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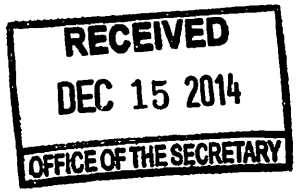
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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.

REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE UNCHARGED ALLEGATIONS, OR, IN THE ALTERNATIVE, TO INTRODUCE ADDITIONAL EVIDENCE

The Respondents file this reply memorandum to address several arguments in the Division's Opposition that mischaracterize the factual record or the law.

First, the Division argues that Respondents were on notice that their purported evidence of an attempted cross-trade of New Forestry's property (the Glawson property) using Willow Run Investments, LLC ("Willow Run") would be utilized as 404(b) evidence. The Division, however, attempts to use that evidence beyond 404(b) and in a manner that is specifically prohibited by Rule 404(b). In its Petition for Review, the Division argues that the purported attempted cross-trade to Willow Run is evidence of other misconduct by Respondents. The Division argues that this uncharged attempted cross-trade demonstrates the "Respondents' cavalier attitude toward their fiduciary duties" and shows that they pose a threat of future misconduct. (Division's Petition for Review 32, 45-46). Respondents' counsel objected to the

use of such evidence and ALJ Eliott allowed it in only for 404(b) purposes. Specifically, ALJ Eliott stated that "even though it's not charged in the OIP and is not directly relevant to any of the transactions that are charged in the OIP, evidence that pertains to preparation, plan, knowledge, motive . . . all the different considerations that are listed in Federal Rule of Evidence 404B is the kind of thing I think would be appropriate to admit." (Tr. at 32:12-19.) The Division's attempted use of this evidence, however, is inconsistent with Rule 404(b)(1), which prohibits the use of such evidence "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Federal Rule of Evidence 404(b)(1). It is one thing to allow the Division to admit evidence unrelated to the allegations in the OIP as 404(b) evidence, but the Division is not using it for that limited purpose. Instead, the Division argues that it is evidence of prior uncharged misconduct and supports the uncharged allegation that Respondents were cavalier toward their fiduciary duties and pose a future threat. Allowing the Division to use such evidence as demonstrating prior misconduct and to support a finding that they are a future threat allows the Division to prove a theory that was never alleged in the OIP and is unfair because it requires respondents to defend a "trial within a trial." *See United States v. Hill*, 322 F.3d 301, 310 (4th Cir. 2003) (upholding exclusion of 404(b) evidence that would result in a "trial within a trial").

Second, Respondents were unfairly prejudiced by the admission of evidence regarding the use of the Glawson property. The Division argues that it did not elicit testimony from Frank Ranlett, AT&T's representative, regarding the development and use of Glawson. Rather, the Division argues that Respondents elicited this testimony regarding the development of Glawson and therefore have no basis to object that it came into evidence. However, the Respondents did not in fact elicit the testimony – it was volunteered by Ranlett and then the ALJ followed up on

it. During the relevant cross-examination, Respondents' counsel asked Ranlett how he evaluated Respondents' performance on behalf of New Forestry and Ranlett responded with a long answer. That long answer included his statement that Timbervest worked the assets very hard to maintain their values and that the trust factor was very important to him. (Tr. at 1144:1-19.) Ranlett then volunteered that he heard other things, like the SEC's allegations and "you hear about hunting lodges being built." (Tr. at 1145:6-14.) ALJ Elliot then questioned Ranlett further about the hunting lodge. (Tr. at 1155:5-7.) The Division argues that Respondents continued to open the door to this evidence when another of Respondents' counsel cross-examined Ranlett further about the improvements to Glawson. However, the Division fails to mention that Respondents only inquired further because ALJ Elliot questioned Ranlett about the hunting lodge.

Additionally, the Division's use of the Respondents' letters to AT&T and Ranlett's testimony at the hearing that Respondents did not live up to their duties to transition the account to a new advisor as evidence of misrepresentations to AT&T is also improper. As to Respondents' letters to AT&T, those were drafted years after the conduct at issue. The Division never pled and never argued at the hearing or in their post-hearing brief that these letters evidence misrepresentations to AT&T. As set forth in Respondents' Petition for Review, the ALJ's finding concerning those letters is error not only because it is factually incorrect but also because Respondents were never given notice that the Division was alleging that these letters contained misrepresentations. The fact that these letters were on the Division's exhibit list did not provide notice of the allegations the Division makes for the first time in its Petition for Review. The Division's use of Ranlett's comment about the transition is similarly improper.

In its Response, the Division cites a series of cases (*Murray Securities Corp., Morris J. Reiter, and J Logan & Co.*) for the proposition that the OIP need not identify "all of the evidence

on which it intends to rely at the hearing." Response, at 3. Respondents do not disagree with this principle. The issue is that the evidence relates to unpled theories, not that it is additional unidentified evidence that supports the allegations in the OIP.

The Division also cites a series of cases (*Montford & Company, Inc., J. Stephen Stout, and Barbato*) for the proposition that the Commission may consider conduct not charged in deciding an appropriate remedy. These are the same cases that Respondents addressed and distinguished in their opening brief, and the Division made no effort to address Respondents' points. *Montford* involved a case where the respondent **admitted** to receiving additional compensation from the same source as pled in the OIP. The additional evidence did not involve different theories; it was more in the nature of additional evidence supporting the theories pled. Furthermore, the instant case involves disputed evidence, not admissions. In *Stout*, the Commission set aside an ALJ's findings of churning and did not consider them for sanctions because they were not pled. Finally, in *Barbato*, the witness tampering considered by the Commission for sentencing was apparently not disputed, and the accusation was made clear to *Barbato* at the hearing (the ALJ ordered Barbato to cease). None of these cases support the Division's contention that evidence supporting unpled theories should be considered for any purpose.

The Division also did not address the several other cases supporting the Respondents' position (*Ponce, Jaffee, Proffitt, Henry Bierce, Blake Constr. Co. Rodale Press, Inc.*).

In sum, the Division attempts to use evidence to support allegations that were never charged or argued. Permitting this practice would require the Respondents to defend trials within trials, not knowing what testimony or what piece of evidence could be used after the hearing to make some argument of misconduct. That practice is neither fair nor legally

supportable because it provides no notice to the Respondents of the conduct the Division alleges violated the law.

This 12th day of December, 2014.

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REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE EXCESSIVE PAGES

The Respondents submit this Reply in further support of their Motion to Strike Excessive Pages and in reply to the Division of Enforcement's Opposition brief. The Respondents include for the Commission's review an electronic copy of the Division's brief in support of its petition for review as Exhibit A to the Declaration of George Kostolampros. Exhibit A was created by taking the .pdf copy of the Division's brief and converting it into a .word file using a pdf converter program. Contrary to the Division's certification and its opposition brief, Exhibit A shows that the word count of the Division's brief is 15,106 words, materially in excess of the 14,000 word limit. This is not the result of word processing systems counting words in different ways, such as including or not including numbers. The Division exceeded the page count by over a thousand words. This is more than seven percent over the limit.

For the reasons set forth in Respondents' Motion to Strike, Respondents request that the Commission strike the remainder of the Division's brief after 14,000 words (pages 46 through 49) and not consider those pages in determining the issues presented to it.

This 12th day of December, 2014.

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DECLARATION OF GEORGE KOSTOLAMPROS

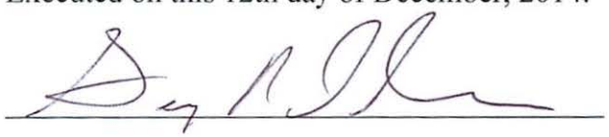
1. My name is George Kostolampros. I am over eighteen years of age and have personal knowledge of the facts set forth herein.

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

3. Attached hereto as Exhibit A is a true and correct copy of the Division of Enforcement's Brief Supporting Petition for Review in a ".word" format. Exhibit A was created by taking the .pdf copy of the Division's brief and converting it into a .word file using a pdf converter program. Exhibit A shows that the word count of the Division's brief is 15,106 words.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of December, 2014.



George Kostolampros