IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

TIMBERVEST, LLC, et al. Petitioners, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 15-1416

PETITIONERS' MOTION TO GOVERN FUTURE PROCEEDINGS

On August 8, 2017, this Court removed this matter from the September 7, 2017 oral argument calendar and held this case in abeyance pending the Supreme Court's decision in *Lucia v. SEC*. Doc. No. 1687691. On June 21, 2018, the Supreme Court issued its ruling in *Lucia*, 138 S.Ct. 2044 (2018), finding that the Securities and Exchange Commission's ("Commission") administrative law judges ("ALJs") are inferior officers who were not properly appointed pursuant to the Appointments Clause of the Constitution. *Id.* at 2055. On July 18, 2018, this Court granted Petitioners' request to extend time to file motions to govern future proceeding to September 6, 2018. Doc No. 1741283. Pursuant to that Order, Petitioners Timbervest, LLC, Walter William Anthony Boden, III, Donald David Zell, Jr., Gordon Jones, II, and Joel Barth Shapiro ("Petitioners") submit this motion to govern future proceedings, and respectfully request this Court resume proceedings and schedule oral argument in this matter to hear Petitioners' pending statute of limitations argument. It has been approximately five years since the Commission filed its action against Petitioners and approximately twelve years since the underlying conduct occurred. It is time for an Article III federal court to finally hear and decide Petitioners' long-raised statute of limitations defense.

It is Petitioners' understanding that the Commission will oppose this request.

I. INTRODUCTION

In this appeal, Petitioners have raised a threshold legal challenge that the five year statute of limitations set forth in 28 U.S.C. § 2462 bars the Commission's action in whole. Although the Supreme Court's ruling in *Lucia* resolves Petitioners' challenge to the underlying proceeding before an SEC administrative law judge, *Lucia* does not resolve Petitioners' statute of limitations argument, which remains a live issue.[1] Consistent with this Court's practice of hearing threshold issues first, this Court must hear the statute of limitations issue before even addressing the Appointments Clause issue. The reason is simple: the statute of limitations is dispositive of this matter, which would make remand improper.

The Commission's position on the application of the statute of limitations to associational bars is in direct conflict with this Court's decision in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). In its Opinion here, the Commission stated that *Johnson* was "incorrectly decided". Opinion at n.71, *In the Matter of Timbervest, et al.*, Admin Proc. File No. 3-1559 (September 17, 2015). The Commission's position as to the application of § 2462 stands against the tide of recent court pronouncements, as the Supreme Court recently decided in *Kokesh v. SEC*, 137 S.

[1] The other issues raised by Petitioners, which relate to the underlying hearing before the ALJ and findings derived therefrom, are moot because of the Supreme Court's ruling in *Lucia*. The statute of limitations argument raised by Petitioners, however, remains a live issue that is not dependent on any of the findings of the ALJ or the underlying hearing before the ALJ.

Ct. 1635 (2017) that disgorgement (a remedy that the Commission also steadfastly argued was not subject to the statute of limitations) is a penalty and thus subject to the statute of limitations. *Id.* at 1639. For the same reasons as in *Kokesh*, as well as pursuant to this Court's decision in *Johnson*, the Commission's remaining remedies here are punitive and thus subject to the statute of limitations in § 2462.

Finally, resolution of the statute of limitations issue at this stage will avoid additional years of litigation and waste of judicial and administrative resources. A remand is futile and would serve no useful purpose other than subjecting Petitioners to an additional proceeding that is barred by the statute of limitations. The Commission has already caused Petitioners to litigate this matter before an unconstitutionally-appointed ALJ. Petitioners have waited for five years to have this case heard before a federal court. Hearing this matter now will eliminate the need for future proceedings before the Commission and ultimately before this Court in a later appeal.

II. BACKGROUND

In September 2013, after spending nearly three years investigating Timbervest's valuation policies, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Petitioners alleging Petitioners violated the Investment Advisers Act of 1940 (the "Advisers Act") based on conduct unrelated to those valuation policies. *See* OIP, *In the Matter*

of Timbervest, et al., Admin Proc. File No. 3-1559 (Sept. 13, 2013). The Commission sought a cease-and-desist order, disgorgement and associational bars against Petitioners but did not seek civil penalties.[2] *Id.*

The Commission brought the enforcement action before an SEC ALJ instead of in federal court before an Article III judge. Prior to the hearing, Petitioners moved for summary disposition, arguing among other things that the claims were all time-barred by the statute of limitations set forth in § 2462, relying on the Supreme Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013), and this Court's decision in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). This Court in *Johnson* found that suspensions and bars are penal and subject to the five year statute of limitations. The SEC ALJ presiding over the matter at that time denied Petitioners' motion for summary disposition. *See* Order Denying Motion for Summary Disposition, Release No. 1101 (December 13, 2013).

After an eight-day hearing between January 21, 2014 and February 6, 2014, the SEC's ALJ ruled in favor of the Commission, finding Petitioners violated §§ 206(1) and (2) of the Investment Advisers Act, and imposing cease-and-desist orders and disgorgement. Consistent with this Court's ruling in *Johnson* and with prior SEC opinions, the SEC ALJ determined that the associational bars sought by the

[2] The Commission presumably did not seek civil penalties because, as it recognized in its later Opinion, the Commission's enforcement action was not brought within five years of the alleged violations. Opinion at 24.

Commission were precluded by § 2462's statute of limitations. The ALJ, however, found that disgorgement and a cease-and-desist order were not subject to the statute of limitations. Petitioners sought the Commission's review of the ALJ's decision, and the Commission granted that review. *See* Respondents' Petition For Review, *In the Matter of Timbervest, et al.*, Admin. Proc. File No. 3-15519 (Sept. 10, 2014).

While the Commission's review of the ALJ's Initial Decision was pending, Petitioners learned that, in violation of the Appointments Clause, the SEC did not appoint the ALJ that presided over Petitioners' hearing. 4/1/2015 Notice Filing. Petitioners raised these issues, along with other challenges to the ALJ's findings, in their appeal to the Commission. 9/10/2014 Petition for Review; Respondents Brief, Doc. No. 1610054.

The Commission issued its Opinion on September 17, 2015, upholding the ALJ's findings against Petitioners, but reversing the ALJ's finding that § 2462 applied to associational bars and imposing associational bars. Opinion at 28. In a footnote in its Opinion, the Commission repudiated its prior opinions that acknowledged the applicability of *Johnson* and made clear that "the Commission maintains that *Johnson* was incorrectly decided." *Id.* at n. 71.

Petitioners appealed to this Court on November 13, 2015. Doc. No. 1583818. On appeal, Petitioners argued that the statute of limitations barred the Commission's enforcement action and that the Commission's administrative proceedings were

unconstitutional because the Commission's ALJs were not properly appointed and because of a violation of the Separation of Powers. Additionally, the Petitioners challenged the underlying merits of the Commission's findings.

After Petitioners filed their initial brief in this appeal, Petitioners moved to adduce additional evidence relating to disgorgement. *See* Doc. No. 1610063. Specifically, Petitioners presented evidence showing that disgorgement was now moot. *Id.* The Commission filed a response requesting that the matter be remanded to the Commission to consider the additional evidence. *See* Doc. No. 1611723. On June 24, 2016, this Court remanded the record to the Commission for the limited purpose of allowing the Commission to consider the additional evidence and determine its effect on the disgorgement order. *See* Doc. No. 1621677. On August 22, 2016, the Commission issued a Recommendation Regarding Disgorgement, recommending that disgorgement be set aside. *See* Doc. No. 1631641. This Court then set a schedule for the remaining briefing in this matter. *See* Doc. No. 1635054. As of January 6, 2017, this appeal was fully briefed and, on June 12, 2017, the clerk issued an order scheduling oral argument for September 7, 2017. Doc. No. 1679272.

On August 8, 2017, this Court removed this appeal from the September 7, 2017 oral argument calendar and held the case in abeyance pending the Supreme Court's disposition of *Raymond J. Lucia Companies, Inc. v. SEC* and directed the

parties "to file motions to govern future proceedings within 30 days of the disposition by the Supreme Court." Doc. No. 1687691.

On June 21, 2018, the Supreme Court issued its decision in *Lucia* and ruled that SEC ALJs are in fact "Officers of the United States" and, therefore, subject to the Appointments Clause, rendering their appointment unconstitutional. 138 S. Ct. at 2055. Although the Supreme Court's ruling in *Lucia* invalidates the Commission's Opinion and underlying findings, there remains the threshold dispositive statute of limitations issue that if resolved in Petitioners' favor, will make clear that the Commission cannot proceed with remand for a hearing before a new ALJ.

III. ARGUMENT

A. The Statute of Limitations is a Threshold, Dispositive Issue that Remains Ripe for this Court to Hear.

This Court has consistently stated that threshold dispositive issues such as the statute of limitations here should be heard first before addressing other issues. For instance, in *Seed Company Limited v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016), this Court stated that "[w]e first consider whether Seed's claims were brought within the statute of limitations, and we then review the grant of summary judgment in the defendants' favor." Similarly, in *U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 877 (D.C. Cir. 2010), this Court stated that "[w]e first address two threshold issues—whether the statute of limitations bars any claims

against the defendants and whether the Foreign Assistance Act preempts the False Claims Act."

Additionally, this Court has not addressed other arguments when the statute of limitations applied to bar the underlying action. *See Nattah v. Bush*, 605 F.3d 1052, 1049 (D.C. Cir. 2010) (holding that "[w]e . . . need not decide whether [Plaintiff's] . . . pleadings are sufficient since his claim is barred by the statute of limitations"); *Condol v. Baltimore & O.R.*, 199 F.2d 400, 402 (D.C. Cir. 1952) (finding that because "the action against [defendant] was barred by the statute of limitations, we need not decide whether there was evidence to go to the jury on the question of wrongful discharge"). This Court observed in *Rendall–Speranza v. Nassim*, 107 F.3d 913, 916 (D.C. Cir. 1997), that the statute of limitations is a threshold question because if it is a "valid defense," then the court need not reach other defenses. *Id.* at 916. There, the Court found that further proceedings in the district court would not alter the statute of limitations defense. *Id.* at 917. Moreover, "[b]y addressing the limitation issue now, therefore, this court may be able to dispose of the entire case and thus to economize on the use of judicial resources." *Id.*

Similarly here, the statute of limitations is a threshold, dispositive issue that must be addressed before the Court should even consider Petitioners' Appointment Clause challenge. Remanding this matter back to the Commission for a new hearing before a new ALJ will not alter Petitioners' statute of limitations defense or raise

any issue of fact to be decided by the Commission in the first instance. The Commission itself stated in its Opinion that "[i]t is undisputed that this proceeding was not brought within five years of the violations." Opinion at 24. Further, the Commission also stated that the remedies at issue (at that time, a cease-and-desist, disgorgement and associational bars) were categorically equitable and not punitive. Opinion at 24. The only question is a legal one: whether the Commission was correct when it held that the remedies at issue were not subject to the statute of limitations. As set forth below, addressing the limitation issue now will lead to disposing the entire case.

B. Remand is Improper Here Because Petitioners' Statute Of Limitations Argument Is Dispositive.

As set forth in Petitioners' briefing in this appeal, § 2462 applies to bar the SEC's actions against Petitioners. While Petitioners' appeal was pending before this Court, the Supreme Court issued its ruling in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Like it did here, the Commission argued in *Kokesh* that disgorgement was an equitable remedy and, accordingly, not subject to the limitations set forth in § 2462. The Supreme Court held that "[b]ecause disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty and thus fall within the 5-year statute of limitations of § 2462." *Id.* at 1645 (*quoting Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013)).

As Petitioners have argued previously, *Kokesh* supports their argument that the SEC's action here is barred by the statute of limitations. Doc. No. 1678363. Like disgorgement, the associational bars and cease-and-desist orders imposed here go beyond remedying any harm caused and are intended to punish and label Petitioners as wrong-doers. The Commission takes the position that associational bars and a cease-and-desist order are purely "remedial" and thus not penalties subject to the limitations set forth in § 2462. Commission's Brief at 41, 46, Doc. No. 1645225. This is the exact position the Commission took—and the Supreme Court rejected—as to disgorgement in *Kokesh*.

Recent district court opinions have applied the reasoning in *Kokesh* to find that § 2462 applies to "obey the law" injunctions (which are akin to the cease-and-desist order here) and to associational bars. Specifically, in *SEC v. Gentile*, the U.S. District Court for the District of New Jersey held that an obey-the-law injunction combined with a "penny stock" bar were penalties, not equitable relief, because they were forms of punishment that would only impact the defendant. No. cv-16-1619 (JLL), 2017 WL 6371301, at *4 (D.N.J. Dec. 13, 2017). The court in that case noted that, although there were different remedies at stake in *Kokesh*, the underlying legal principle applied: "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Id.* at *3 (internal citations omitted).

Similarly, in *SEC v. Cohen*, the U.S. District Court for the Eastern District of New York applied the reasoning in *Kokesh* and found that the injunctive relief sought "would function at least partly as a penalty, and thus is subject to § 2462." 17-CV-430 (NGG) (LB), 2018 WL 3455403, at *13 (E.D.N.Y. July 12, 2018). The district court in *Cohen* acknowledged that its decision as to the applicability of § 2462 to civil injunctions "is in tension" with the U.S. Court of Appeals for the Eighth Circuit in *SEC v. Collyard*, 861 F.3d 760, 763 (8th Cir. 2017). *Cohen*, 2018 WL 3455403 at *14. In *Collyard*, the Eighth Circuit found that § 2462 did not apply to the civil injunction sought there. 861 F.3d at 764. The Eighth Circuit came to this conclusion based upon its finding that deterrence was an "incidental effect" of the injunction. *Collyard*, 861 F.3d at 765. The Supreme Court in *Kokesh*, however, rejected a similar argument as to disgorgement, holding that "[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Kokesh*, 137 S.Ct. at 1645 (internal quotation marks omitted). As the court in *Cohen* held, "[t]o the extent *Collyard* suggests that a remedy is not a § 2462 penalty if the remedy's penal effect is only incidental to its remedial effect, the court respectfully finds this suggestion at odds with *Kokesh*." *Cohen*, 2018 WL 3455403 at *14.

As with a cease-and-desist order, an associational bar is a penalty. This Court in *Johnson* held that a suspension "clearly resemble[d] punishment in the ordinary sense of the word" and were penalties subject to § 2462. 87 F.3d at 488. Even the SEC ALJ here agreed with Petitioners, but the Commission in its Opinion disagreed, repudiated its prior decisions, and stated that *Johnson* was "incorrectly decided." Opinion at 25-26 & n. 71. Given the Supreme Court's decision in *Kokesh*, there is no doubt that associational bars are punitive. As Judge Kavanaugh recently stated in a concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), "[u]nder any common understanding of the term "remedial," expulsion and suspension of a securities broker are not remedial. Rather, expulsion and suspension are punitive."[3] *Id.* at 304.

In sum, the Supreme Court's decisions in *Gabelli* and *Kokesh*, this Court's decision in *Johnson*, and the weight of the recent case law, all support Petitioners' argument that the Commission's action here is subject to the statute of limitations set forth in § 2462. Thus, a remand here would be "futile" and "would serve no useful purpose." *See e.g., George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992) ("On occasion . . . we find that a remand would be futile on

[3] This Court's decision in *Saad* did not concern the application of the statute of limitations. Rather, among other things, petitioner in *Saad* argued that the associational bar was impermissibly punitive. 873 F.3d at 304. There, this Court remanded the matter back to the Commission to address "the relevance — if any — of the Supreme Court's decision in *Kokesh v. SEC*." *Id.*

certain matters as only one disposition is possible as a matter of law. In such cases, we retain and decide the issue."); *Guardian Moving & Storage Co. v. ICC*, 952 F.2d 1428, 1433 (D.C. Cir. 1992) (declining to remand for further agency action where remand "would serve no useful purpose") (internal quotation marks omitted). The Parties have already thoroughly briefed this issue, and remand would result in no further, meaningful development of the record on this issue. The Court should decide the statute of limitations argument now, and avert additional needless proceedings in this matter.

C. *Lucia* Does Not Support The Position That A Remand In This Action Is Proper.

The Commission may point to this Court's recent order remanding the *Lucia* case back to the Commission for a new hearing before a different ALJ or the Commission. *See Lucia v. SEC*, No. 14-1345, Doc. No. 1745723 (D.C. Cir. Aug. 15, 2018). The Supreme Court in *Lucia* held "that the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." 138 S.Ct. at 2055 (citing *Ryder v. United States*, 515 U.S. 177, 182–83, 188 (1995)). The only issue, however, raised before the Supreme Court in *Lucia* was the Appointment Clause violation. As set forth above, a remand here is improper given that there remains a live threshold and dispositive issue

pending in this appeal.[4] Thus, this Court's remand in *Lucia* is not determinative as to further proceedings in this matter.

[4] Additionally, as raised by Petitioners in *Harding Advisory LLC. v. SEC*, No. 17-1070 (D.C. Cir.), a remand based on the Appointments Clause violation is not one of the courses of action permitted to this Court. *See* Petitioner's Opposition to the Securities and Exchange Commission's Motion to Remand to the Commission and Cross-Motion for a Judgment and Decree Setting Aside the Commission's Order, *Harding Advisory LLC. v. SEC*, No. 17-1070 (D.C. Cir.) Doc. No. 1741988. Rather, the relevant statutes provide that this Court may issue a "judgment and decree, affirming, modifying, or setting aside, in whole or in part, [the] order of the Commission . . . ." 15 U.S.C. § 77i(a); *see* 15 U.S.C. § 80b-13(a) ("Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part."). Unlike the Petitioners in *Harding Advisory*, however, Petitioners pending statute of limitations issue here disposes of this or any other new action the SEC could bring regarding the conduct alleged in the underlying proceeding.

IV. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court schedule oral argument in this appeal in order to hear and decide Petitioners' statute of limitations argument.

Respectfully submitted.

Dated: September 6, 2018

/s/George Kostolampros
George Kostolampros
Moxila A. Upadhyaya
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 344-4000 Telephone
(202) 344-8300 Facsimile
GKostolampros@Venable.com
MAUpadhyaya@Venable.com

-and-

/s/Stephen D. Councill
Stephen D. Councill
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 522-4700 Telephone
(404) 230-0935 Facsimile
SCouncill@rh-law.com

CERTIFICATE OF COMPLIANCE

I certify that Petitioners' Motion to Govern Future Proceedings complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,394 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that Petitioners' Motion to Govern Future Proceedings complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally spaced, 14-point Times New Roman typeface.

Dated: September 6, 2018

/s/ George Kostolampros

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on September 6, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ George Kostolampros