HARD COPY

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.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

Pursuant to the Commission's July 5, 2016 Order, Respondents Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden III, Donald David Zell, Jr., and Gordon Jones II submit this Brief in Support of their Motion for Leave to Adduce Additional Evidence. This new evidence shows that the disgorgement ordered by the Commission should be vacated or offset in its entirety by amounts Respondents have repaid to their client.

Timbervest received a $403,500 disposition fee in connection with the disposition of a property (the "Alabama Property") on behalf of a client, New Forestry, LLC, whose ultimate beneficiary was BellSouth. The Commission issued its final opinion and order on September 17, 2015, ordering Respondents to disgorge this fee. Respondents appealed the Commission's final opinion and order to the Court of Appeals for the D.C. Circuit.

While this matter was on appeal to the Commission but prior to the Commission's September 17, 2015 final opinion and order, AT&T[1] filed suit against Respondents, claiming, among other things, that they were entitled to recover the disposition fee on the sale of the Alabama Property and relying on the ALJ's Initial Decision in support of their claims. (May 8, 2015 Complaint at ¶¶ 2-3.) Although AT&T brought claims under ERISA, rather than federal securities laws, the underlying factual allegations against Respondents were the same as those in this matter. (*See, e.g., id.* ¶¶ 2-3.) Moreover, AT&T specifically sought recovery of the $403,500 disposition fee from the sale of the Alabama Property. (*See, e.g., id.* ¶ 69.) After filing their appeal of the Commission's final opinion and order, the Respondents reached a settlement agreement with AT&T, pursuant to which Respondents agreed to pay AT&T an amount in full and complete satisfaction of any claims related to the disposition fee and other claims. (July 15, 2016 Declaration of Donald David Zell, Jr. ("Supplemental Zell Declaration") at ¶ 4, attached hereto as Exhibit 1.)

In connection with the settlement, AT&T wrote a letter to the Commission's Atlanta Regional Office confirming that Respondents had agreed to pay this amount. Specifically, the January 25, 2016 letter from AT&T to the Commission states that Respondents agreed to pay AT&T:

> An amount that is in full and complete satisfaction of any claims that [AT&T] ha[s] or may have against the [Respondents], including any claims for any relief including interest or losses relating to the $403,000[2] disposition fee that the [Respondents] received in connection with the [Alabama P]roperty transaction, and [the payment] eliminates potential unjust enrichment by the [Respondents] in light of all the services performed by the [Respondents] pursuant to the investment manager agreements between AT&T and Tim-

[1] BellSouth was acquired by AT&T in 2006. AT&T includes AT&T Services, Inc., the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan I, the AT&T Umbrella Benefit Plan II, and New Forestry, LLC.

[2] The reference to "$403,000" in the AT&T letter is a typographical error. (Supplemental Zell Declaration ¶ 5.) Timbervest received a $403,500 disposition fee on the sale of the Alabama Property. This was the amount that the Commission ordered disgorged and that Respondents repaid to AT&T. (*Id.*)

bervest and/or the Limited Liability Company Agreement of New Forestry LLC.

January 25, 2016 Letter from Monroe T. Hill, Jr. to M. Graham Loomis, attached hereto as Exhibit 2. Respondents completed their payment obligations under the settlement agreement and consequently AT&T dismissed its lawsuit against Respondents with prejudice. April 22, 2016 Declaration of Donald David Zell, Jr. ("April 22, 2016 Zell Declaration") at ¶¶ 4-5, attached hereto as Exhibit 3.

Based on these events, Respondents filed a motion with the D.C. Circuit, under 15 U.S.C. § 78y(a)(5), to adduce this additional evidence. That statute allows the consideration of additional evidence not introduced at the underlying evidentiary hearing if "the additional evidence is material and . . . there was reasonable ground for failure to adduce it before the Commission." *Id.*

The Commission has essentially the same standard for considering new evidence. Under the Commission's Rule of Practice, additional evidence should be admitted if (1) "there were reasonable grounds for failure to adduce such evidence previously," and (2) "such additional evidence is material." SEC Rule of Practice 452. The January 25, 2016 letter and the Zell Declarations satisfy both of these conditions. As discussed more fully below, the letter and declaration are material, and Respondents had reasonable grounds for not previously adducing such evidence.

This new evidence is material because it shows that Respondents have already returned the $403,500 disposition fee (with interest) to the client beneficiary, and therefore, disgorgement of this amount would be duplicative and improper under the standards for disgorgement and would make the disgorgement order a penalty barred by the statute of limitations.

Disgorgement is supposed to be an equitable remedy designed to prevent defendants from profiting from illegal activity. *See, e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). The primary purpose of disgorgement is to correct unjust enrichment and restore the parties to the status quo ante. *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 96 (2d Cir. 2004). *SEC v. Zacharias*, 569 F.3d 458, 471-72 (D.C. Cir. 2009). Although Respondents contend that they earned this fee and that they were never unjustly enriched by it because the fee was not causally related to the violations alleged in this case, they have nevertheless now returned this amount, with interest, to the client.[3] The parties, therefore, have been returned to the status quo ante, and Respondents have not been unjustly enriched—a fact that AT&T confirms in its letter to the Commission's Atlanta Regional Office. The new evidence therefore demonstrates that disgorgement of the $403,500 disposition fee would be improper.

In its July 5, 2016 Order, the Commission ordered the parties to brief this issue and encouraged the parties to "address the precedent regarding the evidentiary showing required to support an offset against or reduction of disgorgement." Order at 2 & n.6 (*citing SEC v. Currency Trading Int'l, Inc.*, 175 F. App'x 934, 935-36 (9th Cir. 2006); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1364 (S.D. Fla. 2008), *aff'd*, 308 F. App'x 364 (11th Cir. 2009); *Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *44 & nn.226-227 (May 29, 2015); *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *23 & nn. 201-202 (May 2, 2014); and *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *17 & n.106 (Dec. 21, 2007)).

[3] Respondents have argued both before the Commission and in the appeal to the D.C. Circuit that disgorgement was improper because the receipt of the fee was not causally related to any purported violation and because it constituted a penalty and forfeiture barred by 28 U.S.C. § 2462. Although Respondents maintain those arguments, this new evidence provides additional grounds for vacating the disgorgement order.

Each of the cases cited by the Commission supports the Respondents' motion. For example, in *SEC v. Solow*, the defendant argued that the award of disgorgement should be offset by, among other things, amounts the defendant paid in settlement of an arbitration claim. The court disagreed after finding that the monies defendant repaid in the settlement were "not part of the disgorgement number presented by the Commission." 554 F. Supp. 2d. at 1364. Here, in contrast, the amount ordered to be disgorged ($403,500) was calculated based on the very same amounts (the disposition fees) that Respondents have now repaid to their client, as set forth in AT&T's letter to the Commission's Atlanta Regional Office.

Further, in *SEC v. Currency Trading Int'l, Inc.*, the SEC sought disgorgement of an amount that was also the subject of a settlement with the Department of Justice. The SEC conceded it would allow the defendant to set off "any of the funds seized from him to the extent they are, in fact, used to reimburse investors whose transactions were the basis of the disgorgement award." 175 F. App'x at 935-36. The court held that it would hold the government to this concession and "offset the described amounts, if and when the conditions are met." *Id.* Here, the Respondents have in fact reimbursed the investor whose transaction was the basis of the disgorgement award.

In *Calabro*, the respondent requested an offset to disgorgement based on a settlement with the affected customer. The Commission declined to offset the disgorgement order because a "recent BrokerCheck report" indicated that the respondent "made no monetary contribution to the settlement." 2015 WL 3439152, at *44. In contrast, the Respondents here directly paid the disgorgement amounts. (Supplemental Zell Declaration ¶ 6.) Specifically, the funds for the settlement came directly from Respondents Boden, Shapiro, Zell, and Timbervest. (*Id.*) Respond-

ents have received no reimbursement from any insurance provider or other third party for these amounts nor do they anticipate any such reimbursement. (*Id.* ¶ 8.)

In *Montford*, the respondents had urged the Commission to offset disgorgement by the $40,000 they had paid a client as part of a civil suit. The Commission declined to do so because respondents had "failed to provide any documentation to support this claim" and that the "record contains no information about the basis for this suit or the settlement amount." 2014 WL 1744130, at *23. Here in contrast, Respondents have provided a letter written by the client confirming that the amounts agreed to be paid by Respondents as part of the settlement were based on the very same disposition fee that serves as the basis for the Commission's disgorgement order. They likewise provided a sworn declaration that the amounts were in fact paid. The client has dismissed its lawsuit against Respondents with prejudice – an event that would not have occurred if they did not receive payment in full.

In *Disraeli*, the Commission declined to offset a disgorgement award where the respondent claimed he had "repaid approximately $32,000" of the amount ordered to be disgorged. 2007 WL 4481515, at *17. The Commission declined to offset disgorgement by this amount because the respondent failed to "provide documentation verifying these assertions, and, as noted, he carries the burden of doing so." *Id.* Here, in contrast, the Respondents have provided (i) documentation, signed by its client and submitted directly to the Commission staff confirming that Respondents agreed to pay an amount in satisfaction of all their claims (including the disgorgement claim); and (ii) an uncontroverted and sworn declaration that the amounts have in fact been paid and that the lawsuit against Respondents has been dismissed with prejudice.

The foregoing cases make clear that an offset is appropriate where a subsequent settlement results in the defendant or respondent paying a third party who is alleged to be the victim of

the securities law violation that serves as the basis for a disgorgement award. Indeed, in this very case, the Commission treated other amounts as not subject to disgorgement because they had already been repaid by Respondents to their client. *See* Commission's September 17, 2015 Opinion of the Commission and accompanying Order Imposing Remedial Sanctions, n.91. While Respondents continue to dispute that they violated the securities laws, there is now no dispute that they have repaid the disposition fee with interest, and the disgorgement order should be offset entirely by this payment. *See also SEC v. Prime One Partners, Corp.*, 113 F.3d 1242 (9th Cir. 1997) (unpublished table opinion) ("Of course, any money returned to investors would not be subject to disgorgement . . . ."); *SEC v. Narvett*, 2014 WL 5148394, at *2-*3 (E.D. Wis. Oct. 14, 2014) (reducing SEC's requested disgorgement by amounts that were voluntarily repaid to investors); *Segen ex rel. KFx Inc. v. Westcliff Capital Mgmt., LLC*, 299 F. Supp. 2d 262, 273 (S.D.N.Y. 2004) (granting summary judgment to § 16(b) defendants on disgorgement claim because defendants had already entered into a binding settlement agreement to return their profits).

In addition, because the monies have been returned to the client beneficiary, the disgorgement order would now constitute a penalty barred by the statute of limitations in 28 U.S.C. § 2462.[4] Ordering disgorgement of the disposition fee amounts to a penalty because it "goes beyond remedying the damage caused to the harmed parties by the defendant's action," *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). The Zell Declarations and the January 25, 2016 letter from AT&T—the party allegedly harmed by the sale of the Alabama Property—confirm that AT&T has been made whole by Respondents, including with respect to the disposition fee that the Commission ordered to be disgorged. The new evidence is therefore material to showing that

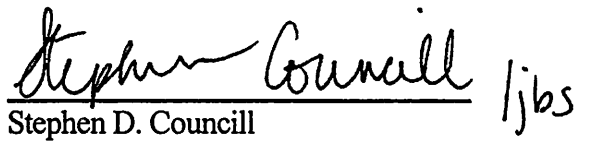
[4] Even without the payment to AT&T, the disgorgement order is barred by the statute of limitations in 28 U.S.C. § 2462 because it is not causally connected to any wrongdoing and is a forfeiture.

ordering disgorgement of the disposition fee would go beyond remedying any damage caused to the client, making the disgorgement a penalty.

Finally, Respondents had reasonable grounds for failing to adduce the new evidence before the Commission. The administrative process ended on September 17, 2015, when, after a hearing and administrative review, the Commission issued its final Opinion ordering, *inter alia*, disgorgement of the disposition fee on the sale of the Alabama Property. Respondents appealed the Commission's Opinion on November 13, 2015. AT&T did not write the letter until January 25, 2016, more than four months after the Commission's Opinion, and Respondents did not complete their payments to AT&T until March 2016, so Respondents could not have adduced the new evidence before the Commission prior to the appeal. (Supplemental Zell Declaration at ¶ 7.)

For the foregoing reasons, the Commission's Order of disgorgement relating to the $403,500 disposition fee, and related interest, should be vacated.

Dated: July 15, 2016



Stephen D. Councill
Julia Blackburn Stone
ROGERS & HARDIN LLP
2700 International Tower, Peachtree Center
229 Peachtree Street, N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224
scouncill@rh-law.com
jstone@rh-law.com

-and-

Nancy R. Grunberg
DENTONS US LLP
1900 K Street, N.W.
Washington, D.C. 20006

Telephone: 202-496-7500
Facsimile: 202-496-7756
nancy.grunberg@dentons.com

-and-

George Kostolampros
VENABLE LLP
575 7th Street, NW
Washington, DC 20004
Telephone: 202-344-4426
Facsimile: 202-344-8300
gkostolampros@venable.com

Counsel for Respondents

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.

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents' Brief in Support of Motion for Leave to Adduce Additional Evidence complies with the length limitations of SEC Rule of Practice 450(d). I further certify that this brief was prepared using Microsoft Word 2010 and that the word count for the document is 2,269 words.

This 15th day of July, 2016.

Stephen Councill /jbs
Stephen D. Councill

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing upon counsel of record in this matter by causing same to be delivered to the following as indicated below:

Via Facsimile (202) 772-9324
and Overnight Delivery

Secretary Brent J. Fields
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E., Mail Stop 1090
Washington, DC 20549
(original and three copies)

Via Email and First Class Mail

Robert K. Gordon
Anthony J. Winter
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, N.E.
Suite 900
Atlanta, Georgia 30236-1382
Gordonr@sec.gov
WinterA@sec.gov

This 15th day of July 2016.

Stephen Councill /jbs
Stephen D. Councill

EXHIBIT 1

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.

SUPPLEMENTAL DECLARATION OF DONALD DAVID ZELL, JR.

I, Donald David Zell, Jr., make the following Declaration under oath and under penalty of perjury:

1. My name is Donald David Zell, Jr. I am over the age of 21 years, and I have personal knowledge of the matters in this Declaration.

2. I am the Chief Operating Officer for Timbervest, LLC, a registered investment adviser, and I have held this position since 2003.

3. On May 8, 2015, AT&T Services, Inc., in its capacity as named fiduciary of the AT&T Pension Benefit Plan, The AT&T Umbrella Benefit Plan 1, The AT&T Umbrella Benefit Plan 2, and New Forestry LLC (collectively, "AT&T") brought suit against Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Gordon Jones, II, and myself (collectively, "Respondents") in the United States District Court for the Northern District of Texas (the "Lawsuit").

4. After filing an appeal of the Commission's final opinion and order to the United States Court of Appeals for the D.C. Circuit, Respondents reached a settlement agreement with

AT&T under which Respondents agreed to pay AT&T an amount in full and complete satisfaction of all claims asserted in the Lawsuit, including, but not limited to, all claims related to the $403,500 disposition fee Timbervest received on the sale of a property (the "Alabama Property"), interest on that disposition fee, and other claims.

5. The January 25, 2016 letter from AT&T to the Atlanta Regional Office of the Commission contains a typographical error in that it references a "$403,000" disposition fee on the sale of the Alabama Property. Timbervest received a $403,500 disposition fee on the sale of the Alabama Property. Respondents repaid the full $403,500 plus interest to AT&T.

6. The funds for the settlement came directly from myself, William Boden, Joel Shapiro, and Timbervest (the "Settlement Funds"). The Settlement Funds were aggregated in a bank account owned and controlled by Timbervest. The Settlement Funds were then transferred to an IOLTA account owned by Thompson Hine LLP (who represented Respondents in the AT&T Lawsuit) and then wired directly to AT&T.

7. Respondents caused two wire payments to be made to AT&T in full satisfaction of its obligations under the settlement agreement. The first wire payment was made on February 18, 2016. The second wire payment was made on March 18, 2016.

8. Respondents have received no reimbursement from any insurance provider or other third party for the settlement amounts paid to AT&T, nor do they expect to receive any such reimbursement. The insurance carriers responsible for providing any potential coverage available to Respondents have all denied coverage for the claims raised in the Lawsuit based on various policy exclusions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 15, 2016.

Donald David Zell Jr.

Donald David Zell, Jr.

EXHIBIT 2

at&t

Monroe T. Hill, Jr.
Executive Director
Senior Legal Counsel

AT&T Services, Inc.
675 W. Peachtree St., NW
Suite 4209
Atlanta, Georgia 30375

404.927.9153 Phone
monty.hill@att.com Email

January 25, 2016

M. Graham Loomis
Regional Trial Counsel
Securities & Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

Re: *In the Matter of Timbervest, LLC, et. al.*, Admin. Proc. File No. 3-15519

Dear Mr. Loomis:

We are writing this letter on behalf of AT&T Services, Inc., in its capacity as the plan administrator and named fiduciary of the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan I, and the AT&T Umbrella Benefit Plan II, and New Forestry, LLC (the "AT&T Plan Parties"). As you know, on May 8, 2015, the AT&T Plan Parties filed a lawsuit against the Timbervest Parties (defined below) for breach of fiduciary duty and related claims under ERISA. This is to inform you that the AT&T Plan Parties have entered into a settlement agreement with Timbervest, LLC and its principals, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr. and Gordon Jones, II (the "Timbervest Parties"), whereby the Timbervest Parties have agreed to pay the AT&T Plan Parties an amount that is in full and complete satisfaction of any claims that the AT&T Plan Parties have or may have against the Timbervest Parties, including any claims for any relief including interest or losses relating to the $403,000 disposition fee that the Timbervest Parties received in connection with the Tenneco Core property transaction, and eliminates potential unjust enrichment by the Timbervest Parties in light of all of the services performed by the Timbervest Parties pursuant to the investment manager agreements between AT&T and Timbervest and/or the Limited Liability Company Agreement of New Forestry LLC .

The settlement has been approved by an independent fiduciary which the AT&T Plan Parties retained to assure that the settlement was in the best interests of the benefit plan participants and beneficiaries. Accordingly, the above-referenced lawsuit has been dismissed.

Please direct any questions to the undersigned.

Sincerely,

Monroe T. Hill

Monroe T. Hill

cc: Timbervest, LLC - Carolyn Seabolt, Esq.

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TIMBERVEST, LLC, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Case No. 15- 1416
	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Respondent.	)	

DECLARATION OF DONALD DAVID ZELL, JR.

I, Donald David Zell, Jr., make the following Declaration under oath and under penalty of perjury:

1. My name is Donald David Zell, Jr. I am over the age of 21 years, and I have personal knowledge of the matters in this Declaration.

2. I am the Chief Operating Officer for Timbervest, LLC, a registered investment adviser, and I have held this position since 2003.

3. Timbervest, LLC, Joel Shapiro, Walter William Anthony Boden, II, Gordon Jones, II, and I (collectively, "Petitioners") entered into a settlement agreement with AT&T.[1] As reflected in a letter sent by AT&T Services, Inc. to M. Graham Loomis, Regional Trial Counsel for the Atlanta Regional Office of the Securities and Exchange Commission dated January 25, 2016, under the settlement agreement, Petitioners agreed to pay AT&T an amount in full and complete satisfaction of any claims that AT&T has had or may have against Petitioners, including any claims for any relief including interest or losses relating to the $403,000 disposition fee that Timbervest received in connection with the Tenneco Core property

[1] AT&T includes AT&T Services, Inc., the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan I, the AT&T Umbrella Benefit Plan II, and New Forestry, LLC.

transaction. The payment amount eliminates any potential unjust enrichment by Petitioners in light of all the services Petitioners performed under the investment manager agreements between AT&T and Timbervest and/or the Limited Liability Company Agreement of New Forestry LLC.

4. Petitioners have completed their obligations under the settlement agreement.

5. AT&T has dismissed its lawsuit against Petitioners with prejudice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2016.

Donald David Zell Jr.
Donald David Zell, Jr.