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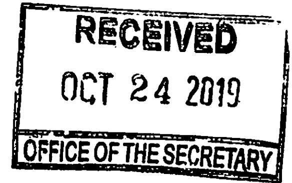


Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of

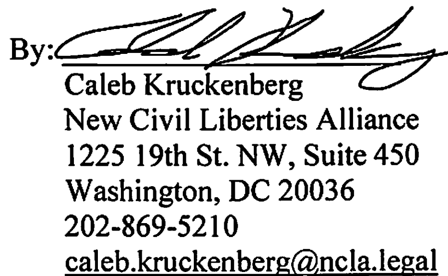
RAYMOND J. LUCIA
COMPANIES, INC. and
RAYMOND J. LUCIA, SR.,

Respondents.

RESPONDENTS' MOTION FOR STAY PENDING APPEAL AND, IN THE ALTERNATIVE, FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

DATED: October 21, 2019

NEW CIVIL LIBERTIES ALLIANCE
Counsel for Respondents
Raymond J. Lucia Companies, Inc. and
Raymond J. Lucia, Sr.

By:


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On September 24, 2019, the United States Court of Appeals for the Fifth Circuit stayed an administrative proceeding just like this one over concerns that every SEC Administrative Law Judge's removal protections violate Article II of the United States Constitution. (Attachment A.) This changed circumstance compels Respondents, Raymond J. Lucia, Sr. and Raymond J. Lucia Companies, Inc., to move for a stay of this administrative proceeding pending exhaustion of their appeal before the Ninth Circuit. In the alternative, Respondents seek to certify for interlocutory appeal to the full Securities and Exchange Commission the question of whether this Administrative Law Judge is unconstitutionally insulated from removal by the President. Respondents bring this motion under Rules 161 and 400 of the Commission's Rules of Practice.

This constitutional question goes to the heart of this ALJ's ability to preside over this matter. If this ALJ is unconstitutionally protected from removal, then this remanded proceeding will be vacated just like the first administrative proceeding in this case. Brushing this risk aside and forging ahead with the Respondents' administrative proceeding, despite warnings from an Article III court, threatens to burden Respondents, the Division of Enforcement, and this ALJ with the financial and other costs of an invalid proceeding.

Granting a stay or, alternatively, certifying this constitutional question for the Commission's consideration avoids these grave risks at little cost. Such an order is prudent and fair. But it also gives due respect to the superior authority of the Article III courts.

This ALJ therefore should adjourn the March 2, 2020 hearing date and applicable discovery deadlines until Respondents have exhausted their pending appeal in the Ninth Circuit. Alternatively, this ALJ should certify this constitutional question for interlocutory appeal before the full Commission.

FACTS AND PROCEDURAL HISTORY

On November 28, 2018, Respondents sought an injunction and declaratory relief in the United States District Court for the Southern District of California, in case number 18-cv-02692. Respondents argued that this ALJ may not preside over this matter without violating Article II of the U.S. Constitution because this ALJ is insulated from removal by at least two levels of tenure protection. Accordingly, Respondents asked the federal court to enjoin this administrative proceeding.

On December 3, 2018, Respondents moved for an order dismissing these proceedings under Rule 250(a) of the Commission's Rules of Practice. As relevant here, Respondents also raised the Article II removal issue. (See Respondent's Motion at 22-23.) Because of the constitutional defect, Respondents asked this ALJ to refer this matter to the full Commission for trial. (See id. at 22.) On July 15, 2019, this ALJ denied the motion in a written order. Order, Administrative Release No. 6628 (July 15, 2019). On the Article II issue, this ALJ applied the Commission's precedent, even though that precedent had been decided prior to, and partially overruled by, the Supreme Court's decision in this case, Lucia v. SEC, 138 S. Ct. 2044 (2018). Id. (citing In the Matter of optionsXpress, Inc. & Jonathan I. Feldman, Release No. 10125, 2016 WL 4413227, at *50-51 (Aug. 18, 2016), reversed in part on other grounds by Lucia, 138 S. Ct. 2044.

Respondents sought certification for interlocutory review. On August 8, 2019, this ALJ denied the request in a written order. Order, Administrative Release No. 6652 (August 8, 2019).

On August 21, 2019, the United States District Court dismissed the declaratory lawsuit on jurisdictional grounds without reaching the merits. Respondents timely filed a notice of

appeal on September 17, 2019. That matter is now pending before the Ninth Circuit Court of Appeals.

On September 24, 2019, facing the same constitutional question that Respondents present here, the Fifth Circuit granted a motion to enjoin administrative proceedings in Cochran v. SEC, No. 19-10396 (5th Cir. 2019). (Attachment A.) Like Respondents, Cochran, the petitioner there, had her first administrative proceeding vacated by the Supreme Court's disposition in Lucia, which deemed her ALJ unconstitutionally appointed. Also like Respondents, Cochran argued on remand that her SEC ALJ's removal protections violate Article II of the U.S. Constitution. She sought an injunction pending full review of the ALJ's removal protections. Shortly after oral argument, the Fifth Circuit granted the preliminary injunction, staying Cochran's administrative proceeding pending resolution of this constitutional question before a merits panel of the court.

Respondents raise the same question and seek the same relief here.

ARGUMENT

I. THIS ALJ SHOULD STAY THESE PROCEEDINGS PENDING EXHAUSTION OF RESPONDENTS' ARTICLE III APPEAL

This ALJ should adjourn the March 2, 2020 hearing date, and the applicable discovery deadlines until Respondents have exhausted their pending appeal in the Ninth Circuit.

A. This Motion Is Not Disfavored

The Commission's rules empower this ALJ to "postpone or adjourn any hearing" "for good cause shown" "at any time prior to the closing of the record." 17 C.F.R. § 201.161(a). The rules specify no durational limit for adjournments. This ALJ merely need "state[] on the record or set[] forth in a written order the reasons why" an adjournment longer than 21 days is "necessary." Id. at § (c)(1).

In determining whether to grant a request for postponement, this ALJ "shall consider" five factors: "(i) [t]he length of the proceeding to date; (ii) [t]he number of postponements, adjournments or extensions already granted; (iii) [t]he stage of the proceedings at the time of the request; (iv) [t]he impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and (v) [a]ny other such matters as justice may require." Id. at § (b)(1). This ALJ must also consider "any other relevant factors." Id. Generally, requests for adjournment are "strongly disfavor[ed]." Id. at § (b)(2). But "this policy of strongly disfavoring requests for postponement will not apply" when the movant seeks "to postpone commencement of a cease and desist proceeding hearing beyond the statutory 60-day period." Id. [at § (b)(2).]

Such is the case here. The Commission has chosen to schedule Respondents' hearing well beyond the statutory 60-day deadline. Even on the least generous measure possible—from the filing date of this motion—more than 150 days remain until next year's hearing. Therefore, this motion is not disfavored. See 17 C.F.R. § 201.161(b)(2).

B. Respondents' Constitutional Claim Has Merit

The combination of holdings in Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010) and Lucia v. SEC, 138 S. Ct. 2044 (2018), makes clear that the removal protections of SEC ALJs are unconstitutional. In Free Enterprise Fund, the Court held that as inferior officers, members of the PCAOB enjoyed unconstitutional removal protections in violation of Article II. See 561 U.S. at 492-98. Lucia held that SEC ALJs are inferior officers like the members of the PCAOB, 138 S. Ct. at 2051, 2055, overturning the Commission's conclusion to the contrary in optionsXpress, Inc., 2016 WL 4413227 at *47–48, 50-51. Because multiple layers of for-cause removal protection shield this ALJ, see Lucia, 138 S. Ct. at 2060

(Breyer, J., concurring in part), just like the PCAOB members in Free Enterprise Fund, 561 U.S. at 492, this ALJ sits in violation of Article II. The Fifth Circuit's decision to grant a preliminary injunction in Cochran v. SEC when faced with this precise question should remove all doubt because it indicates that Respondents' constitutional claim "is likely to succeed on the merits." See Attachment A; Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) (standard for injunction on appeal).

C. Judicial Supremacy and Prudence Warrant Deference to the Cochran Decision

Whether or not Free Enterprise Fund and Lucia resolve whether this ALJ enjoys unconstitutional removal protections, this ALJ still owes deference to the Fifth Circuit's determination that this constitutional question carries such significance as to merit halting ongoing administrative proceedings pending resolution in an Article III court. An agency is "obligated under the principles of stare decisis" to follow the law of the circuit in which agency proceedings are instituted. Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980); see also Murray v. Heckler, 722 F.2d 499, 503 (9th Cir. 1983) ("[N]onacquiescence in our rulings not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government—the rule of law, the doctrine of separation of powers imbedded in the constitution, and the tenet of judicial supremacy."). But the agency "also owes deference to the other courts of appeals which have ruled on the issue[.]" Mary Thompson Hosp., Inc., 722 F.2d at 503.

Indeed, the law of the Ninth Circuit, which is binding in this proceeding, compels this ALJ to give due weight to the Fifth Circuit's decision in Cochran. The Ninth Circuit routinely "look[s] to the reasoning of other circuits and district courts for guidance." Gunther v. Washington Cty., 623 F.2d 1303, 1319 (9th Cir. 1979). It has pointedly "adopted a cautionary

rule, counseling against creating intercircuit conflicts." In re Taffi, 68 F.3d 306, 308 (9th Cir. 1995), aff'd by 96 F.3d 1190 (1996) (en banc). And where the Ninth Circuit's own precedent is inconclusive—as it is here, merely a year after Lucia transformed the law in this area—it "consider[s] how other federal circuit courts have addressed" the same dispute. Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1145 (9th Cir. 2001). The respectful consideration that the Ninth Circuit affords to out-of-circuit precedent should give this ALJ pause before forging ahead with an administrative proceeding that the Ninth Circuit, following the Fifth, may vacate.

To be sure, this ALJ has previously declined to issue a post-hearing stay on a related Appointments Clause challenge even after the Tenth Circuit had ruled that the proceeding was unconstitutional. See Lynn Tilton; Patriarch Partners, LLC; Patriarch Partners VIII, LLC; Patriarch Partners XIV, LLC; & Patriarch Partners XV, LLC, Release No. 4672, 2017 WL 10662121, at *1 (ALJ Mar. 10, 2017). While that matter was eventually resolved in the respondents' favor, history has shown that a stay would have been appropriate in that case and that Tilton's challenge to the appointment of her ALJ was ultimately found to have merit by the Supreme Court. Indeed, the Supreme Court ruling vacated numerous administrative proceedings, including this one, when a pre-hearing stay could easily have avoided the need for repeat proceedings in all of those matters.

D. Risking a Do-Over Is Unfair and Wasteful

Read together, the Supreme Court's decisions in Free Enterprise Fund and Lucia are clear. It is unconstitutional for an officer of the United States to have multiple layers of insulation between her and removal by the President. SEC ALJs are officers of the United States and have multiple layers of insulation between them and their removal by the President. Therefore, SEC ALJs are unconstitutionally insulated from removal. If the Ninth Circuit agrees,

vacatur is required. See Lucia, 138 S. Ct. at 2055 ("[T]he appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official.") (cleaned up).

Forcing Respondents to endure not just one but two unconstitutional (and vacated) proceedings is unfair and wasteful. This case has already subjected Respondents to the reputational, financial, occupational and emotional costs of nearly a decade of civil prosecution. But this repetitive process has been a burden on the agency as well. Agency resources are finite, and it hardly serves the SEC's interests to press on with one more round of proceedings that will likely be vacated.

Staying these proceedings until the Ninth Circuit resolves the fundamental constitutional question at issue avoids this waste. It vindicates the public interests undergirding regulation of securities markets, as well as basic principles of fairness.

II. ALTERNATIVELY, THIS ALJ SHOULD CERTIFY THIS QUESTION FOR REVIEW BEFORE THE FULL COMMISSION

While this ALJ previously denied Respondents' request for certification of the Article II issue, given the Fifth Circuit's grant of an injunction in the Cochran matter, Respondents urge this ALJ to reconsider that determination.

A party to an administrative proceeding may seek an ALJ's certification of a ruling for interlocutory review under Rule 400 of the Commission's Rules of Practices. See 17 C.F.R. § 201.400(c). Certification is appropriate when "[t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and [when] immediate review of the order may materially advance the completion of the proceeding." Id. at § (c)(2).

This ALJ denied Respondents' prior request for certification because, first, regardless of the government's past acknowledgement of the apparent constitutional defect in these

proceedings, "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." Order, Administrative Release No. 6652, at *2 (August 8, 2019). Second, this ALJ determined that immediate review would not advance the completion of the proceeding because the only remedy available to Respondents "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." Id. at *3.

The Fifth Circuit's stay in the Cochran matter has altered the circumstances relative to the first factor. As discussed above, the Court has now held that there is a likelihood that this proceeding suffers from a structural constitutional defect. (Attachment A.) Notably, that is the first and only decision on the merits of the issue by any Article III court. Not only does this ALJ owe great deference to that decision, see Mary Thompson Hosp., Inc., 621 F.2d at 864, but it, at the very least, represents a contradiction of the Commission's view that warrants review by the Commission itself.

Second, as the Fifth Circuit also recognized, this matter would be advanced by immediate review. The Fifth Circuit concluded that the constitutional harm arising from unconstitutional proceedings would result in irreparable injury in the Cochran matter. See Ruiz, 650 F.2d at 565 (injunction pending appeal requires showing of "likelihood of success on the merits" and "irreparable harm" if an injunction is not granted). That same principle applies here. See Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Even if that constitutional harm could ultimately be

remedied, that would not change the fact that Respondents face an unconstitutional proceeding and will face an irreparable constitutional injury if forced to go forward.

Moreover, neither this ALJ nor the Commission can fashion the remedy contemplated by this ALJ, and thus the constitutional defect cannot be so easily fixed as this ALJ suggested.[1] An Article III court, of course, has the inherent power to sever portions of a statute that it has determined to be unconstitutional. See I.N.S. v. Chadha, 462 U.S. 919, 932 (1983). However, neither an administrative law judge nor an agency itself has any "inherent power." Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 202 (2d Cir. 2004); see also Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it."). Nothing in the SEC's statutes empower this ALJ or the agency generally to sever any statute, much less the statutory protections governing the Merit Systems Protection Board (5 U.S.C. § 7521), which, of course, apply to agencies across the government. Statutory severance, if a solution at all, can only happen in an Article III court.

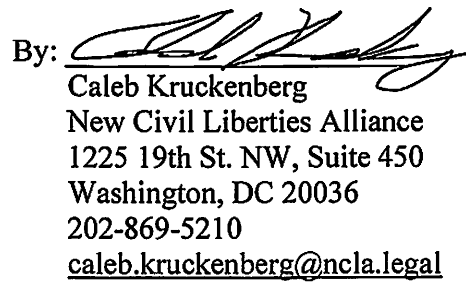
CONCLUSION

This ALJ should stay this matter pending review in the Ninth Circuit Court of Appeals. Alternatively, this ALJ should certify the question of whether SEC ALJs tenure protections violate Article II to the full Commission on interlocutory appeal.

DATED: October 21, 2019

NEW CIVIL LIBERTIES ALLIANCE
Counsel for Respondents
Raymond J. Lucia Companies, Inc. and
Raymond J. Lucia, Sr.

[1] Respondents also do not agree that severance would be an appropriate remedy. When confronted with the related appointments issue, the Supreme Court, of course, ordered a new hearing and proper appointment. See Lucia, 138 S. Ct. at 2055 ("[T]he appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official.") Likely the Court would order a similar remedy for the removal problem.

By: 

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CERTIFICATE OF SERVICE

This is to certify that this filing was sent by facsimile transmission, and that, contemporaneously, the original and three copies of the foregoing motion were mailed, first class, postage prepaid on this day to:

Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE, Mail Stop 1090
Washington, DC 20549
FAX: 703-813-9793

And that one copy of the foregoing motion was mailed first class, postage prepaid on this day to:

Donald W. Searles
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And that the foregoing motion was emailed on this day to:

Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
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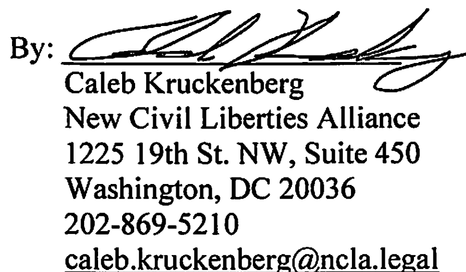
DATED: October 21, 2019

By: 
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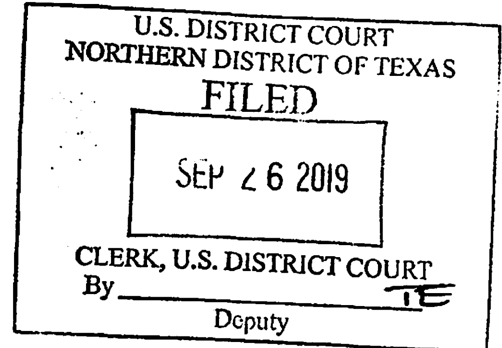
ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

4:19-cv-66-A



No. 19-10396

MICHELLE COCHRAN,

Plaintiff - Appellant

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; WILLIAM P. BARR, U. S. ATTORNEY GENERAL, in his Official Capacity,

Defendants - Appellees

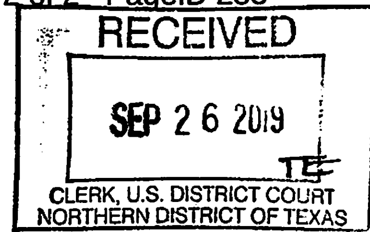
Appeal from the United States District Court
for the Northern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8 is GRANTED.

ORIGINAL



United States Court of Appeals
FIFTH CIRCUIT
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NEW ORLEANS, LA 70130

September 24, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-10396 Michelle Cochran v. SEC, et al
USDC No. 4:19-CV-66-A

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _______________________
Christina A. Gardner, Deputy Clerk
504-310-7684

Mr. Daniel J. Aguilar
Ms. Karen L. Cook
Mr. Samuel Wollin Cooper
Ms. Rebecca Cutri-Kohart
Mr. John Ehrett
Kayla Ferguson
Ms. Allyson Newton Ho
Ms. Ashley E. Johnson
Ms. Margaret A. Little
Ms. Karen S. Mitchell
Mr. Ashley Charles Parrish
Mr. Joshua Marc Salzman
Mr. Brian Walters Stoltz