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.

REPLY TO THE DIVISION'S POST-HEARING BRIEF ON BEHALF OF JOEL B. SHAPIRO

Submitted by: Nancy R. Grunberg
George Kostolampros
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-496-7524
Facsimile: 202-496-7756
ngrunberg@mckennalong.com
gkostolampros@mckennalong.com

Counsel for Respondent Joel Barth Shapiro

TABLE OF CONTENTS

I. INTRODUCTION

The Division's brief highlights the problem with its case—it is based on speculation and not on actual evidence. The Division insists that Respondents violated the Investment Advisers Act by orchestrating a prohibited cross trade under ERISA and collecting and sharing in an unauthorized and bogus brokerage fee. The Division's case is based entirely on the premise that Respondents skirted their fiduciary duties because they knew that a cross trade and the collection of the additional fees violated ERISA. The Division's theory, however, is unsupported by any evidence. No witness testified that the Respondents were motivated by ERISA concerns on either of these two issues, and there is no documentary evidence that ERISA was a motivation.

As to Mr. Shapiro specifically, the Division failed to offer any evidence that he aided and abetted or caused any purported violation. On the Tenneco property transactions, Mr. Shapiro was neither involved in the negotiation of the sale from New Forestry to Chen Timber nor the negotiation of the purchase by Timbervest Partners Alabama from Chen Timber. The Division's theory rests on its belief that Mr. Boden negotiated to repurchase the property from Chen Timber at the same time he was negotiating the sale of the property to that entity. Regardless of whether such an agreement was reached between Mr. Boden and Mr. Woodall, there is no evidence that Mr. Shapiro ever knew of any such agreement. Strikingly, the Division's theory of liability as to Mr. Shapiro, Mr. Zell and Mr. Jones is that because they have no memory of the transactions and because they do not believe that Mr. Boden lied to them, it is reasonable to conclude that they were aware of an agreement to repurchase. This is not (and cannot be) the standard required to show actual knowledge of a purported fraud.

The Division similarly fails to show that Mr. Shapiro participated in any fraudulent scheme to conceal Mr. Boden's fee arrangement and payment. The Division's claim rests upon

mistaken assumptions and mischaracterizations of the evidence. First, the Division claims that if the fee agreement actually existed, it would have been memorialized in a formal document. The evidence at trial, however, showed that it was common that such agreements were not reduced to writing. Second, the Division relies on the testimony of Edward Schwartz to show that disclosure was never made to ORG regarding the fee agreement and to support its contention that Mr. Shapiro and the other Respondents decided to conceal the fee. Mr. Schwartz's testimony, however, is not credible. Moreover, the Division's theory that Mr. Shapiro participated in a scheme to conceal the fee arrangement and payment because he knew that such a fee was prohibited by ERISA and Timbervest could never obtain client approval is contradicted by the very fact that Mr. Shapiro had a conversation with Mr. Schwartz regarding a fee in 2005, prior to any fee being paid to Mr. Boden.

Finally, the Division fails to show that Mr. Shapiro acted recklessly or negligently. Rather, the evidence showed that Mr. Shapiro acted in good faith when he approved the sale of the Tenneco property by New Forestry and the later purchase of that property by Timbervest Partners of Alabama based on the market realities at the time and the clients' respective investment goals. Furthermore, regardless of what Mr. Schwartz claimed to recall about the specifics of the 2005 conversation with Mr. Shapiro, the fact that Mr. Shapiro sought Mr. Schwartz's approval for the fee arrangement shows that he was acting in good faith.

II. ARGUMENT

A. The Division Relies on Speculation and the Lack of Memory To Prove its Claims Against Mr. Shapiro Relating to the Tenneco Transactions.

Even if the Division had been able to prove some illegal conduct regarding the Tenneco transactions, which it has not, Mr. Shapiro's opening brief illustrated why there is no evidence that he either had knowledge or was reckless in taking part in such supposed illegal conduct.

The Division's own brief highlights and strengthens the point that Mr. Shapiro was neither aware of nor reckless concerning any potentially violative conduct regarding these transactions, and that he neither caused nor substantially assisted in any violation. The Division's only evidence as to Mr. Shapiro's knowledge of a cross trade is (1) his lack of memory of the transaction and his belief in Mr. Boden's recollection; (2) his knowledge of ERISA that supposedly would have raised red flags; and (3) contemporaneous documents that the Division claims attempt to conceal the purported cross trade. For the reasons set forth below, these facts do not support the Division's claims against Mr. Shapiro.

1. Mr. Shapiro Had No Involvement in the Negotiation of the Tenneco Sale or Purchase.

The Division lays out its view of the chronology of the Tenneco transactions but, notably, there is no mention of any involvement by Mr. Shapiro in that chronology's description of the emails and discussions that occurred between Lee Wooddall and Mr. Boden regarding the transactions. As illustrated by the Division's own brief, Mr. Shapiro did not participate in any conversations with Mr. Wooddall, he is not alleged to have even been aware of such conversations, and he did not participate in the drafting or negotiations concerning either the sale of the Tenneco property to Chen Timber or the purchase of it from Chen Timber. (Division's Post-Hearing Brief ("Div. Br.") at 10-14; Hearing Transcript ("Hr'g Tr.") at 2256: 13-25.)

In lieu of offering evidence to support its allegations against Mr. Shapiro, the Division attempts to use his lack of recollection against him and speculate that such lack of memory is evidence of scienter. The Division argues that because Mr. Shapiro and the other Respondents do not have recollections of conversations from seven years ago when the Tenneco transactions were considered by the Investment Committee, they must be lying and covering up their true motivations for approving these transactions. (Div. Br. at 14.) Specifically, the Division argues

that if they 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 . . . ." (*Id.*) Such speculation is not proof of anything other than the weakness of the Division's case. Contrary to the Division's arguments, if anything, Mr. Shapiro's lack of recollection highlights his lack of involvement in the underlying details of the transaction itself.

The Division also attempts to argue that the lack of contemporaneous emails or other documentation of the Timbervest Investment Committee's deliberative process is proof that the purchase by TVP Alabama of the Tenneco property was not an independent transaction from the later sale of that property to Chen Timber by New Forestry. (Div. Br.at 15-16.) The Timbervest Investment Committee, however, did not record and keep formal minutes of its meetings (Hr'g Tr. at 1245:7-16), so the fact that there are no minutes discussing the decision to sell and later purchase does not prove that these were not independent transactions. Furthermore, the transactions themselves were documented. The fact of the matter is that no email or document exists that supports the Division's claim that Mr. Shapiro knew that the Tenneco sale and later purchase constituted a prohibited cross trade. The lack of such a document is indicative of the fact that he did not believe it was a cross trade.

The Division's efforts to create a non-existent case against Mr. Shapiro based on speculation and the passage of time must be denied. Indeed, the weakness of the Division's case is best summarized by quoting from its own brief: "it is reasonable to believe that if the circumstances surrounding the repurchase were legitimate, they would have been contemporaneously documented." (Div. Br.at 16.) First, as noted above, the transactions *were* documented. Second, as to its aiding and abetting claim, it is the Division's burden to produce some evidence of actual knowledge or recklessness and knowing and substantial assistance in

proving its case against Mr. Shapiro. *See, e.g. Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000). Similarly, as set forth in Mr. Shapiro's opening brief, with respect to primary violations under Section 206(1), it is not sufficient to prove negligence; the Division must show that Mr. Shapiro acted with scienter. *See In the Matter of Daniel Bogar*, Admin. Proc. File. No. 3-15003 Release No. 502, 2013 WL 393608, at *20 (Aug. 2, 2013). Because it cannot supply such evidence, it asks this Court to find against him based on its speculative argument that it is "reasonable to believe" that some documentation should exist that does not currently exist, or that Mr. Shapiro should remember more about discussions that took place more than seven years ago concerning the transactions in question.

2. There Is No Evidence that Mr. Shapiro Attempted to Evade ERISA or that the Transactions Presented Red Flags.

In an attempt to bolster its argument that Mr. Shapiro and his partners were really trying to evade ERISA prohibitions and are just pretending not to recall specific conversations, the Division points out that (1) two years before these transactions occurred, a former employee (Jerry Barag) discussed ERISA with them, and (2) in March 2006, Mr. Shapiro sent two unrelated emails that reference ERISA. (Div. Br. at 16, 27; Div. Exs. 132, 152.) Based on that type of "proof," the Division would have this Court find that Mr. Shapiro aided and abetted or caused fraud in connection with the Tenneco transactions. There is no evidence that Mr. Shapiro was trying to evade ERISA in connection with the Tenneco transaction, and evidence of his general awareness of ERISA in other contexts does not support the Division's case. The Division itself describes the one email from Mr. Shapiro to Mr. Gruber as "flagging Gruber's proposed cross trade as problematic." (Div. Br. at 16.) Contrary to the Division's argument, the fact that Mr. Shapiro identified previous ERISA cross trade issues does not mean that he must have known that the Tenneco transactions were a cross trade. In fact, the emails cited by the

Division show that if Mr. Shapiro believed that there was an ERISA issue arising out of a transaction, he would not have proceeded with the transaction without obtaining the necessary approvals.

The Division also argues that there were red flags that would have and should have alerted Mr. Shapiro of a prohibited cross trade. The Division uses the fact that Timbervest had never purchased a property it previously sold as a fact against Mr. Shapiro and the other Respondents. (Div. Br. at 14-15.) To the contrary, the fact that this never happened before and never has happened since is evidence that there was no reason to believe that this transaction, which spanned several months during a period of changing economic realities, was anything but a good deal for both clients. Furthermore, this is not the case where a related party or entity purchased the property and then sold it back to another Timbervest entity. The fact that a third party purchased the property is further evidence that the transaction was not a cross trade and, at the very least, gave no reason for Mr. Shapiro to believe that this was a cross trade.

3. Mr. Shapiro Had No Reason to Believe Disclosure to ORG or AT&T of TVP Alabama's Purchase of the Tenneco Property was Necessary.

The Division also argues that the failure of Respondents to disclose to ORG or AT&T that TVP Alabama purchased the Tenneco property from Chen Timber shows that the Respondents were concealing a prohibited cross trade from their client. The Division does not argue, nor can it argue, that two independent transactions occurring several months apart that benefitted both clients were legally required to be disclosed. Rather, the Division argues that given the proximity in time and the price differential, a "prudent fiduciary would have informed its client of the relevant details of the transactions." (Div. Br. at 17.) Therefore, the Division argues, the non-disclosure to ORG or AT&T of the TVP Alabama purchase of Tenneco means that there must have been something improper about the transaction and that such nondisclosure

is "fully consistent with the desire on the part of the Respondents to conceal their designs to engage in a prohibited cross trade." (*Id.* at 18.) The problem with the Division's argument is that Mr. Shapiro did not believe that there was anything that needed to be disclosed because there is no evidence that Mr. Shapiro believed that these two transactions were a prohibited cross trade. Once again, the Division is making unwarranted and speculative inferences in the absence of any evidence of actual knowledge of any wrongdoing.

4. There is No Evidence that Mr. Shapiro Had Any Involvement in the Drafting of Certain Documents That The Division Claims Demonstrate Scienter.

The Division also argues that various documents demonstrate the impropriety of the Tenneco transactions. The Division recites various perceived inconsistencies or other arguments based on a handful of documents, but it completely fails to connect any of these emails or documents to Mr. Shapiro. Moreover, given Mr. Shapiro's role at Timbervest, it is highly unlikely that he would have drafted or reviewed any of the emails or documents in question. (Hr'g Tr. 1696: 10-21.) Recognizing as much, the Division did not ask Mr. Shapiro any questions regarding any of these alleged inconsistences at the hearing.

The first document that the Division describes as inculpatory is a series of emails to and from a Timbervest employee named Barrett Carter. Mr. Shapiro is not on any of the emails in question nor has the Division alleged that Mr. Shapiro was involved in any discussion with Mr. Carter regarding the property. (Div. Br.at 19-21.)

The Division also compares descriptions of the Tenneco property in the New Forestry Disposition Plan and Report as of August 2006 and the Gilliam Forest Spec Book. (Div. Br. at 22-23.) Once again, however, there is no evidence or suggestion that Mr. Shapiro drafted or reviewed these documents. Such activity was not in his job description. As he testified at the

hearing, at Timbervest he was the marketing person who traveled to see the clients and oversaw Timbervest from a very high level. (Hr'g Tr. 1696: 10-21.) He would not have been mired in the minutiae of specific language used in the Disposition Report or the Spec Book. The Division further complains that the Disposition Plan and Report dated August 2006 (Div. Ex. 16) described the offer from Mr. Wooddall to purchase the Tenneco property as "unsolicited" and that, in fact, it was not unsolicited. Again, there is no suggestion that Mr. Shapiro drafted or reviewed that language, and if he had, he would not have known whether or not it was accurate because he was not involved in the negotiations with Mr. Wooddall.

5. There is No Evidence that Mr. Shapiro Had Any Involvement or Even Knew of Mr. Boden's Discussions with Reid Hailey Regarding the Glawson Property.

In its final section concerning the Tenneco transactions, the Division discusses an entirely different transaction about which Mr. Shapiro is not alleged to have knowledge or participation. That transaction concerned the possible sale of the Glawson property to Reid Hailey in 2005. The Division begins its discussion of this transaction by alleging that the "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." (Div. Br.at 28.) However, in the next several pages discussing this supposed attempted cross sale, there is absolutely no mention of any involvement by Mr. Shapiro, and there is no proof of any knowledge or involvement on his part. The proposed deal to sell the Glawson property in 2005 therefore cannot serve as the basis for finding any liability against Mr. Shapiro.

B. The Division's Claims As to the Fee Arrangement Against Mr. Shapiro are Unsupported and Contradicted by the Evidence

The Division's brief also highlights and strengthens the point that Mr. Shapiro did not aid and abet or cause any violation of Section 206(1) or 206(2) of the Advisers Act in connection

with the fees paid to Mr. Boden. The Division's position that Mr. Shapiro chose to conceal Mr. Boden's fees because such a fee would be a violation of ERISA that could not be cured by client consent is unsupported by the evidence. Contrary to the Division's arguments, there is no evidence that Mr. Shapiro was involved in any effort to conceal Mr. Boden's fees. Furthermore, Mr. Shapiro's recognition of the conflict of interest and his 2005 conversation with Mr. Schwartz of ORG is evidence that Mr. Shapiro did not act recklessly or negligently.

1. Mr. Shapiro Had No Knowledge of the Various LLCs that Received Mr. Boden's Fees.

The Division claims that the Respondents took elaborate steps to conceal the recipients of Mr. Boden's fee payment through LLCs formed by Mr. Boden's attorney, Ralph Harrison. (Div. Br. at 34.) The Division further states that the Respondents each caused New Forestry to pay Mr. Boden's fees to those entities. (Div. Br. at 35-36.) Regardless of the reasons why these LLCs were created, as set forth in Mr. Shapiro's opening brief, the undisputed facts are that Mr. Shapiro had no contemporaneous knowledge that Mr. Boden engaged Mr. Harrison, that Mr. Harrison created the LLCs, or that these LLCs were created to and did receive Mr. Boden's fees. (Hr'g Tr. 1826:20–1827:10.)

The Division further states, without any supporting citation to the record, that the Respondents inserted the names of the LLCs in the relevant purchase agreements and those agreements contained false and misleading statements. (Div. Br. at 35.) The Division, however, presented no evidence that Mr. Shapiro was involved in, let alone actually inserted or caused to be inserted, the names of the LLCs in the two relevant agreements. In fact, as stated above, Mr. Shapiro did not even know that LLCs were created to receive Mr. Boden's fees. Further, there was no evidence presented that Mr. Shapiro was involved in the drafting of any purchase or sale agreements. *(See* Hr'g Tr. at 164:11-14; 194:14-195:3 (Mr. Boden testified that in-house

counsel at Timbervest typically drafted contracts and that as to the Tenneco sale agreement to Chen Timber, Chen Timber's counsel drafted the contract.)

In sum, the Division did not introduce any evidence that supports its theory that Mr. Shapiro took any steps or knew that anyone else took steps to conceal the fee arrangement through the use of the LLCs.

2. Mr. Shapiro's 2005 Conversation with Mr. Schwartz Contradicts the Division's Theory of Concealment.

Contrary to the Division's theory that Mr. Shapiro and the other Respondents concealed the fee agreement, the undisputed fact is that Mr. Shapiro told Mr. Schwartz about the fee arrangement. The Division argues that the lack of documentation of the disclosure to Mr. Schwartz supports its contention that Respondents decided to conceal, rather than disclose the fee. (Div. Br. at 47.) The absence of documentation of the disclosure to Mr. Schwartz, however, does not corroborate Mr. Schwartz's testimony that disclosure was not made. Obviously, having such a document likely would have averted the claims that the Division has made related to Mr. Boden's fees. Nevertheless, there is no dispute that Mr. Shapiro had a discussion in 2005, early in ORG's engagement, regarding a fee arrangement—which could only have been about Mr. Boden's fee arrangement. Mr. Shapiro's conversation with Mr. Schwartz is evidence of his attempt to disclose the fee arrangement.

The Division goes on to argue that the Respondents concealed the fee because they knew that it would not be lawful for the client to consent to a prohibited transaction. (*Id.*) If it were true that Mr. Shapiro believed that Mr. Schwartz's consent would not have cured any ERISA violation, and that the Respondents intended to conceal Mr. Boden's fees, then Mr. Shapiro would not have had a discussion with Mr. Schwartz regarding a fee arrangement. Furthermore, the Division's presumption that ORG could not have approved the fee arrangement is not correct.

Even if ERISA applied, ORG held itself out as a QPAM and could have approved of a fee arrangement with anyone associated with Timbervest. (Hr'g Tr. at 2145:22-24; 2146:5-9.)

3. Mr. Schwartz's Testimony Regarding the 2005 Conversation with Mr. Shapiro is Not Credible.

In arguing that the fee was not disclosed, the Division relies solely on Ed Schwartz's testimony. Mr. Schwartz's testimony regarding the 2005 conversation with Mr. Shapiro, however, raises serious concerns about Mr. Schwartz's memory, his recollection of the 2005 conversation, and his credibility.

First, Mr. Schwartz could not even recall the 2005 conversation with Mr. Shapiro when Timbervest first told ORG (in February 2012) that the SEC had raised questions regarding fees paid to Mr. Boden. (Hr'g Tr. at 2092:15-2093:13.) According to Mr. Schwartz, he later remembered the 2005 conversation but not until a May 2012 meeting with Mr. Shapiro and Mr. Jones. (*Id.*) Mr. Schwartz also testified that he did not remember in May 2012 that Mr. Boden was even a Timbervest partner in 2005. (Hr'g Tr. at 2094:21-24.) That testimony makes no sense, however, because Mr. Schwartz knew Mr. Boden only as a partner of Timbervest. Mr. Schwartz first met Mr. Boden after BellSouth engaged ORG in 2005 and, at that time, Mr. Boden was already a Timbervest partner. (Hr'g Tr. 2081:1-2082:16.) Mr. Schwartz's failure to initially recall the 2005 conversation and his purported failure to recall that Mr. Boden was a partner of Timbervest during the relevant period raises questions about his later memory of that conversation.

Second, Mr. Schwartz's testimony raises serious questions regarding his credibility. Mr. Schwartz testified that he could not recall what he told Timbervest's counsel in June 2012 about the 2005 conversation with Mr. Shapiro. He also testified that he could not recall what he told the staff of the Division in two telephone calls in June 2012. (Hr'g Tr. at 2108:4-2109:5, Tr. at

2112:14-23.) For example, although Mr. Schwartz adamantly testified at the hearing that he recalls telling Mr. Shapiro in 2005 that he would need to speak with legal counsel about the fee, Mr. Schwartz claimed under cross-examination that he could not recall whether he told that part of the 2005 conversation to Timbervest's counsel in June 2012. (Hr'g Tr. at 2111:2-15.) Oddly, Mr. Schwartz also claimed that he did not even know if that supposed part of the 2005 conversation would have been important to tell Timbervest's counsel. (Hr'g Tr.at 2111:16-18.) Similarly, Mr. Schwartz testified that he could not recall whether he told counsel for the Division in two phone calls in June 2012 that he told Mr. Shapiro in 2005 that he would need to speak to legal counsel if the fee arrangement were to move forward. (Hr'g Tr. at 2112:14-23.) The Division's notes of that conversation reflect that Mr. Schwartz never made such a statement. Mr. Schwartz's supposed failure to recall his recent prior statements to the SEC and to counsel for Timbervest, while at the same time claiming to recall specifics of the 2005 conversation, calls into question his credibility.

Furthermore, Mr. Schwartz's testimony (under direct examination by the Division) that he would never have approved of such an arrangement with someone who was already a Timbervest partner is also not credible because it conflicts with part of his admitted response to Mr. Shapiro in 2005 and his testimony under cross-examination. Mr. Schwartz testified that in 2005 Mr. Shapiro asked him what he thought of paying someone a commission for work "they did ***prior*** to being an employee or a partner in Timbervest." (Hr'g Tr. at 2056:16-25.) Regardless of whether Mr. Schwartz understood that the individual was currently a partner or employee of Timbervest, by Mr. Schwartz's own description, the question Mr. Shapiro posed to him was whether an employee or partner of Timbervest could be paid a fee for work done prior to becoming a partner or employee. Mr. Schwartz, however, did not respond with an unequivocal "no way." Rather,

both Mr. Shapiro and Mr. Schwartz recall that one of Mr. Schwartz's conditions was that the client must not end up paying two commissions or fees. Furthermore, under cross-examination, Mr. Schwartz testified that ORG was a QPAM for the BellSouth assets. (Hr'g Tr. at 2145:22-2146:14.) In response to whether ORG as a QPAM could approve of Mr. Boden's fee arrangement, Mr. Shapiro again did not respond with an unequivocal "no way." (*Id.*) Instead, Mr. Schwartz answered that he did not know whether he could approve of the fee arrangement without consulting legal counsel because "ERISA is pretty technical and complicated." (*Id.*)

Finally, Mr. Schwartz's failure to acknowledge that his client, Arizona Public Safety Personnel Retirement System (AZPSPRS), had recommitted to its original investment of $50 million in Timbervest shows that he is not credible. (Hr'g Tr. at 2125:13-21.) AZPSPRS withheld $20 million of its original $50 million commitment until ORG completed a full investigation of the matters at issue in this litigation and would not recommit until it and ORG felt comfortable moving forward with the investment. (Hr'g Tr. at 2116:25-2119:4, Resp. Ex. 135.) Specifically, Mr. Schwartz wrote to representatives of AZPSPRS that

> we would like to discuss with PSPRS that Timbervest be approached and that we request that Timbervest make no more future capital calls until such time as we fully investigate the SEC matters. If we do not gain comfort with the SEC matters, ORG recommends that PSPRS take steps necessary to permanently suspend any future capital calls to Timbervest and explore other actions possible depending on the outcome of our investigations.

(Resp. Ex. 135.) Mr. Schwartz, along with ORG's chief compliance officer, conducted that investigation for AZPSPRS. (Hr'g Tr. at 2119:13-2120:11.) After Mr. Schwartz conducted that investigation, AZPSPRS requested that Mr. Schwartz be available to report at a May 22, 2013 Board of Trustees meeting in which the Board decided whether to recommit. (Hr'g Tr. 2138:18-2142:4, Resp. Ex. 143.) Mr. Schwartz was aware of that Board of Trustees meeting and is listed

in the minutes of that portion of the meeting. (*Id.* and Resp. Ex. 131.) The Board of Trustees unanimously approved recommitting its original funding level at that meeting. (Resp. Ex. 131.) Incredibly, Mr. Schwartz claimed in his testimony to be unaware of that decision even though ORG and Mr. Schwartz are fiduciaries of AZPSPRS, oversee these very assets, and were the people charged with doing the internal investigation of Timbervest to determine whether to recommit to its original funding level. Mr. Schwartz even acknowledged speaking with Mr. Shapiro after AZPSPRS's decision to recommit its original funding level and acknowledged that Mr. Shapiro "was happy and excited" but that "I really didn't know what he was talking about." (Hr'g Tr. at 2144:2-8.) It is simply unbelievable that Mr. Schwartz would not know that his client had recommitted to Timbervest its original funding. Either Mr. Schwartz was not being truthful or his memory is extremely questionable.

4. The Fee Agreement Existed and Mr. Shapiro's Testimony Regarding the Existence of the Agreement and its Terms Was Credible.

Even though the Division acknowledges that Mr. Boden and Mr. Shapiro may have had discussions regarding fees from the sale of properties, it takes the position that the fee arrangement never existed and is "an invented alibi for the misappropriation of client funds." (Div. Br.at 49.) As set forth in Mr. Shapiro's and Timbervest's opening briefs, there is ample evidence that the fee agreement existed and that Respondents conducted themselves as though it existed. Moreover, the fact that Mr. Shapiro had a conversation with Mr. Schwartz in 2005 regarding a fee arrangement is evidence that the fee arrangement existed.[1] Although Mr. Schwartz testified that he did not believe that Mr. Boden's name was mentioned in that conversation, the fee arrangement that was discussed could not have been about any other

[1] Mr. Schwartz testified that the fee conversation with Mr. Shapiro took place in 2005, early in ORG's engagement by Bellsouth. (Hr'g Tr. at 2088:1-15.) The first fee was paid to Mr. Boden over a year later for the Tenneco sale in October 2006.

arrangement because there was no other similar fee arrangement. Regardless of whether Mr. Boden's name was mentioned in Mr. Shapiro's discussion with Mr. Schwartz in 2005, the undisputed fact is that a discussion occurred, and it is strong evidence that a fee agreement existed in 2005.

The Division challenges Mr. Shapiro's testimony about how he came to enter into the oral agreement with Mr. Boden by ignoring Mr. Shapiro's explanations. For instance, the Division states that "Mr. 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 properties . . ." and that Mr. Shapiro had no good reason for why the agreement was for five years, given BellSouth's disposition request was to be fulfilled within one year. (Div. Br. at 52.) Mr. Shapiro, however, testified credibly that it takes time to sell off properties. (Hr'g Tr. at 1740:11-25.) Moreover. at that point in time, Timbervest had horrible maps, and there was a significant amount of work to be done just to get the properties ready to sell. (Hr'g Tr. at 1742:18-1743:9.) Mr. Shapiro further explained "we had to figure out what they had and how to sell them to get BellSouth liquidity." (*Id.*)

The Division also disputes the existence of the fee arrangement by arguing that the sale of over $100 million of New Forestry's timberland would have had the effect of reducing Timbervest's management fees for no reason. (Div. Br. at 52.) The Division fails to recognize that Mr. Shapiro entered into the fee arrangement with Mr. Boden in order to benefit New Forestry. The fact that the fee arrangement and the sale of the properties would or could result in reduced management fees for Timbervest shows that Mr. Shapiro was acting in New Forestry's best interest and not Timbervest's own self-interest. The Division, astonishingly, tries to use that fact against Mr. Shapiro.

III. CONCLUSION

In sum, the Division has not established a case against Mr. Shapiro. First, as set forth in Timbervest's briefs, there was no primary violation in connection with either the Tenneco transactions or the fee arrangement. As to the Tenneco transactions, even if a cross trade had existed, there are no documents or testimony showing that Mr. Shapiro was aware of it. Furthermore, there is no evidence that would have alerted Mr. Shapiro that the transactions violated the Advisers Act and no evidence that he acted negligently. As to the fee arrangement, Mr. Shapiro's conversation with Mr. Schwartz regarding a fee defeats the Division's theory of Mr. Shapiro's involvement in any effort to conceal it. Furthermore, the Division has offered no evidence that Mr. Shapiro had knowledge of or provided substantial assistance in any of the steps, such as creation and use of the LLCs, that the Division claims were used to conceal the fee arrangement. There is also no evidence that he acted recklessly or negligently. Mr. Shapiro recognized the conflict of interest, disclosed it in 2002 and again in 2005, and in good faith believed he had obtained consent. Finally, as set forth in Mr. Shapiro's opening brief, the remedies the Division seeks are barred by the statute of limitations or are inappropriate based on the facts presented at the evidentiary hearing.

This 18th day of April, 2014.

Nancy R. Grunberg
George Kostolampros

MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-496-7524
Facsimile: 202-496-7756
ngrunberg@mckennalong.com
gkostolampros@mckennalong.com

Counsel for Respondent Joel Barth Shapiro

Peter J. Anderson
Jaliya S. Faulkner

SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996
peter.anderson@sutherland.com
jaliya.faulkner@sutherland.com

Counsel for Respondents Walter William Boden III, Gordon Jones II, Joel Barth Shapiro and Donald David Zell, Jr.

DC 51111190.4