UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

RECEIVED
DEC 01 2014
OFFICE OF THE SECRETARY

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.

Respondents' Opposition to the Brief Supporting Division of Enforcement's Petition for Review

RESPONDENTS' OPPOSITION TO THE BRIEF SUPPORTING DIVISION OF ENFORCEMENT'S PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Introduction

The Division seeks reversal of the Initial Decision on two issues in which the ALJ found against it. The Division argues for: (1) the imposition of associational bars against the individual Respondents and the revocation of Timbervest's license, and (2) a finding that Respondents Zell and Jones acted with scienter with respect to the payment of fees to Boden. Neither of these requests should be granted.

With respect to the bars, the Division asks the Commission to bar Respondents from the industry in which they earn their living based on scant, distorted, and stale evidence and a gross misapplication of the legal standard. The associational bars and license-revocation are wholly barred by the statute of limitations, and even if they were not, there is no likelihood of future misconduct sufficient to warrant the imposition of such severe penalties. With respect to Zell and Jones, neither acted with scienter regarding Boden's fees. They acted with the reasonable belief that Shapiro had effectively disclosed the fee arrangement to their client. Even the ALJ, who found in favor of the Division on almost every other factual dispute, found that Zell and Jones did not act with scienter.

Despite raising only two discrete issues in its appeal, the Division spends much of its Brief discussing irrelevant facts and slandering the Respondents and non-Respondents alike. The Division's "facts" are divorced from reality, and Respondents address each one in turn.[1]

II. Associational bars are inappropriate.

The Division claims that the Partners should be barred from associating with any investment advisor and that Timbervest's registration as an investment adviser should be

[1] Highlighting the fact that the Division's "facts" have no basis in the evidence are the curious citations in the Division's Brief. Throughout its Brief, the Division cites primarily to the Initial Decision to support its conclusions. But the ALJ's findings are not evidence. Indeed, the Commission conducts a *de novo* review of the record at this stage.

revoked.[2] These extreme sanctions are penalties categorically barred by the statute of limitations. Even if the Commission breaks with binding precedent to consider whether a threat of future misconduct justifies such relief, it is clear that Respondents pose no such threat here.

A. Associational bars are barred by the statute of limitations.

No decision, from the Commission or any federal court, has ever held that an associational bar was appropriate when the entire alleged basis for the relief occurred more than five years before the institution of proceedings. The Commission should follow the strong precedent and affirm the ALJ, who decided that the statute of limitations bars the relief requested.

Under 28 U.S.C. § 2462, all actions for "any civil fine, penalty, or forfeiture," must be commenced within five years after the claim accrued. These claims accrued no later than April 3, 2007. The Division instituted proceedings on September 24, 2013—six-and-a-half years after accrual. Thus, any claim for a "civil fine, penalty, or forfeiture" is barred by § 2462.

Censures, bars, and suspensions have consistently been held to be penalties barred by the statute of limitations. The D.C. Circuit made this clear in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). The court held that suspending Johnson from the industry was punitive and not remedial, requiring application of § 2462. *Id.* at 492. The six-month suspension at issue was penal because it was "likely to have longer-lasting repercussions on [Johnson's] ability to pursue her vocation." *Id.* at 489. The Fifth Circuit has also characterized a bar as a penalty. *Steadman v. SEC*, 603 F.2d 1126, 1139-40 (5th Cir. 1978). In *Steadman*, the court recognized that, from Steadman's perspective, "exclusion from the industry is clearly a penalty" and cited several cases in support of that finding. *Id.* at 1139. The court went on to state "[w]e do not limit the Commission by

[2] The Division refers to both these penalties collectively as "associational bars." Respondents do the same here.

indicating these possible grounds for debarment, but rather give them as examples of the type of situation that would seem to justify that ***penalty***." *Id.* at 1140 (emphasis added).

The Commission has consistently applied this holding from *Johnson*. *See, e.g.*, *Brown*, 2012 WL 625874, at *14 (Feb. 27, 2012) (Commission recognized § 2462 applies to bars and imposed bar only because respondent entered tolling agreement before the limitations period expired); *Trautman*, 2009 WL 6761741, at *20 (Dec. 15, 2009) ("Section 2462 precludes our consideration of [Respondent's] conduct occurring before [the statute of limitations accrued] in determining whether to impose a bar or civil penalty."); *Carley*, 2008 WL 268598 (Jan. 31, 2008) ("We have not considered misconduct occurring before September 1, 1999, in determining to impose bars or civil penalties, but rather have based these sanctions exclusively on Respondents' conduct during the five-year period preceding issuance of the OIP."); *Warwick Capital Management*, 2008 WL 149127, at *10 (Jan. 16, 2008) ("Section 2462 precludes consideration of Respondents' conduct occurring before [the statute of limitations accrued], in determining whether to impose an investment advisory bar or civil penalties.").

The reason for this long line of cases is clear: revoking a professional license and severely constricting an individual's ability to have gainful employment in his or her chosen professional field is a penalty. The Supreme Court and numerous lower federal courts have described excluding a person from his or her chosen profession or suspending or revoking a professional's license as a penalty. *See, e.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967) (holding that disbarment from the practice of law is a *penalty* that triggers the minimum protections of due process notice, a hearing, and the right not to testify against oneself); *United States v. Lovett*, 328 U.S. 303, 316 (1946) ("[P]ermanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C.

Cir. 1977) ("Disbarment or suspension [of an attorney] is equivalent to the penalty imposed on Collins by the SEC here."); *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229 (5th Cir. 1998) ("Although disbarment is intended to protect the public, it is a 'punishment or penalty imposed on the lawyer.'"); *Nat'l Surety Co. v. Page*, 58 F.2d 145, 148 (4th Cir. 1932) (finding that a proceeding "to revoke the license of an insurance agent is not, strictly speaking, either a criminal or a civil action. It is an anomalous proceeding, *penal in its nature*, prosecuted, not for the benefit of an individual, but in the interest of the public.") (emphasis added).

The cases the Division cites do not change the analysis. Importantly, *not a single one* of the Division's cases imposed an associational bar that was otherwise barred by the statute of limitations based on some threat of future harm. Only three even imposed an associational bar, but in each of those cases, the Commission did not need to reach the decision of whether § 2462 applied to the proceeding. For example, in *Valdislav Steven Zubkis*, 2005 WL 3299148 (Dec. 2, 2005), the statute of limitations was not at issue because the Respondent had been enjoined four years earlier in federal court. That injunction, not any other conduct, was the basis for the Division's action, and the statute of limitations was not in issue.

Likewise, in *Bartko*, 2014 WL 896758, at *9 (Mar. 7, 2014), the Commission specifically held that § 2462 did not apply because the proceeding was instituted under § 15(b) of the Exchange Act, which "expressly authorizes the Commission to commence a proceeding up to ten years from the date of a covered conviction." Moreover, the event "triggering [the] cause of action" in *Bartko* was Bartko's conviction, which had occurred only 14 months prior to the institution of proceedings. *Id.*

Finally, *Contorinis*, 2014 WL 1665995 (Apr. 25, 2014), was similarly brought within five years of Respondent's criminal conviction and civil injunction, both of which formed the basis for the suit. Moreover, in *Contorinis*, the Commission made the exact distinction the ALJ did here (and about which the Division complains). In his Decision, the ALJ found that *Zubkis*, *Bartko*, and *Contorinis* were distinguishable because they were follow-on proceedings. In *Contorinis* the Commission agreed: "[T]he five-year statute of limitations does not apply in this case because a follow-on proceeding . . . is not 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' within the meaning of § 2462." *Id.* at *3 (quoting 28 U.S.C. § 2462.) As the Commission explained, "[t]he present action is jurisdictionally grounded on Contorinis's criminal conviction and injunction, and thus it is the date of those events [not the underlying conduct] that is salient for statute of limitations purposes." *Id.*

The Division cites to *Meadows v. SEC*, 119 F.3d 1219 (5th Cir. 1997), for the proposition that § 2462 does not apply to associational bars even when imposed in an original administrative proceeding. But this case stands for nothing of the sort. *Meadows* did not address the statute of limitations or even cite to or mention § 2462. Nor could the statute of limitations have been at issue. The relevant conduct at issue in *Meadows* took place in 1990 and 1991, and the SEC instituted proceedings in January 1994, well within five years.

The Division also cites *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), but that case supports the Respondents. There, the court held that barring the defendant from the banking industry had the effect of "punishing Proffitt for his misconduct, [meaning that the bar's] punitive purpose plainly goes 'beyond compensation of the wronged party.'" *Id.* at 861 (quoting *Johnson*, 87 F.3d at 488).

The other cases the Division cites are inapposite. For example, *SEC v. Brown*, 740 F. Supp. 2d 148 (D.D.C. 2010), simply denied a motion to dismiss and ultimately never actually addressed whether the remedy sought there—an officer-and-director ("O&D") bar—was punitive or remedial because no O&D bar was ever imposed. Instead, one defendant settled before trial without a bar, and the other had an injunction imposed to refrain from violating an accounting bar that had been entered years earlier. Likewise, *SEC v. Jones*, 476 F. Supp. 2d 374 (S.D.N.Y. 2007), did not address associational bars. It focused on whether civil penalties and an injunction were barred by the statute of limitations and concluded that these remedies were, in fact, *unavailable* due to the passage of time.[3] Similarly, *Moskowitz*, 2002 WL 434524 (Mar. 21, 2002), did not impose a suspension or bar—only a cease-and-desist order was at issue.

Finally, the Division cites to two cases involving O&D bars, which are not analogous to the situation here. In *SEC v. Alexander*, 248 F.R.D. 108, 116 (E.D.N.Y. 2007), the court refused to decide whether such a bar was a penalty and specifically noted that the bar may be considered "a form of punishment." And while the court in *SEC v. Quinlan*, 373 Fed. App'x 581 (6th Cir. 2010), did conclude that the O&D bar at issue was remedial, rather than punitive, that case involved recurrent criminal violations of federal and state securities resulting in losses of more than 250 million to which Mr. Quinlan pled guilty. In addition, there is a material distinction between a O&D bar and an associational bar. An O&D bar applies only to officers and directors of *public companies*. It does not prevent a defendant from working in the relevant field or even from working for a public company. It prohibits a defendant only from sitting in the executive suite. This stands in stark contrast to an associational bar, which would prohibit Respondents from being associated in any capacity with *any* investment adviser, whether registered with the Commission or not.

The Division has no support for its contention that an associational bar can be imposed based solely on some inchoate threat of future harm, despite the statute of limitations having run.

[3] The Division misrepresented this holding when it said the court in *Jones* "found that Section 2462 did not apply to the sanctions at issue because there was a risk of future misconduct." (Br. at 43 n.14.)

The Commission has ruled, for years, that it would not consider conduct outside the statute of limitations in considering whether to impose an associational bar.

B. Respondents pose no threat of future harm and are competent to fulfill their fiduciary obligations.

Even if the Division were correct that bars and suspensions are not subject to the statute of limitations if they are designed to address future misconduct, it would not be appropriate to make such a finding here. When the OIP issued, the Division provided no notice to Respondents that their current conduct or competence would be at issue. Indeed, the OIP focused *solely* on the Respondents' conduct of almost seven years past. The hearing likewise focused on Respondents' past conduct and not on their present fitness or competence. It is well established that the Respondents' past conduct alone cannot serve as the basis for Respondent's current competence or risk. *See, e.g.*, *Proffitt*, 200 F.3d at 861–62 ("While a serious offense, even long past, may indicate Proffitt's current risk to the public, that offense cannot alone determine his fitness almost a decade later."); *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995) (isolated incidents of misconduct "can in no way justify the prediction that future misconduct will occur" for purposes of an officer and director bar). In addition, because the allegations on which the Division relies to show Respondents' lack current fitness and competence were never pled by the Division, notice of such was not delivered to Respondents and it was not addressed specifically at the hearing. Moreover, even when considering the Division's newly raised allegations, it is clear that there is no basis to conclude Respondents pose any threat of harm.

1. *Steadman's* factors do not provide the analysis for considering an associational bar.

In its quest for associational bars, the Division relies on the ALJ's findings on the *Steadman* factors in an attempt to establish that the Respondents lack competence and pose a risk of future harm. (Br. at 47.) But, as *Steadman* explained, "[f]rom [the defendant's] perspective, exclusion from the industry is clearly a penalty." 603 F.2d at 1139. The Division's use of the *Steadman* cease-and-desist factors is inappropriate, as they do not include an analysis of the "degree and extent of the consequences to the subject of the sanction" as required by *Johnson* and its progeny. *Johnson*, 87 F.3d at 488. Instead, *Steadman* established only a non-exclusive list of factors to consider in determining whether a cease-and-desist order was warranted, and despite the Division's erroneous citations to the contrary, provides no precedent for determining whether bars are penal under § 2462. (Brief at 47.) In fact, *Steadman* did not make a single reference to § 2642.

2. The Division's substantial delay in filing charges belies its contention that there is a risk of future misconduct.

The Division knew about the relevant transactions by April 2012. At that point, the transactions were already old, and the statute of limitations had already run. But instead of seeking emergency relief (which could have been expected if the Division were seriously concerned about investors' risk), it waited more than 17 months before even filing the OIP, and even then, did not plead that there was a risk of future harm to investors. The courts have found that an agency's delay in bringing charges necessarily goes against the finding of any risk of future misconduct. *See, e.g.*, *Proffitt*, 200 F.3d at 861 ("That the expulsion sanction is punitive is further manifested by the fact that the [agency] did not act for more than six years after Proffitt's misdeeds."); *Johnson*, 87 F.3d at 490 n.9 ("If the SEC really viewed [the defendant] as a clear and present danger to the public, it is inexplicable why it waited *more than five years* to begin the proceedings to suspend her.").

3. The Respondents' long-standing status in the securities industry demonstrates that they pose no risk of future misconduct.

The Division contends that there is a risk of future misconduct simply because the Partners "are currently associated with an investment adviser and intend to remain in that industry for the foreseeable future." (Br. at 45.) While it is true that the Partners remain associated with an investment adviser, that fact alone does not dictate that they should be permanently barred from association or that Timbervest should have its registration revoked, particularly because the (disputed) violations occurred more than seven years ago and have not been repeated since.

Boden's fee agreement was a unique circumstance never likely to recur. Boden had worked for several years as an outside consultant, with a contingent fee arrangement, and then became a partner of Timbervest before the conditions precedent to receiving his fees were triggered. That circumstance was unique in the history of Timbervest, and, given what the Respondents have been through (an SEC investigation, the expense of defending themselves, the loss of a client, and the return of the fees), is unlikely to recur. Similarly, the Chen Transactions represent the only occasion on which a property was sold on behalf of one Timbervest fund and later purchased on behalf of another.

If anything, the Partners' status in the industry is compelling evidence that there is no credible risk of future violations. The Partners have all been in their respective positions for ten or more years, and yet, the OIP alleged no misconduct within the last seven years. This demonstrates they pose no threat of future harm.

4. The Division's litany of uncharged conduct does not demonstrate a risk of future misconduct.

The Division next cobbles together a series of allegations that have no relation to the time-barred allegations in the OIP. The four uncharged issues are: (1) a 2005 attempt to sell a New Forestry property; (2) the improvement of a New Forestry property from 2008 to 2012; (3) three letters that were sent from Timbervest to AT&T in 2012; and (4) the transition to a new investment manager for the New Forestry account in 2012. The absurdity of these belated allegations is that most of the alleged misconduct complained about by the Division occurred well within the statute of limitations. Had the Division truly had any serious concern about these matters, it presumably would have alleged them as violations in the OIP.

Additionally, the Respondents would be substantially prejudiced if the Commission relies on ancillary evidence admitted through the backdoor because they received no notice or opportunity for a hearing on these issues. Not only were these allegations not pled in the OIP, the Division did not even raise them in its pre-hearing briefing. The Division filed a 28-page brief in opposition to Respondents' Motion for Summary Disposition and never mentioned these allegations.[4] There, the Division pointed only to the charged activities, not these extraneous allegations, in support of its contention that Respondents posed a risk of future harm. (Division's Opposition to Summary Disposition at 26.). Furthermore, the allegations concerning the 2012 letters and the transition of the New Forestry account were not even mentioned in the Division's *post*-hearing briefing.

All the evidence concerning these uncharged allegations should be excluded from any consideration based on due process and fundamental fairness principles. *See, e.g.*, *Proffitt*, 200 F.3d at 861–62 (finding that the FDIC could not establish a current risk to the public in an action based solely on Proffitt's long past conduct, when no notice was provided that his current competence and/or risk was at issue and no attempt was made to evaluate his present fitness or competence). It is axiomatic that "a party is entitled to advance notice that an issue is going to be tried and determined by a court." 61B Am. Jur. 2d Pleading § 862 (2010); *see also* 15 U.S.C. § 80b-3 (requiring "notice and opportunity for hearing" before the SEC can impose administrative sanctions).

---

[4] The parties agreed that the briefing on Respondents' Motion for Summary Disposition would serve as pre-hearing briefs.

The Commission has recognized that it should not consider conduct that was not charged in the OIP in determining sanctions. *Russell Ponce*, 2000 WL 1232986, at *11 n.49 (Aug. 31, 2000) ("This conduct was not charged in the Order Instituting Proceedings, however, and we do not consider it in assessing Ponce's conduct or the appropriate sanctions.").[5] Limiting the Division to the theories and facts pled in the OIP is necessary because "[a] respondent may not reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated from a complaint or order if one were to explore every permutation of fact and law there alluded to or asserted." *Jaffee & Co. v. SEC*, 446 F.2d 387, 394 (2d Cir. 1971) (vacating violations found under § 15(b)(5) of the Exchange Act when the Division never made an argument under that section until its post-hearing brief).

Finally, the backdoor evidence should be excluded because much or all of it is patently false, not credible, or does not support the conclusions asserted by the Division. The Respondents are filing a motion to strike these extraneous allegations and tendering new evidence that puts these issues in their proper context. The new evidence shows some of the additional information that would have been available had Respondents received proper notice and opportunity to address these issues at the evidentiary hearing. The following discussion briefly summarizes why each of the four uncharged allegations is unsubstantiated.

a. The 2005 attempt to sell the Glawson property reflected a good faith effort to sell a difficult-to-sell property.

The Division argues that Respondents pose a future threat to investors because in 2005—long before the allegations in this case—Respondents allegedly tried to conduct a cross trade of

---

[5] The Division cites *Montford & Co.*, Advisers Act Release No. 3908 (Sept. 2, 2014), for the proposition that the Commission "may consider conduct outside the OIP in deciding the appropriate remedy," but the September 2, 2014 order in *Montford* did not even address the issue. As discussed more fully in Respondent's motion to strike, a different order addressing this issue supports Respondents' position.

New Forestry's Glawson property. (Br. at 32-35, 45.) There was no such cross trade (or attempt), and the 2005 efforts to sell Glawson are wholly unrelated to the allegations pled in the OIP.

In 2005, Boden attempted to sell the Glawson property on New Forestry's behalf. (Tr. at 255, 277.) The property, located within a short drive of Atlanta, was not core timberland, and Boden believed it stood the best chance at being sold and developed as a single-family, residential property. (Tr. at 272-73.) However, around that time, legislation was passed that had a dramatic impact on the ability to develop the property for single family homes, and developer interest dampened. (Tr. at 274, 277.)

Boden approached Reid Hailey, a Georgia real estate investor, about the possibility of purchasing Glawson. (Tr. at 255.) Because of the "conditional interest" expressed by residential developers, Boden believed that presenting the property for sale, along with selling an option to a developer to later purchase the property, might make the deal less risky to Hailey and give him "a little clarity on [a potential] exit" from the property. (Tr. at 274-76.) Boden asked Harrison to prepare an option contract. (Tr. at 263.)

Despite the Division's assertions, the option was not "part and parcel of the deal." (Br. at 34.) Boden testified that he would have been happy to sell the property to Hailey without an option. (Tr. at 280.) But Hailey never made an offer. (*Id.*) In fact, after just one brief meeting, Hailey informed Boden that he was not interested in pursuing the deal because it was not a good fit for his company; discussions regarding the proposed deal terminated. (Tr. at 275-76, 278-79, 344-47, 873.)

The Division, however, argues that the proposal fell apart because of a letter sent on behalf of real estate broker Zachry Thwaite, who never testified in this case. (Br. at 35.) Thwaite's attorney sent a letter to Timbervest informing the Partners that Thwaite was entitled to a commission on the sale of the Glawson tract. (Div. Ex. 152.) However, this letter was sent nearly *one year after* Boden and Hailey ceased discussing this property; there simply is no basis to contend the Thwaite letter was motivation for Boden, one year earlier, abandoning the proposal. Boden abandoned his brief attempt to sell Glawson to Hailey because, as Hailey testified, he was not interested in the transaction. (Tr. at 873.)

The Division also resorts to attacking Harrison's ethics as an attorney for his actions based on nothing more than speculation. (Br. at 33.) The evidence, however, shows that Harrison had a brief conversation with Boden about the option idea and that Harrison simply drafted documents he believed were needed, and inserted placeholders for the fees, prices, and entities on his own. (Tr. at 397-98, 705-06.) Boden left the documentation to Harrison, and, in fact, never even saw the draft assignment agreement or other documents prepared by Harrison until December 2013. (Tr. at 279-80.)

Moreover, Shapiro, Zell, and Jones had no discussions with Reid Hailey and were not involved, even remotely, in those discussions. The attempts to sell Glawson certainly should not be held against them in deciding whether any remedies are appropriate.

b. Respondents fulfilled their fiduciary duties in improving and adding value to the Glawson property.

The Division next argues that Respondents present a risk of future harm because they made improvements to the Glawson property and attempted to increase its visibility to potential buyers. (Br. at 36.) The Division's argument (i) is contrary to the directives and guidelines imposed by AT&T with respect to Timbervest's management of the New Forestry portfolio, (ii) represents a fundamental lack of understanding of timberland investments and how timberland managers work to improve the value of their clients' properties, and (iii) ignores the fact that Timbervest made material improvements to many other New Forestry properties.

i. The Division's argument is contrary to the New Forestry guidelines and directives.

First, the Division argues that the improvements and activities on the Glawson property evidence some sort of misconduct by Respondents. In fact, Timbervest simply performed its job of managing the property in an attempt to maximize value for its client. Timbervest managed the New Forestry account under Investment Management Agreements and Program Investment Guidelines mandated by the client. (Resp. Ex. 60; Div. Exs. 48-50.) The Investment Management Agreements vested Timbervest with full discretionary authority to manage the client's assets, including the authority to "retain, manage, operate, repair, develop, subdivide, dedicate, preserve and improve" any real property within the client's portfolio. (Div. Exs. 48-50.) The New Forestry guidelines were amended in 2006 and from that point forward required that 70% of the portfolio be designated and managed as "core" (properties for which the financial returns are driven primarily by the biological growth of trees), 20% percent be designated and managed as "value-add" (properties that may produce returns in excess of target returns "when combined with active management strategies" into a higher and better use than timberland), and 10% percent be designated and managed as "opportunistic" (properties that should produce returns well in excess of target returns "when combined with creative management strategies" as a non-timberland property). (Resp. Ex. 60; Div. Ex. 51.)

With respect to the Glawson property, it was designated as a "value-add/opportunistic" property from inception of the New Forestry guidelines. (Div. Ex. 6.) AT&T was fully aware that the Glawson property had been designated as a "value-add/opportunistic" property and was being managed as such. (Div. Ex. 6.) Thus, management of the Glawson property required "active" and "creative management strategies," management "for ultimate disposition into a higher and better use than that as timberland," and "conversion and management as non-timberland property." (Resp. Ex. 60.)

The history of the Glawson property dictated Timbervest's management strategy. Due primarily to its proximity to Atlanta, by 2006 the value of Glawson had grown to over $5,700 per acre (well above the typical value of timberland at approximately $1,000 per acre), earning it a "value-add/opportunistic" designation. (Tr. at 437, 1867; Div. Ex. 6.) Recognizing the opportunistic nature of the property, Timbervest recommended that the property be sold to a residential developer. (Div. Ex. 6.) However, by 2008, in light of new legislation and the declining real estate and housing markets, Timbervest had to reassess its strategy. (Tr. at 1867-68).

In 2008, Boden and Zell, along with the regional forester responsible for overseeing the property, based on their knowledge of and experience in the timberland markets, developed "a plan whereby this would be the premier hunting piece of property for sale within 45 minutes of Atlanta." (Tr. at 1868.) In executing this strategy, Timbervest built roads; purchased additional nearby acreage that had water features; built bridges, fences, and a new entrance; cleared fields; enhanced the wildlife; added hunting improvements; and added additional water features. (Tr. at 1868-69.) It also built a structure to serve as a storage facility while improvements were being made and to eventually serve as an amenity for a future owner. (*Id.*) The total cost of the improvements ultimately reflected a small investment relative to the overall value of the property. (Tr. at 1879-80.)

In the end, as provided in the client's investment mandate, Timbervest implemented an "active" and "creative" management and development plan that, in Timbervest's discretion best positioned the property for the benefit of its client. Timbervest was successful in adding "many,

many millions" to Glawson's value. (Tr. at 1879-80.) Indeed, from beginning of 2008 to 2012 the property had increased in value by almost $3.5 million. New Forestry therefore directly and greatly benefitted from the improvements made by Timbervest.

ii. The Division's complaints about isolated facts and activity demonstrate a fundamental lack of understanding of timberland investments.

The Division's long list of complaints about Timbervest's work on this property demonstrate a lack of understanding about the tactical nature of managing timberland investments and of how timberland managers improve the value of their clients' properties.

First, the Division complains about a "large structure" that was built on the property. (Br. at 36.) As noted, the immediate purpose of the structure was to provide a storage area for equipment used in connection with the improvements made on the property. (Tr. at 1871.) However, in considering the ultimate exit strategy of the property, Timbervest determined, in its discretion, and consistent with the mandates set forth in the New Forestry guidelines, that the incremental cost of constructing a nicer looking structure that could serve as an amenity to a future owner would be beneficial to the value of the property and the client. (Tr. at 1868-69.) The entire structure cost $200,000 and was part of the overall strategic plan that added millions of dollars in value to the property. (Tr. at 1868-69.)

Next, the Division contends that Timbervest cancelled a revenue-generating lease and supposedly gave a "hunting club" composed of Timbervest employees a free one. (Br. at 36.) Timbervest cancelled the lease to remove hunters from the property while Timbervest was implementing its improvement plan. (Tr. at 1882-83.) Moreover, the hunting lease income of $5,000 to $6,000 per year was an immaterial amount for New Forestry. (Tr. at 1882.) The development of the property as a hunting preserve, in contrast, created millions of dollars of value, which more than justified Timbervest's decision. (Tr. at 1870.)

With respect to the free lease given to the "hunting club" composed of Timbervest employees, it was put in place solely for insurance purposes for a *one-time event* on the property designed to showcase the property to qualified third parties capable of purchasing the property. (Tr. at 1897-99.) Additionally, contrary to the Division's assertion, this lease was part of New Forestry's records, was known and discussed with New Forestry's auditors, and was not hidden from anyone, including AT&T. (Tr. at 1897; Div. Ex. 168.)

Lastly, the Division complains that Timbervest supposedly held annual dove hunts and conducted timber tours on the property. (Br. at 36.) The dove hunts held on the property were charitable events that provided free exposure to the property. (Tr. at 1903-04.) By inviting people who were qualified to purchase the property and by showcasing the features and amenities of the property, Timbervest was able to generate awareness of the property among wealthy individuals and potential buyers. The dove hunts were part of New Forestry's records and were never hidden from AT&T. Indeed, PWC, New Forestry's auditor, knew about the dove hunts and provided guidance on the best way to account for the hunts and credit the charitable contributions. (Div. Ex. 168; Tr. at 2263-65.)

Likewise, nothing about the timber tours was improper. The tours were never hidden from BellSouth or AT&T, and, in fact, Timbervest invited AT&T and its fiduciaries on many timber tours. (Tr. at 1874-75.) In the timberland industry, these "timber tours" are hardly out of the ordinary. These tours are the only way that timberland managers, including Timbervest, can demonstrably show the timberland management services it can provide. Timbervest conducts tours on properties owned by all of Timbervest's funds, not just New Forestry's properties, and the tours did not harm New Forestry in any way or put Timbervest's interests ahead of New Forestry's. (Tr. at 1881.) The Division cannot seriously contend that something as routine and widespread in the real estate industry – a manager showing a property to a non-investor – can substantiate improper conduct by the manager in a securities law context.

iii. The Division's arguments ignore the fact that Timbervest made material improvements to many other New Forestry properties.

The Division myopically focuses on improvements made to the Glawson property while ignoring improvements made on numerous other New Forestry properties. As documentation given to the Division during its three-year investigation on valuations shows, New Forestry spent millions of dollars on improvements of various New Forestry properties. Improvements such as structures, roads, bridges, entrances, fences, water features and game management were common and were implemented in accordance with the client's guidelines at Timbervest's discretion. In fact, the one New Forestry property that Frank Ranlett (AT&T's representative) visited personally, the St. Aurelie property in Maine (Tr. at 1078), was the subject of numerous improvements, including both United States and Canadian customs houses, a two-story office, a bunk house for workers, a bridge across the international border, truck and timber weighing scales, and over thirty maple sugar production facilities. Ranlett even praised Timbervest's management of that property. (*Id.*) Such improvements, whether on St. Aurelie, Glawson, or other New Forestry properties, were part and parcel of Timbervest's duties as manager of New Forestry. (*See* Div. Ex. 46.)

c. Respondents made no misrepresentations to AT&T.

The letters Timbervest sent to AT&T in 2012 were accurate and not misleading. Despite the Division spending nearly four pages of its Brief detailing the letters, it fails to identify a single statement in a single letter that was incorrect. There simply were no misrepresentations by Respondents to AT&T (or anyone else) in 2012.

The Division first points to an annual review that Shapiro held with Ranlett and implies that Shapiro did not tell Ranlett that the SEC Staff was looking into the Chen Transactions or the payment of Boden's fees. (Brief at 37.) But Ranlett himself acknowledged that the Chen Transactions were "apparently disclosed" to AT&T at the May 3, 2012 annual meeting. (Div. Ex. 129.) Likewise, at the annual meeting, Shapiro "discuss[ed] the fees with [AT&T] . . . ." (Tr. at 2242.)

The Division also claims that a June 4, 2012 letter from Shapiro to Ranlett about Boden's fees "misled Ranlett" because it failed to disclose (1) the Chen Transactions, (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." (Brief at 37.) The Division completely ignores that this letter was in response to a May 25, 2012 letter from Ranlett that posed five specific questions about Boden's fees. (Div. Ex. 126, 127.) None of the five questions were about the previously disclosed Chen Transactions—they were all about the payment of fees to Boden. (Div. Ex. 126.) There was simply no logical reason why the June 4, 2012 letter would discuss the Chen Transactions, particularly in light of the fact that AT&T was already aware of those transactions. Moreover, the letter provided detailed information in response to the questions of ownership of the LLC posed by AT&T. The letters stated that "Boden did not own" the LLCs, but had a "beneficial interest" in them; that the LLCs were "established in connection with advisory services related to the sale of two properties;" and that "no other person affiliated with Timbervest had an ownership or beneficial interest" in the LLCs. We are uncertain as to what the Division means by "shell companies," but any facts regarding how Harrison set up the LLCs or that the LLCs had no employees were facts not known by Shapiro at the time. These facts were *not known to Shapiro or anyone else at Timbervest*, including Boden, until Harrison gave investigative testimony in November 2012.

The Division claims that a June 8, 2012 follow-up letter from Carolyn Seabolt (Timbervest's General Counsel) to AT&T's in-house counsel and an August 13, 2012 letter from Seabolt to Ranlett were similarly misleading because "no mention was made regarding Harrison's involvement or the nature of the LLCs that received the fees." (Brief at 38.) But again, the nature of the LLCs was explained in the June 4, 2012 letter, and additional facts regarding the LLCs such as Harrison's activities *could not have been made* because, at the time, *no one from Timbervest*, including Boden himself, knew how Harrison had formed the LLCs or all the details concerning their existence until Harrison's November 2012 testimony. But Timbervest did disclose what it knew: that Boden had a beneficial interest in and received his fees through two LLCs. (Div. Exs. 126, 128.)

The Division also claims that the letter "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." (Brief at 38.) The Division cites nothing in support for this statement, and the reason for this omission is clear: it is completely unsupported by the record. First, there was no report to ORG in June 2006 about the Tenneco Noncore data.[6] Moreover, the Tenneco Noncore data were not available until *November 2006*, not September 2006.

[6] There was a report in *August* 2006 that estimated the sales price for the Noncore tracts but that report did not provide an estimated price based on actual sales (Div. Ex. 16.) It simply reported an estimated sale price for a number of properties that Timbervest anticipated liquidating under the client's disposition mandate. (*Id.*) The report reflected the prices that Timbervest hoped to get for each property, not actual sales or guaranteed prices. Anyone knowledgeable about real estate understands there is a significant difference between an estimated sales price, and an executed contract with a willing and able buyer.

These sales were wholly conducted through a third-party broker, LandVest, using a bidding process in which Timbervest did not participate. (Div. Ex. 128.) Timbervest had no communication with any buyer and had no idea what the sales price would be or how many parcels would sell until the results from the bid on the properties were presented by LandVest on October 30, 2006. Indeed, the letter shows that Noncore sales prices simply indicated a strengthening land market trend. (*Id.*) They did not prove the per acre value of Tenneco Core but served as a reasonable basis on which to infer that there could be a similar strengthening in the bulk timberland market.

The Division finally argues that the letter was misleading in its discussion about the repurchase of Tenneco Core because it apparently "gives the impression that Wooddall approached Timbervest with a desire to sell the property back." (Brief at 38-39.) But the letter does not say that Wooddall approached Timbervest about buying it back. In fact, the language used in the letter (that "Wooddall was willing to sell the property" to Timbervest) actually gives the opposite impression—that Timbervest approached Wooddall and that he "was willing" to sell the property back. (Div. Ex. 128.)

Finally, the Division ignores that Timbervest repeatedly offered to talk to AT&T about the SEC's allegations and any further questions they had, either with or without legal counsel. Timbervest also made its legal counsel available to AT&T for further discussions. Contrary to the Division's assertions, Timbervest fully responded to the questions posed by AT&T and offered them avenues to stay completely abreast of the issues with the Division. These letters show that Respondents took their duties to AT&T seriously and did not intend to, nor did they in fact, mislead AT&T or misrepresent any facts to them.

d. Respondents went beyond the call in transitioning the New Forestry account to FIA.

Finally, the Division claims that the Respondents present a future risk of harm because they purportedly "fail[ed] to provide sufficient records to AT&T when asked to do so." (Br. at 36, 46.)

As a result of the SEC's investigation, AT&T terminated Timbervest as New Forestry's manager on September 30, 2012. The Division suggests that Timbervest poses a threat of future misconduct because it "did not provide a 'complete set of information on New Forestry'" to the new manager. (Brief at 39 (quoting Decision at 38-39).) But this argument is contradicted by Ranlett himself, who, on October 12, 2012, wrote to Timbervest that he "regret[ted] any imputation that you were not transitioning to the letter, and likely beyond, of the agreements between our two organizations."[7] And two years later, Timbervest continues to assist New Forestry with the transition to the new investment manager, despite AT&T having never paid Timbervest's management fee for the third quarter 2012 and never having compensated Timbervest for its transition services at any time thereafter. (Tr. at 1059.)

III. Zell and Jones acted reasonably, not with scienter, with respect to Boden's fees.

The Division contends that the ALJ erred in finding that Zell and Jones acted negligently—and not with scienter—with respect to the payment of Boden's fees. Zell and Jones acted reasonably, not with scienter, with respect to Boden's fees.

A. Jones did not act with scienter with respect to Boden's fees.

The undisputed evidence showed that Jones recognized the potential conflict of interest presented by Boden's fee arrangement and took reasonable steps to address it. (Tr. at 1324-26.) Jones discussed the potential conflict of interest with Timbervest's CEO, Shapiro. (Tr. at 1324-

[7] Ranlett wrote this in an October 12, 2012 email to Seabolt and Shapiro, which is attached as an Exhibit to Respondents' Motion to Adduce Additional Evidence.

26.) Jones charged Shapiro with disclosing the arrangement to ORG, New Forestry's representative and fiduciary, because Shapiro was responsible for the client relationship and frequently spoke with ORG. (Tr. at 1325, 1327-28 1330-31, 1772, 1774, 1776.) Jones recalled Shapiro reporting back that he had discussed the arrangement with ORG's representative who "was fine with the arrangement." (Tr. at 1325, 1337, 1352, 1469.) As the Decision recognized, Jones was "entitled to rely on Shapiro's representation . . . that he had obtained consent" for Boden's fees from ORG. (Decision at 54.) That should conclusively end the analysis of whether Jones caused or aided and abetted any theoretical violation by Timbervest. Jones' conduct was abundantly reasonable in these circumstances, and there is no basis to find that he acted with scienter, or even negligence.

Nevertheless, the Division contends that Jones acted with scienter based on the theory that Jones should have been "highly skeptical, if not incredulous, of Shapiro's claim that the client had consented to the payment of fees outside of the management agreements." (Br. at 48.) The Division bases this specious argument on a conversation that Barag, on his way out the door in 2004, had with Jones in which he told Jones that Timbervest could not receive payment outside of the management agreement. Based on this alleged conversation, the Division contends that Jones should have known that Boden's fee arrangement and fees were prohibited by ERISA. But there is no evidence that this supposed conversation revolved around ERISA. Indeed, Barag admitted that he did not "have any personal dealings with Jones on any issues relating to ERISA." (Tr. at 1943.) Moreover, the fees at issue were not paid to Timbervest, but rather to Boden under a pre-existing advisory fee arrangement Jones reasonably believed was approved by the client.

Moreover, that Barag recalls such a conversation from nearly ten years ago regarding an account that he admittedly had "very little to do with" and that was "almost entirely run and managed by David Zell," while being unable to correctly account for the most basic facts regarding his tenure at Timbervest is questionable.[8] Regardless, there is no evidence that a single, vague conversation years before was in the Partners' minds in seeking consent to the agreement from Schwartz. And the Division completely ignores that later in his testimony, Barag specifically testified that he had no conversation with the Partners about commissions, rather his "advice was to be mindful to take care of their client, BellSouth." (Tr. at 2012-13.) He testified quite clearly that there was "[n]ever" a discussion about commissions. (*Id.*)

Additionally, Jones was not an expert in ERISA. Whether Boden's fees violated ERISA never came up with Respondents until the SEC and AT&T asked questions about ERISA's application to the fees, and there is no evidence to suggest to the contrary. Indeed, as soon as Timbervest became aware of a potential ERISA issue with the fee payments, it promptly returned the fees to New Forestry, with interest. (Tr. at 511.)

In any event, Jones believed that Shapiro obtained consent from ORG, which held itself out to be a qualified pension asset manager ("QPAM"). (Tr. at 2145-46.) Although he was not an ERISA expert, Jones understood and believed that a QPAM could make decisions on behalf of New Forestry and approve the arrangement. Jones had no reason to doubt that ORG would consent to the fee arrangement when the client had already approved of a similar conflict of interest with respect to Timbervest itself—that is, New Forestry approved, and in fact mandated,

---

[8] For example, Barag testified that Timbervest had a third, small Missouri account in 2003, and he "remembered" that it was a $20 million account with one or two small timberland assets overseen by regional foresters. (Tr. at 1979-80.) No such account ever existed; yet he was able to "recall" details about its size, assets and management. (Tr. at 2234-35.) He testified that New Forestry did not want to sell properties during his tenure at Timbervest, yet at the time he joined Timbervest the account was under a disposition mandate. (Tr. at 1930-31, 1697, 1739-40.) He testified that New Forestry did not make any acquisitions during his tenure at Timbervest, but the record shows otherwise. (Tr. at 1969-70; Resp. Ex. 140.)

a fee arrangement whereby Timbervest was paid a fee on the dispositions of property and had its management fee concomitantly reduced. Jones had no reason to think that New Forestry and ORG would consent to one such conflict but not the other. Thus, there was a reasonable basis for Jones's reliance on ORG's approval, given ORG's status as a QPAM and fiduciary.

Finally, the Division contends that because "Respondents actually split the fees equally indicates that they acted with the specific intent to deceive their client." (Br. at 49.) The fact is that Boden alone chose to share the fees that he earned equally with his Partners after considering his business relationship with the Partners. (Tr. at 289.) Jones neither asked nor expected Boden to share his fees. (*See* Tr. at 1312-13.) Boden's decision, which was his alone, to share his fees cannot be seen as an indication of Jones's scienter.

B. Zell did not act with scienter with respect to the payment of Boden's fees.

Zell also did not act with scienter, or even negligence, with respect to Boden's fees. Zell understood that Shapiro disclosed the agreement to the client's representative, ORG and Schwartz. (Tr. at 1541.) As the ALJ recognized, Zell was "entitled to rely on Shapiro's representation . . . that he had obtained consent [for Boden's fees] from Schwartz." (Decision at 54.) The Division does not contend that Zell did not, in fact, hold the subjective belief that Shapiro had disclosed the fee arrangement. Instead, it argues that because "Zell managed New Forestry for over a decade on behalf of BellSouth," he must have known that the payments were prohibited by ERISA and that ORG could not have consented to the arrangement. (Br. at 48.)

Zell is no ERISA expert. Although he had worked with pension plans (strictly on the investment side), he did not know the minutiae of a very complex and technical statute. Even Schwartz, the Division's witness who served as an expert in ERISA in another matter, testified that "ERISA is pretty technical and complicated," and to answer questions about ERISA, he would need to seek the advice of qualified legal counsel on ERISA matters. (Tr. at 2146, 2091.)

There is no evidence that Zell knew more about ERISA than he testified to. In any event, as discussed above, even if Zell knew that the payment of fees was generally prohibited by ERISA, he had no reason to doubt that the consent of ORG, which held itself out as a QPAM and had consented to a similar conflict of interest on behalf of Timbervest, would not be effective to remove the prohibition. The Division has nothing more than speculation on which to base its conclusion that Zell should have known that the fees could not be consented to.

Nor is the fact that Boden chose to share his fees with the Partners indicative of any scienter by Zell. As discussed above, the decision to share fees was a decision Boden made alone. Zell never asked or expected Boden to share his fees. Instead, Boden made the decision on his own accord. Thus, the sharing of fees does not show any scienter.

IV. The Division's other miscellaneous arguments have no bearing on the issues raised in its appeal and no basis in the evidence or reality.

While the Division appealed only two issues to the Commission—whether associational bars are prohibited in this case and whether Jones and Zell acted only with negligence with respect to Boden's fees—it spends the vast majority of its Brief making miscellaneous arguments that seek to taint the Respondents and non-respondents as fraudsters and that have no bearing on these issues.

A. Timbervest did not cross trade Tenneco Core.

1. There was no prearranged deal to repurchase Tenneco Core.

Timbervest did not enter into a prearranged deal with Lee Wooddall, on behalf of Chen Timber ("Chen"), to sell the Tenneco Core property ("Tenneco Core") and repurchase it shortly afterwards for $1 million more. The Division states that "Wooddall testified unwaveringly that the repurchase of Tenneco by Timbervest was part of his negotiations with Boden from the beginning" and that "[a]t 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." (Br. at 6.) Wooddall's actual testimony, at most, proves only that there was a discussion between Boden and Wooddall in which Boden told Wooddall that he would submit an ***offer*** to repurchase the property within 6 months after it was sold. (Tr. at 813-14.)

What Wooddall did testify to "unwaveringly" is that the OIP's allegation of "parking" did not occur. The sales contract likewise specifically stated that the sale was not based on or contingent on any other agreement or understanding between the parties. (Div. Ex. 11.) Wooddall testified that he understood that language in the contract and believed it to be true at the time. (Tr. at 838-39, 863.) As he testified, the day after purchasing the property, he could have done whatever he wanted to with the property. (Tr. at 863.) He could have cut and sold off all the timber on the property. (Tr. at 816.) He was free to sell to anyone he wanted. (Tr. at 768, 815-16.) Indeed, he would have sold it to someone other than Timbervest if someone offered a strong enough price, despite what he called a "verbal option" for Timbervest to buy the property back. (Tr. at 768-69, 815-16.) Nor was Timbervest bound to repurchase the property from Wooddall. (Tr. at 859.)

Wooddall's conduct at the time of the transactions also was consistent with there being no agreement to repurchase the property. Wooddall testified that Chen replaced Plantation Land & Management (which he owned with two other individuals and who originally had contracted to purchase the property) as the buyer because one of the partners in Plantation Land & Management did not want to go forward with the deal. (Tr. at 809-10.) Wooddall explained that "there was no guarantee that [they] would not lose big money." (Tr. at 810.) Additionally, Wooddall testified that he obtained a loan of over $11 million to purchase the property from New Forestry. (Tr. at 817.) In obtaining that loan from the bank, Wooddall testified that he never advised the bank's loan officer that this was a no-risk loan or that he had negotiated a sale for a price of $14.5 million. (Tr. at 819.)

Boden adamantly denies any such agreement to repurchase the property at an increase in price of more than $1 million. (Tr. at 184, 207-08, 504-09.) In fact, he testified that, given the downward trend in the property's value during the first half of 2006, it would not have made any economic sense to have an agreement to buy the property back for $14.5 million in the summer of 2006. (Tr. at 207-08, 232.) Nor would he have agreed on a price eight months in advance of an intended acquisition. Agreeing in the summer of 2006 to a $14.5 million repurchase price would have "bak[ed] in a loss on acquisition," meaning that TVP would have been agreeing to buy a property for a price that was more than the property's then valuation. (Tr. 208.) And, as Boden testified, in the eleven years he has been at Timbervest he does not "remember a single acquisition we've made, not one time, where it's come in with a loss on acquisition. . . . Not one." (*Id.*) On cross-examination Wooddall testified that during his negotiations with Boden he may have even told Boden that Chen Timber could do whatever it wanted with the property and was not obligated to sell it back to Timbervest. (Tr. at 801-02.) Thus, whether Wooddall believed there was some unenforceable "verbal option," Wooddall telling Boden that he was not obligated to sell the property back to Timbervest reasonably explains why Boden believed he never negotiated any repurchase agreement.

Even if Wooddall's recollection were credited, it shows only that Boden told Wooddall that Timbervest might be interested in buying it back and would submit a purchase offer if it desired to do so. Timbervest would never have exercised the option unless the economics supported the deal for Timbervest's clients. As fully briefed in Timbervest's Appeal to the Commission, New Forestry was able to sell Tenneco Core for 111.7% of carrying value. And although Timbervest did end up purchasing the property on behalf of another fund, TVP, at an increased price, the increase in price was fully supported by the market data regarding land and timber pricing.[9]

2. There is no reliable evidence that a repurchase price was negotiated prior to the closing of the sale from New Forestry to Chen.

The Division states that "[t]he $14,500,000 repurchase price was negotiated between Boden and Wooddall before September 15, 2006, when Chen executed the agreement to purchase Tenneco from New Forestry for $13,450,000" and that "Wooddall recalled with clarity the prearranged nature of the repurchase agreement." (Br. at 6, 8.) There is no evidence supporting the notion that a repurchase price was negotiated prior to the closing of the initial sale from New Forestry to Chen other than Wooddall's testimony, which, as discussed below, cannot be credited.

First, Wooddall's own testimony is not enough to support such a finding. Wooddall testified: "I think we negotiated it." (Tr. at 770.) Wooddall did not have any specific recollection of negotiating a repurchase price with Boden and his recollection was nothing more than an assumption that there were negotiations. (*Id.*)

Second, Wooddall's assumption that the purchase price was negotiated prior to the closing of the sale is not supported by any documentary evidence and is inconsistent with Wooddall's own testimony. For instance, Wooddall testified that he met with Boden only twice to negotiate the deal. On cross-examination, when asked whether there was any discussion of a repurchase price in his first meeting with Boden, Wooddall testified "I don't think the price was

[9] When TVP purchased the property, it was renamed Gilliam Forest. The Division suggests that the renaming of the property was done with an intent to deceive an unidentified someone. (Br. at 6.) But, as Boden testified, renaming the property was necessary to prevent confusion. (Tr. at 241-43.) New Forestry still owned the Tenneco Noncore tracts, and it would have been far too confusing to have two different properties owned by two different funds each going by the same name.

discussed." (Tr. at 812-13.) As to the second meeting with Boden, when asked by the Division "did any solidification of the terms happen at the second meeting," Wooddall answered, "I don't recall." (Tr. at 762.)

Finally, at the same time Wooddall and Boden were negotiating over the sale of the Tenneco property to Chen Timber, they were also negotiating the purchase by Timbervest of another property owned by Wooddall in Texas, (Tr. at 825-26; Resp. Ex. 35), and at the hearing, Wooddall could not initially recall whether the two deals were being negotiated at the same time or what the status of the Tenneco Core negotiations were when negotiating the Texas deal. (Tr. at 825-26.) Wooddall's inconsistent and evolving testimony regarding negotiating a verbal option with Boden could easily be the result of Wooddall blurring his memories of discussions from seven years prior regarding Timbervest's purchase of his Texas property with those relating to Tenneco Core.

3. Respondents do not recall how the repurchase came about, but it was not designed to avoid ERISA's requirements.

The Chen Transactions took place in 2006 and 2007, long before the Division began investigating Timbervest and long before it ultimately brought charges in late 2013. Since the Chen Transactions have taken place, Timbervest has conducted hundreds of transactions and considered many more. (Tr. at 460.) The Partners simply do not have specific memories about the details surrounding these two transactions with Chen from over seven years ago. While the Partners did not recall all the transactions' details, they remembered the transactions themselves, as evidenced by their voluntary disclosure of the transactions to the Division. (Div. Ex. 79.)

The Division, however, claims that the Partners are only "claim[ing] a failure of recollection" about how the repurchase came about because the Partners somehow knew that the transaction was prohibited by ERISA. (Br. at 8-12.) The Division attempts to support this theory with an email from Shapiro that references ERISA (in an unrelated context) and Barag's testimony that, in 2003 or 2004, there was a conversation about potentially transferring properties from New Forestry to the new Timbervest REIT in an *actual* cross trade. (Br. at 10-11.) A vague memory of a conversation from 2003 or 2004 and an email referencing ERISA is not evidence that supports that the Partners had ERISA in mind when engaging in the Chen Transactions. Indeed, in response to the idea of cross trading properties between New Forestry and the REIT, Barag testified that Zell did not want to engage in such transactions because it would suggest that "Timbervest was more interested in getting control of the assets than maximizing performance of the separate account," and the email from Shapiro flags a proposed cross trade as problematic under ERISA. (Tr. at 1936-37; Div. Ex. 153.) The Division has no explanation for why Zell and Shapiro would have refused to engage in a cross trade earlier but then supposedly approve of one later.

4. There was no concealment of the Chen Transactions.

The Division also argues that Timbervest concealed the Chen Transactions. (Br. at 12-17.) This suggestion is curious in light of the fact that publicly available real estate records clearly show Timbervest's involvement in both transactions and in light of Timbervest's voluntary disclosure of the deals to the Division, despite having already provided all relevant documents to the Division. (Div. Ex. 79.) Likewise, there is no evidence that had anyone from BellSouth or any of the investors in TVP asked about the property they would not have received all the details. Indeed, the auditors responsible for auditing both New Forestry and TVP were aware of the sale of Tenneco by New Forestry and the later repurchase by TVP, but they took no issue with the transactions.

a. Barrett Carter's email does not show an intent to conceal.

As evidence of the alleged intent to conceal, the Division points to an email from Barrett Carter, a Timbervest employee, sent on the day the TVP purchase of Tenneco closed. In the email, Carter explained his understanding that 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." (Br. at 12-14; Div. Ex. 19.) Carter went on to explain that Chen had been presented with a different opportunity and approached Timbervest with the idea of buying it back. (Div. Ex. 19.) While this statement was incorrect, there is no evidence that Carter sent this email with an intent to deceive anyone, much less New Forestry, about the nature of the transaction. Indeed, this email went only to Timbervest personnel and to employees of a company that maintained Timbervest's property records. (*Id.*; Tr. at 934.) This email, which was never sent to BellSouth or AT&T personnel, cannot possibly evidence an intent to conceal the transaction from New Forestry.

b. New Forestry's Annual Report and the Spec Book for TVP's purchase of Tenneco Core were consistent with their purpose.

The Division next lobs a series of complaints about New Forestry's Annual Report and the Spec Book for TVP's purchase of the timberland. (Br. at 14-17.) The Division, however, ignores the fact that there is no evidence that any of the Respondents authored either document. Instead, it first complains that there are seemingly inconsistent descriptions in the two documents about the property. These differences are indicative of different writing styles—but not fraud. Boden agreed that the Annual Report and Spec Book could be seen as inconsistent, but the Respondents explained at the hearing why they were not. (Tr. at 252.)

First, the property characteristics important to a buyer and to a seller are different and are dependent on the strategy of the fund. (Tr. at 1267, 1275.) It is no surprise that the documents' drafters would want to downplay the characteristics of the property when trying to inform New

Forestry about the sale of the property and would want to advertise the long-term benefits of the acquisition when trying to inform TVP about the purchase. Moreover, the descriptions, although written with a different tone, are not actually inconsistent. For example, there is no inconsistency in telling New Forestry that the property would not produce significant returns for several years and explaining to TVP that there would be "*growing* cash flow" from the timberland. Nor is there any inconsistency between explaining to New Forestry that the property is in the poorest area of Alabama and to TVP that the property was "within a short drive of several large cities" (as almost all of Alabama is), or explaining property access issues differently.

The Division also complains that the Spec Book, prepared for internal use only, failed to disclose Timbervest's prior management of the land. (Br. at 16-17.) While the Division claims that there was "no sound explanation" for this omission (Br. at 17), Boden testified that the Spec Books typically do not give any detailed management history but rather only the most recent owner. (Tr. at 248-49.) Given that Spec Books have been drafted by many different personnel over the years and follow a pre-determined structure with pre-determined information, there actually would be "no sound explanation" for this Spec Book to differ from any others Timbervest has produced over the years. Regardless, ample testimony established that this Spec Book was never finalized, and a non-final document prepared for internal use only does not support the conclusion that Timbervest attempted to conceal the transactions. (Tr. at 244-45, 248.)

c. The August 2006 disposition report did not conceal the Chen Transactions.

Finally, the Division complains about the description in an August 2006 disposition report to ORG of Chen's offer to New Forestry to purchase Tenneco as "unsolicited." (Br. at 16.) Boden agreed that this language was inaccurate but stated categorically that he did not draft it.

(Tr. at 117.) Multiple internal personnel draft, review, and revise these documents on Timbervest's behalf. (*See id.* at 118.) No one recalls why the term was used in a document drafted eight years ago, but it is not indicative of an intent to conceal the transactions.

B. Boden was paid under a legitimate consulting agreement and not for any improper purpose.

Boden earned fees on the sale of two New Forestry properties pursuant to a legitimate consulting agreement that he entered into with Timbervest two years before joining Timbervest as a manager. The Division, however, argues that the arrangement was concealed from or not properly disclosed to New Forestry.

1. Respondents did not intend to conceal Boden's fees.

The only concealment motivation the Division can muster is that Timbervest concealed the fees because disclosure would have exposed them to ERISA liability. (Br. at 24.) This argument is supported by nothing more than speculation. As explained above, there is no evidence whatsoever to conclude that Timbervest was motivated to avoid the prohibitions of ERISA.

The Division's position that Timbervest intended to conceal Boden's fees is curious in light of the fact that Boden volunteered to the Division in 2011 that he had worked as a consultant at Timbervest prior to becoming a partner. (Tr. at 558.) The Division chose not to ask any follow-up questions about his position. Nevertheless, Timbervest voluntarily disclosed to the Division Boden's fee arrangement, fee payments, and the LLCs through which Boden was paid. (Div. Ex. 80.) Timbervest provided this information in response to the Division's subpoena, even though the subpoena sent to Timbervest did not directly call for such information. (*Id.*; Div. Ex. 115.) Had Timbervest intended to conceal Boden's payments, it never would have spelled out the information for the Division. In any event, the Division's attempts to show that Timbervest intended to conceal the payments fall flat; each will be discussed in turn. In addition, none of the allegations by the Division regarding the concealment were known by Shapiro, Jones, or Zell, and cannot be the basis of any findings of wrongdoing or future risk against them.

a. The use of LLCs does not demonstrate an intent to conceal.

Boden received his fees through two limited liability companies on the advice of his attorney to protect his personal assets and to limit any claim to the fees made by unknown third parties. The Division takes this simple, reasonable explanation and, ignoring the evidence, tries to argue that the LLC structure was designed to conceal the fees from New Forestry.

Boden wanted to protect his assets, and his attorney said that the best way to do that was to use LLCs. Boden was understandably concerned about other, unknown brokers or third parties asserting a claim to his fees. (Tr. at 369.) His desire to protect himself arose from at least two specific instances where unknown commission agreements at Timbervest later came to his attention. For example, he knew that Bob Chambers, the prior manager of Timbervest, had entered into an oral brokerage agreement with Zachry Thwaite and that the agreement was not memorialized until Chambers was on his way out the door from Timbervest. (Tr. at 376-77.) The Division suggests that because this agreement was eventually reduced to writing (two years after it was originally agreed to), Boden knew about it when he came to Timbervest (Brief at 28); however, Boden's testimony established that he was unaware of the agreement until years later. (Tr. at 373.) Knowing that Chambers had entered into at least one oral brokerage agreement reasonably concerned Boden that there might be other outstanding oral brokerage agreements relating to New Forestry's property.

Additionally, Thwaite's oral brokerage agreement was the subject of a lawsuit filed by New Forestry in 2006 in the Superior Court of Fulton County. (Tr. at 373-74.) This legal dispute served as an additional motivator for Boden to seek legal advice from Harrison on how to protect the potential fees under his consulting arrangement after nearly four years of effort. (*Id.*)

Boden also learned that Chambers had entered into a brokerage agreement with Bob Suter for transactions involving New Forestry properties. (Tr. at 509-11.) Although the Division attempts to characterize the letter reflecting this agreement as only a rate sheet (Brief at 28), Boden disagreed with that characterization. (Tr. at 521-23.) The document itself states, in relevant part: "In the event my real estate firm arranges a trade of property already owned by New Forestry LLC, you agree that I shall be compensated on the above stated commission percentages based on the value of the property traded." (Resp. Ex. 86.) Suter's letter reflects written confirmation of an existing underlying agreement to receive a commission in connection with New Forestry's properties.

Boden did not know what other brokerage agreements related to New Forestry's property that Chambers might have entered into. Boden had never met Chambers, and the circumstances surrounding Thwaite's agreement (that it had been memorialized very close to the time Chambers left Timbervest), gave him pause about what other brokerage agreements might exist. (Tr. at 376-77.) The prudent thing to do, therefore, was for Boden to seek advice from his attorney on how best to protect his assets in case of a claim by an unknown broker or other third party, which is exactly what he did. Boden even waived the attorney-client privilege with respect to the advice he received in connection with using LLCs to receive his fees, further demonstrating he had nothing to hide.

b. Harrison's work does not demonstrate an intent to conceal.

The Division next takes issue with Harrison's methodologies in fulfilling his client's requests, even though there is *no evidence* that any of the Respondents, including Boden, had any knowledge about how Harrison set up the LLCs. Harrison's advice to use LLCs was reasonable.

In Harrison's opinion, an LLC would help limit any potential claims to specific assets. (Tr. at 592-93, 606-07, 613.) He also thought it would be a more sound structure to use a separate LLC each time Boden received a fee. (Tr. at 604.) Harrison also wanted to keep the LLCs as separate as possible to avoid any sort of piercing the veil argument. (Tr. at 608.) He therefore gave each LLC a separate name and address in an attempt to create "the highest level of separateness." (Tr. at 610.)

LLCs, as well as "shell" LLCs (with no underlying business or operations), are a common asset protection vehicle used throughout the business world, the real estate industry in general, and, as explained by Wooddall, in the timberland industry specifically. (Tr. at 592, 824-25.) Timbervest itself sets up special purpose LLCs for each of its funds in each state that the fund owns properties or on a project-by-project basis, resulting in hundreds of Timbervest-created LLCs. (Tr. at 499.)

The Division attempts to discredit Harrison by arguing that Harrison was complicit in a fraud against New Forestry. The suggestion that Harrison would be in cahoots to conceal the beneficiary of the fee and to perpetrate a fraud against New Forestry is outrageous. Had the Division believed this assertion it certainly would have brought charges against Harrison. The fact is that Harrison is an attorney in good standing with no bar complaints. (Tr. at 727.) He has been a lawyer for 25 years, and he would not risk his career to help a client, or a friend, engage in any sort of fraud or deceit. (Tr. at 727-28.)

Equally offensive is the Division's assertion that Harrison's fee for performing this work was "consistent with a reward for helping to conceal the real beneficiaries of the fee payments." (Br. at 31.) Boden and Harrison agreed to a 10% contingency fee. (Tr. at 675-76.) The fee was agreed to before any payments were made to Boden and before Boden knew whether he would ever receive any. (*Id.*) If Boden had never received a fee, Harrison would have received nothing for his legal services. Harrison therefore willingly bore the risk that all of his efforts and advice would result in no compensation should no sales occur.

There is no evidence to support the Division's attempts to paint Harrison as complicit in any sort of fraudulent scheme. Instead, the record amply suggests that Harrison acted reasonably in giving sound legal advice to Boden on how to receive fees and did not intend to hide the ultimate beneficiary of those fees from anyone.

c. Errors in the purchase and sale agreements are not evidence of an intent to conceal.

The Division argues that because there were errors in the purchase and sale agreements ("PSAs") in which Boden received a fee, Timbervest must have intended to conceal the fees. (Br. at 26-28.) In fact, the errors in the PSAs that did exist were nothing more than innocent mistakes. In any event, New Forestry never reviewed the PSAs. (Tr. at 1088.) It makes no sense to "conceal" payments in a document that no one outside of Timbervest would have reviewed. Moreover, if BellSouth or ORG had reviewed the PSAs, the documents reveal that a fee was paid.

There is no evidence to support the Division's theory that Timbervest intentionally inserted errors into the PSAs. Boden testified that he gave the drafters of the contracts the name of the LLC through which he would be receiving his fee and the percentage of the sales price that he was owed. (Tr. at 172-73, 303-04, 353-54.) He was not responsible for any other language in the PSAs about which the Division complains. (*Id.*)

The counterparties to the PSAs also failed to catch or correct the mistakes. For example, Wooddall failed to notice or call to anyone's attention that the PSA included language that Fairfax Realty Advisors, LLC was an advisor to Chen. The Division, however, has never claimed that Wooddall was complicit in some fraud, which he would have to have been if the insertion were anything but a drafting error, as Chen drafted the document. (*See* Tr. at 173.) The payment was correctly classified as a payment by the seller (New Forestry) on the closing statement. (*Id.*) There would be no reason to insert erroneous language in the PSA but then correct the error on the closing statement.[10]

Additionally, the Division complains that the PSA for the Kentucky Property states that New Forestry will pay a fee "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; Br. at 26-27.) But this language is entirely accurate. Under his fee agreement, Boden worked on the formation, negotiation, and execution of the PSA and the subsequent sale of the property. Because Westfield was essentially Boden's alter ego, the description was accurate. Moreover, the PSA does not say that Westfield Realty Partners performed those services, only that it is being paid in connection with those services. (Div. Ex. 33.) There simply was no error in this PSA.

d. Fees paid to an unlicensed broker do not demonstrate an intent to conceal.

The Division also contends that because Boden's fees were paid to LLCs that were not licensed brokers, this "demonstrates most compellingly" that the LLCs were designed to conceal Boden's fee payments. (Br. at 29.) This argument is nonsensical. If Boden or Harrison knew that it was improper to receive his fees in this manner, they would have used a different vehicle.

Further, there was no evidence that Boden knew or should have known that receiving fees in this manner was improper. Boden was a licensed real estate broker. (Tr. at 49.) Although

[10] Similarly, there is no evidence that the counterparty to the Rocky Fork PSA caught or attempted to correct the error that Woodson & Company, LLC acted as an advisor to the parties in the transaction. But, in any event, the error in the Rocky Fork PSA is irrelevant because Boden never received a fee on the sale of that property, as the sale closed outside the sunset date of his fee arrangement.

the two LLCs that received the fees did not hold his license, there is no evidence that Boden did not believe his brokerage license to be effective. Moreover, Boden relied on Harrison to structure the receipt of the fees. (Tr. at 298-99.) If there were an issue with how the fees were received, Boden would have reasonably expected his attorney to alert him to that fact. But there is no evidence that Harrison thought the payment of fees to an unlicensed entity was improper. As Boden testified, "we never defined the entity as a broker. It was a limited liability company set up specifically to insulate me and my assets." (Tr. at 390.) In any event, whether Harrison knew or should have known that the fees were improper is completely irrelevant—he is not a respondent in this case. Only if Boden himself knew or should have known that the fee structure was improper is it even remotely relevant. But there is no evidence that Boden had or should have had this knowledge.

In fact, Boden testified that he knew it was illegal for an unlicensed broker to collect a brokerage commission in Georgia. (Tr. at 383-84.) But Boden did not view his payments as brokerage commissions; rather, he viewed them as advisory fees. (Tr. at 386.) They were compensation for the approximately 20 months of otherwise unpaid work that Boden did on behalf of New Forestry from which New Forestry received direct benefits. And although they were triggered by sales, they were not compensation specifically for the sale but for all the work necessary to create a sales process for New Forestry. (Tr. at 505-06, 1491, 1771.)

The propriety of receiving commissions or advisory fees under the state licensing statutes, however, is not at issue. These statutes do not form the basis for an Advisers Act violation. The Division's focus on them is nothing more than a red herring that diverts the Commission's attention from the facts and the evidence that Timbervest did not intend to conceal the payments of fees to Boden from anyone.

2. The fee arrangement was disclosed.

A conclusion that Timbervest concealed the fees from New Forestry would be particularly unreasonable in light of the fact that Shapiro had a conversation with Schwartz about Boden's fee agreement in 2005. Although Shapiro does not recall the precise words he used during the conversation, he recalls that he walked away thinking it was fine. (Tr. at 1776-77.) The Division asserts that Shapiro presented only a "hypothetical scenario" to Schwartz and did not disclose any of the details of the agreement, including its duration, the properties subject to it, who would pay the fees, or who would receive the fees. (Br. at 21.)

The Division ignores the lack of evidence to support its version of events. Shapiro testified that he could not remember exactly what was said but that he had given Schwartz "the general overview" of the arrangement and "gotten the okay" from Schwartz. [11] (Tr. at 1776-77.) Shapiro reported this back to his partners. (Tr. at 414, 1325, 1337, 1352, 1756.) Indeed, the only basis for the Division's assertion is the self-serving testimony of Schwartz, whose evolving and ever-changing story was designed to cover his own potential liability. The Division completely disregards that Schwartz originally told a different story both to the Division and to Timbervest's outside and general counsel and that Schwartz has made statements since his investigative testimony to at least one other client that he knew of and agreed to Boden's fee arrangement.

The Division argues that there must have been no disclosure of the fee agreement because no contemporaneous documentation exists to corroborate the disclosure. (Br. at 21-22.) But the lack of documents is most likely a function of the passage of time. The disclosures were made

[11] The Division distorts Shapiro's investigative testimony about the response he received from Schwartz during this conversation. The Division claims that Shapiro's recollection is that Schwartz had "no response" to the disclosure. (Br. at 23.) That is clearly not what Shapiro's testimony reflects. Shapiro testified, both in his investigative testimony and at the evidentiary hearing, that Schwartz's response during the conversation was that the agreement was fine and was not a big deal. (Tr. at 1785:1–23.) It was such a non-event that Shapiro cannot recall Schwartz's exact words. (*Id.*)

nearly a decade ago, and emails and other documents at Timbervest and BellSouth from that period no longer exist. (Tr. at 1655-56.) Newly tendered evidence shows ORG, too, did not retain relevant records. (attached as an Exhibit to Respondents' Motion to Adduce Additional Evidence). Investment advisers are required to keep documentation for five years. 17 C.F.R. § 275.204-2. There has been no allegation that Timbervest did not fulfill its record-keeping requirements under the Advisers Act. Timbervest specifically and voluntarily informed the Division about the fees paid to Boden. (Div. Ex. 79.) The sale of Tenneco Core and the Kentucky Property had occurred more than five years ago at that point, but the Division took its time pursuing any claim related to the fees. In fact, it waited more than 17 months after learning of the relevant events before bringing charges but now claims that Timbervest should have maintained documentation that it was not required to maintain. The lack of availability of documentation a decade after the disclosure of the fee agreement to Schwartz should be held against the Division, not the Respondents.

This 1st day of December, 2014.

Stephen D. Councill
Julia Blackburn Stone

ROGERS & HARDIN LLP
2700 International Tower, Peachtree Center
229 Peachtree Street, N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224
scouncill@rh-law.com
jstone@rh-law.com

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

(Sig. by permission)
Nancy R. Grunberg
George Kostolampros

MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-496-7524
Facsimile: 202-496-7756
ngrunberg@mckennalong.com
gkostolampros@mckennalong.com

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

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.**	**Certificate of Compliance**

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents' Opposition to the Brief Supporting Division of Enforcement's Petition for Review complies with the length limitations of SEC Rule of Practice 450(d). I further certify that this brief was prepared using Microsoft Word 2010 and that the word count for the document is 13,822 words.

This 1st day of December, 2014.

/Stephen D. Councill

ROGERS & HARDIN

RECEIVED
DEC 01 2014
OFFICE OF THE SECRETARY

2700 International Tower,
Peachtree Center
229 Peachtree Street, N.E.
Atlanta, Georgia 30303-1601
404.522.4700
Facsimile: 404.525.2224

STEPHEN D. COUNCILL
DIRECT: 404.420.4658
DIRECT FAX: 404.230.0935
EMAIL: SCOUNCILL@RH-LAW.COM

FACSIMILE COVER PAGE

PLEASE CALL US IMMEDIATELY AT (404) 522-4700 IF YOU DO NOT RECEIVE THIS ENTIRE FACSIMILE

DATE: December 1, 2014
PAGES: 47

TO:

Secretary Elizabeth M. Murphy — **PHONE:**

U.S. Securities and Exchange Commission — **FAX:** 202-772-9324 or 202-772-9325

RE: In the Matter of Timbervest, LLC, et al.; File No. 3-15519
Client-Matter Number: 3862.011

NOTES/COMMENTS:

CONFIDENTIALITY NOTE

The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named below. If the reader of this message is not the intended recipient, you are hereby notified that any use, dissemination, distribution or copy of this facsimile is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and return the original message to us at the address to the right via the United States Postal Service. Thank you.

ROGERS & HARDIN

RECEIVED
DEC 01 2014
OFFICE OF THE SECRETARY

December 1, 2014

Stephen D. Councill
Direct: 404.420.4658
Direct Fax: 404.230.0935
Email: scouncill@rh-law.com

VIA FACSIMILE TO 202-772-9324
AND OVERNIGHT DELIVERY

Secretary Elizabeth M. Murphy
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington, DC 20549

Re: In the Matter of Timbervest, LLC, et al.
Administrative Proceeding File No. 3-15519

To Whom It May Concern:

On behalf of Respondents, I enclose for filing the original and two copies of Respondents' Opposition to the Brief Supporting Division of Enforcement's Petition For Review.

Thank you for your attention to this matter.

Sincerely,

Stephen D. Councill

SDC/ydb
Enclosure (as stated)

cc: Robert K. Gordon, Esq. (via Facsimile and United States Mail)