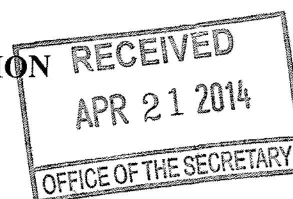
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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.	Reply to the Division of Enforcement's Post-Hearing Brief on behalf of David Zell

REPLY TO THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF ON BEHALF OF DAVID ZELL

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The Division has cherry-picked facts and events, some of which occurred long before or after the charged conduct, to attempt to paint a picture that fits the Division's vision. In the absence of *facts* to support its theory of fraud, the Division speculates on what might have occurred and attributes conduct and knowledge to the collective "Respondents," independent of whether each of the individual respondents was actually involved in the conversations or conduct at issue. The truth is that Mr. Zell had no knowledge of the vast majority of events about which the Division complains. And, based on what he did know, he acted reasonably and in the best interests of his clients. Accordingly, the Division has not and cannot establish that he aided and abetted or caused any violation of the Advisers Act.

Mr. Zell incorporates by reference all matters set forth in Timbervest's Post-Hearing Reply Brief.

A. Mr. Zell Did Not Aid, Abet, or Cause Timbervest to Fail to Disclose a Cross Trade of the Tenneco Property.

As a threshold matter, Timbervest did not violate the Advisers Act by failing to disclose a cross trade of the Tenneco property because there was no cross trade of the Tenneco property. Even if the Court concludes that Timbervest violated the Advisers Act by failing to disclose the Tenneco transactions, Mr. Zell is not liable for aiding, abetting, or causing the violation because there is no evidence that Mr. Zell had any knowledge of the existence of any agreement between Mr. Boden and Mr. Woodall for TVP to repurchase the property at the time he approved the transactions. Rather, Mr. Zell reasonably and in good faith believed they were two independent transactions. Thus, the Division's arguments regarding Mr. Zell's knowledge of ERISA are unpersuasive because there would have been no ERISA violation if the transactions were two independent transactions as Mr. Zell understood them to be.

1. Mr. Zell Had No Knowledge of Any Agreement Between Mr. Boden and Mr. Wooddall for TVP to Acquire Tenneco.

No better argument shows how specious the Division's case is than its argument that because Mr. Zell, Mr. Shapiro, and Mr. Jones approved the transaction *and did not testify that Mr. Boden concealed information from them* "[t]he only conclusion, then, is that Boden did, in fact, tell them of the deal with Wooddall and that they are refusing to admit their complicity." (Div. Br.[1] at 27.) This argument is not only nonsensical but also unsupported by the record. How would Mr. Zell possibly know if Mr. Boden concealed information from him? Moreover, this argument ignores that Mr. Zell testified that he had no knowledge of the alleged arrangement and that it would have caused him concern if he had known.

> Q Did Mr. Boden tell you that he had had a meeting with Mr. Wooddall in which he discussed with Mr. Wooddall repurchasing back the property that he was going to sell to Chen Timber from Chen Timber?
> A No.
> Q Okay. If Mr. Boden did, in fact, have a conversation with Mr. Wooddall in which he discussed with him repurchasing the property that he was going to sell to Chen Timber, would that cause you any concern?
> A Yes.

(Hr'g Tr. 1553:15–24.) Thus, the *only* conclusion is not that Mr. Zell knew about the arrangement and is denying complicity, but, assuming such an agreement existed, that he did not know about it and would have had questions had he known.

2. Mr. Barag's Conversations with Mr. Zell Regarding ERISA Did Not Raise Red Flags Regarding the Tenneco Acquisition.

Based on the testimony of Mr. Barag, the Division further contends that even if Mr. Zell was not aware of the details of Mr. Boden's discussions with Mr. Wooddall (the evidence shows he was not), he was reckless in failing to spot the ERISA issue. This argument fails for at least

[1] "Div. Br." refers to the Division of Enforcement's Post-Hearing Brief, dated March 28, 2014.

two reasons. First, the transactions implicate ERISA only if they were a cross trade. If they were two separate transactions, as Mr. Zell reasonably understood them to be, there was no potential for a violation of ERISA.

Second, Mr. Barag's general discussions with Mr. Zell and his partners about the ERISA implications of a transfer of property directly from one client to another is fundamentally different from the transaction that Mr. Zell understood was occurring when he approved TVP's acquisition of Tenneco, which to the best of his knowledge had been sold to a third-party in an arms-length transaction. Mr. Barag testified that it was he who brought up "[t]he potential of doing a roll-up of BellSouth properties into the REIT." (Hr'g Tr. 1934:15–21.) According to Mr. Barag, Mr. Zell was not open to the idea because he did not believe it was something BellSouth would be interested in, and he was concerned it might appear that Timbervest was not properly focused on maximizing value for BellSouth. (Hr'g Tr. 1937:1–15.) Given Mr. Zell's "resolute" and "quick[]" rejection of Mr. Barag's proposal (Hr'g Tr. 1937:1–15), the logical conclusion is that, if Mr. Zell had been aware of any plan to transfer property from New Forestry to TVP, he would have opposed it for the very same reasons.

When the opportunity for TVP to acquire Tenneco was presented to Mr. Zell around November 2006, these earlier discussions with Mr. Barag did not trigger a red flag because Mr. Zell was not attempting to circumvent ERISA; indeed, ERISA "did not cross [his] mind." (Hr'g Tr. 1562:6–16; 1565:22–1566:5.) What Mr. Zell was considering was the acquisition of a property that New Forestry had previously owned from an independent third party, at a price he believed to be below the property's then current market value.

3. Timbervest Sold Tenneco Because The Client Requested Liquidity.

The Division's argument that the differing descriptions of the Tenneco property contained in the 2006 New Forestry Disposition Report and the Gilliam Spec Book evidence concealment misses the point. Timbervest had discretion to sell any property in New Forestry's portfolio so long as it was consistent with New Forestry's investment guidelines. Indeed, Timbervest was specifically directed to "sell a property when gross proceeds realized are equal to or greater than 90% of the current fair market value and the terms and conditions of the sale are otherwise acceptable to Investment Manager." (Div. Ex. 54.) The sale of Tenneco more than satisfied this criterion. The sale price was at 111.7% of the current fair market and well in excess of the 90% of current fair market value benchmark.

In any event, the Division offered no evidence that Mr. Zell drafted the language in the reports. In addition, Mr. Zell testified that the Spec Book was not intended to be public. (Hr'g Tr. 1653:11–1654:3.) Mr. Zell should not be held liable for conduct that the Division did not and cannot prove by a preponderance of the evidence that he aided, abetted, or caused.

4. Mr. Zell Had No Knowledge of Mr. Boden's Efforts to Sell the Glawson Property to Reid Hailey.

The Division claims that the "Respondents" have a history of trying to cross trade properties; however, even under the Division's best evidence, Mr. Boden offered Mr. Hailey an incomplete contract with an accompanying purchase option for which a premium would be paid. These are different facts from those alleged regarding the Tenneco transactions. Moreover, there is no evidence that anyone other than Mr. Boden had knowledge of any efforts to sell the Glawson property to Mr. Hailey in October 2005. (Hr'g Tr.870:24–871:8.) Mr. Hailey testified he has known Mr. Zell only since 2008 or 2009, long after Mr. Boden's unsuccessful marketing of Glawson to Mr. Hailey. (Hr'g Tr. 870:1–4.) Mr. Hailey further testified that he had never had

any business dealings with Timbervest. (Hr'g Tr. 870:5–13.) Accordingly, even if Mr. Boden offered to sell the Glawson property to Mr. Hailey with an option to purchase at a premium, Mr. Zell had no knowledge of the offer; therefore, the proposed Glawson transaction has no relevance to Mr. Zell's conduct with respect to the Tenneco transactions.

In short, Mr. Zell understood New Forestry's sale of Tenneco and TVP's acquisition of Tenneco to be two independent transactions. Mr. Zell did not know about any alleged agreement between Mr. Boden and Mr. Wooddall regarding Tenneco at the time he approved either New Forestry's sale of Tenneco or TVP's acquisition. Certainly the contracts made no mention of any agreement, and Mr. Wooddall never expressed to anyone, including Mr. Zell or even his lender, that there was one. (*See* Hr'g Tr. 819:18–23; 839:9–12; 863:6–23.) Because he viewed the transactions as two separate transactions, there were no ERISA implications for Mr. Zell to have considered. Sometime before September 15, 2006, Mr. Zell, as a member of investment committee, approved the sale of Tenneco by New Forestry. (*See* Hr'g Tr. 1422:12–17; Resp. Ex. 132.) And, sometime after December 15, 2006, before the expiration of the due diligence period, Mr. Zell, as a member of the investment committee, approved the acquisition of Tenneco on behalf of TVP. (*See* Hr'g Tr. 1423:18–1424:4; Resp. Ex. 132.) Mr. Zell approved each transaction because it was a good deal for the client. (Hr'g Tr. 1565:21–1567:7.) In fact, when asked what he recalled about the decision to acquire Tenneco on behalf of TVP, Mr. Zell testified, "I remember reviewing the underlying data, and I think we had various models looking at it, as we always would." (Hr'g Tr. 1641:4–13.) The Division failed to establish that Mr. Zell with scienter or negligently caused Timbervest to fail to disclose a cross trade of the Tenneco property because it did not prove that Timbervest engaged in any cross trade, and it did not prove

that Mr. Zell knew or should have known of any simultaneous agreement to sell and repurchase the property.

B. Mr. Zell Did Not Aid, Abet, or Cause Any Failure by Timbervest to Disclose the Payment of Mr. Boden's Fees.

Timbervest did not violate the Advisers Act by failing to disclose the payment of Mr. Boden's advisory fees. Even if the Court finds that Timbervest violated the Advisers Act by failing to disclose the fees, Mr. Zell is not liable for aiding, abetting, or causing the violation. First, Mr. Zell understood that the fee agreement had been disclosed. Second, Mr. Zell was not aware of any of the "facts" the Division identifies as evidence of concealment at the time he approved the transactions that resulted in the fees. Finally, it never occurred to Mr. Zell that the payments might be prohibited by ERISA; thus, ERISA could not have been a motive for concealing payment of the fees.

1. Mr. Zell Reasonably Believed the Advisory Fee Arrangement Had Been Disclosed to Mr. Schwartz.

To the best of Mr. Zell's knowledge, the fee arrangement was disclosed to Ed Schwartz of ORG. (Hr'g Tr. 1541:14–16.) Mr. Shapiro testified that he told his partners that Mr. Schwartz was fine with the arrangement, explaining, "Sir, it's been 10 years. I don't really recall. I remember Mr. Schwartz, for all intents and purposes, saying it was fine. I let my partners know. That's all I remember." (Hr'g Tr. 1790:13–16.) Mr. Zell was entitled to rely 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.) He had no reason to doubt Mr. Shapiro, both because they are business partners and because the two had discussed Mr. Boden's fee arrangement in 2002 when Mr. Zell was employed at BellSouth. (Hr'g Tr. 1535:5–14.) Accordingly, even if the disclosure was inadequate, as the Division contends, Mr. Zell believed at the time that the arrangement had been

disclosed to and consented to by ORG. It follows that he could not have acted with scienter or negligently caused the fees not to be disclosed.

2. Mr. Zell Had No Knowledge of Any Efforts to Conceal Mr. Boden's Receipt of the Fees.

Given Mr. Zell's belief that Mr. Boden's fee arrangement was disclosed, it strains credibility to suggest that he participated in any scheme to conceal the fees from the client. While the Division claims the "Respondents took elaborate steps to conceal that they were the recipients of the real estate commissions" (Div. Br. at 34), Mr. Zell had no knowledge of the "steps" the Division cites. Mr. Zell was not familiar with the names of the entities through which Mr. Boden received his fees until the Division's investigation. (Hr'g Tr. 1568:20–1569:2.) At the time of the transactions, he did not know that Mr. Boden had arranged to create these entities to receive his fees. (*see;* Hr'g Tr. 1577:16–1578:9.) Mr. Harrison, Mr. Boden's personal attorney who created the LLCs, testified that he did not have any conversation with any Timbervest partner other than Mr. Boden regarding the LLCs or Mr. Boden's fees. (Hr'g Tr. 731:21–732:4.)

The Division makes much of the language in the purchase and sale agreements for the sale of Tenneco, the Kentucky Lands, and Rocky Fork to Scott Carswell, ignoring the fact that no partner other than Mr. Boden had any involvement with the language regarding the LLCs or Mr. Boden's advisory fee in these documents. Mr. Zell did not have day-to-day responsibility for reviewing purchase and sale contracts. (Hr'g Tr. 1632:19-21.) While Mr. Zell had no knowledge of the LLCs at the time the agreements were entered into, it is unlikely that seeing the names inserted in a sales contract would have been significant to him because it is common practice and, consistent with their purpose, limited liability companies often utilize naming structures that do not identify or relate to any specific individual or entity.

Finally, because Mr. Zell believed the fees to Mr. Boden had been disclosed and did not know that Mr. Boden would share the proceeds of his agreement with his partners, he had no reason to attempt to conceal the payment of the fees. The Tenneco sale to Chen Timber closed on October 17, 2006. (Div. Ex. 11.) The contract for the sale of the Kentucky property is dated December 15, 2006. (Resp. Ex. 34.) In connection with the Chen Timber sale, Mr. Boden caused a check to be made to Mr. Zell on January 13, 2007, almost a month following the Kentucky contract date, and apparently did not deliver the check to Mr. Zell until a month after that because Mr. Zell deposited the check on February 23, 2007. (Div. Ex. 15a.) The Kentucky transaction closed on April 3, 2007. (Resp. Ex. 34.) More than a month later, on May 25, 2007, Mr. Boden caused a check to be made to Mr. Zell, which Mr. Zell deposited on May 30, 2007. (Div. Ex. 32b.) At the time of approving both the sale to Chen Timber and the sale of the Kentucky property, Mr. Zell had no reason to know that Mr. Boden would share his fees with him. There is no evidence that Mr. Zell contributed to any effort to hide the payment of the fees to Mr. Boden or himself from anyone. At its core, the Division's claim of concealment is pure speculation and conjecture.

3. Mr. Zell Did Not Recognize that the Advisory Fee Agreement Implicated ERISA.

Despite all the testimony to the contrary, the Division contends that "Respondents" failed to disclose the fees *because they knew they were prohibited by ERISA*. (Div. Br. at 48 (emphasis added).) The Division relies solely on Mr. Barag's testimony to establish Mr. Zell's knowledge of ERISA, but this reliance is misplaced. Mr. Barag left Timbervest in December 2004, long before the events at issue in this proceeding. (Hr'g Tr. 1930:4.) Mr. Barag testified that he generally "had very little involvement with the BellSouth account." (Hr'g Tr. 1924:8–11.)

Rather, the account was managed by Mr. Zell, and Mr. Barag trusted him implicitly. (Hr'g Tr. 1924:11–12; 2013:7–9.)

Though the Division contends that Mr. Barag warned the Partners that they could not receive any compensation outside of the Investment Management agreement, he later testified that he never discussed issues of potential commissions with the Partners. (Hr'g Tr. 2012:23–6.) Rather, his only concern was that the Partners make efforts to take care of BellSouth as a client. Mr. Barag had no doubt that Mr. Zell would fulfill his duties because he "certainly had BellSouth's interests, you know, best interests at heart ...." (Hr'g Tr. 1946:25-1947:1.)

Mr. Barag also testified that he had a conversation with Mr. Zell in connection with the private placement memorandum for a commingled fund. But it does not follow from that simple conversation, or from the fact that Mr. Zell was aware that New Forestry was governed by ERISA (Div. Br. at 27, 48.), that Mr. Zell did or should have recognized that the payment of the fees might implicate ERISA.

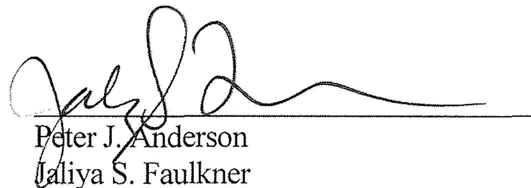
Whatever experience or knowledge Mr. Zell may have had with ERISA at BellSouth, or through conversations with Mr. Barag, they were not analogous to the situation that in fact presented itself. When the fee agreement was entered into, it did not implicate ERISA because Mr. Boden was an independent consultant. Years later, when the fees were paid, and months later, when they were shared with Mr. Zell, it did not occur to Mr. Zell that the payments might be prohibited by ERISA. (Hr'g Tr. 1557:20–1558:11; 1574:15–1575:1.) Given that Mr. Zell did not realize that the payments might violate ERISA, ERISA could not have served as a motivation for him to conceal the payment of the fees.

In the end, Mr. Zell cannot be liable for aiding, abetting, or causing any failure by Timbervest to disclose the payment of Mr. Boden's fees because Mr. Zell believed the arrangement had been disclosed and made no effort to conceal the payment of the fees.

C. 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 because Mr. Zell had no knowledge of any alleged agreement to cross trade the Tenneco property, he reasonably believed Mr. Boden's fee arrangement had been disclosed, and he made no effort to conceal any payment of the fees. Further, for the reasons stated in Mr. Zell's and Timbervest's Post-Hearing Briefs, the remedies the Division seeks are barred by the statute of limitations or are inappropriate based on the facts presented at the evidentiary hearing.

This 18th day of April, 2014.



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