

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3799/April 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17112

In the Matter of

FRAZER FROST, LLP,
SUSAN WOO, CPA, and
MIRANDA SUEN, CPA

ORDER DENYING RESPONDENTS'
MOTION FOR SUMMARY DISPOSITION

Respondents move for summary disposition, raising a number of constitutional challenges. Respondents argue that this proceeding is unconstitutional because the appointments of the Securities and Exchange Commission's administrative law judges violate the Appointments Clause of the Constitution and the Commission's administrative law judges enjoy two layers of tenure protection. Mot. at 2-11. They also raise a class-of-one equal protection argument based on the fact that the Commission pursued certain potentially related individuals and entities in district court. *Id.* at 11-13. Respondents next assert that this proceeding violates their Seventh Amendment right to a jury trial. *Id.* at 13-16. Continuing, they assert that the Congress violated Article I by delegating to the Commission the discretion to choose whether to bring enforcement actions administratively or in district court. *Id.* at 16-20. Finally, Respondents argue that this proceeding violates their right to due process. *Id.* at 20-22. For the reasons that follow, I deny Respondents' motion.

The Commission has rejected Respondents' Appointments Clause and tenure protection arguments. *See Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, 2015 WL 5472520, at *23-28 (Sept. 17, 2015), *pet. for review docketed*, No. 15-1416 (D.C. Cir. Nov. 13, 2015); *see also David F. Bandimere*, Securities Act of 1933 Release No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015), *pet. for review docketed*, No. 15-9586 (10th Cir. Dec. 22, 2015). It has also held that class-of-one claims are not cognizable in this context. *David F. Bandimere*, 2015 WL 6575665, at *18. Because I am bound to follow Commission precedent, I reject Respondents' arguments.

Even if class-of-one claims were cognizable, Respondents' argument would fail. Respondents, an auditing firm and two accountants, argue that they are similarly situated to a firm they audited and to the firm's officers, all of whom were sued by the Commission in district court. Mot. at 12-13. To prevail on a class-of-one claim, a respondent bears the burden to show that without rational basis, he or she was treated differently from similarly situated individuals. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1217 (10th Cir. 2011) (noting the claimant's "substantial burden"). Some courts have held that, in order to demonstrate that one is similarly situated, a respondent must show that he or she is "*prima facie* identical in all relevant respects" to other individuals. *See Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir.

2010) (citation and emphasis omitted). Others have simply held that they must be “similarly situated in all material respects.” *Loesel v. City of Frankenmuth*, 692 F.3d 452, 462 (6th Cir. 2012).

Under either test, Respondents’ claim fails because comparison of the allegations against Respondents and the charges the Commission pursued in district court belie Respondents’ argument. The charges in district court relate to fraud and reporting violations; the allegations against Respondents concern their professional conduct during their audit. Although the facts involved in the two cases are related, the charges and the acts alleged to form the basis for the charges are distinct. Additionally, the firm Respondents audited and the firm’s officer are—unlike Respondents—not accountants.¹

As to Respondents’ Seventh Amendment and delegation arguments, the Commission has held that it lacks the authority “to invalidate the very statutes that Congress has directed [it] to enforce.”² Because my authority derives from the Commission, if it lacks the authority to rule on the constitutionality of securities statutes, so do I.

To rule in Respondents’ favor on their Seventh Amendment argument, I would have to find unconstitutional Section 21B of the Exchange Act, as amended by Section 929P(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The same is true with respect to Respondents’ delegation argument. But, I lack the authority to rule on the constitutionality of the Exchange Act. *See Milton J. Wallace*, 1975 WL 162079, at *2.

I defer ruling on Respondents’ due process arguments. While the differences cited by Respondents between an administrative proceeding and an action in district court are genuine, Respondents’ arguments about possible prejudice to their rights are premature. Respondents may renew their arguments during the hearing in this matter.

Respondents’ motion for summary disposition is DENIED.

James E. Grimes
Administrative Law Judge

¹ Respondents have also not addressed whether multiple parties, who are similarly situated to each other and who are subject to the same treatment as each other, can together bring a class-of-one claim.

² *Milton J. Wallace*, Securities Exchange Act of 1934 Release No. 11252, 1975 WL 162079, at *2 (Feb. 14, 1975); *see William J. Haberman*, Exchange Act Release No. 40673, 1998 WL 786945, at *3 n.14 (Nov. 12, 1998), *aff’d*, 205 F.3d 1345 (8th Cir. 2000); *J. A. Sisto & Co.*, Exchange Act Release No. 2568, 1940 WL 36421, at *5 n.5 (July 1, 1940), *reh’g denied*, Exchange Act Release No. 2625, 1940 WL 36474 (Aug. 29, 1940); *Walston & Co.*, Exchange Act Release No. 2150, 1939 SEC LEXIS 632, at *2 (June 14, 1939).