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.	

DIVISION OF ENFORCEMENT'S PETITION FOR REVIEW

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I. BACKGROUND

The ALJ in this matter found that Respondent Timbervest, LLC violated sections 206(1) and (2) of the Investment Advisers Act of 1940 by failing to disclose to its advisory client that the firm's principals (1) orchestrated a prohibited cross trade of property from that client to another client through the use of a middleman, and (2) collected and shared unauthorized, bogus brokerage fees totaling more than $1.15 million paid from that client. The ALJ found that the four principals, Joel Barth Shapiro ("Shapiro"), Walter William Anthony Boden, III ("Boden"), Donald David Zell, Jr. ("Zell"), and Gordon Jones II ("Jones") aided and abetted and caused Timbervest's violation of sections 206(1) and (2) with respect to the cross trade, and that Boden and Shapiro aided and abetted and caused Timbervest's violation of sections 206(1) and (2) with respect to the brokerage fees. Concluding that Zell and Jones were only negligent in failing to disclose the brokerage fees, the ALJ found that they only caused Timbervest's violation of section 206(2) with respect to that issue.

As remedies, the ALJ imposed cease and desist orders against all Respondents, and ordered them, jointly and severally, to disgorge approximately $1.9 million plus an additional amount of prejudgment interest. The ALJ denied the Division's request for associational bars against the individual respondents and revocation of Timbervest's adviser's license, finding that such relief (collectively referred to as "associational bars") was precluded by the five year statute of limitations in 28 U.S.C. § 2462 ("Section 2462").

Pursuant to SEC Rule of Practice 410, the Division of Enforcement hereby petitions the Commissions to review two aspects of the initial decision: (1) the denial of the Division's request for associational bars and (2) the conclusion that Zell and Jones did not act with scienter in connection with the failure to disclose the brokerage fees. Review of these rulings is

warranted under SEC Rule 411(b)(2)(ii)(B) and (C) because they embody erroneous conclusions of law and those conclusions are important to the Commission.

In finding the claim for associational bars precluded by Section 2462, the ALJ did not apply the proper analysis. Specifically, the ALJ concluded that the statute applied because this matter was an original administrative proceeding rather than a follow-on proceeding. The proper analysis, however, requires the Commission to evaluate whether such relief would be remedial or penal given the unique facts of the particular case. An associational bar is remedial, and thus not subject to Section 2462, if the Commission finds that the respondents pose a plausible threat of future misconduct or currently lack the competence to satisfy their professional obligations. In this matter, there is strong evidence to support either finding. Consequently, the associational bars are not be subject to Section 2462 and are an appropriate sanction in this matter.

The ALJ erred in finding that Zell and Jones were only negligent when they caused Timbervest to violate Section 206(2) by failing to disclose that Timbervest paid fees to Boden from client funds and that Shapiro, Zell and Jones shared in the fees, because the evidence in the record establishes that Zell and Jones acted at least recklessly and unreasonably. For the reasons discussed below, among others, Zell and Jones, like Boden and Shapiro, aided and abetted Timbervest's violation of Section 206(1) of the Advisers Act through their nondisclosures relating to the fees.

II. DISCUSSION

A. Associational Bars Are Appropriate in this Case

1. Section 2462 Does Not Apply to Associational Bars if there is a Plausible Threat of Future Misconduct or the Respondents Currently Lack Competence

The statute of limitations within Section 2462 provides, in relevant part, that a proceeding for the enforcement of any "penalty . . . pecuniary or otherwise" must be commenced within five years from when the claim first accrued. In *Johnson v. SEC*, 87 F.3d 484 (DC Cir. 1996), the court held that "penalty" includes any sanction that is a form of punishment "which goes beyond remedying the damage caused" to the parties harmed by the defendant's actions. *Id.* at 489. The *Johnson* court concluded that the censure and supervisory suspension imposed by the Commission in that case were punitive and thus subject to Section 2462 because, in imposing these sanctions, the Commission focused only on Johnson's prior misconduct. *Id.* The *Johnson* court noted, however, that such sanctions might have been considered remedial (and thus not subject to Section 2462) "if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public." *Id.*

Following *Johnson*, the Commission has repeatedly found that associational bars will not be subject to Section 2462 if they are considered remedial, *i.e.* if there is a plausible threat of future harm to the public or respondents are unfit to fulfill their professional obligations. For example, in *Vladislav Steven Zubkis*, 2005 WL 3299148 (Dec. 2, 2005), the Commission concluded that an associational bar was remedial and not subject to Section 2462 because the sanction addressed a risk of future harm and the respondent lacked current competence. In reaching that conclusion, the Commission opined:

> The United States Court of Appeals for the District of Columbia Circuit held, in *Johnson v. SEC*, that the five-year statute of limitations established by Section

> 2462 applied to a Commission administrative proceeding imposing a censure and a six-month supervisory suspension. The court concluded there that the sanctions imposed constituted a "penalty" within the meaning of Section 2462 because it was "evident" that they were not based on "any general finding of [the respondent's] unfitness ... nor any showing of the risk she posed to the public, but rather were based on [her] failure reasonably to supervise ...." Here, by contrast, in determining that the public interest requires that Zubkis be barred, we are focusing on the respondent's 'current competence or the degree of risk [he] poses to the public.' Hence, the sanctioning assessment at issue in this proceeding is not punitive, as the court found it was in *Johnson*, but remedial, and therefore not subject to Section 2462

Id. at *4, *quoting Johnson*, 87 F.3d at 489. S*ee also, Joseph Contorinis,* 2014 WL 1665995 at * 3 (Apr. 25, 2014) ("[T]he five-year statute of limitations of § 2462 does not apply in this case because a follow-on proceeding seeking an industry-wide bar is not 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' within the meaning of § 2462."); *Gregory Bartko*, 2014 WL 896758 at *9 (Mar 7, 2014) ("[T]he remedies analysis is not driven by the need to punish respondents; rather the analysis is prospective and focuses on [the respondent's] 'current competence' and the 'degree of risk' he poses to public investors and the securities markets in each of the areas covered by the remedies."), *citing John W Lawton*, 2012 WL 6208750 *7 and n.34 (Dec 13, 2012); *Herbert Moskowitz*, 2002 WL 434524 at n.66 (Mar. 21, 2002) (stating, in dicta, "Indeed, [*SEC v. Johnson*] itself recognized that even a suspension or bar would be remedial, if that sanction was not 'sufficiently punitive' to be deemed a penalty").[1]

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[1] Several Commission opinions post *Johnson* suggest that associational bars are categorically subject to Section 2462. *See, e.g., Gregory O. Trautman* 2009 WL 6761741 at *10 (Dec. 15, 2009)("Section 2462 precludes our consideration of Trautman's conduct occurring before February 5, 2002 in determining whether to impose a bar or civil penalty."); *Warwick Capital Management*, 2008 WL 149127 at *10 (Jan 16, 2008)("Section 2462 precludes consideration of Respondents' conduct occurring before July 6, 2001, in determining whether to impose an investment advisory bar or civil penalties"); *John A. Carley*, Exchange Act Release No. 57246, 2008 WL 268598 at *21 (Jan 31, 2008) (looking only to conduct within 5 year statute of limitation in deciding appropriateness of associational bar). *See also, Eric J. Brown*, 2012 WL 625874 at *14 (Feb. 27, 2012). However, in each of these cases there was violative conduct within the limitations period that, standing alone, justified the bar or suspension. Thus,

continued . . .

Several courts have expressed the same view in analogous contexts. *See SEC v. Quinlan*, 373 Fed. App'x. 581 (6th Cir. 2010) (affirming district court conclusion that O&D bar was remedial rather than punitive in the particular case and thus not barred by Section 2462); *SEC v. Brown*, 740 F.Supp.2d 148, 157 (D.D.C. 2010)(O&D bar is remedial if Commission can show a "future risk of harm."); *SEC v. Jones*, 476 F.Supp.2d 374, 381 (S.D.N.Y. 2007) ("the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong **or** protect the public from future harm") (emphasis added).

In this matter, the ALJ found the Commission decisions in *Contornis*, *Bartko* and *Zubkis* to be inapplicable because those cases involved follow-on proceedings. Initial Decision ("ID") at 62. While the ALJ conceded that "nothing in *Johnson* suggests a principled distinction between an 'original' proceeding and a follow-on proceeding," the ALJ found that such a distinction "provides a way of simultaneously avoiding inconsistency with *Contorinis*, *Bartko* . . . , and *Zubkis*, on the one hand, and *Johnson* and its progeny on the other." ID at 63. Thus, under the ALJs rationale, Section 2462 applies to all claims for associational bars in original administrative proceedings, but will not apply to such claims in follow-on administrative proceedings if the sanction can be viewed as remedial.[2]

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in each of these decisions, the Commission did not need to address whether associational bars were penal or remedial given the particular facts of the case.

[2] The ALJ also found other cases cited by the Division, *e.g. Brown* and *Jones,* offered no guidance because they involved sanctions other than associational bars. ID at 61 n.25. But the courts in both of these cases, applying the *Johnson* analysis, found that Section 2462 did not apply to the sanctions at issue because there was a risk of future misconduct. *Brown*, 740 F.Supp.2d at 157; *Jones*, 476 F.Supp.2d at 383. *See also, Quinlan*, 373 Fed. App'x. at 587 (applying *Johnson* test to find Section 2462 inapplicable to O&D bar).

Deciding whether Section 2462 applies to a claim for associational bars does not depend on the type of proceeding. Instead, the Commission must evaluate whether the sanction is penal or remedial. That analysis hinges on whether the respondents pose a plausible threat of future misconduct or lack current competence to fulfill their professional obligations. If there is such a showing, the associational bar should be considered remedial rather than penal, and thus not subject to Section 2462. *See, e.g. Zubkis* ("in determining that the public interest requires that Zubkis be barred, we are focusing on the respondent's 'current competence or the degree of risk [he] poses to the public.'"). The analysis thus depends on the unique facts of each case. *Quinlan*, 373 Fed. App'x. at 587 (noting that, under *Johnson*, court must undertake a "fact-intensive inquiry to determine whether the equitable remedies sought in a particular case are remedial or punitive."); *SEC v. Alexander*, 248 F.R.D. 108, 115 (E.D.N.Y. 2007)(*Johnson* analysis requires a "fact-intensive inquiry.")

The Fifth Circuit's decision in *Meadows v. SEC*, 119 F.3d 1219 (5th Cir. 1997), supports this conclusion. In that case, the court found that Section 2462 did not apply to an associational bar, even though it was imposed in an original administrative proceeding rather than a follow-on proceeding. In reaching this conclusion, the court opined:

> *Johnson* emphasized that the imposition of a six-month suspension is less penal in nature where the reason for the sanction is the degree of risk petitioner poses to the public and is based upon findings demonstrating petitioner's unfitness to serve the investing public. [*Johnson*, 87 F.3d at 489]. In the instant action, the ALJ made such findings.

Id. at 1228 n.20. Thus, in deciding whether Section 2462 applied to an associational bar, the Fifth Circuit did not consider whether the remedy was imposed in an original or follow-on administrative proceeding. Rather, the Fifth Circuit properly focused on whether the

Commission had found that respondent (a) posed a plausible threat of future misconduct or (b) lacked the current competence to fulfill his professional obligations.

2. Respondents Pose a Plausible Threat of Future Misconduct and Lack Current Competence to Fulfill Their Fiduciary Obligations.

In this matter, several facts show that Respondents pose a realistic threat of future misconduct. For example, in finding that cease and desist orders were appropriate, the ALJ in this matter concluded that all Respondents acted with scienter regarding the cross trade and that Boden and Shapiro acted with scienter when failing to disclose Boden's commissions to Timbervest's client. The ALJ also noted that Respondents never (1) recognized the wrongful nature of the misconduct, (2) provided credible assurances against future misconduct or (3) even conceded that their misconduct harmed their clients. Shortly after the ALJ rendered his initial decision, Shapiro penned an article in the press, highlighting his failure to recognize his misconduct. In that article, Shapiro wrote:

> We have become prisoners of a process that lacks protections granted under the Constitution. Still, after years of unfettered access to Timbervest, there is not one document or other reliable piece of hard evidence to support any wrongdoing * * * In summary, the reality does not at all reflect the tale spun by the SEC. Although the allegations against us are few and frivolous, we have spent an extraordinary amount of money to date to clear our names.

See Exhibit A hereto.[3]

In addition, all the individual Respondents are currently associated with an investment adviser and intend to remain in that industry for the foreseeable future. ID at 64. Although Jones claimed at the hearing that he may leave the industry at some point, the ALJ noted that he

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[3] Underscoring the failure to recognize their misconduct, Timbervest and Boden argued to the ALJ that the undisclosed brokerage fees actually benefitted the client. The ALJ rejected this claim, noting "It is not exaggerating to call this argument silly; obviously, depleting [the client's] assets by over $1 million, for no reason other than that Boden felt entitled to it, did not benefit" the client. ID at 55. Also, on another key issue, the ALJ found that Boden's testimony was "knowingly false" because it was "contradicted by so much evidence, both documentary and testimonial." ID at 45.

"showed no inclination to leave the timberland business until after the OIP issued." ID at 64. Moreover, some of the timber funds that the Respondents manage will remain in existence until 2024, and their investors have limited means to exit absent permission from the Respondents. These facts essentially guarantee that Respondents will remain in the industry for the foreseeable future. Also, at the hearing, Respondents admitted that they were seeking to start additional funds. A news article from August 2014 confirms this fact, quoting Shapiro as saying that Respondents' business was "solid and growing" and that Timbervest planned to begin fundraising for a new timber fund shortly.

In sum, there is a plausible threat of future misconduct because Respondents displayed a high degree of scienter, have failed to recognize their misconduct, intend to remain in the adviser industry for the foreseeable future, and even intend to start new funds and solicit new investors. *Conrad P. Seghers*, 2007 WL 2790633 at * 7 (Sept. 26, 2007) (The securities industry "presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence.")

Moreover, the ALJ's findings show that Respondents lack the "current competence" to perform their fiduciary obligations. *Johnson*, 87 F.3d at 489. Specifically, the ALJ found that respondents were "oblivious[] to their fiduciary obligations, which continues today, " ID at 65, and that Shapiro was "shockingly apathetic" toward his fiduciary obligations. ID at 52. Similarly, the ALJ found that "Boden viewed his fiduciary duty as someone else's responsibility." ID at 65. Because the associational bars in this matter would be remedial, they are not subject to Section 2462. These facts also show that associational bars are an appropriate remedy in this case. *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979) (identifying non-

exclusive list of factors to be considered in deciding whether associational bar is in the public interest).

B. Zell and Jones Acted with Scienter In Connection with the Undisclosed Brokerage Fees

The ALJ correctly found that Boden and Shapiro aided and abetted Timbervest's violation of Section 206(1) in connection with the failure to disclose to Timbervest's advisory client the payment of brokerage fees to the four Timbervest principals. But the ALJ erred when it found that Zell and Jones were only negligent in connection with this omission, and thus incorrectly concluded that Zell and Jones only caused Timbervest's violation of 206(2) for this omission. In weighing the evidence, the ALJ noted multiple factors in the record that "weigh in favor of finding scienter as to Zell and Jones" regarding the fees. ID at 53. The ALJ also noted: "To be sure, there is evidence that Zell and Jones knew that Boden's fees were categorically prohibited under ERISA, and thus that Zell and Jones could not have believed that Shapiro's disclosure was legally effective." ID at 54. The ALJ gave greater weight, however, to his finding that Zell and Jones subjectively believed Shapiro's representation that he obtained consent from the client to pay the fees to Boden, and that Zell and Jones subjectively believed that such consent was legally effective. ID at 53-54.

The record clearly demonstrates that Zell and Jones were at least reckless in failing to disclose the payment of the fees to the client. The receipt of fees by a principal of Timbervest was strictly prohibited by Timbervest's written agreements with the client. As the ALJ noted, the fee agreement "provided for compensation to Timbervest, and by extension to the other Respondents, only by way of management fees and disposition fees." ID at 48. Further, Timbervest pledged in its agreements with the client not to engage in prohibited transactions under ERISA. Thus, it would be highly improper for Timbervest to seek permission to pay fees

to a principal not authorized by the management agreement, and such permission, even if given, would not remove the prohibition. Under such circumstances, a subjective belief by Jones and Zell that the client consented to the fees cannot reasonably be viewed as counter-balancing the compelling evidence of scienter in the record. Such a belief, instead, should be deemed evidence of highly unreasonable conduct and recklessness.

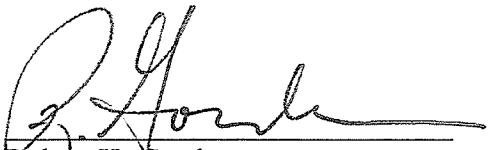
Whether the record supports a finding that Zell and Jones had such a subjective belief is also highly questionable. Jones—in addition to being a fiduciary under the Advisers Act—was Timbervest's President, General Counsel, and Chief Compliance Officer during the events in question, and Zell had more than a decade of experience investing ERISA plan funds. Given this experience, Zell and Jones had many reasons to be highly skeptical, if not incredulous, of Shapiro's claim that the client had consented to the payment of fees outside of the management agreements.

III. CONCLUSION

For the reasons stated herein, the Commission should reverse the ALJ's conclusion that Zell's and Jones were only negligent when they caused Timbervest's failure to disclose its advisory client the payment of brokerage fees, and conclude that they aided and abetted Timbervest's violation of Section 206(1) of the Adviser's Act in connection with this omission. The Commission should also reverse the ALJ's conclusion that Section 2462 precluded the Division's claim for associational bars and find that associational bars are in the public interest.

This 10th day of September, 2014

Respectfully submitted,



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