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.

Post-Hearing Brief on

behalf of David Zell

POST-HEARING BRIEF ON BEHALF OF DAVID ZELL

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I. INTRODUCTION

No evidence supports the Division's claim that Mr. Zell aided and abetted or caused any Advisers Act violations, and the charges should be dismissed in their entirety. With respect to Mr. Boden's fees, Mr. Zell reasonably believed that Mr. Shapiro had disclosed the fee arrangement to the client.

With respect to the Division's allegations that the Chen transactions constituted an improper "parking" agreement, the evidence confirms that Mr. Zell had no involvement in or knowledge of any of the conversations with Mr. Wooddall, and he cannot possibly be liable on this claim. From Mr. Zell's perspective, there was simply no reason to question the two Chen transactions. Each of these transactions, at the time they were likely presented to Mr. Zell, was on its face a very good transaction for Timbervest's clients.

II. STATEMENT OF FACTS

Mr. Zell incorporates by reference the Statement of Facts set forth in the Post-Hearing Brief submitted on behalf of Timbervest, LLC.

III. LEGAL ANALYSIS

A. The Division must prove that Mr. Zell, with scienter or negligently, knowingly and substantially assisted in the conduct that constitutes the primary violation or was the cause of the primary violation.

The Division has alleged that Mr. Zell aided and abetted or caused Timbervest's alleged violations of sections 206(1) and (2) of the Advisers Act. (OIP ¶ 24.) To prove a claim for aiding and abetting, the Division must establish three elements: (1) a primary securities law violation, (2) knowledge, or recklessness in not knowing, that the respondent's role was part of an overall activity that was improper or illegal, and (3) knowing and substantial assistance in the achievement of the primary violation. *See, e.g.*, *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000).

Similarly, three elements must be established for a "causing" claim: (1) a primary securities law violation, (2) that the respondent "knew, or should have known, that his conduct would contribute to the violation," and (3) "an act or omission by the respondent that was a cause of the violation." *In the Matter of Daniel Bogar*, Admin. Proc. File No. 3-15003, Release No. 502, 2013 WL 3963608, at *20 (Aug. 2, 2013). The Division did not carry its burden to prove that Mr. Zell aided and abetted or caused any Advisers Act violation.

First, for the reasons discussed in detail in the Post-Hearing Brief filed by Timbervest, the Division failed to establish a primary violation of either Section 206(1) or 206(2). Second, the Division did not and cannot establish that Mr. Zell had knowledge or was reckless in not knowing, that his role was part of an overall activity that was improper or illegal or that he should have known that his conduct would contribute to a violation. Third, the Division did not and cannot establish that Mr. Zell provided knowing and substantial assistance in the achievement of the primary violation, or that an act or omission by him was the cause of a violation. To the contrary, the evidence presented at trial demonstrated that Mr. Zell acted reasonably and in the best interests of Timbervest's clients based on the information available to him at the time.

B. There Was No Primary Violation by Timbervest.

Mr. Zell cannot be held liable for aiding and abetting or causing because there was no primary violation by Timbervest. In support of this argument, Mr. Zell incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief.

In addition, the Division was required to prove that Timbervest violated the Advisers Act, not that it violated ERISA. At no time prior to the SEC's raising the issue did Mr. Zell (or any of his partners) believe that the payments to Mr. Boden implicated ERISA. (Hr'g Tr. 1574:15–1575:1.) Mr. Zell did not recognize it as problematic because, for whatever reason, the issue did

not raise itself to consciousness, i.e., he never thought about the fees in the context of ERISA. But even if the payment of fees to Mr. Boden violated ERISA, a violation of ERISA would not be tantamount to a violation of the Advisers Act. Two key distinctions between ERISA and the Advisers Act illustrate this point. First, ERISA's rules prohibit certain transactions, absent exception from the Department of Labor, without regard to the benefits of the transaction to the client. (Resp. Ex. 124 at 16-17.) Second, ERISA's requirements cannot be satisfied with adequate disclosure. (*Id.*) As Respondents' expert explained, "ERISA fiduciary duties are materially different from the fiduciary duties defined in other statutes, such as those of investment advisors under the Advisors Act . . . ." (Resp. 124 at 9.) Accordingly, it is not sufficient for the Division to establish that Respondents violated ERISA. The Division was required to prove that Respondents violated the Advisers Act. For the reasons set forth in Timbervest's brief, the Division did not meet its burden.

C. Mr. Zell did not act with scienter or negligently.

The second element in an aiding and abetting claim is that the respondent had knowledge, or was reckless in not knowing, that his role was part of an overall activity that was improper or illegal. While recklessness may satisfy the intent requirement, to show recklessness, the Division was required to prove that Mr. Zell "encountered 'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator," or there was a danger so obvious that he must have been aware of it. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004.) To prove a claim for causing, the Division must prove that Mr. Zell knew or should have known that his conduct contributed to the primary violation. With respect to primary violations under Section 206(1), it is not sufficient to prove negligence; the Division must show that Mr. Zell acted with scienter. *See In re Daniel Bogar*, 2013 WL 3963608, at *20. The Division did not and cannot carry this burden.

1. Mr. Zell did not act with scienter or negligently in connection with the payment of Mr. Boden's fees.

Prior to joining Timbervest in 2003, Mr. Zell oversaw the real estate and natural resources portfolio, including Timbervest's management of New Forestry, at BellSouth. (Hr'g Tr. 1533:6–8; 1534:19–21.) In 2002, Mr. Shapiro and Mr. Boden met with Mr. Zell and Mr. Shapiro informed Mr. Zell that Timbervest was retaining Mr. Boden as an independent consultant to assist Timbervest in its disposition efforts on behalf of New Forestry. (Hr'g Tr. 1535:5–10.) Mr. Shapiro also told Mr. Zell that Mr. Boden would be paid a fee in connection with these dispositions. (Hr'g Tr. 1535:11–14.)

When the payments were ultimately triggered under the terms of the agreement by the closings of the sale of Tenneco to Chen Timber and the sale of the Kentucky properties, both Mr. Zell and Mr. Boden were partners at Timbervest. Mr. Zell understood that Mr. Shapiro disclosed the agreement to ORG. (Hr'g Tr. 1541:14–16.) There were certainly no red flags to suggest the disclosure was not made. Indeed, Mr. Zell discussed Mr. Boden's fee arrangement with Mr. Shapiro in 2002 when he was employed at BellSouth. As a result, he had no reason to believe that Mr. Shapiro, or anyone else, was attempting to conceal the payments of the fees. Mr. Zell reasonably relied on Mr. Shapiro's statement that he had disclosed the fee arrangement to ORG and ORG was okay with it. (Hr'g Tr. 1789:4–14.) Therefore, there is no evidence that Mr. Zell, either with intent or negligently, failed to disclose information regarding the fees to the client as he reasonably believed the disclosure was made.

Although the Division contends that Mr. Zell acted with scienter in an effort to circumvent ERISA, Mr. Zell did not recognize the payment of the fees once Mr. Boden's status changed to an affiliate as a potential violation of ERISA. (Hr'g Tr. 1574:15–1575:1.) The Division contends Mr. Zell should have, based on his experience at BellSouth, but Mr. Zell's

responsibilities at BellSouth did not include monitoring advisor's activities for compliance with ERISA. (Hr'g Tr. 1595:12–18.) In addition, Mr. Zell explained that during his time at BellSouth, he was aware of managers that received commissions in addition to their management fees. (Hr'g Tr. 1578:17–22.) Thus, based on Mr. Zell's previous experience and duties, it is not surprising that he did not consider whether the payment of Mr. Boden's fees might violate ERISA.

As set forth in Timbervest's Post-Hearing Brief, scienter or negligence cannot be inferred from the fact that Mr. Boden received his fees through two LLCs rather than directly. Mr. Zell testified that he was not familiar with the names of the entities through which Mr. Boden received his fees until the Division's investigation. (Hr'g Tr. 1568:20–1569:1.) He did not know that Mr. Boden had arranged to create these entities to receive his fees. In fact, after learning of the LLCs, Mr. Zell asked Mr. Boden why he used them (Hr'g Tr. 1577:16–1578:9.)

Furthermore, Mr. Boden's later decision to share the fees did not result in any conflict of interest on the part of Mr. Zell. Mr. Zell's decision to approve the sales of Tenneco and the Kentucky properties by New Forestry was not impacted by Mr. Boden's later decision to share the fees because Mr. Zell approved the transaction before Mr. Zell learned of Mr. Boden's decision to share the fee. (Hr'g Tr. 1557:1–4; 1572:18–1573:2.) Mr. Zell reasonably believed that the fees had been disclosed. What Mr. Boden elected to do with the fees once he received them pursuant to his pre-existing fee agreement was his decision. Consequently, the Division failed to carry its burden to prove that Mr. Zell substantially assisted or caused any violation with respect to Mr. Boden's fee arrangement.

2. Mr. Zell did not act with scienter or negligently in connection with the sale and acquisition of Tenneco.

The Division failed to prove that Mr. Zell acted with scienter or negligently with respect to the Tenneco transactions. Mr. Zell did not participate in any negotiations with Mr. Wooddall regarding the sale or purchase of the Tenneco property. (Hr'g Tr. 1640:7–9; 1648:13–16.) Mr. Zell was not aware of any discussions between Mr. Boden and Mr. Wooddall regarding the purchase of Tenneco by Timbervest Partners prior to the sale of Tenneco to Chen Timber and was certainly unaware of any alleged "verbal option" to repurchase the property. (Hr'g Tr. 1553:15–19.)

Mr. Zell explained that he looked at each transaction as an independent transaction and considered whether it was a good sale or purchase for the client. (Hr'g Tr. 1565:21–1567:7.) The Division offers no proof that Mr. Zell knew or should have known that the sale was below the fair market value, nor can it. Consequently, the Division failed to prove that Mr. Zell knew or was reckless in not knowing that his activity was part of improper conduct or that he knew or should have known that his conduct would contribute to a violation.

D. Mr. Zell did not provide knowing and substantial assistance in the conduct that constitutes a primary violation nor did he cause a primary violation.

The third element of a claim for aiding and abetting requires that the Division prove knowing and substantial assistance in the primary violation. Mere awareness and approval of the primary violation are insufficient. *Armstrong v. McAlpin*, 699 F. 2d 79, 92 (2d Cir. 1983). Inaction on the part of an aider and abettor is not sufficient to satisfy this prong unless "it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act." *Id.* at 91. To establish a claim for causing, the Division must prove that Mr. Zell's action or inaction was actually the cause of the violation. The Division failed to carry its burden.

1. Mr. Zell did not knowingly or substantially assist in any conduct with respect to the alleged failure to disclose the fee arrangement that constitutes a primary violation nor did he cause any such violation.

There is no evidence that Mr. Zell substantially assisted or caused Timbervest's failure to disclose Mr. Boden's fee arrangement. To the best of Mr. Zell's knowledge, the fee arrangement was disclosed to Ed Schwartz of ORG. As explained above, Mr. Zell approved the transactions, with knowledge that Mr. Boden would receive a fee, because he reasonably and in good faith believed that the transactions were in the clients' best interests. Tenneco was sold to Chen Timber at a price exceeding its carrying value by 11.7% percent. Mr. Zell specifically recalled his approval of the sale of the Kentucky properties because he believed it was an excellent transaction for the client. He testified: "I was amazed at this sale. I can't believe that Mr. Boden got somebody to buy all these properties at what I considered well above fair value." (Hr'g Tr. 1649:12–17.)

Mr. Boden's subsequent sharing of the fees he earned in connection with the transactions did not affect Mr. Zell's decision because at the time he approved the Tenneco and Kentucky transactions, he did not know Mr. Boden would later share the proceeds of his advisory agreement. (Hr'g Tr. 1650:2–13.) Like the other partners, Mr. Zell first learned that Mr. Boden decided to share the proceeds he received from his advisory agreement when Mr. Boden handed Mr. Zell a check. (Hr'g Tr. 1557:1–4; 1572:18–1573:2.) Consequently, the Division did not and cannot establish that Mr. Zell caused or substantially assisted in any violation.

2. Mr. Zell did not knowingly or substantially assist in any conduct with respect to the Tenneco sale and purchase that constitutes a primary violation or cause a primary violation.

As explained above, it is undisputed that Mr. Zell did not participate in any conversations with Mr. Wooddall regarding the Tenneco transactions and that he was not aware of any conversations between Mr. Boden and Mr. Wooddall regarding those transactions. Even if there

was a "verbal option" to repurchase the property, there was no evidence that Mr. Zell knew this option existed.

Mr. Zell's involvement in the transactions was limited to his role as a member of the investment committee. Mr. Zell did not have day-to-day responsibility for reviewing purchase and sale contracts, nor was he involved in the negotiation of either of the Tenneco transactions. (Hr'g Tr. 1640:7–9; 1648:13–16.) Rather, Mr. Zell approved each transaction because it was a good deal for the client. (Hr'g Tr. 1565:21–1567:7.) While not having a present recollection of having done so, in reviewing the matter and recognizing his course of practice, he approved the sale of Tenneco to Chen Timber because he believed it was a good sale for the client evaluated based on the information available to him at the time. (*See* Hr'g Tr. 1566:21–1567:7.)

With respect to the purchase on behalf of Timbervest Partners Alabama, Mr. Zell recalled reviewing the data and models in connection with Timbervest Partners Alabama's purchase of Tenneco. (Hr'g Tr. 1641:4–13.) Mr. Zell also testified that he would have reviewed the offers for the non-core Tenneco property because the brokers marketing the property did not have authority to approve a sale. (Hr'g Tr. 1646:3–12.) Mr. Zell explained that the offers for the non-core Timberland were higher than he anticipated and caused him to start reevaluating the market. (Hr'g Tr. 1647:20–1648:12.) In short, the evidence presented at trial failed to establish that Mr. Zell caused any violation or that he knowingly and substantially assisted in a violation.

E. The requested relief is either barred by the statute of limitations or excessive.

Even if this Court finds that Mr. Zell aided and abetted or caused a primary violation by Timbervest, none of the requested relief should be ordered because it is either barred by the statute of limitations or excessive in scope. In support of this argument, Mr. Zell incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief. For the reasons described in that brief, all remedies the Division seeks are inappropriate in this case. First, censures, bars,

and suspensions are barred by the statute of limitations. Second, disgorgement is not available because the only allegedly ill-gotten gains in this case were Mr. Boden's advisory fees, and those were paid back to the client prior to this case being brought. Finally, as will be discussed in more detail below, there is no basis for a cease and desist order against Mr. Zell under applicable law. *Steadman v. SEC*, 603 F.2d 1126, 1137-40 (5th Cir. 1979); *see also In the Matter of David F. Bandimere & John O. Young*, A.P. File No. 3-151214, 2013 WL 5553898, at *78 (Oct. 8, 2013).

Under *Steadman*, which the Commission applies to administrative sanctions, the Division must show that a C&D is in the public interest considering the following factors: (1) "the egregiousness of the defendant's actions," (2) "the isolated or recurrent nature of the infraction," (3) "the degree of scienter involved," (4) "the sincerity of the defendant's assurances against future violations;" (5) "the defendant's recognition of the wrongful nature of his conduct," and (6) "the likelihood that the defendant's occupation will present opportunities for future violations." *Steadman v. SEC*, 603 F.2d at 1137–40. In addition to these factors, the Division must show that "the recency of the violation, the resulting harm to investors in the marketplace, and the effect of other sanctions" support the imposition of a C&D order. *Bandimere*, 2013 WL 5553898, at *78. The Division has failed to show that any of these factors support the imposition of a C&D order against Mr. Zell.

As described above, there was nothing egregious about Mr. Zell's conduct in this matter. Mr. Zell first learned of Mr. Boden's fee arrangement from Mr. Shapiro in 2002. When the transactions at issue occurred, Mr. Zell understood that Mr. Shapiro had disclosed the fee arrangement to Mr. Schwartz of ORG and concluded from that conversation that the arrangement was fine with ORG. (Hr'g Tr. 1756: 19-23; 1780:11.) Mr. Zell reasonably relied on Mr. Shapiro's disclosure. Indeed, Mr. Shapiro did not keep the fee arrangement a secret from Mr.

Zell when he was employed by BellSouth, so why would he fail to disclose it to ORG? Mr. Zell was not aware of the creation of the LLCs by Mr. Boden and his attorney to receive the fee payments. At the time Mr. Zell approved the sales by New Forestry of the Tenneco and Kentucky properties, he was not aware that Mr. Boden would later share his fees with the other partners, so he could not have been motivated to approve the sales based on his expectation of receiving part of Mr. Boden's fee. He was completely unaware of the negotiations between Mr. Boden and Mr. Woodall regarding any alleged agreement to purchase the Tenneco property back from Chen Timber. There is simply no evidence of any conduct by Mr. Zell that could remotely be considered egregious. For all of these same reasons, Mr. Zell did not act with any degree of scienter under the *Steadman* analysis.

As discussed in the Timbervest brief, the alleged infractions were isolated and non-recurring in the approximately seven years that have elapsed since the conduct at issue in this case. Moreover, Mr. Zell is a Chartered Financial Analyst and has held that designation for more than 20 years. (Hr'g Tr. 1591:4–10.) Throughout that period, he has had no disciplinary issues of any sort, aside from the present administrative proceeding. Moreover, the Division's thorough review of the bank and brokerage records of Mr. Zell and his wife yielded no evidence or report of any improprieties or improper transactions. (Hr'g Tr. 1651:25–1652:10.)

The additional *Steadman* factors concern the respondent's recognition of wrongful conduct, sincere assurances of no future violations, and opportunity for future violations. In this case, the Division has shown no wrongful conduct. However, Mr. Zell and his partners returned the fees, plus interest, to the client in June 2012. (Hr'g Tr. 511:21–512:3.) Timbervest no longer has any separate accounts that hold plan assets and its funds are organized in a manner that exempts them from ERISA. (See,e.g., Div. Ex. 140 at 47.) Given the trauma and disruption that

this investigation and proceeding has caused Mr. Zell and his Partners, there is no chance that they will risk not preserving a careful, written record of such arrangements and seeking the advice of ERISA counsel should they have clients subject to ERISA in the future.

Finally, the remaining factors weigh against the imposition of a cease and desist order against Mr. Zell. *See Bandimere*, 2013 WL 5553898, at *78. Those factors are recency of the violation, the resulting harm to investors, and the effect of other sanctions. *Id.* As thoroughly discussed in the Timbervest brief, all of these factors weigh against imposing a cease and desist order against Mr. Zell: (1) these alleged violations are not recent; (2) no clients or investors were harmed because Mr. Boden's fees were for services actually rendered to the client and, as to the Chen transactions, the purchase and sale met each client's objectives and the respective prices were fair and reasonable; and (3) there is no remedial function to be served by imposing a C&D in this case because there is no alleged ongoing misconduct and no likelihood of future misconduct.

III. CONCLUSION

The claims against Mr. Zell should be dismissed. The Division failed to prove a primary violation of the Advisers Act by Timbervest. Even if there were a primary violation, the Division failed to establish that Mr. Zell aided, abetted, or caused any such violation. Further, the remedies the Division seeks are barred by the statute of limitations or inappropriate based on the facts presented at the evidentiary hearing.

This 28th day of March, 2014.

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