

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1069/November 25, 2013

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

ORDER ON SEVERAL PENDING
MOTIONS

On September 24, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings alleging that Timbervest, LLC (Timbervest), willfully violated Sections 206(1) and (2) of the Investment Advisers Act of 1940, and that the remaining Respondents willfully aided, abetted, or caused Timbervest's violations. Respondents filed a single Answer on October 11, 2013. A hearing is scheduled to begin on January 21, 2014. Pending are:

- Respondents' Motion for Summary Disposition, a forty-five-page document with six declarations, one of which attaches Exhibits A-FF, filed November 8, 2013;
- Division of Enforcement's (Division) Motion for Protective Order filed November 15, 2013, Respondents' Response thereto filed November 19, 2013, and Division's Reply filed November 21, 2013; and
- Respondents' Motion to Compel Brady Material filed November 15, 2013.

The Division makes a compelling argument that it inadvertently produced to Respondents an "Outlook data file," which contains the privileged e-mails of a former Division staff member, and it was unaware of the disclosure until it saw one of the e-mails included as part of the Motion for Summary Disposition as Exhibit BB to the Declaration of Julia B. Stone. According to the Division's Motion for Protective Order, Respondents are willing to return the privileged

material and to destroy all copies in their possession except for June 5, 2012, and June 8, 2012, attorney notes.¹ Motion for Protective Order at 3.

I have reviewed the June 5, 2012, Division attorney notes that are part of Respondents' Motion for Summary Disposition, Exhibit BB to the Declaration of Julia B. Stone. I am not persuaded by Respondents' arguments that these interview notes of a third party by a Division attorney are Brady materials, i.e., documents containing material exculpatory evidence that are required to be turned over to Respondents. See 17 C.F.R. § 201.230(b)(2). I have not seen interview notes dated June 6, 2012. If the interview notes on June 6, 2012, are similar to the June 5, 2012, notes, then my ruling stands as to them also. If Respondents believe they are different in character, I will need to see copies, and Respondents will have to explain how they are different and covered by Brady. This can be done at the beginning of the hearing, when I will require the Division to state on the record that to the best of its knowledge and belief all Brady and Jencks Act materials have been produced to Respondents. See 17 C.F.R. §§ 201.111, .230(b)(2), .231(a).

The parties may renew any arguments on these matters at the start of the hearing, if they choose to do so.

Order

This case is getting out of hand. The parties will not file any new motions until I dispose of the Motion for Summary Disposition. See 17 C.F.R. § 201.111.

I GRANT the Division's Motion for Protective Order and ORDER that Respondents' Motion for Summary Disposition and attached declarations and exhibits, and Motion to Compel Brady Material, which quotes from the June 5, 2012, attorney notes, are immediately covered by a protective order pursuant to Rule 322 of the Commission's Rules of Practice because the Division would be harmed by disclosure of these privileged and non-exculpatory materials and there is no benefit to their disclosure. See 17 C.F.R. § 201.111, .322.

I FURTHER ORDER the following measures agreed to by the parties: (1) Respondents' counsel shall make their best efforts to destroy all copies of the June 5 and 6, 2012, notes in their possession and shall make their best efforts to substitute hard copy documents in the possession of Respondents which quote from or describe specific content of the notes with redacted copies; (2) Respondents shall not make further use of the June 5 and 6, 2012, notes or their contents in this proceeding (except that this limitation shall not limit Respondents' right to reference the notes or their contents in any appeal of a determination by the Administrative Law Judge); (3) the sealed documents in this matter shall remain under seal until further order of the Administrative Law Judge or the Commission; and (4) any party may file, not under seal, a redacted version of any filing made by that party that includes the June 5 and 6, 2012, notes or any quotation of them or any description of their specific contents which redacts all such material. See Reply at 1-2. Finally, I DENY Respondents' Motion to Compel Brady Material.

¹ The June 8 date in the Motion for Protective Order at page 3 is a typo. It should be June 6, 2012, the date stated in Respondents' Response and the Division's Reply. Response at 1; Reply at 1.

The Division's Brady obligation under Rule 230(b)(2) of the Commission's Rules of Practice remains in effect.

Brenda P. Murray
Chief Administrative Law Judge