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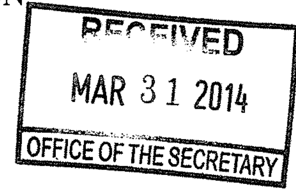
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15519

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

TIMBERVEST'S POST-HEARING BRIEF

Table of Contents

I. Introduction 1

II. Statement of Facts 2

A. Mr. Boden's Fees Were Compensation for his Consulting Service. 2

1. Mr. Boden earned his advisory fees between 2002 and 2004 for work that benefitted New Forestry 3

2. Timbervest disclosed Mr. Boden's fee arrangement. 9

3. The age of the case substantially impairs Respondents' ability to defend themselves. 16

4. Mr. Boden received his fees through two LLCs on the advice of his attorney to insulate him from liability and not to conceal his identity. 18

B. The Chen Transactions Were Not a Parking Arrangement 20

1. Timbervest sold the property to Chen because its client insisted on reducing the size of its portfolio. 20

2. TVP bought the property because the property fit TVP's objectives. 22

3. There was no "parking" agreement 23

4. Each client received the benefits of favorable terms in each transaction with Chen. 26

C. The relief sought is excessive because there has been no wrongdoing since the alleged infractions. 31

III. Legal Argument 33

A. The Division has not proven that a violation of the Advisers Act occurred. 33

1. The Division must prove that Timbervest, with scienter or negligently, made a material misstatement or omission. 33

2. The Division failed to prove that the payment of Mr. Boden's fees resulted in a violation of the Advisers Act. 34

3. The Division failed to prove that the Chen transactions resulted in a violation of the Advisers Act. 39

B. The requested relief is either barred by the statute of limitations or excessive. 43

1. Censures, bars, and suspensions are barred by the statute of limitations. 43

2. A cease-and-desist order is inappropriate under *Steadman*. 44

3. Disgorgement is inappropriate because all "ill-gotten gains" have been returned. 52

IV. Conclusion 53

Table of Authorities

Cases

Aaron v. SEC
446 U.S. 680 (1980) 34

Bryant v. Avado Brands, Inc.
187 F.3d 1271 (11th Cir. 1999) 34

In re KPMG Peat Marwick LLP
554 S.E.C. 1135 (2001) 51

In re Terence Michael Coxon
Admin. Proc. File No. 3-9218, 64 SEC Docket 712
1997 WL 186896 (Apr. 8, 1997) 44

In the Matter of David F. Bandimere & John O. Young
2013 WL 5553898 (Oct. 8, 2013) 45

In the Matter of OptionsXpress, Inc., Thomas E. Stern & Jonathan I. Feldman
SEC Release No. 490, 2013 WL 2471113 (June 7, 2013) 52

In the Matter of Raymond J. Lucia Cos., Inc., A.P. File No. 3-15006, 2013 WL 6384274, at *
(Dec. 6, 2013) 36

In the Matter of Warren G. Trepp
SEC Release No. 115, 1997 WL 469718 (Aug. 18, 1997 39

Johnson v. SEC
87 F.3d 484 (D.C. Cir. 1996) 44

Messer v. E.F. Hutton & Co.
847 F.2d 673 (11th Cir. 1988) 34

SEC v. AMX, Int'l, Inc.
872 F. Supp. 1541 (N.D. Tex. 1994) 52

SEC v. Bard
2011 WL 5509500 (E.D. Pa. Nov. 10, 2011) 53

SEC v. Berry
2008 WL 4065865 (N.D. Cal. Aug. 27, 2008) 52

SEC v. Blatt
583 F.2d 1325 (5th Cir. 1978) 52

SEC v. Capital Gains Research Bureau
375 U.S. 180 (1963) 34

SEC v. Lauer
2008 WL 4372896 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012) 33

SEC v. Pimco Advisers Fund Mgmt. LLC
341 F. Supp. 2d 454 (S.D.N.Y. 2004) 33

Steadman v. SEC
603 F.2d 1126 (5th Cir. 1979) 34, 45

Vernazza v. SEC
327 F.3d 851 (9th Cir. 2003) 33

Statutes

15 U.S.C. § 80b-3(e) and (f) 43

15 U.S.C. §§ 80b–6(1) and (2) 33, 34, 36, 43

17 C.F.R. § 275.206(3)–2 (Rule 206(3)–2) 41

28 U.S.C. § 2462 .... 43, 44

29 C.F.R. § 2510.3-101(e)(1) 38

Exhibits

Division's Ex. 6 (New Forestry, LLC 2006 Annual Report & 2007 Outlook) 20

Division's Ex. 11 (October 17, 2006 Closing Documents) .... passim

Division's Ex. 16 (August 7, 2006 email from Gordon Jones to Steve Gruber) 21

Division's Ex. 18 (December 15, 2006 Timberland Purchase Agreement) 30

Division's Ex. 26 (Timbervest Valuation Policy) 26

Division's Ex. 39 (August 23, 2006 Purchase and Sale Agreement) 5

Division's Ex. 42 (October 3, 2006 letter from Scott Carswell to New Forestry, LLC) 5

Division's Ex. 43 (June 1, 2007 Purchase and Sales Agreement) 5, 6

Division's Ex. 47 (April 25, 2005 New Forestry Investment Guidelines) .... passim

Division's Ex. 54 (New Forestry Fee Agreements) 52

Division's Ex. 74 at 7 (Timbervest's Wells Submission) 13, 14, 23

Division's Ex. 83 at tab 12 (March 7, 2013 Meeting Notebook) 30

Division's Ex. 123 (August 29, 2012 letter from Stephen Burger to Joel Shapiro) 32

Division's Ex. 127 at 2 (June 4, 2012 letter from Shapiro to Ranlett) 4, 47

Division's Ex. 130 (June 8, 2012 letter from Carolyn Seabolt to Monty Hill) 31

Division's Ex. 152 (June 27, 2006 letter by Kirk M. McAlpin to William Holly and Julie A. Wood) 5

Division's Ex. 156c (November 7, 2013 Declaration of Joel Barth Shapiro) 47

Division's Ex. 156d (November 8, 2013 Declaration of Donald David Zell) 47

Respondents' Ex. 5 (Tenneco Market Values Core Tracts 1Q06) 27

Respondents' Ex. 7 (February 1, 2007 Index of Closing Documents) 22

Respondents' Ex. 14 (July 7, 2006 email from Lee Wooddall to Bill Boden) 21

Respondents' Ex. 19 (November 30, 2006 email from Bill Boden to Lee Wooddall) 22, 30
Respondents' Ex. 27 29
Respondents' Ex. 41 (Quarterly Asset Market Value and Value Comparison for Tenneco Core) 27, 46, 51
Respondents' Ex. 52 (June 30, 2005 Appraisal Report) 26, 27, 29
Respondents' Ex. 57 (Limited Liability Company Agreement of New Forestry, LLC) 38
Respondents' Ex. 75 (April 18, 2011 email from Joel Shapiro to Gordon Jones, Bill Boden, David Zell, and Carolyn Seabolt) 27
Respondents' Ex. 127 (November 17, 2006 Purchase and Sale Agreement) 28
Respondents' Ex. 132 (Chen timeline) 21, 22
Respondents' Ex. 136 (TVP Land Acquisition History: 4Q03 through Present) 22
Respondents' Ex. 142; Tr. at 1579:10–18 (Zell) 9

Evidentiary Hearing Transcript .... passim

I. Introduction

The facts of this case date back to 2002 when Mr. Boden first joined Timbervest under an oral consulting arrangement. The three events forming the basis of the Division's charges occurred in 2006 and 2007 and are now more than seven years old. Memories have faded; documents have been lost or destroyed; and much time has passed. The Division uses these gaps in information, documents, and memories to spin a tale of fraud and deception. However, the documented and known facts tell no such tale. The facts that are known in this case have simple explanations that are devoid of any fraud or deception. These facts show that Respondents acted in good faith and that the transactions at issue were in the best interest of Timbervest's clients.

Two of the charged events occurred in 2006 and 2007, when we know that Mr. Boden received fees pursuant to a preexisting consulting agreement. He worked without any other pay for approximately twenty months to earn these fees. At the time Mr. Boden received his fees, he had earned them. We know that Mr. Shapiro had at least two conversations with representatives of the client to discuss Mr. Boden's fee arrangement. With respect to the third charged event, we also know that Mr. Boden negotiated the sale of the Tenneco core timberlands on behalf of Timbervest's largest client, New Forestry, sometime before July 2006. In August 2006, Timbervest told the client's representative this property would sell. The transaction closed in October 2006, and in February 2007, another Timbervest client purchased the same property. Aside from the market conditions supporting both the sale and purchase price, few other details are known.

The Division takes these few known facts and fills in the unknown with speculation and innuendo supported by the faded and inconsistent memories of two individuals to create its tale of fraud and deception. At times, the Division argues that there was no fee agreement. Not a

single piece of evidence supports the argument that there was no fee agreement. To the contrary, substantial evidence reflects the existence of a fee agreement. At other times, the Division seems to accept the existence of a fee agreement but argues that it was not disclosed to the client. Timbervest understood the conflicts of interest inherent in Mr. Boden's fee arrangement and acted in good faith by taking reasonable steps to disclose it.

The Division also alleged that the two transactions with Chen Timber were a parking arrangement. The evidence showed there was no parking arrangement. The Chen Timber representative believed that the only connection between the two transactions was what he described as a "verbal option" to sell the property back to Timbervest. Such a "verbal option" would not constitute a parking arrangement nor cause any of the violations the Division asserts. The uncontroverted evidence shows that the terms of each transaction were appropriate and fully in each client's best interests. The Division suggests that the different prices reflected in the two transactions harmed one or both clients. In reality, when the market conditions are considered, it is clear that each of the two transactions reflected favorable terms to each client at the time each contract was executed.

II. Statement of Facts

A. Mr. Boden's Fees Were Compensation for his Consulting Service.

The Division has alleged that Respondents violated the Advisers Act because Mr. Boden received advisory fees on two transactions conducted on New Forestry's behalf.[1] Specifically, Mr. Boden received $470,750 (3.5% of the sales price) in connection with the sale of Tenneco on October 17, 2006 and $685,486.25 (2.5% of the sales price) in connection with the sale of

[1] Order Instituting Proceedings, September 24, 2013, at ¶¶ 16–22.

timberland property in Kentucky on April 3, 2007.[2] These fees were realized from a bona fide consulting agreement entered into with Timbervest in 2002.

As discussed more fully below, Mr. Boden earned the fees at issue during the 2002 to 2004 time frame in connection with his agreement to create value and sell properties for New Forestry. This was not an arrangement that was made up after-the-fact to explain Mr. Boden's advisory fees, as the Division has sometimes argued, but reflected New Forestry's then-existing goals, the economic realities of selling timberland (it takes time), and the organization of Timbervest at the time.

The Division also claims that Timbervest failed to disclose Mr. Boden's fee arrangement to New Forestry. However, Timbervest disclosed it on at least two occasions: first to BellSouth in 2002 and later to ORG, the investment manager and fiduciary for New Forestry, in 2005. Because more than twelve years have elapsed since the agreement and these disclosures were made, any possible additional disclosures have been forgotten and any possible documentation of the disclosures has been lost or destroyed. Respondents have therefore been unfairly placed in a position where their ability to defend against the false accusations is severely impaired.

1. Mr. Boden earned his advisory fees between 2002 and 2004 for work that benefitted New Forestry.

In 2002, BellSouth wanted to create \$30 to \$60 million in liquidity from New Forestry's assets.[3] Upon arriving at Timbervest in the fall 2002, Mr. Shapiro contacted Mr. Boden, who was experienced in the Southeast commercial real estate industry, to see if Mr. Boden would be interested in working on creating this liquidity for New Forestry.[4] Mr. Boden and Mr. Shapiro, on behalf of Timbervest, thereafter entered into an oral consulting agreement whereby Mr.

[2] Div. Ex. 11 (October 17, 2006 Closing Documents); Resp. Ex. 34 (April 3, 2007 Closing Documents).
[3] Tr. at 1697:9–18 (Shapiro).
[4] Tr. at 1699:9–22, 1748:3–18 (Shapiro).

Boden would receive a sliding-scale fee upon the successful disposition of the eight largest of New Forestry's holdings in the South, provided the sales price was at least $5 million, no other broker received a fee on the deal, and the transaction closed by the end of 2007.[5] The Division has argued that this fee agreement "particularly its claimed five-year term—is a recent invention by the Respondents."[6] In fact, the fee arrangement, including its five-year term, reflected the realities of the timberland industry and BellSouth's desire for liquidity.

Mr. Shapiro and Mr. Boden agreed to a five-year consulting arrangement because it takes time in the timberland space to create liquidity.[7] Selling any of these properties on behalf of New Forestry within a one- to two-year time frame at prices that would maximize value to the client would have been challenging.[8] The eight properties subject to the agreement were chosen because they were all located in the South, a real estate market with which Mr. Boden was familiar and comfortable based on his experience.[9] Finally, Mr. Shapiro recognized that Timbervest's ultimate goal for Mr. Boden's consultancy was to create liquidity for New Forestry at the highest maximum value.[10] He therefore put in place a $5 million minimum amount to ensure that sufficient liquidity would be created.[11]

While there may have been some email or memo that memorialized the terms of the agreement, the agreement itself was oral.[12] The Division has repeatedly suggested that because the agreement was oral, it must be an after-the-fact explanation for the fees.[13] In the timberland industry, and at Timbervest at the time, however, oral agreements were not uncommon. For

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[5] Div. Ex. 127 at 2 (June 4, 2012 letter from Shapiro to Ranlett); Tr. at 393:13–394:8 (Boden); 1735–36 (Shapiro).
[6] Division's Opposition to Motion for Summary Disposition at 15.
[7] Tr. at 1740:17–25, 1743:1–9 (Shapiro).
[8] Tr. at 1740:17–25 (Shapiro).
[9] Tr. at 452:2–10 (Boden), 1748:10–15 (Shapiro).
[10] Tr. at 1749:12–18 (Shapiro).
[11] Tr. at 1749:24–1750:4 (Shapiro).
[12] Tr. at 1767:19–1768:12 (Shapiro).
[13] Division's Opposition to Motion for Summary Disposition at 15.

example, Mr. Chambers, the prior manager of Timbervest, had an oral commission arrangement with another broker to receive a fee upon the sale of certain Timbervest holdings.[14] Additionally, none of the original partners, including former partner Mr. Barag, had formalized or written agreements laying out their compensation and job duties when coming to Timbervest.[15] And the agreement that the new management team would receive a 20% equity interest in Timbervest was never put into writing.[16] Simply because Mr. Boden's consulting agreement was not put in writing does not mean that it did not exist.

Other evidence confirms the existence of Mr. Boden's fee arrangement. First, and most obviously, Mr. Boden showed up to work at Timbervest in the fall of 2002.[17] He was not being paid by Timbervest at the time, but there must have been some expectation of future earnings.[18] Second, the sales contracts under which he received fees reflect fees of very specific percentage points that varied according to the size of the transactions. 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.[19] Third, the unconsummated contract for the sale of the Rocky Fork property with Scott Carswell, anticipated to close before the end of 2007, provided for Mr. Boden's advisory fee.[20] However, that agreement fell through.[21] When Timbervest eventually contracted to sell the property to The Conservation Fund, the closing date was scheduled to be in 2008—outside the sunset date of Mr. Boden's fee agreement.[22] Mr. Boden's

[14] Div. Ex. 152 (June 27, 2006 letter by Kirk M. McAlpin to William Holly and Julie A. Wood).
[15] Tr. at 1768:15–23 (Shapiro), 1950:1–5 (Barag).
[16] Tr. at 1922:22–1923:6 (Barag).
[17] *See* Tr. at 91:12–15 (Boden).
[18] *See* Tr. at 412:23–413:4 (Boden).
[19] *See* Div. Ex. 11 (October 17, 2006 Closing Documents); Resp. Ex. 34 (April 3, 2007 Closing Documents).
[20] Div. Ex. 39 (August 23, 2006 Purchase and Sale Agreement); Tr. at 445:13–446:1 (Boden).
[21] Div. Ex. 42 (October 3, 2006 letter from Scott Carswell to New Forestry, LLC).
[22] Div. Ex. 43 (June 1, 2007 Purchase and Sales Agreement); Tr. at 447:9–448:19 (Boden).

advisory fee was therefore never included in the contract.[23] He thereafter received no fee in connection with the sale of Rocky Fork.[24] All this evidence shows that not only did Mr. Boden's fee arrangement exist, but the terms of the arrangement were defined and adhered to.

Importantly, the fee agreement was designed to benefit New Forestry. Mr. Boden worked for Timbervest for approximately 20 months under this agreement without any other compensation.[25] As Mr. Shapiro explained, Mr. Boden was like an attorney taking a case on a contingency.[26] It was during this period that he earned and created a vested interest in the fees.[27] From 2002 through April 2004, Mr. Boden spent approximately 80% of his working time on creating a process to maximize value for New Forestry.[28] He had to start from scratch to develop a sales process.[29] To do this, he gathered information on New Forestry's properties, including appraisals, title reports, purchase and sale agreements, tax records, and tax appraisals.[30] He visited the properties and talked to the tax assessors in the local areas and the foresters who oversaw the land.[31] He studied the timberland valuation process, including how internal volumes of timberland were created, and how those volumes and the price of timber change over several quarters.[32] He analyzed the other aspects of the land to determine how the value of the properties could be maximized. For example, he researched whether there was oil, gas, or minerals on the properties, what the properties' proximity to cities and suburbs were, whether the properties had any "green uses" or higher-and-better use capability.[33] He worked on the creation of maps and a

[23] Div. Ex. 43 (June 1, 2007 Purchase and Sales Agreement); Tr. at 447:9–448:19 (Boden).
[24] Tr. at 448:24–449:1 (Boden).
[25] Tr. at 412:23–413:4 (Boden).
[26] Tr. 1771:10–15 (Shapiro).
[27] Tr. at 505:21–506:8 (Boden); Tr. at 1491:4–17 (Jones); Tr. at 1771:10–15 (Shapiro).
[28] Tr. at 92:24–93:5 (Boden).
[29] Tr. at 451:6–452:10 (Boden).
[30] Tr. at 560:1–9 (Boden).
[31] Tr. at 560:1–14 (Boden).
[32] Tr. at 560:1–14 (Boden).
[33] Tr. at 560:15–24 (Boden).

descriptive summary of each asset that could be used to market the property.[34] Timbervest also lacked a database of potential buyers for the property, so Mr. Boden worked to develop such a database of buyers and other relevant actors in the timberland industry—a database that Timbervest still uses today.[35] He then approached those potential buyers about these properties, mailed out the summaries he had created, and conducted site visits—all in an attempt to create liquidity and maximize value for New Forestry.[36]

During this period, and despite all this work, Mr. Boden did not receive any compensation from Timbervest.[37] He did not receive a salary or reimbursements.[38] His advisory fees were therefore earned during this 20-month period, and although they were only realized and paid in 2006 and 2007 upon successful sales, they represented compensation for his work for close to two years.[39] While Mr. Boden ultimately participated as a partner in Timbervest's disposition and management fees, there was no basis for him not to receive his full fee pursuant to his consulting agreement. The fee payment was triggered upon the sale of a single property, but the arrangement itself was based on the idea that there would be work done on several properties, and not all of the properties would be sold within the terms of the arrangement.[40] While looking at the two fees paid in a vacuum might make it seem that Mr. Boden received a windfall, it is clear there was no windfall in comparison to all the work he did on properties for which there was no fee paid.

[34] Tr. at 561:1–11 (Boden).
[35] Tr. at 561:12–22 (Boden).
[36] Tr. at 561:11–562:3 (Boden).
[37] Tr. at 412:25–413:4, 505:23–506:8 (Boden).
[38] *See* Tr. at 1491:4–10 (Jones).
[39] Tr. at 505:21–506:8 (Boden), 1490:6–1491:17 (Jones), 1771:10–15 (Shapiro).
[40] *See* Tr. at 1740:17–25, 1743:1–9 (Shapiro).

Moreover, all the work Mr. Boden did from the fall of 2002 through April 2004 was for the long-term benefit of New Forestry.[41] He helped to ensure that New Forestry would achieve the maximum value on any sale, even if it did not trigger a payment under his consulting agreement. In fact, Mr. Boden worked on dozens of transactions on behalf of New Forestry that did not result in fees because the terms of his agreement were not met—either the wrong properties were involved, the price was too low, a third-party broker was used, or the deal closed after the sunset date of his consulting agreement.[42] But the work he did was invaluable to New Forestry's ability to achieve sales, and liquidity, at the highest possible price for all properties in its portfolio.[43]

On top of that, the possibility that Mr. Boden could receive an advisory fee on certain transactions did nothing more than encourage him to achieve the best sales price for New Forestry. Mr. Boden could have sold the properties subject to his agreement at fire sale prices if his only goal were to receive a fee. But he did not do this—he worked to maximize value for New Forestry and was incentivized by his fee agreement to do so. Even Mr. Ranlett, an employee of the company that later acquired the client, recognized that a disposition fee, in which the manager receives a fee as a percentage of a sales price, aligns the interest of the client and the manager because the fee "incentivizes the manager to get the highest price possible" for the client.[44]

[41] Tr. at 1765:20–1766:7 (Shapiro).
[42] Tr. at 445:13–21 (Boden).
[43] Tr. at 1766:1–1766:18 (Shapiro).
[44] Tr. at 1061:6–11 (Ranlett).

2. Timbervest disclosed Mr. Boden's fee arrangement.

While the Division claims that Mr. Boden's fee arrangement was undisclosed, Timbervest disclosed Mr. Boden's fee arrangement to New Forestry's representatives on at least two occasions.

a. Timbervest disclosed the fee arrangement to BellSouth in 2002.

Timbervest first disclosed Mr. Boden's fee arrangement to BellSouth in 2002. At that time, Mr. Zell was the Director of BellSouth's Natural Resources Portfolio and oversaw BellSouth's investments in New Forestry.[45] In 2002, Mr. Zell had a meeting with Messrs. Shapiro and Boden to discuss Mr. Boden's fee arrangement.[46] During this meeting, Mr. Shapiro explained, and Mr. Zell understood, that Mr. Boden was being brought on as a consultant to help with the disposition process and that Mr. Boden would receive a fee in connection with the dispositions.[47] As Mr. Boden explained at the hearing, it was important to Mr. Shapiro that the client approved of the decision to hire Mr. Boden and approved of the process by which Timbervest would be implementing BellSouth's disposition program.[48]

b. Timbervest also disclosed the fee arrangement to ORG in 2005.

Timbervest next disclosed Mr. Boden's fee arrangement to ORG Portfolio Management ("ORG") in 2005. From 2005 until 2007, ORG was the investment manager and fiduciary for the BellSouth pension plans invested through New Forestry.[49] As Mr. Ranlett explained, ORG was essentially an "extension of staff" for BellSouth.[50]

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[45] Tr. at 1533:2–12 (Zell).
[46] Tr. at 397:8–18 (Boden); Tr. at 1534:24–1535:10 (Zell); Tr. at 1811:1–7 (Shapiro).
[47] Tr. at 397:8–398:6 (Boden).
[48] Tr. at 397:11–18 (Boden).
[49] Resp. Ex. 142; Tr. at 1579:10–18 (Zell).
[50] Tr. at 1030:19–1031:4 (Ranlett).

While there are different recollections as to the extent of the disclosure, there is no dispute that Mr. Shapiro discussed an advisory fee arrangement with Mr. Schwartz in 2005. Mr. Shapiro recalls disclosing the fee arrangement to Mr. Schwartz, a principal at ORG, upon Mr. Jones' insistence.[51] Mr. Shapiro wanted to make Mr. Schwartz aware of how Mr. Boden came to Timbervest and that there was a possibility that Mr. Boden could be receiving a fee at some point in the future if Mr. Boden were successful in selling New Forestry's largest Southeastern holdings.[52] Given that this conversation took place more than eight years ago, Mr. Shapiro does not recall the details of the conversation but remembers "coming away thinking it was fine."[53] Mr. Shapiro believed that he had "gotten the okay from Mr. Schwartz."[54] The only restriction was that Mr. Schwartz did not want New Forestry to pay two fees on any single deal.[55] The Partners understood that Mr. Shapiro had disclosed Mr. Boden's fee arrangement to Mr. Schwartz and that the arrangement was "fine" by Mr. Schwartz as long as two fees were not paid on any given deal.[56]

Contrary to his original statements when this issue arose in 2012, at the hearing, Mr. Schwartz testified that (1) this conversation was about a "hypothetical person who hadn't been brought on," and (2) he told Mr. Shapiro that there could not be two fees on a single transaction *and* he would have to "run it by legal counsel."[57] This testimony is not credible. First, it would make no sense for Mr. Shapiro to have a conversation about a "hypothetical person" who had not yet joined Timbervest. Mr. Shapiro knew that Mr. Schwartz was aware in 2005 that Mr. Boden was a partner in Timbervest. It would be completely illogical for Mr. Shapiro to lie to Mr.

[51] Tr. at 1325:12–18 (Jones); Tr. at 1756:10–23, 1774:17–25, 1776:22–1777:2 (Shapiro).
[52] Tr. at 2249:19–24 (Shapiro).
[53] Tr. at 1776:17–1777:2 (Shapiro).
[54] Tr. at 1756:19–23 (Shapiro).
[55] *See* Tr. at 414:17–22 (Boden).
[56] *See* Tr. at 414:17–22 (Boden); Tr. at 1325:12–18, 1337:20–24, 1352:21–25 (Jones); Tr. at 1756:19–23 (Shapiro).
[57] Tr. at 2063:21–2064:9, 2090:18–2091:15 (Schwartz).

Schwartz about the identity of the person who would be receiving a fee under the arrangement. If he wanted to hide the fee arrangement or hide the identity of the person who was to receive the fee, he would never have even broached the topic with Mr. Schwartz. Nothing would have been said.

Further, certain partners recall that Mr. Schwartz has confirmed, on several different occasions over the past few years, that he was aware of Mr. Boden's fee arrangement. For example, Mr. Jones heard Mr. Schwartz confirm his awareness of the fee agreement in February 2012 during a telephonic annual meeting.[58] Mr. Jones also recalls two phone calls with the Arizona Public Safety Personnel Retirement System ("AZPSPRS") in June 2012 in which Mr. Schwartz publicly acknowledged that he was aware of Mr. Boden's fee arrangement and that the fees Mr. Boden received were essentially compensation for work done prior to becoming a partner at Timbervest.[59] Mr. Schwartz even coined the fees a "tail payment" to Mr. Boden.[60] Mr. Shapiro likewise recalls a meeting with AZPSPRS during which Mr. Schwartz said that he knew the fee arrangement existed and that "it was Bill's tail payment for work he had done prior" to joining Timbervest.[61] Mr. Schwartz's memory of these conversations, in contrast, has seemingly evaporated.[62]

Mr. Schwartz's own actions also confirm that he knew of the fee arrangement. Specifically, after Mr. Schwartz's investigative testimony to the Division in 2012, he came away with the mistaken understanding that the Tenneco sale and purchase time frame was eight weeks and that Mr. Boden received a commission both from the sale of the Tenneco property and the

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[58] Tr. at 1470:1–1471:4 (Jones).
[59] Tr. at 1471:10–21 (Jones).
[60] Tr. at 1471:10–21 (Jones).
[61] Tr. at 2252:22–2253:10 (Shapiro).
[62] *See* Tr. at 2092:3–2093:20 (Schwartz).

later purchase.[63] With that misunderstanding, Mr. Schwartz advised AZPSPRS to suspend any future capital calls until ORG conducted a full investigation about the fees and the sale of the Tenneco property, which investigation Mr. Schwartz personally conducted, along with ORG's chief compliance officer.[64] As part of that investigation, Mr. Schwartz requested and reviewed relevant documents and interviewed Timbervest personnel, including Ms. Seabolt and Mr. Jones.[65] Timbervest provided Mr. Schwartz with the letters it had written to AT&T that specifically state that Mr. Boden's fee arrangement was disclosed and approved by ORG.[66] After Mr. Schwartz and ORG concluded the investigation, he reported back to AZPSPRS.[67] AZPSPRS then recommitted to its original funding of Timbervest Crossover Partners III, L.P.[68] At trial Mr. Schwartz denied knowing that AZPSPRS had taken such action, even though Mr. Schwartz is listed as having participated at the AZPSPRS Board of Trustees meeting in which AZPSPRS recommitted to its original investment and even though ORG currently serves as AZPSPRS's investment manager.[69]

Other than his testimony before the SEC and at trial in this matter, Mr. Schwartz has never taken a position that the fee was improper or not disclosed to him. At the evidentiary hearing, he testified that he had a "specific recollection" of telling Mr. Shapiro in 2005 that (1) there could not be two fees earned on a single transaction, and (2) he would have to run it by

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[63] Tr. at 2115:13–2116:19 (Schwartz).
[64] Resp. Ex. 135 (December 21, 2012 email from Schwartz to AZPSRS); Tr. at 2118:11–23, 2120:3–9 (Schwartz).
[65] Tr. at 2120:21–2121:25 (Schwartz).
[66] Tr. at 2129:14–2130:2 (Schwartz). At trial, Mr. Schwartz initially testified that he had seen all of Timbervest's letters to AT&T. Tr. at 2129:14–2130:20 (Schwartz). When presented with the letters, however, Mr. Schwartz could not recall which letter to AT&T he actually saw or read and could only recall "flipping" through a letter. Tr. at 2130:1–2133:22 (Schwartz).
[67] Tr. at 2119:13–20 (Schwartz)
[68] Resp. Ex. 131 at 3 (AZPSPRS May 22, 2013 Bd. of Trustees Meeting Minutes); *see* Tr. at 2254:14–17 (Shapiro).
[69] Resp. Ex. 131 at 3 (AZPSPRS May 22, 2013 Bd. of Trustees Meeting Minutes); Tr. at 2068:23–25, 2125:17–25 (Schwartz). *See also* Resp. Ex. 143 (April 5, 2013 email chain in which Arizona personnel, including in-house counsel at AZPSPRS, requested that Mr. Schwartz provide a short report to the board).

legal counsel.[70] Although he remembers these two facts, he cannot remember what he said during a June 2012 call with Timbervest's outside and in-house counsel.[71] As outlined in Timbervest's Wells submission, Mr. Schwartz told Timbervest's outside and in-house counsel that he could not recall whether he had the conversation with Mr. Shapiro or Mr. Zell, although at trial he could not recall saying that and in fact adamantly recalled: "I didn't say that. . . . I'm pretty darn certain that it wasn't what I said."[72] Although he said it to Timbervest's outside and in-house counsel, he did not recall saying that the arrangement was "fine" so long as two fees were not paid but repudiated that statement saying, "I never used those words."[73] He also was "positive" he never told Timbervest's outside counsel or in-house counsel it was possible he told BellSouth about the fee arrangement, even though he stated otherwise.[74] Furthermore, Mr. Schwartz claimed that he did not say anything on that June 2012 call regarding ERISA, even though he told outside and in-house counsel for Timbervest that Mr. Boden's fee would not have been a problem under ERISA because ORG was acting as a QPAM, a Qualified Professional Asset Manager.[75]

Mr. Schwartz further could not recall what he told the Division during interviews in June 2012.[76] He testified that he "did not" say that BellSouth agreed to the fee arrangement as long as two brokers were not paid, although the Division's notes reflect otherwise.[77] He similarly testified that he never told the Division that he did not see a problem with the fee payments under

[70] Tr. at 2091:10–20 (Schwartz).
[71] *See generally* Tr. 2108–11, 2167–73 (Schwartz).
[72] Div. Ex. 74 at 7 (Timbervest's Wells Submission); Tr. at 2168:18–2169:21 (Schwartz).
[73] Div. Ex. 74 at 7 (Timbervest's Wells Submission); Tr. at 2169:22–2170:4 (Schwartz).
[74] Div. Ex. 74 at 7 (Timbervest's Wells Submission); Tr. at 2171:5–12 (Schwartz).
[75] Div. Ex. 74 at 7 (Timbervest's Wells Submission); Tr. at 2109:24–2111:1 (Schwartz).
[76] *See generally* Tr. at 2173–75 (Schwartz).
[77] Tr. at 2175:10–13 (Schwartz). At the evidentiary hearing, your Honor ruled that the protective order concerning the Division's notes was lifted to the extent that Respondents could use information in the notes based on their memory of what the notes contained. Tr. at 2176:22–2177:3 (Elliot, J.). Respondents have not gone back to the notes to confirm exactly what they reflect.

ERISA, although the notes reflect otherwise.[78] While the notes also reflect that Mr. Schwartz "went on to say, 'but I need to talk to a lawyer about it,'"[79] the context of the notes make it clear that Mr. Schwartz wanted to speak to a lawyer before answering any more of the Division's questions about ERISA, not that he had told Mr. Shapiro that he needed to speak with a lawyer about the fee arrangement. Finally, he testified that he did not tell the Division that he could not remember whether the 2005 conversation was with Mr. Zell or Mr. Shapiro, although the Division's notes reflect otherwise.[80]

Prior to his SEC testimony in November 2012, Mr. Schwartz never said that he told Mr. Shapiro that he would have to discuss the fee arrangement with legal counsel before it could be approved. He did not say it to Timbervest's outside and in-house counsel in June 2012.[81] He did not say it to the Division in June 2012. Rather, he brought it up only after having retained counsel and after receiving questions from AT&T about the fee arrangement.[82] These facts suggest that Mr. Schwartz's new "specific recollection" is not a memory at all but rather a fabrication to distance ORG from its approval of the fee arrangement and to avoid his own and his company's potential liability for failing to think through all the potential repercussions of his approval of Mr. Boden's fee arrangement. That Mr. Schwartz's memory could suddenly improve in late 2012 during testimony before the Division about what happened in 2005 is simply not credible.

Moreover, Mr. Schwartz gave inconsistent testimony *during* the evidentiary hearing. For example, when initially describing his conversation with Mr. Shapiro in 2005, he testified that he understood the fee arrangement was with someone who was outside the company but that

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[78] Tr. at 2175:14–21 (Schwartz).
[79] Tr. at 2226:13–24 (Elliot, J.).
[80] Tr. at 2173:14–21 (Schwartz); Tr. at 2230:8–21 (Elliot, J.)
[81] *See* Div. Ex. 74 at 7 (Timbervest's Wells Submission)
[82] Tr. at 2113:22–2114:14 (Schwartz).

Timbervest was "thinking about making them *a partner* or employee."[83] He thus admitted that the person who would receive a fee may be a partner and testified that he told Mr. Shapiro that there could not be a "double fee" and that he would have to "run it by legal counsel."[84] Later, however, he testified that he "would absolutely have said 'No way'" to the fee arrangement if the person receiving the fee were a partner at Timbervest.[85] These two positions, which he gave within the span of only a few hours of testimony, are irreconcilable.

Mr. Schwartz's testimony is self-serving and simply not credible. At best, his memory of the 2005 conversation is off. For example, it is entirely possible that Mr. Shapiro told Mr. Schwartz that it was "hypothetical that Mr. Boden would receive a fee," rather than that there was a "hypothetical person who would receive a fee." This simple transposition of the sentence completely changes the meaning of the disclosure. A disclosure that it was "hypothetical" that a fee would actually be paid would be consistent with Mr. Boden's actual fee agreement—any payment was hypothetical and not realized or paid until a transaction closed that fulfilled all the parameters of the arrangement.[86] In fact, during testimony, Mr. Shapiro explained that "[t]his was all hypothetical . . . [H]e had earned the fee, but he hadn't been paid."[87] At best, Mr. Schwartz's memory about this conversation is simply not sharp, and he took away a different meaning than what Mr. Shapiro actually said. In any event, his testimony about the 2005 conversation is not credible and should be discounted.

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[83] Tr. at 2057:5–12 (Schwartz) (emphasis added).
[84] Tr. at 2059:12–2060:2 (Schwartz).
[85] Tr. at 2060:8–15 (Schwartz).
[86] *See* Tr. at 1771:17–1772:4 (Shapiro).
[87] Tr. at 1771:25–1772:4 (Shapiro).

3. The age of the case substantially impairs Respondents' ability to defend themselves.

Too many years have passed since the relevant events for Respondents to be able to defend themselves fully against the Division's charges. Mr. Shapiro and Mr. Boden entered into the fee arrangement and disclosed it to BellSouth in 2002—more than eleven years ago. Mr. Shapiro again disclosed the fee arrangement to ORG in 2005—more than eight years ago. Since those events, memories have faded and documents have been lost or discarded. It is possible that Timbervest disclosed the fee arrangement to BellSouth again in 2004 or 2005 or that Timbervest put the disclosures in writing. These are reasonable possibilities, uncontradicted by any facts in the record. However, one can never know for certain, as the lack of documentation and memory from time long past creates unfair hurdles for Respondents' defense.

First, it is possible that Timbervest disclosed the fee arrangement to BellSouth after Mr. Boden became a partner in Timbervest. A disclosure was originally made to Mr. Zell in 2002, and while he does not recall whether he told anyone else at BellSouth about the fee arrangement, it is possible that a note in the file about the arrangement existed in 2004 or 2005.[88] Mr. Zell does not know what happened to his files or emails from his time at BellSouth; he has not seen them since he left BellSouth's employment.[89] Moreover, the entire BellSouth investment team was terminated or retired from AT&T by the fall of 2007, and their emails were all deleted shortly after termination.[90] If a note, an email, or a memorandum about the fee arrangement existed, it has long since been lost.

No one recalls whether a disclosure of the fee arrangement was made to BellSouth in the 2004 to 2005 time frame. Mr. Shapiro thinks that it is "[a]bsolutely" possible that he told

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[88] Tr. at 1536:13–17, 1654:4–1655:10 (Zell).
[89] Tr. at 1654:4–1655:10 (Zell).
[90] Tr. at 2213:16–2214:5 (stipulation as to Monty Hill's testimony).

someone outside of Timbervest about the fee arrangement.[91] Mr. Zell left open the possibility that a disclosure was made to BellSouth about the arrangement but acknowledged that BellSouth did not give formal consent for the payments.[92] Mr. Jones does not recall one way or the other, nor does Mr. Ranlett, who made no investigation to determine whether a disclosure was made directly to BellSouth.[93] Notably, the Division did not put up any witness who was at BellSouth in 2004 or 2005 to show that they did not know about the fee arrangement, despite having listed such witnesses on its Witness List.[94] The Division would have this Court presume that because no BellSouth witness testified and because no one specifically remembers disclosing the fee arrangement to BellSouth, the disclosure must not have occurred. But this presumption unfairly places a burden on Respondents to respond to allegations when memories, witnesses, and documents are gone.

Second, it is possible that Timbervest put the entire fee agreement, and the disclosures about it, in writing or in an email. Mr. Shapiro thinks it is possible but simply does not remember whether he undertook to do this.[95] Likewise, Mr. Jones testified that it would have been his practice to put the disclosure to ORG in writing or to ensure that Mr. Shapiro did, but Timbervest has not been able to locate any such writing.[96] That does not mean, however, that these writings did not exist at one point.

Emails that once existed simply do not anymore. The emails for each BellSouth employee who did not move to AT&T after the merger on December 31, 2006 were deleted and

[91] Tr. at 2263:11–17 (Schwartz).
[92] Tr. at 1532:5–15 (Zell).
[93] Tr. at 1497:8–16 (Jones); Tr. at 1137:10–13 (Ranlett).
[94] Dec. 16, 2013 Witness List of the Division of Enforcement (listing both Brian Caldwell and Donald Nutt to provide testimony regarding BellSouth's communications with Timbervest).
[95] Tr. at 2263:18–22 (Shapiro).
[96] Tr. at 1327:1–4, 1328:6–9 (Jones).

not moved to AT&T's servers.[97] No laptops or hard drives that may have contained such emails have been located.[98] Further, even for employees who did move from BellSouth to AT&T, AT&T's document retention period is 55 days.[99] All their emails would have been deleted 55 days after the merger.[100] There simply are no emails between BellSouth and Timbervest between January 1, 2005 and February 1, 2007.[101]

Because of the age of this case, emails from the relevant period have been lost and destroyed. It is therefore impermissibly difficult for Respondents to defend themselves against the Division's allegations because they do not have access to documentation that could show that disclosures were affirmatively made. Both the 2002 and 2005 disclosures are supported by the testimony of Timbervest principals. Even Mr. Schwartz acknowledged a conversation took place with Mr. Shapiro in 2005 regarding the fee agreement. This fact alone negates any intent to misrepresent or deceive.

4. Mr. Boden received his fees through two LLCs on the advice of his attorney to insulate him from liability and not to conceal his identity.

The Division has alleged that Mr. Boden received his fees through two LLCs that were set up to deceive New Forestry about who was actually receiving the fees, but in fact, they were formed upon the advice of Mr. Boden's personal attorney and not in an attempt to conceal the fact that he was receiving a fee payment in accordance with his advisory fee.

Mr. Boden sought advice from Mr. Harrison about how to receive his fees due to a concern that unknown third-parties might try to assert a claim to his fees.[102] Fee disputes are not uncommon in the real estate business, and Mr. Boden had concerns that Mr. Chambers may have

[97] Tr. at 2212:6–2213:2 (stipulation as to Monty Hill's testimony).
[98] Tr. at 2212:18–2213:2 (stipulation as to Monty Hill's testimony).
[99] Tr. at 2213:1–15 (stipulation as to Monty Hill's testimony).
[100] Tr. at 2213:1–15 (stipulation as to Monty Hill's testimony).
[101] Tr. at 2213:1–15 (stipulation as to Monty Hill's testimony).
[102] Tr. at 369:9–18 (Boden).

entered into undisclosed or unknown brokerage agreements with brokers before leaving Timbervest.[103] This concern was understandable, considering that Mr. Boden did not find out that Mr. Chambers had entered into a brokerage agreement with Zachry Thwaite, a real estate broker, until late 2004 or 2005 or with Bob Suter until sometime after Mr. Chambers left Timbervest.[104] Mr. Boden therefore asked Mr. Harrison what the best way to protect his assets from unknown claims would be.[105]

Upon learning about Mr. Boden's concerns, Mr. Harrison considered the universe of potential claims that could be asserted against Mr. Boden (not just those limited to a fee dispute) and advised setting up a special purpose entity to protect Mr. Boden's assets.[106] In Mr. Harrison's opinion, an LLC would help limit any potential claims to specific assets.[107] As he explained, this is a "very common asset protection strategy."[108] He also thought it would be a more sound structure to have a separate LLC each time Mr. Boden received a fee.[109] Otherwise, if a potential claim exceeded the fee received in a particular transaction and all the fees passed through the same entity, all the funds could possibly be subject to the claim.[110] Mr. Harrison also wanted to keep the LLCs as separate as possible to avoid any sort of piercing the veil argument.[111] He therefore gave each LLC a separate name and address in an attempt to create "the highest level of separateness."[112]

As Mr. Harrison, a member of the Georgia bar in good standing with no bar complaints, testified, these LLCs were not intended to conceal the identity of the person ultimately receiving

[103] Tr. at 369:18–24, 370:21–371:3 (Boden).
[104] Tr. at 371:17–372:18, 373:15–374:2, 509:24–511:18 (Boden).
[105] Tr. at 369:9–370:6 (Boden).
[106] Tr. at 589:4–590:8, 590:25–591:4, 591:14–25 (Harrison).
[107] Tr. at 592:19–593:6, 606:23–607:24, 613:2–25 (Harrison).
[108] Tr. at 592:19–593:6 (Harrison).
[109] Tr. at 604:14–24 (Harrison).
[110] Tr. at 613:2–16 (Harrison).
[111] Tr. at 608:2–7 (Harrison).
[112] Tr. at 610:6–16 (Harrison).

the fees, even if that was the collateral consequence of the legitimate structure.[113] It is not unusual for the names of persons with beneficial interests in an LLC to be unavailable in publicly filed documents.[114] Nor is it unusual for LLCs to lack employees or business plans. Even Mr. Wooddall has had his attorneys set up LLCs without written business plans or designated employees.[115] In sum, the LLCs were a legitimate and common business structure and were created on the advice of Mr. Boden's counsel after Mr. Boden raised a concern about avoiding any liability to his personal assets.

B. The Chen Transactions Were Not a Parking Arrangement

The Division separately alleges that Timbervest violated the Advisers Act by orchestrating a "parking" arrangement "[i]n order to circumvent . . . ERISA restrictions and satisfy [BellSouth's] disposition requirements."[116] In reality, there was no parking agreement and ERISA was not a motivation for Respondents' actions. The two transactions were separate transactions that each benefited Timbervest's clients.

1. Timbervest sold the property to Chen because its client insisted on reducing the size of its portfolio.

When New Forestry sold Tenneco it was in a disposition mode. In April 2005, BellSouth issued investment guidelines directing Timbervest to reduce the New Forestry portfolio from $471 million down to $250 million by year-end 2009.[117] BellSouth therefore sought to reduce New Forestry's portfolio by more than 45% in three-and-a-half years. To satisfy this mandate,

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[113] Tr. at 619:13–18, 727:20–24 (Harrison).
[114] Tr. at 596:8–12 (Harrison).
[115] Tr. at 851:23–852:8 (Wooddall).
[116] OIP ¶ 9.
[117] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines); Div. Ex. 6 (New Forestry, LLC 2006 Annual Report & 2007 Outlook); Tr. at 102:15–103:16, 476:16–20 (Boden).

Timbervest considered any property in the New Forestry portfolio to be for sale.[118] Timbervest had complete discretion to sell any property in the portfolio and to set the sales price.[119]

To satisfy BellSouth's demands, Mr. Boden approached Mr. Wooddall, who was "known to be active in the market," to discuss the possibility of one of his companies acquiring the Tenneco core timberlands property.[120] In 2006, Tenneco no longer fit within New Forestry's investment strategy.[121] The core timberlands were 75% pulpwood, meaning that the majority of trees were younger and would not be income-producing for quite some time.[122] New Forestry wanted to keep only those properties that generated substantial cash flow of 2% per year, and Tenneco simply did not fit this criterion.[123]

On July 7, 2006, Mr. Wooddall, on behalf of a company he controlled, Plantation Land & Management LLC, sent Mr. Boden a signed purchase and sale agreement to purchase Tenneco for $13.42 million.[124] On September 15, 2006, Mr. Wooddall signed another contract, changing the buyer to another company he controlled, Chen Timber, LLC, and the purchase price to $13.45 million.[125] The transaction closed on October 17, 2006.[126] Neither Mr. Boden nor Mr. Wooddall recall exactly when they agreed to the sale or when the purchase price was set, but the contemporaneous documentation show that Chen committed to buy Tenneco in July at the latest, and that on August 7, 2006, Timbervest reported to New Forestry's representative that it was planning to sell the property.[127]

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[118] Tr. at 132:12–15 (Boden).
[119] Tr. at 1118:8–23 (Ranlett).
[120] Tr. at 131:19–132:17, 468:14–23 (Boden).
[121] *See* Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines); Tr. at 483:15–484:13 (Boden).
[122] Tr. at 201:9–11, 483:15–484:13 (Boden).
[123] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines).
[124] Resp. Ex. 14 (July 7, 2006 email from Lee Wooddall to Bill Boden); Resp. Ex. 132 (Chen timeline).
[125] Div. Ex. 11 (October 17, 2006 Closing Documents); Resp. Ex. 132 (Chen timeline).
[126] Div. Ex. 11 (October 17, 2006 Closing Documents); Resp. Ex. 132 (Chen timeline).
[127] Div. Ex. 16 (August 7, 2006 email from Gordon Jones to Steve Gruber).

2. TVP bought the property because the property fit TVP's objectives.

In 2006, TVP was in an acquisition mode and was looking for properties that would fit its long-term growth investment strategy.[128] TVP was willing to inject capital into a property to maximize this growth; this willingness was necessary for the future success of the Tenneco property, given its younger timber profile and "big, bulky tracts."[129]

Because the property fit TVP's investment objectives and because of the strengthening land markets and timber pricing, on November 30, 2006, Mr. Boden sent a draft contract to Mr. Wooddall for the acquisition of Tenneco on behalf of TVP for the price of $14.5 million.[130] This agreement was executed by Chen Timber and was effective as of December 15, 2007.[131] The sale closed, and TVP purchased Tenneco, on February 1, 2007.[132]

Logically, Timbervest did not consider this property for New Forestry as a repurchase because it did not fit within New Forestry's investment objectives, which were focused on property sales, not acquisitions. In fact, Mr. Ranlett testified that repurchasing the property would have been in direct contradiction of the investment mandate given to Timbervest.[133] BellSouth wanted dispositions of property, and, for properties that remained in the New Forestry portfolio, it wanted cash flow at a rate of 2% per year.[134] The property's characteristics did not align with this goal of immediate cash flow, despite the improved economics of the local timberland markets. This property was a non-cash flow generating property because 75% of the trees consisted of pulpwood—the youngest category of trees.[135]

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[128] *See* Resp. Ex. 136 (TVP Land Acquisition History: 4Q03 through Present); Tr. at 83:13–16 (Boden).
[129] Tr. at 233:19–234:18 (Boden).
[130] Resp. Ex. 19 (November 30, 2006 email from Bill Boden to Lee Wooddall); Resp. Ex. 132 (Chen timeline).
[131] Resp. Ex. 7 (February 1, 2007 Index of Closing Documents); Resp. Ex. 132 (Chen timeline).
[132] Resp. Ex. 7 (February 1, 2007 Index of Closing Documents); Resp. Ex. 132 (Chen timeline).
[133] Tr. at 1139:23–1140:6 (Ranlett).
[134] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines).
[135] Tr. at 483:15–484:13 (Boden).

3. There was no "parking" agreement.

The Division alleges that these two Chen Timber transactions were a "parking" agreement whereby Mr. Boden and Mr. Wooddall had agreed to sell and later repurchase the property for a predetermined price.[136] Mr. Boden adamantly denies any such agreement.[137] In fact, he testified that, given the downward trend in the property's value during the first half of 2006, it would not have made any economic sense to have an agreement to buy the property back for $14.5 million in the summer of 2006.[138] Nor would he have agreed on a price eight months in advance of an intended acquisition. Agreeing in the summer of 2006 to a $14.5 million repurchase price would have "bak[ed] in a loss on acquisition," and, as Mr. Boden testified, in the eleven years he has been at Timbervest he does not "remember a single acquisition we've made, not one time, where it's come in with a loss on acquisition. . . . Not one."[139] Mr. Wooddall also denied there was a parking agreement. While denying a parking agreement, Mr. Wooddall did testify that he provided Mr. Boden a "verbal option" at no cost or obligation and that Mr. Boden said that "at some point in the future" Timbervest may like to buy it back. Mr. Wooddall believed that the $14.5 million repurchase price was negotiated prior to September 15, 2006, but the "verbal option" was not included in the contract.[140] In fact, the September 15, 2006 contract contained a provision stating that the contract was not contingent on any other agreement or understanding.[141] Based on conversations with Mr. Wooddall's counsel, Respondents understand that Mr. Wooddall initially told a different story to the Division—*i.e.*, that there had been an agreement to repurchase the property but no agreement as to price.[142] Respondents were unable

[136] OIP ¶¶ 9–14.
[137] Tr. at 184:3–5, 207:19–208:13, 504:9–505:9 (Boden).
[138] Tr. at 207:12–208:13, 232:13–21 (Boden).
[139] Tr. at 208:1–13 (Boden).
[140] Div. Ex. 11 (October 17, 2006 Closing Documents); Tr. at 771:1–6 (Wooddall).
[141] Div. Ex. 11 (October 17, 2006 Closing Documents).
[142] *See* Div. Ex. 74 at 11 (Timbervest's Wells Submission).

to question Mr. Wooddall about his prior statements to the Division because, while the Division interviewed Mr. Wooddall and took notes of that interview, it refused to produce its notes, and the Court ruled that those notes did not contain any *Brady* material.[143] The inability to review those notes may have materially prejudiced Respondents from being able to impeach Mr. Wooddall's testimony. But even taking Mr. Wooddall's testimony as true, it is clear that this arrangement did not amount to a "parking" agreement.

There was no written agreement between Mr. Boden and Mr. Wooddall about repurchasing the property.[144] In fact, the only written agreement—the purchase and sale agreement signed on September 15, 2006—specifically stated that the sale was not based on or contingent on any other agreement or understanding between the parties.[145] Mr. Wooddall understood that language in the contract and thought it was true at the time.[146] He believed that there was no other agreement incidental to his purchase of Tenneco. As he testified, the day after purchasing the property, he could have done whatever he wanted to with the property.[147] He could have cut and sold off all the timber on the property.[148] He was free to sell to anyone he wanted.[149] Mr. Wooddall had no obligation to sell the property back to Timbervest.[150] Indeed, he would have sold it to someone other than Timbervest if someone offered a strong enough price, despite what he called a "verbal option."[151] Nor was Timbervest bound to repurchase the property from Mr. Wooddall.[152] Importantly, and as consistently reiterated by Mr. Wooddall

[143] Tr. at 1179:11–13 (Elliot, J.).
[144] Tr. at 765:18–766:9 (Wooddall).
[145] Div. Ex. 11 (September 15, 2006 Sales Contract at Contract Addendum).
[146] Tr. at 838:18–839:12, 863:9–23 (Wooddall).
[147] Tr. at 863:21–23 (Wooddall).
[148] Tr. at 816:12–19 (Wooddall).
[149] Tr. at 768:7–11, 815:24–816:6 (Wooddall).
[150] Tr. at 815:24–816:6 (Wooddall).
[151] Tr. at 768:22–769:5, 815:2–816:6 (Wooddall).
[152] Tr. at 859:10–15 (Wooddall).

during his testimony, the "verbal option" was not binding on either Timbervest or on Chen Timber.[153] It therefore had no legal effect.

Mr. Wooddall acted inconsistently with someone who had entered into a parking arrangement. He assumed all the risk in the transaction.[154] In fact, Chen Timber ended up purchasing the property instead of Plantation Land & Management (the company named in the original, draft contract) because one of the partners in Plantation Land & Management thought the deal was too risky.[155] Mr. Wooddall agreed that there was no guarantee that he would not "lose big money" on the deal.[156] He assessed at the time of the purchase whether the acquisition would be a good business decision for Chen Timber.[157] He sent a forester to evaluate the property prior to purchasing it.[158] He acquired title insurance.[159] He wanted to make sure that he could still make money if Timbervest did not buy the property, and Chen Timber developed a "game plan" to do that.[160]

There simply was no agreement—written or otherwise—that Timbervest would repurchase the property. All the risk in the transaction was borne by Mr. Wooddall and Chen Timber, all of which belies the Division's contention there was a "parking" agreement. The only question that remains, therefore, is whether the terms of the transactions were fair and to the benefit of Timbervest's clients.

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[153] Tr. at 768:8–769:5 (Wooddall).
[154] *See* Tr. at 810:5–11 (Wooddall).
[155] Tr. at 809:17–810:7 (Wooddall).
[156] Tr. at 810:8–11 (Wooddall).
[157] *See* Tr. at 764:10–22, 860:16–861:3 (Wooddall).
[158] Tr. at 764:10–16 (Wooddall).
[159] Tr. at 819:24–820:3 (Wooddall).
[160] Tr. at 860:6–861:3 (Wooddall)

4. Each client received the benefits of favorable terms in each transaction with Chen.

Both the $13.45 million sales price that New Forestry achieved and the $14.5 million purchase price paid by TVP were favorable prices accretive to the funds' investment returns. New Forestry received liquidity, its primary investment objective, at a price above Timbervest's best estimate of market value for the property at the time. TVP, likewise, acquired the property at a price below what objective factors demonstrated the value of the property to be at the time of its transaction.

a. The sale of Tenneco resulted in a favorable price.

All the economic metrics available to Timbervest indicated that this was a good sale for New Forestry that would bring value and liquidity at a price well above Timbervest's existing valuations for the property. First, Timbervest had a land and timber appraisal from the James Sewall Company from August 2005.[161] Under Timbervest's valuation policy, independent third-party appraisals were done for each property on a two- to three-year cycle, so this 2005 Sewall appraisal was the most recent appraisal Timbervest could consider.[162] Sewall, widely regarded as the best timberland appraiser in the country, valued the core timberlands at $12.13 million.[163] The ultimate sales price of $13.45 million was 11% higher than this appraised value. And importantly, Sewall appraised the bare land on Tenneco at $438 an acre, whereas the sale to Chen Timber provided New Forestry with $547 per acre for bare land—an increase of almost 25%.[164] While the Division argued at the evidentiary hearing that there were hypothetical

[161] Resp. Ex. 52 (June 30, 2005 Appraisal Report); Tr. at 203:13–20, 207:3–11, 209:21–210:5 (Boden); Tr. at 1661:17–23 (Zell).
[162] Div. Ex. 26 (Timbervest Valuation Policy); Tr. at 1465:17–1466:21 (Jones).
[163] Resp. Ex. 52 (June 30, 2005 Appraisal Report); Tr. at 207:3–11, 211:9–18 (Boden); Tr. at 1665:3–18 (Zell).
[164] Resp. Ex. 52 (June 30, 2005 Appraisal Report); Tr. at 200:18–201:3, 207:3–18, 210:–5 (Boden).

conditions in the 2005 Sewall appraisal that somehow made it invalid, the testimony and document itself showed that there were no such hypothetical conditions.[165]

Second, Timbervest had its internal valuations of the Tenneco core at its disposal. All Timbervest clients, including New Forestry, BellSouth, and AT&T, understood and approved of how Timbervest valued properties.[166] PwC, New Forestry's auditor, described Timbervest's valuation policy as "top notch" and noted that Timbervest's "valuations are more site-specific than any others in the field."[167] Timbervest applied, and continues to apply, its valuation policies consistently across every property in any given portfolio.[168] The $13.45 million sales price exceeded Timbervest's valuation of Tenneco for each relevant quarter in 2006, and the Division offered no evidence to dispute this fact. For the first quarter, ending March 31, 2006, Timbervest valued Tenneco at $13.4 million; the final sales price exceeded this amount by $50,000.[169] In the second quarter, ending June 30, 2006, the valuation of Tenneco fell to $12.8 million due to a decrease in stumpage prices.[170] With this fall in value, the sales price gave New Forestry more than $600,000 over where Tenneco was valued. And again, in the third quarter, ending September 30, 2006, the value fell even further to $12.04 million.[171] As of the closing date of October 17, 2006, then, the $13.45 million sales price exceeded Tenneco's value by $1.4 million, or 11.7% percent.[172] As Mr. Boden said, "Every bit of empirical data we had when we sold the property on October 15th said Mr. Wooddall was paying over the fair market value of the

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[165] Resp. Ex. 52 (June 30, 2005 Appraisal Report); Tr. at 209:13–211:21 (Division), 495:18–496:19 (Boden), 1636:22–1637:12 (Zell).
[166] Tr. at 1173:8–15 (Ranlett); Tr. at 1281:7–16, 1464:6–12 (Jones).
[167] Resp. Ex. 75 (April 18, 2011 email from Joel Shapiro to Gordon Jones, Bill Boden, David Zell, and Carolyn Seabolt); Tr. at 1192:4–1195:6 (Ranlett).
[168] Tr. at 1289:9–10 (Jones).
[169] Resp. Ex. 5 (Tenneco Market Values Core Tracts 1Q06); Tr. at 203:1–6 (Boden).
[170] Resp. Ex. 41 (Quarterly Asset Market Value and Value Comparison for Tenneco Core); Tr. at 203:7–10 (Boden).
[171] Resp. Ex. 41 (Quarterly Asset Market Value and Value Comparison for Tenneco Core); Tr. at 203:10–12 (Boden).
[172] Tr. at 206:10–207:1 (Boden).

property."[173] Even Mr. Wooddall agreed that the $13.45 million sales price was not an undervaluation of the property and that the price he paid was "fair."[174] Thus, on the factors Timbervest typically used and continues to use, every indicator signaled that this was a good sale for New Forestry.

Further, as the value of the property fell throughout 2006, Timbervest did not know how long that trend would continue—whether it was temporary or a broader indication of the timber markets.[175] In selling this property, Timbervest was able to meet New Forestry's demands for liquidations at a price well above its valuation, while simultaneously removing a property that had declined in value, that could possibly continue to do so, and that offered little ability to generate harvesting income for years to come.

b. Although TVP paid more for the property, it obtained a favorable price in light of the market change in Q406.

Every indicator available to Timbervest with respect to TVP's purchase of Tenneco showed that the purchase price was fair. First, and perhaps most importantly, Timbervest started to see nearby properties out of the Wolf Creek package go under contract at strong prices.[176] Six nearby properties owned by New Forestry went under contract or sold before TVP purchased Tenneco.[177] Three were under contract before Mr. Boden sent the draft purchase contract to Mr. Wooddall on November 30, 2006.[178] These sales averaged $865 per acre for the bare land.[179] This represented a more than 60% increase in the bare land prices over the August 2005 Sewall

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[173] Tr. 206:14–17 (Boden).
[174] Tr. at 772:17–25 (Wooddall).
[175] Tr. at 1661:17–1662:5 (Zell).
[176] Tr. at 203:21–204:8 (Boden); Tr. at 1664:7–20 (Zell).
[177] Resp. Ex. 125 (November 6, 2006 Purchase and Sale Agreement); Resp. Ex. 126 (November 15, 2006 Purchase and Sale Agreement); Resp. Ex. 127 (November 17, 2006 Purchase and Sale Agreement); Tr. at 217:5–18 (Boden).
[178] Resp. Ex. 125 (November 6, 2006 Purchase and Sale Agreement); Resp. Ex. 126 (November 15, 2006 Purchase and Sale Agreement); Resp. Ex. 127 (November 17, 2006 Purchase and Sale Agreement); Tr. at 217:5–10 (Boden).
[179] Resp. Ex. 125 (November 6, 2006 Purchase and Sale Agreement); Resp. Ex. 126 (November 15, 2006 Purchase and Sale Agreement); Resp. Ex. 127 (November 17, 2006 Purchase and Sale Agreement); Tr. at 203:21–204:1, 215:13–19, 544:18–22 (Boden).

appraisal of the Wolf Creek lands at $538 per acre.[180] These prices were not readily available to others in the timberland markets and, "frankly, . . . surprised" Timbervest and the Partners because of the jump in the value of the bare land.[181] When TVP purchased Tenneco from Chen Timber, removing the current value of the timber, the bare land price per acre was valued at only $650—well below what these other sales indicated would be the price per acre of the property.[182]

Next, the growth of the timber on the property added approximately $350,000 in value.[183] Because Tenneco consisted of mostly pulpwood, a younger category of trees, and because younger trees grow at a faster rate than older trees, the stumpage growth of the trees was approximately 5%.[184] In addition, Timbervest learned in this timeframe that prices for pulpwood had increased.[185] Timbervest's regional forester for Alabama noted on November 20, 2006 that prices were surging.[186] The pulpwood price had increased by about $1.50 per ton—a roughly 30% increase in the price of pulpwood.[187] Because Tenneco had approximately 300,000 tons of pulpwood on it, this increased the value of the property.[188] The following chart shows how the timber land, timber volume, and timber values changed between the 2006 sale and the 2007 purchase:

Category	**2006 Sale**	**2007 Purchase**	**Differential**
Timber Value (reflecting volume and price increases)	$6,346,104	$7,313,500	$967,397 [+15.24%]
Timber land	$7,103,896 ($547/acre)	$8,442,531 ($650 acre)	$1,338,635 [+19%]
Timber volume (merchantable tons)	582,537	611,934	29,396 [+5%]

[180] Resp. Ex. 52 (June 30, 2005 Appraisal Report); Tr. at 210:1–5, 215:13–19 (Boden).
[181] Tr. at 1647:20–1648:12 (Zell).
[182] Tr. at 232:7–12 (Boden).
[183] Tr. at 200:18–201:3 (Boden).
[184] Tr. at 200:18–201:3 (Boden).
[185] Tr. at 201:4–23, 489:20–490:1, 552:6–553:16 (Boden); Tr. at 1664:7–17 (Zell).
[186] Resp. Ex. 27; Tr. at 489:7–490:1 (Boden).
[187] Tr. at 201:9–23 (Boden).
[188] Tr. at 553:8–16 (Boden).

Finally, other economic indicators showed that the value of the timberland in general was rising in the fourth quarter of 2006. For example, the NCREIF timberland fund index showed an 8.5% increase in the value of timberland in the South in the fourth quarter of 2006.[189] Also, the market value of the Plum Creek REIT, which was, at the time, the only publicly traded timberland REIT in the country, increased 15% between September 15 and December 15.[190] Because this was the value of the entire REIT, individual properties within Plum Creek's portfolio would have changed more or less in value than the whole.[191] The chart below indicates the change in value of the Plum Creek REIT on the relevant dates:

Category	2006 Sale	2007 Purchase	Differential
Contract Date	$24.56	$28.27	$3.71 [+15.1%]
Closing Date	$25.31	$29.43	$4.12 [+16.28%]

So while NCREIF increased by 8.5% in the relevant period and Plum Creek increased by more than 15% in the relevant period, Timbervest secured the purchase of TVP at an increase in price of less than 8%.

All of these factors—the nearby sales, the increase in pulpwood prices, the inherent growth in the volume of wood on site, and the market pricing indicators—support Timbervest's willingness to pay more for this property. Mr. Boden therefore offered Mr. Wooddall $14.5 million for the purchase of Tenneco.[192] Although Timbervest and Chen Timber agreed to a purchase price on December 15, 2006, Timbervest was not committed to the sale until the due diligence period expired on January 15, 2007.[193] By that time, Timbervest and the Investment

[189] Div. Ex. 83 at tab 12 (March 7, 2013 Meeting Notebook); Tr. at 205:11–15 (Boden).
[190] Tr. at 853:24–854:17 (Wooddall).
[191] Tr. at 1084:25–1085:10 (Ranlett).
[192] Resp. Ex. 19 (November 30, 2006 email from Bill Boden to Lee Wooddall).
[193] Div. Ex. 18 (December 15, 2006 Timberland Purchase Agreement); Tr. at 1423:20–1424:16 (Jones).

Committee would have determined that $14.5 million was a reasonable purchase price that was below what all the objective factors indicated the value should be.[194]

C. The relief sought is excessive because there has been no wrongdoing since the alleged infractions.

The transactions at issue in this proceeding are old and isolated. Timbervest has conducted hundreds of transactions with enormous sums of money at stake, and the Division has pointed to only three transactions, the latest of which took place nearly seven years ago, as allegedly involving infractions of the securities laws. In the past ten years alone, Timbervest has achieved 152 acquisitions for its funds covering 900,000 acres for a price of $1.06 billion.[195] It has also seen dispositions of 180 properties covering 300,000 acres for $400 million.[196] On average, these sales were completed at 112% of the market value and to the benefit of Timbervest's clients.[197] Thus, in total, Timbervest has completed 332 transactions covering 1.2 million acres of timberland and costing $1.45 billion dollars, not to mention the more than $140 million in timber harvests that have taken place.[198]

Despite all these transactions, only three have sparked the Division's allegations. For two of those – the dispositions for which Mr. Boden was paid a fee – the Partners returned the fees, plus interest, to the client in June 2012 before any charges were discussed by the Division.[199] Despite this voluntary return, AT&T has refused to pay Timbervest's management fee for the third quarter of 2012.[200] This fee is in excess of $750,000 and has no relation to any of the

[194] Tr. at 1423:18–1424:16 (Jones).
[195] Tr. at 460:3–10 (Boden).
[196] Tr. at 460:3–10 (Boden).
[197] Tr. at 460:3–10 (Boden).
[198] Tr. at 460:11–22 (Boden).
[199] Div. Ex. 130 (June 8, 2012 letter from Carolyn Seabolt to Monty Hill); Tr. at 511:21–512:17 (Boden); Tr. at 1057:22–1058:1 (Ranlett).
[200] Tr. at 1059:19–24 (Ranlett).

transactions at issue in this case.[201] The third quarter of 2012 was the last quarter that Timbervest served as an investment manager for AT&T.[202] AT&T eventually terminated their investment manager agreement due to frustration with the Division's investigation and Timbervest's inability to "contain it and make it go away."[203] Simply put, AT&T saw the investigation as a distraction to Timbervest in its ability to manage timberland and did not want the publicity associated with an SEC investigation.[204]

This publicity surrounding the investigation is something that Timbervest has had to deal with for almost five years. Many in the small timberland investment community have been made aware of the investigation, to the detriment of Timbervest's reputation. As Mr. Barag testified, the Division has "been talking to everybody that has been around the timberland sector" about Timbervest, and many in the industry have been tracking the investigation "as a job."[205] Many think Timbervest is "done."[206] This general thinking, in turn, has caused Timbervest to lose about one-third of its employees since the investigation started.[207]

The investigation has also affected each of the individual Respondents greatly. All of their personal bank accounts and brokerage accounts have been subpoenaed and reviewed, as have the bank and brokerage accounts of their families.[208] No improprieties have been reported after the review of these accounts.[209] In addition, the Division's investigation and proceedings have been incredibly stigmatizing, so much so that Mr. Jones has decided to leave the timberland

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[201] Tr. at 1059:19–1060:3, 1090:23–1091:8 (Ranlett).
[202] Div. Ex. 123 (August 29, 2012 letter from Stephen Burger to Joel Shapiro); Tr. at 1059:11–18 (Ranlett).
[203] Tr. at 1476:1–1477:2 (Jones).
[204] Tr. at 1476:1–1477:2 (Jones).
[205] Tr. at 1989:3–1990:19 (Barag).
[206] Tr. at 2259:19–23 (Shapiro).
[207] Tr. at 2259:24–2260:3 (Shapiro).
[208] Tr. at 512:18–513:20 (Boden); Tr. at 1477:14–21 (Jones); Tr. at 1651:25–1652:6 (Zell); Tr. at 2259:3–2260:7 (Shapiro).
[209] Tr. at 513:10–20 (Boden); Tr. at 1477:22–1478:3 (Jones); Tr. at 1652:7–10 (Zell); Tr. at 2259:3–2260:7 (Shapiro).

business altogether.[210] As he explained, the investigation is "the first thing I think about in the morning and the last thing I think about at night."[211] These repercussions and stigmatizations will only increase if this Court finds against Respondents or orders any relief against Respondents.

III. Legal Argument

A. The Division has not proven that a violation of the Advisers Act occurred.

1. The Division must prove that Timbervest, with scienter or negligently, made a material misstatement or omission.

The Division has asserted claims against Timbervest under §§ 206(1) and 206(2) of the Advisers Act.[212] These sections make it unlawful for an investment adviser to use interstate commerce directly or indirectly, "to employ any device, scheme, or artifice to defraud" a "client" or "prospective client" and "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. §§ 80b–6(1) and (2).

Section 206 essentially requires the same substantive elements as a claim under § 17(a) of the Securities Act. *See SEC v. Pimco Advisers Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004). Thus, to make out a violation of § 206, the Division must prove that Timbervest made a material misrepresentation or materially misleading omission. *See, e.g.*, *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003); *SEC v. Lauer*, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012). The Division has not alleged that Timbervest made a material misrepresentation. Because it has not proven that any omission was materially misleading, its claims against Timbervest must fail.

[210] Tr. at 1480:20–1481:7 (Jones).
[211] Tr. at 1481:8–15 (Jones).
[212] OIP ¶ 23.

With respect to its claims under § 206(2) of the Advisers Act, the Division must prove that Timbervest acted negligently. *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963) (scienter not required under § 206(2)). Under § 206(1), the Division must prove that Timbervest acted with scienter. *See Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-78 (11th Cir. 1988) (citing *Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979)). That is, the Division must establish that Timbervest acted with "an intent . . . to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 (1980). Severe recklessness may constitute scienter but only with respect "to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282 n.18 (11th Cir. 1999). The Division did not prove that Timbervest acted with an intent to defraud, in an extreme departure from the standards of care, or with negligence. Its claims under §§ 206(1) and 206(2) must fail for this reason as well.

2. The Division failed to prove that the payment of Mr. Boden's fees resulted in a violation of the Advisers Act.

The Division failed to prove that Timbervest made a material misrepresentation or omission with respect to Mr. Boden's fees and that Timbervest acted with scienter or negligently with respect to the fee arrangement. Because both of these elements are essential to the Division's allegations under §§ 206(1) and 206(2) of the Advisers Act, this Court should find for Respondents.

a. There was no material omission.

As explained above, Timbervest disclosed the fee arrangement to BellSouth in 2002 and again to ORG, New Forestry's investment manager and fiduciary, in 2005.[213] Because of the passage of time, Respondents have been unable to locate written evidence of the disclosures.

The Division relies on the testimony of Mr. Ranlett and Mr. Schwartz to prove that Timbervest did not disclose the fee agreement. As set forth above, though, Mr. Schwartz's testimony is simply not credible to prove that a disclosure was not made. Furthermore, despite having listed several BellSouth witnesses on its witness list, the Division called no BellSouth witness to testify about what the company knew about Mr. Boden's fee arrangement.[214] Instead, it called only Mr. Ranlett from AT&T, which merged with BellSouth effective January 1, 2007. Mr. Ranlett, however, did not meet with Timbervest personnel until February or March of 2007, after the merger.[215] He has no direct knowledge of anything that took place at Timbervest before that time.[216] He also has no personal knowledge about what happened at BellSouth before the AT&T merger.[217] He had nothing to do with BellSouth before the merger, was not responsible for overseeing any BellSouth accounts before the merger, and had no communications with BellSouth about its pension plans or investment advisors before the merger.[218] Mr. Ranlett has no knowledge of conversations between BellSouth and Timbervest or between Timbervest and ORG prior to the merger.[219] He never even spoke with Mr. Nutt from BellSouth about the SEC's allegations to confirm whether Timbervest had disclosed the fee arrangement.[220] Further, at the

[213] *Supra* Part II(A)(2).
[214] *See* Dec. 16, 2013 Witness List of the Division of Enforcement (listing both Brian Caldwell and Donald Nutt to provide testimony regarding BellSouth's communications with Timbervest).
[215] Tr. at 1028:24–1029:3 (Ranlett).
[216] *See* Tr. at 1034:9–14 (Ranlett).
[217] Tr. at 1062:16–21 (Ranlett).
[218] Tr. at 1062:3–1064:1 (Ranlett).
[219] Tr. at 1063:11–1064:1 (Ranlett).
[220] Tr. at 1074:12–1075:2 (Ranlett).

time the fees were paid to Mr. Boden, ORG remained the primary point of contact for Timbervest following the merger through August 2007. So the fact that Mr. Ranlett did not know about the fee is not dispositive; he was not the client contact.

The Division bears the burden of proof and, to impose liability under §§ 206(1) or (2), must show that Timbervest made a material omission. *See, e.g.*, *In the Matter of Raymond J. Lucia Cos., Inc.*, A.P. File No. 3-15006, 2013 WL 6384274, at * (Dec. 6, 2013) (Elliot, J.) (explaining that the Division must prove all the elements of its claim to establish violations under §§ 206(1) and (2)). It did not do this.

b. Timbervest acted in good faith—not with scienter and not negligently.

The Division also failed to prove that Timbervest acted with scienter or negligently. There is no evidence that Timbervest acted with an intent to harm New Forestry. Mr. Boden's advisory fee was earned and benefitted the client, and was akin to a disposition fee for actual services rendered that aligned the interests of Mr. Boden and New Forestry.[221] Further, Mr. Shapiro undertook to disclose Mr. Boden's fee arrangement on at least two occasions—to BellSouth in 2002 and to ORG in 2005.[222] These disclosures are antithetical to a finding that Timbervest acted with scienter or negligently.

Nor can scienter or negligence be inferred from the fact that Mr. Boden received his fees through two LLCs rather than directly. As shown, these LLCs were set up on the advice of counsel for the legitimate purpose of limiting Mr. Boden's liability in case of a dispute from an unknown broker or other unknown party.[223] Limited liability companies are a common way to limit personal liability and are common throughout the real estate industry. Indeed, Timbervest

[221] Tr. at 1061:6–11, 1089:19–24 (Ranlett).
[222] *Supra* Part II(A)(2).
[223] *Supra* Part II(A)(4).

sets up special purpose LLCs for each of its funds in each state that the fund has properties.[224] The LLCs at issue here were not created for any nefarious purpose or to hide any information about who would ultimately receive the fees.[225]

The Division's theory that Timbervest acted with scienter or negligently because it was motivated to avoid certain requirements under ERISA is contradicted by the evidence. All the Partners subjectively thought that New Forestry was subject to ERISA.[226] They understood that ERISA required them to put their client's interests first, which they did at all times.[227] But the Partners are not ERISA experts. They did not understand the intricacies of ERISA's prohibited transaction rules or the Real Estate Operating Company ("REOC") exception.[228] Respondents were all clear that no one even considered ERISA when Mr. Boden received or ultimately shared his advisory fees, which they all believed he had earned.[229] Simply put, "[n]o one spotted the issue."[230]

Even assuming that that the Partners were ERISA experts and knew all the ins and outs of the law, it is clear that there were no ERISA problems with Mr. Boden's fees. ERISA's prohibited transaction rules do not apply to REOCs.[231] Timbervest understood that New Forestry was a REOC.[232] It was structured similarly to Timbervest Crossover Partners, for which Timbervest had received a REOC opinion letter when the only investors were the same three BellSouth pension plans through the same nominee partnerships that also invested in New

[224] Tr. at 499:11–16 (Boden).
[225] Tr. at 619:13–18 (Harrison).
[226] Tr. at 150:20–25 (Boden); Tr. at 1489:24–1490:5 (Jones); Tr. at 1673:14–24 (Zell); Tr. at 1720:16–20 (Shapiro).
[227] Tr. at 152:25–153:3 (Boden).
[228] *See* Tr. at 1674:2–12 (Zell).
[229] Tr. at 296:4–16, 505:23–506:8 (Boden); Tr. at 1379:24–1380:10, 1491:11–17 (Jones); Tr. at 1574:15–1575:1 (Zell); Tr. at 1771:4–1772:8 (Shapiro).
[230] Tr. at 296:6–16 (Boden).
[231] Resp. Ex. 124 at 10 (Expert Report of Bradford Campbell).
[232] *See* Tr. at 1672:15–22 (Zell).

Forestry.[233] And, as established by Mr. Campbell, New Forestry was, in fact a REOC.[234] It met the two statutory prongs to establish a REOC: (1) more than 50% of its assets were invested in real estate; and (2) New Forestry was actively managing and developing those properties.[235]

Because it met the requirements for a REOC, it would be subject to the prohibited transaction rules only if it were proven that New Forestry was an "exception to the exception," that is, if all of its outstanding equity interest was owned by a plan or group of related plans.[236] This is a technical requirement that does not look at whom the beneficial owners may be but at whom the legal owners are.[237] Three nominee partnerships owned New Forestry and held all the outstanding ownership interest.[238] There is no evidence that the BellSouth pension plans had any ownership interest in these nominee partnerships, despite having a beneficial interest in them.[239] The statute is clear that it is not a beneficial interest that is determinative but an *equity* interest. Thus, if Respondents had been experts in ERISA, they would have understood that Mr. Boden's fees raised no ERISA problem, and they therefore would not have acted with any intent to deceive or negligence in ensuring that they were paid.

Even if the REOC exception did not apply, ORG acted as, and represented that it was, a QPAM that had authority to, and did in fact, approve of the fee arrangement.[240] As Mr. Shapiro has consistently testified, he remembers that he had a discussion with Mr. Schwartz regarding the fee agreement and came away from that conversation thinking that he had "gotten the okay from

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[233] Tr. at 1402:3–1403:2 (Jones); Tr. at 1674:2–12 (Zell).
[234] Resp. Ex. 124 at 11–12 (Expert Report of Bradford Campbell).
[235] 29 C.F.R. § 2510.3-101(e)(1); Resp. Ex. 124 at 11 (Expert Report of Bradford Campbell).
[236] *See* 29 C.F.R. 2510.3-101(h)(3); Resp. Ex. 124 at 12 (Expert Report of Bradford Campbell).
[237] Tr. at 998:3–999:4 (Campbell).
[238] Resp. Ex. 57 (Limited Liability Company Agreement of New Forestry, LLC); Resp. Ex. 124 at 13 (Expert Report of Bradford Campbell);
[239] Resp. Ex. 124 at 13–14 (Expert Report of Bradford Campbell); Tr. at 1001:3–21 (Campbell).
[240] Tr. 2145:22–2146:5 (Schwartz).

Mr. Schwartz."[241] Although there is a dispute as to what was specifically stated between Mr. Schwartz and Mr. Shapiro, Timbervest could have obtained approval of the fee from ORG as a QPAM, and this fact also undercuts the Division's theory that the Respondents were motivated because of ERISA concerns.

3. The Division failed to prove that the Chen transactions resulted in a violation of the Advisers Act.

The Division also failed to prove that the Chen transactions involved any material omissions or that Timbervest acted with scienter or negligently. Failing to prove either one is fatal to the Division's claims.

a. Timbervest did not make a material omission.

The OIP alleges that Timbervest violated the Advisers Act by failing to disclose a "parking" arrangement that it supposedly had with Chen Timber.[242] The facts presented at the evidentiary hearing are at odds with the hallmark of a parking agreement—that risk stays with seller. *In the Matter of Warren G. Trepp*, SEC Release No. 115, 1997 WL 469718, at *18 (Aug. 18, 1997) (explaining that a parking agreement occurs when there is a "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."). Here, all the risks associated with the purchase of the property were transferred and assumed by Chen Timber. Mr. Wooddall recognized that the deal was risky and that he needed to ensure he could make money on the transaction if Timbervest did not repurchase the property.[243] Mr. Wooddall had no guarantee that Timbervest would repurchase the property and acted consistently with the understanding that

[241] Tr. at 1756:19–23 (Shapiro).
[242] OIP ¶ 14.
[243] Tr. at 810:5–11, 860:16–861:3 (Wooddall).

Chen Timber owned the property with no strings attached.[244] Despite the Division's allegations, there simply was no parking arrangement, so there was absolutely nothing to disclose to New Forestry and TVP.

Moreover, any alleged "verbal option" that Mr. Boden may have had to repurchase the property was not material. If it existed, it served only to provide guidance as to what price TVP would have been able to purchase the property for in the future, if and when it decided to do so. Moreover, the "verbal option" did not affect the price on either the sale or the repurchase. As amply shown above, every factor, including a third-party land and timber appraisal and Timbervest's internal valuations, showed that New Forestry was able to dispose of the property at a price well above its fair value.[245] As Mr. Wooddall recognized, Mr. Boden is "as good a negotiator as there is," so, if anything, the "verbal option" induced Mr. Wooddall to purchase the property at a higher price.[246] And Mr. Wooddall agreed that the "verbal option" was not material because he signed a purchase and sale agreement that contained language that the agreement was not contingent on any other agreement or understanding and testified that he believed this language to be true at the time he signed the agreement.[247] He agreed that the price, on its own, was fair and did not represent an undervaluation of the property by Timbervest.[248]

Likewise, every factor, including the sales of nearby properties, the increase in pulpwood prices, and timberland market indicators, leads to the conclusion that TVP was able to purchase the property at a price below its fair value in accordance with Timbervest's stated valuation policy.[249] If Timbervest did not think that the value of the property had increased, it was under

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[244] *Supra* Part II(B)(3).
[245] *Supra* Part II(B)(4)(a).
[246] Tr. at 851:21–22 (Wooddall).
[247] Div. Ex. 11 (September 15, 2006 Sales Contract at Contract Addendum); Tr. at 838:21–839:12, 863:9–16 (Wooddall).
[248] Tr. at 772:15–25 (Wooddall).
[249] *Supra* Part II(B)(4)(b).

no obligation to purchase the property or exercise the "verbal option." But because the value had increased, it fully justified TVP's purchase price, and any "verbal option" was not material to the transactions.

Similarly, Timbervest's decision not to offer the "verbal option" to New Forestry was immaterial. New Forestry was focused on sales—not on potential acquisitions.[250] The option, assuming it existed, would have been triggered only if the value of the property increased. New Forestry, though, did not want to hold onto properties to see if their values would increase—it wanted dispositions of its properties. Indeed, Mr. Schwartz recalled that BellSouth at times was frustrated at the pace of dispositions of property and wanted them accomplished more quickly.[251] For the properties that remained in its portfolio, New Forestry wanted cash flow, but the characteristics of the Tenneco property, including the young timber profile and inability to generate immediate cash flow, would not have changed, despite any potential increase in value. Even Mr. Ranlett agreed that for New Forestry to repurchase the property would have been contrary to the investment mandate in place.[252]

Timbervest's failure to disclose TVP's purchase of Tenneco to ORG and/or BellSouth was also immaterial. The law does not require any investment adviser to disclose the simple fact that another client has later purchased the same security that the client had sold.[253] Doing so in all cases would be a practical impossibility. Moreover, Timbervest, acting with the discretion given to it by BellSouth, sold the property in the first instance because it did not fit within New Forestry's investment strategy.[254] New Forestry was focused primarily on dispositions and

[250] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines); Tr. at 483:15–484:13 (Boden).
[251] Tr. at 2042:17–2043:3 (Schwartz).
[252] Tr. at 1139:23–1140:6 (Ranlett).
[253] *Cf.* 17 C.F.R. § 275.206(3)–2 (Rule 206(3)–2) (requiring disclosure of cross-trades only when an investment advisor has clients on both sides of the very same transaction).
[254] *Supra* Part II(B)(1); Tr. at 229:24–230:2 (Boden).

secondarily on cash flow.[255] This property was a non-cash flow generating property because the majority of trees on the land were in the youngest category.[256] Timbervest was under no obligation to present properties that did not fit within New Forestry's criteria to BellSouth for potential purchase, and its failure to do so here was immaterial.[257]

b. Timbervest did not act with scienter or negligently.

In addition to failing to prove that Timbervest made a material omission, the Division has failed to show that Timbervest acted with scienter or negligently. First, Timbervest certainly did not act with any intent to deceive, manipulate, or defraud New Forestry or TVP, even assuming that Mr. Boden had a "verbal option" to buy Tenneco back and that Timbervest failed to disclose TVP's purchase to New Forestry. Timbervest's mission was to achieve sales for New Forestry that were accretive to its returns and make purchases for TVP that could be completed at less than the current market value.[258] Timbervest fulfilled both goals in these transactions. Nor did Timbervest act with negligence. Timbervest was under no duty to offer New Forestry the option to purchase the property, which it had just sold in accordance with New Forestry's mandate. New Forestry would not have condoned purchasing the property due to the fund's investment strategy, which was focused on dispositions and a desire for strong cash flow.[259]

The Division's theory that an attempt to avoid ERISA's requirements motivated Timbervest and indicates scienter should carry no weight. That the two transactions could even implicate ERISA "did not cross [their] mind[s]."[260] Further, even assuming that Timbervest or the Partners had considered that the fees might have ERISA implications, they could have

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[255] *See* Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines); Tr. at 230:13–19 (Boden).
[256] Tr. at 483:15–484:13 (Boden).
[257] Tr. at 478:16–23 (Boden).
[258] Tr. at 93:11–13 (Boden).
[259] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines); Tr. at 1139:23–140:6 (Ranlett).
[260] Tr. at 1562:1–16 (Zell).

confirmed that New Forestry was a REOC as to which ERISA's prohibited transaction rules did not apply.

For all these reasons, the Division's claims under §§ 206(1) and (2) of the Advisers Act must fail.

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

Even assuming, *arguendo*, that the Division has proven that Timbervest violated the Advisers Act, the relief the Division seeks is inappropriate and should not be imposed here. Namely, as your Honor has recognized, censures, bars, and suspensions are barred by the statute of limitations. In addition, the *Steadman* factors weigh against the imposition of a cease-and-desist order, and disgorgement is improper because the Respondents hold no "ill-gotten gains." Each of these points will be discussed in turn.

1. Censures, bars, and suspensions are barred by the statute of limitations.

Under §§ 203(e) and (f) of the Advisers Act and § 9(b) of the Investment Company Act, the Division seeks: (1) a censure, denial or suspension of Timbervest's registration as an investment adviser; (2) a bar or suspension from Respondents' association with an investment adviser; and (3) an order prohibiting Respondents from "serving or acting as an officer . . . for, a registered investment company or affiliated person of such investment adviser."[261]

These remedies are all barred by the statute of limitations. Under 28 U.S.C. § 2462, all actions for "any civil fine, penalty, or forfeiture," must be commenced within five years of the date when the claim accrued. Here, the claims accrued, at the latest, on April 3, 2007. The Division did not institute proceedings until September 24, 2013—nearly six-and-a-half years

[261] OIP at 5.

after the claims accrued. Thus, if the Division seeks a "civil fine, penalty, or forfeiture," the claim is barred by § 2462.

There is no doubt that censures, bars, and suspensions are penalties and therefore barred by the statute of limitations. The D.C. Circuit made this clear in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). There, the court held that a bar banning Johnson from acting as a registered representative in the future was punitive in nature and not remedial, requiring application of § 2462. *Id.* at 492. The six-month suspension at issue was penal because it was "likely to have longer-lasting repercussions on [Johnson's] ability to pursue her vocation" and because it was "not based on any general finding of Johnson's unfitness . . ., nor any showing of the risk she posed to the public, but rather . . . based on Johnson's alleged" violation of the Advisers Act. *Id.* at 489. The Commission, likewise, has recognized the applicability of *Johnson*:

> If the Division in its reply is claiming 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, I disagree. *Johnson's* meaning is plain: a penalty "is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson*, 87 F.3d at 488.

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.). *See also 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 the law is clear that censures, bars, and suspensions are barred by the statute of limitations, they cannot be imposed here.

2. A cease-and-desist order is inappropriate under *Steadman*.

A cease-and-desist order similarly should not be imposed against Respondents. The Division bears the burden of proving that a C&D order 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 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). 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. Because the Division has not shown that any of these factors support the conclusion that a cease-and-desist order against Respondents is in the public interest, such a sanction should not be imposed here.

a. Respondents' conduct was not egregious.

Respondents' conduct was not egregious in either of the two alleged violations. First, Respondents' conduct was not egregious with respect to Mr. Boden's fees. Timbervest disclosed Mr. Boden's fee arrangement to BellSouth in 2002.[262] Mr. Shapiro then re-disclosed the arrangement to Mr. Schwartz in 2005.[263] While Timbervest and the Division disagree about what happened during the 2005 conversation between Mr. Schwartz and Mr. Shapiro, the evidence is clear that Mr. Shapiro broached the topic of the fee arrangement with Mr. Schwartz after Mr. Boden had become a partner. If anything, this conversation is an indication of Respondents' good faith.

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[262] *Supra* Part II(A)(2)(a).
[263] *Supra* Part II(A)(2)(b).

The Division has not alleged or proven that unearned or exorbitant fees were charged to New Forestry. Instead, the evidence shows that Mr. Boden earned his fees in conformity with his fee arrangement and after spending several years creating value for New Forestry at no cost.[264] Finally, the use of LLCs to receive fees is not an indication of egregiousness. These LLCs were set up for the legitimate purpose of limiting any liability and were done on the advice of counsel.[265]

Second, with respect to the Alabama Property transactions, the Division has not alleged and did not prove that New Forestry received too little on the sale of the property or that TVP paid too much. The Division did not introduce any evidence that New Forestry or TVP was harmed in any way as a result of these transactions or that Respondents intended to harm them.

Instead, both transactions were completed in accordance with the clients' investment objectives. In 2005, BellSouth directed Timbervest to reduce the net asset value of the portfolio to $250 million before the end of 2009 and to focus on providing stable cash flow.[266] To satisfy this mandate, Timbervest considered essentially every property in New Forestry's portfolio to be for sale if a sale could be achieved at a fair value.[267] Timbervest recognized that Tenneco did not match New Forestry's investment objectives.[268] The property contained a young timber profile that would not provide stable cash flows for several years to come, and a sale of the property would reduce the portfolio at a premium over the carrying value.[269] Indeed, Timbervest was able to sell Tenneco on behalf of New Forestry at an 11.7% premium.[270] TVP, on the other hand, was a long-term fund that could inject the necessary capital into Tenneco to make it as profitable as

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[264] *Supra* Part II(A)(1).
[265] *Supra* Part II(A)(4).
[266] Div. Ex. 47 (April 25, 2005 New Forestry Investment Guidelines).
[267] Tr. at 93:11–13 (Boden).
[268] *Supra* Part II(B)(1).
[269] *Supra* Parts II(B)(1) & (4)(a).
[270] Resp. Ex. 41 (Quarterly Asset Market Value and Value Comparison for Tenneco Core); Tr. at 206:21–207:1 (Boden).

possible.[271] Because the property fit within TVP's investment objectives and because indicators like the contract prices for the Wolf Creek package, the increase in pulpwood prices, and market-based timberland data all indicated an increase in the value of the property, TVP was able to purchase the property below market value.[272] In such circumstances, Respondents' conduct was not egregious.

Because Respondents' conduct was not egregious with respect to either Mr. Boden's fee arrangement or the Chen transactions, this factor weighs against the imposition of a cease-and-desist order.

b. The alleged infractions were isolated.

This factor, too, weighs against a C&D order. Fees were paid to Mr. Boden on only two occasions in 2006 and 2007 under the terms of his fee arrangement. That agreement expired in 2007.[273] Timbervest has conducted hundreds of transactions since then, but the Division can point to only two as involving fees paid to a partner. The circumstances that led to Mr. Boden earning fees will never be repeated because there is no other person with a similar compensation agreement.[274]

Similarly, the supposed "parking" arrangement occurred with respect to only one property. This single property is the only property that has ever been sold by one Timbervest-managed fund and later purchased by another Timbervest-managed fund.[275] Even if there were a technical Advisers Act violation due to these sales (which there was not), that violation occurred more than seven years ago and has not been repeated since.

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[271] Tr. at 233:17–234:22 (Boden).
[272] *Supra* Parts II(B)(2) & (4)(b).
[273] Div. Ex. 127 at 2 (June 4, 2012 letter from Shapiro to Ranlett); Tr. at 393:18–394:8 (Boden); Tr. at 1736:8–11 (Shapiro).
[274] Div. Ex. 156c (November 7, 2013 Declaration of Joel Barth Shapiro).
[275] Div. Ex. 156d (November 8, 2013 Declaration of Donald David Zell).

Both the payment of fees to Mr. Boden and the Chen transactions were isolated incidents and were not part of some nefarious scheme to defraud Timbervest's clients. This factor therefore militates against imposing a cease-and-desist order.

c. Respondents did not act with scienter.

As discussed above, the evidence shows that Timbervest did not act with scienter with respect to either of the two alleged violations.[276] First, Timbervest did not act with an intent to deceive, harm, or defraud New Forestry with respect to Mr. Boden's fees. Mr. Boden worked for years without compensation under his fee agreement to maximize value for New Forestry.[277] He received a fee for those efforts on two transactions that met all the conditions of his fee agreement.[278] Moreover, Timbervest disclosed the fee agreement on at least two occasions.[279] And although Mr. Schwartz now has a different memory of the 2005 disclosure, the fact that Mr. Shapiro even attempted to disclose the fee agreement reflects Timbervest's good-faith efforts to comply with its duties under the Advisers Act.

Further, there is no evidence that Timbervest intended to harm, deceive, or defraud either New Forestry or TVP with respect to the Chen transactions. Timbervest sold Tenneco on behalf of New Forestry because BellSouth wanted dispositions of more than $200 million, because the property did not fit within New Forestry's investment strategy, as it was young and non-incoming generating and required capital injections, and because the sale could be achieved at a price well above the current valuation of the property.[280] Any "verbal option" that may have existed to repurchase the property was simply an inducement to Mr. Wooddall, a known property

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[276] *Supra* Parts III(A)(2)(b) & (3)(b).
[277] *Supra* Part II(A)(1).
[278] *Id.*
[279] *Supra* Part II(A)(2).
[280] *Supra* Parts II(B)(1) & (4)(a).

"flipper," to buy the property and did not affect the sales price in any way.[281] There similarly was no scienter when Timbervest purchased Tenneco on behalf of TVP. The purchase was made because every economic factor indicated that the value of the property had increased and because the property fit within TVP's long-term investment strategy.[282] Any "verbal option" did not affect the sales price in any way and would not have to be exercised if the value of the property did not increase.[283]

Because Timbervest did not act with scienter, a cease-and-desist order would be inappropriate.

d. There is no risk of future violations.

An important factor in considering the remedy to impose is the "the sincerity of the defendant's assurances against future violations." *Steadman*, 603 F.2d at 1140. Here, there is no risk of future violations. The Division has neither alleged nor proven any wrongdoing or improper conduct except that which allegedly occurred nearly seven years ago. Had there been other incidents even suggesting a possible violation, the Division surely would have found them during its thorough investigation of the company's, the Partners', and the Partners' family members' financial records. *Jones*, 476 F. Supp. 2d at 381 (finding against an injunction because, apart from defendants' past alleged wrongdoing, there was no cognizable danger of recurrent violations, nor any proof that the defendants engaged in a pattern of securities law violations).

Timbervest also can assure that there will be no future violations. The Staff's investigation and the Division's initiation of proceedings against Timbervest have brought severe consequences to Timbervest and the Partners. The investigation has been so difficult for the

[281] *Supra* Part III(A)(3)(a).
[282] *Supra* Part II(B)(2) & (4)(b).
[283] *Supra* Part III(A)(3)(a).

Partners that Mr. Jones has sold his interest in Timbervest and intends to leave the timberland investment manager business.[284] Although the other Partners intend to remain at Timbervest, the ramifications of this investigation and these proceedings have been so severe that there is little chance that they would take the risk of repeating any allegedly improper conduct. Under these circumstances, a cease-and-desist order is inappropriate.

e. The alleged violations are not recent.

The alleged violations are not recent. They all took place in isolated incidents nearly seven years ago. The statute of limitations has run. Indeed, this case is so dated that nearly all the witnesses had difficulty recalling the relevant transactions and conversations.[285] Respondents have faced insurmountable hurdles in defending themselves because of how long ago the alleged violations took place.[286] This factor clearly weighs against a cease-and-desist order.

f. There was no harm to Timbervest's investors.

Neither New Forestry nor TVP suffered any harm from Timbervest's actions. Mr. Boden's fees caused no harm to New Forestry because they represented services rendered to the fund and, in any event, were returned with interest. Mr. Ranlett agreed that BellSouth and AT&T had suffered no harm due to the fees because of their return.[287]

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[284] Tr. at 1480:20–1481:7 (Jones).
[285] Tr. at 172:3–4 (Boden) ("Like I said, it's seven and a half years ago. I just don't recall the discussions."); Tr. at 589:4–6 (Harrison) ("I don't recall specifically . . . You know, my impression from the time, this was seven plus years ago . . . ."); Tr. at 805:2–3 (Wooddall) ("I mean, I can't get into specifics, no. It's eight years ago."); Tr. at 884:8–9 (Hailey) ("It's eight years ago, remember? I don't remember . . . ."); Tr. at 942:23–25 (Carter) ("I don't recall from seven years ago how I got that information."); Tr. at 1317:2 (Jones) ("From nine years ago, I don't remember."); Tr. at 1548:6–7 (Zell) ("To the best of my recollection. It was a long time ago."); Tr. at 1726:24–25 (Shapiro) ("I would assume so. This is a long time ago, sir."); Tr. at 2064:5–6 (Schwartz) ("[A]nd again, it was a number of years ago, it was seven years previous . . . .").
[286] *Supra* Part II(A)(3).
[287] Tr. at 1057:22–1058:7 (Ranlett).

With respect to the Chen transactions, the purchase and sale prices were fair, reasonable, and well-supported by contemporaneous market conditions.[288] The possible existence of any "verbal option" did not affect the prices.[289] Neither fund suffered any harm in the execution of these transactions. In fact, New Forestry benefited by disposing of a property that did not fit its investment objectives at an 11.7% premium over the carrying value.[290] No one, including Mr. Wooddall, Mr. Ranlett, or the Division, has claimed that New Forestry received too little for the property. TVP, in turn, received a solid timberland investment that fit its objectives for less than market value.[291] No one has claimed that TVP paid too much for the property. There was, in short, no harm to any Timbervest investor, so this factor weighs against a cease-and-desist order.

g. A cease-and-desist would not serve a remedial function.

The final factor to consider in determining whether to impose a cease-and-desist order is "the remedial function to be served by the C&D order in the context of any other sanctions being sought in the same proceedings." *In re KPMG Peat Marwick LLP*, 554 S.E.C. 1135, 1192 (2001). Here, there is no remedial function to be served by a cease-and-desist order. A cease-and-desist order is wholly unnecessary. The alleged misconduct is not ongoing, and there is no likelihood of future misconduct.

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

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[288] *Supra* Part II(B)(4).
[289] *Supra* Part III(A)(3)(a).
[290] Resp. Ex. 41 (Quarterly Asset Market Value and Value Comparison for Tenneco Core); Tr. at 206:21–207:1 (Boden).
[291] *Supra* Part II(B)(4)(b).

3. Disgorgement is inappropriate because all "ill-gotten gains" have been returned.

Disgorgement is also an inappropriate remedy in this case. "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).

There are no sums subject to disgorgement from Mr. Boden's fees. The Partners returned these fees to AT&T in 2012. Mr. Ranlett agreed that AT&T had suffered no harm because the fees had been returned.[292] There is, therefore, nothing to disgorge, and this remedy should not be imposed. *See SEC v. Berry*, 2008 WL 4065865, at *10 (N.D. Cal. Aug. 27, 2008) (striking prayer for disgorgement when the "defendant has not been unjustly enriched and there is nothing for her to disgorge.").

There were also no ill-gotten gains from the Chen transactions. Timbervest received no compensation in the purchase of the property for TVP and received only a disposition fee on the sale of the property for New Forestry. This disposition fee is not subject to disgorgement because Timbervest was contractually entitled to the disposition fee under the investment management guidelines. That is, Timbervest would have received the fee even if there had been no "verbal option" to repurchase and even if TVP had not eventually purchased the property.[293] The disposition fee did not flow from any alleged wrongdoing, so it is not subject to disgorgement. *See Johnson*, 87 F.3d at 488 (disgorgement cannot go beyond "remedying the harm caused to the harmed parties"); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The court's power to order

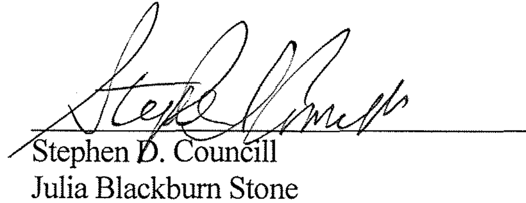
[292] Tr. at 1057:22–1058:7 (Ranlett).
[293] *See* Div. Ex. 54 (New Forestry Fee Agreements).

disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing."); *SEC v. Bard*, 2011 WL 5509500, *3 (E.D. Pa. Nov. 10, 2011) (finding that SEC's request for all fees earned by investment adviser "was not a reasonable approximation of profits causally connected to the violation"). There therefore are no sums subject to disgorgement from the Chen transactions.[294]

IV. Conclusion

This Court should find for Respondents on each of the Division's claims. The Division has failed to prove that the Respondents violated the Advisers Act. There was no material omission or misstatement made negligently or with an intent to deceive in connection with either the Chen transactions or Mr. Boden's fees. On top of that, the remedies the Division seeks are barred by the statute of limitations or inappropriate on the facts presented at the evidentiary hearing.

This 28th day of March, 2014.



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[294] If, however, this Court does choose to impose disgorgement of Timbervest's contractually earned disposition fee, any amounts should be set off by the $750,000 in management fees that AT&T unilaterally decided not to pay Timbervest for the third quarter of 2012. *See* Tr. at 1059:19–24 (Ranlett).