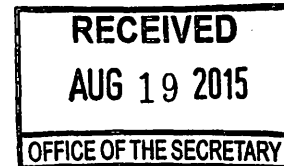


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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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' SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF  
MOTION TO ALLOW SUBMISSION OF ADDITIONAL EVIDENCE  
AND LEAVE TO ADDUCE ADDITIONAL EVIDENCE**

Pursuant to the Commission's Order dated August 11, 2015, Respondents submit this additional brief on the topic of their request for the submission of and opportunity to develop additional evidence concerning the SEC administrative forum's lack of impartiality. Specifically, the Commission granted leave to file a supplemental brief to address "any matters that [Respondents] believe may be pertinent in view of the Interim Report of Investigation ("OIG Report"), including whether official notice should be taken of the Interim Report and/or whether the Interim Report should be adduced as additional evidence." Respondents believe that the IG Report, which is only an "Interim Report" and is not visible to Respondents except in summary fashion, should neither be considered as evidence nor should the Commission take "official notice" of it. Indeed, placing weight on an internal report that does not provide any detailed

factual basis for its preliminary conclusions would only exacerbate the unfairness that has infected this proceeding from the outset.

The Interim OIG Report Does Not Address or Develop Critical Testimonial Evidence

The OIG report lists on page 2 the individuals who were interviewed and the documents that the OIG reviewed in order to reach its interim conclusion that it "did not develop any information to corroborate the allegations of bias in this matter." (Office of Inspector General, U.S. Securities and Exchange Commission, *Interim Report of Investigation*, Case #15-ALJ-0482-1 (Aug. 7, 2015), available at <http://www.sec.gov/oig/reportspubs/oig-sec-interim-report-investigation-admin-law-judges.pdf>, at 2-4.) The OIG interviewed ALJ Cameron Elliot, Chief ALJ Brenda Murray, an unknown (name redacted) person from the Office of the Secretary, and Chair White's Deputy Chief of Staff Erica Williams. The OIG did not interview the central witness, former SEC ALJ Lillian McEwen, who reported to *The Wall Street Journal* ("WSJ") that the system was slanted, that she was criticized for ruling too often in favor of respondents, and that she and the other ALJs were expected to shift the burden to respondents to prove that they did not commit securities violations.

The Commission notes in its Order Requesting Additional Briefing that former ALJ McEwen left the Commission years before the hearing in this matter. The OIG Report also notes that Ms. McEwen left in 2007. That fact does not suggest that Ms. McEwen is an unnecessary witness on the issue of current bias against respondents in SEC administrative proceedings. Former ALJ McEwen reported that she was criticized by Chief ALJ Murray for ruling too often in favor of respondents. Chief ALJ Murray is in the same position today that she was when Ms. McEwen was at the SEC. Based on filings by the Division on the constitutional issues, it appears that Chief ALJ Murray in fact was instrumental, if not the ultimate decision-maker, in

hiring ALJ Elliot. Without being able to depose Ms. McEwen and Chief ALJ Murray, there is no way for Respondents or the Commission to assess Ms. McEwen's statements to the WSJ and whether such pressure is continuing to be felt by the current staff of ALJs under Chief ALJ Murray's supervision. Without further discovery there is also no way to assess whether the success rate for the Division in administrative proceedings can be traced to the hiring of individuals for SEC ALJ positions who are prone to rule in favor of the Division.

Instead of interviewing Ms. McEwen to determine the basis of her statements to the WSJ, the OIG spoke with ALJ Elliot and Chief ALJ Murray, who generally denied any bias or undue influence. With all due respect to the OIG's process, these reported statements by ALJ Elliot and Chief ALJ Murray are useless to the Commission, and do not shed any meaningful light on the issues raised in the WSJ article. They are merely vague hearsay denials. Indeed, ALJ Elliot would not even tell the OIG why he refused to provide an affidavit concerning the bias issue after the Commission had invited him to provide such an affidavit. Instead, ALJ Elliot told the OIG that he had "multiple reasons why[he] decided not to provide a response" but declined to explain any of those reasons. (OIG Report at 3.) It is clear that in order to fairly and fully develop the evidence, Respondents must be given an opportunity – under power of a Commission subpoena -- to depose ALJ Elliot, Chief ALJ Murray, and, of course, former ALJ McEwen. Moreover, in order to effectively depose these individuals, Respondents must be given access to the documents that they requested in their Motion to Allow Submission of Additional Evidence and Motion for Leave to Adduce Additional Evidence ("Respondents' Motion").

The Interim OIG Report Does Not Report or Rely on  
Critical Documentary Evidence Requested by Respondents

Respondents have requested discovery of certain documents related to Ms. McEwen's statements to the WSJ and the issue of bias. (Respondents' Motion at 3-4.) Specifically,

Respondents requested documents relating to her statements to the WSJ, all evaluations of Ms. McEwen, ALJ Elliot and Chief ALJ Murray, documents related to the training of SEC ALJs, documents concerning the history of ALJ rulings, and documents reflecting compensation of ALJs. Those requests are still pending.

The OIG appears to have reviewed a small number of documents that are only vaguely described in the Interim Report and not made available to Respondents. Specifically, the OIG reviewed the WSJ article in which McEwen is quoted, two publicly available blogs from the *Securities Diary*, unspecified "records" from the SEC Office of the Secretary, ALJ Elliot's personnel records, and "email files of the ALJ's related to Timbervest." None of those documents was made public by the OIG or described in any detail. The only discussion of the non-public documents in the OIG report is that the "OIG reviewed select ALJ e-mails directly related to the Timbervest matter and did not develop any information to corroborate the allegations of bias in this matter." (OIG Report at 4.) That conclusory statement does not shed light on what the OIG found in either the emails or in any of the other documents that it reviewed. The OIG's conclusory statement is of no value to Respondents in developing their claim of bias and lack of due process, and it is of no value in advancing the public interest in having these serious claims thoroughly investigated.

#### The Interim OIG Report Does Not Address the Most Significant Evidence of Bias

The OIG Report does not address one critical piece of evidence concerning Respondents' bias argument: the overwhelming success rate of the Division of Enforcement in administrative proceedings and ALJ Elliot's unbroken record of ruling in favor of the Division. As Timbervest described in its Appeal to the Commission, it is imperative that the SEC's administrative forum have at least the appearance of impartiality. *Alexander v. Primerica Holdings*, 10 F.3d 155, 166

(3d Cir. 1993)("When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced."). As noted in Timbervest's appeal, for the last three years (ending September 2014), the SEC had a success record of 96% in administrative cases and 67% in federal court. (Timbervest, LLC's Appeal to the Commission, at 33.) As for ALJ Elliot, his record of ruling for the Division of Enforcement in contested cases was 100% as of the time Timbervest filed its appeal. (*Id.*) Those statistics alone rebut any presumption of impartiality on the part of ALJ Elliot. *See Rothenberg v. Daus*, 2012 WL 1970438, at \*8 (2d Cir. 2012)(stating that presumption of impartiality may be rebutted by, among other things, "a history of ALJs ruling for the agency"). The OIG Report, at least in its preliminary form, is wholly deficient because it does not address, and in fact does not even mention, this significant evidence of bias in the SEC's administrative proceedings.

Similarly, the OIG Report does not address the key credibility and other factual findings by ALJ Elliot that are indicative of his non-impartiality. These findings are described at pages 34-37 of Timbervest's Appeal to the Commission. As noted in the OIG Report, Chair White "requested an OIG investigation of the alleged bias issue because the identified concerns could impact all ALJs and the SEC administrative proceedings." (OIG Report at 3.) The request from Chair White, as described, is not limited to investigating former ALJ McEwen's statements, but rather is focused on the bias issue as a whole.

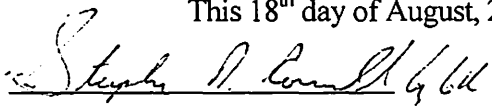
Despite this apparently broad mandate to investigate the bias issue, the OIG has not addressed in its Interim Report several of Respondents' key points concerning this claim. On the issue that it does address -- former ALJ McEwen's statements to the WSJ -- the OIG Report is vague and incomplete. It basically consists of (1) a recitation of the background of the investigation; (2) a brief description of ALJ Elliot's statements to the OIG that he is not biased

and that he is not influenced by anyone in making his decisions; (3) a recitation of Chief ALJ Murray's denials of influence over other ALJs' decisions; and (4) a statement that the OIG's review of unidentified emails "did not develop any information to corroborate the allegations of bias in this matter." As described above, the OIG Report does not reflect any interview of former ALJ McEwen, does not report or rely on important documentary evidence requested by Respondents, and does not address key evidence demonstrating bias. Because of these deficiencies, the Commission should neither take official notice of the OIG's Interim Report nor treat it as additional evidence.

### CONCLUSION

Based on the foregoing, Respondents respectfully renew their request for an order granting their Motion to Allow Submission of Additional Evidence and for Leave to Adduce Additional Evidence.

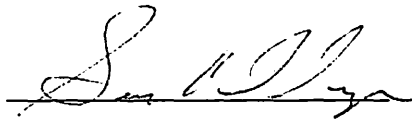
This 18<sup>th</sup> day of August, 2015.



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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 UPS**

Robert K. Gordon  
Anthony J. Winter  
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This 18th day of August, 2015.



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George Kostolampros