UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4735 / July 28, 2017

INVESTMENT COMPANY ACT OF 1940
Release No. 32765 / July 28, 2017

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3885 / July 28, 2017

Admin. Proc. File No. 3-16462

In the Matter of

LYNN TILTON; PATRIARCH PARTNERS, LLC;
PATRIARCH PARTNERS VIII, LLC;
PATRIARCH PARTNERS XIV, LLC; AND
PATRIARCH PARTNERS XV, LLC

ORDER DENYING MOTION TO STAY ADMINISTRATIVE PROCEEDING

Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC ("Respondents") seek a stay of this administrative proceeding pending the resolution by the federal courts of the question of whether Commission administrative law judges are inferior officers rather than employees for the purposes of the Appointments Clause of Article II of the U.S. Constitution. In *Bandimere v. SEC*, the Tenth Circuit granted a petition for review on the ground that Commission administrative law judges are inferior officers subject to the Appointments Clause.[1] In *Raymond J. Lucia Co., Inc. v. SEC*, the D.C. Circuit dismissed a petition for review that raised the same question.[2] Respondents predicate their claim for a stay on the ground that "it appears inevitable that the U.S. Supreme Court will now grant certiorari in *Lucia* or *Bandimere*" given these inconsistent decisions. The Division of Enforcement opposes Respondents' request. Respondents' motion is denied.

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[1] 844 F.3d 1168, 1181 (10th Cir. 2017).

[2] No. 15-1345, 2017 WL 2727019, at *1 (D.C. Cir. June 26, 2017) (en banc) (per curiam).

Analysis

We construe Respondents' motion as a request for a postponement or adjournment under Rule of Practice 161, which governs "all motions or requests" for extensions of time limits or postponements.[3] We "strongly disfavor[]"requests for postponement of an administrative proceeding unless the "requesting party makes a strong showing" that denial would "substantially prejudice [his] case."[4] A pending judicial appeal—particularly an appeal to which the Respondents are not a party—is generally "an insufficient basis upon which to prolong a Commission proceeding."[5] Here, the hearing has already taken place, and the parties are awaiting an initial decision. Respondents have not made the requisite showing under Rule 161.

We disagree with Respondents that it would be "unfair and inefficient for this administrative proceeding . . . to proceed to an initial decision" before the *Lucia* and *Bandimere* appeals are resolved. En banc review in both cases has concluded. And Respondents' claims of Supreme Court review are purely speculative at this time.

Although we recently stayed, *sua sponte*, all administrative proceedings in which a respondent had the option of appealing to the Court of Appeals for the Tenth Circuit in light of that circuit's denial of rehearing in *Bandimere*,[6] that order does not apply to Respondents because, as they concede, they cannot appeal any potentially adverse Commission order to the Tenth Circuit. And, as explained in the government's April 24, 2017 brief in *Lucia*,[7] we respectfully disagree with the *Bandimere* panel decision, including its reading of *Freytag v. Commissioner*,[8] and accordingly decline to follow the *Bandimere* decision here.[9]

In support of their motion, Respondents cite *Michael S. Steinberg*,[10] where we "postponed" briefing by the parties under what Respondents claim were similar "circumstances . . . pending final resolution of a significant legal issue in the federal courts that would 'likely impact'" the case. But in *Steinberg*, Steinberg's criminal conviction formed the basis for the administrative proceeding, that conviction was appealable to the Second Circuit, and the Second Circuit had issued a panel decision in another case that if not vacated or modified would entitle

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[3] 17 C.F.R. § 201.161(b)(1); *Christopher M. Gibson*, Exchange Act Release No. 80509, 2017 WL 1425432, at *1 (Apr. 21, 2017).

[4] 17 C.F.R. § 201.161(b)(1).

[5] *Paul Free*, Exchange Act Release No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012).

[6] *Pending Administrative Proceedings*, Exchange Act Release No. 80741, 2017 WL 2224348 (May 22, 2017).

[7] *See* Doc. No. 1672334, *Lucia*, No. 15-1345 (D.C. Cir. Apr. 24, 2017).

[8] 501 U.S. 868 (1991).

[9] *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160–61 (1984); *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996).

[10] Investment Advisers Act Release No. 4008, 2015 WL 331125 (Jan. 27, 2015).

Steinberg to reversal of his conviction.[11] Under these circumstances, and the Division's consent, we granted Steinberg's motion for a postponement.[12] Respondents, however, cannot appeal to the Tenth Circuit. *Bandimere* would therefore not entitle them to any relief.

As discussed above, the hearing in this proceeding has already occurred. The postponement that Respondents seek could delay significantly the outcome of this proceeding, and Respondents' concern about inefficiency does not override the strong public interest in the prompt enforcement of the federal securities laws.[13]

Finally, Respondents contend that "it would be inequitable for [them] to suffer the reputational consequences of an adverse decision that may well be nullified." But "the 'burden of being haled' into an allegedly improper forum does not constitute an irreparable injury warranting interruption of an ongoing proceeding."[14] And, as we have said previously, we do not discern how Respondents would otherwise be substantially prejudiced by the completion of the proceedings given that if a final Commission decision were adverse to Respondents, it would be subject to judicial review under Section 25(a)(1) of the Securities Exchange Act of 1934.[15]

Accordingly, it is ORDERED that Respondents request for a stay of these proceedings is denied.[16]

By the Commission.

Brent J. Fields
Secretary

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[11] *Id.* at *1–2.

[12] *Id.* at *2.

[13] *See Free*, 2012 WL 266986, at *2.

[14] *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74345, 2015 WL 728006, at *4 (Feb. 20, 2015) (quoting *Deaver v. Seymour*, 822 F.2d 66, 69–70 (2d Cir. 1987)).

[15] *Gibson*, 2017 WL 1425432, at *1 (citing 15 U.S.C. § 78y(a)(1) (stating that any person aggrieved by a final order of the Commission may obtain review of the order in the appropriate United States Court of Appeals)); *Jarkesy v. SEC*, 803 F.3d 9, 28–30 (D.C. Cir. 2015)).

[16] Respondents also petition, "[t]o the extent necessary," for interlocutory review of the law judge's order denying their requests for a stay and for certification of that issue for interlocutory review. *See* 17 C.F.R. § 201.400(c) (requiring that "[a] ruling submitted to the Commission for interlocutory review must by certified" by the law judge). But Rule 161 specifies that the Commission may, for good cause shown, grant a postponement at any time. We therefore dismiss Respondent's petition for interlocutory review as moot, but emphasize that our decision should not encourage parties to avoid first seeking a postponement or stay from a law judge. *Cf. Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513, at *6 (June 14, 2016) (observing that a law judge's evaluation of the Rule 400(c) factors will aid the Commission's determination as to whether interlocutory review is appropriate).