

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 9728 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934  
Release No. 74345 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940  
Release No. 4029 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940  
Release No. 31462 / February 20, 2015

Admin. Proc. File No. 3-15255

In the Matter of

JOHN THOMAS CAPITAL  
MANAGEMENT GROUP LLC d/b/a  
PATRIOT28 LLC and GEORGE R.  
JARKEYS, JR.

ORDER DENYING MOTION TO  
STAY ADMINISTRATIVE  
PROCEEDING

In December 2014, we granted the petition of respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkey, Jr. for review of an administrative law judge's initial decision.<sup>1</sup> Respondents have now filed a Motion to Stay Administrative Proceeding, which requests that the Commission stay the review proceeding until their federal appeal is resolved. We deny the motion for the reasons set forth herein.

**I.**

We begin by providing some context for respondents' motion.<sup>2</sup> At the outset, this administrative proceeding involved two other respondents (the "Settling Respondents") that later

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<sup>1</sup> *John Thomas Capital Mgmt. Grp. LLC*, Securities Exchange Act Release No. 73819, 2014 WL 6985130 (Dec. 11, 2014).

<sup>2</sup> In three previous orders, the Commission has set forth the background of this proceeding in more detail. *See John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 73375, 2014 WL 5282156 (Oct. 16, 2014) (*John Thomas III*) (denying interlocutory review with respect to law judge order rejecting respondents' request that the initial decision be maintained under seal until resolution of federal appeal); *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 71415, 2014 WL 294551 (Jan. 28, 2014) (*John Thomas II*) (denying interlocutory review with respect to law judge order rejecting prejudgment claim); *John Thomas Capital*

(footnote continued . . .)

submitted an offer of settlement to the Commission. The Commission's order accepting the settlement (the "Settlement Order") stated that the "findings herein are made pursuant to [the Settling Respondents'] Offer of Settlement and are not binding on any other person or entity in this or any other proceeding."<sup>3</sup>

In January 2014, JTCM and Jarkesy sought disqualification of the Commission on the basis that the Commission, in issuing the Settlement Order, purportedly had "conclusively prejudged the case" against them. The law judge denied the motion to disqualify and the Commission denied interlocutory review. The order denying review concluded, among other things, respondents' claims could effectively be reviewed following issuance of the initial decision in the event that it was adverse to them.<sup>4</sup> It also observed that respondents had not established that there was a "substantial ground for difference of opinion" because the Commission had in past decisions rejected claims of prejudgment premised upon its acceptance of settlements in multi-respondent proceedings, and respondents had not addressed or distinguished those decisions.<sup>5</sup> This precedent established that no prejudgment of the non-settling respondent's case occurs even though the agency may have acquired some familiarity with the underlying events at another stage of the proceedings involving other respondents.<sup>6</sup>

Later in January 2014, JTCM and Jarkesy sought a temporary restraining order ("TRO") from the United States District Court for the District of Columbia, seeking to stay the hearing before the law judge. Respondents advanced the prejudgment claim as well as claims based on asserted violations of the Due Process Clause, the Equal Protection Clause, and other constitutional provisions. The district court denied their request for a TRO, finding that its jurisdiction was doubtful; that respondents had failed to show that judicial review after the Commission's issuance of a final order would be an inadequate remedy; and that respondents had not established that they would be irreparably harmed.<sup>7</sup> Subsequently, in June 2014, the district court dismissed the case for lack of subject matter jurisdiction. The court observed that Section 25 of the Securities Exchange Act of 1934 confers federal-court jurisdiction over only "*final*

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*Mgmt. Grp. LLC*, Exchange Act Release No. 71021, 2013 WL 6384275 (Dec. 6, 2013) (*John Thomas I*) (denying interlocutory review with respect to law judge order rejecting *Brady* and due process claims).

<sup>3</sup> *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 70989, 2013 WL 6327500, at \*1 n.1 (Dec. 5, 2013).

<sup>4</sup> *John Thomas II*, 2014 WL 294551, at \*3 & nn.23-25.

<sup>5</sup> *Id.* at \*2 & nn.11-15 (collecting cases).

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Jarkesy v. SEC*, Case No. 1:14-cv-00114-BAH, Dkt. No. 22, at 73:1-79:21 (D.D.C. Jan. 31, 2014).

order[s]" of the Commission, and that it was undisputed that the Commission had not yet issued such a final order.<sup>8</sup> The court concluded that, although respondents asserted "violations of their constitutional rights[,] . . . those claims are inextricably intertwined with . . . the very enforcement proceeding," and that respondents would "have the opportunity to seek judicial review if they are aggrieved by the SEC's final order."<sup>9</sup>

JTCM and Jarquesy's appeal from the district court's ruling is pending in the United States Court of Appeals for the District of Columbia. In November 2014, the D.C. Circuit denied the Commission's motion for summary affirmance, directed that the appeal be calendared for oral argument in the present term, and set a briefing schedule that provides for respondents' final brief to be filed in mid-February 2015.

Meanwhile, the law judge held the hearing as scheduled and issued the initial decision in October 2014. Respondents petitioned for review and the Division cross-petitioned for review. The Division also requested expedited treatment of the review proceeding on the basis of asserted concerns about the ongoing disposition of assets in the funds. On December 11, 2014, the Commission granted review and granted the Division's request for expedited treatment consistent with the Commission's other responsibilities. Although the order granting review stated that "no motions for extensions of time to file briefs will be entertained," the briefing schedule afforded the parties more time to file briefs than they ordinarily would have received under Rule of Practice 450.<sup>10</sup>

In light of subsequent orders directing additional briefing and otherwise extending the briefing schedule, this review proceeding is not expected to be fully briefed until April 20, 2015.<sup>11</sup> Additionally, concurrently with the instant motion to stay, respondents also filed two other motions, a motion to adduce additional evidence and a renewed motion to recuse the Commission on prejudgment grounds, both of which remain pending.

## II.

Respondents request that the Commission "stay the proceedings on review of the Initial Decision pending the decision" of the D.C. Circuit. Our Rules of Practice contain no specific provision governing stays of an administrative proceeding pending a related civil proceeding.<sup>12</sup>

<sup>8</sup> 15 U.S.C. § 78y(a)(1) (emphasis added).

<sup>9</sup> *Jarquesy v. SEC*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2584403, at \*5 (D.D.C. June 10, 2014).

<sup>10</sup> 17 C.F.R. §§ 201.450(a); *John Thomas Capital*, 2014 WL 6985130, at \*1.

<sup>11</sup> *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74100, 2015 WL 242391 (Jan. 20, 2015); *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74181, 2015 WL 399928 (Jan. 30, 2015).

<sup>12</sup> Cf. Rules of Practice 161(c)(2), 210(c)(3), 401(c), 17 C.F.R. §§ 201.161(c)(2) (stay pending Commission consideration of an offer of settlement), 201.210(c)(3) (stay pending

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We accordingly construe respondents' motion as a request for a postponement or adjournment under Rule of Practice 161.<sup>13</sup> We adhere to a "policy of strongly disfavoring such requests" absent a strong showing of substantial prejudice and consider the "pendency of an appeal generally . . . an insufficient basis upon which to prolong a Commission proceeding."<sup>14</sup>

Respondents here assert that a stay is necessary to "mitigate any obstruction of the jurisdiction" of the D.C. Circuit and that a "Commission Final Decision entered prior to the decision of the Court of Appeals will effectively defeat the jurisdiction of that court." They also argue that continuation of administrative proceedings will cause them irreparable injury. We do not find these arguments persuasive.

To begin with, JTCM and Jarkey have it backwards: Far from *defeating* the jurisdiction of the federal courts, the eventual issuance of a final Commission decision in this proceeding—assuming hypothetically that it was adverse to respondents—would *vest* the court of appeal with jurisdiction to resolve respondents' claims.<sup>15</sup> Section 25 of the Exchange Act provides that any "person aggrieved by a final order of the Commission . . . may obtain review of the order in the

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criminal investigation or prosecution), 201.401(c) (stay of effectiveness of final Commission order pending judicial review of that order).

<sup>13</sup> See, e.g., *Paul Free*, Exchange Act Release No. 66260, 2012 WL 266986, at \*2 (Jan. 26, 2012); *Joseph John VanCook*, Exchange Act Release No. 59550, 2009 WL 605322, at \*2 (Mar. 10, 2009); *Michael J. Markowski*, Exchange Act Release No. 40748, 1998 WL 960587, at \*2 (Dec. 4, 1998). We note that respondents' stay motion does not cite any Rule of Practice.

<sup>14</sup> *Paul Free*, 2012 WL 266986, at \*2 (quoting Rule of Practice 161(b)(1), 17 C.F.R. § 201.161(b)(1) (denying motion to stay proceedings); cf. *Michael S. Steinberg*, Investment Advisers Act Release No. 4008, 2015 WL 331125, at \*1-2 (Jan. 27, 2015) (granting respondent's unopposed motion to postpone briefing where the Second Circuit granted his unopposed motion to hold his criminal appeal in abeyance pending en banc proceedings in *United States v. Newman* and where respondent argued that, "unless the panel's decision [in *Newman*]. . . is either vacated or modified, he will be entitled to reversal of his conviction . . . , thereby vitiating the basis for the bar imposed by the law judge").

<sup>15</sup> If the Commission's eventual decision were *favorable* to respondents, they could not, of course, seek judicial review. But this does not mean that respondents' claims would be insulated from review in any pertinent sense. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 & n.11 (1980). Indeed, "the possibility that [respondents'] challenge may be mooted in adjudication warrants the requirement that [they] pursue adjudication, not shortcut it." *Id.* at 244 n.11; cf. *Deaver v. Seymour*, 822 F.2d 66, 71 (D.C. Cir. 1987) ("That [the plaintiff's] challenge . . . [has] constitutional implications does not support his argument for accelerated and unorthodox judicial review. Indeed, it substantially weakens it.").

[appropriate] United States Court of Appeals."<sup>16</sup> As the D.C. district court stated in its order dismissing respondents' federal action for lack of jurisdiction, there "is no dispute that [JTCM and Jarkesy] will have the opportunity to raise all of their constitutional claims before a Court of Appeals should . . . the Commission issue orders adverse to them."<sup>17</sup>

Respondents have argued in other papers that issuance of a Commission decision would in practice foreclose *meaningful* judicial review of their constitutional claims because the administrative process, in their view, denies them the ability to develop an adequate record for a court to review.<sup>18</sup> They assert that there is "no procedural mechanism for the necessary development of evidence" in our Rules of Practice or under the Administrative Procedure Act. We cannot agree. Although the *law judge* did deny respondents' requests for the issuance of subpoenas regarding, *inter alia*, their prejudgment, *Brady*, and equal-protection claims—on the ground that the requests were unreasonable, untimely, and sought privileged material—they are free to seek *Commission* review of her rulings.

And JTCM and Jarkesy have done exactly that, both in their opening brief with the Commission and in their motion to adduce additional evidence pertaining to the asserted constitutional violations. They have argued, for example, that the law judge erred because "Rule [of Practice] 232 [governing the issuance of subpoenas] does not preclude the issuance of a subpoena after the hearing has begun" and because the scope of the subpoenas was "not unreasonable" within the meaning of Rule 232.<sup>19</sup> In short, respondents *thus far* have been unable to obtain the information that they seek because of the law judge's context-specific discovery rulings—which they can challenge on appeal to us—*not* because of a limitation inherent to the Commission's administrative procedures that would categorically place such discovery off limits.

We are not bound by the law judge's evidentiary or discovery rulings.<sup>20</sup> Nor would our prior denials of interlocutory review as to those rulings, *see supra* note 2, preclude respondents

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<sup>16</sup> 15 U.S.C. § 78y(a)(1).

<sup>17</sup> *Jarkesy*, 2014 WL 2584403, at \*4; *see also Chau v. SEC*, \_\_\_ F. Supp. 3d \_\_\_, 2014 WL 6984236, at \*14 (S.D.N.Y. Dec. 11, 2014) (considering constitutional challenges to Commission administrative proceeding and concluding that "if [the respondents in that case] lose before the Commission, they will have a full opportunity to present their arguments in a court of appeals").

<sup>18</sup> *E.g.*, Respondents' Motion to Adduce Additional Evidence at 6 (filed Jan. 13, 2015); Respondents' Opening Brief at 30-33 (filed Jan. 13, 2015).

<sup>19</sup> Respondents' Motion to Adduce Additional Evidence at 4-5 (citing Rule of Practice 232, 17 C.F.R. § 201.232).

<sup>20</sup> *See* 5 U.S.C. § 557(b); 15 U.S.C. § 78d-1(b); Rules of Practice 326, 411(a), 17 C.F.R. §§ 201.326, 201.411(a); S. Rep. No. 776 at p. 3, 87th Cong., Pub. L. No. 87-592 (Aug. 24, 1961); *Adopting Release, Rules of Practice*, 60 Fed. Reg. 32738, 32774-75 (June 23, 1995); *cf. Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not

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from renewing their arguments before the Commission now.<sup>21</sup> As a consequence, in the event that we were to conclude that we could not resolve respondents' constitutional claims on the present record, we could provide relief in the course of our review process. We have the authority, for example, to direct that the record be supplemented pursuant to Rule of Practice 452 and allow additional briefing before issuing a final Commission decision.<sup>22</sup> We also have the authority to remand for a new hearing before the law judge at which the parties would have access to all the evidence to which they are entitled.<sup>23</sup> For these reasons, the contention that as-applied constitutional claims turn on "extrinsic evidence [that] cannot be 'explored' within the administrative proceeding" lacks merit.<sup>24</sup>

Even assuming—again, solely for purposes of discussion—that the *Commission* ultimately were to reject respondents' attempts to expand the record and their other defenses, and then issue a final decision that was adverse to them, their claims still would be subject to meaningful *judicial* review. JTCM and Jarkey could argue to the court of appeals that the administrative record was improperly limited; Section 25(a)(5) of the Exchange Act authorizes the reviewing court to "remand the case to the Commission for further proceedings," including the taking of new evidence before the Commission, if the evidence is shown to be material and other conditions are satisfied.<sup>25</sup> A judicial-review provision like this, the Supreme Court has explained, allows a "record which [otherwise] would be inadequate for [judicial] review" to be "made adequate" by the court of appeals, foreclosing any argument that agency "unlawfulness will be 'insulated' because the reviewing court will lack an adequate record."<sup>26</sup> Put another way,

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. . . binding" on the Commission); *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 806, 812 (D.C. Cir. 2005) (characterizing the Commission's review of initial decisions as "plenary").

<sup>21</sup> See *John Thomas III*, 2014 WL 5282156, at \*4 n.20; see also *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 413 (D.C. Cir. 1998) ("An agency . . . may alter or modify its position in response to persuasive arguments[.]").

<sup>22</sup> Rule of Practice 452, 17 C.F.R. § 201.452 (providing that the Commission "may accept or hear additional evidence").

<sup>23</sup> *Id.* (providing that the Commission may "remand . . . the proceeding to a hearing officer for the taking of additional evidence as appropriate"); *John Thomas I*, 2013 WL 6384275, at \*3 (citing, *inter alia*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009)).

<sup>24</sup> See *Chau*, 2014 WL 6984236, at \*11 (rejecting argument, raised by respondents in another Commission administrative proceeding, that evidence-based equal-protection claim was not amenable to meaningful judicial review after a final Commission decision).

<sup>25</sup> 15 U.S.C. § 78y(a)(5).

<sup>26</sup> *Standard Oil Co. of Cal.*, 449 U.S. at 244-45 (discussing analogous provision of the Federal Trade Commission Act, 15 U.S.C. § 45(c)); *Shalala v. Ill. Council on Long Term Care*,

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respondents' constitutional claims—including any claim relating to their purported inability to develop an adequate record before the Commission—will be "ripe for appellate examination in due course in the event that [they] lose in the administrative arena."<sup>27</sup>

Finally, we do not believe that JTCM and Jarkey have made a sufficient showing that irreparable harm (or, for that matter, any cognizable prejudice) would result from the Commission's continued consideration of this matter. Distilled to its essence, respondents' position is that they should not be forced to participate in the instant proceeding because they believe the Commission is an improper and biased decision-maker. But the Supreme Court long has recognized the "expense and disruption of defending . . . [a] protracted adjudicatory proceeding[]" does not constitute irreparable harm, even when the party questions the lawfulness of the agency's proceedings.<sup>28</sup> Generally speaking, the "burden of being haled" into an allegedly improper forum does not constitute an irreparable injury warranting interruption of an ongoing proceeding.<sup>29</sup> Review instead must be deferred until the proceeding has come to an end. That conclusion holds whether the forum is challenged on prejudice,<sup>30</sup> due process,<sup>31</sup> equal protection,<sup>32</sup> Seventh Amendment,<sup>33</sup> separation of powers,<sup>34</sup> or some other venue or

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*Inc.*, 529 U.S. 1, 23-24 (2000) (explaining that a "court reviewing an agency determination under [a similar provision of the Medicare Act] has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide, including, where necessary, the authority to develop an evidentiary record") (citations omitted); *see also Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2138 (2012) (similar; Civil Service Reform Act).

<sup>27</sup> *Chau*, 2014 WL 6984236, at \*11.

<sup>28</sup> *Standard Oil Co. of Cal.*, 449 U.S. at 244 (citing *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209 (1938)).

<sup>29</sup> *Deaver*, 822 F.2d at 69-70 (quotation marks omitted).

<sup>30</sup> *E.g.*, *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960, 962-64 (5th Cir. 1980); *Vuono v. United States*, 441 F.2d 271, 271 (4th Cir. 1971) (per curiam); *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (explaining that it is "well established that a [reviewing] court cannot entertain an attack upon the . . . partiality of arbitrators until after the conclusion of the arbitration").

<sup>31</sup> *E.g.*, *Petroleum Exploration*, 304 U.S. at 211, 221-22; *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1094, 1101-02 (D.C. Cir. 1985); *see also United States v. Lewis*, 368 F.3d 1102, 1107, 1109 (9th Cir. 2004) (holding that *Brady* claims are subject to only post-trial appellate review because a "defendant's due process right to a fair trial" can be vindicated by disclosure of the evidence and a new trial).

<sup>32</sup> *E.g.*, *Altman v. SEC*, 687 F.3d 44, 45 (2d Cir. 2012) (per curiam), *aff'g* 768 F. Supp. 2d 554, 558-62 (S.D.N.Y. 2011); *United States v. Juvenile Female*, 869 F.2d 458, 459-60 (9th Cir. 1989) (per curiam); *see also United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270

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jurisdictional ground.<sup>35</sup> Respondents have failed to justify a departure from this established legal principle.

We are not convinced that respondents have marshalled any sound reasons for arresting the Commission's ongoing review process. Quite the contrary, we believe that allowing that process to play out—*e.g.*, through the completion of briefing on the petition and the cross-petition, the presentation of oral argument before the Commission,<sup>36</sup> the disposition of respondents' other pending motions, and the issuance of a final decision by the Commission—will provide all parties with a fair opportunity to present their arguments and ensure that the issues in this proceeding are fully considered.<sup>37</sup>

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(1982) (holding that the right to be free from vindictive prosecution "is simply not one that must be upheld prior to trial if it is to be enjoyed at all").

<sup>33</sup> *E.g.*, *Germain v. Conn. Nat'l Bank*, 930 F.2d 1038, 1039 (2d Cir. 1991); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261-62 (7th Cir. 1978).

<sup>34</sup> *E.g.*, *Deaver*, 822 F.2d at 67, 70-71; *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 739-41 (D.C. Cir. 1987) (op. of Edwards, J.); *id.* at 750 (op. of Williams, J.); *id.* at 752 (op. of Green, J.); *Hastings*, 770 F.2d at 1102-03.

<sup>35</sup> *E.g.*, *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003); *Harvey v. Seevers*, 626 F.2d 27, 31-32 (7th Cir. 1980); *State of Cal. ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323-24 (9th Cir. 1977).

<sup>36</sup> As a matter of custom and practice, the Commission ordinarily grants any request for oral argument on review from a law judge's initial decision. *Rules of Practice*, 60 Fed. Reg. at 32780. The Commission also may direct oral argument on its own motion. *See* Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

<sup>37</sup> Respondents have elsewhere complained about purported irregularities in the manner in which they were served with the Commission's briefing orders. Their contention that service of such orders by first-class U.S. mail violates Rule of Practice 141(b) or due process is without merit. 17 C.F.R. § 201.141(b) (directing service by "any method . . . authorized under . . . Rule 150(c)(1)-(3)"); *id.* § 201.150(c)(2) (providing for service "through the U.S. Postal Service by first class . . . mail"); *see, e.g., Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146-47 (4th Cir. 2014) (holding that service by first-class mail accords with due process); *Bachynskyy v. Holder*, 668 F.3d 412, 415, 420-21 (7th Cir. 2011) (same); *United States v. Andrews*, 221 F.3d 894, 895 (6th Cir. 2000) (same). Nor, in any event, can respondents show that they have been deprived of the opportunity to present arguments to the Commission. *See also supra* note 11 (orders providing for additional briefing and extending briefing deadlines).



Accordingly, the Motion to Stay Administrative Proceeding is DENIED. We express no view regarding the parties' arguments on the merits.

By the Commission.

Brent J. Fields  
Secretary