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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.	Timbervest's Appeal to the Commission

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TIMBERVEST, LLC'S APPEAL TO THE COMMISSION

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Respondent Timbervest, LLC respectfully requests that the Commission reverse the Initial Decision of ALJ Elliot rendered on August 20, 2014 (the "Decision") for the reasons set forth below.

I. Preliminary Statement

This matter concerns two allegations of wrongdoing—(1) that Timbervest did not disclose fees earned from selling two properties; and (2) for one of those sales (the "Chen Transactions"), Timbervest undervalued the property when selling it to a third party and failed to disclose a conflict of interest when another Timbervest fund purchased that same property from the unrelated third party. The ALJ's finding that Timbervest violated §§ 206(1) and (2) and the relief ordered must be overturned.

First, the evidence does not support a finding that Timbervest violated §§ 206(1) or (2). At best, the evidence showed Timbervest could have better documented the disclosure of the fee arrangement at issue. Such a finding, however, does not support a claim of fraud. As to the Chen Transactions, there was no conflict of interest when Timbervest sold a property pursuant to one client's investment mandate to an unrelated third party and later purchased that same property for another client. As the evidence showed, each transaction was beneficial to each client.

Second, the statute of limitations bars this action. Some facts of this case date back more than a decade—to 2002—and involve transactions that were wholly completed by mid-2007. In what is one of the oldest cases in SEC history, the Division of Enforcement waited until September 2013 to bring any charges against Timbervest and the Partners,[1] despite having been investigating Timbervest since 2010. Because of this extreme lapse of time, documents have been lost or destroyed and memories have faded. This is exactly the type of case a statute of limitations is meant to guard against. Respondents' candid lack of memory is wholly reasonable, given the passage of time. As the Decision correctly found, the statute of limitations has run. But

[1] The "Partners" refers to Respondents Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones, II.

the ALJ ordered sanctions that, under the facts of this case, are penal and therefore are barred by the statute of limitations.

Third, the evidence and law do not support the Decision's disgorgement order. The ALJ ordered that disposition fees earned on the sale of those properties pursuant to a written fee agreement with the client also be disgorged. These disposition fees were disclosed and approved by the client in writing and would have been earned upon the sale of the properties regardless of the allegedly improper advisory fees. There is no causal link between the allegedly improper advisory fees and the disposition fees that the ALJ ordered to be disgorged.

Fourth, the ALJ exceeded his jurisdiction by finding violations based on conduct that was not subject to the Advisers Act. Although Timbervest is registered as an investment adviser, the underlying conduct at issue here concerned the management of real estate and timber, not securities. Accordingly, Timbervest's conduct did not concern investment advisory clients or services, and thus the ALJ had no jurisdiction to find that Timbervest violated the Investment Advisers Act.

Fifth, the Respondents' constitutional rights were violated by these proceedings. Specifically, Respondents' right to due process was violated when (1) the ALJ refused to order the Division to produce *Brady* material; (2) the Respondents were not provided with advance notice of theories that were litigated in the hearing but not pled by the Division; and (3) Respondents' were not provided an impartial trier of fact. Furthermore, the Respondents' right to equal protection was violated when the Commission arbitrarily and capriciously brought this enforcement action in its own administrative forum. Finally, the Decision is unconstitutional because the Commission's administrative proceeding violates the Separation of Powers.

II. Factual Background

Neither of the two alleged instances of wrongdoing—the payment of advisory fees and the Chen Transactions—was supported by credible evidence of a violation of the Advisers Act. Instead, the ALJ based his findings on speculation and innuendo drawn from the passage of time and ignored substantial compelling evidence showing that the transactions were in line with client investment mandates and beneficial to each client. As to the Chen Transactions, the Decision's underlying basis for finding the violations demonstrates a general lack of understanding of investments in timberland assets. The ALJ substitutes and applies his own valuation analysis in lieu of the client's express mandate to Timbervest and Timbervest's written valuation policy. This substitution was both incorrect and inappropriate.

A. Boden received two fees as compensation for his consulting services under a fee agreement that was disclosed to the fiduciary of Timbervest's client.

Boden received advisory fees in connection with the sales of the Tenneco Core property ("Tenneco Core") on October 17, 2006 and of timberland property in Kentucky (the "Kentucky Property") on April 3, 2007. (Div. Ex. 11; Resp. Ex. 34.)

Boden negotiated his advisory fee arrangement with Shapiro in 2002. (Tr. at 1734.) At that time, Boden served as an independent contractor to Timbervest. (Tr. at 1811.) The agreement provided that Boden would receive a sliding-scale fee upon the successful disposition of any of the eight largest of New Forestry's holdings in the South, provided that the sales price was at least $5 million, that no other broker received a fee on the deal, and that the transaction closed by the end of 2007. (Div. Ex. 127; Tr. at 393-94, 1735-36.)

The fee arrangement was designed to, and did, in fact, benefit New Forestry. Boden worked for approximately 20 months under this agreement without any compensation. (Tr. at 448-49.) During this period, he earned a vested right in his fees. (Tr. at 505-06, 1491, 1771.) Specifically, from fall 2002 through April 2004, Boden spent approximately 80% of his working time creating a process to maximize value for New Forestry. (Tr. at 92-93.) He developed a sales process by gathering information on New Forestry's properties, including appraisals, title reports, purchase and sale agreements, tax records, and tax appraisals. (Tr. at 451-52, 560.) He visited the properties and talked to the local tax assessors and foresters who oversaw the land. (Tr. at 560.) He created maps and descriptive summaries for each property that could be used to market the property. (Tr. at 561.) He then approached potential buyers, mailed out the summaries he had created, and conducted site visits. (Tr. at 561-62.) Thus, when Boden became a partner in Timbervest in April 2004, he had already earned his fees under the agreement, even though no sale had occurred that triggered a payment.

Timbervest initially disclosed the fee arrangement to BellSouth in 2002.[2] (Tr. at 397-98.) At that time, Zell was the Director of BellSouth's Natural Resources Portfolio and oversaw BellSouth's investments in New Forestry. (Tr. at 1533.) Shapiro explained to Zell that Boden was being brought on as a consultant to help with the disposition process and that Boden would receive a fee in connection with the dispositions. (Tr. at 397-98.)

After Boden became a partner, and recognizing the potential conflict of interest in the agreement, Timbervest disclosed the fee arrangement to ORG Portfolio Management ("ORG") in 2005. (*See, e.g.*, Tr. at 1776-77.) From 2005 until 2007, ORG was the investment manager and fiduciary for the BellSouth pension plans invested through New Forestry. (Resp. Ex. 142; Tr. at 1579.) While there are different recollections about the extent of the disclosure, there is no dispute that Shapiro discussed an advisory fee arrangement with Ed Schwartz, ORG's principal, in 2005. (Tr. at 1325, 1756, 1776-77.) Given that the conversation took place more than eight years before the evidentiary hearing, Shapiro could not recall the exact details of the conversation but recalled telling Schwartz the general terms of the arrangement and "coming away thinking it was fine." (Tr. at 1776-77.) Shapiro reasonably believed he had "gotten the okay from Mr. Schwartz," so long as New Forestry did not pay another broker on any single deal. (Tr. at 414, 1756.)

Schwartz, in contrast, claimed to remember every single detail about this conversation that occurred more than eight years ago. And contrary to his original statements when the issue first arose, Schwartz testified at the hearing that he had a "specific recollection" that (1) this conversation was about a "hypothetical person who hadn't been brought on," and (2) he told

[2] Three BellSouth pension plans were the beneficial investors in New Forestry, and BellSouth was effectively Timbervest's client. (Tr. at. 140-03, 1674.)

Shapiro that he would have to "run it by legal counsel" before consenting to the arrangement. (Tr. at 2063-64, 2090-91.) As detailed below in Part III(A)(1), Schwartz's testimony cannot be believed.

The faded memories concerning the disclosure are compounded by the lack of documents from the time. Any emails or documents from this time detailing the disclosure have long since been discarded or lost. Astonishingly, the ALJ lays the blame for faded memories and lost documents squarely on Timbervest and the Partners because the Staff issued a subpoena to Timbervest on August 26, 2010. (Decision at 63.) Because the document retention period for investment advisers is generally five years, the ALJ reasons that Timbervest was "on notice to preserve any pertinent documents dating back to no later than August 2005." (Decision at 63.) But this finding ignores that the August 26, 2010 subpoena had nothing to do with the two theories eventually charged by the Division and it ignores that the subpoena itself called only for emails dating back to 2008. (Div. Ex. 110.) This subpoena, therefore, could not have possibly put Timbervest on notice that it was required to retain emails and other documents on unrelated topics past the document-retention period.

Moreover, it is not just Timbervest that has lost emails dating from this period—AT&T no longer has emails that may have shown a disclosure of the fee arrangement. (Tr. at 2212-13.) The emails for each BellSouth employee who did not move to AT&T after the merger of those two companies on December 31, 2006, were deleted. (Tr. at 2212-13.) For employees who did move from BellSouth to AT&T, their emails were deleted 55 days after the merger. (Tr. at 2213.) No laptops or hard drives that may have contained such emails have been located. (Tr. at 2212-13.) There are simply no emails from this period—at Timbervest or anywhere else—and Timbervest has not only been unfairly put in the position of having to defend against serious charges when relevant documents have been discarded and witnesses' memories have faded but was subject to an improper burden shifting by the ALJ, which held those lost documents and faded memories against Timbervest. (Decision at 63.)

B. Tenneco Core provided excellent value to both Timbervest funds.

The ALJ also found that Timbervest violated the Advisers Act by undervaluing Tenneco Core and by failing to disclose a repurchase agreement Boden supposedly made with Lee Wooddall, Chen Timber, LLC's ("Chen") representative, that functionally amounted to a cross-trade. (Decision at 41.) The evidence does not support this finding. Rather, it shows that Timbervest sold Tenneco Core because the property did not further New Forestry's revised investment objectives and because the sale could be accomplished at a price that was well above Timbervest's internal valuations of the property. It also shows that Timbervest, in an entirely separate transaction, evaluated at least seven months later, purchased the same property on behalf of TVP (a different Timbervest fund) because the property fit within TVP's investment objectives and because the purchase could be effectuated at a price that was below current market value at the time of closing. The evidence shows that there was no cross-trade of the property. At most, there was a discussion about repurchasing the property between Wooddall and Boden, but there exists no written agreement and Wooddall testified that he could have sold the property to anyone. (Tr. at 768, 863.) This evidence does not establish an agreement to repurchase and surely does not support a finding of some plan to repurchase in order to effectuate a cross-trade. This discussion, if it took place, most likely was designed to benefit New Forestry (and BellSouth) by incentivizing Wooddall to buy Tenneco Core at a price above its carrying value.

1. The sale of Tenneco Core furthered New Forestry's revised investment objectives and was effectuated at a price well above carrying value.

The Tenneco sale furthered New Forestry's investment objectives. In April 2005, BellSouth directed Timbervest to reduce the New Forestry portfolio from $471 million down to $250 million by year-end 2009. (Div. Ex. 47; Tr. at 102-03, 476.) Timbervest had complete discretion to sell any property in the portfolio and to set the sales price as low as 10% below carrying value to meet this mandate. (Tr. at 1118; Div. Ex. 47.) Timbervest accordingly considered any property in the New Forestry portfolio to be for sale. (Tr. at 132, 1118.) In fact, Boden had already tried to sell Tenneco Core in 2003 and 2004 to other potential buyers and had listed the Noncore ("Wolf Creek") tracts with a third-party broker in the spring of 2006. (Tr. at 111-12, 189.)

Timbervest considered selling Tenneco Core out of New Forestry's portfolio because it no longer fit within New Forestry's investment strategy. (Tr. at 229-30.) The majority of the trees growing on Tenneco Core were "pulpwood" or younger timber that would not be income-producing for quite some time. (Tr. at 201, 483-84.) New Forestry wanted to keep only those properties that generated cash flow from timber harvests of 2% per year, and Tenneco Core did not fit this criterion. (Div. Ex. 47.) Accordingly, sometime in the spring of 2006, Boden approached Wooddall, who was "known to be active in the market," to discuss the possibility of Chen acquiring Tenneco Core. (Tr. at 131-32, 468.)

Chen signed a draft contract effective June 23, 2006 at a price of $13,420,000, and the deal eventually closed on October 17, 2006 at $13.45 million. (Resp. Ex. 132.) All the economic metrics available to Timbervest indicated that this sale was priced well above its carrying value. First, a land and timber appraisal from the country's premier timberland appraiser, James Sewall Company, from August 2005 (well within the appraisal timing parameters contained in New Forestry's valuation policy) valued Tenneco Core at $12.13 million. (Resp. Ex. 52; Tr. at 203-07, 209-10, 1661.) The ultimate sales price was 11% higher than this appraised value. (Resp. Ex. 52; Div. Ex. 11.)

Second, the $13.45 million sales price exceeded Timbervest's internal valuation of Tenneco Core for each relevant quarter in 2006. For the first quarter, ending March 31, 2006, Timbervest valued Tenneco at $13.4 million; the final sales price exceeded this amount by $50,000. (Resp. Ex. 5; Tr. at 203.) In the second quarter, ending June 30, 2006, the valuation of Tenneco fell to $12.8 million due to a decrease in timber prices. (Resp. Ex. 41; Tr. at 203.) The sales price gave New Forestry more than $600,000 over carrying value for the second quarter. In the third quarter, ending September 30, 2006, the timber prices and value fell even further, resulting in a valuation of $12.04 million. (Resp. Ex. 41; Tr. at 203.) As of the closing date on October 17, 2006, the $13.45 million sales price exceeded Tenneco Core's book value by $1.4 million, or 11.7% percent. (Tr. at 206.) Significantly, Timbervest's clients, including New Forestry, and its beneficial owners, BellSouth and, later, AT&T, understood and approved Timbervest's timberland valuation policy. (Tr. at 1173, 1281, 1464.) And PricewatershouseCooper, New Forestry's auditor, described Timbervest's valuation policy as "top notch." (Resp. Ex. 75.) There was no evidence to suggest that Timbervest's valuation policy was not properly applied to Tenneco Core or the policy undervalued the property.

Despite that "[e]very bit of empirical data we had when we sold the property on October 1[7]th said Mr. Wooddall was paying over the fair market value of the property," the Decision found that Timbervest undervalued the sale of Tenneco Core. (Tr. at 206; Decision at 41.) The ALJ made this finding by pointing to a wholly incomplete and deficient Planters First Bank appraisal from October 11, 2006, which valued Tenneco Core at $15,500,000. (Div. Ex. 57.) This appraisal should be given no evidentiary weight. On its face, it is merely a draft. The report indicates that, "prior to completing the assignment," the author will visit the property before closing. (*Id.*) The cover letter to the report indicates that the report "will contain assumptions, data, and reasoning upon which this appraisal will been [sic] made," and the report contains no such data. (*Id.*) The document states that it is ten pages, but the exhibit reflects only nine. (*Id.*) Moreover, and most importantly, neither Timbervest nor Wooddall ever saw this appraisal, a fact that the Decision ignores. This appraisal was ordered by Chen's lender and never shared. (Tr. at 855.) There was no other evidence supporting a finding that Tenneco Core was undervalued when sold, and this finding was clearly in error.

2. The purchase of the property fit TVP's investment strategy and was accomplished at a price below market value.

On the later purchase transaction, which was evaluated in January 2007 and closed in February 2007, the property fit within TVP's strategy and was acquired at a price below its market value. Specifically, in 2006 and 2007, TVP was in an acquisition mode and was looking for long-term capital appreciation with a limited need for current cash flow. (Tr. at 83.) TVP was willing to inject capital into property—necessary for the future success of Tenneco Core, given its younger timber profile and "big, bulky tracts." (Tr. at 233-34.)

Three primary factors substantiated the $1 million (8%) price differential between the signing of the final contract for the sale of Tenneco Core in September 2006 and the ultimate purchase of the property by TVP in February 2007: (1) the volume of timber grew between the two transaction dates; (2) the pulpwood markets in the area strengthened considerably; and (3) the local land market showed increased activity. First, the value of the timber on the land increased by more than $950,000 due to a 5% increase in overall timber volume between October 2006 and February 2007, based on normal growth in the pine pulpwood and pine chip-n-saw categories (which made up 75% of the timber volume on Tenneco Core), as well as the transfer of some pre-merchantable timber into a merchantable category. (Tr. at 200-01.) Second, prices for pulpwood increased by about $1.50 per ton—a roughly 30% increase in the price of pulpwood. (Tr. at 201.) Because Tenneco Core had approximately 300,000 tons of pulpwood on it, the increase in price, along with the increase in volume, increased the value of the property by nearly $1,000,000. (Tr. at 553; *see also* Respondents' Post-Hearing Brief at 29.)

Third, in November 2007, gained some insight of strengthening land markets in the area. (Tr. at 203-04, 1664.) Five nearby properties in the Wolf Creek package out of a total of 34 properties were under contract or sold before TVP purchased Tenneco.[3] (Resp. Exs. 125, 126, 127; Tr. at 217.) And three were under contract before Boden sent the draft purchase contract to Wooddall on November 30, 2006. (Resp. Exs. 125, 126, 127; Tr. at 217.)

The Decision found that Timbervest should have known in August 2006 that the Wolf Creek tracts were going to sell at the price per acre at which they sold to Chen in November 2006 and therefore Timbervest was motivated "to 'land bank' Tenneco Core and then develop

[3] The Decision noted that only three were under contract before TVP acquired Tenneco Core. (Decision at 41.) This finding was clearly in error because all five were under contract before TVP acquired Tenneco Core.

it." (Decision at 42.) It stated that "[c]ertainly some of the [Wolf Creek] data was known to Timbervest before the Tenneco Core sale . . . ." (Decision at 42.) The Decision's finding is completely unsupported and has no basis in the evidence or in reality. Timbervest had no crystal ball: it did not know what the Wolf Creek package was going to sell for until it, in fact, sold. Moreover, these sales were wholly conducted through a third-party broker, LandVest, using a bidding process in which Timbervest did not participate. (Div. Ex. 128.) Timbervest had no idea what the sales price would be or how many parcels would sell until the results from the open bid on the properties, in which Timbervest had no communication with any buyer, came in on October 30, 2006.

Even more importantly, the sale price of the Wolf Creek tracts did nothing more than indicate a strengthening land market trend. They did not prove the per acre value of Tenneco Core but served as a reasonable basis on which to infer that there could be a similar strengthening in the bulk timberland market, and they served to support the small $6 per acre price increase for the bare land paid by TVP. They were completely different properties—the Wolf Creek tracts were much smaller in size, geographically diverse, suited for recreational use, as opposed to a 12,000 acre bulky core timberland tract. (Tr. at 233.)

The Decision points to an August 2006 report that estimated the Wolf Creek sales price as evidence that Timbervest knew what those sales would be before Tenneco Core sold to Chen. (Decision at 42-43.) But that report did not report the estimated prices based on actual sales. (Div. Ex. 16.) It simply reported estimated sale prices for a number of properties that Timbervest anticipated liquidating under the client's disposition mandate. (*Id.*) The report reflected the prices that Timbervest hoped to get for each property, not actual sales or guaranteed prices. In fact, all the properties set forth in this report were ultimately either sold at amounts materially different from the estimated amounts in the report or in several cases never sold. Even the Wolf Creek properties ultimately yielded average prices materially below those of the first five sales in November 2006 and materially below the estimated sales price in the August 2006 report.

The ALJ's inference of the valuation based on the estimated sales price demonstrates a complete lack of understanding of timberland investments. Valuations were based on Timbervest's rigorous valuation policy, which was approved by Timbervest's client and PWC and which the Division spent three years investigating. Additionally, the ALJ's suggestion that Timbervest should have ignored its valuation policy would be tantamount to suggesting that Timbervest violate the backbone of what the Division spent three years ensuring Timbervest had followed.

Other objective indicators showed that the purchase price was more than supportable. During the fourth quarter of 2006, the NCREIF timberland index increased by 8.52%, indicating a material strengthening of the timberland markets in which Tenneco Core was located. (Div. Ex. 83; Tr. at 205.) The Plum Creek REIT likewise increased 15% between September 15 and December 15. (Tr. at 853-54.) In contrast, Timbervest secured Tenneco Core for TVP at an increase in price of less than 8% (and below its market value). Thus, all the documentary evidence available shows that the two transactions were separate and fully supported by the market economics and client objectives.

3. There was no parking arrangement or cross trade.

The Decision improperly found that when Boden first approached Wooddall about a potential sale, they came to an agreement that New Forestry would sell Tenneco Core to Chen and repurchase it on behalf of another fund for an agreed upon sum—all in an effort to effect a cross-trade from one Timbervest-managed fund to another. (Decision at 41.) This finding was unsupported by the evidence. Boden did not recall exactly what was said during his negotiations with Wooddall but adamantly denied any agreement to repurchase Tenneco Core. (Tr. at 172.) Wooddall recalled discussing, at most, a "verbal option" whereby Timbervest would sell Tenneco Core to Chen and then would have an option, but no obligation, to purchase the property at a later date. (Tr. at 768, 771.) Unfortunately, the details of the conversations about the transactions have been forever lost due to the age of the case. The Decision uses this gap in evidence to surmise that the two transactions were effectively negotiated as a single deal. (Decision at 60.) But the known documented facts and the general timeline of the transactions are inconsistent with this conclusion.

Wooddall's testimony that there was an agreement in place on the purchase price before the sale took place contradicts the known and documented facts. The *first* documentary evidence of a repurchase is the draft contract sent by Boden to Wooddall on November 30, 2006—after the first sale closed on October 17, 2006, and well after Timbervest committed to the sale on June 23. (*See* Resp. Ex. 19.) Likewise, the *first* documentary evidence of a repurchase price is the November 30, 2006 draft contract. (*Id.*)

Boden and Wooddall first negotiated the sale in the late spring/early summer of 2006; the contract was signed by Chen effective June 23, 2006 at a price of $13,4200,000. (Resp. Ex. 14; Tr. at 137.) While the final contract, signed by both parties (and increasing the price by $30,000), was dated September 15, 2006, and the transaction did not close until October 17, 2006, testimony at the hearing was clear that Timbervest committed to the sale of Tenneco Core by June 23 at a price of approximately $13,420,000. (Div. Ex. 11; Tr. at 2162.) The contract clearly stated that it was not contingent on any other agreement or understanding, and Wooddall testified that he believed this language to be true. (Div. Ex. 11; Tr. at 863.) Although Wooddall testified that he believed that there was a "verbal option" for Timbervest to buy back the property, Wooddall's account conflicts with his own testimony that the contract language was true and that he believed he could sell the property to anyone he wanted. (Div. Ex. 11; Tr. at 768, 863.)

On the purchase by TVP, the contract was not executed until December 15, 2006, and the closing occurred on February 1, 2007. (Resp. Ex. 7.) TVP did not commit to the purchase until January 15, 2007—when the due diligence period under the contract expired. (Div. Ex. 18, Tr. at 1423-24.) On acquisitions, as opposed to dispositions, the Investment Committee did not consider, evaluate, or commit to the transaction until all due diligence data had been gathered, analyzed, and reviewed. (Tr. at 908-09.) At that point, as discussed below, all the objective indicators showed that the transaction was a good one for TVP, despite the higher price.

The ALJ's conclusion that Timbervest paid over $1 million to an unrelated third party to secure a property for TVP at a below-market value is belied by logic. If Respondents had wanted to line their own pockets by purchasing a property below market value, they would have sold the property to Wooddall at a far lower price so that they could have turned around and acquired Tenneco Core for TVP at a cheaper price. Timbervest had discretion to sell properties for New Forestry as low as 10% below book value ($10.84 million), but this transaction occurred at 11.7% *above* book value ($13.45 million). (Div. Ex. 47; Tr. at 206-07.) Timbervest obtained over $2.6 million more for New Forestry than it needed to. A fraudster intending to effectuate a cross-trade would not have given over $1 million to an unrelated third party. It does not make sense to pay $1 million to a third party and sell the property for $2.6 million more than was necessary to accomplish a prohibited cross trade. The facts simply do not support the conclusions that there was an intentional sale of Tenneco Core at less than market value or that there was a cross-trade. Further, Respondents' ownership interest in Tenneco Core when repurchased by TVP was only 0.3%. It defies logic that the Respondents would go to these extreme lengths when their interest in the property was immaterial.

III. The evidence does not support a finding of violations

A. There was no evidence of a material misstatement or omission.

The Decision erred in finding a violation of §§ 206(1) and 206(2). To make out a violation of § 206, the Division must prove that Timbervest made a material misrepresentation or materially misleading omission. *See, e.g.*, *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003); *SEC v. Lauer*, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012); *SEC v. Pimco Advisers Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004). The Division did not allege, and the ALJ did not find, that Timbervest made a material misrepresentation. And because the Division did not prove that any omission was materially misleading, the Decision's finding of violations based on an alleged omission was in error.

1. There was no material omission with respect to Boden's fees.

First, the Division failed to prove that Timbervest made a material omission with respect to Boden's fees because no representative of Timbervest's client testified at the hearing. (Decision at 51.) Despite having listed several BellSouth witnesses on its witness list, the Division did not call a single BellSouth witness to testify about what the company knew about Boden's fee arrangement. Instead, it called only Frank Ranlett from AT&T, which merged with BellSouth effective January 1, 2007. (Tr. at 1028.) Ranlett, however, did not meet with Timbervest personnel until February or March of 2007. (Tr. at 1028-29.) He had no direct knowledge of anything that took place at Timbervest or BellSouth before that time. (Tr. at 1062.) He never even spoke with Don Nutt from BellSouth about the SEC's allegations to confirm whether Timbervest had disclosed the fee arrangement. (Tr. at 1074-75.) Without evidence as to what the client knew or did not know, the ALJ erred in finding that the fee arrangement had not been disclosed.

The evidence shows that Timbervest disclosed Boden's fee arrangement to Schwartz in 2005 and that Schwartz approved the arrangement. (Part II(A).) The ALJ erred in relying on Schwartz's testimony that the disclosure was not made and that he had not agreed to the fee arrangement. (Tr. at 2063-64, 2090-91.) Schwartz's testimony was not credible.

First, his testimony was inconsistent with what he told the Division in 2012. The Division interviewed Schwartz on June 5 and 6, 2012, and memorialized those conversations in emails dated June 5 and 8, 2012 (the "June 2012 emails"), respectively.[4] The June 2012 emails clearly contradict Schwartz's testimony at the evidentiary hearing and show that Schwartz understood that his conversation with Shapiro concerned Boden earning a fee. Further, the notes reflect that Schwartz and BellSouth approved of the fee arrangement. Specifically, the notes reflect:

- Schwartz "recalls a discussion he had with either Zell or Shapiro about 'a broker who eventually came into the company, Bill Boden.'"

[4] As discussed below in Part VI(A), the ALJ erred in refusing to order the Division to produce the June 2012 emails that are clearly *Brady* material and likewise erred in finding that the Respondents were not entitled to receive and use these emails.

- Schwartz's "understanding was that [Timbervest] was considering bringing on Boden in some capacity other than that of a broker."
- Schwartz reached an understanding "that [after joining Timbervest] Boden could finish up whatever he had started in connection with acting as a broker for New Forestry property."
- "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.'"[5]
- "Schwartz said the idea was not different than many companies that use in house resources instead of third party resources and charge for them."
- "Schwartz said 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."

Additionally, Schwartz has confirmed on several occasions over the past few years that he was aware of Boden's fee arrangement. Jones heard Schwartz confirm his awareness of the fee agreement in February 2012 during a telephonic annual meeting. (Tr. at 1470-71.) Jones also recalled two phone calls with the Arizona Public Safety Personnel Retirement System ("AZSPRS") in June 2012 in which Schwartz acknowledged he had been aware of Boden's fee arrangement and that the fees Boden received were essentially compensation for work done prior to becoming a partner at Timbervest. (Tr. at 1471.) Schwartz even referred to the fees as a "tail payment" to Boden. (Tr. at 1471.) Shapiro likewise recalled a meeting with AZPSPRS during which Schwartz described the fees as "Bill's tail payment for work he had done prior" to becoming a Timbervest partner. (Tr. at 2252-53.) Schwartz's memory of these conversations, however, has seemingly evaporated. (Tr. at 2092-93.)

Schwartz's memory of a conversation he had during a June 2012 telephone call with Timbervest's outside and in-house counsel has also evaporated. (Tr. at 2108, 2167.) During that conversation, Schwartz said that the fee arrangement was "fine" so long as two fees were not paid, but he claimed at the hearing that he "never used those words." (Div. Ex. 74; Tr. at 2169-

[5] At the hearing, Schwartz also testified that he "did not" tell the Division that BellSouth agreed to the fee arrangement as long as two brokers were not paid, even though the June 2012 emails reflect that BellSouth "agreed" to the fee arrangement. (Tr. at 2175.)

70.) He also claimed at the hearing that he was "positive" he never said that it was possible he told BellSouth about the fee arrangement, even though he stated otherwise to Timbervest's outside and in-house counsel. (Div. Ex. 74; Tr. at 2171.) Finally, Schwartz claimed that he did not say anything on that June 2012 call regarding ERISA, even though he in fact said that Boden's fee would not have been a problem under ERISA because ORG was acting as a qualified professional asset manager. (Div. Ex. 74; Tr. at 2109-11.)

At best, Schwartz's memory about the conversation is off. At worst, it was a fabrication designed to distance ORG from its approval of the fee arrangement and to avoid his own and his company's potential liability. In any event, even if Schwartz's testimony is credited, the fact still remains that Shapiro had a conversation with Schwartz about the fee agreement. (Tr. at 2249.) That conversation alone shows that Shapiro attempted to disclose the fee arrangement and the inherent conflict of interest. Therefore, there was no material omission sufficient to support a finding of a violation of §§ 206(1) or (2).

2. There was no material omission with respect to the Chen transactions.

The Decision also found that Timbervest violated §§ 206(1) and (2) because it failed to disclose an alleged "verbal option" that Boden had to repurchase Tenneco Core. (Decision at 44.) The only basis for such a finding was Wooddall's testimony regarding his undocumented negotiation with Boden. The documentary evidence makes no mention of a "verbal option." (Div. Ex. 11.) At most, Boden could have offered to later purchase the property back as a negotiating tactic, resulting in a benefit to BellSouth. As Wooddall recognized, Boden is "as good a negotiator as there is," so, if anything, an offer to later repurchase induced Wooddall to purchase the property at a higher price. (Tr. at 851.) The documentary evidence, and Wooddall's testimony, showed that Wooddall was under no obligation to sell the property to Timbervest. Wooddall testified that he "was free to sell the property to anybody else" and would have done so at the right price. (Tr. at 768-69.)

The ALJ's finding that the sale to Wooddall was undervalued was also not supported by the evidence. Even Wooddall testified that the price was fair and not an undervaluation of the property. (Tr. at 772.) Likewise, every factor, including the increase in timber prices and timberland market indicators, leads to the conclusion that TVP was able to purchase the property at a price below its market value in accordance with TVP's stated valuation policy. (Part II(B)(1).) If Timbervest did not think that the value of the property had increased, TVP was under no obligation to purchase the property or exercise the "verbal option." But because the value had increased, it fully justified TVP's purchase price, and any "verbal option" was not material to the transactions.

Similarly, the idea that Timbervest should have offered the "verbal option" to New Forestry, as the Decision suggests should have been done, is nonsensical. (Decision at 44.) New Forestry was insisting on sales—not on potential acquisitions. (Div. Ex. 47; Tr. at 483-84.) New Forestry did not want to hold onto properties to see if their values would increase—it wanted dispositions of its properties. (Div. Ex. 47.) For the properties that remained in its portfolio, New Forestry wanted current cash flow, but the characteristics of Tenneco Core, including the young timber profile and inability to generate immediate cash flow through timber harvests, would not have changed, despite any potential increase in value. (*Id.*; Tr. at 116.) Even Ranlett agreed that for New Forestry to repurchase the property would have been contrary to the investment mandate in place. (Tr. at 1139-40.)

Because there was no material omission, the Decision erred in finding that the Chen Transactions violated the Advisers Act.

B. There was no evidence of scienter or negligence.

The Decision's findings that Timbervest violated §§ 206(1) and 206(2) were also in error because none of the Partners acted with scienter or negligently. Timbervest can act only through its agents. *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977). Thus, if none of the Partners acted with scienter or negligence, neither did Timbervest. Because, as discussed more fully in the Partners' individual appellate briefs, none of the Partners acted with the requisite mental states, there can be no violation by Timbervest.

IV. The sanctions imposed are improper.

A. All the sanctions imposed are penalties barred by the statute of limitations.

Both disgorgement and the cease-and-desist order are barred by the statute of limitations set forth in 28 U.S.C. § 2462. Section 2462 provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." A claim first accrues under § 2462 "when the factual and legal prerequisites for filing suit [are] in place." *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007). Here, the claims accrued on December 15, 2006.[6] But the Division did not file the OIP until September 24, 2013—nearly seven years from the date of accrual. The Division does not dispute that the five-year period in § 2462 has run. Likewise, the Decision states that "every violation . . . occurred outside the five-year limitations period." (Decision at 61.)

Instead, what is at issue is whether this is a "proceeding for the enforcement of any . . . penalty." If so, § 2462 dictates that the relief is unavailable. *Jones*, 476 F. Supp. 2d at 381 ("[Section 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."). A penalty is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond the damage caused to the harmed parties by the defendant's actions." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). Both a cease-and-desist order and the disgorgement of Timbervest's disposition fees would operate as a penalty in this case, and they are therefore barred by the statute of limitations. The Supreme Court's reasoning in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) also dictates a dismissal. *Gabelli*'s

[6] On December 15, 2006, the contract for the sale of the Kentucky Property was signed. At that point, Timbervest was under an obligation to sell the property. (Resp. Ex. 34.)

underlying premise is that defendants are entitled to closure. *Id.* at 122. Respondents have received no such closure here, but instead have had severe sanctions imposed against them in a case brought far after the statute of limitations ran.

1. The cease-and-desist order is penal and barred.

Several federal courts have held that a claim for injunctive relief, the judicial analog to an administrative C&D order, can be penal and barred by § 2462. *See, e.g.*, *Bartek*, 484 F. App'x 949, 956 (5th Cir. 2010) (holding that § 2462 applied to the SEC's claim for injunctive relief); *SEC v. Graham*, 2014 WL 1891418, at *9 (S.D. Fla. May 12, 2014) ("[T]he injunctive relief sought by the SEC in this case forever barring defendants from future violations of the federal securities laws can be regarded as nothing short of a penalty 'intended to punish' . . . ."); *Jones*, 476 F. Supp. 2d at 384 (statute of limitations barred requested injunction).

To show that a C&D order would be remedial, the Division must "go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence." *Jones*, 276 F. Supp. 2d at 383-84. The Decision ignores this standard and, in fact, specifically states that "a finding of a [past] violation raises a sufficient risk of future violation." (Decision at 64 (alteration in original) (quotation omitted).) Moreover, the ALJ's conclusion that there is a risk of future violation is in error.

There is simply no plausible argument that Timbervest poses a risk to the public or presents a realistic threat of future violations. Out of the hundreds of transactions (with an aggregate price of more than $1.4 billion) conducted by Timbervest over more than ten years, Tenneco Core is the only property ever purchased on behalf of a Timbervest client that was previously managed by Timbervest on behalf of another client. (Div. Ex. 128.) No other Timbervest partner has, or has ever had, a fee agreement entitling him to fees on the disposition of properties. (Tr. at 512-13, 1477, 1651-52, 2259-60.) Timbervest was under investigation for more than four years, and the personal financial records of the Partners, their spouses, and their children have been thoroughly reviewed. (Tr. at 512-13, 1477, 1651-52, 2259-60.) Yet, the

Division's allegations of misconduct relate only to two isolated transactions that were wholly completed more than seven years ago.

Further, the collateral consequences of a C&D order are severe. *See David T. Barr*, A.P. File 3-9585, 2000 WL 1092302, at *21 (July 27, 2000) ("A [C&D] order has significant impact on a[] [respondent], especially one involved in the securities industry."). First, a C&D order will "significantly impair [Respondents'] ability to pursue a career." *Jones*, 276 F. Supp. 2d at 385. The D.C. Circuit has found the suspension a professional license as a penalty. *See, e.g.*, *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) ("Disbarment or suspension [of an attorney] is equivalent to the penalty imposed on Collins by the SEC here."). A C&D order would operate as a penalty here. For example, under the "bad-actor" rule, a bad actor is defined as someone who, in the past five years, has been ordered to cease and desist from committing or causing a violation or future violation of, *inter alia*, § 206(1). 17 C.F.R. § 230.506(d)(v)(A). Once a person or entity has been defined a "bad actor," they are barred from participating in a Rule 506 offer for five years. *Id.* § 230.506(d). This collateral consequence punishes Respondents by limiting their lines of work. Currently, Timbervest's business involves managing funds with fixed terms. (Tr. at 65-66.) It needs to continue to be associated with new offers to continue its business—and not being able to use Rule 506 is a substantial impairment to raising funds. Therefore, a C&D order, which has the effect of barring Timbervest from a Rule 506 offer, is penal. As to the Partners, this same penal impact exists but is aggravated because it also impairs their ability to work for *any other company* that may need to raise funds using Rule 506.

Moreover, if the C&D stands, Jones faces the risk of irreparable harm to his legal reputation and possible sanctions by the State Bar of Georgia against him; Zell faces the risk of irreparable harm to his financial reputation and possible revocation of his status as a chartered financial analyst; Boden faces the risk of irreparable harm to his real estate reputation and revocation of his Georgia real estate license; and Shapiro faces harm to his financial reputation. (Tr. at 49, 1231, 1591, 2259.) The Decision therefore erred in imposing a C&D order and in finding that there was any risk of future violation.

2. Disgorgement of Timbervest's disposition fees is penal and barred.

The disgorgement of Timbervest's disposition fees is likewise penal and barred by the statute of limitations. When disgorgement goes beyond "remedying the harm caused to the harmed parties," it constitutes a penalty subject to the statute of limitations. *Johnson*, 87 F.3d at 488; *see also Zacharias v. SEC*, 569 F.3d 458, 473 (D.C. Cir. 2009) (explaining precedent holding that "disgorgement may not be used punitively"); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (holding that disgorgement extends only to the amount by which the defendant profited and stating that any further sum would constitute a penalty assessment); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."). In fact, one district court has even recently concluded that disgorgement is almost always a penal remedy: "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws—i.e., requiring defendants to relinquish money and property—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462." *Graham*, 2014 WL 1891418, at *9.

As explained below, Timbervest's disposition fees are separate and apart from any funds received as a result of the alleged violations. (Part IV(B).) They are therefore above and beyond the amounts Respondents profited from their alleged wrongdoing and are penal.

B. The evidence does not support disgorgement, and the ALJ misapplied the law of disgorgement.

Disgorgement is supposed to be an equitable remedy designed to prevent defendants from profiting from illegal activity. *See, e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). The primary purpose of disgorgement is to correct unjust enrichment and restore Respondents to the status quo ante. *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 96 (2d Cir. 2004). Disgorgement therefore must be *directly* tied to ill-gotten gains received from the fraud and cannot be imposed above the amount wrongfully acquired. *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402 (S.D.N.Y. 2009). Indeed, the Division bears "the burden of demonstrating a reasonable approximation of the profits *causally connected to the violation*." *Jay T. Comeaux*, 2014 WL 4160054, at *3 (Aug. 21, 2014) (emphasis added) (setting aside initial decision that ordered disgorgement when the Division failed to meet its burden of proof).

Timbervest was contractually entitled to the disposition fee from the sale of Tenneco Core and would have received it even if there had been no "verbal option" to repurchase the property and even if Boden had not received an advisory fee on the transaction. (Div. Ex. 54.) New Forestry specifically directed Timbervest to dispose of properties. (Div. Ex. 47.) Moreover, in 2005, New Forestry mandated that Timbervest be paid with a disposition fee and a reduced management fee to incentivize Timbervest to sell properties. (Div. Ex. 54.) Timbervest did so at the client's direction and therefore earned its disposition fee. The Division presented no evidence to counter this conclusion or to show that Timbervest would not have received its disposition fee absent the alleged violations. The ALJ's erroneous conclusion that the sale of Tenneco Core was not a good deal for New Forestry does not taint the Tenneco Core disposition fee earned by Timbervest. Even accepting the ALJ's flawed reasoning that the sale price was undervalued, had Timbervest sold Tenneco Core for more money, Timbervest would have received a *higher* disposition fee, not a lower disposition fee, as would happen if the violation and fees were causally connected. This fact alone shows that the disposition fee was not causally connected, in any way, to the alleged improper conduct.

Similarly, there is no basis to order disgorgement of the disposition fee earned on the sale of the Kentucky property. Just like with Tenneco Core, Timbervest was contractually entitled to its fee, and Timbervest's client, New Forestry, had directed dispositions of properties and a fee structure that incentivized dispositions. (Div. Ex. 47.) No evidence of any kind was introduced to suggest that Timbervest would not have otherwise been entitled to its disposition fee, and the ALJ's finding that the fee was an ill-gotten gain was in error.

The ALJ did not look to whether there was a *causal* relationship between the disposition fees and the violations but only whether there was "a sufficient nexus between Respondents' receipt of disposition fees and their . . . conduct." (Decision at 69.) The Decision found that this nexus existed simply because the disposition fees were earned on transactions in which the ALJ determined violations—which were completely unrelated to the disposition fees—occurred.

A federal court recently rejected a similar approach in *SEC v. Wyly*, 2014 WL 3739415 (S.D.N.Y. July 29, 2014). There, the SEC argued that all profits made on trades in which the defendant's interest in the transaction was not disclosed were subject to disgorgement simply because the transactions involved violations of federal securities laws. The federal court soundly rejected this argument: "Such a rule would eliminate the requirement that the government provide a reasonable approximation of the profits that are causally connected to the violation. There would be no need for any approximation—reasonable or otherwise—if the required disgorgement is always one hundred percent." *Id.* at *6. Here, the Decision imposed disgorgement of disposition fees that were not caused by, or even related to, the alleged violations.

V. The ALJ exceeded his jurisdiction by finding violations based on conduct that was not subject to the Advisers Act.

The Advisers Act applies only when investment advisers are performing investment advisory services. *See, e.g.*, EQK Partners, SEC No-Action Letter, 1988 WL 234523 (July 13, 1988). An investment adviser is defined as "any person who, for compensation," (1) advises others as to the value of securities, (2) advises others as to "the advisability of investing in, purchasing, or selling securities," or (3) issues or promulgates reports concerning securities. 15 U.S.C. § 80b–2(a)(11). Key to each of these prongs is whether the investment adviser is giving advice concerning *securities*.

Each of the transactions that allegedly violated the Advisers Act involved real estate, not securities. *See, e.g.*, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) (real estate is not a security "when a purchaser is motivated by a desire . . . to occupy the land or develop it themselves.") (marks omitted); *Alumni v. Dev. Res. Grp., LLC*, 445 F. App'x 288 (11th Cir. 2011) (per curiam) (fee simple interests in real estate, even when coupled with management services provided by others were not securities under federal securities laws); Capital Investors, Ltd., SEC No-Action Letter, 1988 WL 235309, at *1 n.1 (Dec.6, 1988) ("[I]f an adviser serves as a general partner to a real estate partnership and renders advice only about real estate, the staff generally would not view these activities as subject to the Advisers Act.").

The ALJ therefore exceeded his jurisdiction in finding violations of §§ 206(1) and (2) and in imposing sanctions based on those supposed violations. As a jurisdictional defect, this problem cannot be waived. *See, e.g.*, *SEC v. Infinity Grp. Co.*, 212 F.3d 180, 187-88 (3d Cir. 2000).

VI. Respondents' due process rights to a fundamentally fair trial were violated.

The Decision must be overturned because Respondents' right to due process was violated. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009). Due process requires, among other things, that an agency follow its own rules, that Respondents be provided with fair notice of the allegations against them, and that Respondents be afforded a hearing before an impartial trier of fact. As set forth below, each of these rights were violated. Whether taken together or separately, these violations deprived Respondents of a fundamentally fair trial and require that the Initial Decision be overturned.

A. Respondents' due process rights were violated when the ALJ refused to order production of *Brady* material.

The SEC's Rules of Practice require that the Division produce all *Brady* material to Respondents. After its three-year investigation, the Division produced no documents, notes, or emails that it identified as *Brady* material. However, prior to the evidentiary hearing, the

Division inadvertently produced the June 2012 emails, which are filled with exculpatory information. Chief ALJ Murray initially ruled that the emails did not constitute *Brady* material and ordered them returned.[7] During the evidentiary hearing, the ALJ likewise refused to order the emails be produced. (Tr. at 2176-77.) Both these decisions were in error.

The Division also maintained notes from an interview with the Division's other key witness, Wooddall (the "Wooddall notes"). (Tr. at 979.) Those notes have never been provided to Respondents. The ALJ reviewed the Wooddall notes in camera and found that they also did not contain *Brady* material. (Tr. at 1179.) Given the ALJ's erroneous finding as to the June 2012 emails, it is likely that the Wooddall notes also contain exculpatory material.

1. The Division violated SEC rules by refusing to produce *Brady* material and thereby violated Respondents' due process rights.

The failure of agencies to comply with their own rules and regulations is a violation of due process under the *Accardi* doctrine. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *see also Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 61 (D.D.C. 1998). ("[T]he Due Process Clause requires that agency officials follow their own rules."). An agency's violation of its own procedural rules results in procedural error if there is a showing of prejudice or that the claimant has been deprived of substantial rights. *Wilson v. Comm'r of Social Sec.*, 378 F.3d 541, 546-47 (6th Cir. 2004). A showing of prejudice is not required if "the regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute." *Rochling v. Dep't of Veteran Affairs*, 725 F.3d 927 (8th Cir. 2013).

Under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution in a criminal proceeding must disclose materially exculpatory or impeaching evidence in the government's possession. The SEC has expressly incorporated the *Brady* doctrine in its

[7] In her order denying Respondents' Motion to Compel *Brady* Material, Judge Murray specifically stated that her order "shall not limit Respondents' right to reference the notes or their contents in any appeal of a determination by the Administrative Law Judge." (Nov. 25, 2013 Order.)

administrative proceedings through Rule of Practice 230(b)(2). *See Optionsxpress, Inc.*, 2013 WL 5635987, at *3 (Oct. 16, 2013).

The Division failed to disclose a *single* piece of exculpatory evidence pursuant to its obligations under Rule 230(b)(2) and *Brady*. As shown below, the June 2012 emails contained *Brady* material, and the failure of the ALJ to order production of those notes and the Wooddall notes requires reversal of the Initial Decision.[8]

2. Respondents' substantive *Brady* rights were violated.

The failure of the Division to produce and the ALJ's refusal to order the production of the June 2012 emails and the Wooddall notes resulted in substantive *Brady* violations. As a result, the Commission must overturn the Decision. *See John Thomas Capital Mgmt. Grp.*, 2013 WL 6384275, at *3 (Commission can remedy an ALJ's erroneous ruling regarding the failure to disclose material exculpatory or impeachment evidence by vacating the initial decision).

A *Brady* violation occurs where: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed; and (3) prejudice resulted from the suppression of the evidence. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To satisfy the prejudice component, the withheld evidence must be material. *United States v. Johnson*, 519 F.3d 478, 488 (D.C. Cir. 2008) (citations omitted). Evidence is material where there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Brodie*, 524 F.3d 259, 268 (D.C. Cir. 2008). Impeachment evidence is "especially likely" to be material if it concerns a key government witness. *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009); *see United States v. Trie*, 21 F. Supp. 2d 7, 26 (D.D.C. 1998) ("To the extent that witness statements of key government witnesses are exculpatory or impeaching . . . they constitute *Brady* material, and the government has an obligation to disclose those statements."). Here, all three

[8] Even under a prejudice standard, as set forth below in subsection (b), the Respondents were prejudiced by the Division's failure to produce *Brady* material.

elements are met with the respect to the Division's failures to produce prior inconsistent statements by Schwartz and Wooddall.

As to the June 2012 emails, they contain multiple exculpatory statements by Mr. Schwartz indicating, *inter alia*, (1) he was aware that the subject of the fee agreement was Mr. Boden and (2) he gave his approval of that fee arrangement to Mr. Shapiro in his 2005 conversation with him. Moreover, as discussed above in Part III(A)(1), the statements in the June 2012 emails conflict with Mr. Schwartz's testimony at the hearing on the following issues:

1. Whether Schwartz was aware that the individual who had the fee arrangement was Bill Boden;

2. Whether Shapiro discussed the fee arrangement in "hypothetical" terms;

3. Whether Schwartz saw the fee arrangement as violative of ERISA;

4. Whether Schwartz told anyone at BellSouth about the fee arrangement;

5. Whether Schwartz told Shapiro he would need to discuss the fee arrangement with counsel before approving it; and

6. Whether Schwartz consented to or approved of Boden's fee arrangement.

The June 2012 emails are material, and the Respondents' ability to cross-examine Schwartz was substantially prejudiced by the exclusion of this evidence. As the government's key witness on the disclosure of the Boden fee arrangement, the importance of Mr. Schwartz's testimony is obvious, particularly in light of the lack of documentary evidence related to the disclosure and the significant length of time since the conversation occurred. *See Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (finding that prior contrary statements were "plainly material" where witness's testimony was only evidence linking petitioner to alleged wrongdoing).

Of particular importance to the ALJ's determination on the adequacy of Timbervest's disclosure was whether Shapiro told Schwartz that the arrangement concerned Mr. Boden. (Decision at 49-50.) The ALJ stated that if Shapiro had identified Boden as the fee recipient, it should have presented a "red flag" to Schwartz. (Decision at 47.) The ALJ, however, credited Schwartz's repeated testimony that "he was not told in 2005 that Boden was the fee recipient."

(Decision at 50.) Schwartz's hearing testimony is clearly inconsistent with the statements reflected in the June 2012 emails. The ALJ failed to appreciate that Schwartz's prior inconsistent statements on this issue completely destroy Schwartz's credibility.

Overall, Schwartz's varying accounts of the 2005 conversation would have demonstrated his unreliability as a witness. Without Schwartz's testimony, the Division could not have proven that disclosure of the fee arrangement was not made to ORG or that Schwartz did not approve of the fee arrangement. Thus, had Respondents been able to use the June 2012 emails at the evidentiary hearing, there is "a reasonable probability" that "the result of the proceeding would have been different." *See Brodie*, 524 F.3d at 268.

The ALJ's conclusion that the June 2012 emails were not *Brady* material was based in part on the erroneous finding that Respondents had Schwartz's inconsistent statements in their possession because Respondents and their counsel had interviewed Schwartz. This finding was incorrect for two reasons. First, the June 2012 emails reflect statements that are substantially different than what Mr. Schwartz told Respondents. Second, the June 2012 emails constitute impeaching *Brady* material even if Respondents were in possession of additional impeachment evidence from their own conversations with Schwartz. *See United States v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) ("[T]he fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial.") (marks omitted); *In re Sealed Case No. 99-3096*, 185 F.3d 887, 896-97 (D.C. Cir. 1999) (information obtained from a 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.").

In addition to the failure to compel production of the June 2012 emails, the ALJ committed error by refusing to order production of the Wooddall notes. At the hearing, Wooddall stated that there was an agreement on the price to be paid upon repurchase but that there was no obligation for Timbervest to repurchase the Alabama Property. (Tr. at 767.) Respondents understand, however, that when the Division staff interviewed him in April 2012, Wooddall said that there was an understanding that Timbervest wanted to buy the property back but that he could not recall any specific price or percentage return. Wooddall's earlier statements to the Division are exculpatory—without an agreement as to the price to be paid upon repurchase, Boden did nothing more than have a conversation about possibly purchasing the property at a later date. And Wooddall's testimony was particularly important here given the lack of documentary evidence supporting the Division's theory that Boden orchestrated the repurchase. As the Decision acknowledges, "the written sale contract contained no provision of repurchase [of the property] by [Timbervest], or an option to repurchase, and it stated that there were no other agreements or understandings between the parties." (Decision at 44.) The Division's failure to produce Wooddall's prior inconsistent statements resulted in prejudice to the Respondents. Without these notes, Respondents were unable to question Wooddall about his prior statements to the Division. The inability to review the prior statements prevented Respondents from effectively impeaching Mr. Wooddall's testimony.

B. Respondents' due process rights were violated when the Decision made findings and admitted and relied on evidence relating to theories and matters not pled.

It is axiomatic that "a party is entitled to advance notice that an issue is going to be tried and determined by a court." 61B Am. Jur. 2d Pleading § 862 (2010); *see also* 15 U.S.C. § 80b-3 (requiring "notice and opportunity for hearing" before the SEC can impose administrative sanctions). Notice is a due process requirement as well. The pleadings give that advance notice by defining the issues to be tried. To avoid unfair surprise, "[a] court may not decide an unpleaded issue, as it lacks jurisdiction over such issues." 61B Am. Jur. 2d Pleading § 862 (2010). When a court decides unpled issues, it is subject to reversal when the finding constitutes a material variance from the pleadings. *See Standard Oil Co. v. Brown*, 218 U.S. 78 (1910). The test is whether the pleading and the proof "substantially correspond." *Id.* Thus, if liability is found "on a substantially different scheme from that pleaded," it cannot stand. *United States v.*

Miller, 728 F.2d 1269, 1270 (9th Cir. 1984). The ALJ, however, made the following findings and allowed the evidence to be admitted without fair notice to Respondents.

First, the Decision found that there was a violation of the Advisers Act with respect to the Chen Transactions "because Timbervest undervalued the property when selling it to Chen and failed to disclose the conflict of interest the repurchase agreement presented." (Decision at 41.) But the Division never pled (or even explicitly argued) that Tenneco was undervalued when Timbervest sold it on behalf of New Forestry.

Second, the ALJ found that there was a violation of the Advisers Act because the Chen Transactions were "functionally a cross-trade." (Decision at 36 n.15.) The OIP did not allege a cross trade. It alleged a parking arrangement. (OIP ¶ 14.) As the evidence conclusively demonstrates, there was no parking arrangement. The hallmark of a parking arrangement is "the sale of securities subject to an agreement or understanding that the securities will be repurchased by the seller at a later time and at a price which leaves the economic risk on the seller." *Warren G. Trepp*, 1997 WL 469718, at *18 (Aug. 18, 1997). Here, all the risks associated with the purchase of the property were transferred and assumed by Chen Timber. (Decision at 44 ("Wooddall bore all the legal risk in the deal.").)

Instead of addressing that the Division failed to prove what it had pled, the ALJ looked to whether there was a "cross trade." (Decision at 44.) But the first time the Division ever even made an argument concerning cross trades was in response to Respondents' Motion for Summary Disposition. But even assuming that this argument, made only in a responsive brief, could somehow amend the Division's pleading, it is clear that there was no cross trade.

A cross trade is a term of art that applies *only* when an adviser has clients on both sides of the *same transaction.* 17 C.F.R. § 275.206(3)-2 (requiring disclosure of cross trades only when an investment advisor has clients on both sides of the very same transaction). Because there were two separate transactions with respect to the Tenneco property, there is no doubt that there was no cross trade. The Decision recognized as much: "Timbervest correctly notes that the Tenneco Core transactions were not technically a cross trade." (Decision at 36 n.15.) Yet, the Decision goes on to conclude that because the verbal option was "functionally a cross trade," it was a violation not to disclose it. (*Id.*) This conclusion is nonsensical: either the transactions were a cross trade (and arguably violated the Advisers Act), or they were not. There are specific disclosure rules regarding cross trades. There are not specific disclosure rules regarding "functional cross trades," and the ALJ's attempt to create such rules here represents a variance from the pleadings and an improper attempt to enlarge the scope of the Advisers Act. Therefore, the conclusion that Timbervest violated the Advisers Act with respect to the Chen transactions is improper and should be overturned.

Third, the ALJ erred by admitting and relying on evidence relating to the Glawson property. This evidence related to a proposed sale of a New Forestry property in 2005 and the later development of the property in 2008 to best situate it for eventual disposition. But the Division never made any allegations related to the Glawson property. There was no separate claim brought with respect to the proposed sale or later development of the property. Nor was there even a reference to the Glawson property as allegedly relevant to one of the two charges actually brought. Essentially, Respondents were forced to defend against issues that they did not know would be raised in the evidentiary hearing, without adequate warning, and then were punished when they could not adequately respond to all of the Division's diversions into irrelevant evidence. The introduction and reliance on evidence related to Glawson was contrary to law and prejudicial to Respondents. Therefore, each and every statement in the Initial Decision relating to the Glawson property was in error.

Moreover, the Decision completely ignored that the improvements made on the Glawson property not only increased its value but were consistent with the client's investment mandate and objectives.[9] In the 2011 Annual Report to New Forestry and 2012 Outlook, the Glawson property (identified as I-20 East as it was a part of a larger purchase unit), was identified as a

[9] In 2008, Timbervest established a plan to improve the Glawson property. The plan included road building and recreation-related improvements to position the property for sale. These improvements were implemented from 2008 to 2010. (Resp. Ex. 146.)

Quartile 3 property – that is, a property that has certain characteristics precluding it from functioning optimally within the fund, some being actively marketed for sale. (Resp. Ex. 146.) When this report was provided to AT&T, the recreational improvements on Glawson had been completed and the I-20 East property moved to Quartile 3 because it was ready for sale. (*Id.*; Tr. at 2241.) The recreational improvements made to the Glawson property were the direct result of the 2006 Program Investment Guidelines mandated by New Forestry calling for active and/or creative management strategies with respect to Value Add and Opportunistic properties ("VAOPs"), of which Glawson was one, as well as management's general plan for the property. (Tr. at 1459.) And while I-20 East is not expressly identified in the 2011 Annual Report as a VAOP, the report indicates that portions of purchase units (like Glawson) may qualify as VAOP and may not be listed. (Resp. Ex. 146.) If any weight is to be given to the evidence surrounding the development of Glawson property, it should be to show that Respondents acted in good faith with respect to that property, consistent with their management discretion, and took actions that in fact substantially increased the value by positioning it for sale into a recreational market.

C. Respondents' right to an impartial trier of fact was violated.

"Essential to a fair hearing is the right to an unbiased judge." *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (citation omitted).The Due Process Clause entitles a litigant to an impartial, neutral, and disinterested tribunal in both civil and criminal cases. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). The requirement of an impartial decision-maker "is applied more strictly in administrative proceedings than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings." *Ventura*, 55 F.3d at 902. Although administrative law judges are entitled to a presumption of honesty and impartiality, this presumption may be rebutted by several types of evidence, including "a history of ALJs ruling for the agency." *Rothenberg v. Daus*, 2012 WL 1970438,*8 (2d Cir. 2012). Here, the presumption of impartiality is rebutted by the history of SEC ALJs ruling for the agency and, specifically, this ALJ's history of ruling in favor of the agency. The ALJ's lack of impartiality can also be found in the underlying findings that were completely baseless and without any support in the record.

1. The SEC's administrative forum lacks impartiality.

"When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Alexander v. Primerica Holdings*, 10 F.3d 155, 166 (3d Cir. 1993). One need only look to the Division's record in the SEC's own administrative forum to see that there is not even an appearance of impartiality. For instance, for the 12 months ending September 2014, in every disputed administrative action, the SEC's ALJ has ruled in favor of the Division. Eaglesham, Jean, "SEC Is Steering More Trials to Judges It Appoints," The Wall Street Journal, Oct. 20, 2014. Yet, during that same time period, the SEC's winning percentage in federal court trials is 61%. *Id.* As reported by the Wall Street Journal, "there has been a similar a winning rate in previous years." *Id.* For instance, for the 12-month period ending September 2013, the SEC won nine of ten disputed administrative actions and seven of seven for the 12-month period ending September 2012. *Id.* During the same periods, the SEC won 75% and 67% of trials in federal court, respectively. Thus, for the last three years, the SEC has a success record of 96% in its own administrative forum in tried cases and 67% in federal court.

ALJ Elliot's history of ruling in favor of the Division is even more striking. He has decided 100% of his cases in favor of the Division. In February 2014, Reuters reported that Judge Elliot "has issued more than 50 'initial decisions' at the SEC, and while the SEC has not always gotten everything it wanted, he has yet to rule against the agency."[10] ALJ Elliot has issued approximately 240 decisions, the majority of which are default decisions or opinions rendered in response to various motions. Fifty-two of those decisions were initial decisions in which the respondent defended the allegations. In all 52 instances, ALJ Elliot ruled for the Division. In every case in which the Division has alleged a violation under §§ 206(1) and 206(2) of the Advisers Act, including this matter, ALJ Elliot has ruled in favor of the Division. This

[10] http://finance.yahoo.com/news/sec-judge-took-big-four-123015266.html.

record of utter deference to the Division is astounding and rebuts any presumption of impartiality.

2. Several key findings illustrate that the ALJ was not impartial.

In addition to the Division's record in the SEC's own administrative forum and this ALJ's record of ruling in favor of the agency, the ALJ made several findings that demonstrate his bias in favor of the Division. When the trier of fact relies on theories that were not pled and finds witnesses who are admittedly biased credible to find violations without any evidentiary support, any presumption of impartiality is rebutted.

a. The ALJ inappropriately made findings based on theories not pled by the Division.

First, the ALJ made a factual finding that Timbervest undervalued Tenneco Core when selling it to Chen. (Decision at 41.) But the Division never made the allegation or took the position that Timbervest undervalued the property when selling it to Chen. In fact, the Division argued that whether the sale of Tenneco to Chen was beneficial to New Forestry was "legally irrelevant." (Div. Response to Respondents' Post-Hearing Briefs at 24.)

In contrast to the Division's position, the ALJ reached beyond the evidence – and beyond logic – to conclude that Timbervest defrauded New Forestry by undervaluing the property in the sale to Chen. As described in Part II(B)(1), there is no evidence to support that conclusion, and it is clearly based on the ALJ's speculation. Not only was this finding illogical, unsupported by evidence, and a significant error in the Decision, it is an example of the fundamental unfairness that permeated this proceeding.

b. The ALJ found Reid Hailey credible even though he admitted offering to provide different testimony if paid by Respondents.

Second, the ALJ found an uncredible witness, Reid Hailey to be credible. (Decision at 19.) Hailey testified concerning a proposed sale of the Glawson property in 2005. This unconsummated sale was totally outside the scope of the Division's allegations (*see supra* Part

VIB) and should not have had probative value in resolving this matter. The ALJ, however, relied in part on the Glawson-related testimony of Hailey to find that Boden acted with scienter in connection with his fee arrangement. (Decision at 59.) Shockingly, Hailey admitted at the hearing that when he spoke to Respondents' attorney, he told Respondents' counsel that his "testimony would go much more favorabl[y]" for the Respondents if Boden and Shapiro made a capital payment in an unrelated deal in which they were limited partners and Hailey was a general partner. (Tr. at 889-90.)

Despite that admission, the ALJ credited Hailey's testimony. Thus, the ALJ accepted and credited testimony from a witness who not only had a reason to be biased against Boden and Shapiro based on an unrelated transaction, but who had explicitly invited Respondents' counsel to buy favorable testimony from him. It is difficult to imagine a less credible witness than Hailey, but the ALJ nevertheless credited him over Boden and relied on his testimony to support a finding that Boden acted with scienter.

c. The ALJ inappropriately made inconsistent rulings among the Partners for which there was no evidentiary support.

A third example of yet another incredible finding by the ALJ was his strange conclusion that "Boden did not believe that Shapiro had obtained Schwartz's informed consent to the fee agreement, even if Shapiro told Boden that he had." (Decision at 59.) That conclusion was based solely on the ALJ's conclusion that Boden's use of the LLCs to collect the advisory fees, and other conduct concerning transactions that was outside the scope of the Division's OIP, was conduct "inconsistent with that of someone who believed what he was doing was lawful." (*Id.*) To solidify that finding, the ALJ speculated that Mr. Boden *did not believe* that Shapiro had obtained ORG's consent to the fee agreement. (*Id.*) There was absolutely no basis for him to make that finding, and it is inconsistent with his finding as to Jones and Zell. As to them, the ALJ found that they subjectively believed that Shapiro had disclosed the fee arrangement to

ORG and that they were entitled to rely on Shapiro's representations that he disclosed the fee arrangement. (Decision at 53.)

There is no logic or basis for finding that of Shapiro's three partners, two of them (Jones and Zell) believed his representation that he had obtained Schwartz's consent to the fee arrangement and one of them (Boden) did not. The finding is not only illogical but is unsupported by any testimonial or documentary evidence.

d. The ALJ inappropriately used the Respondents' lack of memory concerning events nearly a decade ago to make negative credibility assessments.

The ALJ also made negative credibility assessments and factual findings based on Respondents' honest difficulties in recalling events and conversations that occurred from six to nine years prior to the hearing. The most striking example of this is in the Decision's analysis of Shapiro's testimony concerning his conversation with Schwartz in 2005. Shapiro has consistently testified that, although he cannot recall the exact conversation, he disclosed the Boden fee arrangement to Schwartz and that Schwartz consented to it. (Tr. at 1756.) The ALJ, however, explicitly ruled that Schwartz was more credible than Shapiro on the issue of what was disclosed in that conversation because, *inter alia*, Schwartz supposedly had a "strikingly better memory than Shapiro . . . ." (Decision at 50.)

As discussed above, Schwartz's "memory" of the 2005 conversation at the hearing was completely inconsistent with what he told the Division and Timbervest's attorneys in 2012. (Part III(A)(1).) Nevertheless, the ALJ opted to believe Schwartz, praised him for his apparently better memory, and repeatedly criticized Shapiro for his honest difficulty recalling the specifics of the 2005 conversation. The ALJ even pointed out that "Shapiro . . . testified that he 'could not recall,' or some variant thereof, over seventy-five times during the hearing . . . ." (Decision at 50, n.17.) The ALJ also used Shapiro's difficulty recalling the specifics of the 2005 conversation as evidence that his disclosure was "woefully deficient, so much so that it qualifies as an extreme departure from the standard of care." (Decision at 52.) He went on to characterize Shapiro's honest memory issues as evidencing a "lackadaisical approach to his fiduciary duty" that was "highly unreasonable . . . ." (Decision at 52.) The ALJ used the passage of time and the normal fading of memory to reach the conclusion that Shapiro's disclosure was deficient and reckless.

At the same time, the ALJ found that the Division's witness's testimony on that same conversation was credible despite his obvious selective memory. The finding that Schwartz was more credible than Shapiro is remarkable given Schwartz's penchant not to remember the substance of recent conversations but, at the same time, to clearly remember the specifics of a conversation he had with Shapiro nearly a decade ago. *See Next Fin'l Grp., Inc.*, 2008 WL 2444775, at *19 (June 18, 2008) (when witnesses "became much more guarded and developed poor memories when the inquiry turned to their personal involvement," their testimony was entitled to less weight); *Gregory M. Dearlove*, 2006 WL 2080012, at *51 (July 27, 2006) (testimony was not credible when "[i]t was plain that [the witness] had no intention of testifying . . . in a manner that might reflect poorly on himself or [his employer]").

Additionally, Schwartz could not even recall that his current client, AZPSPRS, had recently recommitted to its original investment of $50 million in Timbervest after Schwartz and ORG conducted an investigation of the matters at issue in this litigation. (Resp. Ex. 131; Tr. at 2068, 2125.) Incredibly, Schwartz claimed in his testimony to be unaware of that decision even though ORG and Schwartz are fiduciaries of AZPSPRS, oversee these very assets, and were charged with conducting an internal investigation of Timbervest to determine whether to recommit to its original funding level. (Resp. Ex. 131; Tr. at 2068, 2125.)

VII. Respondents' right to equal protection was violated.

The Commission's arbitrary decision to bring this enforcement action against Respondents in its own administrative forum violates the bedrock principle of administrative law that "'an agency may not treat like cases differently.'" *Eagle Broad. Grp. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (citation omitted). An equal protection claim is established by showing that the aggrieved party "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

There is no rational basis for the SEC's decision to file this case in its administrative forum as opposed to federal court. The SEC provides no guidance as to why it brought this case administratively. The SEC's trial record in federal court as compared to its own administrative forum shows that the motive is to disadvantage Respondents in their defense of this matter and to compel settlements. Motives to disadvantage Respondents bear no relationship to any legitimate government interest and therefore violate equal protection principles.

VIII. The SEC's administrative proceeding violates separation of powers principles.

The SEC's administrative process is unconstitutional because SEC ALJs are executive officers who enjoy two-tiered tenure protection. In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Supreme Court held that if an officer can be removed from office only for good cause, then the decision to remove that officer cannot be vested in another official who also enjoys good-cause tenure. *Id.* at 514.

SEC ALJs are appointed for life, and statutes and regulations make clear that SEC ALJs are executive officers. *See Freytag v. Comm'r*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[ALJs] are all executive officers." (emphasis omitted)). ALJs are appointed by the Commission and are removable from their position only for "good cause," which must be established by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7251(a). Further, the SEC Commissioners themselves, who exercise the power of removal, are themselves protected from removal because they can be removed only by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Additionally, members of the MSPB who determine whether sufficient "good cause" exists to remove an SEC ALJ are also protected by tenure and are removable only by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). As executive officers, SEC ALJs may not be protected by more than one layer of tenure. Thus, as in *Free Enterprise*, because the

President cannot oversee ALJs in accordance with Article II, SEC administrative proceedings violate the Constitution and the underlying proceeding here.

IX. Conclusion

For all the above reasons, the Initial Decision should be overturned.

This 30th day of October, 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 Timbervest, LLC's Appeal 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 13,997 words.

This 30th day of October, 2014.

Stephen D. Councill