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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

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

DIVISION OF ENFORCEMENT'S CONSOLIDATED RESPONSE TO RESPONDENTS' APPEALS TO THE COMMISSION

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I. INTRODUCTION

Respondents violated their fiduciary duties to their advisory client by orchestrating an illicit cross trade, selling timberland in Alabama on behalf one client (New Forestry, LLC or "New Forestry") and, pursuant to a prearranged agreement with the purchaser, re-acquiring that same property (the "Tenneco Core property") a few months later for a different client (Timbervest Partners, LP or "TVP"). 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 causing New Forestry to pay an undisclosed brokerage fee to Boden in connection with the sale of the Tenneco Core property and another property. Rather than disclosing the fee, Boden channeled the funds to himself and the other Respondents through a byzantine structure of shell companies in an effort to conceal the payments. The Administrative Law Judge ("ALJ") in this matter found this structure to resemble money laundering.

After an eight-day hearing, the ALJ found that Respondent Timbervest, LLC violated sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act") and that Timbervest's principles, Shapiro, Boden, Zell, and 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."]

In their Appeals, the Respondents argue that Timbervest did not commit any violations of the Advisers Act, and that Shapiro, Boden, Zell, and Jones could not therefore have aided, abetted, or caused such violations. Their arguments are without merit, however, as they are largely based on statements which (1) misconstrue the record, (2) are wholly unsupported by the evidence, (3) are based entirely on counsel's speculation, and/or (4) are contrary to the substantial evidence that the ALJ found credible. The Respondents also complain that the Commission's administrative proceedings are inappropriate, biased, unfair, and unconstitutional. These arguments, which are frivolous and unsupported, should be rejected.

II. RESPONDENTS DID NOT DISCLOSE THAT BODEN WOULD BE PAID COMMISSIONS IN CONNECTION WITH THE SALE OF CERTAIN NEW FORESTRY PROPERTY

A. Shapiro's Own Testimony Shows that the Disclosure of the Commission Arrangement Was Inadequate

Respondents contend that the payment of commissions to Boden did not violate Section 206 of the Advisers Act because the commission arrangement was disclosed. First, Respondents claim that Shapiro and Boden disclosed Boden's fee agreement (but not the actual payments) to BellSouth in 2002 while Zell was still overseeing New Forestry.[1] *See* Timbervest Appeal at 4. The ALJ properly concluded, however, that any disclosure to Zell in 2002 regarding the possible payment of real estate commissions to Boden would have been irrelevant, because Boden was not a principal or employee of Timbervest at that time. I.D. at 48. Accordingly, Timbervest was free to use Boden's services or the services of any other vendor without obtaining permission

[1] New Forestry was a separate-client account consisting entirely of BellSouth (n/k/a AT&T) pension assets. I.D. at 3, 8. Zell was in charge of the real estate and natural resource portfolio at BellSouth's pension group, which included the management of the New Forestry portfolio, from 1996 until he joined Timbervest in May 2003. Tr. 1534:14-21; 1536:23-25.

from BellSouth. *See* Div. Ex. 46 at Section 6.1(a)(v). By contrast, the payment of real estate commissions to an owner of the investment advisory firm implicates an entirely different set of issues.

Respondents also contend that Shapiro disclosed the commission arrangement to BellSouth's agent, ORG Portfolio Management ("ORG"). Timbervest Appeal at 4. But even Shapiro's own testimony shows that such "disclosure" was woefully inadequate. During the investigation, Shapiro testified that he told Edward Schwartz ("Schwartz"), an ORG partner, that Boden "was hired to help maximize value on the core southeastern properties," and that Boden would be paid an advisory fee if there was not a second fee or commission paid by New Forestry. I.D. at 52. The ALJ found, "That is literally all that Shapiro could remember disclosing, and his memory at the hearing was even worse." *Id.* Indeed, when asked at the hearing what he actually disclosed to Schwartz, Shapiro stated: "I don't really recall. I think I gave him the general overview of it. *And all I can remember is coming away thinking it was fine.*" Tr. 1776:25-1777:2 (emphasis added). Shapiro then acknowledged that "Mr. Schwartz's recollection is a lot better than mine has been on this." Tr. 1778:6-7.

Unlike Shapiro, Schwartz had a specific recollection of the conversation. He remembered Shapiro asking him a purely hypothetical question about whether it would be okay to pay brokerage commissions to a non-employee who might join Timbervest in the future. I.D. at 15-16. Schwartz responded that New Forestry could not pay double brokerage fees (*i.e.*, to both the employee and an unaffiliated real estate agent), but that he would need to consult with legal counsel if an actual situation presenting a potential conflict presented itself. *Id.* at 16. Schwartz testified that Shapiro did not tell him the duration of the agreement or the properties to which it applied, and Shapiro did not contend that he did so. *Id.* at 15-16, 49. Schwartz never

conferred with counsel about the proposed arrangement because his conversation with Shapiro never went beyond the hypothetical. *Id.* at 16.

Schwartz was also emphatic that Respondents did not tell him that the commissions would be paid to a Timbervest principal. I.D. at 50 (citing Tr.). While Respondents dispute this testimony, the ALJ found Schwartz to be credible. *Id.* Indeed, Steve Gruber, the ORG partner with primary responsibility for overseeing Timbervest's management of New Forestry, corroborated Schwartz on this point. Gruber knew of no arrangement whereby Boden was to receive real estate commissions in connection with the sale of New Forestry property. As the partner at ORG in charge of the BellSouth/Timbervest relationship (Tr. 2040:4-22), it is likely that such a significant fact would have been shared with Gruber by Schwartz, if Schwartz had indeed been informed about it. *See* Tr. 982:23-983:17; *see also* Second Stipulations of the Parties, Doc. 45.

B. Schwartz was Credible

Respondents go to great lengths in their Appeals to disparage Schwartz's credibility. *See* Timbervest Appeal at 4-5, 14-16, and 27-28. But the ALJ correctly noted that Schwartz's testimony was generally consistent with Shapiro's in that "they both agreed that Shapiro told Schwartz that Timbervest was hiring, or had hired, someone to 'maximize value,' and that he would get a fee for previously uncompensated work so long as no other commissions were paid." I.D. at 49. Importantly, Shapiro did not testify that he disclosed to Schwartz the specific terms of the agreement, namely the specific properties which were subject to the agreement; the payment percentages; the $5 million minimum sale price requirement; or the five-year duration of the agreement. As the ALJ noted, "Each of these details standing alone, if not disclosed, would have constituted unlawfully material omissions." *Id.* at 51. For this reason, the ALJ

rightly determined that Shapiro's so-called disclosure, even by his own testimony, was "woefully deficient." *Id.* at 52.

To support their claim that Schwartz was not credible, Respondents point to several purportedly inconsistent statements by Schwartz to third parties. Timbervest Appeal at 14-16. As noted, these arguments are irrelevant given that Shapiro's own testimony shows his disclosure was deficient. Moreover, Respondents offer nothing but unsupported allegations about Schwartz's supposedly prior inconsistent statements. In particular, Respondents claimed that Schwartz made statements to them in the presence of third-party witnesses acknowledging that he was aware of Boden's fee arrangement. These include Schwartz supposedly confirming his awareness in a February 2012 annual meeting, two calls with the Arizona Public Safety Personnel Retirement System ("AZPSPRS") in June 2012, and at a meeting with AZPSPRS.[2] *Id.* at 15.

None of the third-party witnesses before whom Schwartz supposedly acknowledged his awareness of the fee arrangement were called by the Respondents as witnesses at the hearing. A number of representatives of AZPSPRS appeared on the Respondents' witness list, but Respondents did not present testimony from any of them. Respondents knew prior to the institution of these proceedings in September 2013 that Schwartz was on record denying that Respondents disclosed fee payments to Boden. *See* Timbervest Wells Submission, Div. Ex. 74 at 8. Respondents' failure to call a single witness from AZPSPRS, or any of the other parties who were supposedly present, to corroborate their claims regarding a potentially issue-

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[2] AZPSPRS is a public pension fund for which ORG managed investments, some of which were placed in Timbervest-managed funds. (Tr. 2067:21-25).

determinative factual dispute raises substantial credibility issues with respect to Shapiro's and Jones' testimony.

Finally, Respondents claim that Schwartz's testimony was also inconsistent with conversations he had in 2012 with their counsel. *See* Timbervest Appeal at 15-16. Once again, however, Respondents did not independently corroborate their claims with third-party testimony; instead they merely cite to assertions made *in their own Wells submission* as ostensible impeachment of Schwartz. Counsel's self-serving statements are entitled to no evidentiary weight. *Id.*

This is not the only instance where Respondents made allegations about witness statements without any evidentiary support. Near the end of the hearing, Shapiro volunteered that Wooddall, a key Division witness, had recanted his hearing testimony that there was a pre-arranged agreement to repurchase the Tenneco Core property. Tr. 1796-97. The ALJ correctly found Shapiro's testimony to be dubious because no other Respondent corroborated this claim and Respondents never recalled Wooddall to corroborate Shapiro. I.D. at 50-51, n.17.

C. Respondents Presented No Testimony Regarding Unavailable Exculpatory Company Documents; No Exculpatory Inferences May Be Drawn from the Stipulation Regarding BellSouth's Email

Respondents hypothesize that there may have been some email or memo that memorialized the disclosure to BellSouth of terms of the commission agreement with Boden, and that such documents may no longer be available. Timbervest Appeal at 5. Speculation for which no foundation has been laid is not evidence. Respondents offered no testimony about Timbervest's own lost or destroyed files, about documents that were once maintained by the company but could not be located, or about electronic record-keeping practices of the company that resulted in the unavailability of electronic files. Moreover, no witness testified about having

created or even seen a document that has since become unavailable, so Respondents' claims about the possibility of helpful documents that are no longer available are groundless speculation that must be disregarded.

Respondents claim that there is a possibility that unavailable BellSouth emails might show disclosures by Timbervest regarding the commission payments to Boden, citing the stipulation that AT&T did not retain BellSouth emails from the relevant period. Timbervest Appeal at 5; Tr. 2212-13. This is grasping at straws. No exculpatory inferences from the stipulation are warranted because: (1) no Respondent testified that he made disclosures to BellSouth (other than the irrelevant disclosures to Zell in 2002); (2) any such disclosures by Respondents would presumably be available to Timbervest from its own files and/or the files of ORG; and (3) Respondents had the ability to subpoena the former employees of BellSouth for testimony about supposed disclosures of the fee payments, but they declined to do so.

Finally, Respondents' speculation that documents evidencing the disclosure of Boden's fee arrangement to BellSouth might have existed, but have since become unavailable, is contradicted by Zell's own testimony. In the following exchange between counsel for the Division and Zell, Zell conceded that Timbervest never disclosed the Boden fee arrangement to BellSouth:

> Q: You would agree with me that regardless of what anyone at Timbervest may have disclosed to Ed Schwartz at ORG, Timbervest never sought consent from BellSouth for the payment of fees to a Timbervest principal, would you not?
>
> A: Yes, I would agree.

Tr. 1532:10-15. Given his ties to BellSouth, Zell almost certainly would have known about any disclosure of Boden's fee arrangement after Zell joined Timbervest, and, in all likelihood, he

would have been directly involved in any such disclosure. Zell conceded, however, that there was no such disclosure. *Id.*

Contrary to Respondents' assertions (*see* Timbervest Appeal at 14), the Division was not obliged to elicit testimony from every former BellSouth employee who came into contact with Timbervest in order to demonstrate there was no disclosure of the commission payments. The Division met its burden by introducing ample evidence that Respondents failed to make any disclosure to BellSouth, including: (1) Schwartz's testimony that there was not disclosure of the material terms (*i.e.*, payment of a commission to a Timbervest principal, (2) affirmative testimony by Respondents about disclosure to Zell but not to any other BellSouth employee (Tr. 1811:11-16); (3) statements in Respondents' Wells submissions and Court filings to the same effect (Div. Ex. 74 at 5-6; Div. Ex. 73 at 4; Respondents' Motion for Summary Disposition, Doc. 13 at 14-15); (4) BellSouth's institution of a three percent disposition fee that applied to the property sales at issue (Tr. 144:4-21), making it highly unlikely that Respondents would seek or obtain permission to pay themselves millions more in compensation for the sales; (5) ORG's unawareness of any disclosure to BellSouth of the commission payments (Tr. 982:23-983:17); (6) Respondents' failure to make disclosure to BellSouth/AT&T or ORG about the payments, either before or after they were made (Tr. 296:17-298:9); (7) Respondents' concealment of the payments through the use of multiple LLCs ostensibly having no connection to Boden (Tr. 595:4-604:2); and (8) Respondents' knowledge that they were subject to ERISA (making either disclosure of prohibited transactions or obtaining consent for them extremely unlikely) (Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20).

III. RESPONDENTS DID NOT DISCLOSE ALL MATERIAL FACTS RELATING TO THE SALE AND REPURCHASE OF THE TENNECO CORE PROPERTY

A. Respondents did not Disclose their Agreement to Repurchase the Tenneco Core Property

Respondents argue that, even though the time between New Forestry's sale of Tenneco Core to Chen Timber, a company controlled by Wooddall, and the subsequent repurchase of that property by a different Timbervest fund, TVP, was extremely compressed, they were two completely independent transactions. Timbervest Appeal at 6.[3] Respondents also focus on the fact that there was no binding agreement with Wooddall to repurchase the property. Timbervest Appeal at 11-12, Boden Appeal at 4. Given these facts, Respondents contend that they had no disclosure obligations to BellSouth regarding the repurchase of the Tenneco Core property.

Respondents miss the point. The crucial fact is that Respondents never told BellSouth that, before the contract for the sale of the Tenneco Core property was executed on September 15, 2006, they had identified a repurchase price that was more than $1 million higher than the sales price. The testimony from Wooddall shows that Respondents had identified a repurchase price for the Tenneco Core property before that property was first sold. Wooddall testified that Boden offered to sell him the land and repurchase it later at a higher price, a deal which he described as "land banking"—*i.e.*, where "you buy something and hold it for somebody for a future takeout." Tr. 858:6-17. This comports with Wooddall's investigative testimony, where he stated: "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 Disposition at 17:10-11.

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[3] The contract for the sale of the property was signed on September 15, 2006 and the sale to Chen Timber closed on October 17, 2006. I.D. at 24. The contract for TVP's repurchase of that property was signed on December 15, 2006 and the sale closed on February 1, 2007. I.D. at 26.

While Boden disputed this aspect of Woodall's testimony, the ALJ found Wooddall to be credible on this point. I.D. at 44.[4]

Although either party could have backed out, the deal that they consummated was exactly the one they agreed to before Wooddall contracted to buy Tenneco for $13.45 million—*i.e.*, that Boden would repurchase the Tenneco Core property on behalf of another fund for $14.5 million. Tr. 861:14-862:13; Div. Ex. 11. That the agreement was oral and thus not legally enforceable is irrelevant (*see* Boden Appeal at 4). The ALJ properly found, "[T]he non-binding nature of the parties' understanding – a "gentleman's agreement," as the Division characterizes it, or a "verbal option," as Respondents characterize it – is not dispositive. Once Timbervest signed the sale contract on September 15, 2006, having informally agreed, via an oral side deal, to a repurchase price that disadvantaged New Forestry, Timbervest had an undisclosed conflict of interest, even if it never repurchased the property." I.D. at 44 (citations omitted).[5]

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[4] Respondents suggest that Boden may have lied to Wooddall about his desire to repurchase the property for $14.5 million in order to get Wooddall to close on the property at a higher price—what the Respondents characterize as a "negotiation tactic"—but that TVP then just happened to exercise that "option" because the property unexpectedly became significantly more valuable in the span of a few weeks. *See* Timbervest Appeal at 16. This is a farfetched claim based on rank speculation and not supported by any evidence. At the hearing, Boden denied having discussed a repurchase price with Wooddall before the property was sold.

[5] Respondents claim that the sales contract conclusively proves that there was no repurchase agreement, citing boilerplate language stating that the deal was not contingent upon any other agreement or understanding. Timbervest Appeal at 5. This is nothing more than an attempt at misdirection. As the ALJ noted, Wooddall testified that he understood that provision to mean, "I could have done whatever I wanted to do the day after I bought the property *if I had felt like they weren't going to do what they said they were going to do.*" Tr. 863:20-23 (emphasis added); I.D. at 46.

B. Respondents' Valuation Arguments Relating to the Sale and Repurchase of Tenneco Core Are Irrelevant

Respondents raise two valuation-related arguments in defense of their sale and repurchase of the Tenneco property for two different clients in a highly compressed time frame. First, they claim that the transactions were economically advantageous to both New Forestry and TVP. Timbervest Appeal at 6-11; Shapiro Appeal at 2-4; Boden Appeal at 2-3; Zell Appeal at 2-4; Jones Appeal at 3-4. Second, they claim that the $1 million premium they paid to Chen Timber to repurchase the property could be justified by information that became available to them after their sale of Tenneco on behalf of New Forestry closed. *Id.* Both arguments fail.

1. Respondents' Argument that the Transactions Were In the Best Interest of Both New Forestry and TVP Is Irrelevant

Respondents contend that they believe the sale of Tenneco by New Forestry for $13.45 million was advantageous because the price represented a premium over the carrying value of the property, and because they believe the sale furthered BellSouth's goal of trimming the portfolio. *Id.* Respondents further contend that they believe the purchase of Tenneco on behalf of TVP for $14.5 million approximately two months later was good for the fund because Tenneco had appreciated significantly in value and fit with TVP's portfolio objectives. *Id.* This argument is legally irrelevant because the Supreme Court has rejected it.

An investment adviser cannot cure an undisclosed conflict by trying to show that he believed himself to be acting in the best interest of the client, notwithstanding the conflict of interest. In *SEC v. Capital Gains Research Bureau, Inc.*, the Supreme Court addressed the application of Section 206 to conflicts of interest and ruled, *inter alia*, that the SEC is not required to parse the many motivations that may have played a role in giving investment advice – instead the onus is on investment advisers to disclose all material facts. 375 U.S. 180, 191-95;

200-01 (1963). Addressing essentially the same argument Respondents raise, the Supreme Court wrote:

> **Respondents argue, finally, that their advice was 'honest' in the sense that they believed it was sound and did not offer it for the purpose of furthering personal pecuniary objectives.** This, of course, is but another way of putting the rejected argument that the elements of technical common-law fraud-particularly intent-must be established before an injunction requiring disclosure may be ordered. It is the practice itself, however, with its potential for abuse, which 'operates as a fraud or deceit' within the meaning of the Act when relevant information is suppressed. The Investment Advisers Act of 1940 was 'directed not only at dishonor, but also at conduct that tempts dishonor.' *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549, 81 S.Ct. 294, 308, 309, 5 L.Ed.2d 268. Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive. **To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute. Reading the Act in light of its background we find no such requirement commanded. Neither the Commission nor the courts should be required 'to separate the mental urges,'** *Peterson v. Greenville*, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323, of an investment adviser, for '(t)he motives of man are too complex * * * to separate * * *.' *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S.Ct. 680, 682, 95 L.Ed. 927. The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. **It misconceives the purpose of the statute to confine its application to 'dishonest' as opposed to 'honest' motives.**

375 U.S. at 200-01 (emphasis added). Accordingly, it is irrelevant whether Respondents believed their actions were fair, and the Division is not required to analyze their motives. The operative facts are that the Respondents engaged in a self-dealing transaction by cross-trading a client asset to another fund in which the principals maintained a pecuniary interest without obtaining their clients' consent, which violates the Advisers Act. *See also Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003)(stating that scienter may be established under Section 206(1) without a showing of willful intent to defraud). Under Section 206, the conflict must be

disclosed to the client so that the client can decide whether to waive the conflict, or, alternatively, to switch to an adviser who is free of such conflicts.

Wooddall's unambiguous testimony that he and Boden agreed, *before* September 15, 2006, that a Timbervest fund would repurchase Tenneco for $14.5 million (Tr. 862:9-13), *i.e.*, when Chen Timber first entered into a contract to buy the property for $13.45 million. It does not matter what justifications for the repurchase Respondents can conjure up now.

2. Respondents' Valuation Arguments Are *Post Hoc* Justifications

Throughout the investigation, at the hearing, and on appeal, Respondents have gone to great lengths to stitch together information that they claim *could have* resulted in their decision to repurchase the Tenneco Core for $14.5 million for the TVP fund just six weeks after they sold it out of New Forestry's portfolio for $13.45 million. Specifically, Respondents claim that, before TVP repurchased the Tenneco Core property, the Tenneco Non-core parcels (renamed the "Wolf Creek" properties) sold for unexpectedly high prices, suggesting that the price for the Tenneco Core property had appreciated. Timbervest Appeal at 9. These arguments are a side-show. The Respondents acknowledged at the hearing that no one at Timbervest actually recalls the Wolf Creek pricing information being among the reasons that Timbervest decided to initiate efforts to buy Tenneco Core from Chen Timber for the TVP fund.[6] They furthermore admitted that the pricing data being held out as the "reason" for their decision to repurchase the property is simply their own "reconstruction." *See* I.D. at 41. Respondents' *post hoc* rationalizations

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[6] Boden explicitly declared, "No one at Timbervest recalls how or exactly when the discussions began regarding a potential purchase of the Alabama Property [from Chen Timber to TVP']." Div. Ex. 156a at ¶ 7; *see* Tr. 181:23-184:21. Asked whether he had a specific recollection that higher-than-expected returns for Wolf Creek property were among the reasons Timbervest decided to repurchase Tenneco for TVP, Boden answered that he believed so, but he acknowledged: "Seven years later, all I can do is reconstruct." Tr. 228:15.

regarding the increased value of the Tenneco property should be dismissed as irrelevant because, (1) they cannot erase Wooddall's testimony regarding when the repurchase price was established, and, (2) they do not even purport to be an explanation of why Respondents actually decided to repurchase the property.

3. Respondents' Valuation Reconstructions Further Undermine their Credibility

As discussed, Respondents' belated attempt to rationalize the repurchase of Tenneco Core based on reconstructed market data is largely irrelevant, given the direct evidence of the undisclosed conflicts in the sale and repurchase of the property. Still, Respondents' arguments are worth noting because the inconsistencies in their discussions of the Wolf Creek parcels further undermine their credibility. For example, as previously stated, throughout the investigation and during the hearing, Respondents claimed that sales of the Wolf Creek properties in early November 2006 likely persuaded them that the Tenneco Core property had appreciated in value and led them to repurchase the property at a $1 million premium above the initial sale price. *See* Timbervest Post-Hearing Brief at 28 (stating, "Every indicator available to Timbervest with respect to TVP's purchase of Tenneco showed that the purchase price was fair. First, *and perhaps most importantly*, Timbervest started to see nearby properties out of the Wolf Creek package go under contract at strong prices.")(emphasis added); *see also* Timbervest Appeal at 9. Respondents also claimed that other factors, such as increased timber volume and higher pulpwood prices, justified paying a higher price for the property. Timbervest Post-Hearing Brief at 29; Timbervest Appeal at 9.

As noted in the Division's response to Respondents' Post-Hearing Brief, these *post hoc* rationalizations are both illogical and contrary to the contemporaneous documentation. *See* Division of Enforcement's Consolidated Response to Respondents' Post-Hearing Briefs at 26-

29. Contrary to Respondents testimony, the Wolf Creek parcels did not see a dramatic increase in value between August 2006 and November 2006. Evidence introduced at the hearing showed that in August 2006, Timbervest expected the Wolf Creek package to sell for $1,424 per acre. Div. Ex. 16 at 18774; I.D. at 42. New Forestry closed on sales of five Wolf Creek parcels before TVP acquired Tenneco, and realized $1,461 per acre. I.D. at 42; Div. Ex. 128. Thus, when the Respondents repurchased Tenneco for TVP (and when they offered to buy Tenneco for a $1 million premium on November 30, 2006), they knew that Wolf Creek was selling for almost exactly what Timbervest predicted in August 2006.

Moreover, Respondents' claim that increased volume and pulpwood prices in the third quarter of 2006 would have contributed to their willingness to pay more for Tenneco than the amount for which they had recently sold it is illogical. Timbervest Appeal at 9. As noted above, Timbervest also claimed that the Wolf Creek sales indicated to them that bare land values had risen dramatically. *See* Timbervest Post-Hearing Brief at 28-29; Timbervest Appeal at 9. What the Respondents did not explain, however, is how both bare land and timber values for the Tenneco core and non-core timberland surged dramatically, yet the Wolf Creek parcels sold for exactly what Timbervest predicted in August 2006. As the ALJ rightly found, if the Wolf Creek sales were coming in as expected while the price of pulpwood was increasing, then the value of the bare land was necessarily *decreasing*, which contradicts the Respondents' account. I.D. at 43.

Finally, documentation of Timbervest's due diligence for TVP's purchase of the Tenneco core property exists in the form of the "Spec Book" for Gilliam Forest (as Tenneco was renamed). Div. Ex. 162. The Respondents acknowledged at the hearing that the Spec Book reflects the due diligence and analysis behind the purchase. Tr. 240:9-12. Tellingly, the Spec

Book for Gilliam Forest contains no reference whatsoever to price signals obtained from sales of the Wolf Creek parcels. I.D. at 26. In fact, the Spec Book states explicitly the properties that were considered for pricing purposes, and Wolf Creek parcels are notably absent. *Id.* Instead, there are four "comps" listed from 2005 sales, and one each from 2003 and 2004 sales. Div. Ex. 162 at 3.

The documentary evidence therefore clearly showed that, if Wolf Creek and Tenneco Core did increase in value during the relevant period, that data was clearly possessed by Respondents no later than August 6, 2006 – *i.e.*, before they signed their first contract with Wooddall. When combined with the fact that the Gilliam Spec Book contains absolutely no reference to the Wolf Creek parcels being listed as "comps," it is simply not possible to conclude that the Respondents paid a $1 million premium to repurchase Tenneco Core based on recently-obtained market data that came into their possession between the signing of the initial contract with Wooddall in September 2006 and Boden emailing an offer to repurchase it from Wooddall in November 2006.[7] Indeed, the most reasonable conclusion to be drawn from the Wolf Creek sales data is that Respondents have attempted to incorporate it as part of their fabricated story that was reversed-engineered in order to conceal their attempt to cross trade Tenneco Core.

Given these incurable deficiencies in their pricing explanation, and given the ALJ's finding that Timbervest possessed all relevant indicators of rising value for Tenneco (both core and non-core) before the first contract with Wooddall was signed (*see* I.D. at 42-43), it is not

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[7] Respondents' references to the NCREIF index and the market value of the Plum Creek REIT (Timbervest Appeal at 11) are of no value because Respondents have established no link between these metrics and the value of the Tenneco property. To the contrary, AT&T's Frank Ranlett testified that the NCREIF index would be of no use in evaluating an individual transaction. Tr. 1201:22-1202:25.

surprising that the Respondents are now, in their Appeals, trying to minimize the role that the Wolf Creek data played in their decision to repurchase Tenneco Core.[8] Indeed, they now **reverse** their position about the importance of the Wolf Creek sales, claiming that "the value of the Tenneco Non-core properties was *largely irrelevant* to the value of the Tenneco Core because the two properties had different sizes, locations, property features, valuations, and markets for potential buyers." Boden Appeal at 8 (emphasis added); *see also* Timbervest Appeal at 10; Zell Appeal at 3. This stands in marked contrast to the position they took during the investigation and at the hearing. In its post-hearing brief, Timbervest stated that the Wolf Creek sales data was, perhaps, the "most important" factor in determining that the value of the Tenneco Core was increasing. Timbervest Post-Hearing Brief at 28. This statement was consistent with Timbervest's Wells submission, which stated, "Through the listing process with the Wolf Creek Sales Package, Timbervest gained valuable market intelligence regarding the existence and depth

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[8] Based on the Respondents' repeated testimony that the Wolf Creek sales data was the basis for Timbervest's determination that the value of the Tenneco Core was increasing, and based also on the fact that the Wolf Creek parcels sold in November 2006 for exactly the value anticipated in August 2006, the ALJ concluded that Timbervest possessed the information about the supposedly increased value for Wolf Creek (and, by extension, Tenneco Core) before Timbervest executed the contract to sell Tenneco Core to Wooddall in September 2006. *See* I.D. at 42 (stating, "Boden's testimony that Tenneco Noncore data provided the basis for Timbervest's valuation of Tenneco Core is consistent with Seabolt's letter to Ranlett, and I credit it."). The ALJ thus found that the sale to Chen Timber "was not a 'good sale for New Forestry,' as Timbervest argues," and he concluded that Respondents defrauded New Forestry by selling the property to Wooddall at below market value and repurchasing it on behalf of TVP. I.D. at 43. The Division accepts the ALJ's conclusion as a reasonable one. Nevertheless, given the Respondents' recent equivocations regarding the importance of the Wolf Creek data (discussed below), their credibility on this point has completely eroded. The Division submits that it may be more reasonable to find that Respondents did not in fact rely on the Wolf Creek sales at all, but simply offered the Wolf Creek data as an after-the-fact attempt to reconstruct a false and misleading justification for their cross trade of Tenneco Core. Such a finding would be supported by the fact that the Respondents have admitted that no one recalls actually having relied on the sale of the Wolf Creek properties in determining to sell and repurchase Tenneco Core and that their explanations regarding Wolf Creek are "reconstructions." *See* I.D. at 41.

of the recreational small tract market in northeast Alabama, as well as the strengthening in overall bare land prices in the area *which it was able to apply to its analysis of the acquisition of the Core Timberlands property.*" Div. Ex. 74 at 35 (emphasis added). Moreover, Timbervest's general counsel, Carolyn Seabolt, made the exact same (nearly verbatim) representation in a letter seeking to explain the cross trade to AT&T in 2012. *See* Div. Ex. 128 at 11. Likewise, at the hearing Boden testified:

> Q. Do you have a specific recollection that the supposedly higher-than-expected return for the Wolf Creek properties was the reason that Timbervest decided to repurchase the Tenneco property for TVP?
>
> A. I believed it was one of the *key* reasons.

Tr. 228:7-11 (emphasis added).

Now, after arguing throughout the investigation and the hearing that the Wolf Creek data was a crucial component of their decision to repurchase the property at a $1 million premium, Respondents seek to distance themselves from their own false narrative by claiming that the value of the Wolf Creek packages was not particularly relevant to the value of the Tenneco Core and, at most, merely "gave [them] comfort" that bare land prices were increasing.[9] Boden Appeal at 8; *see also* Timbervest Appeal at 9-10. Such equivocations are consistent with the Respondents' demonstrated willingness to contrive explanations in order to conceal their liability. Their disingenuousness should be considered by the Commission as yet another indicator that revoking their registration and individually barring them from association with an investment adviser are in the public interest. *See* Brief Supporting Division of Enforcement's Petition for Review at 44-47.

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[9] Of course, this argument is still misleading. As noted above, given the increasing price of pulpwood, the fact that the Wolf Creek sales were coming in as expected shows, if anything, that bare land values were actually decreasing. *See* I.D. at 43.

IV. THE RESPONDENTS' PURPORTEDLY FADED MEMORIES ARE NO DEFENSE

Respondents also complain that this matter suffers greatly from the faded memories of the witnesses given the passage of time. Timbervest Appeal at 5. This is a backdoor effort to assert the defense of laches, a claim that is not available against the Commission. *David Disner, et al.*, Release No. 34-38234, 1997 WL 47268 at * 5 (Feb 4, 1997) (stating that"the defense of laches is not available against a United States government agency acting in the public interest").

Moreover, the only significant memory lapses were confined to the Respondents and the witnesses with whom they shared legal counsel.[10] For example: (1) the four individual Respondents suffered from a memory lapse about how the anomalous repurchase of Tenneco by a Timbervest fund came about (Div. Ex. 156a; Tr. 181:23-184:13; 1254:23-1255:11; 1551:241553:14; 1561:10-15; 2255:14-2257:4);[11] (2) Shapiro remembered nothing of what he said to Schwartz when he supposedly disclosed the conflict of interest relating to the fees (Tr. 1776:25-1777:2); (3) Shapiro could not recall what, if anything, Schwartz said in response to his supposed disclosure (*Id.*); (4) Carter, a Timbervest employee, could not remember who told him Chen Timber approached TVP to sell Tenneco because of "another opportunity" (Tr. 942:16-943:9; 945:5-16); and (5) Harrison, Boden's personal lawyer, drew a blank on why he drafted an

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[10] Shapiro, Boden, Zell, Jones, and Harrison were all represented at the hearing by Sutherland, Asbill & Brennan. Likewise, Timbervest and Carter were both represented by Rogers & Hardin.

[11] By contrast, Boden easily recalled, without reviewing any document, the precise amount at which he offered (unsuccessfully) to sell Glawson to Reid Hailey in the fall of 2005 ("book value, four-million-four-seventy"). Tr. 256:17-18. Similarly, Boden and Shapiro recalled without hesitation the complex terms of the supposed oral agreement that they supposedly made in 2002. Tr. 193:1-5; Div. Ex. 127.

assignment of the option to purchase Glawson (Tr. 697:22-698:3). The Division maintains that these were all memory lapses of convenience, feigned to avoid inculpating the Respondents.

By contrast, the Division, which bore the burden of proof, produced credible witnesses proving Respondents' liability, notwithstanding the passage of time. Unbiased witnesses who were independently represented, including Wooddall, Schwartz, and Barag, were not afflicted with wholesale memory losses about distinctly memorable topics. For example: (1) Wooddall remembered negotiating with Boden the $14.5 million repurchase price for Tenneco *before* Chen Timber contracted to buy the property (Tr. 770:19-771:6); (2) Schwartz was sure that Shapiro never disclosed to him plans to pay commissions to a Timbervest principal on behalf of New Forestry (Tr. 2063:3-9; and (3) Barag remembered having specific conversations with Shapiro, Jones and Zell regarding ERISA's prohibition on cross-trades and the fact that they couldn't receive any fees that were not outlined in the management agreements (Tr. 1933:22-1936:5; 1942:10-1943:1; 1948:3-1949:2).

Evidence of what actually happened from witnesses with competent powers of recollection renders the Respondents' memory lapses and prevarications irrelevant. Regardless of whether the Respondents' and their cohorts' memory lapses were real or feigned, Wooddall, Schwartz, and Barag gave credible testimony against the Respondents regarding crucial events, and their testimony was rightly credited.

V. RESPONDENTS ACTED WITH SCIENTER

Timbervest violated Section 206(1) and (2) the Advisers Act by failing to disclose two material conflicts of interest: (1) the payment of commissions to Boden and (2) the agreement to repurchase the Tenneco Core property. The individual respondents substantially assisted these

violations by approving both the Tenneco Core repurchase and the payment of fees to Boden. I.D. at 60.

Respondents contend that they lacked the requisite scienter, such that no violations of the Advisers Act occurred. Timbervest Appeal at 17-18. The record shows otherwise. As to the cross trade of the Tenneco Core property, Boden was the point-man who negotiated both aspects of the transaction. Jones, Zell, and Shapiro each admitted that Boden could not have sold or repurchased the property without their consent. Each of them also admitted to being aware of and approving both the sale of Tenneco Core to Wooddall and the repurchase of the property a short time later by TVP. According to Barag's testimony, each of them was also aware that ERISA prohibited cross-trading of plan assets. Further, as the ALJ rightly noted, if land values were actually increasing in the region, each of them, as members of the investment committee, would have known that Tenneco Core was undervalued since the Wolf Creek properties were fetching prices that were anticipated as early as August 2006. Given their own knowledge and experience, along with the numerous red flags presented by the short time frame of the transaction, Jones, Zell, and Shapiro certainly acted recklessly (at least) in approving the sale and repurchase of Tenneco Core. Indeed, the only alternative conclusion that could be drawn from the record would be to conclude that the Respondents actually colluded in the transfer of the property to TVP and are now attempting to conceal their misconduct through an agreement to share counsel and to collectively claim memory lapses of the entire "anomalous" transaction.[12]

[12] If the Commission were to conclude that Respondents engaged in such a collective attempt to conceal their misconduct, that finding would, of course, support a determination that each individual Respondent also acted with scienter.

Respondents also acted with scienter in failing to disclose the payment of commissions to Boden. As discussed previously, Shapiro's scienter is manifest, as there is simply no way that he could have believed that he actually obtained the informed consent of either Schwartz or of BellSouth/AT&T based on his own testimony regarding the lone conversation he had with Schwartz in 2005. *See* I.D. at 52-53. Moreover, Schwartz credibly testified that he never consented to such a fee arrangement and that he was completely unaware that Boden had actually collected any fees. *Id.* at 49-50. As to Boden, the ALJ rightly concluded that his scienter was demonstrated by the multiple steps he and Ralph Harrison took to conceal his receipt of the fees. The contracts (which Boden admitted to reviewing) containing misleading descriptions of the supposed services provided by these shell companies, the exorbitant rate he paid to Harrison —on a contingent basis—for creating a byzantine payment structure bearing all the hallmarks of a money laundering scheme, and the receipt of the brokerage commissions in violation of Alabama and Kentucky real estate laws all demonstrate that Boden intended to defraud New Forestry. Regardless of what he now says regarding whether he believed that Shapiro had disclosed the fees to Schwartz and to ORG, his conduct *at the time* makes it clear that he did not believe any disclosure had actually occurred and that his collection of the fees was in fact unlawful. The ALJ therefore rightly found that Boden acted with scienter.

Regarding Zell and Jones, Respondents argue that the ALJ erred in finding that they caused Timbervest's violation as to the payment of Boden's fees. As the Division has argued, however, the ALJ was, if anything, too charitable in determining that Zell and Jones only acted negligently.[13] Indeed, the ALJ noted that multiple factors in the record "weigh in favor of

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[13] The Division contends that both Zell and Jones acted with scienter. *See* Brief Supporting Division of Enforcement's Petition for Review at 47-49.

finding scienter as to Zell and Jones" regarding the fees. I.D. at 53. He also stated: "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." *Id.* at 54. Although the ALJ ultimately concluded that Zell and Jones subjectively believed Shapiro's representation that he had obtained consent from the client to pay the fees to Boden (*see id.* at 53-54), the evidence overwhelmingly indicates that they could not have reasonably believed him. Zell and Jones willfully ignored the numerous red flags raised by the payments to Boden. For example, the receipt of fees by a principal of Timbervest was strictly prohibited by Timbervest's written agreements with the client. Timbervest also pledged in its agreements with the client not to engage in prohibited transactions under ERISA. Barag's testimony at the hearing demonstrated that Zell and Jones were aware of ERISA's requirements and of their responsibilities as ERISA fiduciaries. Finally, given their experience, Zell (as BellSouth's former manager for New Forestry) and Jones (as a former partner at a mid-sized Atlanta law firm and the CCO/General Counsel of Timbervest) had many reasons to be highly skeptical, even incredulous, of Shapiro's claim that the client had consented to the payment of fees outside of the management agreements without signing a written disclosure. Indeed, that they participated in in actually splitting the fees equally with Boden and Shapiro is an indicator that they acted, not negligently, but in collusion with their partners with the intent to defraud their client.

VI. THE SANCTIONS ORDERED BY THE ALJ WERE PROPER

Respondents further contend that the cease-and-desist order in this case is punitive and thus barred by the running of the statute of limitations under 18 U.S.C. § 2462 ("Section 2462").

They also complain that that the ALJ's disgorgement order was punitive and that it suffered from faulty analysis. Both arguments are without merit.

A. The Cease-and-Desist Order is Remedial

Respondents argue that the cease-and-desist order in this matter is punitive and therefore time-barred under Section 2462. Timbervest Appeal at 18-21. They are mistaken. The Commission and multiple courts have routinely rejected this argument, finding that cease-and-desist orders are, as a matter of law, remedial and thus not subject to the statute of limitations under Section 2462. *Riorden v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[A] cease-and-desist order is 'purely remedial and preventative' and not a 'penalty' or 'forfeiture.'") (internal citations omitted); *John Carley et al.*, Release No. 34-57246, 2008 WL 268598 at *21 (Jan. 31, 2008) ("[R]emedial relief such as the imposition of a cease-and-desist order is not barred by the statute of limitations in Section 2462"); *Herbert Moskowitz*, Release No. 34-45609, 2002 WL 434524 at* 10 (Mar. 21, 2002) ("Cease-and-desist proceedings are remedial in nature and not subject to Section 2462").

Even assuming *arguendo* that a cease-and-desist order could theoretically be considered punitive and therefore subject to Section 2462, the facts in this case show that such relief would be remedial because Respondents pose a threat of future harm. In determining whether to impose a cease-and-desist order, the Commission considers numerous factors such as (1) the egregiousness of the Respondents' actions, (2) the isolated or recurrent nature of the infractions, (3) the degree of scienter involved, (4) the sincerity of the Respondents' assurances against future violations, (5) the Respondents' recognition of the wrongful nature of their conduct, and (6) the likelihood that the Respondents' occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979).

Using the *Steadman* factors, the ALJ properly determined that Respondents conduct was "recurrent and egregious" and that it was in the public interest to order them to cease and desist from committing or causing further violations of the securities laws. I.D. at 64-65. Based on the facts developed at the hearing, the ALJ found that the Respondents defrauded BellSouth/AT&T by cross-trading its assets at a price below market value and by wrongfully causing the client's pension funds to pay them millions of dollars in improper brokerage and disposition fees. He also noted that all four Respondents acted with scienter, and that they have never admitted the wrongfulness of their actions. Indeed, the ALJ found that they never even conceded that their misconduct caused harm to their clients, stating, "Timbervest brazenly argues that Boden's fee agreement 'was designed to benefit New Forestry,' and that the Tenneco Core cross trade was 'a good sale for New Forestry.'" I.D. at 64.[14] The ALJ also concluded that the Respondents displayed an "obliviousness to their fiduciary duties, which continues today." I.D. at 65. This finding is further supported by Shapiro's post-hearing behavior, such as writing an article in the press specifically highlighting his failure to recognize his misconduct. *See* Brief Supporting Division of Enforcement's Petition for Review at 45. Finally, the ALJ found that the Respondents would have ample opportunities in the future to violate the securities laws given that they continue to operate active funds and plan to launch new funds in the future. *See* I.D. at 64-65. Accordingly, the ALJ properly determined that a cease-and-desist order would "clearly have a deterrent effect" on the Respondents, which was necessary because their self-serving assurances that they would refrain from any future violations were not deemed credible. *Id.* at 64

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[14] The ALJ found this argument to be "silly," noting correctly, "[O]bviously, depleting New Forestry's assets by over $1 million, for no reason other than that Boden felt entitled to it, did not benefit New Forestry." I.D. at 55. Respondents nevertheless trot out this same argument in their Appeals. *See* Timbervest Appeal at 3;

(stating, "Given Respondents' utter lack of recognition that their conduct violated the law, this assurance [that they will not engage in further violations] cannot be considered sincere.")

Respondents' claim that a cease-and-desist order is punitive because of the professional and reputational harm that Respondents would experience as a result of the order is likewise misguided. Timbervest Appeal at 20. As the D.C. Circuit noted in *Johnson v. SEC*, the test for whether a remedy is punitive or remedial is not a subjective test, but an objective one. 87 F.3d 484, 488 (D.C. Cir. 1996). Indeed, to conclude otherwise would convert all remedies, including disgorgement, into a form of punishment. *Id.*

B. The ALJ's Disgorgement Analysis Was Reasonable

Respondents also claim that the ALJ's disgorgement order in this matter was punitive because it went beyond the amount which Respondents profited from their wrongful conduct. They point out that, pursuant to their fee agreements with BellSouth, Timbervest was entitled to collect a 3% fee on the sale of Tenneco Core ($403,500) and on the sale of the Kentucky lands ($822,583.50). Timbervest Appeal at 22-23. Respondents' thus contend that they were "contractually entitled" to receive those fees and that the fees would have been paid regardless of whether Boden's fees were attached to the same transaction. *Id.* From this, they conclude that the ALJ misapplied the law by using a "sufficient nexus" test instead of attempting to determine whether there was a "causal relationship" between the violations and collection of the disposition fees. I.D. at 23. Respondents are simply attacking a straw man.

First and foremost, disgorgement is not subject to Section 2462. *Johnson*, 87 F.3d at 491; *see also SEC v. Kelly*, 663 F.Supp.2d 276, 286 (S.D.N.Y. 2009) ("[S]ection 2462's statute of limitations applies to the SEC's request for civil penalties but not to its request for permanent injunctive relief, disgorgement, or an officer and director bar"); *see also Zacharias v. SEC*, 569

F.3d 458, 473 (D.C. Cir. 2009) (disgorgement not punitive as a matter of law). Disgorgement is an equitable remedy designed to deprive a wrongdoer of unjust enrichment and also to deter others. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). In determining the appropriate amount of disgorgement, the SEC is required to show that the amount sought is a "reasonable approximation" of the profits reaped from the wrongful conduct. *See First City Financial Corp.*, 890 F.2d at 1231; *Zacharias* 569 F.3d at 472-73.

Moreover, contrary to Respondents' representations, the ALJ explicitly highlighted the causal relationship between the fraud and the collection of the disposition fees when he wrote, "Respondents sold both Tenneco Core and the Kentucky Lands as part of a fraudulent and undisclosed arrangement to collect unlawful brokerage fees. *Timbervest would not have earned disposition fees absent Respondents' wrongful conduct*, and disgorgement of fees earned as the result of wrongful conduct is proper." I.D. at 69 (emphasis added). The ALJ thus concluded that these sales were conducted, at least in part, to collect Boden's unlawful fees. That there was a way to collect the same fees lawfully is irrelevant. The disposition fees were obtained in this instance by engaging in transactions fraught with undisclosed conflicts of interest, conflicts which incentivized the Respondents to sell the properties at any price simply to collect Boden's brokerage commissions. As such, all profits associated with the tainted transactions, including Respondents' collection of any ancillary fees, are properly subject to disgorgement as "reasonable approximations" of the Respondents' unjust enrichment. *See First City Financial Corp.*, 890 F.2d at 1231.

VII. THERE WERE NO JURISDICTIONAL OR DUE PROCESS DEFICIENCIES IN THIS MATTER

In addition to their attempts to rewrite the record in their favor, Respondents' Appeals go on to raise numerous procedural arguments, many for the first time, including (1) that the ALJ lacked jurisdiction in the matter; (2) that their rights to due process were violated, (3) that the entire administrative forum is rife with bias, (4) that ALJ Elliot lacked impartiality. These arguments are wholly without merit.

A. The Commission has Jurisdiction Over this Matter

For the first time in these proceedings, Respondents complain that the conduct in this case was not subject to the Advisers Act, and that the ALJ exceeded his jurisdiction by finding that the cross trade of Tenneco Core and the undisclosed payment of fees to Boden and the other three principals violated Section 206 of the Advisers Act. Timbervest Appeal at 23-24. In support of their claim, they note that the cross trade and the payment of the fees involved real estate transactions, which are not securities and are therefore not subject to the Advisers Act. *Id.* Respondents misstate their duty under the Advisers Act.

First, as the ALJ highlighted, Respondents do not dispute that Timbervest is an investment adviser and that it has been registered with the Commission since 1995. I.D. at 59. It is also clear that Timbervest entered into an advisory relationship with the three BellSouth pension trusts and with New Forestry, LLC, signing investment management agreements with each of these entities. *See* Div. Exs. 46, 48-50. These agreements empowered Timbervest to render advice with respect to a number of potential investments, including investments that undeniably qualify as securities. *See, e.g.,* New Forestry Limited Liability Company Agreement, Ex 46 §§2.51, 2.80 ("Permitted Investments" include investments in money market funds, as

well as "Interests in Timber," which is defined to include direct equity investments in corporations organized to hold interests in forestlands).

As an investment adviser to New Forestry and to the BellSouth pension trusts, Timbervest owed each of these clients an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts.'" *Capital Gains Research Bureau*, 375 U.S. at, 191-92. Moreover, undisclosed conflicts are clearly material (*see Vernazza*, 327 F.3d at 859), and an investment adviser that fails to disclose conflicts of interest demonstrates, at a minimum, "a reckless disregard for the well-established fiduciary duty [it owes to its] clients." *Montford and Company, Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *19 (May 2, 2014).

As discussed, the Respondents failed to disclose to BellSouth/AT&T the conflicts of interest presented by the cross trade of Tenneco Core. They also failed to disclose the conflicts inherent in paying fees to Boden and, subsequently, the three other partners. It is irrelevant that their misconduct involved real estate investments that may not qualify as securities. Unlike the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, Sections 206(1) and (2) of the Advisers Act are not limited to fraud that is connected with securities transactions. *See Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services,* Investment Advisers Act Release No. 1092, 1987 WL 112702 at * 9 (Oct. 8, 1987) (stating that "the Commission has applied Sections 206(1) and 206(2) in circumstances in which the fraudulent conduct arose out of the investment advisory relationship between an investment adviser and its clients, even though the conduct does not involve a securities transaction"); *SEC v. Dibella*, 2005 WL 3215899 at * (D. Conn. Nov. 29,

2005) (noting that Section 206 of the Investment Advisers Act of 1940 does not require proof that fraud was "in connection with the provision of investment advice").

The issue is whether Timbervest breached its fiduciary duty to its investment advisory client by not disclosing material facts. The ALJ rightly concluded that it did. I.D. at 59-60.

B. There Were No *Brady* Violations in this Matter

Respondents also contend that that the ALJs violated their due process rights when they refused to order production of the Division's privileged notes of its initial interviews of Schwartz in June 2012 (the "June 2012 Notes" or "Notes"), which Respondents insist contain materially exculpatory material. Their arguments are baseless.

Rule 230(b)(2) of the Commission's Rules of Practice provides that the Division may not withhold "material exculpatory evidence" under the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), even if the information is otherwise exempt from disclosure in Rule 230. It is clear, however, that "the protections of *Brady* do not require the Government to provide potentially exculpatory information *that is already known to the defendant*." *United States v. Aguirre*, 155 Fed. Appx. 145, 151 (5th Cir. 2005)(emphasis added); *see also Perez v. Smith*, 791 F. Supp. 2d 291, 317-18 (E.D.N.Y. 2011) (government not required to turn over statements of witness when witness has disclosed the substance of those statements to the defense); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) ("[e]vidence that is merely cumulative, is not material").

The record demonstrates that the Respondents already possessed all of the material information contained in the June 2012 Notes, which they had already obtained through other means far in advance of the hearing. For example, Timbervest's own correspondences with the Division, namely its Wells submission and a supplemental letter from Timbervest's counsel on April 22, 2013 (Div. Exs. 74, 77), indicate that the Respondents had unfettered access to

Schwartz at the time of his interviews with the Division and that they had questioned Schwartz immediately before and after his interviews with the Division. The correspondences also show that Respondents were aware of what Schwartz said in those interviews, as they memorialize in great detail Schwartz's account of what he told the Division's attorneys.

Moreover, after receiving a Wells notice from the Division in January 2013, the Respondents were given an opportunity to review Schwartz's full testimony transcript, which contained more fulsome discussions of the material recorded in the June 2012 notes.[15] For example, in his investigative transcript, Schwartz explained in detail (1) that he felt he had answered incorrectly with regard to certain questions the Division asked him during the June 2012 interviews, (2) what his prior answers had been, and (3) why his current answers were different. *See* Ex. L, attached to Division of Enforcement's Response to Respondents' Motion to Compel *Brady* Material, Doc. 21.

Given their own access to and debriefing of Schwartz, documented extensively in their correspondences with the Division, the Respondents' complaints that they were unable to thoroughly impeach Schwartz because they did not know what he said in his June 2012 interviews is truly disingenuous. Respondents' own correspondences with the Division clearly show that they already possessed the information contained in the Notes long before the hearing even began. Indeed, these correspondences, when read together with Schwartz's investigative testimony, and his testimony at trial, make it is obvious that the Respondents' complaint that the ALJ violated their *Brady* rights is nothing more than a smokescreen designed to obscure the fact they defrauded their client by engaging in undisclosed, self-dealing transactions.

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[15] This transcript was also produced in full in October 2013 as part of the Division's Rule 230(a) production.

Two ALJs considered and rejected Respondents' *Brady* argument on three separate occasions. First, following the discovery of its inadvertent disclosure of privileged material, the Division filed a motion for a protective order with regard to the June 2012 Notes, and the Respondents filed a motion to compel the production of *Brady* material on the same day. After reviewing both motions, Chief ALJ Murray rightly determined that the Notes contained no materially exculpatory information and ordered that the Notes be destroyed by Respondents and that the information contained therein be put to no further use.[16] *See* Order on Several Pending Motions, Doc. 22 at 2.

Respondents again pressed their *Brady* argument at the hearing, and, on at least two separate occasions, ALJ Elliot considered their arguments that the June 2012 Notes contained *Brady* material. Tr. 432-433; 781-798; 980-982; 2175-2178; 2222. In both instances, ALJ Elliot read the Notes, considered the Respondents' arguments, and determined that the Notes contained no materially exculpatory information.

To the contrary, upon first considering Respondents' *Brady* motion, ALJ Elliot actually stated that he considered the Notes to be *inculpatory*, stating, "I agree with Judge Murray, looked at in the totality, these notes do not help you. If Mr. Schwartz testifies consistently with what is in Mr. Gordon's notes, he's a much better witness for the Division than for you guys." Tr. at

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[16] The Division also filed a response brief opposing Respondents' *Brady* motion. *See* Division of Enforcement's Response to Respondents' Motion to Compel *Brady* Material, Doc. 21. The Division filed the response on the same day that Chief ALJ Murray issued her Order denying the Respondents' motion to compel, and it is clear from the content of the Order that the judge had not read the Division's response before issuing her Order. At the hearing, however, ALJ Elliot did read the Division's response brief and concluded, "[W]ith one exception [which was read into evidence, *see* discussion below], I agree with the Division that much of what is in these notes that could arguably be considered exculpatory is already known or was already known to the Respondents. It was actually known a long time ago." Tr. 781:22-782:1.

640:6-10. Nevertheless, despite his assessment, ALJ Elliot chose to read one paragraph from the notes into the record, in an abundance of caution, notwithstanding the fact that all of the information contained therein was explicitly discussed in Schwartz's investigative testimony, which was produced to the Respondents and was therefore not *Brady* material. Tr. 798:4-12; 980:1-982:3.

Subsequently, during the cross-examination of Schwartz on the final day of the hearing, ALJ Elliot once more entertained Respondents' motion to reconsider their claim that the June 2012 Notes contained *Brady* material. Although he plainly stated, "[A]t this point, you know what's in there, you've seen them, so they haven't been withheld, there's no *Brady* here," ALJ Elliot once again, in an abundance of caution, allowed the notes to be used, this time to ask two direct questions of the witness from the bench, at the urging of Respondents' counsel. Tr. 2230-2231. When Respondents sought to have him ask questions related to an additional topic covered in the Notes, he finally refused, stating bluntly, "I don't really see any inconsistency [between the notes and Schwartz's testimony on that point]. And certainly, I mean, from the point of view of my evaluating [Schwartz's] credibility, I don't see a problem with it." Tr. 2228-2229.[17]

C. The ALJ's Findings Regarding Matters Not Pled Were Proper

Respondents also argue, incorrectly, that the ALJ violated their rights to a fair hearing when he made findings related to matters that were not pled in the Order Instituting Proceedings

[17] Respondents also claim that the ALJ's denial of their request to disclose the Division's notes of its interviews with Wooddall "resulted in prejudice" against them. Timbervest Appeal at 28-29. This claim lacks merit. At Respondents' request, the Court reviewed the notes *in camera* at the hearing and correctly determined that they contained no *Brady* material. Respondents base their claim that they were deprived of *Brady* material on unsubstantiated assertions that Wooddall provided prior inconsistent statements to the Division. *Id.* Such uncorroborated self-serving claims are entitled to no weight.

("OIP"). Timbervest Appeal at 29-32. Respondents first allege that the ALJ violated their due process rights when, in addition to finding that Respondents failed to disclose the cross trade of Tenneco Core, he also found that Respondents undervalued the property when they sold it to Wooddall. *Id.* at 30. They complain, for reasons which they do not explain, that the ALJ's conclusion harmed them because "the Division never pled (or even explicitly argued) that Tenneco was undervalued when Timbervest sold it on behalf of New Forestry." Timbervest Appeal at 30.

This argument is a red herring. As noted, the ALJ rightly found that the Respondents violated Section 206(1) by failing to disclose the sale and repurchase of Tenneco Core, which was properly pled, and which Respondents knew was an issue long before the institution of the proceedings. *See* Timbervest Wells Submission, Div. Ex. 74. Moreover, the Respondents conveniently ignore that *they* were the ones who introduced the information regarding Timbervest's valuation of the Tenneco properties. They can scarcely be heard now to complain that the ALJ listened to their justifications, found that they lacked credibility, and drew conclusions to the contrary.

Respondents also contend that the ALJ's finding that the sale and repurchase of Tenneco operated as a cross trade was contrary to the allegations in the OIP, which alleged a "parking" arrangement. Timbervest Appeal at 30. In support of their argument they wax on about the technical differences (as they see them) between parking arrangements and cross trades, and thus conclude that the ALJ attempted to unilaterally create new rules that enlarged the scope of the Advisers Act. Timbervest Appeal at 30-31.

These arguments are mere sophistry. What the Respondents do not contend, nor could they, is that they lacked notice of the allegations against them in this matter. *See Morris J.*

Reiter, 39 SEC 484 (1959) (OIP need only identify the subject matter of the misrepresentations and omissions are sufficient and provide respondents adequate notice of the charges against them). Indeed, the OIP explicitly stated that the Respondents sold the property to Wooddall under an undisclosed agreement to repurchase the property at a higher price, which they later did. *See* OIP, Doc. 1 at ¶¶ 6-15. Whether one wishes to characterize the agreement as a parking arrangement (OIP at ¶¶ 9,14), a cross trade (I.D. at 36, n.15, 44), "land banking" (I.D. at 22, 44), a "verbal option" (I.D. at 23, 44), or a "gentleman's agreement" (I.D. at 44), the underlying facts, proven at the hearing, show that Respondents failed to disclose to their client the conflict of interest presented by the repurchase arrangement. By any name, that is fraud.

Finally, the Respondents claim that the ALJ erred by making findings with regard to the Glawson property. This argument is a diversion. The ALJ did find that Respondents' conduct relating to Glawson was relevant to the charged matters, especially to Boden's scienter with regard to the collection of the fees (*see* I.D. at 44-45, 54-59), but the Respondents were not charged with conduct relating to the Glawson property, and the findings do not hold them liable for their activities with regard to it. That they were placed in a position of having to respond to evidence which further undermined their credibility does not violate their right to due process. To the contrary, it is an indication that due process has been upheld in a properly contested proceeding. Moreover, the Commission has concluded that it may consider conduct outside the OIP in determining the appropriate sanction. *Montford and Company*, 2014 WL 1744130 at * 19 (May 2, 2014).

D. The ALJ Was Not Biased

The Respondents next allege that the administrative forum in general lacks impartiality, and that ALJ Elliot, in particular, possesses incurable bias. Timbervest Appeal at 32-37. In

support of their claims they cite to an unsubstantiated news article which they use to imply that the Division's winning percentage in administrative hearings is so high that it cannot be reflective of the merits of the cases it brings. *Id.* at 33. Likewise, in an unsubstantiated *ad hominem* attack on the ALJ's integrity, they claim that ALJ Elliot always rules in favor of the Division.[18] *Id.* at 33-34. They also assert that his track record of rulings is "astounding," demonstrating his "utter deference to the Division," which "rebuts any presumption of impartiality." *Id.* Finally, they amass a list of adverse rulings which, they claim, are without support in the record and clearly show the ALJ's bias in favor of the Division. *Id.* at 34-37.

These allegations barely merit a response. Suffice it to say that debatable inferences drawn from unsubstantiated statistics in a news article do not constitute evidence of bias. Similarly, adverse rulings are also not indicative of bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994) (stating that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Each finding in the ALJ's 73-page decision (many of which favored the Respondents) was reasoned and substantiated. Respondents have cherry-picked a few findings which they particularly disliked and are now using those as the basis to attack the ALJ's impartiality. Needless to say, they have failed to make a compelling case that the ALJ was unfairly biased against them. To the contrary, the ALJ's willingness to entertain Respondents' repeated *Brady* claims demonstrates his fairness to Respondents. Their arguments are thus completely baseless and should be rejected.

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[18] Winning, it seems, is in the eye of the beholder. Respondents conveniently forget that, in this matter alone, the Division did not prevail in its claims that Zell and Jones acted with scienter as to the payment of fees to Boden and in its attempts to obtain associational bars, revocation of registration, and additional disgorgement amounts. *See* Brief Supporting Division of Enforcement's Petition for Review.

VIII. RESPONDENTS' OTHER CONSTITUTIONAL COMPLAINTS ARE WITHOUT MERIT

Respondents conclude their Appeals by introducing two constitutional challenges, both of which are being raised for the first time.

A. The Commission Did Not Violate Respondents' Rights to Equal Protection Under the Law

Respondents first argue that they have been deprived of equal protection because the Commission arbitrarily chose "to bring this enforcement action against Respondents in its own administrative forum." Timbervest Appeal at 37. They further claim that this decision "violates the bedrock principal of administrative law that 'an agency must not treat like cases differently.'" *Id.* Respondents appear to be making a "class of one" equal protection claim, though that is far from clear. *See Gupta v. SEC*, 796 F. Supp.2d 503, 513 (S.D.N.Y. July 11, 2011). If so, to succeed on such a claim, they would have to show (1) intentionally different treatment from other similarly situated parties and (2) the lack of rational basis for such different treatment. *John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot28 LLC*, Initial Decision Release No. 693, at 6 (Oct. 17, 2014); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Witt v. Vill. of Mamaroneck*, 2014 WL 1327502, at *7 (S.D.N.Y. Mar. 31, 2014).

Even assuming that Respondents have stated a cognizable claim, they do not attempt to support their allegation. Respondents have identified no similarly situated litigants who were charged in federal court, nor have they provided specific arguments as to how any such litigants were similarly situated to them. *See Missere v. Gross*, 826 F. Supp. 2d 542, 561 (S.D.N.Y. 2011) (necessary to show an extremely high degree of similarity between claimants and the persons to whom claimants compare themselves). As they have failed to demonstrate that they were disparately treated, it necessarily follows that they cannot establish that such alleged

differential treatment lacked a rational basis. Nor do they even try. Instead, Respondents make the unsupported assertion that the only basis for choosing to pursue a case against a registered investment adviser in an administrative forum was so that the Commission could disadvantage the Respondents in some unspecified manner. Speculation, of course, is not evidence, and their equal protection argument must be rejected.

B. The Commission's Administrative Proceedings Are Constitutional

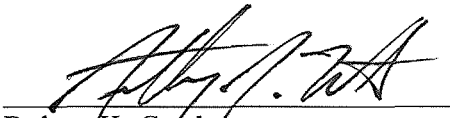
Finally, Timbervest's belated, concluding argument that Commission administrative proceedings before an ALJ violate Article II of the Constitution should be rejected. The Commission's ALJ regime is constitutional. Timbervest's conclusory, two-paragraph argument in support of the asserted constitutional violation does not identify in detail or otherwise expound on the contours of any challenge to the ALJ regime. Were Timbervest to develop this argument more fully, including in any reply brief, or should the Commission determine that it would benefit from further briefing, the Division requests that it be permitted to submit a brief addressing such arguments at the appropriate time.

IX. CONCLUSION

For the reasons discussed above, Respondents' petitions, as detailed in their Appeals, should be rejected.

This 1st day of December, 2014.

Respectfully submitted,



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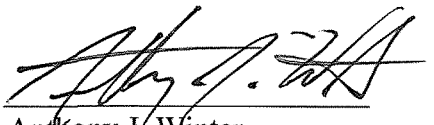
CERTIFICATE OF COMPLIANCE WITH SEC'S RULE OF PRACTICE 450(c)

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 12,004 words.



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