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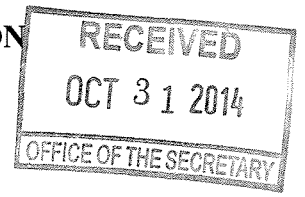
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of

Timbervest, LLC,
Joel Barth Shapiro,
Walter William Anthony Boden, III,
Donald David Zell, Jr.,
and Gordon Jones II,

Respondents.

Walter William Anthony Boden, III's
Appeal to the Commission

WALTER WILLIAM ANTHONY BODEN, III'S APPEAL TO THE COMMISSION

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The Commission should reverse the Initial Decision of Administrative Law Judge Cameron Elliot rendered on August 20, 2014 (the "Decision"). The Decision improperly found that Boden aided and abetted and caused violations of §§ 206(1) and 206(2) of the Investment Advisers Act even though the evidence shows he acted in good faith and without any improper intent. During the relevant period, Boden served as the Chief Investment Officer and was a principal of co-respondent Timbervest, LLC, a registered investment adviser.

The ALJ's Decision found that Boden acted with scienter in connection his role in negotiating the sale of a property by Timbervest's client, New Forestry, to Chen Timber, and by the subsequent purchase of that property by Timbervest Partners, LP, a fund managed by Timbervest. As discussed more fully below, each of these conclusions that Boden acted with scienter was incorrect. Furthermore, for the reasons discussed in Timbervest's brief, the ALJ improperly concluded that Timbervest violated Sections 206(1) and 206(2) and improperly awarded disgorgement and interest against Timbervest and Boden.

I. The Decision erred in finding that Boden acted with scienter with respect to the Chen Transactions.

The Decision used flawed logic to find that Boden acted with "specific intent to defraud" in connection with Timbervest's sale of the Tenneco Core property from New Forestry to Chen Timber, and Timbervest Partners, LP's subsequent purchase of that property. (Decision at 46.) First, the ALJ concluded that Boden acted with scienter because Boden denied the Division's contention that he initially offered to buy Tenneco Core back from Wooddall when first discussing a sale of the property. The Decision erroneously asserts that this denial was "contradicted by so much evidence, both documentary and testimonial." (Decision at 45). The record shows there was absolutely no documentary evidence contradicting Boden. The only testimonial evidence inconsistent with Boden's was Wooddall's ever-changing recollection, and even Wooddall acknowledged that the documentary evidence contradicted his own recollection of a conversation that occurred over eight years ago. To find any level of scienter or negligence

on this record would clearly be error, but to find "specific intent to defraud" in this circumstance was the quintessence of bias inherent in the entire Decision.

A. Boden negotiated two very favorable deals for his clients.

Boden was responsible for negotiating the sale of Tenneco Core and did so beginning in May or June 2006. (Tr. at 122, 856.) At that time, New Forestry wanted a substantial reduction in its timberland holdings. In fact, it wanted more than $220 million in sales over a three-and-a-half year period. (Div. Ex. 47; Tr. at 102-03, 476.) For those properties that remained in its portfolio, New Forestry wanted properties that would generate cash flow of 2% per year. (Div. Ex. 47.) Tenneco Core, however, consisted of 75% pulpwood, meaning that the majority of trees were young and would not be income-producing for quite some time. (Tr. at 201, 483-84.) Selling Tenneco Core would therefore fit both of New Forestry's mandates: dispositions and dispositions of property that would not generate substantial income.

Not only did the sale fit within New Forestry's investment objectives, but Boden was able to negotiate the sale at a price that provided excellent value to New Forestry. Timbervest valued properties quarterly, based on a timberland valuation policy approved by New Forestry and its beneficial owners (BellSouth, later AT&T). (Div. Ex. 26; Tr. at 1111-12, 1627, 1605.) The $13.45 million sales price exceeded Tenneco's carrying value by $1.4 million, or 11.7%. (Tr. at 206-07.) Moreover, an August 2005 appraisal from the James Sewall & Company (the most recent appraisal available to Timbervest based on its valuation policy), valued Tenneco Core at $12.13 million. (Resp. Ex. 52; Tr. at 207, 211, 1665.) This appraisal was less than a year old when the sale of Tenneco Core was negotiated, and the final sales price exceeded the independent appraised value by 11%. And importantly, Sewall appraised the bare land at $438 an acre, whereas the sale to Chen Timber provided New Forestry with $547 an acre for bare land—an increase of almost 25%. (Resp. Ex. 52; Tr. at 200-01, 207, 210.)

Months later, in December 2006, Boden was also able to negotiate the agreement to purchase the property for TVP, with a no-risk due diligence period, at a price that was still

favorable for TVP. The data available at that time showed the purchase transaction was a good one for TVP. In 2006 and 2007, TVP was looking for properties that would fit its long-term growth investment strategy. (Tr. at 83.) In contrast to New Forestry, TVP, with its long-term growth strategy, was willing to inject capital into the property—necessary for the future success of Tenneco Core, given its younger timber profile and "big, bulky tracts." (Tr. at 233-34.) And all the economic indicators available to Timbervest showed the repurchase price to be a good deal for TVP.

By early 2007, the value of the timber on this property had increased by more than $950,000—making up nearly the entire $1.05 million difference between the price of the sale of Tenneco Core and the later purchase of the property by TVP. (*See* Tr. at 200-01.) The timber increased for two reasons: (1) a 5% increase in overall timber volume between October 2006 and February 2007, and (2) prices for pulpwood increased by about $1.50 per ton—a roughly 30% increase in the price of pulpwood. (Tr. at 201.) Because Tenneco Core had approximately 300,000 tons of pulpwood on it, the increase in price, along with the increase in volume, greatly increased the value of the property. (Tr. at 553.) As shown in the chart below, the increase in the value of timber accounted for nearly the entire increase in the purchase price:

Category	**2006 Sale**	**2007 Purchase**	**Differential**
Timber Value (reflecting volume and price increases)	$6,346,104	$7,313,500	$967,397 [+15.24%]
Timber volume (merchantable tons)	582,537(T)	611,934(T)	29,396 [+5%]

Moreover, the small price increase associated with the bare land (approximately $6 per acre) was supported by the fact that the nearby Wolf Creek package was starting to generate offers to purchase small parcels at prices averaging $1,461 per acre. (Div. Ex. 128.) This data provided Timbervest with a clear indication that bare land prices in the smaller tract market were strengthening at the relevant time.

Other objective data points further justified the higher purchase price. The NCREIF timberland index had an 8.5% increase in value in the fourth quarter of 2006, one of its strongest quarters in history. (Div. Ex. 83; Tr. at 205.) The Plum Creek REIT saw a 15% increase in its market value over the same timeframe. (Tr. at 853-54.) TVP's purchase price, by comparison, was less than 8% higher than the price New Forestry received when it sold the property to Chen months earlier. Thus, although TVP paid more for the property, as of February 2007, TVP was buying a more valuable standing forest by all available metrics, and the price was fully supported by the market indicators available.

B. Boden's denial of a parking arrangement does not show scienter.

Boden's testimony reflected his own honest memory and belief of what happened in a verbal conversation that took place eight years ago. Boden did not, in fact, offer to buy Tenneco Core back as part of a parking arrangement or cross-trade transaction. This simply did not happen. Boden's recollection comports with the documented facts, and on this point, as to most points, Boden's and Wooddall's testimony agreed.

The September 15, 2006 contract for the sale of Tenneco Core contained a specific provision stating that the contract was not contingent on any other agreement or understanding. (Div. Ex. 11.) When asked about this language at the hearing, Wooddall testified that he believed this language to be accurate. (Tr. at 863.) Even Wooddall did not testify that Boden promised or guaranteed to repurchase Tenneco Core. He described it as a "verbal option," with no binding effect on either party. (Tr. at 768-69.) In fact, he acknowledged that he was under no obligation or agreement to sell the property back to Timbervest, which is why he performed his usual due diligence on the property. (Tr. at 764, 768, 819, 860.) There simply was no parking arrangement or cross trade.

The only testimonial evidence inconsistent with Boden's arises from one minor aspect of Wooddall's ever-changing testimony, and the Decision suffers fatally from accepting Wooddall's hearing testimony and rejecting Boden's without any sound basis. Indeed, if

anybody's testimony was inconsistent with the documentary evidence, it was Woodall's and not Boden's.

At the hearing, Wooddall claimed Boden had said that "at some point in the future" Timbervest may like to buy it back, and that he gave Boden a no cost "verbal option" to do that. (Tr. at 768-69, 771.) No documentary evidence corroborates this claim, and as Wooddall acknowledged at the hearing, the documentary evidence, that is, the signed and executed sales contract, specifically stated that there were no other agreements. (Div. Ex. 11.) Either there was no agreement to repurchase the contract or the contract was wrong. Because Wooddall specifically testified that the contract was correct, the documents support Boden's recollection, and if anything, contradict Wooddall's confused recollection.

The entire Decision therefore hinges on crediting Wooddall's memory about a conversation that took place over eight years ago. As Wooddall testified, his recollection of this critical conversation that he had with Boden in 2006 was "much more vague" compared to his recollection of conversations with the Division's attorneys from 2012 that he had trouble recalling at the hearing. (Tr. at 847.) He had difficulty recalling the details of another transaction from 2006 in Texas that he was simultaneously negotiating with Boden. (Tr. at 829.) In fact, he could not remember whether he even made a deal with Boden on the Texas property. (*Id.*) Certainly, no one should fault Wooddall for a mistake in his memory. It is difficult to recall a conversation from 8 years ago, with many deals having occurred since then. Indeed, how could anyone expect him to have a perfect memory of a 2006 conversation given he was not asked about that conversation until 2012? What is improper is for the Decision to rely completely on Wooddall's faded memory for a critical finding, and based on this reliance, to impose heavy and severe sanctions and penalties on Boden.

The record shows that Wooddall has remembered various things at various times during the investigation. But the Decision credits Wooddall's hearing testimony as if it were perfect recall, notwithstanding all of the questions about the reliability of Wooddall's memory as to when and what was actually said.

Even a minor mistake in Wooddall's testimony would dramatically change the conclusion. Wooddall could easily be mistaken about the timing, the context, or the specific subject matter of the conversation. Memory is most fallible when it comes to sequencing and timing of events. The conversation Wooddall recalls might have in fact happened, but happened later than he now recalls. For example, it could have occurred after October 17, 2006, when the closing on the first transaction occurred. (Div. Ex. 11.) It even could have occurred after the September 15, 2006 contract was signed. (Div. Ex. 10.) Once the September 15, 2006 contract was signed, New Forestry was obligated to sell the property. (*Id.*) Nothing in the record corroborates the substance or timing of Wooddall's testimony.

The weight given to Wooddall's unsubstantiated recollection is simply unfair. Equally unfair, the ALJ discredits Boden for no reason. Unlike Wooddall's testimony, nothing in Boden's testimony contradicted the documented facts, and his testimony was consistent with the economics of the deal. Given the downward trend in the property's value during the first half of 2006, it would not have made any economic sense in the summer of 2006 to enter into an agreement to buy the property for $14.5 million. (Tr. at 207-08, 232.) As Boden explained, agreeing in the summer of 2006 to a $14.5 million repurchase price would have baked in a "loss on acquisition," and, in the eleven years he has been at Timbervest, Boden emphatically believed there had never been "a single acquisition we've made, not one time, where it's come in with a loss on acquisition. . . . Not one." (Tr. at 208.)

The ALJ's theory of Boden's motivations defies logic. Assuming someone with bad intent sought to park a piece of land, he certainly would not use Wooddall for such an arrangement, allowing an unrelated third party like Wooddall to capture nearly $1 million in profit. Furthermore, someone with such bad intent would not sell the property to Wooddall at such a high price. Timbervest was authorized to sell Tenneco Core for as much as $2.6 million less than what Boden and Timbervest achieved for New Forestry. (*See* Div. Ex. 47.) An unscrupulous individual would have sought to benefit personally by initially selling the property at a much lower price. There simply was no basis for the Decision's attack on Boden's character

and ethics without factual support and without recognizing how Boden's actual conduct demonstrates he sought to obtain the highest price for his client.

Thus, Boden's denial of initially offering Wooddall a parking arrangement with respect to the Chen Transactions is not indicative of scienter or even negligence.

C. The ALJ's crystal ball theory is flawed.

In an apparent effort to bolster the conclusion that documentary evidence contradicted Boden's testimony, the Decision also found, improperly, that Boden acted with scienter because he supposedly knew in August 2006 that portions of the Tenneco Non-Core bid offering (the "Wolf Creek package") would sell at a high price in November 2006. (Decision at 45-46.) This finding, which is offered to support the ALJ's theory (not asserted by the Division) that Respondents undervalued the Tenneco Core property when selling it to Chen, despite having a timely independent third-party appraisal in compliance with Timbervest's valuation policy that fully supported the property valuation, is completely unsupported by any citation to the record and has no basis in the evidence. The Wolf Creek package consisted of smaller properties located near the Tenneco Core property, and the ALJ theorizes (incorrectly) that the higher prices obtained on the sale of the Wolf Creek package in November 2006 were known to Boden at the time he was negotiating with Wooddall months earlier. (Tr. at 110-11; Decision at 42.) The Decision concludes that these later Wolf Creek prices demonstrated that the price that Boden negotiated with Wooddall to pay for the Tenneco Core property several months *prior* to those November sales was too low. (Decision at 42.)

Boden had no crystal ball. He did not know what the Wolf Creek package was going to sell for until it, in fact, sold. The ALJ assumed, without any factual basis, that the Wolf Creek sales would have been discussed before September 15, 2006 (Decision at 43). There is no evidence in the record that Boden had any involvement whatsoever in the Wolf Creek auction process or in the establishment of the original listing agreement. There is no evidence of his involvement in the sale of these properties because the Wolf Creek bid-offering and sale process

was handled in its entirety by an unrelated third-party broker, and consequently, Boden would not have known contract prices until contracts were signed and delivered to Timbervest by the broker for its consideration and decision. (Div. Ex. 128.) Furthermore, Boden and the other Timbervest Partners had no idea what the sales price would be until the results from the open bid on the properties, in which Timbervest had no communication with any buyer, came in on October 30, 2006.

Moreover, the value of the Tenneco Non-core properties was largely irrelevant to the value of the Tenneco Core because the two properties had different sizes, locations, property features, valuations, and markets of potential buyers. The Wolf Creek properties were smaller tracts, more affordable for individual buyers interested in recreational properties, and were therefore worth much more on a per acre basis. (Tr. at 110-11.) In fact, in 2005, the bare land on the Wolf Creek tracts was appraised at approximately $100 more than the bare land on Tenneco Core. Additionally, the sum total of the first five Wolf Creek contracts represented only 520 acres. (Div. Ex. 128.) This is an extremely small amount when compared to Tenneco Core's 13,000 acres. Thus, while the nearby sales of the Wolf Creek tracts gave Timbervest comfort that prices for bare land were increasing, the Wolf Creek sales did not, in and of themselves, establish the per acre value of Tenneco Core. They were simply two different types of timberland, targeted to two very different buyer markets.

On top of that, the August 2006 report to which the ALJ points did not report values based on actual sales. (Div. Ex. 16.) It simply reported estimated sale prices for a number of properties that Timbervest anticipated liquidating under the client's disposition mandate. (*Id.*) The report reflected the prices that Timbervest hoped to get for each property—not actual or guaranteed sales prices. Thus, when the bids for the Wolf Creek properties came in on October 30, 2006, they did not establish the "value" of the very different Tenneco Core tract but stood only to confirm Timbervest's and Boden's impression of the increasing land market.

Relatedly, the Decision found that Boden acted with scienter because he apparently "endorsed" a letter from Timbervest's in-house counsel, which the ALJ found "misleadingly

suggested that Timbervest did not have the [Wolf Creek] data until November 2006." (Decision at 46.) The Decision cites no evidence for this conclusion because there was none – Timbervest *did not*, in fact, have the Wolf Creek data until October 30, 2006. The Decision also cites no support for the finding that Boden "endorsed" the letter because there was none. But even if Boden had "endorsed" the letter, the Decision erred in finding the letter "misleading." The letter did not state that the Wolf Creek data justified the entire $1.05 million difference in purchase price. (Div. Ex. 128.) Rather, it stated that the sale of the Wolf Creek packages gave Timbervest comfort that the $6 per acre bare land increase that TVP paid was justified. (*Id.*) Over the roughly 13,000 acres of Tenneco Core, a $6 increase in bare land price accounted for only approximately $78,000 of the increase in purchase price. The Wolf Creek sales simply were not the reason provided by Timbervest for the increase in purchase price—they were only one factor that helped support TVP's ultimate decision.

Finally, underlying the ALJ's unsubstantiated attack on Boden and this letter was the erroneous premise that the letter had claimed that the sales of the Wolf Creek package were the *reason* for TVP's decision to purchase the property at a higher price. That was not the point of the letter at all. The letter simply noted how those sales fully supported TVP's ultimate purchase price. (*See* Div. Ex. 128.) Thus, the letter, written by someone else six years after the Chen Transactions had been fully consummated, cannot serve as a basis for finding that Boden acted with scienter back in 2006 when he negotiated the two Chen Transactions.

There is, in sum, no basis to find that Boden acted with scienter or negligently with respect to the Chen Transactions, and the Decision's finding to the contrary should be reversed.

II. The ALJ inappropriately found that Boden acted with scienter with respect to his fee arrangement.

Boden's fee arrangement was agreed to, and disclosed to BellSouth, back in 2002. (Tr. at 397-98.) Boden thereafter worked in good faith without compensation for approximately twenty months (from the fall of 2002 to the spring of 2004) with the expectation that he would receive a

fee at the agreed to rate if and when a property covered by his disposition advisory agreement were to actually sell. (Tr. at 448-49.) He had every right to expect he would be paid a fee when Tenneco Core sold because it fit squarely within the terms and conditions of his advisory fee agreement. He also reasonably relied on his business partner, Shapiro, to address the potential conflict raised by this expected fee payment once he became a partner in Timbervest. (Tr. at 622, 625.) Shapiro discussed the fee with the client's representative, and while the client's representative has now disavowed what Shapiro told him, there is no evidentiary basis to find Boden acted with scienter or even negligently. (*See, e.g.*, Tr. at 1776-77.)

The ALJ identified four reasons for his conclusion that Boden acted with scienter with respect to his fee arrangement: (1) that Boden supposedly "misrepresented his identity in the sale contracts" that triggered payment of his fees; (2) that Boden's lawyer's work on the transactions involved "highly irregular lawyering"; (3) that Boden acted as a broker, in violation of state licensing statutes.; and (4) 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. (Decision at 57-59.) None of these reasons shows scienter or negligence, and the Decision's findings to the contrary were in error.

A. Boden did not misrepresent his identity in sales contracts.

First, there is no evidence that Boden "misrepresented his identity in the sales contracts." (Decision at 57.) The Decision does not take issue with the fact that the sales contracts showed the fees being paid to LLCs rather than Boden because there would be nothing untoward about this. Instead, it faults Boden for the descriptions of these LLCs' roles in the transactions. Specifically, the ALJ points to the fact that the Tenneco Core sales contract lists Fairfax Realty Advisors, LLC as "having acted as a brokerage agent" and the Kentucky property sales contract lists Westfield Realty Partners, LLC's fee as being "for services rendered." (Decision at 58 (quoting Div. Ex. 11, Div. Ex. 33).) But there was no evidence that these descriptions were intended to or in fact misled anyone. Indeed, there was no evidence Boden was responsible for

these descriptions. Mr. Boden testified that he gave the drafters of the contracts the name of the LLC through which he would be receiving his fee and the percentage of the sales price that he was owed. (Tr. at 172-73:9, 303-04, 353-54.) He was not responsible for any other language in the sales contracts, nor has he ever been. (Tr. at 172-73:9, 303-04, 353-54.) Boden was focused on negotiating and closing deals. (Tr. at 131, 151, 367.) He did not focus on the minutiae of the sales contract language. (Tr. at 131, 151, 167) Indeed, the sale contract to Chen is not Timbervest's form contract but was instead prepared by Chen's counsel. (Tr. at 366.) Likewise, the contract for the sale of the Kentucky Property was on the counterparty's contract form, not Timbervest's. (Tr. at 367.) The origin of these descriptive terms is unknown, but there is no evidence that they came from Boden. His concern was to ensure that his fee, at the agreed percentage, was included in the sales contracts. (Tr. at 367.)

Moreover, had Boden actually intended to conceal the fees (which he did not), intentionally inserting erroneous descriptions of the fees into the sales contracts (as the Division contends happened) would not be an effective way to accomplish this. New Forestry did not regularly review the sales contracts. (Tr. at 1088.) There is simply no reason to "conceal" payments in a document that New Forestry never reviewed. And even if BellSouth and ORG had reviewed the sales contracts, the documents reveal that a fee was paid and reveal the entities to which the fees were paid. (Div. Ex. 11; Div. Ex. 33.)There simply is no basis to find that innocent mistakes in the sales contracts' language establish that Boden acted with scienter.

B. Boden's lawyer's actions are not evidence of Boden's state of mind.

Boden's lawyer's actions are not a basis on which to find that Boden acted with scienter. Boden received his fees through two limited liability companies because his attorney, Ralph Harrison, advised him this would protect his personal assets and limit any potential claim to the fees made by unknown third parties. (Tr. at 585, 622, 625.) Boden's concern about unknown parties asserting a claim to his advisory fee was understandable, given that there had recently been brokers who claimed to be owed a commission on the sale of New Forestry property based

on agreements entered into under Timbervest's prior management and that were previously unknown to Boden or the other Partners. (Resp. Exs. 85, 86; Tr. at 725.) The record is undisputed on this point. Many of the issues about which the ALJ complains—having Harrison serve as the only member of the LLCs and routing the fees through his IOLTA account, for example, were completely unknown to Boden and there is no evidence to suggest otherwise. (Tr. at 309, 724-26.) Indeed, these actions are not uncommon for attorneys acting on behalf of their clients in real estate transactions. Boden simply hired Harrison to protect the fees from third party claims and he let Harrison take care of the rest. (Tr. at 724-25.) Boden did not know, and had no reason to know, about the details of how the LLCs were set up, organized, managed, or even named. (Tr. at 725.)

The only example of what the ALJ calls "highly irregular lawyering" that Boden was aware of is Harrison's 10% contingency fee for his work. (Decision at 58; Tr. at 287.) But this fee arrangement does not show scienter. The fee was agreed to long before any payments were made to Boden and before Boden knew whether he would ever receive any compensation under his advisory agreement. (Tr. at 587.) If Boden had never received a fee, Harrison would have received nothing for his legal services. He simply had his attorney working under the same framework as had been established in his own advisory fee agreement—pure contingency work. Harrison therefore willingly bore the risk that all of his efforts and advice would result in no compensation should no sales occur. This is the nature of contingency fee work. Furthermore, a 10% contingency is not unusual given the prior work Harrison had performed for Boden and his family for which he was not paid at all. Specifically, Harrison testified that he had given Boden advice relating to his prior businesses, had assisted Boden's wife in a rental property dispute with her tenant, and had reviewed documents relating to Boden's investments. (Tr. at 729.) In each of those instances, Harrison was never paid. (*Id.*)

Thus, none of the Decision's concerns about Harrison can support a finding of scienter or even negligence by Boden. Indeed, as evidence of Boden's good faith, Boden voluntarily waived the attorney-client privilege regarding Harrison's work in creating the LLCs and allowed the

Division of Enforcement to take Harrison's testimony during the investigative stage of this case. As the Decision recognizes, this waiver of privilege strongly weighs against any finding of scienter. (Decision at 55.)

C. State licensing requirements do not show scienter.

The Decision improperly found that Boden acted with scienter on the theory that Boden acted as a broker and received a commission in violation of state real estate licensing requirements. (Decision at 56.) This reasoning is substantially flawed. In Georgia, where Boden resided and worked, the real estate licensing statute provides an exception to licensing for persons "who, as owner or through another person engaged by such owner on a full-time basis or as owner of a management company whose principals hold a controlling ownership of such property, provides property management services . . . or otherwise deals with property owned by such persons." O.C.G.A. § 43-40-29(a). Because Mr. Boden worked full-time on behalf of New Forestry, he would have been exempt from having to be licensed in Georgia. But the licensing question is altogether a red herring. There is no evidence that licensing requirements played any role in anybody's actions in this case.

In the end, the evidence simply shows that Boden earned his fees for performing services for New Forestry without compensation for a nearly two-year period. (Tr. at 448-49.) During that time, he worked to maximize value on the eventual disposition of all New Forestry properties—not just the ones that ultimately resulted in fees. (Tr. at 445, 560.) He also believed in good faith that Shapiro had properly disclosed his fee arrangement to the client's representative. (Tr. at 414-15.) And he relied, in good faith, on the advice of his attorney as to how to structure the deal. (Tr. at 622, 625.) In fact, Boden even waived the attorney-client privilege to show there was no untoward scheme to defraud New Forestry. In these circumstances, it cannot reasonably be said that Boden acted with scienter or even negligently, and the Decision's findings to the contrary should therefore be overturned.

D. There is no support for a finding that Boden did not believe that Shapiro disclosed the fee arrangement and obtained approval.

Even though the Division never alleged or even argued this point, the ALJ found, out of thin air, 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. (Decision at 59.) That conclusion was based solely on the ALJ's conclusion that Boden's use of the LLCs to collect the advisory fees, and other conduct concerning transactions that was outside the scope of the Division's OIP, was conduct "inconsistent with that of someone who believed what he was doing was lawful." (*Id.*) To solidify that finding, the ALJ speculated that Mr. Boden *did not believe* that Shapiro had obtained ORG's consent to the fee agreement. (*Id.*) There was absolutely no basis for him to make that finding.

Furthermore, the finding is inconsistent with the ALJ's finding as to Jones and Zell. As to them, the ALJ found that they subjectively believed that Shapiro had disclosed the fee arrangement to ORG and that they were entitled to rely on Shapiro's representations that he disclosed the fee arrangement. (Decision at 53.) There is no logic or basis for finding that of Shapiro's three partners, two of them (Jones and Zell) believed his representation that he had obtained Schwartz's consent to the fee arrangement and one of them (Boden) did not. The finding is not only illogical but is unsupported by any testimonial or documentary evidence.

III. The sanctions imposed are penal.

Because Boden did not act with scienter or negligence with respect to either the Chen Transactions or his advisory fee agreement, there is no basis for imposing any sanctions against him, and the Decision erred in doing so. Further, the cease-and-desist order imposed on Boden will have a penal effect, making it unavailable under the statute of limitations. *See, e.g.*, *SEC v. Bartek*, 484 F. App'x 949, 956 (5th Cir. 2010) (holding that § 2462 applied to the SEC's claim for injunctive relief); *SEC v. Graham*, 2014 WL 1891418, at *9 (S.D. Fla. May 12, 2014) ("[T]he injunctive relief sought by the SEC in this case forever barring defendants from future

violations of the federal securities laws can be regarded as nothing short of a penalty 'intended to punish' . . . ."); *Jones*, 476 F. Supp. 2d at 384 (statute of limitations barred requested injunction).

Boden has been involved in the real estate industry for decades and currently holds a Georgia real estate license. (Tr. at 48-49.) A cease-and-desist order threatens irreparable harm to his real estate reputation and revocation of his Georgia real estate license by tainting him as a violator of federal securities laws. Moreover, a cease-and-desist order will effectively preclude Boden from being associated with a Rule 506 offering—a necessary tool to raise funds at Timbervest or at any company that may raise funds using Rule 506. Under the SEC's "bad-actor" rule, a bad actor is defined as someone who, *inter alia*, has been ordered to cease and desist from causing a violation of § 206(1) of the Advisers Act. 17 C.F.R. § 230.506(d)(v)(A). Once a person is tainted by the "bad actor" label, he is prohibited from being associated with a Rule 506 offering for five years. *Id.* § 230.506(d). Thus, imposing a cease-and-desist order against Boden will not only jeopardize his reputation in the real estate community, but he will be labeled a "bad actor" and severely constrained in the type of work he could pursue in the future. In these circumstances, a cease-and-desist order is clearly penal and should not be imposed.

IV. Conclusion

The ALJ ordered Boden to cease and desist from securities laws violations and to disgorge, jointly and severally with Timbervest and the other Partners, the disposition fees Timbervest earned on the sale of Tenneco Core and the Kentucky Properties. As discussed more fully in Timbervest's brief, these sanctions are improper. Boden acted in good faith with respect to both the Chen Transactions and his fee arrangement, and there is no basis to impose sanctions and penalties on him in this case.

The Decision plainly erred in finding that Boden acted with scienter with respect to the Chen transactions and to his fee arrangement. The evidence shows that he acted in good faith. He negotiated an excellent deal for New Forestry to accomplish its goal of disposing of properties. He received two fees pursuant to an agreement under which he worked for two years without

compensation and had a reasonable basis to believe that his fee arrangement had been disclosed to the client. The Commission should therefore reverse the Initial Decision's findings against Boden.

This 30th day of October, 2014.

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