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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6628/July 15, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of	:	
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RAYMOND J. LUCIA COMPANIES, INC., and RAYMOND J. LUCIA, SR.	:	ORDER
	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, on September 5, 2012. On July 8, 2013, an Initial Decision imposed various sanctions on Respondents. Respondents appealed a series of adverse decisions, eventually reaching the Supreme Court.[1] The Supreme Court held that the Administrative Law Judge (ALJ) who had initially presided over the proceeding 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." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 & n.6 (2018). As a result, the Commission ordered that Respondents "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 (Aug. 22, 2018); Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018).

[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).

Under consideration are Respondents' Motion for an Order Dismissing the Proceedings, filed December 3, 2018; the Division of Enforcement's Opposition, filed December 26, 2018; and Respondents' Reply, filed January 28, 2019.[2]

Respondents argue 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 203(k)(2) of the Advisers 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, Respondents move 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) Respondents' argument based on the statute of limitations fails. The Commission's September 5, 2012, order that instituted this proceeding (OIP) alleged ongoing misconduct as of that date. Therefore, the proceeding was instituted within the five years specified by 28 U.S.C. § 2462.

Respondents' 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 proceeding but rather ordered that Respondents be provided with the opportunity for a new hearing before a new ALJ. Indeed, Respondents themselves had conceded the validity of the OIP in arguing that "the constitutional error can be remedied only by vacating everything done on Judge Elliot's watch" and that the violation "requires the Court 'to set aside as a nullity' all of Judge Elliot's actions going back to the *Commission's issuance of the order instituting proceedings, the last official act before the involvement of an unconstitutional adjudicator*."[3] Pet. Brief at 43, 46 (emphasis added). Respondents argued, "At minimum . . . Lucia is entitled to an entirely new proceeding before a constitutional Officer" but "the more consequential remedy of dismissal is appropriate." Pet. Brief at 43. The Court did not order the proceeding to be dismissed but rather that Respondents be offered the opportunity of a new hearing before a different ALJ. Since the Court did not invalidate the OIP, the proceeding was instituted within the five-year statute of limitations.

(2) The OIP authorized cease-and-desist proceedings against Respondents pursuant to Section 203(k) of the Advisers Act. Section 203(k)(2) 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

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[2] The Reply 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. 10602, 2019 SEC LEXIS 5, at *1 (Jan. 16, 2019).

[3] *But see* Pet. Reply at 23 ("the taint of unconstitutionality reaches back to the order instituting proceedings").

earlier or later date is set by the Commission with the consent of any respondent so served." The OIP was served on Respondents' then-counsel on September 10, 2012, and the hearing commenced on November 8, 2012, within sixty days.

Respondents' argument that Advisers Act Section 203(k)(2) would be violated by resuming proceedings requires pretending that the hearing that commenced on November 8, 2012, never happened. However, the Supreme Court did not hold that the original hearing never happened but rather ordered that Respondents receive 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 203(k)(2) 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. § 80b-3(k)(2). 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) Respondents' 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.[4] Sunday, July 7, 2013, was 300 days after service, and 17 C.F.R. § 201.160(a) provided that, if the last day of a period prescribed in the Commission's Rules of Practice or by Commission order is a Saturday, Sunday, or Federal legal holiday, "the period runs until the end of the next day that is not a Saturday,

[4] The rule also provided that the ALJ was to schedule the hearing "approximately 4 months" after the issuance of the OIP. Respondents asked for and received a hearing that began within the earlier statutory period. *See Lucia*, Prehr'g Tr. 34–35 (Oct. 24, 2012) (confirming November 8, 2012, hearing date).

Sunday, or Federal legal holiday." Therefore, the July 8, 2013, Initial Decision in this proceeding unquestionably complied with 17 C.F.R. § 201.360(a)(2).

Respondents, however, contend 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.").

(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 Respondents make. *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 addressed Respondents' 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 *Raymond J. Lucia Cos.*, No. 18-cv-02692 (S.D. Cal.). *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, Respondents will have an opportunity for meaningful judicial review of all of the issues they raised in their motion for dismissal.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge