

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' MOTION FOR
POSTPONEMENT OF PROCEEDINGS

Respondents Horter Investment Management, LLC (“HIM”) and Drew K. Horter (“Horter”) (collectively, “Respondents”) respectfully request, pursuant to Rule 161 of the Commission’s Rules of Practice, for this review proceeding to be postponed until the United States Supreme Court (the “Supreme Court”) issues its decision in the matter of *Securities and Exchange Commission v. George R. Jarkesy, Jr., et al.*, Case No. 22-859 (the “Jarkesy Appeal”).

I. INTRODUCTION

On March 8, 2023, the U.S. Securities and Exchange commission (the “Commission”) filed a Petition for Writ of Certiorari with the United States Supreme Court in the Jarkesy Appeal seeking a review of a Fifth Circuit decision. The Commission included the following “Questions Presented” as part of its Petition:

1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment;
2. Whether 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; and
3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

On June 30, 2023, the Supreme Court granted the Commission’s Petition and accepted review of each of the Questions Presented. *SEC v. Jarkesy*, --- S. Ct. ---, 2023 WL 4278448 (June 30, 2023).

The questions currently before the Supreme Court go to the heart of whether these proceedings before the Commission are constitutional. The Circuit Court held that they were not, and expressly decided that vacating the Commission's order was the appropriate remedy. *Jarkesy v. SEC*, 34 F.4th 446, 465-66 (5th Cir. 2022).

In this review proceeding, Respondents filed their Reply Brief concurrently with this Motion. Therefore, the review is fully briefed and ripe for decision. However, allowing that decision to occur when the constitutionality of this process is in question may subject Respondents to the ultimate harm: deprivation of their constitutional rights. Moreover, postponing decision on the review briefing will prevent waste and possible duplicated effort if the Supreme Court requires the Commission's orders to be vacated and new hearings held. No prejudice or other harm will be realized by postponing this proceeding until the *Jarkesy* Appeal is decided.

As such, Respondents respectfully request that the Commission issue an order postponing the decision on the review briefing until the Supreme Court decides the questions before it in the *Jarkesy* Appeal.

II. PROCEDURAL BACKGROUND

On September 8, 2021, the Commission entered an Order Instituting Administrative and Cease-and-Desist Proceedings in this matter. On March 20, 2023, the ALJ issued an initial decision. On April 10, 2023, Respondents filed their petition for review of the initial decision, and the Commission granted the petition for review on May 1, 2023. The review proceedings are now fully briefed and ripe for decision.

On June 30, 2023, approximately three months after the ALJ's initial decision, the Supreme Court accepted certiorari in the *Jarkesy* Appeal, which involves questions of

constitutionality of the administrative proceedings before the Commission, including questions of whether the proceedings violate the Seventh Amendment or Article I (the nondelegation doctrine), and whether the Commission’s ALJ’s for-cause removal protection violates Article II. Each question currently before the Court directly impacts the instant review proceeding.

III. LEGAL ANALYSIS

A. Standards for Postponement

Rule 161 of the Commission’s Rules of Practice governs the determination of whether the review of an initial decision should be postponed.¹ 17 C.F.R. § 201.161. The Commission may, for good cause shown, postpone or adjourn a proceeding. *Id.* In considering a motion for postponement, a movant must make a “strong showing that the denial of the request or motion would substantially prejudice their case.” 17 C.F.R. § 201.161(b)(1). The Commission should consider the following factors:

- (i) The length of the proceeding to date;
- (ii) The number of postponements, adjournments, or extensions already granted;
- (iii) The stage of the proceedings at the time of the request;
- (iv) The impact of the request on the hearing officer’s ability to complete the proceeding in the time specified by the Commission; and
- (v) Any other such matters as justice may require.

Id. Although the Rule provides that the Commission should “adhere to a policy of strongly disfavoring such requests,” postponement is appropriate where the outcome of a separate

¹ “Because our Rules of Practice contain no specific provision governing a stay of a petition for review of an administrative law judge’s initial decision, we construe [a motion to stay] as a request for a postponement or adjournment under Rule of Practice 161.” *In the Matter of Christopher M. Gibson*, SEC Rel. No. IA-4690, 2017 WL 1425432, at *1 (Apr. 21, 2017).

matter has a high likelihood of affecting the matter before the Commission. *See, In the Matter of Michael S. Steinberg*, SEC Rel. No. IA-4008, 2015 WL 331125, at *2 (Jan. 27, 2015) (postponing briefing on a review of initial decision in light of pending criminal matter that may affect outcome of review).

B. A Decision on the Review Proceeding Here Should Be Postponed.

Here, considering the five factors listed in Rule 161 as well as the public interest, the Commission should postpone this matter until the Jarquesy Appeal is decided by the Supreme Court. First, there was only one other brief stay in this matter—from September 23, 2022 through November 4, 2022—while the parties contemplated and negotiated a partial settlement of the matter. Otherwise, the parties have moved through the administrative process without the need for lengthy extensions or other scheduling issues. Second, there is no impact on the hearing officer’s ability to complete the proceeding because this matter is in the review stage post-initial decision. Third, although the proceeding has been pending since September 2021 and the proceeding is now in the review of initial decision stage, those factors alone do not necessitate a denial of the postponement request. Finally, a review of “any other matters as justice may require” can include the harm that will be caused by lack of postponement, public interest in prompt enforcement of securities laws, and administrative efficiency. *See, generally, In the Matter of Jason Jianxun Tang, CPA*, SEC Rel. No. 34-97246, 2023 WL 2805299 (Apr. 4, 2023); *In the matter of Michael S. Steinberg, supra*, 2015 WL 331125.

1. A need for a postponement here overrides the public interest in prompt enforcement of federal securities laws.

Respondents here seek a postponement of the review proceeding pending a decision of the Jarquesy Appeal, which will determine the constitutionality of the very proceedings

Respondents have participated in since 2021. Although Respondents recognize that the Commission has held that the “burden of being haled into an allegedly improper forum does not constitute an irreparable injury warranting interruption of an ongoing proceeding”² and that a pending appeal “is generally an insufficient basis upon which to prolong a Commission proceeding,”³ the issue at play in this postponement request is much more than that. Here, the very constitutionality of the Commission’s administrative proceedings and the ALJs are at issue. The Commission itself is the party that submitted the Writ of Certiorari for the Jarquesy Appeal to the Supreme Court and sought its review, so it is well-aware of the importance of the constitutionality determination.

Although the Commission recognizes that there is a “strong public interest in the prompt enforcement of the federal securities laws,” the need for a postponement here overrides that interest. *In the Matter of Lynn Tilton, et al.*, SEC Rel. No. IA-4735, 2017 WL 3214456, at *2 (July 28, 2017) (denying postponement because it would “delay significantly the outcome” of the proceeding where a Supreme Court review was merely speculative). Here, unlike the movant in *Tilton*, the Supreme Court review of constitutionality of this Commission’s proceedings is not “purely speculative at this time.” *Id.* at *1. The Supreme Court has accepted the Jarquesy Appeal, it will move forward with briefing and argument, and that appeal directly affects the constitutionality of the proceedings here.

Moreover, this is not a matter of an “indefinite stay for the purposes of pursuing other relief.” *In the Matter of Daniel Joseph Touizer*, SEC Rel. No. 34-85321, 2019 WL 1225724, at *2 (Mar. 14, 2019) (denying postponement sought for indefinite period while respondent sought an appeal of his criminal conviction). Rather, the period of the

² *In the Matter of Lynn Tilton, et al.*, SEC Rel. No. IA-4735, 2017 WL 3214456, at *2 (July 28, 2017).

³ *In the Matter of Christopher M. Gibson*, SEC Rel. No. IA-4690, 2017 WL 1425432 (Apr. 21, 2017).

postponement is definite: the Supreme Court has accepted the Jarquesy Appeal and will hear and decide the matter in its next term. *See also, In the Matter of Donald Howard*, SEC Rel. No. 34-94825, 2022 WL 1288208, at *1 (Apr. 29, 2022) (granting postponement and requiring status report every 90 days because period was not indefinite); *In the Matter of Hughe Duwayne Graham*, SEC Rel. No. 34-95638, 2022 WL 3757570, at *1 (Aug. 30, 2022) (granting postponement for longer than 21 days as set forth in Rule 161).

The conduct of Respondents that led to this administrative proceeding occurred in 2014-2017. [*See, Order Making Findings and Imposing a Cease-and-Desist Order* dated November 3, 2022 (the “Cease-and-Desist Order”) at ¶¶ 13-26.] Hannan was convicted for violating Ohio securities laws in January 2019. [*Id.* at ¶ 32.] This proceeding was instituted in September 2021 – four years after the conduct and almost three years after the criminal conviction. At this point, a short postponement while the Supreme Court rules on the constitutionality of the entire process actually serves the public interest. Although the public has an interest in prompt enforcement of laws, it has an interest in doing so while not encroaching on constitutional rights of citizens.

Finally, Respondent HIM is already subject to a cease-and-desist order by the Commission related to this proceeding and has been since November 2022. [Cease-and-Desist Order at p. 13, Section V.] Since February 2022, Respondent Horter no longer has overall supervisory responsibility of the firm’s investment advisor representatives, and both Respondents have “adopted reforms that reduce the likelihood of violations.” [Initial Decision at p. 4, 6.] Therefore, the public interest will not be harmed. *See, In the Matter of Jason Jianxun Tang, supra*, 2023 WL 2805299 at *1 (granting postponement and noting that “the public interest should not be harmed by postponing the proceeding because the OIP

already imposed a cease-and-desist order and barred [respondent] from appearing or practicing before the Commission”).

2. A postponement of the review proceedings will serve the public interest in administrative efficiency.

Here, granting a postponement of this proceeding during the pendency of the Jarkesy Appeal will serve administrative efficiency. Although the review proceeding is fully briefed, the Commission should not consider the briefing and waste resources until such time as it is determined whether the proceeding itself is constitutional. As the Commission is well aware, the Supreme Court previously held in an unrelated challenge to the constitutionality of the Commission’s ALJs, “that the Commission’s ALJs had not been appointed in accordance with the Appointments Clause, and that litigants whose cases had been heard by improperly appointed ALJs were entitled to new hearings before different, properly appointed ALJs.” *SEC v. Jarkesy*, Commission’s Petition for Writ of Certiorari, 2023 WL 2478988, at *5 (Mar. 2023). The Commission also noted that the Circuit Court in *Jarkesy* held that vacating the Commission order was the appropriate remedy for the constitutional violation; so, too, could be the outcome here. *Id.* at *20.

Therefore, in the interest of administrative efficiency, Respondents respectfully request the Commission issue an order postponing this proceeding during the pendency of the Jarkesy Appeal.

IV. CONCLUSION

As set forth above, 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 14, 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 *Respondents' Motion for Postponement of Proceedings* on the following on this 14th day of July 2023 via email as indicated below:

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Dated: July 14, 2023

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