

**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.

RESPONDENTS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

DATED: July 18, 2019

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Pursuant to Rule 400 of the Commission's Rules of Practice, Respondents, Raymond J. Lucia, Sr. and Raymond J. Lucia Companies, Inc. move to certify for interlocutory appeal to the full Securities and Exchange Commission the question of whether this Administrative Law Judge is unconstitutionally insulated from removal by the President in violation of Article II of the United States Constitution. This issue, which was left open by the Supreme Court, goes to the heart of this ALJ's ability to preside over this matter, and thus should be decided by the Commission itself as soon as possible. Simply put, if this ALJ is presiding over this matter in violation of Article II, then this remanded proceeding will face the same fate the first administrative proceeding faced in this very case. Such an outcome is patently unfair for Respondents, but also hardly serves the Division of Enforcement's interests. This ALJ should therefore certify this question for interlocutory appeal to the Commission.

FACTS AND PROCEDURAL HISTORY

On December 3, 2018, Respondents moved for an order dismissing the proceedings under Rule 250(a) of the Commission's Rules of Practice. As relevant here, Respondents argued that this ALJ may not preside over this matter without violating Article II of the U.S. Constitution because this ALJ is insulated from removal by at least two levels of tenure protection. (See Respondent's Motion at 22-23.) Because of this constitutional defect, Respondents asked this ALJ to refer this matter to the full Commission for trial. (See id. at 22.)

On July 15, 2019, this ALJ denied the motion in a written order. Order, Administrative Release No. 6628 (July 15, 2019). On the Article II issue, this ALJ applied the Commission's precedent, even though that precedent had been decided prior to, and partially overruled by, the Supreme Court's decision in this case, Lucia v. SEC, 138 S.Ct. 2044 (2018). Id. (citing In the

Matter of Optionsxpress, Inc. & Jonathan I. Feldman, Release No. 10125, 2016 WL 4413227, at *50-51 (Aug. 18, 2016), reversed in part on other grounds by Lucia, 138 S. Ct. 2044.)

ARGUMENT

A party to an administrative proceeding may seek an ALJ's certification of a ruling for interlocutory review under Rule 400 of the Commission's Rules of Practices. See 17 C.F.R. § 201.400(c). The standard for certification upon application by a party is whether "[t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and [] [a]n immediate review of the order may materially advance the completion of the proceeding." 17 CFR § 201.400(c)(2). A request for certification must be made "within five days of the hearing officer's ruling." Id.

This ALJ's order involves a question of law on which "there is substantial ground for disagreement," and immediate review by the Commission would "materially advance the completion of the proceeding," because the constitutional question goes to the validity of this proceeding. If, as Respondents have argued, this ALJ is barred from presiding over this proceeding, this matter is, once again, legally void. Moreover, even the Solicitor General of the United States and the Division of Enforcement have acknowledged the serious constitutional questions presented by this issue and the grounds for disagreement by the courts. This ALJ should therefore certify this question to the Commission.

I. The July 15, 2019 Order Involves A Question of Law on Which There Is Substantial Disagreement.

The combination of holdings in Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010) and Lucia v. SEC, 138 S. Ct. 2044 (2018), make clear the removal protections of SEC ALJs are unconstitutional. In Free Enterprise Fund, the Court held that as

inferior officers, members of the PCAOB enjoyed unconstitutional removal protections in violation of Article II. See 561 U.S. at 492–98. Lucia held that SEC ALJs are inferior officers like the members of the PCAOB. 138 S. Ct. at 2051, 2055.

SEC ALJs are insulated from removal by multiple layers of for-cause removal protection, id. at 2060 (Breyer, J., concurring in part), just as the PCAOB members were, Free Enter. Fund, 561 U.S. at 492. First, SEC ALJs are removable from their position by the SEC “only” for “good cause,” which must be “established and determined” by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). Second, the President may, in turn, remove members of the MSPB only for “inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d). Third, the SEC Commissioners, who cannot act without approval from the MSPB, 5 U.S.C. § 7521, are themselves protected by tenure. They may not be removed by the President from their position except for “inefficiency, neglect of duty, or malfeasance in office.” Free Enter. Fund, 561 U.S. at 487; MFS Sec. Corp. v. SEC, 380 F.3d 611, 619-20 (2d Cir. 2004). Therefore, this ALJ sits in violation of Article II.

Furthermore, the Enforcement Division has conceded in this very case that a court must resort to a convoluted form of constitutional avoidance to have the SEC ALJ system comport with Article II. (See Div. of Enforcement’s Opp. at 14.) The Solicitor General of the United States agrees. He argued to the Supreme Court, again in this very case, that unless the Court blinded itself to the plain language of the statute through constitutional avoidance, “the limitations that the provision imposes on removal of the Commission’s ALJs would be unconstitutional.” Br. for Resp’t. Supporting Pet’rs at 53, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

Despite this authority, this ALJ has, understandably, followed the best authority available from the Commission on this issue, Optionsxpress, Inc., 2016 WL 4413227 at *50, and denied the claim outright. However, as the U.S. Government and the Division of Enforcement have argued in this and other litigation, the Commission's decision in Optionsxpress, Inc. is constitutionally suspect. This means, at the very least, there is substantial disagreement over the continued vitality of that authority. The Commission concluded in Optionsxpress, Inc. that SEC ALJs were not officers for purposes of the Appointments Clause, and, as a corollary, because "the nature of their duties differs so dramatically from those of the PCAOB" this resolved "any potential concerns about the removal limitations" under Article II. 2016 WL 4413227 at *47-48, 50-51.

Of course, the Supreme Court, in this very case, vacated the Commission's first conclusion about the authorities exercised by SEC ALJs, and, necessarily also cast substantial doubt on the Commission's second conclusion. As Justice Breyer put it, "If the Free Enterprise Fund Court's holding applies equally to the administrative law judges ... then to hold that the administrative law judges are 'Officers of the United States' is, perhaps, to hold that their removal protections are unconstitutional." Lucia, 138 S. Ct. at 2060 (Breyer, J., concurring in part).

This issue therefore presents one involving substantial disagreement, which the Commission should resolve. Indeed, as this ALJ did not use constitutional avoidance to rule on this issue, a concurring opinion of the Supreme Court as well as both the Solicitor General and the Division of Enforcement all appear to acknowledge that the current ALJ structure is unconstitutional. As such, the Commission must resolve this controlling question of law.

II. An Immediate Review of The Order Would Materially Advance This Proceeding's Completion


In Lucia, the Supreme Court vacated six years of administrative proceedings and litigation involving these respondents. This resulted in years of wasted time and the loss of incalculable prosecutorial and defense resources. This certification motion allows this ALJ and the Commission to avoid the same costly—and certain—result. Immediate review of this ALJ's order would allow the Commission to remedy the obvious constitutional defect in the removal protection scheme by hearing the case on its own. Respondents asked for this alternative remedy in their December 3, 2018 brief. (See Respondent's Motion at 23.). Litigating the merits of Respondents' case in an unconstitutional forum does not benefit Respondents, the Commission, or this ALJ. It is in the best interest of all parties for the SEC to resolve this question now in order to provide certainty in this matter, as well as others currently presided over by unconstitutional ALJs. Should the administrative proceedings be allowed to continue, they will likely be vacated and just as last time, that will result in the waste of years of the parties' time, effort, and resources. Immediate review would materially advance the conclusion of this matter and avoid a repeat of the past seven years.

CONCLUSION

This ALJ should certify the question of whether SEC ALJs tenure protections violate Article II to the full Commission on interlocutory appeal.

DATED: July 18, 2019

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CERTIFICATE OF SERVICE

This is to certify that this filing was sent by facsimile transmission, and that, contemporaneously, the original and three copies of the foregoing motion were mailed, first class, postage prepaid on this day to:

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And that one copy of the foregoing motion was mailed first class, postage prepaid on this day to:

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