

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 10609 / February 21, 2019

SECURITIES EXCHANGE ACT OF 1934

Release No. 85172 / February 21, 2019

INVESTMENT ADVISERS ACT OF 1940

Release No. 5116 / February 21, 2019

INVESTMENT COMPANY ACT OF 1940

Release No. 33382 / February 21, 2019

Admin. Proc. File No. 3-15255

In the Matter of

JOHN THOMAS CAPITAL MANAGEMENT GROUP
LLC, d/b/a PATRIOT 28 LLC; and
GEORGE R. JARKESY, JR.

ORDER REGARDING FURTHER PROCEEDINGS

On October 17, 2014, Administrative Law Judge Carol Fox Foelak issued an initial decision in this matter finding that respondents violated the federal securities laws and imposing sanctions.¹ The Commission granted the petition for review filed by respondents and the cross-petition for review filed by the Division of Enforcement.² The parties filed a number of briefs and additional submissions with the Commission in connection with the petitions for review.³

¹ *John Thomas Cap. Mgmt. Group LLC, d/b/a Patriot28 LLC*, Initial Decision Release No. 693, 2014 WL 5304908 (Oct. 17, 2014).

² *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 73819, 2014 WL 6985130 (Dec. 11, 2014).

³ *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 75590, 2015 WL 4608057 (Aug. 3, 2015); *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 74419, 2015 WL 883121 (Mar. 3, 2015); *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 74100, 2015 WL 242391 (Jan. 20, 2015).

On November 30, 2017, before the Commission resolved the petitions, the Commission ratified the appointments of its ALJs in response to challenges to the manner of their appointment. In so doing, the Commission remanded this proceeding for ALJ Foelak to conduct a de novo reconsideration and reexamination of the record to determine “whether to ratify or revise in any respect” her prior actions.⁴ The parties were allowed to submit new evidence and briefs.⁵ On March 14, 2018, ALJ Foelak determined to ratify all prior actions she had taken, including the initial decision, except that she invited respondents to provide additional evidence regarding their contention that disgorgement should be offset by “amounts paid to investors in related private litigation.”⁶ The matter remained pending before ALJ Foelak.

On August 22, 2018, following the Supreme Court’s decision in *Lucia v. SEC*,⁷ which held that the Commission’s ALJs are inferior officers for purposes of the Appointments Clause of Article II of the Constitution, the Commission provided respondents with the opportunity for a “new hearing before an ALJ who did not previously participate in the matter,” who would issue an initial decision.⁸ The Commission also provided the parties with the option of submitting an “express agreement . . . regarding alternative procedures” to the Chief ALJ.⁹ The parties did not exercise that option, and the proceeding was re-assigned to ALJ James E. Grimes.¹⁰

On December 17, 2018, respondents filed an unopposed motion to “set aside the remand, withdraw the proceedings from the new ALJ, and schedule the petitions for review for prompt consideration and issuance of a Final Order.” Respondents expressly “forfeit[ed] and waive[d] any right to challenge the historical proceedings before [ALJ Foelak] on the grounds that the ALJ had not been constitutionally appointed” and “formally withdr[e]w” that challenge in their petition for review. Respondents recite that this waiver was “knowingly and intelligently made with the advice of counsel” so as to “eliminate any need for another hearing on the same issues before another [ALJ].” In short, respondents desire that the petition and cross-petition for review be “rendered operative again” as to the reinstated, originally-issued initial decision. The Division of Enforcement filed a response stating that it did not object to respondents’ “efforts to

⁴ *Pending Admin. Procs.*, Exchange Act Release No. 82178, 2017 WL 5969234, at *1-2 (Nov. 30, 2017).

⁵ *John Thomas Capital Mgmt. Group LLC*, Admin. Proc. Ruling Release No. 5404 (Dec. 19, 2017), available at <https://www.sec.gov/alj/aljorders/2017/ap-5404.pdf>.

⁶ *John Thomas Capital Mgmt. Group LLC*, Admin. Proc. Ruling Release No. 5647 (Mar. 14, 2018), available at <https://www.sec.gov/alj/aljorders/2018/ap-5647.pdf>.

⁷ 138 S. Ct. 2044 (2018).

⁸ *Pending Admin. Procs.*, Exchange Act Release No. 83907, 2018 WL 4003609, at *1 (Aug. 22, 2018).

⁹ *Id.*

¹⁰ *Pending Admin. Procs.*, Admin. Proc. Ruling Release No. 5955 (Sep. 12, 2018), available at <https://www.sec.gov/alj/aljorders/2018/ap-5955.pdf>.

have the Commission proceed on the original Initial Decision and briefing before the Commission on the original cross-petitions for review.”

Given the unusual procedural posture of this matter, and relying on respondents’ waiver of the Appointments Clause claim and the other representations in their motion, the Commission finds good cause to (1) vacate, solely as to this proceeding, the August 22, 2018 order insofar as it directs further ALJ proceedings in this matter, and (2) set the petition and cross-petition for review for immediate Commission consideration on the existing record. The Commission otherwise expresses no view as to the arguments set forth in respondents’ motion.

It is further ORDERED that the parties may file simultaneous supplemental briefs, not to exceed 6,000 words, addressing any matters that they deem pertinent by March 7, 2019.¹¹ They may file simultaneous response briefs, not to exceed 3,000 words, by March 21, 2019. It is unnecessary to re-state arguments asserted in previous submissions to the Commission.¹²

The Commission does not presently intend to re-schedule oral argument,¹³ but the parties may include a request for oral argument with their supplemental briefs.

By the Commission.

Brent J. Fields
Secretary

¹¹ Attention is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rule of Practice 450(b), 17 C.F.R. § 201.450(b), with respect to content limitations. Requests for extensions of time to file briefs are disfavored.

¹² As requested by respondents, the Commission will consider the “arguments and authorities advanced on appeal to the Commission,” including the petition and cross-petition for review, and briefing “filed with the Commission in connection therewith.” Mot. 9. A contention is not, however, properly raised for Commission consideration if it was asserted solely in a submission to the ALJ. *See generally Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 84432, 2018 WL 5023228, at *11 (Oct. 16, 2018). This includes, for the avoidance of doubt, submissions directed to the ALJ subsequent to the Commission’s November 30, 2017 and August 22, 2018 orders. The parties are free, however, to submit such arguments and evidence in response to this order. *See generally Wheat, First Sec.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *18 n.87 (Aug. 20, 2003) (discouraging incorporation by reference).

¹³ *Cf. John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 81317, 2017 WL 3332921 (Aug. 4, 2017).