UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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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.	Respondents' Petition for Review

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GORDON JONES II'S APPEAL TO THE COMMISSION

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Respondent Gordon Jones, II respectfully requests that the Commission reverse the Initial Decision of Administrative Law Judge Cameron Elliot rendered on August 20, 2014 (the "Decision"). Contrary to any reasonable interpretation of the evidentiary record, the Decision found that Jones aided and abetted and caused violations of §§206(1) and 206(2) of the Investment Advisers Act. As addressed in Timbervest's brief, the evidence showed that Timbervest did not violate Section 206, and accordingly, the causing and aiding and abetting charges should be dismissed. With respect to Jones in particular, the ALJ found Jones acted recklessly with respect to a pair of real estate transactions (the Chen transactions), and negligently with respect to the disclosure of fees received by co-Respondent Boden. A careful review of the evidence shows that Jones acted in good faith on these matters, and certainly not recklessly nor negligently.

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

The ALJ first erred in finding that Jones acted recklessly in connection with the sale of the Tenneco Core property ("Tenneco Core") by New Forestry, a Timbervest client, and the later purchase of the same property by Timbervest fund Timbervest Partners, LP ("TVP"). (Decision at 47.)The Decision's explanation for finding Jones to be reckless was that he "would definitely have known that the time lapse between the sale and repurchase was unusually small" and that he "would likely have known that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the Tenneco Noncore data." (*Id.*) The first of these two explanations is a red herring and reflects a misunderstanding of the timing from Jones's perspective, and the second reflects the ALJ's misunderstanding of the economic data.

A. <u>Jones had no reason to question the timing of the two transactions.</u>

Jones's only involvement in the Chen Transactions was as a member of Timbervest's Investment Committee. (Tr. at 1348.) He did not have day-to-day responsibility for reviewing purchase and sale contracts, nor was he involved in the negotiation of the Chen Transactions.

(Tr. at 122-23, 1478-79.) 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. (Tr. at 1348.)

The evidence showed that nearly seven months passed between the two dates when the Investment Committee would have likely evaluated the sale and the purchase of Tenneco Core. The Investment Committee would have most likely evaluated the sale by New Forestry in May or June 2006. When evaluating sales, the Investment Committee evaluated the merits before Timbervest made an offer to sell. (Tr. at 856, 1422-24.) On the other end, the Committee would not have evaluated the purchase until January 2007 during the due diligence period. (Tr. at 1424.) When evaluating acquisitions, the Investment Committee evaluated the merits of the deal shortly before the due diligence period ended. (Tr. at 1422-24) The Investment Committee evaluated the Chen Transactions separately, and to Jones's knowledge, they were negotiated separately. (Tr. at 1279.) Nothing in the record contradicts these undisputed facts, and there was no basis for the ALJ's finding that Jones should have raised more questions about the Chen Transactions, which were evaluated by him at two distinct times.

There certainly were no "obvious red flags" simply because one client purchased a property seven months after another client sold the same property. (Decision at 47.) Again, as a member of the Investment Committee, Jones evaluated the economics of each deal separately and at different times, and ultimately he determined that each client was getting good value. The timing of the two transactions was not a significant factor as the market fully supported each transaction price.

Thus, the Decision erred in finding that Jones acted recklessly with respect to the Chen Transactions.

B. <u>The Decision erroneously concluded that Timbervest's official valuation of Tenneco Core was not consistent with the Tenneco Noncore data.</u>

The second basis for finding Jones acted with scienter was that Jones "would have known that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the

Tenneco Noncore data." (Decision at 47.) This conclusion incorrectly assumes Jones knew when he reviewed the sale to Chen Timber in May or June 2006 information that was not available until November 2006. There is no documentary or testimonial evidence showing that Jones had any such knowledge, and the Division never even alleged or argued this point. The ALJ's finding is pure speculation. The ALJ also erroneously assumed that the August 2006 estimated sale price of Tenneco Core was inconsistent with the Tenneco Noncore data.

Jones first reviewed the sale of Tenneco Core by New Forestry and determined, based on the information available at that time, that this was a good sale for New Forestry. (Tr. at 1482-83.) Jones would have reviewed this sale before the initial offer, likely in May or June 2006. (Tr. at 856, 1422-24.) At that time, 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, however, 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 and dispositions of property that would not generate substantial income.

The terms of the sale presented to Jones also were excellent for New Forestry. Timbervest valued properties quarterly, based on valuation policies approved by New Forestry and its beneficial owners (BellSouth, later AT&T). (Div. Ex. 26; Tr. at 1111-12, 1627, 1605.) The $13.45 million sales price evaluated by Jones exceeded Tenneco's carrying value by $1.4 million, or 11.7%. (Tr. at 206-07.) 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. 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 was at $547 an acre for bare land—an increase of almost 25% or a $109 an acre premium for New Forestry. (Resp. Ex. 52; Tr. at 200-01, 207, 210.) With these facts, it is impossible to say that Jones was reckless or negligent in approving this sale, and the Decision's finding to this extent was in error.[1]

The next involvement Jones had with these transactions would have been January or February 2007, when the Investment Committee reviewed TVP's purchase of the property. (Tr. at 1423-24.) The data available at that time showed the purchase transaction was 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.) And all the economic indicators available to Timbervest showed the repurchase price to be a good deal for TVP. By early 2007, the value of the timber on this property had increased by more than $950,000—making up nearly the entire difference in the two prices. (*See* Tr. at 200-01.) Moreover, the price was supported by the fact that some of the nearby Wolf Creek properties were initially selling at prices averaging $1,461 per acre providing indications of a strengthening land market, at least at the smaller tract level. (Div. Ex. 128.)

Other objective data further justified the higher purchase price. The NCREIF timberland index had an 8.5% increase in value in the fourth quarter of 2006. (Div. Ex. 83; Tr. at 205.) The Plum Creek REIT saw a 15% increase in its market value over the same timeframe. (Tr. at 853-54.) TVP's purchase price, by comparison, was less than 8% higher than the price New Forestry received when it sold the property to Chen.

The ALJ faults Jones based on a misunderstanding of the evidence. The Decision states that Jones "would likely have known that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the Tenneco Noncore (Wolf Creek) data." (Decision at 47.) First and foremost, the value of the Tenneco Noncore properties was largely irrelevant to the value of the Tenneco Core because the two properties had different sizes, locations, property

[1] The attempt by the ALJ to impute knowledge to Jones regarding a November 2006 appraisal conducted by Chen's lender is completely contrary to the record. Jones never saw or had knowledge of the appraisal. In addition, the ALJ's suggestion that Jones and the other Respondents should have arbitrarily ignored the stated valuation policy approved by the client and instead used some other valuation metric for this one property in this single instance is ludicrous and would, itself, have triggered a potential violation of the Advisers Act

features, valuations, and markets of potential buyers. The Wolf Creek properties were smaller tracts, more affordable for individual buyers interested in recreational properties, and were therefore worth more on a per acre basis.

In addition, the ALJ relies on a Timbervest periodic report to New Forestry in August 2006 for his argument that the Tenneco Noncore ("Wolf Creek") property values were going higher, and that the values estimated on those Wolf Creek properties demonstrated that Timbervest's valuation of the nearby Tenneco Core property was too low. (Decision at 42.) The August 2006 report, however, did not report values based on actual sales. (Div. Ex.16.) It simply reported estimated sale prices for a number of properties that Timbervest anticipated liquidating under the client's disposition mandate. (*Id.*) The report merely reflected the estimated prices that Timbervest hoped to get for each property, not actual sales or prices that were in any manner assured. In fact, as noted in Timbervest's Appeal to the Commission, all the properties set forth in this report were ultimately actually either sold at amounts materially different from the estimated amounts set forth in the report or in several cases never sold. With respect to the Wolf Creek properties, the sales were being handled exclusively by a third party sales agent under an auction and direct sale arrangement. (Div. Ex. 128.) Information regarding the first few actual sales was not known to Timbervest and Jones until November 2006. Importantly, even at that time, the pricing from the first few sales represented only five sales from the initial auction process conducted by the third party sales agent. 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 five sales in November 2006.

The ALJ also misunderstood Timbervest's later citation to the sales of Wolf Creek properties as support for TVP's purchase of Tenneco Core at a higher price than New Forestry's sales price. The ALJ apparently mistook this point to mean the <u>prices</u> of these sales served as a basis for the <u>price</u> paid by TVP. (Decision at 42-43.) It was the <u>fact</u> that sales were occurring that Timbervest cited, not the <u>prices</u> at which those sales occurred. As noted above, the Tenneco Core properties and the Tenneco Noncore properties were very different properties with very different attributes and markets. The price of one would not reflect the price of another, no more than the price of one house would reflect the price of another house. The price of one house may be relevant in estimating the price of another house, but they will rarely be expected to be the same.

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

The Decision erred in finding that Jones acted negligently with respect to the disclosure of conflicts arising from the fees Boden received for selling real estate on behalf of New Forestry. (Decision at 54.) There was no evidence to support such a finding. In fact, the undisputed evidence showed that Jones recognized the potential conflict of interest presented by the fee arrangement and took reasonable steps to address it. (Tr. at 1324-26.) Jones began by discussing the potential conflict of interest with Timbervest's CEO, Shapiro. (Tr. at 1324-26.) Jones charged Shapiro with disclosing the arrangement to ORG, New Forestry's representative and fiduciary, because Shapiro was responsible for the client relationship and frequently spoke with ORG. (Tr. at 1325, 1327-28 1330-31, 1772, 1774, 1776.) Jones recalled Shapiro reporting back that he had discussed the arrangement with ORG's representative who was "was fine with the arrangement." (Tr. at 1325, 1337, 1352, 1469.) As the Decision recognized, Jones was "entitled to rely on Shapiro's representation . . . that he had obtained consent" for Boden's fees from ORG. (Decision at 54.) That should conclusively end the analysis of whether Jones caused or aided and abetted any theoretical violation by Timbervest. Jones' conduct was abundantly reasonable in these circumstances and all charges should be dismissed against him based on those findings alone.

Notwithstanding all of this exculpatory evidence, the Decision found that Jones acted negligently for three erroneous reasons.

First, the Decision found that Jones was negligent because he failed to consider buying Boden out of his fee agreement. (Decision at 54.) This finding is nonsensical. To buy Boden out of his fee agreement would accomplish nothing other than to shift the recipient of the fee from

Boden to Timbervest, but this would not resolve any conflict. Therefore, failing to consider buying Boden out of his fee agreement could not have been negligent.

Second, the Decision found that Jones was negligent because he supervised Timbervest's in-house counsel, who wrote a supposedly "misleading" letter to AT&T about Boden's fees. (Decision at 54.) The Decision erroneously found that this letter was misleading because "it failed to disclose Harrison's involvement and the fact that Fairfax and Westfield were shell companies." (*Id.*) Specifically, the ALJ faulted Jones because the letter did not disclose that Boden received his fees through two LLCs, Fairfax and Westfield, that were set up by Boden's attorney, Ralph Harrison, for the specific purpose of receiving the fees; nor did it disclose that Harrison was paid 10% of Boden's fees in exchange for setting up the LLCs. (Decision at 29, 54.) But these facts were completely immaterial to the matters addressed in the letter: namely that Boden had received fees in connection with transactions involving the client's properties. (Div. Ex. 130.) The facts that Boden used a friend who was a lawyer to provide legal services, that the LLCs were formed for these transactions, and that the lawyer received a contingency fee were completely immaterial to the point of the letter. Moreover, as set forth below, the details surrounding these facts were not known specifically by Timbervest or its in-house counsel until Boden waived his attorney-client privilege in November 2012.

Faulting Jones for not including additional information in the letter was also improper because there was no evidence Jones knew of or had reason to know the omitted facts. The truth is that Jones could not have disclosed the additional facts in the August 4, 2012 letter because these facts were not known to him. (Tr. at 216.) Those facts were the subject of privileged communications between Boden and his personal lawyer, protected by the attorney-client privilege, and Boden had not yet waived that privilege. In fact, Boden did not waive the attorney-client privilege until several months later—in November 2012 during the Division's investigation—when Harrison gave investigative testimony. Jones had no knowledge of Harrison's involvement and the circumstances surrounding the creation of the LLCs until Boden chose to waive his attorney-client privilege. (Tr. at 1300, 1303-05, 1335, 1342.) There is simply no basis for holding these unknown facts against Jones.

Finally, the Decision found that Jones was negligent based on the lack of extant contemporaneous documentation regarding Boden's fees. (Decision at 54.) But the relevant documents would be seven to twelve years old, and such documents, to the extent they existed, have likely been discarded or lost. (*See* Tr. at 2122-13.) The ALJ tries to blame Jones for the loss of files, when it is the Division that is at fault for failing to bring charges within the statute of limitations. This case is a prime example of the rationale behind a statute of limitations—the fact that evidence, including documents and memories, can be lost over time.

The ALJ reasons that, because the Staff issued a subpoena on 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 Jones on notice that he was required to retain emails and other documents on unrelated topics past the document-retention period.

Particularly troubling is the ALJ's uncalled for personal attack on Jones and the base name-calling and derision. To suggest Jones's lawyering failed that expected of a first year lawyer, merely due to the fact that he did not recall formally documenting a single disclosure and could not produce documentation from more than seven years later, was entirely unnecessary and reflects the ALJ's inherent bias and desperate determination to find fault where none existed. (Decision at 54.) Such conduct should not be condoned. Jones has been a lawyer for decades, has worked at reputable law firms, and has never had any prior history of alleged misconduct, either as a lawyer or in his capacity as a partner of an investment advisory firm. (Tr. at 1230-33.)

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

III. The sanctions imposed against Jones are improper and barred by the statute of limitations.

The Decision also erred in imposing disgorgement and a cease-and-desist order against Jones. Jones did not act recklessly or negligently with respect to the Chen Transactions and did not act negligently with respect to Boden's fees. There is therefore no basis to impose any sanctions against him.

Further, the sanctions imposed against him are penal and barred by the statute of limitations set forth in 28 U.S.C. § 2462. The disgorgement is penal for the reasons set forth in Timbervest's Appeal to the Commission at 20-23. And the cease-and-desist order operates as a penalty against Jones for several reasons. First, Jones is an attorney in good standing with the State Bar of Georgia. (Tr. at 1230-32.) With a cease-and-desist order imposed against him, he would face the serious risk that the Bar would sanction him and possibly revoke his legal license. Disbarment would obviously prevent Jones from being able to serve as a lawyer to any company or with any firm in the future, constraining his future employment opportunities. Likewise, if a cease-and-desist order is imposed, Jones is faced with being labeled a "bad actor" by the SEC who cannot participate in a Rule 506 offering for five years. 17 C.F.R. §§ 230.506(d)(v)(A), 230.506(d). The taint of this label will bar him from participating in a Timbervest Rule 506 offer or a Rule 506 at *any other company* with which Jones may wish to become employed in the future. Because a cease-and-desist order would severely limit his ability to work as a lawyer or at a company that raises funds via Rule 506 offers, it is penal and barred by the statute of limitations of 28 U.S.C. § 2462.

IV. Conclusion

The Decision ordered Jones 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 Jones 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 Jones acted recklessly with respect to the Chen transactions and negligently with respect to Boden's fees. The evidence shows that he acted in good faith and was not involved in any of the issues giving rise to the supposed violations. The Commission should therefore reverse the Initial Decision's findings against Jones.

This 30th day of October, 2014.

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