UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17112

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In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

PRELIMINARY STATEMENT

The Commission instituted this proceeding pursuant to Section 8A of the Securities Act, Sections 4C and 21C of the Exchange Act, and Rule 102(e) of the Commission Rules of Practice against Frazer Frost LLP, a PCAOB-registered accounting firm, and Susan Woo and Miranda Suen, certified public accountants who worked at Frazer Frost. OIP, ¶¶1-3. The OIP alleges that Respondents engaged in improper professional conduct and that they willfully violated and/or caused violations of Regulation S-X in connection with auditing services that Respondents provided to China Valves Technology, Inc. ("CVVT").

Respondents have moved to dismiss this proceeding on various constitutional grounds, but their arguments are foreclosed by precedent. This Court should deny Respondents' motion.

ARGUMENT

I. The appointment and removal of Commission administrative law judges is constitutional.

Respondents argue (Mot. 2-11) that the Commission's hiring of administrative law judges ("ALJs") and the manner for their removal violate the Appointments Clause of the Constitution, *see* U.S. Const. art. II, § 2, cl. 2. These arguments fail because, as the Commission has held, the Commission's ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *See David F. Bandimere*, Securities Act Rel. No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015); *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015); *Raymond J. Lucia Cos., Inc., et al.*, Exchange Act Rel. No. 75837, 2015 WL 5172953, at *21 (Sept. 3, 2015).

II. This proceeding does not violate Respondents' constitutional rights.

Respondents also argue that by instituting this action in the administrative forum, rather than in federal court, the Commission violated numerous of their constitutional rights. The premise of Respondents' position—that the Commission could have brought this action in federal court—is mistaken with respect to the portion of the proceeding concerning whether Respondents should be denied the privilege of appearing or practicing before the Commission. Section 4C(a) of the Exchange Act provides that the *Commission*, not a federal court, may impose that remedy, so Respondents are mistaken to argue that the Commission could or should have requested this relief in federal court.

To the extent that disgorgement and civil penalties are at issue in this proceeding, the Commission could have sought such relief in federal court while litigating other issues in this administrative proceeding. But as discussed below, the Commission did not violate Respondents' constitutional rights by choosing the more efficient course of bringing the entire action in a single administrative proceeding.

A. This proceeding does not violate Respondents' right to a jury trial.

There is no merit to Respondents' argument (Mot. 13-16) that the Commission has violated their right to a jury trial by instituting this action in the administrative forum. Congress "may assign th[e] adjudication" of cases involving so-called "public rights" to "an administrative agency with which a jury trial would be incompatible[] without violating the Seventh Amendment[] ... even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977). "Public rights" cases are those that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 457 (quotation omitted). Here, in pursuing civil penalties against Respondents, the Commission is acting in the government's "sovereign capacity under an otherwise valid statute creating enforceable public rights," *id.* at 458, and thus, Congress's decision to give the Commission the choice of the administrative forum is proper. Respondents' reliance (Mot. 14) on *Tull v. United States* for the contrary conclusion is misplaced because *Tull* recognized that "the Seventh Amendment is not applicable to administrative proceedings." 481 U.S. 412, 418 n.4 (1987); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) ("If a claim that is legal in nature asserts a 'public right' ... then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity.").

Respondents also argue (Mot. 15-16) that because Congress previously authorized the Commission to pursue civil penalties against unregulated individuals in federal court, Congress may not now add an additional forum with which jury trials are incompatible. But as the Supreme Court has explained, although Congress "could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," it "could also validly opt for administrative enforcement, without judicial trials." *Atlas Roofing*, 430 U.S. at 460. Since Congress could have committed all securities law matters to an administrative tribunal, it follows that Congress properly could authorize the Commission to resolve some matters in an administrative tribunal and others in district court without violating the Seventh Amendment. That Congress initially chose only one forum has no import.

Granfinanciera, upon which Respondents rely (Mot. 15-16), does not hold otherwise. That case involved a bankruptcy trustee's fraudulent conveyance action in Bankruptcy Court. The Court held that Congress could not "relabel[]" a private right cause of action to put it within the jurisdiction of an administrative tribunal without violating the Seventh Amendment. 492 U.S. at 60-61. The Commission's proceeding against Respondents does not involve a private right, and thus the choice of administrative forum here does not implicate the Seventh Amendment.

B. This proceeding does not violate the Equal Protection Clause.

Respondents next assert (Mot. 11-13) that the Commission's decision to pursue this action in an administrative proceeding violates their rights under the Equal Protection Clause because, they argue, there is "no discernible difference between this case and the case that the SEC filed in federal district court" against CVVT. Mot. 12. Respondents are mistaken.

As discussed, this action concerns whether Respondents should be denied the privilege of appearing or practicing before the Commission, and Section 4C(a) of the Exchange Act authorizes the Commission to bring such an action in administrative proceedings only, not in federal court. In contrast, the Commission's action against CVVT alleged, among other things, that CVVT violated the antifraud provisions of the federal securities laws, *see* Complaint, *SEC v. China Valves Tech., Inc.*, No. 14-cv-1630 (D.D.C. Sept. 29, 2014), Dkt. 1, and the Commission had authority under Sections 20 and 22 of the Securities Act and Sections 21 and 27 of the Exchange Act to bring that suit in district court. Whatever overlap there may be in the facts giving rise to the two actions, this proceeding and the federal court case contain different allegations, seek different relief, and were expressly contemplated by Congress to proceed in different fora. Therefore, Respondents are wrong to argue (Mot. 12) that there is "no rational basis" for the Commission to have brought this case in the administrative forum.

In any event, to the extent that Congress has given the Commission authority to initiate administrative proceedings or to bring certain actions in federal court, the "Commission's choice to use either or both of those means to enforce the securities laws is a matter of broad agency discretion" that reflects "a highly individualized assessment of the facts and circumstances of a given case." *Timbervest, LLC*, 2015 WL 5472520, at *29; *see also Bandimere*, 2015 WL

6575665, at *18 (rejecting an analogous challenge to the one Respondents assert here and explaining that a "class-of-one" equal-protection claim "is not legally cognizable in the context of an inherently discretionary governmental decision to bring charges in one forum rather than another"). In order to show such discretion has been abused in a particular case, Respondents must present "clear evidence" that the decision to proceed in a particular forum was based on impermissible grounds. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). For example, to establish that it has been irrationally singled out for disparate treatment, Respondents would need to show an "invidious" motive on the Division's part, which they have not done. *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008); *Armstrong*, 517 U.S. at 646-65 (decision to prosecute must "not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification"); *China-Biotics, Inc.*, Exchange Act Rel. No. 70800, 2013 WL 5883342, at *15 (Nov. 4, 2013). Accordingly, Respondents' Equal Protection challenge fails.

C. Respondents' non-delegation claim is meritless.

Respondents mistakenly argue that Congress impermissibly delegated legislative power to the Executive Branch by authorizing the Commission to seek penalties either in district court or through administrative proceedings without specifying when the Commission should use which forum. Mot. 16-20. The Constitution vests authority to *enforce* the law in the Executive Branch, U.S. Const. art. II, § 3, and grants Congress only "*legislative* Powers," *id.*, art. I, § 1 (emphasis added). The success of any delegation challenge thus turns on whether Congress has impermissibly "delegated *legislative* power to [an] agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis added). It is settled that the Executive acts in an executive—not legislative—capacity when selecting the forum in which to enforce a law; such authority is an inherent part of the Executive power. *E.g.*, *United States v. I.D.P.*, 102 F.3d 507, 511 (11th Cir. 1996); *United States v. Haynes*, 985 F.2d 65, 69 (2d Cir. 1993); *United States v.*

Dockery, 965 F.2d 1112, 1117 (D.C. Cir. 1992). Therefore, Respondents' non-delegation challenge fails at the threshold. *United States v. Batchelder*, 442 U.S. 114, 126 (1979) (rejecting non-delegation challenge where "the power that Congress ... delegated to [certain] officials [was] no broader than the authority they routinely exercise[d] in enforcing the criminal ... laws").

Invoking inapposite language from *INS v. Chadha*, Respondents contend (Mot. 17) that the Commission exercises legislative authority when it selects among the fora that Congress made available because the Commission's choice "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons." 462 U.S. 919, 952 (1983). But that language, which did not pertain to a non-delegation challenge, merely noted that when *Congress* seeks to veto the Attorney General's cancelation of an individual's deportation, Congress was attempting to exercise legislative power and thus must adhere to the bicameralism and presentment requirements of the Constitution—an unsurprising conclusion in light of the Court's observation that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *Id.* at 951. Here, that presumption means that "[w]hen the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II." *Id.* Congress's exercise of legislative power to grant additional enforcement options to the Commission does not mean that Congress has delegated its legislative power to the Executive, and the fact that the Commission's selection of a forum has the potential to affect a respondent does not transform the Commission's executive decision *where to sue* into a legislative one. *See, e.g.*, *United States v. Allen*, 160 F.3d 1096, 1108 (6th Cir. 1998) (rejecting criminal defendant's "attempt to end-run the doctrine of prosecutorial discretion" by casting it as a non-delegation challenge); *United States v. Yousef*, 327 F.3d 56, 116 (2d Cir. 2003) (statute "does not delegate any legislative power [but] merely sets limits on how the Attorney General can exercise his discretion to prosecute").

Finally, Respondents' non-delegation argument would fail even if the Commission's forum choice were legislative. "The Supreme Court has not invalidated a statute for violating the nondelegation doctrine in ... nearly 80 years," *United States v. Cooper*, 750 F.3d 263, 270 (3d Cir. 2014), and the Court has explained that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left those executing or applying the law," *Whitman*, 531 U.S. at 474-75 (quotation omitted). Here, Congress provided that a civil penalty may be imposed in administrative proceedings only where "such penalty is in the public interest," Exchange Act Section 21B(a)(1), and *Whitman* notes that the Supreme Court has "found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest,'" 531 U.S. at 474 (collecting cases).

D. This proceeding is consistent with due process.

Respondents also argue (Mot. 20-22) that this proceeding violates their due process rights on multiple grounds, including that the Commission's Rules of Practice unfairly limit their ability to take discovery and that the rules give them an insufficient amount of time to prepare for the hearing. These arguments lack merit.

The Commission and the courts have repeatedly rejected "[s]uch broad attacks on the procedures of the administrative process." *Harding Advisory LLC*, Securities Act Release No 9561, 2014 WL 988532, at *8 (Mar. 14, 2014); *see also John Thomas Capital Management Group. LLC*, Investment Advisers Act Release No. 3733, 2013 WL 6384275, at *5-6 (Dec. 6, 2013) (rejecting respondents' argument that it was not feasible for them to review the Division's disclosures prior to the hearing). To accept such challenges "would do considerable violence to Congress['s] purposes in establishing" specialized administrative agencies and would "work a revolution in administrative (not to mention constitutional) law." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988). Due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and Respondents will be afforded that opportunity here.

Respondents contend that the proceeding will violate their due process rights because the Federal Rules of Evidence will not apply here. Mot. 21-22. However, it is settled that the fact that an administrative proceeding is not governed by the federal rules does not render the proceeding unfair. *See, e.g.*, *Cunanan v. INS*, 856 F.2d 1373, 1374 (2d Cir. 1988). Nor have Respondents shown how the application of the Commission's Rules of Practice in this proceeding has caused, or will cause, them the type of prejudice sufficient to establish a due process violation. *See, e.g.*, *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) ("In the absence of any suggestion of prejudice, we cannot conclude that Horning was deprived ... of procedural due process.").

Attempting to show prejudice, Respondents assert that because the proceeding is governed by the Commission's Rules of Practice, rather than the federal rules, they "may be unable" to obtain discovery from certain unidentified foreign witnesses. Mot. 20-21. These arguments are premature because this proceeding is still at an early stage and Respondents have made no showing that they tried but were unable to obtain the discovery they purportedly need or that, as a result of any such failed efforts, they have not been afforded a meaningful opportunity to be heard. Nor have Respondents identified any authority holding that the Due Process Clause guarantees a litigant the right to obtain discovery from persons living abroad. Finally, although Respondents assert that had they been sued in federal court they "would be able" to obtain discovery of foreign witnesses through the Hague Convention (Mot. 21), this is far from clear because the availability of discovery under that Convention is committed to the discretion of the district court and is not as of right. *See Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344 (D. Conn. 1997).

CONCLUSION

For the foregoing reasons, this Court should deny Respondents' Motion for Summary Disposition.

DATED: April 13, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 13, 2016, the foregoing document was sent to the following parties and other persons entitled to notice as follows:

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