courses of action permitted to this Court under these circumstances. Rather, the statutes provide that this Court may issue a "judgment and decree, affirming, modifying, or setting aside, in whole or in part, [the] order of the Commission . . . ." 15 U.S.C. § 77i(a); *see* 15 U.S.C. § 80b-13(a) ("Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such

order, in whole or in part."). Based on the clear holding of the Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission's orders must not be affirmed or modified, but rather must be "set aside" in whole because they resulted from an unconstitutional hearing. *See id.* at 2055; *see also* 5 U.S.C. § 706(2)(B) ("The reviewing court shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity[.]").

Consequently, Harding hereby cross-moves that this Court issue a judgment and decree "setting aside" the Commission's orders that pertain to the defective hearing, including the Commission's opinion and its order imposing sanctions.

BACKGROUND

On October 18, 2013, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") asserting allegations of fraud against Harding and directing that those allegations be adjudicated in a hearing before an administrative law judge ("ALJ") no sooner than thirty days and no later than sixty days following the filing of the OIP. *See* OIP, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574 (Oct. 18, 2013). On October 21, 2013, the Commission issued an order scheduling a hearing date and designating ALJ Cameron Elliot to preside at the hearing. *See* Order

Scheduling Hearing and Designating Presiding Judge, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574 (Oct. 21, 2013).

Between October 21, 2013 and January 12, 2015, ALJ Elliot issued a number of orders, including subpoenas for testimony and documents, and presided over a seventeen-day hearing, which took place between March 31, 2014 and April 30, 2014. On February 27, 2014, Harding filed an interlocutory appeal to the Commission from some of ALJ Elliot's rulings, which the Commission rejected by order dated March 14, 2014. *See* Respondents' Petition for Interlocutory Review and Emergency Motion to Stay the Hearing and Prehearing Deadlines, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574 (Feb. 27, 2014); *see also* Order Denying Petition for Interlocutory Review and Emergency Motion to Stay Hearing and Prehearing Deadlines, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574 (March 14, 2014). On January 12, 2015, ALJ Elliot issued an Initial Decision finding violations of the securities laws and imposed sanctions. *See In the Matter of Harding Advisory LLC & Wing F. Chau*, Initial Decision Release No. 734, 2015 WL 137642 (Jan. 12, 2015).

On February 2, 2015, Harding petitioned for review of the Initial Decision by the Commission. *See* Respondents' Petition for Review of the Initial Decision, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-

15574 (Feb. 2, 2015). On January 6, 2017, the Commission issued an opinion and an order rejecting certain of ALJ Elliot's findings, affirming others, and imposing sanctions on Harding. *See* Opinion of the Commission and Order Imposing Remedial Sanctions, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574 (Jan. 6, 2017). Among other things, Harding argued in its petition for review to the Commission that ALJ Elliot's Initial Decision could not be affirmed by the Commission because ALJ Elliot was not constitutionally appointed as an Officer of the United States, and therefore his actions were unauthorized and the hearing was invalid. *See* Respondents' Opening Brief In Support Of Their Petition For Review, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574, at 31–37 (April 1, 2015). The Commission rejected Harding's arguments that ALJ Elliot was not properly appointed, reasoning that, despite presiding over the hearing and issuing various significant orders and decisions, ALJ Elliot was a mere employee who need not be appointed in accordance with the requirements of the Constitution. *See* Opinion of the Commission and Order Imposing Remedial Sanctions, *In the Matter of Harding Advisory LLC & Wing F. Chau*, Admin. Proc. File No. 3-15574, at 26–27 (Jan. 6, 2017).

On March 6, 2017, Harding petitioned this Court for review of all aspects of the Commission's decision and order. *See* Doc. No. 1664837. On May 17, 2017,

this Court ordered that Harding's case be held in abeyance and directed the parties "to file motions to govern further proceedings within 30 days of this court's decision on rehearing en banc in *Raymond J. Lucia Companies, Inc. v. SEC*, No. 15-1345." Doc. No. 1675689. The *Lucia* en banc review followed a panel decision that had rejected Lucia's challenge to the validity of the appointment of the same ALJ that presided over Harding's hearing—ALJ Elliot. *See Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (panel). The *Lucia* panel stated that the ALJ did not exercise significant authority and therefore was an employee, not an officer subject to the Appointments Clause. *See id*. This Court heard *Lucia* en banc and divided evenly, which resulted in reinstatement of the *Lucia* panel decision. *See Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc).

On July 21, 2017, the *Lucia* Petitioners filed a petition for certiorari with the Supreme Court. *See Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *petition for cert. filed sub nom. Lucia v. SEC*, 138 S. Ct. 736 (U.S. July 21, 2017) (No. 17-130). At that point, "the Government switched sides" and abandoned the argument that ALJs were mere employees, instead agreeing that ALJs are constitutional officers. *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018). Thus, the Supreme Court "appointed an *amicus curiae* to defend the judgment below." *Id*. at 2051.

On August 3, 2017, this Court issued an order that Harding's case continue to be held in abeyance pending the Supreme Court's decision in *Lucia*. *See* Doc. No. 1687239. The Court's order stated: "The parties are directed to file motions to govern further proceedings within 30 days of the Supreme Court's disposition of *Raymond J. Lucia Companies, Inc. v. Securities and Exchange Commission*, No. 17-130 (petition for cert. filed July 21, 2017)." *Id.*

On June 21, 2018, the Supreme Court issued its decision in *Lucia*; it reversed this Court's judgment and remanded the case back to this Court for further proceedings consistent with its opinion. *See Lucia*, 138 S. Ct. at 2056. The Supreme Court held that the Commission's decision and order in *Lucia* should be set aside because Commission ALJs are "'Officers of the United States,' subject to the Appointments Clause," and the ALJ who "heard and decided Lucia's case" did so "without the kind of appointment the Clause requires." *Id*. at 2055. The Supreme Court explained that because the Commission "left the task of appointing ALJs . . . to SEC staff members[,]" ALJs "lack[] constitutional authority to do [their] job." *Id*. at 2050. Consequently, the Supreme Court specified that a petitioner, like Lucia, who has made "'a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief," and "that the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Id.*

at 2055 (citing *Ryder v. United States*, 515 U.S. 177, 182–83, 188 (1995)). The Supreme Court said nothing about how that new hearing would be initiated. *See id*.

On July 19, 2018, the Commission filed a motion to govern further proceedings that asked this Court to "remand" Harding's case to the Commission for a new hearing. *See* Doc. No. 1741454. In its motion, the Commission concedes that Harding raised a "timely challenge" to the constitutional validity of the appointment of ALJ Elliot. *Id*.

ARGUMENT

This Court should deny the Commission's motion seeking "remand" and should grant Harding's cross-motion because (1) the Commission's request is not authorized by statute, and (2) Harding's request is the only statutorily-authorized relief consistent with *Lucia*'s decision that petitioners like Harding are entitled to relief. Indeed, to grant the Commission's motion would not only be contrary to statute, but it would add insult to the injury Harding has already suffered—defending itself before an improper adjudicator for almost five years. *Lucia* says that at least one (of many) of Harding's challenges is clearly correct, and thus, Harding is entitled to prevail in this Court.

A. Applicable Law

This Court's jurisdiction in this matter derives from the Securities Laws, specifically the Securities Act of 1933 and the Investment Advisers Act of 1940.

Those statutes have provisions for judicial review, and none of those provisions permit the "remand" the Commission requests.

Section 9 of the Securities Act of 1933 provides in pertinent part:

> Any person aggrieved by an order of the Commission may obtain a review of such order in . . . the United States Court of Appeals for the District of Columbia[] by filing in such Court . . . a written petition praying that the order of the Commission be modified or be set aside in whole or in part. . . . The jurisdiction of the court shall be exclusive and **its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final**, subject to review by the Supreme Court of the United States . . . .

15 U.S.C. § 77i(a) (emphasis added).

Section 213 of the Investment Advisers Act of 1940 provides in pertinent part:

> Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia[] by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . **Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part**. . . .

15 U.S.C. § 80b-13(a) (emphasis added).

Similarly, the Administrative Procedure Act provides for judicial review of agency orders (unless other statutes preclude judicial review or the agency action is committed to agency discretion by law). *See* 5 U.S.C. § 701(a).

Section 706 of Title 5, United States Code, provides in pertinent part:

> The reviewing court **shall—** . . . **hold unlawful and set aside agency action, findings, and conclusions** found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(2) (emphasis added).

Under certain limited circumstances, the above-referenced securities laws permit this Court to refer certain matters back to the Commission for further evidence-taking and, if appropriate, modification by the Commission of its prior findings as a result of that additional evidence taking. Thus, the Investment Advisers Act of 1940 provides in pertinent part:

> **If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken** before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order.

15 U.S.C. § 80b-13(a) (emphasis added).

The Securities Act of 1933 provides in pertinent part:

> If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that **such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the**

> **court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper**. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order.

15 U.S.C. § 77i(a) (emphasis added). The Administrative Procedure Act does not contain a similar provision providing for a referral or remand to the agency for the taking of additional evidence.

Thus, in sum, the statutes upon which this Court's jurisdiction rest only permit this Court to affirm, modify, or set aside the Commission's orders under review; and as discussed below, *Lucia* requires that those orders be "set aside."

B. Discussion

Because the applicable statutes governing this Court's review permit the Court only to affirm, modify, or set aside the challenged orders, and because those orders rest on a hearing that violated the Constitution and entitles Harding to relief, the Court should "set aside" the Commission's orders. Neither the governing statutes nor *Lucia* permit a "remand" to the Commission, and therefore the Commission's motion should be denied.

The Supreme Court's decision in *Lucia* leaves no doubt that the Commission's orders in this matter cannot be affirmed or modified. The Court

stated: "For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are 'Officers of the United States,' subject to the Appointments clause." *Lucia*, 138 S. Ct. at 2055. The Court continued:

> And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. See *supra*, at 2051. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder v. United States*, 515 U.S. 177, 182–183, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id*. at 183, 188, 115 S. Ct. 2031. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment.

Id. Thus, under *Lucia*, Harding is entitled to relief because ALJ Elliot "heard and decided" Harding's case, and Harding made a timely challenge to ALJ Elliot's appointment.

Because the relief available to this Court is set out in statute, and because Harding is entitled to relief (and thus the Commission's orders cannot be affirmed or modified to cure the defect), this Court should "set aside" the Commission's orders that pertain to the ALJ's "hear[ing] and decid[ing]" of Harding's case, including the Commission's opinion and its order imposing sanctions.

The Commission cites no authority for the proposition that this Court can "remand" the case back to the Commission.[1] Instead, in support of its motion, the Commission misstates the holding of the Supreme Court's opinion in *Lucia*. The Supreme Court did not say (let alone "stress"), as the Commission claims, "that 'the appropriate remedy' where a litigant has made a 'timely challenge' to the appointment of the adjudicating official is a *remand* for a 'new hearing before a properly appointed official.'" Doc. No. 1741454 at 1–2 (emphasis added). The word "remand" does not appear in the Supreme Court's holding.

To be sure, the Supreme Court indicated that the constitutional error cannot be cured without affording a "new hearing," but the question of how, procedurally, such a new hearing would come about was not presented to or decided by the Supreme Court. And, while the Supreme Court mentioned in footnotes the word "remand," the parties in *Lucia* did not brief or discuss the statutorily authorized mechanisms for this Court to address an invalid order under review.[2]

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[1] The omission is significant—when the Commission sought Harding's consent for its "remand" motion, counsel for Harding pointed out that the statutory provisions require the entry of an order "setting aside" the Commission's orders under review and asked the Commission for any legal authority supporting its position that this Court has the power to "remand" the case to the Commission. Counsel for the Commission did not provide any such authority. *See* Email from Daniel E. Matro, Office of the General Counsel, SEC, to Alex Lipman, Brown Rudnick LLP (July 18, 2018, 4:10 PM EST), attached as Ex. A.

[2] Of course, the Supreme Court was statutorily authorized to "remand" Lucia's case to this Court for further proceedings consistent with the decision. *See* 28

Under the governing statutes, "remand" is not one of the mechanisms of bringing about a new hearing. *See* 15 U.S.C. § 77i(a); 15 U.S.C. § 80b-13(a); 5 U.S.C. § 706(2). The statutes instead state that this court "shall" "set aside" an invalid order. Once this Court issues a judgment setting aside the Commission's orders, the Commission can—if it chooses to do so and is not otherwise precluded—initiate a new, constitutionally-sound proceeding. After nearly five years of defending itself before an improper adjudicator, the appropriate remedy Harding is entitled to is to prevail in this Court based on *Lucia*.

CONCLUSION

For the reasons stated above, Harding respectfully requests that the Court deny the Commission's motion for "remand" and instead issue a judgment and decree "setting aside" the Commission's orders that pertain to the defective hearing, including the Commission's opinion and its order imposing sanctions.

U.S.C. § 2106. Section 2106 does not set forth this Court's available actions regarding a Commission order under review.

Dated: July 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2) and United States Court of Appeals for the District of Columbia Circuit Rule 27(c) because it contains 3,220 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally spaced, 14-point Times New Roman typeface.

Dated: July 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 2018, I electronically filed the foregoing motion using the Court's CM/ECF system, which will send notice to all parties.

Dated: July 23, 2018

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