

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

INVESTMENT ADVISERS ACT OF 1940  
Admin. Proc. File No. 3-20531

In the Matter of

HORTER INVESTMENT  
MANAGEMENT, LLC and DREW  
K. HORTER,

Respondents.

**RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR  
POSTPONEMENT OF PROCEEDINGS**

The Division of Enforcement's (the "Division") Opposition to Respondents' Motion for Postponement of Proceedings is based on a single assertion: that Respondents "explicitly waived all objections, including but not limited to constitutional objections, to these proceedings." [Opp. at 1.] That argument is misplaced.

Respondents Horter Investment Management, LLC ("HIM") and Drew K. Horter ("Horter") (collectively, "Respondents") do not dispute that the Offer of Settlement contained the waiver language quoted by the Division. The waiver language was required to be included by the Division as part of the settlement.<sup>1</sup> However, what the Division fails to acknowledge is that two of the Questions Presented by the Commission and accepted by the United States Supreme Court (the "Supreme Court") were "[w]hether statutory provisions

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<sup>1</sup> In fact, Respondents were required to waive objections as part of the Offer of Settlement, but then the Division argued and the ALJ found that Respondents refused to acknowledge their wrongdoing despite the settlement as an aggravating factor for sanction determinations.

that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment” and “[w]hether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.” *SEC v. Jarkesy*, Commission’s Petition for Writ of Certiorari, 2023 WL 2478988, at \*1 (Mar. 2023); *Securities and Exchange Commission v. George R. Jarkesy, Jr., et al.*, Case No. 22-859 (the “Jarkesy Appeal”).

It is well-settled law that a contract based on an unconstitutional statute or regulation is void, and thus creates no obligations for the contracting parties. *See, Township of Elmwood v. Marcy*, 92 U.S. 289 (1875) (holding that debt contracts were void and unenforceable because they were entered into pursuant to an unconstitutional law); *Gen. Acc. Ins. Co. of Am. v. Aggreko, LLC*, Case No. 11-cv-1682, 2012 WL 6738217, at \*3 (W.D. La. Dec. 28, 2012) (recognizing that contract was “absolute nullity and unenforceable” because regulation under which parties contracted was found to be unconstitutional); *Geft Outdoor LLC v. Consolidated City of Indianapolis and County of Marion*, 187 F. Supp. 3d 1002, 1012 (S.D. Ind. 2016) (“A party derives no rights based on an unconstitutional statute; an unconstitutional law is void and is no law.”) Here, the Commission has asked the Supreme Court to decide whether the very regulatory and statutory scheme upon which the Commission’s administrative adjudications are based are unconstitutional.

If the Supreme Court decides that the statutes supporting the Commission’s administrative proceedings are unconstitutional, then settlements entered into based upon that unconstitutional statute are void, and the Respondents’ waiver of constitutional

objections are of no force. As such, Respondents respectfully request that this review proceeding be postponed until the Supreme Court determines the Jarkesy Appeal.

This is not a mere matter of seeking postponement based on an appeal to which Respondents are not a party, as argued by the Division. [Opp. at p. 4.] Here, the very constitutionality of the Commission's administrative proceedings and the ALJs is at issue. The Commission itself is the party that submitted the Writ of Certiorari for the Jarkesy Appeal to the Supreme Court and sought its review, so it is well-aware of the importance of the constitutionality determination. The Supreme Court has accepted the Jarkesy Appeal and will move forward with briefing and argument.

In order to avoid administrative waste, prevent substantial harm to Respondents, and in the interest of the public, Respondents respectfully request that the Commission postpone a decision on the review proceedings until the Supreme Court issues its decision in the Jarkesy Appeal, Case No. 22-895, *Securities and Exchange Commission v. Jarkesy*.

Dated: July 26, 2023

Respectfully submitted,

/s Matthew L. Fornshell

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true copy of the foregoing *Reply in Support of Respondents' Motion for Postponement of Proceedings* on the following on this 26th day of July 2023 via email as indicated below:

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Dated: July 26, 2023

/s/ Nicole R. Woods  
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