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.	Gordon Jones II's Reply in Support of his Appeal to the Commission

GORDON JONES II'S REPLY IN SUPPORT OF HIS APPEAL TO THE COMMISSION

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Respondent Gordon Jones, II respectfully files this Reply Brief in support of his Appeal to the Commission, requesting that the Commission reverse the Initial Decision of Administrative Law Judge Cameron Elliot rendered on August 20, 2014 (the "I.D."). Contrary to any reasonable interpretation of the evidentiary record, the I.D. found that Jones aided and abetted and caused violations of §§206(1) and 206(2) of the Investment Advisers Act. As addressed in Timbervest's briefs, the evidence shows that Timbervest did not violate Section 206, and accordingly, the causing and aiding and abetting charges against Jones should be dismissed.

With respect to the individual Respondents, the Division painted all of the individual Respondents with a broad brush of misconduct, even where clearly none exists. Based on these tactics, the ALJ erroneously found Jones acted recklessly with respect to a pair of real estate transactions (the Tenneco Core transactions), and negligently with respect to the disclosure of fees received by co-Respondent Boden.

Jones has been a lawyer in good standing with the State Bar of Georgia for almost 20 years. (Tr. at 1230-32.) He has worked at reputable law firms and never had any prior history of alleged misconduct, either as a lawyer or in his capacity as a partner of an investment advisory firm. (Tr. at 1230-33.) When the focus is squarely put on Jones, the evidence in this case is clear and undisputed that he committed no wrongdoing. In addition, the sanctions sought by the Division against Jones are undeniably penal and, therefore, barred by the statute of limitations. Even if they were not found to be penal, the sanctions are extreme and unwarranted; and the appropriateness of such sanctions has not been analyzed independently from the other Respondents, either with respect to his current competence and future risk, nor with respect to the collateral consequences on Jones.

I. Jones did not act recklessly or negligently with respect to the Tenneco Core transactions.

As an initial matter, as discussed in each of Timbervest's briefs, the Tenneco Core transactions were not a prearranged deal and did not constitute a cross trade. Each of the transactions was distinct from the other and was consummated in each client's best interests.

With respect to Jones, the I.D. and the Division both failed to articulate any reasonable basis for finding Jones aided and abetted and caused a violation by Timbervest in connection with the Tenneco Core transactions. The OIP states that Timbervest sold the Tenneco Core property for one client and repurchased the same property a few months later on behalf of a different client, pursuant to a purported side agreement negotiated by Boden, without disclosure to either client. (I.D. at 2.) With respect to Jones, however, the I.D. and the Division's allegations both center around his approval of the transactions and not about his role in the lack of disclosure. (I.D. at 47; Div. Resp. Br. at 21.) Given this fact, no evidence has been presented on how Jones aided and abetted the allegation charged in the OIP – that Timbervest failed to disclose the transactions. Therefore, the charges against Jones cannot stand. Out of an abundance of caution, however, each of the Division's theories is addressed below.

A. Jones was not involved in any discussions regarding the Tenneco Core Transactions.

Foremost, the evidence is undisputed that Jones had no discussions with Wooddall or Chen Timber with respect to the Tenneco Core transactions and was not made aware of any of Boden's discussions. (Tr. 1478:7-1479:7; 1487:16-20.) Jones, therefore, could not disclose any purported conflict of interest posed by the Tenneco Core transactions to BellSouth because *he had no reason to know* of any purported conflict of interest. In fact, Jones testified repeatedly, that had he known of any discussions regarding a potential repurchase of the Tenneco Core

property, he would have raised questions and ensured that Timbervest was meeting its fiduciary obligations.[1]

B. Jones did not encounter "red flags" and his actions were reasonable.

Due to the undisputed facts that Jones had no involvement in the Tenneco Core transactions, the Division is left grasping for "red flags" they contend should have alerted him to Timbervest's alleged wrongdoing. Although the Division contends that the "red flags" were "numerous," only two "red flags"[2] noted by the Division implicate Jones: (1) the unproven assertion that he *would likely have known* that Timbervest's official valuation of Tenneco Core in August 2006 was not consistent with the Tenneco Noncore data, and (2) the fact that he would have known that the time lapse between the sale and repurchase was unusually small.

First and foremost, Jones was not actively involved in the daily activities of Timbervest's timberland business. (Tr. 1302:17-18; 1390:22-1391:3). In general, he was not involved in the timberland management, valuation, negotiations or documentation of deals, and, specifically, he had no such involvement in the Tenneco Core transactions. (Id.; 1304:17-22; 1421:7-17; 1487:4-13; 1517:12-21; 1634:18-23.) In 2006 and 2007, as President, General Counsel, CCO and director of Timbervest's Crossover Assets platform, Jones managed internal company matters, oversaw complex legal matters and developed and managed the Crossover Assets platform. (Tr. 1411:13-20; 1414:5-10; 1419:9-1420:17.) The Crossover Assets platform in particular was his primary responsibility and accounted for the majority of his time. *Id.*

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[1] "I think I've already said I would have asked questions, I would have raised questions." (Tr. 1299:11-12). "Why, why was this arrangement, what was the purpose of it, and I would have been sure that we were meeting our fiduciary obligations to the New Forestry." (Tr. 1297:10-12.) See also, Tr. 1297:7-8; 1298:32-24; 1299:17-19.

[2] No red flag exists unless the fact constitutes "suspicious events creating reasons for doubt that should have alerted him to the improper conduct of the primary violator" or "a danger ... so obvious that the actor must have been aware of the danger of violations." See, *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004); see also, *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978); *S.W. Hatfield, CPA*, Securities Exchange Act of 1934 (Exchange Act) Release No. 69930, 2013 WL 3339647, at *21 (Jul. 3, 2013).

As a result of his position and duties, Jones's involvement in the Tenneco Core transactions was limited to his approval of the transactions as a member of the investment committee. (Tr. at 1248.) In this capacity, and consistent with his practice on all timberland transactions, Jones's approval was based on the information presented to him by the Timbervest timberland team, comprised of various Timbervest foresters and analysts and managed by Boden and Zell. (Jones App. Br. at 1-6; Tr. at 457:14-21; 1482:9-1483:3; 1525:18-1526:20; 1598:15-1599:2; 1628:1-1628:19; 1625:24-1626:5.) As discussed in Jones's Appeal Brief, the information presented to him showed both the sale and repurchase of the Tenneco Core consistent with each client's mandates and objectives and were financially attractive. (Jones App. Br. at 2-6; Tr. at 1484:10-1486:2.) Jones was entitled to rely on the information provided to him by Timbervest's timberland team and was abundantly reasonable in doing so.

With respect to the Tenneco Noncore data there was no "red flag" that should have alerted Jones to purported misconduct. As discussed in the Timbervest briefs, the Division's arguments are based on nothing more than a straw man and are wholly contradicted by the actual evidence. In any event, given Jones's position and duties, there is no basis on which to conclude that he "*would likely have known*" of any valuation discrepancies even if they actually had existed. He was not actively involved in the daily activities of the Timbervest timberland business and was not involved in the timberland valuations. (Tr. 1302:17-18; 1304:17-22; 1390:22-1391:3; 1421:7-17; 1487:4-13; 1517:12-21; 1634:18-23.) Even had he been presented with the data, it would have been nothing more than a single data point out of thousands relevant to a timberland portfolio in which Jones had no daily involvement. (Tr. 460:11-22.) Jones's involvement with and approval of the transactions was based on the "green flag" information

(i.e., information showing these transactions were beneficial to the clients) presented to him by the Timbervest timberland team.

Likewise, there is nothing about the time lapse that constituted a red flag for Jones. First, the two separate transactions were presented to Jones and the investment committee at least six months apart. (Tr. 1254:23-1255:6.) Second, irrespective of the timeframe, the information presented to him pointed to "green flags" showing both the sale and repurchase of the Tenneco Core to be consistent with the objectives of, financially attractive for and in the best interests of each client. (Jones App. Br. at 2-6; Tr. at 1254:3-22; Tr. at 1484:10-1486:2.)

Jones did not cause or aid and abet any purported violation by Timbervest or any of the other Respondents. Jones's conduct was consistent with his position at Timbervest, his course of conduct and was abundantly reasonable. Therefore, any charges related to the Tenneco Core transactions should be dismissed against him.

II. Jones spotted the conflict associated with Boden's fee agreement, required disclosure and received assurances that the disclosure had been made with the client's approval.

With respect to the Boden fee arrangement and disclosure of the fees, Jones acted very reasonably under the circumstances. It is undisputed that after Boden joined Timbervest, Jones identified the conflict of interest and brought it to the attention of Shapiro and the other partners. (Tr. 1324:25-1325:18; 1327:14-22; 1352:21-25; 1469:12-22; 1495:6-20; 1497:17-19.) Jones asked Shapiro, his partner, Timbervest's CEO and the primary contact with BellSouth/AT&T and ORG, to ensure Boden's fee arrangement was disclosed to the client's fiduciary, ORG. (*Id.*) Shapiro reported back that he had disclosed Boden's fee arrangement to ORG and that ORG was fine with it. (*Id.*; Tr. 1772:17-20; 1774:17-25; 1776:17-21.)[3] With respect to Jones, the debate

[3] As Jones testified: "I identified the issue, . . . I asked that [Shapiro] contact Mr. Schwartz, . . . who was with ORG and who was the fiduciary for the three BellSouth plans and was our only contact at the time, to ensure that he was

over whether Shapiro's disclosure was adequate is not the issue. As the ALJ found, Jones was entitled to rely on the representations of Shapiro. (I.D. at 54.) His reliance on Shapiro's representations about his disclosure was clearly reasonable.

These factors should end the analysis of whether Jones caused or aided and abetted any theoretical violation by Timbervest. Jones's conduct was amply reasonable in these circumstances and all charges should be dismissed against him based on those findings alone.

Nonetheless, the Division continues to make arguments against Jones that are unsupported by the record or unfounded. The first argument attempts to hold Jones accountable for the lack of documentation surrounding Shapiro's disclosure of Boden's fee agreement. (I.D. at 53-54; DB at 21-22.) This argument simply misses the point and ignores the fact that the disclosure itself, not the documentation of the disclosure, is the issue. As the ALJ correctly noted in the I.D., ". . . there is no general requirement that disclosures required under Sections 206(1) or 206(2) be in writing." (I.D. at 53.) More importantly, however, the absence of documentation does not negate Jones's reasonable belief that Shapiro disclosed Boden's fee arrangement to and received approval from ORG.

Of critical importance, while Jones testified that he has been unable to locate written documentation from over seven years ago regarding the disclosure and that his normal course of practice would have been to document the disclosure or have Shapiro do so,[4] Jones and the other Respondents were not the only ones unable to produce records from the relevant period. In fact, none of BellSouth, AT&T or ORG were able to produce records from this period. (Res. Rep. Br. at 8) Yet, despite the fact that all relevant parties were unable to produce

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aware of it. I received confirmation from Mr. Shapiro that he had that conversation and he reported back that Mr. Schwartz had no problem with it." (Tr. 1327:14-22) "I talked to Mr. Shapiro about it. He's one of my partners, and I relied on him to make the disclosure to the client, he reported back that he had made the disclosure and that the client was fine with it." (Tr. 1352:21-25) See also, Tr. 1325:12-18.

[4] Tr. at 1327:1-4; 1328:6-9; 1329:18-23; 1340:6-16; 1341:18-1342:12.

contemporaneous records, the Division asks the Commission to hold this fact solely against Respondents. Even more deplorable, the Division asks for this unreasonable inference knowing all relevant events occurred at least seven years ago – well beyond the statute of limitations – and which serve the basis of one of the, if not the, most dated cases ever tried by the Division.

Second, the ALJ and Division erroneously cite the record for the proposition that Jones supervised Seabolt in 2012, and, this fact is held against Jones because Seabolt "transmitted a letter to Ranlett in August 2012 that was misleading to the same degree as Shapiro's letter to Ranlett in June 2012." (I.D. at 54; Div. App. Br at 38). While the I.D. found that the letter did not support a finding of scienter against Jones, it served as a basis for finding that Jones acted negligently. (I.D. at 54) As discussed in the Jones Appeal Brief at 7-8, and the Timbervest Response Brief at 18-21, there was nothing misleading about this (or any other) letter, and no evidence shows Jones knew the facts allegedly omitted. Furthermore, Jones did not supervise Seabolt in 2012 when the letter was sent. The citations in the I.D. all point to testimony relating to the 2005 to 2007 timeframe (at which point Seabolt did report to Jones who was general counsel at the time). (Tr. 1234:10-23; 1413:10-15; 1414:5-10) Therefore, Jones cannot be held vicariously responsible for the contents, or lack thereof, of Seabolt's letter. Nor can the letter serve as the basis for a finding of negligence against Jones.

Next, the Division cites "red flags" with respect to the Boden fee arrangement, contending that Timbervest's written agreement with the client prohibited the fees and prohibited transactions under ERISA. (Div. Br. at 48; Div. R. Br. at 21, 23.) These were not red flags for Jones. (Tr. 1355:13-1356:1.) In fact, Jones identified the issues presented by Boden's fee arrangement, discussed it with his partners and required Shapiro to disclose it to the client's fiduciary, ORG. (Tr. 1324:25-1325:18; 1327:14-22; 1352:21-25; 1469:12-22; 1495:6-20;

1497:17-19.) Shapiro did so and reported back to Jones that he had made the disclosure and that ORG was fine with Boden's fee arrangement. (*Id.*; Tr. at 1337:20-24.) These assurances from Shapiro were "green flags" to Jones, providing assurances that the client knew of and had approved the Boden fee arrangement notwithstanding the language in the management agreement.

Lastly, the Division attempts to implicate Jones based on Jones receipt of monies from Boden attributable to his consulting fees. Given Jones's reasonable belief that the client was aware of and had approved Boden's fee arrangement, however, it is confounding why Jones would take issue with Boden's decision to share a portion of his fees with him. The record clearly shows that Boden chose to share his fees with Jones and the other Partners completely on his own accord. (Tr. 222:17-21; 288:13-17; 289:4-20; 290:22; 295:20-21; 309:12-310:13; 310:25-311:1; 1313:3-14; 1345:3-1346:6.) He did so due to the fact that he and his Partners had shared revenues and investments in the past, many from endeavors in which Boden had no involvement, and because according to Boden, "it felt like to me the right thing to do." (Tr. at 289:18-19; *Id.*) Jones likewise viewed Boden's decision to share his revenues with his Partners the same as the many other occasions on which they had shared other revenues and investment opportunities. (Tr. 1345:3-1346:6.)

For the reasons stated above, sanctions against Jones with respect to the disclosure of Boden's fees are unwarranted. Jones was entitled to rely on Shapiro's representation to him that he had disclosed Boden's fee arrangement to ORG. The lack of records does not change this fact, especially when the events occurred more than eight years ago, none of the relevant parties were able to produce documents from the relevant period and the disclosure was not required to be in writing in any event. Jones did not supervise Seabolt in 2012 and cannot be held

responsible for contents of letters written by her (which, in any event, were not misleading). Jones received revenues from his business partner, consistent with many other business endeavors. At bottom, the purported "red flags" were not "red flags" when taken out of isolation and the full set of facts is properly considered, including the assurances of proper conduct, and other "green flags," Jones received from others. Jones's actions and conduct in these circumstances were very reasonable.

III. ERISA and Jones's knowledge thereof are nothing more than unproven diversions.

The Division's allegations regarding Jones's misconduct are focused in large part on his knowledge of and potential violations of ERISA, a body of law over which the Commission does not have jurisdiction. The Division contends that ERISA served as his motivation to "collude" with the other Respondents in violating securities laws. (Div. Rep. Br. at 21, 23.) This argument, however, as well as the uncharged and clearly unproven allegation of "collusion," are nothing more than irrelevant diversions. In any event, the Division failed to establish any level of ERISA knowledge by Jones, and certainly not any level of knowledge that could have served as motivation for Jones.

A. Jones's testimony does not substantiate any level of ERISA knowledge or expertise.

Jones's testimony regarding ERISA was confined to his subjective thought that the New Forestry account was subject to ERISA,[5] and three instances from eight to ten years prior where ERISA related issues had come to his attention: (1) Timbervest's abandoned REIT plan in 2004, discussed below;[6] (2) New Forestry's loan facility with Prudential in 2005 which required a QPAM due to Prudential's relationship with BellSouth;[7] and (3) a REOC opinion required by

[5] Tr. at 1489:24-1490:5; 1498:6-9.
[6] Tr. at 1395:7-22.
[7] 1397:13-1398:4.

BellSouth in connection with its investment in Timbervest Crossover Partners, L.P. in 2006.[8] Each of these matters regarded specific, isolated ERISA issues and in no way relate to the matters charged. Jones's limited testimony on ERISA shows that he did not view fiduciary duties or conflicts of interest in an ERISA context,[9] and that he did not consider ERISA in connection with the Tenneco Core transactions, Boden's fee arrangement or his sharing of the fees.[10] None of Jones's testimony regarding ERISA in any way relates to the matters in this case and does not substantiate any level of ERISA knowledge or expertise.

B. Barag's testimony is unreliable and does not establish any level of ERISA knowledge by Jones.

Presented with this evidentiary void, the Division places significant and substantial reliance on the testimony of Barag, an individual who worked with Timbervest for only a few months almost 10 years ago,[11] had only "superficial" involvement with the account in question,[12] is not an ERISA expert,[13] could not correctly recall the most basic facts about his short tenure at Timbervest,[14] had no personal dealings with Jones on any issue related to ERISA,[15] had no actual observations of Jones on which to base his assessment of Jones's ERISA knowledge[16] and was approached by the SEC for testimony on the eve of his company going public.[17] The Division's reliance on Barag about Jones's *knowledge of ERISA*, a very complex body of law, *in an Adviser's Act action* alleging fraud is concerning to say the least. In addition, as the ALJ correctly found, lay witnesses such as Barag are not generally entitled to opine about

[8] Tr. 1401:18-1403:8. Note that the exact same BellSouth pension plans that made up New Forestry were the sole investors in this partnership; and the partnership was determined to be exempt from ERISA due to the REOC exception.
[9] Tr. 1521:17-1522:2.
[10] Tr. 1379:24-1380:16.
[11] Tr. at 1923:15-19; 2010:1-6.
[12] Tr. at 1924:10-21. Or stated otherwise, he had "very little to do" with the New Forestry account. *Id.*
[13] Tr. at 1914.
[14] Res. Opp. Br. at 24
[15] Tr. at 1943:6-14.
[16] Tr. at 1987-88.
[17] Tr. at 1987-88.

someone else's understanding. (Tr. at 1940) Specifically, after several objections by Respondents' counsel, the ALJ required the Division to focus on Barag's observations regarding the Respondents' ERISA knowledge rather than his general understandings. (*Id.*) Notwithstanding this directive, the Division inappropriately continues to rely on Barag's testimony regarding his general understandings of Jones's ERISA knowledge. Specifically, the Division cites Barag's testimony that Jones "possessed knowledge of ERISA and its fiduciary requirements,"[18] that Jones "understood the ramifications of" Barag's purported impromptu lesson on prohibited ERISA cross trades to Respondents in 2004,[19] and that Barag "perceived Jones to be 'knowledgeable' about 'ERISA-*related things*.'" [20]

None of these general understandings are supported by any actual observations by Barag. In fact, Barag admitted that *he never had any personal dealings with Jones on any issue relating to ERISA*.[21] There are only two instances in which Barag could even recall any ERISA related conversations with Jones. And in both purported conversations, *Barag* imparted *his* knowledge regarding ERISA on Jones regarding issues wholly distinct from the issues presented in this case. (Tr. at 1934:20-1936:5; 1944:24-1947:6.) These facts alone should conclusively preclude the Commission from considering Barag's testimony about Jones's ERISA knowledge. Nevertheless, the substance of the two ERISA conversations are briefly addressed below.

The first conversation occurred in 2004 and purports to have Barag counseling Jones, Shapiro, and Zell about ERISA's prohibition on cross trades in connection with an abandoned REIT initiative. (Tr. at 1934:20-1936:5.) Barag's testimony, however, is about an actual cross trade potentially involving the entire New Forestry portfolio. (*Id.*) It was a distinctly different

[18] Div. App. at 10.
[19] *Id.*
[20] DB at 10-11. *Emphasis added.*
[21] Tr. at 1943:6-14. *Emphasis added.*

factual scenario from the facts regarding the Tenneco Core transaction. In addition, as discussed *infra*, Jones was unaware of any purported conversations between Boden and Wooddall regarding the Tenneco Core property, much less any prearranged deal. Therefore, anything Barag may have said to Jones regarding ERISA and cross trades was not factually similar in any respect to Jones's knowledge of the Tenneco Core transactions and could not possibly have been considered by Jones in connection with his approvals.

The second conversation purports to have Barag essentially lecturing Jones and Shapiro on his way out the door from Timbervest about not being able to take fees outside the investment management agreement. (Tr. at 1944:24-1947:6; 1948:3-1949:2.) Aside from the absurdity of the nature and timing of this purported conversation, Barag's testimony is about fees to Timbervest for its management services, not about unrelated fees earned for unrelated services such as those earned by Boden under his fee arrangement. (Tr. at 1948:3-1949:2.) In fact, Barag testified quite clearly that there was "[n]ever" a discussion about commission fees. (Tr. at 2012-13.) Barag's alleged advice also was patently incorrect. Advisors frequently charge separate fees for non-advisory services, such as financial consulting, in agreements not covered by the advisory agreement. Additionally, as any business person knows, agreements can be and routinely are changed, and clients are free to and routinely do approve matters beyond the four corners of contracts. As far as Jones knew, that is exactly what happened here.

The bottom line is that Barag's memory from ten years ago is unreliable, he had no personal dealings with Jones on any issue related to ERISA, and he had no actual observations of Jones on which to base his assessment of Jones's ERISA knowledge. These facts make Barag's impermissible testimony regarding Jones's ERISA knowledge dubious at best.

IV. Jones was not involved in the extraneous matters or any purported concealment.

The Division's introduction of numerous extraneous matters into this case are nothing more than a sideshow of isolating and then manipulating innocent facts to defame the Respondents. Certainly had the Division actually believed any of these matters involved misconduct it would have included them in its charges, especially those that occurred within the five year statute of limitations. With respect to Jones, these extraneous matters are also irrelevant because, as set forth below, they do not implicate him in any manner.

- Jones had no discussions with Carter regarding the Tenneco Core transactions and was not on Carter's email chain. (Div. Ex. 19; *see also* I.D. at 28.)
- Jones did not draft the language describing the Tenneco Core property or regarding the "unsolicited" offer in the August 2006 report to ORG; nor did he draft the language describing the property in the "Spec Book" for TVP. (Tr. at 1266:19-1267:1.)
- Jones was unaware that Boden's fees were paid to LLCs. (Tr. at 1300:1-16; 1303:11-25; 1335:10-22.)
- Jones did not know of Fairfax Realty Advisors, LLC or Westfield Realty Partners, LLC until they were brought to his attention during the course of the Division's investigation in 2012. (*Id.*)
- Jones did not know Ralph Harrison or that Boden had engaged him as counsel in connection with his fee arrangement. (Tr. at 731:4-6; 1307:9-15.)
- Jones had no knowledge of the structures employed by Harrison with respect to Boden's fees. (Tr. at 731:18-732:4; 1304:23-1305:21; 1344:6-9.)
- Jones did not know of Boden's contingency fee arrangement with Harrison. (Tr. at 731:18-732:4; 1342:14-1343:1)

- Jones was not involved with the purchase agreements or other documents related to the Tenneco Core transactions, the Kentucky Lands transactions or the Rocky Fork property negotiations. (Tr. at 122-23; 1478-79)
- Jones does not know Reid Hailey and had no knowledge nor was in any manner involved in the proposed sale of the Glawson property to Reid Hailey in 2004. (Tr. at 869:22-23; Testimony of Hailey at Tr. 866-892.)
- Jones was not involved in the daily activities of Timbervest's timberland management business, did not devise the management plan for the Glawson property or implement any improvements to the property. (Tr. at 1302:17-18; 1390:22-1391:3; 1818:6-9; 1892:3-6; Res. Declarations.)
- Jones did not attend the May 2012 meeting with AT&T. (Tr. 1153:21-1154:2; 2238:4-20.)
- Jones did not author any of the complained about letters to AT&T in 2012. (Div. Ex. 127-130.)
- Jones did not author any press releases by Shapiro related to this matter. (Div. Br. at 45.)

V. Jones did not "feign" any memory loss.

The Division takes much issue with the Respondents' memory lapses from events dated by seven to twelve years, and in its fallacious bravado even sinks to the level suggesting Respondents' legal counsel had some part in purported "collusion."[22] Notwithstanding the disgraceful nature of this argument and the underlying reasons for statute of limitations,[23] none of the Division's complaints implicate Jones. First, as discussed *infra*, Jones was not involved

[22] Div. R. Br. at 19-20.

[23] As the Supreme Court recently reiterated in *S.E.C. v. Gabelli*, 133 S. Ct. 1216 (2013), statute of limitations exist to prevent claims being brought after evidence has been lost, memories have faded, and witnesses have disappeared.

in the daily activities of Timbervest's timberland team (including acquisitions and dispositions), and the Tenneco Core repurchase was one of hundreds of timberland transactions conducted by Timbervest. Second, Jones was not involved in any manner in the negotiations or documentation of the Tenneco Core repurchase. (Tr. at 1487:4-13; 459:21-461:1). Therefore, Jones would not have had any reason to know or remember how the repurchase of the Tenneco Core property came about. The remainder of the Division's complaints regarding "feigned" memories relate to other Respondents or non-Respondents, but in no manner involve Jones. (Div. Rep. Br. at 19-20.)

VI. Sanctions against Jones are not warranted, and, in any event are barred by the statute of limitations.

Jones did not act recklessly or negligently with respect to the Chen Transactions or with respect to Boden's fees. Without these prerequisites there is no basis to impose any sanctions against him. Furthermore, for the reasons set forth in Respondents' Appeal at 20-23 and Jones's Appeal at 9, the sanctions sought by the Division against Jones are penal and barred by the statute of limitations set forth in 28 U.S.C. §2462.

C. The sanctions sought by the Division against Jones are severe and penal.

As set forth in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) a "penalty," as the term is used in § 2462, is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action," and "the degree and extent of the consequences to the subject of the sanction must be considered as a relevant factor in determining whether the sanction is a penalty." (*Id.* at 487–88.) *Johnson* also states in dicta that the sanction "would less resemble punishment" if the SEC's focus had been on the defendant's "current competence or the degree of risk [] posed to the public." (*Id.* at 490.) Each of these matters is addressed below.

Both the associational bar and cease-and-desist order sanctions sought by the Division against Jones extend well beyond remedying any damage caused by Jones. In fact, Jones caused no damage, and the sanctions sought in no manner seek to remedy any damage. They would solely serve to punish Jones.

Both the associational bar and cease-and-desist order sanctions also would have severe collateral consequences on Jones. The collateral consequences associated with an associational bar are clear. Jones's career choices and ability to earn a living in the securities industry undeniably would be limited.[24] A cease-and-desist order would have the same practical effect. Either would also stigmatize Jones for the rest of his life.[25]

Additionally, pursuant to Rule 506(d), if either an associational bar or a scienter-based cease-and-desist order is imposed on Jones, he automatically will be labeled a "bad actor" and be disqualified from participating in a Rule 506 offering for five years.[26] The Rule 506(d) bad actor disqualification is undeniably a "penalty" and has been recognized and characterized as such by the Commission, courts, attorneys and commentators alike.[27] Indeed, as the Commission is aware, this "collateral consequence" would have the effect of barring Jones from a much broader range of future employment opportunities than an associational bar itself. This is

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[24] *Bartek*, 484 Fed. App'x at 957 n.10.

[25] *See, Johnson v. SEC*, 87 F.3d 484, 489 (D.C. Cir. 1996) (the "collateral consequences" of such a suspension could last for the petitioner's entire career); *SEC v. Bartek*, 484 Fed. App'x. 949, 957 (5th Cir. 2012) (the "stigmatizing effect and long-lasting repercussions" of the lifetime bar sought by the SEC suggested that the sanction was punitive in nature); *SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867, 883–84 (N.D. Tex. 2011)("In the investment community, the collateral consequences 'are quite serious,' effectively 'stigmatiz[ing]' the defendant for the rest of his life.")

[26] 17 C.F.R. *§§* 230.506(d)(v)(A), 230.506(d).

[27] *See, e.g.,* Commissioner Stein remarks, Consumer Federation of America's 27th Annual Financial Services Conference, December 4, 2014; United States Securities and Exchange Commission, Public Statement on WKSI Waivers, Commissioner Daniel M. Gallagher, April 29, 2014; American Bar Association comment letter to the U.S. Securities and Exchange Commission on proposed Disqualification of Felons and Other "Bad Actors" From Rule 506 Offerings, October 4, 2011; The Devil is in the Details- Proposed Changes to SEC Rules Affecting Rule 506 Offerings and Summary of Comments, McGuireWoods, September, 2013; NY Times, *With Bank of America Order, S.E.C. Breaks the Mold*, Dec. 8, 2014; Wall Street Journal, *SEC Grants Bank of America Short-Term Waiver from Hedge-Fund Restrictions*, Nov. 25, 2014; Bloomberg, *BofA Mortgage Settlement Stalls Over SEC Political Fight*, Oct. 27, 2014.

because the "covered persons" under Rule 506(d) disqualification include issuers, affiliated issuers, owners, directors, general partners, managing members, executive and other officers, promoters and investment managers and its principals, among others.[28] And because Regulation D and the Rule 506 exemption are the primary capital offering tools used by all U.S. businesses, irrespective of industry, company type, company size or the amount of the capital raised,[29] the tentacles of the Rule 506 disqualification are practically endless.

Rule 506(d) in fact essentially renders moot all of the cases cited by the Division for the proposition that cease-and-desist orders are benign and simply require the defendant to obey the law. (Div. Rep. Br. at 24). None of the cases cited by the Division occurred after the effective date of Rule 506(d), September 23, 2013. While there may have been debate over and legal split of authority regarding the penal or remedial nature of a cease-and-desist order prior to the enactment of Rule 506(d), there certainly can be none now.

The findings in *SEC v. Jones*, 476 F. Supp. 2d 374, 383-85 (S.D.N.Y. 2007), are particularly relevant here. The *Jones* court found that in addition to the reputational damage associated with an injunction, an injunction could serve as the basis for an industry bar against Jones under the Advisers Act; and the court was informed that the Division intended to pursue a bar. (*Id.* at 385.) As a result of this analysis, the court determined that "[t]he severity of these collateral consequences indicate that the requested injunction would carry with it the sting of punishment" and refused to issue an injunction. (*Id.*) The consequences in this case are more dire. The Rule 506(d) disqualification is automatic based on a scienter-based cease-and-desist

[28] 17 C.F.R. §§ 230.506(d)(v)(A), 230.506(d).

[29] See, U.S. Securities and Exchange Commission, Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012, July, 2013. Capital raised through Regulation D offerings was over $900 billion in 2012; Regulation D offerings occur with far greater frequency than any other offering method; Rule 506 accounts for 99% of amounts sold through Regulation D and is the primary offering tool for smaller entities; From 1999-2012 there were more than 40,000 Rule 506 issuances by non-financial issuers with a median offer size of less than $2 million (and 50% less than $1 million).

order. It requires no further proceedings or finding by any court or agency. (Rule 506(d).) Therefore, despite any prior labels or findings of penal or remedial, a cease-and-desist order clearly is no longer benign. Rather it wields automatic collateral consequences at least as severe as associational bars, if not more severe.

Lastly, either sanction could affect Jones's status as an attorney in good standing with the State Bar of Georgia,[30] and would subject him to the serious risk that the Bar would sanction him and possibly revoke his legal license. Disbarment would obviously prevent Jones from being able to serve as a lawyer to any company or with any firm in the future, further constraining his future employment opportunities and ability to earn a living.

For these reasons, the sanctions against Jones sought by the Division are penal and are barred by the statute of limitations set forth in 28 U.S.C. § 2462.

D. Jones poses no future risk to the public.

Even if an associational bar or cease and desist order was somehow determined not to be penal with respect to Jones, the Division has not proven that he poses any risk of future harm.[31] Jones was not involved in any misconduct, much less any repeated misconduct or misconduct occurring in the last seven years. Conduct from more than seven years ago could not be used to determine Jones's current risk to the public in an event.[32] In addition, the fact that more than seven years have elapsed since any alleged violation by Jones severely undermines the

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[30] Tr. at 1230-32.

[31] The SEC must demonstrate that there would be a likelihood of future harm to the public in the event that the injunction is not granted. *Johnson* at 489-490; *SEC v. Patel*, 61 F.3d 137, 141–42 (2d Cir. 1995).

[32] *See, Proffitt v. FDIC*, 200 F.3d 855, 861–62 (D.C. Cir. 2000) ("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 at 141(the defendant's past conduct is by itself insufficient to prove the likelihood of future violations.)

contention that he poses any current risk.[33] Moreover, because the OIP only made allegations regarding matters related to Jones's alleged conduct more than seven years prior, he had no notice that his current competence or risk was at issue; and there was simply no evaluation of his current competence or risk during the hearing.[34]

Recognizing this hurdle, the Division simply bundles the Respondents together and points to numerous extraneous and uncharged conduct in an *ad hoc* attempt to concoct other, more recent misconduct. These tactics have been rejected by the Commission,[35] are prejudicial to the Respondents and are nothing more than a desperate attempt to justify the severe penalties they seek. Certainly had the Division had any real concern about any of this extraneous conduct, it would have included them in the OIP, especially in light of the fact that much of the conduct occurred inside the statute of limitations. Furthermore, the Division's own delay in bringing charges against Jones belies its contention that he poses any current risk.[36] In any event, as discussed infra, with respect to Jones, there is no evidence that he had any involvement in any of these extraneous matters.

Lastly, the Division lumps all Respondents together and cites three statements by the ALJ in support of their contention that the Respondents lack the current competence to perform their fiduciary obligations: (1) Respondents were "oblivious[] to their fiduciary obligations,

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[33] The fact that a defendant's securities violation has ceased for some time show that future violations are not sufficiently likely. See, *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 162 (5th Cir. 1972); *SEC v. Ginsburg*, 362 F.3d 1292, 1305 (11th Cir. 2004); See, also, *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993).

[34] See, *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).

[35] See, *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.")

[36] See, *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.").

which continues today", (2) Shapiro was "shockingly apathetic" toward his fiduciary obligations, and (3) "Boden viewed his fiduciary duty as someone else's responsibility." (Div. Br. at 46-47.) None of these statements, however, implicate Jones. In addition, each of these statements is supported by and relate to erroneous findings about matters beyond those charged. More importantly, they relate to events that occurred many years in the past, certainly not serving as a basis for conduct "which continues today" or on which Jones poses any current risk.

Closer inspection of the first statement shows it is supported by the ALJ's finding that "[n]o individual Respondent gave any thought to the possibility of buying Boden out from his fee agreement when he joined Timbervest" and that "Respondents used Glawson, a New Forestry property, for a fundraiser for Jones's sons' school, and to entertain prospective investors in a commingled fund in which AT&T had not invested." First, the suggestion that Boden could have been bought out was the ALJ's invention and would not have cured the conflict in any event. Additionally, the invented buyout suggestion related to early 2004, prior to or at the time Boden joined Timbervest, and over ten years ago. Second, as discussed in the Respondents' briefs, the Division's assertions of wrongdoing related to the use of the Glawson property are misguided and old. Lastly, these activities occurred in 2009 and 2010, more than four to five years ago.

The second statement regarding Shapiro was directly attributable to Shapiro's disclosure of Boden's fee arrangement to ORG in 2005 and 2006, more than eight years ago. This in no manner implicates Jones.

The third statement regarding Boden was attributable to testimony provided by Boden with respect to his reading and understanding of the New Forestry investment management

agreement and ERISA in 2004, more than ten years ago. Again, this is not evidence of Jones's views and in no manner implicates him.

Lastly in support of their argument that Respondents pose the risk of future harm, the Division states that Respondents "continued to display an extreme disregard for their fiduciary responsibilities" when they made "multiple misrepresentations to AT&T after the fraud was uncovered in 2012." As discussed in the Timbervest briefs, Timbervest's letters to AT&T were accurate and not misleading. In addition, as discussed infra, Jones did not author any of these letters, did not supervise the author, and the contents of the letters, or lack thereof, cannot be attributed to him personally.

For the foregoing reasons, no sanctions against Jones are warranted, and even if sanctions were warranted, they are barred by the statute of limitations.

VII. Conclusion

The charges against Jones are unwarranted, unproven and should be dropped. In addition, the severe sanctions sought by the Division are clearly penal with respect to Jones, are unnecessary and are barred by the statute of limitations. The Commission should therefore reverse the I.D.'s findings against Jones.

This 15th day of December, 2014.

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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.

Certificate of Compliance

CERTIFICATE OF COMPLIANCE

I hereby certify that Gordon Jones II 's Reply In Support Of His Appeal To The Commission 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 6,897 words.

This 15th day of December, 2014.

Stephen D. Councill