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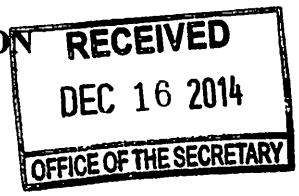
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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.

Respondents' Reply to the Division's Consolidated Response to Respondents' Appeals to the Commission

RESPONDENTS' REPLY TO THE DIVISION'S CONSOLIDATED RESPONSE TO RESPONDENTS' APPEALS TO THE COMMISSION

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I. INTRODUCTION

The Division's theories sound simple: (1) Respondents pre-arranged a roundtrip transaction (a sale of a property by one client and the repurchase of that property by another client); and (2) Respondents failed to disclose fees received by one of the individual Respondents. One problem afflicts both theories. The validity of each turns entirely on uncorroborated human memory of two conversations in 2005 and 2006, and the evidence shows these memories are unreliable.

The Division interviewed its two essential witnesses in 2012, off the record at first. In these initial interviews, these witnesses described their memories of the essential conversations at issue. Their initial statements fell short of establishing the Division's theories, but after continued questioning from the Division, their testimony evolved to conform more squarely with the theories. There should be no doubt that their recollections have zero reliability, but the Division insists on cherry-picking the statements they like and ignoring the numerous contradictions.

Rather than address these issues directly, the Division purports to dismiss this problem by creating straw man arguments. By redefining Respondents' defenses, the Division purports to easily defeat them. A closer look will show that Respondents' actual arguments are sound, rooted in the evidence and supported by the case law. The Division, in contrast, often cites no evidence or cites the Initial Decision, which is not evidence in this de novo review, and repeatedly misrepresents the holdings of cases.

This case is a travesty that should never have reached the public eye. These events dated over five years when the Division first asked questions about them and dated back over six years when it filed charges. The statute of limitations had long since run, and the Respondents have

been substantially prejudiced by the belated filing of these stale charges. They had no opportunity to preserve or to develop evidence in their defense.

All told, after the Respondents spent countless hours and funds over the last several years defending themselves and the government wasted untold resources and public funds on this case, we are left quibbling over which memories of seven to nine year old conversations are most reliable. We could forever debate testimonial inconsistencies and the legal issues for the next several years in federal appellate courts, but the reality is that no human mind can recall a seven-year-old conversation with the clarity the Division needs to prove its case. Statutes of limitation exist because such recall is simply impossible.

The punitive effect of the requested remedies is far too great to rely on such tenuous evidence. A 206(1) cease-and-desist order will label Respondents as Dodd-Frank "bad actors" and prevent them from growing their business. Such a penal effect "must be considered" in determining whether to apply a statute of limitations. *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). As the unanimous Supreme Court again reiterated in *SEC v. Gabelli*, 133 S.Ct. 1216, 1221 (2013): "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" Justice requires that this case be dismissed.

II. RESPONDENTS DISCLOSED BODEN WOULD RECEIVE COMMISSIONS FOR SELLING PROPERTIES

To support its contention that the Respondents failed to disclose Boden's fees to the client, the Division alleges:

1. Shapiro's own testimony shows inadequate disclosure;
2. Schwartz should be credited over Shapiro; and

3. unavailable documents should be held against Respondents.

Each of these arguments fails.

A. Shapiro's Testimony Does Not Prove Inadequate Disclosure

The Division contends Shapiro's testimony shows the disclosure of Boden's fee arrangement to BellSouth's fiduciary, ORG Portfolio Management ("ORG"), was "woefully inadequate." (Response at 3.) In support, the Division references two statements in Shapiro's testimony. The Division points to Shapiro's testimony that he told Schwartz that Boden "was hired to help maximize value on the core southeastern properties," and that Boden would be paid an advisory fee if there was not a second fee or commission paid by New Forestry. The Division also points out that when asked at the hearing in 2014 what Shapiro had specifically disclosed to Schwartz, Shapiro stated (honestly): "I don't really recall. I think I gave him the general overview of it. And all I can remember is coming away thinking it was fine." Tr. 1776:25-1777:2.

Contrary to the Division's characterization, this testimony only proves Shapiro did not recall the specifics of the eight-year-old conversation. Indeed, a fair reading of this testimony is that Shapiro described the arrangement, Schwartz found it acceptable, and Shapiro came away satisfied that Schwartz had no objection. Nothing about this testimony proves Shapiro left out material details.

B. Schwartz Was Not Credible

The Division's fee-disclosure allegations turn entirely on crediting Schwartz's memory of the eight-year-old conversation. As the Division observed, Respondents went to "great lengths" addressing his credibility. (Response at 4.) Yet, the Division never rehabilitated his credibility.

The Division tried to bolster Schwartz by noting the ALJ found that Schwartz and Shapiro "both agreed that Shapiro told Schwartz that Timbervest was hiring, or had hired,

someone to 'maximize value,' and that he would get a fee for previously uncompensated work so long as no other commissions were paid." (Response at 4). The Division then argues, nonsensically, that Schwartz is credible because the ALJ found that *Shapiro* "did not testify that he disclosed to Schwartz the specific terms of the agreement." (Response at 4.) Rather than bolstering Schwartz's credibility, Shapiro's actual testimony reflects a genuine forthright answer that he did not recall the specifics of the eight-year-old conversation.

Ironically, the Division impugns the Respondents for not recalling details of 2005-06 conversations, but ignores how Schwartz himself did not recall 2012 conversations. (Tr. at 2092-93.) Yet the Division wants to credit him with perfect recall for his January 2014 hearing testimony about the 2005 conversation.

The Division attacks the Respondents for not calling third parties to confirm Schwartz's inconsistent statements in 2012, arguing this raises "substantial credibility issues." (Response at 6.) No basis exists for discrediting Respondents' testimony. A large, current client of Timbervest's requested not to be required to travel from Arizona to testify in Georgia, and Timbervest simply honored his request and chose not to subpoena its client.

In a final attempt to rebut Respondents' numerous points about Schwartz's credibility, the Division argues that Respondents have pointed to their Wells Submission (admitted into the record by the Division) for evidence of Schwartz's inconsistent statements. (Response at 6.) The Division dismisses this discrepancy as "self-serving statements [] entitled to no evidentiary weight." Remarkably, it never denies Schwartz made the prior statements, (Response at 6.), presumably because, as addressed in the *Brady* discussion, Schwartz made similar inconsistent statements to the Division in 2012.

C. The Division's Remaining Arguments Do Not Bridge Pivotal Gaps in the Division's Evidence

The Division rounds out its argument that Boden's fee arrangement was not disclosed by arguing:

1. Respondents never presented testimony about unavailable exculpatory documents; and

2. No exculpatory inferences should be drawn from BellSouth's not maintaining documents.

The Respondents articulated a compelling case for the severe prejudice they suffered from the age of this case. The records remaining from 2005-06 tell an innocent story and do not evidence scienter or bad faith by Respondents. The Division argues the lack of documents is "speculation for which no foundation has been laid," and contends no one testified about "lost or destroyed files," "record-keeping practices of the company," or "about having created or even seen a document that has since become unavailable." (Response at 6.)

In reality, every relevant party confirmed it no longer has documents or knows that its records are incomplete. BellSouth confirmed it has no records. (Tr. at 2212-13.) AT&T confirmed it has no records. (Tr. at 2212-13.) ORG confirmed it had no records. (Boden, Shapiro, and Zell Dec. 2, 2012 Declarations, ¶ 55.) Finally, Timbervest confirmed it was missing documents from the relevant time period. (November 8, 2013 Declaration of Seabolt, ¶ 11 (accepted into evidence by Order dated December 13, 2013).

The Division argues BellSouth's lack of records is irrelevant and cites Zell for its contention that "Timbervest never disclosed the Boden fee arrangement to BellSouth." Zell's actual testimony was that Timbervest never *sought consent* from BellSouth for the payment of fees to a Timbervest principal. (Response at 7) (emphasis added). This disingenuous argument glosses over the material difference between seeking consent and making a disclosure.

The Division attempts to dodge the evidentiary void created by its failing to call a single BellSouth witness, listing eight reasons why it did not need a BellSouth witness to prove BellSouth did not receive disclosure of Boden's fee arrangement. The only one of these eight reasons that actually goes to whether BellSouth received disclosure is what the Division calls "affirmative testimony by Respondents about disclosure to Zell but not to any other BellSouth employee." In support, the Division cites Shapiro's testimony at Tr. 1811:11-16:

> Q: Did you ever make any attempt to make the same kinds of disclosures to BellSouth, let's say, between March of 2004 and late 2005, when you had this conversation with Schwartz?"
>
> A: I just don't recall....

There is obviously nothing affirmative about "I just don't recall."

Excluded evidence shows Schwartz may have told BellSouth.

In the end, the Division's failure to call a BellSouth witness left an evidentiary chasm. The Division identified BellSouth employees on its witness list and had every opportunity to call them, but it decided not to do so.

III. RESPONDENTS DISCLOSED ALL MATERIAL FACTS ABOUT THE CHEN TRANSACTIONS

In support the allegation Respondents failed to disclose material facts relating to the Chen transactions, the Division argues Respondents did not disclose the conflicts arising out of an "agreement to repurchase," (Response at 9) and argues for pages that the verifiable, reliable market data provides no defense to Respondents. These arguments fail.

A. No Agreement to Repurchase Existed

The Division argues Respondents failed to disclose an "agreement to repurchase the Tenneco Core Property," and their "crucial point" is that Respondents did not disclose that a purchase price on the second deal had been agreed before the first contract. (Response at 9.)

Respondents acknowledge a pre-arranged agreement for one client to purchase a property for $1 million more than another client receives for selling it would constitute a conflict of interest requiring disclosure. However, there is no evidence that happened here. Boden was clear and emphatic that he would never reach such a deal. (Tr. at 184, 207-08, 504-09.) Wooddall's testimony does not show that anyone agreed to pay a certain price. Critically, he conceded he had no agreement from anyone to buy the property from him. (Tr. at 768-69.)

Even Wooddall's testimony about a non-binding option was not an "agreement to purchase," and were it true, would not create conflict of interest. If credited, that testimony would show only that he gave Boden a non-enforceable option to repurchase the property at a higher price. Setting the exercise price of a non-binding option is not an "agreement to repurchase" because Timbervest had no obligation to repurchase and Wooddall was not obligated to sell. (Tr. At 768-69). These facts undoubtedly show there was no "agreement."

At the end of the day, New Forestry wanted to sell properties. It instructed Timbervest to liquidate 50% of a $500 million portfolio of properties. New Forestry was not interested in holding these properties to see if the value would increase in the future.

Here, the sale met New Forestry's objectives and was financially attractive. Wooddall's testimony about an alleged non-binding option, even if credited, did not create a conflict of interest and was not material information required to be disclosed.

B. Respondents' Valuation Arguments Are Based on the Most Reliable Evidence in the Case

Since Respondents received a "Wells Notice," they have consistently pointed to contemporaneous, documented evidence to establish the difference in prices between the two Chen transactions was consistent with verifiable market events. For example, Respondents pointed to these facts in its Wells submission:

- "The value of the timber on Tenneco increased $967,397 (from $6,346,104 to $7,313,501) between September 2006 and February 2007," substantially justifying the difference between the prices in the two Chen contracts.

- The volume of merchantable timber on Tenneco increased by 5%.

- "TVP AL purchased the Core Timberlands property at only a $6/acre premium (1%) for the land component when compared to the original sale to Chen Timber in 2006."

- "Due to increased overall market activity in the area and sales Timbervest had recently closed out of the Wolf Creek Package for New Forestry, this small premium in the land price was more than justified."

Div. Ex. 74 (Respondents' Wells submission)

Respondents have steadfastly made these arguments in its briefs and during the hearing. The Division's response to these arguments rests largely on a straw man argument that Respondents decided TVP should pay $1 million more for Tenneco Core because the Wolf Creek properties "appreciated" to "unexpectedly high values" between the two transactions with Chen. (Response at 13-14).

The Division knocks down this straw man by claiming the Wolf Creek pricing was known in August 2006 and that the value of Wolf Creek's land component would have decreased between August and November 2006 if the value of timber truly went up during that time period because, it alleges, Wolf Creek's value remained unchanged. (Response at 16). As support, the Division cites to Div. Ex. 16 (the August 2006 disposition report), claiming this shows Respondents "did not see a dramatic increase in value" between August 2006 and November 2006. (Response at 15). The report projects the Wolf Creek properties may sell at "expected sales" prices of $1,424 per acre (*Id.*) The Division compares that metric to the actual sales prices of five Wolf Creek properties that sold in November 2006 at an average of $1,461 per acre, asserting these "sold for exactly what Timbervest predicted in August 2006." (Id.)

The Division ignores how the August 2006 report showed that New Forestry's valuation model valued the Wolf Creek properties, using independent third party inputs, at only $1,058 per acre at that time. (Div. Ex. 16.) It also ignores that the $1,424 per acre expected sales price was nothing more than a hoped-for target price set $360 above then-current valuations. (Id.) The Division further ignores that thirteen other properties in the report also provide hoped-for prices that did not affect valuations. The Division ignores how receiving executed contracts in November 2006 at prices even higher than this hoped-for target would have been positive news. Unlike securities markets, real estate values are never known until an able and willing purchaser signs a contract. In this case, this positive, new information was unknown to Respondents until November.

The Division asserts that the $1,461 per acre prices that became known in November were "exactly what Timbervest had predicted." It ignores that this was $37 per acre higher than projected, which applied to the entire 12,988 acre tract yields a $480,556 increase in value – half the difference between the two Chen Timber prices.

Most importantly, Respondents have repeatedly noted that the verifiable market data shows that the value of this property's timber increased by $967,397, reflecting nearly all of the difference between the two Chen Timber prices. (Div. Ex. 74.) Respondents explained that the Wolf Creek sales were relevant because they "more than justified" the small $6 per acre premium TVP paid for the bare land (i.e., without the timber).

The Division ignores this pricing data because these undisputed facts show Timbervest negotiated two very good deals for its clients.

Would the SEC find fraud if an investment adviser sold a client's IBM stock for $80 on a day when IBM was trading around $72 per share? Of course not. Would the SEC find fraud if

that same investment adviser months later bought IBM stock for another client for $87 on a day when IBM was trading around $91? Of course not. That investment adviser would be highly lauded.

And yet, those are essentially the undisputed, documented facts of this case. Timbervest sold Tenneco Core for New Forestry at 11% over the value of that property based on third party inputs. (Resp. Ex. 52; Div. Ex. 11.) Months later, Timbervest caused TVP to acquire the property for only 7.4% more when market data implied an overall increase of 14.8%. These undisputed, documented facts show two separate transactions benefiting each client.

The Division argues *SEC v. Capital Gains* rebuts an argument that good faith can cure a failure to disclose a conflict of interest, but the Respondents never argued this. This data corroborates Boden's testimony that each transaction was independent, and it rebuts the Division's argument that the other Respondents ignored red flags.

IV. FADED MEMORIES INFECT ALL THE DIVISION'S ALLEGATIONS

The Division claims Respondents point to the problem of faded memories as a "backdoor effort to assert the defense of laches." (Response at 19). But faded memories go to the heart of the Division's theories. The Division complains about Respondents' lack of memories, but the Division chose to pursue a case hinging on the particulars of seven-year-old conversations. No human can reliably recall details of seven-year-old conversations.[1] Astonishingly, the Division implies that Respondents' honest testimony that they could not recall seven-year-old conversations was some form of "collusion."

The uncontested documentary evidence tells a compelling innocent story of two transactions, negotiated by Timbervest in different market conditions, each substantially

[1] Joshua Foer, "Kaavya Syndrome: The accused Harvard plagiarist doesn't have a photographic memory. No one does.", available at http://www.slate.com/articles/health_and_science/science/2006/04/kaavya_syndrome.single.html.

benefitting its two clients. The Division attempts to fill the gaps in documentary evidence with speculation and the unreliable testimony of its two key witnesses: Schwartz and Wooddall. The Division argues that its witnesses were "unbiased" and "not afflicted with wholesale memory losses about distinctly memorable topics."

But Schwartz is obviously biased given his position as a QPAM fiduciary. His bias manifested itself as his testimony evolved from exculpating Respondents to self-serving denials. The Division ignores the exculpatory statements he made when they first interviewed him (before he recognized that he potentially had exposure). Such late-developed, self-serving testimony should be given no weight at all. *See In the Matter of Steven E. Muth, et al.*, A.P. File No. 3-11346, 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").

The Division's notes show that when Schwartz was first asked about these issues on June 5, 2012, he had a very different recollection:

- "Schwartz said that he recalls a discussion he had with either Zell or Shapiro about 'a broker who eventually came into the company, Bill Boden.'"
- "Schwartz said, '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.'"
- "Schwartz said that the idea was not different than many companies that use in house resources instead of third party resources and charge for them."

Exhibit BB to Respondents' Motion for Summary Disposition.

The Division interviewed Schwartz again the next day, and he recalled many additional statements inconsistent with his trial testimony, including:

- the conversation he had with Shapiro or Zell was about "a broker who eventually came into the company, Bill Boden."

- Boden's arrangement "was not different than many companies that use in house resources instead of third party resources and charge for them."

- "at a certain point, he became aware that Boden was an employee of Timbervest, but he was not sure whether he learned this before or after ORG's contract with New Forestry had terminated."

- "that the understanding he reached with Shapiro/Zell was that Boden could finish up whatever he had started in connection with acting as a broker for New Forestry's property."

- "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."

Exhibit K to Division's Response to Respondents' Motion to Compel Brady Material.

The evolution of Schwartz's testimony shows it is particularly unreliable. His testimony in subsequent years (2013 and 2014) transformed into the most self-serving testimony imaginable. He suddenly with crystal clarity recalled telling Shapiro in 2005 he should seek counsel to confirm there were no ERISA problems with the arrangement. Such late-developed, self-serving testimony should be given no weight at all. *See In re Steven E. Muth.*, 2004 WL 2270299, at *20.

The Division also asserts that Wooddall is credible, altogether ignoring the inconsistencies in his memory:

- On or shortly before February 17, 2012, Wooddall's counsel talked to the Division and relayed Wooddall's recollection as follows:

    - Wooddall recalled that Boden called him in 2006 to ask whether he was interested in buying 13,000 acres, and at the same time, Boden made an oral offer to repurchase and "guaranteed they would buy it back at a 13% guaranteed profit."

    - Wooddall asked Boden to put it in writing, but Boden did not do it. He did not refuse, but it did not happen.

    - (Div. Ex. 74, Wells submission)

- When the Division interviewed Wooddall (off the record) a couple months later, around April 2012, Wooddall told the Division that "from the beginning there was an understanding that Timbervest wanted to buy it back," but he could not recall any specific price or percentage return. (interview notes never produced)

- Two months later, Wooddall testified that he and Boden agreed to a second purchase price before the first closing (Exhibit A to November 8, 2013 Declaration of Julia B. Stone, testimony of Charles Lee Wooddall on June 27, 2012 at 16-17.)

Wooddall's recollections of 2006 conversations with Boden should be given no weight. Neither Wooddall nor anyone else could recall a seven-year-old conversation, and his ever-changing testimony reflects how memories are unreliable and susceptible to changing based on repeated questioning about a topic.

Finally, the Division points to Barag. The Division completely ignores that Barag specifically testified that he had no conversation with the Respondents about commissions, rather his "advice was to be mindful to take care of their client, BellSouth." (Tr. at 2012-13.) He testified clearly there was "[n]ever" a discussion about commissions. (*Id.*)

Barag admittedly had "very little to do with" the New Forestry account, which he viewed as "almost entirely run and managed by David Zell." (Tr. at 1924.) Barag's memory, as others, was humanly unreliable. He was unable to correctly account for the most basic facts regarding his tenure at Timbervest. For example, Barag testified that Timbervest had a third, small Missouri account in 2003. (Tr. at 1979-80.) No such account ever existed. (Tr. at 2234-35.) He testified that New Forestry did not want to sell properties during his tenure at Timbervest, yet the evidence shows the account was under a substantial disposition mandate. (Tr. at 1930-31, 1697, 1739-40.) He testified that New Forestry did not make any acquisitions during his tenure at Timbervest, but the record shows otherwise. (Tr. at 1969-70; Resp. Ex. 140.) Barag's memory is simply not reliable.

V. RESPONDENTS DID NOT ACT WITH SCIENTER

The Division cannot show Respondents acted with scienter. The Division rehashes the arguments addressed thoroughly above and in the individual Respondents' briefs.

VI. THE ALJ'S SANCTIONS WERE IMPROPER

C. Cease-and-Desist Orders Are Punitive

In addressing Respondent's position that a cease-and-desist order would be punitive, the Division dismisses their well-reasoned explanations by claiming they reflect "subjective" rather than "objective" factors, and that only "objective" factors should be considered. (Response at 26.) The test may be an objective one, but the Division misconstrues this principle. The Division cites *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996), as holding a sanction's effect on a respondent should not be considered, and claims *Johnson* held that "to conclude otherwise would convert all remedies, including disgorgement, into a form of punishment." (Response at 26.) But what the Division does not reveal is that on the page it cites, *Johnson* contradicts the Division's argument:

> Yet, just as obviously, the degree and extent of the consequences to the subject of the sanction **must be considered as a relevant factor** in determining whether the sanction is a penalty.

87 F.3d at 488. (emphasis added).

Moreover, *Johnson* is not an isolated holding in Respondents' favor. In *SEC v. Jones*, 476 F.Supp.2d 374 (S.D.N.Y. 2007), the court denied the SEC's request for an injunction because it would "stigmatize" defendants in their community and "significantly impair their ability to pursue a career," and the "severity of these collateral consequences indicate that the requested injunction would carry with it the sting of punishment." *Id.* at 384.

The order sought by the Division would carry severe consequences to the Respondents. The Dodd-Frank Act's bad actor provisions now prohibit anyone ordered to cease and desist

violations of Advisers Act Section 206(1) from participating in Rule 506 offerings exempt. These collateral consequences of the requested relief are extreme. Rule 506 is the primary registration exemption used by fund managers, such as Timbervest, to raise money for the private funds they manage.[2] *See* Reply Brief of Gordon Jones at 18, n.29. The requested order would penalize Timbervest by preventing it from sponsoring future funds. Dodd-Frank would also penalize Respondents by publicly vilifying them as "bad actors."

The cases the Division cites as holding cease-and-desist orders are per se remedial all pre-date the effective date of the bad boy provisions in Rule 506(d) (September 13, 2013), and therefore they could not have addressed this penal effect. The collateral consequences of a cease-and-desist order are now at least as severe as associational bars, if not more severe.

Finally, the Division claims the record supports a finding that a cease-and-desist order would be remedial because Respondents pose a risk of future harm, but the Division cites no evidence for this point. The Division relies solely on the Initial Decision, and as explained in great detail in Respondents' Opposition to the Division's Appeal, the Initial Decision failed entirely in identifying any evidence supporting a risk of future harm. (Resp. Opp. at 4-10.)

D. The ALJ's Disgorgement Analysis Was Incorrect

As addressed in Respondents' Appeal, the ALJ's proposed disgorgement was improper because it did not reflect amounts causally related to alleged improper conduct. The Division's only response is that the "disposition fees were obtained in this instance by engaging in transactions fraught with undisclosed conflicts of interest, conflicts which incentivized the

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[2] U.S. Securities and Exchange Commission, Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012, July, 2013. Capital raised through Regulation D offerings was over $900 billion in 2012. Regulation D offerings occur with far greater frequency than any other offering method permitted by the SEC. No other offering method was used even a tenth as much from 2009-2012. Rule 506 accounts for 99% of amounts sold through Regulation D. From 1999-2012 there were more than 40,000 Rule 506 issuances by non-financial issuers with a median offer size of less than $2 million (and 50% less than $1 million). Regulation D and the Rule 506 exemption is the primary offering tool for smaller entities.

Respondents to sell the properties at any price simply to collect Boden's brokerage commissions." (Response at 27.) The Division ignores that the sales resulted from the client's mandate to liquidate 50% of a $500 million portfolio.

Furthermore, while the Division asserts that Respondents were incentivized "to sell the properties at any price," the undisputed evidence shows Timbervest obtained a substantial premium above the price at which it was authorized to liquidate the property. (*Id.*) New Forestry instructed Timbervest to sell properties at no less than 90% of the value set by the valuation policy. (Div. Ex. 47.) This policy authorized Timbervest to sell Tenneco Core for as little as $11,250,000 (90% of $13,450,000). Timbervest sold the property for $14,500,000, a premium of $2,250,000 over the minimum price it had been authorized to accept. (Tr. at 770-71, 815.) While the Division contends that Timbervest had an "incentive" to sell for very little money, the undisputed documented evidence shows Timbervest followed its client's instruction to sell the property and in doing so obtained a very good price. There is no credible argument that any part of the contractual disposition fee should be disgorged.

VII. RESPONDENTS' *BRADY* ARGUMENT IS COMPELLING[3]

The Division mischaracterizes Respondents' *Brady* argument by suggesting Respondents complain they did not know what Schwartz said in his June 2012 interviews with the Staff and therefore could not thoroughly impeach him. (Br. at 31.) Respondents' true argument is that the Division's notes reflect exculpatory statements made by the Division's key witness that are inconsistent with his other statements, including his testimony at the hearing. (Resp. Br. at 26-29.) If the Division's June 2012 emails had been admitted, Respondents would have confronted

[3] The Division's opposition focuses only on Respondents' arguments that Respondents' *Brady* rights were violated when the ALJ refused to order the production of the Division's June 2012 emails reflecting statements made during the Division's two telephone interviews of Schwartz. The Division simply ignores Respondents' argument that the Division failed to produce any *Brady* material at all, which violated Respondents' right to a fair hearing, and ignores the Respondents' arguments concerning the Division's notes of its interview with another key witness, Wooddall. The Respondents rest on their opening brief as to those issues.

Schwartz with those emails during cross-examination. To the extent he disputed the information, Respondents would have called the Division's attorneys who drafted those emails. Most importantly, this testimony should have been admitted into the record, not only for the ALJ to rely upon, but for meaningful appellate review of a full record.

First, Schwartz's statements to the Division in June 2012 were substantially different from the statements Schwartz made to Respondents. The Division claims that the information contained in its notes was available to Respondents because, it alleges, Schwartz told Respondents substantially the same thing. (Div. Br. at 30.) That is false. On the key issue the ALJ identified—whether Shapiro told Schwartz that the fee arrangement concerned Boden—Timbervest's Wells submission shows that in a discussion with Respondents' counsel in 2012 Schwartz said that "he did not recall whether he knew it was Bill Boden at the time of being told about the arrangement." (Div. Ex. 74 at 7.) But the Division's June 5, 2012 email reflects that "Schwartz said that he recalls a discussion he had with either Zell or Shapiro about 'a broker who eventually came into the company, ***Bill Boden***.'" The email further reflects that "Schwartz said that Shapiro or Zell told him that ***Boden*** was in transition, and that Shapiro and Zell were thinking of bringing him on."[4] The Division's June 6, 2012 email confirms "Schwartz's understanding was that [Timbervest] was considering bringing on ***Boden*** in some capacity other than that of a broker." Further, that "Schwartz said that the understanding he reached with Shapiro/Zell was that **Boden** could finish up whatever he had started in connection with acting as a broker for New Forestry property." What Schwartz told the Division in June 2012 was

[4] Schwartz admitted he was confused when he originally spoke with the SEC in June 2012 about Boden's status within Timbervest. In his interview with the Division on June 6, 2012, Schwartz stated that he only became aware of Boden as a partner at Timbervest after the ORG-BellSouth contract had terminated. However, Schwartz later testified (in the investigation) that he forgot Boden was a partner at Timbervest and testified at the hearing that he had only known Boden as a partner of Timbervest. Schwartz's failure to recollect that Boden was a partner of Timbervest undermines Schwartz's recollection and his credibility.

substantially different from what he told Respondents. At the hearing, Schwartz changed his story again, this time unequivocally testifying that he was "unaware" that the agreement concerned Boden. (Tr. at 2063:9.)

Additionally, Timbervest's Wells Submission shows that Schwartz told Respondents' counsel "he did not recall telling BellSouth about the arrangement, but thought it was possible." (Div. Ex. 74 at 7.) The Division's June 5, 2012 email, however, shows Schwartz told the Division that "I said, ***and BellSouth agreed***, we didn't think it was appropriate to pay a brokerage fee two times." When asked whether he conveyed the substance of the conversation with Shapiro to BellSouth, Schwartz changed his story, claiming "he did not remember whether he told BellSouth." (*Id.*) Schwartz later in that same interview contradicted his earlier statement by stating that "had he been told that Boden was a partner, he would have vetted the situation with BellSouth." (*Id.*) But at the hearing Schwartz testified that when interviewed by the Division in 2012 he mistakenly had forgotten that he knew in 2005 that Boden was a partner in 2005. (Tr. at 2094:21-24.) Thus, at the time of the discussion in 2005 with Shapiro he knew that Boden was a partner and by his own account, knowing that Boden was a partner, "he would have vetted the situation with BellSouth." At the hearing Schwartz changed his story again, testifying unequivocally that "I did not tell BellSouth" because it was a "hypothetical question" and not a formal request. (Tr. at 2231:2, 2061:4-9.) In sum, Schwartz's statements reflected in the Division's June 2012 emails are substantially different from those he made to the Respondents and different than his testimony at the hearing.

Second, Schwartz's June 2012 statements are prior inconsistent statements and on that basis alone qualify as *Brady* material. In its opposition, the Division for the first time concedes that Schwartz's June 2012 statements were different from his later statements. (Response at 31.)

Specifically, the Division states that during his January 2013 investigative testimony Schwartz explained that "he felt he had answered incorrectly with regard to certain questions the Division asked him during the June 2012 interviews" and "why his current answers were different." (Response 31.) Schwartz's testimony and the Division's concession should be the end of the *Brady* discussion because prior inconsistent statements in and of themselves are *Brady* material. *See United States v. Johnson*, 519 F.3d 478, 488 (D.D.C. 2008) (stating that to the extent witnesses statements are exculpatory or impeaching, they constitute *Brady*). The Division, however, ignores Respondents' arguments that the June 2012 notes reflect prior inconsistent statements that impeach Schwartz's credibility and ignore Respondents' supporting citation to case law.

Third, the Division cites cases for the proposition that *Brady* does not require production of information already known to the defendant. (Response at 30.) One case the Division cites does not even concern a witness statement. *See United States v. Aguirre*, 155 Fed. Appx. 145, 151 (5th Cir. 2005) (defendant alleged the government failed to disclose exculpatory evidence of a bank audit). The other cases the Division cites support Respondents' *Brady* argument. In *Perez v. Smith*, 791 F.Supp.2d 291 (E.D.N.Y. 2011), the defendant argued that a report containing exculpatory statements by a potential witness was *Brady* material. *Id.* at 316. The court stated that "[a] prosecutor . . . need not package a witness's statement for delivery to a defendant who is 'on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish.'" *Id.* at 317. But Respondents could not call Schwartz as a witness to recount the exculpatory statement. Rather, this case is just the opposite—the witness denies ever making the statement.

A writing by government attorneys evidencing exculpatory and prior inconsistent statements made by the government's key witness is *Brady* material. *See In re Sealed Case No. 99-3096*, 185 F.3d 887, 896-97 (D.C. Cir. 1999) (information obtained from witness who provided inconsistent testimony "cannot substitute for information provided by the government itself—particularly when the defense was seeking information from a more trustworthy source in order to corroborate (or, as become necessary, impeach) that individual.").

Finally, the Division cites *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988), for the proposition that "merely cumulative" evidence is immaterial. But *Strifler* found that a *Brady* violation occurred when the government failed to turn over evidence bearing on the credibility of a significant government witness. *Id.* at 1202. "[D]enying to the defense information bearing on [witness] credibility was not harmless." *Id.*

The Division's argument that Timbervest's Wells submission and other correspondences show Respondents already possessed the information contained in the June 2012 emails is factually incorrect, and even if it were correct, it is irrelevant. The Division argues that " self-serving statements are entitled to no evidentiary weight." (Div. Br. at 6.) The Division's own emails reflecting Schwartz's exculpatory and prior inconsistent statements, however, are evidence of the fact that Schwartz knew the fee arrangement concerned Boden and that he and BellSouth approved of the arrangement. Furthermore, these prior inconsistent statements show he lacked credibility.

The Division goes on to argue that two ALJs considered and rejected Respondents *Brady* argument and that ALJ Eliott, upon first considering Respondents' *Brady* motion, found the notes to be inculpatory. (Response at 32.) The Division quotes ALJ Eliott's statement that he did not see a problem with Schwartz's credibility. (Response at 32.) The fact that ALJ Eliott could

view the notes as inculpatory before the hearing even began further supports Respondents' argument of bias. Furthermore, it is astonishing ALJ Eliott did not see any problem with Schwartz's credibility given Schwartz's ever-changing account and that he faced the same exposure as Respondents did. Nevertheless, regardless of how ALJ Eliott viewed Schwartz's credibility, the statements that Schwartz made, as reflected in the June 2012 emails, should have been produced and admitted as evidence at the hearing. Even ALJ Eliott stated, in response to Respondents' argument that the June 2012 emails contain *Brady* material, "I mean, I suppose reasonable minds could differ on that . . . ." Tr. at 2229:4. ALJ Eliott went on to state that he did not see a problem with Schwartz's credibility, but the June 2012 emails should have been admitted and Respondents should have had an opportunity to fully cross-examine Schwartz with all his inconsistent statements and further corroborate those statements by calling the Division's attorneys who drafted the emails to testify. ALJ Eliott should have made credibility determinations based on a full record. Moreover, with a full record, the Respondents' right to a fair trial would have been preserved for meaningful appellate review.

VIII. THE DIVISION FAILS TO ADDRESS RESPONDENTS' ARGUMENTS THAT THEIR RIGHT TO AN IMPARTIAL TRIER OF FACT WAS VIOLATED

In challenging Respondents' arguments on this issue, the Division unfairly asserts that Respondents rely on an "unsubstantiated" news article and an "unsubstantiated *ad hominem* attack on the ALJ's integrity." (Div. Br. at 36.) But Respondents relied on a credible secondary source, a Wall Street Journal article in which the Director of the Division of Enforcement commented and was quoted. (*See* Resp. Br. at 33.) The WSJ article analyzes the Division's recent track record in both federal court and in the administrative forum. Respondents also analyzed ALJ Eliott's administrative ruling record and found that he has never ruled against the Division to dismiss allegations against a respondent. (*Id.*) Instead of challenging the

Respondents' analysis of ALJ Eliott's actual record of rulings or challenging the WSJ's analysis of the agency's recent trial record, the Division attacks Respondents for raising these facts, claiming they are unsubstantiated and *ad hominem*. The agency's record in its own administrative forum and ALJ Eliott's record of finding violations of the securities laws in every litigated case before him rebut the presumption of impartiality afforded to the Commission's administrative law judges. *See Rothenberg v. Daus*, 2012 WL 1970438, *8 (2d Cir. 2012) (stating that the presumption of impartiality may be rebutted by several types of evidence, including "a history of ALJs ruling for the agency"). The Division, however, has offered nothing to challenge Respondents' showing that the presumption of impartiality is not warranted here.

The Division argues that adverse rulings are not indicative of bias. (Div. Br. at 36.) Respondents' bias claim is not based merely on adverse rulings; it also based on the Division's record in the administrative forum and its record before ALJ Eliott. Further, the specific factual rulings highlighted in Respondents' brief illustrate the lack of impartiality. For example, it is beyond explanation how an impartial trier of fact could find Reid Haley credible when he admitted to offering to provide better testimony for the Respondents if Respondents paid him. (*See* Resp. Br. at 34-35.)

IX. RESPONDENTS' OTHER CONSTITUTIONAL CHALLENGES HAVE MERIT

Respondents challenged the administrative process on equal protection grounds and that the administrative process itself violates the separation of powers. As to the equal protection claim, the Division contends Respondents have not identified similarly situated litigants. (Response at 37.) Respondents are not arguing there is one particular similarly situated litigant, but rather the Commission's process for deciding to bring a case, including this case, administratively is arbitrary and lacks any rational basis. The Commission has brought cases,

including cases against investment advisers in federal court. For example, *SEC v. Mayfield Gentry Realty Advisors, LLC*, 13-cv-12520 (E.D. Mich.) concerned violations of Advisers Act Sections 206(1&2)—the same sections the Division claims were violated here. The *Mayfield Realty* litigants had procedural rights to a fair process, including the right to trial before an Article III judge and the application of the Federal Rules of Civil Procedure and Evidence. Further, the *Mayfield Realty* litigants had the opportunity to conduct full discovery, including deposing witnesses to test the credibility of the Division's witnesses. Here, Respondents received no such protections, violating their rights to equal protection.

As to Respondents' separation-of-powers argument, the Division states only that Respondents' arguments were just two paragraphs. (Response at 38.) Unlike the Division, the Respondents set forth concise arguments in compliance with the length requirements. The Respondents rest on those arguments.

This 15th day of December, 2014.

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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.

Certificate of Compliance

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents' Reply to the Division's Consolidated Response to Respondents' Appeals to the Commission complies with the length limitations of SEC Rule of Practice 450(d). I further certify that this brief was prepared using Microsoft Word 2010 and that the word count for the document is 6,998 words.

This 15th day of December, 2014.

Stephen D. Councill