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UNITED STATES OF AMERICA
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.



Division of Enforcement's Response in Opposition to Respondents' Motion for Stay Pending Appeal and, in the Alternative, for Certification for Interlocutory Review

This Court has previously denied Respondents the very relief they now seek. Order (July 15, 2019); Order (Aug. 8, 2019). Nevertheless, they once again request a stay of this proceeding or, in the alternative, an order certifying for interlocutory review their constitutional challenge to the for-cause restrictions on removing the Commission's Administrative Law Judges ("ALJs"). But Respondents' argument—that circumstances have changed and now warrant their proposed relief—hinges on a gross over-reading of a one-sentence order issued by a motions panel of the Fifth Circuit. In the case they cite, a district court held that it lacked jurisdiction to entertain a challenge to an administrative proceeding involving a different respondent. *Cochran v. SEC*, No. 4:19-CV-066-A (N.D. Tex. Mar. 25, 2019). After the case was appealed, but before a merits panel heard oral argument or issued a decision, a motions panel temporarily enjoined the administrative proceeding pending resolution of the appeal. (Order, *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 26, 2019), temporarily enjoining *In re Michelle L. Helterbran Cochran, CPA*, A.P. File No. 3-17228). Respondents ascribe great import to this order, but, contrary to

their claims, it does not reflect a final decision on even the jurisdictional issue—the sole issue presented in the appeal—let alone a “decision on the merits” of the removal question. Mot. 8. Their requests should therefore be denied.

Background

Following the Supreme Court’s decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which sustained Respondents’ challenge to the manner in which the Commissions’ ALJs were appointed, the Commission ordered that Respondents be provided with the opportunity for a new hearing before an ALJ who had not previously participated in the matter. *Pending Admin. Proc.*, Sec. Act Rel. No. 10536 (Aug. 22, 2018). The case was reassigned and, shortly thereafter, Respondents sought dismissal of the proceeding or, in the alternative, referral of the matter for a hearing before the Commission on the ground that the presiding ALJ remains unconstitutionally insulated from removal, in violation of Article II. This Court denied their motion, explaining that “the Commission has rejected the tenure protection argument that Respondents make” and noting that “[t]o date, no federal court has addressed Respondents’ tenure protection argument . . . [,] let alone agreed with it.” Order (July 15, 2019).

Respondents then moved this Court to certify to the Commission for interlocutory review their argument that the Commissions’ ALJs’ tenure protections are unconstitutional. Once again, however, the Court rejected Respondents’ request, noting that “the Commission has not disavowed” the position that its ALJs’ removal protections comport with Article II, and “no federal court” has either addressed or disagreed with that position. Order (Aug. 8, 2019). Now, citing the Fifth Circuit’s recent order in a case involving a different respondent in a different administrative proceeding (albeit one represented by the same counsel), Respondents have renewed their request for a stay or interlocutory Commission review.

Argument

This Court's prior decisions addressing Respondents' requests remain correct, and, contrary to Respondents' claims, nothing in the Fifth Circuit's one-line order undermines the Court's reasoning.

The pending Fifth Circuit appeal in *Cochran v. SEC* concerns whether a district court correctly held that it lacked jurisdiction over a challenge to an ongoing Commission administrative proceeding brought by respondent Michelle Cochran. Cochran's administrative proceeding was pending at the time the Supreme Court decided *Lucia*. See *Pending Admin. Proc.*, Sec. Act Rel. No. 10536 (Aug. 22, 2018). Her case was assigned to a new ALJ, and, like the Respondents here, she filed suit in federal district court seeking to enjoin the proceeding on the ground that the presiding ALJ's removal protections were unconstitutional. Complaint, *Cochran v. SEC*, No. 4:19-CV-066-A (N.D. Tex. Jan. 18, 2019). The district court dismissed the complaint for lack of jurisdiction, holding that under the Exchange Act, Cochran's arguments must be presented on direct review to a court of appeals following a final determination by the Commission. *Cochran*, 2019 WL 1359252 (Mar. 25, 2019). Cochran appealed to the Fifth Circuit and asked the court to stay her administrative proceeding pending resolution of the appeal. Mot. for Injunction Pending Appeal, *Cochran*, No. 4:19-CV-066-A (Aug. 16, 2019). A motions panel of the Fifth Circuit heard argument on Cochran's request and subsequently issued a one-sentence, per curiam order stating, "IT IS ORDERED that Appellant's motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8 is GRANTED." *Cochran*, No. 19-10396 (5th Cir. Sept. 24, 2019). The Fifth Circuit has yet to issue a decision on the merits of Cochran's appeal; argument before the merits panel is scheduled for November 5, 2019.

Throughout their pending motion, Respondents repeatedly characterize the Fifth Circuit’s order as a judgment on the merits of the removal argument. *E.g.*, Mot. 2, 5, 8. That description egregiously overstates the panel’s determination and misrepresents the actual issue pending before the court. The district court’s dismissal of Cochran’s lawsuit was based entirely on a finding that it lacked jurisdiction over the challenge. *Cochran*, 2019 WL 1359252, at *3 (N.D. Tex. Mar. 25, 2019). Cochran’s appeal thus presented the sole question of whether the district court’s jurisdictional ruling was correct, and she requested “remand so she may pursue her constitutional claims” in the district court. Appellant’s Br., *Cochran*, No. 4:19-CV-066-A, at 6, 55 (June 10, 2019).

Respondents’ claim that an “Article III court” has now issued “a decision on the merits of the [removal] issue” (Mot. 8) is wholly unsupportable. The purpose of an injunction pending appeal is generally to maintain the status quo and ensure the effectiveness of the appellate court’s eventual judgment. *See, e.g., Coastal Corp. v. Tex. Eastern Corp.*, 869 F.2d 817, 819-20 (5th Cir. 1989); *Armstrong v. Bd. of Ed. of City of Birmingham, Jefferson Cty., Ala.*, 323 F.2d 333, 345 (5th Cir. 1963). There is no reason to interpret the Fifth Circuit’s one-line order as doing anything more than that. At most, it can be read to suggest that Cochran demonstrated a likelihood of success on the merits of her argument that the district court should have exercised jurisdiction over her complaint—but even that requires reading beyond the text of the order itself.

It therefore remains the case that “no federal court has addressed the tenure protection argument . . . [,] let alone agreed with it.” Order (Aug. 8, 2019). This Court’s original justifications for denying Respondents’ earlier request thus remain valid and controlling, and the Court should reject Respondents’ dubious effort to suggest otherwise.

* * * *

For the foregoing reasons, Respondents' motion to stay the proceeding or, in the alternative, to certify for interlocutory appeal the question regarding the constitutionality of the Commission ALJs' removal protections, should be denied.

Respectfully submitted,

DIVISION OF ENFORCEMENT

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Dated: October 28, 2019

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

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