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UNITED STATES OF AMERICA
**Before the**
SECURITIES AND EXCHANGE COMMISSION

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15519**

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**In the Matter of**

**Timbervest, LLC,**

**Joel Barth Shapiro,**
**Walter William Anthony Boden, III,**
**Donald David Zell, Jr.,**
**and Gordon Jones II,**

**Respondents.**

**Post-Hearing Brief on behalf of Joel Shapiro**

**POST-HEARING BRIEF ON BEHALF OF JOEL SHAPIRO**

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## TABLE OF AUTHORITIES

### Cases

## I. INTRODUCTION

There was no evidence presented at the hearing supporting a conclusion that Mr. Shapiro, with scienter or negligently, knowingly and substantially assisted in conduct that constitutes a primary violation or caused a primary violation of the securities laws. Mr. Shapiro entered into an advisory fee agreement with Mr. Boden on behalf of Timbervest because he believed it was in New Forestry's best interest. Mr. Shapiro did not attempt to conceal the fee arrangement from BellSouth or its fiduciary, ORG, and the evidence does not support the Division's theory that the partners of Timbervest, LLC ("Partners") are lying about the existence of the agreement. Mr. Shapiro approved the transactions that are the subject of the OIP because he reasonably and in good faith believed they were good transactions that satisfied the client's mandate for liquidity. Thus, even if Timbervest violated the Advisers Act (which it did not), the Division did not establish that Mr. Shapiro aided and abetted or caused any such violation.

## II. STATEMENT OF FACTS

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

## III. LEGAL ANALYSIS

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

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

Similarly, three elements must be established for a "causing" claim: (1) a primary securities law violation, (2) that the respondent "knew, or should have known, that his conduct would contribute to the violation," and (3) "an act or omission by the respondent that was a cause of the violation." *In the Matter of Daniel Bogar*, Admin. Proc. File No. 3-15003, Release No. 502, 2013 WL 3963608, at *20 (Aug. 2, 2013). The Division did not carry its burden to prove that Mr. Shapiro aided and abetted or caused any Advisers Act violation.

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

**B. There Was No Primary Violation by Timbervest.**

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

In addition, the Division was required to prove that Timbervest violated the Advisers Act, not that it violated ERISA. At no time prior to the SEC's raising the issue did Mr. Shapiro (or any of his partners) believe that the payments to Mr. Boden implicated ERISA. (Hr'g Tr.1774:7–13.) Mr. Shapiro did not recognize it as problematic because, for whatever reason, the issue did not raise itself to consciousness, *i.e.*, he never thought about the fees in the context of ERISA. However, even if it is assumed that the payment of fees to Mr. Boden violated ERISA, a violation of ERISA would not be tantamount to a violation of the Advisers Act. Two key distinctions between ERISA and the Advisers Act illustrate this point. First, ERISA's rules prohibit certain transactions, absent exception from the Department of Labor, without regard to the benefits of the transaction to the client. (Resp. Ex. 124 at 16–17.) Second, ERISA's requirements cannot be satisfied with adequate disclosure. (*Id.*) As Respondents' expert explained, "ERISA fiduciary duties are materially different from the fiduciary duties defined in other statutes, such as those of investment advisors under the Advisors Act . . . ." (Resp. 124 at 9.) Accordingly, it is not sufficient for the Division to establish that Respondents violated ERISA. The Division was required to prove that Respondents violated the Advisers Act. For the reasons set forth in Timbervest's brief, the Division did not meet its burden.

### C. Mr. Shapiro did not act with scienter or negligently.

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

Division must show that Mr. Shapiro acted with scienter. *See In re Daniel Bogar*, 2013 WL 3963608, at *20. The Division did not and cannot carry this burden.

### *1. Mr. Shapiro did not act with scienter or negligently in connection with the payment of Mr. Boden's fees.*

Mr. Shapiro engaged Mr. Boden to assist him with the disposition of assets in New Forestry's portfolio to satisfy New Forestry's demand for liquidity. When Mr. Shapiro joined Timbervest in 2002, BellSouth had requested liquidity in the amount of $30 to $60 million. To achieve this liquidity, significant dispositions of New Forestry's portfolio had to be made, but Mr. Shapiro had concerns that the current management team was selling properties in a manner that was counter to the client's interests. (Hr'g Tr. 1697:9–15; 1738:5–16.) Accordingly, Mr. Shapiro asked Mr. Boden, someone he knew had experience buying and selling land, to analyze New Forestry's portfolio and assist with the disposition effort. (Hr'g Tr. 1699:11–13; 1734:9–10.) Recognizing that timber transactions can take years, that the client was seeking liquidity, and that Mr. Boden's real estate expertise was in the Southeast, the two agreed on a fee arrangement pursuant to which Mr. Boden would receive a fee upon the successful disposition of any of eight properties so long as the price was over $5 million, there was no broker's fee paid by New Forestry and the transactions closed before the end of 2007. (*See* Hr'g Tr. 1737:18–1738:4; 1740:17–25; 1748:10–15; 1749:24–1750:4.)

Although the agreement was not reduced to writing, Mr. Shapiro had the authority to enter into the agreement. Mr. Shapiro explained why it did not occur to him to put his agreement with Mr. Boden in writing,

> I'm a man of –my word is my word. I didn't formalize my coming to Timbervest, Bill's coming to Timbervest, David's coming to Timbervest, Jerry Barag's coming to Timbervest. Nothing was ever written. I never got any type of—anything in writing for the stock or any type of compensation. That's just me. I don't

> generally do things in writing. I apologize. I wish I would have put it in writing.

(Hr'g Tr. 1768:15–22.) In any event, there is ample evidence both that the agreement existed and that Mr. Shapiro and Mr. Boden conducted themselves as though it did both before and after the transactions at issue.

First, both Mr. Zell and Mr. Jones, who were not parties to the discussions between Mr. Shapiro and Mr. Boden, testified that they were aware of the agreement before joining Timbervest. Mr. Zell first learned of the advisory arrangement in 2002, when he was employed by BellSouth and was directly responsible for the New Forestry timberland portfolio managed by Timbervest. (Hr'g Tr. 1535:5–14; 1533:9–17.) Mr. Jones learned of the agreement in 2004, when he was a partner at a law firm. (Hr'g Tr. 1314:23–1315:16; 1319:25–1320:6.)

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

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

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

Finally, the inclusion of an advisory fee payment to Woodson and Company LLC in the 2006 Rocky Fork Contract with Scott Carswell, a deal sourced and worked by Mr. Boden, demonstrates that Mr. Boden initially operated under the belief that he was entitled to a fee upon the closing of a successful sale of Rocky Fork. (Div. Ex. 39.) Rocky Fork was one of the eight properties that were subject to Mr. Boden's agreement. (Div. Ex. 127.) The sale of Rocky Fork to Scott Carswell ultimately did not close. Instead, the Conservation Fund subsequently acquired Rocky Fork in 2008, pursuant to a contract negotiated by Mr. Boden at purchase price of $39,950,000, which was higher than the purchase price under the Carswell agreement. Mr. Zell testified, "I was amazed at this sale. I can't believe that Mr. Boden got somebody to buy all these properties at what I considered well above fair value." (Hr'g Tr. 1649:12–17.) Nevertheless, the timing of the sale fell outside the term of Mr. Boden's advisory fee arrangement, which ended in December 2007. Consequently, Mr. Boden did not receive a fee, despite the fact that the sale was based, in part, on his earlier efforts when he was independent consultant. (Hr'g Tr. 448:21–449:1; 445:25- 446:11.) The Rocky Fork contracts therefore demonstrate the irrationality of the Division's position that the agreement was manufactured after the fact. Accordingly, the Division's theory that the agreement was manufactured by the Partners because Mr. Shapiro needed the money as a result of financial problems in 2006 strains credulity and lacks any evidentiary basis.

In addition to discussing the agreement in 2002 with Mr. Zell while he was employed by BellSouth and Mr. Jones in 2003 before he joined Timbervest, Mr. Shapiro discussed the agreement with Mr. Schwartz in 2005 and came away with the understanding that the arrangement "was fine." (Hr'g Tr. 1756:19–23; 1780:11.). Mr. Shapiro communicated that information to his Partners and all of them operated under the belief that the agreement had both been disclosed and was acceptable to BellSouth's fiduciary. (Hr'g Tr. 1789:4–14.) To be sure, the specifics of that conversation will never be known as it occurred more than seven years ago and neither participant can recall exactly what was discussed, but that *any* discussion occurred shows that Mr. Shapiro did not intend to deceive his client and that he was not negligent.

Mr. Shapiro did not recognize the fee payment as a potential violation of ERISA. He explained that, in his opinion, Mr. Boden "did the work, he continued to do the work, he deserved that fee." (Hr'g Tr. 1771:14–15.) That the fee might implicate ERISA did not occur to him or to any of his Partners. (Hr'g Tr. 1774:7–13.) In fact, his disclosure to Mr. Schwartz negates the contention that Mr. Shapiro considered ERISA to be a potential problem because mere disclosure would not have cured a prohibited transaction. It does not follow from the fact that Mr. Shapiro recognized ERISA's prohibitions in other client contexts that he should have recognized the payments of the fees as a prohibited transaction because at the time the agreement was made it was not prohibited by ERISA. As Mr. Shapiro explained, "I looked at this as if he [Mr. Boden] was any other service provider." (Hr'g Tr. 2261:6 –7.) Mr. Shapiro reasonably and in good faith believed that Mr. Boden had performed the work and was entitled to the payments.

As set forth in Timbervest's Post-Hearing Brief, scienter or negligence cannot be inferred from the fact that Mr. Boden received his fees through two LLCs rather than directly. Mr. Shapiro testified that he did not know of the two LLCs nor did he even know that Mr. Boden had arranged to create these entities to receive his fees. (Hr'g Tr. 1826:20–1827:10.) Furthermore, Mr. Shapiro did not know that Mr. Boden was going to share his fee for either property with him or the other Partners before the approval of the sale of those properties. (Hr'g Tr. 1828:3-6; 1828:19–1829:1.) Nor is there any evidence disputing Mr. Shapiro's account that he had no knowledge of the formation or existence of these LLCs to receive Mr. Boden's fees. In sum, the evidence presented at the hearing failed to show that Mr. Shapiro acted with scienter or negligently with respect to the payment of or failure to disclose Mr. Boden's fee arrangement.

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

The Division's allegations with respect to the Tenneco transactions are based entirely on conversations between Mr. Boden and Mr. Wooddall that occurred more than six years ago. For the reasons set forth in Timbervest's Post-Hearing Brief, the sale of Tenneco on behalf of New Forestry and the subsequent purchase on behalf of Timbervest Partners did not violate the Adviser's Act. But even if the transactions *did* constitute a primary violation, there was absolutely no evidence that Mr. Shapiro had any knowledge of these conversations. As a result, the Division did not and cannot establish that Mr. Shapiro acted with scienter or negligently.

Mr. Shapiro did not have any communications with Mr. Wooddall regarding the sale or purchase of Tenneco, nor did he have any knowledge regarding Mr. Boden's conversations with Mr. Wooddall. (Hr'g Tr. 1478:7–1479:7.) Hence, he had no knowledge of the alleged "verbal option" to purchase about which Mr. Woodall testified. It follows that there is no evidence that Mr. Shapiro assisted in any attempt to avoid ERISA by first selling Tenneco to Mr. Wooddall, because there is no evidence Mr. Shapiro had any knowledge of any plan to purchase Tenneco on behalf of Timbervest Partners at the time he approved the sale of Tenneco to Chen Timber, or that he should have been aware of any such plan. As a result, the Division did not and cannot prove that Mr. Shapiro acted with scienter or negligently with respect to the Tenneco transactions.

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

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

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

There is no evidence that Mr. Shapiro substantially assisted or caused Timbervest's alleged failure to disclose the fee arrangement. As discussed above, Mr. Shapiro disclosed the fee arrangement to Mr. Schwartz before any payments were made pursuant to the agreement. Mr. Shapiro later approved the sales of Tenneco and the Kentucky properties as a member of the investment committee based on the financial metrics of the transactions and with the understanding that the fees had been disclosed. His approval was by no means intended to further any alleged fraud on the client.

Further, Mr. Boden's later decision to share the fees did not result in any conflict of interest on the part of Mr. Shapiro. Mr. Shapiro's decision to approve the sales of Tenneco and the Kentucky properties by New Forestry was not impacted by Mr. Boden's later decision to share the fees because Mr. Shapiro approved the transaction before Mr. Shapiro learned of Mr. Boden's decision to share the fee. (Hr'g Tr. 1828:24–25.) Mr. Shapiro reasonably believed that the fees had been disclosed. What Mr. Boden elected to do with the fees once he received them pursuant to his pre-existing fee agreement was his decision. Consequently, the Division failed to carry its burden to prove that Mr. Shapiro substantially assisted or caused any violation with respect to Mr. Boden's fee arrangement.

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

As explained above, it is undisputed that Mr. Shapiro did not participate in any conversations with Mr. Wooddall regarding the Tenneco transactions. Mr. Shapiro was not a participant in any drafting or the negotiations of the contracts for the sale of Tenneco to Chen Timber or the purchase of Tenneco by Timbervest Partners Alabama, but approved the transactions as a member of the investment committee based on the information available to him at the time. Mr. Shapiro had no knowledge of the conversations between Mr. Boden and Mr. Wooddall regarding either of the Tenneco transactions. (Hr'g Tr. 2255:18–2256:6; 2256:17–25.) Thus, he did not cause any violation and he did not knowingly and substantially assist in any violation.

Accordingly, the Division failed to meet its burden to show that Mr. Shapiro, with scienter or negligently, knowingly and substantially assisted in conduct that constitutes a primary violation or caused a primary violation of the securities laws. The Division did not prove that Timbervest violated the Advisers Act. The Division also failed to prove that Mr. Shapiro acted with scienter or negligently in connection with payment of Mr. Boden's fees. Mr. Shapiro disclosed the fee arrangement to the client's fiduciary and understood that the arrangement was "okay." Likewise, Mr. Shapiro did not act with scienter or negligently in connection with Tenneco transactions. Mr. Shapiro had no knowledge of any conversations between Mr. Boden and Mr. Wooddall regarding the Tenneco transactions. He approved each of the three transactions at issue as a member of the investment committee based on the economic information available to him. Thus, the Division failed to prove he substantially assisted or caused Timbervest's alleged violation of the Advisers Act, and the claims against him should be dismissed.

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

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

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

As described above, there was nothing egregious about Mr. Shapiro's conduct in this matter. Mr. Shapiro engaged Mr. Boden in 2002 to assist in carrying out New Forestry's desire to dispose of properties in its portfolio. There is nothing inappropriate about that agreement, which was disclosed to BellSouth at the time. When BellSouth later engaged ORG as its fiduciary, Mr. Shapiro discussed the fee arrangement with Mr. Schwartz of ORG and concluded from that conversation that the arrangement was fine with ORG. (Hr'g Tr. 1756: 19-23; 1780:11.) Although the passage of time has obscured the exact content of that conversation, there is no dispute that a conversation about the fee occurred. Mr. Shapiro was not aware of the creation of the LLCs by Mr. Boden and his attorney to receive the fee payments. At the time Mr. Shapiro approved the sales by New Forestry of the Tenneco and Kentucky properties, he was not aware that Mr. Boden would later share his fees with the other Partners, so he could not have been motivated to approve the sales based on his expectation of receiving part of Mr. Boden's fee. He was completely unaware of the negotiations between Mr. Boden and Mr. Woodall regarding any alleged agreement to purchase the Tenneco property back from Chen Timber. There is simply no evidence of any conduct by Mr. Shapiro that could remotely be considered egregious. For all of these same reasons, Mr. Shapiro did not act with any degree of scienter under the *Steadman* analysis.

As discussed in the Timbervest brief, the alleged infractions were isolated and non-recurring in the approximately seven years that have elapsed since the conduct at issue in this case. Moreover, Mr. Shapiro was in the securities business from mid-1986 to 1995, working at broker-dealers and investment adviser firms, and then again from 2002 to the present. (Hr'g Tr. 1682:18-1685:2; 1691:11-14.) Throughout that period, which is most of his career, he has had no disciplinary issues or regulatory problems of any sort, aside from the present administrative proceeding. Moreover, the Division's thorough review of the bank and brokerage records of Mr. Shapiro and his wife yielded no evidence or report of any improprieties or improper transactions. (Hr'g Tr. 2260:4-7.)

The additional *Steadman* factors concern the respondent's recognition of wrongful conduct, sincere assurances of no future violations, and opportunity for future violations. In this case, the Division has shown no wrongful conduct. However, Mr. Shapiro has recognized that certain matters, such as Mr. Boden's fee agreement, should have been put into writing to prevent future confusion or disagreement with its client and advisors and has apologized for not doing so. (Hr'g Tr. 1768:15-23.) Timbervest no longer has any separate accounts that hold plan assets and its funds are organized in a manner that exempts them from ERISA. (*See,e.g.*, Div. Ex. 140 at 47.) Given the trauma and disruption that this investigation and proceeding has caused Mr. Shapiro and his Partners, there is no chance that they will risk not preserving a careful, written record of such arrangements and seeking the advice of ERISA counsel should they have clients subject to ERISA in the future.

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

C&D in this case because there is no alleged ongoing misconduct and no likelihood of future misconduct.

## III. CONCLUSION

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

This 28th day of March, 2014.

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