UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9664 / October 16, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 73375 / October 16, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3951 / October 16, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31289 / October 16, 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 INTERLOCUTORY REVIEW WITH RESPECT TO RESPONDENTS' MOTION FOR ORDER DIRECTING ALTERNATIVE PROCEDURE FOR FILING, SERVICE AND PUBLICATION OF INITIAL DECISION |

This is the third time in this administrative proceeding that respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. have sought the Commission's intervention before the law judge's issuance of an initial decision. Because they have failed to show that relief is warranted, the Commission has determined to deny interlocutory review with respect to their Motion for Order Directing Alternative Procedure for Filing, Service and Publication of Initial Decision (the "Motion").

**I.**

The Commission has set forth the background of this proceeding in prior orders.[1] It originally involved two other respondents, John Thomas Financial, Inc. ("JTF") and Anastasios

[1] *See John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71415, 2014 WL 294551, at *1 (Jan. 28, 2014) (*John Thomas II*) (denying petition for interlocutory review of order rejecting respondents' claim of prejudgment); *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *1 (Dec. 6, 2013) (*John Thomas I*) (denying petition for interlocutory review of order rejecting respondents' claims based on, *inter alia*, purported due process violations).

"Tommy" Belesis, that later submitted an offer of settlement to the Commission. The Commission's December 5, 2013 order accepting the settlement (the "Settlement Order") made findings and imposed sanctions as to JTF and Belesis. It 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."[2]

In January 2014, JTCM and Jarkesy sought disqualification of the entire Commission on the basis that the Commission, in issuing the Settlement Order, purportedly had "conclusively prejudged the case" against them. The law judge denied the motion to disqualify. JTCM and Jarkesy then filed a petition for interlocutory review with the Commission, which was denied on January 28, 2014. The Commission concluded, among other things, that granting review would delay the resolution of the proceeding without justification because JTCM and Jarkesy's claims could be afforded effective review following issuance of the initial decision in the event that it was adverse to them.[3] Furthermore, the Commission determined that there was not a "substantial ground for difference of opinion" because the Commission had in prior decisions rejected claims of prejudgment premised upon its acceptance of settlements in multi-respondent proceedings, and respondents had not addressed or distinguished those decisions.[4] As the Commission explained, no prejudgment of the non-settling respondent's case occurs even though the agency may have acquired some familiarity with the underlying events at another stage of the proceedings involving other respondents.[5]

JTCM and Jarkesy then sought a temporary restraining order ("TRO") from the United States District Court for the District of Columbia, seeking to stay the hearing in this proceeding. The district court denied their request for a TRO, finding that its jurisdiction was doubtful; that respondents had failed to show that judicial review after the Commission's issuance of a final order would be an inadequate remedy; and that respondents had not established that they would be irreparably harmed. Subsequently, on June 10, 2014, the district court dismissed the case for lack of subject matter jurisdiction. It concluded that, "[a]lthough the plaintiffs raise various allegations of violations of their constitutional rights[,] . . . those claims are inextricably intertwined with . . . the very enforcement proceeding," and "there is no dispute that the plaintiffs will have the opportunity to raise all of their constitutional claims before a Court of Appeals should the [law judge] and the Commission issue orders adverse to them."[6] JTCM and Jarkesy's appeal from that ruling is pending in the court of appeals.

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2 *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 70989, 2013 WL 6327500, at *1 n.1 (Dec. 5, 2013) (*John Thomas Settlement Order*).

3 *John Thomas II*, 2014 WL 294551, at *3 & nn.23-25.

4 *Id.* at *2 & nn.11-15 (collecting cases).

5 *Id.* at *2.

6 *Jarkesy v. SEC*, ___ F. Supp. 2d ___, 2014 WL 2584403, at *4 (D.D.C. June 10, 2014).

Meanwhile, the hearing before the law judge began as scheduled on February 3 and concluded on March 14. The deadline for filing the initial decision is October 17. On October 1, JTCM and Jarkesy filed the instant Motion requesting that the Commission direct that the initial decision be served upon the parties only and that it be maintained under seal until resolution of respondents' appeal of the district court's June 10 order dismissing their case. Respondents assert that they have presented "claims of constitutional violations," including their claim of prejudgment arising from the Settlement Order, and that public release of the initial decision would result in irreparable harm. The law judge denied the Motion on October 2.[7] Subsequently, the Division filed an opposition on October 6.

**II.**

JTCM and Jarkesy's Motion seeks Commission intervention with respect to the conduct of an ongoing administrative proceeding before the law judge has issued an initial decision. It is in substance a petition for interlocutory review and, as such, governed by Rule 400 of the Rules of Practice.[8] Respondents necessarily recognize that they are requesting interlocutory relief from the Commission in that they invoke Rule of Practice 400(b), which provides that "[i]nterlocutory review . . . shall be expedited in every way, consistent with the Commission's other responsibilities," as the basis for requesting expedited consideration of their Motion.[9] "Petitions by parties for interlocutory review are disfavored" and will be granted "only in extraordinary circumstances."[10] The Commission has determined to deny interlocutory review.

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[7] *John Thomas Capital Mgmt. Group LLC*, Admin. Proc. Rulings Release No. 1877 (Oct. 2, 2014). The law judge noted that although the Motion appeared to be principally directed to the Commission, it also requested "that Administrative Law Judge Foelak and the Commission grant expedited consideration" to respondents' sealing request. *Id.*

[8] In *Kevin Hall*, we explained that Rule 400(a) provides "that the 'exclusive remedy for review of a hearing officer's ruling prior to Commission consideration of the entire proceeding' is a petition for interlocutory review." Exchange Act Release No. 55987, 2007 WL 1892136, at *1 (June 29, 2007). Thus, "absent extraordinary circumstances, we will not entertain motions, *no matter how styled*, for interlocutory review." *Id.* at *2 (emphasis added); *Proposed Amendments*, Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003) ("Rule 400 is the sole route for interlocutory review . . . ."). In certain situations, the Rules of Practice create alternative procedures for seeking relief directly from the Commission outside of Rule 400. *E.g.*, Rule of Practice 200(d)(1), 17 C.F.R. § 201.200(d) (amendments of orders instituting proceedings); *id.* § 201.201 (consolidation or severance); *id.* § 201.240 (offers of settlement). The relief requested by the Motion fits into none of these categories. Instead, it implicates the regulation of the course of proceedings before the law judge. *See Kevin Hall*, 2007 WL 1892136, at *2; Rules of Practice 111(d), 322, 17 C.F.R. §§ 201.111(d), 322; *infra* note 16.

[9] Rule of Practice 400(b), 17 C.F.R. § 201.400(b).

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

To begin with, respondents neither sought nor obtained the law judge's certification of her denial of the Motion for interlocutory review. Standing alone, a "failure[] to seek or obtain certification [is] basis enough for the Commission to deny . . . interlocutory review."[11]

Additionally, there would be no basis for certification under the applicable standards in Rule 400(c). The Commission's immediate review of the Motion's denial would not "materially advance the completion of the proceeding" since the initial decision will be issued by the law judge whether or not it is sealed as the Motion requests.[12] Nor does the public release of the initial decision "involve[] a controlling question of law."[13] Questions of whether adjudicative records should be sealed typically call for a nuanced and fact-specific balancing analysis.[14] Such a "'mixed [question] of law and fact' . . . [would be] inappropriate for certification."[15] That principle applies with particular force here, where the justification advanced by respondents for sealing the initial decision is that they have asserted purportedly "credible" constitutional claims arising from the Commission's conduct of the proceeding. Consequently, the sealing issue is inextricably intertwined with the Commission's consideration of respondents' underlying claims and defenses.[16]

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[11] *Harding Advisory LLC*, Securities Act Release No. 9561, 2014 WL 988532, at *3 (Mar. 14, 2014).

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

[13] *Id.*

[14] *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014); *Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991). Moreover, courts have recognized that the public interest in access to governmental decisions is especially strong. *See, e.g.*, *Wash. Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897, 899, 905 (D.C. Cir. 1996); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849-50 (5th Cir. 1993); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.").

[15] *Harding Advisory*, 2014 WL 988532, at *4 (second alteration added).

[16] It is unnecessary to decide whether the law judge was correct in stating that she was "not authorized to grant" the motion to seal. JTCM and Jarkesy could obtain relief now only by *both* identifying a source of authority for filing the initial decision under seal *and* showing that the totality of the circumstances weighed in favor of sealing the decision under whatever legal standard might be applicable. *See, e.g.*, *In re Under Seal*, 749 F.3d 276, 293 (4th Cir. 2014) (explaining that the appealing party must counter the grounds that might support the result below); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 90 (2d Cir. 2003); *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984). We express no definite view as to whether respondents could meet these dual burdens.

Finally, the Commission declines to exercise its discretionary authority to, "at any time, on its own motion," direct interlocutory review.[17] Respondents argue that alternative procedures should be employed in the interests of justice. They assert that the proceedings are void on account of alleged constitutional violations. They speculate that it is "inevitable" that the law judge will find liability—*i.e.*, on the basis of the purported "findings" in the Settlement Order—and that the decision, if released to the public, will cause ongoing and irreparable harm. In short, they claim that a bell cannot be un-rung and this requires the Commission to act now.

Respondents' contentions are without merit. First and foremost, the premise of respondents' argument is incorrect: The Settlement Order did not make any binding findings as to JTCM and Jarkesy. On the contrary, it states 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*."[18] Thus, as the Commission's previous order denying interlocutory review emphasized, any decision as to JTCM and Jarkesy in the instant proceeding—whether the initial decision issued by the law judge or an opinion and final order issued by the Commission—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."[19]

Moreover, the Commission's de novo review following the issuance of an initial decision will offer an adequate forum for JTCM and Jarkesy to present their constitutional claims. Their underlying claims of prejudgment are "'fully reviewable on appeal'" in the ordinary course of the Commission's review under Rule of Practice 410 and any subsequent judicial review proceeding.[20] So are their other claimed constitutional violations.[21]

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[17] Rule of Practice 400(a), 17 C.F.R. § 201.400(a).

[18] *John Thomas Settlement Order*, 2013 WL 6327500, at *1 n.1 (emphasis added)

[19] *John Thomas II*, 2014 WL 294551, at *2 (quotation marks omitted). The finder of fact can "compartmentalize the information [it] receive[s]" and rely only "on evidence relevant for a particular decision." *See, e.g.*, *BCCI Holdings v. Khalil*, 182 F.R.D. 335, 340 (D.D.C. 1998) (quoting *Clifford v. United States*, 136 F.3d 144, 148-49 (D.C. Cir. 1998)) (rejecting prejudgment claim premised on the court's acceptance of "guilty pleas [by alleged coconspirators] on the basis of . . . factual proffers" in related criminal proceedings); *accord FTC v. Cement Inst.*, 333 U.S. 683, 703 (1948) ("[J]udges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the [agency] cannot possibly be under stronger constitutional compulsions . . . than a court."); *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976) ("[W]hat a judge learns . . . by way of guilty pleas of codefendants . . . is not the kind of matter that results in disqualification.").

[20] *John Thomas II*, 2014 WL 294551, at *3 & n.23 (quoting *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960-61 (5th Cir. 1980)). The denial of interlocutory review does not preclude respondents from renewing their claims if and when they petition the Commission for review from the law judge's initial decision. *See, e.g.*, *Kirshner v. Uniden Corp. of Am.*, 842

(continued . . .)

Lastly, JTCM and Jarkesy have not identified a cognizable, irreparable injury arising from the public release of the initial decision while their underlying constitutional claims are being considered.[22] The law judge has not rendered—and may never render—an initial decision that is adverse to them. And even if the initial decision were to find liability as to JTCM and Jarkesy, their fear that the decision could be introduced against them in collateral civil litigation does not constitute *irreparable* harm because reversal of the decision on appeal (whether by the Commission or by a court) would vitiate its use in other proceedings.[23] At any rate, "[a]lthough it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously" tried by the government, bearing that "discomfiture and cost" is "not recognized as [an] irreparable injur[y]."[24] As the D.C. Circuit has made clear, even the "burden of being haled" into an allegedly improper forum does not constitute irreparable injury.[25]

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(…continued)
F.2d 1074, 1078-79 (9th Cir. 1988) (law of the case doctrine does not apply to discretionary denials of interlocutory appellate review).

[21] *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (privilege and discovery); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351-53 (D.C. Cir. 2007) (separation of powers); *Germain v. Conn. Nat'l Bank*, 930 F.2d 1038, 1039 (2d Cir. 1991) (trial by jury); *Harding Advisory*, 2014 WL 988532, at *6 (equal protection); *id.* at *7-8 & n.37 (selective prosecution); *John Thomas I*, 2013 WL 6384275, at *4 & n.29 (due process).

[22] *See, e.g.*, *United States v. Guerrero*, 693 F.3d 990, 997 (9th Cir. 2012) (declining to immediately review "order denying a motion to seal" and rejecting "the cat is out of the bag" argument); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011) (same regarding disclosure order); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658-59 (3d Cir. 1991) (stating that it was "unlikely that . . . embarrassment [from release of unsealed materials] qualifies as irreparable injury"); *cf. United States v. Hubbard*, 650 F.2d 293, 313 (D.C. Cir. 1980) (entertaining immediate appellate review of unsealing order where review would "*not* require us to decide questions inextricably intertwined with the propriety of the criminal conviction") (emphasis added).

[23] *United Brotherhood of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Canada*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.") (quotation marks omitted); *see also BDO China Dahua CPA Co., Ltd.*, Exchange Act Release No. 72753, 2014 WL 3827605, at *1 n.6 (Aug. 4, 2014) ("[T]he Commission is 'not bound by a law judge's initial decision[.]'").

[24] *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) (quotation marks omitted).

[25] *Id.* at 70-71; *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261-62 (7th Cir. 1978) (rejecting assertion of irreparable injury arising from violation of claimed right to be tried "in a judicial forum" as opposed to an "administrative tribunal[]").

Respondents' position, in a nutshell, is that the initial decision should not be released *precisely because* (in their view) it later might be reversed on appeal; the asserted injury thus is inseparable from the underlying, alleged constitutional violations. But every potential appellant could make the identical argument and seek to shield from public view every non-final trial court or agency decision pending appeal.[26] On this record, respondents have not shown irreparable harm calling for the Commission's immediate intervention with respect to their sealing Motion.

* * *

Accordingly, it is ORDERED that interlocutory review with respect to the law judge's denial of respondents' Motion for Order Directing Alternative Procedure for Filing, Service and Publication of Initial Decision is DENIED.

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

Brent Fields
Secretary

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[26] *See, e.g., United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 693 (5th Cir. 2010) (recognizing that trial court decisions may "inclu[de] . . . statements and information that may be embarrassing," but explaining that the proper appellate function is to "review that court's decision . . . not to edit it"); *In re Nat'l Broad. Co., Inc.*, 653 F.2d 609, 615-16 (D.C. Cir. 1981) (rejecting argument that the "risk of potential prejudice at a hypothetical second trial" in the event that the defendant's "convictions [were] reversed on appeal" could justify sealing of trial court records).