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.

Respondents' Motion to Strike
Excessive Pages

RESPONDENTS' MOTION TO STRIKE EXCESSIVE PAGES

Respondents Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II respectfully move the Commission to strike pages 46 through 49 of the Division of Enforcement's Brief in Support of its Petition to the Commission for failure to comply with SEC Rule of Practice 450(c). Rule 450(c) is clear that opening briefs to the Commission "shall not exceed 14,000 words . . . ." Rule 450 also requires a certificate of compliance with that word limit if the brief exceeds 30 pages in length. Rule 450(d).

The Division, though, appears to have violated the word limitation and served an inaccurate certificate that its brief was only 13,871 words. Noticing the Division's brief was ten pages longer than Timbervest's brief, which itself met the word limitation by only three words, Respondents undertook to determine the number of words—exclusive of the case caption, table of contents, table of authorities, signature blocks, exhibits, and certificates—contained in the Division's brief. After converting the Division's brief to a Microsoft Word document, the software indicated that the brief contained 15,106 words. The Division's brief therefore appears

to be more than 1,000 words over the Commission's limitation. The Respondents also undertook to determine where the Division's brief would have ended had it complied with the word limitation. Based on Microsoft Word, the 14,000th word of the Division's brief comes at the bottom of page 45.

Without the requested relief, the Respondents would be severely prejudiced. The Division wrote a brief that paints a tale of purposeful misdeeds and portrays a body of case law seemingly leaving no question that the law is in its favor. In reality, the Division used 15,106 words to distort the facts and the law, and, without the requested relief, the Respondents are and will be prejudiced because they are forced to respond to all those mischaracterizations of case law, exhibits, and testimony.

The Division repeatedly cited cases for propositions inconsistent with or contrary to the holdings of those cases. For example, the Division cites *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), in support of its argument that "because [associational] bars would be remedial, they are not precluded by Section 2462." (Div. Brief at 47.) Yet in stark contrast to the Division's representation to the Commission, the *Steadman* court found that from Steadman's perspective, "exclusion from the industry is **clearly a penalty**" and cited several cases for supporting that finding. *Steadman*, 603 F.2d at 1139 (emphasis added). The Fifth Circuit went on to state that "[w]e do not limit the Commission by indicating these possible grounds for debarment, but rather give them as examples of the type of situation that would seem to justify that ***penalty***." *Id.* at 1140 (emphasis added).

The Division's misrepresentation of *Steadman* was highly material because it purports to support the primary issue taken on appeal by the Division and *Steadman* would be the binding authority in the Eleventh Circuit where Respondents live and work.[1]

The Division likewise claims in its brief that the Fifth Circuit in *Meadows v. SEC*, 119 F.3d 1219 (5th Cir. 1997), "found that Section 2462 did not apply to an associational bar . . ." and that "in deciding whether Section 2462 applied to an associational bar, the Fifth Circuit did not consider whether the remedy was imposed in an original or follow-on proceeding." (Div. Brief at 43-44.) In fact, the *Meadows* case did not even cite to or mention the statute of limitations at any point. A quick review of the case explains why: the conduct at issue dated from 1990 to 1991, and the Commission issued its order instituting proceedings in January 1994. Meadows, 119 F.3d at 1223-24.

As another example, the Division argues that in *SEC v. Jones*, 476 F. Supp. 2d 374 (S.D.N.Y. 2007), the court "found that Section 2462 did not apply to the sanctions at issue because there was a risk of future misconduct." (Div. Brief at 43 n.14.) A closer review of that case, however, reveals that the *Jones* court explained that the severity of an injunction's "collateral consequences indicate that the requested injunction would carry with it the sting of punishment" and would be barred by the statute of limitations if the Commission failed to "go beyond the mere facts of past violations" and absent evidence of "some cognizable danger of recurrent violation." 476 F. Supp. 2d at 383–85. Indeed, the *Jones* court held that the requested civil penalties and injunction were barred by the statute of limitations because the "Commission adduced no positive proof aside from Defendants' past alleged wrongdoing to suggest 'some cognizable danger of recurrent violation.'" *Id.* at 384.

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[1] *See SEC v. Carriba Air, Inc.*, 681 F.2d 1318, n.7 (11th Cir. 1982) ("The Eleventh Circuit is bound by all Fifth Circuit cases handed down prior to the close of business on September 30, 1981 unless and until the Eleventh Circuit en banc speaks on the issue presented.").

The Division also spends substantial time in its brief making arguments based on inaccurate citations to the record. For example, the Division points to a 2006 letter as the purported reason that a 2005 deal fell through (Div. Brief at 35), but the Division's own witness testified that the deal fell through in 2005 after only one conversation about the transaction. (Tr. at 873.) The Division likewise characterizes a letter concerning a fee arrangement that Timbervest's prior manager had entered into as reflecting only a rate sheet and not an agreement (Div. Brief at 28), when, in fact, the letter itself states that there is an agreement in place: "In the event my real estate firm arranges a trade of property already owned by New Forestry LLC, you agree that I shall be compensated on the above stated commission percentages based on the value of the property traded." (Resp. Ex. 86.) The Division also claims that Shapiro testified in his investigative testimony that when he disclosed Boden's fee arrangement to Ed Schwartz, Schwartz had "no response." (Br. at 23.) But that is clearly not what Shapiro's testimony reflects. Shapiro testified, both in his investigative testimony and at the evidentiary hearing, that Schwartz's response during the conversation was that the agreement was fine and was not a big deal. (Tr. at 1785:1–23.) It was such a non-event that Shapiro cannot recall Schwartz's exact words. (*Id.*)

Respondents ask that the Commission strike the remainder of the Division's brief after the 14,000 words (pages 46 through 49) and not consider it in determining the issues presented to it. Such a remedy is appropriate given the violation of the Commission's rules, the filing of an inaccurate certificate of compliance, and the prejudice that would otherwise result to Respondents, who did comply with the Commission's rules. *See, e.g.*, *Thomas C. Gonnella*, A.P. File No. 3-15737 (Aug. 26, 2014 Order on Motion to Strike) (Grimes, A.L.J.) (striking appendix filed by Division that was an "attempt to circumvent" the page limits on post-hearing briefing).

This 2nd day of December, 2014.

Stephen D. Councill
Julia Blackburn Stone

ROGERS & HARDIN LLP
2700 International Tower, Peachtree Center
229 Peachtree Street, N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224
scouncill@rh-law.com
jstone@rh-law.com

Counsel for Respondents Timbervest, LLC, Walter William Boden III, Gordon Jones II, Joel Barth Shapiro, and Donald David Zell, Jr.

Nancy R. Grunberg
George Kostolampros

MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-496-7524
Facsimile: 202-496-7756
ngrunberg@mckennalong.com
gkostolampros@mckennalong.com

Counsel for Respondents Walter William Boden III, Gordon Jones II, Joel Barth Shapiro, and Donald David Zell, Jr.