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.

RESPONDENTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

I. Introduction

The Division's Response in Opposition to Respondents' Motion for Summary Disposition highlights the reasons why Respondents' motion for summary disposition should be granted. Namely, that the Division's allegations are based on a single set of transactions that occurred over six years ago for which memories have faded and evidence surely has been lost over the years. The Division seeks to make its case based on those faded memories and, in many instances, pure speculation regarding what transpired.

The Division's response focuses predominately on a speculation that Respondents were motivated to avoid ERISA violations, yet in so doing, violated both ERISA and the Advisers Act. The Division theorizes that an ERISA violation establishes a violation of the Advisers Act. The Division's ERISA theories are red herrings without factual or legal support. No evidence nor any reasonable inference from the evidence supports a finding that ERISA motivated any conduct. Further, no ERISA

violation occurred. Even had an ERISA violation occurred, proof of that alone would not satisfy the elements needed to sustain a violation of the Advisers Act.

Moreover, claims under the Advisers Act cannot be maintained because the statute of limitations bars the requested relief in this proceeding, which is among one of the most dated cases in the history of the SEC. Acknowledging that the statute of limitations bars any penalties, the Division grasps at straws and argues that its remedies cannot be dismissed without the development of a fuller factual record. The Division, however, ignores clear precedent that bars and suspensions are penalties as a matter of law. Further, as to the other relief it has requested, the Division offers no facts, other than unsupported blanket assertions, suggesting that there is any likelihood of future violations, and there is no basis under the securities laws for the Division's theory of disgorgement.

Finally, because Respondents have shown that there is no dispute of material fact in this matter and the Division has failed to set forth specific facts as to which there is a dispute, the Respondents' motion should be decided in their favor. Notably, the Division articulated no arguments against the motion for summary disposition as to any of the individual Respondents, and the dismissal as to them is appropriate for the reasons set forth in the motion.

II. The Standard for Deciding a Motion for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that a party may move for summary disposition of any or all allegations in the OIP. The facts of the pleadings of the party against whom the motion is made are taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

"A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material." *In the Matter of Eric R. Majors*, 99 S.E.C. Docket 3565,

2010 WL 4877354, at *2 (Dec. 1, 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)). A factual dispute is material if it "might affect the outcome of the suit under the governing law . . . ." *Anderson*, 477 U.S. at 248.[1] A dispute is genuine only "if the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* Thus, the standard "does not require [the hearing officer] to make *unreasonable inferences* in favor of the non-moving party." *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1187 (10th Cir. 2013) (emphasis added); *see also Vera v. McHugh*, 622 F.3d 17, 26 (1st Cir. 2010) ("[W]e will not draw *unreasonable* inferences or credit bald assertions, empty conclusions, or rank conjecture" in favor of the non-moving party.) (emphasis in original; quotation and citation omitted).

Once the moving party carries its burden to show that no genuine and material factual dispute exists, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *In the Matter of Eric R. Majors*, 2010 WL 4877354, at *2 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The opposing party must set forth specific facts showing a genuine issue for a hearing and *may not rest upon the mere allegations* or denials of its pleadings." *Id.* (emphasis added)

"At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing." *Id.* (quoting *Anderson*, 477 U.S. at 249). In the face of the Respondents' properly supported motion for summary disposition, the Division cannot rest on

[1] While federal law on the standards for summary judgment does not govern administrative proceedings before the Commission, it nevertheless "provides helpful guidance on issues not directly addressed by previous Commission opinions." *In the Matter of Jaycee James*, 98 S.E.C. Docket 868, 2010 WL 3246170, at *3 (Apr. 2, 2010). The Division has recognized the relevance of the federal case law on Rule 56: "The Commission modeled Rule 250 on Rule 56 of the Federal Rules of Civil Procedure." Response at 3.

"allegations of a conspiracy" without "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (citing *First Nat'l Bank of Az. v. Cities Serv. Co.*, 391 U. S. 253, 290 (1968)). In short, the Division's conjecture that Respondents engaged in a scheme to defraud clients, absent *facts*, is irrelevant to a determination of Respondents' Motion.

Here, and as discussed more thoroughly in Section V, there is no dispute of material fact. Accordingly, summary disposition of the Division's claims is appropriate.[2]

III. The Division's ERISA Arguments Are Red Herrings

The Division relies heavily on ERISA in its Response and makes three points. First, the Division contends that Respondents violated ERISA. This was not the case because Fund #1 was a Real Estate Operating Company. Second, the Division contends, without any facts to support the contention, that ERISA motivated the Respondents' conduct. Finally, the Division theorizes that proof of an ERISA violation would establish a violation of the Advisers Act. An ERISA violation by itself does not establish an Advisers Act violation. The Division points to a purported prohibited transaction under ERISA, but prohibited transactions are barred by a per se rule not requiring any evaluation of breach of duty. The Division's ERISA arguments are nothing more than an attempt to shift the focus away from the undisputed facts, which show that the Division's claims fail as a matter of law.

In its first point, the Division theorizes that Respondents violated ERISA. Beyond dispute, enforcing ERISA is outside the Division's charge. ERISA matters, such as those discussed here, lie properly within the jurisdiction of the United States Department of Labor's Employee Benefits Security Administration (the "DOL"). Indeed, while the Division was

[2] As Respondents explained in their Motion, the *only* issue of disputed fact concerns what was said in a 2005 conversation between Mr. Shapiro and Mr. Schwartz, the fiduciary of Fund #1. Motion at 16. But this dispute is not material to the determination that the Division's claims should be dismissed.

conducting its investigation, the DOL began its own separate investigation. The DOL's inquiry covered many of the same ERISA issues raised by the Division's Response. To assist with the DOL's investigation, Timbervest hired counsel with substantial experience and expertise in ERISA matters (hereinafter, "ERISA Counsel"). ERISA Counsel addressed the issue of whether Timbervest had engaged in a prohibited transaction with the DOL. Contrary to the Division's assertions, and as set forth in ERISA Counsel's letter to the Department of Labor,[3] Fund #1 did not hold ERISA "plan assets" that would prohibit the sale of Fund #1's property to another entity managed by Timbervest or prohibit the payment of commissions to Mr. Boden.

Plan assets are covered under the DOL's "plan asset" regulations, which provide that "where a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity." 29 C.F.R. 2510.3-101. However, when an exception applies, "the plan's assets include its investment, but do not . . . include any of the underlying assets of the entity." *Id.* A Real Estate Operating Company ("REOC") is one such exception. *Id.* at 2510.3-101(c) and (e). Fund #1 met the requirements of a REOC, and therefore did not hold ERISA plan assets.

To qualify as a REOC under ERISA, (i) at least fifty percent (50%) of an entity's assets must be invested in real estate that is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities; and (ii) such entity must be engaged directly in real estate management or development activities. 29 C.F.R. § 2510.3-101(e). Fund #1 at all times met the requirements of

[3] September 4, 2013 letter from Paul T. Ryan to Brian Giles, attached as Exhibit A to the Supplemental Declaration of Julia B. Stone.

a REOC and therefore did not hold plan assets.[4] Therefore, the transactions at issue here did not trigger any ERISA prohibition.

Nor did the "pertinent agreements between [the investors in Fund #1] and Timbervest" prohibit the sale of Fund #1's property to another entity managed by Timbervest or the payment of advisory fees to Mr. Boden, as the Division now claims. Response at 5, 12. These agreements did provide standard ERISA language regarding prohibited transactions. However, because plan assets were not involved, there was no violation of the ERISA prohibited transaction rules and no breach of Timbervest's agreement with the Fund #1 investors. Likewise, the Fund #1 investors' decision to terminate their investment with Timbervest after more than three years of SEC inquiry does not support the conclusion that there was an ERISA violation. To the contrary, the Fund #1 investors had knowledge of the potential ERISA issues nearly a year before the ERISA statute of limitations expired.[5] They investigated the issues but did not bring a claim against Timbervest.

Despite the Division's assertion that ERISA compliance "would have been futile," Response at 13, even if the properties were plan assets subject to ERISA, Timbervest would have had other ways to comply with ERISA. First, Timbervest could have requested approval from a qualified pension asset manager. Rev. Rul. 84-14. Second, it could have applied for a prohibited transaction exemption with the DOL. Such exemptions are regularly granted, especially for the sale of assets with a limited market (such as timberlands), provided they are for fair market value and in the interests of the participants and beneficiaries. *See, e.g., John Hancock Life Ins. Co.*, PTE 2003-05, 68 Fed. Reg. 3040.

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[4] *Id.*

[5] June 4, 2012 Letter from Joel Shapiro to Frank Ranlett, attached as Exhibit B to the Supplemental Stone Declaration.

In its second ERISA point, the Division asserts that Respondents devised the alleged "parking" arrangement because ERISA prohibited it from selling the Alabama Property from Fund #1 to Fund #2. The Division also suggests that Respondents concealed Mr. Boden's commission payments because such payments were prohibited by ERISA. Contrary to these baseless allegations, the undisputed evidence shows that Respondents never considered the possibility of ERISA violations during the negotiations for the sale of the Alabama Property or the payment and disposition of Mr. Boden's commission payments.[6] The fact that Respondents did not consider the possibility of ERISA violations is unsurprising, given that Fund #1 had implemented a fee structure under which Timbervest would receive a percentage of the gross sales price received for the disposition of properties.[7] In light of this, there was no reason for Respondents to think that Mr. Boden's similar incentive-based fee arrangement would raise any issue under ERISA.

The Division's ERISA-as-a-motivation hypothesis defies all logic. Had the Respondents been sophisticated in ERISA matters, they certainly would have known that Fund #1 was a REOC and that other exemptions were available. They would have no reason to engage in any improper activity.[8] Additionally, they would not have "orchestrated" the purported "cross trade" to avoid ERISA, only to trigger a purported ERISA violation by paying Mr. Boden's fee.

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[6] Zell December 6, 2012 Transcript, attached as Exhibit C to the Supplemental Stone Declaration, at 21 ("I don't recall ever having a question about ERISA."), 77–78 (explaining that the Partners never discussed whether Mr. Boden's fees were prohibited by ERISA); Jones December 6, 2012 Transcript, attached as Exhibit D to the Supplemental Stone Declaration, at 17 (explaining that the Partners never discussed ERISA compliance).

[7] New Forestry, LLC Program Investment Guidelines, Exhibit E to Supplemental Stone Declaration.

[8] As the Division itself states, an ERISA fiduciary that violates the statute risks serious ramifications and to knowingly commit those violations "defies common sense." Response at 16.

As its final ERISA point, the Division essentially seeks to conjure an Advisers Act violation out of a purported ERISA violation that is barred by ERISA's own six-year statute of repose. 29 U.S.C. § 1113(a)(1); *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 242 F.3d 497, 502 (3d Cir. 2001). As the Alabama Property transaction closed in October of 2006 and the Kentucky Property transaction closed in April of 2007, any claim under ERISA relating to these transactions would have been barred by ERISA's statute of repose no later than April 2013. More importantly, even if there were a prohibited transaction under ERISA (which there was not), that ERISA violation would not amount to a violation of the Advisers Act because the prohibited transaction rules under ERISA are per se rules that do not require an evaluation of whether a breach of fiduciary duty occurred.

IV. The Statute of Limitations Bars All the Requested Relief.

As Respondents explained in their Motion, the Division's claims are time-barred by the statute of limitations contained in 28 U.S.C. § 2462, which provides that any action for penalties must be brought within five years of the claim's accrual. The purpose of the statute of limitations is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quotation omitted). The focus is on basic fairness and not on the type of relief the Division seeks.

The Division's Response highlights how this purpose necessitates the application of the statute of limitations in this case. The Division seeks to put the blame on Respondents for the lack of records regarding the relevant events and the fading memories of the witnesses. For example, the Division complains that Timbervest has not explained "how and why [Fund #2] actually came to []purchase the Alabama [P]roperty . . ." and that the "Respondents have been

unable to produce any written evidence of" Mr. Boden's fee arrangement. Response at 10, 15. But that is the exact problem.

Fund #2 purchased the Alabama Property nearly seven years ago—it is not surprising or unreasonable that witnesses cannot remember the details of how Fund #2 came to purchase the property (as opposed to remembering that the purchase matched Fund #2's investment objectives and was at a fair and reasonable price). Since that time, Timbervest has closed hundreds of transactions, with a value of over $1 billion.[9] It should only be expected that witnesses cannot remember every detail about each of those transactions. And while Timbervest has, and has provided to the Division, ample documentation showing the valuation of the property and the economic analysis of the two transactions, it simply does not keep detailed records about where, when, and how potential transactions are first presented. It is therefore not unusual that these documents do not exist with respect to the Alabama Property transactions. And it certainly does not "strain[] credulity" that all the Respondents do not remember everything about a single transaction that was initially negotiated over seven years ago. *See* Response at 10. As the Supreme Court has explained, the entire idea behind statutes of limitations is to prevent "the revival of claims . . . [when] memories have faded." *Gabelli*, 133 S. Ct. at 1221.

Likewise, the statute of limitations is designed to prevent new claims when "evidence has been lost," such as written evidence of Mr. Boden's fee arrangement, to the extent any ever existed. *Id.* Again, the lack of written evidence of Mr. Boden's fee arrangement is not unusual. For example, from 2002 (when Mr. Boden's arrangement was entered into) until 2004, the other Partners did not have written employment or profit sharing agreements and did not even have

[9] Zell Declaration, ¶ 11.

documentation of their ownership stakes in Timbervest.[10] That only two of the Partners remembered all the details of Mr. Boden's fee arrangement is unsurprising, given that it is more than eleven years old and expired over six years ago. The Division offers zero evidence to support its theory that terms of Mr. Boden's fee arrangement are "a recent invention by the Respondents." Response at 15. The undisputed evidence (in the form of Mr. Shapiro and Mr. Boden's testimony) shows that specific terms were agreed to in 2002 and were complied with at all times. The Respondents should not have to bear the burden of others' faded memories and the Division's failure to bring its claims in a timely manner.

Rather, the cause of the delay in bringing these proceedings rests solely with the Division. All the relevant transactions occurred in 2006 and 2007. The Staff initially pursued an on-site examination in September 2009. During that examination, the Staff had access to all the documents relevant to this proceeding. In fact, it had access to all documents in Timbervest's possession, including the property closing documents showing the Alabama Property transactions and the dispositions that resulted in advisory fees to Mr. Boden. Yet the Staff asked no questions about these transactions until February 2012. It then waited until January 2013 to issue a Wells notice and until September 2013 to institute proceedings. The OIP was filed more than four years after the Staff's initial examination and more than six and a half years after the last transaction at issue. This type of delay is unprecedented and represents one of the most dated cases in the history of the SEC.[11]

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[10] Supplemental Declaration of Joel Shapiro, ¶ 3.

[11] At oral argument before the Supreme Court in *Gabelli*, the SEC stated that in its entire history "the longest lag time was six and a half years from the end of the fraud to bringing the complaint" *SEC v. Gabelli*, Oral Argument (Jan. 8, 2013), at 38-39.

A. An associational bar, suspension, or cease and desist order would be inappropriate on the undisputed facts.

On top of the practical considerations for barring the Division's claims, it is clear that the Division is seeking penalties that are indisputably subject to the statute of limitations in § 2462. There is no doubt that associational bars and suspensions are penalties as a matter of law. Your Honor has recognized that suspensions and bars are penal as a matter of law. *See In re Terence Michael Coxon*, Admin. Proc. File No. 3-9218, 64 SEC Docket 712, 1997 WL 186896, at *1 (Apr. 8, 1997) (Murray, C.A.L.J.). Indeed, *Coxon* was decided on a motion for summary disposition, and your Honor explicitly rejected the Division's argument that "*Johnson* does not prohibit a suspension or bar based on activities that occurred five years before the Order because its objective is to protect the public from on-going misconduct." *Id.* The Division is making the same argument here that has been thoroughly rejected both by the Commission and by federal courts. *See Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) (suspensions and bars are penal and subject to the five-year statute of limitations in § 2462); *SEC v. Bartek*, 484 F. App'x 949, 956 (5th Cir. 2012) (per curiam), *cert. dismissed*, 133 S. Ct. 1658 (2013) (injunction and director bar were penalties subject to the five-year statute of limitations in § 2462); *Raymond J. Lucia Cos., Inc.*, Admin. Proc. No. 3-15006, 2013 WL 3379719, at *35 (July 8, 2013) (stating that the statute of limitations in § 2462 applies to associational bars). Because associational bars and suspensions are penalties as a matter of law and because the Division's claims seeking these remedies accrued more than five years ago, this request for relief should be dismissed.

Likewise, the Division's claims seeking a cease-and-desist order should be dismissed. There is no factual dispute that a C&D order is not warranted because there is no need for such prophylactic relief under these circumstances. *See* Motion at 25–28. The Division has not even attempted to introduce evidence of such a factual dispute. Instead, it argues that there needs to be a

"development of the factual record" to determine whether the requested relief is penal and whether there is a risk of future misconduct. *See* Response at 19. This argument is wholly meritless. The law does not require the development of a factual record to determine the likelihood of future harm. Indeed, there are several cases (despite the Division's assertion to the contrary), that have determined the appropriateness of sanctions, including the likelihood of future harm, on a motion for summary disposition. *See, e.g.*, *In the Matter of James E. Franklin*, 89 S.E.C. Docket 945, 2006 WL 3330389 (Nov. 15, 2006) (imposing sanctions after considering likelihood of future misconduct and other *Steadman* factors on motion for summary disposition); *In the Matter of Connie S. Farris*, 89 S.E.C. Docket 796, 2006 WL 3228689 (Nov. 7, 2006) (considering and making finding on likelihood of future misconduct on Division's motion for summary disposition).

Even *Bartek*, in which the Fifth Circuit held that the five-year statute of limitations applied to the SEC's claim for injunctive relief (the judicial analog to an administrative cease and desist order), was decided on summary judgment. *Bartek*, 484 F. App'x at 950 (affirming district court's decision to grant summary judgment for defendants upon finding that the statute of limitations had run). The Division's statement that it made this finding "only after the development of a record," Response at 21, is simply false. The only "record" developed was complete briefing on cross-motions for summary judgment. *See SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867, 870 (N.D. Tex. 2011), *aff'd sub nom SEC v. Bartek.*

The Division's argument that determining whether certain relief is remedial or penal requires an evidentiary hearing can be rejected out of hand. This is particularly true here, where the Division made *no pleading* in the OIP concerning the likelihood of future misconduct and has not presented any evidence, but only general speculation suggesting that there is a likelihood of future misconduct by Respondents. The Division simply makes unsubstantiated allegations

regarding the Respondents' attitude toward their fiduciary responsibilities and claims that because the Division filed an OIP, "no reasonable investor would wish to have Timbervest continuing to exercise discretion over their assets."[12] Response at 27. This argument is flawed, considering that in May 2013, Mr. Schwartz (one of the Division's key witnesses), recommended to one of his clients that it continue to reinstate its initial commitment of $50 million in a Timbervest fund. What the Division has not done is show, or even argue, that there is a dispute of material fact that would preclude a finding on summary disposition that Respondents pose no risk of future misconduct. *See In the Matter of Michael C. Pattison, CPA*, 104 S.E.C. Docket 2559, 2012 WL 4320146, at *11 (Sept. 20, 2012) (summary disposition was appropriately granted when response to motion "related to the appropriateness of the sanction . . . but did not raise the existence of a genuine issue of material fact.") (quotations omitted).

And the undisputed facts show that no such risk exists. *See* Motion at 25–28. No other property that was previously managed on behalf of one Timbervest fund was purchased by another Timbervest fund. No other Partner has received advisory fees on transactions because no other Partner had a similar compensation arrangement and because Mr. Boden's arrangement expired in 2007. Timbervest has closed hundreds of transactions since the alleged violations took place more than six years ago, with a value of more than $1 billion,[13] yet the Division has

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[12] Respondents take issue with the Division's arguments that the Partners did not take their fiduciary responsibilities seriously. The Division quoted the Partners' testimony completely out of context. For example, the Division claims that Mr. Zell and Mr. Jones testified that they did not know whether the management agreements precluded prohibited transactions under ERISA. Response at 26. The testimony is clear that the Messrs. Zell and Jones testified only that they did not know whether the *agreements themselves* contained language regarding ERISA. Zell December Tr. at 26; Jones December Tr. at 17–18. And the Division's argument that Mr. Jones claimed that "he did not think it was his job" to ensure that Timbervest was meeting its fiduciary obligations is likewise mischaracterized. Mr. Jones said that ensuring the company's fiduciary obligations were met was not the job of any one person. Jones Tr. at 17–18.

[13] Zell Declaration, ¶ 11.

not alleged any additional wrongdoing or improper conduct. The Division theorizes that Timbervest did not commit any more violations because it has been "under SEC scrutiny" since 2009. *See* Response at 25 n.25. But the Division has not even alleged that there were any additional violations at any point prior to the Staff's investigation beginning in 2009. In fact, there were no such violations prior to the Staff's investigation, during the Staff's investigation, or after the Staff's investigation. Accordingly, the Commission can and should find that the Division's requested relief is barred by the statute of limitations.

B. The Division's novel theory of disgorgement does not support denial of Respondents' Motion for Summary Disposition.

The Division has proposed an unusual theory of disgorgement in an attempt to avoid the clear requirements of § 2462. The Division realizes that imposing disgorgement of Mr. Boden's fees would be penal, and therefore barred by the statute of limitations, because the Respondents voluntarily returned those fees, plus interest, to Fund #1.[14] The Division therefore argues that Timbervest should be required to disgorge (1) a disposition fee that Timbervest received from Fund #1's sale of the Alabama Property, (2) a disposition fee that Timbervest received from the sale of one of Fund #1's properties (the "Kentucky Property") that resulted in a commission to Mr. Boden, and (3) all the profits obtained from Fund #1 since 2007 under ERISA § 409.

Disgorgement of any of these amounts would not comport with the standard for disgorgement under federal securities laws. Most obviously, the Commission does not have jurisdiction to require disgorgement under § 409 of ERISA, and the Advisers Act contains no similar liability provision.

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[14] The Division's argument that Timbervest did not pay an appropriate amount of interest when returning the fees is meritless. First, Timbervest was not even required to pay interest, given that there was no ERISA violation and no Advisers Act violation. Second, and most obviously, any "lost earnings" calculation made under the Department of Labor's rules and regulations has no applicability here. Third, and finally, the Division has failed to provide any evidence that the amount calculated under the "Division's standard prejudgment interest calculator" was more than the interest Timbervest returned but merely states that it is so.

Moreover, this remedy is described as a "personal liability," *not* disgorgement, and would thus constitute a "civil penalty" within the meaning of § 2462. Finally, there would be no basis for the DOL to impose such penalties, given that there was no ERISA violation. There is simply no basis to conclude that Respondents could be required to *disgorge* all the profits from Fund #1 since 2007.

Nor could they be required to disgorge Timbervest's disposition fees. "Disgorgement is an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong." *SEC v. AMX, Int'l, Inc.*, 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (citations omitted). Essentially, violators are returned to the position in which they "would have been absent the misconduct." *In the Matter of OptionsXpress, Inc., Thomas E. Stern & Jonathan I. Feldman*, SEC Release No. 490, 2013 WL 2471113, at *82 (June 7, 2013) (Murray, C.A.L.J.). Thus, if a violator would have been entitled to or received an amount even absent wrongdoing, such sums are not subject to disgorgement. *See SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998) (the SEC is entitled to disgorgement when the defendant (1) has received ill-gotten funds, and (2) does not have a "legitimate claim" to those funds). Here, there is no doubt that Timbervest was contractually entitled to the disposition fees even absent the alleged wrongdoing and therefore has a "legitimate claim" to the fees. The Division has recognized as much: "But for their [alleged] fraud, Timbervest *would have been contractually entitled to this fee*." Response at 23 (emphasis added). This is, of course, the correct conclusion. Even if Fund #2 had not later purchased the Alabama Property, Timbervest still would have been entitled to and received a disposition fee upon Fund #1's sale of the property.[15] And even if Mr. Boden had not received an advisory fee upon the sale of the Kentucky Property, Timbervest still would have been entitled to and

[15] New Forestry, LLC Program Investment Guidelines, Exhibit E to Supplemental Stone Declaration.

received a disposition fee on the transaction.[16] These amounts have no logical connection to the alleged misconduct and certainly do not "flow[] from [Respondents'] wrong." *AMX, Int'l, Inc.*, 872 F. Supp. at 1544.

Timbervest had been directed by Fund #1 to reduce the size of its portfolio to $250 million by the end of 2009.[17] Fund #1 needed to sell properties to achieve this goal, and indeed, had provided an incentive to Timbervest to sell properties by reducing its base management fee and adding a disposition fee structure under which Timbervest would receive a percentage of the gross sales price received for sales of timber and timberlands meeting certain parameters.[18] The Alabama and Kentucky Property transactions were not effectuated simply to generate fees to Timbervest; rather, the dispositions fit squarely within Fund #1's mandate. It would therefore be improper to "disgorge" Timbervest's disposition fees.

Indeed, if "disgorgement" were imposed under the Division's theory, such a remedy would constitute a penalty. As the Fifth Circuit has explained, a "court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). Because the disposition fees do not represent amounts by which Timbervest "profited from [its] wrongdoing," they, as well as any fines under ERISA, would be penalties that are barred under the statute of limitations in § 2462.

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[16] *Id.*
[17] New Forestry, LLC 2006 Annual Report & 2007 Outlook (Exhibit V to Stone Declaration).
[18] New Forestry, LLC Program Investment Guidelines, Exhibit E to Supplemental Stone Declaration.

V. The Division cannot establish a violation of Section 206 on the undisputed facts

A. The Division's "disputed facts" are not facts.

Although the Division's Response uses the term "disputed issue of fact," its repeated invocation of the phrase does not create a material issue of disputed fact or establish that any such dispute exists. Rather, in most instances, it is clear that the Division is not offering any contrary evidence but merely providing unsubstantiated allegations and speculative alternative theories to draw from the undisputed facts. The law is clear that when a party opposing a motion for summary disposition raises only "[c]onclusory allegations unsupported by specific facts," there is no basis for finding that disputed issues of fact exist sufficient to defeat the motion. *Giles*, 245 F.3d at 493.

The Division has not satisfied its burden to introduce *evidence* showing that a dispute of material fact exists. The new facts that it did introduce support Respondents' theory.[19] Even the Division's mere allegations are undeniably incorrect. The Division contends that the motive for the sale of the Alabama Property to the Real Estate Company was "to satisfy ORG's directive" to "complete some sales of entire parcels of New Forestry timberlands." Response, at 6. There was no such directive at that time. Moreover, the sale of the Alabama Property did not represent a sale of an entire parcel of timberland. In fact, the entire parcel that encompassed the Alabama Property was sold in 19 separate transactions over a five-year period.[20] Thus, the sale would not have satisfied any directive to sell an entire parcel. The Division cannot avoid the conclusion that there are no issues of disputed facts by citing to the mere allegations in the OIP, shown to be false by the uncontested facts in the record.

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[19] For example, the Division introduced an email from Timbervest's Director of Transactions, J. Barrett Carter, in which he explained that there was no prearranged transaction to purchase the Alabama Property, but "[i]t just happened to work out that one client sold it to another party and another client wound up buying it back from that party." Response at 11 and Exhibit H. All the Division can do in response is to reject this email. But not liking the undisputed facts that exist does not create a factual dispute.

[20] Supplemental Seabolt Declaration, at ¶ 5.

B. The Alabama Property Transactions did not violate Section 206.

There are no disputes of material fact relevant to the Division's claims that Timbervest violated § 206 of the Advisers Act when Fund #1 sold the Alabama Property to the Real Estate Company and Fund #2 later purchased the Alabama Property from the Real Estate Company. Despite vague references to "disputed issues of material fact," the Division has not identified any disputes of material fact that would preclude summary disposition on these claims. Rather, it simply labels the undisputed facts offered by Respondents as "farfetched" and "falsehoods" without offering any evidence to the contrary. Because there are no disputed issues of material fact and because the undisputed facts show that there was no violation, the claims related to the Alabama Property transactions must be dismissed. Although this decision could be based on Respondents' Motion alone, Respondents briefly address some of the flaws in the Division's argument that there might have been a violation of § 206.

1. The Division ignores the timeline of events.

First, the Division ignores the timeline of events that led to the sale and later purchase of the Alabama Property. It suggests that the relevant dates are the closing of the sale of the Alabama Property from Fund #1 to the Real Estate Company and the date of the *draft* contract for the purchase of the sale from the Real Estate Company to Fund #2. Response at 9. Although admittedly close in time, these dates do not provide an apples-to-apples comparison and therefore do not properly represent the timing of the transactions.

If making a true apples-to-apples comparison, there are three relevant dates that could be considered. First, the initial dates of the contracts are June 23, 2006 and November 30, 2006,

respectively.[21] Thus, the initial terms of the transactions were essentially agreed to more than five months apart. Second, the final contracts were signed on September 15, 2006 and December 27, 2006, respectively—more than three months apart.[22] Finally, the two transactions closed on October 17, 2006 and February 1, 2007, respectively, meaning that the transactions were completed nearly four months apart.[23] These were separate transactions, negotiated separately at different times. There is no basis to support the Division's conclusion that the transactions were part of a prearranged transaction occurring only six weeks apart.

In addition, the Division attempts to create a factual dispute by arguing that Mr. Boden must have been lying when Mr. Wooddall recalled that Mr. Boden had said that Timbervest could not commit to purchasing the Alabama Property because Timbervest "hadn't raised the money for the fund." Response at 8. Timbervest was, in fact, in the process of raising funds for another Timbervest fund at that time, albeit not the fund that purchased the Alabama Property.[24] The Division completely ignored this evidence and instead attempts to cast Mr. Boden in a sinister light with absolutely no support. There is no factual dispute, and to the extent any exists, it is immaterial because even the testimony the Division cites states that Timbervest "could not commit to purchase something back . . . ." *Id.*

2. The Division ignores the economic realities of the transactions.

In addition to ignoring the timeline of the relevant events, the Division ignores the economic realities of the two transactions: neither of Timbervest's clients was disadvantaged by the Alabama Property Transactions, and the transactions fit each client's investment objectives. The Division

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[21] Sales Contract dated June 23, 2006 (Exhibit W to Stone Declaration); Draft Timberland Purchase Agreement between Chen Timber, LLC and Timbervest Partners Alabama, LLC (Exhibit Y to Stone Declaration).
[22] Sales Contract dated September 15, 2006 (Exhibit O to Stone Declaration); Seabolt Declaration, ¶ 3.
[23] Wooddall Tr. at 26; OIP ¶ 13.
[24] Supplemental Shapiro Declaration at ¶ 5.

dismisses Respondents' arguments on this point by stating that Respondents merely showed that "it might not be economically irrational for" Fund #2 to purchase the Alabama Property. This dismissal, however, ignores that, as laid out in Respondents' Motion for Summary Disposition, both the sale and later purchase of the Alabama Property fit within the funds' investment objectives and were conducted at a fair and reasonable price. Motion at 7–12.

Namely, Fund #1's sale of the Alabama Property was consistent with its investment guidelines and disposition mandate to reduce the net asset value of the portfolio to $250 million before year-end 2009.[25] The sale resulted in a price to Fund #1 at a $1,409,993 (11.7%) premium over the then-current market value and an approximately 25% premium over the bare land value from an independent appraisal conducted in 2005 by the James W. Sewall Company.[26] And the Alabama Property, with its young timber profile, fit within Fund #2's investment objectives, which were focused on long-term growth and capital appreciation.[27] These transactions were negotiated months and not weeks, apart. The price differential was fully supported by changes in pricing due to strengthening land and timber prices in the area, as well as increases in the volume of wood from biological growth of the trees.[28]

The Division attempts to counter this compelling and undisputed evidence by saying that these are not "actual *reasons*" for the transactions but merely explanations for them. The economics of each transaction, however, are the "actual reasons" each transaction occurred, as with every transaction Timbervest has ever negotiated. Of course, as explained, the reason why Timbervest has been unable to provide evidence concerning the minutiae of the transactions is because the transactions took place

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[25] New Forestry, LLC 2006 Annual Report & 2007 Outlook (Exhibit V to Stone Declaration).
[26] Motion at 7–8; Third quarter 2006 Quarterly Asset Market Volume and Value Comparison by Purchase Unit for New Forestry, LLC (Exhibit T to Stone Declaration); August 16, 2005 Appraisal Report from the James W. Sewall Company (Exhibit X to Stone Declaration)
[27] Boden March 2012 Tr. at 139–40, 154–56; New Forestry Disposition Report (Exhibit S to Stone Declaration).
[28] *See* Motion at 11–12.

nearly seven years ago. Notably, the Division has not argued either that Fund #1 received too little on the sale of the Alabama Property or that Fund #2 paid too much. It is clear that both transactions fit within the clients' investment objectives and were obtained at a fair price. On this undisputed evidence, a § 206 claim cannot stand.

3. The Division acknowledges that there was no parking agreement between the Real Estate Company and Timbervest.

Finally, in its Response, the Division acknowledges there was no parking agreement between the Real Estate Company and Timbervest related to the Alabama Property. Of course, in the OIP, the Division *did allege* that there was a parking arrangement. *See* OIP ¶¶ 9, 14–15. Then, faced with the Respondents arguments that "[t]he hallmark of a parking arrangement . . . is 'the sale of securities subject to an agreement or understanding that the securities will be repurchased by the seller at a later time and at a price which leaves the economic risk on the seller,'" Motion at 6 (quoting *In the Matter of Warren G. Trepp*, SEC Release No. 115, 1997 WL 469718, at *18 (Aug. 18, 1997)), the Division backed off of this allegation and now "does not contend that the economic risk remained with the seller." Response at 6 n.3. Essentially, then, the Division no longer contends that there was a parking arrangement.

Instead, the Division now has attempted to characterize the two separate transactions as an "unlawful cross trade." Response at 11. But, as Respondents explained in their Motion, this is not a case of cross trading securities:

> Implicit in the Division's theory is an effort to impose requirements on Timbervest that simply are inapplicable. In limited circumstances, Rule 206(3)-2 requires investment advisers to disclose the details of the transaction to both clients when engaging in cross trading of securities. But these requirements apply only when the investment adviser has clients on both sides of the very *same* transaction. They do not apply when an adviser has clients who trade in the same security in separate and independent transactions that occur days or months apart—the information simply is not material.

Motion at 39. Thus, the Division's argument that the separate Alabama Property transactions were part of an illegal cross trade is just as specious as the argument that the separate transactions constituted a parking agreement.

Moreover, the Division has effectively conceded that Mr. Wooddall lacked the "[]ability to enforce the agreement" and complains only that Respondents "selectively quot[ed] from [Mr.] Wooddall's testimony." Response at 9. But Mr. Wooddall's testimony is clear: at some point prior to the closing of the first sale, Mr. Boden expressed a desire, but not a promise, to purchase the property.[29] There was "no written or verbal agreement about buying it back."[30] And Mr. Wooddall's other actions support his testimony that there was no agreement. For example, he conducted due diligence on the land, obtained an independent third party appraisal and purchase price financing, obtained title insurance, and had the Real Estate Company take an assignment of all existing hunting leases affecting the property.[31] The undisputed evidence is therefore clear: there was no agreement to purchase the property, and the Division's claims on this theory must be dismissed.

C. Mr. Boden's fee arrangement did not violate Section 206.

As with the Alabama Property transactions, the Division has not shown that any dispute of material fact exists that would make it inappropriate to decide the Division's claims on a summary disposition basis. The truth is, and the undisputed evidence shows, that Mr. Boden earned his fees under his compensation arrangement and that he did not intend to conceal anything about the payment of those fees.

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[29] Wooddall Tr. at 16, 19, 37–38.
[30] Seabolt Declaration, at ¶ 4.
[31] Forest Managers & Consultants, Inc. Appraisal (Exhibit N to Stone Declaration); Commitment for Title Insurance (Exhibit Q to Stone Declaration); Assignment and Assumption of Leases and Contracts between New Forestry, LLC and Chen Timber, LLC (Exhibit R to Stone Declaration).

Rather than offering evidence to contest these undisputed facts, the Division merely disagrees with the undisputed facts presented and offers bald allegations and unreasonable conclusions that it asserts should be drawn from the undisputed facts. *See* McNamara Affidavit at ¶ 6(c)–(f) (identifying disputes as to whether (1) the undisputed facts support the conclusion that Respondents "disclosed" Mr. Boden's fee arrangement, (2) the Partners "ha[d] knowledge," and (3) the LLCs were designed to "conceal[] . . . the payment" of Mr. Boden's fees). In identifying these issues as disputes of "fact," the Division has not explained why a dispute exists. It merely recognizes the undisputed facts and then disagrees with those facts because they are "not credible." Response at 13–14 n.11. For example, the Division acknowledges that Mr. Harrison testified that the limited liability companies that received Mr. Boden's fees were not set up to conceal anything but were for the legitimate business purpose of limiting liability if there "were [an] attempt to try and claw back a fee" from an unknown broker or other third party.[32] This testimony is undisputed, and the Division has not presented any other evidence that contradicts it. There is no factual dispute that Mr. Harrison's actions in setting up the limited liability companies were permissible and for a legally recognized purpose. Instead, the Division simply says that "Harrison's testimony is not credible."[33] Response at 13–14 n.11. But calling Mr. Harrison's testimony non-credible does not create an issue of fact—Mr. Harrison gave sworn testimony that has not been disputed by any other facts, only the Division's conjuring up of some nefarious scheme, which is completely unsupported by any evidence, by Respondents to hide Mr. Boden's fee arrangement.

[32] Harrison Tr. at 70

[33] This position is particularly interesting, given that Mr. Harrison has previously testified as a witness for the government in a criminal securities fraud trial held in May and June of this year. *United States v. James Fry*, 0:2011-cr-00141 (D. Minn.).

Likewise, the undisputed evidence shows that the fee arrangement was disclosed.[34] It was first disclosed to Mr. Zell in 2002, when the arrangement was initially agreed to, when Mr. Zell was the Director of Real Estate & Natural Resources for the Fund #1 investors.[35] It was then discussed by Mr. Shapiro and Mr. Schwartz in 2005, after Mr. Boden became a partner in Timbervest.[36] There is now a fact dispute about exactly what was said in that conversation because Mr. Schwartz changed his story several times. In June 2012, he told Timbervest's General Counsel and outside counsel that he had discussed the fee arrangement with someone at Timbervest and that his reaction was that the agreement would be acceptable as long as there were not two brokerage fees on any particular deal.[37] As the Division has admitted, he provided the same recollection to the Staff during a telephone interview.[38] Again, during a June 2012 telephone conference with personnel from a major investor in two Timbervest funds, Mr. Schwartz confirmed discussing Mr. Boden's fee arrangement in 2005 with either Mr. Shapiro or Mr. Zell.[39] He further recalled that the fees were to be paid to Mr. Boden for "finishing up" transactions on behalf of Fund #1.[40]

Then, in November 2012, during testimony, which occurred after learning that his client, the investors in Fund #1, had raised concerns regarding the fees, he testified that Mr. Shapiro had

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[34] The Division suggests that in addition to disclosing the terms of Mr. Boden's fee arrangement, Timbervest should have disclosed the actual payments of fees to Mr. Boden. *See* Response at 16. However, once the fee arrangement was disclosed, there was no need for additional disclosure. The Division points to no authority to the contrary.
[35] Zell Tr. at 27–29; Shapiro December Tr. at 24–25; Boden November Tr. at 16–18.
[36] Shapiro December Tr. at 39.
[37] Supplemental Declaration of Carolyn Seabolt at ¶ 3.
[38] *See* Division of Enforcement's Response to Respondents' Motion to Compel Brady Material at 10–11 (Nov. 25, 2013) (noting that "Respondents were well aware of what Schwartz told the Division's attorneys").
[39] Supplemental Seabolt Declaration at ¶ 4.
[40] *Id.*

presented the issue as a hypothetical rather than an actual event.[41] Thereafter, in a January 2013 meeting with the same major investor referenced above, Mr. Schwartz stated that he was aware of Mr. Boden's fee arrangement and that the fees represented "tail" payments for Mr. Boden's work as a consultant.[42] In ignoring these contradictions and departures from his earlier and later statements, the Division mischaracterizes the nature of Mr. Schwartz's testimony. But, in any event, it is undisputed that Mr. Shapiro discussed Mr. Boden's compensation arrangement with Mr. Schwartz, negating any finding of scienter, recklessness, or negligence, which findings would be required to hold Timbervest liable under § 206.

Also contradicting the Division's arguments that Timbervest acted with an intent to deceive is the fact that Respondents have been forthright with the Division about the details of the fee arrangement. The Division claims that "[b]ut for the Division's investigation, [Mr. Boden's payments] almost certainly would not have come to light." Response at 13. But Timbervest *voluntarily disclosed* the two fee payments made to Mr. Boden in response to a Staff subpoena dated April 10, 2012, even though the subpoena *did not call for such a disclosure.*[43] Timbervest has provided all the information it has about the arrangement—both Mr. Boden and Mr. Shapiro recall the same details about the arrangement and have provided undisputed testimony in this regard. The Division simply complains that there is no written agreement and no one else remembers all the details, but again, the arrangement was originally agreed to over eleven years ago. It is unsurprising that memories have faded or that documents, if any existed, have been lost.

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[41] Schwartz Tr. at 78.
[42] Supplemental Shapiro Declaration at ¶ 4.
[43] April 10, 2012 subpoena from the SEC to Timbervest (Exhibit CC to Stone Declaration); May 2, 2012 letter from Stephen D. Councill to Robert K. Gordon (Exhibit DD to Stone Declaration).

Despite the time lapse, the undisputed evidence is clear: Mr. Boden was paid in strict compliance with his compensation arrangement.[44] The payment of market-rate fees represented actual, and time-consuming, work done by Mr. Boden on Fund #1's behalf.[45] And Mr. Shapiro disclosed the fee arrangement to Fund #1's investors in 2002, when the arrangement was first created, and, at a minimum, attempted to disclose it again in 2005, after Mr. Boden became a partner in Timbervest.[46] On these undisputed facts, a claim under § 206 cannot stand.

VI. The Aiding and Abetting Claims Should Be Dismissed.

As explained in Respondent's Motion for Summary Disposition, there is no basis to find any of the individual Partners liable for aiding and abetting or causing any alleged Advisers Act violation. That is, (1) there was no primary violation by Timbervest, so the Partners cannot be held liable for aiding and abetting or causing; (2) the Partners did not have knowledge and were not reckless in not knowing that they were contributing to a primary violation; and (3) the Partners did not substantially assist or actually cause any primary violation.[47]

The Division's allegations concern what was said during two conversations that occurred more than seven years ago—the conversation between Mr. Boden and Mr. Wooddall, and the conversation between Mr. Shapiro and Mr. Schwartz. As to the first conversation, the undisputed facts show that, at most, Mr. Boden indicated that Timbervest might desire to purchase the property at a later date. And the undisputed facts show that Messrs. Shapiro, Jones, and Zell were not parties to any such conversation or even aware of any such conversation until many years later.[48] As to the second conversation, the undisputed facts show that Mr. Shapiro attempted to disclose Mr. Boden's fee arrangement to Mr. Schwartz. They likewise show that Messrs. Boden, Zell, and Jones were not a part

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[44] Motion at 14–17.
[45] *Id.* at 14–15.
[46] Zell Tr. at 27–29; Shapiro December Tr. at 24–25, 39; Boden November Tr. at 16–18.
[47] Motion at 41–44.

of the conversation and had, and continue to have, an understanding that the fee arrangement was disclosed to Mr. Schwartz.[49]

In its Response, the Division completely ignored these arguments and the compelling, and undisputed evidence. Indeed, the only time in its Response that the Division uses the phrase "aiding and abetting" is in the opening, introductory sentence and in a footnote buried on page 22 of its brief. These two stand-alone sentences cannot reasonably be seen as a "response" to Respondent's Motion for Summary Disposition as to the aiding and abetting and causing charges against the individual Partners. Rather, the only reasonable explanation for this complete absence of response on the Division's behalf is that it has no factual response to Respondents' arguments.

Instead, the Division spends approximately half of its brief attempting to explain why there was a violation of § 206 of the Advisers Act. Of course, only registered investment advisers can be liable under this section. *See* 15 U.S.C. 80b–6 (Section 206 applies to "investment adviser[s]"). The only Respondent who is a registered investment adviser is Timbervest. The Partners cannot be held liable for a violation of the Advisers Act, and as the Division has effectively conceded, they likewise cannot be held liable for aiding and abetting or causing any such violation. Accordingly, and for all the reasons explained in the Motion for Summary Disposition, the aiding and abetting and causing claims against the Partners should be dismissed.

VII. Conclusion

The Commission should dismiss each of the Division's claims. The statute of limitations bars all the requested relief; the Division's arguments about ERISA are nothing more than a smoke screen to distract the Commission from the weakness of the Division's securities claims; and the undisputed facts show that there was no Advisers Act violation. Rather than meet its burden of putting forth evidence of

[48] Jones Declaration at ¶ 6; Shapiro Declaration at ¶ 10; Zell Declaration ¶ 5.
[49] Boden November Tr. at 15–16; Jones December Tr. at 59; Jones Declaration at ¶ 8; Zell Declaration, ¶¶ 6–7.

specific facts that are in dispute, the Commission has lobbed various theories in an attempt to show that there was some reprehensible scheme by Respondents to violate the Advisers Act, in the hopes that one of these theories will stick. The Division's theories are oftentimes incoherent and contradictory. In contrast, the Respondents have offered a clear, coherent explanation for all the events that occurred and shown why the undisputed facts lead to the conclusion that no violations occurred. The Commission must therefore dismiss each of the Division's claims.

This 11th day of December, 2013.

Stephen D. Councill
Julia Blackburn Stone

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Counsel for Respondent Joel Barth Shapiro

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.

SUPPLEMENTAL DECLARATION OF JOEL BARTH SHAPIRO

1. My name is Joel Barth Shapiro. I am over eighteen years of age and have personal knowledge of the facts set forth herein.

2. I am the Chief Executive Officer and a managing partner of Timbervest, LLC.

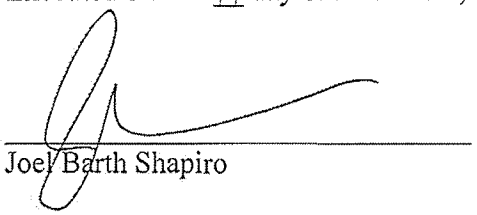
3. From 2002 until 2004, the Timbervest's principals did not have a written agreement as to how they would share the company's profits amongst themselves. None of the principals had a written employment agreement or documentation setting forth their ownership stakes in Timbervest, LLC.

4. In June 2013, I participated in a meeting with personnel from the Arizona Public Safety Personnel Retirement System. Mr. Schwartz was also present. During that meeting, Mr. Schwartz stated that he was aware of Mr. Boden's fee arrangement and that the fees represented "tail" payments for Mr. Boden's work as a consultant.

5. In the middle of 2006, Timbervest was in the process of raising funds for Timbervest Partners II, LLC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 11 day of December, 2013.



Joel Barth Shapiro

UNITED STATES OF AMERICA
Before the
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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.

SUPPLEMENTAL DECLARATION OF CAROLYN SEABOLT

1. My name is Carolyn Seabolt. I am over eighteen years of age and have personal knowledge of the facts set forth herein.

2. I am General Counsel for Timbervest, LLC.

3. On June 4, 2012, I, along with outside counsel for Timbervest, interviewed Edward Schwartz. During that interview, Mr. Schwartz said that he had discussed a fee arrangement with a "broker" who would be coming in house with someone at Timbervest. He said that the arrangement was acceptable to him, as long as two brokerage fees were not paid on any single transaction.

4. In June 2012, I participated in a telephone conference call with Mr. Jones, Mr. Shapiro, Mr. Schwartz, and investment personnel from a major investor in two Timbervest funds. During that call, Mr. Schwartz confirmed that he had discussed Mr. Boden's fee arrangement in 2005

with either Mr. Shapiro or Mr. Zell. Mr. Schwartz further recalled that the fees were to be paid to Mr. Boden for "finishing up" transactions on behalf of New Forestry, LLC.

5. The entire parcel of land that encompassed the Alabama Property was sold in 19 separate transactions over a five-year period.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 11 day of December, 2013.

Carolyn Seabolt

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.

SUPPLEMENTAL DECLARATION OF JULIA B. STONE

1. My name is Julia B. Stone. I am over eighteen years of age and have personal knowledge of the facts set forth herein.

2. I am counsel for Respondent Timbervest, LLC in the above-captioned matter.

3. Attached hereto as Exhibit A is a true and correct copy of a letter sent on September 4, 2013 from Paul T. Ryan to Brian Giles.

4. Attached hereto as Exhibit B is a true and correct copy of a letter sent on June 4, 2012, from Joel Shapiro to Frank Ranlett.

5. Attached hereto as Exhibit C is a true and correct copy of additional excerpts from the testimony of Donald David Zell, given before the SEC on December 6, 2012.

6. Attached hereto as Exhibit D is a true and correct copy of additional excerpts from the testimony of Gordon Jones, given before the SEC on December 6, 2012.

7. Attached hereto as Exhibit E is the New Forestry, LLC Program Investment Guidelines, produced by Timbervest at TV_SEC_1071597.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 11th day of December, 2013.

Julia B. Stone

EXHIBIT "B"

TIMBERVEST

3715 Northside Parkway Building 200 Suite 500 Atlanta GA 30327
Phone 404 848 7500 Facsimile 404 848 7501

June 4, 2012

Mr. Frank Ranlett
Director – Investment Management
AT&T Services Inc.
One AT&T Way – Room 3D109
Bedminster, New Jersey 07921

Re: SBC Master Pension Trust Accounts

Dear Frank:

This letter is in response to the questions in your letter dated May 25, 2012. We received similar questions from the SEC. These questions relate to events from six to ten years ago, and we are still gathering and verifying information about these events. However, we wanted to provide a prompt, preliminary response with the information we have gathered to date.

1. Were the transactions and commissions described above actually related to the former BellSouth Master Pension Trust and VEBA accounts (now part of the SBC Master Pension Trust)?

The transactions were sales of timberland properties owned by New Forestry, LLC ("New Forestry"). The fees were paid out of the proceeds from the sale of these timberland properties. New Forestry was previously owned by BellSouth Master Pension Trust, BellSouth Corporation Representable Employees' Health Care Trust – Retirees and BellSouth Corporation RFA VEBA Trust.

2. If so, were the two companies, Fairfax and Westfield, owned by William Boden or any other persons affiliated with Timbervest?

William Boden did not own either of these two companies, but did have a beneficial interest in both companies. These limited liability companies ("LLCs") were established in connection with advisory services related to the sale of two properties owned by New Forestry, LLC. No other person affiliated with Timbervest had an ownership or beneficial interest in either of these LLCs.

3. Was anyone at BellSouth notified about the payment of these commissions?

Yes. In 2002, given the limited size of Timbervest's business, Mr. Boden's relationship with Timbervest started in an advisory/consulting role based on an agreement negotiated with me. Mr. Boden was engaged to assess, organize, oversee and manage the sale of portions of New Forestry's timberland holdings. In particular, he was tasked with

oversight of and sales efforts related to the eight largest timberland holdings in the South. Mr. Boden's advisory/consulting compensation was a success fee agreement payable only upon the sale of these properties. The specific terms of Mr. Boden's advisory/consulting success fee agreement are set forth below. He received no other compensation from New Forestry or Timbervest until he joined Timbervest as a partner in 2004.

The terms of this agreement were discussed with Bellsouth at the time of Mr. Boden's engagement in 2002 through David Zell, Director - Real Estate & Natural Resources. In addition, from 2005 through 2007, ORG Portfolio Management, LLC ("ORG") was the Investment Manager for the New Forestry account. ORG was aware of the advisory/consulting success fee agreement with Mr. Boden.

Although we have not located a document detailing the terms of the Boden advisory/consulting success fee agreement, the basic terms were as follows:

Properties Covered

NC Properties, GA
Tenneco, AL
Rocky Fork, TN
Three Sisters, TN
Skinner Mountain, TN
Fluvanna, VA
Piney Woods, VA
Kentucky Lands (Kinniconick, Huber, Ferguson and Tolville)

Success Fee Payment Amounts

$5MM to $10MM	-	4.0%
$10MM to $15MM	-	3.5%
$15MM to $20MM	-	3.0%
$20MM or more	-	2.5%

Payment Conditions

Minimum sale of $5MM
No third party broker otherwise paid by seller
Term of five years – through the end of 2007

Ultimately, in late 2006 and early 2007, two transactions triggered payments under Mr. Boden's agreement – the sale of the Tenneco core timberlands and the Kentucky portfolio properties. Mr. Boden, through Fairfax Realty Advisors, LLC, was paid a 3.5% fee on the Tenneco core timberlands sale and, through Westfield Realty Partners LLC, was paid a 2.5% fee on the sale of the Kentucky portfolio properties. Subsequent to the

payment of each of these fees to Mr. Boden, he decided to share the fees equally with his now business partners.

4. Were the payment of the commissions acceptable under the applicable ERISA and DOL fiduciary and prohibited transaction provisions?

As this potential issue has only very recently been brought to our attention by the SEC and involves a complex law, we do not have an answer at this point. We can assure you that we have asked outside legal counsel to look into this issue. We hope to have feedback from legal counsel by no later than June 15th, at which time we will provide you with a written update.

5. Have there been any other dispositions in which commissions were paid to these companies or to other companies controlled by Timbervest or Timbervest principals?

No.

We would be glad to answer any additional questions you have. In addition, we wanted to respond to your comment on our discussions at our most recent meeting. First, as previously discussed, the SEC has asked Timbervest numerous questions and for multitudes of documents and information regarding almost every facet of our business for a period covering the past 10 years. At the time of our meeting on May 3rd, we had only very recently provided the SEC with information regarding the consulting relationship with William Boden and the associated advisory/consulting fee payments. We provided this information to the SEC on May 2nd on a voluntary basis and in connection with a request received for a number of other items. We were not aware of any new focus associated with this arrangement any more so than other matters raised by them. Since the SEC does not provide us with any feedback, we have no idea what they will choose to focus on among all the documents and information we provide.

We did however feel it was important to inform you promptly of the SEC's interest in Mr. Boden's advisory/consulting arrangement. We recall discussing this matter with you during the SEC update at the end of our meeting. We briefly discussed Mr. Boden's historical relationship with Timbervest and told you that several years back Mr. Boden had been paid advisory/consulting fees in connection with the sale of a couple of timberland properties. We thought we stated that these were New Forestry properties, which is why we wanted to alert you to this issue so promptly, and we apologize for any confusion on this point. We also informed you that we would not be surprised if the SEC had further questions about this for AT&T.

When the SEC presented several additional questions about this last week, I attempted to contact you to discuss this further and to keep you abreast of that development. We would still welcome the opportunity to discuss this matter further. If you have availability this week or next, we would be happy to come see you in person.

In addition, as previously offered, we are happy to have periodic status update calls with you or your internal legal counsel as often as desired. We are also happy to include our external legal counsel as desired. This is likely the only way to ensure that all current information is provided to AT&T, whether or not we believe the matter to be an "issue" or "focus" of the SEC.

Again, should you have any additional questions, please let us know. In the meantime our General Counsel, Carolyn Seabolt, and our external counsel will reach out directly to Monty Hill.

Sincerely,

Joel Shapiro

cc: Carolyn Seabolt

EXHIBIT "C"

1:1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

3 In the Matter of:)

4 TIMBERVEST, LLC) File No. A-03245-A

5)

6

7 WITNESS: DONALD DAVID ZELL, JR.

8 PAGES: 1 through 84

9

10 PLACE: Securities and Exchange Commission

11 950 East Paces Ferry Road

12 Suite 900

13 Atlanta, Georgia 30326

14 DATE: Thursday, December 6, 2012

15 The above-entitled matter came on for investigative

16 interview, at 9:09 a.m.

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19

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22

23

24 Diversified Reporting Services, Inc.

25 (202) 467-9200

MR. WINTER: Understood.
MR. ANDERSON: -- suggesting perhaps a legal responsibility.
BY MR. WINTER:
Q Did you have -- back to my question, did -- were you aware of anyone at BellSouth who was responsible for making certain that ERISA-protected assets were not being misused?
A No.
Q If you ever came across an issue where you had a question about ERISA, who would you go to at BellSouth?
A I don't recall ever having a question about ERISA.
Q Was there a protocol that you should go to someone if you had a question?
MR. ANDERSON: For an ERISA issue?
MR. WINTER: Yes.
THE WITNESS: There were ERISA attorneys at BellSouth. And there were sections of agreements pertaining to ERISA that they would deal with.
BY MR. WINTER:
Q Who were those attorneys when you were there?
A I don't recall their names.
Q In any of the investment management agreements that you read in your time at BellSouth, did you ever read section for -- did you ever read provisions that prohibited

77:1 with the situation.
2 MR. GORDON: Is it something that you would vet
3 with counsel at BellSouth?
4 THE WITNESS: No.
5 MR. GORDON: Who would you have vetted it,
6 something like a situation like that?
7 THE WITNESS: Other folks I was working with see
8 if they had had a similar situation.
9 BY MR. WINTER:
10 Q I believe you said earlier that you believed at
11 the time that Mr. Boden received the fees that he was
12 entitled to those fees, is that correct?
13 A Yes.
14 Q And that you still believe that Mr. Boden was
15 entitled to those fees?
16 A Yes.
17 Q Have you and your partners at Timbervest discussed
18 whether collection of those fees was prohibited by ERISA?
19 MR. ANDERSON: And let me just caution you that
20 you need not disclose any discussions that you had with your
21 partners with counsel, but outside of that you can share with
22 them.
23 THE WITNESS: There were no discussions outside of
24 counsel of ERISA issues.
25 BY MR. WINTER:

78:1 Q But you have discussed whether or not, so just
2 that there has been discussions.
3 MR. ANDERSON: The existence?
4 MR. WINTER: Yes.
5 Mr. ANDERSON: That you're -- you're asking that
6 has -- has the existence of this been discussed?
7 MR. WINTER: Yes. Has the issue been discussed.
8 I'm not asking about the content of the discussion. But just
9 the topic.
10 MR. ANDERSON: You can answer that.
11 THE WITNESS: Yes.
12 BY MR. WINTER:
13 Q If you were to determine that the collection of
14 those funds was prohibited by ERISA, do you still think Mr.
15 Boden would be entitled to them?
16 MR. ANDERSON: You know, again, any response need
17 not disclose any discussions that you had with counsel or --
18 or form the basis of the response. So, if you can answer the
19 question without disclosing what you've been told by myself,
20 you can do so.
21 THE WITNESS: There's no answer outside of counsel
22 discussions.
23 BY MR. WINTER:
24 Q Let me ask, based on your understanding of New
25 Forestry's investment management agreement, would collection

EXHIBIT "D"

1:1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

3 In the Matter of:)

4 TIMBERVEST, LLC) File No. A-03245-A

5)

6

7 WITNESS: GORDON JONES, II

8 PAGES: 1 through 65

9

10 PLACE: Securities and Exchange Commission

11 950 East Paces Ferry Road

12 Suite 900

13 Atlanta, Georgia 30326

14 DATE: Thursday, December 6, 2012

15 The above-entitled matter came on for investigative

16 interview, at 1:35 p.m.

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23

24 Diversified Reporting Services, Inc.

25 (202) 467-9200

17:1 Q Okay. And you were also chief compliance officer?
2 A Yes.
3 Q What did -- what were those duties?
4 A I think I told you earlier my recollection of what
5 I was doing, what those duties were, were to work with our
6 outside compliance officer, to oversee our compliance program
7 and to otherwise ensure that Timbervest was -- was acting in
8 accordance with its duties as a registered investment
9 advisor.
10 Q Did you provide legal counsel for questions that
11 came up inside the organization?
12 A Sometimes.
13 Q Do you ever recall discussing ERISA compliance
14 with your four -- or with your three partners?
15 A No.
16 Q Never?
17 A I don't recall. No.
18 Q Have you personally ever received training on
19 requirements of ERISA?
20 A No.
21 Q No CLEs?
22 A Not that I recall.
23 Q In 2006 and 2007, did Timbervest have an
24 investment management agreement with BellSouth or New
25 Forestry?

EXHIBIT "E"