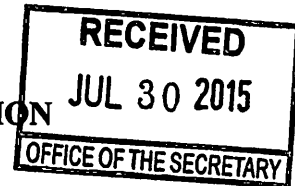


**HARD COPY**

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.**

**MOTION TO COMPEL PRODUCTION OF *BRADY* MATERIAL**

Respondents seek to compel the production of materials that either contain or are likely to contain *Brady* material so that the record on appeal before the Commission and, to the extent necessary, before a Court of Appeals, is complete. Specifically, Respondents request that the Commission order that the Division produce the following documents —

1. The Division's June 6 and June 8, 2012 emails containing statements made by Ed Schwartz to the staff that were reviewed by ALJs Murray and Elliot and any other notes of the Division that contain statements made by Schwartz to the staff;
2. The Division's notes of its interviews with Lee Woodall that were reviewed *in camera* by ALJ Elliot; and
3. All documents reflecting statements of third party witnesses called by the Division at the hearing.

## ARGUMENT

First, Respondents are entitled to the Division's June 6 and June 8, 2012 emails reflecting the Division of Enforcement's interviews of one of the Division's key witnesses, Edward Schwartz. As the Commission is aware, the Division produced those two emails to the Respondents prior to the underlying hearing in this matter. The Division argued that the emails reflected the Division's attorney work product and were inadvertently produced. Respondents argued that the emails contained exculpatory and inconsistent statements by Schwartz and therefore are *Brady* material. ALJ Murray sided with the Division and ordered that the Respondents' counsel should make their best efforts to destroy all of their copies of the emails. *See* November 25, 2013 Order on Several Pending Motions. ALJ Murray's order allowed for Respondents to reference the contents of the two emails in an appeal to the Commission. At the actual hearing, Respondents renewed their argument that the emails contained *Brady* material but ALJ Elliot disagreed and refused to allow Respondents to admit the emails into the record and cross-examine Schwartz with those emails.

As set forth in Respondents' appellate briefs to the Commission, ALJ Murray and ALJ Elliot erred in finding that the Division's two emails did not contain *Brady* material. Although the Division is entitled to withhold documents that are privileged, Rule 230(b)(2) explicitly states that work product and other privileged information cannot be withheld if the documents "contain material exculpatory evidence." *See also United States v. Gupta*, 848 F. Supp. 2d 491, 496-97 (S.D.N.Y. 2012) (rejecting argument that work product that contained *Brady* material could be withheld from defendant). The Division's emails contain statements made by Schwartz that undisputedly show that Schwartz told the Division that he was "informed of the arrangement and the possibility of . . . payments" to Mr. Boden. Schwartz acknowledged the payments to Mr.

Boden would be “okay” but he and [the client] did not think “it was appropriate to pay a brokerage fee two times.” Schwartz even said to the Division that “the idea was not different than many companies that use in house resources instead of third party resources and charge for them.” Finally, in contrast to his testimony at the evidentiary hearing, these notes reveal how Schwartz originally told the Division that “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.” These statements are exculpatory, and, at the very least, are inconsistent statements made by Schwartz that are *Brady* material.

Respondents do not seek production of attorney work product but rather the statements made by Schwartz, many of which are in direct quotes. The attorney work-product doctrine “is intended only to guard against divulging the attorney’s strategies and legal impressions.” *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). The work-product doctrine does not protect documents or other items that do not reflect the attorney’s mental impressions. *See United States v. Nobles*, 422 U.S. at 238, 95 S.Ct. 2160 (“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”). Schwartz’s statements to the Division’s staff are simply not attorney work product and should be produced.

Respondents seek to compel the production of the interview notes at this juncture because it is not clear that the Commission has before it in the record the underlying emails. The Commission in conducting its *de novo* review “may affirm, reverse, modify, set aside or remand for further proceeding, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.” Rule of Practice 411(a). ALJ Murray, however, ordered that the Division’s emails remain sealed until

further order of the ALJ or the Commission and further ordered that Respondents' counsel make a good faith effort to destroy all of their copies of the emails. In making their arguments to the Commission that the ALJs erred in their *Brady* determination, Respondents did not and could not attach as exhibits the actual Division emails. As the record stands now, the Division's emails are not before the Commission and were not admitted as exhibits in the underlying record. In order for the Commission to properly conduct a *de novo* review of the Initial Decision, it must have before it the Division's June 6 and June 8, 2012 emails. Respondents were not only prejudiced by not being able to use those emails in the underlying hearing, but will continue to suffer prejudice if the underlying emails are not in the record for the Commission's review and, if necessary, a Court of Appeals' appellate review.<sup>1</sup>

Second, for the same reason, Respondents seek to compel the Division to produce the Division's summaries of its interviews with witnesses it called at trial, including the Division's other key witness, Lee Woodall. At the hearing, ALJ Elliot reviewed the Division's notes of their interviews with Woodall *in camera* and found that the notes did not contain *Brady* material. Respondents have also argued in their briefs to the Commission that given ALJ Elliot's ruling on the Division's emails reflecting Schwartz's statements it is likely that ALJ Elliot erred in ruling that the Woodall notes do not contain *Brady* material. Respondents, however, have never

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<sup>1</sup> Respondents are also being prejudiced outside of these proceedings. AT&T filed a complaint against Respondents only after ALJ Elliot issued his Initial Decision. A review of AT&T's complaint shows that it wholly relies on ALJ Elliot's findings and conclusions. AT&T quotes directly from the ALJ's Initial Decision regarding those findings and conclusions in its complaint. In that Initial Decision, contrary to Respondents' arguments and showing, ALJ Elliot found that the Boden fee agreement was not disclosed to AT&T and/or its fiduciary ORG. In its complaint, AT&T does not even mention Schwartz, ORG, or the 2005 conversation Shapiro had with Schwartz regarding the Boden fee arrangement. Respondents are being prejudiced because of their inability to use Schwartz's statements in the Division's emails. Schwartz's statements set forth in those emails corroborate Shapiro's testimony that he disclosed the fee arrangement to Schwartz and also show that Schwartz's testimony at the hearing was inconsistent and thus not credible.

reviewed those notes and have never had the opportunity to challenge substantively the Division's claim that the notes are privileged and do not contain *Brady* material. Moreover, the Division's Woodall notes are not in the record. In order for the Commission to properly conduct a *de novo* review of the Initial Decision, it must have before it the Woodall interview notes.

Finally, Respondents had also requested that the ALJ presiding over this matter issue an order requiring the Division to review its unproduced files for additional *Brady* material, which request was declined. The Division's position that its summaries of Schwartz's exculpatory statements need not have been disclosed to Respondents shows that the Division did not understand or appreciate its obligations as required by Rule 230(b)(2). By failing to require the Division to review its unproduced files for additional *Brady* material, there is a significant likelihood that the record should have, but does not include exculpatory documentary evidence. The Division should be required to produce all other interview summaries of witnesses who testified at the hearing on behalf of the Division. At a minimum, the Division should be required to submit any withheld interview summaries to the Commission for an *in camera* review to determine whether their withholdings are appropriate.

### CONCLUSION

Based on the foregoing, Respondents respectfully request an order directing the Division to produce not under seal the following documents:

1. The Division's June 6 and June 8, 2012 emails containing statements made by Ed Schwartz to the staff that were reviewed by ALJs Murray and Elliot and any other notes of the Division that contain statements made by Schwartz to the staff;
2. The Division's notes of its interviews with Lee Woodall that were reviewed *in camera* by ALJ Elliot; and

3. All documents reflecting statements of third party witnesses called by the

Division at the hearing.

This 29<sup>th</sup> day of July, 2015.



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UNITED STATES OF AMERICA  
Before the  
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ADMINISTRATIVE PROCEEDING  
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In the Matter of  
Timbervest, LLC,  
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Respondents.

Certificate of Service

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing MOTION TO COMPEL PRODUCTION OF *BRADY* MATERIAL upon counsel of record in this matter by causing same to be delivered to the following as indicated below.

Via Facsimile to 202-772-9324  
and Overnight Delivery

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

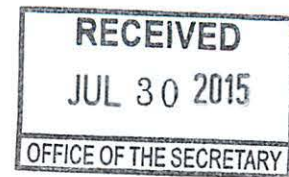
Via Email and Facsimile to 404-842-7679

Robert K. Gordon  
Anthony J. Winter  
U.S. Securities and Exchange Commission  
950 East Paces Ferry Road, NE  
Suite 900  
Atlanta, Georgia 30236-1382  
GordonR@sec.gov  
WinterA@sec.gov

This 29<sup>th</sup> day of July, 2015.

  
\_\_\_\_\_  
Stephen D. Council

**HARD COPY**  
ROGERS & HARDIN



July 29, 2015

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**VIA FACSIMILE TO (202) 772-9324**  
**AND OVERNIGHT DELIVERY**

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

To Whom It May Concern:

On behalf of Respondents, I enclose for filing before the Commission the original and three (3) copies of Respondents' Motion to Compel Production of *Brady* Material in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,

Stephen D. Councill

SDC/ydb  
Enclosure (as stated)

cc: Robert K. Gordon, Esq. (via Email and Facsimile)  
Anthony J. Winter, Esq. (via Email and Facsimile)