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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.

Joel Barth Shapiro's
Appeal to the Commission

JOEL BARTH SHAPIRO'S APPEAL TO THE COMMISSION

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Respondent Joel Barth Shapiro respectfully requests that the Commission reverse the Initial Decision of Administrative Law Judge Cameron Elliot rendered on August 20, 2014 (the "Decision"). The Decision found that Shapiro aided and abetted and caused violations of §§ 206(1) and 206(2) of the Investment Advisers Act without any evidentiary basis to support the findings and imposed sanctions that are impermissible under the law and facts. As addressed in Timbervest's brief, the evidence showed that Timbervest did not violate § 206, and accordingly, the causing and aiding and abetting charges should be dismissed. With respect to Shapiro in particular, the ALJ found Shapiro acted recklessly with respect to a pair of real estate transactions (the Chen Transactions) and with respect to the disclosure of fees received by co-Respondent Boden. A careful review of the evidence shows that Shapiro acted in good faith on these matters, and certainly not recklessly or negligently.

I. There is no evidence that Shapiro acted recklessly or negligently with respect to the Chen transactions.

The Decision first erred in finding that Shapiro aided and abetted and caused Timbervest's supposed violation of the Advisers Act with respect to the sale of Tenneco Core by New Forestry and the later purchase of the same property by another Timbervest fund, TVP (the "Chen Transactions"). The Decision found that the Chen Transactions violated the Advisers Act because "Timbervest undervalued the property when selling it to Chen and failed to disclose the conflict of interest the repurchase agreement presented." (Decision at 41.) But there was no evidence that Shapiro was reckless or negligent in supposedly undervaluing Tenneco Core or in failing to disclose the alleged repurchase agreement. The ALJ recognized as much, and in an effort to explain why he found Shapiro reckless, he proffered tenuous theories that Shapiro: (a) should have been aware that nearby properties were going to sell for a higher amount before they did, in fact, sell; (b) was aware that selling from one fund to another was generally prohibited; and (c) disclosed the Chen Transactions to AT&T's Frank Ranlett in a meeting. (Decision at 47.) None of these bases supports a finding of recklessness or negligence, and Shapiro therefore cannot be held liable for aiding and abetting or causing any violation relating to the Chen Transactions.

A. Shapiro was not reckless in failing to disclose the alleged repurchase agreement.

First, Shapiro could not have acted recklessly or negligently in failing to disclose the alleged repurchase agreement because he did not even know it existed. He did not participate in any negotiations or conversations of any sort with Wooddall regarding the sale or purchase of Tenneco Core. (Tr. at 1478-79.) He was not aware of any discussions between Boden and Wooddall regarding the transactions and certainly was unaware of the alleged "verbal option" to repurchase the property. (*Id.*) Instead, the only information he had were the written terms of the two transactions. Importantly, the agreement signed on September 15, 2006, for the sale of Tenneco Core to Chen Timber explicitly stated that the sale was not based on or contingent on any other agreement or understanding between the parties. (Div. Ex. 11.) Thus, Shapiro did not know, and had no reason to know, that there may have been a "verbal option" to repurchase the property. With these facts, it cannot be said that Shapiro acted recklessly or negligently in failing to disclose the alleged repurchase agreement.

B. Shapiro was not reckless in allegedly undervaluing Tenneco Core.

Nor did Shapiro act recklessly or negligently in Timbervest's alleged undervaluation of Tenneco Core. Shapiro's only involvement in the transactions was as a member of Timbervest's Investment Committee. (Tr. at 2255-57) He did not have day-to-day responsibility for reviewing purchase and sale contracts, nor was he involved in the negotiation of either the sale or purchase of the Tenneco Core property. (*Id.*) Instead, he evaluated the transactions as a member of the Investment Committee and ultimately decided that each transaction was a good deal for each client. (*Id.*)

The sale of Tenneco Core was a good one for New Forestry. In 2006, New Forestry wanted a substantial reduction in its timberland holdings. (Div. Ex. 47.) In fact, it wanted more than $220 million in sales over a three-and-a-half year period. (Div. Ex. 47; Tr. at 102-03, 476.)

For those properties that remained in its portfolio, New Forestry wanted properties that would generate cash flow of 2% per year. (Div. Ex. 47.) Tenneco Core, though, consisted of 75% pulpwood, meaning that the majority of trees were young and would not be income-producing for quite some time. (Tr. at 201, 483-84.) Selling Tenneco Core would therefore fit both of New Forestry's mandates: dispositions to reduce its timberland holdings and dispositions of property that would not generate substantial income.

The terms of the sale also were excellent for New Forestry. Based on Timbervest's own valuation policies, which every client, including New Forestry and its beneficial owners (first, BellSouth, and then AT&T), understood and approved of, the $13.45 million sales price exceeded Tenneco's value by $1.4 million, or 11.7%. (Div. Ex. 26; Tr. at 1111-12, 1627, 1605.) Moreover, an August 2005 appraisal from the James Sewall Company (the most recent appraisal available to Timbervest based on its valuation policy), valued Tenneco Core at $12.13 million. (Res. Ex. 52; Tr. at 207, 211, 1665.)The final sales price exceeded the appraised value by 11%. And importantly, Sewall appraised the bare land at $438 an acre, whereas the sale to Chen Timber provided New Forestry with $547 an acre for bare land—an increase of almost 25%. (Resp. Ex. 52; Tr. at 200-01, 207, 210.) With these facts, it is impossible to say that Shapiro was reckless or negligent, and the ALJ's finding on this point was in error.

The purchase transaction was also a good one for TVP. In 2006 and 2007, TVP was looking for properties that would fit its long-term growth investment strategy. (Tr. at 83.) TVP was willing to inject capital into property—necessary for the future success of Tenneco Core, given its younger timber profile and "big, bulky tracts." (Tr. at 233-34.) Moreover, the economic indicators available to Timbervest showed the repurchase price to be fair. First, between the sale and purchase, the value of the timber on the land increased by more than $950,000—making up nearly the entire difference in prices. (*See* Tr. at 200-01.) Moreover, the price was supported by the sale of the nearby Wolf Creek properties, which were averaging $1,461 per acre. (Div. Ex. 128.) In contrast, TVP secured the property at a price of $1,116.37 per acre. (Div. Ex. 18.) Likewise, the NCREIF timberland fund had an 8.5% increase in value, and the Plum Creek REIT saw a 15% increase in value over the same timeframe. (Div. Ex. 83; Tr. at 205, 853-54.) TVP, though, secured the property at an increase in price of less than 8%.

C. Shapiro's lack of a crystal ball does not show recklessness.

Seemingly recognizing that Shapiro was not reckless or negligent in valuing the properties or failing to disclose the alleged verbal option, the Decision finds that Shapiro was reckless because "he likely [would] have known" in August 2006 that the Wolf Creek package would sell at a high price in November 2006. (Decision at 47.) This finding is unsupported by any citation to the record and has no basis in the evidence.

Shapiro had no crystal ball. He did not know what the Wolf Creek package was going to sell for until it, in fact, sold. There is no evidence in the record that Shapiro had any involvement in the Wolf Creek auction process or listing agreement. There is no such evidence because a third-party broker handled all aspects of these transactions, and consequently, Shapiro would not have known contract prices until contracts were signed and delivered to Timbervest. And Shapiro and the other Timbervest Partners had no idea what the sales price would be until the results from the open bid on the properties, in which Timbervest had no communication with any buyer, came in on October 30, 2006.

In any event, the August 2006 report to which the Decision cites did not report the *value* of the Wolf Creek tracts (or Tenneco Core). (Div. Ex. 16.) It simply reported the estimated sale prices for a number of properties that Timbervest hoped to get for each property. (*Id.*) It did not report actual sales or prices that were, in any manner, assured. In fact, the complete sales program for the Wolf Creek properties would ultimately encompass over forty separate property sales spanning more than four years and yield average prices materially below those of the first four sales in November 2006. Because there is absolutely no basis on which to support the finding that Shapiro "likely [would] have known" what the price of the November sales would have been back in August, this finding cannot serve as a basis upon which to find recklessness.

D. The timing of the two transactions does not show recklessness.

The Decision also finds that Shapiro was reckless because the timing of the two transactions was ostensibly suspicious. (Decision at 47.) But this finding is insupportable because the timing of the two transactions was not suspicious and is not indicative of recklessness or negligence. Nearly seven months passed between when the Investment Committee would have evaluated the sale and when it would have evaluated the purchase. That is, the Investment Committee would have evaluated the sale, at the latest, in June 2006 because, on dispositions, the Investment Committee evaluates at the time that contracts are received or sent. (Tr. at 856 1422-24) It then would have evaluated the purchase in January 2007, when the due diligence period on the purchase expired, because when evaluating acquisitions, the Investment Committee looks at whether it is a good deal shortly before the due diligence period ends and earnest money goes hard. (Tr. at 1422-24) A sale in June and a purchase in January is not suspicious on its face, especially when those two transactions were evaluated pursuant to the timberland valuation policy, as every sale or acquisition is, and found to be beneficial to each client.

And although, as the Decision points out, "Shapiro was aware that selling property from one fund to another was normally prohibited" (Decision at 47), there was no evidence that Shapiro saw these transactions as anything other than separate transactions that, on their face, presented excellent opportunities for both Timbervest clients.

E. Shapiro's disclosure of the Chen Transactions shows good faith, not recklessness.

Finally, the Decision finds that Shapiro was "extremely unreasonable" because Shapiro disclosed the Chen Transactions to Ranlett, a representative of the beneficial owner of New Forestry, on May 3, 2012, but did not provide all the details concerning the two transactions. (Decision at 47.) This theory holds no water. This communication occurred five years after the events in question and cannot possibly be relevant to Shapiro's state of mind at the time of the transactions. Moreover, a disclosure of the Chen Transactions to Timbervest's client shows that

Shapiro had nothing to hide, not that he acted recklessly. The letter the ALJ cites in support of his finding from Ranlett is clear that Shapiro told him that "a property was sold out of New Forestry to a third party, but thereafter the same property was bought back by Timbervest for the benefit of another investor . . . ." (Div. Ex. 129.) It is thus clear that New Forestry understood that one of its properties was sold to a third party and that another Timbervest fund later purchased the same property. Shapiro's disclosure was accurate. It was not misleading in any way and does not support a finding of recklessness.

There was, in sum, no evidence to support the finding that Shapiro acted recklessly with respect to the Chen Transactions, and the Initial Decision's finding to the contrary should be overturned.

II. There is no evidence that Shapiro acted recklessly or negligently with respect to Boden's fees.

There was also no evidence to support the finding that Shapiro acted recklessly with respect to the disclosure of Boden's fee arrangement. The Decision found that Shapiro acted recklessly because he "fail[ed] to make a complete and accurate disclosure" of Boden's fee arrangement; because he did not put the disclosure he did make in writing; and because he displayed a "generally cavalier attitude toward" disclosure. (Decision at 53.) Each of these ascribed bases for finding scienter is inconsistent with or unsupported by the evidence.

A. Shapiro's disclosure of the fee arrangement shows good faith, not recklessness.

The ALJ determined that the most "crucial evidence of [Shapiro's] state of mind" was the "substance of his conversation with Schwartz." (Decision at 52.) This determination exemplifies the ALJ's irrationality and steadfast determination to find culpability in the face of so much exculpatory evidence. The most "crucial evidence" in the ALJ's mind was recollections of a conversation that occurred eight years before the hearing. No determination should be based on such unreliable evidence as a memory of a conversation eight years prior. Certainly, sanctions as severe as those the ALJ sought to impose in this case should not turn on such unreliable evidence.

The reality is that no one will ever know the actual substance of the conversation because no one can possibly remember the details of a conversation that took place nearly a decade ago. The ALJ should have credited Shapiro for his candor about his lack of memory regarding the conversation. Instead, the Decision accepted Schwartz's version of the disclosure (that the conversation was about a "hypothetical" person and that Schwartz said he would have to run the arrangement by legal counsel before he could consent), which was wholly unreasonable. (Decision at 50-51; Tr. at 2063-64.) Moreover, the finding is contradicted by Schwartz's own inconsistent statements.

For example, Schwartz's testimony at the evidentiary hearing was entirely inconsistent with what he originally told the Division—before he obtained counsel and before he realized that there may have been a problem with the payment of fees to Boden—in 2012. At the hearing, Schwartz testified that he did not know about Boden's fee agreement or that it was Boden, in particular, who had the fee arrangement. (Tr. at 2063-64, 2090-91.) In sharp contrast, he told the Division in 2012 that he was "informed of the arrangement and the possibility of . . . payments" to Boden. He also testified at the hearing that he was unaware that the person who held the fee agreement was Boden (Tr. at 2063-64), but in his telephone interview with the Division in 2012, he clearly "recall[ed] a discussion he had with either Zell or Shapiro about 'a broker who eventually came into the company, Bill Boden'" and that his "understanding was that [Timbervest] was considering bringing on Boden in some capacity other than that of a broker." Schwartz told the Division in his 2012 interview that he had reached an understanding with Shapiro "that Boden could finish up whatever he had started in connection with acting as a broker for New Forestry property." At the hearing, Schwartz changed his testimony to say that Shapiro and Jones had "led him to believe" that the conversation in 2005 had been about Boden, who Schwartz thought was not a partner. (Tr. at 2094.) But this change of testimony was self-serving and illogical. Schwartz knew that Boden was a partner in 2005. (Tr. at 2095.) Schwartz was the fiduciary for New Forestry's management and knew, or at least should have known, the four partners at New Forestry's investment manager. (*Id.*) There would be absolutely no reason to mislead Schwartz into thinking that Boden had not been a partner, when it was obvious to everyone, both in 2005 and in 2012, that Boden had been a Timbervest partner in 2005. Schwartz's testimonial claim that he was misled simply reflects his own desire to distance himself from the issue and is entirely inconsistent with the clear evidence that he knew Boden was a partner.

Schwartz likewise testified that the arrangement would have presented a clear conflict of interest under ERISA and that there was no way he would have consented to the agreement without counsel's advice. (Tr. at 2057, 2059-60, 2091, 2105-06, 2201-02.) But he told the Division in 2012: "I said, and BellSouth agreed, we didn't think it was appropriate to pay a brokerage fee two times. So, if he was truly acting as a broker, the same as if it was done outside, and it was not disadvantageous to Bellsouth, that would be okay." He also "said the idea was not different than many companies that use in house resources instead of third party resources and charge for them." And "that from an ERISA/fiduciary standpoint, he saw no problem with the arrangement that he discussed with Shapiro/Zell because services were to be performed by a broker."

Additionally, Schwartz has confirmed on several different occasions over the past few years that he was aware of Boden's fee arrangement. Jones heard Schwartz confirm his awareness of the fee agreement in February 2012 during a telephonic annual meeting. (Tr. at 1470-71.) Jones also recalled two phone calls with the Arizona Public Safety Personnel Retirement System ("AZSPRS") in June 2012 in which Schwartz acknowledged he was aware of Boden's fee arrangement and that the fees Boden received were essentially compensation for work done prior to becoming a partner at Timbervest. (Tr. at 1471.) Schwartz even coined the fees a "tail payment" to Boden. (Tr. at 1471.) Shapiro likewise recalled a meeting with AZPSPRS during which Schwartz described the fees as "Bill's tail payment for work he had done prior" to becoming a Timbervest partner. (Tr. at 2252-53.) Schwartz's memory of these conversations has seemingly evaporated, as has a conversation that he had in June 2012 with Timbervest's outside and in-house counsel that tracked what he told the Division and what he announced to the Partners. (Tr. at 2092-93, 2108, 2167.)

In similar circumstances, when a witness remembered some specific details but could not remember others when it would be unreasonable to do so, a witness testifying against the Division was found to be uncredible. *Steven E. Muth, et al.*, 2004 WL 2270299, at *20 (Oct. 8, 2004) (testimony was not credible when it was "littered with references about being unable to remember certain events, yet [the witness] recalled specific facts and details when it serviced his interests to do so"). Schwartz directly fits the model of the uncredible witness in *Steven E. Muth*—he recalled only self-serving details but could recall basically nothing that was against his interest. Shapiro, in contrast, made no effort to create self-serving memories. He was honest about his difficulties recalling a conversation from nearly a decade ago. There is simply no basis to use Schwartz's testimony to support a finding that Shapiro acted recklessly.

B. The lack of documentation does not show recklessness.

The ALJ attacked Shapiro for the lack of documentation of his disclosure to Schwartz, but this was after noting that "there is no general requirement that disclosures required under Sections 206(1) or 206(2) be in writing." (Decision at 53.) This finding was clearly in error. No one should be found to have acted fraudulently because they did not obtain a writing when the law does not require one.

This finding also ignores the evidence that there may have been a writing at one time, but that it has been lost due to the age of the case. Shapiro testified that it was possible that he put the entire fee agreement, and the disclosures about it, in writing or in an email; he just simply could not recall whether he had, in fact, done so. (Tr. at 2263.)

Shapiro certainly should not be faulted for lack of documentation given the age of the case. To the extent such a writing or email existed, it has been lost or destroyed through no fault of Shapiro's. (*See* Tr. at 2122-13.) The Decision tries to blame Respondents for the loss of files, when in reality, it is the Division that is to blame in failing to bring charges within the statute of limitations. (Decision at 63.)

The ALJ reasons that, because the Staff issued a subpoena to August 26, 2010 and because the document retention period for investment advisers is generally five years, the Partners were "on notice to preserve any pertinent documents dating back to no later than August 2005." (Decision at 63.) But this finding ignores that the August 26, 2010 subpoena had nothing to do with the two theories eventually charged by the Division—it came at a time when the Staff's investigation was focused solely on Timbervest's valuation methodologies—and it ignores that the subpoena itself called only for emails dating back to 2008. (Div. Ex. 110.) This subpoena, therefore, could not have possibly put Shapiro on notice that he was required to retain emails and other documents on unrelated topics past the document-retention period. Moreover, even assuming that Shapiro should have maintained documents dating back to August 2005, there is no evidence that the documents necessary to show Boden's fee arrangement and the disclosure of that fee arrangement would have been swept into the documents to be saved. Boden's fee agreement was negotiated in 2002, and Shapiro disclosed the fee agreement to Schwartz sometime in 2005. (Tr. at 1325, 1734, 1756, 1774, 1776-77.) Thus, documents from the last quarter of 2005 would likely not contain any of the pertinent material the ALJ wanted to see. Thus, there is no basis to find that Shapiro was reckless or negligent simply because of the lack of contemporaneous documentation.

C. Shapiro was honest and candid, not cavalier.

Shapiro did not display a "cavalier attitude" toward his responsibilities to disclose Boden's fee agreement. (Decision at 53.) To the contrary, he undertook to disclose it on more than one occasion. He disclosed it first to BellSouth in 2002 when the agreement was first entered into and then again in 2005, after Boden became a partner and ORG became New Forestry's fiduciary. (Tr. at 397-98, 1325, 1734, 1756, 1776-77.) It is difficult to see how multiple disclosures of the fee agreement show a "cavalier attitude" toward his fiduciary responsibilities. And, in fact, the Decision points only to Shapiro's investigative testimony to support the conclusion that he had a "cavalier attitude." (Decision at 52.) That testimony, though, does not show that Shapiro exhibited a "cavalier attitude" toward his disclosure obligations. Specifically, when asked how Schwartz responded when Shapiro disclosed Boden's fee arrangement, Shapiro could not recall exactly what Schwartz's response was but remembered that it simply was "[w]hatever." (Tr. at 1778-79.) As Shapiro explained in testimony, he understood Schwartz saw the fee arrangement as "such a non-anything" and this is why Shapiro did not have a specific recollection of his response to the disclosure. (Tr. at 1778-79.) If anyone displayed a "cavalier attitude" regarding the fee arrangement it was Schwartz, not Shapiro.

Moreover, although there is now a dispute about what exactly Shapiro told Schwartz about the fee arrangement and what exactly Schwartz said in response, the simple fact that Shapiro had a conversation with Schwartz about the fee arrangement negates any finding of bad faith or recklessness. If Shapiro had been motivated to hide the fee arrangement from New Forestry, he never would have told Schwartz about the fee arrangement. Talking about a fee arrangement, even in hypothetical terms, should only have piqued ORG's curiosity about the arrangement and caused them to ask more questions.

In sum, there is no evidence supporting a finding that Shapiro acted recklessly or negligently with respect to Boden's fees, and the Decision's findings to the contrary were in error.

III. The sanctions imposed against Shapiro are penal and barred.

Shapiro did not act with scienter or negligence either with respect to the Chen Transactions or with respect to Boden's fee arrangement. Therefore, the evidence does not support the imposition of any sanction against him, and the ALJ's decision to impose disgorgement and a cease-and-desist order against him was in error. Moreover, the sanctions imposed are wholly barred by the statute of limitations. Disgorgement is penal for the reasons discussed in Timbervest's Appeal to the Commission at 20-23.

A cease-and-desist order is also penal as applied to Shapiro. First, Shapiro faces grave harm to his financial reputation if he is ordered to cease-and-desist from supposed securities violations. Shapiro has been a businessman for decades—serving as everything from running a coffee company to the Chief Executive Officer of Timbervest. (Tr. at 1682, 1687.) His reputation as a sound, honest businessman will no doubt be forever tainted in the business community if he is ordered to cease-and-desist from violating federal securities laws. Moreover, Shapiro will be labeled a "bad actor" and prohibited from associating with any company engaging in a Rule 506 offer for five years. *See* 17 C.F.R. §§ 230.506(d)(v)(A), 230.506(d). Not only will Shapiro be prohibited from associating with Timbervest in a Rule 506 offer, but he will be prohibited from associating with *any company*, involved in *any business* that uses Rule 506 offers to raise funds. Thus, even if Shapiro decides to leave the investment advisory business altogether, he would still be severely restrained in his options for future employment. The cease-and-desist order imposed against him cannot be described as anything but a penalty in these circumstances.

IV. Conclusion

The ALJ ordered Shapiro to cease and desist from securities laws violations and to disgorge, jointly and severally with Timbervest and the other Partners, the disposition fees Timbervest earned on the sale of Tenneco Core and the Kentucky Properties. But because Shapiro did not act recklessly or negligently with respect to either the Chen Transactions or Boden's fees, no sanctions against him are appropriate.

The Decision plainly erred in finding that Shapiro acted recklessly with respect to the Chen Transactions and Boden's fees. The evidence shows that he acted in good faith. He was not involved in the Chen Transactions except as a member of the Investment Committee, and he undertook to disclose Boden's fee arrangement to New Forestry's fiduciary. The Commission should therefore reverse the Initial Decision's findings against Shapiro.

This 30th day of October, 2014.

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