UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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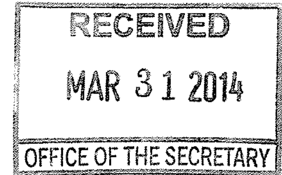

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of **Timbervest, LLC,** **Joel Barth Shapiro,** **Walter William Anthony Boden, III,** **Donald David Zell, Jr.,** **and Gordon Jones II,** **Respondents.**	**Post-Hearing Brief on** **behalf of Gordon Jones II**

POST-HEARING BRIEF ON BEHALF OF GORDON JONES II

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I. INTRODUCTION

Gordon Jones had no communications whatsoever with Mr. Wooddall or Chen Timber regarding the Tenneco transactions and was unaware of who approached whom or of any purported "verbal option" or any other terms regarding the sale to Chen Timber beyond what was presented to him as a member of the investment committee. Mr. Jones, as a member of the investment committee, approved the sale of Tenneco property by New Forestry solely based on the information known by him – the sale met the client's objective to sell properties to generate liquidity, and the financial terms of the sale were beneficial to and in the best interest of the client based on all financial and market analysis. Likewise, Mr. Jones, as a member of the investment committee, approved the acquisition of Tenneco by Timbervest Partners Alabama's ("TVP") because it met TVP's objectives and the acquisition price was immediately accretive to TVP's returns.

Mr. Jones was told of Mr. Boden's consulting fee arrangement when he joined Timbervest in 2004 and was told that the client, BellSouth, had been notified of the arrangement. Later, after Mr. Boden became a partner at Timbervest, Mr. Jones identified the potential conflict of interest raised by Mr. Boden's consulting fee arrangement and requested that his partner disclose the arrangement to New Forestry's investment manager, ORG. Mr. Jones received assurances from his partner that this disclosure had been made and that ORG was fine with the arrangement.

Mr. Jones was aware that Mr. Boden was entitled to the consulting fees owed to him upon the sale of the Tenneco and Kentucky properties. However, Mr. Jones was not aware of the entities employed by Mr. Boden to receive the fees, and reviewing line items such as commissions on closing statements was beyond Mr. Jones' duties. Mr. Jones was also unaware

of the other structures and protections Mr. Boden implemented on the advice of his personal attorney, Ralph Harrison, regarding how Mr. Boden would receive his consulting fees.

Mr. Jones also had no expectation that Mr. Boden would later decide to share his fee proceeds with Mr. Jones and the other partners, and his approval of these sales, as a member of the investment committee, was made well before that decision by Mr. Boden. Mr. Jones approved the sales of Tenneco and the Kentucky properties by New Forestry, as a member of the investment committee, solely because the sales met the client's objective to sell properties to generate liquidity and because the financial terms of the sales were beneficial to and in the best interest of the client based on all financial and market analysis.

In summary, Mr. Jones knew the terms of the sale of the Tenneco property by New Forestry and the later purchase of the property by TVP. He knew that each transaction met the client's investment objectives, were economically accretive and were in the best interest of the client. He knew that Mr. Boden was entitled to consulting fees upon the sale of properties that met the terms of his consulting arrangement. He knew that he had identified a potential conflict of interest associated with Mr. Boden's arrangement and had directed Mr. Shapiro to disclose the arrangement to the client. He knew that Mr. Shapiro confirmed to him that he had made the disclosure and that the client had no objection. He knew that, many weeks after Mr. Boden had received his consulting fees, Mr. Boden had decided to share a portion of the proceeds with his partners. He knew that his acceptance of the proceeds from Mr. Boden did not pose any additional conflict of interest for him or the other partners because each of them had approved both sale transactions many weeks before as members of the investment committee. While Mr. Jones considered New Forestry an ERISA client, at no time prior to the SEC's raising the issue did Mr. Jones think about Mr. Boden's consulting fees in the context of ERISA, and, therefore,

he never considered any potential ERISA issues associated with the fees. These were the facts known by Mr. Jones at the time and there is no evidence that Mr. Jones should have done more. Whether in his capacity as President, General Counsel or Chief Compliance Officer, Mr. Jones acted reasonably in light of the information known by him.

Timbervest did not violate Section 206(1) or 206(2) of the Advisers Act and Mr. Jones certainly did not willfully aid and abet or cause any such violation. There was no evidence presented at the hearing supporting a conclusion that Mr. Jones, with scienter or negligently, knowingly and substantially assisted in conduct that constitutes a primary violation or caused a primary violation.

II. STATEMENT OF FACTS

Mr. Jones incorporates by reference the Statement of Facts set forth in the Post-Hearing Brief submitted on behalf of Timbervest, LLC.

III. LEGAL ANALYSIS

A. The Division must prove that Mr. Jones, with scienter or negligently, knowingly and substantially assisted in the conduct that constitutes the primary violation or was the cause of the primary violation.

The Division has alleged that Mr. Jones aided and abetted or caused Timbervest's alleged violations of sections 206(1) and (2) of the Advisers Act. (OIP ¶ 24.) To prove a claim for aiding and abetting, the Division must establish three elements: (1) a primary securities law violation, (2) knowledge, or recklessness in not knowing, that the respondent's role was part of an overall activity that was improper or illegal, and (3) knowing and substantial assistance in the achievement of the primary violation. *See, e.g.*, *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000).

Similarly, three elements must be established for a "causing" claim: (1) a primary securities law violation, (2) that the respondent "knew, or should have known, that his conduct would contribute to the violation," and (3) "an act or omission by the respondent that was a cause of the violation." *In the Matter of Daniel Bogar*, Admin. Proc. File No. 3-15003, Release No. 502, 2013 WL 3963608, at *20 (Aug. 2, 2013).

The Division did not carry its burden to prove that Mr. Jones aided and abetted or caused any Advisers Act violation. First, for the reasons discussed in detail in the Post-Hearing Brief filed by Timbervest, the Division failed to establish a primary violation of either Section 206(1) or 206(2). Second, the Division did not and cannot establish that Mr. Jones had knowledge, or was reckless in not knowing, that his role was part of an overall activity that was improper or illegal or that he should have known that his conduct would contribute to a violation. Third, the Division did not and cannot establish that Mr. Jones provided knowing and substantial assistance in the achievement of the primary violation, or that an act or omission by him was the cause of a violation. To the contrary, the evidence presented at the hearing demonstrated that Mr. Jones acted reasonably and in the best interests of Timbervest's clients based on the information reasonably available to him at the time.

B. There Was No Primary Violation by Timbervest.

Mr. Jones incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief.

In short, because the Division did not prove a primary violation by Timbervest, Mr. Jones cannot be liable for aiding, abetting, or causing a violation.

C. Mr. Jones did not act with scienter or negligently.

The second element in an aiding and abetting claim is that the respondent had knowledge or was reckless in not knowing that his role was part of an overall activity that was improper or illegal. While recklessness may satisfy the intent requirement, to show recklessness the Division was required to prove that Mr. Jones "encountered 'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator," or there was a danger so obvious that they must have been aware of it. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004.) To prove a claim for causing, the Division must prove that Mr. Jones knew or should have known that his conduct contributed to the primary violation. With respect to primary violations under Section 206(1), it is not sufficient to prove negligence, the Division must show that Mr. Jones acted with scienter. *See In re Daniel Bogar*, 2013 WL 3963608, at *20. The Division did not and cannot carry this burden.

1. Mr. Jones did not act with scienter or negligently in connection with the sale and acquisition of Tenneco.

The Division's allegations with respect to the Tenneco transactions are based on purported conversations during negotiations between Mr. Boden and Mr. Wooddall that occurred more than seven years ago. For the reason's set forth in Timbervest's Post-Hearing Brief, the sale of the Tenneco property on behalf of New Forestry and the subsequent purchase on behalf of TVP did not violate the Adviser's Act. However, even if the transactions *did* constitute a primary violation, there is absolutely no evidence that Mr. Jones took part in or even had any knowledge of these conversations.

Mr. Jones did not have any communications with Mr. Wooddall regarding the sale or purchase of the Tenneco property to Chen Timber, nor was he involved in any manner in the negotiations or structuring of the transaction. (Hr'g Tr. Boden 0122:15-0123:8; 1478:7–1479:7.)

Mr. Jones had no knowledge of the communications between Mr. Boden and Mr. Wooddall and was unaware of any terms regarding the sale of the Tenneco property to Chen Timber outside of the terms presented to him as a member of the investment committee. (Hr'g Tr. Boden 0122:15-0123:8; 1478:7–1479:7.) He, therefore, had no knowledge of the purported "verbal option" to purchase about which Mr. Woodall testified. (Hr'g Tr. 1297:7-8.) Mr. Jones also had no knowledge regarding how the sale opportunity was described in property reports to the client or whether or not the sale was "unsolicited." (Hr'g Tr. 1264:13-1265:1; 1421:7-11.) Knowing these details were beyond Mr. Jones' role at Timbervest. (Hr'g Tr. 1302:17-18; 1266:25-1267:1) Mr. Jones' sole involvement in this transaction was as a member of the investment committee. (Hr'g Tr. 1348:15-17.) The terms of the sale as presented to Mr. Jones as a member of the investment committee were squarely within the investment strategy and mandates of New Forestry. Moreover, the terms were beneficial to and in the best interests of New Forestry. (Hr'g Tr. 1355:8-12; 1484:10-16.)

Likewise, Mr. Jones had no communications with Mr. Wooddall regarding the purchase of the Tenneco property (as Gilliam Forest) by TVP from Chen Timber, nor was he involved in any manner in the negotiations or structuring of the transaction. (Hr'g Tr. Boden 0122:15-0123:8; 1478:7–1479:7.) Mr. Jones had no knowledge of the communications between Mr. Boden and Mr. Wooddall and was unaware of any purported terms outside of the terms presented to him as a member of the investment committee. (Hr'g Tr. Boden 0122:15-0123:8; 1478:7–1479:7.) Again, Mr. Jones' sole involvement in this transaction was as a member of the investment committee. (Hr'g Tr. 1348:15-17.) As a member of the investment committee, Mr. Jones became aware that Chen Timber was willing to resell the Tenneco property to TVP at a price that was favorable relative to market prices at the time. The terms presented to Mr. Jones

as a member of the investment committee were squarely within the investment strategy and mandates of TVP. Moreover, the terms were beneficial to and in the best interests of TVP. (Hr'g Tr. 1355:8-12; 1485:18-1486:2.)

Mr. Jones did not encounter any "red flags," "suspicious activity" or "danger" with respect to the Tenneco transactions. The only red flags or suspicious activity the Division presented with respect to Mr. Jones was in the context of hypotheticals regarding *if* he had known of some agreement to sell and repurchase the Tenneco property. (Hr'g Tr. 1297:1-1299:19.) However, he clearly was not aware of any purported agreement to repurchase the property at any time. (Hr'g Tr. 1297:7.) In fact, Mr. Jones was only aware of the terms of each transaction that were presented to him as a member of the investment committee. (Hr'g Tr. 1348:15-17.) While Mr. Jones does not recall the specifics of the investment committee meeting for either transaction , he reasonably relied on the terms presented to him by the timberland investment team. (Hr'g Tr. 1247:25-1248:2; 1252:16-19;1256:7-9.) These were the facts known by Mr. Jones. Had he known of some purported "verbal option" he would have had questions and would have looked into the matter further. (Hr'g Tr. 1297:1-1299:19.) However, Mr. Jones had no such knowledge and was operating only with the information known by him at the time. (Hr'g Tr. 1483:7-10.)

The Division also portrays the timing and pricing of the Tenneco transactions in the light most detrimental to the Respondents. Mr. Jones was aware that New Forestry sold the property and that at a later point TVP purchased the property, over a timeframe that spanned from June 2006 to February 2007. (Hr'g Tr. 153:25-154:2; Resp. Ex. 132.) After more than seven years have elapsed, Mr. Jones does not recall whether or not the timing of the transactions was discussed specifically by the investment committee or with his partners. (Hr'g Tr. 1262:21-24.)

However, presumably, if it was discussed at the investment committee meeting or otherwise, Mr. Boden, the only Timbervest party to have any communications with Mr. Wooddall, would not have mentioned an agreement to repurchase that Mr. Boden testified never existed. (Hr'g Tr. Boden 0179:17-25; 0180:17:20.) Irrespective of the timing, the controlling facts for Mr. Jones were that the terms of each transaction were reasonable and were beneficial to and in the best interests of each client based on all information presented to and known by Mr. Jones. (Hr'g Tr. 1483:7-10.) The sale terms and price met the investment objectives of New Forestry and were economically accretive, and the purchase terms and price met the investment objectives of TVP and were economically accretive. (Hr'g Tr. 1484:10-1486:2.) The financial analysis of the two transactions and the different purchase prices unquestionably speak for themselves. (Timbervest Post-Hearing Brief.) These are the bases on which Mr. Jones, as a member of the investment committee, approved the transactions. (Hr'g Tr. 1349:6-8; 1355:8-12.)

It follows that there is no evidence that Mr. Jones assisted in any attempt to avoid an ERISA violation by selling to and then repurchasing the Tenneco property from Chen Timber, as opposed to a direct sale between Timbervest clients. As noted above, there is no evidence Mr. Jones had any knowledge of any such plan, or that he should have been aware of any such plan. Moreover, there is no evidence that such a direct transaction would have been prohibited by ERISA in the first place.

As a result of the above, the Division did not and cannot prove that Mr. Jones acted with scienter or negligently with respect to the Tenneco transactions.

2. Mr. Jones did not act with scienter or negligently in connection with the payment of Mr. Boden's consulting fees.

Mr. Jones joined Timbervest in January 2004 at the request of Timbervest's prior owners, Rock Creek Capital, to assist in the company's effort to bring to form and publicly market a

timberland REIT. (Hr'g Tr. 1385:20–1386:13; 1393:19–22.) During his due diligence in making the decision to leave his position as a partner at a law firm and join Timbervest, Mr. Jones talked to Mr. Shapiro about the individuals with whom he would be working. At this time, he learned that Mr. Shapiro, on behalf of Timbervest, and Mr. Boden had earlier entered into an consulting fee arrangement. (Hr'g Tr. 1314:23–1315:16; Shapiro 1770:10-13.) However, at that time no payments had been made as a result of the agreement.

In 2006 and 2007, the time of the relevant transactions, Mr. Jones served as President, General Counsel, Head of Crossover Assets and Chief Compliance Officer of Timbervest. (Hr'g Tr. 1234:10–14; 1419:9-1420:1.) After Mr. Boden became a partner at Timbervest, Mr. Jones recognized the potential conflict of interest raised by the potential fees to be paid under Mr. Boden's consulting arrangement. (Hr'g Tr. 1324:19-20; 1325:24-1326:1.) Mr. Jones discussed the potential conflict of interest with Mr. Shapiro and his other partners. (Hr'g Tr. 1325:12-1326:17.) Because Mr. Shapiro was responsible for the client relationship and frequently spoke with New Forestry's investment manager and fiduciary, ORG, Mr. Jones charged Mr. Shapiro with disclosing the arrangement to and with obtaining their approval. (Hr'g Tr. 1325:12–18; 1327:14–22; 1330:15–19; 1328:15-19; 1331:14-15; Shapiro 1772:17-20; 1774:17-25; 1776:17-21.) Mr. Jones recalled Mr. Shapiro reporting back to him that Mr. Shapiro discussed the arrangement with Mr. Schwartz and that "Mr. Schwartz was fine with the arrangement." (Hr'g Tr. 1325:12-18; 1337:22-25; 1352:21-25; 1469:21-25.) Mr. Shapiro also confirmed that he reported back to his partners regarding the disclosure to ORG and ORG's acquiescence to the arrangement. (Hr'g Tr. Shapiro 1789:8-14; 1790:2-7; 1790:14-16.)

While Mr. Jones did not personally disclose the arrangement to ORG and was not privy to Mr. Shapiro's conversation with Mr. Schwartz, Mr. Jones' reliance on his partner who was

Timbervest's CEO and the primary client contact was reasonable, and Mr. Jones had no reason to question it. (Hr'g Tr. 1330:15–19; 1331:14-15; 1479: 17-20.) Had Mr. Jones had some indication that the disclosure was not made to, and agreed by, ORG, it would have been incumbent on Mr. Jones to follow up directly with ORG. However, this was not the case, and based on his reasonable reliance, to the best of Mr. Jones' knowledge Mr. Shapiro made the disclosure and "Mr. Schwartz had no problem with it." (Hr'g Tr. 1327:20–22; 1352:21–25.)

The inability to produce a written record of the disclosure does not establish that Mr. Jones acted with scienter or negligently. Mr. Jones testified that, although it would have been his practice to create a written record of the disclosure or have Mr. Shapiro do so, he has not been able to locate one. (Hr'g Tr. 1327:1–4.) Given that these events occurred more than seven years ago, however, the lack of written documentation does not support an inference that Mr. Shapiro did not report to Mr. Jones that the disclosure of Mr. Boden's fee arrangement had been made to Mr. Schwartz's; nor does it support an inference that no record was created. Mr. Shapiro specifically reported back to Mr. Jones that the disclosure had been made and Mr. Boden's arrangement was approved by ORG, and Mr. Jones testified that it would have been his "course of conduct" to document the disclosure. (Hr'g Tr. 1325:12–18; 1328:6-9.) In any event, there is no evidence that Mr. Jones had any intent or motive to deceive New Forestry with respect to Mr. Boden's fee arrangement. To the contrary, Mr. Jones' directive to Mr. Shapiro to disclose the arrangement to ORG demonstrates that Mr. Jones intended for Mr. Boden's fee agreement to be disclosed to and approved by the client. (Hr'g Tr. 1325:12–18; 1328:6-9.)

Mr. Jones was aware that Mr. Boden was entitled to his consulting fee upon the sale of the Tenneco property and the Kentucky Timberlands property, as each transaction met the terms of his consulting arrangement. (Hr'g Tr. 1328:16-21; 1334:5-9.) Mr. Jones believed that Mr.

Boden was entitled to the fees based on services provided to New Forestry with no compensation during 2002 to 2004. (Hr'g Tr. 1491:4-17.) He also understood that the consulting arrangement had been disclosed and approved by ORG. (Hr'g Tr. 1308:8-14.) However, Mr. Jones was not aware that Mr. Boden had engaged his personal attorney, Ralph Harrison. He was not aware of the structures and protections Mr. Boden had implemented on the advice of Mr. Harrison regarding how Mr. Boden would receive his consulting fee. (Hr'g Tr. 1303:23-1305:12; Harrison 0731:18-0732:1.) He was not aware of Fairfax Realty Advisors nor Westfield Realty Partners. (Hr'g Tr. 1300:1-2; 1335:8-22.) He was not aware of the terms on which Mr. Boden had engaged Mr. Harrison. (Hr'g Tr. Harrison 0731:4-6; 1342:21-22). In fact, Mr. Jones was not aware of any of this until it was brought to his attention in 2012 in the course of the Division's investigation. (Hr'g Tr. 1300:1-2; 1335:8-22; Harrison 0731:18-0732:1.) Nor did Mr. Jones' duties at Timbervest include reviewing commission payments on closing statements or investigating the personal structures pursuant to which one of his partners was to receive earned compensation. (Hr'g Tr. 1302:17-18; 1304:19-22; 1308:8-14.)

Finally, the Division argues that Mr. Jones should have known there was a per se ERISA prohibition against paying Mr. Boden his advisory fee from New Forestry's proceeds. Mr. Jones and the Respondents disagree that any such ERISA prohibition was applicable. (Timbervest Post-Hearing Brief.) Moreover, Mr. Jones never considered any ERISA implications in his assessment of Mr. Boden's consulting arrangement. Although he admittedly considered New Forestry to be an ERISA client, ERISA never entered his thoughts. (Hr'g Tr. 1379:24-1380:16.) He was focused on the potential conflict of interest associated with Mr. Boden's arrangement and disclosure to the client. (Hr'g Tr. 1324:19-1325:18; 1521:17-22.) Mr. Jones' insistence of the disclosure and approval of Mr. Boden's consulting arrangement to ORG shows that Mr.

Jones believed that the conflict of interest presented by Mr. Boden's arrangement was being addressed adequately. Mr. Jones was aware of the conflict of interest and reasonably relied on Mr. Shapiro, his partner, Timbervest's CEO and the primary client contact, to make the disclosure to the client. (Hr'g Tr. 1352:22-25.) Mr. Shapiro reported back to Mr. Jones that he had made the disclosure and that the client was fine with it, and Mr. Jones reasonably relied on this report. (Hr'g Tr. 1325:12-18; 1337:22-25; 1352:21-25; 1469:21-25.)

In sum, the Division did not and cannot prove that Mr. Jones acted with scienter or negligently with respect to the payment or disclosure of Mr. Boden's fee arrangement.

3. Mr. Jones did not act with scienter or negligently in connection with the sharing of Mr. Boden's fees.

Several weeks after Mr. Boden received his consulting fee for each of the Tenneco sale and the Kentucky Timberlands sale, Mr. Boden made a decision to share his fee proceeds with his partners, including Mr. Jones. (Hr'g Tr. Boden 0222:17-21; 0288:13-0290:2.) Given the partners' business dealings over the prior years, Mr. Jones did not find this gesture by Mr. Boden to be "out of the ordinary." (Hr'g Tr. 1345:3-9.) Mr. Jones stated that after the four partners purchased Timbervest in 2005:

> . . . there were lots of opportunities that various partners brought to the table that other partners profited from. And there were lots of not only opportunities, but we were investing side-by-side with each other both in Timbervest-sponsored funds and in things outside of Timbervest. And, you know, by this point in time, the fact that Mr. Boden came and said, you know 'I've determined that I want to share my fee' did not seem strange to me.

(Hr'g Tr. 1345:22-1346:6.) At the time Mr. Jones received the monies from Mr. Boden, Mr. Jones did not believe that Mr. Boden's gesture created a conflict of interest for Mr. Jones or the other partners. (Hr'g Tr. 1348:14-1349:11.) Mr. Boden had been paid a fee that he had earned and was entitled to receive pursuant to a consulting arrangement that Mr. Jones believed had

been fully disclosed to and approved by the client. (Hr'g Tr. 1352:21-25.) Mr. Jones had approved both sale transactions that triggered the payment of Mr. Boden's fees with no expectation that Mr. Boden would later decide to share his fee proceeds, and, in the case of each approval, weeks prior to the time that Mr. Boden actually made his decision to share his fee proceeds from either sale transaction. [1] (Hr'g Tr. 1348:14-18; 1349:1-11.)

Mr. Jones action of accepting a portion of Mr. Boden's fee proceeds was reasonable in light of the partners' history and course of dealings. His acceptance of the proceeds did not create any additional conflict of interest or disclosure requirement. For these reasons, the Division did not and cannot prove that Mr. Jones acted with scienter or negligently with respect to his receipt of fee proceeds from Mr. Boden.

D. Mr. Jones did not provide knowing and substantial assistance in the conduct that constitutes a primary violation nor did he cause a primary violation.

The third element of a claim for aiding and abetting requires that the Division prove knowing and substantial assistance in the primary violation. Mere awareness and approval of the primary violation are insufficient. *Armstrong v. McAlpin*, 699 F. 2d 79, 92 (2d Cir. 1983). Inaction on the part of an aider and abettor is not sufficient to satisfy this prong unless "it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act." *Id.* at 91. To establish a claim for causing, the Division must prove that Mr. Jones' action or inaction was *actually* the cause of the violation. The Division failed to carry its burden.

[1] Mr. Jones approved the sale of Tenneco on or before September 15, 2006. Mr. Jones approved the sale of the Kentucky Timberlands on or before December 15, 2006. Mr. Boden shared his fee proceeds from the Tenneco transaction with Mr. Jones around February 22, 2007. Mr. Boden shared his fee proceeds from the Kentucky Timberlands transaction with Mr. Jones on May 25, 2007.

1. Mr. Jones did not knowingly or substantially assist in any conduct with respect to the Tenneco sale and purchase that constitutes a primary violation or caused a primary violation.

Mr. Jones had no discussions with Mr. Wooddall or anyone at Chen Timber regarding the Tenneco transactions (Hr'g Tr. 1478:7-1479:7.) He was not involved in the negotiation of either Tenneco transaction. (Hr'g Tr. 1304:17–22; 1487:4–20.) He was not aware of the conversations between Mr. Boden and Mr. Wooddall regarding the Tenneco transactions, nor was there evidence that Mr. Jones should have known of such conversations. (Hr'g Tr. 1478:7-1479:7.) Mr. Jones was not involved in the day-to-day transactions on the timberland side of Timbervest's business and did not have responsibility for reviewing purchase and sale contracts or for drafting or reviewing property reports. (Hr'g Tr. 1302:17-18; 1304:17–22; 1487:4–20.) Rather, Mr. Jones' involvement in the transactions was limited to his role as a member of the investment committee, and he approved each transaction as a member of the investment committee based on the information that was available to him at the time. (Hr'g Tr. 1482:18-1483:3.)

With respect to New Forestry's sale of the Tenneco property, Mr. Jones explained that the transaction, "met their objectives that were in place at the time, which was to create liquidity, and . . . from an economic standpoint, was an attractive sale that yielded . . . [an] 11.7 premium over what we were carrying at the time." (Hr'g Tr. 1484:12–16.) The Division can point to no evidence either known to Mr. Jones, or about which he should have been aware, that would suggest that Chen Timber was purchasing the Tenneco property from New Forestry at less than fair market value.

Mr. Jones reasonably viewed Timbervest's Partners Alabama's subsequent purchase of Tenneco as a separate transaction that was in line with the objectives of TVP. He testified:

> New Forestry sold the property, sold it as of September 15th, sold it at a premium from where we were carrying that

> property and fairly material premium above where we were carrying the property.
>
> When we revalued the property months later for TVP and their potential acquisition of that property, we revalued that property based on the market conditions at the time.

(Hr'g Tr. 1279:12–19.) Mr. Jones did not, therefore, knowingly and substantially assist in a violation or cause any violation as a result of his approval of the transactions.

2. Mr. Jones did not knowingly or substantially assist in any conduct with respect to the alleged failure to disclose the fee arrangement that constitutes a primary violation nor did he cause any such violation.

There is no evidence that Mr. Jones substantially assisted or caused any alleged failure by Timbervest to disclose the fee arrangement. To the contrary, as set forth above, Mr. Jones instructed Mr. Shapiro to disclose the consulting fee arrangement to BellSouth's investment manager, ORG. (Hr'g Tr. 1352:21-25.) In reliance on his discussions with Mr. Shapiro, to the best of Mr. Jones' knowledge the fee arrangement was disclosed to and approved by ORG. (Hr'g Tr. 1352:21-25.) Instructing his partner to disclose the consulting arrangement is the antithesis of causing a failure to disclose, much less knowingly and substantially assisting in fraud. *See Armstrong*, 699 F. 2d at 91.

3. Mr. Jones did not knowingly or substantially assist in any conduct with respect to Mr. Boden's decision to share portions of his consulting fee proceeds that constitutes a primary violation nor did he cause any such violation.

Mr. Boden's decision to share a portion of the proceeds from his consulting fee with Mr. Jones and the other partners did not impact Mr. Jones' approval of the transactions, and, therefore, did not create a conflict of interests or trigger any further disclosure requirement. (Hr'g Tr. 1349:1–11.) At the time the transactions were approved, Mr. Jones had no knowledge of Mr. Boden's decision to share his fee proceeds. (Hr'g Tr. Boden 0289:22–0290:2; Resp. 133.) Rather, he approved the transactions several weeks prior to Mr. Boden's decision to share the

first fee proceeds and because he believed they were in the clients' best interests based on the information available to him at the time. (Hr'g Tr. 1483:7-10; 1484:10-1486:2.) Accordingly, the Division failed to prove that Mr. Jones substantially assisted or caused any violation with respect to Mr. Boden's sharing of proceeds from his fee arrangement.

E. The requested relief is either barred by the statute of limitations or excessive.

Mr. Jones incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief.

1. Under the circumstances here, a cease-and-desist order would constitute a penalty to Mr. Jones, and, therefore should be barred by the five-year limitations period in § 2462.

With respect to Mr. Jones, a cease-and-desist order would constitute a penalty and not a remedial measure, and therefore should not be granted. See *SEC v Jones,* 476 F. Supp. 2d 374 at 384, (2007). As set forth in Timbervest's Post-Hearing Brief, for a cease-and-desist order to be an appropriate remedy, the Division cannot rely on mere facts of past violations and must demonstrate a realistic likelihood of recurrence. In addition, collateral consequences must be considered.

There is simply no plausible argument that Mr. Jones poses a risk to the public or presents a threat of future violations. Mr. Jones has been a member of the State Bar of Georgia, in good standing, since 1995 and practiced law for 10 years at a prominent Atlanta law firm. (Div. Ex. 156b *Jones Declaration* at ¶ 3 and ¶ 4.) Mr. Jones' personal financial records have been thoroughly reviewed by the Staff and have not been questioned. (Hr'g Tr. 1477:14-1478:3.) The Division's allegations of misconduct date back to 2005-2007, more than seven years ago. The allegations relate to a property transaction in which Mr. Jones was involved only in an isolated role as a member of the investment committee, and to the payment of two consulting fees paid under a consulting agreement which predated Mr. Jones joining Timbervest, to which Mr. Jones was not a party, and that expired

more than five years ago. (Hr'g Tr. 1348:15-17; Boden 0394:3-8.) Moreover, Mr. Jones is leaving the timberland investment business. (Hr'g Tr. 1480:20-1482:8.)

In addition, the collateral consequences of a cease-and-desist order undoubtedly would stigmatize Mr. Jones. The entire timberland investment community, including services providers, consultants, partners and investors freely banter speculation throughout the industry. (Hr'g Tr. Barag 1989:3-6; 1990:15-17.) During the Division's investigation, all Mr. Jones' personal and family bank accounts and brokerage accounts were subpoenaed and reviewed; and the results have yielded no improprieties or improper transactions. (Hr'g Tr. 1477:14-21; 1477:14-1478:3.) Simply as a result of the charges filed by the Division, Mr. Jones was informed that two of his personal securities accounts had been restricted and would be closed. (Div. Ex. 156b *Jones Declaration* at ¶ 9.) The issuance of a cease-and-desist order would only magnify and result in more of these types of collateral consequences. In addition, a cease-and-desist order would impair significantly his ability to pursue a career, not only in the investment world, but as an attorney. Mr. Jones faces the risk of irreparable harm to his legal reputation and sanctions by the State Bar of Georgia.

Given these facts and those set forth in Timbervest's Post Hearing Brief, the Division's request for a cease-and-desist order against Mr. Jones carries "the sting of punishment" and is subject to the five year statute of limitations in § 2462. *SEC v. Jones,* 476 F. Supp. 2d at 385.

2. A cease-and-desist order against Mr. Jones in not appropriate based on the Steadman factors.

In addition to the analysis of the *Steadman* (*Steadman v. SEC, 603 F.2d 1126, 1137-40 (5th Cir. 1979)* factors set forth in Timbervest's Post-Hearing Brief, the following facts should be considered for Mr. Jones.

(a) Mr. Jones' conduct was not egregious in either of the two violations.

First, Mr. Jones was not aware of any purported "verbal option" or other agreement between Mr. Boden and Mr. Wooddall regarding the Tenneco transactions. (Hr'g Tr. Boden 0122:15-0123:8; 1478:7-1479:7.) Mr. Jones' role in the transactions was limited to his participation on the investment committee. In this role he approved both transactions based on the information presented to him. (Hr'g Tr. 1483:7-10; 1279:12-19.) In each case, Mr. Jones concluded that the transaction met the client's objective, was economically accretive and was in the best interest of the client. (Hr'g Tr. 1483:7-10; 1484:10-1486:2.) Second, when Mr. Jones joined Timbervest Mr. Boden's consulting arrangement was already in place. (Hr'g Tr. 1314:23-1315:16.) After Mr. Boden became a partner in Timbervest, Mr. Jones identified a potential conflict of interest and discussed the matter with his partners. He then directed Mr. Shapiro, Timbervest's CEO and the primary client contact, to disclose Mr. Boden's consulting arrangement to ORG and to obtain approval of it. Mr. Jones reasonably relied on Mr. Shapiro to complete this task and reasonably relied on Mr. Shapiro when he reported that he had made the disclosure to ORG and that ORG was fine with it. (Hr'g Tr. 1325:12-18; 1325:12–18; 1327:14–22; 1330:15–19; 1328:15-19; 1331:14-15; 1469:21-25; Shapiro 1772:17-20; 1774:17-25; 1776:17-21.) Thirdly, Mr. Jones' sharing in a portion of Mr. Boden's consulting fee proceeds did not seem unusual to Mr. Jones given the partners' history and course of dealings. (Hr'g Tr. 1345:22-1346:6.) Moreover, it did not impact the transaction approvals given by Mr. Jones prior to his knowledge that Mr. Boden intended to share his fee proceeds. Because Mr. Jones' approvals of the transactions were complete several weeks prior to Mr. Boden's decision to share his fee proceeds from the Tenneco transaction, Mr. Boden's decision to share the fee from the Tenneco transaction (and any possibility that he could later choose to share his fee proceeds from the sale of the Kentucky Timberlands transaction) did not create a new conflict of interest for

Mr. Jones or the other Respondents. (Hr'g Tr. 1348:14-18; 1349:1-11.) Lastly, Mr. Jones' and the other Respondents' decision to return to New Forestry the fees earned by Mr. Boden years earlier, with interest, evidences his good faith and intent to act in the best interests of his clients. (Hr'g Tr. Ranlett 1057:22-1058:7.) In sum, Mr. Jones' conduct was not egregious in any manner.

(b) The alleged infractions were isolated and are not reflective of Mr. Jones' 20 years in the professional business world.

Mr. Jones has been a member of the State Bar of Georgia, in good standing, since 1995 and practiced law for 10 years at a prominent Atlanta law firm. (Div. Ex. 156b *Jones Declaration* at ¶ 3 and ¶ 4.) Throughout his 20-year career, Mr. Jones has had no complaints or disciplinary or regulatory problems of any sort. Mr. Jones' personal financial records have been thoroughly reviewed by the Staff and no improprieties or improper transactions have been found. (Hr'g Tr. 1477:14-1478:3.) The Division's allegations of misconduct date back to 2005-2007, more than seven years ago. The allegations relate to a property transaction in which Mr. Jones was involved only in an isolated role as a member of the investment committee, and to the payment of two consulting fees paid under a consulting agreement which predated Mr. Jones joining Timbervest, to which Mr. Jones was not a party and that expired more than five years ago. (Hr'g Tr. 1348:15-17; Boden 0394:3-8.)

(c) Mr. Jones did not act with scienter with respect to either of the two alleged violations.

First, Mr. Jones did not act with an intent to deceive, harm, or defraud either New Forestry or TVP with respect to the Tenneco transactions. To the contrary, based on all the information known by Mr. Jones, he concluded that the transactions met each of the client's objectives, were economically accretive and were in the best interest of the client. (Hr'g Tr. 1483:7-10; 1484:10-1486:2.) Second, Mr. Jones did not act with an intent to deceive, harm, or defraud New Forestry with respect to Mr. Boden's fees. To the contrary, Mr. Jones identified a

potential conflict of interest, discussed the matter with his partners and directed Mr. Shapiro, Timbervest's CEO and the primary client contact, to disclose Mr. Boden's consulting arrangement and obtain approval of it. Mr. Jones reasonably relied on Mr. Shapiro to complete this task and reasonably relied on Mr. Shapiro when he reported that he had done so and that the client was fine with it. (Hr'g Tr. 1325:12–18; 1327:14–22; 1330:15–19; 1328:15-19; 1331:14-15; 1469:21-25; Shapiro 1772:17-20; 1774:17-25; 1776:17-21.) Mr. Jones' clear intention was that the client be made aware of Mr. Boden's consulting arrangement and the associated fees that could be paid to Mr. Boden thereunder.

(d) There is no risk of future violations by Mr. Jones.

Mr. Jones has taken the Division's investigation and these proceedings extremely seriously. (Hr'g Tr. 1481:10-15.) As he explained, the investigation is "the first thing I think about in the morning and the last thing I think about at night." (Hr'g Tr. 1481:10-15.) He has recognized that it would have been better practice to ensure that certain things, such as Mr. Boden's consulting arrangement and the consulting fee disclosure be well documented, and that certain improvements can be made in the details of certain property descriptions and reports to clients. (Hr'g Tr. 1327:5-9; 1321:3-14; 1275:13-1276:1.)

The Division's investigation and proceedings have been incredibly stigmatizing for Mr. Jones. The entire timberland investment community, including services providers, consultants, partners and investors freely banter speculation throughout the industry. (Hr'g Tr. Barag 1989:3-6; 1990:15-17.) During the Division's investigation, all Mr. Jones' personal and family bank accounts and brokerage accounts were subpoenaed and reviewed; and the results have yielded no improprieties or improper transactions. (Hr'g Tr. 1477:14-21; 1477:14-1478:3.) Mr. Jones was informed that two of his personal securities accounts had been restricted and would be closed.

(Div. Ex. 156b *Jones Declaration* at ¶ 9.) The stigmatization has affected Mr. Jones so much so that he has decided to leave the timberland business altogether. (Hr'g Tr. 1480:20-1482:8.)

(e) The alleged violations are not recent.

The matters at issue here took place over seven years ago, after memories have clearly faded and documents have disappeared. During the hearing, the Division repeatedly implied that because Mr. Jones could not produce written documentation of matters dating back at least seven years, and well beyond the SEC's five year retention policy, he had "dropped the ball." (Hr'g Tr. 1342:1-3; 1327:5-7; 1331:16-20: 1332:1-7; 1340:24-1341:2: 1363:15-21.) This significant lapse of time since the events in question took place, while impacting all of the Respondents, has significantly prejudiced the accusations against Mr. Jones due to his status as an attorney and his former roles as General Counsel and Chief Compliance Officer.

(f) There was no harm to Timbervest's investors from Mr. Jones' conduct.

First, with respect to the Tenneco transactions, Mr. Jones gave his approval only after he concluded that the transactions met each of the client's objectives, were economically accretive and were in the best interest of the client. (Hr'g Tr. 1483:7-10: 1484:10-1486:2.) Second, with respect to Mr. Boden's consulting arrangement, Mr. Jones identified a potential conflict of interest, discussed the matter with his partners and directed Mr. Shapiro, Timbervest's CEO and the primary client contact, to disclose Mr. Boden's consulting arrangement and obtain approval of it. (Hr'g Tr. 1325:12–18; 1327:14–22; 1330:15–19; 1328:15-19; 1331:14-15; Shapiro 1772:17-20; 1774:17-25; 1776:17-21.) Additionally, when the issue of Mr. Boden's fees surfaced more than seven years after they had been earned, Mr. Jones and the other Respondents voluntarily repaid the fees, with interest. (Hr'g Tr. Ranlett 1057:22-1058:7.)

(g) A cease-and-desist would not serve a remedial function with respect to Mr. Jones.

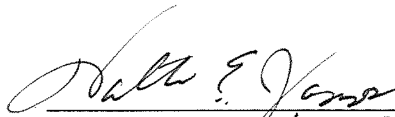
There is no remedial function to be served by issuing a cease-and-desist order against Mr. Jones, and such an order is wholly unnecessary. The alleged misconduct is not ongoing, and there is no likelihood of future misconduct by Mr. Jones. Due to his roles at Timbervest, Mr. Jones has lived every day during the past four years with this investigation and these proceedings at the forefront of his thoughts. (Hr'g Tr. 1480:20-1482:8.) It has taken at a great toll on him personally as well as his family. (Hr'g Tr. 1480:20-1482:8.) In addition, Mr. Jones has made a decision to leave Timbervest and the timberland investment business, has sold his ownership interests and has started his transition out of the business. (Hr'g Tr. 1480:20-1482:8.)

Because all the relevant factors weigh in favor of Timbervest, and the further facts above weigh in favor of Mr. Jones, a cease-and-desist order against him would not be in the public interest. It is an improper remedy that should not be granted.

IV. CONCLUSION

The claims against Mr. Jones should be dismissed. The Division failed to prove a primary violation of the Advisers Act by Timbervest. Even if there were a primary violation, the Division failed to establish that Mr. Jones aided, abetted, or caused any such violation. Further, the remedies the Division seeks are barred by the statute of limitations or inappropriate based on the facts presented at the evidentiary hearing.

This 28th day of March, 2014.



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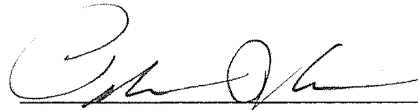

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