

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2015

4 (Argued: September 16, 2015 Decided: June 1, 2016)

5 Docket No. 15-2103

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Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC,
8 Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC,
9 *Plaintiffs-Appellants,*

10 v.

11 Securities and Exchange Commission,
12 *Defendant-Appellee.*
13

14 Before: NEWMAN, SACK, and DRONEY, *Circuit Judges.*

15 The appellants, Lynn Tilton and several of her investment firms, are
16 respondents in an ongoing administrative proceeding initiated by the Securities
17 and Exchange Commission and conducted by an administrative law judge. They
18 brought suit in the United States District Court for the Southern District of New
19 York to enjoin the Commission's proceeding before its completion, on the theory
20 that the administrative law judge's appointment violated the Appointments
21 Clause of Article II of the United States Constitution. The district court (Ronnie
22 Abrams, *Judge*) dismissed the suit for lack of subject matter jurisdiction. The

1 appellants now ask us to overturn that dismissal and reach the merits of their
2 constitutional argument. We agree with the district court, however, that
3 Congress implicitly precluded federal jurisdiction over the appellants'
4 Appointments Clause claim while the Commission's proceeding remains
5 pending. The judgment of the district court is therefore

6 AFFIRMED.

7 Judge NEWMAN concurs in a separate opinion.

8 Judge DRONEY dissents in a separate opinion.

9 DAVID M. ZORNOW, Skadden, Arps,
10 Slate, Meagher & Flom LLP, New York, NY
11 (Christopher J. Gunther, *on the brief*), for
12 *Plaintiffs-Appellants*.

13 Susan E. Brune (*on the brief*), Brune &
14 Richard LLP, New York, NY, for *Plaintiffs-*
15 *Appellants*.

16 MARK B. STERN, Appellate Staff Attorney
17 (Mark R. Freeman and Megan Barbero,
18 Appellate Staff Attorneys, *on the brief*), for
19 Benjamin C. Mizer, Principal Deputy
20 Assistant Attorney General, and Beth S.
21 Brinkmann, Deputy Assistant Attorney
22 General, United States Department of
23 Justice, Washington, DC, for *Defendant-*
24 *Appellee*.

25 Jeannette A. Vargas (*on the brief*), for Preet
26 Bharara, United States Attorney for the

1 Southern District of New York, *for*
2 *Defendant-Appellee.*

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4 SACK, *Circuit Judge:*

5 The Securities and Exchange Commission (the "SEC" or the "Commission")
6 enforces the federal securities laws by, among other things, filing actions seeking
7 monetary penalties against alleged transgressors. Under the 2010 Dodd-Frank
8 Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L.
9 No. 111-203, 124 Stat. 1376, the SEC's enforcement actions generally may take
10 either of two forms: a civil lawsuit in federal district court, or an administrative
11 proceeding conducted by the Commission or an administrative law judge
12 ("ALJ"). Where both of those alternatives are available, the choice between them
13 belongs to the SEC without express statutory constraint.

14 In this case, the SEC chose to seek penalties against the appellants, Lynn
15 Tilton and several of her investment firms, by commencing an administrative
16 proceeding conducted by an ALJ. That proceeding is subject to two layers of
17 review: A party that loses before the ALJ may petition for *de novo* review by the
18 Commission, and a party that loses before the Commission may petition for
19 review by a federal court of appeals. Not unlike a lawsuit in district court,

1 therefore, the administrative proceeding ultimately offers the losing party a route
2 to federal appellate review.

3 The appellants contend that the SEC's administrative proceeding is
4 unconstitutional because the presiding ALJ's appointment violated Article II's
5 Appointments Clause. They have raised that claim as an affirmative defense
6 within the proceeding and will be able to argue the issue in a federal court of
7 appeals if they lose before the Commission. The appellants nevertheless sought
8 more immediate access to federal court: Two days after the administrative
9 proceeding against them began, they filed a separate lawsuit in the United States
10 District Court for the Southern District of New York asserting their
11 Appointments Clause claim and seeking an injunction against the ALJ's
12 adjudication based on its alleged unconstitutionality.

13 The district court (Ronnie Abrams, *Judge*) dismissed the suit for lack of
14 subject matter jurisdiction. Relying in part on the Supreme Court's decisions in
15 *Elgin v. Department of Treasury*, --- U.S. ---, 132 S. Ct. 2126 (2012), *Free Enterprise*
16 *Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Thunder*
17 *Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the court concluded that the
18 appellants' Appointments Clause challenge fell within the exclusive scope of the

SEC's administrative review scheme and could reach a federal court only on a petition for review of a final decision by the Commission.

We agree. By enacting the SEC's comprehensive scheme of administrative and judicial review, Congress implicitly precluded federal district court jurisdiction over the appellants' constitutional challenge.

BACKGROUND

Until 2010, the SEC's authority to impose monetary penalties through administrative proceedings was relatively limited. The agency could not, for example, penalize a non-regulated person such as Tilton through administrative channels. The Dodd-Frank Act dramatically expanded the SEC's authority to impose penalties administratively, making it essentially coextensive with the SEC's authority to seek penalties in federal court." H.R. Rep. No. 111-6 (2010). Since then, the SEC has reportedly prosecuted an increasing number of cases through administrative proceedings, with a rate of success notably higher than it has achieved in federal district courts. See Sean Eaglesham, In House, Judges Help SEC Rack Up Wins, Wall St. J., May 14, 2015, at A1.

When the Commission chooses to seek penalties administratively, it must either preside over the proceeding itself or designate a hearing officer—usually

