

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6652/August 8, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-15006

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

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, “[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled,” and “[t]he 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).

This Order addresses Respondents’ July 18, 2019, Motion for Certification for Interlocutory Appeal of the July 15, 2019, Order that denied their Motion for an Order Dismissing the Proceedings. See *Raymond J. Lucia Cos.*, Admin. Proc. Release No. 6628, 2019

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).

SEC LEXIS 1744 (A.L.J.) (July 15 Order). The Division of Enforcement filed an opposition on July 30, 2019.²

The July 15 Order addressed several arguments that Respondents raised in urging dismissal of the proceeding, including the argument that the undersigned is presiding over the proceeding in violation of Article II of the United States Constitution because she is unconstitutionally insulated from removal. This issue was left open by the Supreme Court in *Lucia*, 138 S. Ct. at 2050 n.1. It is the July 15 Order's ruling on this issue that Respondents request be certified to the Commission for interlocutory review pursuant to 17 C.F.R. § 201.400(c)(2), which provides, in relevant part:

(c) *Certification Process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer The hearing officer shall not certify a ruling unless:

...

(2) Upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the order may materially advance the completion of the proceeding.

With reference to (i), Respondents acknowledge that the Commission has rejected their tenure protection argument. *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, the Commission has not disavowed that position, and no federal court has addressed the tenure protection argument, *see Lucia*, 138 S. Ct. at 2050 n.1, let alone agreed with it. To show "substantial ground for difference of opinion," Respondents argue that the U.S. Government has argued that the Commission's position is constitutionally suspect, citing the Government's arguments in its brief to the Supreme Court in *Lucia*, which the Supreme Court declined to address. Respondents also argue that the Division appears to acknowledge that the current ALJ structure is unconstitutional (which the Division denies). Even if this were true, the undersigned declines to regard the Division, or a *party* to any litigation, as a source of controlling precedent.

With reference to (ii), Respondents note that in *Lucia*, the Supreme Court vacated six years of administrative proceedings and litigation involving Respondents. They argue that immediate review of the tenure protection issue will forestall additional years of wasted time and resources in this matter as well as others currently presided over by ALJs. To the contrary,

² The opposition was timely filed. *See Raymond J. Lucia Cos.*, Admin. Proc. Release No. 6644, 2019 SEC LEXIS 1845 (A.L.J. July 25, 2019).

immediate review of the tenure protection issue is unlikely to materially advance the completion of this proceeding.

Respondents cite *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), in support of their argument that ALJs such as the undersigned have unconstitutional removal protections in violation of Article II.³ Assuming, *arguendo*, the validity of this argument, interlocutory review is unlikely to materially advance the completion of this proceeding. The remedy ordered by the Supreme Court was to declare the removal restrictions in the PCAOB's authorizing statute to be invalid while leaving the PCAOB to function as before. *See id.*, 561 U.S. at 508-10. Were this principle to be applied in this proceeding, it would be to declare that the undersigned and other ALJs could be removed at will. It would not affect properly appointed ALJs' functioning in presiding over hearings and thus would not advance the completion of this proceeding. Accordingly, Respondents' Motion will be denied.

IT IS SO ORDERED.

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

³ The procedure for removal of administrative law judges is found in 5 U.S.C. § 7521(a), which provides that removal or other specified adverse actions "may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."