HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of	:
Timbervest, LLC,	:
Joel Barth Shapiro,	:
Walter William Anthony Boden, III,	:
Donald David Zell, Jr.,	:
and Gordon Jones II,	:
Respondents.	:

BRIEF SUPPORTING DIVISION OF ENFORCEMENT'S PETITION FOR REVIEW

Robert K. Gordon
Anthony J. Winter
Robert Schroeder
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 E. Paces Ferry Road NE, Suite 900
Atlanta, Georgia 30326-1232
404-842-7600

TABLE OF CONTENTS

Page

I. SUMMARY 1

II. FACTS 3

A. Background 3

1. Ownership and Management of Timbervest 3

2. BellSouth Hires ORG Portfolio Management and is Subsequently Acquired by AT&T 4

B. Timbervest Cross-Traded the Tenneco Property 5

1. The Sale and Repurchase of Tenneco by Timbervest on Behalf of Two Different Clients Was a Prearranged Cross Trade 6

2. The Individual Respondents Could Not Recall Why TVP Repurchased Tenneco, and Boden Gave False Testimony About His Discussions with Wooddall 8

3. The Respondents Attempted to Conceal the Sale and Repurchase Because ERISA Prohibits Cross-Trading of Plan Assets 9

4. Contemporaneous Documents Demonstrate the Respondents' Attempts to Conceal the Tenneco Cross Trade 12

C. The Individual Respondents Collectively Split over $1.15 Million in Unlawful Fees Collected from New Forestry 17

1. The Payment to Fairfax Realty Advisors 17

2. The Payment to Westfield Realty Partners 19

3. The Respondents Never Disclosed to BellSouth/AT&T or to Ed Schwartz of ORG the Payment of the Real Estate Commissions by New Forestry to Boden 19

4. Zell and Jones Knew that New Forestry was Subject to ERISA and that Fee Payments to Principals were Prohibited Transactions Not Curable by Disclosure and Consent 24

5. The Byzantine Payment Structure Demonstrates Boden's Attempts to Conceal the Payments 24

6. Other Evidence of Boden's Efforts to Conceal the Payments 26

D. The Respondents Demonstrated Their Cavalier Attitudes Toward Their Fiduciary Duties By Their Use of the Glawson Property and Their Misrepresentations to AT&T 32

1. The Glawson Property 32

2. The Respondents Made Misrepresentations to AT&T After the Fraud Was Discovered 36

III. DISCUSSION 39

A. Associational Bars Are Appropriate in this Case 39

1. Section 2462 Does Not Apply to Associational Bars if There is a Threat of Future Misconduct or if the Respondents Currently Lack Competence 40

2. Respondents Pose a Threat of Future Misconduct and Lack Current Competence to Fulfill Their Fiduciary Obligations 44

B. Zell and Jones Acted with Scienter In Connection with the Undisclosed Brokerage Fees 47

IV. CONCLUSION 49

TABLE OF AUTHORITIES

Page

Cases

Conrad P. Seghers, 2007 WL 2790633 (Sept. 26, 2007) 46
Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) 9
Eric J. Brown, 2012 WL 625874 (Feb. 27, 2012) 41
Gregory Bartko, 2014 WL 896758 (Mar 7, 2014) 41, 42
Gregory O. Trautman, 2009 WL 6761741 (Dec. 15, 2009) 41
Herbert Moskowitz, 2002 WL 434524 (Mar. 21, 2002) 41
John A. Carley, 2008 WL 268598 (Jan 31, 2008) 41
John W. Lawton, 2012 WL 6208750 (Dec 13, 2012) 41
Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) ..... passim
Joseph Contorinis, 2014 WL 1665995 (Apr. 25, 2014) 41, 42
McCurdy v. SEC, 396 F.3d 1258 (D.C. Cir. 2005) 42
Meadows v. SEC, 119 F.3d 1219 (5th Cir. 1997) 43, 44
Montford & Company, Inc., Advisers Act Rel. No. 3908 (Sept. 2, 2014) 46
Proffitt v. FDIC, 200 F.3d 855 (D.C. Cir. 2000) 42
SEC v. Alexander, 248 F.R.D. 108 (E.D.N.Y. 2007) 43
SEC v. Brown, 740 F.Supp.2d 148 (D.D.C. 2010) 42, 43
SEC v. Jones, 476 F.Supp.2d 374, 381 (S.D.N.Y. 2007) 42, 43
SEC v. Quinlan, 373 Fed. App'x. 581 (6th Cir. 2010) 42, 43
SEC v. Steadman, 603 F.2d 1126 (5th Cir. 1979) 47
Vladislav Steven Zubkis, 2005 WL 3299148 (Dec. 2, 2005) 40, 41, 42, 43
Warwick Capital Management, 2008 WL 149127 (Jan 16, 2008) 41

Statutes

Section 206 of the Advisers Act (15 U.S.C. § 80b-6) ..... passim
28 U.S.C. § 2462 ..... passim
Employee Retirement Income Security Act of 1974 (29 U.S.C. §§ 1001-1461) ..... passim
O.C.G.A. §43-40-30 29
Ala. Code § 34-27-11(a) 29
Ala. Code § 34-27-30 29
Kentucky Revised Statute § 324.020 29
Kentucky Revised Statute § 324.990(1) 29

I. SUMMARY

Respondents violated their fiduciary duties to their client by orchestrating an illicit cross trade: selling timberland in Alabama on behalf of one client (New Forestry, LLC or "New Forestry") and, pursuant to a prearranged agreement with the purchaser, re-acquiring that same property a few months later for a different client. When they sold the property, Respondents did not tell New Forestry that they had prearranged to repurchase that same property for more than $1 million above the sales price. Respondents further breached their fiduciary obligations by collecting an undisclosed brokerage fee from New Forestry in connection with the sale of the Alabama property and another property. Rather than disclosing the fee, Respondents channeled the funds through a byzantine structure of shell companies in an effort to conceal the payments. The Administrative Law Judge ("ALJ") noted that this money flow resembled money laundering.

After an eight-day hearing, the ALJ found that Timbervest, LLC ("Timbervest") violated sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act") and that Timbervest's principles, Joel Barth Shapiro ("Shapiro"), Walter William Anthony Boden, III ("Boden"), Donald David Zell, Jr. ("Zell"), and Gordon Jones II ("Jones"), aided and abetted and caused Timbervest's violation of sections 206(1) and (2) with respect to the cross trade, and that Boden and Shapiro aided and abetted and caused Timbervest's violation of sections 206(1) and (2) with respect to the brokerage fees. Concluding that Zell and Jones were only negligent in failing to disclose the brokerage fees, the ALJ found that they caused Timbervest's violation of section 206(2) with respect to that matter. *Timbervest, LLC*, Initial Decision Rel. No. 658, 2014 WL 4090371 (Aug. 20, 2014) [hereinafter "I.D."]

As remedies, the ALJ imposed cease-and-desist orders against all Respondents, and ordered them, jointly and severally, to disgorge approximately $1.9 million plus an additional amount of prejudgment interest. Although the ALJ found that Respondents displayed a cavalier attitude toward their fiduciary obligations, the ALJ concluded that the Commission could not impose associational bars against the individual respondents or revoke Timbervest's adviser's license because such relief (collectively referred to as "associational bars") was precluded by the five-year statute of limitations in 28 U.S.C. § 2462 ("Section 2462").

In finding that associational bars were precluded by Section 2462, the ALJ did not apply the proper analysis. Specifically, the ALJ concluded that the statute applied because this matter was an original administrative proceeding rather than a follow-on proceeding. The proper analysis, however, requires the Commission to evaluate whether such relief would be remedial or penal given the unique facts of the particular case. An associational bar is remedial, and thus not subject to Section 2462, if the Commission finds that the respondents pose a threat of future misconduct or currently lack the competence to satisfy their professional obligations. In this matter, compelling evidence satisfies both prongs. Accordingly, the Commission should find that associational bars are not subject to Section 2462 and should impose them on the Respondents.

The ALJ also erred in finding that Zell and Jones were only negligent in failing to disclose that Timbervest paid fees to Boden from client funds and that Shapiro, Zell and Jones shared in the fees. In fact, the evidence in the record establishes that Zell and Jones acted at least recklessly and unreasonably. For the reasons discussed below, the Commission should find that Zell and Jones, like Boden and Shapiro, aided and abetted Timbervest's violation of Section 206(1) of the Advisers Act through their nondisclosures relating to the fees.

II. FACTS

A. Background

1. Ownership and Management of Timbervest

Timbervest, a Georgia limited liability company ("LLC") headquartered in Atlanta, Georgia, is a registered investment adviser, which currently manages approximately $1.2 billion in timberland and other environmental assets on behalf of various funds. I.D. at 3. Timbervest was founded in 1995 by a group of private equity investors from Jacksonville, Florida who did business as Rock Creek Capital. I.D. at 7-8. Timbervest's first client was New Forestry, a separate-client account consisting entirely of BellSouth pension assets. I.D. at 3, 8. From its inception in 1997 through its termination by AT&T (BellSouth's successor in interest), effective September 30, 2012, Timbervest acted as New Forestry's investment manager. I.D. at 3, 38. New Forestry was Timbervest's largest client at all relevant times. I.D. at 3.

The founding CEO of Timbervest was replaced by Shapiro in 2002. I.D. at 7-8. Shapiro gradually assembled his management team, bringing on Zell, Jerry Barag ("Barag"), Boden, and Jones. I.D. at 9-10. Barag served as the Chief Investment Officer of Timbervest until his departure in late 2004. I.D. at 10. In March 2004, Shapiro, Zell, Jones, Boden, and Barag collectively acquired a 20% ownership stake in Timbervest. *Id.* The Rock Creek Capital group owned the remaining 80%. Resp. Ex. 68.

In early 2004, the owners of Timbervest began implementing a plan to take the company public as a Real Estate Investment Trust ("REIT"). I.D. at 9-11. Timbervest's efforts to launch a REIT, however, were not successful, and the efforts ceased by the summer of 2004. *Id.* Barag subsequently left Timbervest and Boden became the Chief Investment Officer. I.D. at 10-11. Shapiro, Boden, Zell and Jones then negotiated to buy Rock Creek Capital's 80% interest in

Timbervest. I.D. at 11; Resp. Ex. 68. The four individual Respondents completed the buy-out of the company effective January 1, 2005. I.D. at 11. Ironwood Capital Partners became the sole owner of Timbervest, and Shapiro, Zell, Boden, and Jones each owned 25% of Ironwood Capital Partners. *Id.*

Around the same time that the Respondents became owners of Timbervest, the firm began launching commingled timberland and environmental funds.[1] I.D. at 10-11. Timbervest Partners, LP ("TVP"), which started in 2004, was the first commingled fund launched by Timbervest. I.D. at 10. The firm eventually established seven commingled funds,[2] and, as of the time of the hearing, was planning to launch an eighth fund, Timbervest Partners IV. Tr. 57:19-58:12; 1377:3-9; 1850:9-25. In addition to serving as advisors to these commingled funds, the four individual Respondents are investors in each fund. Tr. 63:5-64:1. Their aggregate investment in TVP alone is $1 million. Tr. 1677:14-1678:4.

2. BellSouth Hires ORG Portfolio Management and is Subsequently Acquired by AT&T

In September 2005, BellSouth hired ORG Portfolio Management ("ORG") to oversee Timbervest's management of its New Forestry account. I.D. at 14. At the time, Timbervest was under a mandate from BellSouth to reduce the size of the New Forestry portfolio. I.D. at 15. While Steve Gruber ("Gruber") was the ORG representative primarily responsible for overseeing New Forestry (Tr. 2040:4-16), Gruber's partner, Edward Schwartz ("Schwartz") had frequent contact with Shapiro and other Timbervest principals. I.D. at 15. When BellSouth engaged

---

[1] These funds were "commingled" in that unrelated investors were able to participate in the funds by pooling their money and purchasing limited partnership interests. I.D. at 10-11, n.4; Tr. 55:20-56:8.

[2] By the time of the hearing, one of the commingled funds, Duck River Partners, had reached the end of its life cycle and had been closed. Tr. 58:4-7.

ORG in 2005, it informed Timbervest by letter that, while Timbervest was required to maintain its existing reporting responsibilities to BellSouth, Timbervest should copy ORG on all correspondence. I.D. at 14; Div. Ex. 178. BellSouth sent the letter to Zell, who shared it with the other Timbervest principals. *Id.*

In December 2006, during ORG's oversight of New Forestry, BellSouth merged with AT&T. I.D. at 35. From that point forward, Timbervest's client for the New Forestry account was AT&T. *Id.* The AT&T manager for the New Forestry account was Frank Ranlett ("Ranlett"). *Id.* Ranlett communicated directly with Timbervest because AT&T did not intend to renew ORG's contract. I.D. at 35-36. AT&T terminated ORG on August 11, 2007. I.D. at 17.

B. Timbervest Cross-Traded the Tenneco Property

On July 7, 2006, while ORG was responsible for overseeing New Forestry, Lee Wooddall ("Wooddall"), an Atlanta businessman, sent Boden an email to which Wooddall attached a sales contract signed by Wooddall on behalf of Plantation Land and Management for the purchase of New Forestry's Tenneco property in Alabama for $13,420,000. I.D. at 22; Div. Ex. 9. The draft contract identified "Fairfax Realty Advisors" as the broker for the purchaser, noting that Fairfax Realty Advisors would receive a commission of 3% of the purchase price. I.D. at 22-23; Div. Ex. 9. Wooddall later substituted another company he owned, Chen Timber, as the purchaser. I.D. at 23-24. Boden caused the commission payment to Fairfax Realty Advisors to be changed from the 3% specified in the draft contract to 3.5%. I.D. at 23. There was also a small adjustment in the purchase price, and the final contract to purchase Tenneco from New Forestry for $13,450,000 was executed, effective September 15, 2006. I.D. at 24; Div. Ex. 10. The sale closed on October 17, 2006. I.D. at 24; Div. Ex. 11.

On November 30, 2006, approximately six weeks after the close of the sale to Chen Timber, Boden sent an email to Wooddall stating, "Lee, as per our discussion, please see the attached." I.D. at 26; Div. Ex. 13. The attachment to the email was a proposed Timberland Purchase Agreement between Timbervest Partners Alabama, LLC ("TVP Alabama"), a wholly owned subsidiary of TVP, and Chen Timber for the purchase of the identical Tenneco property. The purchase price in the agreement was $14,500,000. *Id.* The repurchase agreement was executed by Boden, effective December 15, 2006. I.D. at 26; Div. Ex. 17. The sale closed on February 1, 2007. I.D. at 26; Div. Ex. 18. Upon acquiring Tenneco for TVP, Timbervest renamed the property "Gilliam Forest." I.D. at 12, n.6, 42.

1. The Sale and Repurchase of Tenneco by Timbervest on Behalf of Two Different Clients Was a Prearranged Cross Trade

At the time of the sale and repurchase arrangements, Wooddall and Boden were neighbors. I.D. at 22. Wooddall testified that Boden set the events in motion when Boden called him in May or June of 2006 and "said he'd like to meet and talk about a proposed deal."[3] Tr. 759:7-12; I.D. at 22. Wooddall and Boden subsequently met twice to discuss the deal. I.D. at 23.

Wooddall testified unwaveringly that the repurchase of Tenneco by Timbervest was part of his negotiations with Boden from the beginning. At their first meeting Boden told Wooddall that Timbervest wanted to sell him a property in Alabama and to repurchase the property from him within six months for a higher price. I.D. at 22. The $14,500,000 repurchase price was negotiated between Boden and Wooddall before September 15, 2006, when Chen Timber executed the agreement to purchase Tenneco from Chen Timber for $13,450,000. I.D. at 26.

---

[3] The ALJ found Wooddall to be a credible witness, and he credited Wooddall's testimony over Boden's with regard to the Tenneco sale and repurchase. I.D. at 43-44.

Wooddall negotiated the repurchase price with Boden before entering into the September 15, 2006 contract so he would "know what [his] upside was." *Id.*

Boden told Wooddall that Timbervest needed to liquidate the property for one fund but wanted to acquire it for another fund. I.D. at 22. Boden told Wooddall, however, that Timbervest could not commit in writing to the repurchase because Timbervest was still raising money for the fund that wanted to buy the property.[4] *Id.* Boden told Wooddall that he planned to make a written offer to repurchase the property within six months after closing the sale, and Wooddall understood Boden's proposal to be a form of "land banking," that is, an arrangement in which land is bought and held "for somebody for a future takeout." I.D. at 22.

Until December 15, 2006, when Chen Timber executed an agreement to sell the property to TVP for $14,500,000, there were no actual restrictions on what Wooddall could do with the property, notwithstanding the understanding that he and Boden had reached about the repurchase by Timbervest. I.D. at 23. Wooddall testified that, in financing most of the purchase price, he and his partners had taken on substantial risk and had to protect their interests in case Boden did not carry through on the verbal understanding that he and Wooddall had reached. Tr. 809:17-810:11. Accordingly, Chen Timber took steps to make sure that it was comfortable with the deal even if Timbervest did not repurchase the property, as Boden had said it would. Tr. 764:10-765:16; *see also* I.D. at 44.

Despite the lack of an enforceable, written agreement, events played out exactly as anticipated, with Chen Timber holding the property for a short period until Timbervest repurchased it for TVP. Wooddall's typical practice was to buy large tracts of timberland and

---

[4] This explanation was not true, as TVP, the fund that repurchased Tenneco from Chen Timber, had been actively acquiring timberland since July of 2004, and Tenneco (i.e., "Gilliam") was the 28th acquisition for TVP's portfolio. *See* I.D. at 22; Div. Ex. 31A at 62.

break them into smaller parcels for resale. I.D. at 6. In the case of Tenneco, however, he never tried to sell the property in smaller pieces or sought a higher bid because he had given his word to Boden that he would sell the property back to Timbervest. Tr. 860:6-862:22; I.D. at 23. His customary practice of breaking up a tract into smaller parcels for resale was only a back-up plan for Tenneco in case Timbervest failed to honor its promise to repurchase the property. Tr. 860:6-861:13.

2. The Individual Respondents Could Not Recall Why TVP Repurchased Tenneco, and Boden Gave False Testimony About His Discussions with Wooddall

Wooddall recalled with clarity the prearranged nature of the repurchase agreement. As noted, the ALJ found him credible (I.D. at 43-44) and his testimony was consistent with previous statements of his that were admitted into evidence.[5] By contrast, the individual Respondents, who approved the sale and rapid repurchase of Tenneco for $1 million more, claimed a failure of recollection about how this came about—even as they conceded that the circumstances were highly unusual. *See* I.D. at 26-27. Boden, who was the point man for Timbervest in the Tenneco transactions, claimed, remarkably, that he could not recall why Timbervest decided to repurchase Tenneco on behalf of TVP. Notwithstanding his lack of recollection regarding this admitted "anomaly," Boden emphatically denied that he told Wooddall that Timbervest would repurchase Tenneco if Wooddall bought the property. I.D. at 22, 41. The ALJ found that Boden's denial was "contradicted by so much evidence, both documentary and testimonial, that [it was] knowingly false." I.D. at 45.

---

[5] During his investigative testimony, Wooddall explained, "Boden said that, you know, we'll sell you the land. We'll buy it back, but we can't put it in writing." Ex. E to Division's Opposition to Motions for Summary Adjudication at 17:10-11; *see* Order Denying Motion for Summary Adjudication at Doc. 25, p. 1.

3. The Respondents Attempted to Conceal the Sale and Repurchase Because ERISA Prohibits Cross-Trading of Plan Assets

In addition to being fiduciaries to New Forestry under the Advisers Act, Timbervest also had fiduciary obligations to New Forestry under the Employee Retirement Income Security Act of 1974 (codified in part at 29 U.S.C. §§ 1001-1461) ("ERISA"). These obligations arise from the fact that New Forestry's assets were those of AT&T's employee pension plans. I.D. at 2. The evidence, viewed in its totality, shows that the prohibition on cross trades imposed by ERISA was part of the Respondent's motivation to conceal their acquisition of New Forestry's property for another Timbervest-managed fund—in this case one in which the individual Respondents had a financial interest.

ERISA imposes a high fiduciary standard on investment managers, requiring them to act exclusively for the benefit of the plan's participants and beneficiaries. *See Expert Report of Arthur Kohn*, Div. Ex. 137 at 13. This standard has been described as "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir. 1982). Section 406 of ERISA (29 U.S.C. § 1106) forbids fiduciaries from engaging in certain "prohibited transactions" which can create conflicts of interest that compromise the fiduciary's duty of loyalty and make it impossible for the fiduciary to act solely in the best interest of the plan. Div. Ex. 137 at 13-14. Among other things, Section 406 prohibits (1) self-dealing, including payments made by a fiduciary to itself, and (2) direct sales of plan assets to another client managed by the same fiduciary. *Id.* at 18, 26-27. A prohibited transaction under ERISA cannot be cured through disclosure. *Id.* Furthermore, any person who causes an ERISA plan to breach its fiduciary duties is *personally* liable to make the plan whole. *Id.* at 14.

Timbervest acknowledged in its Investment Management Agreement and in the New Forestry LLC Agreement that it was a fiduciary under ERISA with respect to the plan assets comprising New Forestry. I.D. at 10; Div. Exs. 46, 49-51; *see also* Div. Ex. 137 at 12. In its agreements, Timbervest pledged to meet the ERISA fiduciary standard of care and to refrain from engaging in defined prohibited transactions. *Id.* All four of the individual Respondents understood that Timbervest was subject to the provisions of ERISA in managing New Forestry's assets. I.D. at 8-10, 14.

The individual Respondents also understood the restrictions that ERISA placed on their activities as managers. According to Jerry Barag–Timbervest's former Chief Investment Officer–Shapiro, Jones, and Zell all possessed knowledge of ERISA and its fiduciary requirements. Barag noted that issues relating to ERISA came up "in tangential ways all the time" in regard to New Forestry. (Tr. 1942:10-1943:1). More specifically, Barag had discussions about ERISA's prohibition on cross trades with Jones, Shapiro, and Zell in 2004, and he believed that all three understood the ramifications of everything they discussed.[6] I.D. at 10. Barag also testified that Zell exhibited his knowledge of ERISA in the course of work that they did together at Timbervest. Tr. 1940:24-1941:25. Barag further recalled having conversations

---

[6] In the context of launching the REIT, Barag proposed the possibility of rolling certain BellSouth properties directly from New Forestry into the REIT. I.D. at 10. Barag, who had almost twenty-five years of experience managing ERISA–related funds at Equitable Life and its affiliates, professed to having a "pretty good knowledge and understanding of ERISA." I.D. at 5. Barag understood that this proposal would be prohibited under ERISA, and that a special exemption would have to be obtained directly from the Department of Labor to make this occur. I.D. at 10; Tr. 1933:22-1938:18. This proposal was never pursued, however, because Zell was "resolute" in his opposition to it, believing it would give BellSouth the impression that Timbervest was more interested in getting control of BellSouth's assets than in maximizing their performance. *Id.*

with Jones about ERISA, and he perceived Jones to be "knowledgeable" about "ERISA-related things and fiduciary obligations." I.D. at 10.

Boden and Shapiro confirmed Barag's testimony, as both testified that Jones was better versed in ERISA than the other partners. Tr. 154:8-11; 1727:1-6. Shapiro also acknowledged that Zell possessed knowledge of ERISA based on his long experience managing pension fund assets for BellSouth. Tr. 1730:16-19. Finally, Shapiro wrote emails that explicitly demonstrated his own awareness of ERISA's prohibition on cross trades. Div. Ex. 153.[7]

It is undisputed that each of the four individual Respondents, who comprised Timbervest's Investment Committee, approved the Tenneco repurchase: "Mr. Boden would not have the independent authority to enter into any such [repurchase] agreement on behalf of Timbervest or its client, since all acquisition and disposition decisions must be approved by the Investment Committee." Div. Ex. 128 at 13; *see also* I.D. at 27. Nevertheless, despite the fact that the Tenneco repurchase was highly unusual, all four Respondents purport to have forgotten how and when the discussions to repurchase Tenneco began. Div. Ex. 156A, ¶ 7, Tr. 1254:23-1255:6; 1478:7-1479:7; 1561:10-15; 1640:7-19; 2256:13-2257:4. This is unlikely, as the record contains compelling evidence that the Respondents were familiar with ERISA's prohibition on cross trades. Given their knowledge—not to mention the troubling optics of the rapid sale and repurchase—it is reasonable to assume that the circumstances of the repurchase, if legitimate, would have been discussed and documented. The Commission should therefore find that the

---

[7] For his part, Zell attempted to minimize his ERISA experience, and stated—implausibly—that, despite years of managing ERISA-based investments for BellSouth, ERISA matters were "not generally our bailiwick" and that he had "limited ERISA experience." Tr. 1554:10-1555:5. The ALJ found that Zell was not credible on this point, stating, "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." ID at 53.

Respondents' failure of recollection is designed to cover up their complicity in evading ERISA by concealing their cross trade of Tenneco through the use of a middleman.

4. Contemporaneous Documents Demonstrate the Respondents' Attempts to Conceal the Tenneco Cross Trade

Respondents' knowledge that the Tenneco repurchase was prohibited is further evidenced by contemporaneous documents created by them to conceal it, including: (1) a false narrative regarding TVP's purchase of Tenneco offered by Timbervest's current Chief Compliance Officer, Barrett Carter ("Carter"); (2) contradictory and self-serving descriptions of the property offered to ORG, on the one hand, and to the TVP investors, on the other; (3) Timbervest's false statement to ORG that it sold the property as a result of an "unsolicited" offer; and (4) Timbervest's failure to disclose its longstanding management of the property on behalf of New Forestry in describing the property's history to the investors in TVP.

a. Barrett Carter Disseminated a False Narrative Regarding the Tenneco Repurchase from Chen Timber to Conceal the Cross Trade

Carter was Vice President, Director of Transactions at Timbervest during the sale and repurchase of Tenneco. I.D. at 27. He subsequently held the position of Vice President, Director of Strategic Land Management, and is currently Timbervest's Chief Compliance Officer. *Id.* Carter disseminated a blatantly false narrative, which he likely received from Boden, regarding Timbervest's repurchase of Tenneco.

Carter recognized that the sale and repurchase of the same property by Timbervest on behalf of two different clients presented an unusual situation. *Id.* Accordingly, a day or two after the February 1, 2007 closing, Carter questioned Boden about the repurchase of Tenneco

because Carter had concerns about Timbervest's fiduciary obligation. I.D. at 28. Specifically, Carter stated that "the increase in price of the Tenneco property in such a short period of time" gave him "pause." Tr. 928:23-929:3; 929:10-14. When Carter confronted Boden about the transaction, Boden "took exception" to Carter's questioning him. I.D. at 28.

Shortly thereafter, on February 7, 2007, in response to an email inquiry by a company that performed record keeping and other forestry services for Timbervest, Maria Horstmann, then Timbervest's Finance Manager, wrote: "[TVP] purchased all the Tenneco core timberland tracts originally owned by New Forestry. Literally, it's basically a fund swap transaction." Div. Ex. 19; *see also* I.D. at 28. Although he was only copied on Horstmann's email and not a primary addressee, a little more than two hours later Carter emailed all the recipients of Horstmann's email, stating: "Let me take exception to it being a fund swap transaction. It just happened to work out that one client sold it to another party and another client wound up buying it back from that party." *Id.* Carter then went on to disseminate a false explanation about how Chen Timber came to resell the Tenneco property to TVP Alabama, claiming, "*The buyer was presented with a different opportunity elsewhere and approached us with the idea of buying the property back.*" *Id.* (emphasis added). This statement was patently false. Wooddall never suggested that he approached Timbervest to sell back Tenneco because of another opportunity. Instead, he testified that the repurchase was pursuant to an understanding that he reached with Boden before Chen Timber entered into the first purchase agreement. I.D. at 26. Carter conceded that he had no first-hand knowledge of the two transactions. He further claimed that he could not remember how he learned this information. I.D. at 28.

Carter later sent the email string containing this response to Boden and Zell, even though they were not recipients of Horstmann's initial email. *Id.* It is highly unlikely that Carter would

have forwarded this story about the repurchase to Boden, who had exclusive first-hand knowledge of the deal at Timbervest, and who had recently taken "exception" to Carter questioning him about it, unless Carter knew that Boden approved of the explanation. The ALJ properly concluded that Boden was most likely the source of the false information that Carter disseminated. I.D. at 43.

b. Timbervest Provided Self-Serving and Contradictory Descriptions of Tenneco to Support its Sale on Behalf of One Client and Purchase on Behalf of Another

Timbervest also attempted to conceal the cross trade of the Tenneco property by offering New Forestry and the TVP investors separate, self-serving, and contradictory descriptions of Tenneco's attributes in order to justify the sale on behalf of New Forestry, and the repurchase on behalf of TVP. For example, in connection with BellSouth's mandate that Timbervest reduce the value of New Forestry's portfolio to $250 million by the end of 2009, in January 2006 Timbervest provided ORG with a list of properties that it proposed to sell. I.D. at 21; Div. Ex. 7. The January 2006 list included the Tenneco non-core property (approximately 5,200 acres), but not the Tenneco core property (approximately 13,000 acres). *Id.*

In August 2006, Jones submitted a revised list of disposition recommendations to ORG's Steve Gruber. I.D. at 23; Div. Ex. 16. The revised report stated: "The remaining 13,000 plus acres of the Tenneco property have also been designated for sale as a result of an unsolicited favorable offer received in July of 2006." *Id.* Seeking to justify the addition to the list of a "core" timberland property—a term signifying that the property was strategic to the portfolio (*see* Tr. 109:11-21)—Timbervest noted, among other things: "The property has challenging

access issues, inferior topography, and is generally located in some of the poorest regions of Alabama." Div. Ex. 16.

By contrast, in trumpeting the acquisition of Tenneco (renamed "Gilliam Forest") to the investors of TVP, Timbervest included a remarkably different description of the property in its Spec Book.[8] The following table shows Timbervest's conflicting descriptions of the property:

Div. Ex 16 **2006 New Forestry Disposition Report** **(Sent to BellSouth/ORG)**	**Div. Ex 162** **Gilliam Spec Book** **(Available to TVP investors)**
"comprised of relatively young timber and will not produce significant returns for several years"	"immediate and growing cash flow from these tracts"
"inferior topography and is generally located in poorest areas of Alabama"	"situated for optimal recreational opportunities within a short drive of several large cities"
"challenging access issues"	"The multiple locations and divisions by major roads will offer significant value-added opportunities during the disposition phase of the property."

Likewise, in its annual report to TVP's investors, Timbervest described the property's access as "Excellent." When pressed on whether one client was being told one thing, and the

[8] In connection with each acquisition of property by Timbervest on behalf of a client, Timbervest prepared a document entitled, "Recommendation to Acquire Timberland," known colloquially as the "Spec Book" for the property. Tr. 239:8-240:12; Div. Ex. 27. Boden acknowledged that two principal purposes of the Spec Books were to serve as: (1) "a document source for deals we bought," which, among other things, memorializes the due diligence analysis leading to the acquisition of the property, and (2) a resource for informing interested investors about an acquisition. Tr. 239:15-21; 240:5-12.

other something different, Boden was forced to admit, "I think there's definitely an issue with this ..." Tr. 252:21; I.D. at 43.

c. Timbervest Falsely Informed ORG that It Sold Tenneco on Behalf of New Forestry as a Result of an "Unsolicited Offer"

The August 2006 disposition report sent by Jones to Steve Gruber of ORG stated that Tenneco had been "designated for sale as a result of an unsolicited favorable offer received in July of 2006." Div. Ex. 16. In truth, Wooddall's offer to purchase Tenneco was not "unsolicited." Wooddall testified that "Mr. Boden called me and said he'd like to meet and talk about a proposed deal." Tr. 759:7-12; I.D. at 22. Even Boden agreed that he solicited Wooddall, and that he thought that the use of the term "unsolicited" in the report sent to ORG was wrong. I.D. at 23. Boden had no explanation for why the report sent to ORG described Wooddall's offer to purchase Tenneco as "unsolicited," and he characterized it as a "mistake." I.D. at 23. The ALJ, however, called the characterization "blatantly false." *Id.* Indeed, the false description reflects yet another attempt to conceal the cross trade, this time by offering a fabricated justification for the sale of a property that was not among the initial candidates for disposition.

d. Timbervest Omitted Any Discussion of Its Longstanding Management of Tenneco when Describing the Property's History to the Investors in TVP

As noted above, in connection with each acquisition of property by Timbervest for a client, Timbervest prepared a "Spec Book." Under the section of the Gilliam Forest Spec Book entitled "History," the document stated, in part: "The Gilliam Forest purchase unit was acquired from Chen Timber Co. in February of 2007." Div. Ex. 162. The "History" section gave no indication that Chen Timber had owned the property for just over two months, or that Timbervest

had managed the property before that for eight years on behalf of another client. *Id.* Moreover, an earlier draft of the Spec Book was reviewed by Zell and passed to Shapiro, and the same misleading description of the property's history inexplicably survived both of their reviews. Div. Exs. 175-176; I.D. at 26. These omissions appear calculated to avoid inviting intrusive questions from investors that might uncover the fraud. Boden denied this, but he had no sound explanation for why the property's true history was left out. Tr. 249:8-14.

C. The Individual Respondents Collectively Split over $1.15 Million in Unlawful Fees Collected from New Forestry

In addition to the concealed cross trade of New Forestry's property to TVP, the Respondents also unlawfully collected and shared $1,156,236.25 in real estate commissions in connection with the sale of two New Forestry properties, without disclosure to their client. The fees were paid through to two separate shell companies, which were created by Boden's personal attorney and close friend, Ralph Harrison, solely for the purpose of receiving and disbursing these funds. The Respondents acknowledged that the payment of real estate commissions to a principal of Timbervest in connection with the sale of New Forestry property was a conflict of interest (I.D. at 15), but contend that they disclosed this conflict. As discussed below, the ALJ found otherwise.

1. The Payment to Fairfax Realty Advisors

The first shell company that Harrison established to receive a real estate commission was Fairfax Realty Advisors, LLC ("Fairfax Realty Advisors"), established on June 15, 2006. Div. I.D. at 28; Ex. 1a. Harrison rented a post office box at a UPS Store in Atlanta to serve as Fairfax Realty Advisors' address. Div. Ex. 1h; I.D. at 57.

On July 7, 2006, Wooddall sent Boden a contract for the sale of New Forestry's Tenneco property in Alabama to Plantation Land and Management, LLC ("Plantation Land and Management"), of which Wooddall was an owner, for $13,420,000. The draft contract specified that Fairfax Realty Advisors was to receive 3% of the gross sales price. Div. Ex. 9 ¶ 20(d). The draft contract was later superseded by one substituting Chen Timber, another company of which Wooddall was an owner, as the purchaser. I.D. at 23-24.

On September 15, 2006, Chen Timber and New Forestry executed a contract for the sale of Tenneco for $13,450,000. Div. Ex. 10. The agreement stated:

> Seller and Purchaser acknowledge Fairfax Realty Advisors, LLC has acted as a brokerage agent on behalf of the Purchaser in this transaction. As a result of these efforts, Seller agrees to pay Fairfax Realty Advisors, LLC a real estate commission equal to three and one-half per cent (3.5%) of the gross sales price and that said commission shall be paid in full at the time of closing.

Div. Ex. 10 ¶20(d). The contract was executed by Shapiro on behalf of New Forestry. Div. Ex. 10 at 12.

On October 17, 2006, upon the sale of Tenneco by New Forestry, the escrow agent issued a check to Fairfax Realty Advisors for $470,450 in brokerage commissions. I.D. at 32. Several days later, Zell signed a check to Fairfax Realty Advisors from New Forestry's account for $300 to make up for a shortfall in the amount paid. *Id.*

Harrison deposited the checks for $470,750 in his Interest on Lawyers Trust Account ("IOLTA") and sent a check for $423,675 to Boden made payable to WAB, Inc. Harrison retained $47,075 for his fee. *Id.* Boden then shared the $423,675 equally with each of his partners, presenting them with cashier's checks. *Id.* Boden's partners understood that the source of the funds that they received from Boden was the brokerage fee that Boden obtained from New Forestry in connection with the sale of Tenneco. I.D. at 34-35.

2. The Payment to Westfield Realty Partners

On July 31, 2006, Harrison established Westfield Realty Partners, LLC ("Westfield Realty Partners") for purposes of receiving another real estate commission from New Forestry. I.D. at 28; Div. Ex. 2B. Harrison rented a post office box at a private mailbox store, Mail USA, and listed this as Westfield Realty Partners' business address on the entity's organizational documents. Tr. 618:3-17; I.D. at 57.

On December 15, 2006, New Forestry entered into a contract for the sale of timberland in Kentucky (the "Kentucky Lands") to Resource Land Holdings, LLC for $25,135,000. I.D. at 33. The contract provided that New Forestry would pay a real estate commission of 2.5% of the purchase price to Westfield Realty Partners. *Id.*

The Kentucky Lands sale closed on April 3, 2007. I.D. at 33; Div. Ex. 35. The escrow agent gave Boden a check payable to Westfield Realty Partners for $685,486.25. I.D. at 33. As with the previous commission, the funds went from Boden to Harrison, from Harrison's IOLTA to Boden's WAB, Inc. account, then from the WAB, Inc. account to Boden's partners in the form of cashier's checks. *Id.* Harrison retained $68,548.62 for his fee. *Id.* Boden, Shapiro, Zell and Jones each got $154,234.40. *Id.* Boden's partners understood that the checks represented a share of the commissions from the sale of the Kentucky Lands. I.D. at 34-35.

3. The Respondents Never Disclosed to BellSouth/AT&T or to Ed Schwartz of ORG the Payment of the Real Estate Commissions by New Forestry to Boden

Respondents claim that Shapiro disclosed the agreement to pay fees to Boden to Ed Schwartz of ORG, and that Schwartz consented to the payment of these commissions. I.D. at 48. In his hearing testimony, however, Schwartz testified that neither Shapiro nor anyone else ever

informed him that Timbervest wanted to pay—or that it had paid—advisory fees or brokerage commissions out of New Forestry's assets to Boden. I.D. at 50. The ALJ found Schwartz to be credible on this point. *Id.*

The only discussion regarding brokerage fees that Schwartz recalled having with Shapiro was a phone call in 2005, in which Shapiro asked how Schwartz would feel about Timbervest "bringing someone in" to work at Timbervest and paying brokerage commissions to that person for work done prior to his becoming an employee. I.D. at 49. Schwartz understood Shapiro to be talking about someone who was not already an employee. I.D. at 15.

Schwartz believed that the arrangement that Shapiro seemed to be proposing posed an obvious conflict of interest. I.D. at 16. Shapiro said nothing about any supposed agreement by which this hypothetical person was to be paid, including nothing about the duration of any agreement, or whether the possible fee payments would be paid in connection with particular properties. I.D. at 15. Nor did Shapiro discuss with Schwartz the source of funds for the hypothetical payment of the brokerage commissions. *Id.* Shapiro told Schwartz nothing about the person who might be receiving the commissions, or what that person's responsibilities would be if employed by Timbervest. *Id.*

Schwartz responded to Shapiro's scenario with two concerns: (1) that the client not be disadvantaged, meaning that New Forestry could not pay a double commission on the sale of any property; and (2) that he would want to run the scenario by legal counsel if it ever became anything more than hypothetical. I.D. at 16. Schwartz sated that he would need to seek input from legal counsel in order to ensure that New Forestry would not be engaging in a prohibited transaction under ERISA. *Id.*

Schwartz said that if Shapiro had told him that Timbervest wanted to pay a commission to someone who was already a partner, Schwartz would "absolutely have said, 'No way,'" because that would pose a major conflict of interest, and because the Timbervest partners already received compensation through Timbervest's management fees. *Id.* Schwartz did not mention the call with Shapiro to anyone at BellSouth or ORG because the conversation regarded a hypothetical scenario and Shapiro had made no concrete request that required approval. *Id.*

ORG's process for handling a request like the one Shapiro was proposing involved two important steps. First, ORG would need to get approval from legal counsel. *Id.* Second, ORG would have inserted itself into the process to oversee the sales process, removing Timbervest from the decision-making to alleviate any conflicts of interest. *Id.* Schwartz also stated that any agreement to pay fees such as those Shapiro was proposing would have to be in writing, and that ORG would have disclosed the arrangement to BellSouth in writing. *Id.* Again, the ALJ found Schwartz's testimony to be credible, and he credited Schwartz's testimony over that of Shapiro where they differed. I.D. at 49-51.

a. The Absence of Documentation Corroborates Schwartz's Testimony that Respondents Did Not Disclose Boden's Receipt of Brokerage Fees

If Respondents believed, as they have contended, that Schwartz's consent to the payment of the fees to Boden was all that kept them from breaching their fiduciary duty, one would expect them to have documented their supposed disclosure in writing and to have obtained written consent. Indeed, Jones, who was Timbervest's CCO at the time he received his share of Boden's fees, testified that, as an attorney, it would have been his normal practice to make disclosures of this kind in writing. I.D. at 12. Jones conceded, however, that he was not aware of any written

document that evidences the Respondents' supposed disclosure to Schwartz. *Id.* On two separate occasions, Boden received brokerage fees from New Forestry, and on both of those occasions he presented Shapiro, Zell, and Jones with large checks. Shapiro, Zell, and Jones understood that the origin of these funds was their client, New Forestry. I.D. at 34-35.

The lack of documentation corroborates Schwartz's testimony that there was no disclosure, and supports the Division's contention that the Respondents decided to conceal, rather than disclose these fees, because obtaining client consent to the payment of these fees was not a viable option. The Respondents knew that no consent would be given, both because the Timbervest partners were already being compensated in the form of management fees and other fees, and (as discussed above) because it would not be lawful for the client to consent to prohibited transactions under ERISA.[9]

b. Even Accepting Shapiro's Testimony Regarding his Conversation with Schwartz Regarding Fees, Shapiro's Disclosure was Inadequate

Even if Shapiro's testimony about his conversation with Schwartz regarding the payment of brokerage fees to Boden is accepted, no one could reasonably conclude from Shapiro's testimony that he made adequate disclosure or that he obtained consent to pay brokerage commissions to Boden. The ALJ thus correctly found that the Respondent's purported disclosure of Boden's fees was "woefully deficient." I.D. at 52.

---

[9] At the hearing, Respondents tried to explain the critical absence of documentation by hypothesizing that such documentation could have been destroyed given the passage of time. The ALJ dismissed this argument, noting that Timbervest had a duty to preserve any such documents, and stating, "[I]f Respondents have been unduly prejudiced by the passage of time, it has largely been self-inflicted." I.D. at 63.

For example, Shapiro testified during the investigation that he told Schwartz that Boden was being paid an advisory fee "to help maximize value on the core southeastern properties" and that the fee would be paid as long as there was not a second fee or commission paid by New Forestry. I.D. at 52. The ALJ noted, "That is literally all that Shapiro could remember disclosing, and his memory at the hearing was even worse." *Id.* Shapiro could not even recall Schwartz's response to his purported disclosure. *Id.* His best recollection was that Schwartz had no response. Tr. 1779:23-24. At the hearing, Shapiro was asked whether he inferred from Schwartz's silence that he was "fine" with New Forestry's paying commissions to Boden. Tr. 1788:15-18. Shapiro responded, "[W]hatever was said, I believe he said—whatever it was, I walked away believing it was fine." Tr. 1788:22-24. When asked what his basis was for that belief, Shapiro responded: "I don't recall." Tr. 1789:1-3. Thus, even accepting Shapiro's testimony, there is no colorable argument that ORG consented to the payment of fees to Boden.

Shapiro never claimed to have identified to Schwartz the actual properties to which a purported fee arrangement with Boden was supposed to have applied, the duration of the supposed fee arrangement, the amount of the fees, or the other important conditions of the arrangement. I.D. at 15. Moreover, as the ALJ stated, "There is … literally no evidence that the specific fees [paid to Boden] were disclosed to BellSouth, AT&T, or ORG prior to May 2012." I.D. at 48. Without disclosure of these material facts, it would be impossible for Schwartz to provide any sort of reasonably informed consent.

4. Zell and Jones Knew that New Forestry was Subject to ERISA and that Fee Payments to Principals were Prohibited Transactions Not Curable by Disclosure and Consent

As discussed previously, the Respondents had a powerful motive to conceal the payment of the fees to Boden (and their subsequent sharing in the fees)—namely, that fee payments to principals are prohibited by ERISA, and this prohibition is not affected by disclosure. *See* Div. Ex. 137 at 18). Each Respondent conceded at the hearing that he understood New Forestry was subject to ERISA. Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20. Barag's testimony established that Shapiro, Jones, and Zell also had knowledge of ERISA and its fiduciary requirements. *See* Tr. 1933:22-1936:5; 1942:10-1943:1. Barag had worked with Zell on ERISA-related issues, and he discussed ERISA on numerous occasions with Jones and found him "knowledgeable" about ERISA. I.D. at 10; Tr. 1940:24-1941:25. Finally, as the ALJ found, prior to leaving Timbervest, "Barag ... told [Shapiro and Jones] that the only compensation an investment manager could receive under ERISA was from the management agreement. I.D. at 11. It is therefore hard to avoid the conclusion that the Respondents' understood ERISA's prohibition on payments to principals and that their understanding was one of the reasons that they concealed, rather than disclosed, the true recipients of the brokerage fees.

5. The Byzantine Payment Structure Demonstrates Boden's Attempts to Conceal the Payments

For both of the sales from which the Respondents misappropriated funds, the commission payments took a deliberately circuitous path to Boden, and, upon receiving the funds, Boden shared them equally with his three partners. In preparation for the receipt of the commission payments that were misappropriated by the Timbervest partners, Harrison formed separate

Georgia LLCs. I.D. at 28. Harrison established himself as the owner and sole member of these LLCs; neither Boden nor any of his partners had membership or any other legal relationship with the entities. I.D. at 30. Harrison also testified that he would not have disclosed Boden's beneficial interest in the LLCs if anyone had asked. I.D. at 57. For the business addresses of each LLC on the organizational documents, Harrison used post office boxes that he had rented at different private mailbox stores in separate locations. *Id.*

Boden inserted the names of the LLCs in the relevant purchase agreements, along with acknowledgments that New Forestry would pay these supposed third party brokers a percentage of the sales proceeds in consideration for services that they ostensibly performed. I.D. at 22, 33, 59. At each property closing, the escrow agent issued a check to the particular LLC. I.D. at 57. Boden delivered the checks to Harrison, and Harrison deposited them in his IOLTA. *Id.* Harrison retained 10% of the commissions and sent the other 90% to Boden in the form of checks payable to WAB, Inc., a corporation that Boden had established for various business dealings. *Id.* Boden wrote checks on his WAB, Inc. account to each of Shapiro, Zell, and Jones for one-quarter of the amount of the checks Harrison sent him. *Id.* Finally, Boden obtained cashier's checks for his partners' share and handed them out. *Id.*

Although Boden and Harrison denied any intent to conceal the payments received by Boden, the ALJ found that there was strong evidence of such intent, stating "the unusually complex series of transactions arranged by Harrison [was] 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.'" I.D. at 56-57.

6. Other Evidence of Boden's Efforts to Conceal the Payments

The Division presented additional evidence showing Boden's efforts to conceal the payments he received from New Forestry.

a. The Relevant Purchase Agreements Contained False and Misleading Statements Regarding the Commissions

The pertinent New Forestry sales contracts that Boden negotiated falsely characterized the LLCs that received these fees as brokerage agents or real estate advisers. The ALJ concluded that the presence of such affirmative misrepresentations supported a finding of scienter against Boden. I.D. at 56.

For example, both the July 2006 draft of the purchase agreement for Tenneco, in which Plantation Land and Management was to be the purchaser, and the September 15, 2006 executed purchase agreement between Chen Timber and New Forestry, contained identical acknowledgments that Fairfax Realty Advisors "has acted as a brokerage agent *on behalf of the Purchaser* in this transaction." Div. Exs. 9-10 (emphasis added). In truth, Fairfax Realty Advisors acted as a broker to no one, as it was just a shell company. Boden, himself, conceded that he did not act as a brokerage agent for the "Purchaser." Tr. 173:3-7; see also I.D. at 57-58. Boden acknowledged that he reviewed the part of the contracts containing this representation, in that the language appeared in the same paragraph that specified the broker's commission rate. Tr. 193:22-194:25. He had no explanation for why the misrepresentations appeared in the purchase agreements or why they survived his review. *Id.*

Likewise, the December 15, 2006 purchase agreement for the Kentucky Lands contained a section entitled "Brokers Fees" stating, in part: "Seller shall pay all advisory fees or real estate commissions equal to 2.5 percent of the purchase price due to Westfield Realty Partners LLC in

connection with the formation, negotiation, and execution of the agreement and the subsequent sale of the property for services rendered." Div. Ex. 33, I.D. at 33. Boden testified that the agreement was drafted by the purchaser, and that he only supplied the information identifying Westfield Realty Partners and its fee rate. I.D. at 33.

Boden acknowledged that Westfield Realty Partners, too, was merely a shell company that performed no services. I.D. at 33. He further acknowledged that he reviewed the paragraph containing the list of services purportedly performed by Westfield Realty Partners, which also specified the fee rate. Tr. 304:15-19. Although he reviewed and signed the contract, Boden disclaimed responsibility for the false description of services provided by Westfield Realty Partners because he did not draft the agreement. Tr. 305:2-9.

Finally, on August 23, 2006, New Forestry entered into a purchase agreement to sell its Rocky Fork property in Tennessee to Scott Carswell for $39 million. Div. Ex. 39. The agreement was signed by Shapiro on behalf of New Forestry. *Id.* Carswell later backed out of the sale. Tr. 350:8-17.

The agreement stated, in part: "[I]t is understood and agreed that Woodson & Company, LLC ('Woodson') has acted as an advisor to the parties with respect to the transaction described in this agreement." Div. Ex. 39. Boden conceded that Woodson & Company, a Harrison-owned shell company, performed no services, and he further acknowledged that he personally did not act as an advisor to "the parties." Tr. 352:14-354:12. Boden contended that he simply identified Woodson & Company and its rate to Carswell, and that Carswell was responsible for the language referring to "the parties." Tr. 354:14-17. The Division introduced documents, however, that belie Boden's claim and show that Timbervest was the source of the misleading language. Div. Ex. 40; *see also* Division of Enforcement's Post-Hearing Brief, at 39-40.

The ALJ found these misrepresentations significant. Specifically, he stated that, while the presence of innocent mistakes in a contract does not support a finding of scienter, "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." I.D. at 56.

b. Boden's and Harrison's Explanations for the Devised Payment Structure are Not Credible, Evidencing an Intent to Conceal the Payments

Boden claimed that the LLCs were used because he sought advice from Harrison about how to receive fees that he was expecting in connection with the sale of timberland because of concerns that unknown brokers might assert claims to his fees. I.D. at 29. Boden contended that his concerns were based on fee agreements by previous management that he learned about. The agreements cited by Boden included an agreement by R. Zachry Thwaite ("Thwaite"), discussed below, and another purported agreement with a broker in California. Tr. 371:17-372:11; Tr. 520:16-523:14.

That Boden would go to such elaborate lengths and expense to protect himself from unknown broker claims is not credible for variety of reasons. The Thwaite agreement had been reduced to writing, and the parties stipulated that, if Chambers testified, he would say that he placed a copy of it in Timbervest's files around the time it was executed and left it there. Tr. 372:12-373:10. Regarding the California broker, Boden claimed that a letter he saw from the broker raised his level of concern. The letter, however, appeared to be simply a description of the rates the broker would charge if New Forestry asked him to sell property or arranged a trade of property. Tr. 520:16-523:14. Furthermore, Boden conceded that he could not point to a

single example, despite his extensive experience in the real estate business, of a broker filing a claim against another broker based on promises that had been made to the aggrieved broker by the principal. Tr. 370:21-371:6.

What demonstrates most compellingly, however, that the payment structure implemented by Harrison and Boden was established not to protect Boden, but to conceal his fee payments, is that it entailed the payment of brokerage fees to unregistered brokers in violation of state law. Each state in which the recipient of a brokerage fee might be subject to jurisdiction (in this case, Georgia, Alabama, and Kentucky, collectively) forbids the receipt of brokerage fees by anyone except a licensed broker. O.C.G.A. §43-40-30; Ala. Code § 34-27-30; Kentucky Revised Statute § 324.020. In fact, it is (and was) a criminal misdemeanor in Alabama and Kentucky for anyone except a licensed broker to receive a brokerage fee. Ala. Code § 34-27-11(a) ("Any person or corporation which violates any provision of this chapter commits a Class A misdemeanor and, on conviction, shall be punished accordingly"); Kentucky Revised Statute § 324.990(1) ("Any person engaging in real estate brokerage without a license shall be guilty of a Class A misdemeanor for a first offense and a Class D felony for any subsequent offenses"). Both Harrison and Boden conceded that neither Fairfax Realty Advisors nor Westfield Realty Partners was licensed as a real estate broker in any state. I.D. at 29; *see also* Tr. 385:13-16; 682:16-19.

Boden and Harrison were highly knowledgeable about the real estate industry and knew that Georgia and other states forbid the payment of real estate brokerage fees to anyone other than a licensed broker. Boden is a licensed real estate salesman who sold commercial real estate for many years. I.D. at 4. Boden knew that brokers needed to be licensed in the state where they were active, and he conceded that he knew that it was illegal for unlicensed brokers in Georgia and other states to collect brokerage fees. I.D. at 58. In Boden's words: "If the broker is

expecting to earn a commission or it has listings or has activity in a state, for example, you know, Mississippi, they need to hold a Mississippi broker's license, that's my understanding." Tr. 384:9-13.

Despite his knowledge of real estate law, Boden admitted, that he inserted entities in New Forestry purchase agreements that would purport to be earning brokerage fees, knowing that they were unlicensed brokers. Tr. 390:1-7; 387:14-388:13. Although he contended that it never occurred to him that this might be a problem, the ALJ concluded otherwise, noting that, to the extent Boden acted as broker "he knew his fee was illegal" because he understood that "it was illegal for an unlicensed broker to collect a brokerage fee in Georgia." I.D. at 58. However, because his goal was simply to conceal the ultimate beneficiaries of the fees, and to make it appear that the fees were being paid to third party brokers, Boden was willing to overlook that the scheme entailed the use of unlicensed brokers. It would serve its purpose of concealment. The ALJ agreed, finding that Boden's knowledge of the illegality of his fees supported a finding of concealment and scienter. I.D. at 58-59.

Also, the contention that Harrison devised a payment structure using shell companies that he owned, which would violate state law by receiving brokerage commissions, simply to protect Boden from potential claims by actual, licensed brokers, is not credible. Nor is Harrison's claim that he never considered the pitfalls of paying real estate commissions to unlicensed brokers believable. Harrison has been practicing real estate law for most of his career. I.D. at 7. Nevertheless, he did nothing to determine whether the LLCs that he set up could legally receive real estate commissions in the relevant states, and he acknowledged that the structure that he created could actually be a source of liability for Boden if the fees were deemed illegal brokerage fees. I.D. at 29.

Further, Harrison's testimony about his reasons for setting up separate entities, each with a different private mailbox address at a different location, and his reason for passing the funds through his IOLTA was not credible. As the ALJ found, "[T]he 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." I.D. at 56. Neither was Harrison's contention that he devised the entire payment structure based solely on a five-minute conversation with Boden worthy of belief. See I.D. 58. Even the most minimally competent attorney would have asked basic questions, and would have quickly understood that the payment structure was totally inappropriate given Boden's fiduciary relationship with the payor of the fees.

Finally, Harrison's work, in the ALJ's words, "involved 'highly irregular' lawyering." I.D. at 58. In particular, the payments of $115,623.25 to Harrison (the equivalent of approximately $6,000 per hour) were disproportionate to his efforts. *Id.* They were, however, consistent with a reward for helping to conceal the real beneficiaries of the fee payments. For all of these reasons, the ALJ found that the Harrison LLCs and the payment structure that he helped put in place were established in furtherance of Boden's goal of creating the appearance of fee payments to legitimate third party brokers and concealing the receipt of the funds by Boden. I.D. at 56-58.

D. The Respondents Demonstrated Their Cavalier Attitudes Toward Their Fiduciary Duties By Their Use of the Glawson Property and Their Misrepresentations to AT&T

1. The Glawson Property

Apart from the conduct alleged in the OIP, the Respondents' history of trying to cross trade New Forestry's Glawson property, along with their misuse of Glawson up until their termination by AT&T in 2012, shows the Respondents' cavalier attitude toward their fiduciary duties. In the fall of 2005, Boden proposed to Reid Hailey ("Hailey") of Hailey Real Estate that Hailey purchase the Glawson property and simultaneously sell Willow Run Investments, LLC ("Willow Run Investments"), for $100,000, an option to repurchase the property from him. I.D. at 18; Div. Ex 155A. Willow Run Investments was a Georgia LLC established by Harrison on August 31, 2005, of which Harrison was the sole member and organizer. I.D. at 18; Div. Ex. 5. Boden supplied copies of the proposed purchase and option agreements to Hailey. I.D. at 20; Div. Ex. 146. Neither Hailey nor his clients were interested in pursuing Boden's proposal. I.D. at 20.

The ALJ found that Boden attempted to use Hailey and Willow Run much as he later used Wooddall—as a middleman to obtain Glawson from New Forestry for another Timbervest-controlled entity. I.D. at 59. The documents show Boden intended: (1) for Hailey (or one of Hailey's clients) to purchase Glawson from New Forestry and to simultaneously sell an option to Willow Run Investments for $100,000 allowing Willow Run to buy Glawson within three years at a specified price; (2) for Willow Run Investments to assign the option to TVP or to another company controlled by Boden and his partners, in exchange for a payment of approximately $75,000 to Harrison, plus reimbursement of his $100,000 with interest; (3) for the company

controlled by Boden and others to then exercise the option, if desired, and to acquire Glawson. *See* I.D. at 19-20, n.9; *see also* Div. Exs. 155A-D. The plan would conceal that a Timbervest-affiliated company had repurchased a property that Timbervest had sold on behalf of New Forestry.

Harrison received no compensation in exchange for drafting the documents. I.D. at 19. It is apparent, however, that Harrison's compensation for drafting the documents and involving Willow Run Investments in the plan would be, per the assignment agreement, the approximately $75,000 assignment payment, plus interest on the $100,000 option purchase price. Although free personal favors by Harrison for Boden might be understandable given their relationship, it makes no sense that Harrison—who was financially strapped at the time (Tr. 718:25-13) —would do charity work for New Forestry.[10]

Timbervest had in-house and outside counsel available to draft real estate documents. Tr. 163:5-164:22. Boden, however, called on Harrison to draft the documents. Boden and Harrison met as students at University of Virginia, where they were roommates, and they remained close friends since that time. I.D. at 6. Among other things, Harrison was a member of Boden's wedding party, had gone on vacation with Boden's family, had attended Boden's son's sporting events, and had even started a business with Boden. I.D. at 7, 28. A logical inference is that Boden used Harrison for this transaction, rather than Timbervest's normal counsel, because Boden either knew Harrison would assist in this unlawful transaction, or wanted to conceal the transaction from Timbervest's lawyers.

---

[10] The ALJ agreed, stating, "On the whole, the most reasonable view of the evidence is that Harrison drafted four legal document for Boden without immediate compensation, because he believed he would be compensated, somewhat similar to his compensation in connection with Fairfax and Westfield, by the use of Willow Run as a 'middle man' between Hailey and TVP-1 (which was acquiring properties) or another of Timbervest's funds" (internal citations omitted).

Boden and Harrison provided incredible explanations of their involvement in the Glawson scheme. For example, Boden claimed that he asked Harrison to draft an option agreement so that he could show Hailey an example of what one looked like. Tr. 275:22-276:8. Hailey, by contrast, testified that Boden gave him the option agreement because its execution, along with the purchase agreement, was part and parcel of the deal Boden proposed. Tr. 870:24-871:8. Boden claimed he had no recollection of this. Tr. 281:5-9.

Boden also claimed that he did not know that the option agreement listed Willow Run Investments as the purchaser of the option, and that he had no idea why Harrison wrote Willow Run into the agreement. Tr. 278:4-279:7. Boden said that his goal was to try to find a developer to buy an option to purchase Glawson from Hailey, because he believed that this would make it more likely that Hailey would agree to purchase the property. Tr. 276:14-278:3. But if the property increased in value, the option agreement would limit Hailey's upside; if it declined, the option holder would not exercise the option. Thus, the option agreement did not actually mitigate risk, so it could not have been created as an inducement for Hailey to buy the property. I.D. at 20, n.9.

Boden also claimed that he never asked Harrison to prepare an assignment of the option agreement, and that Harrison prepared the assignment and a document related to it without being asked to do so for unknown reasons. Tr. 278:4-15. This claim is highly implausible. Harrison testified that he prepared the assignment documents as a result of an understanding of what Boden told him about the structure of the transaction. Tr. 705:10-706:9.

Harrison claimed that he inserted Willow Run Investments in the option agreement and the assignment as a "placeholder," with the expectation that when Boden identified a party to be the actual option holder, that party could assume control and ownership of Willow Run

Investments and use it as the option-holding vehicle. Tr. 710:21-713:13. Harrison's claim is unconvincing. His explanation fails to account for why his name and contact information appear repeatedly throughout the option agreement and the agreement to assign the option. (Div. Exs. 155A-D).

That Boden would want to get an option for a Timbervest-controlled entity to purchase Glawson is not surprising, as the property was near Atlanta and provided numerous personal and business benefits to the Respondents (*i.e.*, timber tours, recreation, hunting, entertaining, networking, etc.). *See* Div. Exs. 163-167, 168-169, 179-180. On June 27, 2006, however, Kirk M. McAlpin, Jr., the lawyer for Zachry Thwaite and Greer & Thwaite Properties, Inc. ("G&T"), sent a letter to Timbervest's lawyers accusing New Forestry of trying to transfer the Glawson property to Willow Run Investments for Respondents' personal benefit. (Div. Ex. 152 at 2). Thwaite had been involved in a fee dispute with Timbervest relating to the Glawson property, and he had placed a lien on the Glawson property. Timbervest sued Thwaite for filing the lien. In his letter on Thwaite's behalf, McAlpin wrote:

> G&T has been informed that New Forestry has been attempting to sell the Property. Based on documents that we have seen and statements that have been made in connection therewith, it appears that New Forestry is attempting to sell the property at less than fair market value yet also requiring any potential purchaser to execute an option to sell the property to Willow Run Investments which appears to be owned or controlled by New Forestry executives and relatives. The net effect would appear to be that Willow Run Investments could purchase the property at less than fair market value, while creating the appearance of an arm's length transaction to a third party.

Div. Ex. 152 at 2. Shortly after receiving that letter, the Respondents dropped their lawsuit and apparently ceased their efforts to sell and repurchase Glawson. I.D. at 21.

After AT&T replaced Timbervest, AT&T's Frank Ranlett learned from one of the new managers that a large structure had been built on Glawson. It appeared to Ranlett from photographs that he obtained that the structure was a hunting lodge. I.D. at 39. Ranlett had not previously been told that the structure had been built on Glawson. *Id.* Timbervest built the structure using New Forestry's money. *Id.* Shapiro acknowledged that Timbervest did not confer with, or seek approval from, AT&T before constructing the building. Tr. 1878:20-23; *see also* I.D. at 39.

Around the time that Timbervest built the hunting lodge, Timbervest: (1) formed a hunting club ("Alcovy Hunt Club") comprised of Timbervest employees and their families (Tr. 1894:12-1898:21); (2) cancelled a hunting lease that generated money for New Forestry and awarded Alcovy Hunt Club a free one (Tr. 1898:9-15; 1900:15-1901:4; Div. Ex. 165); (3) began holding annual dove hunts at Glawson, to which it invited prominent members of the Atlanta business community (Tr. 1902:25-1905:8); (4) began using Glawson to promote commingled timber funds that it was launching by conducting "timber tours" for potential investors (Tr. 1880:8-1881:24; 1905:9-1906:7); and (5) donated hunting excursions on the property to raise money for a local private school attended by some of the Respondents' children. *See* Div. Exs. 163-167, 168-169, 179-180; *see also* I.D. at 39. Timbervest informed AT&T about none of these seemingly self-serving activities. Tr. 1875:18-20; 1878:20-23; 1884:4-8.

2. The Respondents Made Misrepresentations to AT&T After the Fraud Was Discovered

The Respondents also showed their disregard for their fiduciary responsibilities by making misrepresentations to AT&T after their fraud was discovered in 2012 and by failing to provide sufficient records to AT&T when asked to do so.

Ranlett testified that he met with Shapiro for an annual review in May 2012. I.D. at 37. At the time, AT&T was aware that the Division was investigating Timbervest's valuation practices. *Id.* At end of their meeting, Ranlett asked Shapiro for an update regarding the Commission's investigation. I.D. at 37-38. Shapiro, who was already aware of the Division's concerns over the cross traded property and the fees paid to Boden, replied that the Commission was looking at some other "small things" but that it was "bovine excrement." *Id.* Only when the Division began to question AT&T's in-house counsel about these transactions did Ranlett become aware of the cross trade and the fees paid to Boden. I.D. at 38.

On May 25, 2012, Ranlett sent Shapiro a letter asking questions about Boden's fees, noting that "when we met recently, you 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, insisting that all future communications be in writing and complaining that Shapiro had not been "completely forthcoming" at their most recent meeting. Ranlett stated, "To 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 on June 4, 2012, in which he disclosed some, but not all, of the details of Boden's fees. Div. Ex. 127. The ALJ correctly found that Shapiro misled Ranlett and AT&T in his response because he specifically omitted any mention of (1) the cross trade with Wooddall; (2) Harrison's involvement in the payment of the fees; and (3) the fact that the LLCs used to receive the payments were shell companies. I.D. at 38, 54.

On June 8, 2012, Carolyn Seabolt, Timbervest's General Counsel,[11] sent AT&T's in-house counsel a letter explaining Boden's history at Timbervest and stating that Timbervest had only "recently learn[ed] about the potential for an ERISA issue" arising from Boden's fees. Seabolt's letter was also misleading, because, again, no mention was made regarding Harrison's involvement or the nature of the LLCs that received the fees. Div. Ex. 130 at 1-2.

On July 26, 2012, Ranlett sent another letter to Timbervest. On August 3, 2012, Seabolt responded with a fifteen-page letter answering his questions and describing in detail the post-hoc analysis that Timbervest performed to purportedly justify the prices for which it sold and repurchased Tenneco from Wooddall. Once again, Seabolt omitted any mention of Harrison's involvement or any disclosure that Fairfax Realty Advisers and Westfield Realty Partners were shell companies. Seabolt also gave the misleading impression that Timbervest did not expect the Tenneco Noncore tracts to sell at the prices they were fetching until September 2006, when in fact Timbervest's own reports to ORG show that the Noncore tracts sold for the values anticipated in June 2006. The ALJ found that Seabolt's letter to Ranlett was, like Shapiro's June 2012 letter, misleading in this regard. I.D. at 54.

Finally, Seabolt's discussion of Wooddall's willingness to sell the property back was highly misleading. She wrote to Ranlett: "Timbervest was not surprised when it became aware that Mr. Wooddall was willing to sell the property shortly after the close. Mr. Wooddall had a reputation for flipping timberland properties shortly after or even before the closing on a property." Div. Ex. 128 at 7. Exactly how Timbervest became aware of Mr. Wooddall's willingness to sell the property back she did not say. As drafted, however, Seabolt's description gives the impression (though she was careful not to state it explicitly) that Wooddall approached

---

[11] Seabolt was supervised by Jones. I.D. at 54.

Timbervest with a desire to sell the property back. As Wooddall testified, however, the repurchase was Boden's idea and the agreement to sell Tenneco back to Timbervest at a predetermined price was part of the arrangement that Boden proposed to him from the very beginning.

AT&T terminated Timbervest as New Forestry's manager effective September 30, 2012. Div. Ex. 123. Ranlett stated that the transition to a new investment manager was "extremely difficult," because Timbervest did not provide a "complete set of information on New Forestry." I.D. at 38-39. He also stated that 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." I.D. at 39; *see also* Div. Ex. 124. AT&T switched New Forestry's management to two new managers, who, independent of each other, wrote down the value of New Forestry's portfolio by roughly twenty percent, or about $70 million, based on a different valuation methodology. I.D. at 39.

III. DISCUSSION

A. Associational Bars Are Appropriate in this Case

As the facts above clearly show, the Respondents acted with a high degree of scienter in defrauding their clients. They also displayed an extreme disregard for their fiduciary duties right up until the present time. Moreover, their brazen denials of wrongdoing and their refusals to recognize the harms they inflicted on their client demonstrate their unfitness to serve as investment advisers. As such, associational bars are appropriate in this matter.

1. Section 2462 Does Not Apply to Associational Bars if there is a Threat of Future Misconduct or if the Respondents Currently Lack Competence

The statute of limitations within Section 2462 provides, in relevant part, that a proceeding for the enforcement of any "penalty . . . pecuniary or otherwise" must be commenced within five years from when the claim first accrued. In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), the court held that "penalty" includes any sanction that is a form of punishment "which goes beyond remedying the damage caused" to the parties harmed by the defendant's actions. *Id.* at 489. The *Johnson* court concluded that the censure and supervisory suspension imposed by the Commission in that case were punitive and thus subject to Section 2462 because, in imposing these sanctions, the Commission focused only on Johnson's prior misconduct. *Id.* The *Johnson* court noted, however, that such sanctions might have been considered remedial (and thus not subject to Section 2462) "if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public." *Id.*

Following Johnson, the Commission has repeatedly found that associational bars will not be subject to Section 2462 if they are considered remedial, *i.e.*, if they are based on a threat of future harm to the public or on a showing that respondents are unfit to fulfill their professional obligations. For example, in *Vladislav Steven Zubkis*, 2005 WL 3299148 (Dec. 2, 2005), the Commission concluded that an associational bar was remedial and not subject to Section 2462 because the sanction addressed a risk of future harm and the respondent lacked current competence. In reaching that conclusion, the Commission opined:

> The United States Court of Appeals for the District of Columbia Circuit held, in *Johnson v. SEC*, that the five-year statute of limitations established by Section 2462 applied to a Commission administrative proceeding imposing a censure and a six-month supervisory suspension. The court concluded there that the sanctions

> imposed constituted a "penalty" within the meaning of Section 2462 because it was "evident" that they were not based on "any general finding of [the respondent's] unfitness ... nor any showing of the risk she posed to the public, but rather were based on [her] failure reasonably to supervise ...." Here, by contrast, in determining that the public interest requires that Zubkis be barred, we are focusing on the respondent's 'current competence or the degree of risk [he] poses to the public.' Hence, the sanctioning assessment at issue in this proceeding is not punitive, as the court found it was in *Johnson*, but remedial, and therefore not subject to Section 2462.

Id. at *4, *quoting Johnson*, 87 F.3d at 489. *See also*, *Joseph Contorinis*, 2014 WL 1665995 at * 3 (Apr. 25, 2014) ("[T]he five-year statute of limitations of § 2462 does not apply in this case 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."); *Gregory Bartko*, 2014 WL 896758 at *9 (Mar 7, 2014) ("[T]he remedies analysis is not driven by the need to punish respondents; rather the analysis is prospective and focuses on [the respondent's] 'current competence' and the 'degree of risk' he poses to public investors and the securities markets in each of the areas covered by the remedies."), *citing John W. Lawton*, 2012 WL 6208750 *7 and n.34 (Dec 13, 2012); *Herbert Moskowitz*, 2002 WL 434524 at n.66 (Mar. 21, 2002) (stating, in dicta, "Indeed, [*SEC v. Johnson*] itself recognized that even a suspension or bar would be remedial, if that sanction was not 'sufficiently punitive' to be deemed a penalty").[12]

---

[12] Several Commission opinions post-*Johnson* suggest that associational bars are categorically subject to Section 2462. *See, e.g.*, *Gregory O. Trautman*, 2009 WL 6761741 at *10 (Dec. 15, 2009)("Section 2462 precludes our consideration of Trautman's conduct occurring before February 5, 2002 in determining whether to impose a bar or civil penalty."); *Warwick Capital Management*, 2008 WL 149127 at *10 (Jan 16, 2008)("Section 2462 precludes consideration of Respondents' conduct occurring before July 6, 2001, in determining whether to impose an investment advisory bar or civil penalties"); *John A. Carley*, 2008 WL 268598 at *21 (Jan 31, 2008) (looking only to conduct within 5 year statute of limitation in deciding appropriateness of associational bar). *See also*, *Eric J. Brown*, 2012 WL 625874 at *14 (Feb. 27, 2012). However, in each of these cases there was violative conduct within the limitations period that, standing alone, justified the bar or suspension. Thus, in each of these decisions, the Commission did not need to address whether associational bars were penal or remedial given the particular facts of the case.

Several courts have expressed the same view in analogous contexts. *See SEC v. Quinlan*, 373 Fed. App'x. 581 (6th Cir. 2010) (affirming district court conclusion that O&D bar was remedial rather than punitive in the particular case and thus not barred by Section 2462); *SEC v. Brown*, 740 F.Supp.2d 148, 157 (D.D.C. 2010) (O&D bar is remedial if Commission can show a "future risk of harm."); *SEC v. Jones*, 476 F.Supp.2d 374, 381 (S.D.N.Y. 2007) ("the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm").[13]

In this matter, the ALJ found the Commission decisions in *Contornis*, *Bartko* and *Zubkis* to be inapplicable because those cases involved follow-on proceedings. I.D. at 62. While the ALJ conceded that "nothing in *Johnson* suggests a principled distinction between an 'original' proceeding and a follow-on proceeding," the ALJ found that such a distinction "provides a way of simultaneously avoiding inconsistency with *Contorinis*, *Bartko* . . . , and *Zubkis*, on the one hand, and *Johnson* and its progeny on the other." I.D. at 63. Thus, under the ALJ's rationale, Section 2462 applies to all claims for associational bars in original administrative proceedings,

---

[13] Four years after issuing the *Johnson* opinion, the D.C. Circuit addressed a similar issue in *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000). Relying on *Johnson*, the *Proffitt* opinion held that an associational bar ordered by the FDIC was both penal and remedial, and was thus subject to the five year statute of limitations in Section 2462. *Proffitt*, 200 F.3d at 861 ("Although the FDIC's expulsion of Proffitt from the banking industry had the dual effect of protecting the public from a dishonest banker and punishing Proffitt for his misconduct, its punitive purpose plainly goes 'beyond compensation of the wronged party.'") *Proffitt* does not require a conclusion that the SEC's associational bars are always subject to the statute of limitations because the Court determined in a later decision that occupational bars are not categorically penal. *McCurdy v. SEC*, 396 F.3d 1258, 1265 (D.C. Cir. 2005) ("The purpose of the [102(e) suspension] was not to punish McCurdy, but rather to protect the public from his demonstrated capacity for recklessness in the present, and presumably to encourage his more rigorous compliance with GAAS in the future.").

but does not apply to such claims in follow-on administrative proceedings if the sanction can be viewed as remedial.[14]

Deciding whether Section 2462 applies to a claim for associational bars does not depend on the type of proceeding.[15] Instead, the Commission must evaluate whether the sanction is penal or remedial. That analysis hinges on whether the respondents pose a threat of future misconduct or lack current competence to fulfill their professional obligations. If there is such a showing, the associational bar should be considered remedial rather than penal, and thus not subject to Section 2462. *See, e.g., Zubkis* ("in determining that the public interest requires that Zubkis be barred, we are focusing on the respondent's 'current competence or the degree of risk [he] poses to the public.'"). The analysis thus depends on the unique facts of each case. *Quinlan*, 373 Fed. App'x. at 587 (noting that, under Johnson, court must undertake a "fact-intensive inquiry to determine whether the equitable remedies sought in a particular case are remedial or punitive."); *SEC v. Alexander*, 248 F.R.D. 108, 115 (E.D.N.Y. 2007) (*Johnson* analysis requires a "fact-intensive inquiry.")

The Fifth Circuit's decision in *Meadows v. SEC*, 119 F.3d 1219 (5th Cir. 1997), supports this conclusion. In *Meadows*, the court found that Section 2462 did not apply to an associational

---

[14] The ALJ also found that other cases cited by the Division, *e.g. Brown* and *Jones,* offered no guidance because they involved sanctions other than associational bars. I.D. at 61, n.25. But the courts in both of these cases, applying the *Johnson* analysis, found that Section 2462 did not apply to the sanctions at issue because there was a risk of future misconduct. *Brown*, 740 F.Supp.2d at 157; *Jones*, 476 F.Supp.2d at 383. *See also*, *Quinlan*, 373 Fed. App'x. at 587 (applying *Johnson* test to find Section 2462 inapplicable to O&D bar).

[15] If the type of proceeding were determinative, this would give rise to the anomaly that the Division could seek an associational bar in a follow-on proceeding if it first obtained an injunction against the wrongdoer in federal court, but the Division would be unable to seek such a bar in an administrative proceeding based on the identical facts.

bar, even though it was imposed in an original administrative proceeding rather than a follow-on proceeding. In reaching this conclusion, the court opined:

> *Johnson* emphasized that the imposition of a six-month suspension is less penal in nature where the reason for the sanction is the degree of risk petitioner poses to the public and is based upon findings demonstrating petitioner's unfitness to serve the investing public. [*Johnson*, 87 F.3d at 489]. In the instant action, the ALJ made such findings.

Id. at 1228 n.20. Thus, in deciding whether Section 2462 applied to an associational bar, the Fifth Circuit did not consider whether the remedy was imposed in an original or follow-on administrative proceeding. Rather, the Fifth Circuit properly focused on whether the Commission had found that the respondent (a) posed a threat of future misconduct or (b) lacked the current competence to fulfill his professional obligations.

2. Respondents Pose a Threat of Future Misconduct and Lack Current Competence to Fulfill Their Fiduciary Obligations

In this matter, the facts show that Respondents pose a sufficient threat of future misconduct to warrant the imposition of associational bars. In finding that cease and desist orders were appropriate, the ALJ found that all Respondents acted with scienter regarding the cross trade and that Boden and Shapiro acted with scienter when failing to disclose Boden's commissions to Timbervest's client.[16] The ALJ also noted that Respondents never: (1) recognized the wrongful nature of the misconduct, (2) provided credible assurances against future misconduct, or (3) conceded that their misconduct harmed their clients. To the contrary, Timbervest and Boden argued to the ALJ that the undisclosed brokerage fees actually benefitted

[16] As discussed below, the Division argues that the ALJ erred in determining that Zell and Jones did not act with scienter with regard to their participation in the payment and splitting of Boden's fees. Should the Commission determine that Zell and Jones did act with scienter, their mental states would then provide additional evidence of their incompetence and the threat they pose to the investing public.

their client.[17] *See* I.D. at 64-66. Moreover, shortly after the ALJ rendered his initial decision, Shapiro penned an article in the press, highlighting his failure to recognize his misconduct, writing:

> We have become prisoners of a process that lacks protections granted under the Constitution. Still, after years of unfettered access to Timbervest, there is not one document or other reliable piece of hard evidence to support any wrongdoing * * * In summary, the reality does not at all reflect the tale spun by the SEC. Although the allegations against us are few and frivolous, we have spent an extraordinary amount of money to date to clear our names.

See Exhibit A attached hereto.

The threat posed by the Respondents is also evidenced by the fact that the individual Respondents are currently associated with an investment adviser and intend to remain in that industry for the foreseeable future. I.D. at 64. Although Jones claimed at the hearing that he may leave the industry at some point, the ALJ noted that he "showed no inclination to leave the timberland business until after the OIP issued." I.D. at 64. Furthermore, some of the timber funds that the Respondents manage will remain in existence until 2024, and their investors have limited means to exit absent permission from the Respondents. Tr. 1377:3-1378:13; 61:4-62:3. These facts essentially guarantee that Respondents will remain in the industry for the foreseeable future. Also, at the hearing, Respondents admitted that they were seeking to start additional funds. Tr. 1377:3-9; 1850:9-1851:5. A news article from August 2014 confirms this fact, quoting Shapiro as saying that Respondents' business was "solid and growing" and that Timbervest planned to begin fundraising for a new timber fund shortly. *See* Exhibit A.

Moreover, the undisclosed cross trade and commissions were not the only misconduct adduced at the hearing. In 2005, Respondents attempted another illicit cross trade of the

---

[17] The ALJ rejected this claim, noting "It is not exaggerating to call this argument silly; obviously, depleting [AT&T's] assets by over $1 million, for no reason other than that Boden felt entitled to it, did not benefit" the client. I.D. at 55.

Glawson property, another property owned by New Forestry, using Reid Haley as a middleman. That plan ceased only after a third party threatened to sue if the cross trade went through. More recently, Respondents erected a hunting lodge on the Glawson property using New Forestry's funds, but without disclosing this conduct to AT&T. Respondents then used the hunting lodge and property to entertain Timbervest clients and potential clients, again without telling AT&T. Finally, as discussed above, Timbervest continued to mislead AT&T even after its fraud was discovered by failing to disclose Harrison's involvement in the payment scheme or Boden's use of shell companies to collect the fees. They also offered AT&T highly misleading explanations for the Tenneco cross trade.[18]

In sum, there is a sufficient threat of future misconduct because Respondents displayed a high degree of scienter, have failed to recognize their misconduct, intend to remain in the adviser industry for the foreseeable future, and even intend to start new funds and solicit new investors. Moreover, the misconduct has been repeated, rather than isolated. *Conrad P. Seghers*, 2007 WL 2790633 at * 7 (Sept. 26, 2007) (The securities industry "presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence.")

Moreover, the ALJ's findings show that Respondents lack the "current competence" to perform their fiduciary obligations. *Johnson*, 87 F.3d at 489. Specifically, the ALJ found that Respondents were "oblivious[] to their fiduciary obligations, which continues today, " I.D. at 65, and that Shapiro was "shockingly apathetic" toward his fiduciary obligations. I.D. at 52. Similarly, the ALJ found that "Boden viewed his fiduciary duty as someone else's

---

[18] While this misconduct was not alleged in the OIP, the Commission has found that it may consider conduct outside the OIP in deciding the appropriate remedy. *Montford & Company, Inc.*, Advisers Act Rel. No. 3908, Opinion at 31 (Sept. 2, 2014).

responsibility." I.D. at 65. Finally, by making multiple misrepresentations to AT&T after the fraud was uncovered in 2012, the Respondents continued to display an extreme disregard for their fiduciary responsibilities. These facts clearly show that associational bars in this matter are necessary to protect the public; and because such bars would be remedial, they are not precluded by Section 2462. *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979) (identifying non-exclusive list of factors to be considered in deciding whether associational bar is in the public interest).

B. Zell and Jones Acted with Scienter In Connection with the Undisclosed Brokerage Fees

The ALJ correctly found that Boden and Shapiro aided and abetted Timbervest's violation of Section 206(1) in connection with the failure to disclose to Timbervest's advisory client the payment of brokerage fees to the four Timbervest principals. But the ALJ erred when he found that Zell and Jones were only negligent in connection with this omission, and thus incorrectly concluded that Zell and Jones only caused Timbervest's violation of 206(2) for this omission. In weighing the evidence, the ALJ noted multiple factors in the record that "weigh in favor of finding scienter as to Zell and Jones" regarding the fees. I.D. at 53. The ALJ also noted: "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." I.D. at 54. The ALJ gave greater weight, however, to his finding that Zell and Jones subjectively believed Shapiro's representation that he obtained consent from the client to pay the fees to Boden, and that Zell and Jones subjectively believed that such consent was legally effective. I.D. at 53-54.

The record clearly demonstrates that Zell and Jones acted recklessly (at least) with regard to the payment of Boden's fees. The receipt of fees by a principal of Timbervest was strictly prohibited by Timbervest's written agreements with the client. As the ALJ noted, the fee agreement "provided for compensation to Timbervest, and by extension to the other Respondents, only by way of management fees and disposition fees." I.D. at 48. Further, Timbervest pledged in its agreements with the client not to engage in prohibited transactions under ERISA. As discussed above, prohibited transactions cannot be cured by client disclosure. Moreover, Barag's testimony demonstrates that Zell and Jones were aware of ERISA's requirements and of their responsibilities as ERISA fiduciaries. Zell managed New Forestry for over a decade on behalf of BellSouth, and the ALJ found that he downplayed his knowledge of ERISA at the hearing. Moreover, Barag testified that he worked with Zell on several ERISA-related issues and that ERISA came up "all the time" in the context of managing New Forestry. Barag also stated that he had discussions with Jones about ERISA and found him knowledgeable on the topic. Jones—in addition to being a fiduciary under the Advisers Act—was Timbervest's President, General Counsel, and Chief Compliance Officer at the time of the violations. Most importantly, shortly before he left, Barag explicitly told Jones and Shapiro that they could not collect fees from New Forestry outside of the management agreements.

Given their experience, Zell and Jones had many reasons to be highly skeptical, if not incredulous, of Shapiro's claim that the client had consented to the payment of fees outside of the management agreements. Even if Shapiro told them that he had secured Schwartz's permission to pay fees to Boden, they knew such permission would not remove the prohibition on payment of the fees, and their subjective belief that the client consented to the fees was highly unreasonable conduct evidencing recklessness, at least. Indeed, that all four individual

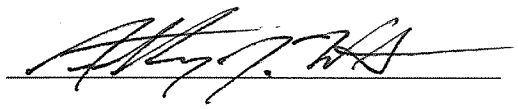
Respondents actually split the fees equally indicates that they acted with the specific intent to deceive their client.

IV. CONCLUSION

For the reasons stated herein, the Commission should find that Zell and Jones aided and abetted Timbervest's violation of Section 206(1) of the Adviser's Act in connection with Timbervest's failure to disclose to its advisory client the payment of brokerage fees to Boden. The Commission should also reverse the ALJ's conclusion that Section 2462 precluded the Division's claim for associational bars and find that associational bars are in the public interest in this matter. The Commission should affirm the Initial Decision in all other respects.

This 30th day of October, 2014

Respectfully submitted,



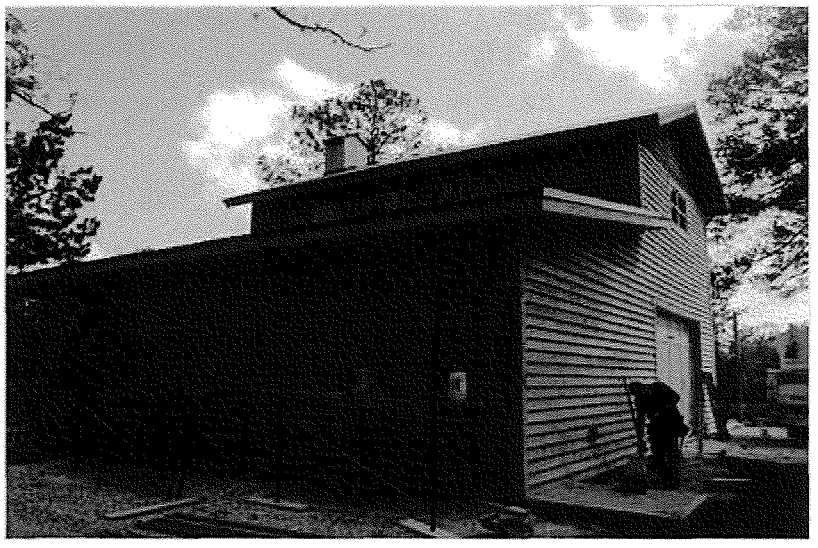
Robert K. Gordon
Anthony J. Winter
Robert Schroeder
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 E. Paces Ferry Road NE, Suite 900
Atlanta, Georgia 30326-1232
404-842-7600

EXHIBIT A

Pensions&Investments

Timbervest CEO disputes SEC

By: Pensions & Investments
Published: August 20, 2014



The story, "SEC ruling expected in Timbervest case" (Aug. 18, 2014) did not contain much of our side of the story in part because the reporter mostly relied upon the SEC's biased information. Among the points missed is the administrative law judge's prior ruling that disbarment of the principals will not be an outcome of these proceedings.

The alleged infractions in this proceeding are old and isolated. Of the hundreds of transactions Timbervest has conducted with enormous sums of money at stake, the Securities and Exchange Commission's Division of Enforcement has pointed to only three, all of which took place nearly eight years ago. Two involve a payment of commission fees while the third is an alleged prearranged deal.

These supposed infractions represent less than 1% of the money in the 350-plus transactions completed during the last decade, which covered approximately 1.4 million acres of timberland costing more than $1.5 billion (including more than $140 million in timber harvests that have taken place). On average, sales completed approximated 112% of market value, all to the benefit of our clients.

Regarding the division's assertion we terminated a hunting lease on a client's property so that we could construct a hunting lodge for our own use, what really happened was we enhanced the property's value by millions of dollars with the addition of a lake, road system and other amenities a hunter as buyer would expect.

The so-called hunting lodge (see photo) in reality is a utility barn. To allege this was a "destination" for anyone is obviously absurd. We might note that the lease we canceled (for all of $7,000 per annum) was also part of preparing the property for sale; it's simply not good practice to have armed hunters, contractors and prospective buyers on a property at the same time.

These stories would be humorous if they were not evidence of SEC attorneys' intent on achieving a predetermined, punitive result, rather than the truth. The division has ignored the statute of limitations and has more than reasonable doubt of its own assertions, yet it proceeds in its attack.

Witnesses on record early with clear memories and accounts of simple activities have flipped their scripts after meeting with investigators. Incredibly, a staff attorney inadvertently released a document to us, which clearly demonstrated our innocence. Even more incredible, the judge later allowed that document to be "protected" as privileged.

We have become prisoners of a process that lacks protections granted under the Constitution. Still, after years of unfettered access to Timbervest, there is not one document or other reliable piece of hard evidence to support any wrongdoing.

Now that the judge has ruled,we are prepared to appeal the decision. Unfortunately, at this stage, the initial appeal is to the same body of people — the SEC — which we believe has no regard for due process or the presumption of innocence. In federal court, we will finally be afforded independent judges and normal constitutional protections.

In summary, the reality does not at all reflect the tale spun by the SEC. Although the allegations against us are few and frivolous, we have spent an extraordinary amount of money to date to clear our names.

And, despite what was printed, our business is solid and growing.

Joel Shapiro

CEO

Timbervest LLC

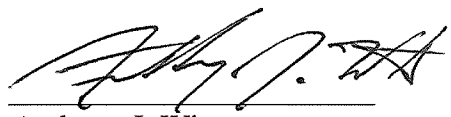
Atlanta

Editor's note: SEC Administrative Law Judge Cameron Elliot on Aug. 20 ruled that Timbervest LLC and four of its principals violated securities laws in relation to the case discussed in this letter. Timbervest's lawyer said the firm intends to appeal. For more information about the ruling, see: SEC rules Timbervest violated Investment Advisers Act

Original Story Link: http://www.pionline.com/article/20140820/ONLINE/140829983/timbervest-ceo-disputes-sec

CERTIFICATE OF COMPLIANCE WITH SEC'S RULE OF PRACTICE 450(c)

I hereby certify that this brief complies with the length limitation set forth in SEC Rule 450(c). According to the word processing system used to prepare this document, the brief contains 13,871 words.



Anthony J. Winter