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September 8, 2015

*By ECF*

Ms. Catherine O'Hagan Wolfe  
Clerk of the Court  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

RE: *Lynn Tilton, et al. v. SEC, No. 15-2103*

Dear Clerk of the Court:

As counsel for Appellants, we write pursuant to Federal Rule of Appellate Procedure 28(j) regarding the SEC's opinion in *Matter of Raymond J. Lucia Cos., Inc.*, No. 3-15006 (Sept. 3, 2015) (available at [www.sec.gov/litigation/opinions/2015/34-75837.pdf](http://www.sec.gov/litigation/opinions/2015/34-75837.pdf)). By a 3-2 vote, *Lucia* held that SEC ALJs are "mere employees" not subject to the Appointments Clause. *Id.* at 28-33.<sup>1</sup>

Now that the SEC has decided the issue, it is undeniably futile for Appellants to be required to submit their constitutional claims for adjudication through the lengthy administrative process – a process that will not inform the constitutional analysis. *See* App. Br. at 4-5, 24-29; Reply Br. at 8-12.

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<sup>1</sup> The majority did not await the dissenting opinion, which "will issue separately." *Id.* at 41.

Clerk of the Court, U.S. Court of Appeals  
September 8, 2015  
Page 2

Further, under *Lucia*, Appellants are stripped of meaningful judicial review through a classic Catch-22. The mantra of the SEC brief is that Appellants will obtain judicial review if they patiently await a final SEC order. *See* SEC Br. at 2, 3, 9, 12-13, 26, 28. But *Lucia* is to the contrary. *Lucia* says the Commission's *de novo* review leaves no prejudice "from the manner of appointment of our ALJs," so an appellant "would not be entitled to relief." *Lucia* at 32 n.115; *see id.* at 31-32 (asserting *de novo* review cures ALJ-related errors).

The SEC cannot have it both ways: If a structurally unconstitutional ALJ trial cannot be remedied after a final SEC order, then Appellants will have no meaningful judicial review unless this Court exercises jurisdiction now. Meaningful review is the opportunity to seek relief before being tried by an unconstitutional judge. *See* App. Br. at 17-22, 28-29; Reply Br. at 6-7, 9-12.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ David Zornow  
David M. Zornow