UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of<br><br>JOHN THOMAS CAPITAL MANAGMENT GROUP LLC d/b/a PATRIOT28 LLC, and<br><br>GEORGE R. JARKESY, JR.,<br><br>Respondents. | File No. 3-15255 |

**RESPONDENTS' UNOPPOSED MOTION TO VACATE REMAND, FOR COMMISSION ADJUDICATION OF PETITIONS FOR REVIEW, AND FOR THE ISSUANCE OF A FINAL ORDER**

Respondents John Thomas Capital Management d/b/a Patriot28 LLC ("Patriot28") and George R. Jarkesy ("Jarkesy) (collectively "Respondents"), submit to the Commission this Unopposed Motion to Vacate Remand and Proceed to Adjudication of Petitions for Review, and show as follows:

## I.
## SUMMARY

This is the oldest administrative proceeding before the Commission pending petition for review. Both the Division of Enforcement and Respondents perfected appeals to the Commission from an Initial Decision issued more than four years ago. The Commission granted expedited review in 2014. Yet after all these years, the Commission has now summarily remanded this proceeding for another hearing before another Administrative Law Judge ("ALJ") without first

considering and ruling on the parties' other complaints, some of which would, if sustained, require a different remedy—not a remand. Both parties wish to dispense with a new administrative hearing and proceed to a Commission decision on their petitions for review without further delay.

The Commission lacks statutory authority to remand for new hearing without first addressing the other issues raised in the Respondents' petitions for review, since those challenges demand outright dismissal of the proceedings, not remand for yet another trial. To the extent that the Commission's putative remand of this proceeding is based on the U.S. Supreme Court's Appointments Clause decision in *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Respondents hereby with this motion waive their rights under the Appointments Clause and withdraw that point of error in their pending petition for review pleadings, *nunc pro tunc*.

The parties' appeals to the Commission—and granted *expedited* consideration by the Commission— have languished inexplicably for years while all other contemporaneous and more recently-filed cases have long since proceeded to be heard by the Commission and resolved by Final Order. Both the Administrative Procedure Act ("APA") and the U.S. Constitution prohibit final agency action that is "unreasonably delayed."

The Commission is constitutionally and statutorily obliged to correct this manifest error by vacating the summary remand and proceeding expeditiously to the issuance of a Final Order.

## II.
## RELEVANT PROCEDURAL HISTORY

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| March 22, 2013 | Order Instituting Proceedings Issued by Commission |
| February 3, 2014 | Administrative Hearing Commences |
| March 14, 2014 | Administrative Hearing Concludes |
| October 15, 2014 | ALJ issues Initial Decision |

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| November 7, 2014 | Respondents file Petition for Review with Commission |
| November 17, 2014 | Division of Enforcement files Cross Petition for Review |
| December 11, 2014 | Commission grants both petitions for review; Commission grants expedited review |
| August 22, 2018 | Without considering merits of remaining challenges, Commission issues omnibus order summarily remanding case for new hearing solely for its own Appointments Clause violation |

## III.
## THE SUMMARY REMAND VIOLATES THE ADMINISTRATIVE PROCEDURE ACT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Once the parties' administrative appeals to the Commission were perfected, review was granted by the Commission, and the issues were briefed, the Commission was without statutory authority to ignore most of the legal and constitutional challenges and summarily remand this proceeding for a new hearing, since issues propounded in Respondents' petition for review would, if sustained, require a different remedy, to wit: dismissal of the proceeding altogether. The summary remand thereby ran afoul of the dictates of the APA and the Due Process Clause of U.S. CONST. amend V.

The APA requires agency governing bodies, sitting as appellate tribunals, to address and rule on *each and every issue raised* in an administrative appeal, and to do so in a timely fashion. 5 U.S.C. § 557(c)(3)(A) provides as follows:

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
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> (B) the appropriate rule, order, sanction, relief, or denial thereof.

*Id.* (Emphasis supplied.)

The courts have long and routinely held that this mandate applies to the final dispositions of contested administrative proceedings by the agency head or governing boards of administrative agencies. *See, Reddy v. Commodity Futures Trading Comm'n*, 191 F.3d 109, 124 (2d Cir. 1999); *Escobar-Ramos v. I.N.S.*, 927 F.2d 482, 484 (9th Cir. 1991) (agency governing board must review record before it and cannot summarily resolve an appeal without doing so); *Harberson v. N.L.R.B.*, 810 F.2d 977, 984 (10th Cir. 1987) (governing board of agency must decide all issues raised); *UAW v. NLRB,* 802 F.2d 969, 975 (7th Cir.1986) (agency board required to give reasons for rulings contained in ALJ's decision); *Borek Motor Sales, Inc. v. N.L.R.B.,* 425 F.2d 677, 681 (7th Cir. 1970) (this section in APA requires appellate board "to rule on each exception" raised by the appealing parties).

Arbitrary agency actions like this summary remand offend the Due Process Clause, a violation § 557 is designed to prevent. "The purposes of [§ 557(c)(3)(A)] are to prevent arbitrary agency decisions, provide parties with a reasoned explanation for those decisions, settle the law for future cases, and furnish a basis for effective judicial review." *Armstrong v. Commodity Futures Trading Comm'n*, 12 F.3d 401, 403–04 (3d Cir. 1993) (sustaining the respondent's argument that the summary decision by the CFTC violated this section's requirement that the commission address "all the material issues of fact, law, or discretion presented on the record"); *see also*, *Perez-Alvarez v. I.N.S.*, 857 F.2d 23, 25 (1st Cir. 1988) ("the Board in exercising the discretionary authority conferred upon it by Congress cannot proceed arbitrarily and must consider and evaluate all relevant factors"); 4 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 39.05 (June 1991).[1]

[1] The only exception to this principle, not applicable here, applies when an agency governing board, performing an appellate function, *expressly* adopts *all* of the ALJ's findings and conclusions, thereby

In their petitions for review the Respondents raised several issues of a constitutional dimension that would require the Commission to *dismiss* this administrative proceeding, not remand it for another hearing. These include the violation of the separation of powers doctrine for Congress' failure to provide any intelligible principle for the Commission's exercise of delegated legislative authority in the selection of forum, the violation of the Respondents' Seventh Amendment rights triggered by the expansion of agency power under Dodd-Frank, the Equal Protection Clause violation under the well-established "class of one" doctrine, and the Due Process violation occasioned by the Commission's prejudgment of Respondents' liability through gratuitous factual findings and legal conclusions reached in a settlement with co-respondents.[2]

The Commission has already ruled that the Respondents have made "a reasonable showing" that prejudicial errors of fact or law were committed in the course of this administrative proceeding or that, at minimum, the Respondents have raised "important" issues "that the Commission should review."[3] These constitutional issues have been recognized as significant concerns by the judiciary.[4]

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specifically rejecting all of the challenges and ratifying the reasoning of the ALJ as its own. *See, e.g., Armstrong, supra*, at 404 n.4; *Cities of Bethany v. FERC,* 727 F.2d 1131, 1144 (D.C. Cir.), *cert. denied,* 469 U.S. 917, 105 S.Ct. 293 (1984).

[2] *See* Respondents' Opening Brief, at 4-17, January 14, 2015.

[3] The Commission in 2014 granted Respondents' petition for review pursuant to 17 C.F.R. 201.411(b)(2), requiring a Commission finding that the petition "makes a reasonable showing" that:

> (i) A prejudicial error was committed in the conduct of the proceeding; or
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> (ii) The decision embodies:
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> > (A) A finding or conclusion of material fact that is clearly erroneous; or
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> > (B) A conclusion of law that is erroneous; or
> >
> > (C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

[4] For example, Justice Kavanaugh has recently noted "formal constitutional problems" raised with modern administrative proceedings' "tension with Article III of the Constitution, the Due Process Clause of the

"[I]t is a basic tenet of administrative law that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency." *Chicago Local No. 458-3M, Graphic Commc'ns Int'l Union, AFL-CIO v. N.L.R.B.*, 206 F.3d 22, 24 (D.C. Cir. 2000); *Trident Seafoods, Inc. v. NLRB,* 101 F.3d 111 (D.C.Cir.1996). This also includes the statutory and constitutional right to procedures that take place within a reasonable time and in a reasonable manner. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). "Unreasonable delay, whether it be negligent or intentional, by governmental agencies or state actors, in and of itself, is a constitutional [procedural Due Process] violation. There is no lawful reason for delays not related to a legitimate, governmental purpose or function." *Eaton v. City of Solon*, 598 F. Supp. 1505, 1512 (N.D. Ohio 1984); *Lesher v. Lavrich*, 632 F. Supp. 77, 83 (N.D. Ohio 1984), *aff'd,* 784 F.2d 193 (6th Cir. 1986) ("unreasonable delays in affording a hearing and a decision by a ... governmental agency does not afford due process").

To insure constitutional integrity of administrative proceedings, the APA requires that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). The APA compels agency heads to issue final decisions without unreasonable delay. 5 U.S.C. § 706(1). Egregious delay in the issuance of a final decision can itself constitute final agency action pursuant to 5 U.S.C. §§ 704 and 706, triggering judicial intervention and review. *Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984).

That the Commission granted review in 2014—and uniquely designated the case for expedited review—yet allowed the matter to sit for four years, and with no end in sight, indicates

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Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases." *Lorenzo v. S.E.C.*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *cert. granted sub nom. Lorenzo v. S.E.C.*, 138 S. Ct. 2650 (2018).

that something has gone terribly awry. That the Commission then bypassed the constitutional and statutory requirement to address and rule "on each finding, conclusion, or exception presented," by instead remanding summarily on only one of those exceptions, ignoring those which would require dismissal, cannot be reconciled with the Administrative Procedure Act or the fundamental dictates of the Due Process Clause of the U.S. Constitution. For these reasons alone, the remand order of August 22, 2018, should be vacated as to the Respondents herein and the case restored to the docket for timely final disposition by the Commission.[5]

## IV.
## RESPONDENTS HEREBY WAIVE THEIR RIGHTS TO CONTEST THE CONSTITUTIONAL VALIDITY OF THE PRESIDING ALJ UNDER THE APPOINTMENTS CLAUSE

The Commission's remand order of August 22, 2018, was expressly grounded upon the recent holding in *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), that a *properly preserved* Appointments Clause exception entitles a respondent to a new hearing before a different administrative law judge. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, https://www.sec.gov/litigation/opinions/2018/33-10536.pdf., at 1. The Commission correctly read *Lucia* as allowing only for the "opportunity" for a remand and new hearing. The *Lucia* Court emphasized that the Appointments

[5] There is nothing in the Commission's August 22, 2018, remand order that would impede the vacatur of the remand as to these Respondents only. Respondents are aware that the agency's General Counsel takes the position that all pending administrative proceedings were themselves vacated by the order, ostensibly rendering it impossible for the Commission to resurrect the proceedings. This position is unavailing, as any court or agency can reverse its own decisions upon reconsideration, and in any event the Commission in that order, in plain language, only purported to vacate *its own* decisions in the pending administrative proceedings, not the underlying proceedings themselves or the actions of the ALJs: "We ... vacate any prior opinion *we* have issued in the matter." See *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, https://www.sec.gov/litigation/opinions/2018/33-10536.pdf., at 1-2 (emphasis supplied). If the Commission truly intended—despite the language it employed—to vacate all of its prior actions in these proceedings, its own Orders Instituting Proceedings would also be invalidated, an outcome the Respondents assume the Commission likely did not intend. If the Commission had wanted to render void all of the prior administrative proceedings and decisions rendered by the ALJs, it would have simply said so.

Clause error was one which could be waived or forfeited, stressing that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief," citing *Ryder v. United States,* 515 U.S. 177, 182–183, 115 S.Ct. 2031 (1995).

The Supreme Court has long recognized that even structural or fundamental constitutional claims and rights can be waived. *See, e.g., Gonzalez v. United States*, 553 U.S. 242, 253, 128 S. Ct. 1765, 1772 (2008) (waiver of constitutional right to trial before Art. III judge); *Patton v. United States,* 281 U.S. 276, 293, 50 S.Ct. 253 (1930) (waiver of right to jury trial); *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185–86, 92 S. Ct. 775 (1972) (waiver of due process rights to notice and hearing prior to a civil judgment).[6] For the sake of ending the Due Process offense occasioned by the multi-year delay in the resolution of their cases and bringing the constitutional challenges to final adjudication, the Respondents are willing to, and do, waive the Appointments Clause exception they previously raised and preserved.

Following these principles, the Commission has already recognized the efficacy of an express Appointments Clause waiver to eliminate the need for a new hearing and cause a vacatur of the remand. In *In the Matter of Alexandre S. Clug,* Exchange Act Release No. 84776 (Dec. 10, 2018), the respondent waived his opportunity for a new hearing before a new administrative judge and relinquished his rights to contest the validity of the original ALJ's appointment under the Appointments Clause. *Id.* at 2. The Division of Enforcement joined in the "request that the Commission decide their petitions for review on the present record." *Id.* The Commission thus

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[6] Even in the criminal arena, where personal liberty interests are at stake, waiver of past and present constitutional rights is a commonplace and long-accepted feature of litigation and settlement. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 342—343, 90 S.Ct. 1057, 1060 (1970) (waiver of right to be present at trial); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966) (waiver of rights to counsel and against compulsory self-incrimination); *Fay v. Noia*, 372 U.S. 391, 439, 83 S.Ct. 822, 849 (1963) (waiver of right to habeas corpus); *Rogers v. United States*, 340 U.S. 367, 371, 71 S.Ct. 438, 440 (1951) (right against compulsory self-incrimination).

determined the original petitions for review were now "operative" and ordered that "the Petitions for Review will proceed" to adjudication by the Commission. *Id.* at 3.

Following this precedent, attached to this motion and incorporated herein for all purposes as Exhibit A is a duly executed and authenticated Irrevocable Waiver of Respondents' Objection to Hearing Based Upon Appointments Clause Error ("Waiver") signed by both Respondents and their attorneys of record in this proceeding. In their Waiver the Respondents forfeit and waive any right to challenge the historical proceedings before the Administrative Law Judge[7] on the grounds that the ALJ had not been constitutionally appointed, and formally withdraw that point of error from their preserved complaints in connection with their Petition for Review. This legally restores this proceeding to the *status quo ante*, where it was before the Supreme Court issued *Lucia* and as if Respondents had never invoked their rights under the Appointments Clause in the first place.

In the wake of the Waiver, there is no arguable basis for the remand ordered by the Commission in its order of August 22, 2018.[8] Just as the Commission acted in *Clug, supra*, the Respondents' petition for review complaints are now rendered operative again. The Commission should therefore set aside the remand, withdraw the proceedings from the new ALJ,[9] and schedule the petitions for review for prompt consideration and issuance of a Final Order.

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[7] This administrative proceeding was conducted by ALJ Carol Fox Foelak. It is the complaint about the constitutional defect in her appointment as to the proceedings culminating with her October 15, 2014, Initial Decision that the Respondents are specifically foregoing and withdrawing with the Waiver.

[8] The Commission's obligation to vacate the remand only applies to litigants, such as Respondents, who request such vacatur and (1) had advanced points of error in their petitions for review that would require a different remedy other than remand, or (2) had timely raised an Appointments Clause challenge and now present a waiver of that constitutional defect. Of course, Respondents have done both.

[9] This administrative proceeding was reassigned to Administrative Law Judge James E. Grimes by order of Chief Administrative Law Judge on September 12, 2018. *See, Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264. As used herein, "petition for review" encompasses all arguments and authorities advanced on appeal to the Commission, including the November 7, 2014, petition for review and all supplemental briefing filed with the Commission in connection therewith.

## V.
## CONCLUSION AND PRAYER FOR RELIEF

The Division of Enforcement does not opposed the relief invoked by this motion and Respondents' Waiver—the vacatur of the remand and Commission consideration of the remaining exceptions advanced in the parties' respective petitions for review.

This proceeding has been pending appellate review by the Commission longer than any case pending in the agency. There is now no basis for further administrative litigation, other than consideration and adjudication of the petitions for review and the issuance of a Final Order on the parties petitions for review. Respondents respectfully request that the Commission enter an order:

(1) Vacating the remand for further proceedings contained in its August 22, 2018, order; and

(2) Setting the parties' petitions for review for consideration at the earliest possible date.

The Respondents request that the Final Order be issued by the Commission expeditiously.

Respectfully Submitted,

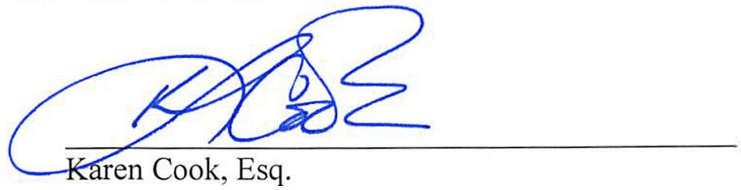
**Karen Cook, Esq.**
KAREN COOK, PLLC
E-mail: karen@karencooklaw.com
Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

**S. Michael McColloch, Esq.**
S. MICHAEL MCCOLLOCH, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

**Counsel for John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr.**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2018, the foregoing document was served on the parties below and in the manner indicated.



Karen Cook, Esq.

Elizabeth M. Murphy, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 3628
Washington, DC 20549
*VIA FACSIMILE: 202.772.9324*
*VIA FEDERAL EXPRESS*

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington, DC 20549
*VIA U.S. MAIL*
*VIA E-MAIL:* alj@sec.gov

Todd D. Brody
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
*VIA U.S. MAIL*
*VIA E-MAIL:* brodyt@sec.gov

Alix Biel
Senior Staff Attorney
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
*VIA U.S. MAIL*
*VIA E-MAIL:* biela@sec.gov

# EXHIBIT A

## Irrevocable Waiver of Respondents' Objection to Hearing Based Upon Appointments Clause Error

Respondents George R. Jarkesy, Jr. and Patriot28 LLC (collectively, "Respondents") each hereby expressly and irrevocably waive, forfeit and forego, to the fullest extent permitted by applicable law, any and all claims, in the administrative proceeding captioned *In the Matter of John Thomas Capital Management Group LLC d/b/a Patriot28 LLC and George R. Jarkesy, Jr.* [File No. 3-15255] ("Matter") and in any subsequent appeal of this Matter, that Administrative Law Judge Carol Fox Foelak was not properly appointed under the Appointments Clause of the United States Constitution, as construed and determined by *Lucia v. SEC,* 138 S.Ct. 2044 (2018), prior to conducting the hearing or issuing an Initial Decision in this Matter, relating to all of her prior acts in this Matter. This waiver is entered at this time to eliminate any need for another hearing on the same issues before another administrative law judge and is knowingly and intelligently made with the advice of counsel. This waiver is also intended to withdraw any Appointments Clause claims in Respondents' pending petition for review, but does not affect any other claims and points of error in said petition for review.

George R. Jarkesy, Jr.
Respondent

**John Thomas Capital Management Group LLC d/b/a Patriot28 LLC**
By: George R. Jarkesy, Jr.
Manager

BEFORE ME, the undersigned authority, appeared George R. Jarkesy, Jr., individually and as Manager of John Thomas Capital Management Group LLC d/b/a Patriot28 LLC, who, upon being duly sworn, stated that the foregoing Irrevocable Waiver of Respondents' Objection to Hearing Based Upon Appointments Clause Error is true and correct.

PATTY VILLA
Notary Public, State of Texas
Comm. Expires 02-20-2021
Notary ID 12230301

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

APPROVED AS TO FORM AND CONTENT:

**Karen Cook, Esq.**
KAREN COOK, PLLC
Counsel for Respondents

**S. Michael McColloch, Esq.**
S. MICHAEL MCCOLLOCH, PLLC
Counsel for Respondents