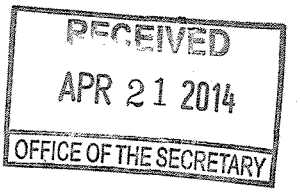
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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 of Enforcement's Post-Hearing Brief on behalf of William Boden

REPLY TO THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF ON BEHALF OF WILLIAM BODEN

Table of Contents

Despite its fruitless review of the individual Respondents' bank and brokerage records, the Division concluded long ago that Mr. Boden and his partners are fraudsters and then made it the Division's mission to destroy them and Timbervest. As part of this mission, the Division recasts events that occurred before and after the conduct to paint a picture that fits the Division's conclusion. Where historical facts are not provable, "would have" and "must have" substitute for "did." But there is no pattern of evidence, and the Division does not have the right to create a fictitious tale of fraud and hope this Court believes it. It is insufficient for the Division to identify conduct it dislikes and infer that there must have been a violation. The Division has to prove Mr. Boden's liability for aiding, abetting, or causing the violations of the Advisers Act by a preponderance of the evidence.

Throughout its Brief, the Division refers to "Respondents" without identifying whether it is referring to Timbervest or any of the individual respondents. Mr. Boden should not be held liable for conduct that the Division did not and cannot prove by a preponderance of the evidence that he aided, abetted, or caused.

The Division's suspicion of Mr. Boden and his partners' inability to recall the specific transactions at issue reflects its lack of understanding of Timbervest's business. Since the fourth quarter of 2003, Timbervest has negotiated more than 150 contracts for the acquisition of more than 900,000 acres for over $1 billion. (Hr'g Tr. 459:21–460:17; Resp. Ex. 138.) Since January 2003, Timbervest has negotiated more than 180 contracts for the disposition of more than 300,000 acres for almost $400 million. (Hr'g Tr. 459:21–460:17; Resp. Ex. 137.) These over 330 complex transactions, of course, do not include the multitude of transactions that were considered but not consummated, nor the over 1,000 timber harvest contracts that were negotiated and contemplated during this same period (Resp. Ex. 139). One cannot begin to

imagine the numbers of conversations Mr. Boden has had with counterparties and potential counterparties in that time, nor can Mr. Boden be expected to recall the general substance of many, let alone the details. The Division's choice to bring this case more than seven years after the operative events occurred places Mr. Boden and the other Respondents at a severe disadvantage. No one told Mr. Boden to remember the conversations he had from 2002 to 2006 because he would be asked about those conversations seven years later, or that he should memorialize those conversations, or that he should keep documents beyond any mandated retention requirement because they might be needed many years later.

What Mr. Boden and his partners do remember, and what cannot be disputed, is that Timbervest was under a mandate by BellSouth/AT&T to reduce the New Forestry portfolio by over $200 million. Timbervest was permitted to and did use its discretion to determine the best manner in which to meet that demand. And that is precisely what Mr. Boden did. His successful sales of the Tenneco and the Kentucky properties were in furtherance of the client's interest. And even his 2005 unsuccessful effort to sell Glawson was designed to give the client the liquidity it mandated. The Division has not presented a single fact that shows how New Forestry was harmed by these transactions, even more so given that the fees paid to Mr. Boden were voluntarily returned, in full and with interest, before the OIP was even filed. The Division ignores the critical driver of Mr. Boden's actions--the creation of liquidity through timber land sales without resorting to fire sales or wholesale auctions. Instead, the Division chooses the most unfavorable interpretation of each fact and draws the most sinister inferences, essentially asking Mr. Boden to prove that the Division is wrong.

The Division proffers that Mr. Boden's reason for receiving his advisory fee payments through LLCs rather than directly must have been to conceal the payments because they violated

ERISA; however, there are more reasonable interpretations of Mr. Boden's and his attorney's decisions regarding fees and the LLCs. In 2002, Mr. Boden was an unpaid, incentive-only based independent consultant, retained by Timbervest to build a disposition strategy and to effect large sales of property on behalf of New Forestry. Four years after the advisory fee agreement was made, when it appeared Mr. Boden might be entitled to collect a sizable fee pursuant to its terms, Mr. Boden wanted to protect his personal assets from potential third-party claims, which were both common in the real estate industry, in general, and evident to Mr. Boden during his time at Timbervest, in particular. He therefore sought the advice of his friend and personal attorney to help him do just that. Mr. Boden understood that the client was aware of and had approved the agreement, and he therefore had no reason to conceal it from anyone. There was nothing nefarious about Mr. Boden's conduct.

The Division also contends that Mr. Boden entered into simultaneous agreements to sell and repurchase Tenneco to avoid ERISA. But Timbervest was under a mandate to substantially reduce the New Forestry portfolio. For that reason, and that reason alone, Mr. Boden negotiated the sale of Tenneco to Mr. Wooddall's company, Chen Timber. The Division would have the Court infer from Mr. Wooddall's testimony that Mr. Boden promised, agreed, or otherwise guaranteed to buy the property back for one of Timbervest's funds. Given the valuation of the Tenneco property, the Division never offers a reason why Tenneco, as opposed to all other properties in the New Forestry portfolio that were sold, was so attractive. It is at least equally likely, if not more likely, that Mr. Boden induced Mr. Wooddall to make the purchase by expressing possible interest in acquiring it in the future without guaranteeing to do so as a negotiating tactic, knowing that Mr. Wooddall by reputation was a short-term speculator or "flipper."

The Division has the burden to prove that it is more likely than not that the events unfolded the way the Division speculates. It has not met that burden because it is just as likely, if not more likely, that Respondents' version of events long past is what, in fact, occurred. It is unfortunate that so much time has passed, which makes the task that much more difficult. But that is a situation not of Mr. Boden's making. The Division failed to establish that Mr. Boden aided, abetted, or caused any violation, and the Court should dismiss the claims against Mr. Boden.

Mr. Boden incorporates by reference all matters set forth in Timbervest's Post-Hearing Reply Brief.

A. Glawson is Irrelevant to the Charged Conduct.

The Division devotes a significant portion of its brief to "facts" that are not actually relevant to the two violations that have been alleged, *i.e.* that Timbervest failed to disclose the receipt of unauthorized brokerage fees and that Timbervest failed to disclose a cross trade of the Tenneco property. While the Division claims the Respondents' conduct with respect to Glawson shows a pattern or demonstrates state of mind, the story only makes sense if you operate from the Division's initial premise that Mr. Boden and his partners are fraudsters.

1. Mr. Boden Attempted to Sell Glawson to Satisfy the Client's Demand for Liquidity.

Mr. Boden's motivation for selling Glawson was to create liquidity for New Forestry, consistent with the client's objectives. The property had been clear cut and was therefore not income-producing core timberland, which is what the client was seeking to retain for its portfolio. (Hr'g Tr. 348:3–9.) Given these characteristics, Mr. Boden believed the best disposition plan for the property was to sell it to a single-family developer. (Hr'g Tr. 272:24–273:6.) To that end, Mr. Boden had discussions with representatives of numerous residential real

estate developers. (Hr'g Tr. 276:16–21; 282:12–20.) None of the developers were prepared to purchase the property because of uncertainty surrounding their ability to develop the property as residential real estate due to recent and impactful environmental regulatory changes. (Hr'g Tr. 344:23–346:20.) Because the potential end-users wanted time to evaluate the suitability of a residential project, and because "New Forestry was interested in sales and monetization of properties, sales" not "conditional sales" or options, selling an option to the developer directly would not have been in New Forestry's interest. (Hr'g Tr. 347:9–13.) Therefore, Mr. Boden sought out an investor such as Mr. Hailey, who might be interested in providing New Forestry with liquidity by acquiring the property, with the knowledge that there were developers sufficiently interested in acquiring the property to purchase an option, which would provide them time to ascertain its viability as a development site under the new regulations. Accordingly, Mr. Boden proposed to Mr. Hailey that Mr. Hailey buy the property and sell for a premium an option to acquire it. In connection with this proposal, Mr. Boden provided Mr. Hailey with two documents, a form purchase and sale agreement and an option agreement, to illustrate the proposal. (Hr'g Tr. 873:17–24; Div. Ex. 146.) Mr. Hailey, however, was not interested and negotiations never progressed beyond those initial drafts. (Hr'g Tr. 876:1–5.)

2. The Proposed Glawson Transaction Does Not Show Any History or Pattern of Attempted Cross Trading.

The Division contends that Mr. Boden wanted to sell Glawson out of New Forestry's portfolio and obtain an option for another Timbervest-controlled entity to acquire it. (Div. Brief[1] at 32.) There is no evidence, however, that Mr. Boden attempted to obtain an option for another Timbervest-controlled entity. None.

[1] "Div. Brief" refers to the Division of Enforcement's Post-Hearing Brief, dated March 28, 2014.

The draft purchase agreement that Mr. Boden provided to Mr. Hailey did not identify the purchaser or the seller. (Div. Ex. 146.) The draft option agreement, which was prepared by Mr. Boden's attorney, Ralph Harrison, listed the purchaser of the option as Willow Run Investments, LLC. (Div. Ex. 146.) Mr. Hailey testified that he assumed that it was a Timbervest entity that wanted to sell and repurchase the property. (Hr'g Tr. 880:15–881:21; 872:6–9.) There is no evidence, however, to support that assumption. Mr. Boden testified that he did not ask Mr. Harrison to create Willow Run Investments or to insert a name into the option agreement. (Hr'g Tr. 278:11–15.) And there is no evidence that any Timbervest partner had any interest in Willow Run Investments.

The Division's theory regarding Mr. Boden's motivation is based on three other documents prepared by Mr. Harrison that were never shared with or physically presented to Mr. Boden or Mr. Hailey: a memorandum of the option agreement, an assignment of the option agreement, and a memorandum of the assignment. (Div. Exs. 155b, c, & d.) The assignment and the memorandum of the assignment do not identify the entity to which the option was intended to be assigned. (Div. Exs. 155c & 155d.) There is no evidence that Mr. Boden requested or received the other documents. Mr. Boden testified that the only document that he asked Mr. Harrison to prepare was an option agreement and that this was the only document he ever physically received. (Hr'g Tr. 263:2–3; *see* Div. Ex. 146.) Mr. Harrison testified that he did not recall Mr. Boden asking him to prepare the documents but that he had tried to anticipate what he thought Mr. Boden might need based on his cursory understanding of the proposal from his brief conversation with Mr. Boden. (Hr'g Tr. 695:21–697:4.)

Mr. Harrison used Willow Run Investments as a placeholder in the draft option. Mr. Harrison explained that he created Willow Run Investments along with two other entities for a

hedge fund strategy he was working on following a discussion with the principals of SSR Capital. (Hr'g Tr. 571:2–8; 660:17–662:2.) He initially created Willow Capital Management to act as a management company. (Hr'g Tr. 661:10–13.) Next, he created Willow Run Partners, which was intended to be an investment fund, and drafted a private place memorandum. (Hr'g Tr. 661:14–20.) Finally, he created Willow Run Investments, which was intended to be a fund for distressed real estate. (Hr'g Tr. 661:21–662:2.) The hedge fund strategy never came to fruition, so when Mr. Boden asked Mr. Harrison to prepare an option agreement for a pending meeting Mr. Boden had scheduled, *Mr. Harrison* decided to use Willow Run Investments as a placeholder because he thought it would look better to the potential purchaser. (Hr'g Tr. 710:11–20.) Although the Division dislikes Mr. Harrison's explanation, that does not make it untrue.

The Division questions Mr. Harrison's credibility, but his decision to correct his testimony and provide the additional documents to the Division demonstrates his truthfulness. (Hr'g Tr. 568:24–571:1.) When Mr. Harrison gave on-the-record testimony in the investigation that led to this proceeding, he did not recall that Willow Run Investments had ever been used in connection with any business involving Mr. Boden. This is not surprising given that seven years had elapsed since Mr. Harrison prepared the documents. Following an inquiry from counsel, he reviewed the Georgia Secretary of State's records and his records and found documents related to the Glawson transaction. (Hr'g Tr. 568:24–571:1.) Neither his lawyer nor the Division was aware of the existence of the three documents introduced as Division's Exhibits 155b, c, and d. These documents certainly are not helpful to Respondents' case. Accordingly, if Mr. Harrison were the deceitful person the Division claims, he never would have provided the three documents. Mr. Harrison was being honest.

The Division's criticisms of Mr. Boden's marketing of Glawson do not show that it was an attempt to cross trade the property. At best, these criticisms show that the proposal was not well thought out, which is not surprising given that Mr. Boden explained that it was a structure for Mr. Hailey to consider. Both Mr. Boden and Mr. Hailey testified that it was an introductory illustration of a potential structure that never went anywhere. (Hr'g Tr. 281:19–21; 338:16–20; 871:2-8; 875:21-15.) Thus, Mr. Boden's effort to sell Glawson to Mr. Hailey was not an attempt to obtain property for Timbervest and is not relevant to the Tenneco transactions.

3. Timbervest Improved the Glawson Property to Maximize Its Value for New Forestry.

The Division asserts that "Glawson was the source of numerous personal and business benefits for the Respondents" (Div. Brief at 32); however, the evidence demonstrates that the improvements Timbervest made to the property were for the purpose of enhancing its value upon its ultimate disposition. In 2008, after it became clear that the property could not be developed as residential property, due to the impact of the Alcovy River Watershed Management Act on the property, the collapse of the housing market, and the economic recession, a distinct change in the disposition strategy was required. Timbervest decided that the best disposition strategy for the property was to reposition it as a high-end hunting preserve. (Hr'g Tr. 1867:2–1868:9.)

Timbervest therefore worked to improve the property, add value to the property, and create an exit strategy for New Forestry so the property could be sold. Timbervest built roads. (Hr'g Tr. 1868:10-16.) It purchased additional nearby acreage that had water features. (*Id.*) It built bridges, cleared fields, enhanced the wildlife, added hunting improvements, built fences and a new entrance, and added additional water features. (Hr'g Tr. 1868:10-1869:7.) It also built a structure to serve as an amenity for potential hunters. (Hr'g Tr. 1868:17-23.) Although the improvements cost a few hundred thousand to complete, a small amount relative to the overall

valuation of the tract on Timbervest's books, significant costs were saved because Timbervest employees spent hundreds of days of their time implementing and overseeing these improvements. (Hr'g Tr. 1871:24-1872:4.) Timbervest was successful in adding "many, many millions" to Glawson's value. (Hr'g Tr. 1879:22-1880:3.) New Forestry therefore directly and greatly benefitted from the improvements made by Timbervest to the Glawson property. These types of value-add HBU strategies are in line with what Timbervest does for its clients and their assets as a timberland manager.

In 2008, consistent with the new disposition strategy, Timbervest decided to terminate an existing hunting lease for the property, which generated a very modest sum on annual basis. The presence of hunters on the site while so many improvement initiatives were ongoing would have posed logistical difficulties as well as a potential for physical injury. Further, because continuing to hunt the property would have negatively impacted the wildlife population Timbervest was trying to enhance and run counter to the ultimate disposition plan, Timbervest limited hunting on the property to that necessary to manage the game. (Hr'g Tr. 1869:18-1870:3; 1872:5–12.) As Mr. Shapiro explained, Timbervest was trying to create maximum value for its client. (Hr'g Tr. 1869:8–12.) To that end, on a few occasions, Timbervest invited guests to the property to create interest in the property among potential purchasers, i.e., high net worth individuals in and around the southeast. (Hr'g Tr. 1898:11–21.)

Finally, the Division contends Timbervest never intended to sell Glawson (Div. Br. at 56) ignoring the 2011 New Forestry Annual Report and 2012 Outlook provided in connection with Timbervest's annual meeting with AT&T. In this report, the I-20 East package, of which Glawson is a principal asset, had been positioned as a Quartile 3 asset. (Resp. Ex. 146 at 28.) Timbervest described Quartile 3 assets as follows: "While these sales do not hurt the Fund's

overall performance, some are being actively marketed and sale opportunities will be explored where advantageous." (*Id.* at 27.) Quartile 3 assets were therefore on track for disposition, not retention, as compared to Quartile 1 and 2 assets, which were deemed better long-term fits for the portfolio. (*Id.*) Accordingly, as Timbervest neared completion of its efforts to reposition this once-troubled asset, it began the process of Glawson's disposition with its new improvements. This positioning for sale occurred just prior to Timbervest's termination by AT&T and before any listing effort was implemented. In short, the Division is once again mischaracterizing the "Respondents'" activities to suggest some illicit purpose when in fact Timbervest's purpose was to maximize the value of the property for its client.

B. Mr. Boden Did Not Make Any Effort to Conceal His Receipt of Advisory Fees.

Both Mr. Boden and Mr. Harrison testified that the LLCs were established for the purpose of protecting Mr. Boden from personal liability. Mr. Boden understood the fee arrangement had been disclosed, thus he had no reason to attempt to conceal the payment of the fees. On at least two occasions, Mr. Boden became aware of third parties seeking compensation from the potential sale of New Forestry's assets based on unknown promises made by the prior Timbervest management team. (Resp. Exs. 85 & 86.) The Division contends Mr. Boden should have contacted Mr. Chambers to inquire whether he had made any promises regarding these properties,[2] but even if Mr. Boden had, Mr. Chambers could not have eliminated the possibility of some third-party asserting a claim with respect to the property. Mr. Harrison was not just attempting to protect Mr. Boden from claims made by past associates of Bob Chambers, but from unknown claims generally. (Hr'g Tr. 591:21–592:4.) Mr. Harrison testified that it was not his intention to conceal Mr. Boden's identity; rather, his only goal was to protect Mr. Boden's

[2] For the Division to make such a suggestion demonstrates how far afield its case has gone and how it missed the mark.

assets through the LLC structure, which is a common asset protection strategy. (Hr'g Tr. 725:11–14; 619:13–18; 590:25–591:4.)

1. The Advisory Agreement Existed.

The Division's argument that there was no advisory agreement in which Mr. Boden could potentially earn fees is unpersuasive and the balance of the evidence suggests otherwise.[3] Both Mr. Zell and Mr. Jones, who were not associated with Timbervest at the time the agreement was made, testified that they were aware of the agreement. (Hr'g Tr. 1535:5–14; 1533:9–17; 1314:23–1316:10; 1319:25–1320:8.) Mr. Boden worked to sell the eight properties that were subject to the agreement, both while he was an independent consultant and after he became a partner, and received no compensation during the approximately two year period when he was an independent consultant because no properties sold that satisfied all of the terms of the agreement. (Hr'g Tr. 505:21–506:8; 51:19–23; 1764:17-1766:7.) The Division acknowledges that Mr. Shapiro and Mr. Schwartz had a discussion about *brokerage commissions* in 2005, but it fails to explain why Mr. Shapiro would raise the topic if there were no advisory agreement. The fees paid to Mr. Boden in connection with the Tenneco and Kentucky sales were consistent with the terms of the agreement. Finally, an advisory fee provision was included in the contract for the sale of Rocky Fork to Scott Carswell, which was scheduled to close in 2007, because it would have met the terms of the agreement if it had closed, but similar language was not included in the 2008 contract for the sale of Rocky Fork to the Conservation Fund because it would not have closed during the five-year term of the agreement. (Div. Ex. 39 & 43.)

[3] At the hearing, the Division implied that Mr. Boden failed to disclose the existence of his advisory agreement during his first on the record testimony (Hr'g Tr.536:19–537:21); however, a review of the transcript reveals that Mr. Boden testified that he was working pursuant to a third-party consulting arrangement, and was never asked about its terms or whether he was paid pursuant to that arrangement. (Hr'g Tr. 558:19–25.) Further, his statement that he was never paid for most of his work during his tenure as an independent consultant is accurate given that he was compensated for only two of the eight properties he worked to sell pursuant to the terms of his advisory agreement. (Hr'g Tr. 559:1–20.)

The Division's argument that there is no reason why Mr. Zell and Mr. Jones would know about Mr. Boden's fee arrangement if Mr. Barag did not demonstrates the reach to which the Division will go to cobble together its theory. One person's lack of knowledge does not disprove another's. Mr. Zell first learned of the advisory arrangement in 2002, when he was employed by BellSouth and was responsible for the New Forestry timberland portfolio managed by Timbervest. (Hr'g Tr. 1535:5–14; 1533:9–17.) Mr. Jones, the last of the partners to join the company, learned of the agreement in 2004, at or around the time he joined Timbervest when he was inquiring about how everyone came to the company. (Hr'g Tr. 1314:23–1316:10; 1319:25–1320:8.)

By contrast, Mr. Barag came to Timbervest in late 2003 as an unpaid consultant with no formal agreement to work exclusively on the new REIT effort. He did not testify that he asked Mr. Shapiro any questions about anyone else's arrangement. Mr. Barag did testify that he generally "had very little involvement with the BellSouth account." (Hr'g Tr. 1924:8–11.) In addition, Mr. Barag "checked out" of Timbervest in the fall of 2004 when the REIT effort failed, before any contract was entered into that would have triggered payment under Mr. Boden's fee arrangement. (Hr'g Tr. 1930:4.) Hence, it is not at all surprising that Mr. Barag was unaware of Mr. Boden's fee arrangement.

2. *Mr. Harrison's Advice Regarding the Use of LLCs was Sound and Not for the Purpose of Concealing Mr. Boden's Identity.*

The Division contends that the payment of brokerage fees to Mr. Boden violated state laws regarding payment of brokerage fees to unregistered brokers and "demonstrates most compellingly" that the structure was designed to conceal Mr. Boden's identity. (Div. Br. at 42.) The Division is wrong. Mr. Harrison recommended the LLC structure as sound legal advice designed to protect Mr. Boden's personal assets, not to conceal his identity. Indeed, Mr. Harrison

never saw the purchase and sale agreements and therefore did not know whether Mr. Boden's name was listed in them or not. (Hr'g Tr. 681:22–682:4; 723:14–18.)

Mr. Harrison had very little knowledge of the source of Mr. Boden's advisory fees or the terms of his arrangement. (Hr'g Tr. 591:19–20; 680:21–681:1.) Thus, it is not surprising that Mr. Harrison did not research the applicability of brokerage licensing statutes to Mr. Boden's advisory fee agreement (Hr'g Tr. 682:9–15), but if he had, he might have concluded that Mr. Boden's fee arrangement was excepted from the applicable statutes because Mr. Boden was effectively a full-time property manager. *See* Ga. Code Ann. § 43-40-29(a)(7); *see also* Ky. Rev. Stat. Ann. § 324.030(1) & (5); Ala. Code § 34-7-2(b)(1).[4] Thus, the payment of the fees did not necessarily violate state law and is not evidence that Mr. Boden attempted to conceal the fees as the Division claims.

3. Mistakes in the Purchase Agreements Regarding the Advisory Fee Payments Had No Effect on the Transactions.

The Division contends that the purchase agreements contained misleading statements regarding the payment of commissions; however, the "misstatements" the Division identifies are more accurately described as mistakes, which had no impact on the transactions and therefore did not harm the client. For example, the Tenneco purchase agreement mistakenly identified Fairfax Realty Advisors as the agent for the purchaser. This error did not affect the transaction because it was always clear that the fee would be paid by the seller, as was evidenced by the actual closing statements. Drafting mistakes occur. They are not necessarily indicia of fraud. By way of example, the draft contract for the sale of Glawson reads "fifteen (30) days." (Div. Ex. 146.) Presumably, if the transaction had proceeded the mistake would have been corrected.

[4] Given his testimony that he had not researched the statutes, the alleged statutory prohibitions certainly could not have been the rationale for the LLC structures.

The Division also complains that Mr. Boden, not Fairfax Realty, Westfield Realty, or Woodson and Company performed the services described by the contracts. But the inclusion of the names of the limited liability companies was not intended to deceive anyone. Mr. Boden was following the advice of his counsel in receiving the fees through a limited liability company rather than in his own name. Moreover, each of Mr. Boden's partners, who had authority to execute the contracts on behalf of New Forestry and approved the transactions at issue, was aware that Mr. Boden would be receiving a fee in connection with each transaction in accordance with his long standing advisory fee agreement.

Finally, the Division identifies a 2% commission rate in the Rocky Fork-Scott Carswell contract, which is not consistent with the terms of Mr. Boden's advisory agreement. (Div. Br. at 39.) This commission rate is a mistake, much like the mistake in Mr. Wooddall's draft of the Tenneco contract. The draft contract that Mr. Wooddall sent to Mr. Boden specified a commission of 3%, payable to Fairfax Realty, LLC. (Div. Ex. 9). The executed contract, however, states that the commission is 3.5% (Div. Ex. 10), consistent with the terms of Mr. Boden's fee arrangement. The sale of Rocky Fork to Scott Carswell was terminated in 2006 during the inspection period, and, thus, it never closed. If the transaction had proceeded to closing, it is likely this mistake would have been corrected, just as the Tenneco contract was corrected. Thus, the "misstatements" identified by the Division are not evidence of any attempt to mislead, but evidence that the contracts were not perfectly drafted.

4. Mr. Harrison's Payment Arrangement Was Reasonable under the Circumstances.

There is no justification for a finding that the payment to Mr. Harrison was a reward for helping Mr. Boden conceal his identity, as the Division suggests. (Div. Br. at 44.) Mr. Harrison and Mr. Boden have been friends since college, and Mr. Harrison has provided legal services to

Mr. Boden and his family on numerous occasions over the years without any compensation including advice relating to Mr. Boden's property tax consulting business, assisting Mr. Boden's wife with a dispute related to a rental property, and advising Mr. Boden on his personal investments. (Hr'g Tr. 729:2–15.) In addition, Mr. Harrison was not compensated for preparing work related to the Glawson option. (Hr'g Tr. 701:20–22.)

Mr. Harrison considered the fee arrangement to be a contingency fee. (Hr'g Tr. 718:22–24.) There was no guarantee Mr. Harrison would receive any payment at all for his work. In fact, he was not compensated for the creation of Woodson and Company, LLC or Loudoun Realty Company, LLC. (Hr'g Tr. 729:10-15.) Consequently, the payments to Mr. Harrison are more reasonably seen as compensation for the many instances of free advice he has provided Mr. Boden over the years, rather than the illicit reward the Division posits. Mr. Harrison is a member of the State Bar of Georgia and has never had a bar complaint in twenty-five years. (Hr'g Tr. 727:20–24.) He would not risk his bar license for a 10% fee. As he testified, if he suspected that the companies were being used for any unethical purpose, he would have refused to help. (Hr'g Tr. 727:25–728:12.)

5. Mr. Boden Did Not Recognize Any Potential ERISA Issue.

Mr. Boden understood his fee arrangement was disclosed to ORG by Mr. Shapiro and that it had been approved. Contrary to the Division's arguments, Mr. Boden did not attempt to conceal the payment of the fees because he knew they were prohibited by ERISA; Mr. Boden never considered whether the advisory fee arrangement was prohibited by ERISA. Mr. Boden explained that he understood that he was a fiduciary and required to put the interests of his clients first, which he did, but he did not understand the intricacies of ERISA. (Hr'g Tr. 152:20–153:3; 154:7.) While the Division has relied on the testimony of Mr. Barag to establish the Partners' supposed knowledge of ERISA, noticeably lacking from that assertion is any

representation as to Mr. Boden's knowledge. Mr. Barag did not testify that he had any conversations with Mr. Boden about ERISA. Indeed, regarding Mr. Boden, Mr. Barag testified that he believed and continues to believe that Mr. Boden is a man of integrity. (Hr'g Tr. 2013:13–20.) Mr. Boden testified to a lack of knowledge of ERISA. Mr. Harrison had no knowledge of who Mr. Boden's client was, or that it might be subject to ERISA. Given these circumstances, the idea that Mr. Boden was in any way motivated by ERISA is ludicrous.

In sum, the Division did not establish that Mr. Boden concealed the payment of his advisory fees and therefore did not establish that Mr. Boden aided, abetted, or caused any failure by Timbervest to disclose the receipt of his fees.

C. The Tenneco Transactions Were Two Separate Transactions.

The Division contends that Timbervest violated the Advisers Act by failing to disclose the cross trade of the Tenneco transaction. However, the Tenneco transaction was not a cross trade, thus there was nothing to disclose. Mr. Wooddall's testimony that he and Mr. Boden agreed to a "verbal option" does not mean the transactions were a cross trade. Even assuming Mr. Wooddall's recollection is accurate, there was no promise or guaranty by Timbervest to repurchase the property. Any such "verbal option" was not binding on either Timbervest or Chen Timber. Indeed, Mr. Boden may not have intended to ever act on the purported option. As set forth in Mr. Boden's Post-Hearing Brief, it would have been illogical to commit another client to purchase the property at a price higher than its current value. Any such verbal option or understanding regarding a repurchase amounted only to a negotiating tactic serving to persuade Mr. Wooddall to acquire Tenneco thereby completing an accretive sale for New Forestry. This was not a breach of fiduciary duty but a fulfillment of New Forestry's mandate to sell.

The sale of Tenneco provided the client with the liquidity it was seeking at a price that represented a more than 11% premium over the carrying value, which was supported by Timbervest's valuation policy and its recent third-party appraisal. The transaction was negotiated and agreed to based on the best economic information available during the second quarter of 2006. The acquisition on behalf of TVP, based on the best economic information available to Timbervest during the fourth quarter of 2006 and first quarter of 2007, likewise benefitted TVP. TVP acquired the property at a price below what every objective factor demonstrated the value of the property to be at the time. In addition, there is no evidence that Mr. Boden was motivated by ERISA to enter into either transaction.

1. Any Verbal Option Regarding Tenneco was a Negotiating Tactic.

Crediting Mr. Wooddall's testimony that he gave Mr. Boden a verbal "no cost" option on Tenneco, it is reasonable to conclude that Mr. Boden induced Mr. Wooddall to purchase the property by indicating Timbervest's possible future interest for the purpose of persuading Mr. Wooddall to close. Mr. Wooddall testified that he did not believe the two discussed a price for the reacquisition at their first meeting, just that "they would like to repurchase it." (Hr'g Tr. 812:24–813:2.) Mr. Wooddall sent a draft contract to Mr. Boden on July 7, 2006. (Resp. Ex. 14.) The fully executed contract is dated September 15, 2006, with only minor changes to the parties and the price (Div. Ex. 11); however, on August 7, 2006, Timbervest reported to ORG that it expected the property to be sold in the third or fourth quarter of 2006 (Div. Ex. 16).[5] Mr. Wooddall and Mr. Boden likely continued to have conversations during July and August in

[5] The Division takes issue with the use of the word "unsolicited" to describe Mr. Wooddall's offer on the property. Mr. Boden testified that he did believe that term to be accurate, but that he was not the drafter of the report. (Hr'g Tr. 117:11–15.) The statement should not be attributed to Mr. Boden given the likelihood that many individuals played a role in revising the document. Rather than being intended to mislead the reader, a more reasonable interpretation of the mistake is to contrast it against the auction process that was underway with respect to the non-core Tenneco properties as there was no formal effort to market the Tenneco core property. In any event, the use of the word "unsolicited" did not change the operative fact for the client—New Forestry had an interested buyer who was likely to close on a sale.

which Mr. Boden persuaded him to close on the property. Mr. Wooddall described Mr. Boden as "as good a negotiator as there is." (Hr'g Tr. 851:19–22.)

But at the time of these discussions, Mr. Boden believed the property to be worth only $12 million based on the information available to him, including the most recent independent third-party appraisal. (Hr'g Tr. 206:21–24; Resp. Ex. 52.) Thus, it would have been illogical for Mr. Boden to plan to acquire the property for $14.5 million in six months as that would have meant recording a loss on acquisition, something Timbervest has never done. (Hr'g Tr. 208:1–7.) Therefore, the more reasonable conclusion is that Mr. Boden played on Mr. Wooddall's reputation for "buy[ing property] and turn[ing] around and resell[ing] it immediately" (Hr'g Tr. 857:13–23), by suggesting Timbervest would have an interest in acquiring the property in the future.

2. There Was No Conflict of Interest With Respect to the Tenneco Transactions.

The Investment Committee separately considered whether each transaction met the needs of the client. Mr. Jones explained that it would never have occurred to Timbervest to transfer the property from New Forestry to TVP because no price would have been in both the clients' interests:

> Ultimately, the transaction I don't think would ever happen, though, because it's just not consistent with our objectives for either of the clients, for lack of a better term.
>
> I mean, our 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 market 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.

(Hr'g Tr. 1489:11–23.) The terms of the two transactions were fair and benefited both of the clients. Thus, there was no conflict of interest. Ignoring that a cross trade would not have been

logical, given that Mr. Wooddall paid a premium over the carrying value in 2006 and TVP purchased at a discount to the estimated value in 2007, the Division points to documents and testimony it contends demonstrate a conflict of interest.

The Division argues that Barrett Carter disseminated a false narrative regarding the Tenneco repurchase in an email, which should be attributed to Mr. Boden because, according to the Division, Mr. Boden is the likely source of the information. Mr. Carter, however, could not recall the specifics of his discussions with Mr. Boden about the Tenneco transactions because it was seven years ago. (Hr'g Tr. 959:25–960:8.) Mr. Carter also could not recall who told him Chen Timber approached Timbervest. (Hr'g Tr. 945:5–12.) Even if Mr. Boden is the only person who had conversations with Mr. Wooddall, it does not follow that Mr. Boden did not discuss the repurchase with anyone else, or that the information ultimately relayed to Mr. Carter was what Mr. Boden actually said. Thus, the words Mr. Carter used cannot be attributed to Mr. Boden. The Division is once again only speculating that Mr. Boden was Mr. Carter's source for the information or that Mr. Carter got it right. Moreover, there is no evidence that Mr. Carter sent this email with intent to deceive anyone, much less New Forestry, about the nature of the transaction. Indeed, this email went only to Timbervest personnel and to employees of a company that maintained Timbervest's property records. (Hr'g Tr. 934:13-25.) It is therefore unclear how such an email, which was never sent to BellSouth or AT&T personnel, could be seen as the basis of intent to conceal the transaction from New Forestry.

The Division is also critical of the descriptions of the Tenneco properties contained in the 2006 New Forestry Disposition Report and the Gilliam Spec Book; however, the descriptions do not constitute a violation of the Advisers Act. Nevertheless, the Division offered no evidence that Mr. Boden was responsible for the descriptions. Mr. Boden testified that he did not write the

reports. (Hr'g Tr. 252:19–253:10.) He therefore cannot be held liable for their contents. Moreover, the descriptions had no impact on the transaction because Timbervest had discretion to sell any property in the portfolio, consistent with the governing documents and the investment guidelines. (Div. Ex. 46, 47, & 54)

The Division questions the Respondents' inability to recall the specific discussions about the acquisition of Tenneco by TVP, but the transaction was one of more than 330 acquisitions and dispositions completed since 2003 (Resp. Ex. 137 & 138) and occurred more than seven years ago. The Division believes it must have been memorable because the partners must have discussed the appearance of a conflict of interest based on their knowledge of ERISA. In truth, they did not discuss ERISA because it did not occur to any of them, likely because they believed the transactions to be two separate transactions. Although this is the only instance in which a Timbervest fund acquired a property previously owned by a client, the transaction itself was not remarkable because the partners followed the same procedure they always did and continue to follow today. In fact, Mr. Zell testified, "I remember reviewing the underlying data, and I think we had various models looking at it, as we always would." (Hr'g Tr. 1641:4–13.) The Division's suggestion that Timbervest should have disclosed TVP's acquisition of Tenneco, even if there were no cross trade, is not supported by any rule or regulation. The Division did not establish that Timbervest failed to disclose a cross trade of Tenneco and therefore did not establish that Mr. Boden aided, abetted, or caused Timbervest's failure to disclose a cross trade of the Tenneco property.

D. Conclusion.

The claims against Mr. Boden should be dismissed. The Division failed to prove a primary violation of the Advisers Act by Timbervest. Even if there were a primary violation, the

Division failed to establish that Mr. Boden aided, abetted, or caused any such violation. Further, the remedies the Division seeks are barred by the statute of limitations or inappropriate based on the facts presented at the evidentiary hearing.

This 18th day of April, 2014.

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.