UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1101/December 13, 2013

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	ORDER DENYING MOTION FOR SUMMARY DISPOSITION

On September 24, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940. Respondents filed an Answer on October 11, 2013. A hearing is scheduled to begin on January 21, 2014.

Background

As agreed to at the October 29, 2013, prehearing conference, Respondents filed a Motion for Summary Disposition (Motion), with the Declaration of Walter William Anthony Boden, III (Boden), the Declaration of Gordon Jones II (Jones), the Declaration of Carolyn Seabolt (Seabolt), the Declaration of Joel Barth Shapiro (Shapiro), the Declaration of Julia B. Stone (Stone), with Exhibits A through FF attached, and the Declaration of Donald David Zell, Jr. (Zell), on November 8, 2013. On December 4, 2013, the Division of Enforcement (Division) filed an Opposition to the Motion (Opposition), with Exhibits A through P attached, and on December 11, 2013, Respondents filed a Reply Brief (Reply), with the Supplemental Declarations of Seabolt, Shapiro, and Stone. I accept into evidence the Declarations and Exhibits attached to the filings. See 17 C.F.R. § 201.111(c).

On January 1, 2005, Boden, Jones, Shapiro, and Zell (the Partners) bought Timbervest, LLC (Timbervest), a Georgia limited liability company that provided professional timberland and timberland-related investments and management services. OIP at 2; Answer at 1; Motion at 3; Shapiro Declaration at 2. Timbervest, a registered investment adviser since 1995, manages seven commingled funds with approximately $1.2 billion in assets under management and has approximately forty employees. OIP at 2; Answer at 1; Shapiro Declaration at 2.

Motion for Summary Disposition

According to the Division:

> Timbervest, LLC, a registered investment adviser, aided and abetted by its four principals, violated the [Advisers Act] by arranging the indirect sale of timberland from one client to another. Timbervest parked the property with a middleman and failed to disclose the conflicts of interest inherent in the transactions to the affected clients. Timbervest further violated the Advisers Act by paying more than $1.15 million in commissions to one of its owners, who immediately split the money with the other co-owners.

Opposition at 1.

Respondents' Motion

The Motion maintains that summary disposition should be granted because Timbervest did not violate Sections 206(1) and (2) of the Advisers Act and the Partners did not aid or abet or cause the alleged violations. Motion at 36-45. The Motion makes a number of factual assertions, which it contends are uncontested, in support of Respondents' position that the evidence does not support the Division's allegation that Timbervest agreed to sell the "Alabama Property" on behalf of one client as part of a prearranged roundtrip transaction, by which it purchased the property for another client after paying a third party a $1.05 million "parking fee" to hold the property between the sale and repurchase. Motion at 3-20. The Motion also argues that the facts show that Timbervest disclosed the terms of Boden's compensation agreement to the fund's investors. Motion at 40.

In addition, the Motion claims the conduct occurred from six and one-half to eleven years ago and the application of any penalty is barred by 28 U.S.C. § 2462, the five-year statute of limitations, citing SEC v. Jones, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007), and Gabelli v. SEC, 133 S. Ct. 1216, 1224 (2013). Motion at 20-22. The Motion contends that censures, bars, suspensions, cease-and-desist orders, disgorgement, and officer and director bars are punitive measures that are barred because the Division's claims arose in February and April 2007, more than five years before this proceeding was instituted. Motion at 23-28. The Motion argues at length that a cease-and-desist order is not appropriate under the criteria set out in Steadman v. SEC, 603 F.2d 1126, 1137-40 (5th Cir. 1979). Motion at 28-34. In addition, the Motion argues that a cease-and-desist order is inappropriate in this situation because the alleged violations were isolated and occurred more than six years ago with no harm to investors, and they would serve no remedial purpose as there is no ongoing misconduct or any likelihood of future misconduct. Motion at 34-35. The Motion argues that disgorgement is an inappropriate remedy here because there is nothing to disgorge. Motion at 35-36.

Division's Opposition

The Division argues that the Motion should be denied because there are substantial issues of disputed material facts, and that a factual record is needed to determine what relief is appropriate. Opposition at 1-2, 4-19. The Division points to six factual issues cited by Matthew F. McNamara, an Assistant Regional Director in the Division, who supervised the investigation that led to this proceeding:

1. Was the sale of timberland by New Forestry, LP (New Forestry), to Chen Timber, LLC (Chen), and the subsequent sale of the same timberland by Chen to Timbervest Partners Alabama, LLC (a wholly owned subsidiary of Timbervest Partners, LP), part of a prearranged cross trade agreed to by Boden and Lee Wooddall?

2. Did [the Partners] knowingly agree to complete a prearranged prohibited cross trade?

3. Were the $1.15 million in commissions paid to limited liability companies beneficially owned by Boden, and the subsequent sharing of those commissions by the Partners, disclosed to BellSouth, AT&T, or ORG Portfolio Management?[1]

4. Did the [Partners] know that the payment of certain commissions to Boden or to companies beneficially owned by him in 2006 and 2007 was prohibited by the Employee Retirement Income Security Act of 1974 (ERISA)?

5. Was the purpose of Fairfax Realty Advisors, LLC (Fairfax), and Westfield Realty Partners, LLC (Westfield), to conceal the payment of commissions to Boden?

6. Was the purpose of paying the commissions to Fairfax and Westfield through the Interest on Lawyers Trust Account (IOLTA) of Ralph Harrison to conceal payment to Boden and the other Partners?

Opposition, Exhibit A at 2-3.

The Division cites to what it contends are two examples in the investigative testimony of third parties that support the allegations in the OIP. Opposition at 4. The Division contends that Timbervest was a fiduciary under both the Advisers Act and ERISA,[2] and the conduct that is the subject of the OIP was an attempt by Timbervest to circumvent Section 406(b)(2) of ERISA, which strictly prohibits cross trades. Opposition at 7, 12. The Division claims further that Respondents failed to disclose the $1.15 million in commission payments or the conflict of interest, which resulted in a violation of Section 206 of the Advisers Act. Opposition at 12.

[1] According to the Division: (1) BellSouth formed New Forestry in 1997 to invest its employees' pension plans with Timbervest; (2) in 2005, BellSouth engaged ORG Portfolio Management to oversee certain of its pension plan assets, including investments with Timbervest; and (3) BellSouth and AT&T completed a merger in 2006. Opposition at 4, 6.

[2] ERISA is codified in part at 29 U.S.C. §§ 1101-1114.

The Division claims that:

> In 2006 and 2007, the Respondents obtained more than $1.15 million of New Forestry's assets by charging their client prohibited fees. To obtain these funds, Boden formed companies having no employees, no business operations, and no offices. Their sole purpose was to serve as vehicles for the receipt of commissions from the sales of two New Forestry properties. The commissions were routed through the [IOLTA] of Boden's friend, attorney Ralph Harrison, to a Bolden holding company. Once Harrison sent the money to Boden, Boden split it up with Shapiro, Jones, and Zell.

Opposition at 13.

The Division states that the totality of evidence will show that the Partners knowingly or recklessly took prohibited payments and did not disclose them to their client. Opposition at 13 n.10. The Division rejects Respondents' claim that payment of the $1.15 million to Boden was pursuant to an oral agreement he entered into with Shapiro in 2002, and the Division argues, in any event, an oral agreement would not have survived when Boden became an owner of Timbervest in 2002. Opposition at 15. The Division contends that Respondents' claimed disclosure of the commissions to Edward Schwartz in 2005 is contrary to the evidence in the record. Opposition at 17.

Finally, the Division represents that it is not seeking civil money penalties, which are barred by 28 U.S.C. § 2462 absent some conduct that tolls the statute, and that courts are divided on whether and how Section 2462 applies to equitable remedies once a factual record has been established for consideration of that issue, citing SEC v. Kelly, 663 F. Supp. 2d 276, 287 (S.D.N.Y. 2009) ("[S]ection 2462's statute of limitations applies to the SEC's request for civil penalties but not to its request for permanent injunctive relief, disgorgement, or an officer and director bar."); SEC v. Alexander, 248 F.R.D. 108, 115-16 (E.D.N.Y. 2007) ("[Some courts] have held that at least some of the forms of relief at issue here are equitable as a matter of law, and as a result, are not subject to the limitation contained in Section 2462."); Zacharias v. SEC, 569 F.3d 458, 471-72 (D.C. Cir. 2009) (disgorgement not punitive as a matter of law); and Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[A] cease-and-desist order is 'purely remedial and preventative' and not a 'penalty' or 'forfeiture.'" (citation omitted)). Opposition at 20.

The Division insists that the investigative record contains facts that support the imposition of equitable relief and a hearing is needed to assess the risk of future misconduct, the scope of disgorgement, and whether other equitable relief, including cease-and-desist orders and associational bars, are appropriate and in the public interest. Opposition at 22-27.

Respondents' Reply

In their Reply, Respondents repeat their position that there are no disputes of material fact. Reply at 2, 4, 13, 17-19, 22. Respondents maintain that the Division's arguments as to

ERISA violations are red herrings and that one of the funds at issue was a real estate operating company and thus did not hold ERISA "plan assets" that would prohibit the sale of the fund's property to another entity managed by Timbervest or prohibit the payment of commissions to Boden. Reply at 4-5. Respondents insist that no prohibited transactions under ERISA occurred, but that even if they did occur, they would not result in a violation of the Advisers Act "because the prohibited transactions rules under ERISA are per se rules that do not require an evaluation of whether a breach of fiduciary duty occurred." Reply at 8. The Reply also reiterates Respondents' position that the Division's allegations and all requested relief are time-barred by the statute of limitations at 28 U.S.C. § 2462. Reply at 8, 27.

Conclusion and Order

Commission Rule of Practice 250(b) provides that a motion for summary disposition may be granted "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b).

I DENY the Motion because, as is evident from the positions set forth in detail above, and the nine Declarations submitted by Respondents that make factual representations with which, I believe, the Division disagrees, there are several issues of material fact that require evidence to resolve. For example, whether prearranged sale and repurchase arrangements existed for certain timberlands owned by funds managed by Timbervest, and whether undisclosed commissions paid to Boden were moved through shell corporations and an IOLTA account to the Partners. It is not accurate that all possible relief that might be sought by the Division is barred by the statute of limitations should the alleged violations be proven true. Respondents therefore have not shown that they are entitled to a summary disposition as a matter of law.

The hearing in this proceeding will commence on January 21, 2014, at 9:30 a.m. in a courtroom at the United States Tax Court, 56 Forsyth St., NW, Atlanta, GA 30303.

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Brenda P. Murray
Chief Administrative Law Judge