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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

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

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

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I. SUMMARY

In its July 5, 2016 order, the Commission ordered the parties to submit briefs limited to the "effect, if any, on the Commission's disgorgement order" of the additional evidence that Respondents claim demonstrates that, in the course of settling a private litigation with their defrauded former client, AT&T, Respondents have paid the disgorgement amounts ordered by the Commission for their antifraud violations. In addressing whether Respondents' proffered evidence establishes this fact, the Commission directed the parties to focus on "the basis of AT&T's lawsuit against respondents, the extent to which the settlement amount is attributable to the misconduct underlying the Commission's disgorgement order, and whether respondents themselves paid the settlement amount." Timbervest, LLC, et al., Investment Advisers Act Rel. No. 4443 (July 5, 2016) ("July 5, 2016 Order") at 2.

As demonstrated below, Respondents have failed to carry their burden to demonstrate that the answers to those questions lead to the conclusion that they are entitled to an offset or modification of the Commission's disgorgement order. In particular, although given the opportunity to unequivocally demonstrate that, when they entered into the claimed settlement with AT&T, they paid AT&T the $403,500 (their ill-gotten disposition fee connected to their violations) plus $181,814.05 in prejudgment interest for the same misconduct that was the basis for the Commission's disgorgement order, Respondents' filing does no such thing. At most, Respondents' filing demonstrates that they paid an unspecified amount to AT&T to settle multiple claims (with millions of dollars in associated damages). That evidentiary deficiency is fatal to their motion. For this reason, and for the reasons that follow, the Commission should reject Respondents' claimed offset or modification.

II. BACKGROUND

A. The Commission Ordered Disgorgement of the Tenneco Core Disposition Fee

On September 17, 2015, the Commission issued an opinion and order finding that Respondents defrauded BellSouth (now known as AT&T), one of their pension fund clients, in connection with the sale of a property in Alabama known as the Tenneco Core. Specifically, the Commission found that, without disclosure to AT&T, Respondents agreed to sell the Tenneco Core to a third party at a below-market rate and then repurchase that property at a significantly higher rate. The Commission found that Respondents failed to disclose their conflict of interest in the transaction and, as part of the remedies, ordered the Respondents to disgorge the $403,500 disposition fee that they charged AT&T in connection with the sale of this property, plus prejudgment interest of $181,814.05, for a total of $585,314.05.

In their appeal to the U.S. Court of Appeals for the District of Columbia Circuit, Respondents sought to adduce two additional items of evidence in support of modifying the disgorgement order. The proffered evidence consisted of a letter by a lawyer at AT&T (BellSouth's successor) stating that AT&T had reached a settlement in its lawsuit against Respondents, and that Respondents agreed to pay AT&T an unspecified sum "in full and complete satisfaction" of AT&T's claims, "including any claims for any relief including interest or losses relating to the $403,000 [sic] disposition fee." The second item was a declaration by Respondent David Zell stating that Respondents had satisfied their obligations under the settlement agreement and that AT&T's action had been dismissed with prejudice.

On June 24, 2016, the D.C. Circuit remanded to the Commission for its consideration of the additional evidence identified by Respondents and its effect, if any, on the Commission's disgorgement order. In the July 5, 2016 Order, the Commission ordered additional briefing, and

encouraged the parties to address precedent regarding the showing required to support modification of a disgorgement order based on the repayment of ill-gotten gains. The evidence proffered by the Respondents to the Commission consists of the two items submitted to the Court of Appeals, and a supplemental declaration by Respondent Zell.

B. AT&T's Private Litigation against Respondents Seeks Additional Damages

On May 8, 2015, AT&T filed a private lawsuit against Respondents. A true and correct copy of the Complaint in AT&T Services, Inc. et al. v. Timbervest LLC, et al., Case No. 3:15-cv-01454-D) (N.D.Tex.), is attached as Exhibit A hereto.[1] AT&T brought its action pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on behalf of its various pension plans that were defrauded by the Respondents. As discussed below, AT&T sought more than $19 million in monetary relief based on various claims.

In addition to seeking recovery of the $403,500 disposition fee paid in connection with the sale of the Tenneco Core (Complaint ¶¶ 40, 69), AT&T asserted a litany of additional claims for damages in connection with the sale and repurchase of the Tenneco Core, the total value of which dwarfed the disposition fee.[2] Most notably, AT&T sought disgorgement of all management fees paid by the AT&T pension plans to Timbervest from the fourth quarter of 2006 through September 30, 2012, the effective date that Timbervest was dismissed by AT&T. (Complaint ¶¶ 55, 62, 69, 71(b)). This amount was approximately $12,106,000. See Timbervest Initial Decision at p. 67 n.29. AT&T also sought a sum equal to the "difference between the sale price of Tenneco Core property that Timbervest illegally flipped and the then-current market

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[1] The Commission may take official notice of the allegations in the complaint under Rule 323 of the Commission's Rules of Practice.

[2] All potential damage figures are stated without any prejudgment interest amount.

value of such property...." (Complaint ¶¶ 69, 71(c)). According to the Complaint, that amount was as much as $5.5 million. (Complaint at ¶ 33).

The Complaint also sought damages for conduct unrelated to the sale and repurchase of the Tenneco Core. AT&T sought recovery of the $200,000 of plan assets that Respondents used to construct a hunting lodge on another AT&T property (referred to as the "I-20 Property"). AT&T alleged that such conduct violated ERISA because Respondents used the hunting lodge for their own personal interests and AT&T never consented to this use of its funds. (Complaint ¶¶ 63 -65, 69, 71(e)). AT&T also sought "the fair value of Defendants' use of the I-20 Property for personal purposes, plus interest." (Complaint ¶ 71(e)). AT&T also sought unspecified damages as a result of Respondents' fraudulent refusal to provide AT&T with certain books and records. (Complaint ¶¶ 61, 76) Finally, AT&T sought recovery of the $822,000 disposition fee it had paid Respondents in connection with the sale of property in Kentucky ("the Kentucky Property"), alleging that the sale violated ERISA because Respondents failed to disclose that the Respondents would be paid a commission from the sale of that property. (Complaint ¶¶ 46-50, 69, 71(d)).

III. DISCUSSION

Respondents bear the burden of showing that an offset or reduction of the disgorgement award is appropriate. Montford & Co., Investment Advisers Act Release No. 3829, 2014 WL 1744130 at *23 (May 2, 2014). As the Commission has noted, in this case, the relevant considerations in determining whether an offset or reduction should be ordered include: "the basis of AT&T's lawsuit against respondents, the extent to which the settlement amount is attributable to the misconduct underlying the Commission's disgorgement order, and whether respondents themselves paid the settlement amount." July 5, 2016 Order at 2, n.6. Respondents

have failed to satisfy their burden of showing that these considerations warrant modification of the Commission's disgorgement award.

A. The Commission's proceeding against Respondents is different than AT&T's private lawsuit against Respondents

The first factor identified by the Commission—a comparison of the Commission's proceedings against the Respondents and AT&T's private lawsuit against the Respondents—weighs against modifying the disgorgement award. As discussed above, the Commission's disgorgement award in this case requires Respondents to disgorge the $403,500 disposition fee that they charged AT&T in connection with the sale of the Tenneco Core property, plus prejudgment interest of $181,814.05, for a total of $585,314.05. In contrast, AT&T's private ERISA lawsuit against Respondents sought more than $19 million in monetary relief against Respondents. The total amount represents not only the $403,500 Tenneco Core disposition fee, but also, among other things, more than $12 million in management fees that AT&T paid to Timbervest after the fourth quarter of 2006 and $5.5 million in profits that Timbervest made on the sale price of Tenneco Core. *Supra* at 4-5. Because the bases of the two lawsuits are different, this factor weighs against modifying the disgorgement award.

B. Respondents have not shown the extent to which their settlement with AT&T private lawsuit is attributable to the misconduct underlying the Commission's disgorgement award

Respondents also have not carried their burden of showing the extent to which their settlement with AT&T is attributable to the misconduct underlying the Commission's disgorgement award.[3] To the contrary, their newly proffered evidence appears to show only that

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[3] Most obviously, Respondents have not shown how much interest they paid pursuant to their settlement with AT&T. This makes it impossible for the Commission to compare any interest paid to the $181,814.05 in prejudgment interest that the Commission imposed in the disgorgement order.

the Respondents paid an unspecified amount to AT&T to settle multiple claims (with millions of dollars in associated damages), including a claim for return of the Tenneco Core disposition fee. Respondent Zell stated in a declaration:

> Respondents reached a settlement agreement with AT&T under which Respondents agreed to pay AT&T an amount in full and complete satisfaction *of all claims asserted in the Lawsuit*, including, but not limited to, all claims related to the $403,500 disposition fee Timbervest received on the sale of a property (the 'Alabama Property'), interest on that disposition fee, and other claims.

(Exhibit 1 to Respondents' Brief) (emphasis added). A letter from AT&T attorney Monroe T. Hill, Jr. to the Division contains a similar description of the settlement payment:

> [T]he Timbervest Parties have agreed to pay the AT&T Plan Parties an amount that is in full and complete satisfaction *of any claims* that the AT&T Plan Parties have or may have against the Timbervest Parties, including any claims for any relief including interest or losses relating to the $403,000 [sic] disposition fee that the Timbervest Parties received in connection with the Tenneco Core property transaction, and eliminates potential unjust enrichment by the Timbervest parties in light of all the service performed by the Timbervest Parties pursuant to the investment manager agreement between AT&T and Timbervest ...

(Exhibit 2 to Respondents' Brief) (emphasis added).

These documents are insufficient to show that an offset is appropriate. AT&T's damage claims far exceeded the amount of the Tenneco Core disposition fee, and were based in large part on conduct unrelated to the sale of the Tenneco Core property. The evidence that Respondents seek to adduce fails to identify the total amount paid to AT&T. Nor does it show how the unspecified payment was allocated among AT&T's various damage claims, or whether there even was such an allocation. Given these facts, the Commission cannot determine whether the settlement involved the full repayment of the Tenneco Core disposition fee, or whether the payment compensated AT&T for different claims or conduct. See Montford & Co., 2014 WL 1744130 at *23 and n.202 (opining that, if settlement payment by Respondent compensated

victim for damages that were not included in disgorgement, then offset to disgorgement would not be appropriate); SEC v. Nadel, 2016 WL 639063 at *17 (E.D.N.Y. Feb. 11, 2016) (denying disgorgement offset when settlement payment to investor compensated for different damages); SEC v. Currency Trading Intern., Inc., 175 F. App'x. 934, 935-36 (9th Cir. 2006) (denying disgorgement offset absent showing that settlement payments were also "the basis for disgorgement awards.") (internal quotation marks omitted).[4]

Respondents' brief, it should be noted, makes factual assertions that go beyond the statements that they have proffered in evidence. Specifically, Respondents' brief asserts that the new evidence "shows that Respondents have already returned the $403,500 disposition fee (with interest) to the client beneficiary." (Respondents' Brief at 3). In fact, however, the proffered statements appear to show, at most, that the Respondents paid AT&T an unspecified amount in exchange for the dismissal of multiple damage claims, among them a claim for the return of the Tenneco Core fee.[5]

The statement by AT&T's Mr. Hill that Respondent's settlement payment "eliminates potential unjust enrichment by the respondents in light of all the services performed by the

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[4] Respondents' discussion of these authorities is flawed because it is based on the false premise that the evidence proffered in support of its motion shows that their settlement payments to AT&T were based on the identical conduct that formed the basis of the Commission's disgorgement order. (See Respondents' Brief, pp. 4-7). In each of the cases where an offset was allowed, there was evidence showing the precise amount that the Respondent or Defendant paid.

[5] The evidence submitted by the Respondents as to what they paid to settle AT&T's claims is vague at best. Following the Zell declaration's statement that the claim for return of the Tenneco Core fee was among the claims resolved by the unspecified settlement payments (Exhibit 1 to Respondents' Brief at ¶4), the declaration states, "Respondents repaid the full $403,000 plus interest to AT&T." (Exhibit 1 to Respondents' Brief at ¶5). Exactly what Zell means by the latter statement is unclear, and it is unsupported by documentation. Respondents have the burden of establishing their entitlement to any offset; the vagueness and uncertainty in the evidence offered is therefore to the Respondents' detriment. See SEC v. Contorinis, 743 F.3d 296, 305 (2d Cir. 2014) (any risk of uncertainty as to the appropriate amount of disgorgement "should fall upon the wrongdoer whose illegal conduct created that uncertainty.")

respondents pursuant to the investment manager agreements ...," should not sway the Commission in its consideration of Respondents' motion. The Commission is not bound by AT&T's claim that a settlement has provided full compensation. SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)(disgorgement is "not confined by an amount for which injured parties were willing to settle."); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E.D.Pa.1976) ("Disgorgement contemplates total recovery from the wrongdoer, not recovery that may be . . . subject to a compromise of actual damages.") See also, SEC v. Prime One Partners, Corp., 1997 WL 222329 at *1 (9th Cir, Apr. 30, 1997) ("Victims cannot 'release' their assailants from returning ill-gotten gains....") Rather, to be entitled to an offset, Respondents must show that they fully repaid the amount that the Commission identified as ill-gotten gains. In addition, Mr. Hill's wholly conclusory statement is contrary to the claims on which AT&T's Complaint was based, namely, that the Respondents were legally barred under ERISA from obtaining any fees or other plan assets of the pension funds once they breached their fiduciary duty by engaging in prohibited transactions. (Complaint, ¶ 69).

C. Respondents cannot prevail even assuming arguendo that they themselves paid the unspecified settlement amounts

Because the Respondents have clearly come up short on the two critical considerations identified by the Commission—the extent of overlap between the Division's and AT&T's respective actions against Respondents, and the extent to which the settlement payments were for the conduct underlying the Commission's disgorgement order—Respondents' motion should be denied. Even assuming arguendo that the Respondents themselves paid the settlement amounts to AT&T (see July 5, 2016 Order at 2, n.6), this alone would not establish the Respondents' entitlement to an offset.

Zell's supplemental declaration states that "the funds for settlement came directly from [Respondents]." (Exhibit 3 to Respondents' Brief at ¶ 6). While the Division has no contrary evidence, it notes that the Commission has previously determined that such generic statements, absent documentary corroboration, are insufficient. In the Matter of David Disraeli, Exchange Act Rel. No. 57027, 2007 WL 4481515 at * 17 (Dec. 21 2007) (denying offset because the Respondent did "not provide documentation verifying the financial statements that he submitted which claimed he had repaid a portion of is ill-gotten gains, and, as noted, he carries the burden of doing so.") See also, SEC v. Prime One Partners, Corp., 1997 WL 222329 at * 1 (affirming denial of disgorgement offset given "the absence of any concrete facts or documentary evidence to back up [Defendant's declaration] that the [ill-gotten gain] was returned."); SEC v. Narvett, 2014 WL 5148394 at *203 (E.D. Wisc. Oct. 14, 2014) (denying offset for settlement payments that defendant attested to but did not provide supporting bank records because the "SEC [was] precluded from interviewing [Defendant] about where the money came from and why there are no records of the transactions.") Because the Respondents have clearly failed to meet their evidentiary burden with respect to the first two factors, however, it may be unnecessary for the Commission to opine on the adequacy of the evidence about who paid the unspecified settlement amounts.

CONCLUSION

For the reasons set forth above, and any other reason deemed appropriate by the Commission, the Commission should deny Respondents' Motion for Leave to Adduce Additional Evidence and leave its order of disgorgement against the Respondents unmodified.

Respectfully submitted,[6]

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[6] By his signature hereto, Division counsel certifies that the Division has complied with the word limitation prescribed by the July 5, 2016 Order. The Division's brief is less than 3,100 words.

CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing document by electronic mail and by UPS overnight mail this day addressed as follows:

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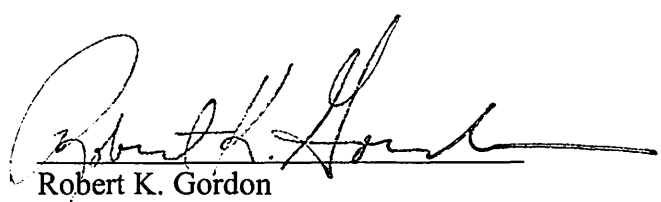

Robert K. Gordon
Attorney for the Division of Enforcement

Division of Enforcement's Opposition to Respondents' Motion to Adduce Additional Evidence

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AT&T SERVICES, INC., in its capacity as named fiduciary of the AT&T Pension Benefit Plan, The AT&T Umbrella Benefit Plan 1, and The AT&T Umbrella Benefit Plan 2, and NEW FORESTRY LLC,	)	
Plaintiffs,	)	
v.	)	Case No. _____
TIMBERVEST LLC, JOEL BARTH SHAPIRO, WALTER WILLIAM ANTHONY BODEN, III, DONALD DAVID ZELL, JR., AND GORDON JONES, II,	)	
Defendants.	)	

COMPLAINT

Plaintiffs AT&T Services, Inc. ("AT&T Services") and New Forestry LLC ("New Forestry") (collectively, "Plaintiffs"), by and through their attorneys, Sidley Austin LLP, for their Complaint against Timbervest, LLC ("Timbervest"), Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones, II (collectively, "Defendants") allege as follows:

PRELIMINARY STATEMENT

1. This is an action brought pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This action seeks relief for Defendants' pattern of fraud and concealment, including Defendants' blatantly improper and unlawful use of the assets of the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan 1, and the AT&T Umbrella

Benefit Plan 2 (collectively, the "Plans"), for Defendants' own personal interests. Defendants' actions were undertaken in breach of their fiduciary duties pursuant to ERISA and the agreement between Timbervest and AT&T Services regarding the management of the Plans' assets, and in contravention of the provisions of ERISA regarding prohibited transactions.

2. Defendants' misconduct described in this Complaint was recently the subject of an administrative enforcement action before the United States Securities and Exchange Commission (the "SEC Proceeding"). In a 73-page decision, an administrative law judge ("ALJ") found all Defendants guilty of gross misconduct. (*See* Exhibit A attached hereto.) The ALJ concluded that each of the Defendants intentionally defrauded AT&T Services and New Forestry in connection with the management of assets that belong to retirement plans governed by ERISA. The ALJ found that Defendants breached their fiduciary duties owed to AT&T Services and the Plans.

3. While the ALJ ordered disgorgement of more than $1.9 million, none of those monies have provided relief to Defendants' victims, AT&T Services and New Forestry. In this action, AT&T Services and New Forestry seek relief under ERISA for the gross wrongdoing perpetrated by Defendants.

PARTIES

4. Plaintiff AT&T Services is a Delaware corporation with its principal place of business in Dallas, Texas. AT&T Services is a wholly-owned subsidiary of AT&T Inc., which acquired BellSouth Corporation ("BellSouth") in 2006 and currently maintains the Plans. Assets of the Plans are held by the former BellSouth Master Pension Trust, which is now part of the SBC Master Pension Trust, the former BellSouth Corporation Representable Health Care Trust – Retirees, which is now part of the AT&T Union Welfare Benefit Trust, and the BellSouth

Corporation RFA VEBA Trust (collectively, the "Trusts"). AT&T Services is the named fiduciary and administrator of the Plans.

5. Plaintiff New Forestry LLC ("New Forestry") is a title holding entity, the outstanding equity interests of which are wholly owned by the Trusts, which held timber property that was managed by Timbervest. Specifically, the three members of New Forestry are: (i) Marinecrew & Co., a nominee partnership for the BellSouth Master Pension Trust; (ii) Benchlight & Co., a nominee partnership for the BellSouth Corporation Representable Health Care Trust – Retirees; and (iii) Blazership & Co., a nominee partnership for the BellSouth Corporation RFA VEBA Trust. Accordingly, a related group of plans owns all of the outstanding equity interests in New Forestry.

6. Defendant Timbervest is a Georgia limited liability company with its principal place of business in Atlanta, Georgia. Timbervest was established in 1995 and currently manages approximately $1.2 billion in timber-related investments. Timbervest was named "Timbervest Investment Services, LLC" until August 2, 2000.

7. Defendant Joel Barth Shapiro ("Shapiro") is the Chief Executive Officer of Timbervest.

8. Defendant Walter William Anthony Boden, III ("Boden") is the Chief Investment Officer of Timbervest.

9. Defendant Donald David Zell, Jr. ("Zell") is the Chief Operating Officer of Timbervest.

10. Defendant Gordon Jones, II ("Jones") is the President of Timbervest. Jones also served as Timbervest's Chief Compliance Officer from approximately January 2005 through August 2012.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that this is a civil action arising under the laws of the United States.

12. Venue is proper in this district because the Plans and Trusts are administered in the Northern District of Texas.

FACTS

I. Agreement Between The Parties.

13. On September 1, 1994, BellSouth entered into a Master Pension Trust Agreement for the purpose of establishing a master trust for the assets of the BellSouth Personal Retirement Account Pension Plan, the BellSouth Pension Plan and any other defined benefit pension plan maintained by BellSouth or its subsidiaries and affiliates.

14. Section 6 of the Master Pension Trust Agreement provides that BellSouth may appoint an investment manager within the meaning of ERISA with respect to the assets governed by the Master Pension Trust Agreement.

15. On July 31, 1996, BellSouth and Timbervest entered into the Investment Manager Agreement pursuant to which Timbervest was appointed the Investment Manager of the Trusts.

16. Pursuant to Section 8 of the Investment Manager Agreement, Timbervest acknowledged that it was an "investment manager" of the Trusts as that term is defined by Section 3(38) of ERISA and that it was a "fiduciary" of the Trusts as that term is defined in Section 3(21)(A) of ERISA.

17. Section 4 of the Investment Manager Agreement provided that Timbervest was to, *inter alia*, make all decisions regarding the investment and reinvestment of the assets of the investment account governed by the Master Pension Trust Agreement "to the extent required or permitted by ERISA and other applicable law."

18. In Section 19 of the Investment Manager Agreement, Timbervest also agreed to "carry out its duties and responsibilities hereunder in accordance with, and be limited in the exercise of its rights by, the provisions of ERISA, the [Internal Revenue] Code and other applicable law."

19. Section 6 of the Investment Manager Agreement specifically provided that Timbervest would have fiduciary responsibilities under ERISA, and included an agreement that Timbervest would not engage in a prohibited transaction within the meaning of Section 406 of ERISA, 29 U.S.C. § 1106.

20. Section 4 of the Investment Manager Agreement also mandated that Timbervest "keep accurate books and records relating to its transactions" involving the Trusts and that it "permit the Trustee and the Company [AT&T Services] to inspect its books and records relating to transactions with respect to the Investment Account at all reasonable times, and furnish such information concerning the Investment Account to such persons as the Company may, in writing, reasonably request."

21. On December 29, 2006, AT&T Inc. acquired BellSouth. AT&T Services is the successor to BellSouth in connection with the Investment Manager Agreement and the Master Pension Trust Agreement. During 2007, following the acquisition of BellSouth by AT&T Inc., the Master Pension Trust Agreement was commingled with and merged completely into the SBC Master Pension Trust, which is the trust maintained by AT&T Inc. to hold the assets of all of its pension programs. From that time through he current date, the timberland assets managed by Timbervest, which are the subject of this Complaint, have been held by the SBC Master Pension Trust.

22. In or about 1990, BellSouth also entered into a retiree health care trust, the BellSouth Corporation Representable Health Care Trust – Retirees, for the purpose of funding various union employee retiree medical benefits. Following the acquisition of BellSouth by AT&T Inc. in 2006, during 2011, the BellSouth Corporation Representable Health Care Trust – Retirees was merged into the AT&T Union Welfare Benefits Trust, the retiree health care trust sponsored by AT&T Inc. to provide retiree medical benefits to all of its union retirees.

23. During 1990, BellSouth also entered into a retiree life insurance trust, the BellSouth Corporation RFA VEBA Trust, for the purposes of funding various life insurance benefits for its retirees. Following the acquisition of BellSouth by AT&T Inc., this trust continues to be maintained as a separate trust by AT&T Inc.

II. The Sale And Repurchase Of The Tenneco Core.

24. Starting in 1996, Timbervest was managing the Trusts' portfolio of assets that were invested in timberland. In approximately 2005, BellSouth Corporation, through its agent ORG Portfolio Management, LLC, directed Timbervest to reduce the size of the Trusts' portfolio by selling some timberland property, but without specifying which property was to be sold.

25. In connection with this directive, and in contravention of ERISA, Defendants hatched a fraudulent scheme that was concealed from AT&T Services and New Forestry in which they would sell some of the Trusts' property to a nominal third-party at an artificially low price, and then have an investment fund managed by Timbervest repurchase the same property from the third-party at a higher price. As explained below, the effect of this illicit scheme was to deprive the Trusts of the true proceeds of the sale of their property, which amount to millions of dollars. Indeed, Timbervest knew at the time of the initial sale to the third party – pursuant to data and information that was concealed from AT&T Services and New Forestry – that the

property was worth substantially more than the nominal sale price and, in fact, that it was worth more than the higher price that Timbervest paid to repurchase the property.

26. This illegal scheme was carried out as follows. In or about May 2006, Boden made an unsolicited telephone call to Lee Woodall, who owned a timber investment company called Chen Timber, LLC ("Chen Timber") and who had been a neighbor of Boden, and said that he wanted to meet and talk to Woodall about a proposed deal. Woodall accepted the meeting, and later met with Boden at a restaurant called Houston's in Atlanta.

27. During that meeting, Boden stated that he was selling a tract of timberland located in Alabama (the "Tenneco Core" property). Boden explained that Timbervest wanted to sell the property and then buy it back for one of Timbervest's own funds at a higher price. Boden knew that this deal would be attractive to Woodall because it was essentially a sure thing – Woodall was guaranteed to make a substantial amount of money on the re-sale of the property back to Timbervest.

28. Woodall later agreed to purchase the Tenneco Core property. However, before Woodall would agree to sign a purchase contract, he wanted to negotiate the price at which Timbervest would later re-purchase the property, so that he would know how much he would be making on the deal. Prior to September 15, 2006, Boden and Woodall agreed that Chen would purchase the property for $13,450,000, and that Timbervest would re-purchase it for $14,500,000. This meant that Woodall's company, Chen Timber, would make over $1 million for participating in Boden's sale/re-purchase scheme.

29. On September 15, 2006, after agreeing on the repurchase price, Timbervest and Chen Timber signed the purchase contract for the Tenneco Core property, with a stated purchase

price of $13,450,000. The sale terms were reviewed and approved by Defendants Shapiro, Zell, and Jones.

30. On October 17, 2006, the parties closed on the sale of the Tenneco Core property, and Chen Timber thereby became the temporary "owner" of the property.

31. On November 30, 2006, just six weeks later and in accordance with their prearranged deal, Boden sent Chen Timber a draft sales contract offering to repurchase the Tenneco Core property on behalf of a different Timbervest-managed investment fund for the previously agreed-upon price of $14,500,000 – more than $1 million more than the sale price paid at the closing just six weeks earlier.

32. On December 15, 2006, Boden and Chen Timber executed an agreement to sell the Tenneco Core to Timbervest Partners Alabama, LLC for $14,500,000. The sale closed on February 1, 2007. Shapiro, Zell, and Jones reviewed and approved the sale.

33. At the time of the initial sale of the Tenneco Core to Chen Timber, Defendants were in possession of data and information – which was concealed from AT&T Services and New Forestry – indicating that the Tenneco Core property was worth more than the $13,450,000 sales price and more than the $14,500,000 repurchase price. Indeed, just two months after the closing of the repurchase, a spec book was prepared for the transaction listing a total site value of $18,905,685.

34. An appraisal that was performed at the time of the initial sale to Chen Timber likewise showed a valuation substantially in excess of the amount paid by Chen Timber. Specifically, an appraisal performed for First Planters Bank, which loaned some of the money to Chen Timber to make the initial purchase, showed that the property was worth $15.5 million.

35. As a result of Defendants' illicit sale and repurchase of the Tenneco Core property, the Trusts (and, thus, the Plans) received millions less than they were entitled to on the sale of the property.

36. In the SEC Proceeding, the ALJ found that the sale/repurchase transaction was unlawful and flat out defrauded New Forestry (i.e., the Plans). The ALJ specifically found that Woodall "understood that Timbervest wanted to 'land bank' Tenneco Core, that is, sell it and buy it back later for a different fund," and that "the motive for the transactions was, in effect, to execute a cross trade." (Ex. A at 44.) He noted that "the transaction had the same consequence as an improper cross trade because it benefitted [Timbervest] at the expense of New Forestry." (*Id.*)

37. Neither Timbervest, nor any of the individual Defendants, sought approval from, or otherwise disclosed to, AT&T Services or New Forestry the affiliated nature of the sale of the Tenneco Core or the fact that Timbervest had "parked" the Tenneco Core with Chen Timber for a short period of time in order to flip the property at a higher price.

38. Timbervest and its directors' use of Chen Timber as a middleman concealed the unauthorized nature of the transaction and constituted a prohibited use of the assets of the Trusts pursuant to ERISA § 406, 29 U.S.C. § 1106(b)(1).

39. As the ALJ in the SEC Proceeding succinctly stated, "[t]he Tenneco Core sale and later repurchase, taken together and under the totality of the evidence, defrauded New Forestry." (Ex. A at 41.)

40. As a result of the sale of the Tenneco Core, the Trusts also paid Timbervest a disposition fee of $403,500.00.

41. The fraudulent scheme regarding the Tenneco Core was not the first time that Timbervest had attempted to "park" or "land bank" property owned by the Trusts and managed by Timbervest. In or about 2005, Boden had attempted to arrange a similar sale/buyback arrangement with a third party relating to another property owned by the Trusts along Interstate 20 in Georgia (the "I-20 Property" or "Glawson"). Just as he did with the Tenneco Core, Boden tried to arrange a deal in which a third party would buy it back at a higher price, thereby depriving the trusts of the proceeds of the true sale price. This deal, however, was never consummated.

42. The ALJ in the SEC Proceeding found that Boden was guilty of misconduct with respect to the I-20 Property as well. The ALJ found that the evidence of Boden's prior attempted sale of the I-20 Property was "generally consistent" with the conclusion that Boden attempted to land bank that piece of property – albeit unsuccessfully – "before he succeeded in land banking" the Tenneco Core. (Ex. A. at 44; *see also id.* at 17-21.)

III. Boden's Unauthorized Commissions That Were Shared With Shapiro, Zell, And Jones.

43. In connection with the initial sale of the Tenneco Core to Chen Timber, a real estate commission of $470,750.00 was paid to an entity called Fairfax Realty Advisors, LLC ("Fairfax") from the assets of the Trusts.

44. Unbeknownst to AT&T Services and New Forestry, Fairfax is and was a shell company beneficially owned by Boden that has no offices, assets or employees, and was established for the sole purposes of receiving the real estate commission payments in connection with the sale of the Tenneco Core, and deceiving AT&T Services and New Forestry as to the recipient of the commission.

45. Boden created Fairfax to conceal from AT&T Services and New Forestry that he personally would be receiving a commission on the sale of the Tenneco Core. The use of the shell company created the appearance that a commission was being paid to a legitimate third party broker, rather than a plan fiduciary like Boden.

46. On or about April 3, 2007, Timbervest sold a property in Kentucky owned by the Trusts (the "Kentucky Property").

47. In connection with the sale of the Kentucky Property, the Trusts paid a disposition fee to Timbervest of $822,583.50.

48. In connection with the sale of the Kentucky Property, the Trusts also paid a real estate commission of $685,486.00 to an entity called Westfield Realty Partners, LLC ("Westfield").

49. Unbeknownst to AT&T Services and New Forestry, Westfield is and was a shell company beneficially owned by Boden that has no offices, assets or employees, and was established for the sole purposes of receiving real estate commission payments in connection with the sale of the Kentucky Property, and deceiving AT&T Services and New Forestry as to the recipient of the commission.

50. Boden created Westfield to conceal from AT&T Services and New Forestry that he personally would be receiving a commission on the sale of the Kentucky Property. The use of the shell company created the appearance that a commission was being paid to a legitimate third party broker, rather than a plan fiduciary like Boden.

51. Upon receipt of these two real estate commissions totaling over $1.1 million, Boden paid $115,000 to his attorney, and then split the remaining proceeds equally with Shapiro, Jones, and Zell.

52. Timbervest selected for sale the Tenneco Core and the Kentucky Property rather than other properties held by New Forestry because Boden, Shapiro, Jones, and Zell all were aware of the real estate commissions that would be paid to them, and they knew that there was no written agreement authorizing such commissions. At the time they received their share of the commission payments, they were each aware of the source of such payments – i.e., from assets that belonged to the Trusts.

53. The real estate commissions resulting from the sales of the Tenneco Core and the Kentucky Property were fraudulently concealed from AT&T Services and New Forestry. These payments also constitute a prohibited use of the assets of the Trusts pursuant to ERISA § 406, 29 U.S.C. § 1106.

54. The real estate commissions resulting from the sales of the Tenneco Core and the Kentucky Property were repaid to the Trusts in June 2012 after Timbervest received inquiries from both the SEC and AT&T Services regarding the legality of these commissions.

55. During and after the fourth quarter of 2006, the Investment Manager Agreement failed to constitute a reasonable contract or arrangement for services necessary for the operation of the Trust at reasonable compensation for purposes of ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2), because Timbervest not only engaged in transactions prohibited by the Agreement and ERISA, but also continuously concealed its misconduct from AT&T Services and New Forestry after the misconduct occurred and, accordingly, operated under an ongoing conflict of interest. Therefore, because the service relationship between the Trust and Timbervest failed to satisfy the requirements for any exemption from the prohibited transaction rules, the service relationship constituted a prohibited transaction and Timbervest is not entitled to any management fee earned thereunder during or after the fourth quarter of 2006.

IV. Timbervest's Management Fee And AT&T's Termination Of Timbervest.

56. Pursuant to Section 7 of the Investment Manager Agreement and the Fee Agreement in connection therewith, the Trusts pay a quarterly management fee to Timbervest.

57. Pursuant to Section 7 of the Investment Manager Agreement, the management fee is paid "[a]s compensation for [Timbervest's] services pursuant to this Agreement."

58. Because Timbervest engaged in transactions prohibited by the Agreement, which were fraudulently concealed from AT&T Services and New Forestry, Timbervest is not entitled to its management fee for any work performed for the Trusts during or after the fourth quarter of 2006.

59. Had Timbervest not fraudulently concealed its misconduct at the time that it occurred, AT&T Services would not have allowed the Trusts to continue paying management fees to Timbervest and would have immediately terminated Timbervest's role as an investment manager of the Trusts. In fact, as explained below, AT&T Services did terminate Timbervest immediately after conducting its own investigation into some of Timbervest's wrongdoing.

60. Because of Defendants' fraudulent and intentional concealment, however, AT&T Services was not aware of any of the transactions described above until AT&T Services was contacted by the SEC in May 2012. At that time, the SEC raised questions regarding the Trusts' assets managed by Timbervest, and specifically inquired into the real estate commissions paid to Fairfax and Westfield in 2006 and 2007. In July 2012, AT&T Services was again contacted by the SEC. At that time, the SEC raised additional questions regarding the "flip" of the Tenneco Core property.

61. After this inquiry from the SEC, AT&T Services began its own investigation into Timbervest's activities as manager for the Trusts. This investigation was hampered by Timbervest's refusal – despite repeated requests and demands from AT&T Services – to turn

over any pre-2011 books and records related to its activities as investment manager of the Trusts. Timbervest's refusal to provide any pre-2011 books and records related to its activities as investment manager of the Trusts was in direct contravention of Section 4(b)(iii) of the Investment Manager Agreement. To this day, Timbervest has still never turned over the pre-2011 books and records, perhaps because such records would reveal additional wrongdoing by Defendants.

62. On July 16, 2012, shortly after commencing its investigation of Timbervest stemming from the SEC's inquiry, AT&T Services instructed Timbervest not to engage in any further binding agreements to buy or sell properties in the New Forestry portfolio, or to undertake to borrow money on behalf of New Forestry pending completion of such investigation. AT&T Services then terminated Timbervest's role as investment manager of the Trusts effective September 30, 2012.

V. The I-20 Property.

63. In addition to the fraudulent misconduct described above, AT&T Services also learned that Timbervest had engaged in prohibited transactions in connection with the I-20 Property.

64. Specifically, Timbervest used approximately $200,000 in funds belonging to the Trusts, as well as $600,000 in additional funds, to build a hunting lodge and to make other related improvements on the I-20 Property. Such improvements, including the building of the lodge, were undertaken without disclosure to, or the knowledge of, AT&T Services. AT&T Services has learned that Boden, Jones, Shapiro, and Zell used the hunting lodge and certain related improvements for their own personal enjoyment and benefit, including, *inter alia*, by

auctioning its use at a fundraiser for an Atlanta school, and to promote investment in other Timbervest funds in which AT&T Services was not invested.

65. Due to Defendants' fraudulent and intentional concealment of the activities described in the paragraph above, and their subsequent refusal to provide books and records regarding Timbervest's activities as investment manager of the Trusts during AT&T Services' 2012 investigation into Timbervest's activities, AT&T Services and New Forestry did not become aware of Defendants' fraudulent activities with respect to the I-20 Property until the SEC disclosed such information to AT&T Services in or about November 2013.

VI. The SEC Proceedings: Defendants Found Guilty Of Gross Misconduct.

66. On September 24, 2013, the SEC issued an Order Instituting Administrative Cease-and-Desist Proceedings (the "OIP") against Defendants pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act") and Section 9(b) of the Investment Company Act of 1940. The OIP alleged that Timbervest violated Sections 206(1) and 206(2) of the Advisers Act and that Boden, Jones, Shapiro, and Zell aided and abetted and caused such violations. These allegations arose from the same prohibited transactions described herein – namely, the "parking" of the Tenneco Core property, and the unauthorized commissions received by Boden and shared with Jones, Shapiro, and Zell as a result of the sale of the Tenneco Core and the Kentucky Property.

67. A hearing on this matter was held in Atlanta, Georgia before ALJ Cameron Elliot over the course of eight days between January 21 and February 6, 2014. During the course of the hearing, the ALJ heard testimony from numerous witnesses including, *inter alia*, Boden, Jones, Shapiro, and Zell.

68. On August 20, 2014, the ALJ issued a 73-page Initial Decision finding that Timbervest violated Sections 206(1) and 206(2) of the Advisers Act and that Boden, Jones, Shapiro, and Zell aided and abetted and caused Timbervest's violations. (Ex. A.) The Initial Decision ordered all Defendants to cease and desist from further violations of the Advisers Act and to disgorge nearly $1.9 million plus prejudgment interest. (*Id.*) The Initial Decision specifically held, *inter alia*, that the sale of the Tenneco Core and later repurchase "taken together under the totality of the evidence, defrauded New Forestry" (i.e., the Plans) and that Defendants acted with scienter in breaching their fiduciary duties in connection with this scheme. (*Id.*) The Initial Decision also held that the unauthorized commissions from the Trusts that were received by Boden in connection with the sale of the Tenneco Core and the Kentucky Property were improper and that Defendants acted with scienter in breaching their fiduciary duties in connection with these commissions. (*Id.*)

* * *

69. As a result of the aforementioned fiduciary breaches, Plaintiffs seek relief on behalf of the Plans in the form of a sum equal to the difference between the sale price of Tenneco Core property that Timbervest illegally flipped and the then-current market value of such property, a sum equal to the amount of Plan assets that Timbervest and its principals used to enhance the I-20 Property for their own personal interests, a sum equal to the value of the use of certain Plan assets for the personal benefit of the Defendants, the disgorgement of any and all disposition fees paid by the Plans to Timbervest in connection with the sale if the Tenneco Core and the Kentucky Property for which Timbervest paid unauthorized commissions, and the disgorgement of any and all quarterly management fees paid by the Plans to Timbervest since the date of its fiduciary breaches and prohibited transactions in the fourth quarter of 2006, as well as

profits received or directed to others by Timbervest in connection with such prohibited transactions, and any other relief that the Court deems just and proper in connection with Defendants' breaches of their fiduciary duties under ERISA.

COUNT ONE

Violations of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1)

70. Plaintiffs re-allege Paragraphs 1 through 69 as though fully set forth herein.

71. Defendants' sale of the Tenneco Core, their receipt of disposition fees and real estate commissions from the sale of the Tenneco Core and the Kentucky Property, and their use of the Trusts' assets to enhance the I-20 Property for their own personal benefit constituted prohibited transactions pursuant to ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), which provides that "a fiduciary with respect to a plan shall not...deal with the assets of the plan in his own interest or for his own account."

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) enter judgment against Defendants on Count One;

(b) order Defendants to disgorge all management fees received from the Trusts since the fourth quarter of 2006, plus interest, to the Trusts;

(c) order Defendants to disgorge a sum equal to the difference between the sale price of the Tenneco Core to Chen and the then-current market value of the Tenneco Core, plus interest, to the Trusts;

(d) order Defendants to disgorge the disposition fees paid by the Trusts to Timbervest in connection with the sale of the Tenneco Core and the Kentucky Property, plus interest, to the Trusts;

(e) order Defendants to disgorge a sum equal to the amount of (i) the assets from the Trusts that were used to enhance the I-20 Property without the knowledge or consent of AT&T Services or New Forestry, and (ii) the fair value of Defendants' use of the I-20 Property for personal purposes, plus interest, to the Trusts; and

(f) grant other and further relief as the Court deems necessary and appropriate.

COUNT TWO

Violations of ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3)

72. Plaintiffs re-allege Paragraphs 1 through 69 as though fully set forth herein.

73. Defendants' sale of the Tenneco Core, their receipt of disposition fees and real estate commissions from the sale of the Tenneco Core and the Kentucky Property, and their use of the Trusts' assets to enhance the I-20 Property for their own personal benefit constituted prohibited transactions pursuant to ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), which provides that "a fiduciary with respect to a plan shall not...receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) enter judgment against Defendants on Count Two;

(b) order Defendants to disgorge all management fees received from the Trusts since the fourth quarter of 2006, plus interest, to the Trusts;

(c) order Defendants to disgorge a sum equal to the difference between the sale price of the Tenneco Core to Chen and the then-current market value of the Tenneco Core, plus interest, to the Trusts;

(d) order Defendants to disgorge the disposition fees paid by the Trusts to Timbervest in connection with the sale of the Tenneco Core and the Kentucky Property, plus interest, to the Trusts;

(e) order Defendants to disgorge a sum equal to the amount of (i) the assets from the Trusts that were used to enhance the I-20 Property without the knowledge or consent of AT&T Services or New Forestry, and (ii) the fair value of Defendants' use of the I-20 Property for personal purposes, plus interest, to the Trusts; and

(f) grant other and further relief as the Court deems necessary and appropriate.

COUNT THREE

Violations of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)

74. Plaintiffs re-allege Paragraphs 1 through 69 as though fully set forth herein.

75. Defendants' sale of the Tenneco Core, their receipt of disposition fees and real estate commissions from the sale of the Tenneco Core and the Kentucky Property, and their use of the Trusts' assets to enhance the I-20 Property for their own personal benefit, constituted breaches of their fiduciary duties pursuant to ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) enter judgment against Defendants on Count Three;

(b) order Defendants to disgorge all management fees received from the Trusts since the fourth quarter of 2006, plus interest, to the Trusts;

(c) order Defendants to disgorge a sum equal to the difference between the sale price of the Tenneco Core to Chen and the then-current market value of the Tenneco Core, plus interest, to the Trusts;

(d) order Defendants to disgorge the disposition fees paid by the Trusts to Timbervest in connection with the sale of the Tenneco Core and the Kentucky Property, plus interest, to the Trusts;

(e) order Defendants to disgorge a sum equal to the amount of (i) the assets from the Trusts that were used to enhance the I-20 Property without the knowledge or consent of AT&T Services or New Forestry, and (ii) the fair value of Defendants' use of the I-20 Property for personal purposes, plus interest, to the Trusts; and

(f) grant other and further relief as the Court deems necessary and appropriate.

COUNT FOUR

Violations of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)

76. Plaintiffs re-allege Paragraphs 1 through 69 as though fully set forth herein.

77. Defendants' fraudulent failure to provide to AT&T Services books and records regarding Timbervest's activities as investment manager for the Trusts for periods prior to 2011 upon such a request from AT&T Services constitutes a breach of their fiduciary duties pursuant to ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) enter judgment against Defendants on Count Four;

(b) order Defendants to turn over to AT&T Services all books and records regarding Timbervest's activities as investment manager for the Trusts for all periods prior to 2011; and

(c) grant other and further relief as the Court deems necessary and appropriate.

COUNT FIVE

Violations of ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C)

74. Plaintiffs re-allege Paragraphs 1 through 69 as though fully set forth herein.

75. Defendants' provision of investment management services to the Trusts under the Investment Manager Agreement during and after the fourth quarter of 2006, during which time Timbervest was operating under an ongoing conflict of interest, constituted a prohibited transaction under ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), which provides that "a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest."

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) enter judgment against Defendants on Count Five;

(b) order Defendants to disgorge all management fees received from the Trusts since the fourth quarter of 2006, plus interest, to the Trusts; and

(c) grant other and further relief as the Court deems necessary and appropriate.

Dated: May 8, 2015

Respectfully submitted,

AT&T SERVICES, INC. and NEW FORESTRY LLC

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