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	:	**MOTION TO ADDUCE ADDITIONAL EVIDENCE**
ANASTASIOS "TOMMY" BELESIS,	:	**RULE 452**
Respondents.	:	

MOTION TO ADDUCE ADDITIONAL EVIDENCE

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. ("Jarkesy") (collectively "Respondents"), submit this Motion to Adduce Additional Evidence ("Motion"), show the following:

FACTUAL BACKGROUND

The Securities and Exchange Commission ("Commission") instituted this proceeding with an Order Instituting Proceedings ("OIP") on March 22, 2013, pursuant to Section 8A of the Securities Act of 1933, Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

During the proceeding before the Hearing Officer, the Respondents sought to adduce certain evidence necessary to their defenses:

- Documents responsive to a subpoena to the Commission's Custodian of Records regarding the settlement of claims against John Thomas Financial, Inc. ("JTF") and Anastasios Belesis ("Belesis");
- Testimony responsive to a subpoena to the Commission's Office of General Counsel on specified topics relating to the settlement of claims against JTF and Belesis;
- Division staff notes containing *Brady* information from interviews conducted during the investigation; and
- An affidavit of Anastasios Tommy Belesis ("Belesis") pertaining to this matter.

The Hearing Officer improperly denied Respondents' efforts to acquire or use such information on a variety of grounds. Pursuant to Commission Practice Rule 452 and the Commission's December 11, 2014, Order Granting Review and Scheduling Briefs, Respondents now seek leave to adduce the additional evidence previously identified.

ARGUMENT AND AUTHORITIES

A. Standard for Leave to Adduce Additional Evidence.

Rule of Practice 452 provides that "a party may file a motion for leave to adduce additional evidence at any time prior to issuance of decision by the Commission." 17 C.F.R. §452. Respondents' Motion must "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." *Id.* Further, the motion "shall demonstrate that the evidence could not have been developed and introduced" before the Hearing Officer, and if the Hearing Officer refused relief "the motion shall specify the manner in which relief was sought, the proffer made to the [Hearing Officer], and the [Hearing Officer's] ruling." *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 73819, Commission Order Granting Review and Scheduling Briefs, Dec. 11, 2014.

B. The Commission Should Grant Leave to Adduce Additional Evidence.

1. Additional Evidence Pursuant to Respondents' Subpoenas to the Commission's Office of General Counsel and Custodian of Records Regarding the Settlement of John Thomas Financial, Inc. and Belesis Is Warranted.

On December 5, 2013, John Thomas Financial, Inc. and Belesis (collectively the "Settling Parties") settled this matter with regard to the Commission's claims against them. *See John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 70989, 2013 SEC LEXIS 3862 (Dec. 5, 2013). As a part of the settlement, the Settling Parties agreed to the entry of an Order whereby the Settling Parties were not required to admit liability of any of the facts alleged in the OIP. *Id.* However, the Commission entered findings of fact not just pertaining to the Settling Parties, but made findings *against the Respondents who were non-settling parties*. The Commission did so two months prior to Respondents' evidentiary hearing and without notice to Respondents. Many of the improper findings are documented in Respondents' Motion for Recusal of the Commission and Dismissal of Administrative Proceeding filed contemporaneously herewith, which is incorporated by reference. If the Commission did not glean these "facts" from a hearing, Respondents are at a loss to explain how the Commissioners could have possibly obtained the considerable—and one-sided—testimony, documentation and data needed to formulate and enter these extensive and condemnatory findings on their own, unless through prohibited *ex parte* contact with emissaries from the Division of Enforcement. *See* 5 U.S.C. § 554(d)(2).

Subsequent to this settlement, Respondents submitted subpoenas directed at the Commission's Office of General Counsel and the Commission's Custodian of Records to the Hearing Officer for documents and information pertaining specifically to the findings against the Respondents, who were not parties to the settlement.[1] *See* Exhibit 1; Exhibit 2; *John Thomas Capital Mgmt. Group LLC*, Admin. Proceedings Ruling Release No. 1242 (Feb. 14, 2014), attached as Exhibit 3. The Hearing officer summarily denied the Respondents' subpoena requests as unreasonable, under the meaning of 17 C.F.R. § 201.232(b), because (1) they were untimely; and (2) they sought privileged information. *See* Exhibit 3 (attached). Both grounds lack merit.

First, the subpoenas were not untimely. The ALJ concluded that the subpoenas were untimely "as a general matter," because Respondents requested them after the hearing had begun. However, as the ALJ acknowledged, there were no deadlines set for the submission of subpoena requests. Additionally, Rule of Practice 232(a), which relates to the availability of subpoenas, provides, in relevant part, that:

> In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses ***at the designated time and place of hearing***, and subpoenas requiring the production of documentary or other tangible evidence returnable ***at any designated time or place***.

17 C.F.R. § 201.232(a). Thus, Rule 232 does not preclude the issuance of a subpoena after the hearing has begun.

The ALJ also determined that the subpoenas were untimely because they would not have been served until the week of February 18, 2014, which would not allow the Division to have 15 days from the date of service to move to quash the subpoenas before the hearing would be

[1] Respondents subpoena to the Commission's Office of the General Counsel and exhibit identifying documents sought is attached hereto as "Exhibit 1;" Respondents subpoena to the Commission's Custodian of Records and exhibit identifying documents sought is attached hereto as "Exhibit 2."

concluded. However, Rule 232(e) does not give the Division a minimum of 15 days to move to quash. Instead, the rule allows the Division to request that the subpoenas be quashed or modified "prior to the time specified . . . [in the subpoena] for compliance, but in no event more than 15 days after the date of service of such subpoena." *See* 17 C.F.R. § 201.232(e)(1). Thus, even assuming that the 15-day timeframe would have run past the conclusion of the hearing, this would not have rendered the subpoenas untimely. In fact, the hearing did not conclude until March 14, 2014, more than a month after the subpoenas were requested.

Second, the subpoenas were not unreasonable due to the information requested. Rule of Practice 232(b) governs the "Standards for Issuance" of subpoenas and provides:

> Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the person requested to issue the subpoena determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved.

See 17 C.F.R. § 201.232(b).

As the ALJ noted, the documents sought in the subpoena to the Commission's Custodian of Records relate to the same topics for testimony sought in the subpoena to the Commission's Office of General Counsel. In particular, the document subpoena generally sought "all documents, media, and electronic data" relating to the settlement with the Settling Parties; the Order Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order as to JTF and Belesis, issued by the Commission on December 5, 2013; the Commission's decision to initiate the enforcement proceeding in the administrative forum rather than federal court; and all

communications received by the SEC regarding Respondents. These topics are not "unreasonable, oppressive, excessive in scope, or unduly burdensome," because they directly relate to issues raised by Respondents in this proceeding, including that (1) the Commission improperly prejudged Respondents based upon the December 5, 2013 order; (2) there were improper the *ex parte* communications between members of the Division and the Commission in this proceeding; (3) Respondents' equal protection rights under the Fifth Amendment were violated when the Commission arbitrarily decided to bring this enforcement action in the administrative forum rather than in federal court; and (4) there was no basis for many of the findings against Respondents.

The Commission has boldly asserted before the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit that Respondents will have every opportunity to meaningfully litigate and press these claims through this statutory review process, all the way up to the court of appeals. What the Commission has failed to explain, however, is just how Respondents can assert these claims without obtaining and presenting the evidence necessary to support them. Discovery is necessary in support of evidence-based constitutional claims, such as an equal protection claim, where the gathering of the facts is necessary "to further elucidate the essential issues of th[e] case... ." *Miller v. Caldera*, 138 F. Supp. 2d 10, 12 n.1 (D.C. Cir. 2001). *See also, Greater Baltimore Ctr. for Pregnancy Concerns, Inc., v. Mayor & City Council of Baltimore*, 721 F.3d 264, 282 (4th Cir. 2013) (to properly adjudicate constitutional challenge in an as-applied analysis, the district court was obliged to first afford discovery).

The subpoenaed documents are relevant to each of these claims and necessary for Respondents to adequately prove these claims, and the Commission has assured the federal

courts that Respondents will be afforded the opportunity to "meaningfully" press these claims through the statutory review process dictated by the APA and the SEC's Rules of Practice. These assurances will ring hollow indeed if all of Respondents' efforts to acquire and present the evidence—starting with the issuance of these subpoenas—are rejected. If the Commission is standing by its repeated pledge to the federal courts that Respondents may litigate these claims through the statutory review process, now is the time to demonstrate that these promises have meaning. The subpoenas must be issued.

2. Additional Evidence Concerning Division Staff Notes from Witness Interviews Is Warranted.

Prior to the hearing in this matter, almost no discovery pertaining to the Division's allegations was allowed. *See* 17 C.F.R. § 201.230 - 231. As a part of the Division's Rule 231 Production, certain interview notes from a witness interview with a Steven Benkovsky were (allegedly inadvertently) produced that contained undisclosed *Brady/Jenks* material.[2] It is clear from just the one set of notes that were produced that *Brady/Jenks* material was being improperly withheld and that the Division's summaries of these notes did not contain all of the *Brady/Jenks* material that the Division was required to produce.

Respondents objected to the withholding of the *Brady/Jenks* material via written motion to compel filed on October 11, 2013. Subsequently, Respondents filed an amended and corrected motion to compel the same information on October 15, 2013. The Division filed its Opposition to Respondents' motion to compel; Respondents then filed a reply on October 24, 2013. A hearing on the motion to compel was conducted on the afternoon of October 24, 2014. *See* Transcript of the October 24, 2013, hearing, attached hereto as "Exhibit 5."

[2] For further discussion of the Benkovsky interview notes, *See* Reply of Respondents to Division's Opposition Memorandum, at p.2-3, excerpt attached hereto as "Exhibit 4."

Without entertaining oral argument on the issue, the Hearing Officer concluded that the Division's *Brady* obligations are somehow different from the jurisprudential requirements of the doctrine as set forth in the *Brady* opinion and its progeny. *See* Exhibit 5, Tr. at p.4. Respondents further requested that the Hearing Officer's decision be certified for interlocutory appeal, a request that was also denied. *Id.* Subsequently, the Hearing Officer issued an order memorializing the same. *John Thomas Capital Mgmt. Group LLC*, Admin. Proceedings Ruling Release No. 992 (Oct. 24, 2013), attached as "Exhibit 6."

Respondents then filed their Petition for Interlocutory review, including the *Brady/Jencks* issue. *See* Petition for Interlocutory Review, filed with the Commission on October 31, 2013, at p. 3-8, excerpt attached hereto as "Exhibit 11." After the Division filed its response and the Respondents filed a reply, the Commission, by way of order, requested additional briefing on the issue. *John Thomas Capital Mgmt. Group LLC*, Admin, Exchange Act Release No. 70841 (Nov. 8, 2013), attached as "Exhibit 7." On November 13, 2013, the Commission granted an interim stay of the proceedings until a determination based on Respondents' Petition for Interlocutory Review. *John Thomas Capital Mgmt. Group LLC*, Admin, Exchange Act Release No. 70869 (Nov. 13, 2013), attached as "Exhibit 8." On December 26, 2013, the Commission denied interlocutory review of Respondents' *Brady* claims. *John Thomas Capital Mgmt. Group LLC*, Admin, Exchange Act Release No. 71021 (Dec. 6, 2013), attached as "Exhibit 9."

As noted in the previous filings, an *in camera* review of the Division's interview was not conducted—an issue that was brought to the Hearing Officer's attention and noted in the Petition for Interlocutory Review. As a result of the Hearing Officer's wholesale denial of Respondents' motion and the Commission's refusal to take the issue on interlocutory review, the notes at issue are not contained within the record for evaluation on review. As described in the underlying

papers, the notes appear to contain exculpatory material pertaining to the charges against Respondents and *Jenks* material that was never produced.

It is also important to note that, despite the Commission's failure to grant interlocutory review of this issue, the Commission went on to comment on the merits of Respondents' position. Given the evolution of the proceedings, the Commission was simply incorrect in its assumption of what does and does not constitute exculpatory material. Specifically, the Commission—though not deciding the issue because it refused the petition of review—opined in dicta that "[t]he fact that Benkovsky testified that Belesis made false statements to him in order to induce him to invest has no bearing on whether JTCM and Jarkesy made the misrepresentations for which they have been charged." This misses the point of *Brady* entirely: that Respondents may have made misrepresentations would not be exculpatory, it would be inculpatory. Belesis was on the Division's witness list; a false statement by a Division witness is—by definition—exculpatory as to Respondent.

Moreover, "who" made "what" representations and whom the investors depended upon for investing is a critical issue in determining liability and what, if any, civil penalty is appropriate for a case. *See John Thomas Capital Mgmt. Group LLC* Initial Decision Release No. 693, at p. 32-33 (Oct. 17, 2014), excerpt attached as "Exhibit 10" ("[a] third-tier penalty ... is appropriate ... [where] Respondents' violative acts involved fraud *and resulted in* substantial losses to other persons who may have decided not to invest or to stay invested in the funds had they received accurate information") (citations omitted) (emphasis added). The Division notes contained statements that Benkovsky invested as a result of statements by the Settling Respondents, not Jarkesy or JTCM. If nothing else, this information is exculpatory toward

Respondents for the third-tier civil penalties—totaling millions of dollars—that the Division continues to seek.

At a minimum, the Commission has an obligation to conduct an *in camera* review or remand for an *in camera* review the Division's witness interview notes, beginning with requiring the Division to turn over the notes for the record before the Commission, to permit a harm analysis. As it stands, Respondents are unable to meaningfully litigate the *Brady* issue because the witness interview notes were not preserved in the record.

3. The Affidavit of Tommy Belesis Should Be Admitted into the Record.

During the hearing, the issue of whether Mr. Belesis would be available to testify became a frequently discussed issue. Tr. 3029:7 - 3045:15. Toward the end of the hearing, whether he was intimidated by the Division or he just had a fear of criminal prosecution, the Division asserted that, if called to testify, Mr. Belesis would simply plead the Fifth Amendment. Tr. 3029:7-3040:8. The Hearing Officer correctly determined that, for whatever reason, this had the effect of making Belesis an "unavailable" witness for legal purposes. Tr. 3040:2-8. Despite his unavailability, the Hearing officer refused to admit an affidavit signed under the penalty of perjury by Belesis (Respondent Exhibit #327) consistent with prior investigative testimony that he gave the Division in this very matter, attached as "Exhibit 12." Tr. 3043:16 - 3044:9; *see also* Fed. R. Ev. 804(b)(1).

The Belesis affidavit directly rebutted critical theories of liability maintained by the Division and relied upon by the Hearing Officer in the Initial Decision. For example,

- When Jarkesy and Belesis met and their relationship began;
- Who originated the idea of the funds;
- Who actually managed the funds;

- Whether Belesis exerted control over the funds;
- Who introduced the funds to certain companies;
- How certain referral fees were paid; and
- Information concerning the discontinuance of the relationship between the Funds and the Settling Respondents.

See Exhibit 12. The testimony contained in the affidavit is material to factual findings made against Respondents. Further, the Hearing Officer was inconsistent in rulings by allowing the Division evidence of prior testimony by Jarkesy, but refusing to allow the affidavit containing prior testimony of Belesis. The testimony comes from questioning performed by the *Division* itself and certainly the Division had the opportunity to continue questioning Belesis about his answers.

Pertaining to the admissibility of the Affidavit, (1) hearsay was not an issue; (2) there was no question that, legally, the witness was "unavailable;" and (3) the Division had previously had ample opportunity to question Belesis concerning all statements made in the affidavit—and in fact had questioned Belesis over the same issues, *for 35 hours*. Tr. 3029:7 – 3045:15.

The Hearing Officer admitted numerous business records affidavits—that were facially defective—which purported to authenticate hundreds of documents, which were also admitted into evidence. The hearsay verbiage of the affidavits served as a substitute for witness testimony as to the authenticity and foundation for each of the sponsored documents. All of the defective affidavits and the hundreds of documents they purported to authenticate were admitted into evidence and relied upon by the Hearing Officer in the Initial Decision. Consistent with the Hearing Officer's rulings on the *Division's* submitted affidavits, the Belesis Affidavit should be considered by the Commission as additional evidence in making its decision.

Respectfully Submitted,

By: _____

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Karen Cook, PLLC
E-mail: karen@karencooklaw.com
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1717 McKinney Avenue, Suite 700
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S. Michael McColloch, Esq.
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1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6431

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

[redacted]

SUBPOENA

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of John Thomas Capital Management Group, LLC, d/b/a Patriot28, LLC, et al., Administrative Proceeding No. 3-15255

To: U.S. Securities and Exchange Commission
Office of General Counsel
100 F. Street, NE
Washington, DC 20549

[ ] YOU MUST PRODUCE the documents or other tangible evidence specified in the Attachment to this subpoena to officers of the Securities and Exchange Commission, at the following place, date and time

---

[X] YOU MUST ATTEND AND TESTIFY before an Administrative Law Judge of the Securities and Exchange Commission, at a hearing in this matter, at the following place, date and time (and from day to day, as may be required, until completion of the hearing) regarding the items specified in Exhibit A. The Commission must designate one or more employees, agents or other persons who consent to testify on your behalf about the items specified in Exhibit A:

[redacted]

FEDERAL LAW REQUIRES YOU TO COMPLY WITH THIS SUBPOENA.
Failure to comply may subject you to a fine and/or imprisonment.

Signed, sealed and issued pursuant to Rule 232 of the Commission's Rules of Practice by:

_____ on _____, 2014

This subpoena was issued at the request of the Respondent John Thomas Capital Management Group, LLC d/b/a Patriot28, LLC and George R. Jarkesy, Jr., whose counsel in this matter is Karen [redacted] Karen Cook, PLLC, 1717 McKinney Avenue, Suite 700, Dallas, TX 75202, Telephone 214.593.

EXHIBIT 1

EXHIBIT A

One or more SEC representatives identified by the Commission who can testify as to the following:

(1) The bases, facts and circumstances surrounding the negotiation, recommendation, consideration and approval of the settlement dated December 5, 2013, between the Securities Exchange Commission ("SEC") and Anastasios "Tommy" Belesis ("Belesis") and John Thomas Financial, Inc. ("JTF");

(2) The bases, facts and circumstances surrounding the communications between members of the Division of Enforcement and the Commissioners, including the Commissioners' staff members, regarding, relating to or referring to the settlement on December 5, 2013 of the SEC's enforcement action against Belesis and JTF;

(3) The bases, facts and circumstances surrounding the findings against George R. Jarkesy, Jr. ("Jarkesy") and Patriot28, LLC ("Patriot28") reflected in the Order Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order as to John Thomas Financial, Inc. and Anastasios "Tommy" Belesis, issued by the Commission on or about December 5, 2013, and the accompanying Offer of Settlement;

(4) The bases, facts and circumstances surrounding the Commission's decision to initiate the enforcement action against Jarkesy and Patriot28 as an administrative proceeding, instead of a federal court proceeding; and

(5) The standards, criteria, policies and procedures established or used by or for the SEC, the Commission or its employees for determining whether to initiate an administrative proceeding or federal court proceeding for all enforcement actions for which the Commission has concurrent administrative and federal court authority.

SUBPOENA

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of John Thomas Capital Management Group, LLC, d/b/a Patriot28, LLC, et al., Administrative Proceeding No. 3-15255

To: U.S. Securities and Exchange Commission
Custodian of Records
100 F Street, NE
Washington, DC 20549

[X] YOU MUST PRODUCE the documents or other tangible evidence specified in Exhibit A to this subpoena to Karen Cook, PLLC, at the following place, date and time:

Karen Cook, Esq.
Karen Cook, PLLC
1717 McKinney Avenue, Suite 700
Dallas, TX 75202
February 26, 2014 at 5:00 p.m. CST

[ ] YOU MUST ATTEND AND TESTIFY before an Administrative Law Judge of the Securities and Exchange Commission, at a hearing in this matter, at the following place, date and time (and from day to day, as may be required, until completion of the hearing):

FEDERAL LAW REQUIRES YOU TO COMPLY WITH THIS SUBPOENA.
Failure to comply may subject you to a fine and/or imprisonment.

Signed, sealed and issued pursuant to Rule 232 of the Commission's Rules of Practice by:

_____ on _____, 2014

This subpoena was issued at the request of the Respondent John Thomas Capital Management G
LLC d/b/a Patriot28, LLC and George R. Jarkesy, Jr., whose counsel in this matter is Karen C
Karen Cook, PLLC, 1717 McKinney Avenue, Suite 700, Dallas, TX 75202, Telephone 214.593.

EXHIBIT
2

EXHIBIT A

All documents, media and electronic data:

(1) regarding, relating to or referring to the negotiation, recommendation, consideration and approval of the settlement between the Securities Exchange Commission ("SEC") and Anastasios "Tommy" Belesis ("Belesis") and John Thomas Financial, Inc. ("JTF") in Administrative Proceeding No. 3-15255, including, but not limited to, all action memoranda, summaries, correspondence, notes, audio recordings and video recordings of all meetings, and all communications between and among staff members of the Enforcement Division and the Commissioners, including the Commissioners' staff, and all communications between staff members of the Enforcement Division and Belesis or JTF;

(2) regarding the drafting, consideration and acceptance of the Order Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order as to JTF and Belesis, issued by the Commission on December 5, 2013, and the accompanying Offer of Settlement, and all action memoranda, summaries, correspondence, notes, and all audio recordings and video recordings of all meetings and proceedings conducted as to the findings against George R. Jarkesy, Jr. ("Jarkesy") and John Thomas Capital Management, Inc. d/b/a Patriot28, LLC ("Patriot28").

(3) regarding, relating to or referring to the Commission's decision to initiate the enforcement proceeding against Jarkesy and Patriot28 as an administrative proceeding instead of federal court proceeding;

(4) regarding, relating to or referring to all standards, criteria, policies and procedures established or used by or for the SEC, the Commission or its employees for determining whether to initiate an administrative proceeding or federal court proceeding for all enforcement actions for which the Commission has concurrent administrative and federal court authority; and

(5) all communications received by or through the SEC or any of its agents or employees, on or after January 1, 2009, that references Jarkesy or Patriot28 (f/k/a John Thomas Capital Management, LLC) by full, former or partial name.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1242 /February 14, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	:	ORDER

The Securities and Exchange Commission (Commission) instituted this proceeding on March 22, 2013. It ended as to John Thomas Financial, Inc., and Anastasios "Tommy" Belesis (JTF/Belesis) on December 5, 2013. John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC, Exchange Act Release No. 70989, 2013 SEC LEXIS 3862 (Dec. 5, 2013) (JTF/Belesis Settlement). After several postponements, the hearing as to the remaining Respondents, John Thomas Capital Management Group LLC d/b/a Patriot28 LLC and George R. Jarkesy, Jr. (JTCM/Jarkesy), commenced on February 3, 2014. Hearing sessions were held on February 3-7, 2014, in New York City, and are scheduled to resume there on February 24, 2014. It is expected that the hearing will be closed on or before February 28, 2014.

Under consideration are subpoenas requested by JTCM/Jarkesy by email on February 13, 2014,[1] and a brief February 13, 2014, e-mail from the Division of Enforcement (Division)[2] objecting to the issuance of the subpoenas.

The Division's e-mail does not rise to the level of a motion to quash or modify. However, on their face, the subpoenas directed to the Commission's Office of General Counsel (Subpoena No. 1) and Custodian of Records (Subpoena No. 2) are unreasonable within the

[1] United States Government offices, including the Commission, in the Washington, D.C., area were closed on February 13, 2014, due to inclement weather conditions.

[2] "Any person to whom a subpoena is directed, or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena, or any party may . . . request that the subpoena be quashed or modified." 17 C.F.R. § 201.232(e)(1) (emphasis added); see also Amendments to the Rules of Practice, 69 Fed. Reg. 13166, 13170 (Mar. 19, 2004).

meaning of 17 C.F.R. § 201.232(b). First, they are untimely. While no deadline was set for the submission of subpoena requests, the subpoenas specify a large quantity of documents and were requested ten days after the commencement of the hearing, so they are untimely as a general matter. Additionally, were JTCM/Jarkesy to obtain and serve the subpoenas, this would be accomplished, at the earliest, during the week of February 18, 2014, and the Division and any person to whom the subpoenas are directed, or who is an owner, creator, or subject of the documents to be produced, are allowed fifteen days from the date of service to request that the subpoenas be quashed. See 17 C.F.R. § 201.232(e)(1). By that time, the hearing and record will have been closed. Second, aside from their untimeliness, the subpoenas are unreasonable. Subpoena No. 1 specifies evidence largely consisting of privileged internal Commission deliberations concerning the JTF/Belesis Settlement and concerning the institution of this proceeding against JTCM/Jarkesy. Documents specified in Subpoena No. 2 relate to the topics enumerated in Subpoena No. 1. Accordingly, the subpoenas will not be issued.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

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
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GEORGE R. JARKESY, JR.,	:	
	:	
JOHN THOMAS FINANCIAL, INC., and	:	ALJ Carol Fox Foelak
	:	
ANASTASIOS "TOMMY" BELESIS,	:	
	:	
Respondents.	:	

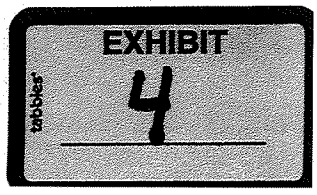
REPLY OF RESPONDENTS JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PARTIOT28 LLC AND GEORGE R. JARKESY, JR. TO DIVISION'S OPPOSITION MEMORANDUM TO RESPONDENTS' MOTION FOR RELIEF

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. ("Jarkesy") submit the following reply ("Reply") to the Division's opposition memorandum to Respondents' motion for relief ("Motion"), and respectfully show as follows:

I.
THE DIVISION HAS NOT COMPLIED WITH ITS *Brady* REQUIREMENTS

The Commission adopted the requirements of *Brady v. Maryland*[1] and its progeny in Rule 230 of the Rules of Practice. The standard for *Brady* emanates from the Constitutional right to Due Process. There is only one standard, and the government's *Brady* obligations are not watered down for civil or administrative matters.

[1] 373 U.S. 83 (1963).



The Division correctly states that Rule 230 prevents the Division from withholding *Brady* material. They have withheld *Brady* material during the entire pendency of this matter and they are still doing it.

1. **The Summaries Provided By the Division Do Not Include All *BRADY* Material**

As Respondents asserted in the Motion, the summaries provided by the Division are not as reliable as the contemporaneously-prepared notes. Respondents can now prove that the Division did not include all *Brady* material in its summaries. On October 17, 2013, the Division produced additional documents, including handwritten notes, which appear to be the interview of Steven Benkovsky on July 18, 2011 ("Benkovsky Notes"), referenced in the summaries provided in the Declaration of Todd D. Brody Regarding the Division's Compliance with its Brady Obligations ("Declaration"). A copy of the notes is attached as Exhibit A and a copy of the Declaration is attached as Exhibit B. The six-sentence summary provided by the Division does not include all of the *Brady* material in the Benkovsky Notes. Virtually all of the statements in the Benkovsky Notes relate to the persons, entities and investments that are involved in this case. These statements make clear that much of information related to the Fund and its underlying investments was communicated by settling Respondent Belesis and his employees. The notes refer to a Power Point presentation, which is undoubtedly material as to what disclosures were made about the witness' investment and who made them. Other key statements are, "JTBOF: Thinks Geo running it + Belesis selling it" and "Geo may have mentioned fund licenses name". None of this information was included in the Declaration, and all of it is *Brady* material as to Respondents.

The notes indicate that other government agents (including SEC Assistant Director Michael Osnato) were present during the Benkovsky interview. This raises the question whether

the other agents also took notes that captured more or different information supplied by the witness. All of this information is *Brady* material as to Respondents.

2. The Division Waived Its Assertion Of Privilege As To Interview Notes Through Voluntary Disclosure

The Division asserted, both in conference with Respondents' counsel, and in its Withheld Document List, that witness interview notes prepared by the Staff are protected by the attorney-client, attorney work-product, and "other privileges." After making the privilege assertion, the Division voluntarily produced to Respondents a document that appears to be the handwritten notes of an interview with JTBOF limited partner Steven Benkovsky, dated July 18, 2011.[2] The Division's voluntary production of the notes waives the claimed privileges. Additionally, as addressed is section 1 of this Reply, the disclosed notes establish that the summary of the Benkovsky interview in the Brody Declaration is deficient and fails to satisfy *Brady* because it does not fully disclose the exculpatory and impeachment material in the notes.

"[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the [attorney-client] privilege." *Westinghouse Electr. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991) citing *United States v. AT & T,* 642 F.2d 1285, 1299 (D.C. Cir.1980). Waiver of the attorney-client privilege "does not require that the privilege holder "intentionally relinquish[ ] a known right." *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 479 (S.D.N.Y. 1993) citing 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence,* ¶ 511[02] at 511–6 to 7 & nn. 14–16 (1990) (additional citations omitted). When this standard is applied to the

[2] The pdf file name for the interview notes is "Steven benkovsky interview, Alix's notes, 7.18.2011.pdf" suggesting they were prepared by Ms. Biel, although her name is not in the document.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
Administrative Proceeding
File No. 3-15255
----------x

In the Matter of

JOHN THOMAS CAPITAL MANAGEMENT GROUP, LLC, d/b/a PATRIOT28, LLC,
GEORGE R. JARKESY, JR.
JOHN THOMAS FINANCIAL, INC.
ANASTASIOS "TOMMY" BELESIS,

Respondents.
----------x

Held at 3 World Financial Center, New York, New York 10281, on October 24, 2013, commencing at 2:25 o'clock p.m.

B E F O R E: HON. CAROL FOX FOELAK,
Administrative Law Judge

A P P E A R A N C E S:

TODD D. BRODY
ALEX BIEL
Securities and Exchange Commission
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STANLEY SPORKIN, ESQ.
Attorney for Respondents
1130 Connecticut Avenue, Suite 500
Washington, D.C. 20036

ALSO PRESENT:
LANCE FOGARTY, Computer Expert
Proteggo, LLC

P R O C E E D I N G S

JUDGE FOELAK: Let's go on the record.

This is the pre-hearing conference in the matter of Administrative Proceeding No. 3-15255 entitled John Thomas Capital Management Group, LLC, d/b/a Patriots28, LLC, and others.

And this pre-hearing conference is being held by telephone at around 2:30 Eastern Time on October 24, 2013.

I am Judge Foelak.

Can I have your appearances for the record, please.

MR. BRODY: Todd Brody and Alex Biel, for the Division.

MS. COOK: Karen Cook, Steve Gleboff, Mike McColloch.

MR. SPORKIN: Stan Sporkin, for the Respondents.

JUDGE FOELAK: Are there any settlement negotiations we should be apprised of?

MR. BRODY: No, your Honor.

JUDGE FOELAK: The Respondents had requested an in-person oral argument on their pending motion, and that will be denied.

Respondents have articulated at great length the arguments that they wish to make, and there is no need for an oral argument

Okay. Firstly, at issue is the Respondents' motion

dated the 15th of October, and it is entitled "Motion to Compel Production of Brady Material and Other Things."

I am requesting expedited consideration.

And also received was the Division's opposition, and Respondents' reply, which we've received and studied.

Okay.

Looking at it from a high level, basically Respondents argued that Brady and Jencks material was not produced, and general facts material should be produced, and there are many gaps, and we should do much more.

Looking at all the pleadings, it appears to me that th Division has done enough. Whatever the precedent may be in criminal cases, you know, there's a Supreme Court, ruling. We are really bound by SEC rulings, and as the parties have acknowledged, the Commission had a ruling in the Jet case in June of '96 that said no fishing expeditions. And they pretty much reinforced that in a recent ruling entitled "Options Expressed."

So, basically, the Respondents' request with reference to see Brady and Jencks Act materials are denied.

The Respondents also request that the denial be certified for interlocutory review by the Commission. However, that will not be done. It will not move the completion of the hearing forwards, and the likelihood of

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prevailing is not great.
Okay. Next, we get to the motion to change the venue to Texas.
The Division is incorrect in saying that the Respondents' convenience should not be considered. However the Respondents' convenience is not the only thing that should be considered. It's that of all parties and all witnesses, and for that reason, the venue will not be changed from New York.
However, Mr. Brody, now that politeness has been settled, and will not be part of the hearing, originally the parties had estimated that this would take two weeks. Will it take less?
MR. BRODY: Yes. I believe it will take less time, your Honor.
JUDGE FOELAK: Will it take one week?
MR. BRODY: It's hard for me to estimate what the defense will be in this case, but it may take a little longer than one week, but I would be surprised if it took two weeks.
JUDGE FOELAK: I was just thinking that the first week is a four-day week, anyway.
We have the courtroom reserved for two weeks. We can start on the second week, but you don't think that is a

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good idea?
MR. BRODY: If that's the only option that your Honor is giving us with respect to, you know, the parties' joint request for an adjournment, then if that is the only option, then I think we would want to take advantage of that to give the Commission time to address the settlement proposal made that we've recommended, or that we are recommending. But I don't know if that addresses the needs of Respondents in this case, so they'll probably want to talk to that.
JUDGE FOELAK: Yes.
Okay, as I have pointed out before, and I have reiterated several times, that to go beyond mid-November is just a nonstarter.
You know, I appreciate how Respondents feel that -- well not feel, but that if this case had gone to a District Court, that there would not be the constraints, but there are.
Mr. Brody, with reference to your previous request of a three-week postponement because of your pending settlement --
MR. BRODY: Well, if I can give your Honor a little context, which might be helpful, and obviously, there is a limit to which we can discuss where we are in terms of the

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Commission approving --
JUDGE FOELAK: Well, I understand that.
And my only remark is that if the Commission approves a settlement in three weeks, it would be a first. You know, one year is more the norm.
MR. BRODY: We are trying to expedite it as quickly as we can, because we have this pending hearing, which is why we are only requesting three weeks extension.
We thought that it could be resolved within that period of time, given the steps we are taking to expedite the review process, as well as to get on the first available Commission meeting.
That is why we felt the three weeks would be sufficient, because, in our view, if the Commission didn't approve this, didn't approve this settlement, then we would really be trying the same case a second time, and it's not like we can take advantage of the first witness' testimony since the New York Respondents will not have had the opportunity to cross-examine them.
So, that is why we were requesting the stay of the entire case, and not just the stay of the case against Belesis and John Thomas Financial.
JUDGE FOELAK: I understand what you're saying, and, you know, what you're saying is that it's a gamble to

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go forwards.
Okay. So how long do you think it will take, the case against the current Respondent?
MR. BRODY: Because so much of the case was duplicative, I don't want to say it won't require the full two weeks. I think it will require a couple of days less, but more than that, I wouldn't want to say, because I don't know if that is possible.
I mean, there are a lot of witnesses on our list, and we are trying to cut it down, and we know that there are, you know, that the Respondents have a number of witnesses on their list, too. So, it's hard to say.
JUDGE FOELAK: It can still start the second week, and we can hope that we can get the courtroom for a couple of days, you know, the following week.
MR. BRODY: Well, if I can make a suggestion, which is that since the case is going to be in New York, we have here in this office, we have hearing rooms, and we can get those hearing rooms for whatever dates we need,
If we didn't want to do it at 26 Federal Plaza, and we can do it for -- there are lots of reasons. We can give the Respondents their own caucus room for the entire -- as well.
There is some advantage to us doing the matter here

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in our hearing room, as opposed to 26 Federal Plaza.
And we can pretty much guarantee that we can get the space for whenever we needed it.
JUDGE FOELAK: Well, anyway, we do have the 26 Federal Plaza space, and it is policy to try and use that whenever possible.

Okay. Let's see.
I wanted to mention, you know, in your reply you had made mention of certain potential expert witnesses, and I noticed, Respondents' counsel, that in your previous filing you described the previous witnesses and fact witnesses, and I am not sure why. (Inaudible.)
We can't really have somebody who is a fact witness be your expert witness. There could be a possible privilege and sequestration.
MS. COOK: Well your Honor, there were fact witnesses in that they were retained as experts and third-party experts to assist with accounting and valuation matters. They are experts with regards to factual matters within their knowledge.
You can have witnesses with mixed factual and expert testimony.
JUDGE FOELAK: Okay. So, basically Mr. Herrera is going to testify that he did certain evaluations and, for

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example, that it met all industry standards and evaluations; is that correct?
MS. COOK: That's correct.
JUDGE FOELAK: Okay. Another thought that I was going to mention, you know, with reference -- in reference to travel, is that, you know, perhaps some of these people could testify remotely. Just a thought.

MS. COOK: Okay. Thank you.
MR. BRODY: We would have to figure -- that would, I think, take more resources than are available at 26 Federal Plaza, and would you have to, you know, have a rea sense in advance of who those people are, so we can make arrangements for wherever those people are that they get copies of the exhibits, and that is also a little bit of a difficulty.
JUDGE FOELAK: However, not insurmountable and theoretically, you know, we can all do it, after we've gone home to our various offices.
Anyway, it's a thought and certainly, it's not exactly known what the nature is of this testimony that would require all kinds of demonstrative -- we would be doing it by telephone, rather than by video. That's possible at 26 Federal Plaza.
Okay. Let's see.

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I guess the parties are going to file and exchange their witness and exhibit lists on this coming Monday, the 28th; is that correct?
MR. BRODY: That's correct.
JUDGE FOELAK: Okay. Does anyone have anything else?
MR. BRODY: So I'm clear, are we going to start the second week, or are we going to start the first week?

JUDGE FOELAK: We are going to start the second week, and hope for the best as far as going into the week following that, and perhaps a week following that -- the week following that is the week of Thanksgiving, by the way.
MR. BRODY: Right. So, if we expect to start on the 22nd, we are now going to start on --
I'm sorry. If we were starting on the 12th and now we are going to start on the 18th?
JUDGE FOELAK: That is right
MR. BRODY: Okay.
JUDGE FOELAK: I think it would be advisable to try and -- okay. How far down can you compress your -- (inaudible).
MR. BRODY: Compress our what?
JUDGE FOELAK: Compress your case.
MR. BRODY: We'll try and compress it as much as we

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can, but we'll also reach out to Respondents' counsel and see if we can perhaps stipulate to a couple of facts, to avoid needing to bring on witnesses, for example, to authenticate documents from certain people.
So perhaps we can do that, and that might cut down on some of it, as well.
JUDGE FOELAK: Okay. And if somehow it extends to more -- somehow if it's not wrapped up by the end of the fifth day, we can remain flexible as to whether to continue

it on the 25th and 26th, or, you know, maybe the first week of December, or maybe doing it remotely.
MR. BRODY: Like I said, if we can't get that room at 26 Federal Plaza for the week afterwards, not to beat a dead horse, but we can get a room here to do it, if we want to do it in person.
JUDGE FOELAK: Okay. We can remain flexible. So, we'll start on the 18th. How about 10:00?
MR. BRODY: Sure.
MS. COOK: I'm sorry, what time was that?
JUDGE FOELAK: 10:00. You can make it earlier if you want.
9:00?
MS. COOK: Just asking for clarification, because the phone cut out.

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JUDGE FOELAK: Okay.
MR. BRODY: I think 10:00 is good, because we are going to have a lot of electronic material that we'll have to move.
So we'll need time to set up.
JUDGE FOELAK: In that location there is no set time that you have to leave. I'm not saying we want to go for twelve hours, but we won't have to leave at 5:00 or 5:30.
MR. BRODY: Okay.

JUDGE FOELAK: Okay. Does anyone have anything else?
MS. COOK: Yes, your Honor.
Karen Cook.
Has the Court denied the motion for continuance?
JUDGE FOELAK: The Court has. Yes, I have, yes.
MS. COOK: Have you denied our interlocutory appeal request?
JUDGE FOELAK: I'll put out an Order memorializing this, so you will have it in writing, also.
MS. COOK: Okay.
Will the Court Reporter contact information be on that?
JUDGE FOELAK: No

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You had better get the Court Reporter's contact information from the Court Reporter. I'm merely telling you that I'm putting out an Order.
MS. COOK: All right.
Can we get it now?
JUDGE FOELAK: Aside from the contact information, is there anything else?
MR. BRODY: Not from the Division's perspective, your Honor.
JUDGE FOELAK: Okay.
Miss Cook?

MS. COOK: Nothing, your Honor.
JUDGE FOELAK: Thank you.
In that case, the pre-hearing conference is closed.
Thank you for your participation.
(Time noted: 3:00 o'clock p.m.)

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION
REPORTER'S CERTIFICATE

I, HAROLD RABINOWITZ, Reporter, hereby certify that this transcript of 17 pages is a complete, true and accurate transcript of the testimony indicated, held on Thursday, October 24, 2013, at 3 World Financial Center, New York, New York, in the matter of John Thomas Capital Management Group
I further certify that this proceeding was reported by me and that the transcript was prepared under my direction.

_____ _____
HAROLD RABINOWITZ Date

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SCOPIST CERTIFICATE

I, JUDITH STEWARD, hereby certify that the transcript, consisting of 17 pages, is a complete, true and accurate transcript of the investigative hearing held on Thursday, October 24, 2013, at 3 World Financial Center, New York, New York, in the matter of John Thomas Capital Management Group.
Further certify that this proceeding was reported by Harold Rabinowitz, and that the transcript has been scoped by me.

_____ _____
Scopist Date

PROOFREADER'S CERTIFICATE

In the Matter of: John Thomas Capital Management
File Number: 3-15255
Date: Thursday, October 24, 2013
Location: 3 World Financial Center,
New York, New York

This is to certify that I, Judith Steward, do hereby swear and affirm that the attached proceedings before the United States Securities and Exchange Commission were held according to the record, and that this is the original complete, true and accurate transcript that has been compared to the reporting or recording accomplished at the hearing.

_____ _____
Judith Steward Date

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 992 /October 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	:	ORDER

The Securities and Exchange Commission instituted this proceeding on March 22, 2013. On May 13, 2013, the hearing was scheduled to commence on October 15, 2013. Thereafter, following a ninety-day continuance request from John Thomas Capital Management Group LLC d/b/a Patriot28, LLC and George R. Jarkesy, Jr. (JTCM/Jarkesy), the hearing, expected to take up to two weeks, was postponed to commence on November 12, 2013, at 26 Federal Plaza, New York, New York 10278.

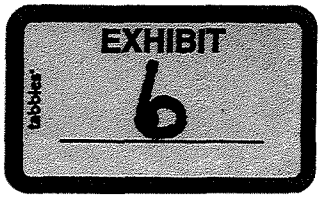
The proceeding has been stayed, pursuant to 17 C.F.R. § 201.161(c)(2), as to John Thomas Financial, Inc., and Anastasios "Tommy" Belesis. John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC, Admin. Proc. Rulings Release No. 964 (A.L.J. Oct. 16, 2013). The Division of Enforcement's (Division) request to postpone the November 12, 2013, hearing date was denied. Id.

A third prehearing conference, at which the Division and JTCM/Jarkesy appeared, was held today. JTCM/Jarkesy's Motion[1] dated October 15, 2013, and the responsive filings were considered. JTCM/Jarkesy requested expedited consideration of the Motion.

At today's prehearing conference, the undersigned made the following rulings:

JTCM/Jarkesy's request for in-person oral argument on the Motion was denied. Their arguments were fully articulated in their pleadings.

[1] The Motion is titled "Motion to Compel (1) Production of Brady and Jencks Act Material, (2) Designation of Brady and Jencks Act Material in Voluminous Records Previously Produced, (3) Certification of Brady and Jencks Act Compliance, and (4) Designation of Documents Produced in Response to Subpoenas and Document Requests; (5) Motion to Continue and Extend Time, and (6) Motion to Change Venue of Hearing."



JTCM/Jarkesy's requests "to Compel (1) Production of Brady and Jencks Act Material, (2) Designation of Brady and Jencks Act Material in Voluminous Records Previously Produced, (3) Certification of Brady and Jencks Act Compliance, and (4) Designation of Documents Produced in Response to Subpoenas and Document Requests" were denied.

JTCM/Jarkesy's request for a continuance was denied, except that the commencement of the hearing was postponed from November 12 to November 18, 2013 (at 10:00 a.m. EST). The parties have been repeatedly advised that any postponement of the hearing date beyond mid-November is inconsistent with the deadlines provided in 17 C.F.R. § 201.360(a)(2). John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC, Admin. Proc. Rulings Release Nos. 826 (A.L.J. Aug. 30, 2013), 857 (A.L.J. Sept. 10, 2013), 862 (A.L.J. Sept. 11, 2013), 964 (A.L.J. Oct. 16, 2013).

JTCM/Jarkesy's request to change the venue of the hearing from New York City to Houston or Dallas, Texas, was denied, pursuant to 17 C.F.R. § 201.200(c)

JTCM/Jarkesy's request for certification for interlocutory review, pursuant to 17 C.F.R. § 201.400(c), of the adverse rulings was denied.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70841 / November 8, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	ORDER DIRECTING ADDITIONAL BRIEFING ON PETITION FOR INTERLOCUTORY REVIEW

At a prehearing conference on October 24, 2013, the administrative law judge denied requests by respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. for, *inter alia*, production of *Brady* and Jencks Act material and a change of venue. The law judge also denied JTCM and Jarkesy's subsequent motion to certify the rulings for interlocutory appeal pursuant to Rule of Practice 400(c).[1]

On October 31, 2013, JTCM and Jarkesy filed a petition with the Commission for interlocutory review of those rulings. The Division filed a letter in opposition and JTCM and Jarkesy filed a reply. The Commission's consideration of the petition would be assisted by the submission of additional briefing. The parties are directed to identify specific statements in the handwritten interview notes and explain with particularity why those statements constitute (or do not constitute) material exculpatory or impeachment evidence that has not otherwise been disclosed to respondents.

Accordingly, it is ORDERED that respondents shall file a supplemental brief (not to exceed 2,000 words in length) by November 15, 2013. The Division's response (not to exceed 2,000 words in length) shall be filed by November 20, 2013.

[1] 17 C.F.R. § 201.400(c).

This order is not to be construed as expressing any view as to the Commission's determination whether to grant the petition for interlocutory review.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9478 / November 13, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70869 / November 13, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3716 / November 13, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30784 / November 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	ORDER GRANTING INTERIM STAY

On March 22, 2013, the Commission instituted administrative proceedings[1] against the above-named respondents pursuant to Section 8A of the Securities Act of 1933; Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934; Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940.[2] A hearing in this matter as to respondents John Thomas Capital Management LLC

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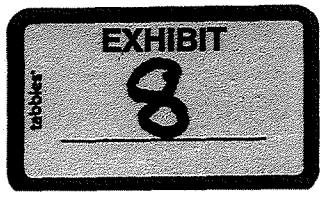
1 *John Thomas Capital Mgmt. Grp. LLC*, Securities Exchange Act Release No. 69208, 2013 WL 1180836 (Mar. 22, 2013).

2 15 U.S.C. §§ 77h–1, 78o(b)(4), 78o(b)(6), 78u-3, 80b–3(e), 80b–3(f), 80b–3(k), 80a–9(b).



d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. is scheduled to begin on November 18, 2013 at 26 Federal Plaza, New York, New York 10278.[3]

At a prehearing conference on October 24, 2013, the law judge denied a request by JTCM and Jarkesy to compel (i) production of *Brady*[4] and Jencks Act[5] material, (ii) designation of *Brady* and Jencks Act material in voluminous records previously produced, (iii) certification of *Brady* and Jencks Act compliance, (iv) designation of documents produced in response to subpoenas and document requests, (v) motion to continue hearing, and (vi) motion to change venue of hearing. The law judge also denied JTCM and Jarkesy's subsequent motion to certify an interlocutory appeal to the Commission and their motion to stay the hearing pending that appeal.

On October 31, 2013, JTCM and Jarksey filed a petition with the Commission for interlocutory review of the law judge's rulings. JTCM and Jarksey argue that they "cannot possibly review the enormous quantity of data" they received from the Division of Enforcement before the November 18, 2013 hearing. JTCM and Jarksey also assert that the Division has failed to produce certain materials, which respondents claim has deprived them of their due process right to a fair hearing. They further contend that, without a change of venue, they will incur significant and unnecessary legal expense, "which materially impacts [their] ability to defend themselves [and] implicates their due process right to a fair hearing." In the interest of maintaining the status quo pending our consideration of JTCM and Jarkesy's request for interlocutory review, we have determined to grant an interim stay of the hearing scheduled to begin on November 18, 2013.[6]

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[3] Pursuant to Commission Rule of Practice 161(c)(2), 17 C.F.R. § 201.161(c)(2), the administrative law judge stayed the proceedings as to John Thomas Financial, Inc. and Anastasios "Tommy" Belesis while the Commission considers an offer of settlement by those two respondents. *John Thomas Capital Mgmt. Grp. LLC*, Admin. Proc. Release No. 964 (Oct. 16, 2013).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] 18 U.S.C. § 3500.

[6] *Cf. Clark T. Blizzard*, Admin. Proc. File No. 3-10007 (Mar. 5, 2002) (staying law judge's order pending consideration by the Commission of a request to grant interlocutory review).

Accordingly, it is ORDERED that the hearing is hereby stayed pending consideration by the Commission of the petition by JTCM and Jarkesy to grant interlocutory review of the law judge's rulings.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9492 / December 6, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 71021 / December 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3733 / December 6, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30820 / December 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC and GEORGE R. JARKESY, JR.	ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

I.

Pending before a law judge are administrative proceedings against John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. The Commission issued an interim stay on November 13, 2013 pending consideration of JTCM and Jarkesy's petition for interlocutory review. For the reasons discussed below, interlocutory review is denied.

II.

The Order Instituting Proceedings was issued on March 22, 2013.[1] It alleged that JTCM (the adviser to two hedge funds) and Jarkesy (the funds' manager) engaged in fraudulent conduct in connection with the offer, purchase, and/or sale of securities. Among other things, JTCM and Jarkesy were alleged to have recorded arbitrary valuations for certain of the funds' holdings without a reasonable basis for doing so—thus causing the funds' performance figures to be false and misleading and their own compensation to be inflated—and to have marketed the funds on

[1] *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Release No. 69208, 2013 WL 1180836 (Mar. 22, 2013).

the basis of false representations about, for example, the identities of the funds' auditor and prime broker. The OIP also alleged that JTCM and Jarkesy placed the interests of John Thomas Financial, Inc. ("JTF") (a broker-dealer and the funds' placement agent) and Anastasios "Tommy" Belesis (who controlled a holding company that owned JTF) over those of the funds when they directed millions in fees to JTF for services of dubious value. Furthermore, according to the OIP, JTCM and Jarkesy breached their fiduciary duty of full and fair disclosure by, among other things, falsely representing that JTCM was wholly independent of JTF, that JTCM was solely responsible for managing the funds, and that Jarkesy was responsible for all of the funds' investment decisions. JTF and Belesis were alleged to have willfully aided, abetted, and/or caused JTCM and Jarkesy's violations of the securities laws.

The law judge set the hearing for November 12, 2013. At a prehearing conference on October 24, 2013, the law judge denied JTCM and Jarkesy's motion for, *inter alia*, production of alleged *Brady* material and a change of venue. The law judge also denied their request for a continuance, although she did further postpone the hearing's commencement until November 18, 2013.[2] Subsequently, the law judge denied JTCM and Jarkesy's motion to certify her rulings for interlocutory appeal pursuant to Rule of Practice 400(c) and denied their motion for a stay of proceedings pending appeal.[3]

On October 31, 2013, JTCM and Jarkesy filed the instant petition with the Commission for interlocutory review. Their principal contention is that the Division of Enforcement did not comply with its disclosure obligations under Rule of Practice 230(b)(2) and *Brady v. Maryland*.[4] They argue that the Division withheld witness interview notes that contain material exculpatory information omitted from the previously produced summaries of those notes. They assert that the Division violated its disclosure obligations by not specifically identifying where within the Division's production of electronic data potential *Brady* material might be found. Finally, JTCM and Jarkesy also contend that the law judge should have set the hearing to be held in Texas rather than in New York.

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[2] Separately, on October 16, the proceeding was stayed as to only JTF and Belesis pursuant to Rule 161(c)(2) to permit the Commission's consideration of their offer of settlement. *See* 17 C.F.R. § 201.161(c)(2). The Commission accepted the offer of settlement on December 5. *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Release No. 70989 (Dec. 5, 2013).

[3] 17 C.F.R. § 201.400(c).

[4] 17 C.F.R. § 201.230(b)(2); *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the prosecution in a criminal proceeding must disclose materially exculpatory or impeaching evidence to the defendant. Although *Brady* has no direct application to administrative proceedings, Rule of Practice 230(b)(2) is generally consistent with *Brady*. *See optionsXpress, Inc.*, Exchange Act Release No. 70698, 2013 WL 5635987, at *3 & n.15 (Oct. 16, 2013).

III.

The order requesting the filing of additional briefs explicitly reserved decision on whether to grant interlocutory review.[5] Upon a thorough review of the parties' arguments, it is apparent that the standard for interlocutory review has not been met.

"Rule of Practice 400(a) provides that '[p]etitions by parties for interlocutory review are disfavored' and will be granted only in 'extraordinary circumstances.' [The Commission] adopted this language 'to make clear that petitions for interlocutory review . . . rarely will be granted.'"[6] Moreover, the "Commission generally does not consider petitions for interlocutory review where"—as here—"the law judge has 'declined to certify [the] motion for interlocutory review.'"[7] That follows from Rule of Practice 400, which "does not contain any provision relating to a party's ability to petition the Commission directly for interlocutory review" without first obtaining certification from the law judge.[8] To the contrary, Rule 400(c) provides that any ruling that a party "submit[s] to the Commission for interlocutory review *must* be certified in writing" by the law judge as satisfying certain criteria.[9]

The law judge appropriately declined to certify her rulings for interlocutory review. Rule 400(c) states that the law judge "shall not certify a ruling unless," among other things, "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and (ii) An immediate review of the order may materially advance the completion of the proceeding."[10] The rulings for which JTCM and Jarkesy sought certification involve quintessentially "mixed [questions] of law and fact"—namely, the application of established legal standards (*e.g.*, the disclosure obligations under Rule 230(b)(2)) to the evidence

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5 *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 70841, 2013 WL 5960689 (Nov. 8, 2013).

6 *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting 17 C.F.R. § 201.400(a) and *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)).

7 *Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co., Inc.*, Investment Advisers Act Release No. 3311, 2011 WL 5434023, at *2 n.3 (Nov. 9, 2011))); *Vincent Poliseno*, Exchange Act Release No. 38770, 1997 WL 346154, at *1 (June 25, 1997) ("[A] ruling submitted for review ordinarily must be certified by the law judge.").

8 *Jean-Paul Bolduc*, Exchange Act Release No. 42096, 1999 WL 1048643, at *2 (Nov. 4, 1999).

9 17 C.F.R. § 201.400(c) (emphasis added).

10 *Id.*

in the record—and not controlling questions of law suitable for certification.[11] The law judge's denial of certification by itself presents a sufficient basis for denying JTCM and Jarkesy's petition for interlocutory review.[12]

Apart from accepting a certified ruling for interlocutory review, the Commission also may direct interlocutory review upon its own motion. The Commission has broad discretion to grant interlocutory review "at any time" and "on its own motion" pursuant to Rule of Practice 400(a)."[13] Still, the Commission's emphatic preference—which embodies the "general rule" disfavoring piecemeal, interlocutory appeals[14]—is that claims should be presented in a single petition for review after "the entire record [has been] developed"[15] and "after issuance by the law judge of an initial decision."[16] That a party may "disagree with the law judge's determination" does not make a ruling "appropriate for interlocutory review."[17] JTCM and Jarkesy have failed to set forth any compelling reasons for the Commission to take up their claims on its own motion at this juncture.

Only sparingly has the Commission employed its discretion to direct interlocutory review. For example, the Commission has declined to review uncertified rulings in cases in which the respondent claimed that the Division "overlooked exculpatory evidence" and was "tardy in producing" its investigative file[18] or that the respondent would be deprived of due process if forced to go forward with the hearing given the "voluminous investigatory files"

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11 *See, e.g.*, *Montford & Co.*, 2011 WL 5434023, at *2 & n.7; *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999) (denying petition for interlocutory appeal of certified ruling because the ruling did not involve a "question of law that controls the outcome").

12 *See, e.g.*, *Jean-Paul Bolduc*, 1999 WL 1048643, at *2; *Poliseno*, 1997 WL 346154, at *1.

13 17 C.F.R. § 201.400(a); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, 2004 WL 503739, at *12 ("[T]he Commission retains discretion to undertake such [interlocutory] review on its own motion at any time."). This "discretion to grant interlocutory review" exists even when the law judge has declined to certify the ruling in question. *Eric David Wagner*, 2012 WL 1037682, at *2; *see also City of Anaheim*, 1999 WL 1034489, at *1 & n.3 (explaining that Rule 400 "in no way limits the Commission's discretion to direct that matters be submitted to it").

14 *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (collecting cases).

15 *Kevin Hall*, Exchange Act Release No. 55987, 2007 WL 1892136, at *2 (June 29, 2007).

16 *Gregory M. Dearlove*, Admin. Proc. File No. 3-12064, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006).

17 *Montford & Co.*, 2011 WL 5434023, at *3.

18 *Kevin Hall*, 2007 WL 1892136, at *1.

turned over by the Division.[19] Of particular relevance here, the Commission has emphasized that interlocutory review is rarely appropriate for "pre-trial discovery orders" and that "complaints about production of documents" will not ordinarily "warrant . . . interference with the orderly hearing process."[20] Such complaints do not constitute "extraordinary circumstances justifying our intervention" before the completion of proceedings before the law judge.[21] The claims now raised by JTCM and Jarkesy are of the same basic kind and character. Accordingly, they do not warrant interlocutory review on the Commission's own motion.

Nonetheless, JTCM and Jarkesy contend that this case is "extraordinary" in that their claims, "[b]y their very nature," supposedly can be vindicated only though immediate review. For instance, they contend that it is "uniquely impossible" to measure and remedy the harm that results from "denial[] of access to evidence" such as undisclosed *Brady* material. This argument lacks merit. On review of an initial decision, the Commission can, if necessary, remedy a law judge's erroneous ruling as to the scope of disclosure "in the same way that an [appellate court can] remedy a host of other erroneous evidentiary rulings: by vacating [the initial decision] and remanding for a new" hearing at which the parties have access to all the evidence to which they are entitled.[22] Furthermore, the Commission can allow new evidence to be adduced in the course of its independent review of the record "at any time prior to issuance of a decision" if a party shows with particularity that the evidence is "material" and that there were "reasonable grounds for failure to adduce such evidence previously."[23] Therefore, when denying interlocutory review of law judges' discovery rulings, the Commission has often invoked the principle that review

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19 *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *6; *see also Kevin Hall*, 2007 WL 1892136, at *2 (declining to review "law judge's decision not to postpone the proceeding").

20 *Michael Sassano*, Exchange Act Release No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007) (declining to review uncertified discovery ruling) (quotation marks omitted).

21 *Id.*

22 *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009) (confirming "settled" rule disfavoring interlocutory review of "pretrial discovery orders" on the ground that "postjudgment appeals generally suffice to protect the rights of litigants"); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of "[o]rders relating to discovery matters . . . must usually wait until a final judgment"). The Supreme Court made plain in *Mohawk* that postjudgment review is sufficient even though it might not completely remedy the effects of the erroneous ruling: "That a ruling may burden litigants in ways that are only imperfectly reparable . . . has never sufficed" to warrant immediate interlocutory review. 558 U.S. at 107 (quotation marks omitted).

23 Rule of Practice 452, 17 C.F.R. § 201.452. In view of the Commission's independent review of the record, the respondent also must show that the error was not harmless. *See* Rules of Practice 230(h) & 231(b), *id.* §§ 201.230(h) & 201.231(b); *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *18 n.129 (Nov. 4, 2013); *William H. Gerhauser, Sr.*, Exchange Act Release No. 40639, 1998 WL 767091, at *7 (Nov. 4, 1998).

following issuance of an initial decision is sufficient to protect the parties' rights.[24] This principle applies with equal force to claims that the Division failed to disclose material exculpatory or impeachment evidence.[25]

Similarly without merit is JTCM and Jarkesy's argument that the "harm resulting from an unprepared defense"—*i.e.*, because of their alleged inability to prepare for the hearing within the time set by the law judge—cannot be remedied by post-hearing review. As the Commission has explained, the denial of a continuance can "'be effectively reviewed post-judgment'" by vacatur and remand in the event that the law judge's refusal to postpone the hearing was improper.[26] The denial of a motion to transfer venue, too, is "reviewable after [the] entry of judgment."[27]

Finally, JTCM and Jarkesy contend that "extraordinary circumstances" exist and interlocutory review is called for whenever a respondent asserts "Constitutional due process violations." The Commission has rejected this argument.[28] A party is not entitled to an interlocutory appeal merely because he or she presses a claim premised on a constitutional right or guarantee.[29]

IV.

In a truly unusual case, and *if* serious and prejudicial error were plainly apparent upon even a cursory review of the record, then deferring review until issuance of an initial decision

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[24] *E.g.*, *Warren Lammert*, 2007 WL 2296106, at *7 (alleged failure to "preserve crucial evidence" did not warrant interlocutory review); *Kevin Hall*, 2007 WL 1892136, at *1 ("tardy" production of Division's investigative file); *Benjamin G. Sprecher*, Exchange Act Release No. 36574, 1995 WL 735903, at *1 (Dec. 12, 1995) ("law judge's refusal to issue . . . requested subpoenas").

[25] *United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) ("Courts typically review *Brady* violations post-trial."); *Warren Lammert*, 2007 WL 2296106, at *7 (denying petition for interlocutory review of claim premised on alleged *Brady* violation).

[26] *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7 (quoting *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004)).

[27] *United States v. Snipes*, 512 F.3d 1301, 1302 (11th Cir. 2008); *see also FDIC v. McGlamery*, 74 F.3d 218, 221-22 (10th Cir. 1996).

[28] *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *5 (denying interlocutory review notwithstanding respondent's argument that the "matter at hand presents extraordinary circumstances with due process implications").

[29] *E.g.*, *Flanagan v. United States*, 465 U.S. 259, 266-67 (1984) (claim "based on the Due Process Clause of the Fifth Amendment" not subject to interlocutory appeal); *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010) ("Fourth or Sixth Amendment violations . . . long been held unamenable to interlocutory appellate review").

might well postpone an inevitable later vacatur and remand.[30] But that is not this case. It appears evident that granting interlocutory review is unlikely to promote the efficient resolution of these proceedings.

JTCM and Jarkesy's principal complaint is that the Division did not produce its notes from certain witness interviews. Asserting privilege, the Division instead provided a declaration from its lead counsel describing the statements from those witnesses constituting, in the Division's view, potential *Brady* material. Although "the disclosure of material exculpatory *facts* not otherwise available to the respondent" is required even "when those facts are recited in privileged documents," the Division can satisfy its obligations by providing the respondent with the substance of the materially exculpatory statements; it need not turn over the documents themselves.[31]

JTCM and Jarkesy do not take issue with this proposition as a general matter. They argue, though, that there is reason to believe that the Division's summaries omit *Brady* material. Handwritten notes from one of the interviews—that of JTCM investor Steven Benkovsky—were later inadvertently produced by the Division. JTCM and Jarkesy claim that those notes contain material exculpatory evidence not found in the summary previously produced to them. This, according to JTCM and Jarkesy, raises an inference that the Division's summaries of notes from *other* interviews (which they do not have) also are incomplete.

The premise of their argument is faulty because the notes from Benkovsky's interview do not, in fact, contain material exculpatory or impeachment evidence that has not elsewhere been disclosed to respondents. For example, although it may be somewhat impeaching as to Benkovsky that he admitted during the interview that he did not read the funds' private placement memorandum, the Division's summary disclosed that admission. More fundamentally, JTCM and Jarkesy take an overly broad view of what constitutes *Brady* material. The fact that Benkovsky testified that *Belesis* made false statements to him in order to induce him to invest has no bearing on whether *JTCM and Jarkesy* made the misrepresentations for which they have been charged.[32] Evidence that Belesis lied to Benkovsky about certain topics is

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30 *Cf. City of Anaheim*, 1999 WL 1034489, at *1 (granting interlocutory review in the "interests of expediting the disposition of th[e] matter, avoiding a future remand, and providing general guidance with regard to the conduct of our proceedings").

31 *optionsXpress, Inc.*, 2013 WL 5635987, at *4 & n.19 (emphasis added). The Division is not obligated to disclose its *analysis* of the statements elicited during the interviews or its legal theories. *See id.* at *7. Nor is the Division required to produce "evidence that is not exculpatory but is merely not inculpatory." *United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C. 1989); *accord United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) (holding that *Brady* does not require "the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning").

32 In any event, the Division had also produced a sixteen-page Statement of Claim that Benkovsky filed against respondents in a FINRA arbitration, which includes claims based on

(continued . . .)

irrelevant to whether Jarkesy *also* lied to Benkovsky (and other investors) as to the matters specified in the OIP and in the Division's pre-hearing brief; it does not contradict or undermine the Division's theory of the case.[33] Because JTCM and Jarkesy have not shown that the notes from Benkovsky's interview contain undisclosed *Brady* material, their argument concerning the *other* interview notes necessarily rests on mere speculation—which is not enough to obtain relief.[34] They have failed to make the requisite "plausible showing" that those notes might contain *Brady* material, and therefore they are not entitled to demand that the law judge or the Commission conduct an *in camera* review of them.[35]

JTCM and Jarkesy also argue that the Division should be required to turn over the "settlement offer, communications[,] and supporting documents" with respect to JTF and Belesis. Here too, they have not made the requisite "plausible showing" that these settlement-related communications contain material exculpatory or impeachment evidence. The Commission has previously rejected the contention that the "government must disclose all proffers" or that it must

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(...continued)
JTF's and Belesis's alleged misconduct. The Division is not required to disclose information that the respondent already knows about or should know about. *optionsXpress, Inc.*, 2013 WL 5635987, at *8 & n. 50; *see also United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources[.]") (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.1986)).

33 *See, e.g., Jones v. Bagley*, 696 F.3d 475, 486 (6th Cir. 2012) (evidence that hotel "routinely hired criminals" and had "more crime than other hotels" not exculpatory because it did not show that "someone other than [the defendant] was responsible for [the particular] murder" at that hotel); *United States v. Saget*, 108 F. App'x 667, 669 n.2 (2d Cir. 2004) ("[The witness's] statement that [he did not purchase guns for the co-defendant] is not exculpatory, because that fact has no bearing on [the witness's] testimony that he purchased guns for [the defendant]."); *United States v. Ailport*, 17 F.3d 235, 237 (8th Cir. 1994) (evidence tending to show that a particular individual was "one of [the co-defendant's] suppliers" did not "support . . . the position that [the defendant claiming the *Brady* violation] was *not* a supplier") (emphasis added); *United States v. De Peri*, 778 F.2d 963, 983-84 (3d Cir. 1985) ("Evidence that not all vendors were extorted is irrelevant to the charge that defendants conspired to extort and did extort protection payments from certain vendors."); *United States v. Pappas*, 602 F.2d 131, 134 (7th Cir. 1979) ("The fact that [the defendant] did not try to influence [the witness] on [a certain date] is a negative fact and has no bearing on other evidence that he attempted to influence other people at other times.").

34 *optionsXpress, Inc.*, 2013 WL 5635987, at *6 & nn.37-40.

35 *Id.* at *6 & n.35.

disclose statements "contained in the back-and-forth hypothesizing that commonly occurs during plea negotiations between the prosecution and defense attorneys."[36]

Next, JTCM and Jarkesy contend that the Division violated its disclosure obligations by producing its investigative file in the form of a hard drive containing 700 GB of electronic data. According to JTCM and Jarkesy, it is not feasible for them to go through all of this information in advance of the hearing. The Division counters—and JTCM and Jarkesy do not dispute—that the files were produced to respondents in the "same way the files are kept by the Division" itself and, where applicable, in the same way that the Division received documents from third parties. Further, it is undisputed that the Division supplied the documents in an electronically searchable Concordance database format.[37]

JTCM and Jarkesy assert that the Division must go further and specifically identify material exculpatory or impeaching evidence within the production or, at the very least, provide a "roadmap" for those documents. That is not so. Neither Rule 230(b)(2) nor *Brady* requires the Division to prepare respondents' case for them. The basic purpose of Rule 230(b)(2) is to ensure that "exculpatory material known to the Division is not kept from the respondent."[38] To that end, although "Rule 230(b)(1) enumerates certain grounds on which the Division may withhold documents, Rule 230(b)(2) makes clear that the former subsection does not 'authorize[] the Division . . . to withhold, contrary to the doctrine of *Brady*[,] . . . documents that contain material exculpatory evidence.'"[39] On its face, documents that the Division has produced to respondents have not been "kept" or "withheld" from them in violation of Rule 230(b)(2). The Division's "open file" production of its investigative file is consistent with the text of Rule 230(b)(2); JTCM and Jarkesy do not seriously contend otherwise.

Still, JTCM and Jarkesy argue that the Division's production method has, as a practical matter, deprived them of the benefit of the *Brady* doctrine, which is effectively "incorporated" in administrative proceedings by Rule 230(b)(2).[40] But even if this were a criminal proceeding

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[36] *Id.* at *8 (quotation marks omitted) (denying request for "settlement communications between the Division and [the settling party]").

[37] The Concordance software package enables users to conduct a "quick and thorough search" of the database and identify documents that contain matches to specified search parameters. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 298 n.29 (6th Cir. 2010); *United States v. Ohle*, No. S3 08 CR 1109(JSR), 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011). Thus, JTCM and Jarkesy's estimates for how long it would take to conduct a page-by-page review of the materials are irrelevant; they can use Concordance's search capabilities to home in on the documents that they need to prepare for the hearing.

[38] *optionsXpress, Inc.*, 2013 WL 5635987, at *6 (quotation marks omitted).

[39] *Id.* at *3 (quoting 17 C.F.R. § 201.230(b)(2)).

[40] *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 WL 360528, at *1 (June 17, 1996).

(and *Brady* thus were directly applicable), the Division's "open file" production would satisfy its disclosure obligations. It is settled that the government is not required to direct a defendant to specific items of potentially exculpatory evidence within a larger body of disclosed material.[41] Indeed, the Supreme Court has made clear that the government may satisfy its *Brady* obligations through an "open file" policy, which the Court reasoned could well "increase the efficiency and the fairness of the criminal process."[42]

JTCM and Jarkesy fail to grapple with this authority. Their contrary reliance on the unpublished district court decision in *United States v. Salyer* is misplaced.[43] *Salyer* can be distinguished in various ways—among other things, the court rested its order directing the government to identify exculpatory material on its "case management" authority under the Federal Rules of Civil Procedure, which do not apply in administrative proceedings.[44] But principally, its reasoning is simply unpersuasive: The overwhelming weight of authority holds that *Brady* is not violated when, as here, the government turns over its investigative file—voluminous though it might be—in an electronically searchable format and there is no suggestion of bad faith (such as the burying of known exculpatory evidence within a production deliberately padded with irrelevant documents).[45] Nothing in either Rule 230(b)(2) or *Brady*

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41 *See, e.g.*, *Rhoades v. Henry*, 638 F.3d 1027, 1039 n.12 (9th Cir. 2011) (noting "that 'there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with[in] a larger mass of material that it has already turned over'") (quoting *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997)); *Warshak*, 631 F.3d at 297 (holding that defendant's argument that the "government was obliged to sift fastidiously through the evidence . . . in an attempt to locate anything favorable to the defense . . . comes up empty"); *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) ("*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty . . . to ferret out any potentially defense-favorable information from materials that are . . . disclosed"); *United States v. Wooten*, 377 F.3d 1134, 1142 (10th Cir. 2004) ("no *Brady* violation where the evidence was available to the defendant through the government's open file policy").

42 *See Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999).

43 Cr. No. S-10-0061 LKK (GGH), 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010).

44 *Compare id.* at *2, *with Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 n.24 (Aug. 25, 2006) ("The Federal Rules of Civil Procedure do not apply in administrative proceedings."). Additionally, *Salyer* involved a "singular, individual defendant, who is detained in jail pending trial, and who is represented by a relatively small defense team" and a substantial amount of the documentary evidence was in the form of "hard paper" that filled multiple storage containers. 2010 WL 3036444, at *3, 7; *see also United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 825 F. Supp. 2d 451, 456 (S.D.N.Y. 2011) (distinguishing *Salyer*); *Ohle*, 2011 WL 651849, at *3 (same). None of these circumstances is present here.

requires the Division to go further and prepare a "roadmap" of the documents for the respondent's benefit.

Finally, JTCM and Jarkesy contend that New York is a burdensome venue and that the law judge should be directed to hold the hearing in Texas, which is where they are located. This argument is insubstantial. Rule of Practice 200(c) provides that the "time and place for any hearing shall be fixed with due regard for the public interest and the convenience of the parties."[46] This language "expressly speaks of the convenience of the 'parties,'" and thus calls for consideration of "the convenience of *all persons concerned*," including "the convenience of the agency."[47] It does not "require[] . . . a hearing site convenient to [the respondent's] place of business."[48] In light of the undisputed facts that (1) JTCM and Jarkesy chose to use a New York-based broker-dealer (*i.e.*, JTF) as the placement agent for the funds; (2) JTF and Belesis are located in New York; (3) most of the witnesses designated by the parties do not reside in Texas and many reside in the New York area; and (4) the Division staff is from the New York Regional Office, New York appears to be a reasonable choice of venue.

Accordingly, it is ORDERED that the petition for interlocutory review be, and it hereby is, denied.[49]

(...continued)

45 *See supra* note 41 (collecting cases); *cf. Warshak*, 631 F.3d at 297-98 (cautioning that the government cannot deliberately "lard[] its production with entirely irrelevant documents"); *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) ("[I]t should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it."), *vacated in part on other grounds*, 561 U.S. 358 (2010).

46 17 C.F.R. § 201.200(c).

47 *Burnham Trucking Co. v. United States*, 216 F. Supp. 561, 564 (D. Mass. 1963) (construing Section 5(b) of the Administrative Procedure Act, 5 U.S.C. § 554(b)); *see also E. Utils. Assocs. v. SEC*, 162 F.2d 385, 387 n.1 (1st Cir. 1947) (similar). Because the Commission's formal adjudications are subject to the APA, *Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, at *17 (June 9, 1995), and the language of Rule 200(b) essentially tracks Section 5(b) of that Act, *id.* at *43, it is appropriate to draw guidance from the case law interpreting the APA's venue provision.

48 *McCormick v. Edwards*, No. Civil 82-32-S, 1982 WL 1146, at *2 (M.D. Ala. Aug. 24, 1982) (construing Section 5(b) of the Administrative Procedure Act).

49 JTCM and Jarkesy have requested oral argument. Because the "presentation of facts and legal arguments in the briefs and the decisional process" would not be significantly aided by oral argument, this request is denied. Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

INITIAL DECISION RELEASE NO. 693
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15255

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
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JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	:	INITIAL DECISION AS TO JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, d/b/a PATRIOT28 LLC, and GEORGE R. JARKESY, JR[1] October 17, 2014

APPEARANCES: Todd Brody and Alix Biel for the Division of Enforcement, Securities and Exchange Commission

Karen Cook and S. Michael McColloch for Respondents John Thomas Capital Management Group LLC, d/b/a Patriot28 LLC, and George R. Jarkesy, Jr.

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

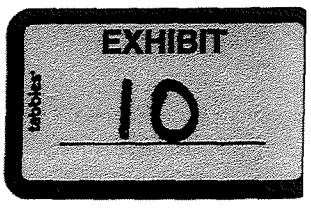
This Initial Decision (ID) concludes that George R. Jarkesy, Jr. (Jarkesy) and John Thomas Capital Management Group LLC, d/b/a Patriot28 LLC (JTCM) (collectively, JTCM/Jarkesy or Respondents) violated the antifraud provisions of the federal securities laws. The ID orders Respondents to cease and desist from further violations and, jointly and severally, to disgorge $1,278,597 plus prejudgment interest and to pay a third-tier civil penalty of $450,000.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on March 22, 2013, pursuant to Section 8A of the Securities Act of 1933, Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934, Sections

[1] The proceeding has ended as to Respondents John Thomas Financial, Inc., and Anastasios "Tommy" Belesis, who settled the charges against them. *John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC*, Exchange Act Release No. 70989, 2013 SEC LEXIS 3862 (Dec. 5, 2013).



at *8 (D. Ariz. Apr. 12, 2011), *aff'd*, 532 Fed. App'x 775 (9th Cir. 2013); *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 SEC LEXIS 3872, at *72-73 (Nov. 20, 2009). Accordingly, Respondents will be ordered to jointly and severally disgorge $1,278,597, the fees they received from the Funds, plus prejudgment interest. Respondents will be held jointly and severally liable because JTCM was Jarkesy's *alter ego* in the violative activities. *See SEC v. Monterosso*, 756 F.3d 1326, 1337-38 (11th Cir. 2014); *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at *100 n.246 (May 16, 2014), *pet. for review docketed*, No. 14-1134 (D.C. Cir. July 11, 2014); *Daniel R. Lehl*, Exchange Act Release No. 45955, 2002 SEC LEXIS 1796, at *50-53 & n.65 (May 17, 2002).[39]

3. Civil Money Penalty

Sections 8A of the Securities Act, 21B of the Exchange Act, 203(i) of the Advisers Act, and 9(d) of the Investment Company Act authorize the Commission to impose civil money penalties for willful violations of those Acts or rules thereunder. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. *See* Sections 21B(c) of the Exchange Act, 203(i)(3) of the Advisers Act, and 9(d)(3) of the Investment Company Act; *New Allied Dev. Corp.*, Exchange Act Release No. 37990, 1996 SEC LEXIS 3262, at *30 n.33 (Nov. 26, 1996); *First Sec. Transfer Sys., Inc.*, Exchange Act Release No. 36183, 1995 SEC LEXIS 2261, at *9 (Sept. 1, 1995); *see also Jay Houston Meadows*, Exchange Act Release No. 37156, 1996 SEC LEXIS 1194, at *25-27 (May 1, 1996), *aff'd*, 119 F.3d 1219 (5th Cir. 1997); *Consol. Inv. Servs., Inc.*, Exchange Act Release No. 36687, 1996 SEC LEXIS 83, at *22-24 (Jan. 5, 1996).

As to Respondents, there are no mitigating factors, and several aggravating factors. They violated the antifraud provisions, so their violative actions "involved fraud [and] reckless disregard of a regulatory requirement" within the meaning of Sections 21B(b)(3)(A), (c)(1) of the Exchange Act, 203(i)(2)(C)(i), (3)(A) of the Advisers Act, and 9(d)(2)(C)(i), (3)(A) of the Investment Company Act. Harm to others is shown by the millions of dollars of losses incurred by the Funds' investors, who may have decided not to invest or to stay invested had they received accurate information. Deterrence also requires a substantial penalty because of the abuse of the fiduciary duty owed by investment advisers.

Penalties in addition to the other sanctions ordered are in the public interest in this case in consideration of fraud, harm to others, unjust enrichment, and the need for deterrence. *See* Sections 21B(c) of the Exchange Act, 203(i)(3) of the Advisers Act, and 9(d)(3) of the Investment Company Act; *see also* H.R. Rep. No. 101-616 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1379, 1384-87. The Division requests that Respondents be ordered to pay third-tier penalties. A third-tier penalty, as the Division requests, is appropriate because Respondents' violative acts involved fraud and resulted in

[39] In addition to requesting disgorgement, the Division requests "an accounting of all JTCM operations and investments." Div. Post-Hearing Mem. at 25. The Division, however, nowhere provides any more detail about this request or any authority for imposition of an accounting. Accordingly, the undersigned declines to impose such a sanction.

substantial losses to other persons who may have decided not to invest or to stay invested in the Funds had they received accurate information. *See* Sections 8A(g)(2)(C) of the Securities Act, 21B(b)(3) of the Exchange Act, 203(i)(2)(C) of the Advisers Act, and 9(d)(2)(C) of the Investment Company Act. Under those provisions, for each violative act or omission after February 14, 2005, and before March 4, 2009, the maximum third-tier penalty is $130,000 for a natural person. 17 C.F.R. §§ 201.1003, .1004. For each violative act or omission on or after March 4, 2009, and before March 5, 2013, the maximum third-tier penalty is $150,000 for a natural person. 17 C.F.R. § 201.1004, .1005. The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue started before, and continued after, March 4, 2009. They will be considered as three courses of action – the violations arising from the material misrepresentations and omissions relating to (1) the life settlement component of the Funds' investments; (2) the corporate investment component of the Funds' investments; and (3) Respondents' relationship with JTF/Belesis – resulting in three units of violation. Since JTCM was essentially Jarkesy's *alter ego* in the violative activities, a third-tier penalty amount of $450,000 will be ordered against Respondents, jointly and severally. Combined with the other sanctions ordered, this penalty is in the public interest. Insofar as Respondents argue that the imposition of penalties would be an impermissible retroactive application of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the argument fails. Respondents' violative conduct continued after the July 22, 2010, effective date of the Dodd-Frank Act.

4. Industry Bar

The Division requests that Jarkesy be barred from the securities industry. Combined with other sanctions ordered, bars are in the public interest and appropriate deterrents.[40] The violations involved scienter. Jarkesy's business provides him with the opportunity to commit violations of the securities laws in the future. The record shows a lack of recognition of the wrongful nature of the violative conduct. His attempts to deflect blame onto others are aggravating factors. In short, it is necessary in the public interest and for the protection of investors that Jarkesy be barred from the industry.

5. Officer and Director Bar

Securities Act Section 8A(f) and Exchange Act Section 21C(f) authorize a bar against a respondent who has violated, respectively, Securities Act Section 17(a)(1) or Exchange Act Section 10(b), from acting as an officer or director of any issuer with a class of securities registered

[40] The fact Respondents were not registered with the Commission does not insulate Jarkesy from a bar. The Commission has authority to bar persons from association with investment advisers, whether registered or unregistered. *See Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999). Likewise, the fact that the Funds were not registered investment companies is not a barrier to imposing an investment company bar. *See Zion Capital Mgmt. LLC*, Securities Act Release No. 8345, 2003 SEC LEXIS 2939, at *18 n.27 (Dec. 11, 2003).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

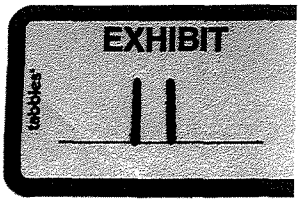
In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGMENT GROUP LLC d/b/a PATRIOT28 LLC,	:	File No. 3-15255
	:	
GEORGE R. JARKESY, JR.,	:	
	:	
JOHN THOMAS FINANCIAL, INC., and	:	**EXPEDITED CONSIDERATION REQUESTED**
	:	
ANASTASIOS "TOMMY" BELESIS,	:	**RULE 400(b)**
	:	
Respondents.	:	

PETITION FOR INTERLOCUTORY REVIEW

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. ("Jarkesy") (collectively "Respondents"), submit this Petition for Interlocutory Review pursuant to Rule of Practice 400, seek expedited consideration, and show the following:

PRELIMINARY STATEMENT

The Division alleges that Respondents formed and managed two investment pools, and that respondents John Thomas Financial, Inc. ("JTF") and Anastasios "Tommy" Belesis ("Belesis") served as placement agent selling interests in the pools to investors. After Respondents were served with the Order Instituting Administrative and Cease-And-Desist Proceedings ("OIP"), the Division delivered to Respondents digital media containing over 700 gigabytes ("gb") of data the Division obtained in the over two-year investigation of this case. Despite diligent efforts, Respondents cannot possibly



circumstances" exist in this case to warrant such review because, as shown below, Respondents' have been denied their right to due process of law. Rule of Practice 400(a). In *Blizzard* the Commission granted review to consider the disqualification of a lawyer. Here, the issues presented are Constitutional due process violations; matters of arguably greater import than were presented in *Blizzard.*

II.
THE ALJ'S DENIAL OF RESPONDENTS' MOTION TO COMPEL PRODUCTION AND IDENTIFICATION OF *BRADY* MATERIAL DENIES RESPONDENTS' RIGHT TO DUE PROCESS

A. Division Allegations Reflect Possession of Information that Mitigates Respondents' Liability, which is *Brady* Material that Must Be Produced

The Division alleges that Respondents were responsible for managing two investment pools, but also allege that settling respondents JTF and Belesis exercised authority over the activities and investments of the pools. These latter allegations necessarily raise the issue of which respondents are responsible for the alleged fraudulent conduct and losses to investors. The Division's evidence related to these allegations is *Brady* material as to Respondents.

The Division Staff must comply with *Brady* in SEC administrative proceedings. Brady holds that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady [v. Maryland]* 373 U.S. [83], 87 (1963). *Brady* has been incorporated into Commission Rule 230(b)(2). *See* 17 C.F.R. § 201.230(b)(2). The Supreme Court has since held that the duty to disclose material exculpatory evidence is applicable even when there has been no request for that information by the accused and that the duty to disclose also extends to impeachment evidence. *See City of Anaheim*, Administrative Proceedings Rulings Release No. 586 (July 30, 1999), 70 SEC Docket 881, 881 (*citing United*

States v. Agurs, 427 U.S. 97, 107 (1976) and *Untied States v. Bagley*, 473 U.S. 667, 676 (1985)).

In the Matter of David F. Bandimere and John O. Young, Administrative Proceedings Rulings Release No. 759 (March 12, 2013) at 2 and n.1. The *Brady* doctrine, as defined by *Brady v. Maryland* and its progeny, requires the government to turn over all evidence that may be favorable to the defendant and material to the issue of guilt or punishment. Such evidence includes "[a]ny and all records and/or information which might be helpful or useful to the defense in impeaching...the [government's] witness." *U.S. v. Kiszewski*, 877 F.2d 210 (2d Cir. 1989).

The Division has an affirmative obligation to turn over this material well in advance of the hearing. *U.S. v. Ferguson*, 478 F. Supp. 2d 220, 242 (D. Conn. 2007). As discussed below, providing 700 gb of data is not compliance with the Division's *Brady* obligations. These failures deny Respondents their due process right to a fair hearing.

C. *Brady* Material in Interview Notes Must be Produced

After the Division very recently revealed that it possessed witness interview notes that contain *Brady* material, Respondents moved to compel production of the notes. Immediately before Respondents filed their motion, the Division Staff provided a declaration purporting to show the Division's compliance with its *Brady* obligations ("Division Declaration"), attached hereto as Exhibit 2, and a Withheld Document List, attached hereto as Exhibit 3. The Division subsequently and voluntarily produced to Respondents a document that appears to be the handwritten notes of an interview with JTBOF limited partner Steven Benkovsky, dated July 18, 2011.[2] The disclosed notes

[2] The pdf file name for the interview notes is "Steven benkovsky interview, Alix's notes, 7.18.2011.pdf" suggesting they were prepared by Division counsel Biel, although her name is not in the document.

establish that the summary of the Benkovsky interview in the Division Declaration is deficient and violates *Brady* because it does not fully disclose the exculpatory and impeachment material in the notes.[3] A copy of the notes is attached as Exhibit 4.

ALJ's, however, permit the Division to employ a procedure of producing attorney-drafted "summaries" of interview notes that purportedly disclose all *Brady* exculpatory and impeachment evidence. *See Bandimere* at 3; *In the Matter of John J. Aesoph, CPA, and Darren M. Bennett, CPA*, Administrative Proceedings Rulings Release No. 789 (August 9, 2013) at 1. As shown by the deficient Division Declaration in this case, permitting the Division to only produce summaries of interview notes is insufficient and deprives respondents their due process *Brady* rights.[4]

Permitting the Division to only provide summaries carries the risk of withholding material information. An incomplete response

> not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. We agree

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[3] The Division has claimed (without explanation) the notes were inadvertently produced. That claim is irrelevant: the issue is whether Respondents have a due process right to the *Brady* material in the notes, which was concealed until the notes were produced. *Brady* requires, at least, an *in camera* review. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Moreover, it is obvious the notes, one of five files intentionally burned to a CD and intentionally sent by overnight delivery to Respondents, were intentionally produced, making the "inadvertent production" argument nonsensical.

[4] Virtually all of the statements in the produced notes relate to the persons, entities and investments that are involved in this case. These statements make clear that much of information related to the John Thomas Bridge and Opportunity Fund and its underlying investments was communicated by settling respondent Belesis and his employees. The notes refer to a Power Point presentation, which is undoubtedly material as to what disclosures were made about the witness' investment and who made them. Other key statements are, "JTBOF: Thinks Geo running it + Belesis selling it" and "Geo may have mentioned fund licenses name". None of this information was included in the Division Declaration and all of it is *Brady* material as to Respondents.

> that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

United States v. Bagley, 473 U.S. 667, 683 (1985).

The Division's witness interviews were not privileged communications, and the factual details in the notes contain *Brady* material. By way of illustration, the interview notes likely contain information about the following non-exclusive topics, all of which could be exculpatory and/or useful for impeachment:

- disclosures that were, or were not, made
- who made disclosures related to the partnership interests
- offering and marketing materials received or not received
- investment funds and returns on investment
- management efforts, activity and results
- valuation of investments
- relationship between and among respondents and others involved with their companies
- communications with third parties regarding respondents
- communications with respondents and respondents' agents and employees
- communications with others related to fund activity and results
- net worth and financial condition
- risk tolerance, investment history and results of other investments
- investment experience, education, and status as accredited investor, or not
- status as present or past party to civil lawsuits, or lawsuits related to business activities
- personal criminal history or regulatory history, or histories related to business activities
- judgments, liens, and bankruptcy
- health issues

Brady material is broadly defined, and the burden is on the Division to search for and produce it. The summaries in the Division Declaration apparently only purport to include what the Division has decided are "material exculpatory evidence." *Brady*

requires much more disclosure from the Division. *See Giglio v. United States*, 402 U.S. 150, 154-155 (1972) (evidence of witness reliability); *United States v. Agurs*, 427 U.S. 97, 104 (1976) (prosecutor's duty to produce evidence); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (duty to disclose impeachment evidence). In *Kyles v. Whitley*, 514 U.S. 419, 438 (1995), the Court held that the *Brady* rule includes evidence "known only to police investigators and not to the prosecutor." Hence, to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 437. Respondents are aware of communications between the Division and other agencies and a Self Regulatory Organization regarding the respondents in this matter. Examples of *Brady* material in the Division Staff's file that has not been turned over to the Respondents will include:

Results of searches of databases to obtain information about whether witnesses have:

- any criminal record or other disciplinary history
- filed any complaints with the S.E.C. or other agencies
- been the subject of any complaints filed with the S.E. C. or other agencies
- been the subject of or witness in any prior investigations (informal or formal) by the S.E. C. or other agency

Division Staff notes reflecting:

- differences from witness transcripts
- differences from the notes of other Division Staff or government agents relating to the same witness, interview or conversation
- agreements, terms, assurances, promises, inducements and threats with or to witnesses and settling respondents
- witness investment experience, risk tolerance and any securities or financial accounts or other investments
- witness education, training and current or former professional licenses
- all information from witnesses that bears upon the allegations in the Order Instituting Proceedings
- disclosures made by Respondents
- documents received from Respondents or others on behalf of Respondents
- representations made by Division Staff

- representations made by other respondents
- representations made by other potential witnesses

Evidence of witness bias or prejudice, such as:

- current or past registration with the S.E.C.
- potential exposure for S.E.C. violations, regulatory action or civil or criminal liability
- information regarding financial distress or losses in the wake of 2008-2009 financial meltdown and economic recession
- political animus to Respondents
- incentive to shift blame or liability to Respondents.

The ALJ should have ordered the Division to produce notes of interviews and conversations with potential witnesses in this matter and all other material in its possession that is exculpatory or shows bias or prejudice.

The Supreme Court has dictated that in cases where government lawyers assert that portions of their files are confidential, the Court must conduct an *in camera* review for exculpatory material. *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). The Division asserted that documents in its investigative files are privileged or protected by the Work Product Doctrine, but the ALJ refused to conduct an *in camera* review, thus compounding the error.

D. *Brady* Material Hidden in a 700 gb Data Compilation Must be Identified

The Division investigated for at least two years before recommending the institution of this proceeding. In that time, the Division gathered, through subpoena and otherwise, millions of pages of information in close to three million computer files. The Division provided to respondents over 700 gb of electronic data, most of which appears to be e-mails, electronic copies of documents, spreadsheets, images of documents, and other computer files. The data comprise over 2.5 million individual files, and an additional 800,000+ images (believed to be image files of documents).

STATE OF NEW YORK)
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)
COUNTY OF NY)

Affidavit of Anastasios Peter Belesis

CAME ON this date before me, the undersigned authority, a person known to me to be ANASTASIOS PETER BELESIS, who, upon being duly sworn, did upon his oath say as follows:

My name is Anastasios Peter Belesis. I am over the age of 21 and am competent to make this affidavit. The facts contained in this affidavit are within my personal knowledge.

I gave sworn testimony during an investigation by the SEC styled, *In the Matter of John Thomas Capital Management*, FW-08496. I gave the testimony on or about December 11 and 12, 2011. If asked the following questions posed during that investigative testimony, I would give the same answers under oath today:

Q: *"When did you meet Mr. Jarkesy?"*

A: "In 2005."

Q: *"Did Mr. Jarkesy come up with the idea for the Bridge and Opportunity Fund?"*

A: "Yes."

Q: *"How did the John Thomas Bridge and Opportunity Fund come into existence?"*

A: "I opened up John Thomas Financial. George Jarkesy had presented the firm with a product which was a bridge fund, to offer it to the clients of John Thomas Financial, more towards an alternative investment vehicle. The firm thought it made a lot of sense and could offer a great up-side for the clients, and we did an exclusive placement agent agreement with the Bridge & Opportunity Fund."

Q: *"How developed was Mr. Jarkesy's idea for this fund? Did you help him develop the idea or was it all his?"*

A: "It was all his."

Q: *"In 2007, when you begin to have these discussions with Mr. Jarkesy, did you discuss the possibility that John Thomas Financial would play a role in identifying bridge loan candidates?"*

A: "Yes."

Q: *"Tell me about those discussions, please."*

A: "John Thomas Financial had had companies that were the investment bankers' that we referred to the fund to make bridge loans to those companies."

Q: *"Can you identify those companies?"*

A: "Yes. Amber, Sahara Media."

Q: *"You say the reason was because the firm John Thomas Financial had a preexisting relationship with these companies, and could direct them to the fund for potential financing?"*

A: "That's right."

Q: *"What did you do, referrals?"*

A: "Yes. We referred these companies to the bridge fund."

Q: *"Did the firm John Thomas Financial receive compensation from those referrals?"*

A: "Yes."

Q: *"The fee for the bridge loan was paid by the company that received the loan, not by the Bridge & Opportunity Fund?*

A: "Yes."

Q: *[Referring to investigative exhibit 66] "Where it says 'consulting fee' as the income type, what does that mean?"*

A: "These are consulting fees that John Thomas Financial received in reference to America West Resources, the companies that we had investment bank relationships with.

Q: *"These are investment bank consulting fees?"*

A: "That is correct."

Q. *"There were commissions earned by John Thomas Financial from buying and selling securities transactions executed on behalf of the fund?"*

A: "That is correct."

Q: *"I guess, placement fees?"*

A: "That is correct."

Q: *"Did John Thomas Financial receive any revenue from the fund that was not in the form of money, cash?"*

A: No.

Q: *"Who is it that runs the Bridge & Opportunity Fund at any point?"*

A: "George Jarkesy."

Q: *"Anyone else?"*

A: "No."

Q: *"Did he seek advice or guidance from you (Belesis) about how to run the fund?*

A: "No."

Q: *"Formally or informally?"*

A: "Correct."

Q: *"What was the reason for severing the business relationship with Bridge & Opportunity Fund?"*

A: "Difference of opinion, different direction."

Q: *"Can you tell about the difference of opinion that precipitated the break?"*

A: "Just different investment strategies, difference of opinion, the philosophy was different."

Q: *"How were you personally compensated with respect to those funds, if you were compensated? Were you personally compensated?"*

A: "No."

Q: *"Did it surprise you that Mr. Jarkesy was using a relatively small auditing firm?"*

A: "No."

Q: *"Was that significant to you, which firm was going to be auditing?"*

A: "No."

Q: *"When you discussed the fund with investors, the prospective investors, did anyone mention that it was something that was important to them?"*

A: "No."

Q: *"Did any of your reps tell you that that was something that was important to them?"*

A: "No."

Q: *"Or to their customers?"*

A: "No."

Q: *"Is your testimony that this was George Jarkesy's fund to run and John Thomas Financial provided placement services and some trading services and some bridge-loan services, but you didn't make the investment decisions as to how the fund would be invested?"*

A: "That is correct."

Q: *"And on the third page of [Investigative] Exhibit 8 of the paragraph entitled 'Grant of Trademark License,' that is the provision that allowed Mr. Jarkesy's fund to use the name John Thomas?"*

A: "That is correct."

Q: *"But that was just for the name of the fund. It did not suggest that John Thomas Financial was involved in any way other than in that agreement?"*

A. "That is correct. He had asked if he could utilize the name and I said, 'yes,' and that's what happened."

Q: *"What is the purpose of the disclaimer [on John Thomas Capital Group's website]?*

A: "To make a clear distinction, that John Thomas Financial is not affiliated with the John Thomas Bridge & Opportunity Fund."

Q: *"So in your relationship with Mr. Jarkesy, neither of you worked for the other; is that correct?"*

A: "That is correct."

Q: *"In the past, had you had a relationship where one of you worked for the other?"*

A: "No."

Q: *"Did you have any authority to tell him or to suggest to him what to do with his fund?"*

A: "No."

References in my testimony to "John Thomas Financial" in fact referred to John Thomas Financial, Inc., the registered broker dealer owned by me and which was later named, along with me, as a respondent in an Order Instituting Proceedings styled *John Thomas Capital Management Group LLC, d/b/a Patriot28 LLC, George R. Jarkesy, Jr., John Thomas Financial, Inc., and Anastasios "Tommy" Belesis*, Admin. Proc. File No. 3-15255. Both John Thomas Financial and I subsequently entered into a settlement agreement with the Securities and Exchange Commission upon my execution of a settlement offer prepared by the SEC's Division of Enforcement. The Commission approved the settlement in an order published on or about December 5, 2013.

Attached are emails I sent or received during my tenure at John Thomas Financial, Inc.

ANASTASIOS PETER BELESIS

SUBSCRIBED AND SWORN TO before me this 13th day of March, 2014.

NOTARY PUBLIC IN AND FOR
MARIA A. MORAGNE
NOTARY PUBLIC, State of New York
No. 24-014718348
Qualified in Kings County
Commission Expires June 30, 2014

THE STATE OF NEW YORK

From: Thomas Belesis [redacted]
Sent: Sunday, October 25, 2009 8:49 AM
Subject: FW: IMG00065-20091024-1840.jpg
Attachments: IMG00065-20091024-1840.jpg

SPARTANS NEVER RETREAT AND NEVER SURRENDER!

From: Thomas Belesis [redacted]
Sent: Thursday, October 08, 2009 5:49 AM
Subject: JTF INSIGHT OF THE DAY-NO RETREAT NO SURRENDER
Attachments: image001.jpg

Refuse to let your present results influence your thinking. Keep reminding yourself that you have a power within you that is superior to any condition or circumstance you may encounter enroute to your goal."

Thomas Belesis
John Thomas Financial
Chief Executive Officer
[redacted]

From: Thomas Belesis [redacted] > on behalf of Thomas Belesis
Sent: Tuesday, September 15, 2009 12:48 PM
To: Barry Rabkin
Subject: RE: John Thomas article mention
Attachments: image001.gif

HEY BUDDY , NO RETREAT NO SURRENDER

From: Barry Rabkin [redacted]
Sent: Tuesday, September 15, 2009 1:37 PM
To: Thomas Belesis
Subject: Re: John Thomas article mention

John Thomas Financial, a Manhattan-based broker dealer, has just moved into new offices at 14 Wall St. and is looking to hire 500 independent financial advisers

i love it!

B.S.R.

From: Thomas Belesis [redacted]
To: Barry Rabkin [redacted]
Sent: Monday, September 14, 2009 3:47:04 PM
Subject: FW: John Thomas article mention
Subject: John Thomas article mention

http://www.fins.com/Finance/Articles/SB125250638443195647/Four-Finance-Shops-Hiring-in-September?Type=0&idx=4

[cid:image001.gif@01CA360B.140013D0]

From: Thomas Belesis [redacted] on behalf of Thomas Belesis
Sent: Wednesday, September 09, 2009 8:38 AM
To: [redacted]
Subject: FW: IMG00054.jpg
Attachments: IMG00054.jpg

NO RETREAT NO SURRENDER

Sent via BlackBerry by AT&T

From: Thomas Belesis [redacted] on behalf of Thomas Belesis
Sent: Thursday, August 20, 2009 3:56 PM
To: [redacted]
Subject: RE: Hello
Attachments: IMG00054.jpg

MEGALE,

SHE NEDDS TO BE SERIES 7 AND 63 LICENSED

NO RETREAT NO SURRENDER

-----Original Message-----
From: Tim Pappas [redacted]
Sent: Thursday, August 20, 2009 4:50 PM
To: Thomas Belesis
Subject: Hello

Thomas,
Hope all is well. I tried your cell phone but I think I took the wrong number. In regards to that executive assistant position what are the requirements? Only cause I wanna make sure that I know what to relate to my friend. Let me know. And many thanks. Nice to see you Sincerely

Tim Pappas
General Manager NYC
Philippe Chow Restaurant Group
[redacted]

www.philippechow.com
www.philippechow.com.mx
www. philippechowexpress.com

"Best of the Best"
NY Magazine 2007

"Excellent"
Zagat 2008

NYC* Miami* West Hollywood* East Hampton* Mexico City* Greenwich Village

Philippe Express

From: Thomas Belesis
Sent: Friday, October 31, 2008 6:41 AM
To: 'Philip Sassower'
Subject: FW: TO ALL THE CHAMPIONS OF JTF-NEVER RETREAT AND NEVER SURRENDER
Attachments: image001.jpg

"Don't take NO for an answer, and NEVER submit to failure."
Winston Churchill

Winners abound in every walk of life. From coast to coast and border to border, these achievement oriented individuals have taken charge of their lives and their destinies, fashioning their own personal treks to the top in a variety of ways. The manner in which each person has forged his or her own success path is as diverse as the people themselves.

Each and every person on earth is decidedly different, not one person exactly like anyone else. Not surprisingly, the dreams, goals and aspirations they hold for themselves are quite unique as well, as one-of-a-kind as the individuals themselves. Yet each of these super successful people do have one thing in common. They did not reach their lofty heights by taking NO for an answer.

Thomas Belesis

John Thomas Financial

Chief Executive Officer

14 Wall Street

5th Floor

New York, NY 10005

[redacted]

From: David Martirosian [redacted] > on behalf of David Martirosian
Sent: Tuesday, March 02, 2010 7:28 AM
To: [redacted]
Subject: [redacted]

No retreat, no surrender

David Martirosian
Account Executive
John Thomas Financial
[redacted]