

No. _____

IN THE

Supreme Court of the United States

GEORGE R. JARKESY, JR., and PATRIOT28 LLC
Cross Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**APPENDIX TO CONDITIONAL CROSS PETITION
FOR A WRIT OF CERTIORARI**

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APPENDIX

1. 5 USC § 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 15 USC § 78y provides:

Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

- (2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in SECTION 2112 OF TITLE 28 and the Federal Rules of Appellate Procedure.
- (3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.
- (4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.
- (5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k-1, 78o(c)(5) or (6), 78o-3, 78q, 78q-1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

- (3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.
- (4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.
- (5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

- (1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.
- (2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding SECTION 705 OF TITLE 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or

(C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1) For purposes of the preceding subsections of this section, the term "Commission" includes the agencies enumerated in SECTION 78C(A)(34) OF THIS TITLE insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78o-5 of this title.

(2) For purposes of subsection (a)(4) of this section and SECTION 706 OF TITLE 5, an order of the Commission pursuant to SECTION 78S(A) OF THIS TITLE denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to SECTION 78S(B) OF THIS TITLE disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

3. 28 USC § 2106 provides:

Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE
COMMISSION

SECURITIES ACT OF 1933
Release No. 9688 / December 11, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 73819 / December 11, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3978 / December 11, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31370 / December 11, 2014

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 GRANTING REVIEW AND
SCHEDULING
BRIEFS**

Pursuant to Commission Rule of Practice 411,¹ the petition of respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC (“JTCM”) and George R. Jarkesy, Jr. and the cross-petition of the Division of Enforcement for review of an administrative law judge’s initial decision are

¹ 17 C.F.R. § 201.411.

GRANTED.² Pursuant to Rule of Practice 411(d), the Commission will determine what sanctions, if any, are appropriate in this matter.³

Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a),⁴ that briefs be filed as follows:

Respondents' opening brief: Respondents shall file a single consolidated brief, not to exceed 16,000 words, by January 13, 2015.

Division's principal and response brief: The Division shall file a brief, not to exceed 16,000 words, by February 13, 2015. This brief must address the issues presented by the Division's cross-petition for review and respond to respondents' opening brief.

Respondents' response and reply brief: Respondents shall file a single consolidated brief, not to exceed 10,000 words, by March 9, 2015.

Division's reply brief: The Division may file a reply brief, not to exceed 2,000 words, by March 23, 2015. This brief must be limited to the issues presented by the Division's cross-petition for review.

² *John Thomas Capital Mgmt. Group LLC*, Initial Decision Release No. 693, 2014 WL 5304908 (Oct. 17, 2014).

³ 17 C.F.R. § 201.411(d).

⁴ 17 C.F.R. § 201.450(a).

As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission.⁵ Pursuant to Rule of Practice 180(c), failure to file a brief in support of the petition or cross-petition may result in dismissal of this review proceeding as to that party.⁶

The Division requests expedited treatment of this review proceeding “to protect any remaining assets in the funds.” Consistent with the Commission’s other responsibilities, this request will be granted; no motions for extensions of time to file briefs will be entertained. The Commission’s ongoing consideration of this matter is without prejudice to any other remedies or relief that the Division might pursue.

We remind the parties that Rule 452 provides that motions for leave to adduce additional evidence must show with particularity that the evidence is material and there were reasonable grounds for failure to adduce such provides that motions for leave to adduce additional evidence must show with particularity that the evidence is material and there were reasonable grounds for failure to adduce such evidence previously.⁷ Thus, to the extent that any party contends that the record compiled before

⁵ Attention is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rules of Practice 450(b) and (c), 17 C.F.R. § 201.450(b), 201.450(c), with respect to content and length limitations (except as modified in this order). The number of words includes any pleadings that are incorporated by reference.

⁶ 17 C.F.R. § 201.180(c).

⁷ 17 C.F.R. § 201.45.

the law judge is incomplete or inadequate, we direct that relief under Rule 452 be sought promptly, and in no event later than the date on which respondents' opening brief is due. Such motion shall demonstrate that the evidence could not have been developed and introduced below; if the law judge refused relief, the motion shall specify the manner in which relief was sought, the proffer made to the law judge, and the law judge's ruling.

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

Brent J. Fields Secretary