

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

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| _____ |) | |
| TIMBERVEST, LLC, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | 15-1416 |
| v. |) | |
| |) | |
| SECURITIES AND EXCHANGE |) | |
| COMMISSION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

**SECURITIES AND EXCHANGE COMMISSION’S RESPONSE TO PETITIONERS’
MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE**

Petitioners Timbervest, LLC, a registered investment adviser, and its principals, Walter William Anthony Boden, III, Donald David Zell, Jr., Gordon Jones, II, and Joel Barth Shapiro, have moved this Court for leave to adduce additional evidence that was not part of the record before the Commission when it issued the order under review, *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520 (Sept. 17, 2015). Section 213 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-13, which governs petitioners’ request, authorizes this Court to remand the record to the Commission to adduce additional evidence, make additional factual findings, and, if necessary, recommend “modification or setting aside of the original order,” if the Court is satisfied “that

such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission.”¹

In the order under review, the Commission found that petitioners defrauded AT&T, one of their pension fund clients,² by selling one of AT&T’s assets at a below-market rate to another Timbervest client without disclosing the conflict of interest petitioners’ role in the transaction created. *Timbervest*, 2015 WL 5472520, at *1, *4-8. The Commission determined that petitioners were unjustly enriched as a result of this violation because they inappropriately charged AT&T a disposition fee of \$403,500 on the sale of the asset. *Id.*, 2015 WL 5472520, at *17-18. The Commission ordered petitioners to disgorge that fee, together with \$181,814.05 in prejudgment interest. *Id.*, 2015 WL 5472520, at *18.

Petitioners now seek to adduce evidence purportedly demonstrating that the facts have changed in a way that warrants modifying the Commission’s order. According to petitioners, after the order under review was issued, they reimbursed AT&T for the \$403,000 fee that was the subject of the Commission’s

¹ In their motion, petitioners invoke Section 25(a)(5) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a)(5). That section is inapplicable here because the order under review was entered under the Advisers Act. Regardless, the provisions are materially identical, and Section 25 of the Exchange Act, like Section 213 of the Advisers Act, makes clear that the process for adducing additional evidence is a “remand to the agency.” *Jarkesy v. SEC*, 803 F.3d 9, 16 (D.C. Cir. 2015).

² AT&T is the successor in interest to BellSouth, which was petitioners’ client at the relevant time. *See Timbervest*, 2015 WL 5472520, at *17. We refer to the client as AT&T in this response.

disgorgement order. Petitioners claim that, in light of this alleged payment, the Commission's disgorgement order is not only "mooted" but has now been rendered a "penalty" that would be subject to the statute of limitations found in 28 U.S.C. § 2462 because the order "go[es] beyond remedying any damage caused to the client." Mot. 3-4; *see also* Br. 18-19, 62.

The Commission does not oppose petitioners' request, which, if granted, would necessitate a remand to the Commission. To the extent that petitioners suggest that the Court may supplement the record and consider the additional evidence in the first instance, the Commission opposes such a request. The statutory provision authorizing the adducement of evidence beyond what was in the record on which the decision on review was rendered directs that such additional evidence "be taken before the Commission." And as discussed in greater detail below, the required remand makes particular sense here, because the evidence petitioners seek to have adduced is not itself dispositive of their disgorgement liability. Instead, it raises a number of factual, legal, and policy issues surrounding this equitable remedy that the Commission must be given an opportunity to address in the first instance.³

³ Relatedly, because petitioners' brief raises substantive issues regarding the Commission's disgorgement order that counsel cannot respond to before the Commission has considered them in the first instance, *see SEC v. Chenery*, 332 U.S. 194 (1947), the Commission is separately filing a motion to stay the briefing

BACKGROUND

In the September 2015 order under review, the Commission found that Timbervest violated the antifraud provisions of the Investment Advisers Act, and that the Timbervest principals aided, abetted, and caused Timbervest's violations, when they sold AT&T's assets to another client at a below-market rate, to AT&T's detriment, and failed to disclose the conflict of interest their role in this transaction created. *Timbervest*, 2015 WL 5472520, at *1, *4-8. Among other remedies, the Commission ordered petitioners to disgorge \$403,500, representing a fee that Timbervest obtained on the fraudulently undisclosed transaction, together with \$181,814.05 in prejudgment interest. *Id.*, 2015 WL 5472520, at *17-18. The Commission also found that petitioners fraudulently caused AT&T to pay petitioners an undisclosed commission on the sale, but it did not order disgorgement of the commission because petitioners had reimbursed AT&T for that sum after the Commission began to investigate this matter. *Id.*, 2015 WL 5472520, at *4 n.9 & *17 n.91. The Commission stayed its sanctions pending judicial review. *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4198, 2015 WL 5472521 (Sept. 17, 2015). Petitioners filed a petition for review in this Court on November 13, 2015, and the Court's jurisdiction became exclusive on

schedule in this case pending resolution of the issues raised by petitioners' motion, including any such limited remand the Court may order.

December 31, 2015, upon the filing of the certified index of the record before the Commission. 15 U.S.C. § 80b-13(a).

Petitioners filed their opening brief on April 22, 2016, and on the same day, moved this Court for leave to adduce the following two documents that were not part of the record before the Commission:

- A January 25, 2016, letter from a senior legal counsel at AT&T to an attorney at the Commission's Atlanta Regional Office, stating that AT&T had reached a settlement in a private action it had instituted against Timbervest purportedly arising out of the conduct underlying the Commission's administrative enforcement proceedings. *See* Exhibit 1 to Petitioners' Motion for Leave to Adduce Additional Evidence.
- An April 22, 2016, declaration from one of the individual petitioners, which states that "under the settlement agreement, Petitioners agreed to pay AT&T an amount in full and complete satisfaction of any claims that AT&T has had or may have against Petitioners, including any claims for any relief including interest or losses relating to" the disposition fee that Timbervest received in connection with the transaction at issue in the Commission administrative proceeding. Exhibit 2 to Petitioners' Motion for Leave, ¶3.

Based solely on this new, extra-record evidence, petitioners argue that the "disgorgement order has been mooted." Br. 19. They further contend that this new evidence demonstrates that AT&T is no longer injured, that Timbervest is no longer unjustly enriched, and that, consequently, the Commission's disgorgement award is a "penalty" under 28 U.S.C. § 2462 and "cannot stand." Mot. at 3-4; *see also* Br. 18-19, 62. The Commission did not have an opportunity to address these arguments because, as petitioners note, the AT&T attorney "did not write the letter

until January 25, 2016, more than four months after the Commission's Opinion," and a month after this Court's jurisdiction over the matter became exclusive. Mot. at 4.

ARGUMENT

Section 213 of the Advisers Act sets forth a detailed process for addressing an application to adduce evidence that was not presented to the Commission before it issued an order that is the subject of a petition for review. It provides that, upon a proper showing, the Court may remand the record to the Commission to adduce additional evidence:

If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

15 U.S.C. § 80b-13(a). Section 213 then sets forth the additional fact-finding and legal determinations that the Commission may make upon remand:

The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order.

Id. It is thus plain that a remand to the Commission is the sole mechanism that the Advisers Act provides for adducing additional evidence, finding additional facts,

and making any legal determinations or recommended modifications to the original order.⁴

Petitioners' motion illustrates why the requirement of a remand under the statutory scheme makes sense. The Commission found that petitioners defrauded AT&T by (1) selling one of AT&T's assets at a below-market rate to another Timbervest client without disclosing Timbervest's conflict of interest raised by the sale; and (2) causing AT&T to pay Timbervest an undisclosed commission on the sale. The Commission did not order disgorgement of the undisclosed commission because petitioners reimbursed AT&T for that amount after the Commission began to investigate the underlying conduct but before the order under review was issued. *See Timbervest*, 2015 WL 5472520 at *4 n.9 & *17 n.91. But the Commission found that petitioners continued to be unjustly enriched by the inappropriate disposition fee, which they continued to retain at the time of the Commission order. *Id.*, 2015 WL 5472520, at *17-18. The Commission also ordered

⁴ This comports with general principles of administrative law. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); Pierce, *Administrative Law Treatise*, § 11.6 at 1047 (5th ed. 2010) ("[T]he general rule of administrative law [is] that a court can engage in judicial review of an agency action based only on consideration of the record amassed at the agency.").

prejudgment interest of \$181,814.05 on the disposition fee. *Id.*, 2015 WL 5472520, at *18.

In their motion for leave to adduce evidence and in their opening brief, petitioners argue that the facts and the legal analysis have changed. They seek to adduce evidence showing that *after* the Commission issued the disgorgement order they reimbursed AT&T for the disposition fee, and they contend that this shows “that AT&T has been made whole by Petitioners, including with respect to the disposition fee that the SEC ordered to be disgorged.” Mot. at 3. They further claim that the new facts have shifted the legal landscape for multiple reasons, including that, according to petitioners, the order requiring disgorgement of the disposition fee “has been mooted,” Br. 19, and that in light of the purported repayment, ordering disgorgement constitutes a “penalty” that would be subject to the statute of limitations found in 28 U.S.C. § 2462 because the order “go[es] beyond remedying any damage caused to the client,” Mot. 3-4; *see also* Br. 18-19, 62.

The record on which the Commission assessed the amount of disgorgement necessary to remedy the unjust enrichment petitioners derived from their violations did not include the evidence petitioners now seek to add to the record. Moreover, the documents that petitioners have attached to their motion do not disclose the settlement terms between AT&T and petitioners, and instead speak vaguely of a

payment in satisfaction of “any claims that [AT&T] have or may have against the Timbervest Parties.” Mot. at 2. Whether that additional evidence would support a modification of the disgorgement order depends on a number of issues that the proffered evidence does not in itself resolve—and that the Commission must be given an opportunity to address in the first instance, including:

- Whether the claimed reimbursement to AT&T covered the same misconduct that was the predicate for the Commission’s disgorgement order;
- Whether—assuming the reimbursement could be proven—petitioners (and not an insurer or other third-party) were the source of the payment, such that it could be viewed as reducing *petitioners’* unjust enrichment;
- Whether the amount of the claimed reimbursement would also cover the prejudgment interest that the Commission determined was necessary to fully deprive petitioners of their unjust enrichment;
- And whether, assuming all of the foregoing issues were resolved in petitioners’ favor, a post-judgment reimbursement payment warrants modifying the disgorgement order or is more appropriately viewed as a potential offset to the amounts collectible on the judgment.

If, after engaging in the necessary fact-finding, the Commission agrees with petitioners that the “disgorgement order has been mooted” by the additional evidence, Br. 19, that would obviate the need for the Court to consider petitioners’ challenge to that aspect of the Commission’s order. Regardless, until the Commission has evaluated petitioners’ new evidence, the Commission’s counsel cannot make any argument about it, *see Chenery*, 332 U.S. 194, and there is no Commission reasoning for this Court to review, *see Sprint Nextel Corp. v. FCC*,

508 F.3d 1129, 1132-33 (D.C. Cir. 2007). Finally, as is evidenced by petitioners' filing of their motion and the arguments highlighted in petitioners' brief, petitioners' challenge to the disgorgement award is a significant component of their petition for review, so a limited remand at this juncture is appropriate even though petitioners have also raised other challenges to the Commission's order. Indeed, this Court "commonly grant[s]" motions to "remand the administrative record to allow the agency to consider ... new evidence and make a new decision," because the Court prefers to allow the agency to consider such evidence in the first instance "rather than wasting the courts' and the parties' resources reviewing a record" that may be "incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 523-24 (D.C. Cir. 1993).

Other considerations also weigh in favor of a limited remand now, before briefing is complete. The Commission has broad authority to "accept or hear additional evidence" itself, 17 C.F.R. § 201.452; *see also BDO China Dahua CPA Co., Ltd.*, Exchange Act Release No. 72140, 2014 WL 1871078, at *3-4 (May 9, 2014) (granting respondents' motions to adduce additional evidence that, according to respondents, "'undermine[d] the sanction proposed by the [ALJ's] initial decision'"); *Calais Res. Inc.*, Exchange Act Release No. 67312, 2012 WL 2499349, at *4 n.19 (June 29, 2012) (granting motions by both respondent and the Enforcement Division to adduce additional evidence), and here—especially in

view of the narrow scope of the evidence at issue—the Commission may be able to decide any remand expeditiously, on paper submissions, without any further remand to the ALJ. Moreover, a remand would not prejudice petitioners because the Commission has stayed the sanctions it imposed pending judicial review. And the Court, of course, may provide in any remand order “such terms and conditions as to the court may seem proper,” Section 213(a), to ensure an efficient resolution of this case.

CONCLUSION

The Court should remand the record to the Commission for the limited purpose of allowing the Commission to consider the additional evidence that petitioners have identified.

Respectfully submitted,

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May 4, 2016

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 May 4, 2016. 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/ Daniel Staroselsky
Daniel Staroselsky