

**UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY**

In the Matter of:

Saul Ortega
Former Chief Financial Officer, Director,
President, Chief Executive Officer, and
Chairman of the Board

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) AA-EC-2017-44
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David Rogers, Jr.
Former Chairman of the Board

) AA-EC-2017-45
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First National Bank
Edinburg, Texas

**ORDER DENYING RESPONDENTS' MOTION
FOR INTERLOCUTORY REVIEW**

Before the Comptroller of the Currency (“Comptroller”) is a *Motion for Interlocutory Review* filed by Respondents Saul Ortega and David Rogers, Jr. (“Respondents”), requesting that the Comptroller review two adverse orders entered by Administrative Law Judge (“ALJ” or “Judge”) Jennifer Whang on March 17, 2020. For the reasons discussed below, the Comptroller hereby denies Respondents’ *Motion for Interlocutory Review*.

I. BACKGROUND

The Notice of Charges in this matter was filed on September 25, 2017. The case was initially assigned to ALJ Christopher B. McNeill. On August 21, 2018, the Comptroller issued his *Order in Pending Enforcement Cases in Response to Lucia v. Securities and Exchange Commission*.¹ The *Order* reassigned ALJ C. Richard

¹ *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018).

Miserendino to this matter. Upon ALJ Miserendino's retirement, the Comptroller assigned ALJ Whang to this matter by order dated January 6, 2020.

On January 8, 2020, ALJ Whang issued a *Notice of Reassignment and Order Regarding the Comptroller of the Currency's Order in Pending Enforcement Cases*, which directed the parties to file any objections they may have to the undersigned's assignment to this case or to any of the previous actions taken by the prior ALJs. In response, the Respondents filed a *Motion for Summary Disposition on the Appointments Clause and Objections to Orders Issued by ALJ* ("*Motion for Summary Disposition and Objection to Prior ALJ Orders*"). Thereafter, the Office of the Comptroller of the Currency's ("OCC") Enforcement Counsel ("Enforcement Counsel") filed an *Opposition to Respondents' Motion for Summary Disposition on the Appointments Clause and Response to Objections to Orders Issued by ALJ* ("*Opposition to Summary Disposition and Response to Objections*"). On March 17, Judge Whang entered an *Order Denying Respondents' Motion for Summary Disposition on the Appointments Clause* ("*Order Denying Summary Disposition*") and *Order Reviewing Prior ALJ Prehearing Actions* ("*Order Reviewing Prior ALJ Actions*") (together, "March 17 Orders"). Respondents thereafter filed the instant *Motion for Interlocutory Review* of the March 17 Orders, which Enforcement Counsel opposes. Judge Whang referred the request for interlocutory review to the Comptroller for disposition on April 13, 2020. See 12 C.F.R. § 19.28(d).

A. Respondents' Motion for Summary Disposition and Objection to Prior ALJ Orders

In their *Motion for Summary Disposition and Objection to Prior ALJ Orders*, Respondents contended that, under the Supreme Court's decision in *Lucia*, the proceedings against them were commenced and continue to proceed in violation of the Appointments

Clause of the Constitution, *see* U.S. CONST. art. II, § 2, cl. 2. Essentially, Respondents argued that none of the ALJs who have been assigned to this case have been appointed in a manner that is consistent with the Constitution. Respondents thus requested full dismissal of the charges against them and alternatively, if the proceedings are thereafter recommenced, that a new ALJ be appointed to hear the matter. *See Motion for Summary Disposition* at 3-4. Additionally, Respondents generally objected to all orders entered before the case was reassigned to Judge Whang, arguing that these orders should be “vacated and voided” because the ALJs who were assigned to the case at the time that the orders were issued lacked authority to proceed under the Appointments Clause. *Id.* at 3-4. Respondents also specifically objected to (a) an order granting Enforcement Counsel’s motion to strike several of Respondents’ affirmative defenses, arguing that motions to strike are generally disfavored and not expressly authorized by the procedural rules set forth in 12 C.F.R. § 19; and (b) a Status Conference Order and Scheduling Order, arguing that these orders improperly declined to mandate mediation. *See id.* at 20-23.

B. Enforcement Counsel’s *Opposition to Summary Disposition and Response to Objections*

In their *Opposition to Summary Disposition and Response to Objections* Enforcement Counsel argued, *inter alia*, that Respondents had been afforded the remedy required under *Lucia*; that Judge Whang’s appointment was consistent with the Appointments Clause; and that the orders entered in the case before it was reassigned to Judge Whang had been correctly decided. *See Opposition to Motion for Summary Disposition* at 1-2. In support, Enforcement Counsel submitted the following exhibits: an October 2019 Federal Deposit Insurance Corporation (“FDIC”) Board Resolution Appointing Judge Whang (“Ex. 1”); October 2019 Appointment Affidavits by Judge

Whang (“Ex. 2”); and a November 2019 Treasury Secretary Order Appointing Judge Whang as an ALJ for the OCC (“Ex. 3”). *See Opposition to Motion for Summary Disposition Exhibits 1-3.*

C. Judge Whang’s March 17 Orders

On March 17, Judge Whang entered an *Order Denying Summary Disposition and Order Reviewing Prior ALJ Actions*, which are the subject of the instant *Motion for Interlocutory Review*.

1. Order Denying Summary Disposition

In her *Order Denying Summary Disposition*, Judge Whang concluded that any potential Appointments Clause issue did not warrant further delay of the proceedings and that Respondents had not established that she should render a decision as to the constitutionality of the appointment of OCC’s ALJs in the first instance. *See Order Denying Summary Disposition* at 5. Judge Whang reasoned, *inter alia*, that *Lucia* did not support Respondents’ contention that the appropriate remedy for an Appointments Clause violation is to void the entire action; indeed, the appropriate remedy under *Lucia* was for the case to be heard anew by a properly appointed ALJ. *See id.*

2. Order Reviewing Prior ALJ Actions

In her *Order Reviewing Prior ALJ Actions*, Judge Whang recited the following procedural background. In response to *Lucia*, in August 2018 the Comptroller issued an order reassigning the instant case and instructing the newly-assigned ALJ, Judge Miserendino, to review Judge McNeil’s orders and adopt or revise them as he should deem appropriate. At the direction of Judge Miserendino, Respondents filed objections to orders entered by Judge McNeil. While these objections remained pending, the case was

reassigned to Judge Whang with instructions for her to adopt or revise prior orders as she should deem appropriate. Respondents then filed the *Motion for Summary Disposition and Objection to Prior ALJ Orders*, and Enforcement Counsel filed the *Opposition to Summary Disposition and Response to Objections*. See *Order Reviewing Actions* at 1-2. Having recited this background, Judge Whang concluded that the prior orders were correctly decided for the same reasons stated by the previously-assigned ALJ. *Id.* at 2-4.

D. Respondents' Motion for Interlocutory Review

On March 27, Respondents timely filed their *Motion for Interlocutory Review*, requesting that the Comptroller reverse the *Order Denying Summary Disposition and Order Reviewing Prior ALJ Actions*. *Motion for Interlocutory Review* at 6-7. In support of their requests for relief, Respondents reiterate their previous arguments and urge interlocutory review, arguing that the *Order Denying Summary Disposition* involves a controlling question of law and policy as to which substantial grounds exist for a difference of opinion—"namely, whether the appropriate remedy for structural error in the proceeding is dismissal of the action"; that immediate review would materially advance the outcome of the proceeding; and that subsequent modification of the ruling would cause unusual delay or expense. See *id.* at 7-8.

E. Enforcement Counsel's Opposition to Respondents' Motion for Interlocutory Review

Enforcement Counsel filed an *Opposition to Respondents' Motion for Interlocutory Review*, reiterating arguments made in prior briefings; arguing that there are not substantial grounds for a difference of opinion as to the controlling question of law; and asserting that, contrary to Respondents' contention regarding the potential for undue delay, the striking

of improperly pled and legally insufficient affirmative defenses is not a basis to restart discovery. *Opposition to Respondents' Motion for Interlocutory Review* at 3-4.

This matter was referred to the Comptroller by Judge Whang on April 13, 2020. *See Order Referring Respondents' Motion for Interlocutory Review*. On April 20, the Comptroller issued to the parties a *Notice of Submission of Proceeding for Final Disposition*, followed by an *Amended Notice of Submission of Respondents' Motion for Interlocutory Review for Final Disposition*, which clarified that the Comptroller had not suspended or stayed the proceedings pending review. *See Notice of Submission of Proceeding for Final Disposition; Amended Notice of Submission of Respondents' Motion for Interlocutory Review for Final Disposition*.

II. DISCUSSION

The Comptroller may, at his discretion, exercise interlocutory review of an ALJ's ruling if the Comptroller finds that:

- (1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
- (2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;
- (3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
- (4) Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 19.28(b). Respondents invoke the first, second, and fourth criteria as grounds for interlocutory review of the *Order Denying Summary Disposition and Order Reviewing Prior ALJ Actions*. *Motion for Interlocutory Review* at 7-8. For the reasons stated below, the Comptroller agrees with Enforcement Counsel that none of these criteria supporting interlocutory review are met. The Comptroller therefore denies Respondents' *Motion for*

Interlocutory Review as to both the *Order Denying Summary Disposition* and *Order Reviewing Prior ALJ Actions*.

A. *Order Denying Summary Disposition*

With respect to the first criterion raised in support of their motion, Respondents argue that substantial grounds exist for a difference of opinion as to the nature of the remedy required under *Lucia*. In support of their contention that the appropriate remedy is fully voiding the proceedings, Respondents cite *Vasquez v. Hillery*, 474 U.S. 254 (1986); *United States v. Leeper*, 2006 WL 1455485 (W.D.N.Y. May 22, 2006); *Fowler v. Butts*, 829 F.3d 788 (7th Cir. 2016); *Nguyen v. United States*, 539 U.S. 69 (2003), and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). The Comptroller notes that these cases (and indeed, the specific passages cited by Respondents) deal with criminal and *habeas corpus* matters—matters that are distinguishable from the present case. More specifically, the cases cited by Respondent concern systemic racial discrimination and other errors affecting grand juries; the impartiality of a judge considering a petition for habeas corpus; the authority of an Article IV territorial court judge to decide a criminal appeal; and a former prosecutor’s failure to recuse himself from participating in a decision to reinstate a criminal defendant’s death sentence. The Comptroller finds Respondents’ cited authorities both inapposite to the instant administrative proceedings and generally unresponsive of Respondents’ contention.

Furthermore, the Comptroller agrees with Enforcement Counsel that the Supreme Court’s decision in *Lucia* leaves little ground for any reasonable dispute as to what is required to cure an administrative action tainted by a violation of the Appointments Clause. As the Supreme Court has explained:

[Lucia] contested the validity of Judge Elliot’s appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. *So what relief follows?* This Court has also held that the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment.

Lucia, 138 S. Ct. at 2055 (emphasis added). *Lucia* thus clearly identifies the appropriate remedy in a proceeding tainted by an Appointments Clause violation—namely, a new hearing before a properly appointed official. For this reason, contrary to Respondents’ contention, the first criterion supporting interlocutory review is not met.

The Comptroller further concludes that the above finding necessarily entails comparable findings that the second and fourth criteria are not satisfied, as Respondents have already been afforded the remedy required under *Lucia*. That is, they have been afforded a new hearing before a properly appointed official. Judge Whang has been appointed in a Constitutionally appropriate manner, *i.e.* by the “head of a department.”. See Ex. 1 (resolution by FDIC Board of Directors “appoint[ing] [ALJ] Jennifer Whang as an [ALJ] for the FDIC”); Ex. 2 (Judge Whang’s Oath of Office); Ex. 3 (order appointing Judge Whang as an ALJ for the OCC issued by Secretary of the Treasury Steven T. Mnuchin on November 14, 2019); *see also* 31 U.S.C. § 307 (“The Office of the Comptroller of the Currency . . . is an office in the Department of the Treasury); 31 U.S.C. § 301(b) (Secretary of the Treasury is the head of the Treasury Department); *Lucia*, 138 S. Ct. at 2051, 2055 (holding that SEC ALJs are “inferior officers” under the Appointments Clause and that they therefore must be appointed by “the President, a court of law, or a head of department”; stating “[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.”).

B. Order Reviewing Prior ALJ Actions

The Comptroller is similarly unpersuaded that Judge Whang's rulings in the *Order Reviewing Prior ALJ Actions* meet the criteria for interlocutory review cited by Respondents. With respect to Judge Whang's ruling as to Respondents' general objection to prior ALJ orders based on the Appointments Clause issue, the Comptroller finds as follows. The order reassigning this case to Judge Whang made clear that she was free to dispose of orders differently than the ALJs previously assigned to this case. Following the parties' briefing on the previously-entered orders, Judge Whang ruled that the prior orders were correctly decided for the same reasons stated by the previously-assigned ALJs. *Id.* There is no indication that Judge Whang failed to review these orders *de novo*. Accordingly, the Comptroller concludes that Respondents have not articulated a cognizable basis for interlocutory review of this ruling.

With respect to Respondents' specific objections to the order granting Enforcement Counsel's motion to strike certain affirmative defenses and the scheduling orders, the challenged rulings do not involve controlling questions of law or policy on which there exist substantial grounds for disagreement. The challenged rulings instead concern routine procedural matters pertaining to the scope of the litigation and whether mediation ought to be required. Thus, the first criterion is not met. The Comptroller further finds that immediate review of such procedural matters would not promote adjudicative efficiency, and therefore also concludes that the second and fourth criteria supporting interlocutory review are not met.

III. CONCLUSION

For the reasons stated above, the Comptroller hereby denies Respondents' *Motion for Interlocutory Review*.

It is so ordered.

Date: June 16, 2020

A handwritten signature in blue ink, consisting of several loops and flourishes, positioned above a horizontal line.

Acting Comptroller of the Currency of the United States