UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4492 / August 22, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32223 / August 22, 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	RECOMMENDATION REGARDING DISGORGEMENT

Remand order issued: June 24, 2016
Last brief received: August 1, 2016

This matter is before us on the limited remand order issued by the United States Court of Appeals for the D.C. Circuit on June 24, 2016.[1] The D.C. Circuit ordered that the "record be remanded . . . for the limited purpose of allowing the Commission to consider the additional evidence identified by [the respondents] and determine its effect, if any, on the Commission's disgorgement order." The court further ordered that we issue a "recommendation for the modification or setting aside of the disgorgement order." Upon consideration of the briefs and evidence submitted by the parties in response to our July 5 scheduling order,[2] we recommend that the disgorgement order be set aside as set forth herein.

On September 17, 2015, we issued an opinion and order finding that respondents, whom we refer to collectively as Timbervest,[3] defrauded BellSouth, one of Timbervest's pension fund

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

2 *Timbervest, LLC*, Investment Advisers Act Release No. 4443, 2016 WL 3595460 (July 5, 2016).

3 The respondents are 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.

clients, by selling an asset owned by BellSouth to another Timbervest client at a below-market rate without disclosing respondents' conflict of interest in the transaction.[4] We 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. We ordered respondents to disgorge that fee as well as $181,814.05 in prejudgment interest.

The D.C. Circuit's limited remand order directed the Commission to consider evidence of circumstances occurring after the Commission's September 2015 issuance of the disgorgement order that, in respondents' view, warranted modification of that order.

On remand, respondents have offered three items of additional evidence.[5] The first item is a January 25, 2016 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 Timbervest for breach of fiduciary duty and related claims under ERISA. The letter stated, among other things, that Timbervest agreed to pay AT&T an unspecified amount "in full and complete satisfaction" of AT&T's claims against Timbervest, "including any claims for any relief including interest or losses relating to the $403,000 disposition fee." The letter recited that the settlement "eliminates potential unjust enrichment in light of all the services performed" by Timbervest under its investment management agreements. It also stated that the settlement had been "approved by an independent fiduciary" to "assure that [it] was in the best interests of the benefit plan."

The second item is a declaration by one of the respondents, Donald David Zell, Jr., stating that respondents have "completed their obligations under the settlement agreement" and that AT&T subsequently dismissed its lawsuit with prejudice.

The third item is another declaration by Zell clarifying that AT&T's January 25 letter contained a typographical error in that it referenced a $403,000 disposition fee. In fact, the declaration explained, "Timbervest received a $403,500 disposition fee on the sale" of the asset in question and, pursuant to the settlement, respondents "repaid the full $403,500 plus interest to AT&T." Zell also averred that the "funds for the settlement came directly from myself, William Boden, Joel Shapiro, and Timbervest" and that 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." Finally Zell described how respondents' money was routed from their bank accounts to respondents' attorneys and ultimately to AT&T.

The Division of Enforcement did not submit contrary evidence or challenge the veracity of the factual assertions in Zell's declarations.

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

5 We admit this evidence into the record. *See* Rule of Practice 452, 17 C.F.R. § 201.452.

"Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."[6] Its "paramount purpose" is "to make sure that wrongdoers will not profit from their wrongdoing."[7] The respondent bears the burden of showing that an offset or reduction of disgorgement is appropriate.[8]

Based on the unrebutted documentation respondents submitted, we find that respondents have met that burden. Our initial order on remand explained that "[r]elevant 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."[9] Respondents have submitted a letter sent directly to the Commission by AT&T confirming that it had been repaid in full by respondents for the misconduct that was the basis for our September 2015 disgorgement award. As the complaint in the private action stated, AT&T's suit was premised on the same underlying "misconduct [that] . . . was recently the subject of [respondents'] administrative enforcement action before the United States Securities and Exchange Commission." AT&T sought "disgorgement of any and all disposition fees" relating to the same asset at issue in this proceeding. Pursuant to the settlement, which was approved by an independent fiduciary, respondents repaid AT&T the entire $403,500 disposition fee plus interest "in full and complete satisfaction" of AT&T's claims.[10] Respondents have also presented documentary evidence that they themselves paid for the settlement funds, without contribution from any third parties.

Accordingly, we recommend that the disgorgement order's provision that respondents "disgorge, jointly and severally, $403,500, plus prejudgment interest of $181,814.05" be set aside.

By the Commission.

Brent J. Fields
Secretary

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6 *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

7 *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987).

8 *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130 at *23 (May 2, 2014); *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *17 (Dec. 21, 2007).

9 *Timbervest, LLC*, 2016 WL 3595460, at *1 n.6 (collecting citations).

10 AT&T's complaint asserted other claims and "sought damages on top of the $403,500 disposition fee"; thus, respondents state that the total settlement that respondents paid to AT&T was a "higher amount" than the disposition fee plus interest.