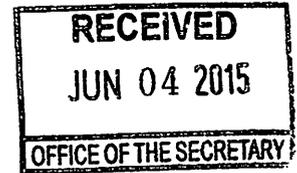


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of :
:
:
Timbervest, LLC, :
Joel Barth Shapiro, :
Walter William Anthony Boden, III, :
Donald David Zell, Jr., :
and Gordon Jones II, :
:
Respondents. :
:

NOTICE OF FILING

On May 27, 2015, the Commission ordered the Division of Enforcement (“Division”) to file and serve on Respondents by June 4, 2015, an affidavit and any supporting materials “setting forth the manner in which administrative law judge (“ALJ”) Cameron Elliot and Chief ALJ Brenda Murray were hired, including the method of selection and appointment.” The Division hereby submits the attached Affidavit, which contains the factual information the Division believes legally relevant to resolving Respondents’ Article II-based constitutional claims—namely that, consistent with his status as an agency employee and not a constitutional officer, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission.¹

¹ Respondents’ contention that ALJ Elliot’s hiring violated the Appointments Clause rests on the false premise that he is an inferior constitutional officer. As the Division has explained (Memorandum of Law in Response to the Commission’s Order Requesting Supplemental Briefing at 4-13), ALJ Elliot is an employee, not an inferior officer. To the extent the

The Division also submits the following background information regarding the selection and hiring of Commission ALJs: Pursuant to current statutes and regulations, the hiring process for Commission ALJs is overseen by the U.S. Office of Personnel Management (“OPM”), which administers the competitive examination for selecting all ALJs across the federal government. *See* 5 U.S.C. §§ 1104, 1302; 5 C.F.R. § 930.201(d)-(e). As do other agencies, the Commission hires its ALJs through this OPM process. *See* 5 U.S.C. § 3105; 5 C.F.R. § 930.201(f). When the Commission seeks to hire a new ALJ, Chief ALJ Murray obtains from OPM a list of eligible candidates; a selection is made from the top three candidates on that list. *See* 5 U.S.C. §§ 3317, 3318; 5 C.F.R. §§ 332.402, 332.404, 930.204(a). Chief ALJ Murray and an interview committee then make a preliminary selection from among the available candidates. Their recommendation is subject to final approval and processing by the Commission’s Office of Human Resources.²

It is the Division’s understanding that the above process was employed as to ALJ Elliot, who began work at the agency in 2011. As for earlier hires, it is likely the Commission employed a similar, if not identical, hiring process. But the Division acknowledges that it is possible that internal processes have shifted over time with changing laws and circumstances,

Commission disagrees with the Division on this point, the Division believes that the facts set forth in the affidavit—*i.e.*, facts relating to ALJ Elliot’s hiring—are sufficient for the Commission’s consideration of Respondents’ Appointments Clause challenge. Further, the Division notes that it was limited in its ability to collect information regarding ALJ hiring in light of *ex parte* considerations related to pending litigation.

² OPM retains oversight over each agency’s “decisions concerning the appointment, pay, and tenure” of ALJs, 5 C.F.R. § 930.201(e)(2), and establishes classification and qualification standards for ALJ positions, *id.* § 930.201(e)(3). ALJs also are paid according to a statutorily prescribed pay schedule. 5 U.S.C. § 5372; 5 C.F.R. §§ 930.205, 206; *see also* <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/factsheets/administrative-law-judge-pay-system/> (ALJ pay system).

and thus the hiring process may have been somewhat different with respect to previously hired ALJs. For instance, Chief ALJ Murray began work at the agency in 1988 and information regarding hiring practices at that time is not readily accessible.

This 4th day of June, 2015.

Respectfully submitted,

/s/ M. Graham Loomis

M. Graham Loomis

Robert K. Gordon

Anthony J. Winter

Attorneys for Division of Enforcement

Securities and Exchange Commission

950 E. Paces Ferry Road NE

Atlanta, Georgia 30326-1232

CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that the foregoing document has been served as follows:

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Securities and Exchange Commission
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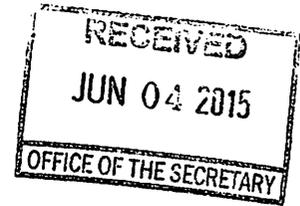
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/s/ M. Graham Loomis

M. Graham Loomis
Attorney for Division of Enforcement

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AFFIDAVIT OF JAYNE L. SEIDMAN

Jayne L. Seidman, states that:

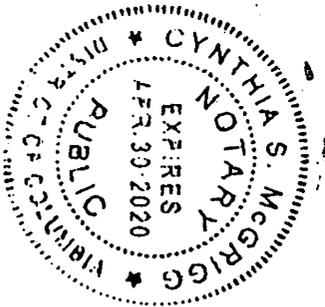
1. I am a Senior Officer at the Commission and Deputy Chief Operating Officer.
2. I make this Affidavit in response to the Commission's May 27, 2015, Order Requesting Additional Submissions and Additional Briefing.
3. In its May 27, 2015, Order, the Commission directed the Division to file and serve on Respondents by June 4, 2015, an affidavit and any supporting materials "setting forth the manner in which ALJ Cameron Elliot and Chief ALJ Brenda Murray were hired, including the method of selection and appointment."

4. Based on my knowledge of the Commission's ALJ hiring process, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4 th day of June, 2015.

Jayne L. Seidman
Jayne L. Seidman
Deputy Chief Operating Officer



District of Columbia: SS

Subscribed and sworn to before me, in my presence,
this 4th day of June, 2015

By Jayne L. Seidman

[Signature] Notary Public
My Commission Expires April 30, 2020