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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.	:

DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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I. INTRODUCTION

The Division of Enforcement ("Division") submits this brief in connection with the hearing held at the Richard Russell Federal Building in Atlanta, Georgia on January 21, 22, 23, 24, and 28, 2014, and at the Atlanta Regional Office of the Securities and Exchange Commission on February 4, 5, and 6, 2014.

At the hearing, the Division demonstrated that Respondents Timbervest, LLC ("Timbervest"), Joel Barth Shapiro ("Shapiro"), Walter William Anthony Boden, III ("Boden"), Donald David Zell, Jr. ("Zell"), and Gordon Jones II ("Jones") knowingly and willfully violated Section 206 of the Investment Advisers Act of 1940 ("Advisers Act") by failing to disclose to their advisory client that they (1) orchestrated a prohibited cross trade of property from one client to another through the use of a middleman, and (2) collected and shared unauthorized, bogus brokerage fees totaling more than $1.15 million paid from one of its clients to shell companies set up and owned by an associate of Boden.

II. SUMMARY

Respondents violated Section 206 of the Advisors Act by arranging a prohibited cross trade of the Tenneco core timberland ("Tenneco"), a property located in Alabama, from New Forestry, LLC ("New Forestry") to Timbervest Partners, LP ("TVP"), a Timbervest-managed fund in which the Respondents had a financial interest. The Respondents concede that the cross trade was never disclosed to their client, BellSouth/AT&T, or to ORG Portfolio Management ("ORG"), a manager retained by BellSouth/AT&T to oversee Timbervest's management of New Forestry. The Respondents claim that the sale of this New Forestry property to a third party and the subsequent repurchase of the property by TVP were completely separate, independently-negotiated transactions, and that the short timeframe between the sale and repurchase was merely coincidental. The Respondents have further claimed that, despite the admittedly "anomalous" nature of the transaction, they do not recall how or precisely when they decided to reacquire the property for TVP.

The facts and common sense contradict Respondents' claim that these were completely independent transactions. Most notably, Respondents offered to repurchase the property only six weeks after they sold it, and the purchase price was $1.05 million more than the previous sales price. Thus, accepting Respondents' claim requires this Court to conclude that the property's value increased by nearly 8% in only a few weeks. Also, Charles Lee Wooddall ("Wooddall"), the person who bought and then resold the property, testified that Boden proposed that Wooddall buy the property, hold it for a short time, then resell it to a Timbervest fund for approximately $1 million more than he had paid for it. Respondents' only response to this testimony is that there was no binding obligation to repurchase the property from Wooddall. This fact misses the key point: the conflict arose because Respondents specified the repurchase price *before* they even sold the property to Wooddall.

Finally, Boden attempted to cross trade a different property owned by New Forestry, located in Covington, Georgia and known as the "Glawson" tract (sometimes referred to as the "I-20 East" tract). This previous attempt to cross trade New Forestry's Glawson property seriously undermines Respondents' claim that the sale and repurchase of the Tenneco property were completely separate transactions.

Respondents also violated Section 206 of the Advisers Act by collecting for themselves more than $1.15 million in improper brokerage fees from their client, New Forestry, in connection with the sale of two New Forestry properties without disclosing these fees to

BellSouth, AT&T or ORG. New Forestry was an entity funded with BellSouth/AT&T pension assets, for which Timbervest served as the general manager.

Respondents' sole defense to this claim is that they disclosed the fees to Edward Schwartz ("Schwartz"), a representative of ORG. The facts again show that this claim is unfounded. First, and most importantly, Schwartz denied Respondents' contention in no uncertain terms. Second, Respondents could not produce one shred of documentation to corroborate their claim that the fees were disclosed. Third, Respondents took elaborate steps to conceal the payment of these fees to Boden and the other Timbervest principals. They used Boden's lawyer and close friend, Ralph Harrison, to establish shell LLCs to receive these fees, took steps to hide Boden's affiliation with the LLCs, and laundered the payments through Harrison's attorney trust bank account and through an account in the name of Boden's personal holding company, WAB, Inc.

The facts show that the purported "agreement" pursuant to which the brokerage fees were supposedly paid, never in fact existed. For example, despite the elaborate details contained in this "agreement," including specific properties, duration of the contract, and an intricate methodology for calculating the payments, there is no documentation of this agreement. Finally, Respondents acknowledged that they understood that they were subject to ERISA. ERISA prohibited payment of these type of fees to principals. Because Respondents knew that disclosure of the fees would have exposed them to ERISA liability, it is highly likley that they would have concealed the fees, rather than disclose them to ORG or to BellSouth/AT&T.

Even if the Court accepts Respondents' claim that there was some disclosure made to Schwartz, the Court should still conclude that Respondents violated the Advisors Act. Schwartz testified that Shapiro never told him (1) which properties would generate a fee if sold, (2) the amounts of the fees to be paid, (3) the source of the fees to be paid, (4) that the fees would be paid to a principal of Timbervest, or (5) that the fees would be shared by all of the principals of Timbervest.

In addition to these two independent violations of the Advisers Act, the Division also demonstrated that the Respondents flouted their fiduciary duty to AT&T by using New Forestry funds to construct a hunting lodge on the Glawson property without notice to AT&T. Timbervest also cancelled a revenue-producing hunting lease on the property in favor of a free lease for itself, and, without the knowledge of AT&T, entertained friends, family, and business associates at an annual dove hunt on New Forestry's property. This additional misconduct heightens the need for meaningful remedies in this case.

III. RESPONDENTS

A. Timbervest is registered investment adviser headquartered in Atlanta, Georgia. (Tr. 54:3-6). Timbervest manages timberland and other environmental assets on behalf of various funds. (Tr. 54:12-16; 1694:9-11). During the period of the alleged violations, Timbervest had approximately 35 employees. (Tr. 54:17-55:6). The four individual Respondents, plus a fifth person who left the company in late 2004, became partial owners of Timbervest in March of 2004, collectively owning 20% of Timbervest. (Tr. 78:17-23). Effective January 1, 2005, the four individual Respondents became 100% owners of Timbervest through their equal ownership shares in Ironwood Capital Partners, LLC, of which Timbervest was a wholly-owned subsidiary. (Tr. 83:17-84:3).

B. Shapiro has been the Chief Executive Officer of Timbervest since September 20, 2002 (Tr. 1691:11-1692:2). He has previously been affiliated with broker-dealers and investment advisers and has held several securities licenses. (Tr. 1682:8-1684:23). From 1995 until he started at Timbervest in September 2002, Shapiro invested in and managed a variety of small businesses not related to the securities industry. (Tr. 1686:14-1689:23).

C. Boden has been the Chief Investment Officer of Timbervest since late 2004. (Tr. 51:16-23; 1537:14-19). He has more than a decade of experience in the commercial real estate industry. (Tr. 47:22-48:20). Boden also ran a property tax appeal business until 2005 or 2006. (Tr. 50:25-51:15). Boden has been a licensed real estate salesperson in Georgia for his entire career. (Tr. 49:8-13; 381:10-16). Boden was a consultant to Timbervest before he became a principal of the company. (Tr. 1535:15-22).

D. Zell has been Timbervest's Chief Financial Officer since March 2004. (Tr. 53:9-10). He joined Timbervest in 2003. (Tr. 1532:16-1533:8). Zell was a senior manager in BellSouth's pension group from 1995 until he joined Timbervest. (Tr. 1532:16-1533:8). While at BellSouth, Zell oversaw New Forestry and had dealings with Timbervest as New Forestry's investment manager. (Tr. 1533:9-11).

E. Jones was the General Counsel, Chief Compliance Officer and President of Timbervest at all times relevant to this proceeding. (Tr. 1233:3-1234:9; 1234:10-13). He was a partner at the Atlanta law firm Parker, Hudson, Rainer and Dobbs before he joined Timbervest in 2004. (Tr. 1231:5-25).

IV. FACTS

A. Timbervest is Formed to Manage BellSouth Pension Assets

Timbervest was established in 1997 as a result of a large investment by BellSouth. (Tr. 71:24-73:24). From its inception through its termination by BellSouth's successor-in-interest, AT&T, effective September 30, 2012, Timbervest managed the separate account known as New

Forestry, consisting entirely of BellSouth pension money. (Tr. 73:11-13). Timbervest managed one other small separate client account. (Tr. 70:8-23).

Timbervest also established and managed several co-mingled timberland and environmental funds. These funds were "co-mingled" in the sense that unrelated investors could participate in the funds by purchasing limited partnership interests. (Tr. 55:15-56:8). TVP, which started in 2004, was the first such co-mingled fund launched by Timbervest. (Tr. 58:13-59:4). The other co-mingled funds subsequently established by Timbervest were Timbervest Partners II, LP; Timbervest Partners III, LP; Timbervest Crossover Partners, LP; and Timbervest Crossover Partners II, LP. (Div. Ex. 138b; Tr. 55:10-59:4). In addition to serving as advisors to these co-mingled funds, the four individual Respondents are investors in each one. (Tr. 63:5-64:1). Their aggregate investment in TVP is $1 million. (Tr. 1677:14-1678:4).

B. Ownership/Management of Timbervest

Timbervest was founded by a group of four private equity investors from Jacksonville, Florida who did business as Rock Creek Capital. (Tr. 73:18-23; 74:6-9). The CEO of Timbervest from its founding until the fall of 2002, when he was replaced by Shapiro, was Robert Chambers (Tr. 72:11-20). Shapiro gradually brought on Zell, Jerry Barag ("Barag"), Boden, and Jones—in that order—as the new management team. (Tr. 1921:5-18). Barag served as the Chief Investment Officer of Timbervest (Tr. 75:18-76:13). Boden had been head of acquisitions, but became the Chief Investment officer when Barag left the company in December 2004. (Tr. 76:4-77:13; 1920:23-1921:4; 1929:25-1930:4).

In March 2004, Shapiro, Zell, Jones, Boden, and Barag each acquired a 4% ownership stake in Timbervest. Collectively, they owned 20% of the company, with the Rock Creek

Capital group owning the rest. (Tr. 78:17-23). The new management team's 20% interest was directly held by Ironwood Capital Partners LLC ("Ironwood Capital Partners"), in which each of the five managers of Timbervest owned an equal share. (Tr. 1922:20-1923:6).

In early 2004, the owners of Timbervest began implementing a plan to take the company public as a Real Estate Investment Trust ("REIT"). (Tr. 74:10-24). They planned to keep the assets of New Forestry separate from the REIT. (Tr. 1918:8-10). Timbervest's efforts to launch a REIT, however, were not successful, and the efforts ceased by the summer of 2004. (Tr. 79:25-80:5; 1920:1-16).

Following the cessation of the REIT efforts, Shapiro, Boden, Zell and Jones began negotiations with the Rock Creek Capital group to buy their 80% interest in Timbervest. The four individual Respondents completed the buy-out of the company effective January 1, 2005. (Tr. 83:17-85:3). The purchase price was $3.5 million, $1.7 million of which was financed and $500,000 of which was in the form of a deferred purchase price. (Id.). Ironwood Capital Partners became the owner of 100% of Timbervest, and each of Shapiro, Zell, Boden, and Jones owned 25% of Ironwood Capital Partners. (Tr. 83:17-84:3).

C. The Respondents Understood that Timbervest was Subject to ERISA in Managing New Forestry's Assets

Each of the individual Respondents acknowledged that he understood at all times relevant to the proceedings that Timbervest was subject to the provisions of ERISA in managing the assets of New Forestry. (Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20). It was this very understanding that caused Respondents to take considerable efforts to conceal both the cross trade and their receipt of brokerage fees, as they knew these transactions constituted prohibited transactions under ERISA. (See Expert Report of Arthur Kohn, Div. Ex. 137).

Timbervest's management of New Forestry was governed by an Investment Management Agreement and the New Forestry Limited Liability Company Agreement ("New Forestry LLC Agreement") with BellSouth.[1] (Tr. 147:18-22; 155:16-157:11). In the both the Investment Management Agreement and the New Forestry LLC Agreement, Timbervest acknowledged that it was a fiduciary under ERISA with respect to the plan funds comprising New Forestry, and it pledged to meet the ERISA fiduciary standard of care and to refrain from engaging in prohibited transactions as that term was defined in ERISA . (Tr. 149:24-150:25; 152:7-153:21).[2]

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[1] An April 2005 amendment to the New Forestry LLC Agreement instituted new program investment guidelines calling for a reduction in the net asset value of the New Forestry portfolio from approximately $470 million to $250 million by the end of 2009. The amendment reset Timbervest's management fee at 75 basis points for the first $250 million of managed assets and 25 basis points for any additional assets under management. The amendment also provided that Timbervest would receive a disposition fee of 3% of the value of all New Forestry timberland and timber that was sold, provided that certain conditions were met. (Tr. 102:15-19; 103:3-10; 104:2-7).

[2] Respondents have, at various times since the institution of this proceeding, incorrectly represented to the Court – and to U.S. Department of Labor ("DOL") – that New Forestry was not subject to ERISA. Specifically, Respondents argued that New Forestry is a Real Estate Operating Company ("REOC") under ERISA and that it is, therefore, exempt from ERISA's prohibited transaction rules. This Court need not decide this issue. What is relevant is that, at the time, Respondents *believed* that New Forestry was subject to ERISA and, as a result, sought to conceal their violative conduct. That point is undisputed.

Nevertheless, it should be noted that Respondents' arguments to the Court and to DOL were incorrect and highly misleading. (See Response to Division's Opposition to Motion for Summary Adjudication, p. 5-6, and Letter from Paul T. Ryan to Brian Giles attached as Exhibit A to the Supplemental Declaration of Julia B. Stone). Respondents conveniently omitted to cite the provision immediately following the provisions that they rely upon, which states, plainly, that the REOC exception does not apply if the assets are owned entirely by a single plan or a related group of plans. (See Kohn Report, Div. Ex. 137, at pp. 6-7). Respondents' own expert conceded, that, (1) if it could be shown that New Forestry was 100% owned by BellSouth pension funds, New Forestry would not qualify for the REOC exception and would be subject to ERISA, and (2) it appeared to him that all parties to the agreements believed that New Forestry was subject to ERISA at the time of the violative conduct. (Tr. 990:14-20; 1013:18-1014:2).

D. Engagement of ORG by BellSouth; Acquisition of BellSouth by AT&T

In September 2005, BellSouth hired ORG to oversee Timbervest's management of its New Forestry account. (Tr. 98:9-99:1). Throughout ORG's engagement by BellSouth, which terminated on September 30, 2007 (Tr. 1059:15-18), ORG's Steve Gruber ("Gruber") was primarily responsible for overseeing New Forestry, and Gruber was ORG's main point of contact with BellSouth. (Tr. 2040:4-16). Because of personality conflicts between Gruber and the Timbervest principals, however, Schwartz had frequent contact with Shapiro and some of the other Timbervest principals. (Tr. 2040:17-2041:21).

When BellSouth engaged ORG, it informed Timbervest by letter that, while Timbervest was required to maintain its existing reporting responsibilities to BellSouth, Timbervest should copy ORG on all correspondence. (Tr. 1531:2-1532:9; Div. Ex. 178). BellSouth sent the letter to Zell, who shared it with the other Timbervest principals. (Tr. 1580:7-23; 1581:17-22).

During ORG's oversight of BellSouth's New Forestry investment, BellSouth merged with AT&T. The merger was effective at the beginning of January 2007. From that point forward, Timbervest's client for the New Forestry account was AT&T rather than BellSouth. (Tr. 145:2-13).

The AT&T manager for the New Forestry account was Frank Ranlett, who met with the Timbervest principals on several occasions without ORG in attendance. (Tr. 1028:24-1029:17; 1037:4-10). The AT&T pension group generally did not retain or use consultants to oversee its

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Fact testimony at the hearing established definitively that New Forestry is in fact 100% owned by BellSouth/AT&T pension funds, putting the issue to rest once and for all. The constituents of New Forestry are three ERISA plan funds owned by BellSouth/AT&T: the Master Pension Trust, which owned 91% of New Forestry, and two related healthcare trusts, each of which owned 4.5%. (Tr. 1032:25-1033:24).

outside investment managers, and preferred to handle all such oversight in-house. (Tr. 1035:2-8). Ranlett testified that he did not involve ORG in his meetings with Timbervest because he knew AT&T would not be renewing ORG's contract and it therefore made sense for him to establish his own relationship with Timbervest. (Tr. 1035:25-1036:19).

E. Timbervest Simultaneously Arranged to Sell Tenneco on Behalf of New Forestry and to then Acquire the Property for $1 Million More on TVP's Behalf

1. Chronology of the Cross Trade

On July 7, 2006, Wooddall, in connection with discussions that he had with Boden in May or June of 2006 (Tr. 117:8-15), sent Boden an email to which Wooddall attached a sales contract signed by Wooddall on behalf of Plantation Land and Management for the purchase of New Forestry's Tenneco property in Alabama for $13,420,000. (Tr. 137:20-138:7; Div. Ex. 9). Subsequently, Wooddall determined to substitute another company of which he was an owner, Chen Timber, as the purchaser in place of Plantation Land and Management. (Tr. 809:17-810:4).

On September 15, 2006, New Forestry and Chen Timber entered into a purchase agreement for the sale of Tenneco for the sum of $13,450,000. (Tr. 191:17-192:5; Div. Ex. 10). On October 17, 2006, the sale closed. (Tr. 195:25-196:4; Div. Ex. 10).

On November 30, 2006, Boden sent an email to Wooddall stating, "Lee, as per our discussion, please see the attached." (Tr. 196:17-22; Div. Ex. 13). The attachment to the email was a proposed Timberland Purchase Agreement between Timbervest Partners Alabama, LLC ("TVP Alabama"), a wholly owned subsidiary of TVP, and Chen Timber for the purchase of the identical Tenneco property that Chen Timber had purchased from New Forestry six weeks earlier. The purchase price indicated in the agreement was $14,500,000. (Tr. 197:12-16; Div. Ex. 13).

The repurchase agreement was executed by Boden, effective December 15, 2006. (Div. Ex. 17). The sale closed on February 1, 2007. (Div. Ex. 18) Upon acquiring Tenneco for TVP, Timbervest renamed the property "Gilliam Forest." (Tr. 241:24-243:13).

2. The Sale and Repurchase of Tenneco by Timbervest on Behalf of Two Different Clients Was a Prearranged Cross Trade

Although the Respondents admit that the repurchase of a property that they had previously sold was "anomalous" and had never happened before (Tr. 226:13-15), they claim that they could not recall how or exactly when the discussions began regarding a potential repurchase of Tenneco from Chen Timber by TVP.[3] (Div. Ex. 156a; Tr. 181:23-184:13; 1254:23-1255:11; 1551:241553:14; 1561:10-15; 2255:14-2257:4). Wooddall, by contrast, clearly recalled the pertinent aspects of the transactions. Wooddall testified that Boden called him around May or June of 2006 (Tr. 856:7-17) and "said he'd like to meet and talk about a proposed deal." (Tr. 759:7-12). Following the call, Wooddall and Boden had a lunch meeting, and later had a second such meeting to discuss the deal further. (Tr. 759:7-762:15).

Boden told Wooddall that Timbervest wanted to sell him a property in Alabama and to repurchase the property from him within six months for a higher price. (Tr. 760:5-762:3;

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[3] In connection with Respondents' Motion for Summary Disposition, Boden stated in a sworn declaration that "[n]o one at Timbervest recalls how or exactly when the discussions began regarding a potential purchase of the Alabama Property" from Chen Timber to TVP. (Div. Ex. 156a, ¶7). The declarations and exhibits submitted with Respondent's motion were accepted into evidence by Chief Judge Murray. (See Order Denying Motion for Summary Disposition at Doc. 25, p. 1).

769:25-770:5). The $14,500,000 repurchase price was negotiated between Boden and himself. (Tr. 770:7-18). Wooddall and Boden agreed on the $14,500,000 repurchase price before September 15, 2006, when the agreement by Chen Timber to purchase Tenneco from Chen Timber for $13,450,000 was executed. (Tr. 770:19-771:6). When asked why he negotiated the repurchase price with Boden before entering into the September 15, 2006 contract, Wooddall responded, "So I would know what my upside was." (Tr. 862:9-13).[4]

Boden told Wooddall that Timbervest needed to liquidate the property for one fund but wanted to acquire it for another fund. (Tr. 763:3-764:9). Boden told Wooddall, however, that Timbervest could not commit in writing to the repurchase because Timbervest was still raising money for the fund that wanted to buy the property. (Tr. 763:3-764:9; 766:21-767:21). This explanation was not true, however, as TVP, the fund that repurchased Tenneco from Chen Timber, had been actively acquiring timberland since July of 2004 (Tr. 58:13-59:13), and Tenneco (i.e., "Gilliam") was the 28th acquisition for TVP's portfolio. (Div. Ex. 31a, p. 62). As the Respondents acknowledged: "In 2006, [TVP] was in its investment period, analyzing timberland properties for potential acquisitions and closing on select timberland properties fitting within its investment parameters." (Respondents' Motion for Summary Disposition at Doc. 13, p. 9).[5] This spurious explanation by Boden as to why the agreement could not be memorialized

4 When Boden was asked whether he could rule out whether his conversations with Wooddall about repurchasing the Tenneco property began before Chen Timber closed on the Tenneco property, Boden testified, "I have no evidence to rule that out." (Tr. 184:14-21).

5 Timbervest was raising funds for TVP II at the time Boden proposed the deal to Wooddall. (Tr. 65:4-18). There is no evidence, however of any plan to acquire Tenneco for TVP II. In any event, the sale by Timbervest of Tenneco from New Forestry's portfolio with the stated intention of reacquiring the property on behalf of another Timbervest fund would still constitute a breach by Timbervest of its fiduciary duty, irrespective of which fund ultimately reacquired the property.

shows that Boden involved Wooddall in order to conceal Timbervest's cross trade of Tenneco from New Forestry to TVP, as such cross trades were prohibited by ERISA.

Until December 15, 2006, when Chen Timber executed an agreement to sell the property to TVP for $14,500,000, there were no actual restrictions on what Wooddall could do with the property, notwithstanding the understanding that he and Boden had reached about the repurchase by Timbervest. (Tr. 768:7-20; 860:6-861:13; 863:20-23). Wooddall also testified that, in financing most of the purchase price, he and his partners had taken on substantial risk and had to protect their interests in case Boden did not carry through on the verbal understanding that he and Wooddall had reached. (Tr. 809:17-810:11). Accordingly, Chen Timber took steps to make sure that it was comfortable with the deal even if Timbervest did not repurchase the property, as Boden had said it would. (Tr. 764:10-765:16).

Notwithstanding the lack of an enforceable, written agreement, events played out exactly as anticipated, with Chen Timber holding the property for a short period until Timbervest repurchased it for TVP. Wooddall testified that his typical practice was to buy large tracts of timberland and break them into smaller parcels for resale. (Tr. 742:3-743:9; 856:18-857:23; 860:6-10). He testified that, in this instance, he never tried to sell the property in smaller pieces or sought a higher bid because he had given his word to Boden that he would sell the property back to Timbervest. (Tr. 860:6-862:22). In regard to Tenneco, his customary practice of breaking up a tract into smaller parcels for resale was only a back-up plan in case Timbervest failed to honor its promise to repurchase the property. (Tr. 860:6-861:13).

Wooddall's recounting of the prearranged nature of the repurchase agreement is clear. Wooddall even described it as a "land bank" arrangement, meaning one where "you buy something and hold it for somebody for a future takeout." (Tr. 858:12-14). Moreover, his testimony on this point is credible and consistent with his investigative testimony, pertinent portions of which were admitted into evidence. (Order Denying Motion for Summary Adjudication at Doc. 25, p. 1). For example, Wooddall had testified: "Boden said that, you know, we'll sell you the land. We'll buy it back, but we can't put it in writing." (Ex. E to Division's Opposition to Motions for Summary adjudication at 17:10-11).[6]

3. Respondents' Collective Failure to Recall How the "Anomalous" Repurchase of Tenneco Originated Shows That the Repurchase Was Not an Independent Transaction

Each of the individual Respondents approved the sale and the nearly immediate repurchase of Tenneco for $1 million more. (Tr. 1793:1-6). The repurchase was an admittedly "anomalous" event that had never happened before and has not happened since. (Tr. 209:8-12). If Respondents were truly not complicit in a scheme to cross trade the property, it is inconceivable that such an unusual transaction would not have been the subject of internal discussions about the appearance of a conflict of interest, since the Respondents knew that cross trades were prohibited under ERISA. In 2004, Jerry Barag, a former Timbervest principal,

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6 Shapiro claimed that after Wooddall testified, he called Boden and "said there was never a deal in place" and that "he couldn't believe that this whole thing was going on." (Tr. 1797:5-9). According to Shapiro, "[Wooddall] apologized to Mr. Boden and said it was ridiculous." (Id.). Shapiro's double hearsay testimony has no evidentiary value. Had Shapiro been testifying accurately, however, Respondents could reasonably be expected to call Boden to testify about what Wooddall supposedly said to him, and even try to recall Wooddall, himself. (See Tr. 2233:2-5). In fact, the Court noted that these reported comments of Wooddall could be a "particularly important issue in this case, potentially dispositive of one of the violations." (Tr. 2283:2-15). Defense counsel, however, without comment, elected to rest its case within minutes of the Court's remarks—providing yet another reason for doubting Shapiro's credibility.

discussed with Jones, Shapiro, and Zell the possibility of engaging in cross trades in connection with Timbervest's plan to launch a REIT. (Tr. 1933:22-1936:5). Barag testified that Zell believed asking BellSouth to engage in such a cross trade would "strike a bad tone" as it would indicate that "Timbervest, was more interested in getting control of [BellSouth's] assets than maximizing performance of the separate account." (Tr. 1936:22-1937:16).

Each of the Respondents—including Boden, who was the point man for Timbervest in the Tenneco transactions—claims a failure of recollection about how the repurchase came about, yet the circumstances surrounding Timbervest's almost immediate repurchase of a 13,000 acre tract of land for $1 million more than it had just sold it for on behalf of another client were highly unusual. According to the Respondents, such a series of transactions by Timbervest was unique. (Tr. 226:10-15). The individuals who approved this repurchase certainly could not have forgotten how it came about; their assertions to the contrary raise obvious questions about their reasons for feigning lack of recollection. Moreover, the Respondents' discussions with Barag along with emails evidencing Shapiro's knowledge of Hancock's DOL exemption (Div. Ex. 153) show that the Respondents had spent time discussing and thinking about ERISA's prohibition on cross trades, making their collective failure of recollection regarding the actual events that led to the repurchase of Tenneco that much more improbable.

4. Respondents' Failure to Contemporaneously Document the Rationale For Their Decision to Repurchase Tenneco on behalf of TVP Undermines Their Claim That the Repurchase Was an Independent Transaction

Respondents concede, but cannot explain, the complete lack of contemporaneous documentation regarding how they came to purchase Tenneco on behalf of TVP almost immediately after completing its sale on behalf of New Forestry. (Tr. 230:20-232:1; 1560:19-

1561:3). That the Respondents' files contain no records or notes of their deliberative process, given the known sensitivities surrounding the sale and purchase of the same land for different clients so close in time for different prices, weighs against them.

The Respondents had fiduciary obligations under ERISA with respect to New Forestry, and each Respondent admitted that he understood New Forestry to be covered by ERISA. (Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20). Moreover, Respondents clearly understood that cross trades, especially in the ERISA context, are generally problematic and therefore subject to more intensive review. For example, Zell testified that Timbervest could have sold Tenneco directly from New Forestry to a co-mingled fund, but that (1) New Forestry would have to agree to the transaction, (2) TVP's advisory committee would also have to approve it, and (3) the process would elicit heightened scrutiny. (Tr. 1555:15-1556:7; 1559:11-16). Likewise, Jones testified that a cross trade of Tenneco would have presented a conflict of interest and would have required disclosure and consent from both parties, noting, "[T]here's really no way to marry up those two goals [i.e., selling it for above carrying value and repurchasing it for below carrying value] if you were to have a transaction between two parties such as New Forestry and Timbervest Partners." (Tr. 1488:15-1489:23). Shapiro even drafted emails evidencing his ability to spot ERISA cross trade issues. (Div. Ex. 153; <u>see also</u> Div. Ex. 132 (flagging Gruber's proposed cross trade as problematic and stating, "I hope you realize we are overly cautious on ERISA issues")). Given the Respondents' demonstrated understanding of the general prohibition on cross trades, and the troubling appearance created by the Tenneco repurchase, it is reasonable to believe that if the circumstances surrounding the repurchase were legitimate, they would have been contemporaneously documented.

Furthermore, the Respondents admitted that it was Timbervest's practice to complete written financial analysis and modeling before any offer to purchase a property was made, including the offer to purchase Tenneco from Chen Timber. (Tr. 160:24-161:18, 211:25-212:9; 1641:9-13). The Respondents could point to no documents, however, evidencing contemporaneous financial analysis and modeling related to their offer to purchase Tenneco or to the $14,500,000 purchase price. (Tr. 212:16-213:1). Nor could they explain the absence of such documentation. (Tr. 230:20-232:1). It is reasonable to infer, under the circumstances, that the modeling and analysis that was part of Timbervest' standard procedure for purchases was not done for TVP's purchase of Tenneco because of the irregular nature of the preconceived indirect cross trade.

5. Respondents Failure to Inform ORG or AT&T of TVP's Repurchase of Tenneco Shows That the Repurchase Was Part of a Prearranged Cross Trade

It is undisputed that the Respondents took no steps to inform either ORG or AT&T that Timbervest repurchased from Chen Timber for $14,500,000 the identical property that it had two months earlier sold to Chen Timber from New Forestry's portfolio for $13,450,000. (Tr. 229:2-5; 982:23-984:23; 1041:7-14; 2070:3-2071:10). By the same token, the Respondents did nothing to inform the investors in TVP, through the Spec Book or through its annual reports to investors, that Timbervest had caused the sale of the property to Chen Timber for $1 million less than the amount TVP paid. (Div. Exs. 31a; 31b, 162).

Given the proximity in time of the two sales and the price differential, a prudent fiduciary to New Forestry, if it had nothing to hide, would have, at a minimum, informed its client of the relevant details of the transactions. Ranlett testified that he would have expected Timbervest to disclose the repurchase of Tenneco by TVP a short time later, irrespective of whether the repurchase was prearranged. (Tr. 1052:22-1056:21). He noted that he would have wanted to ensure, given the condensed timeframe, that the two transactions were arms-length. (Tr. 1055:25-1056:21). He also would have wanted to know why, if the property was so undervalued, AT&T was not given the opportunity to repurchase it. (Tr. 1055:25-1056:21).[7] Likewise, Ed Schwartz from ORG testified that, at that time, he would have expected Timbervest to disclose to ORG and BellSouth that it had repurchased Tenneco on behalf of another fund because the sale and repurchase at a higher price "doesn't look good." (Tr. 2071:11-23). He also testified that he would have wanted to know if Timbervest had agreed to a repurchase price before the property was initially sold, as that would have raised concerns that New Forestry was being disadvantaged and that the property was not being sold for the highest price possible. (Tr. 2073:7-19).

The Respondents chose to do business in a highly regulated environment—one in which they were subject to heightened disclosure standards governed by their fiduciary status under both ERISA and the Advisers Act. Moreover, AT&T was a client that emphasized the importance of communication. (Tr. 1055:5-23; 1136:3-10). The Respondents' failure to inform AT&T or ORG about the admittedly "anomalous" repurchase of a property that they had just sold on behalf of New Forestry is fully consistent with the desire on the part of the Respondents to conceal their designs to engage in a prohibited cross trade.

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7 Boden conceded that, upon concluding that Tenneco was worth significantly more than the amount for which Timbervest had just sold it, Respondents gave no consideration to offering the property back to BellSouth to enable the client to capture the value by reselling the property instead of appropriating the opportunity for TVP. (Tr. 229:19-25; 230:1-19; 232:22-234:3).

6. Contemporaneous Documents Demonstrate the Conflict of Interest Posed by Respondents' Cross Trade of Tenneco

Contemporaneous documentation of the Tenneco transactions illustrates the conflict of interest that the cross-trade presented and Respondents' efforts to conceal it. Such documents include: (1) the false narrative regarding TVP's purchase of Tenneco offered by Barrett Carter; (2) the contradictory and self-serving descriptions of the property offered to ORG, on the one hand, and to the TVP investors, on the other; (3) Timbervest's statement to ORG that it sold the property as a result of an "unsolicited" offer; and (4) Timbervest's failure to disclose its longstanding management of the property on behalf of New Forestry in describing the property's history to the investors in TVP.

a. Barrett Carter Disseminated a False Narrative Regarding the Tenneco Repurchase from Chen Timber to Conceal the Cross Trade

Barrett Carter ("Carter") was Vice President, Director of Transactions at Timbervest during the sale and repurchase of Tenneco. (Tr. 898:14-18). He subsequently held the position of Vice President, Director of Strategic Land Management (Tr. 899-24-900:11), and he is currently Timbervest's Chief Compliance Officer. (Tr. 893:11-17).

Carter recognized that the sale and repurchase of Tenneco by Timbervest on behalf of two different clients presented an unusual situation. (Tr. 915:15-916:3). Accordingly, a day or two after the February 1, 2007 closing (Tr. 941:1-8), Carter questioned Boden about the repurchase of Tenneco because Carter had concerns about Timbervest's "fiduciary obligation." (Tr. 926:1-11). Specifically, Carter had concerns "because the increase in price of the Tenneco property in such a short period of time" gave him "pause." (Tr. 928:23-929:3; 929:10-14).

When Carter confronted Boden about the transaction, Boden "took exception" to Carter's questioning him. (Tr. 929:15-18).

Shortly thereafter, on February 7, 2007, Carter sent an email response to a group of individuals containing a false explanation about how Chen Timber came to resell the Tenneco property to TVP Alabama. (Div. Ex. 19). Carter's email responded to one that Maria Horstmann, then Timbervest's Finance Manager, had sent to six people, including Carter, who was copied on the email. All of the recipients of Horstmann's email except Carter were employees of F&W Forestry ("F&W"), which maintained Timbervest's property records and performed various other services for it.

In response to an inquiry by one of the individuals from F&W, Horstmann wrote on February 7, 2007: "[TVP] purchased all the Tenneco core timberland tracts originally owned by New Forestry. Literally, it's basically a fund swap transaction." (Tr. 926:12-17; Div. Ex. 19). Although he was only copied on Horstmann's email and not a primary addressee, on February 7, 2007 at 8:47 p.m., using "reply all," Carter replied, in part: "Let me take exception to it being a fund swap transaction. It just happened to work out that one client sold it to another party and another client wound up buying it back from that party." (Tr. 939:21-25). Carter conceded that he had no first-hand knowledge of the transactions and that this statement likely would have been based on information that someone told him. (Tr. 941:16-942:15).

Carter's response further stated: "*The buyer was presented with a different opportunity elsewhere and approached us with the idea of buying the property back.*" (Div. Ex. 19) (emphasis added). This last statement is patently false. Wooddall never contended that he approached Timbervest to sell back Tenneco because of another opportunity. Instead, he testified that the repurchase was pursuant to an understanding that he reached with Boden before

Chen Timber entered into the first purchase agreement. (Tr. 770:19-771:6). Carter testified that his remark about the buyer approaching Timbervest because of another opportunity was likely based on information given to him by someone with knowledge of the transaction, but he could not recall who that was. (Tr. 942:16-943:9; 945:5-16).

Boden is the most likely source of the information, as he—and only he—represented Timbervest in the negotiations with Wooddall. (Tr. 118:9-12). In addition, Carter sent the email string containing his response to Horstmann's email to Zell and Boden, even though they were not recipients of Horstmann's initial email. (Tr. 943:21-24).[8]

b. Timbervest Provided Self-Serving and Contradictory Descriptions of Tenneco to Support its Sale on Behalf of One Client and Purchase on Behalf of Another

Timbervest further attempted to conceal the cross trade of the Tenneco property by offering New Forestry and the TVP investors separate, self-serving, and contradictory descriptions of Tenneco's attributes in order to justify the sale on behalf of New Forestry, and the repurchase on behalf of TVP.

In connection with BellSouth's mandate that Timbervest reduce the size of New Forestry's portfolio to $250 million by the end of 2009, Timbervest provided ORG with a list of properties that it had identified as disposition candidates in January 2006. (Tr. 105:8-20; Div. Ex. 7). The January 2006 list included the Tenneco non-core property (approximately 5,200

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[8] It is highly unlikely that Carter would have forwarded the explanation that he provided to Horstmann and F&W about the repurchase to Boden, who had exclusive first-hand knowledge of the deal at Timbervest, and who had recently taken "exception" to Carter questioning him about it, unless Carter knew that Boden approved of the explanation. Given these facts, the Court should find that Boden provided a false explanation of the circumstances of the repurchase to Carter, which Carter then disseminated to others.

acres), but *not* the Tenneco core property (approximately 13,000 acres). (Tr. 109:11-110:24; 112:22-113:5).

In August 2006, Gordon Jones submitted a revised list of disposition recommendations to ORG's Steve Gruber. (Div. Ex. 16). The revised report stated: "The remaining 13,000 plus acres of the Tenneco property have also been designated for sale as a result of an unsolicited favorable offer received in July of 2006." (Tr. 116:19-117:7). Seeking to justify the addition to the list of a "core" timberland property—a term signifying that the property was strategic to the portfolio (see Tr. 109:11-21)—Timbervest noted, among other things: "The property has challenging access issues, inferior topography, and is generally located in some of the poorest regions of Alabama." (Div. Ex. 16; Tr. 251:7-20).

By contrast, in trumpeting the acquisition of Tenneco (renamed "Gilliam Forest") to the investors of TVP, Timbervest included a remarkably different description of the property in its Spec Book. That document stated that the property offered "immediate and growing cash flow from these tracts," was "situated for optimal recreational opportunities within a short drive of several large cities," and noted that the "multiple locations and divisions by major roads will offer significant value-added opportunities during the disposition phase of the property." (Div. Ex. 162). See Table 1.

Table 1

Div. Ex 16 **2006 New Forestry Disposition Report** **(Sent to BellSouth/ORG)**	**Div. Ex 162** **Gilliam Spec Book** **(Available to TVP investors)**
"comprised of relatively young timber and will not produce significant returns for several years"	"immediate and growing cash flow from these tracts"
"inferior topography and is generally located in poorest areas of Alabama"	"situated for optimal recreational opportunities within a short drive of several large cities"
"challenging access issues"	"The multiple locations and divisions by major roads will offer significant value-added opportunities during the disposition phase of the property."

Likewise, in its annual report to TVP's investors, Timbervest also described the property's access as "Excellent." Boden initially opined that the contradiction in the "access" rating, as between the report sent to ORG and the TVP 2007 annual report, was because the former was referring to internal access, while the later was referring to external access to the property on highways in and around the area. (Tr. 251:21-252:6). When the Division pointed out that the TVP 2007 annual report explicitly stated, "The property has a good internal road system" (Tr. 252:7-13), however, and asked Boden whether one client was being told one thing, and the other something different, Boden admitted, "I think there's definitely an issue with this ..." (Tr. 252:21). Boden went on to state, however, that the apparently contradictory descriptions of the property's "access" were, in fact, reconcilable, but the documents were just not well-drafted. (Tr. 252:25-253:6).

c. Timbervest Falsely Informed ORG that It Sold Tenneco on Behalf of New Forestry as a Result of an "Unsolicited Offer"

As noted previously, the August 2006 disposition report sent by Jones to Steve Gruber of ORG stated that Tenneco had been "designated for sale as a result of an unsolicited favorable offer received in July of 2006." It is clear from the record that Wooddall's offer to purchase Tenneco was not "unsolicited." Wooddall testified that the first event that occurred that ultimately led to his entering into a contract to purchase the property was, "Mr. Boden called me and said he'd like to meet and talk about a proposed deal." (Tr. 759:7-12). Even Boden agreed that he solicited Wooddall, and that he thought that the use of the term "unsolicited" in the report that was sent to ORG was wrong. (Tr. 117:8-19; 118:9-16). Boden had no explanation for why the report that was sent to ORG would have contended that Wooddall's offer to purchase Tenneco was "unsolicited." (Tr. 118:17-20).

The description of the offer as "unsolicited" appears to have been an attempt to justify why a property that was not among the initial disposition candidates was being sold. Further reasons that may have played a role, and which Timbervest neglected to mention, included plans to acquire Tenneco on behalf of TVP and to pay $475,750 in brokerage fees to be paid to Fairfax Realty Advisers, LLC and divide the proceeds among the four partners.

d. Timbervest Omitted Any Discussion of Its Longstanding Management of Tenneco when Describing the Property's History to the Investors in TVP

As mentioned already, in connection with each acquisition of property by Timbervest on behalf of a client, Timbervest prepared a document entitled, "Recommendation to Acquire Timberland," known colloquially as the "Spec Book" for the property. (Tr. 239:8-240:12; Div. Ex. 27). Boden acknowledged that two principal purposes of the Spec Books were to serve as: (1) "a document source for deals we bought" (Tr. 239:15-19), which, among other things, memorializes the due diligence analysis leading to the acquisition of the property (Tr. 240:9-12), and (2) a resource for informing interested investors about an acquisition. (Tr. 239:15-21; 240:5-8).

Under the section of the Gilliam Forest Spec Book entitled "History," the Spec Book stated, in part: "The Gilliam Forest purchase unit was acquired from Chen Timber Co. in February of 2007." (Div. Ex. 27). The "History" section gave no indication that Chen Timber had owned the property for just over two months, or that Timbervest had managed the property before that for approximately eight years on behalf of another client. (Tr. 240:20-241:7). Boden had no good explanation for why Timbervest would not wish to memorialize this information in the source document for TVP's acquisition of Tenneco, or why Timbervest would not wish to share such pertinent information with TVP investors. (Tr. 249:8-14).

e. Timbervest's Valuations of Gilliam Forest Around the Time of TVP's Purchase Also Highlight Timbervest's Conflict of Interest

As Boden testified, the principal reason for preparing Spec Books for each acquisition was for them to serve as "a document source for deals we bought" and a record of the due diligence process. (Tr. 239:15-19). The Gilliam Forest Spec Book contained a page at the end documenting the approval of the four partners and of Rick Malm, the Southeast Regional Forester. (107:18-22; 241:5-9). The Spec Book shows that the Gilliam Forest (Tenneco) acquisition was recommended by Boden and Malm. (240:17-21).

The Gilliam Forest Spec Book shows what Timbervest believed the property to be worth when TVP acquired it. The Spec Book shows that Timbervest valued the property as a whole at $18,905,685 in its due diligence, with the land comprising $10,390,800 of this value and the timber comprising $8,514,885. (Div. Ex. 162). The actual value that TVP booked for Gilliam Forest at the first valuation date after the acquisition (3/31/07) was the more conservative sum of $15,700,000.

Both the $18,905,685 and the $15,700,000 valuations were appreciably more than either the value of the property on New Forestry's books at the time of sale just a few months earlier ($12,040,007) (Div. Ex. 128, p. 6), or the amount for which Timbervest caused the property to be sold to Wooddall ($13,450,000). The Respondents cannot reasonably account for Timbervest's enhanced valuations for a core timberland property in rural Alabama in such a short time span.

7. Shapiro, Zell, and Jones Were Complicit in the Cross Trade or Should Have Known About it in View of the Red Flags Presented

Timbervest admitted that "Mr. Boden would not have the independent authority to enter into any such [repurchase] agreement on behalf of Timbervest or its client, since all acquisition and disposition decisions must be approved by the Investment Committee." (Div. Ex. 128, p. 13). All of the Respondents agree, and have testified that they approved the transaction. But, conveniently, they have no recollection of how or exactly when the discussions to repurchase Tenneco began. If the Court finds Wooddall's testimony credible, which it should, Boden knew of the repurchase agreement when he discussed the reacquisition with Shapiro, Jones, and Zell. None of the partners have testified that Boden concealed information about the repurchase from them. The only conclusion, then, is that Boden did, in fact, tell them of the deal with Wooddall and that they are refusing to admit their complicity.

Moreover, according to Jerry Barag, Shapiro, Jones, and Zell all possessed knowledge of ERISA and its fiduciary requirements. Barag had discussions about cross trades under ERISA with Jones, Shapiro, and Zell in 2004 in connection with Timbervest's plan to launch a REIT. (1933:22-1936:5). He also testified that Jones, Zell, and to a lesser degree, Shapiro, all understood the ramifications of that discussion. (Tr. 1937:25-1938:18). His testimony is corroborated by Shapiro's emails regarding Hancock's DOL exemption and other ERISA-related issues. Barag also noted that he had worked with Zell on ERISA-related matters, one of which involved the creation of co-mingled funds that could accommodate ERISA-governed investors. (Tr. 1940:24-1941:25). According to Barag, New Forestry's being subject to ERISA was a topic that came up in the business "in tangential ways all the time" because managers dealing with ERISA-based funds "have different criteria and controls that they have to deal with [than non-ERISA based funds]." (Tr. 1942:10-1943:1). Lastly, Barag testified that he had conversations with Jones regarding ERISA-related matters and fiduciary obligations and that Jones was knowledgeable about such things. (Tr. 1943:9-14). That Jones had more knowledge of ERISA than anyone at Timbervest is supported not only by Barag's testimony, but also the testimony of Boden and Shapiro. (Tr. 154:8-11; 1727:1-6).

Despite Barag's testimony regarding their awareness of ERISA, Shapiro and Zell attempted to downplay their knowledge during the hearing. Shapiro stated that he had a "general knowledge" of ERISA, and testified that "everybody from the principal and legal standpoint," with the possible exception of Boden, had more knowledge of ERISA than he did. (Tr. 1730:4-15). Shapiro also stated that Zell possessed knowledge of ERISA based on his long experience managing pension fund assets for BellSouth. (Tr. 1730:16-19). For his part, however, Zell stated, implausibly, that, despite years of managing ERISA-based investments for BellSouth, ERISA matters were "not generally our bailiwick" and that he had "limited ERISA experience." (Tr. 1554:10-1555:5).

Even crediting the testimony of Shapiro, Jones, and Zell, and assuming that they were, in fact, unaware of the details of Boden's discussions with Wooddall about repurchasing the land, their knowledge of ERISA (according to Barag) was sufficient that, given the abundant red flags attending the repurchase transaction, they were extremely reckless in not spotting the issue and disclosing the conflicts to their clients.

8. Respondents Previously Attempted to Orchestrate a Cross Trade of New Forestry's Glawson Tract

Respondents' history of trying to cross trade properties from one client to another supports the Division's claim that the Tenneco transaction was a cross trade. Specifically, in the fall of 2005, Boden proposed to Reid Hailey of Hailey Real Estate Company that Hailey purchase the Glawson property and simultaneously sell Willow Run Investments, LLC ("Willow Run Investments"), for $100,000, an option to repurchase the property from him. (Tr. 870:24-872:9; Div. Ex 155a). Willow Run Investments was a Georgia limited liability company established by Harrison on August 31, 2005, of which Harrison was the sole member and organizer. (Div. Ex. 5). Boden supplied copies of the proposed purchase and option agreements to Hailey. (Tr. 873:17-875:8; Div. Ex. 146). Hailey canvassed his clients to see if they had any appetite for the deal, but they did not. (872:17-873:8). After discussing the deal with his partners, Hailey determined that he also had no interest in the proposal. (Tr. 875:6-876:5).

Boden's proposal to Hailey, however, and the documents that Harrison created in connection with the proposed deal, show that Boden was seeking a means of acquiring Glawson for TVP or another entity controlled by Timbervest. In addition to the option agreement, which anticipated that Willow Run Investments would purchase an option on Glawson from Hailey, Harrison had also drafted an agreement for Willow Run Investments to assign the option to an unknown third party in exchange for approximately $75,000. (Div. Ex. 155c). The assignment agreement also called for the assignee to reimburse Willow Run Investments the $100,000 that it spent to purchase the option from Hailey, plus 13 per cent interest per annum. (Id.).

The documents show that Boden attempted to use Hailey much as he later used Wooddall—in order to obtain Glawson from New Forestry for a Timbervest-controlled entity. The documents show Boden intended: (1) for Hailey (or one of Hailey's clients) to purchase Glawson from New Forestry and to simultaneously sell an option to Willow Run Investments for $100,000 allowing Willow Run to buy Glawson within three years at a specified price; (2) for Willow Run Investments to assign the option to TVP or to another company controlled by Boden and his partners, in exchange for a payment of approximately $75,000 to Harrison, plus reimbursement of his $100,000 with interest; (3) for the company controlled by Boden and others to then exercise the option, if desired, and to acquire Glawson. (Div. Exs. 155a-d). The plan would conceal that a Timbervest-affiliated company had repurchased a property that Timbervest had sold on behalf of New Forestry.

Although neither Harrison nor Boden conceded the point, it is apparent from the documents (and consistent with their course of conduct in the brokerage fee scheme) that

Harrison's compensation for drafting the documents and involving Willow Run Investments in the plan would be, per the assignment agreement, the approximately $75,000 assignment price, plus interest on the $100,000 option purchase price. Harrison testified that he received no compensation in exchange for drafting the documents. (Tr. 701:20-22). He further testified that his financial circumstances during this period were not good. (Tr. 718:25-13). Although favors by Harrison for Boden, personally, might be understandable, it makes no sense that Harrison would perform work in order to facilitate the sale of property by New Forestry with no expectation of compensation.

Timbervest had both in-house and outside counsel available to draft real estate documents for New Forestry. (Tr. 163:5-164:22). What Boden wanted to achieve with the Glawson deal, however, was far from routine; he needed help from someone whom he trusted implicitly. It is, therefore, not surprising that he chose Harrison. Boden and Harrison had a close friendship going back to college. They met as students at University of Virginia, where they were roommates, and they remained close friends since that time. Among other things, Harrison was a member of Boden's wedding party, had gone on vacation with Boden's family, had attended Boden's son's sporting events, and had even started a business with Boden. (Tr. 258:7-259:12).

Boden and Harrison provided incredible explanations of their involvement in the Glawson scheme. For example, Boden claimed that he asked Harrison to draft an option agreement so that he could show Hailey an example of what one looked like. (Tr. 275:22-276:8). Why it would be necessary to show Hailey, an experienced real estate broker, an option agreement for purely illustrative purposes, however, is not clear. Hailey, for his part, testified that Boden gave him the option agreement because its execution, along with the purchase agreement, was part and parcel of the deal Boden proposed. (Tr. 870:24-871:8). Boden claimed he had no recollection of presenting the purchase and option agreements to Hailey as a package deal. (Tr. 281:5-9).

Boden claimed, implausibly, that he was not even aware, when he gave the option agreement to Hailey, that it listed Willow Run Investments as the purchaser of the option, and that he had no idea why Harrison did this. (Tr. 278:4-279:7). Boden said that his goal was to try to find a developer to buy an option to purchase Glawson from Hailey, because he believed that this would make it more likely that Hailey would agree to purchase the property. (Tr. 276:14-278:3). Boden's story regarding the option agreement makes little sense. If the property increased in value, the option agreement would limit Hailey's upside; if it declined, the option holder would not exercise the option. How the option agreement would encourage Hailey to purchase the Glawson property is a mystery.

Boden also claimed that he never asked Harrison to prepare an assignment of the option agreement, and that Harrison prepared the assignment and a document related to it without being asked to do so, for reasons that Boden does not understand. (Tr. 278:4-15). The notion that Harrison would prepare an assignment document on his own, and that he would decide, for example, what the purchase price should be for the assignment, is highly implausible. Harrison, for his part, contended that he prepared the assignment documents as a result of an understanding of what Boden told him about the structure of the transaction. (Tr. 705:10-706:9).

Harrison testified that he inserted Willow Run Investments in the option agreement and the assignment as a "placeholder," with the expectation that when Boden identified a party to be the actual option holder, that party could assume control and ownership of Willow Run Investments and use it as the option-holding vehicle. (Tr. 710:21-713:13). Harrison's claim that he made Willow Run Investments the option holder on the assumption that a developer would want to use the entity to buy an option is unconvincing. In addition, Harrison's explanation fails to account for why his name and contact information appear repeatedly throughout the option agreement and the agreement to assign the option. (Div. Exs. 155a-d). Boden's and Harrison's attempts to explain away the damaging evidence are simply not credible.

That Boden would want to sell Glawson out of the New Forestry portfolio, and obtain an option for TVP or another Timbervest-controlled entity to acquire it, is not surprising. Glawson was the source of numerous personal and business benefits for the Respondents (i.e., timber tours, recreation, hunting, entertaining, networking, etc., all within reasonable driving distance of Atlanta). (See Div. Exs. 163-167, 168-169, 179-180). BellSouth had mandated a major sell-down of the New Forestry portfolio. (Tr. 2038:10-13). If the Respondents moved Glawson to an entity over which Timbervest exercised full control outside the strictures imposed by ERISA, they could then better control when—if ever—it would be marketed and sold, and they could do as they pleased on the property (such as build a hunting lodge) without BellSouth or ORG looking over their shoulder.

Any realistic possibility of Timbervest acquiring the Glawson property from New Forestry, however, ended on June 27, 2006, when Kirk M. McAlpin, Jr., the lawyer for a land broker named R. Zachry Thwaite ("Thwaite") and Greer & Thwaite Properties, Inc. ("G&T"), sent a letter to Timbervest's lawyers accusing New Forestry of trying to effect a transfer of the Glawson property to Willow Run Investments for their personal benefit. (Div. Ex. 152, p. 2).

Thwaite had been involved in a fee dispute with Timbervest relating to the Glawson property. Thwaite had a written agreement from New Forestry, executed by former Timbervest CEO Robert Chambers, for the payment of a fee to him upon the sale of Glawson. (Tr. 371:24-375:1; Div. Ex. 152, p. 2). Thwaite had placed a lien on the Glawson property, and Timbervest sued Thwaite in Fulton County Superior Court for filing the lien. Hailey and Thwaite were friends, and Hailey, knowing that Thwaite had a disputed commission agreement regarding Glawson, kept Thwaite informed about Boden's proposal relating to the property. (873:9-874:22).

On June 27, 2006, McAlpin wrote a letter notifying Timbervest's lawyers that he intended to file an abusive litigation claim against New Forestry. In the letter, McAlpin stated:

> G&T has been informed that New Forestry has been attempting to sell the Property. Based on documents that we have seen and statements that have been made in connection therewith, it appears that New Forestry is attempting to sell the property at less than fair market value yet also requiring any potential purchaser to execute an option to sell the property to Willow Run Investments which appears to be owned or controlled by New Forestry executives and relatives. The net effect would appear to be that Willow Run Investments could purchase the property at less than fair market value, while creating the appearance of an arm's length transaction to a third party.

(Div. Ex. 152, p. 2). After receiving that letter, it appears that Respondents ceased their efforts to sell and repurchase the Glawson property. But Respondents then proceeded to *treat* Glawson as though it was their own, constructing a hunting lodge on the property without consulting AT&T, holding an annual dove hunt on the property for friends and business associates, and awarding themselves a free hunting lease on the property. The activities were incompatible with their fiduciary role obligations to BellSouth/AT&T. (See Div. Exs. 163-167, 168-169, 179-180).

F. The Respondents Engaged in a Scheme to Misappropriate $1,156,236.25 in Bogus Brokerage Fees from New Forestry

The Respondents caused New Forestry to pay real estate commissions totaling $1,156,236.25 to two separate shell companies owned by Harrison in connection with the sale of two New Forestry properties and falsely described the LLCs that received these fees as brokerage agents or real estate advisers in the New Forestry sales contracts. For both of the sales from which the Respondents misappropriated funds, the commission payments took a deliberately circuitous path to Boden, and, upon receiving the funds, Boden shared them equally with his three partners.

The Respondents have acknowledged that the payment of real estate commissions to a principal of Timbervest in connection with the sale of New Forestry property was a conflict of interest. (Tr. 1324:10-20). The Respondents claim, however, that they disclosed the conflict and obtained consent from Ed Schwartz of ORG, as an authorized agent of the client, to pay the commissions to Boden. As demonstrated below, the Respondents' claim is without merit.

1. **The Respondents Took Elaborate Steps to Conceal that They Were the Recipients of the Real Estate Commissions**

There was no disclosure to ORG of the payment of the commissions to Boden. In fact, the Respondents, assisted by Harrison, took elaborate steps to conceal the ultimate recipients of the real estate commissions. In preparation for the receipt of the commission payments that were misappropriated by the Timbervest partners, Harrison formed separate Georgia limited liability companies ("LLCs"). (Tr. 370:13-16; 584:16-586:1). Harrison established himself as the owner and sole member of these LLCs; neither Boden nor any of his partners had membership or any other legal relationship with the entities. (Tr. 602:17-604:10). For the business addresses of each LLC on the organizational documents, Harrison used post office boxes that he had rented at different private mailbox stores in separate locations. (Tr. 616:9-20).

The Respondents inserted the names of the LLCs in the relevant purchase agreements, along with acknowledgments that New Forestry would pay these supposed third party brokers a percentage of the sales proceeds in consideration for services that they ostensibly performed.

At each property closing, the escrow agent issued a check to the particular LLC. Boden delivered the checks to Harrison, and Harrison deposited them in his Interest on Lawyers Trust Account ("IOLTA"). (Tr. 625:14-19). Harrison retained 10% of the commissions and sent the other 90% to Boden in the form of checks payable to WAB, Inc., a corporation that Boden had established for various business dealings. (Res. Ex. 133). Boden wrote checks on his WAB, Inc. account to each of Shapiro, Zell, and Jones for one-quarter of the amount of the checks Harrison sent him. (Id.) Finally, Boden obtained cashier's checks for his partners' share and handed them out. (Tr. 292:16-293:6).

a. **The Respondents Caused New Forestry to Pay $470,475 in Fees to Fairfax Realty Advisors**

The first LLC that Harrison established to receive a real estate commission was Fairfax Realty Advisors, LLC ("Fairfax Realty Advisors"), established on June 15, 2006. (Div. Ex. 1a). Harrison rented a post office box at a UPS Store in Atlanta to serve as Fairfax Realty Advisors' address. (Tr. 616:9-24; Div. Ex. 1h).

On July 7, 2006, Wooddall sent Boden a contract for the sale of New Forestry's Tenneco property in Alabama to Plantation Land and Management, LLC ("Plantation Land and Management"), of which Wooddall was an owner, for $13,420,000. The draft contract specified that Fairfax Realty Advisors was to receive 3% of the gross sales price. (Div. Ex. 9 ¶ 20(d)). The draft contract was later superseded by one substituting Chen Timber, another company of which Wooddall was an owner, as the purchaser. (Tr. 809:17-810).

On September 15, 2006, Chen Timber and New Forestry executed a contract for the sale of Tenneco for $13,450,000. (Div. Ex. 10). The agreement stated:

> Seller and Purchaser acknowledge Fairfax Realty Advisors, LLC has acted as a brokerage agent on behalf of the Purchaser in this transaction. As a result of these efforts, Seller agrees to pay Fairfax Realty Advisors, LLC a real estate commission equal to three and one-half per cent (3.5%) of the gross sales price and that said commission shall be paid in full at the time of closing.

(Div. Ex. 10 ¶20(d)). The contract was executed by Shapiro on behalf of New Forestry. (Div. Ex. 10, p.12).

On October 17, 2006, upon the sale of Tenneco by New Forestry, the escrow agent issued a check to Fairfax Realty Advisors for $470,450 in brokerage commissions. (Tr. 284:10-15). Several days later, David Zell wrote a check to Fairfax Realty Advisors from New Forestry's account for $300 to make up for a shortfall in the amount paid. (Tr. 1569:7-1570:24).

Harrison deposited the checks for $470,750 in his IOLTA and sent a check for $423,675 to Boden made payable to WAB, Inc. Harrison retained $47,075 for his fee. (Tr. 287:14-20). Boden then shared the $423,675 equally with each of his partners, presenting them with cashier's checks. (Tr. 288:13-18). Boden's partners understood that the source of the funds that they received from Boden was the brokerage fee that Boden obtained from New Forestry in connection with the sale of Tenneco. (Tr. 293:7-14; 1312:20-1313:14; 1568:18-23; 1573:25-1574:7; 1827:18-1828:2).

b. The Respondents Caused New Forestry to Pay $685,486.25 in <u>Fees to Westfield Realty Partners</u>

On July 31, 2006, Harrison established Westfield Realty Partners, LLC ("Westfield Realty Partners") for purposes of receiving a real estate commission from New Forestry. (Tr.

585:24-586:4; Div. Ex. 2b). Harrison rented a post office box at a private mailbox store, Mail USA, and listed this as Westfield Realty Partners' business address on the entity's organizational documents. (Tr. 618:3-17).

On December 15, 2006, New Forestry entered into a contract for the sale of timberland in Kentucky (the "Kentucky Lands") to Resource Land Holdings, LLC for $25,135,000. (Tr. 300:24-301:24; 303:5-11). The contract provided that New Forestry would pay a real estate commission of 2.5% of the purchase price to Westfield Realty Partners. (Tr. 303:18-304:6).

The Kentucky Lands sale closed on April 3, 2007. (Div. Ex. 35). The escrow agent gave Boden a check payable to Westfield Realty Partners for $685,486.25. (Tr. 306:23-25; 307:24-308:2). As with the previous commission, the funds went from Boden to Harrison, from Harrison's IOLTA to Boden's WAB, Inc. account, then from the WAB, Inc. account to Boden's partners in the form of cashier's checks. (Tr. 307:24-309:19). Harrison retained $68,548.62 for his fee. (Tr. 309:5-7). Boden, Shapiro, Zell and Jones each got $154,234.40. (Tr. 309:12-19). Boden's partners understood that the checks represented a share of the commissions from the sale of the Kentucky lands. (Tr. 1312:20-1313:14; 1573:25-1574:7; 1827:18-1828:2).

c. **The Relevant Purchase Agreements Contained False and Misleading Statements Regarding the Commissions**

Three Harrison-controlled LLCs were inserted in the New Forestry purchase agreements as purported brokers or advisors. Two of these contracts resulted in sales (Tenneco and Kentucky Lands); one did not (Rocky Fork). Timbervest's insertion of the names of the Harrison LLCs, alone, which performed no services of any kind on behalf of New Forestry, is presumptive evidence of concealment. The fraud, however, went beyond simply using the names of the entities as the purported seller's broker. The contracts contained further statements regarding the role of the Harrison entities consistent with the intent to deceive. Boden acknowledged that he reviewed the agreements and acknowledged that these statements were false. But he contended—unpersuasively—that he must have simply failed to catch them in the review process. (Tr. 367:15-17; 368:17-19).

i. **Tenneco Agreements**

For example, both the July 2006 draft of the purchase agreement for Tenneco, in which Plantation Land and Management was to be the purchaser, and the September 15, 2006 executed purchase agreement between Chen Timber and New Forestry, contained identical acknowledgments that Fairfax Realty Advisors "has acted as a brokerage agent on behalf of the *Purchaser* in this transaction." (Tr. 173:3-7, Div. Ex. 10) (emphasis added). In truth, Fairfax Realty Advisors acted as a broker to no one, as it was just shell company. Boden, himself, conceded that he did not act a brokerage agent for the "Purchaser." (Tr. 173:3-7). Boden acknowledged that he reviewed the part of the contracts containing this representation, in that the language appeared in the same paragraph that specified the broker's commission rate. He had no explanation for why the misrepresentations appeared in the purchase agreements or why they survived his review.

ii. **Kentucky Lands**

The December 15, 2006 purchase agreement for the Kentucky Lands contained a section entitled "Brokers Fees" stating, in part: "Seller shall pay all advisory fees or real estate commissions equal to 2.5 percent of the purchase price due to Westfield Realty Partners LLC in connection with the formation, negotiation, and execution of the agreement and the subsequent sale of the property for services rendered." (Tr. 303:14-304:6). Boden testified that the agreement was drafted by the purchaser, and that he only supplied the information identifying Westfield Realty Partners and its fee rate. (Tr. 305:18-21).

Boden acknowledged that Westfield Realty Partners, too, was merely a shell company that peformed no services. (Tr. 303:14-305:21). He further acknowledged that he reviewed the paragraph containing the list of services purportedly performed by Westfield Realty Partners, which also specified the fee rate. (Tr. 304:15-19). Although he reviewed and signed the contract, Boden disclaimed responsibility for the false description of services provided by Westfield Realty Partners because he did not draft the agreement. (Tr. 305:2-9).

iii. Rocky Fork

On August 23, 2006, New Forestry entered into a purchase agreement to sell its Rocky Fork property in Tennessee to Scott Carswell for $39 million. (Tr. 350:23-351:18). The agreement was signed by Shapiro on behalf of New Forestry. (Tr. 351:20-24). Carswell later backed out of the sale. (Tr. 350:8-17).

The agreement stated, in part: "[I]t is understood and agreed that Woodson & Company, LLC ('Woodson') has acted as an advisor to *the parties* with respect to the transaction described in this agreement." (Tr. 352:3-7) (emphasis added). Boden conceded that Woodson & Company, a Harrison-owned shell company, performed no services, and he further acknowledged that he personally, did not act as an advisor to "the parties." (Tr. 352:14-354:12). Boden contended that he simply identified Woodson & Company and its rate to Carswell, and that Carswell was responsible for the language referring to "the parties." (Tr. 354:14-17).

The Division introduced documents, however, that belie Boden's claim and show that Timbervest was the source of the misleading language. (Div. Ex. 40). The documents were a series of revisions to a draft of the Rocky Fork contract, which, as the content makes apparent, are Timbervest's changes on behalf of New Forestry. (Id.). The documents contain the handwritten notation "CS to WB," which, Boden acknowledged, appeared to be writing by him that likely stood for "Carolyn Seabolt to William Boden." (Tr. 355:15-356:16). Reviewing purchase agreements was among Seabolt's responsibilities as counsel for Timbervest. (Tr. 356:10-12).

Among the revisions that were apparently proposed by Seabolt to Boden, presumably for submission to Carswell, were the following:

> Delete Section 13.3 regarding further assurances, rename Section 13.3 advisors and insert the following, Woodson & Company, LLC, advisor, has acted as an advisor to the parties in initiating, structuring, and closing this transaction, and as a result of these efforts, said advisor is to be paid an advisory fee at closing in the amount of 2 percent of purchase price, as defined in Section 2.2 of the agreement, which advisory fee shall be paid by seller from the gross proceeds at the time of closing.

(Tr. 358:18-359:12). Thus, it appears that Boden was involved in providing information to Carswell regarding both the services purportedly performed by Woodson & Company, including rendering advisory services to the "parties." It further appears the Boden had a hand in specifying the 2% commission rate—which is inconsistent with the Respondent's written representations to AT&T, which Boden verified (Tr. 92:12-23; 193:1-5), regarding the rate structure of of the purported oral agreement. Although apparently drafted by Seabolt, the content for these changes must have come from Boden, as the evidence shows Seabolt knew nothing about Woodson & Company or any of the other Harrison shell companies. (Tr. 2209:6-2010:14, Resp. Ex. 144).

d. Attempts By Boden and Harrison to Explain Away the Fee Scheme as a Plan to Protect Boden from Claims by Unknown Brokers Should be Rejected

Boden testified that the LLCs were used because he sought advice from Harrison about how to receive fees that he was expecting in connection with the sale of timberland because of concerns that unknown brokers might assert claims to his fees. (Tr. 369:9-370:6). Boden contended that his concerns were based on fee agreements by previous management that he learned about. The agreements cited by Boden included Thwaite's agreement with former Timbervest CEO Robert Chambers for the payment of a fee upon New Forestry's sale of the Glawson tract (Tr. 371:17-372:11), and another purported agreement with a broker in California. (Tr. 520:16-523:14).

That Boden would go to such elaborate lengths and expense to protect himself from unknown broker claims is not credible for variety of reasons. The Thwaite agreement had been reduced to writing, and the parties stipulated that, if Chambers testified, he would say that he placed a copy of it in Timbervest's files around the time it was executed and left it there. (Tr. 372:12-373:10). Regarding the California broker, Boden claimed that a letter he saw from the broker rasied his level of concern. The letter, however, appeared to be simply a description of the rates the broker would charge if New Forestry asked him to sell property or arranged a trade of property. (Tr. 520:16-523:14). Boden's claimed reliance on this letter and the Thwaite agreement as reasons he sought Harrison's assistance to protect his brokerage fees were unconvincing.

Furthermore, Boden had no explanation for purporting to be concerned that he would be subject to claims by unknown brokers, given that, under the scenarios that he hypothesized, New Forestry would have been the contracting party with any such brokers. (Tr. 370:7-16). Boden conceded that he could not point to a single example, despite his extensive experience in the real estate business, of a broker filing a claim against another broker based on promises that had been made to the aggrieved broker by the principal. (Tr. 370:21-371:6). In addition, Boden conceded that he never bothered to take the simple step of asking Chambers directly whether he had made any promises to other brokers to pay fees upon the sale of any of the eight southeastern properties. (Tr. 378:7-379:8).

What demonstrates most compellingly, however, that the payment structure implemented by Harrison and Boden was not established to protect Boden against unknown brokers, but rather to conceal the fee payments to Boden, is that it entailed the payment of brokerage fees to unregistered brokers in violation of state law. Both Harrison and Boden conceded that neither Fairfax Realty Advisors nor Westfield Realty Partners was licensed as a real estate broker in any state. (Tr. 385:13-16; 682:16-19).

Boden and Harrison were highly knowledgeable about the real estate industry and knew that Georgia and other states forbid the payment of brokerage fees to anyone other than a licensed broker. Boden was a licensed real estate salesman who sold commercial real estate for many years. Boden conceded that he knew that it was illegal for unlicensed brokers in Georgia and other states to collect brokerage fees. (Tr. 388:22-389:3). He knew that brokers needed to be licensed in the state where they were active. In Boden's words: "If the broker is expecting to earn a commission or it has listings or has activity in a state, for example, you know, Mississippi, they need to hold a Mississippi broker's license, that's my understanding." (Tr. 384:9-13).

He admitted, however, that he inserted entities in New Forestry purchase agreements that would be earning brokerage fees, knowing that they were unlicensed brokers. (Tr. 390:1-7; 387:14-388:13). Boden contended that it never occurred to him that this might be a problem.

(Tr. 388:22-389:6). Had Boden, indeed, been focused on protecting himself from unknown brokers, this serious flaw in the plan would have been obvious to him. Because his goal was simply to conceal the ultimate beneficiaries of the fees, and to make it appear that the fees were being paid to third party brokers, he was willing to overlook that the scheme entailed the use of unlicensed brokers. It would serve its purpose.

Harrison testified that he did nothing to determine whether the LLCs that he set up could legally receive real estate commissions in the relevant states. (Tr. 684:1-9). He acknowledged that the structure that he created could actually be a source of liability for Boden if the fees were deemed illegal brokerage fees. (Tr. 684:17-22).

Harrison has been practicing real estate law for most of his career. (Tr. 257:11-258:6; 580:22-581:5). The contention that he devised a payment structure using shell companies that he owned, which would violate state law by receiving brokerage commissions, to *protect* Boden from potential claims by actual, licensed brokers, is not credible. Nor is Harrison's claim that he never considered the pitfalls of paying real estate commissions to unlicensed brokers believable.

Each state in which the recipient of the brokerage fee might be subject to jurisdiction (in this case, Georgia, Alabama, and Kentucky, collectively) forbids the receipt of brokerage fees by anyone except a licensed broker. O.C.G.A. §43-40-30; Ala. Code § 34-27-30; Kentucky Revised Statute § 324.020. In fact, it is (and was) a criminal misdemeanor in Alabama and Kentucky for anyone except a licensed broker to receive a brokerage fee. Ala. Code § 34-27-11(a) ("Any person or corporation which violates any provision of this chapter commits a Class A misdemeanor and, on conviction, shall be punished accordingly"); Kentucky Revised Statute § 324.990(1) ("Any person engaging in real estate brokerage without a license shall be guilty of a Class A misdemeanor for a first offense and a Class D felony for any subsequent offenses").

The contention that Harrison and Boden settled on the structure employed as a way to protect Boden against potential claims by unknown brokers must be rejected. Both Harrison and Boden would have known that the payment of brokerage fees to entities not licensed as brokers in the states in which they were doing business would subject them sanctions. Moreover, they would have appreciated that the payment structure would render Boden much more vulnerable—not less—to any claims by licensed brokers.

Further, Harrison's testimony about his reasons for setting up separate entities, each with a different private mailbox address at a different location, and his reason for passing the funds through his IOLTA were unconvincing. Nor is Harrison's contention that he gave legal advice to Boden in a vacuum worthy of belief. (Tr. 586:6-587:8). Even the most minimally competent attorney would have asked basic questions, and would have quickly understood that the "payment structure" was totally inappropriate given Boden's fiduciary relationship with the payor of the fees. The Court should reject Harrison's contention that he took on legal work for Boden with blinders on, particularly in light of his close friendship with Boden.

Finally, the payments of $115,623.25 to Harrison are disproportionate to his efforts. They are, however, consistent with a reward for helping to conceal the real beneficiaries of the fee payments. The Division submits that a finding is warranted that the Harrison entities and the payment structure that he helped put in place were in furtherance of Boden's goal of creating the appearance of fee payments to legitimate third party brokers and concealing the receipt of the funds by Boden.

2. Shapiro Never Disclosed to Ed Schwartz of ORG the Payment of the Real Estate Commissions by New Forestry to Boden

As noted, the Respondents conceded that the payment of the commissions to Boden was a conflict of interest, but they claim that Shapiro disclosed the payments to Ed Schwartz of ORG, and that Schwartz consented to them. In his hearing testimony, however, Schwartz testified categorically that neither Shapiro nor anyone else ever informed him that Timbervest wanted to pay—or that it had paid—advisory fees or brokerage commissions out of New Forestry's assets to Boden. (Tr. 2063:3-9).

The only discussion regarding brokerage fees that Schwartz recalled having with Shapiro was a phone call in 2005, in which Shapiro asked how Schwartz would feel about Timbervest "bringing someone in" to work at Timbervest and paying brokerage commissions to that person for work done prior to his becoming an employee. (Tr. 2056:16-2057:2). Schwartz understood Shapiro to be talking about someone who was not already an employee. (Tr. 2057:13-16).

Schwartz testified that the arrangement that Shapiro seemed to be proposing posed an obvious conflict of interest. (Tr. 2057:3-12). Shapiro said nothing about any supposed agreement by which this hypothetical person was to be paid (Tr. 2057:22-25), including nothing about the duration of any agreement (Tr. 2058:1-3), or whether the possible fee payments would be paid in connection with particular properties. (Tr. 2058:15-20). Nor did Shapiro discuss with Schwartz the source of funds for the hypothetical payment of the brokerage commissions. (Tr. 2058:21-25). Shapiro told Schwartz nothing about the person who might be receiving the commissions (Tr. 2059:7-11), or what that person's responsibilities would be if employed by Timbervest. (Tr. 2059:1-5).

Schwartz recalled responding to Shapiro's scenario with two concerns: (1) that the client not be disadvantaged, meaning that New Forestry could not pay a double commission on the sale of any property (Tr. 2059:12-19); and (2) that he would want to run the scenario by legal counsel if it ever became anything more than hypothetical. (Tr. 2059:20-2060:2). Schwartz testified that he would need to do so to make sure that New Forestry would not be engaging in a prohibited transaction under ERISA. (Id.).

Schwartz said that if Shapiro had told him that Timbervest wanted to pay a commission to someone who was already a partner, Schwartz would "absolutely have said, 'No way,'" because that would pose a major conflict of interest, and because the Timbervest partners already received compensation through Timbervest's management fees. (Tr. 2060:8-21). Schwartz said that he did not mention the call with Shapiro to anyone at BellSouth or ORG because the conversation regarded a hypothetical scenario and Shapiro had made no concrete request that required approval. (Tr. 2060:25-2061:9).

Schwartz testified that if Shapiro had made an actual request to pay brokerage fees to an employee of Timbervest, several things would have to happen. First, ORG would need to get approval from legal counsel. Second, if there was a way to structure the compensation so that paying it was advantageous for BellSouth, ORG would have worked directly with the broker to negotiate the arrangement. Third, ORG would have overseen the entire sales process, removing Timbervest from the decision. (Tr. 2061:10-25). Schwartz also stated that any agreement to pay fees such as those Shapiro was proposing would have to be in writing, and that ORG would have disclosed the arrangement to BellSouth in writing. (Tr. 2062:1-11).

3. **The Absence of Documentation Corroborates Schwartz's Testimony that Respondents Did Not Disclose Boden's Receipt of Brokerage Fees**

If Respondents believed that Schwartz's consent to the payment of the fees to Boden was all that kept them from breaching their fiduciary duty, one would expect them to have documented their supposed disclosure in writing, and similarly, to have obtained written consent. Indeed, Jones testified that, as an attorney, it would have been his normal practice to make disclosures of this kind in writing. (Tr. 1329:9-1330:5). Jones conceded, however, that he was not aware of any written document that evidences the Respondents' supposed disclosure to Schwartz. (Id.). On two separate occasions, Boden received brokerage fees from New Forestry, and on both of those occasions he presented Shapiro, Zell, and Jones with large checks. Shapiro, Zell, and Jones do not dispute that they understood that the origin of these funds was their client, New Forestry. (Tr. 293:7-14; 1312:20-1313:14; 1568:18-23; 1573:25-1574:7; 1827:18-1828:2). That none of the individual Respondents, at any point, required the supposed disclosure to Schwartz be reduced to writing or otherwise documented defies credulity. The lack of documentation corroborates Schwartz's testimony that there was no disclosure, and supports the Division's contention that the Respondents decided to conceal, rather than disclose these fees, because obtaining client consent to the payment of these fees was not a viable option. The Respondents knew that no consent would be given, both because the Timbervest partners were already being compensated in the form of management fees and disposition fees, and because it would not be lawful for the client to consent to prohibited transactions under ERISA.

4. The Respondents Knew that New Forestry was Subject to ERISA and that Fee Payments to Principals were Prohibited Transactions Not Curable by Disclosure and Consent

As stated, one of the main reasons that the Respondents did not disclose the payment of the fees to Boden (or their subsequent sharing in the fees) is that fee payments to principals are prohibited by ERISA, and this prohibition is not affected by disclosure. (Tr. 2061:10-2062:11; See also Expert Report of Arthur Kohn, Div. Ex. 137, p. 18). Respondents have conceded that they understood that New Forestry was subject to ERISA. (Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20).

Barag's testimony demonstrated that Shapiro, Jones, and Zell all had knowledge of ERISA and its fiduciary requirements. (Tr. 1933:22-1936:5;1942:10-1943:1). In fact, Barag testified that, prior to leaving Timbervest, he had a conversation with Shapiro and Jones regarding compensation from ERISA-based accounts, where he explicitly told them that "you can't get compensation outside of the investment management agreement." (Tr. 1948:3-1949:2). The record supports an inference that ERISA's prohibition on payments to principals was among the reasons that the Respondents elected to conceal, rather than disclose, the true recipients of the brokerage fees.

5. Shapiro Never Made a Five-Year Oral Agreement to Pay Fees to Boden, as Respondents Claim

The Respondents claim the fees paid to Boden from Tenneco and the Kentucky Lands sales were made pursuant to a five-year oral agreement that Shapiro made, on behalf of New

Forestry, with Boden in 2002.[9] (Div. Ex. 127). According to the Respondents, the oral agreement provided that Boden would be paid a commission by New Forestry, based on a sliding scale of percentages from 2.5% to 4.0% depending on the sale price, for sales of New Forestry's eight largest properties in the Southeast. Further, they contended that, in order for Boden to earn a commission, the property had to sell for at least $5 million, and no other broker for the seller could be involved. Respondents claimed that the duration of the oral agreement was through December 31, 2007. (Div. Ex. 127). Shapiro contended that he made the five-year agreement when Boden started consulting for Timbervest (Tr. 1733:23-1734:19), and Jones testified that he was informed about the agreement shortly after he came to work for Timbervest. (Tr. 1314:23-1315:9; 1490:11-16). Zell claimed he was told about the agreement in 2002 when Boden was an independent contractor, but that he was not aware of the details. (Tr. 1536:18-22).

While Shapiro and Boden may have had discussions about fees from the sale of property, the facts show that the oral agreement described by Boden and Shapiro—including its five-year term, sliding scale of rates, and specified properties—never existed. Instead, the oral agreement was invented as an alibi for the misappropriation of client funds. The testimony of Boden and Shapiro regarding the supposed oral agreement, and the claims of Zell and Jones that they were informed about it are not credible.

The implausibility of the claimed oral agreement is manifest. Boden and Shapiro were experienced, sophisticated businessmen and Boden, as a licensed real estate salesman, would have appreciated the need to commit such a significant commission agreement to writing.

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9 The existence of such an agreement would not excuse the Respondents' breach of their fiduciary duty in paying undisclosed brokerage fees for their personal benefit. At most, it appears to be a basis for Respondents to argue that their breach of fiduciary duty was the result of mistake, rather than an intentional plan to misuse client assets.

Potential payouts under the supposed agreement were $3-4 million range. Respondents contend that it was to remain in effect for five years and that it had a rate scale and various other terms.

Other than the four interested Respondents in this proceeding, no one came forward on behalf of the Respondents to verify that such an agreement ever existed. Nor is there a shred of documentary evidence showing that the claimed oral agreement was ever made—no email, letter, memo, handwritten note, or anything of the kind. It is inconceivable that Boden and Shapiro would enter into a high value, long-term agreement with various terms and conditions without confirming the arrangement in writing or even writing down the terms. Equally implausible is that all writings relating to the agreement have vanished.

The one disinterested person who was in a position to know about the oral agreement—former Timbervest partner Jerry Barag—never heard of it. (Tr. 1931:20-25; 1932:21-1933:4). Barag began working at Timbervest in March of 2003, around the same as Zell (Tr. 1912:10-12; 1921:12-14), and left in December of 2004. (Tr. 1930:4). There is no reason why Zell and Jones would be informed of the supposed oral agreement but Barag would be kept in the dark. As Barag noted, it was not a big office (Tr. 1930:11-15), so it is reasonable to conclude that he would know about the supposed oral fee agreement between New Forestry and Boden if such an agreement existed. The Division submits that Barag, in contrast to the Respondents, was a highly reliable and credible witness with an impressive facility for recalling the details of his time at Timbervest.

In regard to any efforts to sell large parcels of New Forestry land (much less the majority of its Southeast portfolio) during the period that he was at Timbervest, Barag testified, "There were none." (Tr. 1930:5-1931:5). He further stated that he would have been aware of such efforts.[10] (Id.). Barag said that even though the BellSouth account was primarily handled by Zell, it "was not a big office" and Zell would confer with others on strategic issues related to the BellSouth portfolio. (Tr. 1930:11-21). In fact, Barag observed that Boden was only working on small-acreage, HBU land sales, not entire purchase units or major portions of them. (Tr. 1930:5-12; 1957:16-1958:14). Thus, Barag's knowledge and observations from his time at Timbervest are incompatible with the existence of claimed oral agreement.[11]

Shapiro's testimony about how he supposedly came to enter into the oral agreement with Boden was also not credible. Shapiro claimed that he engaged Boden as a consultant and entered into the oral agreement within weeks of Shapiro's showing up at Timbervest. (Tr. 1733:23-1734:19). Shapiro testified that at the time that he supposedly committed New Forestry to a five-year agreement involving the liquidation of its eight largest properties in the Southeast, he was in a 90- to 120-day unpaid trial period at Timbervest, after which he would decide whether he wished to remain as CEO. (Tr. 1700:9-20). Shapiro testified that he had no previous experience in the timberland industry. (Tr. 1694:19-21).

Shapiro further testified that when he began at Timbervest, BellSouth had requested property dispositions totaling either \$30 million or \$60 million within a year. (Tr. 1697:11-1698:8). Timbervest's management fees from New Forestry were based on the value of the

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10 The Repondents' justification for making the fee payments to Boden was the substantial, but uncompensated, efforts he supposedly made while a consultant to sell (or to position for sale) the eight largest properties in the southeast in New Forestry's portfolio. Given this justification, one might have expected to hear meaningful evidence from the Respondents and from disinterested witnesses about those efforts and to see documentary proof of them. No such evidence was offered by the Respondents, however, which corroborates Barag's recollection and belies the claimed five-year oral agreement between Shapiro and Boden.

11 Boden's claims that he spent 80% of his time between Fall 2002 and March 2004 working to sell the eight largest properties of New Forestry's properties in the Southeast is not credible given Barag's testimony. (See Tr. 92:24-93:5).

assets under management. Shapiro had no explanation for why he would have entered into an agreement with Boden to sell off the bulk of New Forestry's southeastern timberland—which he acknowledged was valued in excess of $100 million—in view of Bellsouth's request. This would have had the effect of reducing Timbervest's management fees for no reason. Nor did he have a good answer for why he would have made an agreement lasting five years given that BellSouth's disposition request was to be fulfilled within one year.

The Respondents contend that there was no discussion whatsoever of the continued viability of Boden's supposed oral fee agreement when Boden went from being a consultant for Timbervest to being an owner in March of 2004. (Tr. 1771:16-1772:8; 1772:22-1773:11). Instead, the Respondents claim to have understood, without the need for any communication, that the oral fee agreement survived Boden's move to the owner category. (Id.). These claims are farfetched, especially in view of each of the Respondent's acknowledged understanding that Timbervest was subject to ERISA in managing the assets of New Forestry.

Finally, there are discrepancies between what Respondents contend was the rate scale and what appears in some of the agreements. The variation in the rates is consistent with the Division's contention that the five-year oral agreement is a fiction, and that the commission rates inserted in the contracts were determined willy-nilly. They also serve to illustrate why the terms of such an agreement between sophisticated parties would have been reduced to a written agreement if such an agreement had ever been made.

Specifically, the July 2006 draft of the Tenneco purchase agreement specified that Fairfax Realty Advisors was to receive 3% of the sales proceeds, and this changed to 3.5% in the agreement executed with Chen Timber. (Tr. 174:1-5). Boden attributed the 3% rate in the initial draft of the purchase agreement to a "clerical error." (Tr. 192:22-193:13). In addition, the

December 15, 2006 draft of the Rocky Fork purchase agreement states that that Woodson & Company would receive 2% of $39 million in sales proceeds. (Div. Ex. 39, § 11.3). According to Shapiro's June 4, 2012 letter to Ranlett, however, the rate ought to have been 2.5%, given that sale was for more than $20 million. (Div. Ex. 127). The Respondents cannot credibly claim that this was an error by the would-be purchaser that escaped their attention, as the 2% rate appears to have been inserted at Timbervest's request. (See Div. Ex. 40).

6. Even Accepting Shapiro's Testimony Regarding his Conversation with Schwartz Regarding Fees, Shapiro's Disclosure was Woefully Inadequate

Even if Shapiro's testimony about his conversation with Schwartz regarding the payment of brokerage fees to Boden is accepted, no one could reasonably conclude from Shapiro's testimony that he made adequate disclosure or that he obtained consent to pay brokerage commissions to Boden. Shapiro testified that he told Schwartz that Boden was being paid an advisory fee "to help maximize value on the core southeastern properties" (Tr. 1779:5-6) and that the fee would be paid as long as there was not a second fee or commission paid by New Forestry. (Tr. 1779:9-10). Shapiro actually could not recall Schwartz's response. (Tr. 1779:19-21). His best recollection was that Schwartz had *no* response. (Tr. 1779:23-24). At the hearing, Shapiro was asked whether he inferred from Schwartz's silence that he was "fine" with New Forestry's paying commissions to Boden. (Tr. 1788:15-18). Shapiro responded, "[W]hatever was said, I believe he said—whatever it was, I walked away believing it was fine." (Tr. 1788:22-24). When asked what his basis was for that belief, Shapiro responded: "I don't recall."

(Tr. 1789:1-3). Thus, even accepting Shapiro's testimony, there is no colorable argument that ORG consented to the payment of fees to Boden. (Tr. 1776:11-1780:11).[12]

In addition, Shapiro never even claimed to have identified to Schwartz the actual properties to which a purported fee arrangement with Boden was supposed to have applied, the duration of the supposed fee arrangement, the amount of the fees, or the other conditions of the supposed fee arrangement. (Tr. 1780:1-11). Nor do any of the Respondents contend that they ever disclosed the actual fee payments arising from the sale of Tenneco and the Kentucky lands to ORG or to the client.

G. Timbervest Demonstrated a Cavalier Attitude Toward Its Fiduciary Duties By Its Use of the Glawson Property

Evidence developed at trial regarding Respondents' use of the Glawson property demonstrates their cavalier attitude toward their fiduciary duties. Ranlett testified that, after AT&T terminated Timbervest and hired new managers, he learned from one of the new managers that a large structure had been built on the Glawson property, and that he had obtained photographs. (Tr. 1145:7-10; 1155:3-24). The structure appeared to Ranlett to be a hunting lodge. (Id.). Ranlett did not know about the construction of the building, and had no idea who paid for it or what the cost was. (Tr. 155:3-24). As it turned out, it was built with New Forestry's money. (Tr. 1877:17-22).

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12 Shapiro testified that "Mr. Schwartz has on no less than six or eight occasions, in front of mutual clients and to several people, said it was fine, and he said it was fine then." (Tr. 1786:7-10). The Respondents produced no witnesses who testified that Schwartz said the payment of real estate commissions by New Forestry to Boden was "fine." Because such evidence would obviously be of great significance, it can reasonably be concluded from the Respondents' failure to call such witnesses that no such witnesses exist, and that Shapiro lacks credibility.

The structure had multiple rooms, a kitchen, and a stone fireplace on the upper floor; the ground floor was a large unfinished area where vehicles and equipment were kept.[13] Timbervest had also constructed an entrance gate to the Glawson property with signage for "Alcovy Rise Plantation." (Tr. 1891:3-12). Shapiro acknowledged that Timbervest did not confer with, or seek approval from, AT&T before constructing the lodge. (Tr. 1878:20-23).

Undermining Shapiro's claims that Timbervest had only the client's interests in mind is the undisputed evidence that, around the time that Timbervest built the hunting lodge: (1) Timbervest formed a hunting club ("Alcovy Hunt Club") comprised of Timbervest employees and their families (Tr. 1894:12-1898:21); (2) Timbervest cancelled a revenue-generating hunting lease and awarded Alcovy Hunt Club a free one (Tr. 1898:9-15; 1900:15-1901:4; Div. Ex. 165); (3) Timbervest began holding annual dove hunts at Glawson, to which it invited prominent members of the Atlanta business community (Tr. 1902:25-1905:8); and (4) Timbervest began using Glawson to promote commingled timber funds that it was launching by conducting "timber tours." (Tr. 1880:8-1881:24; 1905:9-1906:7).

Timbervest informed AT&T about none of these seemingly self-serving activities, indicating, at a minimum, a casual view of its role as a fiduciary. (Tr. 1875:18-20; 1878:20-23; 1884:4-8). As Ranlett stated: "[A]s a fiduciary, they have to act in our interests, not in their own interests. And to build a cabin and use it for their, you know, entertaining, I mean, that's way out of line." (Tr. 1156:7-11).

New Forestry relied on Timbervest, as its manager, to determine the best time to sell the property in order to realize the highest return. The various activities for which the Respondents

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[13] Counsel for Timbervest made the suggestion to Ranlett that the structure was "essentially a garage with some additional space above," which Ranlett immediately rejected. The photographs introduced in evidence speak for themselves. (Tr. 1210:6-8; Div. Ex. 163).

used the Glawson property, however, benefitted them personally and represented undisclosed conflicts of interest. Shapiro conceded that he knew of no formal marketing efforts by Timbervest to sell Glawson—such as listing it with a broker—from the time the improvements began in 2008[14] right through Timbervest's termination by AT&T. (Tr. 2267:16-2269:13). This raises the obvious question of whether the Respondents grew too fond of the property and the benefits that it offered them to act objectively in the client's best interest. The Respondents failure to disclose the construction of the lodge and the uses that they were making of the property brings the conflict-of-interest issues into sharp relief.

Shapiro suggested that the annual dove hunts at Glawson were actually a kind of marketing efforts. (Tr. 1904:1-3). The invitations to the dove hunt, however, which called on the invitees to "attend this year's dove shoot scheduled for opening day at our farm in Covington" (Tr. 2273:20-2274:11), do not appear to be consistent with any marketing effort. The dove hunts appeared, instead, to be a networking opportunity for the Respondents "to advance their position in Atlanta society," in Ranlett's words. (Tr. 1145:9-10). In addition, Timbervest's failure to list the property for sale either directly or through a broker at any point after spending considerable funds of New Forestry to make improvements makes Shapiro's claim especially dubious.

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[14] The Division demonstrated that by January of 2008, Timbervest's Investment Committee, in-cluding all four partners, had decided to manage Glawson "as a tour demonstration area and possible bird hunting preserve." (Tr. 1880:8-23). How managing the property as a "tour demonstration area" could ever be in New Forestry's interest, rather than Timbervest's, is not clear.

V. LEGAL ANALYSIS

A. The Legal Standard for Violations of Section 206 of the Advisers Act and for Aiding, Abetting, and Causing Such Violations

The Division alleges that Timbervest violated the antifraud provisions – Sections 206(1) and 206(2) – of the Advisers Act by failing to disclose to BellSouth/AT&T the conflicts of interest presented by the repurchase of Tenneco and the collection of fees by Boden. The Division also alleges that Boden, Shapiro, Jones and Zell aided, abetted, or caused Timbervest's violations. Section 206 provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly –
>
> > (1) to employ any device, scheme or artifice to defraud any client; and
> >
> > (2) 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), (2). As noted by the Supreme Court in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), conflicts of interest were a primary concern behind the promulgation of the Advisers Act:

> The report [that culminated in the Advisers Act] reflects the attitude – shared by investment advisers and the Commission – that investment advisers could not 'completely perform their basic function – furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments – **unless all conflicts of interest between the investment counsel and the client were removed.**'

375 U.S. 187-88 (emphasis added) (footnotes omitted). The Supreme Court emphasized that the conflicts that come within the ambit of the Advisers Act include any financial benefit to the adviser other than the fee from his client:

> This concern was not limited to deliberate or conscious impediments to objectivity. Both the advisers and the Commission were well aware that whenever advice to a client might result in financial benefit to the adviser – other than the fee for his advice – 'that advice to a client might in some way be tinged with that pecuniary interest (whether consciously or) subconsciously motivated . . . .'
>
> * * *
>
> The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a **congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested.**

375 U.S. 187-92 (emphasis added) (footnotes omitted). Accordingly, any financial benefit to the advisor apart from its fees presents a conflict – irrespective of why the benefit was purportedly conferred – because such a financial incentive tends to taint the advisor's objectivity and judgment.

Section 206 was thus enacted to benefit the clients of investment advisers. <u>Transamerica Mortgage Advisers, Inc. v. Lewis</u>, 444 U.S. 11, 17 (1979). To that end, "section 206 established 'federal fiduciary standards' to govern the conduct of investment advisers." <u>Id</u>. at 17. As part of these fiduciary standards, the Supreme Court has interpreted the Advisers Act to require the investment adviser to disclose all conflicts of interest which might incline it to consciously or unconsciously render advice which is not disinterested. It has imposed upon the investment adviser "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,'" as well as an affirmative obligation to employ reasonable care to avoid misleading its clients. Capital Gains Research, 375 U.S. at 189–192, 194.

The standard for materiality under Section 206 is that set forth by the Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976): "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important" when making an investment decision. Steadman v. SEC, 603 F.2d 1126, 1130 (5th Cir. 1979), *aff'd.*, 450 U.S. 91 (1981).

Violations of Section 206(1) require scienter. Steadman, 603 F.2d at 1134. When demonstrating scienter, the Division must show that Respondents knew or were reckless in not knowing that they failed to disclose material information to their clients and the investing public. In the Matter of IMS/CPAS & Associates, et al., Admin. Rel. No. 119, 1998 WL 7448 (Jan. 12, 1998), citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976) and Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569-70 (9th Cir. 1990) (en banc); see also Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1282 (11th Cir. 1999) (confirming "extreme recklessness" satisfies scienter in the 11th Circuit). With respect to scienter, Timbervest could take no meaningful actions except those which were dictated by Boden, Shapiro, Jones, and Zell. Accordingly, their scienter is imputed to the firm. SEC v. North American R. & D. Corp., 424 F.2d 63, 79 (2d Cir. 1970); see also SEC v. Manor Nursing Ctrs. Inc., 458 F.2d 1082, 1089 n.3 (2d Cir. 1972). Section 206(2) does not require a showing of scienter. Capital Gains Research, 375 U.S. at 195.

To establish that Boden, Shapiro, Jones and Zell aided, abetted, or caused Timbervest's violations of Section 206 of the Advisers Act, the Division must show that: (1) another party violated the statute, (2) the alleged aider and abettor has a general awareness that his role was part of an overall activity that was improper, and (3) the alleged aider and abettor knowingly and substantially assisted the principal violation. SEC v. Grendys, 840 F.Supp.2d 36, 45 (D.D.C. 2012); see also Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir. 1980). Recklessness satisfies the knowledge or awareness requirement when the alleged aider and abettor is a fiduciary. SEC v. Lybrand, 200 F.Supp.2d 384, 400 (S.D.N.Y.2002). "[Recklessness] may be found if the alleged aider and abettor encountered red flags or suspicious events creating reasons for doubt that should have alerted him to the improper conduct of the primary violator, or if there was a danger so obvious that the actor must have been aware of the danger." Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004)(internal quotations and citations omitted). Negligence is sufficient to establish liability for causing a violation if the primary violation does not require a showing of scienter. Howard, 376 F.3d at 1143.; see also In re KPMG Peat Marwick LLP, Release No. 34-43862, 2001 WL 47245 *19 (Jan. 19, 2001).

B. Failure to Disclose the Cross Trade of the Tenneco Property from New Forestry to TVP

Timbervest violated Section 206(1) and (2) by failing to disclose to BellSouth/AT&T its efforts to repurchase Tenneco on behalf of another fund in which the principals had a pecuniary interest. As the individuals responsible for this and all other acquisition and disposition activity, each of the individual Respondents knowingly aided, abetted, or caused Timbervest's violation.

The facts show that this transaction was a cross trade, rather than two independently negotiated transactions, as Respondents suggest. Most tellingly, Wooddall testified that Boden offered to sell the property to Chen Timber and repurchase it at a higher price on behalf of another Timbervest Fund within six months. (Tr. 760:5-762:3; 769:25-770:5). He also testified that the repurchase price had been agreed upon before the first contract to acquire the property from New Forestry was signed on September 15, 2006. Boden provided a sworn statement saying neither he, nor anyone else at Timbervest remembers how this repurchase came about. (Tr. 181:23-184:13; Div. Ex. 156a, ¶7). He also testified that he could not rule out the possibility that his conversations with Wooddall about repurchasing the Tenneco property began before Chen Timber closed on the Tenneco property. (Tr. 184:14-21) The other three principals testified that they had no direct knowledge of Boden's negotiations with Wooddall and cannot recall how they became aware that TVP was going to repurchase Tenneco. (Tr. 1254:23-1255:6; 1478:7-1479:7; 1561:10-15; 1640:7-19; 2256:13-2257:4).

Boden's refusal to reduce the repurchase terms to an enforceable written contract reflects his understanding that such a document would provide stark evidence of Timbervest's intent to violate ERISA and breach its fiduciary duty to New Forestry. Boden apparently learned this lesson when the purchase agreement and option contract which he provided to Reid Hailey led to accusations against Timbervest's owners in June 2006 of trying to acquire another property owned by New Forestry for themselves at a favorable price. (See Div. Ex. 152, p. 2). Likewise, Boden's misrepresentations to Wooddall regarding why he could not memorialize the repurchase agreement (i.e., telling him that the fund had not raised enough money, when TVP was already fully subscribed) supports the inference that he was aware of the wrongfulness of the conduct.

The evidence also indicates that Shapiro, Jones, and Zell, despite their implausible denials, were complicit in the cross trade of Tenneco. Each of the Respondents approved the sale and the nearly immediate repurchase of Tenneco property for $1 million more, but, conveniently, they have no recollection of how or exactly when the discussions to repurchase Tenneco began. There is credible evidence to suggest, however, that Shapiro, Jones, and Zell did in fact know that the repurchase was prearranged.

First, Timbervest admitted that Boden could not have acted independently, since all acquisition and disposition decisions are unanimously approved by the Investment Committee. (Div. Ex. 128, p. 13). All of the Respondents agree, and have testified that they approved the transaction. Boden clearly possessed actual knowledge of the repurchase agreement when he brought the repurchase to the Investment Committee. No one has indicated that they believe Boden lied to them about the parameters of the deal. It is therefore reasonable to conclude that everyone was aware of the repurchase agreement and that they are now feigning ignorance.

Second, Shapiro, Jones, and Zell possessed sufficient knowledge of ERISA and its fiduciary requirements that it is inconceivable that the deal raised no red flags for them, as they claim. Barag testified that he had discussions about ERISA's prohibition on cross trades with all three men in 2004 when Timbervest considered populating the new REIT with properties from New Forestry's portfolio. (Tr. 1933:22-1936:5). He also testified that they understood the issues that such a proposal raised, and that Zell in particular was resolutely against broaching the subject with BellSouth because it indicated that Timbervest was more interested in acquiring BellSouth's assets than in maximizing performance. (Tr. 1936:22-1937:15). Barag also noted that he had worked with Zell on ERISA-related matters (Tr. 1940:24-1941:25), and stated that ERISA was a topic that came up often in the course of managing New Forestry's business. (Tr. 1942:10-1943:1). Finally, Barag testified that he and Jones had several conversations about ERISA and that Jones was knowledgeable about such things. (Tr. 1943:9-14). The Respondents' claims that they were unaware of the ERISA issues implicated in the Tenneco repurchase in simply not credible given Barag's credible testimony about their knowledge of ERISA and awareness of their fiduciary responsibilities.

Finally, the Respondents' scienter is demonstrated by contemporaneous documents which fail to disclose, and even attempt to conceal the repurchase arrangement. As discussed above, Timbervest provided self-serving and contradictory descriptions of the property to New Forestry and the investors in TVP. Moreover, in a disposition report emailed by Jones and copied to Shapiro, Timbervest falsely informed ORG that Tenneco, contrary to Wooddall's testimony, had been sold to Chen Timber based on an "unsolicited" offer. (Div. Ex. 16). When discussing the history of the property in its Spec Book, drafts of which were reviewed by Zell and forwarded to Shapiro, Timbervest gave no indication that Chen Timber had owned the property for approximately two months or that the previous owner was a single client account managed by Timbervest. (Div. Exs. 162, 175, and 176).

The agreement to repurchase the property placed Timbervest on both sides of the transaction and created a material conflict of interest for Timbervest which it failed to disclose to either BellSouth/AT&T or to the investors in TVP. (Tr. 229:2-5; 982:23-984:23; 1041:7-14; 2070:3-2071:10; Div. Exs. 31a, 31b, 62). Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003) ("It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission"). Indeed, Jones acknowledged that a prearranged deal like the one Wooddall described created conflicts of interest so great that the transaction likely would never be attempted in a legitimate fashion, noting, "[O]ur objective when we sell a property is to sell it for more than what we're carrying it at and to achieve some benefit for the client on the sale, while on the other side, our objective is always to buy at a discount of what we think the fair value of that property is. And there's really no way to marry up those two goals if you were to have a transaction between two parties such as New Forestry and Timbervest Partners." (Tr. 1489:11-23). The Division agrees, and the evidence demonstrates that this is precisely the reason the property was sold to a middleman before being moved into TVP, with the knowledge of all four principals.

It is clear from the record that Boden, on behalf of Timbervest, and Wooddall, on behalf of Chen Timber, reached an understanding about the sale and repurchase of Tenneco at the outset, and that Boden and his partners then took actions that were fully consistent with that understanding. It is also clear that the repurchase by TVP was never disclosed to BellSouth/AT&T and that the prior ownership by New Forestry was disclosed to the investors of TVP. That the clients would have never agreed to such a cross trade underscores the reasons that Timbervest concealed the deal. Assuming *arguendo*, that the Shapiro, Jones, and Zell did not know the details of Boden's proposal to Wooddall to repurchase the land, their knowledge of ERISA was substantial enough, and the red flags (i.e., the compressed timeframe, the million-dollar price difference, the contradictory statements to investors, etc.) were sufficiently abundant, that they were at least extremely reckless in not spotting the issue and disclosing the conflict to their clients. As such, Timbervest violated Sections 206(1) and (2) of the Advisers Act and each of the individual Respondents aided, abetted, or caused Timbervest's violations.

C. By Failing to Disclose the Unauthorized Brokerage Commissions Paid to Boden and Subsequently Split Amongst the Partners, Timbervest Violated Section 206 of the Advisers Act, and Boden, Shapiro, Jones, and Zell Aided, Abetted or Caused Timbervest's Violation

Timbervest also violated Sections 206(1) and (2) by failing to disclose to BellSouth/AT&T the conflicts associated with Boden's unauthorized receipt (and subsequent splitting) of real estate commissions earned on the sale of the Alabama and Kentucky properties. As the sole principals of the firm with total control over all acquisitions and dispositions, and as the recipients of the undisclosed and unlawful payments, the four principals aided and abetted Timbervest's violations.

Timbervest's potential conflicts of interest in the collection of Boden's fees were material facts with respect to its clients. Vernazza, 327 F.3d at 859. Indeed the representatives and agents of BellSouth/AT&T who testified at the hearing indicated that they would have wanted to know about the payments to Boden at the time the transactions occurred. (Tr. 1040:1-1041:22; 2056:4-15; 2071:1-23). They also indicated that Timbervest's actions raised concerns about its commitment to the clients' best interests. (Tr. 1040:1-1041:22; 1152:17-1156:11; 2060:8-21; 2073:7-19). See Montford & Company, I.D. No. 457 at 14 (April 20, 2012) (relying on testimony of clients to determine materiality of omitted information). Finally, the significance of Timbervest's self-dealing in the eyes of its client is demonstrated by the fact that AT&T immediately terminated Timbervest upon discovering its misconduct and has been contemplating whether to file its own lawsuit against the firm.

The evidence presented at hearing shows a high level of scienter on the part of each of the four principals with regard to the payment and sharing of the fees. Boden knowingly collected unauthorized fees in violation of ERISA and in breach of Timbervest's fiduciary duties to New Forestry. His scienter is established through his employment of Ralph Harrison, whom he retained at an exorbitant fee, for no other purpose than to create a convoluted payment structure which concealed the fact that he received the payments made to Fairfax and Westfield. The other Principals knowingly consented to the payment of the unauthorized fees to Boden, only to receive a share of the unlawful proceeds at a later date. Shapiro, Zell, and Jones each testified also that he knew, prior to the closing of each transaction, that Boden was going to be paid a fee in connection with the sale of New Forestry's assets. Each man also testified that, at the time they split the proceeds, he was aware that the funds were derived from the so-called "advisory fees" that Boden received from assisting with the transactions.

Their knowledge of ERISA, combined with their sharing of the illegally-obtained fees, supports the inference that Shapiro, Jones, and Zell joined Boden in a scheme to defraud BellSouth's pension plan of more than $1 million. At a minimum, given their knowledge of their fiduciary duties under the Advisers Act and under ERISA, the individual Respondents were extremely reckless in not obtaining ORG or AT&T's written consent regarding the conflict embedded in collecting the unauthorized fees.[15] This is especially true given that (1) Schwartz testified that he specifically told Shapiro that any real estate commissions received by an employee of Timbervest would need to be scrutinized to ensure compliance with ERISA, and (2) Barag testified that, prior to leaving Timbervest, he had a conversation with Shapiro and Jones regarding compensation from ERISA-based accounts, where he explicitly told them that "you can't get compensation outside of the investment management agreement." (Tr. 1948:3-1949:2).

Respondents all testified that they believed the fees were disclosed to Ed Schwartz at ORG. This testimony is implausible given (1) Ed Schwartz's credible testimony that the fees were never disclosed and that he never consented to them, (2) the laundering of the fees though Harrison's IOLTA account and shell LLCs that had no apparent connection to Boden, and (3) the complete absence of any documentation regarding the existence of the five-year agreement,

[15] Jones testified that, as an attorney, it would have been his normal course of conduct to put such disclosures in writing. However, he has no recollection of memorializing the disclosure to ORG and cannot locate any document which evidences such disclosure. (See Tr. 1329:9-1330:5)

Shapiro's alleged disclosure of it to ORG, or Jones's supposed instructions to Shapiro to disclose the conflict to ORG.[16]

The Division presented strong evidence of materiality and scienter in this case, and Respondents' defenses are based on implausible reconstructions and fatuous denials of the documents and of the testimony of other, more credible witnesses. Their conduct was intentional and contrived, or, at a minimum, reckless in the extreme. The Court should therefore find that Timbervest violated Section 206(1) as well as 206(2) of the Advisers Act and that the four principals aided and abetted the firm's violations.

VI. RELIEF REQUESTED

A. Cease-and-Desist Order

Section 203(k) of the Advisers Act authorizes the Commission to enter an order requiring any person that violated or is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing such violation and any future violation of the same provision, rule or regulation. While there must be "some" risk of future violations, that risk:

> need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.

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16 Even if Shapiro's testimony is deemed credible, the disclosure to ORG was inadequate because Shapiro did not tell Schwartz any of the details of the agreement or that a principal of the firm would be receiving commissions for the Alabama and Kentucky properties, but rather made generic statements that there might be commissions paid for unspecified properties. (Tr. 1756:19-1757:16)

KPMG Peat Marwick, LLP, 2001 WL 47245 at *24 (Jan. 19, 2001). When determining whether to impose a cease-and-desist order, the Court also should consider a range of factors, including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); see also In the Matter of Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976). No one criterion is dispositive.

Respondents' misconduct in this matter was clearly egregious. The misappropriation of pension funds by the investment manager appointed to be oversee and manage those such funds is undeniably a serious matter. Moreover, the fallout from Respondents' conduct, which is not limited to this proceeding, shows its egregiousness. The cross trading of property and the unlawful collection of brokerage commissions were explicitly prohibited by ERISA, and either act alone would have subjected Timbervest to (1) termination by AT&T, (2) regulatory action by the Department of Labor, (3) regulatory action by the Internal Revenue Service, (4) liability from AT&T, and (5) liability from the limited partners of TVP. Finally, Respondents' prohibited transactions have created uncertainty for AT&T, which, itself, owes a fiduciary duty to New Forestry.

The evidence presented at hearing also demonstrated that these were not isolated events that resulted in no harm to investors. A deliberate, or even reckless, breach of fiduciary duty to a client, however, is itself harmful. Moreover, the Respondents' breaches resulted in the misappropriation of at least $1.15 million in plan assets, and the Respondents were enriched by ill-gotten gains far exceeding this sum. That the Respondents made a strategic decision (with advice of counsel) to repay the unlawful commissions after getting caught—five years later—does not erase the harm done by the Respondents. Nor does it address the transition costs imposed on New Forestry as a result of having to obtain new investment managers who take their fiduciary obligations seriously, or the cost and disruption to AT&T and to the investors in TVP as a result of investigating Timbervest's violative conduct.

As shown in the discussions of scienter above, the Respondents acted with full knowledge of the unlawfulness of their conduct. Their experience and training, the operative fund documents detailing their responsibilities, and the calculated schemes employed to deny and conceal their actions all demonstrate this. Respondents' claim that they failed to recognize the wrongfulness of their conduct is not credible. In fact, the evidence shows that Respondents' acted deliberately, shirking their fiduciary responsibilities and engaging in knowing or reckless conduct that subjected themselves and their clients to economic loss and potential legal liability.

Finally, the evidence clearly shows that Respondents present a continuing risk to their current clients and to the investing public. Respondents' reckless attitude toward their fiduciary duties, and their refusal to acknowledge the seriousness of their misconduct, translate into a substantial risk of future violations. The evidence has shown that Respondents continue to operate with a cavalier attitude toward their fiduciary responsibilities, evidenced by their ongoing use New Forestry's Glawson property for personal benefits such as (1) constructing a hunting lodge on the property without consulting AT&T, (2) holding annual dove hunts on the property (which they refer to as "our farm") for friends, family, and business associates, (3) canceling income-producing hunting leases on the property, (4) granting themselves free hunting leases on the property, (5) using the tract as a dedicated "tour demonstration area" for potential (non-AT&T) investors, and (6) engaging in other activities that appear to be incompatible with their fiduciary role such as donating hunting excursions on the property to raise money for local private schools attended by their children. (See Div. Exs. 163-167, 168-169, 179-180)

It is also undisputed that they will have ample opportunities in the future to defraud their investors. The current timberland funds have a ten-year lifespan, and Jones testified that the most recent fund, TVP III, will not wind up until at least 2021, and possibly not until 2024. (Tr. 1377:3-1378:13). It is the intention of the Respondents to continue managing these funds until they wind up (Tr. 1379:19-23; 1850:9-13), and the investors in these funds have limited exit rights until the funds' lifecycles expire (Tr. 61:4-62:3), essentially guaranteeing that Respondents will remain in the advisory business for at least another decade. Furthermore, Jones testified that a new fund, TVP IV, had already been formed and Shapiro testified that Timbervest intends to launch new timberland and crossover funds in the future. (Tr. 1377:3-9; 1850:9-1851:5). Given their high degree of scienter and guile implicated in their misconduct, their disregard for the seriousness of their fiduciary duties, and their stated intent to continue managing and launching new funds for the foreseeable future, the opportunities for investor harm are abundant, and the likelihood of Respondents' engaging in future violative conduct is high. Accordingly, based upon the evidence presented at the hearing in this matter, the Court should order Respondents to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and (2) of the Advisers Act.

Respondents will likely contend that a cease-and-desist order is barred by the statute of limitations because such relief is punitive, rather than remedial. But the Commission and multiple courts have rejected this argument, concluding that cease-and-desist orders are remedial and thus not subject to the statute of limitations under 28 U.S.C. § 2462 ("Section 2462"). Riorden v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[A] cease-and-desist order is 'purely remedial and preventative' and not a 'penalty' or 'forfeiture.'") (internal citations omitted); John Carley et al., Release No. 34-57246, 2008 WL 268598 at *21 (Jan. 31, 2008) ("[R]emedial relief such as the imposition of a cease-and-desist order is not barred by the statute of limitations in Section 2462"); Herbert Moskowitz, Release No. 34-45609, 2002 WL 434524 at* 10 (Mar. 21, 2002) ("Cease-and-desist proceedings are remedial in nature and not subject to Section 2462").

B. Disgorgement and Prejudgment Interest

Section 203(j) of the Advisers Act allows the Commission to seek an order requiring disgorgement, including prejudgment interest, in administrative proceedings in which the Commission may impose a money penalty. The Commission may also seek disgorgement and prejudgment interest in the cease-and-desist proceedings pursuant to Section 203(k) of the Advisers Act. Disgorgement is an equitable remedy designed to deprive a wrongdoer of unjust enrichment and also to deter others. SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C.Cir. 1989). Disgorgement differs from restitution in that that restitution aims to make the damaged persons whole, while disgorgement aims to deter violations of the securities laws by depriving violators of their ill-gotten gains. SEC v. Bear, Stearns & Co. Inc., 626 F.Supp.2d 402, 406 (S.D.N.Y. 2009). Courts have broad discretion in determining whether to award disgorgement and in setting the amount. SEC v. Alanar, 2008 WL 1994854 at *4 (S.D.Ind. May 6, 2008); SEC v. Michel, 521 F.Supp.2d 795, 830 (N.D.Ill. 2007); SEC v. Collins, 2003 WL 21196236 *5 (N.D.Ill. May 21, 2003).

The SEC is required to show that the amount of disgorgement is a "reasonable approximation" of the profits the defendant reaped from the wrongful conduct. See First City Financial Corp., 890 F.2d at 1231; Zacharias v. SEC, 569 F.3d 458, 472-73 (D.C.Cir. 2009).

The burden then shifts to the Respondents to show that this approximation is inaccurate. Zacharias, 569 F.3d at 473 ("But the well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty."). Disgorgement of salaries and other forms of compensation may be an appropriate remedy. SEC v. Black, 2009 WL 1181480 (N.D.Ill. 2009) (former company CEO ordered to pay $3.8 million in disgorgement of compensation he received directly or indirectly from company in 2002 and 2003 on the theory that, if he had not covered up his fraudulent conduct, the company's board of directors would have promptly discharged him and discontinued any further compensation); SEC v. Koenig, 532 F.Supp.2d 987 (N.D.Ill. 2007) (CFO ordered to disgorge bonuses plus prejudgment interest for years in which company engaged in accounting fraud); SEC v. Church Extension of Church of God, Inc., 429 F.Supp.2d 1045, 1050 (S.D.Ind.2005) (ordering disgorgement of one-half of defendants' salaries for last year of entity's operations where entity would have collapsed earlier but for the securities violations); SEC v. Conaway, 2009 WL 902063 *20 (E.D.Mich. March 31, 2009). In this matter there are several methods for determining disgorgement.

1. Management Fees From New Forestry

First, the Respondents should not be permitted to keep their portion of the profits derived from managing the New Forestry account subsequent to committing the fraud.[17] ERISA imposes a strict responsibility on AT&T to oversee the pension assets contained in the New Forestry

[17] With the exception the unpaid prejudgment interest on Boden's commissions (discussed below), all Respondents should be held jointly and severally liable for all disgorgement amounts ordered. Timbervest was 100% owned by Boden, Shapiro, Jones, and Zell at the time of the misconduct, and the actions of the company are coextensive with those of its four principals. As such, there is no meaningful difference between the entity and its owners in this instance.

account. But for the concealment of the prohibited transactions, Timbervest certainly would have been terminated as soon as AT&T discovered the fraudulent conduct.[18] To permit the Respondents to retain such profits allows them to benefit from their elaborate efforts to avoid detection. All profits obtained by the Respondents from managing the New Forestry account after the commission of the fraud should therefore be disgorged and returned to the pension trusts.

The Division believes that the amount by which the Respondents profited from their management of the New Forestry account can be reasonably approximated using the distributions made annually to the partners. As these distributions represent pure profits paid directly into the partners' pockets, Respondents should be ordered to disgorge the portion of these distributions equal to the percentage paid by New Forestry of the overall management fees collected annually by Timbervest from the time of the fraud in 2006 until they were terminated in 2012.[19]

According to audited financial statements for the years 2006, 2007 and 2008, Timbervest collected management fees of approximately \$5.5 million, \$7.6 million, and \$12.9 million, respectively.[20] (Div. Exs. 71, 72). According to the notes in the same financial statements,

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18 As noted, AT&T did, in fact, terminate Timbervest approximately four months after first learning of the Respondents' misconduct.

19 AT&T did not pay Timbervest any management fees for the third quarter of 2012. (Tr. 1059:11-1060:4). This fact is reflected in the Division's disgorgement calculations, which estimates fees paid to Timbervest for only half of 2012. See Table 2.

20 New Forestry also paid a 3% disposition fee to Timbervest for land and timber sold at prices in excess of 90% of the internal carrying value. It is arguable that these fees should also be disgorged, since Respondents would have been terminated and therefore not been entitled to receive them, but for the concealment of their fraud. However, given the transactional nature of these fees, it is arguable that Respondents received these payments for bona fide services

revenues from the three BellSouth/AT&T pension funds constituted 46% of the investment management fees collected in 2006 (Ex. 71, page 14), 36% of total management fees in 2007, and 29% in 2008 (Ex. 72, page 10). The financial statements also indicate that Respondents received distributions in the amounts of approximately $2.8 million, $6.3 million, and $8.5 million, respectively. (Div. Exhs. 71 and 72). Assuming that the percentage of the partners' draw related to New Forestry is consistent with the percentage of the management fees paid to Timbervest by New Forestry, disgorgement can be calculated by multiplying the amount of the total distribution to the members by the percentage of fees paid by New Forestry:

provided. The Division is therefore not seeking disgorgement of all disposition fees (but see discussion below regarding disgorgement of disposition fees earned on the sale of the Alabama and Kentucky properties).

Table 2

Ref.	Description	Year 2006	Year 2007	Year 2008	Source
A	Total Management Fees Collected by Timbervest	$5,485,638	$7,581,000	$12,899,000	From Audited Financial Statements of Ironwood and Timbervest, LLC for the years ended December 2006 and 2008. (Exhs. 71 and 72).
B	Percentage of total investment management fees coming from New Forestry	46%	36%	29%	From Audited Financial Statements of Ironwood and Timbervest, LLC for the years ended December 2006 and 2008. (Exhs. 71 and 72).
C	Distributions to members	$2,816,339	$6,339,000	$8,478,000	From Audited Financial Statements of Timbervest, LLC and Subsidiaries for the years ended December 2006, 2007 and 2008. (Exhs. 71 and 72).
D	**Distributions to members from investment management fees collected from New Forestry**	**$1,295,516**	**$2,282,040**	**$2,458,620**	**D=C*B**
E	**Distribution to each member**	**$323,879**	**$570,510**	**$614,655**	**E=D/4**

As demonstrated in Table 2, 46% of the partners' draw in 2006 amounts to approximately $1.3 million, or approximately $324,000 per partner in disgorgeable fees. However, the Respondents fraud was not effectuated until the fourth quarter of 2006, so only one-fourth of these fees should be disgorged, or $323,879 (approximately $81,000 per partner). In 2007, 36% of the partners' draw equals approximately $2.3 million in disgorgement, or $571,000 per partner. For 2008, 29% of the partners' draw equals approximately $2.5 million, or $615,000 per partner. While the Division does not possess financial statements for Ironwood and Timbervest for 2009 through 2012, it reasonable to believe that the partners' draws relative to the fees paid by New Forestry were similar for those years (with the exception that fees were only paid for the first half of 2012), given that the management fees are calculated in large part based on the total value of the assets in New Forestry's portfolio, which has generally remained stable.[21] As such, the Division proposes that the court compute Respondents' disgorgement for 2009 through 2012 based on the average draw received between 2006 and 2008, or $2.01 million per year (approximately $503,000 per partner/per year).

Based on the foregoing, the profits related to the management of New Forestry which Respondents should disgorge equals $12,106,745, with prejudgment interest in the amount of $1,854,711, for a total of $13,961,456. See Table 3.[22]

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[21] In 2009, Timbervest valued the New Forestry timber and timberland assets at $572 million. For all other years between 2006 and 2010, the account was valued near $500 million.

[22] Should the Court conclude that Respondents have demonstrated that they provided real and valuable services to the account over the years, it may be appropriate to reduce the amount of disgorgement accordingly. See Black, 2009 WL 1181480 (concluding that it may be appropriate to reduce disgorgement of defendant's compensation by the amount that company benefited from his services to the extent that defendant makes a sufficient showing of the value of the services he provided for his compensation, but that defendant has failed to do so). For example, some courts have determined to limit disgorgement to a fractional portion of the overall

Table 3

Year	Partners' Draw Related to New Forestry	Prejudgment Interest
2006	$323,879	$120,100.24
2007	$2,282,040	$607,990.87
2008	$2,458,620	$475,113.30
2009	$2,012,059	$289,517.05
2010	$2,012,059	$199,710.38
2011	$2,012,059	$123,940.49
2012	$1,006,029	$38,338.72
TOTAL	**$12,106,745**	**$1,854,711.05**

2. Disposition Fees on the Tenneco and Kentucky Land Sales

Separate and apart from the management fees, the Court should order Timbervest to disgorge the disposition fee it collected for the improper cross trade of Tenneco. Pursuant to their fee agreements, Timbervest collected a 3% fee of approximately $403,500 on the sale of the property to Wooddall. (Div. Exs. 54; 56, p.3). However, but for their fraud in the arrangement of the sale and repurchase, Timbervest would not have sold the property to Wooddall in the first place, and therefore could not have collected the fee. Their collection of the fee therefore constitutes ill-gotten gains, and the fee, with prejudgment interest of $131,094.45, for a total of $534,594.45, should be disgorged.

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compensation received. See Church Extension of Church of God, Inc., 429 F.Supp.2d at 1050 (ordering disgorgement of one-half of defendants' salaries for last year of entity's operations where entity would have collapsed earlier but for the securities violations, but "reflect[ing] in an equitable way the fact that both defendants also provided real and valuable services . . . for many years"). Alternatively, the Court could choose to limit disgorgement to the amount of fees collected in 2006 and 2007 on the basis that it is unjust for Respondents to retain the profits they received during the years when they defrauded their client.

Timbervest collected a second disposition fee of $822,583.50 on the sale of the Kentucky property, which should also be disgorged. (Div. Exs. 54; 56, p.3). That fee was inappropriate given that Respondents defrauded New Forestry in that transaction through the payment of illegal and undisclosed commissions to Boden. Timbervest should not be permitted to profit from the very transaction in which it breached its fiduciary duty to New Forestry by misappropriating funds. Accordingly, the disposition fee from the sale of the Kentucky property may properly be viewed as an ill-gotten gain subject to disgorgement. That fee, along with $227,833.82 in prejudgment interest (for a total of $1,050,417.32), should also be returned.

3. Outstanding Prejudgment Interest

Finally, while Respondents paid back to AT&T the amount of Boden's unlawful commissions, they paid insufficient interest upon return of the principal. On June 8, 2012, Respondents returned $1,156,236.25 in principal and $96,315.27 in interest. However, according to the Division's standard prejudgment interest calculator (using the same date range employed by the Respondents), Respondents owe an additional $244,353.21 in interest which must be disgorged in order to return them to the status quo ante. (Div. Ex. 136). Prejudgment interest is an appropriate component of any disgorgement calculation because it deprives the Respondents of the economic return they received from their fraud, thus putting them in the same position as if they had never received the ill-gotten gains. The remaining interest should therefore be disgorged. See In re Coxon, Administrative Proc. File No. 3-9218, 80 SEC Docket 2586, 2003 WL 21991359 at *14 (Aug. 21, 2003)("We believe that, except in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims").

C. The Court Should Revoke Timbervest's Registration and Bar Boden, Shapiro, Jones and Zell from Associating with an Investment Advisor

Section 203(e) of the Advisers Act authorizes the Commission to censure, place limitations on the activities, functions, or operations of, or suspend for a period not exceeding twelve months, or revoke the registration of an investment adviser, where it is in the public interest to do so, and where the adviser has been found to have violated the securities statutes. Section 203(f) of the Advisers Act authorizes the Commission to impose similar sanctions on persons associated with an investment adviser, including barring such person from being associated with an investment adviser.

As discussed above, the established criteria for determining what sanctions are appropriate in the public interest are:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); see also In the Matter of Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976). The rationale supporting the imposition of cease-and-desist orders also supports the revocation of Timbervest's registration and the associational bars against Boden, Shapiro, Zell and Jones.

Respondents will likely contend that these remedies are barred by the statute of limitations as a matter of law. Such a determination, however, turns on whether the sanction would be punitive or remedial, and such a conclusion depends on the unique facts of each case.

If there is a realistic threat of future harm, these sanctions are properly viewed as remedial, and thus not subject to the statute of limitations.

In Johnson v. SEC, 87 F.3d 484 (DC Cir. 1996), the court held that "penalty" includes any sanction that is a form of punishment "which goes beyond remedying the damage caused" to the parties harmed by the defendant's actions. Id. at 489. The Johnson court concluded that the censure and supervisory suspension imposed by the Commission were punitive, reasoning that, in imposing these sanctions, the Commission had only focused on Johnson's prior misconduct. Id. The Johnson court noted, however, that such sanctions might have been considered remedial (and thus not subject to a statute of limitation) "if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public." Id.

Determination of whether an associational bar is punitive or remedial for purposes of the statute of limitations is a fact-intensive inquiry focusing heavily on the realistic threat of future harm to the public. See, e.g., SEC v. Brown, 740 F.Supp.2d 148, 157 (D.D.C. 2010) (associational bar is remedial if Commission can show a "future risk of harm."); SEC v. Jones, 476 F.supp.2d 374, 381 (S.D.N.Y. 2007) ("the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm"). Vladislav Steven Zubkis, Exchange Act Rel. No. 34-52876, 2005 WL 3299148 at *4 (Dec. 2, 2005) ("[I]n determining that the public interest requires that Zubkis be barred, we are focusing on the respondent's 'current competence or the degree of risk [he] poses to the public'")(quoting Johnson). See also, Herbert Moskowitz, Exchange Act Rel. No. 45609, 2002 WL 434524 at n. 66 (Mar. 21, 2002) (stating, in dicta, "Indeed, [SEC v. Johnson] itself recognized that even a suspension or bar would be remedial, if that sanction was not 'sufficiently punitive' to be deemed a penalty").

As noted above, Respondents acted with a high degree of scienter and their infractions were calculated and deliberate. Respondents willfully violated the Advisers Act, and the seriousness of their violations cannot be disputed. In addition to subjecting the Respondents to potential liability under the federal securities laws, the affiliated property transaction and the collection of unwarranted fees were explicitly prohibited by ERISA, and either action alone would have resulted in Timbervest's being terminated by AT&T (which later occurred). Their misconduct also exposed them to significant liability from other regulatory agencies, from AT&T, and from the investors in TVP. Respondents' actions have also imposed significant costs on their clients. For example, AT&T was forced to move its account to another manager and the investors in TVP (including the Arizona Public Safety Personnel Retirement System) have incurred significant expenses investigating Respondent's conduct and obtaining legal advice.

Moreover, the Respondents have not acknowledged the wrongfulness of their misconduct. Instead they have contrived implausible stories (contradicted by sworn testimony) meant to suggest that they acted in good faith, fully unaware that their actions breached their fiduciary duties to their clients. They also continued to mislead their clients about the nature of the SEC's investigation and the seriousness of the charges against them. (Tr. 1152:17-1155:4).

As discussed previously, the likelihood of future violations by the Respondents is high. Respondents' clearly unlawful conduct, combined with the machinations devised to conceal it, demonstrates their deceitfulness and the lengths they will go to in order to hide their self-dealing. Likewise, their ongoing use of New Forestry's property for personal benefit (e.g., using it for to entertain friends and clients, cancelling revenue-generating hunting leases and granting free leases for themselves, etc.) shows their perpetually cavalier attitude toward their fiduciary responsibilities. Also, Timbervest is registered with the Commission as an investment adviser, and the firm continues to manage over $1 billion in assets. Its Principals are not only the owners, but the CEO (Shapiro), President and former Chief Compliance Officer (Jones), Chief Operations Officer (Zell), and Chief Investment Officer (Boden) of the company. Their current funds will not unwind until at least 2024, and their investors have limited means to exit without Timbervest's approval. Respondents have testified that they plan to continue managing their current funds until they wind up. Finally, Respondents have testified that Timbervest plans to launch new funds in the future, which will provide even more opportunities to mislead their clients and use their assets for personal gain in the future. Because Respondents will likely remain in the industry for the foreseeable future, a revocation of Timbervest's registration and associational bars against the individual Respondents are necessary to protect the public, as there is a substantial risk that the Respondents will once again act opportunistically, violating the Advisers Act and injuring their clients. Conrad P. Seghers, Advisers Act Rel. No. 2656 (Sept. 26, 2007) (The securities industry "presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence").

VII. CONCLUSION

For the foregoing reasons, and based on the evidence presented by the Division at the hearing, the Court should find that Respondents violated the Advisers Act provisions set forth in the OIP and grant relief as requested herein.

This 28th day of March, 2014.

Respectfully submitted,

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EXHIBIT A

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Partnership Distributions Related to New Forestry Fees 2006

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$323,879.00
01/01/2007-03/31/2007	8%	1.97%	$6,388.85	$330,267.85
04/01/2007-06/30/2007	8%	1.99%	$6,587.26	$336,855.11
07/01/2007-09/30/2007	8%	2.02%	$6,792.48	$343,647.59
10/01/2007-12/31/2007	8%	2.02%	$6,929.44	$350,577.03
01/01/2008-03/31/2008	7%	1.74%	$6,101.57	$356,678.60
04/01/2008-06/30/2008	6%	1.49%	$5,320.94	$361,999.54
07/01/2008-09/30/2008	5%	1.26%	$4,549.72	$366,549.26
10/01/2008-12/31/2008	6%	1.51%	$5,528.28	$372,077.54
01/01/2009-03/31/2009	5%	1.23%	$4,587.26	$376,664.80
04/01/2009-06/30/2009	4%	1%	$3,756.33	$380,421.13
07/01/2009-09/30/2009	4%	1.01%	$3,835.48	$384,256.61
10/01/2009-12/31/2009	4%	1.01%	$3,874.15	$388,130.76
01/01/2010-03/31/2010	4%	0.99%	$3,828.14	$391,958.90
04/01/2010-06/30/2010	4%	1%	$3,908.85	$395,867.75
07/01/2010-09/30/2010	4%	1.01%	$3,991.21	$399,858.96
10/01/2010-12/31/2010	4%	1.01%	$4,031.45	$403,890.41
01/01/2011-03/31/2011	3%	0.74%	$2,987.68	$406,878.09
04/01/2011-06/30/2011	4%	1%	$4,057.63	$410,935.72
07/01/2011-09/30/2011	4%	1.01%	$4,143.13	$415,078.85
10/01/2011-12/31/2011	3%	0.76%	$3,138.68	$418,217.53
01/01/2012-03/31/2012	3%	0.75%	$3,119.49	$421,337.02
04/01/2012-06/30/2012	3%	0.75%	$3,142.76	$424,479.78
07/01/2012-09/30/2012	3%	0.75%	$3,201.00	$427,680.78
10/01/2012-12/31/2012	3%	0.75%	$3,225.13	$430,905.91
01/01/2013-03/31/2013	3%	0.74%	$3,187.52	$434,093.43
04/01/2013-06/30/2013	3%	0.75%	$3,246.78	$437,340.21
07/01/2013-09/30/2013	3%	0.76%	$3,307.01	$440,647.22
10/01/2013-12/31/2013	3%	0.76%	$3,332.02	$443,979.24

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2007-12/31/2013	**$120,100.24**	**$443,979.24**

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Partnership Distributions Related to New Forestry Fees 2007

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$2,282,040.00
01/01/2008-03/31/2008	7%	1.74%	$39,717.47	$2,321,757.47
04/01/2008-06/30/2008	6%	1.49%	$34,636.05	$2,356,393.52
07/01/2008-09/30/2008	5%	1.26%	$29,615.87	$2,386,009.39
10/01/2008-12/31/2008	6%	1.51%	$35,985.72	$2,421,995.11
01/01/2009-03/31/2009	5%	1.23%	$29,860.21	$2,451,855.32
04/01/2009-06/30/2009	4%	1%	$24,451.38	$2,476,306.70
07/01/2009-09/30/2009	4%	1.01%	$24,966.60	$2,501,273.30
10/01/2009-12/31/2009	4%	1.01%	$25,218.32	$2,526,491.62
01/01/2010-03/31/2010	4%	0.99%	$24,918.82	$2,551,410.44
04/01/2010-06/30/2010	4%	1%	$25,444.20	$2,576,854.64
07/01/2010-09/30/2010	4%	1.01%	$25,980.34	$2,602,834.98
10/01/2010-12/31/2010	4%	1.01%	$26,242.28	$2,629,077.26
01/01/2011-03/31/2011	3%	0.74%	$19,447.97	$2,648,525.23
04/01/2011-06/30/2011	4%	1%	$26,412.69	$2,674,937.92
07/01/2011-09/30/2011	4%	1.01%	$26,969.24	$2,701,907.16
10/01/2011-12/31/2011	3%	0.76%	$20,430.86	$2,722,338.02
01/01/2012-03/31/2012	3%	0.75%	$20,305.96	$2,742,643.98
04/01/2012-06/30/2012	3%	0.75%	$20,457.43	$2,763,101.41
07/01/2012-09/30/2012	3%	0.75%	$20,836.50	$2,783,937.91
10/01/2012-12/31/2012	3%	0.75%	$20,993.63	$2,804,931.54
01/01/2013-03/31/2013	3%	0.74%	$20,748.81	$2,825,680.35
04/01/2013-06/30/2013	3%	0.75%	$21,134.54	$2,846,814.89
07/01/2013-09/30/2013	3%	0.76%	$21,526.60	$2,868,341.49
10/01/2013-12/31/2013	3%	0.76%	$21,689.38	$2,890,030.87

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2008-12/31/2013	**$607,990.87**	**$2,890,030.87**

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Partnership Distributions Related to New Forestry Fees 2008

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$2,458,620.00
01/01/2009-03/31/2009	5%	1.23%	$30,311.75	$2,488,931.75
04/01/2009-06/30/2009	4%	1%	$24,821.13	$2,513,752.88
07/01/2009-09/30/2009	4%	1.01%	$25,344.14	$2,539,097.02
10/01/2009-12/31/2009	4%	1.01%	$25,599.66	$2,564,696.68
01/01/2010-03/31/2010	4%	0.99%	$25,295.64	$2,589,992.32
04/01/2010-06/30/2010	4%	1%	$25,828.96	$2,615,821.28
07/01/2010-09/30/2010	4%	1.01%	$26,373.21	$2,642,194.49
10/01/2010-12/31/2010	4%	1.01%	$26,639.11	$2,668,833.60
01/01/2011-03/31/2011	3%	0.74%	$19,742.06	$2,688,575.66
04/01/2011-06/30/2011	4%	1%	$26,812.10	$2,715,387.76
07/01/2011-09/30/2011	4%	1.01%	$27,377.06	$2,742,764.82
10/01/2011-12/31/2011	3%	0.76%	$20,739.81	$2,763,504.63
01/01/2012-03/31/2012	3%	0.75%	$20,613.03	$2,784,117.66
04/01/2012-06/30/2012	3%	0.75%	$20,766.78	$2,804,884.44
07/01/2012-09/30/2012	3%	0.75%	$21,151.59	$2,826,036.03
10/01/2012-12/31/2012	3%	0.75%	$21,311.09	$2,847,347.12
01/01/2013-03/31/2013	3%	0.74%	$21,062.57	$2,868,409.69
04/01/2013-06/30/2013	3%	0.75%	$21,454.13	$2,889,863.82
07/01/2013-09/30/2013	3%	0.76%	$21,852.12	$2,911,715.94
10/01/2013-12/31/2013	3%	0.76%	$22,017.36	$2,933,733.30

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2009-12/31/2013	**$475,113.30**	**$2,933,733.30**

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Partnership Distributions Related to New Forestry Fees 2009

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$2,012,059.00
01/01/2010-03/31/2010	4%	0.99%	$19,844.97	$2,031,903.97
04/01/2010-06/30/2010	4%	1%	$20,263.37	$2,052,167.34
07/01/2010-09/30/2010	4%	1.01%	$20,690.34	$2,072,857.68
10/01/2010-12/31/2010	4%	1.01%	$20,898.95	$2,093,756.63
01/01/2011-03/31/2011	3%	0.74%	$15,488.06	$2,109,244.69
04/01/2011-06/30/2011	4%	1%	$21,034.66	$2,130,279.35
07/01/2011-09/30/2011	4%	1.01%	$21,477.88	$2,151,757.23
10/01/2011-12/31/2011	3%	0.76%	$16,270.82	$2,168,028.05
01/01/2012-03/31/2012	3%	0.75%	$16,171.36	$2,184,199.41
04/01/2012-06/30/2012	3%	0.75%	$16,291.98	$2,200,491.39
07/01/2012-09/30/2012	3%	0.75%	$16,593.87	$2,217,085.26
10/01/2012-12/31/2012	3%	0.75%	$16,719.00	$2,233,804.26
01/01/2013-03/31/2013	3%	0.74%	$16,524.03	$2,250,328.29
04/01/2013-06/30/2013	3%	0.75%	$16,831.22	$2,267,159.51
07/01/2013-09/30/2013	3%	0.76%	$17,143.45	$2,284,302.96
10/01/2013-12/31/2013	3%	0.76%	$17,273.09	$2,301,576.05

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2010-12/31/2013	**$289,517.05**	**$2,301,576.05**

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Partnership Distributions Related to New Forestry Fees 2010

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$2,012,059.00
01/01/2011-03/31/2011	3%	0.74%	$14,883.72	$2,026,942.72
04/01/2011-06/30/2011	4%	1%	$20,213.89	$2,047,156.61
07/01/2011-09/30/2011	4%	1.01%	$20,639.83	$2,067,796.44
10/01/2011-12/31/2011	3%	0.76%	$15,635.94	$2,083,432.38
01/01/2012-03/31/2012	3%	0.75%	$15,540.36	$2,098,972.74
04/01/2012-06/30/2012	3%	0.75%	$15,656.27	$2,114,629.01
07/01/2012-09/30/2012	3%	0.75%	$15,946.38	$2,130,575.39
10/01/2012-12/31/2012	3%	0.75%	$16,066.63	$2,146,642.02
01/01/2013-03/31/2013	3%	0.74%	$15,879.27	$2,162,521.29
04/01/2013-06/30/2013	3%	0.75%	$16,174.47	$2,178,695.76
07/01/2013-09/30/2013	3%	0.76%	$16,474.52	$2,195,170.28
10/01/2013-12/31/2013	3%	0.76%	$16,599.10	$2,211,769.38

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2011-12/31/2013	**$199,710.38**	**$2,211,769.38**

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Partnership Distributions Related to New Forestry Fees 2011

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$2,012,059.00
01/01/2012-03/31/2012	3%	0.75%	$15,007.98	$2,027,066.98
04/01/2012-06/30/2012	3%	0.75%	$15,119.93	$2,042,186.91
07/01/2012-09/30/2012	3%	0.75%	$15,400.10	$2,057,587.01
10/01/2012-12/31/2012	3%	0.75%	$15,516.23	$2,073,103.24
01/01/2013-03/31/2013	3%	0.74%	$15,335.28	$2,088,438.52
04/01/2013-06/30/2013	3%	0.75%	$15,620.38	$2,104,058.90
07/01/2013-09/30/2013	3%	0.76%	$15,910.14	$2,119,969.04
10/01/2013-12/31/2013	3%	0.76%	$16,030.45	$2,135,999.49

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2012-12/31/2013	**$123,940.49**	**$2,135,999.49**

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Partnership Distributions Related to New Forestry Fees 2012

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$1,006,029.00
10/01/2012-12/31/2012	3%	0.75%	$7,586.45	$1,013,615.45
01/01/2013-03/31/2013	3%	0.74%	$7,497.98	$1,021,113.43
04/01/2013-06/30/2013	3%	0.75%	$7,637.37	$1,028,750.80
07/01/2013-09/30/2013	3%	0.76%	$7,779.05	$1,036,529.85
10/01/2013-12/31/2013	3%	0.76%	$7,837.87	$1,044,367.72

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
10/01/2012-12/31/2013	**$38,338.72**	**$1,044,367.72**