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 CONSOLIDATED RESPONSE TO RESPONDENTS' POST-HEARING BRIEFS

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The Division of Enforcement ("Division") hereby files this consolidated response to the Respondents' Post-Hearing Briefs, stating as follows:

I. INTRODUCTION

As discussed below, the Respondents' Post-Hearing Briefs contain statements which are unsupported by the record, including: (1) inaccurate descriptions of the evidence developed at the hearing; (2) "factual" assertions having as their only source Respondents' own Wells submissions; and (3) speculation about the existence of lost or destroyed exculpatory documents. Accordingly, Respondents' legal arguments are flawed in that they are not based on the evidence developed at the hearing.

II. RESPONDENTS SHOULD NOT BE HEARD TO COMPLAIN ABOUT ALLEGATIONS RELATING TO 2006 AND 2007 IN VIEW OF THEIR CONCEALMENT

The Respondents contend that their ability to defend against the allegations is compromised by faded memories and the possible loss or destruction of documents that might be helpful for their defense. (Timbervest Post-Hearing Brief at 16-18). There is nothing unfair about holding Respondents accountable for the conduct in which they engaged in late 2006 through early 2007. The Respondents concealed their fraudulent activity, and the Division investigated the conduct promptly upon uncovering it. Moreover, the Respondents' claimed failures of recollection are suspect, and defense counsel's speculative arguments about lost or destroyed documents are entitled to no weight.

A. Respondents Presented No Testimony Regarding Unavailable Exculpatory Company Documents; No Exculpatory Inferences May Be Drawn from the Stipulation Regarding BellSouth's Email

Respondents' claims about the possibility of helpful company documents that are no longer available are groundless speculation that must be disregarded. (See Timbervest Post-

Hearing Brief at 16). Respondents offered no testimony about lost or destroyed company files, about documents that were once maintained at the company but could not be located, or about electronic record-keeping practices of the company that resulted in the unavailability of electronic files. Speculation for which no foundation has been laid is not evidence.

Regarding the stipulation about BellSouth's email retention practices (Tr. 2212-13), Respondents claim there is a possibility that unavailable BellSouth emails might show disclosures by Timbervest regarding the fee payments to Boden. (Timbervest Post-Hearing Brief at 18). This is grasping at straws. No exculpatory inferences from the stipulation are warranted because: (1) No Respondent testified that he made disclosures to BellSouth (other than the irrelevant disclosures to Zell in 2002); (2) any such disclosures by Respondents would presumably be available to Timbervest from its own files and/or the files of ORG; and (3) Respondents had the ability to subpoena the former employees of BellSouth for testimony about supposed disclosures of the fee payments, but they declined to do so.

The Division bears the burden of proof in this proceeding. This does not mean, however, that the Division was obliged to elicit testimony from every former BellSouth employee who came into contact with Timbervest to show there was no disclosure of the commission payments.

The Division introduced ample evidence to show that Respondents failed to make disclosure to BellSouth, including: (1) affirmative testimony by Respondents about disclosure to Zell but not to any other BellSouth employee (Tr. 1811:11-16); (2) statements in Respondents' Wells submissions and Court filings to the same effect (Div. Ex. 74 at 5-6; Div. Ex. 73 at 4; Respondents' Motion for Summary Disposition (Doc. 13) at 14-15); (3) BellSouth's institution of a three percent disposition fee that applied to the property sales at issue (Tr. 144:4-21), making it highly unlikely that Respondents would seek or obtain permission to pay themselves

millions more in compensation for the sales; (4) ORG's unawareness of any disclosure to BellSouth of the commission payments (Tr. 982:23-983:17); (5) Respondents' failure to make disclosure to BellSouth/AT&T or ORG about the payments, either before or after they were made (Tr. 296:17-298:9); (6) Respondents' concealment of the payments through the use of multiple LLCs ostensibly having no connection to Boden (Tr. 595:4-604:2); and (7) Respondents' knowledge that they were subject to ERISA (making either disclosure of prohibited transactions or obtaining consent for them extremely unlikely) (Tr. 150:20-153:3; 1355:22-1356:5; 1673:20-1674:2; 1720:16-20).

Finally, Respondents' speculation that documents evidencing the disclosure of Boden's fee arrangement to BellSouth might have existed, but have since become unavailable (see Timbervest Post-Hearing Brief at 15), is undermined by Zell's testimony. In the following exchange between counsel for the Division and Zell, Zell conceded that Timbervest never disclosed the Boden fee arrangement to BellSouth:

> Q: You would agree with me that regardless of what anyone at Timbervest may have disclosed to Ed Schwartz at ORG, Timbervest never sought consent from BellSouth for the payment of fees to a Timbervest principal, would you not?
>
> A: Yes, I would agree.

(Tr. 1532:10-15). Given his ties to BellSouth,[1] Zell certainly would have known about any disclosure of Boden's fee arrangement after Zell joined Timbervest, and, in all likelihood, he would have been directly involved in any such disclosure. Zell conceded, however, that there was no such disclosure. (Id.)

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[1] Zell ran the real estate and natural resource portfolio at BellSouth's pension group from 1996 until he joined Timbervest in May 2003. (Tr. 1534:14-21; Tr. 1536:23-25).

B. Memory Lapses Pose No Obstacle to Reasoned Findings; Only the Respondents and the Witnesses Associated with Them Claimed Lack of Memory as to Memorable Events

In regard to fading memories, the most significant memory lapses were confined to the Respondents and the witnesses with whom they shared legal counsel.[2] For example: (1) the four individual Respondents suffered from a memory lapse about how the anomalous repurchase of Tenneco by a Timbervest fund came about (see Division's Post-Hearing Brief at 11) (citing record);[3] (2) Shapiro remembered nothing of what he said to Schwartz when he supposedly disclosed the conflict of interest relating to the fees (Tr. 1776:25-1777:2); (3) Shapiro could not recall what, if anything, Schwartz said in response to his supposed disclosure (Id.); (4) Carter, a Timbervest employee, could not remember who told him Chen Timber approached TVP to sell Tenneco because of "another opportunity" (Tr. 942:16-943:9; 945:5-16); and (5) Harrison, Boden's personal lawyer, drew a blank on why he drafted an assignment of the option to purchase Glawson. (Tr. 697:22-698:3). The Division submits that these were all memory lapses of convenience, feigned to avoid inculpating the Respondents.

By contrast, the Division, which bears the burden of proof, produced credible witnesses proving Respondents' liability, notwithstanding the passage of time. Unbiased witnesses who were independently represented, including Wooddall, Schwartz, and Barag, were not afflicted with wholesale memory losses about distinctly memorable topics. For example: (1) Wooddall

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[2] Shapiro, Boden, Zell, Jones, and Harrison are all represented by Sutherland, Asbill & Brennan. Timbervest and Carter are both represented by Rogers & Hardin.

[3] By contrast, Boden easily recalled, without reviewing any document, the precise amount at which he offered (unsuccessfully) to sell Glawson to Reid Hailey in the fall of 2005 ("book value, four-million-four-seventy"). (Tr. 256:17-18). Similarly, Boden and Shapiro recalled without hesitation the complex terms of the supposed oral agreement that they supposedly made in 2002. (Tr. 193:1-5; Div. Ex. 127).

remembered negotiating with Boden the $14.5 million repurchase price for Tenneco *before* Chen Timber contracted to buy the property (Tr. 770:19-771:6); (2) Schwartz was sure that Shapiro never disclosed to him plans to pay commissions to a Timbervest principal on behalf of New Forestry (Tr. 2063:3-9; and (3) Barag was certain that that he never heard of an oral agreement between Boden and Shapiro encompassing major New Forestry properties in the Southeast, or about efforts to sell such properties. (Tr. 1930:5-1931:5; 1931:20-25; 1932:21-1933:4)

Regardless of whether the Respondents' and their cohorts' memory lapses were real or affected, the Court should credit the testimony of credible witnesses who *did* recall the crucial pertinent events. For those instances in which witnesses Wooddall, Schwartz, and Barag gave testimony against the Respondents, and the Respondents lacked recollection about those events, the witnesses' testimony should be credited. Evidence of what actually happened from witnesses with competent powers of recollection renders Respondents' memory lapses and prevarications irrelevant.

III. THE RECORD DOES NOT SUPPORT RESPONDENTS' CLAIM THAT SHAPIRO DISCLOSED THE CONFLICT OF INTEREST REGARDING THE FEE PAYMENTS TO ORG'S SCHWARTZ

A. Shapiro Had No Recollection of the Conversation in which Respondents Claim Disclosure was Made; Schwartz's Specific Recollection of the Conversation Shows that Shapiro Did Not Disclose Boden's Fees

Respondents contend that the conflict of interest posed by the payment of real estate commissions to Boden was cured by Shapiro's disclosure to Schwartz. (Timbervest Post-Hearing Brief at 10). Shapiro's testimony, however, was virtually devoid of any credible evidence of such disclosure. When asked what he actually disclosed to Schwartz, Shapiro stated: "I don't really recall. I think I gave him the general overview of it. *And all I can remember is coming away thinking it was fine.*" (Tr. 1776:25 to 1777:2) (emphasis added). Shapiro

acknowledged that "Mr. Schwartz's recollection is a lot better than mine has been on this." (Tr. 1778:6-7).

Unlike Shapiro, Schwartz had a specific recollection of the conversation. He remembered Shapiro asking him a purely hypothetical question about whether it would be okay to pay brokerage commissions to a non-employee who might join Timbervest in the future. (Tr. 2057:3-2059:11). Schwartz responded that New Forestry could not pay double brokerage fees, but that he would need to consult with legal counsel if an actual situation presenting a potential conflict presented itself. (Tr. 2059:20-2060:2). Schwartz did not confer with counsel because his conversation with Shapiro never went beyond the hypothetical. (Tr. 2057:24-25; 2061:5-9).

Steve Gruber, the ORG partner with primary responsibility for overseeing Timbervest's management of New Forestry knew of no arrangement whereby Boden was to receive real estate commissions in connection with the sale of New Forestry property. As the partner at ORG in charge of the Timbervest relationship, it is likely that such a significant fact would have been shared with Gruber by Schwartz, if Schwartz had ever been informed about it.[4]

Thus, the record is devoid of credible evidence that Shapiro disclosed an intention to pay real estate commissions to Boden from New Forestry funds, either generally or in connection to

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[4] The parties stipulated as follows: "(1) If called as a witness, Steve Gruber would testify that during the time that ORG was retained by BellSouth/ AT&T to manage its natural resources portfolio, (A) he was the primary person at ORG in charge of managing the New Forestry portfolio on behalf of BellSouth/AT&T; (B) at no time did anyone, including anyone at ORG, at Timbervest, or at BellSouth/AT&T, communicate anything to him about an arrangement by which New Forestry would pay brokerage or advisory fees based on the sales of certain New Forestry properties to any employee or principal of Timbervest; (C) at no time did anyone inform him of any brokerage or advisory fees paid by New Forestry to William Boden or any other employee or principal of Timbervest; (D) he recalled the sale of the Tenneco core property under New Forestry's April 2006 disposition mandate; (E) at no time was he aware that Timbervest had repurchased the Tenneco core property on behalf of a different Timbervest client; (2) Respondents claim that they had a different understanding as to Mr. Gruber's role as testified to in Stipulation 1A." (Tr. 982:23-983:17; Doc. 45).

specific properties. When Schwartz's testimony is compared side-by-side with Shapiro's, a finding that Shapiro failed to disclose the disputed fee payments appears virtually unavoidable.

B. Respondents' Attack on Schwartz's Credibility Lacks Merit

1. Respondents' Failure to Offer Corroboration for Schwartz's Supposed Prior Inconsistent Statements Raises Credibility Issues in Regard to the Testimony of Shapiro and Jones

Despite Respondents' failure to offer credible evidence that they obtained informed consent from Schwartz, the Respondents nevertheless attack Schwartz's credibility in recounting his conversation about fees. (See Timbervest Post-Hearing Brief at 10). These attacks are entirely without merit.

Like Shapiro's conspicuously unsubstantiated claim about Wooddall's supposed recantation (see Division's Post-Hearing Brief at 14 n.6), Shapiro and other Respondents make equally unsubstantiated claims about prior inconsistent statements of Schwartz.[5] In particular, Respondents claim that Schwartz made statements to them in the presence of third-party witnesses acknowledging that he was aware of Boden's fee arrangement. These include Schwartz supposedly confirming his awareness in a February 2012 annual meeting, two calls with the Arizona Public Safety Personnel Retirement System ("AZPSPRS") in June 2012, and at a meeting with AZPSPRS.[6] (Timbervest Post-Hearing Brief at 11).

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[5] According to Shapiro, Schwartz stated on "no less than six or eight occasions, in front of mutual clients and to several people," that the payment of real estate commissions to Boden was "fine." (Tr. 1786:7-10). Jones made similar claims. (Tr. 1470:1-17; 1471:1-21; 1472:24-1473:7). Respondents elicited testimony from none of the many third-party witnesses that they claimed heard Schwartz make these remarks. The Respondents' claims are not credible.

[6] AZPSPRS is a public pension fund for which ORG managed investments, some of which were placed in Timbervest-managed funds. (Tr. 2067:21-25).

None of the third-party witnesses before whom Schwartz supposedly acknowledged his awareness of the fee arrangement were called by the Respondents as witnesses at the hearing. A number of representatives of AZPSPRS appeared on the Respondents' witness list, but Respondents did not present testimony from any of them. Respondents knew prior to the institution of these proceedings in September 2013 that Schwartz was on record denying that Respondents disclosed fee payments to Boden. (Div. Ex. 74 at 8). Respondents' failure to call a single witness from AZPSPRS, or any of the other parties who were supposedly present, to corroborate their claims regarding a potentially issue-determinative factual dispute raises substantial credibility issues with respect to Shapiro's and Jones' testimony.[7]

Rather than independently corroborating their claims with third-party testimony that, according to their version of events, was readily available, Respondents instead cite to assertions in their own Wells submissions as ostensible impeachment of Schwartz. Counsel's self-serving statements are entitled to no evidentiary weight.[8]

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[7] Respondents' questioning the veracity of Schwartz's lack of knowledge of AZPSPRS restoration of its original funding commitment to Timbervest Crossover Partners III suffers from the same flaw. (See Timbervest Post-Hearing Brief at 12). An inaccurate claim by Schwartz on this point would be easily refutable through the testimony of one or more AZPSPRS representatives. Because Respondents made no effort to elicit such testimony, their unsubstantiated challenge to Schwartz's credibility should be discounted.

[8] Further, Respondents misstate the law in connection with their claims that Schwartz approved the fee arrangement as a Qualified Plan Asset Manager ("QPAM") under ERISA. As stated in the Division's expert report, a QPAM can validly agree to pay the advisor fees outside of its management contract only if the QPAM negotiated the fees independently. (Kohn Report, Div. Ex. 137 at pp. 20-21 n.1). Schwartz testified similarly, stating that approving an agreement to pay brokerage fees to Boden would have required ORG (1) to engage legal counsel, (2) to independently negotiate the arrangement with Boden, and (3) to oversee the entire sales process, removing Timbervest from the decision so as "to alleviate the conflict of interest." (Tr. 2061:10-22). Here, however, Respondents contend that the fee arrangement was in effect since 2002, long before BellSouth engaged ORG. There is no colorable claim that ORG negotiated the fees. Accordingly the QPAM exception is inapplicable.

2. The Fact that Shapiro and Schwartz Discussed Fees in a Hypothetical Context is Not Probative of Disclosure

Grasping at straws, Respondents argue that the mere fact that Shapiro had *any* type of conversation with Schwartz mentioning brokerage commissions proves that Shapiro made disclosure, and that the Respondents' receipt of the fees in question could not have been part of a scheme. (Timbervest Post-Hearing Brief at 18). Neither conclusion, however, is sound.

Shapiro's true reasons for raising the hypothetical scenario are unknown. But it is not hard to posit possible reasons that have nothing to do with disclosing a conflict of interest. For example, Shapiro may have been testing the waters to see what kind of approach Schwartz took toward his fiduciary role. (If so, Schwartz's reference to the need for review by ERISA counsel would have been the end of the test). Alternatively, Shapiro may have been seeking to establish a basis for making the very argument that Respondents now advance, in case the misappropriations ever came to light. Nor can it be ruled out that Shapiro was referring to an actual consultant—someone other than Boden—to whom Timbervest was considering extending an employment offer. Each of these possibilities is admittedly speculative. The point, however, is that the fact that there was a conversation in which a scenario about fees was discussed does not add up to disclosure. Nor does it negate the Division's compelling evidence of scienter.

3. Schwartz's Testimony About Which of the Scenarios Posed Would Call for Consultation with Legal Counsel was Consistent

There is no contradiction, as claimed by Respondents, between: (1) Schwartz's testimony that Shapiro's scenario involved a consultant who Timbervest was considering bringing on as an employee or a partner, and (2) his testimony that if he knew the person was a partner he would have said "no way." (See Timbervest Post-Hearing Brief at 14). Scenario #1, posed by Shapiro, involved paying brokerage commissions to a consultant who might later become an employee or

a partner. (Tr. 2060:3-7). Scenario #2, the subject of a hypothetical question posed by the Division, involved the payment of brokerage fees to someone who Shapiro identified as a current partner in connection with the payments. Schwartz stated that he would need to confer with counsel in regard to scenario #1 (as he informed Shapiro), but that he would say "no way" to scenario #2 without any need for legal advice. (Tr. 2060:8-21).

4. Schwartz was Unaware of Correspondence from Timbervest to AT&T Claiming that the Fee Arrangement had been Disclosed to ORG

Schwartz was unaware that Timbervest claimed to have disclosed the fee agreement with Boden to ORG in correspondence that Timbervest sent to AT&T in 2012. Schwartz visited Timbervest's offices in February 2013 and reviewed certain documents. (Tr. 2120:18-2121:11). Schwartz skimmed a letter that Timbervest wrote to AT&T during his visit. (Tr. 2132:17-24). He could not identify which letter he reviewed. (Tr. 2134:12-16). He was not aware of any statement in the letter that he reviewed contending that Timbervest disclosed Boden's fee arrangement to ORG. (Id.). Respondents' claim that Schwartz reviewed letters to AT&T stating that ORG approved Boden's fee arrangement (see Timbervest Post-Hearing Brief at 12) is therefore unsupported.

5. Authorizing Timbervest to Engage in Clearly Prohibited Transactions Would Not Have Been in ORG's Interest

The explanation that Respondents offer for Schwartz's denial of any disclosure by Shapiro is unconvincing: "[T]o distance ORG from its approval of the fee arrangement and to avoid his own and his company's potential liability for failing to think through all the potential repercussions of his approval of Mr. Boden's fee arrangement." (Timbervest Post-Hearing Brief at 14).

As Schwartz testified, a textbook "prohibited transaction" such as the payment of brokerage fees to a principal of the advisory firm would not require any pondering. (Tr. 2060:14-15). Schwartz was knowledgeable about ERISA (Tr. 2048:14-17), had considerable experience managing plan assets (id.), and has served as an expert witness on ERISA matters for DOL. (Id.). Respondents suggest no motivation for ORG to gratuitously jeopardize its relationship with BellSouth by authorizing Timbervest to engage in prohibited transactions. Respondents' motivation for concealing their receipt of the prohibited fees is, by contrast, easy to grasp: personal financial gain, plus their belief that their broad discretion as managers would make detection highly unlikely.

6. Schwartz's Certainty That Shapiro Did Not Disclose the Payment of Fees to Boden was Not Based on a Semantic Misunderstanding

Respondents argue that "it is entirely possible that Mr. Shapiro told Mr. Schwartz that it was 'hypothetical that Mr. Boden would receive a fee,' rather than that there was a 'hypothetical person who would receive a fee.'" (Timbervest Post-Hearing Brief at 15). Schwartz testified that the scenario posed by Shapiro "seemed to me like a hypothetical question" (Tr. 2057:24-25; 2061:5-9); he did not ascribe the use of the word "hypothetical" to Shapiro. Accordingly, the suggestion that Schwartz's testimony was based on a faulty recollection of word placement has no merit.

C. The Record Does Not Support Respondents' Claim that Shapiro Disclosed the Payment of Fees to Boden Upon Jones' Insistence

Respondents state: "Mr. Shapiro recalls disclosing the fee arrangement to Mr. Schwartz, a principal at ORG, upon Mr. Jones' insistence." (Timbervest Post-Hearing Brief at 10). This is a significant mischaracterization of the record.

Shapiro testified that in September 2005, in connection with Schwartz's queries about the role of Timbervest's managers, he described Boden's role. (Tr. 1784:11-17). Shapiro could not recall any of the specifics that he related to Schwartz, nor could he recall what response, if any, Schwartz had. In fact, Shapiro believed that Schwartz had no response. (Ex. G to Division's Opposition to Motion for Summary Disposition at 41:22-23). According to Shapiro, "[A]ll I can remember is thinking it was fine"—"it" referring to the payment of brokerage fees to Boden. (Tr. 1776:11-1777:2). Shapiro supposedly relayed this to Jones and his other partners. (Tr. 1790:2-16). Jones has no recollection of putting Shapiro's supposed disclosure to ORG in writing at any point. (Tr. 1329:9-1330:5).

According to Shapiro, Jones asked him in late 2006 or early 2007, around the time the fee was paid to Fairfax Realty Advisors, to "reconfirm or reacknowledge" that ORG knew about Boden's fee agreement. (Tr. 1775:15-1776:7). Shapiro recalled Jones asking him a number of times whether he had done so, then "leaving me alone." (Tr. 1774:17-25). Shapiro could not specifically recall having a conversation with Schwartz to reconfirm that he knew about Boden's fee arrangement. (Tr. 1777:7-15; Tr. 1787:14-18). Schwartz was certain that he had no discussions with Shapiro about the payment of brokerage fees to Boden at *any* time. (Tr. 2063:3-9). Thus, the evidence shows that there was no purported disclosure conversation between Shapiro and Schwartz around the time of the payment to Fairfax Realty Advisors.[9]

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[9] The contention that Jones asked Shapiro to reconfirm the disclosure to Schwartz arose for the first time during the hearing, raising questions about its veracity. Notably, the claim is absent from Jones' November 8, 2013 declaration, which states, in part: "In 2005 I had, and continue to have, an understanding that Mr. Shapiro disclosed the fee arrangement in full to Mr. Schwartz and that Mr. Schwartz was fine with the arrangement." (Ex. 156b at ¶ 8). Similarly, neither Jones' nor Timbervest's Wells submissions make any mention of Jones directing Shapiro to disclose (or to redisclose) information about Boden's fee arrangement to ORG. (See Ex. 73 at p. 4; Ex. 74 at pp. 7-8). If, in fact, however, Jones pocketed client funds after he identified a need

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D. The Supposed Disclosure to Zell in 2002 is Irrelevant

Any disclosure to Zell in 2002 regarding the possible payment of real estate commissions to Boden would have been irrelevant, because Boden was an independent consultant at the time. (Tr. 70:25-71:7). Timbervest was free to use his services or the services of any other vendor without obtaining permission from BellSouth. (See Div. Ex. 46 at Section 6.1(a)(v)). By contrast, the payment of real estate commissions to an *owner* of the investment advisory firm implicates an entirely different set of issues.

Respondents point to a 2002 introduction of Boden to Zell as ostensible proof of the existence of "Mr. Boden's fee arrangement" – *i.e.*, the supposed terms set forth in a June 4, 2012 letter from Shapiro to AT&T's Frank Ranlett (see Div. Ex. 127). Respondents, however, disingenuously conflate disclosure of Timbervest's use of Boden as a consultant with disclosure of "Mr. Boden's fee arrangement." (Timbervest Post-Hearing Brief at 1, 3).

Zell testified that in 2002, Shapiro told him only that Boden had been brought in to help with the disposition of property. (Tr. 1535:5-10). According to Zell, there was no discussion of specific properties or of the other terms of Boden's supposed arrangement. (Id.; see also Tr. 1536:18-22).[10] The Division does not dispute that Boden may have started working as an independent real estate salesman for Timbervest in 2002; what the Division disputes is that the

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for reconfirmation of ORG's consent, but failed to obtain such reconfirmation, this would be further evidence of his recklessness.

[10] While Zell had no recollection of particular properties being identified, Boden claimed that at their meeting in the fall of 2002, Zell gave his "final blessing" on the sale of the eight properties that Shapiro had initially identified to Boden. (Tr. 95:22-97:15). Zell, in fact, testified that he did not become aware that either Tenneco or Kentucky Lands were within the scope of Boden's fee arrangement until around the time that those transactions closed. (Tr. 1511:20-1512:4).

five-year oral agreement described in Div. Ex. 127 ever existed. Zell's testimony establishes no disclosure of a five-year oral agreement in 2002. Barag's recollection is that as a consultant, Boden worked on acquisitions and small HBU sales only (Tr. 1928:19-1929:24; 1957:16-1958:18). Zell's testimony does not show otherwise.

E. Zell Changed His Testimony About When He First Learned of Disclosure to Schwartz; Zell was Not Credible in Other Respects

Zell had previously testified that he recalled learning from Shapiro for the first time in 2012 that Shapiro disclosed Boden's fee arrangement to ORG. (Tr. 1538:14-1539:11). At the hearing, however, Zell claimed that he "might have misspoken" or "may have been confused" in his investigative testimony, and that, in fact, he knew in early 2006 that Shapiro had discussed Boden's fee arrangement with ORG. (Tr. 1540:5-15).

Zell's amendment of his testimony raises credibility issues. There was nothing confusing or ambiguous about the questions Zell was asked or the answers he gave in his investigative testimony.[11] If Zell accepted the checks from Boden without being told there had been

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[11] The pertinent questions and answers from Zell's 2012 testimony were as follows:

Q: In 2005 to 2007, did anyone else besides Mr. Shapiro, yourself, and Mr. Boden in that time frame, did anyone else know about Mr. Boden's fee arrangement?
A: I believe ORG was aware of it.
Q: Why do you believe that?
A: Because Joel said he had discussions with them during that time frame.
Q: Did he tell you that?
A: Yes.
Q: When did he tell you that?
A: Sometime this year.
Q: Is that the first time that you were aware that Mr. Shapiro had communicated with ORG about this?
A: It's the first time I recall.

(See Tr. 1538:14-1539:8).

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disclosure to ORG after Boden became an owner, this would obviously cast Zell in a negative light. It is reasonable to infer that Zell was not confused when he originally testified, but, instead, that he shaped the facts to strengthen his defense.

Zell was not a credible witness in other respects. One of the more improbable aspects of his testimony was his professed lack of knowledge of ERISA, despite his considerable experience with investing pension plan assets.[12] Zell claimed, implausibly, that no thought of ERISA crossed his mind regarding the fees paid to Boden and divided among the partners (Tr. 1558:4-8), or in regard to the anomalous repurchase of Tenneco by TVP. (Tr. 1554:4-9).

Zell worked in BellSouth's pension group for approximately eight years, seven of which he spent overseeing BellSouth's real estate and natural resource portfolio. (Tr. 1532:19-1534:21). For three to four of these years, Zell was personally responsible for oversight of the New Forestry portfolio. (Tr. 1533:9-14). Zell's former partner at Timbervest, Jerry Barag, testified that he worked on ERISA-related issues with Zell. (Tr. 1940:24-1941:25). Barag further noted that, in his dealings with Zell, ERISA-related issues came up in the business "in tangential ways all the time." (Tr. 1942:17-19). Zell had been responsible for the development of the private placement memorandum for Timbervest's first co-mingled fund, which, unlike New Forestry, was carefully structured to fit within the REOC exception. (Tr. 1941:1-22). It is therefore reasonable to conclude that Zell knew that New Forestry was not a REOC.

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[12] Zell minimized his understanding of ERISA at every opportunity: "ERISA matters were not generally our bailiwick [in BellSouth's pension group]." (Tr. 1554:18-19). "I am more familiar now than I was in the past [with what prohibited transactions are] and still am somewhat confused as to exactly how I define a prohibited transaction." (Tr. 1554:23-25). (See, generally, Tr. 1555:1-1575:1).

But Zell claimed, incredibly, that he thought New Forestry—which he personally oversaw for three to four years—was a REOC, which he defined as a "real estate operating company that is a carve-out from ERISA." (Tr. 1597:23-1598:2). Zell was subsequently asked about his belief that New Forestry was not covered by ERISA. He responded, to the surprise of many, including the Court: "No, I didn't say that. I believe it is covered by ERISA." (Tr. 1673:20-24). The Court interjected to ask Zell about his apparent self-contradiction. (Tr. 1673:25-1674:1). Zell responded to the Court's inquiry with what might be charitably termed unintelligible prevarication, the gist of which is that he, in fact, did understand that New Forestry was subject to ERISA. (Tr. 1674:2-12).[13]

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[13] The Division notes again that, for purposes of this proceeding, the Court need not determine whether New Forestry was actually a REOC and therefore exempt from ERISA's prohibited transaction rules. What matters is that the Respondents' believed that they were subject to ERISA, which is undisputed. Nevertheless, the Division feels compelled to set the record straight in regard to the Respondents' misleading claim, for whatever purpose it may have been intended.

The Division established conclusively that New Forestry was subject to ERISA, in that it was 100% owned by the BellSouth pension funds, and that it was not an exempt REOC. Respondents own expert testified that, if New Forestry was 100% owned by the BellSouth pension funds, it was not a REOC and was subject to ERISA. (Tr. 990:14-20). Frank Ranlett, the representative of AT&T with firsthand knowledge of New Forestry's ownership, testified that (1) New Forestry was 100% owned by BellSouth/AT&T pension trusts; (2) the nominee partnerships were merely names assigned to the trust entities, (3) he had seen the partnership documents for the nominee entities, and (4) the nominee names were used to make BellSouth's ownership less conspicuous. (Tr. 1032:25-1033:24; 1067:19-1069:5). The documentary evidence supports Ranlett's testimony. (See Div. Ex. 60 at p. 6) (2006 New Forestry Financial Statement, stating that the members of New Forestry are three nominee partnerships – Marine Crew & Co. owning 91% of the interests, Benchlight & Co. and Blazership & Co., each owning 4.5%, respectively; also stating that each nominee partnership "represents a separate employee benefit trust of a single employer"); (see also Div. Ex. 159 at p. 1) (Sept. 11, 2006 Letter from State Street Bank, stating that the three nominee partnerships are nominee names assigned to the accounts of BellSouth Corporation "for their exclusive use as they see fit").

Contrary to their recently-contrived denials, contemporaneous documentation demonstrates that Respondents knew that New Forestry was 100% owned by BellSouth. (See

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Finally, further credibility questions are raised by Zell's—and Shapiro's—denials that they had any knowledge of Fairfax Realty Advisors or Westfield Realty Partners. Zell testified that he "did not become familiar with the names of the entities" to which the fees were paid until learning them in connection with the Division's investigation. (Zell Post-Hearing Brief at 5). Zell, however, actually signed a check for $300 payable to Fairfax Realty Advisors the day after New Forestry's sale of Tenneco closed. (Div. Ex. 1j; Tr. 1569:15-1571:6). Respondents further claim there is no "evidence disputing Mr. Shapiro's account that he had no knowledge of the formation or existence of these LLCs to receive Mr. Boden's fees." (Shapiro Post-Hearing Brief at 8). Shapiro, however, executed the contract between New Forestry and Chen Timber providing for the payment of a brokerage commission to Fairfax Realty Advisors. (Div. Ex. 10 at 12).

F. Respondents' Arguments Regarding the Existence of the Five-Year Oral Fee Agreement are Unconvincing

Anticipating the Division's argument that Boden's five-year oral "fee arrangement," as described in Shapiro's June 4, 2012 letter to Frank Ranlett (Div. Ex. 127) was fabricated, Respondents attempt to show the contrary. Respondents cannot, however, overcome the lack of independent corroboration of the agreement or its sheer implausibility under the circumstances. (See Division's Post-Hearing Brief at 48-53). The testimony of Shapiro and Boden that they entered into the five-year "fee arrangement" in 2002, and the testimony of Zell and Jones that

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. . . continued
Exs. 157, 158) (emails from Jones stating clearly that New Forestry is 100% owned by the BellSouth pension trusts and that the nominee partnerships are "names only"). Moreover, Respondents have provided no evidence (because there is none) that anyone other than the BellSouth pension trusts owned any portion of New Forestry at any time. The Division contends that Respondents' strident insistence – against all evidence and common sense – that New Forestry was not subject to ERISA, further undermines their credibility and demonstrates their continuing refusal to accept responsibility for their misconduct.

they were informed about it by the time they accepted checks from Boden, demonstrates their lack of credibility and collective involvement in a scheme to misappropriate client funds and to conceal.

1. Respondents Cannot Account for the Lack of Documentary Evidence of the Supposed Fee Agreement

Respondents cannot explain why no documentary corroboration of the supposed agreement exists, other than to state that "there may have been some email or memo that memorialized the terms of the agreement" which is no longer available. (Timbervest Post-Hearing Brief at 4). Such speculation is entitled to no weight. No witness testified about creating or seeing a document that has since become unavailable.

2. The Mere Fact that Boden May Have "Showed Up" to Work at Timbervest in 2002 Does Not Prove the Existence of the Supposed Five-Year Fee Agreement

The fact that Boden "showed up to work at Timbervest in the fall of 2002" with an expectation of future earnings does not prove that the five-year oral agreement was formed. (See Timbervest Post-Hearing Brief at 5). Like Jerry Barag, who worked for Timbervest for approximately one year without compensation (Tr. 1916:20-1917:1), Boden's lure may have been the chance to get in on the ground floor of a growing business. (See Tr. 1917:2-16). Alternatively, he may have had an understanding with Shapiro about receiving fees in connection with HBU sales that he generated having no five-year time frame. In 2004, Boden obtained a management position at Timbervest, and became its 25% owner in 2005. (Tr. 78:17-79:4; 83:17-84:3). By 2006 and 2007, he was earning generous compensation. (Tr. 88:6-91:11). Moreover, he continued to work in his property tax appeal business throughout this period and beyond. (Tr. 50:20-51:15). The notion that Boden had to be paid more than $1 million for unsuccessful sales efforts dating back to 2002 makes little sense.

3. The Matching Fee Rates of the Supposed Fee Agreement and the Property Contracts Shows Only that the Terms were Reverse-Engineered

The fact that the commissions were "specific percentage points" varying according to the size of the transaction is not proof of the "fee arrangement." (See Timbervest Post-Hearing Brief at 5). If, as the Division contends, the Respondents reverse-engineered the Boden "fee arrangement" to match the facts about the commissions that were paid, it would hardly be surprising that the properties, fees and time frames synched with the supposed terms of the "fee arrangement."

4. That No Client Fees Were Misappropriated in Connection with the Rocky Fork Sales Does Not Prove that Existence of the "Fee Arrangement"

Respondents point out that Boden would have received an advisory fee had the sale of Rocky Fork to Carswell closed in 2007, but because the sale of Rocky Fork to a different buyer closed after 2007, Boden received no fee. Respondents contend that Boden received no fee because the timing of the closing foreclosed the payment, and that this is proof that the Boden "fee arrangement" really did exist. (Timbervest Post-Hearing Brief at 5-6).

A fact that the Respondents fail to mention, however, is that the United States government was involved in the Rocky Fork purchase. The USDA Forestry Service closed on part of Rocky Fork in December 2008 (Resp. Ex. 92), and The Conservation Fund closed on another part in December 2009. (Resp. Ex. 91). It is not surprising that the Respondents refrained from inserting into an agreement involving the United States government a provision requiring payment to a sham brokerage company. That no brokerage commission was taken by Respondents in connection with the Rocky Fork sales is not probative of the existence of the

"oral agreement." If anything, it indicates that the Respondents did not wish to have such provisions subjected to the heightened scrutiny of the government's acquisition process.

5. The Claim that Shapiro Entered Into a Five-Year Fee Agreement to Effect a One-Year Disposition Mandate is Not Credible

Respondents have no reasonable explanation for why Shapiro would have made an oral agreement longer than five years in duration, given that BellSouth had called for $30 to $60 million in liquidity in less than a year. The explanation offered is that it "takes time" to sell timberland. (Timbervest Post-Hearing Brief at 4). But Shapiro had no way of knowing whether BellSouth would be buying or selling timberland after the specified year had passed, so it makes no sense that he would have entered into an agreement lasting five years. It is much more likely that the five-year term was contrived in order to encompass the payments to Fairfax Realty Advisors and Westfield Realty Partners in 2006 and 2007, respectively.

6. Respondents Have Taken Contradictory Positions About Whether Boden Received Compensation for Work He Did as a Consultant, Raising Further Doubts About the Existence of the Five-Year Fee Agreement

As demonstrated at the hearing, Boden's claims about entering into a five-year oral "fee arrangement" with Shapiro in 2002 were not supported by his March 1, 2011 investigative testimony. In that testimony—given before the payment of the prohibited brokerage fees came to light—Boden discussed his compensation as a consultant but failed to mention anything about a five-year fee arrangement.

Boden stated in his March 2011 testimony that he drew his first paycheck from Timbervest in July 2003. (Tr. 534:8-25). He then claimed, "Most of what I did before that [referring to his receipt of his first paycheck in July 2003] *I didn't actually get paid for.* It was to tell them how we could do things better." (Tr. 534:13-19) (emphasis added). Boden did not

disclose that he was subsequently compensated for this work in the form of brokerage fees, nor did he claim to have entered into a "fee arrangement" in 2002. (Tr. 537:15-21). This significant omission casts further doubt on the contention that this "fee arrangement" ever existed.

After the Division discovered the improper brokerage fees, Boden altered his testimony, claiming that he got his first paycheck from Timbervest in April 2004 (see Tr. 412:25-413:1), increasing the amount of time he claimed to have worked without compensation by nine months. (Tr. 535:19-536:5). Respondents maintain that the disputed brokerage commissions were compensation to Boden for work he performed as a consultant: "Mr. Boden earned the fees at issue during the 2002 to 2004 time frame in connection with his agreement to create value and sell properties for New Forestry." (Timbervest Post-Hearing Brief at 3; see also Tr. 1771:10-15). This claim lacks credibility in light of Boden's prior inconsistent statements, raising further doubts about the existence of the supposed five-year fee agreement.

IV. THE RECORD SHOWS THAT BODEN AND WOODDALL AGREED ON THE RESALE OF TENNECO FOR $14.5 MILLION BEFORE WOODDALL AGREED TO BUY IT FOR $13.45 MILLION

A. The Agreement Between Boden and Wooddall was a "Land Banking" Arrangement, Not a "Verbal Option"

In their post-hearing briefs, the Respondents repeatedly refer to the agreement between Wooddall and Boden that resulted in the compressed sale and repurchase of the Tenneco property as a "verbal option" to repurchase the property for $14.5 million. The Division acknowledges that the term "verbal option" was used at trial by Respondents' counsel and not objected to by Wooddall. (Tr. 815:1-8).

The agreement described by Wooddall, however, was not an "option" as the term is generally understood. Certainly, it was not an option agreement like the one Boden presented to Reid Hailey relating to the Glawson property. (See Div. Ex. 155a). Wooddall never claimed, for

example: (1) that Boden paid him consideration for an option to repurchase Tenneco for $14.5 million within a certain period; (2) that Wooddall was legally constrained from making any other disposition of the property during a certain term; or (3) that Boden was neutral in regard to repurchasing the property and just wanted to keep open the possibility.

The term that Wooddall used to describe his deal with Boden—and the way he said he understood it—was not a "verbal option" but "land banking"—where "you buy something and hold it for somebody for a future takeout." (Tr. 858:6-17). As Wooddall previously 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 Disposition at 17:10-11).

"Gentleman's agreement" may be the most apt term to describe what Boden and Wooddall had, based on the testimony of Wooddall. ("*Gentleman's agreement*: an informal agreement based on trust rather than on a legal document," Merriam-Webster Online Dictionary). Although either party could have backed out, the deal that they consummated was exactly the one they agreed to before Wooddall contracted to buy Tenneco for $13.45 million—*i.e.*, that Boden would repurchase Tenneco on behalf of another fund for $14.5 million. (Tr. 861:14-862:13; Div. Ex. 11).[14]

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[14] As the Division noted, it was a conflict for Boden to agree on the $14.5 million repurchase price before contracting to sell Tenneco to Chen timber for $13.45 million. (Division's Post-Hearing Brief at 2). It would, however, have been a conflict for Boden to sell New Forestry property while expressing interest in repurchasing it at any price. Such an interest would pose a risk that Timbervest would sell the property too cheaply so that it could repurchase it at an attractive price. Thus, selling New Forestry property but securing a "verbal option" to repurchase it for another fund would pose a material conflict, because the BellSouth/AT&T pension funds had the right to an adviser that was bargaining solely for their interests. (See Tr. 1054:14-1055:23). Respondents' suggestion that Boden may have told Wooddall that he would buy the property back for $14.5 million as a "sales tactic" to get Wooddall to close, and that TVP just happened to exercise that option because the property became significantly more valuable in

continued . . .

B. The Court Did Not Deprive Respondents of *Brady* Material By Declining to Turn Over the Division's Notes of Interview of Wooddall Following *In Camera* Review of the Notes

Respondents claim that the Court's denial of their request on *Brady* grounds for disclosure of the Division's notes of interview of Wooddall "may have materially prejudiced Respondents from being able to impeach Mr. Wooddall's testimony." (Timbervest Post-Hearing Brief at 24). Respondents' claim lacks merit. The Court reviewed the notes *in camera* and correctly determined that they contained no *Brady* material.[15] Respondents base their claim that they were deprived of *Brady* material on unsubstantiated assertions from Respondents' own Wells submission. (Timbervest Post-Hearing Brief at 23) (citing Div. Ex. 74 at 11). Such uncorroborated self-serving claims are entitled to no weight.[16]

C. Respondents' Valuation Arguments Relating to the Sale and Repurchase of Tenneco Are Improper and Irrelevant

Respondents make two valuation-related arguments in defense of their sale and repurchase of the Tenneco property for two different clients in a highly compressed time frame. First, they claim that the transactions were economically advantageous to both New Forestry and TVP. Second, they claim that the $1 million premium they paid to Chen Timber to repurchase

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. . . *continued*
a span of weeks, is a farfetched claim not supported by the evidence. (See Boden Post-Hearing Brief at 20).

[15] The Court demonstrated its willingness to give Respondents the benefit of the doubt in regard to the disclosure of the Division's attorney notes, ordering portions of the notes of interview of Ed Schwartz disclosed in an abundance of caution even though they were determined not to constitute *Brady* material. (See Tr. 797:25-798:12; 981:21-982:15).

[16] Respondents fail to note that they filed a prior motion to compel *Brady* material at the outset of this proceeding. (Doc. 17). After reviewing the Division's privileged notes, Chief Judge Murray ruled that they contained no *Brady* material. (See Doc. 22 at 2).

the property could be justified by information that became available to them after their sale of Tenneco on behalf of New Forestry closed.

1. Respondents' Argument that the Transactions Were In the Best Interest of Both New Forestry and TVP Is Improper

Respondents contend that they believe the sale of Tenneco by New Forestry for $13.45 million was advantageous because the price represented a premium over the carrying value of the property, and because they believe the sale furthered BellSouth's goal of trimming the portfolio. (See Timbervest Post-Hearing Brief at 25-26). Respondents further contend that they believe the purchase of Tenneco on behalf of TVP for $14.5 million approximately two months later was good for the fund because Tenneco had appreciated significantly in value and fit with TVP's portfolio objectives.[17] This argument is legally irrelevant because the Supreme Court has rejected it.

An investment adviser cannot cure an undisclosed conflict by trying to show that he believed himself to be acting in the best interest of the client, notwithstanding the conflict of interest. In SEC v. Capital Gains Research Bureau, Inc., the Supreme Court addressed the application of Section 206 to conflicts of interest and ruled, *inter alia*, that the SEC is not required to parse the many motivations that may have played a role in giving investment advice – instead the onus is on investment advisers to disclose all material facts. 375 U.S. 180, 191-95; 200-01 (1963). Addressing essentially the same argument Respondents raise, the Supreme Court wrote:

> **Respondents argue, finally, that their advice was 'honest' in the sense that they believed it was sound and did not offer it for the purpose of furthering**

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[17] Respondents state: "The only question that remains, therefore, is whether the terms of the transactions were fair and to the benefit of Timbervest's clients." (Timbervest Post-Hearing Brief at 25).

> **personal pecuniary objectives.** This, of course, is but another way of putting the rejected argument that the elements of technical common-law fraud-particularly intent-must be established before an injunction requiring disclosure may be ordered. It is the practice itself, however, with its potential for abuse, which 'operates as a fraud or deceit' within the meaning of the Act when relevant information is suppressed. The Investment Advisers Act of 1940 was 'directed not only at dishonor, but also at conduct that tempts dishonor.' United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549, 81 S.Ct. 294, 308, 309, 5 L.Ed.2d 268. Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive. **To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute. Reading the Act in light of its background we find no such requirement commanded. Neither the Commission nor the courts should be required 'to separate the mental urges,'** Peterson v. Greenville, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323, of an investment adviser, for '(t)he motives of man are too complex * * * to separate * * *.' Mosser v. Darrow, 341 U.S. 267, 271, 71 S.Ct. 680, 682, 95 L.Ed. 927. The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. **It misconceives the purpose of the statute to confine its application to 'dishonest' as opposed to 'honest' motives.**

375 U.S. at 200-01 (emphasis added). Accordingly, it is irrelevant whether Respondents believed their actions were fair, and the Division is not required to parse their motives. The operative facts are that the Respondents engaged in a self-dealing transaction by cross-trading a client asset to another fund in which the principals maintained a pecuniary interest without obtaining their clients' consent, which violates the Advisers Act. See also Vernazza v. SEC, 327 F.3d 851, 860 (9th Cir. 2003)(scienter may be established under Section 206(1) without a showing of willful intent to defraud). Under Section 206, the conflict must be disclosed to the client so that the client can decide whether to waive the conflict, or, alternatively, to switch to an adviser who is free of such conflicts.

2. Respondents' Argument that the $1 Million Premium Paid to Repurchase Tenneco for TVP May Be Justified by Previously Unknown Market Data is Irrelevant

Respondents' attempt to show that there was a possible economic justification for buying the Tenneco property back from Chen Timber for the TVP fund at a $1 million premium is irrelevant. Given the unambiguous testimony that Boden and Wooddall agreed that a Timbervest fund would repurchase Tenneco for $14.5 million *before* September 15, 2006 (when Chen Timber entered into a contract to buy the property for $13.45 million), it does not matter what justifications for the repurchase Respondents can conjure up now. (Tr. 862:9-13). Boden's agreement to repurchase the property at a set premium was an undisclosed material conflict of interest—end of story.

3. Respondents' Argument that the $1 Million Premium May Be Justified by Previously Unknown Market Data Is Flawed

Respondents go to lengths to stitch together information that could have resulted in their decision to buy Tenneco for $14.5 million for the TVP fund just six weeks after they sold it out of New Forestry's portfolio for $13.45 million. The main factor that Respondents contend may have caused them to conclude that Tenneco was more valuable than they previously thought is pricing information that started trickling in in early November 2006 regarding the sale of the Tenneco non-core parcels (rebranded "Wolf Creek"), which had been listed with a broker. (See Timbervest Brief at 28).

The Respondents have acknowledged that no one actually recalls Wolf Creek pricing information being among the reasons that Timbervest decided to initiate efforts to buy Tenneco from Chen Timber for the TVP fund. "No 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 at ¶ 7; see Tr. 181:23-184:21). Asked whether he had a specific

recollection that higher-than-expected returns for Wolf Creek property were among the reasons Timbervest decided to repurchase Tenneco for TVP, Boden answered that he believed so, but he acknowledged: "Seven years later, all I can do is reconstruct." (Tr. 228:15).

In addition, the Respondents failed to establish the logic of paying a $1 million premium for Tenneco based on pricing data from Wolf Creek sales. As noted, the claims about the Wolf Creek sales' impact on how the Respondents valued the Tenneco property that they had recently sold to Chen Timber are largely irrelevant. The Respondents' prevarications relating to Wolf Creek, however, are worth noting because they bear negatively on Respondents' credibility.

Evidence introduced at the hearing showed that in August 2006, Timbervest expected the Wolf Creek package to sell for $1,424 per acre. (Tr. 218:15-219:20; Div. Ex. 16). New Forestry closed on sales of five Wolf Creek parcels before TVP acquired Tenneco, and realized $1,461 per acre. (Tr. 216:9-217:23; Div. Ex. 128). Thus, when the Respondents repurchased Tenneco for TVP (and when they offered to buy Tenneco for a $1 million premium on November 30, 2006), they knew that Wolf Creek was selling for almost exactly what Timbervest predicted in August 2006. The Wolf Creek sales cannot have played any role in Respondents' decision to repurchase for a significant premium.

Respondents also claim that increased pulpwood prices in the third quarter of 2006 would have contributed to their willingness to pay more for Tenneco than the amount for which they had recently sold it. (Timbervest Post-Hearing Brief at 29). At the same time, Respondents claim that the Wolf Creek sales indicated to them that bare land values had risen dramatically.

(Id. at 28-29).[18] What the Respondents failed to explain, however, is how both bare land and timber values for the Tenneco core and non-core timberland surged dramatically, yet the Wolf Creek parcels sold for exactly what Timbervest predicted in August 2006. The story fails to make sense on several levels.

Documentation of Timbervest's due diligence for TVP's purchase of the Tenneco core property exists in the form of the "Spec Book" for Gilliam Forest (as Tenneco was renamed). (Div. Ex. 162). The Respondents acknowledged that the Spec Book reflects the due diligence and analysis behind the purchase. (Tr. 240:9-12). Tellingly, the Spec Book for Gilliam Forest contains no reference whatsoever to price signals obtained from sales of the Wolf Creek parcels. In fact, the Spec Book states explicitly the properties that were considered for pricing purposes, and Wolf Creek parcels are notably absent. Instead, there are four "comps" listed from 2005 sales, and one each from 2003 and 2004 sales. (Div. Ex. 162 at 3).

Boden, understandably, tried to minimize the impact of the Gilliam Forest Spec Book, claiming that it did not reflect the correct analysis and might be other than the final version. The Gilliam Spec Book that was introduced (Div. Ex. 162), however, had clear indicia of finality: it was in color; it included color property maps; it was posted to the internet (at http://www.timbervest.net/resourcelibrary/GilliamForest_PropertySpecBook.pdf) and available by internet search; it had boxes checked indicating approval of the purchase by each member of the Investment Committee (Id. at 4). In addition, counsel for Timbervest, after being directed by the Court to determine whether Timbervest had in its possession a more recent version of the

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[18] Determining bare land values is a matter of assigning an allocation of the total price between land and timber. It is not clear how Respondents' bare land values were derived or if they are valid.

Gilliam Forest Spec Book than Div. Ex. 162, represented on the record that there was no "more recent or final version" than Div. Ex. 162. (Tr. 985:2-986:1).

Respondents' reconstructed explanations for why they paid a $1 million premium for the New Forestry property that they had recently sold appear to be a series of prevarications designed to obfuscate rather than to clarify. Respondents' references to the NCREIF index and the market value of the Plum Creek REIT (Timbervest Post-Hearing Brief at 30) are of no value because Respondents have established no link between these metrics and the value of the Tenneco property.[19] Respondents' rationalizations for their conduct are both incredible and irrelevant.

V. AT&T DID NOT TERMINATE TIMBERVEST BECAUSE OF THE "DISTRACTION OF THE SEC INVESTIGATION"

The Respondents make the unsubstantiated assertion that AT&T terminated Timbervest as the investment manager for New Forestry simply because they deemed the SEC investigation too distracting for Timbervest and because they did not want adverse publicity. (Timbervest Post-Hearing Brief at 31). This claim demonstrates Respondents' failure to accept responsibility for their actions and is demonstrably false. The Division began investigating Timbervest in 2010. AT&T had been aware of the investigation from very early on, as a result of being served with a document subpoena. (Tr. 1153:12-16). AT&T, however, did not terminate Timbervest until September 2012, only after the facts came out about the Tenneco cross trade and the misappropriation of pension plan funds through the payment of bogus brokerage fees. (Tr. 1154:3-1155:2; Div. Ex. 123).

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[19] To the contrary, Ranlett testified that the NCREIF index would be of no use in evaluating an individual transaction. (Tr. 1201:22-1202:25).

AT&T gave ample opportunity for Timbervest to tell its side of the story, but Timbervest came up short. (Tr. 1153:17-1155:4). In returning the "brokerage fees" to AT&T, Timbervest acknowledged that it knew of no exception to ERISA that would make the payment of the funds to a principal of Timbervest lawful. (Div. Ex. 130 at 3). Timbervest claimed that when Boden went from being a consultant to an owner of Timbervest, no one realized that payments to him were prohibited under ERISA. (Id.)

AT&T, through its attorney, expressed incredulity about this claim, stating:

> Your statement that '[a]t the time of these events, Timbervest did not recognize that ERISA would impact the agreement or subsequent payments [of commissions] under the agreement' is very surprising given that Timbervest must have been aware that the assets were held in an account that was subject to ERISA, as reflected on the first page of the Investment Management Agreement between you and BellSouth Corporation dated July 31, 1996 (the "IMA"). As an ERISA fiduciary, Timbervest should have been aware of, and complied with, the fiduciary requirements and prohibited transaction restrictions of ERISA.

(Div. Ex. 124 at 1).

In addition, Frank Ranlett of AT&T testified that he believed that Timbervest's breaches of fiduciary duty were serious and that Timbervest had not been forthcoming with AT&T regarding the status of the Division's investigation. (Tr. 1154:3-1155:2). Ranlett made it clear that he lost trust in Timbervest, and that AT&T had to find trustworthy managers for the assets. (Id.) Although he learned of Timbervest's construction of a hunting lodge on AT&T's Glawson property only after the termination of Timbervest, this confirmed for him Timbervest's untrustworthiness. (Tr. 1155:5-1156:11).

In view of the foregoing, Respondents' claim that Timbervest was terminated because the SEC investigation was distracting and AT&T wanted to avoid adverse publicity—and not because the Respondents did anything to deserve being replaced—is either disingenuous or

delusional. Either way, the Respondents' failure to acknowledge the egregiousness of their breaches of fiduciary duty is an appropriate fact to be considered in evaluating the risks that they continue to pose to their current and future investors.

VI. CONCLUSION

The evidence shows that the Respondents' misuse of client assets was deliberate and egregious. Further, the Respondents' lapses in committing the violations were equaled by their attempt to perpetrate the concealment by offering incredible testimony. For the reasons stated herein and in the Division's Post-Hearing Brief, the Division respectfully requests:

1. That the Court find the individual Respondents not to be credible;

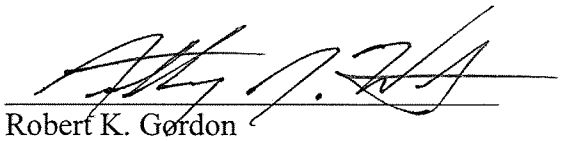
2. That the Court find that the sale and repurchase of Tenneco, and the misappropriation of client assets by paying phony brokerage fees to shell corporations, were fraudulent schemes involving material undisclosed conflicts of interest in which each of the Respondents knowingly engaged; and

3. That the Court find that, even if the Respondents had convinced the Court that the Respondents acted without actual scienter—which they did not—each of the Respondents would still have been found to be extremely reckless in failing to disclose the conflicts of interest and to refrain from conflicted transactions to which its clients did not consent; and

4. That the Court impose all available remedies to protect the investing public and to require disgorgement of ill-gotten gains.[20]

This 18th day of April, 2014.

Respectfully submitted,



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[20] At the hearing, Jones expressed his intention to separate from Timbervest. (Tr. 1480:20-1481:7). He has not yet done so, however, and he claims the process for exiting Timbervest is "going to take some time." (Tr. 1481:16-1482:8). Moreover, at the time of the hearing, the terms of the agreement to sell his interest to Shapiro had not been fully finalized. (Tr. 1374:23-1375:12). In determining what if any remedies are appropriate, the Division contends that Jones' stated intention to depart should be given no weight, because he is still at Timbervest and, even if he leaves, could re-enter the investment advisory business with another entity. Further, the Division respectfully requests that, if the Court declines to impose associational bars based on the view that they are foreclosed by the applicable statute of limitations, the Court consider providing an indication of whether, in its view, the *Steadman* factors would support the imposition of bars if the statute of limitations did not preclude them.