

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1173/January 15, 2014

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 GRANTING IN PART
SUBPOENA REQUESTS

On September 24, 2013, the Securities and Exchange Commission (Commission) instituted this proceeding with 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 and Section 9(b) of the Investment Company Act of 1940.

On December 26, 2013, this Office received a request from Respondent Timbervest, LLC (Timbervest), for four subpoenas duces tecum directed to AT&T Services, Inc. (AT&T), ORG Portfolio Management LLC (ORG), Chen Timber, LLC (Chen), and Charles Lee Wooddall (Wooddall) (Subpoena Request(s)), requesting the production of documents and other materials by January 10, 2014. I set a briefing schedule for any motions to quash or modify the Subpoena Requests. Timbervest, LLC, Admin. Proc. Rulings Release No. 1133, 2013 SEC Lexis 4131 (Dec. 30, 2013). On January 6, 2014, this Office received a request from Timbervest for two amended subpoenas duces tecum directed to AT&T and ORG, and also received the Division of Enforcement's (Division's) Objection to Respondent Timbervest's Subpoena Requests (Objection). On January 10, 2014, this Office received Timbervest's Response to Division's Objection to Subpoena Requests (Response).

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232(a). However, a subpoena may be quashed or modified "[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome." 17 C.F.R. § 201.232(e)(2). A respondent is not entitled to conduct a "fishing expedition" in an effort to discover something that might assist him in his defense. China-Biotics, Inc., Securities Exchange Act of 1934 (Exchange Act) Release No. 70800, 2013 WL 5883342, at *18 n.131 (Nov. 4, 2013) (quoting Scott Epstein, Exchange Act Release No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 n.54).

The Division argues that the subpoenas directed to Chen and Wooddall are overbroad because they seek documents pertaining to real estate transactions other than those charged in the OIP. Objection at 4. Timbervest argues that the documents sought by both subpoenas are relevant because they are expected to show that Chen and Wooddall were “known in the industry for ‘flipping’ properties,” and will support Timbervest’s defense that the transactions alleged in the OIP were “part of the ordinary course of business for [Chen] and not the result of a prearranged parking agreement.” Response at 2-3.

I will not issue the subpoena to Wooddall. Timbervest’s conduct, not Chen and Wooddall’s ordinary course of business, is at issue in this proceeding. Even assuming that Chen and Wooddall flipped every property they purchased by immediately selling it back to its previous owner, the requested documents are only relevant to the issues in this proceeding to the extent they pertain to Timbervest. To be sure, it is relevant whether or not Respondents believed that Chen and Wooddall would sell any purchased property right back to Timbervest, but I do not see how documents exclusively in the possession of Chen and Wooddall will establish that belief, or lack thereof. For the same reason, the first category of documents in the subpoena to Chen will be stricken.

The second category of documents in the subpoena to Chen is, in sum, all documents, correspondence, or communications between Chen and Timbervest between June 1, 2006, and the present. The scope of the Division’s February 29, 2012, investigative subpoena to Chen is similar but not precisely the same as the scope of this second category of documents, and does not cover the period after December 31, 2009, which might include communications about the present proceeding. Objection, Ex. C at 3. Accordingly, I will issue the subpoena to Chen, containing only the second category of requested documents.

The Division argues that the subpoena directed to ORG should be modified by striking some categories of requested documents and narrowing others. One such category, pertaining to Lakepoint Office Park, has been voluntarily withdrawn by Timbervest. Response at 1-2. As to the other categories, the Division argues that: (a) documents pertaining to the investment of the Arizona Public Safety Personnel Retirement System (AZSPRS) in a Timbervest fund not discussed in the OIP are irrelevant; (b) the request for communications between BellSouth and ORG concerning fees paid to any broker is overbroad, and should be narrowed to cover just Respondent Walter William Anthony Boden, III (Boden); and (c) there are no communications between BellSouth and the Commission postdating September 1, 2009, because BellSouth did not exist at that time. Objection at 5-6.

As to category (a), Timbervest argues that ORG’s principal, Edward Schwartz (Schwartz), gave “presentations to AZSPRS related to Timbervest” and to this proceeding, and that the requested documents contain, in essence, impeachment evidence. Response at 3. It stands to reason that Schwartz may have reassured AZSPRS that Timbervest remained a sound investment adviser, notwithstanding the present proceeding and the investigation that led to it, and that such reassurances might be admissible as impeachment in this proceeding, and accordingly, I do not view category (a) as irrelevant or overbroad. Timbervest argues that category (b) is not overbroad because it seeks only documents and communications concerning

broker fees paid for the disposition of properties in one of the funds discussed in the OIP (Fund #1), even though they may have been paid to brokers other than Boden. Response at 3-4; OIP at 2. I agree; the history of broker fees paid to anyone in connection with disposition of Fund #1's properties could be either exculpatory or inculpatory. As to category (c), Timbervest notes that the term "BellSouth" includes AT&T, its successor in interest, and its subpoena request is therefore not "nonsensical." Objection at 6; Response at 4. I agree.

The Division argues that the subpoena directed to AT&T seeks, in its first category, documents dating to 1995, and that the period covered should be narrowed, and also that its third category has the same defect as category (b) of the subpoena directed to ORG. Objection at 6-7. Timbervest has narrowed its first category to cover just the period January 1, 2005, to February 1, 2007, which still seems overly broad, although not unreasonably so. For the same reason as the ORG subpoena, I reject the Division's argument pertaining to the third category of AT&T documents.

The Division has demonstrated that many of the requested documents were produced to it during the investigation and then produced to Respondents, and that duplication of production is therefore likely. Accordingly, the entities responding to the subpoenas need not produce any documents that have previously been provided to Timbervest. Timbervest does not oppose this condition. Response at 2.

In summary, I will not issue the subpoena to Wooddall, I will issue a modified subpoena to Chen, I will issue the amended subpoenas to ORG and AT&T without modification, and Chen, ORG, and AT&T need not produce any documents that have previously been provided to Timbervest. The new production date will be the start date of the hearing, January 21, 2014.

SO ORDERED.

Cameron Elliot
Administrative Law Judge