

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
JOHN THOMAS CAPITAL MANAGMENT :
GROUP LLC d/b/a PATRIOT28 LLC, : File No. 3-15255
GEORGE R. JARKESY, JR., :
JOHN THOMAS FINANCIAL, INC., and : EXPEDITED CONSIDERATION
ANASTASIOS "TOMMY" BELESI, : REQUESTED
Respondents. : RULE 400(b)

EMERGENCY MOTION FOR CLARIFICATION REGARDING ORDER
DIRECTING ADDITIONAL SUBMISSION AND, IN THE
ALTERNATIVE, MOTION FOR AUTHORITY TO EXCEED
16,000-WORD LIMIT AND FOR ADDITIONAL TIME

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC
("JTCM") and George R. Jarquesy, Jr. ("Jarquesy") (collectively "Respondents"),
submit this Emergency Motion for Clarification Regarding Order Directing
Additional Submission and, in the Alternative, Motion for Authority to Exceed
16,000-Word Limit and for Additional Time, and seeking expedited
consideration, show the following:

FACTUAL BACKGROUND

The Division of Enforcement ("Division") filed its 35-page post-hearing
memorandum of law and 67 pages of proposed findings of fact and conclusions of
law on April 8, 2014. Respondents filed their 35-page post-hearing memorandum
of law and 142 pages of proposed findings of fact and conclusions of law on May

28, 2014. The Division filed its 35-page post-hearing reply memorandum of law on May 12, 2014. Both parties were granted extensions of time to make their post-hearing submissions, due to the volume of evidence and complexity of issues in this case.

Initial Decision for this administrative proceeding was issued on October 17, 2014, after the hearing officer sought and received a six-month extension for filing the Initial Decision due to the volume of evidence and complexity of issues in this case. Respondents filed a 29-page Petition for Review on November 6, 2014, and on November 17, 2014, the Division filed a Cross Petition for Review.

The Commission issued an Order Granting Review and Scheduling Briefs on December 11, 2014 and, in an apparently unprecedented occurrence, granted expedited treatment of the review. The Order Granting Review directed that Respondents' opening brief not exceed 16,000 words, and stated that no extensions of time will be granted. Respondents filed their opening brief on January 13, 2015.

On January 20, 2015, the Commission issued an Order Directing Additional Submission ("Order"), due on February 3, 2015, ordering Respondents to provide an additional two-column submission with citations to the record to support certain evidentiary, factual and legal challenges to the Initial Decision. The Order further directs Respondents to provide a certificate stating the total number of words in the second column of the submission. The Order was sent the day after issuance and was served on Respondents by First Class U.S. Mail.

ARGUMENT AND AUTHORITY

RESPONDENTS WERE NOT PROMPTLY SERVED WITH THE ORDER

Rule 141(b) of the Commission's Rules of Practice provides:

(b) *Service of orders or decisions other than an order instituting proceedings.* Written orders or decisions issued by the Commission or by a hearing officer ***shall be served promptly*** on each party pursuant to any method of service authorized under paragraph (a) of this section or § 201.150(c)(1)-(3). Such orders or decisions may also be served by facsimile transmission if the party to be served has agreed to accept such service in a writing, signed by the party, and has provided the Commission with information concerning the facsimile machine telephone number and hours of facsimile machine operation. Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be made by the Secretary or the hearing officer. (emphasis added.)

Contrary to these requirements, the Order was served on Respondents' counsel via ordinary U.S. Mail, commonly referred to as "snail mail," as evidenced by the envelope. In light of the required response date, the Order was not served promptly. Unlike other Commission orders and the Initial Decision, the Order was not transmitted to Respondents via facsimile, electronic mail, overnight courier, or any other *prompt* method. It was not received until *one week* after issuance. Both the method of service used and the short deadline for response demonstrate that the service of the Order fails to comply with the Rules of Practice.

The Commission's violation of *its very own Rules of Practice* transgresses a fundamental precept of due process. The Supreme Court has long held that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency and must be followed by the agency.

Columbia Broad. Sys., Inc. v. United States, 62 S.Ct. 1194 (1942); *see also*, *United States ex rel. Accardi v. Shaughnessy*, 74 S.Ct. 499 (1954). As the Second Circuit explained in *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir.1991), “[t]he notion of fair play animating [the Fifth Amendment] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit.”

The abandonment of the SEC Rules of Practice in this case—by this latest transgression as well as the previous ones—violates Respondents’ due process rights. The Supreme Court has consistently held that proceedings cannot be salvaged where the agency has disregarded procedures which are borne of statutory or constitutional mandates. In *Morton v. Ruiz*, 94 S.Ct. 1055 (1974), the Court held that “[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.” The Court reiterated this commandment in *United States v. Caceres*, 99 S.Ct. 1465, (1979), repeating the principle that such violations invalidate the proceedings without even requiring any showing of prejudice. The most recent pronouncement comes from the Third Circuit, which vacated an agency adjudicatory proceeding in 2010 over a technical oversight by an ALJ—because the violation related to the due process protections in the agency’s rules. In *Leslie v. Atty. Gen. of the United States*, 611 F.3d 171 (3rd Cir. 2010), the court well summarized the relevant jurisprudence as follows:

When an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard

to whether the alleged violation has substantially prejudiced the complaining party.

Id. at 180.

The Commission's most recent violation of the SEC Rules of Practice clearly prejudices the Respondents, as the case law recited above demonstrates. The Order fails to give Respondents adequate notice and opportunity to comply with the Order—especially in light of the Commission's threat to dismiss Respondents' appeal brief. This sort of gamesmanship does not occur in federal court clerk's offices, which do not have a direct stake in the outcome of the matters adjudicated.

**MOTION FOR CLARIFICATION REGARDING THE ORDER
DIRECTING ADDITIONAL SUBMISSION AND, IN THE
ALTERNATIVE, MOTION FOR EXTENSION OF TIME AND
AUTHORITY TO EXCEED 16,000-WORD LIMIT**

The Initial Decision in this proceeding contains more than 19,000 words,¹ and is now subject to *de novo* review by the Commission. Respondents have challenged this administrative proceeding on multiple constitutional grounds, including due process violations for the Commission's failure to follow its own rules. Respondents have notified the Commission of all of these claims in briefs and other pleadings filed in prior to, and during, the hearing of the administrative proceeding and in a separate lawsuit filed in federal court. Respondents have also challenged the Initial Decision on numerous grounds of erroneous evidentiary rulings and factual and legal conclusions, all of which were included in Respondents' lengthy Petition for Review. All of these issues were known to the

¹ This calculation was performed by a word processor computer program.

Commission before the 16,000-word limit for Respondents' opening brief was set. Respondents' opening brief incorporates all of these challenges just under the word limit.²

Respondents take issue with a statement in the Order that reads:

“It appears that the sections of the opening brief enumerating respondents' exceptions to the initial decision's evidentiary rulings (Br. At 36-38), factual findings (*id.* At 39-45), and legal conclusions (*id.* At 46-47) do not contain *any* citations to the portions of the record or to legal authorities.”

To the contrary, Respondents make numerous citations on those pages to the Initial Decision, which *is* a part of the record. Those cited portions of the Initial Decision reference pages in the hearing transcript and exhibits. In addition, Respondents' post-hearing memorandum of law and proposed findings of fact and conclusions of law—which *are* a part of the record—give detailed citations to the hearing transcript, exhibits, federal cases, laws, regulations and Commission opinions. There are numerous factual and legal issues in this case relating just to the allegations in the Order Instituting Proceedings. Both the Division and Respondents provided lengthy and detailed analysis and argument as to the evidence and the law in their respective post-hearing submissions, and both requested extra time due to the volume of evidence and contested issues in this case. The existing record already contains lengthy and detailed analysis of the issues, including the evidentiary rulings, findings of fact and conclusions of law.

² Respondents' opening brief contained 15,668 words, according to the calculation of a word processing computer program.

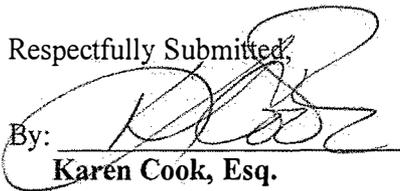
There is no need for the Commission to sift through the hundreds of exhibits and hundreds of pages of hearing transcript to review the matters raised in Respondents' petition for review.

The Order requires Respondents to submit a supplemental word count, but does not clarify whether the original word limit continues to apply. Respondents seek clarification of whether the original word count applies—which leaves Respondents only 332 words to comply with the Commission's Order. Certainly Respondents can comply with the Order by adding to the citations previously provided, but Respondents cannot make detailed citations to the hearing transcript, exhibits, statutes, regulations, court or Commission decisions, as requested, with the existing word limit or time allotted. In the event the Commission did not relax the word limit upon issuing the Order, Respondents seek authority to exceed the 16,000-word limit and for additional time to comply with the Order. If the Commission indeed intends to review in good faith the matters raised in this appeal without sifting through the extensive records, Respondents should be permitted sufficient space and time to provide even more detailed citations to the record to facilitate the review.

EXPEDITED CONSIDERATION

Respondents seek expedited consideration of this motion in light of the extremely short deadline set by the Commission and the late service of the Order.

Respectfully Submitted,

By: 

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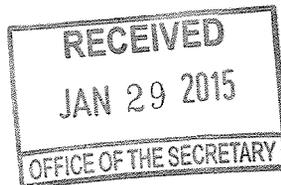
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Pages: 10 including cover

Re: In the Matter of John Thomas Capital Management, Group, LLC et al., Admin. Proc. File No. 3-15255

Comments: Following is Respondents' Emergency Motion for Clarification Regarding ●rder Directing Additional Submission and, in the Alternative, Motion for Authority to Exceed 16,000 Word Limit and for Additional Time in the above referenced case: