

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4443 / July 5, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32169 / July 5, 2016

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 SCHEDULING BRIEFS

This matter is before the Commission on the limited remand order issued by the United States Court of Appeals for the D.C. Circuit on June 24, 2016.¹

On September 17, 2015, the Commission issued an opinion and order finding that respondents² defrauded BellSouth, one of their pension fund clients, by selling an asset owned by BellSouth to another client at a below-market rate without disclosing respondents' conflict of interest in the transaction.³ The Commission determined that respondents were unjustly enriched as a result of this conduct in that they inappropriately charged BellSouth a disposition fee of \$403,500 on the sale of the asset. The Commission ordered respondents to disgorge that fee as well as \$181,814.05 in prejudgment interest.

Respondents sought review in the D.C. Circuit. They filed a motion for leave to adduce additional evidence that, in respondents' view, calls for modification of the disgorgement order. Respondents sought to adduce two items of additional evidence. The first item is a letter authored by a lawyer at AT&T (BellSouth's successor) stating that AT&T had reached a settlement in a private action it had instituted against respondents. The letter stated, among other things, that respondents agreed to pay AT&T an unspecified amount "in full and complete satisfaction" of AT&T's claims against respondents, "including any claims for any relief

¹ Doc. No. 1621677, *Timbervest, LLC v. SEC*, No. 15-1416 (D.C. Cir. June 24, 2016).

² Timbervest, LLC, a registered investment adviser, and its individual principals, Walter William Anthony Boden, III; Donald David Zell, Jr.; Gordon Jones, II; and Joel Barth Shapiro.

³ *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520 (Sept. 17, 2015).

including interest or losses relating to the \$403,000 disposition fee.” The second item is a declaration by one of the respondents stating that respondents have completed their obligations under the settlement agreement and that AT&T has dismissed its lawsuit with prejudice.

On June 24, 2016, the D.C. Circuit remanded the record to the Commission “for the limited purpose of allowing the Commission to consider the additional evidence identified by [respondents] and determine its effect, if any, on the Commission’s disgorgement order.”

Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a),⁴ that respondents file a brief addressing this issue, not to exceed 4,000 words, by July 15, 2016; that the Division of Enforcement file a response, not to exceed 4,000 words, by July 25, 2016; and that respondents may file a reply brief, not to exceed 2,000 words, by August 1, 2016.

Any evidentiary materials relied upon shall be attached to the briefs.⁵ The briefs shall be limited to the “effect, if any, on the Commission’s disgorgement order” of the additional evidence identified by respondents. The parties are encouraged to address the precedent regarding the evidentiary showing required to support an offset against or reduction of disgorgement.⁶

No briefs in addition to those specified in this order may be filed without leave of the Commission. All briefs must be served by e-mail and/or facsimile, as well as by mail.

For the Commission, by the Office of General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

⁴ 17 C.F.R. § 201.450(a).

⁵ The briefs shall be construed as incorporating motions to adduce additional evidence pursuant to Rule of Practice 452. See 17 C.F.R. § 201.452.

⁶ See, e.g., *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); *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *17 & n.106 (Dec. 21, 2007). Relevant considerations may include the basis of AT&T’s lawsuit against respondents, the extent to which the settlement amount is attributable to the misconduct underlying the Commission’s disgorgement order, and whether respondents themselves paid the settlement amount.