-UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9519 / January 28, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 71415 / January 28, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3764 / January 28, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 30894 / January 28, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15255

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| In the Matter of<br><br>JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC and GEORGE R. JARKESY, JR. | ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW |

Respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. seek interlocutory review of the law judge's order denying their Motion for Disqualification and Recusal of the Commission and Dismissal of Administrative Proceeding. For the reasons below, interlocutory review is denied.

**I.**

The Order Instituting Proceedings was issued on March 22, 2013.[1] Among other things, it alleged that JTCM (the adviser to two hedge funds) and Jarkesy (the funds' manager) placed the interests of John Thomas Financial, Inc. ("JTF") (the funds' placement agent) and Anastasios "Tommy" Belesis (who controlled a holding company that owned JTF) over those of the funds by directing excessive fees to JTF. According to the OIP, JTCM and Jarkesy breached their fiduciary duty of disclosure by falsely representing their independence from JTF and Belesis.

[1] *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Release No. 69208, 2013 WL 1180836 (Mar. 22, 2013).

JTF and Belesis were alleged to have willfully aided, abetted, and/or caused JTCM and Jarkesy's violations of the securities laws.

JTF and Belesis submitted an offer of settlement, which the Commission accepted on December 5, 2013 (the "Settlement Order").[2] The Settlement Order made findings and imposed remedial sanctions against JTF and Belesis. It explicitly stated that the "findings herein are made pursuant to [JTF's and Belesis's] Offer of Settlement and *are not binding on any other person or entity* in this or any other proceeding."[3]

On January 3, 2014, JTCM and Jarkesy filed a motion seeking disqualification and recusal of the Commission and dismissal of this proceeding on the ground that the Commission (and each of the Commissioners individually), in issuing the Settlement Order, had purportedly "conclusively prejudiced the case" against them. JTCM and Jarkesy also argued that the Commission had "engaged in impermissible *ex parte* communications with the Division staff in connection" with negotiating and accepting the settlement. The law judge denied the motion on January 6 and also denied a subsequent motion, filed by respondents on January 14, to certify her ruling for interlocutory appeal pursuant to Rule of Practice 400(c).[4]

**II.**

The Commission has recently reiterated that "[p]etitions by parties for interlocutory review are disfavored and will be granted only in extraordinary circumstances."[5] That a party disagrees with a law judge's ruling (even if that ruling later is found to be erroneous) is not enough to make an issue appropriate for interlocutory review. The Rules of Practice therefore impose a threshold requirement that any order "'submit[ted] to the Commission for interlocutory review *must* be certified'" by the law judge.[6] The law judge's denial of certification "by itself

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[2] *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 70989, 2013 WL 6327500 (Dec. 5, 2013).

[3] *Id.* at *1 n.1 (emphasis added).

[4] 17 C.F.R. § 201.400(c); *John Thomas Capital Mgmt. Group LLC,* Admin. Proc. Rulings Release No. 1148 (Jan. 6, 2014) (denying disqualification motion); *John Thomas Capital Mgmt. Group LLC,* Admin. Proc. Rulings Release No. 1170 (Jan. 14, 2014) (denying motion to certify). The law judge properly decided these motions in the first instance. Rules of Practice 151(c), 400(c)(2), 17 C.F.R. §§ 201.151(c), 201.400(c)(2); *Investors Mgmt. Co.*, Admin. Proc. Rulings Release No. 24, 1968 WL 87629, at *1 (Dec. 30, 1968) (law judge order) (denying motion to disqualify the Commission).

[5] *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (quotation marks omitted; alteration in original) (rejecting JTCM's and Jarkesy's petition for interlocutory review of another order in this proceeding).

[6] *Id.* (quoting Rule of Practice 400(c), 17 C.F.R. § 201.400(c)).

presents a sufficient basis for denying . . . interlocutory review" because the Rules of Practice "'do[] not contain any provision relating to a party's ability to petition the Commission directly for interlocutory review' without first obtaining certification from the law judge."[7] Accordingly, the Commission has determined to deny the petition for interlocutory review.

Furthermore, it is clear that the law judge correctly denied certification.[8] Rule of Practice 400(c) provides that certification is appropriate only if the law judge determines that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "immediate review of the order may materially advance the completion of the proceeding."[9] Neither of these criteria is satisfied.

To begin with, the denial of JTCM's and Jarkesy's disqualification motion did not "involve[] a controlling question of law as to which there is substantial ground for difference of opinion."[10] The Commission has rejected arguments similar to those raised by JTCM and Jarkesy in an unbroken line of decisions.[11] These decisions establish that "consideration of

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[7] *John Thomas Capital*, 2013 WL 6384275, at *2 & n.12 (quoting *Jean-Paul Bolduc*, Exchange Act Release No. 42096, 1999 WL 1048643, at *2 (Nov. 4, 1999)); *see also Proposed Rules and Request for Comment*, Exchange Act Release No. 33163, 1993 WL 468594, at *38 (Nov. 5, 1993) (explaining that it would be "inconsistent with reasonable standards of judicial economy" if a law judge's "decision not to certify a question for interlocutory review can itself be subject to interlocutory review").

[8] Additionally, although the law judge did not rely on lack of timeliness as a basis for denying the motion, she would have been warranted in doing so. *See* Rule of Practice 400(c)(2), 17 C.F.R. § 201.400(c)(2) (requiring a motion to certify a ruling for interlocutory review to be filed "within five days of the [law judge's] ruling").

[9] Rule of Practice 400(c)(2)(i)-(ii), 17 C.F.R. § 201.400(c)(2)(i)-(ii).

[10] Rule of Practice 400(c)(2)(i), 17 C.F.R. § 201.400(c)(2)(i).

[11] *See, e.g.*, *Jean-Paul Bolduc*, Exchange Act Release No. 43884, 2001 WL 59123, at *3 & nn.21-22 (Jan. 25, 2001); *The Stuart-James Co.*, Exchange Act Release No. 28810, 1991 WL 291802, at *2-3 (Jan. 23, 1991), *adhered to by C. James Padgett*, Exchange Act Release No. 38423, 1997 WL 126716, at *15-16 (Mar. 20, 1997), *pet. for review denied*, *Sullivan v. SEC*, 159 F.3d 637 (table), 1998 WL 388511 (D.C. Cir. 1998) (per curiam); *Steadman Sec. Corp.*, Exchange Act Release No. 13695, 1977 SEC LEXIS 1388, 46 S.E.C. 896, 920 n.82 (June 29, 1977); *Edward Sinclair*, Exchange Act Release No. 9115, 1971 WL 120487, at *4 & n.14 (Mar. 24, 1971), *pet. for review denied*, *Sinclair v. SEC*, 444 F.2d 399, 401-02 (2d Cir. 1971); *Atl. Equities Co.*, Exchange Act Release No. 8118, 1967 WL 87747, at *9 (July 11, 1967), *pet. for review denied*, *Hansen v. SEC*, 396 F.2d 694 (D.C. Cir. 1968) (per curiam); *see also Withrow v. Larkin*, 421 U.S. 35, 57 n.24 (1975) ("'The [Administrative Procedure] Act does not . . . forbid the combination with judging of instituting proceedings, negotiating settlements, or testifying.'") (quoting 2 K. Davis, *Administrative Law Treatise* § 13.11, p. 249 (1958)).

[certain respondents'] offer of settlement while the proceedings were still pending against . . . other respondents [is] proper and [does] not violate the Administrative Procedure Act . . . or our rules regarding *ex parte* communications."[12] In particular, the Commission has determined previously that no prejudgment of a non-settling respondent's case occurs especially when—as took place here—the order accepting an offer of settlement "expressly state[s] that it was not binding on other [non-settling] respondents."[13] Any decision that the Commission makes as to JTCM and Jarkesy will be "based solely on the record" adduced before the law judge and will "in no way [be] influenced by our findings as to [JTF and Belesis] based on [their] offer of settlement."[14]

Although JTCM and Jarkesy are "entitled to make a good-faith argument for a change in the law," they are "obligated to acknowledge that they were doing just that and to deal candidly with the obvious authority that is contrary to [their] position."[15] In their disqualification motion filed before the law judge, JTCM and Jarkesy did not address the Commission's "precedent . . . that settles the issue at hand," failed to show that the precedent should be reconsidered, and therefore did not demonstrate that there is a "substantial ground for difference of opinion" as to the law judge's denial of that motion.[16]

In their subsequent certification motion, JTCM and Jarkesy only hinted at an argument, asserting that "controlling precedents from Article III courts differ markedly from those found in Commission opinions." But the Commission has made clear that "'[a]n argument cannot be merely intimated or hinted at to be raised.'"[17] Because JTCM and Jarkesy did not support their

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12 *Padgett*, 1997 WL 126716, at *16.

13 *Sinclair*, 1971 WL 120487, at *4, *aff'd*, 444 F.2d at 401 ("We find no merit in the argument that [the Commissioner] had prejudged [the non-settling respondent's] case by participating in the Commission's decision to accept a . . . settlement offer setting forth certain stipulated facts. . . . The decision stated that it was not binding on the other respondents."); *see John Thomas Capital*, 2013 WL 6327500, at *1 n.1 (Settlement Order).

14 *Sinclair*, 1971 WL 120487, at *4.

15 *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012); *see also* Rule of Practice 153(b)(1)(ii), 17 C.F.R. § 201.153(b)(1)(ii).

16 *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013) (per curiam); *see also White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994) ("[I]n light of this established body of law, there is no substantial ground for difference of opinion.").

17 *Richard A. Neaton*, Exchange Act Release No. 65863, 2011 WL 6009649, at *2 n.10 (Dec. 1, 2011) (quoting *KPMG LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002)); *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 n.9 (Aug. 9, 2007) (criticizing pleading for "resort[ing] to more rhetoric than legal analysis"); *see also Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.").

assertion in the certification motion with any legal argument, they have not sustained their burden of showing that there is a "substantial ground for difference of opinion" as to the correctness of the Commission's prior decisions.[18] Moreover, to the extent that the certification motion (or, for that matter, the instant petition for interlocutory review) advanced new arguments not already made in their disqualification motion, JTCM and Jarkesy may not rely upon such arguments as a basis for urging interlocutory review.[19]

Finally, granting interlocutory review would delay rather than materially advance the ultimate termination of this proceeding.[20] The hearing—already once postponed to allow for the consideration of JTCM's and Jarkesy's previous, unsuccessful attempt to seek interlocutory review of a separate ruling—is scheduled to begin on February 3, 2014 and would in all likelihood conclude before an interlocutory appeal could be heard and determined. For this independent reason, too, JTCM and Jarkesy have failed to demonstrate that there are extraordinary circumstances warranting interference with the ordinary hearing process.

**III.**

The Commission also declines to exercise its discretionary authority to direct interlocutory review upon its own motion.[21] In all but the most unusual of circumstances, "claims should be presented in a single petition for review after 'the entire record [has been]

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[18] For example, the certification motion did not attempt to show how or why the Commission's decisions have been undermined by any intervening change in the law.

[19] *E.g.*, *Moorman v. UnumProvident Corp.*, 464 F.3d 1260, 1272-73 (11th Cir. 2006) (declining to consider a "noncertified" issue on the basis of "new theories not raised below"); *In re Bank of Am.*, No. 09 MD 2058(PKC), 2010 WL 4237304, at *3 (S.D.N.Y. Oct. 8, 2010) (explaining that certification "is not a vehicle for raising new arguments on appeal"); *Lindley v. Life Investors Ins. Co. of Am.*, Nos. 08–CV–0379–CVE–PJC, 09–CV–0429–CVE–PJC, 2010 WL 2465515, at *4 (N.D. Okla. June 11, 2010) ("[T]he Court will not consider this new argument as a ground to certify an interlocutory appeal."). For similar reasons, JTCM's and Jarkesy's request for the "Production and Preservation of Records" relating to the settlement with JTF and Belesis is not properly before the Commission at this juncture. *See also* Rule of Practice 151(c), 17 C.F.R. § 201.151(c). That request was made for the first time in their January 24 letter responding to the Division's January 23 opposition and "amending" their petition for interlocutory review.

[20] *See, e.g.*, *Local 836 of UAW v. Echlin, Inc.*, 670 F. Supp. 697, 708 (E.D. Mich. 1986) (declining to certify ruling denying recusal motion given impending trial date and likelihood that the "action probably will be tried before the Sixth Circuit could review the matter[]").

[21] Aside from accepting a certified ruling for interlocutory review, the Commission has the discretion to call for interlocutory review on its own initiative at any time. *E.g.*, *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *1 & n.3 (Nov. 16, 1999).

developed' and 'after issuance by the law judge of an initial decision.'"[22] There is no compelling justification for the Commission to decide JTCM's and Jarkesy's claims on an interlocutory basis. Recusal and "[d]isqualification questions are fully reviewable on appeal" following a hearing and are therefore typically not appropriate for interlocutory review.[23] JTCM and Jarkesy assert that continuation of these proceedings would violate their "right to due process," but a "party is not entitled to an interlocutory appeal merely because he or she presses a claim premised on a constitutional right or guarantee."[24]

In the event that the law judge's initial decision is adverse to JTCM and Jarkesy, they will be free to press their arguments as to disqualification or recusal by petitioning the Commission for review of that decision pursuant to Rule of Practice 410. If the Commission then determines that JTCM's and Jarkesy's arguments have merit, it could afford them an adequate remedy at that time. The fact that JTCM and Jarkesy "will [have] be[en] put to the expense and trouble of a trial" is not a sufficient reason for disrupting the orderly hearing process and putting aside the general rule against piecemeal, interlocutory appeals.[25]

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[22] *John Thomas Capital*, 2013 WL 6384275, at *2 (quoting *Kevin Hall*, Exchange Act Release No. 55987, 2007 WL 1892136, at *2 (June 29, 2007), and *Gregory M. Dearlove*, Admin. Proc. File No. 3-12064, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006)); *see also SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963) ("The party asserting disqualification must make his record in the administrative hearing.").

[23] *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960-61 (5th Cir. 1980); *accord In re Cargill, Inc.*, 66 F.3d 1256, 1264 n.10 (1st Cir. 1995) ("[W]e see no reason why orders pertaining to judicial disqualification cannot be effectively reviewed" after trial.); *Alexander v. Chicago Park Dist.*, 709 F.2d 463, 471 (7th Cir. 1983) (refusing to permit immediate appeal because the party "will be able to obtain appellate review of the order denying disqualification after a final decision on the merits"); *Vuono v. United States*, 441 F.2d 271, 271 (4th Cir. 1971) (per curiam) ("[a] determination . . . not to disqualify . . . is ordinarily reviewable only upon appeal from a final decision on the cause").

[24] *John Thomas Capital*, 2013 WL 6384275, at *4 & nn.28-29.

[25] *Green v. Murphy*, 259 F.2d 591, 594 (3d Cir. 1958) (refusing to permit interlocutory appeal challenging denial of recusal motion); *see also In re Cargill, Inc.*, 66 F.3d at 1264 n.10 ("[T]he fact that a lengthy trial has intervened will not rob an appeal of its effectiveness."); *In re Continental Inv. Corp.*, 637 F.2d 1, 6 (1st Cir. 1980) (similar); *cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-78 (1981) (refusing to permit interlocutory appeal of "order refusing to disqualify counsel" on the ground that even when such a refusal is "erroneous," the potential harm "does not diffe[r] in any significant way from the harm resulting from other [unappealable] interlocutory orders that may be erroneous[,] such as . . . denying motions for recusal of the trial judge") (quotation marks omitted).

Accordingly, it is ORDERED that the petition for interlocutory review be, and it hereby is, denied.[26]

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

[26] JTCM's and Jarkesy's request for a stay is moot in light of the deposition of their petition. *See Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *3 n.12. Their request for "Production and Preservation of Records" relating to the Settlement Order must be directed to the law judge. *See* Rules of Practice 151(c), 232(a)(1), 17 C.F.R. § 201.151(c), 201.232(a)(1); *SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963) ("The party asserting disqualification must make his record in the administrative hearing."); *cf. Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011) (holding that "strong" evidence of "unalterably closed minds" is required to justify discovery into an agency's decisionmaking); *San Francisco Mining Exch. v. SEC*, 378 F.2d 162, 168 (9th Cir. 1967).