INITIAL DECISION RELEASE NO. 658
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15519

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of TIMBERVEST, LLC, JOEL BARTH SHAPIRO, WALTER WILLIAM ANTHONY BODEN, III, DONALD DAVID ZELL, JR., and GORDON JONES II	INITIAL DECISION August 20, 2014

APPEARANCES: Robert K. Gordon, Anthony J. Winter, Robert F. Schroeder, and Graham Loomis, Esqs., representing the Division of Enforcement, Securities and Exchange Commission

Stephen Councill and Julia B. Stone, Esqs., representing Respondent Timbervest, LLC

Peter J. Anderson and Jaliya S. Faulkner, Esqs., representing Respondents Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II

Nancy R. Grunberg and George Kostolampros, Esqs., representing Respondent Joel Barth Shapiro

Walter E. Jospin and S. Tameka Phillips, Esqs., representing Respondent Gordon Jones II

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision finds that Respondent Timbervest, LLC (Timbervest), violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (Advisers Act), and that Respondents Joel Barth Shapiro (Shapiro), Walter William Anthony Boden, III (Boden), Donald David Zell, Jr. (Zell), and Gordon Jones II (Jones) (collectively, the Timbervest principals or individual Respondents) aided and abetted and caused Timbervest's violations of Sections

206(1) and 206(2) of the Advisers Act. It orders Respondents to cease and desist from further violations of the Advisers Act and to disgorge $1,899,348.49 plus prejudgment interest.

I. INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 24, 2013, pursuant to Sections 203(e), 203(f), and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act of 1940. Respondents filed a joint Answer on October 11, 2013. A hearing was held over the course of eight days between January 21 and February 6, 2014, in Atlanta, Georgia. The admitted exhibits are listed in the corrected Record Index issued by the Secretary of the Commission on July 8, 2014. The Division of Enforcement (Division) and Respondents filed post-hearing briefs and post-hearing reply briefs.[1]

The OIP alleges three prohibited transactions. OIP at 2-4. First, Timbervest allegedly sold a tract of timberland in Alabama on behalf of a client, and caused the client to pay a brokerage fee to Boden without disclosing the fee. OIP at 3-4. Second, Timbervest allegedly repurchased the same property a few months later on behalf of a different client, pursuant to a side agreement negotiated by Boden prior to the tract's sale, without disclosure to either client. OIP at 2-3. Third, Timbervest allegedly sold tracts of timberland in Kentucky on behalf of a client, and caused the client to pay a brokerage fee to Boden without disclosing the fee. OIP at 3-4.

Respondents deny most of the key allegations. Answer at 2-8. Respondents also assert that the OIP fails to state a claim on which relief can be granted, that relief is barred by the statute of limitations, and that disgorgement is unavailable because of an offsetting payment. Answer at 8.

II. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this Initial Decision.

[1] Citations to the transcript of the hearing are noted as "Tr. ___.". Citations to the Answer are noted as "Answer ___." Citations to exhibits offered by the Division and Respondents are noted as "Div. Ex. ___." and "Resp. Ex. ___.", respectively. The Division's and Respondents' post-hearing briefs are noted as "Div. Br. ___." and "[Respondent] Br. ___.", respectively. The Division's and Respondents' post-hearing reply briefs are noted as "Div. Reply ___" and "[Respondent] Reply ___," respectively. Citations to the "Stipulations of the Parties" are noted as "First Stip. ___," and citations to the "Second Stipulations of the Parties" are noted as "Second Stip. ___."

A. Background and Lay Witnesses

1. Timbervest and New Forestry

Timbervest is a Georgia limited liability company with its principal place of business in Atlanta, Georgia. Answer at 1. It was established in 1995 and currently manages approximately $1.2 billion in investments related to timber and environmental and ecological remediation, via various client funds. Id.; Tr. 65-66; Div. Ex. 138B. Timbervest has been registered with the Commission as an investment adviser since October 5, 1995. Answer at 1. It is owned by Ironwood Capital Partners (Ironwood), a holding company formed by Zell and Shapiro in late 2003, and owned by the four Timbervest principals at all relevant times until December 31, 2013, when Jones sold his interest to Shapiro. Tr. 51-52, 1374-77, 1491-92, 1549, 1950; Div. Exs. 128, 138B. At the time of the hearing, Timbervest had thirty-five employees, most located at its Atlanta headquarters, and a payroll of about $4.5 million. Tr. 54-55, 1650-51. In the past ten years, it has executed 332 timberland transactions involving about 1.2 million acres, with an aggregate value of $1.45 billion, and conducted over 1,000 timber harvests. Tr. 460.

New Forestry, LLC (New Forestry), was formed in 1997 with Timbervest as its general manager, that is, New Forestry was a Timbervest client fund and Timbervest was its investment manager. Tr. 1034, 1235; Div. Ex. 46 at 1. Timbervest's management of New Forestry was governed by an Investment Management Agreement and a Limited Liability Company Agreement. Tr. 155-57; Div. Exs. 46, 48. New Forestry had three investors, all pension plans: the SBC Master Pension Trust, which owned ninety-one percent; the AT&T Union Welfare Benefit Trust (as successor to a BellSouth VEBA trust), which owned four and one-half percent; and the BellSouth RFA VEBA Trust, which owned four and one-half percent. Tr. 1033. The three trusts had nominee partnerships associated with them by State Street Bank and Trust Company, the trustee, to make the trust names less conspicuous. Tr. 1033, 1068-69, 1129-30; Div. Exs. 157-59; Resp. Exs. 56, 57. Between 2005 and 2007, New Forestry was Timbervest's largest client fund. Tr. 1239-40.

2. Shapiro

Shapiro is the CEO and a managing partner of Timbervest. Answer at 2; Tr. 1682. He resides in Atlanta, Georgia, and was fifty years old as of October 11, 2013. Answer at 2. After graduating from the University of Georgia in 1986, he worked at a travel company for a few months, at Morgan Keegan for less than a year as a registered representative, and at Marshall & Company for less than six months as a registered representative. Tr. 1682-83. Shapiro held series 7 and 63 securities licenses between approximately 1986 or 1987 and approximately 1990 or 1991. Tr. 1689-91. He has held a series 65 (investment adviser) license since approximately 1990 or 1991. Tr. 1690.

In 1988 or 1989 Shapiro started Shapiro Carter, a broker-dealer and investment adviser. Tr. 1683-84. The company's name changed to Shapiro Capital in 1990 or 1991, and changed again to Shapiro Capital Management in 1995. Tr. 1683-84. Shapiro Capital shut down its broker-dealer business in approximately 1990 or 1991, but continued as a registered investment adviser. Tr. 1684, 1690. Shapiro was a principal of Shapiro Capital Management and its

predecessors until 1995. Tr. 1684-85. He does not recall managing plan assets under the Employee Retirement Income Security Act of 1974 (codified in part at 29 U.S.C. §§ 1001-1461) (ERISA), or managing the assets of pension funds, while at Shapiro Capital Management or its predecessors. Tr. 1685-86.

Between 1995 and 2002 he was a private investor in various companies, including Partners Coffee. Tr. 1686-89. He had an automobile accident in 1998, which prevented him from working for about a year. Tr. 1689, 1833. He sold his interest in Partners Coffee sometime in the 1990s for approximately $1 million dollars, which was about the same amount of money he had invested in the business. Tr. 1689, 1833-35. When he sold his interest in Partners Coffee, he did not pay off a "personal note from a home mortgage account for $100,000," which resulted in a judgment against him that eventually grew to $108,000. Tr. 1833-35. Because of the judgment and his inability to work, his attorney advised him to close his checking account, and he thereafter lacked his own checking account until sometime in the past two years. Tr. 1832-34. His wife, however, had a checking account and paid all the bills. Tr. 1832.

3. Boden

Boden is the chief investment officer and a managing partner of Timbervest. Answer at 2; Tr. 51. He resides in Atlanta, Georgia, and was fifty-two years old as of October 11, 2013. Answer at 2. He graduated from the University of Virginia in 1983 and from Emory Business School in 1985. Tr. 47-48. His first job after business school was with Cochran Properties, an Atlanta real estate development company, where he worked for ten or eleven years, including as a sales agent. Tr. 48-49. Around 1994, he started his own property tax appeal business, and worked in that business off and on until about 2005 or 2006. Tr. 50-51. He has held a Georgia real estate sales agent's license since 1985, and the broker holding his license is Draper Owens, his father-in-law's firm. Tr. 49, 384-85. As chief investment officer, Boden focuses on acquiring and disposing of property. Tr. 77.

4. Zell

Zell is the chief operating officer and a managing partner of Timbervest. Answer at 2. He resides in Atlanta, Georgia, and was fifty-three years old as of October 11, 2013. Id. He holds an undergraduate degree in industrial engineering from Georgia Institute of Technology and an MBA from Georgia State University. Tr. 1590-91. He obtained a certification as a chartered financial analyst in 1993. Tr. 1591. He has served on the board of his synagogue and at the time of the hearing was a member of the advisory board for the college of engineering at Georgia Institute of Technology. Tr. 1591.

Zell worked for BellSouth for eighteen years, beginning in 1985 as a programmer. Tr. 1532, 1592. After two or three years, he moved into the finance group, and then into the human resources department. Tr. 1592. He started working in the pension group in approximately 1994 or early 1995 and remained in that group until he left BellSouth to work at Timbervest in May 2003. Tr. 1532-33, 1536, 1592, 1598. In late 1996 or early 1997 he was overseeing BellSouth's real estate and natural resource portfolio. Tr. 1534, 1593. Prior to leaving for Timbervest, Zell passed his responsibilities on the New Forestry account to Brian Caldwell (Caldwell). Tr. 1533-

34. Zell spends about twenty-five percent of his time with forestry issues, twenty-five percent of his time working on acquisitions and dispositions, and fifty percent of his time working with accounting. Tr. 1598-99, 1625-26, 1631-32.

5. Jones

Jones is the president of Timbervest. Answer at 2. He resides in Atlanta, Georgia, and was forty-three years old as of October 11, 2013. Id. He served as Timbervest's chief compliance officer (CCO) from approximately January 2005 until August 2012, and as general counsel from 2004 until 2008 or 2009, when Carolyn Seabolt (Seabolt) assumed that position, although he thereafter supervised her. Answer at 2; Tr. 1233-34, 1519. He graduated from the University of Georgia in 1992 with a degree in accounting, and graduated from the University of Georgia law school in 1995. Tr. 1230-31, 1488. He is a member of the bar in the state of Georgia. Answer at 2.

After law school he worked at the law firm Parker, Hudson, Rainer & Dobbs (Parker Hudson), where he eventually became a partner, specializing in corporate law and commercial finance. Tr. 1231, 1382-83. While at Parker Hudson, he handled matters for Timbervest, and came to know Shapiro, Boden, and Zell. Tr. 1232-33. He joined Timbervest in 2004. Tr. 1233. Effective December 31, 2013, he sold his twenty-five percent ownership interest in Ironwood to Shapiro. Tr. 1374-75. Although he intends to "eventually . . . do[] something else," he remains a manager of Timbervest. Tr. 1379.

6. Jerry Barag

Jerry Barag (Barag) is the president and CEO of CatchMark Timber Trust (CatchMark), a publicly traded real estate investment trust (REIT) that began trading on the New York Stock Exchange in December 2013. Tr. 1908. CatchMark has about $400 million in assets and Barag has been its president and CEO since October 26, 2013. Tr. 1908. Barag received a B.S. in economics from the Wharton School at the University of Pennsylvania in 1980. Tr. 1908-09. He worked at Equitable Life (Equitable) and its subsidiaries for close to twenty years, starting as a financial analyst and ending as an executive vice president. Tr. 1909. Almost all of his work at Equitable involved pension plans. Tr. 1909.

In 1998, one of Equitable's subsidiaries, Equitable Real Estate, was purchased by Lend Lease, and Barag became Lend Lease's chief investment officer. Tr. 1909, 1982. As chief investment officer, he oversaw investment operations involving $35 billion in assets. Tr. 1910-11. A "significant" amount of those assets constituted ERISA plan funds. Tr. 1911. Overall, he spent about twenty-four or twenty-five years doing investment work relating to pension plans, during which he gained a "pretty good knowledge and understanding of ERISA." Tr. 1909-10. Barag left Lend Lease in about March 2003 and started working at Timbervest shortly thereafter. Tr. 1911.

7. Edward Schwartz and ORG

Edward Schwartz (Schwartz) is a co-owner of ORG Portfolio Management (ORG), an investment adviser registered with the Commission. Tr. 2032-33. ORG manages real estate,

infrastructure, timber, and agriculture, and advises large pension funds on such holdings, including overseeing investment managers. Tr. 2034-35. Most of ORG's clients are large state or municipal investment funds. Tr. 2035. ORG was a Qualified Plan Asset Manager (QPAM) within the meaning of ERISA. Tr. 2146. Schwartz understood this to mean that ORG could oversee ERISA assets and opine on prohibited transactions. Tr. 2158-59.

Schwartz received a B.A. in economics from Kenyon College in 1989 and an MBA from Case Western Reserve University in 1994. Tr. 2031. He thereafter worked for The Townsend Group, a consulting firm for pension funds, until 1999, when he formed ORG Holdings, an owner, manager, and developer of properties in the Cleveland, Ohio area. Tr. 2032-33, 2078. He formed ORG in approximately April 2005, and it was initially partially owned by a partner, Steve Gruber (Gruber). Tr. 2032-33, 2076. Gruber left ORG in September 2011. Tr. 2033. Schwartz's current business partner in both ORG Holdings and ORG is his cousin, Jonathan Berns (Berns). Tr. 2032. Schwartz spends most of his time on ORG matters, and Berns spends most of his time on ORG Holdings matters. Tr. 2033-34.

Schwartz has had considerable experience overseeing ERISA assets, and believes he has a "good familiarity" with ERISA. Tr. 2048. He served as an expert witness on an ERISA case for the U.S. Department of Labor, and was familiar with the prohibited transaction rules in 2005 through 2007. Tr. 2048-49.

8. Wooddall and Chen Timber

Charles Lee Wooddall (Wooddall) lives in Atlanta, attended Auburn University, and graduated from Georgia State University in 1986 with a degree in finance. Tr. 739-40. He worked for his uncle, a real estate developer, for about six months after graduating. Tr. 774-75. He developed day care centers for his uncle, then developed shopping centers, and then developed buildings on property owned by Eckerd, a drugstore chain. Tr. 776-77. He later bought and sold tracts of timberland, then moved into other real estate deals, and since 2008 has bought distressed debt. Tr. 776.

He has interests in at least five companies: Chen Timber (Chen), Plantation Land & Management (Plantation), Equity Resource Partners, Chen Development, LLC, and Southwood Development Company. Tr. 740-42, 775, 777-78. The first three companies have bought or sold timberland, although Wooddall's involvement in buying and selling timberland has been on a "small scale" since 2007. Tr. 741-42. Wooddall owns Chen and Plantation with partners, including Andrew Johnson (Johnson) and Ron Turner (Turner), Wooddall's cousin. Tr. 741, 745-46, 774, 809-10. Chen's business entirely involves buying tracts of timberland and immediately selling them off in smaller units, and Chen has a reputation in the industry for that practice. Tr. 857, 860.

9. Ralph Harrison

Ralph Harrison (Harrison) is Boden's personal attorney and friend. Tr. 581-82, 584, 728. He graduated from the University of Virginia in 1983, where he and Boden were roommates, and received a law degree from the University of Georgia in 1989. Tr. 577, 582-83. Upon

graduating from law school, Harrison worked at Kilpatrick & Cody (n/k/a Kilpatrick Townsend & Stockton LLP) in Atlanta for approximately nine and one-half years. Tr. 578, 721. He was then either self-employed or employed as a consultant, and beginning in 2003 he did "a substantial amount of work" in private practice for McChesney Investment Advisors (McChesney), which primarily handled real estate investments. Tr. 578-79. In November 2006 he took a job with SSR Capital, a hedge fund in Dallas, Texas. Tr. 579-81. In 2009 he returned to Atlanta, and he now works as an attorney at Zakas & Leonard. Tr. 579.

Harrison practices real estate and debt finance law and some investment and general corporate law. Tr. 580, 721. He is not a licensed real estate broker or salesperson but through his legal practice he has familiarized himself with Georgia real estate statutes. Tr. 580-81. As Boden's personal attorney, Harrison provides general legal advice on various matters such as property tax and landlord-tenant issues. Tr. 584. Harrison was a groomsman at Boden's wedding, and they have vacationed together. Tr. 582-83. In the 1990's Harrison and Boden jointly invested in a smoothie franchise; the venture failed and they sold their interest at a loss. Tr. 583.

10. Frank Ranlett, BellSouth, and AT&T

Frank Ranlett (Ranlett) is a director of investment management for AT&T Services, Inc. Tr. 1024-25. The group with which he works invests the assets of the AT&T pension plans, namely, "the SBC Master Pension Trust and associated VEBA trusts," and is responsible for approximately $50 billion in pension assets. Tr. 1025, 1033. Ranlett is specifically assigned to private equity, natural resources, and real estate, with total assets of about $10 billion, of which around $1.2 billion is in natural resources, i.e., oil and gas, timber, power generation, and mining and metals. Tr. 1025-26. Ranlett first met Zell in 2000, at a real estate conference. Tr. 1145.

Ranlett received a bachelor's degree in economics from the University of Toronto in 1976, a master's degree in economics from the University of Western Ontario in 1977, and an MBA from New York University in 1993 in international marketing. Tr. 1026-27, 1067. He has managed pension funds since 1995, first with Warner-Lambert Corporation, and then, since 2000, with AT&T. Tr. 1027. Southwestern Bell (also known as SBC) merged with AT&T in 2005, and the combined entity was named AT&T. Tr. 1028. AT&T then bought out BellSouth effective approximately December 31, 2006. Tr. 1028.

A "significant portion" of Ranlett's job is reviewing documents pertaining to ERISA. Tr. 1159. He estimated he deals with ERISA three or four times per month. Tr. 1160. AT&T attorneys put on seminars on ERISA, in which he participates. Tr. 1161. Ranlett considers the standard of care under ERISA to be "very high," and he believes it requires, among other things, that a fiduciary must act "solely in the interest of the plan participants as represented by the trust." Tr. 1160-61.

B. Timbervest Operations to 2005

Timbervest was founded as Timberland Investment Services, LLC, in approximately 1995. Tr. 71-72; Div. Ex. 48. Between its founding and approximately 2002, Timbervest was run by Robert Chambers (Chambers). Tr. 72. In 2002, Timbervest was owned by Rock Creek

Capital in Jacksonville, Florida, a private equity firm owned by four investors, one of whom was a Mr. Dahl (Dahl).[2] Tr. 73-74, 78, 1384, 1541-42, 1916, 1953.

BellSouth was an original investor in Timbervest. Tr. 72-73. While he was at BellSouth, Zell worked with Timbervest on the New Forestry account for at least three or four years. Tr. 1533, 1593-94. Zell understood the three BellSouth trusts that invested in New Forestry were governed by ERISA, and stated that he was not personally a fiduciary of the three trusts. Tr. 1596. Zell testified that only one person, normally BellSouth's treasurer, was the named fiduciary at BellSouth, and that only the named fiduciary had insurance to cover his or her decisions. Tr. 1596-97.

Zell dealt infrequently with Chambers, who managed Timbervest's portfolio. Tr. 1594. Zell at that time did not have a role in designating what properties would be bought or sold, the authorization of the construction of amenities on properties owned by New Forestry, or monitoring compliance with ERISA. Tr. 1594-95. Zell understood New Forestry to be a real estate operating company (REOC), which is a "carve-out" from ERISA. Tr. 1597-98, 1670. He did not consider himself knowledgeable about ERISA, although according to Shapiro, he had "long experience managing pension fund assets." Tr. 1670-72, 1730. Zell stated that he understood that BellSouth's investments were in REOCs because he was tasked with getting the REOC opinions by the lawyers, but testified that he "didn't quite understand that in terms of ERISA." Tr. 1672. Zell did not know whether New Forestry had a REOC opinion at the time, but assumed it was a REOC. Tr. 1672-73.

Zell eventually learned that Rock Creek Capital was looking for someone to help revitalize Timbervest's operations. Tr. 1541-42. Dahl was unhappy with Chambers at that time, and Zell believed that Shapiro had the necessary personality and marketing experience, and could "maybe bring some fresh ideas." Tr. 1546, 1691-92, 1955. Zell and Shapiro had first met two or three years before. Tr. 1544-45, 1692. Zell suggested Shapiro as a CEO candidate in early fall 2002, and introduced Shapiro to the principals of Rock Creek Capital. Tr. 1543-45, 1691. Shapiro began working at Timbervest on September 30, 2002, as its CEO. Tr. 1691, 1693. He had no prior experience with forestry or forestry investment. Tr. 1693. Chambers left after a few months and his interest in Timbervest was bought out. Tr. 1698.

When Shapiro began at Timbervest, it had two clients, the BellSouth pension funds, with about $300 million dollars in assets, and the State of Ohio patrolmen's pension fund, with about $20 million in assets.[3] Tr. 1693. Shapiro's initial objective was to evaluate Timbervest's business, because the principals of Rock Creek Capital "weren't really sure what was going on." Tr. 1694. Accordingly, he researched, read, and talked to foresters, and eventually gained "a pretty good expertise" in buying and selling timberland. Tr. 1694-95. His main focus over the

[2] Barag and Jones testified that Dahl's first name was Jim. Tr. 1384, 1916. Boden testified that Dahl's first name was Robert. Tr. 78.

[3] Barag testified that there was a third account, for a client in Missouri, with about $20 million in assets, and that the total assets under management was around $400 million. Tr. 1915-16, 1979-80. Shapiro disagreed and testified that there were only two accounts. Tr. 2235.

years has been marketing, including traveling to see clients. Tr. 1696. He oversees Timbervest from a "very high level," and does not consider himself a "detail person." Tr. 1696. He understood that Timbervest was an ERISA fiduciary of New Forestry and of the plans that owned it. Tr. 1720.

In 2002, BellSouth requested some disposition of properties by Timbervest, although Zell, once he was at Timbervest, tried to dissuade BellSouth from insisting on dispositions. Tr. 1961. Barag characterized Timbervest's efforts to dissuade BellSouth as "fairly significant." Tr. 1961. Shapiro and Boden knew each other from their "kids' sports," and Shapiro knew that Boden had experience selling and developing real estate, including property which "probably was timberland." Tr. 71, 443, 1698-99. Boden was one of the first people Shapiro called when he started at Timbervest, and Boden began to consult for it in late 2002. Tr. 70-71, 91, 1697. Barag testified that it is possible Boden was working for Timbervest before Barag joined, but that Barag did not know it, and also that he believed Boden was not initially an employee but that Zell was. Tr. 1953-54, 1965. Barag had no personal knowledge of what Boden was doing for Timbervest, if anything, prior to Barag's arrival at Timbervest. Tr. 1957. However, Barag first started seeing Boden at Timbervest's office only after Barag started, in early 2003. Tr. 1953.

Zell had conversations with Shapiro beginning in spring 2003 about Zell joining Timbervest, which Zell did around May 2003. Tr. 1543-44, 1696-97. Zell and Shapiro formed Ironwood Holdings, which received a monthly fee from Timbervest that was distributed to Zell and Shapiro. Tr. 1547-49. Zell was not sure whether they were technically employees of Ironwood; Shapiro did not testify about this. Tr. 1548-49. Ironwood Holdings was later purchased by the same individuals who owned Ironwood. Tr. 1549, 1950. Ironwood Holdings had an operating agreement written by Zell, but Zell could not recall when it was drafted. Tr. 1657, 1950.

Zell's testimony surrounding when Ironwood Holdings was formed was confusing. Tr. 1547-50. Zell initially testified that he and Shapiro formed Ironwood Holdings when Zell joined Timbervest. Tr. 1547. He later testified, when asked about his previous testimony, that it was possible that he formed Ironwood Holdings prior to departing BellSouth. Tr. 1547. He then testified, in response to a question about whether he saw the existence of a conflict of interest in forming Ironwood Holdings, that "to the best of my recollection, it was not formed until after I had notified BellSouth I was leaving." Tr. 1547-48. Zell did not see any conflict in forming Ironwood Holdings while still employed at BellSouth. Tr. 1548.

Shapiro asked Barag to help Timbervest in "growing the firm" in about March 2003. Tr. 1911. Because of Barag's concerns over a non-compete provision in his contract with Lend Lease, his previous employer, he started out as a consultant with an office at Timbervest. Tr. 1911. His role was "very ad hoc," but mostly he helped Shapiro review Timbervest's existing business. Tr. 1912.

Rock Creek Capital was looking for an "exit plan" from Timbervest, and proposed converting the firm into a public REIT. Tr. 1385-86. Jones was hired by Rock Creek Capital, not by Shapiro, to help lead the legal part of making the REIT. Tr. 1386. Timbervest made an

effort to create and market a REIT beginning in late 2003 or early 2004. Tr. 74, 77, 1918. Barag, who focused primarily on the REIT, consulted for Timbervest until approximately March 2004 before taking any compensation. Tr. 1394, 1916-17. Barag testified that the REIT was meant to be entirely separate from BellSouth's investment, but Jones testified that selling Timbervest into the REIT was contemplated, and he recalled discussions with BellSouth about it contributing properties to the REIT. Tr. 1389, 1394, 1918. In approximately March 2004, the REIT underwriter insisted on a formal management structure, with employees and titles. Tr. 1917.

On or about March 31, 2004, Rock Creek Capital awarded a twenty percent ownership interest in Timbervest to the Timbervest principals, apparently through Ironwood. Tr. 78-79, 91, 1393, 1922-23, 1995; Div. Ex. 128 at 1; Resp. Ex. 68 at 1. Boden became a manager at that time, and the management team otherwise comprised Shapiro, Zell, Jones, and Barag. Tr. 75-76. Zell testified that he did "not think about" whether Boden's change in status from contractor to owner raised any concerns regarding Boden's fiduciary duty to New Forestry. Tr. 1537, 1540-41. At about that time, each manager received titles and more formally designated roles, and a four percent interest in Ironwood, that is, one-fifth of the twenty percent interest awarded by Rock Creek Capital, as a well as monthly pay of at least $15,000; Jones was paid as an employee so that he could have health insurance. Tr. 76, 78, 91, 1704-05, 1775, 2244; Resp. Ex. 149. Shapiro was named CEO, Zell was named chief financial officer, Jones was named president and chief counsel, Barag was named chief investment officer, and after Barag left Timbervest in late 2004, Boden, who was originally head of acquisitions, took over as chief investment officer. Tr. 77, 1920-21.

In the course of working on the REIT, Barag proposed rolling BellSouth properties into it, but he recognized that any such transactions would be prohibited under ERISA and that an independent fiduciary might have to be appointed to advise BellSouth. Tr. 1934-35. He recalled discussing this issue specifically with Shapiro, Zell, and Jones, and working with Zell on preparing the REIT's private placement memorandum. Tr. 1936, 1941. Zell was "resolute" in his opposition to Barag's proposal, and to even raising it with BellSouth, because it would suggest that Timbervest was less interested in maximizing performance of New Forestry and more interested in retaining control over BellSouth's assets. Tr. 1936-37. Barag felt that "certainly Mr. Jones and Mr. Zell understood the ramifications of everything we were discussing," although he is less sure regarding Shapiro. Tr. 1938. Based on their discussions, Barag felt that Jones was "knowledgeable" about "ERISA-related things and fiduciary obligations." Tr. 1943. Jones testified that he understood that Timbervest had a fiduciary duty to BellSouth and AT&T under ERISA, and had agreed, in its Investment Management Agreement with New Forestry, to comply with ERISA. Tr. 1355-56, 1490-91.

Timbervest put on "a multitude of road shows," among other efforts, but by late summer 2004 the REIT market had softened, and the underwriter asked to delay the REIT offering. Tr. 79-80, 1920. By August 2004 it was clear that the REIT would not be launched on schedule. Tr. 1396, 1920. At the same time, Timbervest was working on funding Timbervest Partners I (TVP I or TVP), its first commingled[4] fund. Tr. 72, 81-82, 1407. TVP I had $33.6 million in capital

[4] A "commingled" fund is one that has money from multiple investors, as opposed to just one investor. Tr. 1507. Although Jones testified that New Forestry could be considered a

by the end of 2005. Tr. 82-83, 1925. In 2004, Timbervest's higher and best use (HBU) sales were generally less than 1,000 acres. Tr. 1959. Shapiro had a "particular fascination" with HBU sales, according to Barag. Tr. 1958. Some of the properties acquired with the intent to assign them to the REIT were eventually sold to New Forestry, once Zell convinced BellSouth to fund their acquisition. Tr. 1969-71, 2018.

After it became clear that the REIT offering would not go through, Shapiro, Boden, Zell, and Jones explored with Dahl the possibility of buying out Rock Creek Capital entirely. Tr. 83, 1404-05. The tension at Timbervest at this time was exacerbated by Dahl, and the individual Respondents were unwilling to continue at the firm if Dahl continued his involvement. Tr. 1944. For example, at a meeting on or about October 6, 2004, it was announced that the REIT would cease operations and that Timbervest payroll and benefits would be cut by $400,000, a cut which would affect the personnel who had worked on the REIT. Tr. 1974-75.

At the same time, Timbervest was considering an inquiry from iStar Financial (iStar) to become an investment arm of iStar. Tr. 1944. Barag left Timbervest in December 2004 to join TimberStar, an iStar affiliate, and warned Shapiro and Jones to be "careful about what they did going forward with BellSouth because of the fiduciary obligations that they had under ERISA." Tr. 1405-06, 1930, 1945, 1972, 2009. Barag also told them that the only compensation an investment manager could receive under ERISA was from the management agreement. Tr. 1948-49. He felt that Zell had BellSouth's "best interests at heart," and that Boden is a "man of integrity." Tr. 1946-47, 2013. Barag conveyed his interest in Ironwood to the individual Respondents when he left Timbervest. Tr. 1994.

The four individual Respondents bought full ownership of Timbervest, through Ironwood, in equal twenty-five percent shares, effective January 1, 2005, for $3.5 million. Tr. 83-87, 1404, 1703, 1845-46; Resp. Ex. 68 at 1. Beginning at that time, and continuing through the present, the four individual Respondents each received a base salary of $250,000 directly from Timbervest, although their quarterly draws, which have generally been much greater, come from Ironwood.[5] Tr. 88, 91, 410-11, 1707-08. Zell, however, is not technically an employee of Timbervest. Tr. 1598.

C. Boden's Fee Agreement

Shapiro discussed an "oral fee arrangement" with Boden in the last quarter of 2002. Tr. 1734. It is possible that Shapiro and Boden reached the fee agreement before Shapiro had even committed himself to staying with Timbervest. Tr. 1739. According to Shapiro, the basic terms

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commingled fund, because it technically had three investors, Timbervest officially considers it non-commingled. Tr. 1508-09; Div. Ex. 138B.

[5] Resp. Ex. 149 lists the pay for each Timbervest principal, except Jones, for most of calendar year 2004. The Timbervest principals' total annual pay (salary plus draw) rose yearly until about 2008, and since then it has been "around a million dollars," except in 2011, when it was about $2.5 million. Tr. 88-91, 1706-08.

of the arrangement were outlined in a letter to Ranlett dated June 4, 2012, and it was not Shapiro's practice to reduce such an agreement to writing. Tr. 1734-35, 1768; Div. Ex. 127. In pertinent part, the arrangement involved selling one or more of eight properties by the end of 2007, at a minimum sale price of $5 million, in return for which Boden would receive a commission on a sliding scale dependent on sale price. Tr. 1735-36; Div. Ex. 127. At the time, Boden was a licensed real estate agent but not a licensed broker, which made no difference to Shapiro. Tr. 381-85, 1769-70. Two of the eight properties subject to this agreement were Tenneco Core and the Kentucky Lands.[6] Div. Ex. 127.

Shapiro's testimony on who selected the eight properties was equivocal; initially he testified that he selected them, and later he testified that he and Boden "probably" selected them together, but that he could not recall. Tr. 1748, 1750, 2261-62. Boden was "comfortable" with selling the eight properties because they were in the southeast United States, an area with which he was familiar. Tr. 1748, 1750. Some of the eight properties were not identified as disposition candidates in January 2006. Tr. 1754-55; Div. Ex. 7. Shapiro did not identify the specific properties that were the subject of Boden's fee agreement to ORG, BellSouth, or AT&T. Tr. 1756-58. Shapiro felt that when Boden was an independent contractor to Timbervest, there was no conflict of interest arising from his fee agreement. Tr. 1811. Shapiro did not tell BellSouth about the fee agreement once Boden became a Timbervest owner, in about March 2004, and did not recall why he did not make that disclosure. Tr. 1811-12. Jones' practice was to memorialize such a fee agreement in writing, but he admitted that he never suggested that it should be so memorialized, and he does not remember why he did not make that suggestion. Tr. 1318-19, 1321, 1327, 1340. Respondents have not been able to locate a written record of the fee agreement, although Jones now wishes that it had been memorialized. Tr. 1321, 1327, 1340-42.

In the beginning, when Boden was still a consultant to Timbervest, Shapiro asked him for advice (without compensation) on smaller properties. Tr. 1762-63. Shapiro did not know why he did not pay Boden a commission on all properties, but felt that Boden was "well incentivized" by the fee agreement. Tr. 1763. Although Boden's directive was to "carve up these properties" and sell them piecemeal, the sales had to be large enough to create liquidity for BellSouth, and Shapiro does not recall why the fee threshold was set at $5 million. Tr. 1749-50. The aggregate value of the eight properties as of December 31, 2004, was $144 million, and if all were sold within one year Timbervest would have significantly exceeded its mandate from BellSouth to achieve at most $60 million in liquidity. Tr. 1736, 1739-40. Timbervest was not entitled to disposition fees at the time, and its management fee would have decreased had it sold all eight properties. Tr. 1742-43. Shapiro did not deny that it would not have been in Timbervest's best interests for Boden to sell all eight properties. Tr. 1742-43. Shapiro acknowledged that third-

[6] The Alabama land at issue was part of an 18,256 acre tract originally called Tenneco. Div. Ex. 6 at 2285. This tract was divided into Tenneco Core, which was approximately 12,988 acres, and Tenneco Noncore, which was approximately 5,250 acres. Id. The witnesses and exhibits sometimes refer to Tenneco Core as Tenneco 2, Gilliam, or Gilliam Forest, and to Tenneco Noncore as Tenneco 1 or Wolf Creek. Tr. 111-12, 167, 180-81, 1268, 2165. The Kentucky Lands were comprised of the Kinniconick, Huber, Ferguson, and Tolville tracts. Div. Ex. 127 at 3. The sale of the Kentucky Lands involved the sale of the Kinniconick and Huber tracts, and an exercised option to purchase the Ferguson and Tolville tracts. Tr. 301; Div. Ex. 33.

party brokers sometimes offer advantages in selling property, but did not consider it a conflict of interest for Boden to have a disincentive to using a third-party broker to sell the eight properties, because Boden knew the value of the properties. Tr. 1760-61.

Boden was unable to sell any of the eight properties until 2006, and although he worked on selling all of them, only two resulted in a fee to him, either because the sales involved outside brokers or they closed after 2007. Tr. 445, 562-63, 1764-65. BellSouth decided in 2004 to increase, rather than decrease, its portfolio (although Boden testified that by the end of 2004 New Forestry was "in a disposition mode"), and Timbervest focused on its REIT in 2004, which also involved acquisitions. Tr. 501, 503, 564, 1744, 1765, 1767. As a result, Boden initially spent more time on acquisitions and less on dispositions. Tr. 457. Also, for the first year and a half Boden spent most of his time "figuring out" Timbervest's portfolio. Tr. 1765. Shapiro never gave any thought to buying Boden out of his fee agreement. Tr. 2260-61. Boden never considered accepting a reduced fee despite the fact that his ownership interest in Timbervest compensated him after April 2004 for at least some of the work he put into selling Tenneco Core. Tr. 566. Jones could not recall ever considering buying Boden out of his fee agreement, because, in Jones' view, Boden had a "vested interest that he had earned over those two years," regardless of the fact that Timbervest and Ironwood started compensating him for the same work in 2004. See Tr. 1491.

Boden believes that he entered into his fee agreement "[p]robably sometime around September" 2002, and he does not remember reducing it to writing. Tr. 393, 396. He testified that it was "not uncommon" to have unwritten broker arrangements in his line of business. Tr. 427-28. When asked why he did not talk to Harrison about his fee agreement in 2002, Boden testified, "I just didn't." Tr. 409. He spent about eighty percent of his working time between fall 2002 and March 2004 trying to sell New Forestry's "eight largest properties in the south." Tr. 92-93; Div. Ex. 127 at 1-2. During that time, he "didn't get paid any money by Timbervest," and Shapiro testified that Boden "deserved that fee." Tr. 413, 1771. Boden understood initially from Shapiro that BellSouth wanted sales of those eight properties, and he confirmed that fact with Zell while Zell was still with BellSouth. Tr. 93, 97. Boden did not know at the time that Zell was negotiating to join Timbervest. Tr. 98. Boden had no prior experience selling timberland, although he had experience selling "relatively large tracts and transitional land in pre-development." Tr. 93. The general theme for BellSouth was always "sales, return cash." Tr. 128.

Shapiro introduced Zell to Boden at a meeting in late 2002; Boden testified that the meeting took place in October or November 2002. Tr. 397, 1534-35. Zell, who was still at BellSouth at the time, understood that Boden was an independent contractor, and that he was helping dispose of a number of properties. Tr. 1534-35. Zell was told at the meeting that Boden was going to be paid a fee in connection with the disposition of the properties, although he did not recall the specific properties. Tr. 1535. The specific terms of Boden's arrangement were not discussed during the meeting and Zell never saw the arrangement reduced to writing. Tr. 399, 1536-37. After learning about the fee agreement, Zell did not tell anyone at BellSouth about it, either before or after joining Timbervest. Tr. 1536. In Boden's view, Zell would have known what properties Boden was trying to sell no later than about May 2003, when Zell moved to Timbervest. Tr. 399-400. Shapiro believes he told Zell and Jones about Boden's fee agreement

when they joined Timbervest. Tr. 1770. Jones testified that he learned of Boden's fee agreement no later than January 2004, when he joined Timbervest. Tr. 1490. Zell testified at the hearing that he knew in early 2006 that Shapiro had discussed Boden's fee agreement with ORG; however, during the investigation he testified that Shapiro told him of his disclosure to ORG sometime in 2012. Tr. 1538-40.

All four Timbervest principals knew of Boden's fee agreement. Tr. 1323. However, Barag was unaware of any Timbervest principals who had "agreements regarding commission payments tied to large sales of New Forestry property," and specifically knew nothing about Boden's fee agreement. Tr. 1931-33; Div. Ex. 127 at 2. Boden testified that Barag was at Timbervest "for a real specific reason," and Boden did not know of "any reason to think [Shapiro] would have offered" information regarding Boden's fee agreement to Barag. Tr. 401-03, 408.

Boden did not recall ever seeing the July 1996 Investment Manager Agreement between Timbervest and BellSouth. Tr. 147-48; Div. Ex. 48. He also had no independent recollection of, and was not certain of, ever seeing the "Limited Liability Company Agreement of New Forestry LLC." Tr. 155-56; Div. Ex. 46. He was aware, "in general," that Timbervest was a fiduciary under ERISA with respect to BellSouth, and he understood that being a fiduciary meant putting his client's interests "first and foremost at all times." Tr. 150, 152-53. Boden was not aware that the Investment Manager Agreement had a provision covering prohibited transactions under ERISA, but if he had known that, Timbervest would not have engaged in such transactions. Tr. 153. When asked if he had any way of knowing whether or not Timbervest was operating consistently with ERISA, he simply replied, "the investment committee," and opined that Jones "probably" had the most experience on ERISA, but he was not really sure. Tr. 154.

D. ORG Becomes Involved

One of ORG's first clients was BellSouth. Tr. 2038-39. Gruber was referred to BellSouth, specifically to Caldwell, and in August 2005 BellSouth hired ORG as New Forestry's oversight manager, with discretion (within guidelines and parameters) over BellSouth's assets. Tr. 2037-39, 2079-80. ORG then hired Caldwell, after ORG obtained written consent from BellSouth and after consulting with legal counsel about the hire. Tr. 2153-55. Schwartz understood that both ORG and Timbervest were ERISA fiduciaries with respect to New Forestry. Tr. 2051-52; Resp. Ex. 89. Prior to ORG's engagement by BellSouth, Schwartz had no dealings with anyone at Timbervest, although Gruber knew Zell. Tr. 2081-82.

Prior to ORG's involvement, Timbervest reported solely to BellSouth. Tr. 1529. BellSouth instructed Timbervest, by letter dated September 12, 2005, to continue its "existing reporting to BellSouth," and to copy ORG on all reporting and correspondence. Tr. 1530-31; Div. Ex. 178. Zell, however, did not believe that Timbervest had to continue to deal directly with BellSouth even after ORG was retained. Tr. 1579-80. He understood the September 12, 2005, letter to mean that ORG would act as BellSouth's fiduciary. Tr. 1590. Zell shared the letter with the other principals at Timbervest, but did not recall how he distributed it. Tr. 1580-81. Zell agreed that Timbervest never sought consent directly from BellSouth for the payment of fees to a Timbervest principal. Tr. 1532.

Around this time, BellSouth directed Timbervest and ORG to reduce New Forestry's timber holdings from about $350 million to about $250 million by the end of 2009. Tr. 2038, 2086. The directive was issued in April 2005, before ORG was retained, in BellSouth's "Program Investment Guidelines." Tr. 102, 105, 125; Div. Ex. 47 at 1. To that end, Timbervest's new management fee, effective January 1, 2005, was seventy-five basis points on the first $250 million of assets under management, and twenty-five basis points on the balance. Tr. 142; Div. Ex. 47 at 1071655. Timbervest was newly entitled, however, to a disposition fee equal to three percent of the gross sales price of any property sold at 90% or more of its most recent fair market value. Tr. 144; Div. Ex. 47 at 1071655.

ORG was also hired to reduce BellSouth's agricultural assets, which were part of a portfolio managed by UBS. Tr. 2039-40. Gruber was primarily responsible for overseeing New Forestry, although Schwartz was also involved. Tr. 2040; Second Stip. 1A, 2. Initially Gruber dealt mainly with Shapiro, although over time he dealt more with Zell. Tr. 2040-41. Schwartz's interactions with Timbervest personnel were mainly with Shapiro, followed in frequency by Jones and Zell, and Boden least of all. Tr. 2041, 2174. Schwartz spoke with Shapiro multiple times per week. Tr. 2049-50. In Schwartz's conversations with them, none of the individual Respondents indicated that they thought New Forestry was not governed by ERISA. Tr. 2051.

Because BellSouth's asset reduction plan was meant to be achieved over multiple years, ORG asked Timbervest for an orderly liquidation plan. Tr. 2042. Timbervest provided a plan and picked the properties to sell, and ORG reviewed the list and the reasons for the proposed sales. Tr. 2043, 2045. Timbervest's basic strategy, according to Schwartz, was to keep properties which had HBU potential, for example, a property on the edge of a growing city, and to dispose of properties which lacked HBU attributes. Tr. 2044. Timbervest had discretion over the New Forestry account, such that it could buy or sell property without permission from ORG or BellSouth. Tr. 2045-46. Timbervest informed ORG of its activities at least quarterly. Tr. 2046.

After ORG's engagement, Schwartz and Gruber, and possibly Berns, visited Timbervest, and Schwartz personally interviewed Timbervest personnel, checked its references, and toured its assets. Tr. 2082-83, 2250. At some point in 2005, Jones asked Shapiro to disclose Boden's fee agreement to Schwartz. Tr. 1772, 1775-76. Shapiro and Jones believed that the fee agreement presented a conflict of interest, and Jones communicated this belief to Boden and Zell, as well. Tr. 1326, 1773, 1782. Shapiro could not recall why he did not disclose Boden's fee agreement to BellSouth between early 2004, when Boden became an owner of Timbervest, and late 2005, when ORG was retained. Tr. 1811-12.

According to Schwartz, Shapiro called Schwartz sometime in 2005, early in ORG's engagement, and asked how Schwartz felt about Timbervest "bringing someone in to work at Timbervest" who was to be paid a brokerage commission for work they did prior to being at Timbervest. Tr. 2056, 2088, 2104, 2230. Schwartz's understanding was that the "someone" was an outsider, not an employee, and Timbervest was considering making that person either an employee or partner. Tr. 2057. Shapiro did not mention the duration of the brokerage arrangement, the properties to which it applied, the source of the funds used to pay the brokerage commission, or the person's duties and responsibilities once employed at Timbervest. Tr. 2058-

59, 2179. No one told Gruber anything about an arrangement by which New Forestry would pay brokerage or advisory fees based on sales of New Forestry properties to any employee or principal of Timbervest. Second Stip. 1B. Schwartz had a "nice" relationship with Shapiro at the time of the conversation. Tr. 2088.

Schwartz felt that the proposal "obviously" presented a conflict of interest. Tr. 2057. Schwartz told Shapiro that he did not want New Forestry to be disadvantaged by paying a double commission, and that ORG would have to consult with legal counsel to make sure it was not a prohibited transaction. Tr. 2059-60, 2091, 2105-06, 2201-02. ORG's process for handling a fee like that would have been to first get legal advice, and then to have ORG insert itself into the process and oversee the sale, so that Timbervest would be removed from the decision-making and any conflict of interest would be alleviated. Tr. 2061. ORG also would have had the brokerage agreement reduced to writing, and would have disclosed it to BellSouth. Tr. 2061-62. Had Shapiro told Schwartz that Timbervest wanted to pay a commission to a current partner in Timbervest, Schwartz, who considered that scenario an "easy one," would have said "no way." Tr. 2060. This was because that scenario "is just a complete conflict of interest. They're already getting compensated through their investment management fee." Tr. 2060. Schwartz did not tell anyone about his call with Shapiro, including anyone at BellSouth, because he considered the question hypothetical. Tr. 2057, 2060-61. Schwartz had no further conversations about this topic with Shapiro until 2012. Tr. 2062. Schwartz was not aware that fees were actually paid until 2012. Tr. 2053-55.

Shapiro testified during the investigation that he told Schwartz "what the basic deal was," but could not recall if he conveyed to Schwartz (or BellSouth or AT&T) which properties were subject to the agreement. Tr. 1757-58, 1779. During the investigation, Shapiro testified that he told Schwartz that Boden "was hired to help maximize value on the core southeastern properties," and would be paid an advisory fee so long as there was not a second fee or commission paid by New Forestry. Tr. 1779. When asked during the investigation about Schwartz's response, Shapiro could give only a vague description of it. Tr. 1779. During the hearing, he did not recall if any other "specific terms" of the fee agreement were conveyed. Tr. 1777-78. Nonetheless, Shapiro testified that he had "gotten the okay from Mr. Schwartz." Tr. 1756, 1780, 1785. Shapiro did not recall Schwartz saying that the fee agreement would need to be reviewed by legal counsel. Tr. 1787-88. At some point, Shapiro told the other Timbervest principals that Schwartz was fine with Boden's fee agreement. Tr. 1325, 1352, 1789. Shapiro testified that in late 2006 or early 2007, Jones began pestering him to make another disclosure of Boden's fee agreement to Schwartz. Tr. 1777, 2269-70. However, Shapiro did not recall actually making a second disclosure of Boden's fee agreement in 2006 or 2007, or what he told Jones about it, but recalled Jones ceasing his "pestering," from which Shapiro inferred that he must have made a second disclosure. Tr. 1777, 2270-71.

Shapiro testified that Schwartz later, "on no less than six or eight occasions" in the last two years, said the agreement was "fine," but that Schwartz's memory of their 2005 conversation was better than Shapiro's. Tr. 1778, 1786-87, 1791. Jones recalled four instances when Schwartz "provided confirmation" that Shapiro had advised Schwartz of Boden's fee agreement. Tr. 1470. The first instance was in February 2012, when, during Timbervest's annual meeting, Berns reported that Schwartz was aware of Boden's agreement and "expressed no concern at that

point." Tr. 1470-71. The second instance was in June 2012, when Schwartz, on a conference call, characterized Boden's fees as a "tail payment" for work done prior to becoming a Timbervest principal. Tr. 1471. The two other instances were also in June 2012, possibly on conference calls, in which Timbervest and Schwartz "went over the SEC issues." Tr. 1472-73. As to the last three instances, Jones did not state whether Schwartz was concerned. Tr. 1471-73.

Boden understood ORG to be the manager of BellSouth's investments, and that it helped set direction for BellSouth's investment objectives and made sure that its mandates were followed. Tr. 98-99. Boden felt that Timbervest was supposed to interface with ORG regarding the BellSouth account. Tr. 99. Shapiro and Jones were the primary contacts with ORG, and Boden had little communication with them. Tr. 100. Boden did not personally tell ORG that he would receive approximately $500,000 on the sale of Tenneco Core, and does not know if anyone else so informed ORG. Tr. 135. He testified that Shapiro told him his advisory agreement had been discussed with ORG, and Boden assumed that ORG had approved it. Tr. 135-36, 414. Boden did not know whether ORG knew which eight properties were within the advisory agreement, or that the agreement involved a sliding scale. Tr. 135, 402.

Once AT&T took over BellSouth, Schwartz had a pretty good sense that ORG would not be retained. Tr. 2047. Schwartz had the impression that AT&T communicated directly with Timbervest more than BellSouth had. Tr. 2047-48. ORG was terminated by AT&T on August 11, 2007. Tr. 1036; Resp. Ex. 73.

E. Boden Offers to Sell Glawson

Timbervest started its first commingled fund, TVP I, in 2004. Tr. 58, 1407. Funds for TVP I were not raised "in earnest" until 2005 and 2006, and it received its full commitment of $231 million in "probably" 2006. Tr. 58, 60-61, 267, 1407-08. Timbervest started raising capital for its second commingled fund, Timbervest Partners II, in spring or early summer 2006, and it was fully funded at $375 million by mid-2008. Tr. 64, 1408. Timbervest started raising capital for another commingled fund, Timbervest Crossover Partners L.P. (TCP), a REOC, in "around 2006." Tr. 65-67, 1402, 1527. As noted, in April 2005 BellSouth directed Timbervest to reduce New Forestry's assets. Tr. 102, 105, 125, 267-68; Div. Ex. 47 at 1.

According to Zell, New Forestry's valuation policy had three primary purposes: (1) to establish, in writing, the manner in which property is valued so that everyone can understand the process of valuing properties each quarter; (2) to disseminate and review valuations with clients, so they know how their portfolio is being valued each quarter; and (3) to provide Timbervest's auditors with data for its financial statements. Tr. 1626-27; see Div. Ex. 26. Zell is primarily responsible for the implementation of the timber valuation policy. Tr. 1627. He works with specialists who set up the appraisals, and reviews the appraisals. Tr. 1628. Boden also reviews appraisals, although Zell is more "into the details." Tr. 1628. The value of each property is updated quarterly, but each property is appraised once every two or three years. Tr. 1605, 1628-29. Thus, the property held by New Forestry in 2006, 2007, and 2008 was appraised on a two- to three-year cycle. Tr. 1629.

The valuation policy states that "[t]imber volumes, on a five-year cycle, are updated by a new cruise completed by an independent third party consultant." Div. Ex. 26 at 1. According to

Zell, this means that "every five years we recruise the property, which means an inventory, but since you can't count every tree, it's a statistical estimation of the volume of trees, the species, the size, and any number of factors that relate to a tree." Tr. 1629. This allows Timbervest to check its estimates and update its inventory. Tr. 1630. The cost of conducting a cruise varies, but can cost well over $100,000, depending on the circumstances. Tr. 1630. During 2005, 2006, and 2007 Timbervest did not require a timber cruise prior to a disposition or acquisition of property for New Forestry. Tr. 1630-31.

Boden considered Glawson,[7] a New Forestry property in Newton County, Georgia, to be "difficult to sell," although it had "some potential." Tr. 273, 276. Glawson was not one of the eight properties subject to his fee agreement. Div. Ex. 127 at 2. He was not getting any interested buyers among the "single-family guys," that is, home builders, and thought he would do "a pretty good job" if he sold Glawson for book value. Tr. 274, 276. He then offered Glawson to Reid Hailey[8] (Hailey) in the fall of 2005. Tr. 275-76, 871-72; Div. Ex. 155A; First Stip. 18; see also Tr. 878, 881-82.

Boden's offer included an option to purchase (Option Agreement) at a price higher than the sale price. Tr. 872, 878, Div. Ex. 155A. The Option Agreement was prepared by Harrison at Boden's request. Tr. 263, 691. The Option Agreement had a blank space for the seller, and listed the purchaser as Willow Run Investments, LLC (Willow Run). Div. Ex. 155A at 1. The option would have remained in effect until November 30, 2008, with a purchase price ranging from $4,520,000 to $5,690,000, depending on closing date. Div. Ex. 155A at 2. The lowest purchase price was "exactly $50,000 over the book value of the property" in the third quarter of 2005. Tr. 261. The option price listed in the Option Agreement was $100,000. Tr. 694; Div. Ex. 155A at 2.

Willow Run was organized by Harrison on September 2, 2005. Tr. 690. Willow Run's address, which was also listed on the option agreement, was McChesney's business address. Tr. 260, 262, 659-60; Div. Ex. 5; Div. Ex. 155A at 11. Harrison organized Willow Run as part of "a hedge fund strategy" he had discussed with SSR Capital, but which "didn't really ever go anywhere." Tr. 571, 660-62.

Boden asked Harrison to draft option agreement forms for real estate transactions, which Harrison did without asking questions about ownership of the parcels or the reasons why Boden

[7] Glawson is sometimes referred to as I-20 East. Tr. 1214-15, 2266-67.

[8] Hailey is a licensed real estate broker in Georgia and has been for twenty or more years. Tr. 867. Hailey has not had any business dealings with Timbervest, but in 2005 Boden, Shapiro, and Zell were involved in a real estate deal sponsored by Hailey. Tr. 870, 885. The deal soured, Boden failed to meet a $16,000 capital call in December 2012 or January 2013, which cost all investors more money, including Hailey, and the property went into foreclosure. Tr. 887-91. When asked by counsel for the individual Respondents, "did you not tell me that your testimony would go much more favorable for my client if my clients paid the . . . limited partnership capital call," Hailey said, "Yes." Tr. 889-90. However, Hailey explained that his comment was meant sarcastically. Tr. 891.

needed the options. Tr. 692-94; see Div. Exs. 155A-D. Harrison chose the documents to draft based on his belief that they may be needed; Boden did not ask him to draft anything other than the Option Agreement. Tr. 333-35, 705-06. Thus, Harrison drafted a Memorandum of Option Agreement (Memorandum), an Agreement to Sell and Assign Option Agreement (Assignment Agreement), and an Assignment (Assignment), in addition to the Option Agreement itself. Tr. 262-67, 694; Div. Exs. 155A-D.

Harrison "presume[d]" that the $100,000 option price in the Option Agreement was set by Boden, and the "permitted exceptions" and location of the property (i.e., in Newton County) listed in the Option Agreement were drafted by Harrison "presumably" based on information provided by Boden. Tr. 692-94. Similarly, Harrison "would have gotten" the purchase prices listed in the Option Agreement from Boden. Tr. 695. Harrison has no specific recollection of Boden giving him this information, nor did he know who owned Glawson. Tr. 692-95. Harrison testified that he drafted the Memorandum because he "wouldn't have drafted an option without also drafting a way to put it in the public record." Tr. 695-96.

He and Boden agreed to use Willow Run as a "placeholder" for the purchaser in the Option Agreement forms. Tr. 569, 700-01, 709-10. Harrison testified that he "could have left them blank, but I thought for optics purposes, it would probably look better to have an actual option holder, like, you know, we're ready to do a deal." Tr. 710. Nonetheless, he testified that it was not his intention that Boden, Harrison, or Willow Run would buy the option. Tr. 710-14. Based on the structure created by Harrison – which he testified Boden did not help create – if the option was exercised and then assigned, Willow Run, as the "middle man," would net $75,000 and interest. Tr. 714-15. Boden did not compensate Harrison for creating these documents. Tr. 701, 715.

When Boden presented the offer for Glawson to Hailey, Hailey understood that the property owner wanted to sell it and then buy it back.[9] Tr. 871-72. Hailey did not know whether

[9] I credit Hailey's testimony on this point over Boden's and Harrison's. E.g., Tr. 437 (Boden testified that Glawson was not a "fit" for the TVP-I strategy). To be sure, Hailey had reason to be biased against Boden, because of their failed real estate deal, but he credibly testified that his comment to Boden's counsel, to the effect that his testimony would be more favorable if Boden paid his capital call, was meant only sarcastically. Tr. 891. Otherwise, Hailey testified straightforwardly, without evasion and with a generally good memory of events. In contrast, Boden and Harrison provided inconsistent and non-credible testimony about the offer to Hailey. For example, Boden testified that he never saw the Memorandum or Assignment Agreement until December 2013. Tr. 262-67. There is no reason, however, why Harrison would not have delivered all four documents to Boden. Boden also testified initially that he did not know why Harrison drafted the Memorandum or Assignment Agreement, and indeed, was initially evasive about it. Tr. 263-64, 275-79. He eventually agreed that the Memorandum would have been used to publicly record the option, but still testified that he did not know why Harrison drafted the Memorandum. Tr. 264-65. Harrison, however, testified that he "wouldn't have drafted an option without also drafting a way to put it in the public record," and it is unlikely that Boden, an experienced real estate salesman, would not have immediately understood this. Tr. 695-96. In fact, Boden conceded later that he was particularly "concerned" about public notice because

the owner was Timbervest, but assumed it was a Timbervest entity. Tr. 872, 880-81. He did not recall Boden providing an explanation why the owner would buy back the property, and did not recall Boden saying anything about any developers wanting to buy the option. Tr. 876. Hailey understood that Boden was offering the deal to him so that Hailey could buy it himself, get a group together to buy it, or find a buyer. Tr. 340, 871-72. He could not recall ever being offered any similar deal, that is, where someone sold property with an option to repurchase it. Tr. 876.

Hailey talked to three persons about the offer, including David Aldridge (Aldridge), a friend of his involved in the timber business, but no interest in the deal was generated from these discussions. Tr. 872-73, 875, 879. Aldridge met with Hailey and introduced him to Thwaite, who, as noted, had a broker's lien on the Glawson property. Tr. 873, 879-80. On October 13, 2005, Hailey sent Thwaite an email attaching two documents he had received from Boden, a purchase agreement and the Option Agreement. Tr. 874-75, 878, 883; Div. Ex. 146. The purchase agreement was essentially a generic blank form, with no listing for seller, purchaser, price, or property. Div. Ex. 146. Hailey did not have any further involvement with Glawson and did not know if it was sold or not. Tr. 880.

Timbervest had sued Zachry Thwaite (Thwaite) over a broker's lien Thwaite filed on the Glawson property in 2004, based on a brokerage agreement Thwaite entered into with Chambers, which Boden knew nothing about until 2004. Tr. 371-73, 377; Div. Ex. 152; Resp. Ex. 85; First Stip. 19-20. Boden testified that he did not look at the Option Agreement before forwarding it to Hailey, and had no explanation for why Willow Run was listed as the option holder, but Harrison testified that he and Boden agreed that Willow Run was to be a "placeholder." Tr. 278-79, 569. Harrison testified that the plan was to sell the property with an option to purchase, either assignable to the ultimate purchaser or temporarily to Willow Run so that Willow Run could flip it to the ultimate purchaser; Boden testified that there was no plan, that the option structure was merely an "illustration," and that he did not think Harrison understood what Boden "was trying to accomplish." Tr. 275-76, 279, 696, 711. Boden initially characterized this plan as a "risk mitigator" for Hailey, but eventually agreed that it was a "fair statement" that if the property's value dropped, it was not very likely that the option holder would exercise the option – that is, there was no actual risk mitigation. Tr. 340, 344. As for Harrison, he provided false testimony about Willow Run during the investigation, which he amended, after Boden's counsel spoke to him in December 2013, by executing an affidavit on January 6, 2014. Tr. 569-71. In sum, he testified during the investigation that Willow Run had nothing to do with Boden, but stated the opposite in his affidavit. Tr. 569-71. He produced to the Division (as attachments to the affidavit) the Option Agreement, Memorandum, Assignment Agreement, and Assignment, which apparently he had not produced before, after retrieving them from "an old computer." Tr. 569-71, 651, 693; Div. Exs. 155A-D. Also, Harrison testified that he had no "understanding of who owned" Glawson, even though Hailey immediately understood that it was Timbervest, and further testified that he filled in the Option Agreement purchaser line because of "optics," even though he left the seller line blank, and the purchase agreement Hailey received was essentially just a generic form. Tr. 694, 710, 872. On the whole, the most reasonable view of the evidence is that Harrison drafted four legal documents for Boden without immediate compensation, because he believed he would be compensated, somewhat similar to his compensation in connection with Fairfax and Westfield (see infra), by the use of Willow Run as a "middle man" between Hailey and TVP-I (which was acquiring properties) or another of Timbervest's funds. Tr. 714-15.

Timbervest sued Thwaite over his broker's lien, and on June 27, 2006, Thwaite's counsel sent Timbervest's counsel a letter asserting that New Forestry was "attempting to sell [Glawson] at less than fair market value" to Willow Run, and that Willow Run was "owned or controlled by New Forestry executives and relatives." Tr. 374; Div. Ex. 152. Timbervest dropped the lawsuit shortly thereafter. Tr. 374. Glawson was not sold, and remained in New Forestry's inventory until AT&T terminated Timbervest. Tr. 1155, 1215.

F. Boden Negotiates With Wooddall

Zell generally worked with Boden or a forestry analyst to review acquisitions and dispositions. Tr. 1631-32. However, Zell did not typically review contracts, and approved transactions verbally. Tr. 1632-33. Jones was not involved in the details of acquisitions and dispositions, and was typically brought into the transactions later in the process to give a final review. Tr. 1634.

Boden testified that he did not know the fair market value of New Forestry's portfolio in April 2005, when BellSouth issued its Program Investment Guidelines mandating a reduction of assets to $250 million. Tr. 103-04. In fact, the gross fair market value of New Forestry's assets at the end of 2005 was approximately $472 million. Tr. 103-04; Div. Ex. 6 at 2269. The reduction mandate did not take effect until the second quarter of 2006. Tr. 126, 128-29; Resp. Ex. 128 at 4.

In response, in January 2006, Timbervest wrote its "New Forestry Timberland Disposition Recommendations." Div. Ex. 7. Boden characterized it as "possible" that he had some input into the substance of the document, and testified that he could not remember who picked the properties to be disposed of, even though he was Timbervest's chief investment officer and the document indicates that he approved it. Tr. 106-07; Div. Ex. 7 at 18988. He testified both that he did not "know what those really mean," in reference to the check mark in the "Approved" box next to his name and next to those of the other individual Respondents at the end of the document, and that the check mark is "supposed to mean" that the document's recommendations were approved. Tr. 107. Jones testified that the document was merely an "early iteration of a disposition plan." Tr. 1452.

No recommendation was made in the January 2006 New Forestry Timberland Disposition Recommendations to sell Tenneco Core. Tr. 112-13; Div. Ex. 7 at 18987. However, in Boden's mind "any property in the portfolio is available to be sold at a good price at any time." Tr. 190. Boden worked on trying to sell Tenneco Core as early as 2003, and showed it to potential buyers in 2003 and 2004. Tr. 190-91. Also, Timbervest engaged LandVest sometime before June 2006 to try to sell Tenneco Noncore parcels. Tr. 111-12, 189.

An appraisal of Tenneco Core was done effective June 30, 2005, by the James Sewell Company. Resp. Ex. 52; Tr. 1635-36, 1665. Zell testified that he would not have been responsible for ordering the appraisal of Tenneco Core, but would have read it before approval. Tr. 1636. A letter from Jeff Wikle at the James Sewell Company, dated August 16, 2005, valued the property at $12,130,000. Resp. Ex. 52 at 2; Tr. 1636. Zell considered the James Sewell Company to be a top appraisal firm and it was one of the appraisal firms Timbervest used frequently; Boden considered it "probably the best raw land, timberland appraisal company in

the United States," and Jeff Wikle as the best at the James Sewell Company. Tr. 203, 207, 211, 1665-66. The appraisal helped Zell conclude that the Tenneco Core transaction was a good one because the appraisal was thorough. Tr. 1666-67.

In Zell's view, because Timbervest had an appraisal in late 2005, there was no reason to obtain another one at the time of the Tenneco Core sale in 2006. Tr. 1668. Between August 2005 to October 2006, when Chen Timber purchased Tenneco Core, no other appraisal was conducted. Tr. 1636. Zell testified that, in looking at the quarterly market value sheet, Tenneco Core was valued at $12,833,000 as of June 30, 2006, and $12,040,000 as of September 30, 2006. Tr. 1657-59; Resp. Ex. 41.

Boden and Wooddall lived in the same neighborhood, and they became acquainted in the 1990s. Tr. 743. Wooddall testified that Boden called him and said he wanted to meet and talk about a proposed deal. Tr. 759. Wooddall did not know the precise date of the meeting, but testified that it "would have had to have been, you know, 30, 45, 50 days" before July 7, 2006, or approximately sometime in May 2006. Tr. 760, 856. They met, along with Johnson, at a Houston's restaurant for lunch. Tr. 759-60. Boden does not recall such a meeting, and does not recall ever meeting Johnson. Tr. 176, 178. According to Wooddall, Boden told Wooddall that Timbervest had some property for sale in Alabama, that is, Tenneco Core. Tr. 759-61.

According to Wooddall, Boden said that Timbervest wanted to buy the property back at some point in the future at a higher price, although they did not talk about the "specifics." Tr. 761, 812-13. Boden explained that Timbervest was selling the Tenneco Core property out of one fund and wanted to buy it for a second fund, but they could not commit to buying it in writing because they were still raising funds for the second fund. Tr. 763-64, 767, 823. In fact, the eventual buyer (TVP) had purchased numerous properties throughout 2005 and early 2006. See generally Div. Ex. 31A. Wooddall did not know at the time for which fund Timbervest planned to repurchase the property. Tr. 767. Boden told Wooddall that he intended to make a written repurchase offer within about six months after closing on the sale. Tr. 769-70, 815. Wooddall characterized Boden's proposal as a form of "land banking," where a tract of land is bought and held "for somebody for a future takeout." Tr. 858.

Boden did not recall whether he first approached Wooddall or Wooddall first approached him regarding Tenneco Core. Tr. 131-32, 175. Boden did not recall offering Wooddall any properties on the disposition list, nor did he recall considering doing so. Tr. 132-34. Boden did not remember why he offered Wooddall Tenneco Core rather than some other property. Tr. 134. Boden's memory of how the Tenneco Core sale began was generally vague, but he emphatically denied offering to buy Tenneco Core back. Tr. 179-80, 186.

Wooddall was interested in the deal, and said that he would "take a look at it." Tr. 760-61. Boden did not recall any price negotiations prior to receiving a draft contract from Wooddall on July 6, 2006. Tr. 171-72; Div. Ex. 9. The draft contract states that it was "made and entered into this 23rd day of June, 2006." Tr. 137; Div. Ex. 9 at 2. It identified Fairfax as a broker for the purchaser, which Boden agreed was information he must have supplied to Wooddall, although he has no recollection of doing so. Tr. 172-76; Div. Ex. 9 at 11-12. Fairfax was in fact the vehicle for Boden's advisory fee, and not the purchaser's broker, and this discrepancy was

repeated in the final contract, although Boden testified (erroneously) that it had been corrected. Tr. 172-74, 193; Div. Ex. 10 at 11; Div. Ex. 11 at 9693339. The draft contract also listed the advisory fee as three percent of the sales price, which Boden ensured was changed to three and one-half percent in the final contract. Tr. 192-93; Div. Ex. 9 at 11-12. Specifically, the final contract stated that "Seller and Purchaser acknowledge [Fairfax] has acted as a brokerage agent on behalf of Purchaser in this transaction. As a result of these efforts, Seller agrees to pay [Fairfax] a real estate commission equal to three and one-half percent (3.5%) of the gross sales price." Div. Ex. 11 at 9693339.

According to Wooddall, Wooddall met with Boden at Houston's a second time, without Johnson, to "maybe solidify the terms," although Wooddall does not recall if the terms were solidified at the second meeting. Tr. 762, 811. Someone at Timbervest provided Wooddall with maps and timber figures for the property. Tr. 764. One of Wooddall's employees checked out the property. Tr. 764.

Wooddall told Boden, possibly by telephone, that he preferred a written repurchase contract before Wooddall committed to buying it. Tr. 766-67. In fact, nothing was ever reduced to writing regarding the repurchase until Timbervest made a written offer to repurchase dated November 30, 2006. Tr. 765-66; Div. Ex. 13. Wooddall considered the understanding he had reached with Boden to be a "verbal option." Tr. 768, 815. Although he felt free, after the closing, to dispose of the property as he liked, he testified that he would not have sold the property to anyone else because of the verbal option, and that he did not shop the property around to anyone else. Tr. 768-69, 815-16, 863. He never told Boden that he felt free to sell the property to anyone else, nor did he actually discuss a sale with any other potential purchasers. Tr. 769.

In August 2006, Timbervest issued a "New Forestry Disposition Plan and Report." Tr. 113; Div. Ex. 16. Despite being chief investment officer, and despite at least some of its comments being in his "wheelhouse" and "bailiwick," Boden could only say about this document that he "would have been consulted on the ideas going into the report and talked about it," and that it was "possible, but not certain," that he reviewed it before it was sent to ORG. Tr. 114, 120-22. Regarding Tenneco Core, the August 2006 New Forestry Disposition Plan and Report stated that it had been "designated for sale as a result of an unsolicited favorable offer received in July of 2006." Tr. 116; Div. Ex. 16 at 18769. Boden testified that the offer was received on June 23, 2006, and that he "wouldn't define that as unsolicited. I would define that as more solicited." Tr. 117-18. He was the only person at Timbervest communicating with Wooddall in May and June 2006. Tr. 123. He initially denied telling anyone, and later denied having a recollection of telling anyone, that Wooddall's offer was unsolicited. Tr. 123-24. Boden characterized this clause in the August 2006 New Forestry Disposition Plan and Report as a "mistake"; in fact, it was blatantly false. Tr. 124-25.

The draft contract listed a price of $13,420,000. Tr. 137-38; Div. Ex. 9. The purchaser was originally Plantation, but it later became Chen. Tr. 809-10; Div. Ex. 9. Wooddall viewed the deal as "risky," and Johnson was not as enthusiastic about it as Wooddall, in part because Wooddall, Turner, and Johnson had to personally guarantee a loan of approximately $11,739,000 from Planters First Bank. Tr. 809-10, 816-18; Div. Ex. 18 at 843114. Johnson wanted to reduce

his personal exposure, so the transaction was structured using Chen, in which Johnson had twenty percent ownership, rather than Plantation, in which Johnson had thirty-three percent ownership. Tr. 809-10.

The escrow agent specified in the contract was Martin Snow, LLP (Snow). Div. Ex. 9 at 1282931.001. Snow is a law firm Wooddall uses on transactions. Tr. 778. The sale price was eventually set at $13,450,000, by a contract signed by New Forestry and Chen on September 15, 2006. Div. Ex. 10. Wooddall considered that a "fair purchase price" and not an undervaluation of the property. Tr. 772, 835. Boden, in contrast, testified that Wooddall was "way overpaying for the bare land." Tr. 200, 202. The contract stated that Chen's agreement to enter into the contract was not contingent on "any other agreement or understanding," which Wooddall believed to be true at the time. Tr. 838-39, 863; Div. Ex. 11 at 963342. The sale closed on October 17, 2006. Tr. 195-96; Div. Ex. 11 at 963327.

Zell testified that New Forestry's valuation policy required periodic updates. Tr. 1659. The values reflected in New Forestry's quarterly market value sheet are what Zell thought the properties were worth. Tr. 1659. According to Zell, the price paid by Wooddall for the Tenneco Core property was "five or so percent above" the value listed in the market value sheet. Tr. 1660. Zell would have approved the offer based on what he knew about the value of the property as of July 7, 2006. Tr. 1660. Between July 7 and September 30, 2006, the value of Tenneco Core decreased, according to Zell, and Wooddall signed a contract for a price slightly higher than the first one he signed. Tr. 1660-61. Zell testified that he would have approved the amended contract, as well. Tr. 1661-62.

Zell testified that the sale of the Tenneco Core property met the objectives and guidelines for timber investments. Tr. 1638. Specifically, Zell stated that the objectives and guidelines stated that Timbervest "should sell a property where gross proceeds realized are equal to or greater than 90 percent" of fair market value. Tr. 1638. The Tenneco Core property was sold at a price in excess of ninety percent of book value. Tr. 1638. Zell had "no knowledge" whether he or Boden considered offering the property to Wooddall at less than Timbervest's book value, although Zell recalled a few instances of selling small properties – 100 or 200 acres – for less than approximately 98 percent of their appraised value. Tr. 1638-39. In contrast to sales, Boden could not recall any purchase by Timbervest that "[came] in at a loss on acquisition." Tr. 208.

As it related to Zell and Boden's roles in setting the price at which Tenneco Core would be offered, Zell testified that Boden took "the first leg of this in terms of sourcing [counterparties], vetting them, the early negotiations with them, or final in some cases." Tr. 1635. Zell stated that he would generally be brought in much later in the process. Tr. 1635. He did not participate in the negotiations with Wooddall, and had no recollection of any specific details of conversations Boden relayed to him regarding the conversations between Boden and Wooddall. Tr. 1635, 1639-40, 1648.

Zell testified that Boden did not tell him that Boden and Wooddall had a discussion about Boden repurchasing the Tenneco Core property. Tr. 1553, 1648. Zell stated that if Boden did have this conversation with Wooddall, it would have caused Zell concern. Tr. 1553-54. Zell testified that he does not recall analyzing at the time of the repurchase whether it was a good

transaction, but also that he has had the opportunity to look back at it and believes it was a good transaction, because during that period the market shifted, timber prices started to go up substantially, and there were signs of a shift in the land market. Tr. 1663-64.

Boden told Zell in November 2006 that Boden "was putting in an offer" to buy Tenneco Core. Tr. 1561. When asked if ERISA would be violated if the amount of the offer for repurchase had been agreed upon prior to the initial sale, Zell stated, "I don't have any expertise in this question." Tr. 1562. Zell was asked if he understood how the sale and repurchase of Tenneco Core could have been seen as a mechanism to avoid ERISA restrictions. Tr. 1562. In response, Zell stated, "I guess it could be interpreted that way." Tr. 1562. Zell testified that he has general knowledge of ERISA, and that he would not have thought about a proposed sale and repurchase of the Tenneco Core property in terms of ERISA. Tr. 1554. Zell testified that he dealt with investing ERISA funds and non-ERISA funds while he was at BellSouth, but that ERISA matters were generally left to ERISA attorneys. Tr. 1554. Zell characterized himself as "somewhat confused" as to how to define a prohibited transaction under ERISA. Tr. 1554-55. He testified that property could not be transferred between clients, but could be sold from one client to another, in particular, that Tenneco Core could have been sold directly from New Forestry to Timbervest Partners Alabama (TVP-A), a "single purpose [LLC] created for holding Alabama timberland properties under the structure of TVP." Tr. 1485, 1554-56, 1559-60; Div. Ex. 128 at 7. He testified that a sale of Tenneco Core directly from New Forestry to TVP-A would have heightened disclosure requirements, and that New Forestry and Timbervest's "advisory committee" had to agree to the transaction, but he was otherwise unfamiliar with the procedure needed to approve such a transaction. Tr. 1485, 1554-56, 1559-60.

Jones would have "likely asked some questions about it" if Boden had discussed repurchasing Tenneco Core before it was sold. Tr. 1297-98. Jones agreed that a sale of Tenneco Core directly from New Forestry to TVP-A would have heightened approval requirements, consisting of approval by both New Forestry and the TVP-A advisory committee, and potentially third party involvement to "scrub the transaction." Tr. 1282-83, 1488-89. The price would likely have been at the value assessed by Timbervest, and Jones accordingly believes such a transaction would never occur, because Timbervest's objective is always to sell "for more than what we're carrying it at" and to "buy at a discount." See Tr. 1287-89, 1489. Boden was "not sure" of the procedure for selling property from one fund to another, and testified that Timbervest had "never really done that" kind of transaction. Tr. 187. Shapiro believed that selling a property from one fund to another was normally prohibited, but considered both Zell and Jones more knowledgeable about ERISA than himself. Tr. 1729-30; Div. Exs. 132, 153.

Zell could not recall when he became aware that Timbervest was repurchasing Tenneco Core for $1 million more than the sale price, but was aware of it at the time of the transaction, that is, in February 2007. Tr. 1565. He testified that he did not think about whether the repurchase for $1 million more than the sale implicated ERISA. Tr. 1565-66. He did not consider whether this was a prohibited transaction. Tr. 1566. Zell testified that he looked at the purchase and the sale separately to determine whether it met the client's needs and stated,

> they were two very separate transactions that each had their own metrics that had to be looked at to see if the sale was good for the client . . . and when the offer was made to purchase this, is the purchase good for the client.

Tr. 1567. Zell could not recall any instances of selling a property and then buying it back at a higher price. Tr. 1567. When asked if the unusual nature of the transaction caused him any concern from an ERISA, conflict of interest, or Advisers Act perspective, Zell again stated, "I just looked at them as two very separate transactions and they stood alone, so I did not think in those terms." Tr. 1567-68.

Tenneco Core was appraised for Planters First Bank at $15,500,000 on October 11, 2006, six days before the closing, although that fact was not disclosed to Wooddall at the time. Tr. 855; Div. Ex. 57. Jones testified that this appraisal was "absolutely meaningless" without knowing its conditions, assumptions, and parameters. Tr. 1281. The repurchase price of $14,500,000 was set, after "plenty negotiations," before the contract was signed on September 15, 2006. Tr. 770-71, 815. Wooddall negotiated the purchase price before signing the contract so he "would know what [his] upside was." Tr. 862. Boden has essentially no recollection of such negotiations, but agreed that immediately reevaluating a property after sale for potential repurchase was "an anomaly." Tr. 180-85, 209.

On November 30, 2006, forty-four days after the Tenneco Core sale closed, Boden sent Wooddall a draft, unsigned contract for TVP-A to purchase Tenneco Core from Chen. Tr. 196-97; Div. Ex. 13 at 1-2. Boden believes he supplied the terms in the contract to whomever at Timbervest actually drafted it. Tr. 197-98. The four Timbervest principals discussed the draft contract before it was sent to Wooddall, although Boden was not sure about Jones' participation in the discussion. Tr. 198-99. No minutes of any investment committee meetings at which the sale was approved exist "in any formal sense." Tr. 1245-46. The draft contract was signed by TVP-A and Chen on December 15, 2006, fifteen days after it was sent to Chen. Div. Ex. 18 at 843085, 843099.

The Tenneco Core purchase closed on February 1, 2007, at the contract price of $14,500,000. Div. Ex. 18. As with the sale two months before, no minutes of any investment committee meetings at which the purchase was approved exist "in any formal sense." Tr. 1246. Some time after Tenneco Core was repurchased, a "spec book" was prepared for the transaction, which was available to investors. Tr. 239; Div. Ex. 27. The Tenneco Core spec book states that it was approved by all four Timbervest principals, and lists a "total site value" of $18,905,685 and a bare land value of $800 per acre. Tr. 241, 244; Div. Ex. 27 at 942637, 942639. The comparables listing does not cite to any sales of Tenneco Noncore parcels, nor does it disclose that Chen owned Tenneco Core for only about two months. Tr. 240-41; Div. Ex. 27 at 942638. Boden disputed the numbers, and testified that he believed the spec book was only a draft, although a color copy of it was posted on Timbervest's website. Tr. 247-48; Div. Ex. 162. Zell testified that he forwarded an earlier draft of the spec book to Shapiro in August 2007, suggesting that it needed more work, as well as Shapiro's oversight, which implies that the version in evidence is not a draft. Tr. 1583-87; Div. Exs. 162, 175, 176.

Jones did not know when he learned of the sale, but testified that it was "[p]resumably sometime prior to" September 15, 2006. Tr. 1254-55. Similarly, he did not know when he learned of the repurchase, but "it would have been sometime before" February 1, 2007. Tr. 1255. Jones could not recall another time when Timbervest sold and then repurchased the same property in a short span of time. Tr. 1254, 1262. According to Jones, if a deal was consummated, it was necessarily approved by Timbervest's investment committee, and conformity with ERISA and the Advisers Act was "ensure[d] at the time [the committee] made the decision." Tr. 1248-49, 1255-56. The investment committee, including the Timbervest principals, "would have been aware of" the sale price, the repurchase price, and the "abbreviated timeline" between sale and repurchase. Tr. 1261-62.

John Barrett Carter (Carter), Timbervest's current CCO,[10] "worked on a legal description" of the Tenneco Core property and "likely would have distributed a closing statement after the closing." Tr. 905-07, 915. He could not describe the process by which Timbervest made property dispositions or acquisition decisions. Tr. 907-08. He believed that the investment committee reviewed the disposition and acquisition of property after the due diligence was complete, and he understood the investment committee comprised Timbervest's four partners and a forester. Tr. 908-09. He was not certain whether the investment committee met to discuss every disposition or acquisition, but he agreed that such meetings were commonplace. Tr. 909. Jones explained that the investment committee approved sales contracts prior to signing, and purchase contracts prior to expiration of the due diligence period, that is, the time when Timbervest was bound to either accept or reject the deal. Tr. 1422-23.

Carter was not aware of another situation in which Timbervest sold and later repurchased the same property. Tr. 915-16, 918. He stated that "[i]t was different. It was not common." Tr. 915-16. He did not have an explanation for why Timbervest repurchased the same property for $1 million more than it sold it for just a few months earlier. Tr. 918-19. He was not aware that Timbervest made an offer to repurchase the Tenneco Core property before the sales contract from Chen Timber was signed. Tr. 919. In his view, a $1 million increase in the value of the property between the sale and repurchase was "notable, could be odd." Tr. 919.

[10] Carter is also Timbervest's director of strategic land management. Tr. 893. He has been CCO for approximately one year. Tr. 893-94. Carter attended Georgia Southern University, Dekalb College, and University of Louisiana at Lafayette before graduating from Georgia State in 1998. Tr. 894-95. After graduation, Carter attended a nine-month program at the National Center for Paralegal Training and received his paralegal certificate in 1999. Tr. 895. Carter later obtained an MBA in international business in 2004 from Mercer University. Tr. 896-97. In November 1999, Carter began working as a paralegal at Parker Hudson, where he assisted with commercial finance closings. Tr. 895-96. One of the partners Carter assisted was Jones. Tr. 896. In March 2005, after receiving his MBA, Carter began working at Timbervest as vice president, director of transactions. Tr. 898. In this role, Carter assisted with real estate closings. Tr. 898-99. In approximately 2012, Carter became vice president, director of strategic land management, and spent more time on the management of Timbervest properties, as opposed to transactions. Tr. 900. Carter did not perform any ERISA work while at Parker Hudson, and did not know whether Jones engaged in any ERISA work or compliance work there. Tr. 900-01.

Carter had a "question" about the sale and repurchase of Tenneco Core, and sometime around February 1, 2007, he spoke to Boden in Boden's office about it. Tr. 925, 928-29, 941. Carter testified during the investigation that "it's my job from a fiduciary standpoint to – if I see things like that, cause me to pause to raise questions about it." Tr. 927-28. Boden "took exception" to Carter "bringing that information to [Boden's] attention," although during the hearing Carter could not recall exactly to what Boden took exception, nor could he remember if he left the meeting satisfied. Tr. 929-30, 957-58, 961-62. Carter could not recall questioning one of the Timbervest principals "face to face" before that time. Tr. 930.

On February 7, 2007, another Timbervest employee sent an email, copied to Carter, stating that the sale and repurchase of Tenneco Core was "basically a fund swap transaction." Tr. 936; Div. Ex. 19. Carter replied to all at 8:47 pm that day, explaining that the sale and repurchase was "not exactly a fund swap," and that Chen "approached [Timbervest] with the idea of buying the property back." Tr. 938-40; Div. Ex. 19 at 1312233.001. Carter could not recall how he learned this information. Tr. 939-43. The email string was later forwarded to Boden and Zell, and Carter could not remember whether Boden or Zell confirmed that Carter's characterization of the transaction was accurate. Tr. 947-48.

Neither Schwartz nor Gruber were aware, until February 2012, that Tenneco Core was repurchased by a Timbervest fund in 2007. Tr. 2071-72; Second Stip. 1E. Schwartz would have expected the repurchase to be disclosed to ORG and BellSouth, because "it really doesn't look good that you sell a property and then shortly thereafter buy it back for another client at a higher price." Tr. 2071. Schwartz would have wanted to know beforehand that the repurchase price for a New Forestry property had been agreed upon before sale, because of concerns that New Forestry "was being disadvantaged" by not getting the "highest price possible." Tr. 2073.

G. Boden's Fees and the Kentucky Lands Sale

After a five minute conversation with Boden following one of Boden's son's sporting events, Harrison formed four limited liability companies – Fairfax, Woodson & Company (Woodson), Westfield, and Loudoun Realty Company (Loudoun) (collectively, SPEs) – to serve as special purpose entities for the benefit of Boden. Tr. 584-86, 623-24, 652-53, 685. Fairfax was created in June 2006; Woodson in July 2006; Westfield in August 2006; and Loudoun in January 2007. Tr. 717; Div. Exs. 1B, 2C. The entity names were chosen by Harrison. Tr. 724. Harrison testified that he did not organize them all at the same time because at the time the first two were organized he was time constrained. Tr. 717-18. Boden's initial understanding was that Harrison would form just one company, but when he told Harrison about the Kentucky Lands sale, Harrison "formulated a second one." Tr. 299-300.

The SPEs were created to collect, disburse, and protect from personal liability fees generated from Boden's real estate transactions. Tr. 585-87, 593-94, 607, 652-53, 659. Harrison testified that there was no other purpose for the SPEs, and that Boden told him that Boden would receive fees if his real estate transactions closed and no other brokerage commission was paid. Tr. 585-86, 686-88. Harrison testified that Boden did not tell him anything about the underlying real estate transactions for which the SPEs were created, and that he did not have any other

substantive conversations with Boden. Tr. 588, 604, 679-80, 723. Boden did not tell Harrison the amount of the fees he would receive. Tr. 724. Harrison did not know whether the fees received by Fairfax and Westfield were considered brokerage commissions or not, and he and Boden referred to them as advisory fees. Tr. 680-81. Harrison distinguished between a brokerage commission and an advisory fee: "the broker is the seller. Advisory is giving advice to a client." Tr. 681, 683. Harrison did not do any research into how or why Boden was being paid fees, or whether they were brokerage commissions or advisory fees. Tr. 680-82, 734-35. He did not recall whether Boden specified the nature of the liabilities he was concerned with avoiding, just that he wanted to avoid personal liability with regard to his personal assets. Tr. 588-89. Harrison did not suggest additional discussions because he believed SPEs, a common asset protection strategy, adequately isolated Boden's assets. Tr. 592-93.

Harrison "advised [Boden] on a structure that would provide him with the best protection," even though Harrison did not know where the potential claim might come from. Tr. 591, 594-95. Boden testified that he was concerned about claims by unknown brokers, such as Thwaite. Tr. 371-72, 520-23. Harrison did not recall if he suggested the establishment of one LLC or multiple LLCs, but he recalled Boden saying, "[f]ine, just handle it, I'll pay you 10 percent of whatever I get" as compensation. Tr. 287, 586-87, 622, 675-76; see Tr. 593. In addition to establishing the SPEs, Harrison was responsible for administrative services, including preparing tax returns, sending out Forms 1099, and distributing the SPEs' funds. Tr. 622, 624-26. Rather than set up the entities himself, he paid $600 to BizFilings to establish each entity. Tr. 623-24; see Div. Ex. 2d.

Harrison did not research whether the structure he devised was legal under the real estate laws of Georgia, Alabama, or Kentucky with regard to payment of brokerage commissions. Tr. 682, 685. The SPEs were not licensed real estate brokers and Harrison is not sure whether the real estate laws of Georgia, Alabama, and Kentucky prohibit unlicensed brokers from collecting advisory fees or brokerage commissions in connection with the sale of land in those states. Tr. 682-83. Harrison did not question Boden to determine whether Boden represented the seller of the real estate transaction and did not understand whether a licensed salesperson in the state of Georgia, Alabama, or Kentucky is permitted to collect fees directly from the sale of land. Tr. 683-84. Harrison is not aware of the penalties for collecting illegal brokerage commissions in Georgia, Alabama, or Kentucky. Tr. 684. He admitted that the structure he created to insulate Boden may be a source of liability if illegal brokerage fees are collected; he did not consider this at the time he created the structure, but believed he collected enough information to properly protect Boden's personal assets. Tr. 684-85.

The SPEs only "held" assets in the form of cash, received as fees, between collection and distribution, or about one week, and they otherwise never possessed any assets. Tr. 600-01, 653-54. Fairfax, Woodson, and Westfield were all dissolved in December 2007. Div. Exs. 1c, 2e, 4. Harrison dissolved Loudoun in 2012 or 2013, after he first gave testimony during the investigation. Tr. 602, 688.

Harrison did not have a retainer agreement with Boden relating to the creation of the SPEs. Tr. 718. Harrison considered his fee agreement with Boden to be a contingency fee arrangement. Tr. 718. Harrison testified that he had virtually no experience doing contingency

fee work, and he admitted that the type of work he was doing for Boden was not the kind of work typically associated with a contingency fee. Tr. 720-21. He lacked malpractice insurance at the time, because he "was cheap"; when asked whether his current malpractice carrier required written retainer agreements, he replied, "I'd have to check with my partner on that." Tr. 719. In 2006 and 2007, Harrison did not do any conflict check before assisting Boden because he had a relatively limited practice and he did not believe there would be any conflicts resulting from his work with McChesney. Tr. 719.

Harrison understood that there was no guarantee that any of the transactions would close, so Boden would contact him to tell him that a transaction closed and to expect the fee. Tr. 622-23. Harrison recalled working on three transactions and testified that the Fairfax and Westfield transactions closed, but the Woodson transaction did not. Tr. 623.

Harrison designated himself as the general manager and managing member for each of the SPEs, and BizFilings was designated as the registered agent for Fairfax, Westfield, and Woodson. Tr. 596, 598-99, 601-05, 722-23; Div. Ex. 3. Harrison was listed as the registered agent for Loudoun and he testified that he changed the registered agent to himself (from BizFilings) when he moved to Georgia, to avoid having to pay a fee to BizFilings before dissolving Loudoun. Tr. 601-05.

Harrison was listed as the manager of Fairfax as early as June 15, 2006. Div. Ex. 1A. However, he testified that he did not realize that there was no member designated until he filled out the first tax return in April 2007, at which time he decided to designate himself "because there really was no equity left into . . . the LLC" and that it "made sense for administrative purposes and for convenience." Tr. 595-96. Boden's name did not show up on any of the filings or documents related to the SPEs, but Harrison testified that Boden was the "beneficial owner," meaning he was entitled to distribution of the assets held in the SPEs. Tr. 596-98. Boden's beneficial ownership was not reflected in any company documents, and Harrison agreed that there was no way for anyone to determine that Boden was in any way affiliated with the SPEs, except to contact the registered agent.[11] Tr. 598-99, 603. Boden testified that he had no interest in Fairfax. Tr. 284-85. Boden did not instruct Harrison to omit Boden's name on the formation documents, and there was no place for Boden's name in any event. Tr. 725. Harrison and Boden had an understanding that the money was Boden's, but Harrison acknowledged that there was no legal document that would entitle Boden to the fees if a dispute arose or if something happened to Harrison. Tr. 603-04.

Harrison acknowledged that in setting up the structure of the SPEs, he exposed himself, in addition to Boden, to liability. Tr. 611, 685. Harrison agreed that in the event that someone brought a lawsuit against one of the SPEs, he could "possibly" be sued, and through discovery it would be evident that Boden ultimately received the fees, and the plaintiff might then go after Boden. Tr. 605-06. When asked how this protected Boden, Harrison explained that any recovery, absent a "fraudulent transfer argument," would be limited to the SPE's assets. Tr. 606. The use of the limited liability structure makes claims against Boden more difficult, but not

[11] There is no evidence that the registered agent, BizFilings, would have known that Boden had any connection to the SPEs.

"bulletproof." Tr. 606-08, 616. Harrison testified that there is presumably no way, other than through the discovery process, that a person could learn that Boden was the ultimate recipient of the fees, and that the SPE structure would make it more difficult to determine who received payments made to the SPEs. Tr. 608-09, 665-66. Had he received a call from a potential claimant, Harrison would not have provided any information about Boden, because he viewed each of the SPEs as his client and distinct legal entities, and therefore considered such information confidential. Tr. 608-09. That is, Harrison represented clients that he created. Tr. 608-09.

> Harrison created four separate legal entities, because
>
> If there was a claim that was generated that exceeded – in a particular transaction that exceeded the amount of the fee for that transaction, and you were running all of the money through the same entity, that potentially all that money might be subject to clawback and – to satisfy that liability.

Tr. 613. Harrison believed that punitive damages could be awarded under a fraudulent conveyance theory. Tr. 614-15.

Harrison also believed that creating separate entities would insulate Boden's personal assets from liability. Tr. 653. Harrison gave each of the SPEs a separate address in an effort to provide the "highest level of separateness for each" entity. Tr. 610, 616-17, 654-55. Harrison paid to establish a private mailbox in a separate mail store for each of the SPEs. Tr. 616-19, 654-55. He believed that using different locations and different mailboxes for each of the SPEs was another way of indicating that each was a separate legal entity. Tr. 619, 654-55. He used separate mail stores for each mailbox to establish a degree of separateness, not to conceal the identity of the person receiving the ultimate payments. Tr. 619-20. Harrison testified that "it created some, maybe marginal, maybe immaterial, benefit to use different addresses." Tr. 656. He further stated that "appearance is one degree of separateness," and that having different addresses would make it more difficult to "pierce the corporate veil," but he acknowledged that the SPEs did not have operating agreements, and that made piercing the corporate veil more likely. Tr. 656-58, 716. Harrison testified that the similarities of the transactions undertaken by each of the SPEs are one reason he set up the SPEs as he did for Boden. Tr. 662-63.

Only Fairfax and Westfield received payments. Tr. 666. Woodson did not receive money because the real estate transaction, involving a New Forestry property called Rocky Fork, fell through. Tr. 350, 666-67. As to Loudoun, Harrison did not recall any substantive conversation with Boden regarding why the deal fell through, or whether the deal fell through before or after he formed Loudoun. Tr. 667-68. Harrison recalls the miscalculation of one of the fees and receipt of a second check, drawn on the New Forestry account, in the amount of approximately $300. Tr. 670. Harrison did not set up bank accounts for each of the SPEs; rather, he deposited the checks and made disbursements from his IOLTA (interest on lawyer trust account) account. Tr. 670-71, 673. He was the only person who could endorse the checks payable to Fairfax and Westfield. Tr. 672. He acknowledged that depositing the checks and making disbursements from his IOLTA account did not create any separateness, but testified that that was one reason he sought to create other indications of separateness. Tr. 672-73. Harrison

did not believe that he was commingling funds in his IOLTA account, because he was holding the funds in escrow for a particular entity, the funds would only be there a short time, and funds from different transactions would not be in the account at the same time. Tr. 674, 678-79. He also believed someone with a claim against funds in his IOLTA account based on a client relationship would not have a claim against any other money in the account relating to a different client relationship. Tr. 733.

Harrison testified that Boden, on the advice of Boden's accountant, decided to have the disbursements payable to WAB, Inc. (WAB), and that Boden was considering sharing the fee with his partners. Tr. 675-78. The full name of WAB is William A. Boden, Incorporated, a holding company Boden has used for twenty-five years to collect income from his businesses and to hold his retirement plan. Tr. 287-88. Harrison did not ask any questions about why Boden considered sharing the fees with his partners. Tr. 676-77.

Upon closing of the Tenneco Core sale, Snow issued a check in the amount of $470,450, dated October 19, 2006, payable to Fairfax, New Forestry issued a check in the amount of $300, dated October 18, 2006, payable to Fairfax and signed by Zell, Boden received both checks and forwarded them to Harrison (who may have been in Texas at the time), and Harrison deposited a total of $470,750 into his IOLTA account on October 23, 2006, reflecting the payments to Fairfax. Tr. 286-87, 653, 671-72; First Stip. 1A-C. Boden did not remember the $300 shortfall until "somewhat later." Tr. 293-94. The $300 check was signed by Zell, who explained that he typically gets about eighty checks per week to approve, which have already been through accounting. Tr. 1569-70, 1656; Div. Ex. 1J. The check would have been in a pile with all of the other checks he reviewed and signed, and he would have returned it to accounting, but he had no independent recollection of the check. Tr. 1570-71. Harrison paid himself $47,075, or ten percent of the total payment to Fairfax, by check dated November 1, 2006, drawn on his IOLTA account. First Stip. 1D. Harrison wrote a check dated November 1, 2006, drawn on his IOLTA account and payable to WAB for $423,675, or ninety percent of the total payment to Fairfax. Tr. 675-76; First Stip. 1E, 3B.

Boden deposited Harrison's check into his WAB account on January 4, 2007. Tr. 288; First Stip. 3A. At some point, Boden decided to share the money with the other Timbervest principals. Tr. 288. Boden was under "no obligation" to share the money with them, but did not consider his distributions to be gifts. Tr. 288-89. He viewed them as "paying for other things [Boden] had gotten through this relationship" with the other Timbervest principals, and ensured his accountant issued Forms 1099 to each of them. Tr. 290-91. The process of distribution involved Boden writing a check on his WAB account, then converting each WAB account check to a certified check at Wachovia Bank on January 13, 2007,[12] and then physically handing Shapiro, Zell, and Jones their certified check and a Form 1099. Tr. 292-93; First Stip. 3C-E. Each Timbervest principal's share was $105,918.75, and Shapiro, Zell, and Jones each cashed their checks between February 16, 2007, and February 23, 2007. Div. Exs. 12A, 14, 15A, 15B; First Stip. 4-7. None of the recipients raised any issue or questioned the appropriateness of their

[12] Each WAB check listed a Timbervest principal, rather than WAB, as the payor, and the WAB checks do not appear to have been endorsed. Div. Ex. 12A; First Stip. 3C-E.

checks, nor did any of them consult with outside counsel about the distribution. Tr. 294-95. Nor did anyone contemporaneously disclose the transaction or Fairfax's involvement to BellSouth or ORG. Tr. 296-98.

On December 15, 2006, New Forestry entered into a contract to sell its Kinniconick and Huber tracts, as well as an exercised option on the Ferguson and Tolville tracts (collectively, the Kentucky Lands) to Resource Land Holdings, LLC (Resource). Tr. 301; Div. Ex. 33. As with the Tenneco Core sale, no minutes of any investment committee meetings at which the sale was approved exist "in any formal sense." Tr. 1246. The Kinniconick and Huber tracts consisted of 43,712 acres in Kentucky, and the sale price was $25,135,000. Tr. 303; Div. Ex. 33 at 818453. The Ferguson and Tolville tracts consisted of 4,434 acres in Kentucky, and the sale price in the purchase option was $3,081,600. Div. Ex. 33 at 818458. The contract was drafted by Resource, but the language regarding Westfield was provided by Boden: in the "Broker's Fees" section, it references "advisory fees or real estate commissions, equal to 2.5 percent of the purchase price, due to Westfield Realty Partners, LLC . . . for services rendered." Tr. 303-04; Div. Ex. 33 at 818457. Boden was evasive when asked whether Timbervest would ever put in language about "services rendered," but agreed that the statement was misleading because Westfield did not "per se" provide any "services." Tr. 304-06, 354. As with Fairfax and the Tenneco Core sale, Westfield was used "to insulate and protect [Boden's] interests from any potential claims from third parties" in connection with the Kentucky Lands sale, according to Boden. Tr. 304.

Upon closing of the Kentucky Lands sale, First American Title Company issued a check in the amount of $685,486.25, dated April 3, 2007, payable to Westfield and representing two and one-half percent of the purchase price. Tr. 306, 671-72; Div. Ex. 33 at 818480; First Stip. 2A-B. Boden mailed the check to Harrison, who was in Texas at the time, and Harrison deposited a total of $685,486.25 into his IOLTA account on April 9, 2007, reflecting the payment to Westfield. Tr. 306, 653, 672; First Stip. 2A-B. Harrison paid himself $68,548.62, or ten percent of the total payment to Westfield, by check dated April 15, 2007, drawn on his IOLTA account. First Stip. 2D. Harrison wrote a check dated April 15, 2007, drawn on his IOLTA account and payable to WAB, for $616,937.63, or ninety percent of the total payment to Westfield. Tr. 675-76; First Stip. 2C, 11B.

Boden deposited Harrison's check into his WAB account on April 24, 2007. First Stip. 11A. At some point, Boden decided to share the money with the other Timbervest principals, although he thought about it for less time than with the previous distribution. Tr. 309-10. The process of distribution again involved Boden writing a check on his WAB account, then converting each WAB account check to a certified check at Wachovia Bank on May 25, 2007, and then physically handing Shapiro, Zell, and Jones their certified check. Tr. 309; First Stip. 11C-E, 12. Each Timbervest principal's share was $154,234.40, and Shapiro, Zell, and Jones each cashed their checks between May 30, 2007, and June 1, 2007. Div. Exs. 32A, 32B, 37; First Stip. 9, 10, 13. None of the Timbervest principals initially disclosed the fee-sharing or Westfield's involvement to BellSouth or ORG. Tr. 307.

Timbervest published a document entitled "Description of Controls,"[13] which specified certain procedures to be followed when Timbervest used a "listing broker," including the requirement for "solicitation" of brokers. Div. Ex. 64 at 9. Jones agreed that no brokers were solicited for the Tenneco Core or Kentucky Lands sales, but testified that "there was no broker" in any event, that is, no solicitation would have been needed. Tr. 1365-69. The documentary evidence, however, suggests that Boden acted as a broker. The original Tenneco Core sale contract contained a provision stating that Fairfax "has acted as a brokerage agent," although it erroneously stated that it had acted as a broker on behalf of the purchaser. Div. Ex. 9 at 1282931.010. The executed Tenneco Core sale contract erroneously stated that Fairfax was the purchaser's broker, and the closing statement refers to Fairfax as "Brokers," and lists Fairfax's fee as a "Broker's Commission." Div. Ex. 11 at 963339, 963345. As noted, the Kentucky Lands contract contained a provision referring to Westfield's "services rendered" in a section entitled "Broker's Fees." Tr. 303-04; Div. Ex. 33 at 818457. The Rocky Fork contract contained similarly misleading language with regard to Woodson, although it explicitly stated that the parties had not relied on "the assistance of any broker," and listed the advisory fee as two percent, when the fee as reported to Ranlett in 2012 was two and one-half percent. Tr. 352-54, 358-60; Div. Ex. 39 at 1277496-97; Div. Ex. 40; Div. Ex. 127 at 2.

Zell learned that Boden was to receive an advisory fee for Tenneco Core at least a month before closing, and an advisory fee for the Kentucky Lands one or two months before closing. Tr. 1549-51, 1571, 1650. Zell learned of the Tenneco Core fee from Shapiro, and possibly Boden, but could not remember whether it was Boden or Shapiro who informed him of the Kentucky Lands fee. Tr. 1551, 1571-72. Zell was not aware of Boden's desire to share his fees until Boden handed him the check, and could not recall what exactly Boden said to him when Boden gave him his share of Boden's fees, but it was something about his desire to share. Tr. 1556-57, 1573. Boden told Zell that Boden used Fairfax and Westfield to collect fees so that the fees were segregated and would not affect other assets, which seemed "logical" to Zell. Tr. 1577-78. Zell believed that ORG "knew about" Boden's fees. Tr. 1579. Zell knew that the fee Boden was sharing with him was from the fees Boden received from New Forestry, which Zell testified did not cause him any concern. Tr. 1557-58. Zell could not recall his specific thought process at the time, but stated that he did not believe he thought about whether or not ERISA was implicated. Tr. 1558.

Jones learned the exact amount of Boden's Tenneco Core fee at or before September 15, 2006, and the exact amount of Boden's Kentucky Lands fee in approximately April 2007, but before closing. Tr. 1328-29, 1334. Jones first heard of Fairfax and Westfield in connection with the investigation leading to the present proceeding, and this did not concern him as CCO. Tr. 1300, 1308, 1335-36. He believed that Boden was "entitled" to receive a fee under his consulting agreement, and how he received his fee and what he did with it was Boden's business, in Jones' mind. Tr. 1303, 1306, 1308-09. At the time of the transaction, Jones did not know that Harrison would receive a portion of Boden's fee. Tr. 1342. Jones generally recollects that Shapiro told him of Boden's fee agreement in 2004, when Jones joined Timbervest. Tr. 1314-15. When Boden gave a share of Boden's fee to Jones, Jones had a general understanding that

[13] This document is undated, and Jones testified that it "was never finalized." Tr. 1366; Div. Ex. 64.

the check was a share of Boden's commission on the sale of Tenneco Core, but Jones did not remember where they were when Boden gave him the check, or what Boden said at the time. Tr. 1311-13. Jones did not consider it out of the ordinary for Boden to share his fee, given the way the Timbervest principals conducted their business. Tr. 1345-46. Jones did not consult with Timbervest's outside compliance consultants regarding Boden's fee agreement. Tr. 1350. Jones did not consult with anyone regarding whether Boden's fees, or Jones' share of them, presented ERISA issues, and did not consider them to violate ERISA. Tr. 1379-80, 1498.

Boden's advisory fees totaled $1,156,236.25, each Timbervest principal received one-quarter of ninety percent, or $260,153.15, and Harrison received ten percent, or $115,623.62. First Stip. 1-2, 4, 12. For his share, Harrison performed less than twenty hours of work, including preparing Forms 1099. Tr. 625; First Stip. 1-2, 4, 12. Harrison has met the other Timbervest principals. Tr. 729-31, 735. He did not tell them any details about the formation of limited liability companies or fees. Tr. 731-32. He is aware that Boden and the other Timbervest principals returned the fees collected through Fairfax and Westfield, but Harrison has not returned any of the fees he received, and no one has asked him to do so. Tr. 716.

Neither Schwartz nor Gruber were aware, until February 2012, that Boden was paid commissions or advisory fees in connection with the Tenneco Core and Kentucky Lands sales, or that those fees were split with the other Timbervest principals. Tr. 2053-55; Second Stip. 1C.

H. AT&T Takes Over From BellSouth

AT&T and BellSouth merged on December 29, 2006. Tr. 2212. Ranlett understood that in 2007, Timbervest was the investment manager for New Forestry, and that, just before the AT&T/BellSouth merger, ORG was a QPAM in charge of oversight and reporting to BellSouth staff regarding BellSouth's portfolio. Tr. 1033-34, 1099-1100; Resp. Ex. 89. BellSouth, through ORG, had committed money to TCP, a Timbervest fund invested in mitigation credits. Tr. 1102-03.

AT&T preferred not using gatekeepers such as ORG, and cut back on ORG's authority such that ORG could do nothing without telling AT&T; AT&T terminated ORG in August 2007. Tr. 1036, 1076, 1079-80, 2145. Ranlett understood Timbervest to be an ERISA fiduciary with respect to New Forestry, based in part on the investment management agreement and on New Forestry's LLC agreement, although he did not understand that ORG, as a QPAM, could conduct transactions in New Forestry's portfolio. Tr. 1038, 1100; Resp. Exs. 56, 57. Ranlett also considered himself to be such a fiduciary; in contrast, Zell, one of Ranlett's predecessors, did not consider himself a fiduciary. Tr. 1136, 1596. AT&T expected its investment managers to maintain a full set of books and records, to record all transactions, and to report key events and key developments. Tr. 1057. AT&T did not require Timbervest to distribute cash to the trusts quarterly, and Ranlett instead expected an income of two percent, although the operating agreement (which initially required quarterly income distributions) was not amended to require an annual cash flow of two percent until April 2006. Tr. 1071-72, 1455-56; Resp. Ex. 128 at 4.

Once AT&T merged with BellSouth, Ranlett's group was tasked with merging the assets of AT&T, SBC, and BellSouth. Tr. 1029. Ranlett was put in charge of the relationship with

Timbervest. Tr. 1038. After preliminary discussions with BellSouth staff, including Don Nutt (Nutt), who had responsibility for BellSouth's timber assets immediately before Ranlett, Ranlett met with Timbervest personnel in approximately March 2007. Tr. 1029-31, 1093-94. Ranlett and Nutt met with Shapiro, Jones, and Boden,[14] went through the investment portfolio with them at a high level, and discussed Timbervest's management strategy. Tr. 1032, 1066, 1108-09. ORG personnel were not invited to the meeting, nor did Ranlett speak with Schwartz or Gruber before the meeting. Tr. 1035-36, 1107-08. The purpose of the meeting was to see "on a quick triage basis, whether or not [AT&T] would continue with [Timbervest] or not." Tr. 1132.

Thereafter, Ranlett generally communicated with Shapiro, and did not go through ORG. Tr. 1044. AT&T stopped the disposition process until after it understood what was in the portfolio, and then asked Timbervest to continue disposing of property, particularly "marginal or less attractive properties." Tr. 1086, 1116. Ranlett does not remember being presented with any properties for potential acquisition for New Forestry. Tr. 1086-87. Ranlett does not remember any particular discussions with Timbervest personnel between March 2007 and their next meeting, in New Jersey in the fall of 2007, again with Shapiro, Jones, and Boden. Tr. 1037, 1066, 1123. At that meeting, they again went through the investment portfolio and Timbervest's management strategy, and also discussed AT&T's disposition plan and Timbervest's valuation policy. Tr. 1038, 1112. Boden did not remember a lot of meetings with Ranlett before ORG was terminated, but did remember meetings with Ranlett thereafter. Tr. 100, 102.

AT&T did not independently assess whether a particular New Forestry transaction was good or not, because it trusted Timbervest and relied on Timbervest's status as an ERISA fiduciary. Tr. 1135-36. Ranlett was not involved in approving acquisitions, dispositions, land improvements, or timber harvesting and planting. Tr. 1467-68. Ranlett trusted Timbervest at this time, and considered his relationship with the individual Respondents to be "very cordial." Tr. 1140, 1142. Timbervest's performance during 2007-09 was better than their competitors', and Ranlett was impressed that Timbervest's strategy appeared to be successful. Tr. 1143-44.

Prior to becoming aware of them as a result of the investigation leading to this proceeding, Ranlett knew nothing about Timbervest's agreement to pay Boden commissions out of New Forestry assets. Tr. 1040. He also knew nothing about the alleged cross trade,[15] the payment of the $685,000 brokerage fee in connection with the sale of the Kentucky property, the payment of the $470,000 brokerage fee in connection with the sale of the Tenneco Core property, or the sharing of fees between the four individual Respondents. Tr. 1040-46. AT&T made a "fairly thorough search" of its files, and found no evidence of disclosure of these facts, nor did Nutt ever tell Ranlett that he knew of these facts. Tr. 1045-46. Ranlett has never seen any contemporaneous documentation of Timbervest's rationale for the cross trade. Tr. 1057.

[14] Ranlett testified that the meeting was in Atlanta, lasted three or four hours, and included lunch. Tr. 1066, 1108. Jones testified that the meeting was in New Jersey and was just a "meet and greet," followed by dinner. Tr. 1444; Resp. Ex. 142.

[15] Timbervest correctly notes that the Tenneco Core transactions were not technically a cross trade. Timbervest Reply at 27-28 (citing 17 C.F.R. § 275.206(3)-2). Nonetheless, they were functionally a cross trade, and I sometimes refer to them as such in this Initial Decision.

AT&T and its predecessors normally deleted emails after fifty-five days, in accordance with their email retention policy, and AT&T "has been unable to locate any emails between BellSouth and Timbervest employees for the time period beginning January 1, 2005 and ending February 1, 2007." Tr. 2213. However, the email retention policy would not have applied to hard copies of emails. Tr. 2214.

Ranlett considered the facts regarding Boden's fees and the alleged cross trade significant, because investment managers cannot pay themselves, Boden was a party in interest, the transactions were prohibited, the cross trade did not involve the highest bid after full marketing, and if the fees were payment for services rendered under a prior arrangement, then "something clearly had changed if [Boden] was sharing it with . . . his colleagues." Tr. 1040-45. Had he known of payment of the brokerage fees, Ranlett would have demanded an explanation. Tr. 1043, 1045. He did not consider the cross trade to be a "clean transaction," because if there was an agreement beforehand for Timbervest to repurchase the Tenneco Core property, or an option to do so, "there was at least somebody at the other end of that transaction who was willing to pay a million dollars more," the cross trade did not "achiev[e] the highest price possible for the property for" AT&T, and Timbervest was "not acting solely in the interests of the plan participants and the client." Tr. 1053-55. He was "certain" that AT&T would have questioned the cross trade if it had known of it. Tr. 1138-39. Even if it had been mere coincidence that Timbervest had sold the Tenneco Core property out of the New Forestry portfolio, and then repurchased it for a different portfolio a few months later – for example, because there was a quarter-to-quarter rise in value of seven percent – Ranlett would have wanted an explanation. Tr. 1056, 1081. Ranlett would have wanted to know why, "if this is such a screaming deal . . . I should at least be presented with the option of buying it back into New Forestry," even though buying it back would have been contrary to the New Forestry disposition mandate. Tr. 1056, 1081, 1140. No such option was ever presented to AT&T. Tr. 1056-57. Ranlett admitted that he did not actually question such a change in value when it occurred, and that Timbervest had "absolute discretion" to determine the sale price for a property. Tr. 1082, 1118.

I. Events After April 2007

Ranlett met with Timbervest representatives again in the fall of 2007, and managed the Timbervest account until 2012, although he was temporarily reassigned in 2011 and early 2012. Tr. 1123, 1141, 1179-80. His relationship with the Timbervest principals at this time was "[v]ery cordial," and he trusted them. Tr. 1142-43. During this period, when "the financial world was ending," Timbervest's valuations held up. Tr. 1143-44. New Forestry received unqualified audit opinions between 2005 and 2007. Tr. 1468. Timbervest was praised by its auditors in April 2011 for being "cooperative," "open," and having a "top-notch" valuation process. Tr. 1192; Resp. Ex. 75.

At some point prior to July 25, 2011, Shapiro told Ranlett that the Commission was looking into Timbervest's valuation policies. Tr. 1153; Div. Ex. 126. On July 25, 2011, AT&T received a Commission subpoena, and Ranlett's reaction was "I thought this matter was behind us." Tr. 1153; Div. Ex. 126. On May 3, 2012, Ranlett met with Shapiro for an annual review. Tr. 1153; Div. Ex. 131. At the end of the meeting, Ranlett asked Shapiro about the Commission's inquiry, and Shapiro replied that the Commission was looking at "small things"

and that it was "bovine excrement." Tr. 1153-54. Thereafter, AT&T's in-house counsel communicated with the Commission about "some very serious matters," and "[t]he trust start[ed] to erode at that point." Tr. 1154.

Ranlett sent Shapiro a letter on May 25, 2012, seeking answers to certain questions concerning Boden's fees, and expressing concern that "when we met recently, [Shapiro] did not disclose that the SEC's new focus was specifically related to the payment of real estate commissions for the BellSouth/SBC account." Div. Ex. 126. Shapiro emailed Ranlett a few days later, in an attempt to set up a call. Div. Ex. 131. On May 31, 2012, Ranlett responded by email, complaining that Shapiro had not been "completely forthcoming" at the May 3, 2012, meeting, and stating that "[t]o be brutally candid, the time to talk was on Thursday May 3, at the start of our annual review meeting." Id.

Shapiro responded by letter dated June 4, 2012, in which he disclosed certain details of Boden's fees, but did not mention Harrison's involvement, or the fact that the LLCs were shell companies. Div. Ex. 127. Nor was there any reference to the cross trade. Id. Ranlett sent Shapiro a follow-up letter on July 26, 2012, in which he stated that at the May 3, 2012, meeting, Shapiro had "apparently disclosed . . . an instance in which a property was sold out of New Forestry to a third party, but thereafter that same property was bought back by Timbervest for the benefit of another investor." Div. Ex. 129. The May 3, 2012, meeting was the first time Timbervest communicated anything about the cross trade to AT&T. Tr. 1165-66, 1182-83; Div. Ex. 129 at 2.

In the meantime, on June 8, 2012, Seabolt sent AT&T's in-house counsel a letter explaining Boden's history at Timbervest, and that Timbervest had only "recently learn[ed] about the potential for an ERISA issue" arising from Boden's fees, but, again, not mentioning Harrison's involvement or the nature of the LLCs. Div. Ex. 130 at 1-2. That same day, Timbervest reimbursed New Forestry $1,252,551.52, representing $1,156,236.25 in fees (including Harrison's share) and $96,315.27 in interest, calculated using the average ninety-day U.S. Treasury rate since April 3, 2007. Div. Ex. 130 at 3. The reimbursement was paid out of an Ironwood account. Tr. 1475; Div. Ex. 128 at 1.

On August 3, 2012, Seabolt sent Ranlett a fifteen-page letter answering Ranlett's questions in his July 26, 2012, letter, and describing the cross trade in some detail. Div. Ex. 128. AT&T terminated Timbervest as New Forestry's manager by letter dated August 29, 2012, with an effective date of September 30, 2012.[16] Div. Ex. 123. The transition to a new investment manager was "extremely difficult," because Timbervest did not provide a "complete set of

[16] Jones testified that AT&T terminated Timbervest out of frustration with the Division's investigation, because of a concern for bad publicity, and because AT&T saw the investigation as a distraction to Timbervest. Tr. 1476-77. This is not inconsistent with the implication of Ranlett's testimony, that AT&T terminated Timbervest primarily because it was concerned with an ERISA violation, and secondarily because of other factors. In fact, AT&T hired outside counsel a few months after the termination to assist with an "audit of Timbervest's activities as an investment manager." Div. Ex. 124 at 3.

information on New Forestry." Tr. 1058-59. AT&T did not pay Timbervest's third quarter 2012 management fee, because Timbervest "did not live up to their duties to transition the account . . . in a professional manner." Tr. 1059-60; see Div. Ex. 124. AT&T remains an investor in TCP. Tr. 1479-80.

AT&T switched New Forestry's management to Forest Investment Associates (FIA) and TIR. Tr. 1169. FIA and TIR, independent of each other, wrote down the value of the New Forestry portfolio by roughly twenty percent, or about $70 million, based on a different valuation methodology. Tr. 1170-72, 1199.

At some point FIA visited Glawson and took pictures of a structure on the tract, which Ranlett called a hunting lodge and Shapiro called an amenity. Tr. 1155-56, 1209, 1868; Div. Ex. 163. The first floor of the structure is a garage, and the second floor has a kitchen, a bathroom, and a fireplace, but no bedroom. Tr. 1868-69, 1890; Div. Ex. 163. The structure was built with New Forestry funds for about $200,000, and other improvements on the property cost about $600,000. Tr. 1868, 1892. Timbervest did not obtain approval from AT&T before building it, and Ranlett did not know that New Forestry paid for it or how much it cost. Tr. 1155-56, 1878. In Timbervest's view, the most productive use of the property was not to grow timber, but to develop an "amazing hunting plantation" close to Atlanta. Tr. 1868-72; Div. Ex. 180. In furtherance of its development plan, Timbervest put up a gate near the structure with the words "Alcovy Rise Plantation" on it, canceled a hunting lease on the property in 2008, started up the "Alcovy Hunt Club" in 2010 (many of whose members were Timbervest employees and their families), and held promotional activities (such as timber tours and dove hunts), with the result that Timbervest "created many millions of dollars of value there." Tr. 1879-82, 1891, 1899; Div. Exs. 163, 164, 167, 169. However, Timbervest also used the property to hold a fundraiser for an Atlanta school, and to promote investment in at least one Timbervest fund in which AT&T had not invested. Tr. 1902-06; Div. Ex. 168, 170. The school fundraiser was disclosed to New Forestry's auditors, although the fact that Jones' sons attended the school was apparently not disclosed. Tr. 1381; Div. Ex. 168.

III. DISCUSSION AND ANALYSIS

A. ERISA

The Division retained Arthur H. Kohn (Kohn) as an expert regarding ERISA. Div. Ex. 137. Kohn opined, in summary, as follows: (1) the assets of New Forestry were subject to ERISA; (2) Timbervest and each of the Timbervest principals were fiduciaries of BellSouth's pension plans; (3) Boden's fee agreement and his receipt of fees were prohibited by ERISA; (4) Shapiro, Zell, and Jones violated ERISA by receiving a portion of Boden's fees; (5) if Boden considered the possibility of another Timbervest fund purchasing Tenneco Core in determining the terms of Tenneco Core's sale, Timbervest violated ERISA; and (6) the Timbervest principals had a duty to understand their responsibilities as ERISA fiduciaries. Div. Ex. 137 at 4-5. Kohn did not testify at the hearing.

Respondents retained Bradford P. Campbell (Campbell) as an expert, also regarding ERISA. Tr. 987. Campbell opined, in summary, as follows: (1) it is inappropriate to proceed on

matters related to ERISA determinations without the participation of U.S. Department of Labor's Employee Benefits Security Administration (EBSA), the agency charged with administering ERISA; (2) ERISA's application to the internal management of investment vehicles is limited; (3) New Forestry was a REOC that did not hold assets subject to ERISA; and (4) ERISA and the Advisers Act impose materially different fiduciary obligations. Resp. Ex. 124 at 7-18. Campbell testified at the hearing. Tr. 987.

Notwithstanding Kohn's expert report, the Division takes the position that I "need not decide" whether New Forestry was subject to ERISA's prohibited transaction rules. Div. Br. at 8 n.2. Instead, the Division asserts that the relevant issue is whether "Respondents believed that New Forestry was subject to ERISA and, as a result, sought to conceal their violative conduct." Id. Timbervest agrees that I "do[] not need to decide whether Timbervest actually violated ERISA or whether the REOC exception applies." Timbervest Reply at 4. Shapiro, Boden, and Zell cite to Campbell's expert report, but only in support of their argument that "it is not sufficient for the Division to establish that Respondents violated ERISA." Shapiro Br. at 2-3; Boden Br. at 3-4; Zell Br. at 2-3. Jones argues that there is no evidence that the sale and repurchase of Tenneco Core violated ERISA, and that ERISA is inapplicable in any event. Jones Br. at 8, 11.

I generally find that Kohn's and Campbell's opinions, and Campbell's testimony, are immaterial. As noted, the parties contend either that I need not determine whether there was an ERISA violation, or that ERISA is beside the point, and it follows that I need not decide any subsidiary issues, such as whether New Forestry was a REOC, or whether the individual Respondents were ERISA fiduciaries in their individual capacities. What the individual Respondents understood to be their duties and responsibilities under ERISA, by contrast, is relevant to an evaluation of Respondents' states of mind, as explained infra. Div. Br. at 8; Timbervest Br. at 37-38. But ERISA's statutory language, and the experts' opinions, are immaterial in evaluating Respondents' understanding of ERISA. Accordingly, with two exceptions, I have not addressed whatever issues the experts' opinions present.

The first exception is Campbell's opinion that it is inappropriate to proceed on matters related to ERISA determinations without EBSA's participation. Campbell notes that the "potential for an unjust outcome is very real if this action results in sanctions based on an interpretation of ERISA issues" later rejected by EBSA. Resp. Ex. 124 at 7-8. Although I generally agree with Campbell's assertion, to the extent Campbell implies that I lack (or should lack) any authority whatsoever to interpret ERISA, I disagree. Commission administrative law judges are occasionally called upon to interpret and apply non-securities law, for example, privilege law. E.g., Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2615. Although I have had no occasion in this proceeding to interpret ERISA, I can imagine circumstances where such an occasion may arise.

The second exception pertains to certain arguments of the parties, particularly disgorgement. The Division argued, at the summary disposition stage, that "disgorgement could potentially far exceed" the amount of disposition fees AT&T paid Timbervest. Division of Enforcement's Opposition to Motion for Summary Disposition (Opp'n) at 24 (Dec. 4, 2013). In support of this argument, it asserted that under Section 409 of ERISA, a "fiduciary who has

breached its duties must restore to the [pension] plan any profits" made from the plan's assets. Id. (citing Div. Ex. 124 at 2-3). The Division continues to argue that: "ERISA imposes a strict responsibility on AT&T"; but for the concealment of its misconduct, "Timbervest certainly would have been terminated as soon as AT&T discovered" that misconduct; and all management fees received for managing New Forestry "after the commission of the fraud should therefore be disgorged." Div. Br. at 72-73. This argument is potentially based on two legal predicates not explicitly articulated by the Division: that ERISA compels a pension plan to immediately dismiss a fiduciary for any breach of fiduciary duty, no matter how trivial, or that disgorgement of management fees is a proper measure of damages for any breach of fiduciary duty. However, the Division contends post-hearing that I need not decide whether New Forestry was subject to ERISA, and it has not cited to any authority demonstrating that these legal predicates are valid, other than a letter from AT&T's attorney to Seabolt (which it does not cite in its post-hearing brief), nor has it otherwise made any effort to prove their validity. Div. Br. at 8 n.2, 72-73; Opp'n at 24 (citing Div. Ex. 24 at 2-3). Accordingly, I construe the Division's disgorgement argument as one that does not rely on substantive ERISA law – that is, it is not actually based on these two legal predicates. For its part, Timbervest contends that New Forestry was a REOC, and that an actual cross trade of Tenneco Core directly from New Forestry to TVP would not run afoul of ERISA. See Timbervest Reply at 25, 33-34, 37-38. In view of Timbervest's position that I need not determine whether ERISA was violated, I construe Timbervest's contention as one that simply responds to the Division's arguments. Substantive ERISA law, as opposed to Respondents' understanding of substantive ERISA law, is thus immaterial to this proceeding.

B. Tenneco Core Transactions

I find that the Tenneco Core sale and later repurchase, taken together and under the totality of the evidence, defrauded New Forestry, because Timbervest undervalued the property when selling it to Chen and failed to disclose the conflict of interest the repurchase agreement presented.

1. Documentary Evidence

According to Boden, the purchase price of $14.5 million was set at about seven percent more than the sale price, based on an evaluation that the property value was greater than initially estimated. Tr. 184, 186, 202-04. The evaluation was based on data from "co-marketing" sales in the Tenneco Noncore property, and on improved "stumpage" prices, that is, prices for wood. Tr. 201, 203-04, 213, 215. In short, in "the fourth quarter [of 2006] things changed," with increases in both bare land values and wood prices. Tr. 203-05. Boden did not know if there was any documentation regarding Timbervest's evaluation, and when asked if his explanation of the reasons for repurchasing Tenneco Core was a reconstruction "based on looking at the file," he testified, "I think so." Tr. 212, 227-28, 230-32. On August 3, 2012, Seabolt wrote a letter to Ranlett describing the "Land Analysis" Timbervest conducted to justify its repurchase of Tenneco Core for TVP-A. Div. Ex. 128 at 11-12. The letter listed the sale price for five parcels in Tenneco Noncore, all of which closed between December 2006 and March 2007, and three of which were at least under contract before the repurchase of Tenneco Core closed. Tr. 217; Div. Ex. 128 at 11. This letter was when AT&T "first found about" the details of the cross trade,

although it had been "apparently disclosed" in a meeting with Ranlett on May 3, 2012. Div. Ex. 129 at 2.

Boden's testimony that Tenneco Noncore data provided the basis for Timbervest's valuation of Tenneco Core is consistent with Seabolt's letter to Ranlett, and I credit it. However, the documentary evidence demonstrates that the Tenneco Noncore data was known to Timbervest before September 15, 2006, and possibly before July 7, 2006. On August 7, 2006, Jones sent Gruber Timbervest's August 2006 New Forestry Disposition Plan and Report (August 2006 Plan). Div. Ex. 16. The August 2006 Plan showed a "current value" and "estimated sales price" of $1,058 and $1,424 per acre, respectively, for the Tenneco Noncore property, which Timbervest intended to sell in its entirety because it was "non-strategic." Div. Ex. 16 at 18768-70, 18774.

The eventual average sale price for all five parcels was $1,461 per acre. Div. Ex. 128 at 11. Boden agreed that $1,424 and $1,461 per acre were "the same number." Tr. 219. When asked if Tenneco Noncore "performed exactly as you expected [it] would in August of 2006," Boden answered non-responsively, referring to "bare land value" as "critical," and asserting that pine pulpwood prices were going up in the fourth quarter of 2006. Tr. 220-21. Boden was then asked if, because the value of the timber went up, and the total per acre price was the same as what was expected in the summer of 2006, then the bare land value must have decreased, and he simply responded, "I'm not following you." Tr. 221.

Also, as noted, in August 2006 Tenneco Noncore's "current value" was $1,058 per acre, but its "estimated sales price" was $1,424. Div. Ex. 16 at 18774. There was no testimony on the striking difference – approximately thirty-five percent – between these numbers, but a reasonable inference is that Timbervest knew or had reason to know of the higher sale prices for Tenneco Noncore parcels prior to August 7, 2006, which would have motivated Timbervest to "land bank" Tenneco Core and then develop it. See Tr. 233-34 (describing planned investments in Tenneco Core); Div. Ex. 27 at 942638 (estimating an eight year holding period). Certainly some of the Tenneco Noncore data was known to Timbervest before the Tenneco Core sale contract was signed the following month.

It is also likely that some of the Tenneco Noncore data was known to Timbervest before Wooddall's July 6, 2006, offer. Three of the five Tenneco Noncore parcels were under contract by November 17, 2006. Div. Ex. 128 at 11; Resp. Exs. 125-27. Those three parcels had an eventual average sale price of $1,509 per acre, which was higher than the average of $1,461 for all five parcels. Div. Ex. 128 at 11. Indeed, the first property listed in Seabolt's letter to Ranlett, which had a signed contract by November 6, 2006, and closed on December 15, 2006, had the highest sale price of all – $1,958 per acre – which would have easily supported the $15.7 million valuation Timbervest assigned to Tenneco Core in November 2006. Tr. 232, 234; Div. Ex. 16 at 18774; Div. Ex. 128 at 11. Approximately seventy days passed between July 6, 2006, when Wooddall transmitted his offer for Tenneco Core, and September 15, 2006, the date of the signed contract, and Wooddall testified that, at least as to the Tenneco Core transaction, he met with Boden to discuss the deal between thirty and fifty days before he transmitted his July 6, 2006, offer. Tr. 856; Div. Exs. 9, 11. Conservatively assuming 100 days between the first discussion of terms and the signed Tenneco Noncore contracts, as in the case of Tenneco Core, the three

Tenneco Noncore parcels under contract by November 17, 2006, would have been the subject of initial discussions prior to September 15, 2006. Div. Ex. 128 at 11; Resp. Exs. 125-27. Wooddall testified that the repurchase price for Tenneco Core was agreed upon before September 15, 2006; it is distinctly possible that the first property listed in Seabolt's letter had been the subject of preliminary discussions as early as late July 2006, so that its sale price or at least some preliminary valuation would have been known to Timbervest while Boden was negotiating with Wooddall. Tr. 770-71, 815.

Other documentary evidence is inconsistent with Boden's explanation for the cross trade. Tenneco Core was appraised at $12.13 million in June 2005, but at $15.5 million just days before the sale closed. Div. Ex. 57; Resp. Ex. 52. The August 2006 Plan showed an "estimated sales price" of $13.5 million for Tenneco Core, based on an "unsolicited favorable offer"; as noted, the offer was actually solicited by Boden, and this statement to ORG was false. Div. Ex. 16 at 18768-69, 18774. Timbervest failed to disclose to TVP investors that Tenneco Core had been owned for years by another Timbervest fund, that Timbervest was consequently very familiar with the property, and indeed, that Timbervest changed the property's name (to Gilliam) for no apparent reason. Div. Ex. 161 at 2269. Carter disseminated a false explanation about Chen "approaching" Timbervest with a sales offer; Carter did not remember who told him this, but it was most likely Boden, to whom Carter conveyed his qualms about the transaction. Tr. 929, 941-42; Div. Ex. 19. Lastly, Timbervest denigrated the property's location, access, and topography in 2006, when describing to Gruber and New Forestry investors the reasons for selling it, but praised those same qualities when justifying its repurchase. Tr. 1272-73; Div. Ex. 6 at 2285; Div. Ex. 16 at 18769; Div. Ex. 31A at 62; Div. Ex. 162 at 2-3. For example, the New Forestry Disposition Plan and Report stated that Tenneco Core has "challenging access issues," while TVP investors were told in the fund's 2007 annual report that Tenneco Core had "excellent" access. Div. Ex. 16 at 18769; Div. Ex. 161 at 2269. Boden agreed that the discrepancy was "definitely an issue." Tr. 252. Jones, however, did not recall that this inconsistency "was an issue." Tr. 1276.

In sum, the documentary evidence demonstrates that the Tenneco Core sale was not a "good sale for New Forestry," as Timbervest argues. Timbervest Br. at 26. Admittedly, the sale price of $13.45 million exceeded Timbervest's valuation just prior to closing. Tr. 203; Resp. Ex. 41; see generally Timbervest Br. at 27-28. But that valuation was out of date because it did not account for the known Tenneco Noncore data. That the valuation may have been performed consistently with Timbervest's valuation policy is irrelevant; there is no apparent reason Timbervest could not have updated Tenneco Core's valuation when it updated Tenneco Noncore's. See Timbervest Reply at 31-32. Timbervest may not have anticipated the rise of pulpwood prices in fall 2006, or of improved index and timber REIT prices. Div. Ex. 83 at 17; Resp. Exs. 27, 28. But the Tenneco Noncore sales were coming in exactly as anticipated, which suggests that bare land prices were performing worse than expected, contrary to Boden's testimony. Tr. 221. Boden's objection that Timbervest never acquired a property where there was a "loss on acquisition" is beside the point, because the evidence demonstrates persuasively that TVP's purchase price was below Tenneco Core's market value. Tr. 208; Div. Ex. 57.

2. Wooddall's Credibility

In view of the documentary evidence, I credit Wooddall's testimony over Boden's with respect to the Tenneco Core sale and repurchase. Based on Boden's explanation, Wooddall understood that Timbervest wanted to "land bank" Tenneco Core, that is, sell it and buy it back later for a different fund. Tr. 858-59. I see no reason not to take Boden's explanation to Wooddall at face value, and I find that the motive for the transactions was, in effect, to execute a cross trade. Clearly, the transaction had the same consequence as an improper cross trade, because it benefited TVP at the expense of New Forestry. As Timbervest knew in October 2006, Tenneco Core was worth more than $13.45 million – what New Forestry received – and even more than $14.5 million – what TVP paid. As Ranlett stated, "if this is such a screaming deal . . . I should at least be presented with the option of buying it back into New Forestry," even though buying it back would have been contrary to the New Forestry disposition mandate. Tr. 1056, 1081, 1139-40.

I am not persuaded by Timbervest's arguments that Wooddall should not be believed. See Timbervest Br. at 23-25. Wooddall had a straightforward, matter-of-fact demeanor, with no apparent motive to fabricate his testimony. By contrast, although Boden's demeanor was also generally straightforward, he was frequently long-winded and sometimes non-responsive. E.g., Tr. 221, 347, 375, 647. To be sure, the written sale contract contained no provision for repurchase by TVP, or an option to repurchase, and it stated that there were no other agreements or understandings between the parties. Tr. 838-39; Div. Ex. 11 at 16. But Wooddall viewed the "no other agreements" contract provision as accurate, because he was not required to sell the property back to Timbervest. Tr. 838-39, 863. As Timbervest points out at length, Wooddall bore all the legal risk in the deal. See Timbervest Br. at 25. But the non-binding nature of the parties' understanding – a "gentleman's agreement," as the Division characterizes it, or a "verbal option," as Respondents characterize it – is not dispositive. Div. Br. at 22; Timbervest Br. at 25. Once Timbervest signed the sale contract on September 15, 2006, having informally agreed, via an oral side deal, to a repurchase price that disadvantaged New Forestry, Timbervest had an undisclosed conflict of interest, even if it never repurchased the property.

3. Other Issues

Three additional points merit discussion. First, as noted, the motive for the Tenneco Core transactions was a desire to move Tenneco Core from New Forestry to TVP. I agree with Respondents that this furthered BellSouth's stated goal of generating liquidity, and at the same time placed a valuable property into TVP, which was still in acquisition mode. Timbervest Br. at 20-23. That Timbervest executed the transactions by land banking was an "anomaly," as Boden put it, but Timbervest's motives are otherwise immaterial, because, as explained infra, there is direct evidence of Boden's scienter. Tr. 209, 226; see Donald L. Koch, Advisers Act Release No. 3836, 2014 WL 1998524, at *14 (May 16, 2014) ("it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical").

Second, the evidence pertaining to Boden's attempted sale of Glawson is generally consistent with the Division's position, namely, that Boden attempted to land bank Glawson before he succeeded in land banking Tenneco Core. See Div. Br. at 28-33; Tr. 270-71, 871-72; but see Timbervest Reply at 39-44. Nonetheless, I consider the evidence on this issue more

pertinent to evaluating Boden's fees, and I have placed little weight on it in evaluating the Tenneco Core transactions.

Third, Timbervest asserts, citing its own Wells submission, that Wooddall gave a different version of events to the Division during the investigation, and that "Respondents were unable to question Mr. Wooddall" about his prior statements because the Division's interview notes were not disclosed. Timbervest Br. at 23-24. But Timbervest's Wells submission recounts at length exactly what Wooddall told the Division, based on what Wooddall's counsel told Timbervest, and argues that "Wooddall gave varying accounts of his memory of the negotiations." Div. Ex. 74 at 1469180. Respondents were in no sense "materially prejudiced" by my ruling that the Division's notes were attorney work product, because they already possessed the impeachment material. Tr. 1179; Timbervest Br. at 24.

4. Scienter

Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980). A finding of recklessness satisfies the scienter requirement. David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); see Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (citing eleven circuits holding that recklessness satisfies scienter in Section 10(b) and Rule 10b-5 actions), cert. denied, 499 U.S. 976 (1991). Recklessness, in the context of securities fraud, is "highly unreasonable" conduct, "which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1978)); see also Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004); S.W. Hatfield, CPA, Securities Exchange Act of 1934 (Exchange Act) Release No. 69930, 2013 WL 3339647, at *21 (Jul. 3, 2013).

The standard of care for a registered investment adviser is based on its fiduciary duty. See Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979); SEC v. Capital Gains Research Bureau, 375 U.S. 180, 191-92 (1963). Investment advisers have an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts.'" Capital Gains Research Bureau, 375 U.S. at 194 (citations omitted); SEC v. Blavin, 760 F.2d 706, 711-12 (6th Cir. 1985). The standard is one of "reasonable prudence, whether it usually is complied with or not." Vernazza v. SEC, 327 F.3d 851, 861 (9th Cir. 2003) (citation omitted). Investment advisers have a "duty to disclose any potential conflicts of interest accurately and completely, and to recognize . . . a potential conflict." Id. at 860. An investment adviser who fails to disclose a conflict of interest shows, at minimum, "a reckless disregard for the well-established fiduciary duty he owe[s] his clients." Montford and Company, Inc., Advisers Act Release No. 3829, 2014 WL 1744130, at *19 (May 2, 2014). Respondents also had a "duty with respect to the best price and execution for the particular transaction for the advisory client." 17 C.F.R. § 275.206(3)-2(c).

As for Boden, he emphatically denied initially offering to buy Tenneco Core back from Wooddall. Tr. 179-80, 186. I do not credit this testimony, and indeed, it is contradicted by so much evidence, both documentary and testimonial, that I find it to be knowingly false.

Timbervest knew in August 2006 that Tenneco Noncore parcels were selling at high prices, which was reflected in the August 2006 Plan. But Boden endorsed the explanation provided to AT&T in 2012, as outlined in Seabolt's August 3, 2012, letter to Ranlett, which misleadingly suggested that Timbervest did not have the Tenneco Noncore data until November 2006. See Div. Ex. 128; see also Div. Ex. 156A at 1-3. When confronted with this discrepancy, all he could say was, "I'm not following you." Tr. 221. Boden likely provided false information to Carter to ease his qualms about the transactions. Boden admitted he had no evidence to rule out the possibility that his repurchase negotiations began before the sale closed. Tr. 184. In fact, Wooddall's testimony, combined with Boden's denials, is sufficient to establish Boden's state of mind. The evidence demonstrates convincingly that Boden acted with the specific intent to defraud New Forestry, that is, the highest degree of scienter.

As for Zell, I conclude that he acted recklessly, that is, his scienter was of a lower degree than Boden's. The Division argues that Zell (and Shapiro and Jones) possessed knowledge of ERISA, that all four Timbervest principals were on the investment committee, which approved sales and purchases, and that there were "abundant red flags attending the repurchase transaction." Div. Br. at 26-28; Tr. 1646-47. However, there are no contemporaneous records regarding the decision to repurchase Tenneco Core so soon after its sale. Tr. 212, 230-32, 1560-61. Although I agree with the Division that Zell disingenuously downplayed his knowledge of ERISA, there is no direct evidence that Zell acted with a specific intent to defraud, and circumstantial evidence suggests only that he acted recklessly.

Zell would not have been responsible for ordering the appraisal of Tenneco Core, but would have read it before approval. Tr. 1636. He generally worked with Boden or a forestry analyst to review acquisitions and dispositions. Tr. 1631-32. Zell concluded from the appraisal that the Tenneco Core sale was a good one because the appraisal was thorough. Tr. 1666-67. Zell testified that the sale of the Tenneco Core property met the objectives and guidelines for timber investments, and he would have approved the offer based on what he knew about the value of the property as of July 7, 2006. Tr. 1638, 1660-62. According to Zell, the price paid by Wooddall for the Tenneco Core property was "five or so percent above" the value listed in the market value sheet. Tr. 1660. As noted, though, the Tenneco Noncore data justified Tenneco Core's repurchase price and would have been known to Zell as early as August 2006. Zell did not participate in the negotiations with Wooddall, and had no recollection of any specific details of conversations Boden relayed to him regarding the conversations between Boden and Wooddall. Tr. 1635, 1639-40, 1648. Zell testified that Boden did not tell him that Boden and Wooddall had a discussion about Boden repurchasing the Tenneco Core property. Tr. 1553, 1648. Zell stated that if Boden did have this conversation with Wooddall, it would have caused Zell concern. Tr. 1554. But when asked whether he or Boden considered offering the property to Wooddall at less than Timbervest's assessment of its value, Zell answered, oddly, that he had "no knowledge" of that. Tr. 1638-39.

Zell testified that he has general knowledge of ERISA, and that he would not have thought about a proposed sale and repurchase of Tenneco Core in terms of ERISA. Tr. 1554. Zell testified that he did not believe that property could be transferred between clients, but that Tenneco Core could have been sold directly from New Forestry to TVP-A. Tr. 1485, 1554-56, 1559-60. When asked if ERISA would be violated if the amount of the offer for repurchase had

been agreed upon prior to the initial sale, Zell answered, disingenuously, "I don't have any expertise in this question." Tr. 1562. Zell was asked if he understood how the sale and repurchase of Tenneco Core could have been seen as a mechanism to avoid ERISA restrictions. Tr. 1562. In response, Zell admitted, "I guess it could be interpreted that way." Tr. 1562. Boden told Zell about the repurchase offer in late November 2006. Tr. 1561-62. Zell could not recall any instances of selling a property and then buying it back at a higher price. Tr. 1567-68; Div. Ex. 156D at 1. When asked if the unusual nature of the transaction caused him any concern from an ERISA, conflict of interest, or Advisers Act perspective, Zell stated, "I just looked at them as two very separate transactions and they stood alone, so I did not think in those terms." Tr. 1567-68.

On balance, the preponderance of the evidence shows that Zell acted highly unreasonably. He would have been aware that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the Tenneco Noncore data, and that the time lapse between the sale and repurchase was unusually small, and he testified that he could not recall any instances where Timbervest sold a property and then bought it back. Tr. 1567. Although he testified that he viewed the transactions as "very separate," he did not dispute that their nature made the conflict of interest "seemingly obvious." Tr. 1566-67. His approval of the transactions in the face of obvious red flags constituted an extreme departure from the standard of care imposed on an investment adviser, and demonstrated "a reckless disregard for the well-established fiduciary duty he owed his clients." Montford, 2014 WL 1744130, at *19; see Ronald S. Bloomfield, Exchange Act Release No. 71632, 2014 WL 768828, at *22 (Feb. 27, 2014) (ignoring "obvious red flags" supports a finding of "reckless disregard of the applicable regulatory requirements").

As for Shapiro and Jones, although they were less involved in evaluating the Tenneco Core transactions than Zell, I conclude that they, too, acted recklessly. Both would likely have known that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the Tenneco Noncore data, and would definitely have known that the time lapse between the sale and repurchase was unusually small. Shapiro was aware that selling property from one fund to another was normally prohibited. Tr. 1726-27; Div. Exs. 132, 153. Jones, by contrast, testified that he believed that a direct cross trade was possible, with heightened procedures. Tr. 1282-83, 1488-89. He recognized, though, that it would never happen, because Timbervest always wanted to buy low and sell high. See Tr. 1286-87, 1489. He agreed he would have "likely asked some questions about" the Tenneco Core transactions if he knew that there had been repurchase discussions at the time of the sale. Tr. 1297-98. Also, Shapiro "apparently disclosed" the cross trade at a meeting with Ranlett on May 3, 2012, but he provided only the haziest details, which is extremely unreasonable. Div. Ex. 129 at 2. As with Zell, Shapiro and Jones' approval of the transactions in the face of obvious red flags constituted an extreme departure from the standard of care, and demonstrated a reckless disregard for their fiduciary duty.

As for Timbervest, its scienter is established by the scienter of its officers and directors. See Montford, 2014 WL 1744130, at *14; Robert M. Fuller, 56 S.E.C. 976, 987 n.26 (2003). Therefore, Timbervest acted with scienter.

C. Boden's Fees

1. Disclosure and Materiality

Respondents do not dispute that Boden received fees from New Forestry funds, that the fees amounted to $1,156,236.25, and that the fees were shared with Shapiro, Zell, and Jones. Div. Exs. 127, 130. Indeed, Timbervest returned those fees (including the portion retained by Harrison), plus $96,315.27 in interest, to New Forestry on June 8, 2012. Div. Ex. 130. Such self-dealing presents a conflict of interest and is unlawful in the absence of "accurate[] and complete[]" disclosure. Tr. 1324; Vernazza, 327 F.3d at 860; see Eric T. Burns, Initial Decision Release No. 582, 2014 WL 1246758, at *5 (Mar. 27, 2014) (citing Ross Mandell, Exchange Act Release No. 71668, 2014 WL 907416, at *4 (Mar. 7, 2014)). It was also prohibited by the New Forestry fee agreement, which provided for compensation to Timbervest, and by extension to the other Respondents, only by way of management fees and disposition fees. Div. Ex. 54.

The OIP alleges that the Timbervest principals "did not disclose the commission payments" to BellSouth, AT&T, or ORG. See OIP at 4. Respondents dispute this issue. E.g., Timbervest Br. at 35-36. There is, however, literally no evidence that the specific fees were disclosed to BellSouth, AT&T, or ORG prior to May 2012. Div. Ex. 126. Indeed, Respondents do not argue that the fees themselves were timely disclosed; instead, they argue that the agreement to pay the fees was disclosed to BellSouth in 2002 (via Zell) and to ORG in 2005. Timbervest Br. at 35; Shapiro Br. at 5-8; Boden Br. at 10-12; Zell Br. at 4-5; see Jones Br. at 12-14 (arguing that Shapiro disclosed the fee agreement to ORG, presumably in 2005); see also Div. Ex. 127 at 2.

As noted, an investment adviser has a duty to accurately and completely disclose conflicts of interest. Vernazza, 327 F.3d at 860. I agree with the Division that no such accurate and complete disclosure could have occurred in 2002, for the simple reason that Boden was not at that time a principal or employee of Timbervest. Div. Reply at 13-14. In the usual case, paying a broker to list and sell properties is uncontroversial, and in 2002, Boden was apparently such a broker. Div. Ex. 64 at 9 (authorizing listing brokers); Div. Ex. 127 at 2. No conflict of interest existed until 2003 or 2004, when Boden started receiving compensation from Timbervest, at which time Zell was no longer at BellSouth. Tr. 534, 1543-44, 1697; Div. Ex. 127 at 2.

Once Boden became a principal at Timbervest, however, any fee agreement that involved paying client funds to him was no longer uncontroversial. Any prudent investment adviser would have abrogated or modified Boden's brokerage agreement once Boden became associated with it, and any client could reasonably have assumed, absent disclosure to the contrary, that Boden's agreement had been so abrogated or modified. An investment adviser's duty to provide accurate and complete disclosure includes a duty to avoid materially misleading omissions. See Montford, 2014 WL 1744130, at *14. A failure to disclose that Boden's fee agreement survived his movement in-house is just such an omission. Thus, the 2002 disclosure to Zell did not satisfy Timbervest's fiduciary duty, and there is no evidence that Zell (or anyone else) provided updated information to BellSouth between Boden's hiring and Shapiro's 2005 disclosure. See Tr. 1536.

As for the 2005 disclosure, even assuming it was accurate, it was incomplete. It is undisputed that the details of Shapiro's disclosure to Schwartz are not recorded anywhere, and may never have been, and that Gruber was unaware of Boden's fee agreement. Tr. 1329-30; Second Stip. According to Shapiro, he called Schwartz sometime in 2005. Tr. 1772, 1775-76. Shapiro testified during the investigation that he told Schwartz "the basic deal," consisting of two facts: that Boden was hired to "help maximize value on the core southeastern properties" and that Boden was to be paid an "advisory fee" as long as there was no second fee or commission paid by New Forestry. Tr. 1757-58, 1778-80; see also Tr. 2249. During the hearing, Shapiro could remember virtually nothing about his disclosure, even after his investigative testimony was read into the record. Tr. 1778-80. He could not recall if he conveyed to Schwartz which properties were subject to the agreement, and he did not recall if any other "specific terms" of the fee agreement (as outlined in his June 4, 2012, letter to Ranlett) were conveyed. Tr. 1757-58, 1777-80; Div. Ex. 127.

Schwartz testified that Shapiro told him in 2005 that Timbervest was "bringing someone in to work at Timbervest," who was to be paid a brokerage commission for work he did prior to being at Timbervest. Tr. 2056-57, 2088, 2104-05, 2230. Schwartz considered the issue "hypothetical," and did not convey the information to BellSouth. Tr. 2057, 2178, 2230-31. In February 2013, Schwartz visited Timbervest and met with Shapiro, among others. Tr. 2252-53; Div. Ex. 181. Shapiro "went through what [he] believe[d] the story to be, as did Mr. Schwartz, their stories [were] exactly the same." Tr. 2253.

Indeed, the testimony of the two percipient witnesses, although not "exactly the same," was generally consistent: they both agreed that Shapiro told Schwartz that Timbervest was hiring, or had hired, someone to "maximize value," and that he would get a fee for previously uncompensated work so long as no other commissions were paid. Tr. 1757-58, 1778-80, 2056-57, 2088-89, 2104-05, 2230, 2253. Schwartz specifically recalled that Shapiro did not mention the duration of the brokerage arrangement or the properties to which it applied, and Shapiro had no recollection whether he did or not. Tr. 1757-58, 1777-79, 2058-59, 2179. Shapiro's disclosure was oral, and there is no evidence anyone else heard it. Tr. 1772, 2056-57. The only reasonable conclusion from the evidence is that Shapiro did not disclose Boden's complete history with Timbervest, the properties, the fee percentages, the minimum sale price, or the agreement's duration. Tr. 2056-59; Div. Ex. 127.

Timbervest spends over five pages of its post-hearing brief disparaging Schwartz's credibility, ultimately contending that Schwartz's "testimony about the 2005 conversation is not credible and should be discounted." Timbervest Br. at 9-15. But even assuming that Schwartz's testimony was entirely false, there is no evidence that Shapiro's disclosure of Boden's fee agreement was legally sufficient. Shapiro himself remembered virtually nothing about what he told Schwartz. It is beside the point that Schwartz may have stated that he consented to the fee agreement, or to the fees, or advised other clients to continue investing with Timbervest, because such advice and consent were not fully informed. E.g., Timbervest Br. at 10 (arguing that Schwartz was "fine" with Boden's fee agreement). On the whole, Shapiro's testimony and Schwartz's testimony are generally not inconsistent, and Schwartz's credibility is thus largely immaterial.

The one exception is whether Shapiro identified Boden as the fee recipient – a fact that would have presented a much bigger red flag than any other detail. Schwartz testified repeatedly and emphatically that he was not told in 2005 that Boden was the fee recipient, and that he never approved, and never would have approved, a commission to a current Timbervest partner. Tr. 2063, 2109-10, 2130, 2132, 2169-71, 2178, 2185, 2193, 2198, 2201. Schwartz was generally a credible witness. His demeanor was good: he testified forthrightly, with a strikingly better memory than Shapiro, and his tone of voice was consistent with someone upset that he had been misled. By contrast, even the best evidence Timbervest musters in support of its position – namely, Schwartz's after-the-fact affirmative statements – is not inconsistent with Schwartz's testimony. Shapiro testified at the hearing, when asked what he told Schwartz, "I don't really recall." Tr. 1776. During the investigation, Shapiro had a better recollection, and testified that he conveyed the "basic deal," but it is not clear from the investigative testimony that he disclosed that Boden, as opposed to "someone," was to be the fee recipient. Tr. 1778-80, 2056-57. Shapiro testified that on "six or eight" occasions, he heard Schwartz say the fee agreement was fine, but, again, it is not clear that Schwartz understood that Boden was to be the fee recipient, nor did Shapiro provide any details.[17] Tr. 1786, 2246-53. Jones testified more specifically about

[17] Both Shapiro and Jones testified that Schwartz used the term "tail payment" in at least one meeting in 2012, suggesting that Schwartz was aware that the fee recipient was to be compensated for work done before joining Timbervest. Tr. 1470-73, 2252-53. Shapiro – but, significantly, not Jones – testified specifically that on February 12, 2013, Schwartz used the term "Bill's tail payment," suggesting that Schwartz knew that Boden was the fee recipient. Tr. 2252-53; Div. Ex. 181. I do not credit Shapiro's testimony on this point. As noted, Schwartz had a better memory than Shapiro, he possessed a good demeanor, and the evidence is otherwise not inconsistent with his testimony on this point. Shapiro, by contrast, testified that he "could not recall," or some variant thereof, over seventy-five times during the hearing, even as to matters one would expect him to recollect. See generally Tr. 1681-1906, 2265-75. Moreover, Shapiro provided uncorroborated and incredible hearsay (on other, highly relevant subjects) on at least two occasions during the hearing; notably, Timbervest does not rely on these statements in its post-hearing briefs. See Timbervest Br. at 9-15, 23-26; Timbervest Reply at 23-32. First, he testified that on the morning of Tuesday, February 4, 2014, just before the start of the hearing day, Wooddall called Boden, apologized, and said there was "never a deal in place" and that he thought "it" was "ridiculous." Tr. 1796-97. Boden, who was in the courtroom when Shapiro testified and was present the following day (i.e., the last hearing day), could have testified on this point, and I even flagged it as an issue that might extend the hearing, but neither Boden nor Wooddall were called to testify further about it. Tr. 2282-83. Wooddall's alleged statement was double hearsay, inconsistent with the documentary evidence, and uncorroborated, and Shapiro conceivably had a motive to fabricate it. See Joseph Abbondante, 58 S.E.C. 1082, 1101 & n.50 (2006) (listing factors to consider in evaluating hearsay). I therefore do not credit it, and indeed, I find that it generally erodes Shapiro's credibility. Second, he testified that in late 2006 or early 2007, Jones asked him to disclose Boden's fee agreement to Schwartz, and that he did so. Tr. 1772, 1775-76. Neither Jones nor Schwartz corroborated this assertion, nor is there any documentary evidence of it, and I do not credit it. Tr. 1328, 2056-57. Additionally, Shapiro testified that "[e]very timber tour we had, AT&T or their representatives were always invited," and that Ranlett, in particular, was personally invited by Shapiro. Tr. 1869, 1874-75. Timbervest cites to this testimony as evidence that it had nothing to hide, but there is no

four instances where Schwartz provided "confirmation" that "Shapiro had advised [Schwartz] of Mr. Boden's fee agreement." Tr. 1470-71. But in each instance (one of which is apparently double hearsay), Jones did not explicitly testify that Schwartz confirmed he understood that Boden was to receive the fees. Tr. 1470-73. What little after-the-fact documentary evidence exists is either silent on this issue, or supports Schwartz's testimony. Div. Ex. 181; Resp. Ex. 144 at 2 ("information ed [Schwartz] heard was different than what joel [Shapiro] said"). I accordingly credit Schwartz's testimony that he did not know that Boden was to be the fee recipient. Tr. 2094.

The Division has carried its burden of proving that Shapiro's disclosure was incomplete and therefore legally insufficient.[18] Shapiro's contention, "that *any* discussion occurred shows that Mr. Shapiro did not intend to deceive his client and that he was not negligent," misstates Shapiro's duty under the Advisers Act. Shapiro Br. at 8. Shapiro could not recall if any of the following details outlined in his June 4, 2012, letter to Ranlett were disclosed: (1) Boden was a consultant in 2002, when the fee agreement was entered into, but became a Timbervest principal in 2004, without modification of the fee agreement; (2) the specific properties covered by the agreement; (3) the "success fee payment" percentages; (4) the requirement of a minimum sale price of $5 million; (5) the agreement's five-year duration; and (6) the lack of consideration given to ERISA. Div. Ex. 127. Schwartz affirmatively testified that some were not disclosed. Tr. 2058-59, 2179. Under the circumstances, all these details would have been material, that is, they would have been significant to a reasonable investor, because they bear on how the investor's funds were being used. See David Henry Disraeli, Exchange Act Release No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 861-62 & n.33 (collecting cases finding that self-dealing is material). Each of these details standing alone, if not disclosed, would have constituted unlawfully material omissions. Indeed, Ranlett requested the details at least twice after learning of the fee payments, and AT&T was concerned enough about the details that it terminated Timbervest and hired ERISA counsel to investigate. Div. Exs. 124, 126, 129; see Montford, 2014 WL 1744130, at *14 (citing client testimony as evidence of materiality).

In sum, the preponderance of the evidence demonstrates that Boden's fee agreement was not adequately disclosed to Timbervest's client, and that the fees themselves were not disclosed at all until years later. This constitutes a material omission under the Advisers Act.

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documentary evidence of such invitations, even as to the one Glawson timber tour described in the record. Tr. 1905; Div. Ex. 169; Timbervest Reply at 49. Ranlett was not asked about it, but his tone of voice when discussing Timbervest's use of Glawson conveyed betrayal and even disgust, and I do not credit Shapiro's testimony on this point. Tr. 1155-56, 1209-11. On the whole, Schwartz was a more credible witness than Shapiro, and although I have credited Shapiro's testimony on many other points, his claim that Schwartz used the term "Bill's tail payment" is not believable.

[18] The Division presented considerable evidence calling into question whether the fee agreement even existed. See Div. Reply at 17-21. Nonetheless, both Shapiro and Schwartz testified that there had been some sort of disclosure in 2005, from which I find that there existed some sort of fee agreement. I accept Respondents' contention that Shapiro's June 4, 2012, letter to Ranlett is the best evidence of the fee agreement terms. Div. Ex. 127.

2. State of Mind of Shapiro, Zell, and Jones

Shapiro was on notice that Boden's fee agreement presented a conflict of interest, and he accordingly disclosed something about it to Schwartz. Tr. 1773, 1777, 1782, 2270-71. Shapiro did not know that Boden had created Fairfax or Westfield, nor did he know beforehand that Boden would share his fees. Tr. 1826-29. Nor did Shapiro orchestrate the fee payments. Such evidence tends to show a lack of scienter. See generally Shapiro Reply at 8-15.

However, in Shapiro's case, there is additional, crucial evidence of his state of mind: the substance of his conversation with Schwartz. During the investigation, Shapiro testified that he told Schwartz that Boden "was hired to help maximize value on the core southeastern properties," and would be paid an advisory fee so long as there was not a second fee or commission paid by New Forestry. Tr. 1779. That is literally all that Shapiro could remember disclosing, and his memory at the hearing was even worse. Tr. 1777-78.

Such a disclosure was woefully deficient, so much so that it qualifies as an extreme departure from the standard of care. Shapiro's lackadaisical approach to his fiduciary duty was highly unreasonable and presented an obvious danger of failing to keep Timbervest's client's representative, much less its actual client, informed. Shapiro was shockingly apathetic toward his "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts.'" Capital Gains, 375 U.S. at 194. This is powerfully demonstrated by his investigative testimony, when questioned about Schwartz's reaction to disclosure of the fee agreement:

Q. Okay, was it – would it have been early or soon after ORG took over the account that you told him about this?
A. My guess and to the best of my recollection, it was when he was asking how everybody came to Timbervest.
Q. And what do you remember telling Mr. Schwartz about Mr. Boden?
A. I just remember telling him the basic deal.
Q. And what was the basic deal?
A. He was hired to help maximize value on the core southeastern properties and he was being paid a fee, an advisory fee. He's been instrumental in getting us to the point we were and he was getting a fee as long as there was not a second fee or a commission paid by New Forestry.
Q. What was Mr. Schwartz's response to the fee arrangement?
A. Whatever.
Q. I'm sorry?
A. Whatever, it's fine, I mean whatever.
Q. Like you saw no problem with it?
A. Other managers do this.
Q. Okay, but I'm asking about –
A. No.
Q. -- Mr. Schwartz's response.
A. Once again, it was a nonevent, it was nothing.
Q. So you're saying Mr. Schwartz had no response or said it was fine?
A. I don't recall.

Q. I'm just confused about what you're saying Mr. Schwartz's response was.
A. I don't think his response was anything. I also don't recall. This is such a non-anything.

Tr. 1778-79. According to Shapiro, this constituted "[getting] the okay from Mr. Schwartz." Tr. 1756, 1780, 1785.

Such a conclusion is highly unreasonable, particularly in view of the fact that neither Shapiro's disclosure, nor Schwartz's informed consent, was ever memorialized in any fashion. Unlike Advisers Act Section 206(3), there is no general requirement that disclosures required under Sections 206(1) or 206(2) be in writing. See 15 U.S.C. 80b-6(3) (agency cross trades prohibited "without disclosing to such client in writing before the completion of such transaction the capacity in which [the investment adviser] is acting and obtaining the consent of the client to such transaction"). Nevertheless, prudence dictates that an agreement to self-deal, potentially involving millions of dollars, and the client's consent to that agreement, should be reduced to writing. Shapiro's failure to make a complete and accurate disclosure, either orally or in writing, combined with his generally cavalier attitude toward it, evinces recklessness.[19]

Zell and Jones, like Shapiro, knew prior to each closing that Boden was to receive a fee, and nonetheless approved each transaction. Tr. 1328, 1550-51. Zell and Jones knew at the time they received their share that each fee had been paid out of New Forestry assets. Tr. 1313, 1557. Zell and Jones were on notice that Boden's fee agreement presented a conflict of interest. Tr. 1948-49. Zell testified as if his knowledge of ERISA was thin, even though he had worked for years, both at BellSouth and at Timbervest, managing pension plan assets, which, as noted, I find disingenuous. Tr. 1532-33, 1562. Also, I agree with the Division that Zell's testimony regarding whether ERISA actually covered New Forestry was confusing and inconsistent. Tr. 1672-74; Div. Reply at 16. As for Jones, he had no explanation at all for Timbervest's failure to document in writing the disclosure of Boden's fees, and ORG's or BellSouth's consent to them, even though such documentation was his usual practice. Tr. 1321.

These considerations weigh in favor of finding scienter as to Zell and Jones. Of greatest weight, though, is their subjective belief that Shapiro had disclosed Boden's fee agreement to Schwartz, which negates scienter. Jones testified repeatedly that he understood Shapiro had obtained Schwartz's consent. Tr. 1325, 1337, 1352. Jones could not remember exactly when Shapiro informed him, but it was in 2005 or 2006, most likely before the Tenneco Core sale

[19] Shapiro's disclosures in 2012 support a finding of scienter, as well, although I have not placed as much weight on them as Shapiro's initial disclosure, which is alone sufficient to find recklessness. Div. Ex. 127. Specifically, Fairfax and Westfield's status as shell companies, and Harrison's receipt of a substantial fee for relatively trivial work, would have been material but were not initially disclosed by Shapiro in 2012. See Tr. 1043-45 (Ranlett would have "demanded an explanation" for a $685,000 payment to an LLC for Boden's benefit). In fact, the letter comes close to affirmatively concealing Harrison's fee, because it states that Boden "decided to share the fees equally with his now business partners," suggesting that the Timbervest principals were the only persons with whom Boden shared his fees. Div. Ex. 127 at 3.

closed. Tr. 1326. Zell's testimony on this point was inconsistent. Tr. 1538-40; Div. Reply at 14 & n.11. However, Zell knew Boden had a fee agreement as early as 2002. Tr. 399, 1536-37. Given this, it is plausible that Zell confused his own disclosure from Shapiro in 2002 with ORG's disclosure from Shapiro in 2005, and was, in fact, initially confused about when Shapiro's early 2006 disclosure happened. Tr. 1540. Accordingly, I credit Zell's hearing testimony over his investigative testimony, and find that Shapiro informed Zell in early 2006 that he had obtained ORG's consent. Tr. 1540.

Zell and Jones were entitled to rely on Shapiro's representation to them that he had obtained consent from Schwartz. See Zell Reply at 6-7; Jones Br. at 9-10. To be sure, there is evidence that Zell and Jones knew that Boden's fees were categorically prohibited under ERISA, and thus that Zell and Jones could not have believed that Shapiro's disclosure was legally effective. See Div. Br. at 66. However, the preponderance of the evidence shows that Zell and Jones believed that Shapiro's disclosure was legally effective. That it was in fact insufficient is irrelevant to their state of mind, because Zell and Jones subjectively understood, based on what Shapiro told them, that Schwartz had consented to Boden's fee agreement. Also, there is no evidence that Zell or Jones actually knew beforehand that Boden's fees were processed through LLCs. Tr. 1335-36, 1577-78. Thus, Zell and Jones did not act either intentionally or highly unreasonably, as required to show scienter.

They did, however, act negligently. Zell and Jones never gave any thought to the possibility of buying Boden out of his fee agreement when he became an owner of Timbervest, even though they knew it presented a conflict of interest. Tr. 1324-25, 1490-91; see Tr. 566. Zell signed the $300 check, made out to Fairfax, that made up the shortfall in Boden's Tenneco Core fee, and Zell thus should have known at the time that an LLC was involved in the transaction, even though he actually did not. Div. Ex. 1J. Zell's explanation, essentially that he just signed the stack of checks he routinely received, is plausible, and supports a finding of negligence rather than scienter. Tr. 1569-70, 1656. Jones supervised Seabolt, who transmitted a letter to Ranlett in August 2012 that was misleading to the same degree as Shapiro's letter to Ranlett in June 2012. Tr. 1234, 1413; Div. Ex. 128. Specifically, it failed to disclose Harrison's involvement and the fact that Fairfax and Westfield were shell companies, and it further gave the misleading impression that Timbervest did not expect the Tenneco Noncore tracts to sell at high prices prior to September 2006; Jones should have spotted these issues.[20] Div. Ex. 128. Most significant is the lack of contemporary documentation of Boden's fee agreement, the fee payments, and the client's consent. Zell, as a long-time manager of pension plan assets, would have known to exercise more care than he did in documenting Boden's fees and ORG's consent to them. Jones' failure to ensure written documentation of Shapiro's disclosure and ORG's consent is a classic example of imprudent lawyering – a first year law student would have known better. This evidence, taken as a whole, does not prove scienter but it clearly proves negligence.

3. Scienter of Boden and Timbervest

[20] To be sure, attempts to conceal misconduct support a finding of scienter rather than negligence. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26799. But because the letter went out under Seabolt's signature rather than Jones', and it was not even copied to Jones, it does not support a finding of scienter as to Jones.

I conclude that Boden acted with scienter. Although all the Timbervest principals approved the sale of Tenneco Core and the Kentucky Lands, and shared in the unlawful fees, Boden was plainly the principal most involved in the transactions. Accordingly, Timbervest shares the same state of mind as Boden.

I have carefully considered Respondents' arguments that Boden lacked scienter. Timbervest argues that Boden's fees benefited New Forestry. Timbervest Br. at 6, 8, 36; see also Boden Br. at 5-6. It is not exaggerating to call this argument silly; obviously, depleting New Forestry's assets by over $1 million, for no reason other than that Boden felt entitled to it, did not benefit New Forestry. Equally obviously, the argument that "no [Timbervest principal] even considered ERISA when Mr. Boden received or ultimately shared his advisory fees . . . '[n]o one spotted the issue,'" does not negate scienter – indeed, quite the opposite. Timbervest Br. at 37.

Timbervest further argues that Shapiro disclosed Boden's fee agreement, that Boden volunteered in his 2011 investigative testimony that he had worked as a consultant at Timbervest prior to becoming a principal, and that Timbervest voluntarily disclosed in May 2012 the fee agreement, fee payments, and involvement of the LLCs. Timbervest Br. at 36; Timbervest Reply at 14-15, 23-26. But Shapiro's disclosure was inadequate, Boden's investigative testimony revealed only that he had been a consultant before Timbervest hired him, and not that he had a fee agreement amounting to an obvious conflict of interest, and Timbervest's "voluntary" disclosure occurred well after initiation of the Division's investigation, and after considerable back-and-forth between the Division and Timbervest's counsel. Tr. 556-58, 1778-79; Div. Exs. 79-81. The actual May 2, 2012, disclosure took place after issuance of a subpoena asking for all records of payments by Chen or Wooddall to Boden or Timbervest, and it was hardly fulsome, in view of the disclosure just months later. Div. Ex. 80; Div. Ex. 128.

Timbervest further argues that LLCs are "a common asset protection vehicle," and the fact that Boden's fees were transmitted through them is of no consequence. Timbervest Br. at 36-37; Timbervest Reply at 18. This argument misses the point, which is that the details of Fairfax and Westfield, and the specific manner in which Boden and Harrison used them, were suspicious. See infra. That Boden waived attorney-client privilege does, indeed, weigh against a finding of scienter, because it suggests that he believed he had nothing to hide. Timbervest Reply at 17. This argument is substantially undercut, though, by the fact that the attorney, Harrison, was himself represented by Boden's own counsel, and continued to be so represented during the hearing. Tr. 572-73. Timbervest argues that there was no need for Harrison to ask Boden "a lot of questions about what Mr. Boden's fees were and where they came from" before setting up the LLCs, beyond the five-minute conversation they had, because Harrison and Boden had a longstanding friendship. Timbervest Reply at 18-19. This argument, too, is undercut by the fact that Boden did not know why Harrison did certain things and prepared certain documents, and in the case of Glawson's attempted sale, by Boden's belief that Harrison did not understand Boden's intent. Tr. 262-67, 275-79, 299-300, 725. Contrary to Timbervest's argument, Harrison's receipt of a ten percent contingency fee, amounting to over $115,000, for less than twenty hours of transactional legal work is, indeed, "'consistent with a reward for helping to conceal the real beneficiaries of the fee payments.'" Tr. 625; Timbervest Reply at 19 (quoting Div. Br. at 44). Harrison admitted that he had virtually no experience doing

contingency fee work, and that the type of work he was doing was not typically compensated by way of contingency fee. Tr. 720-21.

Timbervest further argues that it makes no sense to conceal Boden's payments in the sale contracts, because New Forestry, BellSouth, and ORG did not review those contracts. Timbervest Reply at 20. But concealment of Boden's payments made it more difficult for anyone, including Timbervest employees such as Carter and other real estate brokers such as Thwaite, to discern the true circumstances of Boden's fees. In fact, Thwaite's attorney sent Timbervest a letter in June 2006, just days before Wooddall transmitted his Tenneco Core purchase offer, complaining that Timbervest wanted to sell Glawson using a vehicle "owned or controlled by New Forestry executives and relatives." Div. Ex. 152. Thwaite's letter may not have motivated the creation of Fairfax, but it may well have motivated the byzantine manner in which Boden's fees wended their way into the hands of the Timbervest principals. Concealment of Boden's payments also made it more difficult for New Forestry's auditors to trace the transactions.

I agree with Timbervest that the presence of innocent mistakes in the sale contracts, including the one for Rocky Fork, does not support a finding of scienter. Timbervest Reply at 20-21. But the presence of affirmative misrepresentations, such as listing Fairfax and Westfield as brokers and performers of "services rendered," does support such a finding, because only Boden would have been in a position to identify Fairfax and Westfield as such.

Timbervest further argues that it is "nonsensical" to think that the LLCs were "designed to conceal Mr. Boden's fee payments," because it "d[id] not help to use an entity that may call attention to itself because of brokerage licensing statutes." Timbervest Reply at 21-22. This misses the point, which is that Boden and Harrison knew or should have known that what they arranged was unlawful under state real estate law, which is inconsistent with an intention only to protect Boden's assets. Div. Br. at 42-44 (citing Tr. 387-90, 684). Timbervest has no real rebuttal to the Division's argument on this issue, except speculation that Boden may have been aware of a particular provision of Georgia law exempting property managers from real estate licensing requirements. Timbervest Reply at 22-23.

Concededly, the evidence supporting a finding of scienter is not one-sided. I agree with Timbervest that Boden had legitimate concerns about competing claims on his brokerage fees, the whole point of LLCs is to insulate an individual from personal liability, and Boden was entitled to rely on Harrison's specific advice to use LLCs for that purpose. See generally Timbervest Reply at 15-18; Boden Br. at 9-10. Boden was likely aware of Thwaite's competing claim no later than mid-2006, and it was reasonable for Boden to make some sort of arrangement to protect his assets from potential litigation. Div. Ex. 152. But the specifics of how Boden obtained his fees are not consistent with an intent solely to insulate himself from liability, and are consistent with a dual intent – to protect his fees and to conceal their origin.

Boden denied an intent to conceal, as did Harrison. Tr. 369, 619. But there is strong circumstantial evidence of such intent. See generally Div. Br. at 34-44. Indeed, the unusually complex series of transactions arranged by Harrison is strikingly reminiscent of concealment money laundering, in which transactions are "designed in whole or in part to conceal or disguise

in any manner the nature, location, source, ownership or control of the proceeds of unlawful activity." United States v. Garcia-Emanuel, 14 F.3d 1469, 1473 (10th Cir. 1994) (emphasis and quotation marks omitted). In such cases, "a variety of types of evidence have been cited . . . as supportive of evidence of intent to disguise or conceal," including unusual secrecy surrounding the transaction, structuring the transaction in a way to avoid attention, depositing illegal profits in the bank account of a legitimate business, using third parties to conceal the real owner, a series of unusual financial moves, and highly irregular features of the transaction.[21] Id. at 1475-76. The Commission has found similar types of evidence to be indicative of scienter. See Milligan, 98 SEC Docket at 26799 (use of third party bank account); Thomas C. Bridge, Exchange Act Release No. 60736 (Sep. 29, 2009), 96 SEC Docket 20805, 20828 n.61 (misrepresenting identity and use of multiple accounts).

There was unusual secrecy surrounding the transactions; Harrison rented different post office boxes at different mailbox stores for each LLC. Tr. 616-19, 654-55. The transactions were structured to avoid attention and the fees were deposited in the bank account of a legitimate business; the fees passed through Harrison's IOLTA account, rendering them fungible with other client funds. Tr. 671, 673. Third parties concealed the true owner of the fees; neither Boden nor Timbervest were listed anywhere in the LLC documents, or otherwise had a legal connection with the LLCs, and Harrison testified that he would not have disclosed Boden's beneficial interest in the LLCs if anyone had asked. Tr. 596-98, 602-04, 608-09; Div. Exs. 1-3.

Transfer of the fees to the Timbervest principals involved a series of unusual financial moves and multiple accounts. As to the Tenneco Core sale: (1) Snow issued a check, which Boden received (First Stip. 1A-C); (2) Timbervest issued a check, which Zell signed and returned to accounting, and which Boden eventually received (Tr. 286-87, 653, 672; First Stip. 1A-C; Div. Ex. 1J); (3) Boden sent both checks to Harrison in Texas (Tr. 286-87, 653, 672); (4) Harrison deposited the checks in his IOLTA account and wrote a check to himself (First Stip. 1D); (5) Harrison wrote a check to WAB for the balance and gave it to Boden (Tr. 675-76; First Stip. 1E, 3B); (6) Boden deposited Harrison's check into his WAB account (Tr. 288; First Stip. 3A); and (7) Boden wrote four checks on his WAB account, converted each WAB account check to a certified check, and physically handed each certified check to Shapiro, Zell, and Jones (Tr. 292-93; First Stip. 3C-E). A very similar series of transactions occurred for the Kentucky Lands sale. See generally First Stip.

Considered separately, none of these facts are especially indicative of scienter, and even considered in the totality, they are arguably consistent with Boden's stated intent, namely, that he was protecting his assets. But three particular considerations are not consistent with an intent just to protect assets, and only make sense if Boden also had an intent to conceal his fees from BellSouth and AT&T, and communicated that intent to Harrison.

First, Boden misrepresented his identity in the sale contracts. See Thomas C. Bridge, 96 SEC Docket at 20828 n.61 (misrepresenting identity is evidence of scienter). The executed

[21] I do not, of course, find that Boden committed money laundering. I simply look to money laundering law for guidance in evaluating circumstantial evidence of an "intent to disguise or conceal" material facts, that is, of evidence showing scienter. 14 F.3d at 1473-75.

Tenneco Core sale contract referred to Fairfax as "ha[ving] acted as a brokerage agent," which was misleading because Fairfax was merely a shell company and not a broker. Div. Ex. 11 at 963339. The executed Kentucky Lands contract falsely stated that Westfield's "advisory fees or real estate commissions" were "for services rendered." Div. Ex. 33 at 5. Boden agreed that this statement was misleading. Tr. 305. He also characterized his fees as "advisory fees" rather than brokerage fees, and testified that Fairfax and Westfield were intentionally not set up as brokers, even though the contracts identified them as such. Tr. 390. Also, as to both sales, the fees were for work completed years before Fairfax and Westfield came into existence. Boden was vague about how much time he spent "brokering" the Tenneco Core lands while a Timbervest consultant, relative to how much time he spent on selling them after becoming a Timbervest principal, but he agreed that he did spend some time on it both before and after joining Timbervest. Tr. 563-66.

Second, Harrison's work on the transactions involved "highly irregular" lawyering. Garcia-Emanuel, 14 F.3d at 1476. Harrison created the LLCs, with himself as the only member, and then used his IOLTA account for handling their funds. Tr. 596-99; Div. Ex. 3. This may or may not constitute commingling of funds, but it is clearly imprudent.[22] Harrison was paid a contingency fee, which was unusual for him, for work he admitted was not normally performed on contingency, and his fee was very large relative to the amount of work performed, even by contingency fee standards – the equivalent of about $6000 per hour. Tr. 625, 720-21. He had no written retainer agreement and performed the work based solely on a five minute conversation with Boden, with no further investigation into, for example, who might challenge Boden's fee, the location of the properties at issue, or the jurisdiction in which any fee challenge might be filed. Tr. 586-87, 652-53, 685.

Third, as noted, neither Fairfax nor Westfield acted as a broker, but to the extent Boden did, he knew his fee was illegal. Although he characterized his payments as "advisory," rather than "brokerage," fees, he agreed that they had all the characteristics of a brokerage fee. Tr. 386, 388. He also understood that it is "illegal for an unlicensed broker to collect a brokerage fee in Georgia," and that brokers need to be licensed in the state where they do business, that is, where the property is located. Tr. 383-84, 388-89. When asked whether he knew that if the sales had taken place in Georgia, they would have been illegal, he replied that if he had arranged a sale on the one Georgia property on his list of eight properties, "it probably would have gone the same way" because "[i]t was an advisory fee agreement with myself personally," and not with Draper Owens, the broker holding his license. Tr. 389.

In sum, according to Boden, he was not breaking the law because his activities were merely "advisory," though having all the characteristics of brokering, and therefore did not require him to run his fee through his actual broker. This explanation is utterly incredible, nothing more than doublespeak, and erodes his overall credibility. Had Boden received his fees lawfully, by passing them through Draper Owens, he likely could have obtained the same protection from personal liability he claims motivated him to pass his fees through Fairfax and Westfield. It is irrelevant that he may have actually been exempt from Georgia state brokerage

[22] The Division does not argue that Harrison commingled funds, nor did Harrison subjectively believe that he had commingled funds. Tr. 674, 678-79.

law by virtue of his employment with Timbervest, because there is no evidence he was aware of such an exemption. See Timbervest Reply at 22-23. Boden subjectively believed that his receipt of fees violated state law.

Additionally, Boden's uncharged actions, specifically, his attempted sale of Glawson and his negotiation of the Rocky Fork contract, demonstrate a plan to use LLCs to conceal his activities. As noted, Boden attempted, without credibility, to distance himself from the Glawson documents presented to Hailey. Tr. 262-67, 275-79. But the evidence demonstrates that Boden and Harrison intended to use Willow Run as a "middle man." Tr. 714-15; see supra. The Rocky Fork contract contained language with regard to Woodson that was misleading in the same way the Tenneco Core and Kentucky Lands contracts were misleading with regard to Fairfax and Westfield. Tr. 352-54, 358-60; Div. Ex. 39 at 10-11; Div. Ex. 40.

On the whole, Boden's conduct is inconsistent with that of someone who believed what he was doing was lawful. I conclude that Boden did not believe that Shapiro had obtained Schwartz's informed consent to the fee agreement, even if Shapiro told Boden that he had. This is plausible, considering that Shapiro admitted that he was not detail-oriented, and in more than one instance provided a "disclosure" that was woefully deficient on relevant facts.[23] Tr. 1696; Div. Ex. 129 at 2. I find that Boden, and by extension Timbervest, acted with intent to defraud, that is, with scienter.

IV. CONCLUSIONS OF LAW

A. Timbervest

Timbervest violated Sections 206(1) and 206(2) of the Advisers Act. Section 206 provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly – (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or] (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. § 80b-6. To establish violations under sections 206(1) and (2) of the Advisers Act, the Division must prove that Timbervest was an investment adviser, that it engaged in fraudulent activities by jurisdictional means, and that it at least negligently breached its fiduciary duty by material omissions and, in the case of Tenneco Core, failure to sell at the best price. SEC v. Merrill Scott & Assoc., Ltd., 505 F. Supp. 2d 1193, 1215 (D. Utah 2007); SEC v. Gotchey, No. 91-1855, 1992 WL 385284, *2 (4th Cir. Dec. 28, 1992); see Capital Gains Research Bureau, 375 U.S. at 191-92. To establish a violation of Section 206(1), the Division must also prove that Timbervest acted with scienter. SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992).

[23] Although Zell and Jones could also have disbelieved Shapiro based on this evidence, the totality of the record demonstrates that they did believe Shapiro.

It is undisputed that Timbervest was a registered investment adviser at all relevant times. Timbervest Answer at 1. As noted supra, it committed fraud. It is located in Georgia, Boden used email to sell Tenneco Core in Alabama at a fraudulently low price, and Boden used the mail to send the Kentucky Lands fee check to Harrison in Texas. Tr. 286-87, 671-72; Div. Ex. 9. This satisfies the interstate commerce requirement. See SEC v. Softpoint, Inc., 958 F. Supp. 846, 865 (S.D.N.Y. 1997); see also SEC v. N. Am. Fin. Co., 214 F. Supp. 197, 202 (D. Ariz. 1959) (collection of installment payments by mail, and mailing stock certificates after payment, held to satisfy interstate nexus under Exchange Act Section 15(a)). The failure to disclose Boden's fees was material, as noted, and the materiality of the fraudulently low Tenneco Core sale price, and of Timbervest's concomitant failure to disclose the repurchase agreement, is virtually self-evident. See Disraeli, 92 SEC Docket at 861-62 & n.33. As noted, Timbervest acted with scienter. Therefore, Timbervest violated both sections 206(1) and (2) of the Advisers Act, as to both the Tenneco Core transactions and Boden's fees.

B. Individual Respondents

A finding of aiding and abetting requires proof of: (1) a primary violation of the securities laws; (2) knowledge of the primary violation by the aider and abettor; and (3) substantial assistance by the aider and abettor in the commission of the primary violation. SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant. See Geman v. SEC, 334 F.3d 1183, 1195-96 (10th Cir. 2003); Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, pet. denied, 289 F.3d 109 (D.C. Cir. 2002).

As to the Tenneco Core sale and repurchase, all four individual Respondents acted at least recklessly, possessed fiduciary duties, and provided substantial assistance by, if nothing else, approving the transactions. See Fundamental Portfolio Advisors, Inc., 56 S.E.C. 651, 684 (2003) (associated persons of investment advisers are fiduciaries). All four therefore aided and abetted, and caused, Timbervest's primary violations of Advisers Act Sections 206(1) and 206(2). See Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998) (finding of aiding and abetting necessarily implies that respondent caused the primary violations), aff'd, 222 F.3d 994, 1000 (D.C. Cir. 2000).

As to Boden's fees, Boden and Shapiro acted at least recklessly, possessed fiduciary duties, and provided substantial assistance by, among many other things, entering into the fee agreement. Zell and Jones were negligent, and thereby caused Timbervest's primary violations of Advisers Act Section 206(2). Thus, Boden and Shapiro aided and abetted and caused Timbervest's primary violations of Advisers Act Sections 206(1) and 206(2), and Zell and Jones caused Timbervest's primary violation of Advisers Act Section 206(2).

C. Affirmative Defenses

Respondents initially asserted what purported to be three affirmative defenses.[24] Answer at 8. They argue two of them in their post-hearing briefs: statute of limitations and offset (i.e., "all 'ill-gotten gains' have been returned"). Timbervest Br. at 43-44, 52-53; Shapiro Br. at 12-15; Boden Br. at 18-21; Zell Br. at 8-11; Jones Br. at 16-17. I address offset infra in connection with the disgorgement calculation. The third affirmative defense, failure to state a claim, is not a true affirmative defense, and necessarily fails in any event.

The statute of limitations, however, warrants consideration. Under 28 U.S.C. § 2462, the statute of limitations clock begins running at time of accrual, that is, when the cause of action becomes enforceable. See Gabelli v. SEC, 133 S. Ct. 1216, 1220-21 (2013). The facts show, and the Division does not dispute, that every violation occurred prior to September 24, 2008, and there is no evidence of a tolling agreement. Every violation thus occurred outside the five-year limitations period. See 28 U.S.C. § 2462.

The seminal case interpreting Section 2462 is Johnson v. SEC, 87 F.3d 484, 489-92 (D.C. Cir. 1996). Johnson held that censure and a suspension are punitive, "qualify therefore as a 'penalty' within meaning of § 2462," and are barred if untimely. Id. Johnson also held that Section 2462 did not apply to disgorgement. 87 F.3d at 491. Johnson's progeny have clarified that Section 2462 also applies to civil penalties, but not to prejudgment interest or cease-and-desist orders. See Riordan v. SEC, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); Zacharias v. SEC, 569 F.3d 458, 470-71 (D.C. Cir. 2009). Associational bars, and by analogy revocation of Timbervest's registration as an investment adviser, are, a fortiori, unavailable in this case.

The Division nonetheless urges imposition of associational bars and registration revocation. Div. Br. at 79-82. The strongest case cited by the Division in support of its position is Vladislav Steven Zubkis, 58 S.E.C. 1014 (2005).[25] Zubkis, following the suggestion in Johnson that censure and a suspension "would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public," held (arguably in dicta) that a permanent associational bar against Zubkis was "not punitive" and not subject to Section 2462, because the Zubkis remedies analysis was so focused. Id. at 1024 (citing Johnson, 87 F.3d at 489); see also Proffitt v. FDIC, 200 F.3d 855, 861-62 (D.C. Cir. 2000).

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[24] Boden and Timbervest argue, as to Boden's state of mind, that Boden "reasonably, and in good faith, followed his attorney's advice." Boden Br. at 10; see Timbervest Reply at 15-19. Inasmuch as Boden and Timbervest assert an "advice of counsel" defense, it has been waived because it was not asserted in the Answer. It also fails on the merits: there is no evidence Boden fully disclosed the relevant facts to Harrison, Boden did not seek advice on the legality of his fees or of the overall manner in which he received the fees, and Harrison did not opine that Boden's conduct overall was legal. See Rodney R. Schoemann, Securities Act of 1933 Release No. 9073 (Oct. 23, 2009), 97 SEC Docket 21726, 21745-46.

[25] The other cases cited by the Division do not deal with associational bars. See SEC v. Brown, 740 F. Supp. 2d 148, 157 (D.D.C. 2010) (injunction and officer and director bar); SEC v. Jones, 476 F. Supp. 2d 374, 381-85 (S.D.N.Y. 2007) (civil penalties, injunction, and disgorgement); Herbert Moskowitz, 55 S.E.C. 658, 683-84 (2002) (cease-and-desist order).

Around the same time the parties filed their post-hearing briefs and replies, the Commission issued two pertinent opinions that the parties, not surprisingly, did not cite. See Joseph Contorinis, Advisers Act Release No. 3824, 2014 WL 1665995 (Apr. 25, 2014); Gregory Bartko, Exchange Act Release No. 71666, 2014 WL 896758 (Mar. 7, 2014). In Bartko, a follow-on proceeding imposing an associational bar, the Commission held that "the five-year statute of limitations does not apply because this proceeding is not 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' within the meaning of § 2462." 2014 WL 896758, at *9 (citing John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61733 n.34). In contrast to the individualized analysis in Zubkis, the holding in Bartko is categorical: because the applicable remedies analysis focuses on current competence and degree of risk, Section 2462 does not apply. 2014 WL 896758, at *9.

Bartko suggests, even more strongly than Zubkis, that associational bars are available here. Nonetheless, both Zubkis and Bartko analyze the public interest using the same standard (the Steadman factors) applicable since at least 1986, well before Johnson. See 58 S.E.C. at 1029-30; 2014 WL 896758, at *13 (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)); Blinder, Robinson & Co., Inc., 48 S.E.C. 624, 632 (1986) (same). The Steadman factors do not include current competence or degree of risk, and neither Zubkis nor Bartko analyzes those issues separately from the Steadman factors. See 603 F.2d at 1140; 58 S.E.C. at 1029-30; 2014 WL 896758, at *11-*17. Bartko mentions "risk" multiple times, but only in conclusory fashion, and it mentions "competence" only once, in asserting that "the remedies analysis . . . focuses on Bartko's 'current competence.'" E.g., 2014 WL 896758, at *9, 17 ("our *Steadman* analysis properly focuses on the risk that Bartko poses to investors"). Bartko cites Lawton for the proposition that the remedies analysis categorically focuses on current competence and degree of risk, but Lawton does not actually say that, and the cited language in Lawton is plainly dicta in any event. See 2014 WL 896758, at *9 (citing 105 SEC Docket at 61733 n.34).

In short, it is not clear how the remedies analyses in Zubkis and Bartko are any different from the remedies analysis found wanting in Johnson. Cf. Lawton (Comm'r. Gallagher, concurring in part and dissenting in part), at 12 (arguing that Johnson is not distinguishable on the basis that the sanctions analysis focuses on risk of future harm). Contorinis, however, suggests a way of avoiding running afoul of Zubkis, Bartko, and Johnson. In Contorinis, the Commission clarified that the statute of limitations did not apply "because a follow-on proceeding seeking an industry-wide bar is not 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' within the meaning of § 2462." 2014 WL 1665995, at *3 (citing Bartko, 2014 WL 896758, at *9). Contorinis, Bartko, and Zubkis were follow-on proceedings. See 2014 WL 1665995, at *3; Bartko, 2014 WL 896758, at *9; 58 S.E.C. at 1024. Johnson, like the instant case, was not a follow-on proceeding. 87 F.3d at 486.

To be sure, nothing in Johnson suggests a principled distinction between an "original" proceeding and a follow-on proceeding. 87 F.3d at 489-92. But I am unaware of any Commission opinions since Johnson that have imposed a censure, suspension, associational bar, or registration revocation based on conduct outside the limitations period, nor has the Division cited any, and there is no reason to think that the U.S. Court of Appeals for the District of Columbia Circuit is inclined to overrule Johnson, Zacharias, and Riordan. Drawing a distinction

between original and follow-on proceedings provides a way of simultaneously avoiding inconsistency with Contorinis, Bartko (to the extent Contorinis qualifies it), and Zubkis, on the one hand, and Johnson and its progeny on the other. Accordingly, I hold that because this is an original proceeding, the statute of limitations prohibits imposition of an associational bar or revocation of registration.

Lastly, Timbervest argues that the passage of time has damaged its ability to defend itself. Timbervest Br. at 16-18. Although this defense – essentially, laches – was not raised in its Answer, I address it briefly. See Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1971-74 (2014) (laches is an affirmative defense under the Federal Rules of Civil Procedure, requiring proof of unreasonable delay in bringing suit and prejudice arising from the delay). Admittedly, witnesses' memories have faded since 2002, when Shapiro and Boden entered into the fee agreement, and even 2005, when Shapiro conveyed something about that fee agreement to Schwartz. But the Division began its investigation in August 2010, based apparently on an examination in 2009, and issued a subpoena to Timbervest on August 26, 2010. Div. Exs. 55, 110; Div. Ex. 128 at 14-15; Resp. Ex. 129; Resp. Ex. 144 at 2. The document retention period for investment advisers is generally five years. See 17 C.F.R. § 275.204-2(e). Thus, Timbervest, and its principals, were on notice to preserve any pertinent documents dating back to no later than August 2005. August 2005 predated Shapiro's disclosure of Boden's fees (which could only have taken place after ORG was retained), the actual payment of the fees by New Forestry in 2006 and 2007, and the sale and repurchase of Tenneco Core in 2006 and 2007. Many highly relevant, even exculpatory, documents dating to August 2005, had they existed in the first place, could easily have been preserved in anticipation of possible litigation. But they apparently were not. That AT&T and BellSouth had a fifty-five day retention policy for emails is of little relevance; it is Timbervest's record keeping that matters most. Tr. 2212-13; see Timbervest Br. at 17-18. In sum, if Respondents have been unduly prejudiced by the passage of time, it has largely been self-inflicted.

V. SANCTIONS

The Division requests that Respondents be ordered to cease and desist from further violations of the securities laws; that Timbervest have its investment adviser registration revoked; that Respondents Boden, Shapiro, Jones, and Zell be barred from association with any investment adviser; and that Respondents be ordered to pay disgorgement and prejudgment interest totaling $15,790,820.98. Div. Br. at 67-82. For the reasons discussed supra, I will not impose an associational bar or registration revocation.

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., 58 S.E.C. 1197, 1217-18 & n.46 (2006). The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Gary M. Kornman, Advisers Act Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010).

A. Cease-and-Desist Order

Advisers Act Section 203(k) authorizes the Commission to impose a cease-and-desist order for violations of the Advisers Act and against any person who caused such violations, whether willful or not. See 15 U.S.C. § 80b-3(k)(1). The Commission requires some likelihood of future violation before imposing a cease-and-desist order. KPMG Peat Marwick LLP, 54 S.E.C 1135, 1185 (2001), recons. denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). However, absent evidence to the contrary, "a finding of a [past] violation raises a sufficient risk of future violation," because "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." Id. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the age of the violation, the degree of harm to investors or the marketplace, and the combination of sanctions against the respondent. See id. at 1192; see also WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004).

These factors weigh in favor of a cease-and-desist order. Respondents' misconduct was recurrent and egregious. Respondents reaped millions of dollars in improper brokerage and disposition fees by cross trading Tenneco Core and obtained improper fees for selling Tenneco Core and the Kentucky Lands. All Respondents acted with scienter with respect to the Tenneco Core cross trade, and Shapiro, Boden, and Timbervest acted with scienter with respect to Boden's fees. Respondents have not recognized the wrongful nature of their misconduct, provided credible assurance against future violations, or even conceded that their misconduct caused harm to their clients. In fact, Timbervest brazenly argues that Boden's fee agreement "was designed to benefit New Forestry," and that the Tenneco Core cross trade was "a good sale for New Forestry." Timbervest Br. at 6, 28, 46, 50-51; see also Jones Br. at 21. To be sure, Respondents returned a substantial sum to New Forestry. But the reimbursement happened only after AT&T found out about the fee payments through the Commission's actions, five years after Respondents' misconduct ended, and with no clear admission by Respondents that ERISA had been violated and no recognition at all that the Advisers Act had been violated. Div. Ex. 130. The best argument Respondents can muster regarding the risk of future violations is that the "ramifications of this investigation and these proceedings have been so severe that there is little chance" of future misconduct. Timbervest Br. at 50; see also Jones Br. at 21 (arguing that Jones has decided to "leave the timberland business"). Given Respondents' utter lack of recognition that their conduct violated the law, this assurance cannot be considered sincere, and with respect to Jones in particular, he showed no inclination to leave the timberland business until after the OIP issued. Respondents continue to operate active funds and retain their investment adviser registration and associations, and thus will have opportunities for future violations. That there is no current fee agreement comparable to Boden's does not mean Respondents cannot suffer from

other conflicts of interest in the future. See Timbervest Br. at 47 (citing Div. Ex. 156C). Indeed, they attempted to improperly cross trade Glawson (before the instant violations) and obtain fees from selling Rocky Fork (after the instant violations). A cease-and-desist order will also clearly have a deterrent effect, particularly on Respondents themselves.

Admittedly, the violations are relatively old, and although recurrent, they were not particularly so. However, these factors are outweighed by the evidence of Respondents' obliviousness to their fiduciary duties, which continues today. No individual Respondent gave any thought to the possibility of buying Boden out from his fee agreement when he joined Timbervest. Respondents used Glawson, a New Forestry property, for a fundraiser for Jones' sons' school, and to entertain prospective investors in a commingled fund in which AT&T had not invested. Boden viewed his fiduciary duty as someone else's responsibility:

> Q Okay. So I'm just trying to get a sense of how you functioned as an officer of an investment advisor given that you don't appear to have any knowledge about the investment advisory agreement or its terms or the LLC agreement, which define the relationship between the investment advisor and New Forestry.
> A Right.
> Q How did you function, how did you know what you could and couldn't do?
> A As I said, I worked on the properties at the property level, managing the properties and working on buying and selling as part of the investment – there were other people on the committee who were more – delved into these type topics than myself.
> Q But don't all the officers have to know what they can and can't do when they're conducting the business of Timbervest?
> A You can make that point, but I didn't really see it that way. I don't think our investment committee was dysfunctional because of that, so –
> Q Well, you said earlier that you understood that you were an ERISA fiduciary.
> A I understood I was a fiduciary, yes.
> Q Okay. Don't you think a fiduciary has an obligation to read the basic agreements governing the investment advisory relationship?
> A Like I said, Mr. Gordon, I focused on what my job was, which was the property-level work, buying and selling, managing the properties, making sure that was being done properly and well at all times, and represent[ing] the client's best interests in that regard. I just wasn't an ERISA guy and I'm not a document guy in terms of these operating agreements like this. There were others on the committee who were more versed in that.

Tr. 157-58.

The public interest factors are not entirely one-sided, but the weightiest of them – egregiousness, scienter, and lack of recognition of the wrongful nature of the misconduct – clearly show a need for a cease-and-desist order. It is thus in the public interest to order

Respondents to cease and desist from committing or causing violations of, and any future violations of, Sections 206(1) and 206(2) of the Advisers Act.

B. Disgorgement

The Division seeks an order requiring disgorgement of ill-gotten gains by Respondents, pursuant to Advisers Act Section 203(k).[26] See 15 U.S.C. § 80b-3(k)(5). Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he or she would have been absent the misconduct and deters others from violating the securities laws. Id.; see Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009). As with a cease-and-desist order, no showing of willfulness is required under Advisers Act Section 203(k), and the Steadman factors weigh in favor of ordering disgorgement.[27] See 15 U.S.C. § 80b-3(k)(5).

The amount of the disgorgement need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 54 S.E.C. 65, 84-85 n.35 (1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)), pet. denied, 230 F.3d 362 (D.C. Cir. 2000). Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to Respondents to demonstrate that the Division's disgorgement figure is not a reasonable approximation. Guy P. Riordan, Securities Act Release No. 9085 (Dec. 11, 2009), 97 SEC Docket 23445, 23480-81, pet. denied, 627 F.3d 1230 (D.C. Cir. 2010). The consequence of uncertainty as to the disgorgement amount

[26] The Division also seeks disgorgement under Advisers Act Section 203(j). Under the current version of Section 203(j), as well as the version in effect at the time of violations, disgorgement is permitted in proceedings "in which the Commission may impose a penalty" under Advisers Act Section 203. 15 U.S.C. § 80b-3(j) (2010). This case was brought under, in relevant part, Advisers Act Sections 203(e) and 203(f), and Section 203(i) permits the Commission to impose a civil penalty in cases brought under those sections. 15 U.S.C. § 80b-3(i) (2010). I have concluded that civil penalties cannot be imposed in this case, and the Division has not asked for them, so it is unclear whether this is a case "in which the Commission may impose a penalty" under Section 203. However, assuming it is such a case, a penalty may be imposed only for willful conduct under the version of Section 203(i) in effect at the time of the violations, and I find that Respondents' conduct was willful. See 15 U.S.C. § 80b-3(i) (2010); Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (a finding of willfulness does not require intent to violate the law, but merely intent to commit the act which constitutes the violation); Donald L. Koch, Exchange Act Release No. 72179, 2014 WL 1998524, at *13 n.139 (May 16, 2014) (a finding of scienter demonstrates willfulness). Regardless, Section 203(k) provides the necessary authority to impose disgorgement, and therefore Section 203(j) is immaterial.

[27] Although Zell and Jones acted without scienter in connection with Boden's fees, the remaining Steadman factors weigh in favor of imposing disgorgement against them for violating Advisers Act Section 206(2).

falls on the wrongdoer whose illegal conduct created the uncertainty. See First City Fin. Corp., 890 F.2d at 1232. The Division seeks three distinct forms of disgorgement.[28]

1. Management Fees

The Division seeks disgorgement of the management fees from New Forestry that Respondents received subsequent to the cross trade of Tenneco Core. Div. Br. at 72-77. The Division argues that "[b]ut for the concealment of the prohibited transactions, Timbervest certainly would have been terminated as soon as AT&T discovered the fraudulent conduct" and as a result "[a]ll profits obtained by the Respondents from managing the New Forestry account after the commission of the fraud should therefore be disgorged and returned to the pension trusts." Id. at 73. According to the Division's calculations, this amount includes all management fees paid to Timbervest from New Forestry from the fourth quarter of 2006 until Timbervest was terminated in 2012, for a total of $13,961,456.[29] Id. at 73-76. In the alternative, the Division proposes limiting the amount of disgorgement of management fees to those collected in 2006 and 2007, when the transactions for Tenneco Core and Kentucky Lands took place. Id. at 76-77 n.22.

The Division has failed to establish that the management fees are causally linked to Respondents' wrongdoing. The Division argues that it was Respondents' concealment of their wrongdoing, rather than the wrongdoing itself, that serves as the basis for disgorgement. Div. Br. at 73. But the Division cites only one case that supports its position, SEC v. Black, No. 04-cv-7377, 2009 WL 1181480 (N.D. Ill. Apr. 30, 2009), and I find this case readily distinguishable.[30] The Black court concluded that the defendant would have been terminated in 2002, instead of 2003, had he not concealed his wrongdoing, and ordered disgorgement of the compensation paid to defendant in 2002 and 2003. Id. at *3-5. The Division asks that I draw a similar inference that Timbervest would have been terminated in 2006 or 2007 had Respondents not concealed their wrongdoing. I decline, because unlike the court in Black, I find that such a conclusion is unsupported by the evidence.

[28] The difference between the purchase price of Tenneco Core and its market value at the time may also be subject to disgorgement. See SEC v. Contorinis, 743 F.3d 296, 302-04 (2d Cir. 2014) (affirming order to disgorge insider trading profits portfolio manager earned on behalf of client fund). The Division does not seek disgorgement of this amount, however, and I do not address it further.

[29] This figure includes a base disgorgement amount of $12,106,745 plus prejudgment interest of $1,854,711.

[30] The other cases cited by the Division merely hold that disgorgement of compensation is appropriate when that compensation results directly from the wrongdoing. See SEC v. Conaway, No. 2:05-CV-40263, 2009 WL 902063, at *18-20 (E.D. Mich. Mar. 31, 2009); SEC v. Koenig, 532 F. Supp. 2d 987, 992-95 (N.D. Ill. 2007), aff'd in part and remanded in part, 557 F.3d 736 (7th Cir. 2009); SEC v. Church Extension of the Church of God, Inc., 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005). These cases do not discuss concealment of wrongdoing as the basis for disgorgement of compensation, as the Division is alleging here, and thus carry no weight.

Ranlett stated that a disclosure in 2006 or 2007 would have been "of interest" and "concern" and that he would have demanded an explanation from Respondents. Tr. 1042-43, 1052-55. But he did not express, and his testimony does not suggest, that Timbervest would have been terminated immediately upon disclosure. Indeed, AT&T remains a Timbervest investor today. See Timbervest Reply at 65 (citing Tr. 1479-80). Nor do I place much weight on the fact that Timbervest was terminated four months after disclosure of wrongdoing in 2012. At that point, the severity of the wrongdoing had been compounded by years without disclosure, Respondents had downplayed the Commission's investigation in a meeting with AT&T earlier that year, and Ranlett, at least, felt like he had been inappropriately kept in the dark. Tr. 1145, 1188-89; Div. Ex. 126. None of these aggravating factors existed in 2006 or 2007. The record does not allow me to infer that Timbervest would have been terminated in 2006 or 2007 had disclosure been made then.[31]

The Division has also failed to show that the disgorgement amount sought is a "reasonable approximation" of the wrongful profits reaped by Respondents. Disgorgement of compensation must, by a reasonable approximation, differentiate between compensation earned through legitimate activities and those connected to violative activities. See SEC v. Perry, No. 11-cv-1306, 2012 WL 1959566, at *6 (C.D. Cal. May 31, 2012); Gregory O. Trautman, Securities Act Release No. 9088 (Dec. 15, 2009), 97 SEC Docket 23492, 23529-32. The Division asserts that all New Forestry management fees from the fourth quarter of 2006 to 2012 are subject to disgorgement. However, it is undisputed that Respondents performed legitimate management activities for New Forestry during that period. Tr. 1143-44; Div. Exs. 60, 61, 63, 66. By not even attempting to differentiate between legitimate fees and ill-gotten fees, the Division has failed to carry its burden. See SEC v. Jones, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007).

In the alternative, the Division argues perfunctorily that I should limit disgorgement to the management fees collected in 2006 and 2007 or that I should limit disgorgement to a fractional portion of the overall compensation received. Div. Br. at 76-77 & n.22. Both arguments fail. The first argument has no support in the law or in the facts, for the reasons discussed supra. The second argument fails because the Division has provided absolutely no basis for me to determine what, if any, fractional amount of Respondents' compensation should be subject to disgorgement. See Jones, 476 F. Supp. 2d at 386.

In sum, the Division has failed to show that Timbervest's management fees were causally related to Respondents' wrongdoing, or that the disgorgement of management fees is a reasonable approximation of Respondents' ill-gotten gains. Accordingly, the Division's claim for disgorgement of management fees is denied.

2. Disposition Fees on the Tenneco Core and Kentucky Lands Sales

[31] I also decline to speculate whether Respondents would have been terminated in any of the years following 2007 and preceding 2012. The record similarly does not support any such inference.

The Division argues that Respondents should be ordered to disgorge the disposition fees earned from the sales of Tenneco Core and the Kentucky Lands. The Division asserts that Respondents only sold Tenneco Core, and thus collected the disposition fee, as part of their fraudulent scheme to sell and repurchase the land, and that they committed fraud in the sale of the Kentucky Lands by not disclosing Boden's advisory fees. Div. Br. at 77-78. Respondents do not contest the amount of disgorgement requested, but instead argue that such disgorgement is improper because Timbervest was contractually entitled to the disposition fees even if Boden had not received an advisory fee or TVP had not repurchased Tenneco Core, and that Respondents provided valuable services in connection with the sales. Timbervest Reply at 62-63.

The record supports a finding that Respondents only sold Tenneco Core as part of an improper cross trade. Respondents sold Tenneco Core, and collected the disposition fee, as part of a fraudulent arrangement to repurchase the property. Respondents sold both Tenneco Core and the Kentucky Lands as part of a fraudulent and undisclosed arrangement to collect unlawful brokerage fees. Timbervest would not have earned disposition fees absent Respondents' wrongful conduct, and disgorgement of fees earned as the result of wrongful conduct is proper. See SEC v. Koenig, 532 F. Supp. 2d 987, 992-95 (N.D. Ill. 2007) (CFO ordered to disgorge bonuses plus prejudgment interest for years in which company engaged in accounting fraud), aff'd in part and remanded in part, 557 F.3d 736 (7th Cir. 2009) (remanding with respect to the calculation of defendant's bonuses under proper accounting); SEC v. Church Extension of the Church of God, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005) (ordering disgorgement of one-half of defendants' salaries for last year of entity's operations where entity would have collapsed earlier but for securities violations). In contrast to Respondents' management fees, there is a sufficient nexus between Respondents' receipt of disposition fees and their wrongful conduct. SEC v. DiBella, 587 F.3d 553, 572 (2d Cir. 2009) ("The inquiry is whether defendants-appellants were unjustly enriched by aiding and abetting the . . . section 206(2) violations."). To be sure, had Timbervest closed on the deals without engaging in misconduct – something that Timbervest has apparently done in the other 300-plus deals it has consummated – it would have received untainted disposition fees. See Timbervest Reply at 61-63. But the Tenneco Core and Kentucky Lands transactions involved misconduct that goes to the heart of Respondents' duties under the Advisers Act, and the disposition fees were thus unlawfully earned.

For Tenneco Core, the Division requests that Respondents disgorge $403,500 in disposition fees and $131,094.45 in prejudgment interest. Div. Br. at 77. The amount of $403,500 correctly represents the 3% disposition fee that Timbervest received on the $13,450,000 sale of Tenneco Core. Div. Exs. 10, 54. However, the $131,094.45 sought for prejudgment interest appears to be the prejudgment interest calculated from the date of the violation only up to around the period ending June 30, 2012, as the Division's $131,094.45 figure is $1,308.04 shy of the prejudgment interest calculated through that period. Div. Ex. 136 at 2. It is unclear why the Division ended its calculation of prejudgment interest where it did. Under Commission Rule of Practice 600, prejudgment interest "shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a). Because Respondents have yet to disgorge any of the Tenneco Core disposition fees, prejudgment interest should be

calculated until they do.[32] I am unable to complete this calculation because it is forward-looking and because the Division has provided the prejudgment interest calculation for the Tenneco Core disposition fees only up to the period ending November 30, 2013. Div. Ex. 136 at 2. Accordingly, Respondents are ordered to disgorge for the Tenneco Core transaction, jointly and severally, $403,500 in disposition fees, $155,602.96 in prejudgment interest (comprising the prejudgment interest from the date of violation until November 30, 2013), and an additional amount of prejudgment interest to be calculated from the period starting December 1, 2013, "through the last day of the month preceding the month in which payment of disgorgement is made."[33] 17 C.F.R. § 201.600(a).

For the Kentucky Lands, the Division requests that Respondents disgorge $822,583.50 in disposition fees and $227,833.82 in prejudgment interest. Div. Br. at 78. Timbervest was entitled to disposition fees equal to 3% of the Kentucky Lands sale price. Div. Ex. 54. However, the Kentucky Lands sales contract contains several purported purchase prices, and the Division does not explain what sales price it used to calculate the $822,583.50 disposition fee amount. Div. Br. at 78; Div. Exs. 33, 54, 56. It appears that the Division relied on a sales price of $27,419,450, which is the sum of the buyer charges for "Total Consideration" and "Option Property" on the Final Settlement Statement in the Kentucky Lands sales contract.[34] Div. Ex. 33 at 818478. Other documents in evidence suggest that the actual sales price of the Kentucky Lands may have been higher.[35] However, for the purpose of calculating the disposition fees Timbervest received for the sale of the Kentucky Lands, I find that the sales price of the Kentucky Lands was $27,419,450. I make this finding for two reasons: (1) Boden used the same

[32] The Division does not explain why it requests prejudgment interest calculated only to around the June 30, 2012, period. The Division's requested prejudgment interest amount is plainly wrong under Commission Rule of Practice 600, and I assume that this was simply an oversight. In contrast, the amount of outstanding prejudgment interest on Boden's fees, discussed infra, is correctly calculated by the Division. More importantly, it is clearly based on repayment in June 2012, and the Division's calculation thus ends with that date. I therefore assume that the Division's failure to request post-June 2012 prejudgment interest on Boden's fees was intentional, and decline to impose it.

[33] Respondents do not specifically dispute the imposition of joint and several liability. See Div. Br. at 72 n.17; Timbervest Reply at 54-64. Joint and several liability is clearly appropriate here, because all Respondents collaborated and had a close relationship in engaging in the illegal conduct. See SEC v. Whittemore, 659 F.3d 1, 10-11 (D.C. Cir. 2011) (quoting SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997)).

[34] Three percent of the sales price of $27,419,450 equals $822,583.50, or the amount of disposition fees that the Division asks to be disgorged for the Kentucky Lands transaction.

[35] For instance, the Purchase and Sale Agreement in the Kentucky Lands sales contract suggests that the sales price of the Kentucky Lands, which includes the Kinniconick and Huber tracts and an exercised option to purchase the Tolville and Ferguson tracts, may have been higher than $27,419,450. Div. Ex. 33 at 818453, 818458.

sales price to calculate his 2.5% commission for the sale of the Kentucky Lands;[36] and (2) New Forestry's ledger reveals that Timbervest received three payments of disposition fees for the Kentucky Lands sale that, when totaled, equal $822,583.50. As a result, I conclude that the Division correctly calculated that Timbervest received $822,583.50 in disposition fees for the Kentucky Lands.

However, the Division did not correctly calculate the amount of prejudgment interest due on the Kentucky Lands disposition fees. The Division requests that Respondents disgorge $227,833.82 in prejudgment interest, which appears to be the prejudgment interest calculated from the date of violation only up to the period ending June 30, 2012. Div. Ex. 136 at 4. As explained supra, because Timbervest has yet to disgorge any of the Kentucky Lands disposition fees, the prejudgment interest calculation should run until they do. As before, the Division has provided the prejudgment interest calculation only up to the period ending November 30, 2013. Id. Accordingly, Respondents are ordered to disgorge for the Kentucky Lands transaction, jointly and severally, $822,583.50 in disposition fees, $273,308.82 in prejudgment interest (comprising the prejudgment interest from the date of violation until November 30, 2013), and an additional amount of prejudgment interest to be calculated from the period starting December 1, 2013, "through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a).

3. Outstanding Prejudgment Interest

The Division seeks an additional $244,353.21 in prejudgment interest that it contends Respondents did not pay when they returned Boden's commissions to AT&T in June 2012. See Div. Br. at 78. This additional $244,353.21 is a result of a total $340,668.48 in prejudgment interest on Boden's commissions, as calculated by the Division, minus the $96,315.27 in prejudgment interest paid when Boden's commissions were returned to AT&T. See Div. Ex. 136 at 1, 3; Div. Ex. 130 at 8; Tr. 285-87, 304-07; First Stip. 1A-C, 2A-B. The Division, in essence, does not dispute that disgorgement of Boden's fees should be offset by Respondents' June 2012 reimbursement. See Div. Br. at 78. Respondents argue that they paid back an interest amount that they calculated based on the 90-day Treasury rate in effect from October 2006 to June 2012. See Timbervest Reply at 63-64. Respondents' argument is unavailing. Prejudgment interest is computed at the rate established under 26 U.S.C. § 6621(a)(2), not at whichever rate Respondents choose. 17 C.F.R. § 201.600(b). The Respondents are therefore ordered to disgorge, jointly and severally, the sum of $244,353.21.[37]

[36] For the sale of the Kentucky Lands, Boden received a commission of $685,486.25, which is 2.5% of $27,419,450. Div. Ex. 33 at 818457; First Stip. 2A-B.

[37] Joint and several liability among all Respondents is also warranted here, even though, unlike the other Respondents, Timbervest did not receive any of Boden's fees. Boden's fees were collected from transactions that Timbervest executed, and disgorgement can be ordered from entities which create wrongful profits for others. Cf. Contorinis, 743 F.3d at 302-04. Moreover, Boden's commissions were repaid by Ironwood, Timbervest's owner, and they were undercalculated by Timbervest, demonstrating the collaboration and close relationship between Timbervest and the individual Respondents. See Whittemore, 659 F.3d at 10-11.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Corrected Record Index issued by the Secretary of the Commission on July 8, 2014.

ORDER

IT IS ORDERED that, pursuant to Section 203(k) of the Advisers Act, Timbervest, LLC, shall CEASE AND DESIST from committing, and Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II shall CEASE AND DESIST from aiding and abetting or causing the commission of any violations or future violations of Sections 206(1) or 206(2) of the Advisers Act.

IT IS FURTHER ORDERED that, pursuant to Section 203(k) of the Advisers Act, Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II shall jointly and severally DISGORGE $1,899,348.49, plus an additional amount of prejudgment interest for the disposition fees on the Tenneco Core and Kentucky Lands transactions that shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), shall be compounded quarterly, and shall run from December 1, 2013, through the last day of the month preceding the month in which payment is made. 17 C.F.R. § 201.600.

Payment of disgorgement shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15519, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

Cameron Elliot
Administrative Law Judge