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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 William Boden

POST-HEARING BRIEF ON BEHALF OF WILLIAM BODEN

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I. INTRODUCTION

The Division failed to prove that Mr. Boden, with scienter or negligently, knowingly and substantially assisted in conduct that constitutes a primary violation or caused a primary violation of the securities laws. For nearly two years, Mr. Boden worked very hard and diligently, spending much of his time on New Forestry's behalf with the understanding that he would be compensated for his efforts if and when any of the properties covered by his fee arrangement sold. The only issue is whether disclosure was adequate, and Mr. Boden reasonably and in good faith understood that his fee arrangement had been disclosed to New Forestry's fiduciary, ORG, and that the agreement would be honored.

The LLCs utilized to receive the consulting fees on the Tenneco and Kentucky transactions were legitimate special purpose entities set up by Mr. Boden's personal attorney to address Mr. Boden's concerns related to possible claims by third parties. This specific issue had arisen on at least two occasions during Mr. Boden's tenure at Timbervest prior to his seeking his counsel's advice for how to take protective measures. The use of LLCs is a common practice in the real estate and business world designed to safeguard assets, just as Mr. Boden desired to do. No nefarious intent should be implied by the use of this common business practice, nor is any supported by the record.

Mr. Boden negotiated the sales of Tenneco and the Kentucky properties by New Forestry because he believed those transactions were in the best interests of the client and consistent with the client's demand for liquidity. The record is clear that Mr. Boden did not enter into any agreement to purchase the Tenneco property before New Forestry sold it. Even assuming Mr. Wooddall's most recent recollection of a nonbinding, "verbal option," was correct, New Forestry received a substantial benefit because the property sold well over market and the most-recent appraised value. Moreover, the client wanted its properties sold and did not want to hold onto the non-cash generating Tenneco property waiting to see if its value might increase in the future. Mr. Boden also obtained a beneficial price when he negotiated the purchase of the Tenneco property on behalf of TVP as the extensive market economic statistics demonstrate for the relevant period. There simply were no violations arising out of these transactions.

The claims against Mr. Boden should be dismissed because Timbervest did not commit any violations, and Mr. Boden certainly did not aid, abet, or cause any such violations.

II. STATEMENT OF FACTS

Mr. Boden 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. Boden, 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. Boden 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. Boden 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. Boden 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. Boden 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 trial demonstrated that Mr. Boden acted reasonably and in the best interests of Timbervest's clients based on the information available to him at the time.

B. There Was No Primary Violation by Timbervest.

Mr. Boden cannot be held liable for aiding and abetting or causing because there was no primary violation by Timbervest. In support of this argument, Mr. Boden incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief.

In addition, the Division was required to prove that Timbervest violated the Advisers Act, not that it violated ERISA. At no time prior to the SEC's raising the issue years later did Mr. Boden (or any of his partners) believe that the payments to Mr. Boden implicated ERISA. (Hr'g Tr. 296:12–16.) Mr. Boden did not recognize it as problematic because, for whatever reason, the issue did not raise itself to consciousness, *i.e.*, he never thought about the fees in the context of ERISA. However, even if it is assumed that the payment of fees to Mr. Boden violated ERISA, a violation of ERISA would not be tantamount to a violation of the Advisers Act. Two key distinctions between ERISA and the Advisers Act illustrate this point. First, ERISA's rules prohibit certain transactions, absent exception from the Department of Labor, without regard to the benefits of the transaction to the client. (Resp. Ex. 124 at 16-17.) Second, ERISA's requirements cannot be satisfied with adequate disclosure. (*Id.*) As Respondents' expert explained, "ERISA fiduciary duties are materially different from the fiduciary duties defined in other statutes, such as those of investment advisors under the Advisors Act . . . ." (Resp. 124 at 9.) Accordingly, it is not sufficient for the Division to establish that Respondents violated ERISA. The Division was required to prove that Respondents violated the Advisers Act. For the reasons set forth in Timbervest's brief, the Division did not meet its burden.

C. Mr. Boden did not act with a conscious intent to defraud or in a negligent manner.

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. Boden "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 he 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. Boden 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. Boden acted with scienter. *See In re Daniel Bogar*, 2013 WL 3963608, at *20. The Division did not and cannot carry this burden.

1. Mr. Boden did not act intentionally or negligently in connection with the payment or disclosure of his advisory fees.

a. Mr. Boden operated under the reasonable and good faith belief that his fee agreement would be honored.

Mr. Boden began his relationship with Timbervest in 2002 as an independent consultant under the terms of an incentive-based, success fee advisory agreement. (Hr'g Tr. 70:25–71:3; 393:18–394:8; Div. Ex. 127.) As the CEO of Timbervest, Mr. Shapiro had the authority to engage a third party independent consultant, such as Mr. Boden. (Hr'g Tr. 1540:16–20.) Thus, there was nothing impermissible about Mr. Boden's agreement at the time it was made. In retrospect, all of the Partners of Timbervest ("Partners") agree the better business practice would have been to put the agreement in writing. (Hr'g Tr. 1321:8–9.) But that the agreement existed cannot be credibly disputed.

First, both Mr. Zell and Mr. Jones, who were not parties to the discussions between Mr. Shapiro and Mr. Boden, testified that they were aware of the agreement before joining Timbervest. Mr. Zell first learned of the advisory arrangement in 2002, when he was employed by BellSouth and was responsible for the New Forestry timberland portfolio managed by Timbervest. (Hr'g Tr. 1535:5–14; 1533:9–17.) Mr. Jones learned of the agreement in 2004, at or around the time he joined Timbervest. (Hr'g Tr. 1314:23–1316:10; 1319:25–1320:8.)

Second, testimony at the hearing established that both during the time that he was an independent consultant and after he became a Partner, Mr. Boden worked on behalf of New Forestry to sell the eight properties that were the subject of his advisory fee agreement. (Hr'g Tr. 559:21–562:3.) This sales effort was consistent with the disposition mandate from BellSouth and, later, AT&T (*e.g.*, Hr'g Tr. 93:6–13; Resp. Ex. 128). During the period from the fall of 2002 through March 2004, a period of approximately twenty-one months, prior to becoming a Partner, Mr. Boden devoted approximately 80 percent of his time attempting to sell properties on behalf of New Forestry. (Hr'g Tr. 92:24–93:5; Div. Ex. 156a.) Mr. Boden's work during this time undoubtedly contributed to subsequent sales of properties on behalf of New Forestry. Indeed, Mr. Boden testified that the sale of Rocky Fork in December 2008 to the Conservation Fund and the sale of the Kentucky Lands to Resource Land Holdings in 2007 could be traced back to his work in 2003. (Hr'g Tr. 445:24–447:4; 505:21–506:8.) Mr. Boden received no compensation of any sort for the time, effort, and expense he put forth, in good faith and in accordance with the terms of his advisory fee agreement, during the approximately twenty-one month period he worked to sell New Forestry's properties prior to becoming a Partner at Timbervest in May 2004 as no sales occurred during this period that met all of the terms of the advisory agreement in full. (Hr'g Tr. 505:21–506:8; 51:19–23; 1764:17-1766:7.)

Third, although the substance of the conversation in 2005 between Mr. Shapiro and Mr. Schwartz regarding the fee arrangement was contested at the hearing, there was no dispute that a conversation about a fee arrangement occurred. If there were no pre-existing agreement, there would have been no reason to have such a conversation before the existence of any sales contract that would trigger a payment under the agreement. Mr. Shapiro reported to his Partners that he had disclosed the fee arrangement to Ed Schwartz and that he was fine with it. (Hr'g Tr. 1789:4–14.) Thereafter, Mr. Boden and his Partners operated under the reasonable belief that the agreement had been disclosed to New Forestry's fiduciary, ORG. (Hr'g Tr. 414:2–415:2; 1327:14–22; 1541:14–16; 2249:19–24.)

Fourth, the fees actually paid were consistent with the terms of the agreement. The fees were in line with industry standards and were a result of actual services rendered and delivered to the client for its benefit. There were eight properties subject to the agreement, but Mr. Boden only collected a fee on two of them. (Hr'g Tr. 445:3–13.) Six of the eight properties were sold due to Mr. Boden's efforts while Timbervest served as the manager, but only Tenneco and the Kentucky sales satisfied all of the terms of the agreement. (Hr'g Tr. 445:13–21.) The Kentucky and Tenneco transactions occurred during the five-year period of the agreement, involved no third-party brokerage fees paid by New Forestry, were above the $5 million minimum sale price, and were two of the eight properties that were the subject of the agreement. Mr. Boden received $470,750 (3.5% of the sales price) in connection with the sale of Tenneco on October 17, 2006 (Div. Ex. 11), and $685,486.25 (2.5% of the sales price) in connection with the sale of timberland property in Kentucky on April 3, 2007 (Div. Ex. 33). The fees for Tenneco and the Kentucky lands were exactly 3.5% and 2.5% of the purchase price, respectively, and varied according to the size of the transaction, corresponding to the sliding scale fee that was part of Mr. Boden's agreement. (Div. Ex. 127.)

Finally, the inclusion of an advisory fee payment to Woodson and Company LLC in the 2006 Rocky Fork Contract with Scott Carswell, a deal sourced and worked by Mr. Boden, demonstrates that Mr. Boden and his Partners initially operated under the belief that he was entitled to a fee upon the closing of a successful sale of Rocky Fork. (Div. Ex. 39.) Rocky Fork was one of the eight properties that were subject to Mr. Boden's agreement. (Div. Ex. 127.) The sale of Rocky Fork to Scott Carswell ultimately did not close. Instead, the Conservation Fund acquired Rocky Fork in 2008, pursuant to a contract negotiated by Mr. Boden at purchase price of $39,950,000, which was higher than the purchase price under the Carswell agreement. (Div. Exs. 39 & 43.) Mr. Zell testified, "I was amazed at this sale. I can't believe that Mr. Boden got somebody to buy all these properties at what I considered well above fair value." (Hr'g Tr. 1649:12–17.) Nevertheless, the timing of the contract and sale fell outside the term of Mr.

Boden's advisory fee arrangement, which ended in December 2007. Consequently, Mr. Boden did not receive a fee, despite the fact that the sale was based, in part, on his earlier efforts when he was an independent consultant. (Hr'g Tr. 448:21–449:1; 445:25- 446:11.) The Rocky Fork contracts therefore clearly demonstrate the irrationality of the Division's position that the agreement was manufactured after the fact.

b. Mr. Boden operated under the reasonable and good faith belief that his fee agreement was disclosed.

Mr. Boden acted reasonably and in good faith in relying on Mr. Shapiro's disclosure of the advisory fee arrangement to ORG. At the time the agreement was established in 2002, it did not implicate ERISA because Mr. Boden was an independent consultant. In April or May of 2004, approximately twenty-one months later, Mr. Boden became a Partner at Timbervest. (Hr'g Tr. 51:19–23.) ORG was retained by BellSouth to serve as its fiduciary in September 2005. (Hr'g Tr. 1529:3–6.) Mr. Shapiro testified that he told his Partners that he disclosed the fee arrangement to ORG principal Mr. Ed Schwartz, and that Mr. Schwartz was fine with it. (Hr'g Tr. 1789:4–14.) Thus, Mr. Boden understood that Mr. Shapiro disclosed the potential conflict inherent in the agreement to ORG *after* Mr. Boden was a partner (Hr'g Tr. 414:2–415:2). As Mr. Boden testified, "[T]he advisory fee agreement was disclosed and approved, it was my clear understanding . . . ." (Hr'g Tr. 303:1–4.) The Division did not present any evidence that Mr. Boden was aware that the agreement implicated ERISA when fees were paid in 2006 and 2007. In fact, Mr. Boden's reliance on the prior disclosures of his advisory fee arrangement, which would not have cured the alleged "prohibited transaction" if it were deemed that New Forestry was not a REOC, demonstrates that ERISA was not consciously recognized as an issue by him. In sum, Mr. Boden, reasonably and in good faith, operated under the belief that the oral agreement he entered into with Mr. Shapiro in 2002 was disclosed to the client on at least two distinct occasions (Mr. Zell in 2002 and Mr. Schwartz in 2005) and would be honored in good faith, and he conducted himself accordingly. He alone bore the risk that he would not be paid if he performed, as the agreement was not in writing and therefore not enforceable should he have a falling out with his Partners. Ultimately, he performed in accordance with the terms of his advisory agreement in good faith, generated multiple accretive sales over the term of the agreement (most of which did not trigger the payment of a fee under the agreement), and was paid only on the two sales that met all of the terms of the agreement. Accordingly, the Division failed to prove that Mr. Boden acted with scienter or negligently in connection with the payment of the fees pursuant to the terms of the advisory agreement.

c. Mr. Boden reasonably and in good faith followed the advice of his attorney regarding the use of limited liability companies to receive the fee.

The Division's contention that the limited liability companies through which Mr. Boden received his fees were designed to conceal his identity was also unsupported by the evidence presented at trial. Mr. Boden's attorney, Ralph Harrison, decided on the structure through which Mr. Boden would receive his fees. (Hr'g Tr. 585:14–23.) The express purpose was to protect Mr. Boden's personal assets from potential claims that might arise as a result of these transactions, not to conceal his identity, though that was a collateral consequence. (Hr'g Tr. 725:11–14; 619:13–18; 590:25–591:4; 587:2–8; 589:5–16.) The evidence presented at trial demonstrated the basis for Mr. Boden's concern about potential claims. On at least two occasions, Mr. Boden became aware of third parties seeking compensation from the potential sale of New Forestry's assets based on unknown promises made by the prior Timbervest management team. (Resp. Exs. 85 & 86.) Thus, Mr. Boden's desire to insulate his personal assets from exposure was reasonable and his counsel's advice was to use a "common asset protection strategy," a limited liability company. (Hr'g Tr. 592:19–593:2.) Mr. Boden reasonably, and in good faith, followed his attorney's advice and directed Mr. Harrison to handle the logistical details. (Hr'g Tr. 625:4–5; 622:15–20.)

The lack of transparency as to Mr. Boden's association with the limited liability companies was a legitimate byproduct of the limited liability structure, but his entitlement to and receipt of the fees was not an intended secret. Each of Mr. Boden's Partners was aware that Mr. Boden was receiving a fee in connection with each of the transactions. (Hr'g Tr. 1309:16–20; 1511:20–1512:4; 1735:17–1736:11.) Mr. Harrison testified that it was not his intention to conceal Mr. Boden's identity; rather, his only goal was to protect Mr. Boden's assets through the LLC structure, which is recognized as a sound business practice in the real estate industry. (Hr'g Tr. 725:11–14; 619:13–18; 590:25–591:4.) Mr. Harrison testified that he, not Mr. Boden, selected the names of the companies. (Hr'g Tr. 724:12–16.) The names were high schools and counties where Mr. Harrison grew up. (Hr'g Tr. 724:16–22.) There was nothing nefarious about Mr. Boden's name not appearing in publicly available documents regarding Fairfax Realty Advisors and Westfield Realty Partners. As Mr. Harrison explained, "that would be typical for any LLC formed in Georgia or registered in Georgia." (Hr'g Tr. 598:23–599:4; *see also* Hr'g Tr. 722:10–17.) At bottom, the explanation that Mr. Harrison offered for the creation of the limited liability companies, i.e., to protect Mr. Boden's personal assets from third party claims, is more likely to be accurate than the tortured tale of fraud the Division has woven.

All in all, the Division failed to establish that Mr. Boden acted with any intent to deceive New Forestry or that he acted negligently. Mr. Boden entered into an oral agreement with Timbervest to be compensated for his advisory services performed on behalf of New Forestry through the payment of fees only upon the successful disposition of any of the eight properties, so long as certain conditions were met. Mr. Boden worked in good faith for almost two years without compensation under the agreement, but with a promise of future earnings should a successful sale occur at some point prior to the end of 2007. Mr. Boden conducted himself under the reasonable belief that the agreement was disclosed and would be honored by all parties as he continued in his efforts. He did not intend to conceal his receipt of the advisory fees. Therefore, the Division failed to prove that Mr. Boden acted with scienter or negligently in connection with the payment or disclosure of his advisory fees.

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

The Division also failed to prove that Mr. Boden acted with scienter or negligently in connection with Tenneco transactions. The Division's assertion that the sale of Tenneco to Chen Timber was a "parking" arrangement is not the most likely explanation for the transactions for several reasons. First, the timing is implausible. Under the Division's theory, Mr. Boden would have had to have planned for the repurchase prior to June 2006, the date of the original purchase agreement Mr. Wooddall sent to Mr. Boden on July 7, 2006. (Div. 9.) But the evidence shows that economics would not have supported Timbervest Partners Alabama paying $14.5 million for the property at that time. Timbervest was carrying the property at a value of approximately $12 million. (Hr'g Tr. 206:21–24.) As Mr. Boden testified,

> And so I'm baffled by how – how do we sit there in June or May and make a deal to pay – to buy this property back? I'm automatically going to lose money, and you know what, I've been at Timbervest now for 11 years and I don't remember a single acquisition we've made, not one time, where it's come with a loss on acquisition.

(Hr'g Tr. 208:1–7.) Indeed, Mr. Wooddall did not say that the repurchase price was agreed to in June; Mr. Wooddall testified that the verbal option price of $14.5 million was agreed to before the execution of the purchase and sale agreement on September 15, 2006. (Hr'g Tr. 770:7–771:6.)

Further, given that New Forestry's Investment Objectives and Guidelines directed Timbervest to sell "a property when gross proceeds realized are equal to or greater than 90% of the current fair market value and the terms and conditions of the sale are otherwise acceptable to Investment Manager" (Div. Ex. 54; 1637:24–1638:15), and if Mr. Boden contemplated repurchasing the property before he initially offered it to Mr. Wooddall, it would have been in his and his Partners best interests to sell at a lower price rather than an 11 plus percent premium. As Mr. Boden testified, "And so for me, for anybody in our company to suggest we were going to agree to pay more than what he's paying for the property then and there when he's overpaying for the property already, it's nonsensical in every way." (Hr'g Tr. 208:9–13.) Thus, Mr. Boden believed, based on the information available to him at the time -- the first half of 2006 -- that Mr. Wooddall was in fact over-paying for Tenneco.

Second, the Division's theory regarding Timbervest's desperation for properties for TVP has no basis in fact. TVP was investing the funds it raised both before and after acquiring Tenneco. TVP acquired nine properties over $1 million during 2004 and 2005, another twelve before it acquired Tenneco in February 2007, and another eleven in the year that followed. (Resp. Ex. 136.) Thus, there is no evidentiary support for the Division's theory that "it was hard to find good timberland."

Third, Mr. Boden's conduct with respect to Mr. Wooddall during the relevant time was inconsistent with the existence of a parking arrangement. Significantly, on July 20, 2006, in the midst of this purported parking arrangement, Mr. Boden sent Mr. Wooddall an offer for a property in Texas, known as St. Augustine, that Mr. Wooddall described as "somewhat insulting" and responded that Mr. Boden should contact Mr. Wooddall if he wanted to make a "serious offer." (Resp. Ex. 18; Hr'g Tr. 828:22–829:7.) If Mr. Wooddall were a necessary straw man for the reacquisition of Tenneco, why would Mr. Boden risk angering him when there was no written agreement obligating him to sell the property to TVP? Conversely, if Mr. Wooddall were guaranteed a $1 million payday, via the Division's described "parking arrangement," why would he not be more amenable to striking a deal on the St. Augustine property and risk angering Mr. Boden in the process?

Finally, even assuming that Mr. Boden and Mr. Wooddall agreed to a $14.5 million "verbal option" (which Mr. Boden simply does not recall), New Forestry was not harmed. The option did not change the economics of the sale by New Forestry. The most likely scenario is that any "verbal option" would only have encouraged Mr. Wooddall to close on the deal by giving him comfort there could be a "flip" or "resale" out there consistent with Mr. Wooddall's business practices and reputation as a "flipper" should Timbervest follow through and choose to exercise the "verbal option" at some point in the future. (*See* Hr'g Tr. 857:13–16.) This ultimately benefitted New Forestry as the property was sold at an 11.7 percent premium above its carrying value and an 11 percent premium above the most recent independent third-party appraisal. (Hr'g Tr. 1461:2–5; 206:21–207:1; Resp. Ex. 52.) There is no evidence that Mr. Boden, or any of his Partners had any reason to believe the property was worth more than its carrying value at the time. The 2005 Sewell appraisal was approximately one year old and therefore within the two-year appraisal cycle mandated for New Forestry assets at the time. (Resp. Ex. 52; Hr'g Tr. 1486:3–15.) At most, any "verbal option" would have given TVP an unenforceable right, but not an enforceable obligation, to acquire Tenneco at Mr. Wooddall's requested price of $14.5 million if it elected to do so based on future supportive economic information when and if they became available. Accordingly, the Division did not establish that Mr. Boden acted with scienter or negligently in connection with the Tenneco transactions.

D. Mr. Boden 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. Boden's action or inaction was actually the cause of the violation. The Division failed to carry its burden.

1. Mr. Boden 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. Boden substantially assisted or caused any violation with respect to the payment or disclosure of the fees. First, Mr. Boden and each of his Partners understood the inherent conflict of interest created by the fee payment after Mr. Boden became a Partner. Second, each of Mr. Boden's Partners knew of his advisory fee arrangement before any transactions triggering payment were entered into. Third, Mr. Boden and his Partners all believed that ORG was aware of the conflict and was "okay" with the arrangement. (Hr'g Tr. 1790:13–16.) Mr. Shapiro testified that he told his Partners that he disclosed the fee arrangement to ORG, and that Mr. Schwartz, the principal contact at ORG, was fine with it. (Hr'g Tr. 1789:4–14.) In addition, Mr. Boden was present in 2002 when Mr. Shapiro discussed the fee arrangement with Mr. Zell, who had primary responsibility for the New Forestry portfolio at the time for BellSouth. (Hr'g Tr. 96:8–13; 1535:5-14.) Thus, he had no reason to doubt that Mr. Shapiro had likewise disclosed the arrangement to ORG. Fourth, no Partner recognized that the payment of the fees to Mr. Boden implicated ERISA at the time. (Hr'g Tr. 296:12–16; 1379:24–1380:3; 1498:10–24; 1574:15–1575:1; 1774:7–13.) Fifth, as a member of the investment committee, each of the Partners approved the sales of Tenneco and the Kentucky properties because they believed the transactions were in New Forestry's best interests and consistent with New Forestry's investment objectives. (Hr'g Tr. 158:19–159:1.) Finally, no Partner, other than Mr. Boden, knew that Mr. Boden would later decide to share his advisory fees at the time the sales were approved by the Timbervest Investment Committee. (Hr'g Tr. 289:22–290:2; 1349:1–11; 1650:2–13; 1828:24–1829:1). Accordingly, the Division failed to prove that Mr. Boden substantially assisted or caused any violation with respect to his fee arrangement.

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

The Tenneco transactions were not a parking arrangement; they were two separate transactions that benefited each client. When Mr. Boden negotiated the sale of Tenneco to Chen Timber, New Forestry was in a mandated disposition mode. (Div. Ex. 47; Div. Ex. 6.) Tenneco was a potential candidate for sale because it did not fit within New Forestry's investment strategy because the majority of trees on the property were younger and would not be income-producing for some time. (Hr'g Tr. 230:3–7; 478:2-23.) New Forestry wanted to keep only those properties that generated substantial and sustainable cash flow of 2% per year, and Tenneco clearly did not fit this criterion. (Div. Ex. 47.)

By contrast, in 2006, TVP was in an acquisition mode and seeking properties that would fit its long-term growth investment strategy, which focused less on income generation and more on long-term growth in value. (*See* Hr'g Tr. 1640:20–22; 233:19–234:2.) The property fit TVP's investment objectives and, because of the economics associated with the strengthening land and timber markets in and around the area where Tenneco was located (which became clearly evident later in 2006), on November 30, 2006, Mr. Boden sent a proposed contract to Mr. Wooddall for the acquisition of Tenneco on behalf of TVP for the price of $14.5 million. (*See* Resp. Ex. 19; Resp. Ex. 132; Hr'g Tr. 484:14–488:15.)

The terms of the transactions were fair and to the benefit of Timbervest's clients. Both the $13.45 million sales price that New Forestry received in October 2006, per the sales contract executed in September 2006, and the $14.5 million purchase price later paid by TVP in February 2007 were favorable prices accretive to the funds' investment returns. New Forestry received liquidity, its primary investment objective, at a price well above the best estimate of market value for the property as determined by its 2005 third-party appraisal adjusted with current timber pricing. (Hr'g Tr. 1484:10–1485:11.) TVP, likewise, acquired the property at a price below what every objective factor demonstrated the value of the property to be at the time of the transaction in the First Quarter of 2007, *i.e.*, the unexpected rise in the local land values, the growth in standing timber volumes on site through the Fourth Quarter of 2006 and First Quarter of 2007, and the increases in the local timber prices which serve to drive up the value of the standing forest on the Tenneco property. (Hr'g Tr. 1485:18–1486:11.)

New Forestry benefitted from the sale of Tenneco, and the price was based on the information that was available to Mr. Boden and his Partners at the time. First, Timbervest had a land and timber appraisal from the James Sewall Company from August 2005, which was the most recent appraisal Timbervest would consider. (Resp. Ex. 52.) Sewall, widely regarded as the best timberland appraiser in the country, valued the core timberlands at $12.13 million. (*Id.*; Hr'g Tr. 211:9–14.) The ultimate sales price of $13.45 million was 11% higher than this appraised value. (Hr'g Tr. 203:13–20.) Significantly, Sewall appraised the bare land on Tenneco at $438 an acre (Hr'g Tr. 110:25–111:1), whereas the sale of Tenneco to Chen Timber provided New Forestry with $547 per acre for bare land, a premium of approximately 25 percent over the appraised value. (Hr'g Tr. 202:14-206:8; 207:12–18.) In addition, the $13.45 million sales price exceeded Timbervest's valuation of Tenneco for each relevant quarter in 2006. The sales price was in excess of $600,000 more than where Tenneco was valued as of the Second Quarter of 2006 and $1.425 million more than its value in the Third Quarter of 2006. (Hr'g Tr. 203:1–20.) Thus, as Mr. Boden testified, "[e]very bit of empirical data we had when we sold the property on September 15th said Mr. Wooddall was paying over the fair market value of the property." (Hr'g Tr. 206:14–17.) Even Mr. Wooddall agreed that the $13.45 million sales price was "a fair price" in his opinion. (Hr'g Tr. 772:15–25.) Accordingly, on the factors Timbervest typically used and continues to use, every indicator signaled that this was a good sale for New Forestry. And the Division has not offered any evidence of any other potential buyers of Tenneco at the time who were willing to pay more for the property, let alone the $13.45 million purchase price paid by Chen Timber. There were none.

Similarly, the price paid by TVP was fair based on the information available at the time. In early to mid-November 2006, three nearby properties were under contract as part of Timbervest's efforts to sell the Wolf Creek package on behalf of New Forestry. (Hr'g Tr. 217:1-11.) These contracts were approved by the Partners as member of Timbervest's Investment Committee (Hr'g Tr. 158:19-159:1), before Mr. Boden sent the draft purchase contract to Mr. Wooddall on November 30, 2006. (Resp. Exs. 125, 126, & 127.) These sales averaged $865 per acre for the bare land. (Hr'g Tr. 203:21–204:1.) This was a substantial premium over the Sewell appraised value of these same Tenneco bare lands at $438 per acre in August 2005. (Hr'g Tr.

207:3-18; 215:13-19.) These prices were higher than Timbervest expected because of the increase in the value of the bare land. (Hr'g Tr. 1647:20–1648:12.) In addition, there were increases in the timber stumpage pricing markets near the Tenneco property. (Hr'g Tr. 199:10–201:23; Resp. Ex. 27.) As a result of this new economic information, which Mr. Boden learned in the fourth quarter of 2006, Timbervest's underwriting substantiated $14.5 million purchase price. But none of this information was available to Mr. Boden in summer or early fall of 2006 when the contract for the sale of Tenneco to Chen Timber was negotiated and executed.

In sum, the Tenneco transactions were beneficial to the clients, the Division did not and cannot prove that Mr. Boden knowingly or substantially assisted in any conduct with respect to the Tenneco sale and purchase that constitutes a primary violation or caused a primary violation.

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

Even if this Court finds that Mr. Boden aided and abetted or caused a primary violation by Timbervest, none of the requested relief should be ordered because it is either barred by the statute of limitations or excessive in scope. In support of this argument, Mr. Boden incorporates by reference the arguments set forth in Timbervest's Post-Hearing Brief. For the reasons described in that brief, all remedies the Division seeks are inappropriate in this case. First, censures, bars, and suspensions are barred by the statute of limitations. Second, disgorgement is not available because the only allegedly ill-gotten gains in this case were Mr. Boden's advisory fees, and those were paid back, with interest, to the client prior to this case being brought. Finally, as will be discussed in more detail below, there is no basis for a cease and desist order against Mr. Boden under applicable law. *Steadman v. SEC*, 603 F.2d 1126, 1137-40 (5th Cir. 1979); *see also In the Matter of David F. Bandimere & John O. Young*, A.P. File No. 3-151214, 2013 WL 5553898, at *78 (Oct. 8, 2013).

Under *Steadman*, which the Commission applies to administrative sanctions, the Division must show that a C&D is in the public interest considering the following factors: (1) "the egregiousness of the defendant's actions," (2) "the isolated or recurrent nature of the infraction," (3) "the degree of scienter involved," (4) "the sincerity of the defendant's assurances against future violations;" (5) "the defendant's recognition of the wrongful nature of his conduct," and (6) "the likelihood that the defendant's occupation will present opportunities for future violations." *Steadman v. SEC*, 603 F.2d at 1137–40. In addition to these factors, the Division must show that "the recency of the violation, the resulting harm to investors in the marketplace, and the effect of other sanctions" support the imposition of a C&D order. *Bandimere*, 2013 WL 5553898, at *78. The Division has failed to show that any of these factors support the imposition of a C&D order against Mr. Boden.

As described above, there was nothing egregious about Mr. Boden's conduct in this matter. Mr. Shapiro engaged Mr. Boden in 2002 to assist in carrying out New Forestry's desire to dispose of properties in its portfolio. There is nothing inappropriate about that agreement, which was disclosed to BellSouth at the time. Mr. Boden understood that when BellSouth later engaged ORG as its fiduciary, Mr. Shapiro discussed the fee arrangement with Mr. Schwartz of ORG and concluded from that conversation that the arrangement was fine with ORG. (Hr'g Tr. 1756:19-23; 1780:11.) Although the passage of time has obscured the exact content of that conversation, there is no dispute that a conversation about the fee occurred. The LLCs through which Mr. Boden received his fees were created by his attorney for the purpose of protecting Mr. Boden's personal assets, not to conceal his identity. Each of Mr. Boden's Partners was aware that he was receiving fees in accordance with the terms and conditions of his advisory fee agreement at the time they approved the sales by New Forestry of the Tenneco and Kentucky properties, but they were not aware that Mr. Boden would later decide to share his fees with the other Partners, so none could have been motivated to approve the sales based on any expectation of receiving part of Mr. Boden's fee. Thus, they approved the transactions because they were in the best interests of the client.

There was no "parking" arrangement with respect to the Tenneco transactions. It would not have made sense for Mr. Boden to have agreed to a $14.5 million purchase price for Tenneco at a time when he believed the property to be worth only $12 million. Even if Mr. Wooddall had given Mr. Boden a "verbal option" to repurchase the property, the better explanation for any "verbal option" was a sales tactic employed by Mr. Boden to incent Mr. Wooddall to acquire Tenneco in a timely manner and thereby create liquidity for New Forestry, consistent with New Forestry's demands. There is simply no evidence of any conduct by Mr. Boden that could remotely be considered egregious. For all of these same reasons, Mr. Boden did not act with any degree of scienter under the *Steadman* analysis.

As discussed in the Timbervest brief, the alleged infractions were isolated and non-recurring in the approximately seven years that have elapsed since the conduct at issue in this case. Moreover, the Division's thorough review of the bank and brokerage records of Mr. Boden and his wife yielded no evidence or report of any improprieties or improper transactions. (Hr'g Tr. 513:10–20.)

The additional *Steadman* factors concern the respondent's recognition of wrongful conduct, sincere assurances of no future violations, and opportunity for future violations. In this case, the Division has shown no wrongful conduct. However, Mr. Boden has recognized that certain matters, such as his fee agreement, could have been disclosed more clearly. (Hr'g Tr. 137:3–7.) Timbervest no longer has any separate accounts that hold plan assets and its funds are organized in a manner that exempts them from ERISA. (*See,e.g.*, Div. Ex. 140 at 47.) Given the trauma and disruption that this investigation and proceeding has caused to Mr. Boden and his Partners, there is no chance that they will risk not preserving a careful, written record of such arrangements and seeking the advice of ERISA counsel should they have clients subject to ERISA in the future.

Finally, the remaining factors weigh against the imposition of a cease and desist order against Mr. Boden. *See Bandimere*, 2013 WL 5553898, at *78. Those factors are recency of the violation, the resulting harm to investors, and the effect of other sanctions. *Id.* As thoroughly discussed in the Timbervest brief, all of these factors weigh against imposing a cease and desist order against Mr. Boden: (1) these alleged violations are not recent; (2) no clients or investors were harmed because Mr. Boden's fees were for services actually rendered to the client and, as to the Chen transactions, the purchase and sale met each client's objectives and the respective prices were fair and reasonable; and (3) there is no remedial function to be served by imposing a C&D in this case because there is no alleged ongoing misconduct and no likelihood of future misconduct.

III. CONCLUSION

The claims against Mr. Boden 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. Boden 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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