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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RAYMOND J. LUCIA
COMPANIES, INC., and
RAYMOND J. LUCIA, SR.,

Plaintiffs,

v.

U.S. SECURITIES AND
EXCHANGE COMMISSION, JAY
CLAYTON, in his official capacity
as Chairman of the U.S. Securities
and Exchange Commission, and
MATTHEW G. WHITAKER, in his
official capacity as Acting United
States Attorney General,

Defendants.

Case No. 18-cv-2692 DMS (JLB)

ORDER:

**(1) GRANTING DEFENDANTS’
MOTION TO DISMISS, AND**

**(2) DENYING PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION AS MOOT**

Pending before the Court are Defendants’ Motion to Dismiss for lack of jurisdiction,¹ and Plaintiffs’ Motion for Preliminary Injunction. The motions have been fully briefed. As discussed below, Defendants’ jurisdictional arguments are

¹ Defendants include the United States Securities and Exchange Commission (“SEC”), Jay Clayton in his official capacity as SEC Chairman, and William Barr in his official capacity as U.S. Attorney General. On February 14, 2019, William Barr succeeded Matthew Whitaker as U.S. Attorney General. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, William Barr is automatically substituted for Matthew Whitaker as a defendant.

1 moored to settled and well-reasoned case law. The Court follows those cases, grants
2 Defendants’ motion to dismiss and denies as moot Plaintiffs’ motion for preliminary
3 injunction.

4 **I.**

5 **BACKGROUND**

6 **A. Statutory Background**

7 Congress authorized the United States Securities and Exchange Commission
8 (“SEC”) to bring civil actions to enforce violations of the Securities Exchange Act
9 of 1934 (“Exchange Act”) and regulations promulgated thereunder. The SEC may
10 bring these civil actions in either a federal district court or in an administrative
11 proceeding. *See, e.g.*, 15 U.S.C. §§ 78u(d), 78u-1(a)(1), 78u-3. In an administrative
12 proceeding, the SEC itself may preside over the proceeding, (17 C.F.R. § 201.110),
13 or it “may, and typically does, delegate that task to an ALJ.” *Lucia v. SEC*, 138 S.
14 Ct. 2044, 2049 (2018) (citing 15 U.S.C. § 78d-1(a); 17 C.F.R. § 201.110).

15 When the SEC delegates review, the ALJ holds an evidentiary hearing and
16 renders an initial decision with factual findings and conclusions of law. 17 C.F.R.
17 § 201.360(a)(1), (b). The SEC may review the ALJ’s decision, either upon request
18 or *sua sponte*. *Id.* § 201.360(d)(1). Regardless of whether the ALJ’s decision is
19 appealed, the administrative process culminates in a final order issued by the SEC.
20 *Id.* § 201.360(d)(2); *Hill v. SEC*, 825 F.3d 1236, 1238 (11th Cir. 2016). The
21 aggrieved party may then seek judicial review of the final order in a federal court of
22 appeals pursuant to 15 U.S.C. § 78y(a)(1) of the Exchange Act, which “provides a
23 detailed scheme for appellate court review of final Commission orders.” *Hill*, 825
24 F.3d at 1238. Once the aggrieved party files a petition for review, the court of
25 appeals has exclusive jurisdiction to affirm, modify, or vacate the order. 15 U.S.C.
26 § 78y(a)(3).

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1 **B. Factual Background**

2 Plaintiff Raymond Lucia was a financial planning professional. (Compl. ¶ 16.)
3 He and his company, Plaintiff Raymond J. Lucia Companies, Inc., marketed a
4 retirement savings strategy called “Buckets of Money,” under which retirement
5 savings were divided among assets of different risk levels and periodically
6 reallocated as those assets changed in value. (*Id.* ¶ 19.)

7 On September 5, 2012, the SEC issued an order instituting proceeding (“OIP”)
8 against Plaintiffs. (*Id.* ¶ 29.) The SEC alleged that Plaintiffs used misleading
9 presentations to deceive prospective clients and charged Plaintiffs with violating
10 various provisions of the Exchange Act and the Investment Advisers Act of 1940
11 (“Advisers Act”). (*Id.* ¶¶ 35, 40.) ALJ Cameron Elliot was assigned to adjudicate
12 the case. (*Id.* ¶ 40.) ALJ Elliot had not been appointed by the SEC, but by the Chief
13 ALJ. (*Id.* ¶ 41.) ALJ Elliot issued an initial decision following a hearing on the
14 matter. He concluded Plaintiffs violated the securities law and imposed sanctions.
15 *Lucia*, 138 S. Ct. at 2049–50.

16 Plaintiffs appealed to the SEC arguing, in part, that the administrative
17 proceeding was invalid because ALJ Elliot had not been properly appointed under
18 the Appointments Clause, and thus lacked constitutional authority to perform his job.
19 *Id.* The SEC affirmed ALJ Elliot’s decision. (Compl. ¶ 50.) Plaintiffs then appealed
20 to the D.C. Circuit, which affirmed the SEC’s decision. (*Id.* ¶ 54.) Subsequently,
21 the Supreme Court granted certiorari and reversed the D.C. Circuit’s decision. (*Id.*
22 ¶ 57.) The Supreme Court held that SEC ALJs are “Officers of the United States,”
23 and as such must be appointed by the President, “Courts of Law,” or “Heads of
24 Departments” under the Appointments Clause. *Lucia*, 138 S. Ct. at 2055; Art. II, §
25 2, cl. 2. Because ALJ Elliot had not been properly appointed, the Court held that
26 Plaintiffs were entitled to a new hearing before “a properly appointed official”—
27 specifically “another ALJ (or by the Commission itself).” *Id.*

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1 While the *Lucia* case was pending before the Supreme Court, the SEC issued
2 a general order, which, among other things, ratified the appointment of its ALJs.
3 (Compl. ¶ 61.)² On September 12, 2018, ALJ Carol Fox Foelak was assigned to the
4 case. (*Id.* ¶ 94.) Plaintiffs moved to dismiss the proceedings before ALJ Foelak,
5 which was denied. *See Raymond J. Lucia Cos.*, Admin. Proc. Release No. 6628,
6 2019 SEC LEXIS 1744 (A.L.J.) (July 15, 2019 Order). The hearing is scheduled to
7 commence on March 2, 2020. *See id.*, Admin. Proc. Release No. 6657, 2019 SEC
8 LEXIS 2111 (A.L.J.) (August 16, 2019 Order).

9 Plaintiffs filed the subject Complaint seeking to enjoin the administrative
10 proceeding before ALJ Foelak on grounds that (1) SEC ALJs have multiple levels
11 of protection against removal which violates Article II of the U.S. Constitution, and
12 (2) the SEC’s proceeding “violates its own rules of practice and their mandatory
13 deadlines” and thereby deprives Plaintiffs of due process. (Compl. ¶¶ 100–16.)
14 Plaintiffs contend that because the SEC and its ALJs lack authority to address
15 threshold constitutional challenges, the Court must exercise jurisdiction over these
16 claims.

17 After Plaintiffs filed their motion for preliminary injunction, Defendants filed
18 an unopposed *Ex Parte* Motion to Stay Proceedings During Lapse in Appropriations,
19 which was granted by the Court. Defendants thereafter filed a Notice of Restoration
20 of Appropriations, and on April 4, 2019, the Court held an informal telephonic
21 conference. The parties informed the Court of ongoing settlement negotiations and
22 requested a further stay pending settlement discussions. The parties also agreed that
23 in the absence of settlement, Defendants would file a motion to dismiss on
24 jurisdictional grounds and the Court could simultaneously address that motion along
25 with Plaintiffs’ motion for preliminary injunction. Because the case did not settle,
26 the Court addresses the parties’ motions.

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28 ² The Supreme Court in *Lucia* declined to address the validity of the ratification.
138 S. Ct. at 2055 n.6.

II.**DISCUSSION**

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3 Generally, federal district courts have “original jurisdiction of all civil actions
4 arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.
5 § 1331. However, Congress may preclude district court jurisdiction by establishing
6 an alternative statutory scheme for administrative and judicial review. *See, e.g.,*
7 *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 9 (2012); *Thunder Basin Coal Co. v. Reich*,
8 510 U.S. 200, 207 (1994). That is the case here.

9 Five circuit courts, including the Second, Fourth, Seventh, Eleventh, and D.C.
10 Circuits, have held the federal securities laws create a detailed review scheme that
11 channels all judicial review of SEC administrative proceedings to the courts of
12 appeals, thus precluding district court jurisdiction. *See Bebo v. SEC*, 799 F.3d 765,
13 768 (7th Cir. 2015) (alleging SEC’s administrative proceedings are unconstitutional
14 because ALJs are “protected from removal by multiple layers of for-cause
15 protection” and the proceedings violate due process and equal protection); *Bennett*
16 *v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016) (alleging SEC’s administrative
17 enforcement proceedings are unconstitutional because of multiple layers of
18 protection against removal); *Hill v. SEC*, 825 F.3d 1236, 1239 (11th Cir. 2016)
19 (same); *Jarkesy v. SEC*, 803 F.3d 9, 14 (D.C. Cir. 2015) (alleging SEC’s
20 administrative proceedings are unconstitutional because they violate due process and
21 equal protection); *Tilton v. SEC*, 824 F.3d 276, 278–79 (2nd Cir. 2016) (alleging
22 SEC’s administrative proceedings are unconstitutional because appointment of ALJs
23 violates Appointments Clause). These courts have declined to enjoin SEC
24 administrative proceedings in the face of constitutional challenges in district courts
25 to the authority of SEC ALJs to preside over those proceedings. Each court held
26 that the statutory review scheme in the federal securities laws precluded district court
27 jurisdiction over the plaintiffs’ claims. *See, e.g., Bebo*, 799 F.3d at 775 (stating
28 Congress did not intend for parties “who are already subject to ongoing

1 administrative enforcement proceedings to be able to stop those proceedings by
2 challenging the constitutionality of the enabling legislation or the structural authority
3 of the SEC”). The Court agrees with these decisions, which dooms Plaintiffs
4 arguments to the contrary.³

5 Plaintiffs also argue this case is distinguishable from *Bebo*, *Bennett*, *Hill*,
6 *Jarkesy* and *Tilton* because those cases “were decided without the benefit of the high
7 court’s assessment [in *Lucia*] of the significance and consequence of an
8 unconstitutionally appointed judge[.]” (Pls.’ Opp’n at 19.) This argument has been
9 raised before, and rejected by, at least two district courts. *See Cochran v. SEC*, No.
10 19-066, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019) (“[T]hat [the appellate
11 decisions] were decided before *Lucia* ... has no impact on the jurisdictional issue at
12 hand.... The [decisions] hold that [plaintiff] must make her constitutional arguments,
13 no matter how meritorious they are, before the SEC and then before the applicable
14 court of appeals.”); *Morris & Dickson Co. v. Whitaker*, 360 F. Supp. 3d 434, 444
15 n.6, 447 (W.D. La. Dec. 28, 2018) (“[T]here is no reason to conclude that any
16 strength of [plaintiff]’s Appointment Clause challenge [on the basis of *Lucia*] alters
17 the question of jurisdiction.”).

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20 ³ Plaintiffs’ principal argument in support of district court jurisdiction rests on *Free*
21 *Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).
22 However, *Free Enterprise* has been persuasively distinguished by the circuit courts
23 in *Bebo*, *Bennett*, *Hill*, *Jarkesy* and *Tilton*. For example, the petitioners in *Free*
24 *Enterprise* had no guaranteed path to judicial review of their claims, while Plaintiffs
25 here are entitled to review of any adverse SEC administrative ruling in the court of
26 appeals. In addition, unlike the petitioners in *Free Enterprise*, Plaintiffs are already
27 respondents in an ongoing administrative proceeding and need not voluntarily “incur
28 a sanction” to raise their constitutional challenges. *See* 561 U.S. at 490; *see also*
Bennett, 844 F.3d at 186; *Hill*, 825 F.3d at 1247–48; *Tilton*, 824 F.3d at 288–89;
Bebo, 799 F.3d at 774; *Jarkesy*, 803 F.3d at 19–20. The ability of an appellate court
to vacate an agency’s judgment and remand for a new hearing, “although imperfect,
suffices to vindicate the litigant’s constitutional claim.” *Tilton*, 824 F.3d at 285
(citing *Germain v. Conn. Nat’l Bank*, 930 F.2d 1038, 1040 (2d Cir. 1991)).

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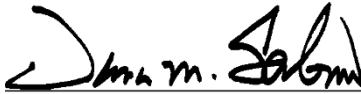
The Court finds no basis to adopt a holding contrary to the decisions of the circuit and district courts above. This Court lacks jurisdiction.

III.
CONCLUSION

For these reasons, the Court GRANTS Defendants’ Motion to Dismiss and DENIES as moot Plaintiffs’ Motion for Preliminary Injunction.

IT IS SO ORDERED.

Dated: August 21, 2019



Hon. Dana M. Sabraw
United States District Judge