

HARD COPY

RECEIVED
AUG 06 2015
OFFICE OF THE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of	:	
	:	
	:	
Timbervest, LLC,	:	Division of Enforcement's Opposition
Joel Barth Shapiro,	:	to Respondents' Motion to the Commission
Walter William Anthony Boden, III,	:	to Compel Production of <i>Brady</i> Material
Donald David Zell, Jr.,	:	
and Gordon Jones II,	:	
	:	
Respondents.	:	

The Division of Enforcement ("Division") opposes the Respondents' Motion to the Commission to Compel Production of Brady Material ("Motion"), stating as follows:

The Respondents seek the production of: (1) attorney work product of the Division in the form of emails dated June 5 and 8, 2012 relating to telephone interviews with Ed Schwartz on June 5 and 6, 2012, respectively, and any other attorney notes reflecting comments by Schwartz;¹ (2) attorney notes of the Division's interviews with Lee Wooddall that were reviewed *in camera* by ALJ Elliot; (3) all other attorney notes of the Division concerning interviews of witnesses called by the Division at the hearing.²

¹ Respondents refer to June 6 and 8, 2012 emails relating to Schwartz. In fact, the emails in question are dated June 5 and 8, 2012, and relate to telephonic interviews the Division conducted with Schwartz on June 5 and 6, 2012, respectively.

² Respondents seek "documents reflecting statements of third party witnesses called by the Division at the hearing" (Motion at 1), but, presumably, they mean attorney notes as opposed to "statements" as that term is used in the Jencks Act. All Jencks materials, including transcripts of

Respondents' expressed reason for seeking to compel the production of the interview notes specified in items #1 and #2 above at this late stage is "because it is not clear that the Commission has before it in the record" the two emails and the Wooddall interview notes. Motion at 3. In fact, the Schwartz emails are before the Commission, and the Division does not object to providing under seal for Commission review the same Wooddall interview notes that Judge Elliott reviewed *in camera*. And in any event, Respondents provide no basis other than unfounded speculation to overcome the well-established protection afforded the Division's attorney work product for the remaining materials.

**Attorney Notes Pertaining to Ed Schwartz
Are Currently Available to the Commission**

The June 5 and 8, 2012 attorney notes relating to Schwartz are part of the record that the Commission is reviewing *de novo*, and both are contained in filings under seal.³ The Division does not object to the Commission reviewing these documents *in camera*.

**The Division Does Not Object to *In Camera* Review of the
Division's Attorney Notes Regarding Wooddall**

The Division's attorney notes relating to its interviews with Lee Wooddall (item #2) were reviewed *in camera* by ALJ Elliott, who determined that they did not contain *Brady* material. The Division does not object to making the notes of its interviews with Wooddall available to the Commission for its *in camera* inspection.

investigative testimony, were made available to the Respondents in advance of the hearing. *See generally, Palermo v. United States*, 360 U.S. 343, 352-53 (1959) (addressing distinction between Jencks materials and interview notes not reflecting substantially verbatim recitals of witness statements). The Jencks materials produced by the Division in advance of the hearing included the investigative testimony of Schwartz and Wooddall.

³ The June 5 and 8, 2012 emails are contained in Ex. BB to the Declaration of Julia B. Stone, attached to Respondents' Motion for Summary Disposition, Doc. 13.5 and Ex. K, attached to Division of Enforcement's Response to Respondents' Motion to Compel *Brady* Material, Doc. 21, respectively.

**The Respondents Cannot Demonstrate a Compelling Need
That Overrides the Protection for Attorney Work Product**

All other relief sought by the Respondents, namely, the production of the Division's attorney notes of interview for all of its witnesses (or, in the alternative, the *in camera* submission of the notes to the Commission), should be denied.⁴ Under the case law regarding work product, codified for the federal courts in Fed.R.Civ.P. 26(b)(3), disclosure of notes and memoranda subject to the work product protection will not be ordered unless the party seeking them can overcome the privilege based on a showing of sufficient need. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Even a showing of substantial need may not justify production of work product that will inevitably reveal the attorney's mental processes as he prepares for litigation. *See Hickman*, 329 U.S. at 513; *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

Notes of interview by Division attorneys prepared in anticipation of litigation, such as those sought by the Respondents, have repeatedly been held to be work product by the courts. *See, e.g., SEC v. NIR Group, LLC*, 283 F.R.D. 127, 2012 WL 3553416 (E.D.N.Y. Aug. 17, 2012) (notes and memoranda of witness interviews conducted by a Division attorney as part of attorney-conducted witness interviews held to fall within the work product protection); *SEC v. Cavanagh*, 1998 WL 132842 (S.D.N.Y. Mar. 23, 1998) (notes taken by SEC attorneys during interviews held to be classic work product); *SEC v. Sentinel Mgmt. Group, Inc.*, 2010 WL 4977220 at *7 (N.D.Ill. Dec. 2, 2010) ("Materials prepared by SEC attorneys in anticipation of litigation that disclose what they learned during witness interviews undoubtedly constitute

⁴ The Respondents refer to the Division's attorney notes as its "summaries of its interviews" with witnesses it called at trial. (Motion at 4). The Division disagrees with any assertion that the attorney notes in question are simply "summaries of its interviews." As discussed herein, the notes represent core work product and contain the attorneys' mental impressions.

attorney work product.”); *SEC v. Jasper*, 2010 WL 375137 at *2 (N.D.Cal. Jan. 25, 2010) (interview notes are work product).

The attorney notes that the Respondents seek constitute work product prepared in anticipation of litigation. They are not verbatim statements of the witnesses. As is typical of interview notes, they were written quickly to capture the essence of what the interviewer thought was important, and they reflect the attorney’s process of continuous mental sorting to select the information deemed to have potential significance for the Division’s case. The notes further reflect the interviewing attorney’s mental processes in regard to the order of the subjects covered, revealing the areas that the Division attorney believed to be most important. Moreover, the attorney notes contain underlinings, symbols, and other markings that reveal the attorney’s mental processes. In some instances (such as the June 5, 2012 notes regarding the Division’s interview with Schwartz), the notes contain explicit comments regarding areas for further investigation and inquiry as part of the Division’s trial preparations. In sum, while the Division does not object to the Commission’s having access to the attorney notes that Judge Elliot reviewed *in camera*, it opposes further production of its confidential attorney work product.

The Respondents have not demonstrated a need for the Division’s attorney notes that overrides the work product protection. They are not entitled to engage in a fishing expedition for material that they hope will prove helpful to them. *See optionsXpress, Inc.*, Securities Act Release No. 9466, 2013 SEC LEXIS 3235, at *13-14 & n.19 (Oct. 16, 2013) (“[A] respondent is not entitled to conduct a fishing expedition ... in an effort to discover something that might assist [it] in [its] defense ... or in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.”); *John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC*, Securities Act Release No. 9492, 2013 WL 6384275 at *5 (Dec. 6, 2013) (Respondent’s

incorrect claim that inadvertently produced interview notes were *Brady* does not support their claim that the Division improperly withheld other interview notes). The Respondents have made no showing whatsoever that the attorney notes sought contain *Brady* material, and they do not.⁵

The Division provided the Respondents with a *Brady* declaration prior to the commencement of the hearing. See Exhibit A, attached to Division of Enforcement's Response to Respondents' Motion to Compel *Brady* Material, Doc. 21. In addition, at the hearing, ALJ Elliot directed the Division to review information that came into its possession after the execution of the *Brady* declaration in order to determine whether such new information constituted *Brady* material.⁶ Tr. 784:8 to 793:12. The Division complied and determined that it possessed no *Brady* material.

The Division's *Brady* declaration, along with the ALJ's follow-up to ensure that the Division's representations regarding the absence of *Brady* material were current, show the Respondent's sweeping request to be unwarranted. See *City of Anaheim*, 70 SEC Docket 881, 887 (July 30, 1999) ("affidavits should be the primary tool for resolving *Brady* disputes"); *Orlando Joseph Jett*, 52 S.E.C. 830, 831 (June 17, 1996) (affidavit regarding *Brady* "remove[d] any doubt about the matter"); *Thomas Bridge, et al.*, 2009 WL 3100582, at *20 (Sept. 29, 2009)

⁵ The Division's responses to Respondents' *Brady* claims have been fully briefed. See, e.g., Division of Enforcement's Response to Respondents' Motion to Compel *Brady* Material, Doc. 21; Division of Enforcement's Consolidated Response to Respondents' Post-Hearing Briefs, Doc. 57 at 23; Division of Enforcement's Consolidated Response to Respondents' Appeals to the Commission at 30-33. Two different ALJs reviewed selected attorney notes of the Division and found no *Brady* material.

⁶ The Division attested that it had reviewed its files for potential *Brady* material, and the ALJ accepted the Division's representation. Moreover, the ALJ ordered the Division to review all interview notes obtained after the date of its initial *Brady* declaration for possible exculpatory material. The Respondents' unsupported contention that the ALJ declined to order the Division "to review its unproduced files for additional *Brady* material" (Motion at 5) is therefore incorrect.

(Division complied with Rule 230 where it represented that it was not aware of any *Brady* material in its investigative files); *Warren Lammert*, Securities Act Rel. No. 8833, 2007 WL 2296106 at *6 (Aug. 9, 2007) (Commission may rely on Division's representation that it is not aware of *Brady* material in the investigative file).

**The Commission Should Deem Respondents' Argument
For the Submission of Additional Attorney Notes to be Waived**

Respondents previously moved ALJ Elliot to order the submission for *in camera* review of the Division's attorney notes for all of its hearing witnesses. Tr. 640:20 to 641:12. ALJ Elliot declined to order such a wholesale review, but he agreed to review the Division's notes from its interviews of Lee Wooddall as an accommodation to the Respondents. Tr. 792:20 to 793:1; 797:6-24. Upon such review, ALJ Elliot definitively determined that the notes contained no *Brady* material, and he returned the notes to the Division. Tr. 1177:5 to 1179:13. In their petition for review and briefs in support thereof, Respondents did not challenge ALJ's Elliot's refusal to order the wholesale *in camera* inspection of all of the Division's interview notes of its hearing witnesses. Instead, they raised an issue only as to the attorney notes regarding Schwartz and Wooddall.

Rule 410(b) of the Rules of Practice provides that the Commission shall have discretion to deem any argument that could have been raised in the petition for review, but was not raised, waived. Respondents have offered no reason for their failure to raise ALJ Elliot's refusal to order the wholesale inspection of attorney notes relating to the Division's witnesses in their petition for review. Accordingly, the Commission should exercise its discretion and deem Respondents' challenge to ALJ Elliot's refusal to order the wholesale submission of the Division's attorney notes for all of its witnesses to have been waived.

The Respondents' Motion Was Belatedly Filed

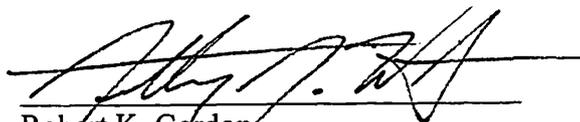
Finally, it should be noted that the Respondents' motion to compel was filed extremely late in these proceedings. The concerns that the Respondents now raise by motion could have been raised much earlier, given that the cross-petitions for review were granted on September 30, 2014. As it is, the Respondents did not raise the issues until well after the completion of briefing and oral argument in this matter. The Commission may take into account the belated nature of the filing in considering the pending motion.

CONCLUSION

For the reasons stated herein, and for any other reasons that the Commission deems appropriate, the Commission should deny the Respondents' motion.

This 5th day of August, 2015.

Respectfully submitted,



Robert K. Gordon
Anthony J. Winter
Attorneys for Division of Enforcement
Securities and Exchange Commission
950 E. Paces Ferry Road NE
Atlanta, Georgia 30326-1232
(404) 842-7652

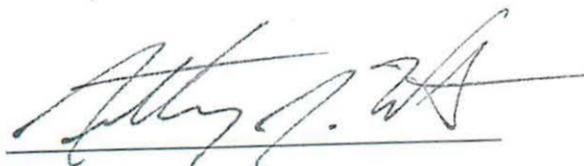
CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing document this day addressed as follows:

Brent J. Fields
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
(by facsimile and UPS overnight mail)

Stephen D. Councill, Esq.
Julia Blackburn Stone, Esq.
Rogers & Hardin, LLC
2700 International Tower
229 Peachtree Street
Atlanta, GA 30303
scouncill@rh-law.com
jstone@rh-law.com
(by electronic mail and UPS overnight mail)

Nancy R. Grunberg, Esq.
Gregory Kostolampros, Esq.
DENTONS U.S. LLP
1900 K Street, N.W.
Washington, DC 20006
nancy.grunberg@dentons.com
george.kostolampros@dentons.com
(by electronic mail and UPS overnight mail)



Anthony J. Winter
Attorney for the Division of Enforcement