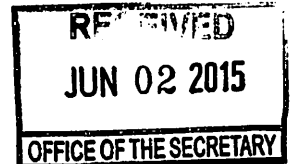


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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 IN FURTHER SUPPORT OF RESPONDENTS' MOTION TO ALLOW
SUBMISSION OF ADDITIONAL EVIDENCE AND MOTION FOR LEAVE TO
ADDUCE ADDITIONAL EVIDENCE**

The Respondents file this reply in order to address several points in the Division of Enforcement's opposition to Respondents' motion for leave to adduce additional evidence. First, the Division of Enforcement claims that Respondents have not made any showing of ALJ bias warranting the discovery requested. The Respondents cited to the Second Circuit's decision in *Rothenberg v. Daus*, which held that

any "presumption of honesty and integrity" under *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), may be rebutted by the evidence proffered by plaintiffs, including financial incentives and *a history of ALJs ruling for the agency*. See *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982) (recognizing that "[t]his presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification").

2012 WL 1970438, at *8 (2d Cir. 2012) (emphasis added). The Division simply ignores the Second Circuit's holding in *Rothenberg* and ignores that the agency's record before its own law judges and, in particular, ALJ Elliot's history of ruling in favor of the agency, rebuts the presumption of ALJ impartiality. In addition, the May 6, 2015 Wall Street Journal article sets forth that former SEC ALJ McEwen said "she came under fire from Ms. Murray for finding too often in favor of defendants" and retired because of the criticism. Chief Administrative Law Judge Brenda P. Murray initially presided over the hearing here, issued several substantive orders, and supervises ALJ Elliot, who ultimately presided over the testimony and issued the Initial Decision. Former SEC ALJ McEwen's statements are evidence of direct pressure on SEC ALJs to rule in favor of the agency. Contrary to the Division's suggestion, Respondents' discovery requests are not some fishing expedition but are narrowly tailored requests seeking clearly relevant information that concern whether ALJs, and in particular the ALJs who presided over this hearing, are pressured to rule in favor of the agency.¹ The Second Circuit in *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989), held that "[t]o coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court's words 'a clear infringement of decisional independence.'" *Id.* at 681 (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). Direct pressure on SEC ALJs to reach a result in favor of the agency undeniably imputes the presumption of ALJ impartiality.

Second, the Division, citing to other opinions of the Commission, states that "the Commission has consistently found that its *de novo* review on appeal adequately addresses any

¹ One of the Commission's most recently hired Administrative Law Judge recently disagreed with the Office of General Counsel's opposition to a similar request for discovery seeking documents and communications that support or reflect or are related to former SEC ALJ's McEwen's statements. See *In the Matter of Charles L. Hill, Jr.*, Release No. 2706 (May 21, 2015) (ALJ Grimes).

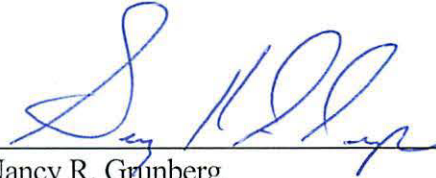
claims that the presiding ALJ was biased." The underlying record here includes an eight day hearing in which numerous witnesses testified, credibility determinations were made, evidentiary rulings on the admission of evidence and testimony were made, and *Brady* rulings were issued that compromised the entire record before the Commission. As a result, the Commission could not conduct a proper *de novo* review based on the underlying hearing record here. In *Ward v. Village of Monroeville*, the Supreme Court found an inherent due process violation where traffic offenses were tried in mayoral courts when a substantial portion of local revenues was derived from traffic fines and fees and the mayor was simultaneously responsible for village finances, thus making the mayor partial to ruling in favor of fines and fees. 409 U.S. 57, 59 (1972). The Court found unpersuasive the claim that any unfairness in this regard could be corrected "on appeal and trial *de novo* in the County Court of Common Pleas," rejecting the proposition that "the State's trial court procedure [could] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." *Id.* at 61. Similarly here, a *de novo* review based on the hearing presided over by partial ALJs is constitutionally improper.

In sum, the narrow discovery requested on the issue of ALJ bias is relevant to the claims of bias and any actual ALJ bias is not cured by the Commission's *de novo* review that relies on the underlying hearing record.

This 1st day of June, 2015.



Stephen D. Councill
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing upon counsel of record in this matter by causing same to be delivered to the following as indicated below.

Via Facsimile (202) 772-9324
and Overnight Delivery

Secretary Brent J. Fields
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E. Mail Stop 1090
Washington, DC 20549
(original and three copies)

Via Email and First Class Mail

Robert K. Gordon
Anthony J. Winter
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, NE
Suite 900
Atlanta, Georgia 30236-1382
[REDACTED]
[REDACTED]

This 1st day of June, 2015.



George Kostolampros

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June 1, 2015

VIA FACSIMILE 202-772-9324 AND UPS

Brent J. Fields, Secretary
Office of Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington, DC 20549

Re: ***In the Matter of Timbervest, LLC, et al.,
Administrative Proceeding File No. 3-15519***

Dear Mr. Fields:

Please find enclosed for filing in the above-referenced matter before the Commission the original and three (3) copies of Reply in Further Support of Respondents' Motion to Allow Submission of Additional Evidence and Motion for Leave to Adduce Additional Evidence.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Kostolampros".

George Kostolampros

Enclosure

cc: Counsel of Record (via email and UPS)