

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6635/July 23, 2019

ADMINISTRATIVE PROCEEDING

File No. 3-17228

In the Matter of	:
	:
DAVID S. HALL, P.C. d/b/a THE HALL GROUP CPAS,	ORDER
DAVID S. HALL, CPA,	:
MICHELLE L. HELTERBRAN COCHRAN, CPA, and	:
SUSAN A. CISNEROS	:

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings, pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, on April 26, 2016. Only Michelle L. Helterbran Cochran remains in the proceeding. *See David S. Hall, P.C.*, Exchange Act Release No. 79147, 2016 SEC LEXIS 3987 (Oct. 24, 2016) (settlement order as to David S. Hall, P.C. d/b/a The Hall Group CPAs, and David S. Hall, CPA); Initial Decision Release No. 1114, 2017 SEC LEXIS 685 (A.L.J. Mar. 7, 2017), *finality order* Exchange Act Release No. 80949, 2017 SEC LEXIS 1771 (June 15, 2017), *order scheduling briefs*, Exchange Act Release No. 81349, 2017 SEC LEXIS 2424 (Aug. 8, 2017) (scheduling briefs as to timeliness of Helterbran's request for Commission review of the ID).

Thereafter, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that the Administrative Law Judge (ALJ) who had initially presided over the *Lucia* proceeding¹ had not been properly appointed in compliance with the Appointments Clause of the U.S. Constitution. The Court said, "To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled," and "The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment."

¹ See *Raymond J. Lucia Cos.*, Initial Decision Release No. 495, 2013 SEC LEXIS 1973 (A.L.J.); *supplemented*, Initial Decision Release No. 540, 2013 SEC LEXIS 3856 (A.L.J. Dec. 6, 2013); *opinion of the Commission*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628 (Sept. 3, 2015); 832 F.3d 277 (D.C. Cir. 2016) (denying petition for review); 868 F.3d 1021 (D.C. Cir. 2017) (on rehearing *en banc* by an equally divided court, denying petition for review); 138 S. Ct. 2044 (2018) (reversing and remanding); 736 F. App'x 2 (D.C. Cir. 2018) (setting aside Commission decision and remanding to Commission for a new hearing).

Lucia v. SEC, 138 S. Ct. 2044, 2055 & n.6 (2018). On August 22, 2018, in light of *Lucia*, the Commission ordered that Helterbran “be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter”; the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2; Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018). Thereafter, the proceeding was stayed pursuant to 17 C.F.R. § 201.161(c)(2), based on the parties’ representation that they had reached an agreement in principle to a settlement. *David S. Hall, P.C.*, Admin. Proc. Rulings Release No. 6326, 2018 SEC LEXIS 3221, at *1-2 (Nov. 15, 2018). The stay subsequently lapsed.

Under consideration are Helterbran’s Motion for an Order Dismissing the Proceedings, dated December 31, 2018; the Division of Enforcement’s Opposition, filed March 6, 2019; and Helterbran’s Reply, filed March 19, 2019.²

Helterbran argues that the proceeding should be dismissed because: (1) the five year statute of limitations provided in 28 U.S.C. § 2462, applicable to the proceeding has passed; (2) the hearing date – thirty to sixty days after service of the OIP – mandated by Section 21C(b) of the Exchange Act has passed; and (3) the Commission’s internal timeline provided in 17 C.F.R. § 201.360 for an initial decision in this proceeding has passed. As alternatives, Helterbran moves for an order: (4) referring the matter for trial before the Commission on the ground that the presiding ALJ is barred from adjudicating it under the Appointments Clause because of unconstitutional removal protections; or (5) staying the matter pending adjudication of constitutional objections raised in United States District Court.

(1) Helterbran’s argument based on the statute of limitations fails. The Commission’s April 26, 2016, OIP alleged ongoing misconduct as of that date. Therefore, the proceeding was instituted within the five years specified by 28 U.S.C. § 2462.

Helterbran’s suggestion that the five-year statute of limitations would be violated by resuming proceedings requires assuming that the OIP was invalid. However, the Supreme Court did not dismiss the *Lucia* proceeding but rather ordered that the respondents in that case be provided with the opportunity for a new hearing before a different ALJ. Likewise, the OIP in this proceeding is not invalid, and the proceeding was instituted within the five-year statute of limitations.

(2) The OIP authorized cease-and-desist proceedings against Respondents pursuant to Section 21C of the Exchange Act. Section 21C(b) specifies, “The [OIP] . . . shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or later date is set by the Commission with the consent of any respondent so served.” A later date was set by the then-presiding ALJ, with the consent of all Respondents, and the hearing

² The Motion was dated and served on December 31, 2018, during the Commission’s “lapse in appropriations” and furlough of personnel, which commenced on December 27, 2018. See *Pending Admin. Proc.*, Securities Act Release No. 10603, 2019 SEC LEXIS 37, at *1 (Jan. 30, 2019).

commenced accordingly, on October 24, 2016. *David S. Hall, P.C.*, Admin. Proc. Rulings Release No. 3853, 2016 SEC LEXIS 1773 (A.L.J. May 19, 2016) (advising Respondents that unless they indicate otherwise, agreement to a postponement of the hearing date is “consent” under Section 21C(b)); May 25, 2016, Prehr’g Tr. *passim* (showing no Respondent objecting to the postponed hearing date), 9-11 (setting hearing date to accommodate the desire of Helterbran and other Respondents to file motions for summary disposition).

Helterbran’s argument that Exchange Act Section 21C(b) would be violated by resuming proceedings requires pretending that the hearing that commenced on October 24, 2016, never happened. However, the Supreme Court’s holding in *Lucia* was not that the original hearing never happened but rather that the respondents in that case should be provided with the opportunity for a new hearing before a different ALJ. In line with that precedent, Helterbran has been provided with the opportunity for a new hearing before a different ALJ.

Further, the Supreme Court has held that federal statutes that prescribe internal time periods for federal agency action without specifying consequences for noncompliance do not necessitate dismissal of the action if the agency does not act within the time prescribed. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63–65 (1993); *Brock v. Pierce Cty.*, 476 U.S. 253, 266 (1986); *see also Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *41 (May 2, 2014), *pet. denied*, 793 F.3d 76, 83 (D.C. Cir. 2015) (deferring to the Commission’s reasonable interpretation under *Brock* and *James Daniel Good* that it may still pursue an enforcement action even if, contrary to Exchange Act Section 4E, Commission staff failed to file the action within 180 days of issuing a Wells notification).

Nothing in Section 21C(b) requires dismissal of the administrative proceeding if a hearing is not held within sixty days of service of the OIP, let alone where a new hearing is required on remand. 15 U.S.C. § 78u-3(b). Congress enacted the cease-and-desist authority in 1990 to enable the Commission “to move quickly in administrative proceedings, particularly in those situations where investor funds are at risk,” rather than being limited to injunctive relief in federal court; “to resolve cases without protracted negotiation or litigation”; and “to respond in a more timely fashion to violat[ive] conduct or practices.” S. Rep. No. 101-337, at 8, 17–18 (1990). The statutory hearing period is directed towards effectuating these goals; it is not a limitations period that would preclude agency action if a hearing is not held within the prescribed time. Cf. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (“Nor, since *Brock*, have we ever construed a provision that the Government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.”); *Montford*, 793 F.3d at 83 (“Nothing in the text or structure of Section 4E overcomes the strong presumption that, where Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result.”).

(3) Helterbran’s argument concerning the Commission’s internal timeline regarding initial decisions fails. As then-applicable, 17 C.F.R. § 201.360(a)(2) and the OIP provided that the time for an initial decision was 300 days after service of the OIP. Therefore, the March 7,

2017, Initial Decision in this proceeding was issued within 300 days of the May 11, 2016, service of the OIP and unquestionably complied with 17 C.F.R. § 201.360(a)(2).³

Helterbran, however, contends that the original deadlines have been violated because the original proceedings were invalid and a properly appointed official has yet to hold a hearing or issue an initial decision. However, the original deadlines no longer apply. In its August 22, 2018, order remanding these proceedings after *Lucia*, the Commission directed:

In all proceedings, the ALJ shall compute the deadlines for scheduling a hearing and issuing an initial decision as specified in amended Rule of Practice 360(a)(2) from the date the proceeding is assigned to a hearing officer pursuant to this order, rather than the date of service of the relevant [OIP].

Pending Admin. Proc., 2018 SEC LEXIS 2058, at *4 n.7. The Commission further noted that “[t]he deadlines stated in this order confer no procedural or substantive rights on any party, and the presiding ALJ may, for good cause shown, modify any of them, including the date by which the initial decision must be issued.” *Id.*; see also 17 C.F.R. § 201.360(a)(2) (2012), 17 C.F.R. § 201.360(a)(2)(ii) (2016) (“These deadlines confer no substantive rights on respondents.”).

As the Commission noted, 17 C.F.R. § 201.360(a)(2) was amended, effective September 27, 2016. Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50212, 50213-15, 50239-40 (July 29, 2016). The deadlines under the amended rule, which the Commission has applied to this proceeding, have not been triggered. Assuming that the Commission’s determination is proper (which the undersigned is not authorized to overrule), there is no cognizable claim under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), that the agency violated its own rules to the prejudice of others. Cf. *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) (“Accardi has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others.”).

Helterbran also notes that she has been hampered in her ability to defend against the charges because she no longer has access to the relevant records and because a key witness now suffers from ill health. These evidentiary problems can be dealt with by procedures within this proceeding.

(4) Concerning the argument that, to comply with the Appointments Clause, the Commission, not the new ALJ, should preside over the hearing, as noted above, the Supreme Court stated, “To cure the constitutional error, *another ALJ (or the Commission itself)* must hold the new hearing to which Lucia is entitled.” 138 S. Ct. at 2055 (emphasis added). Further, the Commission has rejected the tenure protection argument that Helterbran makes. See *optionsXpress, Inc.*, Securities Act Release No. 10125, 2016 SEC LEXIS 2900, at *180-89 (Aug. 18, 2016), abrogated in part on other grounds by *Lucia*, 138 S. Ct. 2044. To date, no federal court has

³ Service of the OIP was complete on May 11, 2016, with service on Respondent Cisneros. Service on the other individual Respondents occurred on May 2, 2016.

addressed Helterbran's tenure protection argument, *see Lucia*, 138 S. Ct. at 2050 n.1, let alone agreed with it.

(5) In light of Commission precedent, the proceeding will not be stayed pending the outcome of *Cochran v. SEC*, No. 4:19-cv-66, 2019 U.S. Dist. LEXIS 49751, at *6 (N.D. Tex. Mar. 25, 2019) (dismissing complaint), *appeal filed*, No. 19-10396 (5th Cir. Apr. 8, 2019). *See Lynn Tilton*, Advisers Act Release No. 4735, 2017 SEC LEXIS 2296 (July 28, 2017) (declining to stay administrative proceeding pending resolution by federal courts of Appointments Clause issue). A respondent may seek such a stay in the federal courts. *See Tilton v. SEC*, No. 15-2103 (2d Cir. Sept. 17, 2015) (staying administrative proceeding pending further order of the court). The court noted its stay in its decision affirming the district court's dismissal of a respondent's Appointments Clause claim on jurisdictional grounds. *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016), *application for stay denied*, 137 S. Ct. 29 (2016), *cert. denied*, 137 S. Ct. 2187 (2017). In the event of an unfavorable outcome of this proceeding, Helterbran will have an opportunity for meaningful judicial review of all of the issues she raised in her motion for dismissal.

Finally, because this proceeding was stayed, the parties did not submit a joint proposal for the conduct of further proceedings. *See David S. Hall, P.C.*, Admin. Proc. Rulings Release No. 6127, 2018 SEC LEXIS 2711, at *2-3 (A.L.J. Oct. 2, 2018). The parties should submit their proposal by August 13, 2019

IT IS SO ORDERED.

/S/ Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge