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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

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In the Matter of Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Respondents.	Timbervest's Response to the Division's Post-Hearing Brief

TIMBERVEST'S RESPONSE TO THE DIVISION'S POST-HEARING BRIEF

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I. Introduction

From a set of innocent events seven to ten years ago, the Division has spun a tale of fraud and deception fit for a John Grisham novel. The facts tell no such tale. They show that Mr. Boden received fees under a legitimate consulting fee agreement, that he worked without any other compensation for 20 months to earn the fees, and that Mr. Shapiro had a conversation with the client's representative about the fee agreement. They also show that Timbervest sold the Tenneco property under the client's disposition mandate at a price well above carrying value and that when Timbervest later purchased that property for another client, the purchase price was below Timbervest's assessment of the property value at the time.

Rather than acknowledging that these facts have simple and innocent explanations, the Division argues that these facts are part of a fraudulent and deceptive scheme. But the Division has no facts in its corner, only speculation and innuendo. Because it cannot rely on facts, the Division resorts to the use of inflammatory and emotionally charged language (calling Mr. Boden's consulting agreement "bogus," claiming that the Partners "laundered" money," and saying that the Respondents are guilty of "misleading the Court") that has no basis in reality. Such histrionics, however, do not prove the Division's case.

The Division waited nearly seven years after the last relevant transaction and four years after it began an investigation into Timbervest to bring this case, and yet it claims that there has been a fraud because the Partners lack specific memories about the details of the relevant events. The Division goes so far as to posit that the Partners are "feigning lack of recollection." It conveniently omits that all the witnesses, not just the Partners, had trouble correctly remembering the details of the relevant events because they took place so long ago. The Division also claims that the lack of documentation surrounding the relevant events must mean that there has been a fraud, but this tactic is nothing more than a last-ditch attempt to avoid the simple fact that it cannot meet its burden of proof. The Division bore the risk of faulty memories and incomplete documentation when it brought this case two years after the statute of limitations had run. The very purpose of a statute of limitations is to guard against a party being disadvantaged by faulty memories and incomplete documentation. The Division should not be able to use faulty memories and incomplete documentation to support its speculative argument.

Notably, the Division's case involves events which were discernible early-on in the course of its lengthy investigation of Timbervest's timberland valuation practices and procedures, issues with which the Staff ultimately became satisfied. The documents evidencing the sale of the Tenneco property to Chen Timber and the subsequent purchase of the same property by TVP were produced to the Division in response to subpoena requests from 2010. Additionally, in testimony taken from Mr. Boden in 2011, Mr. Boden revealed that his initial involvement with Timbervest was as a consultant. The Division did not ask him about the specific terms of his arrangement or whether or how he was paid. Despite its ability to root out the charged events back in 2011, the Division failed to do so, allowing time to pass and memories to fade. Instead, it was Timbervest who ultimately drew to the Division's direct attention the details regarding the Chen Timber sale and subsequent TVP purchase in response to a subpoena that did not even directly call for this information. It was also Timbervest who volunteered information relating to the fee payments received by Mr. Boden. The Division now seeks to distort the record of events through its allegations of a scheme to defraud and conceal. Its position is disingenuous and unsupported by the facts; the Respondents should not be penalized for the length of the Division's investigation. The Division's tactics in this case will only encourage other investment advisors not to volunteer relevant information if not otherwise asked during the course of an examination or investigation for fear that the end result will be what the Division has done to the Respondents.

All the evidence that is known and documented shows that Timbervest acted with the good faith belief that its conduct was both permissible under the law and favorable to its clients. The Division therefore cannot meet its burden of proof to show that there was a violation of the Advisers Act. Further, all the relief sought by the Division is inappropriate. The Division either seeks remedies that are plainly barred by the statute of limitations or other relief that is vastly disproportionate to and unconnected from the alleged violations. The Division's charges and all the remedies sought should be dismissed.

II. ERISA did not serve as a motivation for Timbervest's conduct.

The basic theory of the Division's case, unsupported by any facts, is that Timbervest and the Partners were trying to avoid their duties under ERISA, and they thereby violated the Advisers Act.[1] The testimony at the hearing, however, affirmatively established that ERISA issues were not on anyone's radar—either when Mr. Boden was paid fees or when Timbervest approved the sale and later purchase of the Tenneco properties.[2] The Partners are not experts in ERISA and simply failed to catch that there may have been an ERISA question with the transactions.[3] As Mr. Schwartz testified, "ERISA is pretty technical and complicated," and even he would have needed to seek the advice of qualified legal counsel on ERISA matters.[4] In addition, as Mr. Campbell testified, violations of ERISA often involve no bad intent, and it is "not uncommon at all to see entities violate the prohibited transaction rules without any intent to

[1] *See* Div. Post-Hearing Br. at 7–8. The parties' post-hearing briefs were due on March 28, 2014. The Division, however, failed to meet this deadline and waited until the early morning hours of March 29, 2014 to serve (and presumably to file) its post-hearing brief.
[2] *See id.* at 37–38, 42–43.
[3] *Id.*
[4] Tr. at 2146:11–14, 2091:23–24 (Schwartz).

do so."[5] These facts belie any argument that because the Partners know about ERISA in a general sense, they somehow must have been aware of all of the law's technicalities, nuances, and implications.

The Division does finally acknowledge (as Timbervest has contended all along) that this Court does not need to decide whether Timbervest actually violated ERISA or whether the REOC exception applies.[6] But in the same breath it states that Timbervest and the Partners have misled the Court and the United States Department of Labor about New Forestry's status as a REOC.[7] This accusation is both highly inappropriate and wrong. First, Timbervest established that Timbervest Crossover Partners, L.P. ("TCP") was a fund owned by the same three BellSouth pension plans that invested in New Forestry. As with New Forestry, BellSouth used nominee partnerships to hold the actual ownership interests of TCP.[8] At the time this fund closed, Timbervest, for BellSouth and at their request, obtained a REOC legal opinion letter, which explained that TCP was a REOC.[9]

Second, there has been a battle of the experts concerning whether the REOC exception (and the exception to the REOC exception) applies to New Forestry, and the former Assistant Secretary of Labor for Employee Benefits at the Department of Labor opined that New Forestry was a REOC because there is no evidence that the three BellSouth pension plans owned 100% of the "equity interest" in New Forestry, rather than the nominee partnerships who are listed in the New Forestry operating agreement as owning the fund.[10] In fact, it is the Division that has mischaracterized the evidence by contending that the issue of New Forestry's status has been

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[5] *Id.* at 1017:25–1018:2 (Campbell).
[6] Div. Post-Hearing Br. at 8, n.2.
[7] *Id.*
[8] *Id.* at 1402:12-1403:8 (Jones)
[9] *Id.*; *id.* at 1674:2–12 (Zell).
[10] Resp. Ex. 124 (Expert Report of Bradford P. Campbell).

"put to rest once and for all," based on Frank Ranlett's testimony that he believed the pension funds to own all of New Forestry.[11] Although the pension funds may have had a beneficial ownership interest in New Forestry, this does not necessarily establish that they had an "equity interest" in New Forestry within the meaning of ERISA.[12] Mr. Ranlett also acknowledged during testimony that the New Forestry ownership certificates show the owners of the fund as the three nominee partnerships, that he had seen the partnership documents for these entities, and that they each had taxpayer IDs that were separate from the pension plans' taxpayer IDs.[13]

In any event, as Mr. Campbell testified, any individual's subjective opinion about ownership is irrelevant to determining who owns the "equity interest" in a fund – what matters is whether all the "equity interest" is actually owned by the plans.[14] The Division failed to introduce any evidence showing the ownership structure of the nominee partnerships, which would actually "put to rest once and for all" the issue of whether the BellSouth plans owned 100% of New Forestry's "equity interests." For all the Division's hysterics about the lack of documentation surrounding relevant events, it is curious that the Division, with its virtually unlimited subpoena power, failed to offer such evidence, suggesting that none, in fact, existed and that New Forestry did, in fact, meet the definition of a REOC.

When the far-fetched theory that Timbervest violated the Advisers Act because it was trying to avoid its fiduciary duties under ERISA is set aside, it is clear that both the payment of fees to Mr. Boden and the Chen transactions were not the result of fraud or any scheme to harm Timbervest's clients but rather were innocent transactions with reasonable explanations.

[11] Div. Post-Hearing Br. at 9, n. 2.
[12] Tr. at 998:10–14 (Campbell).
[13] *Id.* at 1068:15–1069:11, 1069:14–23 (Ranlett).
[14] *Id.* at 1012:22–1013:2 (Campbell).

III. Mr. Boden was paid under a legitimate consulting agreement and not for any improper purpose.

The Division's first set of allegations relate to the payment of fees to Mr. Boden, triggered by the sale of two New Forestry properties. As explained in Timbervest's Post-Hearing Brief, Mr. Boden earned these fees pursuant to a legitimate consulting agreement that he entered into two years before joining Timbervest as a manager.[15] The Division suggests that Mr. Boden's consulting agreement never existed and that the payment of fees was concealed from New Forestry.[16] It simultaneously seemingly acknowledges the existence of the consulting agreement but argues that it was never disclosed.[17]

a. Mr. Boden's consulting agreement existed, and its terms were known.

As amply set forth in Timbervest's Post-Hearing Brief, the existence of Mr. Boden's fee agreement is supported by the contemporaneous evidence, and its terms were known.[18] These points will not be re-argued here. Nevertheless, the Division makes a number of contentions purportedly designed to demonstrate that Mr. Boden's fee agreement was "bogus" and was a recent invention by Timbervest. Each has no merit and will be discussed in turn.

The Division first suggests that Mr. Boden's consulting agreement could not have existed because there is no documentation from 2002 supporting its existence.[19] The lack of a written agreement does not mean that the agreement itself did not exist. There is no law requiring that such an agreement be put in writing. And, as the testimony at the hearing established, oral agreements regarding employment and consulting fees were common. None of the Partners had written employment agreements when they came to Timbervest.[20] The agreement that the new

[15] Post-Hearing Br. at 2–8.
[16] Div. Post-Hearing Br. at 48–53.
[17] *Id.* at 45–47.
[18] Post-Hearing Br. at 4–6.
[19] *See* Div. Post-Hearing Br. at 47.
[20] Tr. at 1768:15–23 (Shapiro); *id.* at 1950:1–5 (Barag).

management team would receive a 20% equity interest in Timbervest was not in writing.[21] Taking the Division's argument to the extreme, one could say that this agreement to receive a 20% equity interest was "bogus" and that the new management team surreptitiously stole an equity interest from the prior managers simply because the agreement was never put in writing. That is not the case and not the law.

Similarly, the Division argues that Mr. Boden's fee agreement does not exist because Mr. Boden and Mr. Shapiro were sophisticated businessmen who would have known to put the agreement in writing.[22] But as Mr. Shapiro testified, he simply did not put these sorts of agreements in writing.[23] Moreover, other similar commission agreements at Timbervest were oral. For example, Timbervest's former manager entered into an oral commission agreement with Zachry Thwaite, and although it was eventually memorialized, that did not happen until some three years later.[24] Moreover, as explained in Timbervest's Post-Hearing Brief, it is entirely possible that a documentation of the agreement existed at one point.[25] The risk of loss of these possible documents falls squarely on the Division, which waited nearly seven years after the relevant events took place and four years after beginning an investigation into Timbervest to bring charges.

The Division's third quibble to support the dubious argument that Mr. Boden's fee agreement did not exist is that no one other than the Partners testified at the hearing to verify the consulting agreement.[26] No one else was called to testify about it because no one else would have necessarily known about it (other than Mr. Schwartz, to whom the fee agreement was

[21] *Id.* at 1922:22–1923:6 (Barag).
[22] Div. Post-Hearing Br. at 49–50.
[23] Tr. at 1768:15–23 (Shapiro).
[24] Div. Ex. 152 (June 27, 2006 letter from Kirk M. McAlpin, Jr. to William Holley, II).
[25] Post-Hearing Br. at 17–18.
[26] Div. Post-Hearing Br. at 50–51.

disclosed). Mr. Zell knew about the fee agreement from his time at BellSouth; he first learned about it years before he joined Timbervest.[27] Mr. Jones knew about the consulting agreement because he was an attorney, used to asking questions in a due diligence context. He was leaving a stable job and wanted to make sure he knew everything about this new company he would be joining, including how everyone in the new management team came to Timbervest.[28] Unless others at Timbervest asked similar questions, they would not necessarily have ever even heard about the fee agreement. This lackluster argument therefore does not establish that Mr. Boden's consulting agreement did not exist.

Fourth, the Division asserts that it is "implausible" that all documents related to the agreement would "vanish."[29] The Division attempts to paint a picture in which all documents from this period exist, except for ones related to Mr. Boden's consulting agreement. But this is not the case. None of Timbervest's emails from the 2002 period have been maintained.[30] BellSouth's emails from this period have likewise been destroyed.[31] Thus, all electronic documents from that period have been discarded, not just the ones related to Mr. Boden's agreement. As explained previously, it is entirely possible that the fee agreement, and the disclosures concerning the agreement, were memorialized in an email or memorandum at the time.[32] Mr. Jones testified that it would have been his practice to put the disclosures in writing.[33] Timbervest simply has not been able to locate any such writing, nor could it reasonably be

[27] Tr. at 1534:24–1535:18 (Zell).
[28] *Id.* at 1314:23–1315:16 (Jones).
[29] Div. Post-Hearing Br. at 50.
[30] *See* Tr. at 1655:21–1656:2 (Zell).
[31] *Id.* at 2212:6–2214:5 (Hill stipulation).
[32] *Id.* at 1767:19–1768:12 (Shapiro).
[33] *Id.* at 1327:1–4, 1328:6–9 (Jones).

expected to, given that the writings would be nine to twelve years old.[34] This is therefore not a basis to find that no agreement existed.

The Division next attempts to argue that the agreement did not exist because Mr. Barag, who was at Timbervest for a short period in 2003 and 2004 (also without any type of written agreement), did not know about the fee agreement.[35] As noted above, Mr. Barag would not necessarily have known about Mr. Boden's efforts during 2002 and 2003. Mr. Barag was almost exclusively focused on the REIT effort and had very little to do with the New Forestry account.[36] There is no evidence that Mr. Barag asked anyone about Mr. Boden's compensation or knew of any of the other Partners' compensation arrangements. Indeed, Mr. Barag could not correctly recall his own compensation, the owners of Timbervest, or the status of himself or other individuals as employees or owners of Timbervest, none of which is surprising given that ten years have transpired since the events in question.[37] Notwithstanding his inability to remember correctly basic terms that were directly pertinent to him at the time, the Division claims that Mr. Barag had an "impressive facility [sic] for recalling the details of his time at Timbervest,"[38] even though Mr. Barag himself testified he is not "a detail guy."[39] Additionally, due to the decade that has elapsed since his tenure at Timbervest and the Division unfairly placing Mr. Barag in an impossible position of being asked about details of events from ten years ago, Mr. Barag's

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[34] *Id.* at 1327:1–4 (Jones).
[35] Div. Post-Hearing Br. at 50–51.
[36] Tr. at 1924:8-21, 1949:21-25 (Barag).
[37] For example, Mr. Barag testified that, beginning in May 2004, he was a Timbervest employee and earned a salary of $100,000. *Id.* at 1975:24–1976:2. In fact, Mr. Barag was never a Timbervest employee. *See id.* at 2244:1–11 (Shapiro). He was paid through Ironwood Capital Partners and received a draw of $17,000 per month (more than $200,000 per year). Resp. Ex. 149 (Ironwood Capital Partners Cashflow Register). Mr. Barag similarly denied that he had an equity interest in Timbervest in 2004, but in fact, Ironwood Capital Partners, of which he was an owner, owned 20% of Timbervest at the time. Tr. at 1995:6–23 (Barag); *see also* Div. Post-Hearing Br. at 4 (acknowledging that the Partners, along with Mr. Barag, collectively owned 20% of Timbervest as of March 2004). Mr. Barag testified that Jim Dahl was the sole owner of Timbervest in 2003-2004, prior to recanting that remark and making a further incorrect account about Timbervest's ownership at the time. Tr. at 1952:24-1953:14 (Barag).
[38] Div. Post-Hearing Br. at 50–51.
[39] Tr. at 1992:3–5 (Barag).

"impressive facility," [sic] was nothing more than an inaccurate and imprecise memory of decades-old events. For example, Mr. Barag testified that "New Forestry was one of the two LLCs . . . set up to own . . . the properties for the BellSouth pension fund."[40] It is undisputed that New Forestry was the only LLC related to BellSouth; there were not two. He also testified that Timbervest had a third, small Missouri account in 2003, and he "remembered" that it was a $20 million account with one or two small timberland assets overseen by regional foresters.[41] No such account ever existed; yet he was able to "recall" details about its size, assets and management.[42] He testified that New Forestry did not want to sell properties during his tenure at Timbervest, yet at the time he joined Timbervest the account was under a disposition mandate.[43] He testified that New Forestry did not make any acquisitions during his tenure at Timbervest, but the record shows otherwise.[44]

Mr. Barag's lack of memory is understandable given that it has been nearly a decade since he worked at Timbervest. However, given his inability to recall material facts correctly, his testimony is simply not relevant because his testimony makes clear he had no reason to know about Mr. Boden's fee agreement. As noted above, Mr. Barag would not necessarily have known about Mr. Boden's efforts during 2002 and 2003. Mr. Barag "had very little to do with" New Forestry and was focused on the REIT effort.[45] Mr. Barag, did, however, observe Mr. Boden working on higher-and-better use ("HBU") sales of New Forestry's property.[46] This observation is consistent with what Mr. Boden was doing under his consulting agreement, part of which, as Mr. Boden testified, involved identifying lands within the New Forestry portfolio for potential

[40] *Id.* at 1942:5–7 (Barag).
[41] *Id.* at 1979:22–1980:22.
[42] *Id.* at 2234:20–2235:8 (Shapiro).
[43] *Id.* at 1930:22-1931:5 (Barag); Tr. at 1697:9-20; 1739:21-1740:5 (Shapiro)
[44] *Id.* at 1969:10-1970:10 (Barag); Resp. Ex. 140 (New Forestry acquisitions from June 2004 through June 2007).
[45] *Id.* at 1924:8–21 (Barag).
[46] *Id.* at 1957:19–1958:14.

HBU sales.[47] Although Mr. Barag did not observe sales of large tracts of New Forestry's properties during his short tenure with Timbervest,[48] this is unsurprising, given that Mr. Boden did not accomplish any large tract sales during that period. Rather, Mr. Boden instituted the entire sales process for New Forestry; he focused not just on the eight properties that were subject to his agreement, but on maximizing value for all potential dispositions.[49] Mr. Barag's observations of Mr. Boden's activities therefore confirm Mr. Boden was doing the work called for by his consulting agreement. Mr. Barag's not having a memory of any conversation about Mr. Boden would be paid for the efforts Mr. Barag himself observed does not in any way show no arrangement existed.

The Division's sixth supposed reason that Mr. Boden's consulting agreement was nonexistent is that BellSouth's then desire for \$30 to \$60 million was lower than the total value of all eight properties subject to Mr. Boden's agreement.[50] As Mr. Shapiro testified, it takes time to sell timberland.[51] None of the properties would be sold overnight, and if one or two were sold in a year (generating \$30 to \$60 million in liquidity for New Forestry), Mr. Boden would have been extraordinarily successful.[52] When Mr. Shapiro joined Timbervest, the then management was selling New Forestry's best properties at fire sale prices.[53] He wanted to slow those sales down and create a process to maximize value and returns for New Forestry.[54] Mr. Boden was essential to this process. Had Mr. Boden wanted to fulfill the liquidity mandate quickly, he could

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[47] *Id.* at 559:21–560:25 (Boden).
[48] *Id.* at 1930:5–10 (Barag).
[49] *See id.* at 559:21–562:22 (Boden); *id.* at 1748:20–1749:18 (Shapiro). Mr. Boden explained his efforts on behalf of New Forestry in response to a Division question about the work he did on properties for which he did not get paid a fee; however, his answer made clear that the process he created was "for all of" the properties under his fee agreement. *Id.* at 559:21–562:22 (Boden).
[50] Div. Post-Hearing Br. 51–52.
[51] Tr. at 1740:17–25, 1743:1–9 (Shapiro).
[52] *Id.*
[53] *Id.* at 1738:5–16.
[54] *Id.* at 1738:5–16, 1748:20–1749:18.

have sold all the properties at discounted prices and received a fee. Instead, Mr. Boden spent his energies and efforts in maximizing value for New Forestry rather than in dumping properties. And although New Forestry initially wanted the $30 to $60 million in liquidity to be fulfilled within a year or two, for Mr. Boden to receive a fee, there had to be a sale. If New Forestry had ended up changing its mind and halting dispositions (which it never did), Mr. Boden would not have received a fee. This was a risk borne by Mr. Boden under his fee agreement, but it does not support the Division's theory that Mr. Boden's consulting agreement never existed.

The Division's final gripe is that there are errors in the fee percentage in the unconsummated Rocky Fork–Carswell contract.[55] While the Division is correct that the Rocky Fork contract contains a 2% fee and that Mr. Boden would have been entitled to a 2.5% fee had this deal closed, it is difficult to see how this error somehow means that the fee agreement itself did not exist. Leaving aside this leap in logic, there is no evidence to suggest that this error was anything more than an administrative error. Mr. Boden worked on deals and was not concerned with the minutiae of contract language.[56] He did not draft contracts, and he is not a lawyer. Any mistake would not necessarily get caught on his review of the first draft. Even had the wrong percentage been intentionally inserted into the contract, the error inured to New Forestry's benefit because it would have paid *less* than what Mr. Boden was owed under his agreement. And if Mr. Boden's agreement had been fabricated and was an attempt to steal money from the client, Mr. Boden would have asked for a higher percentage for his fee, not a lower one. Importantly, when the Rocky Fork property did actually sell, the sales contract contained no provision for Mr. Boden's fee because the deal was scheduled to close outside the sunset date of

[55] Div. Post-Hearing Br. at 52–53.
[56] *See Id.* at 131:5–7, 151:8–15, 367:9–14 (Boden)

the consulting agreement.[57] This wholly supports the fact that Mr. Boden's consulting agreement existed and that its terms were known.

The Division fails to put forth a single reasonable argument that Mr. Boden's fee arrangement did not exist. Indeed, while simultaneously arguing that the consulting agreement was a made up excuse to avoid liability, it acknowledges that Mr. Boden was a consultant to Timbervest before becoming a principal of the company.[58] It has no explanation for why Mr. Boden would be an unpaid consultant prior to joining Timbervest if not pursuant to his fee agreement. The Division refuses to accept the basic and reasonable explanation that Mr. Boden was working for nearly two years under a consulting agreement without other compensation because it implicitly recognizes that acknowledging that Mr. Boden's fee arrangement existed negates any fraudulent intent by Timbervest or the Partners.[59]

The Division has offered no theory for why the fees would be paid to Mr. Boden if they had not been paid under his consulting agreement. It is inconceivable that Timbervest would choose two random properties out of the numerous property dispositions it consummated from 2002 to 2007, and decide, on some completely ad-hoc basis, to give Mr. Boden a fee representing 3.5% and 2.5% of the purchase price. There is no evidence that Mr. Boden, or any of the other Partners, were struggling financially or in need of cash at the time.[60] In 2006 and 2007, the Partners collectively received more than $9 million in distributions; they were not

[57] Div. Ex. 43 (June 1, 2007 Purchase and Sales Agreement); Tr. at 447:9–448:19 (Boden).
[58] Div. Post-Hearing Br. at 5.
[59] *See id.* at 49, n.9.
[60] At the evidentiary hearing, the Division asked Mr. Shapiro certain questions about a judgment entered against him after he took a loan from a home mortgage account for an unrelated business venture in the late 1990s. Tr. at 1833:9–1835:6 (Shapiro). Mr. Shapiro paid the judgment in November 2006 (before receiving any portion of Mr. Boden's fees) with funds from his father. *Id.* at 1841:23–1842:22, 1844:2–5. Mr. Boden's fees were not necessary to satisfy the judgment and were not a motive to make up a fee agreement.

strapped for cash or otherwise in need of an additional $250,000 each.[61] Except pursuant to his consulting agreement, there would be no reason for Mr. Boden to take these fees, and the Division has not even attempted to offer a potential motive. It is simply not reasonable to conclude that Mr. Boden's fee agreement was "bogus," and the Division's arguments to the contrary are nothing more than a story it has created out of whole cloth.

b. Timbervest did not intend to conceal Mr. Boden's fees.

In addition to arguing that Mr. Boden's consulting agreement never existed, the Division contends that Timbervest intended to conceal Mr. Boden's fees from New Forestry.[62] The only motivation to conceal the fees that the Division can muster is that Timbervest concealed the fees because disclosure would have exposed them to ERISA liability.[63] This argument, too, is supported by nothing more than speculation and is designed simply to fit within the Division's tale of fraud and deception. As explained above, there is no evidence whatsoever to conclude that Timbervest was motivated to avoid the prohibitions of ERISA. Indeed, as soon as Timbervest became aware of a potential ERISA issue with the fee payments, it promptly returned the fees to New Forestry, with interest.[64]

The Division's position that Timbervest intended to conceal Mr. Boden's fees is curious in light of the fact that Mr. Boden volunteered to the Division in 2011 that he had worked as a consultant at Timbervest prior to becoming a partner.[65] The Division chose not to ask any follow-up questions about his position. Nevertheless, Timbervest voluntarily disclosed to the Division Mr. Boden's fee arrangement, fee payments, and the LLCs through which Mr. Boden

[61] *See* Div. Ex. 71 (Ironwood Capital Partners Consolidated Financials for the Year Ended December 31, 2006); Div. Ex. 72 (Ironwood Capital Partners Consolidated Financials for the Years Ended December 31, 2008 and 2007).
[62] Div. Post-Hearing Br. at 34–45.
[63] *See id.* at 48.
[64] Tr. at 511:21–512:17 (Boden).
[65] *Id.* at 558:19–25.

was paid.[66] Timbervest provided this information in response to the Division's subpoena, even though the subpoena sent to Timbervest did not directly call for such information.[67] Had Timbervest intended to conceal Mr. Boden's payments, it never would have spelled out the information for the Division. In any event, the Division's attempts to show that Timbervest intended to conceal the payments fall flat; each will be discussed in turn.

i. The use of LLCs does not demonstrate an intent to conceal.

As explained in Timbervest's Post-Hearing Brief, there was no intent to conceal the payment of Mr. Boden's fees or the identity of the person who ultimately would be receiving the fees from New Forestry, BellSouth, or ORG.[68] Mr. Boden received his fees through two limited liability companies on the advice of his attorney to protect his personal assets and to limit any claim to the fees made by unknown third parties.[69] The Division takes this simple, reasonable explanation and proclaims that the use of LLCs to receive the fees is "presumptive evidence of concealment."[70] This allegation misses the mark.

The truth is that Mr. Boden wanted to protect his assets; his attorney said that the best way to do that was to use LLCs. Mr. Boden was understandably concerned about other, unknown brokers or third parties asserting a claim to his fees.[71] Although New Forestry may have also had exposure in any fee dispute, Mr. Boden recognized that he faced potential exposure because any third party asserting a claim to his fees would likely sue anyone who had touched the funds.[72] Mr. Boden knew that fee disputes in the industry were not uncommon; as he testified, they are

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[66] Div. Ex. 80 at 2–3 (May 2, 2012 letter from Stephen D. Councill to Robert K. Gordon).
[67] Div. Ex. 115 (April 10, 2012 Subpoena to Timbervest); Div. Ex. 80 at 2–3 (May 2, 2012 letter from Stephen D. Councill to Robert K. Gordon).
[68] Post-Hearing Br. at 18–20.
[69] *Id.* at 18–19.
[70] Div. Post-Hearing Br. at 37.
[71] Tr. at 369:9–18 (Boden).
[72] *See id.* at 370:7–17.

simply "part of the business."[73] He also knew of two specific instances where unknown commission agreements at Timbervest had later come to his attention. For example, he knew that Bob Chambers, the prior manager of Timbervest, had entered into an oral brokerage agreement with Zachry Thwaite and that the agreement was not memorialized until Mr. Chambers was on his way out the door from Timbervest.[74] Although the Division suggests that because this agreement was eventually reduced to writing (two years after it was originally agreed to), Mr. Boden knew about it when he came to Timbervest,[75] Mr. Boden's testimony established that he was unaware of the agreement until years later.[76] In any event, given that Mr. Chambers had entered into at least one oral brokerage agreement, there was no guarantee that he did not have other outstanding oral brokerage agreements relating to New Forestry's property.

Additionally, Mr. Thwaite's oral brokerage agreement was the subject of a lawsuit filed by New Forestry in 2006 in the Superior Court of Fulton County.[77] This legal dispute served as an additional motivator for Mr. Boden in seeking legal advice from Mr. Harrison on how to protect the potential fees under his consulting arrangement after nearly four years of effort.[78]

Mr. Boden also found out, years after Mr. Chambers left Timbervest, that he had entered into a brokerage agreement with Bob Suter for transactions involving New Forestry properties.[79] Although the Division attempts to characterize the letter reflecting this agreement as only a rate sheet,[80] Mr. Boden disagreed with that characterization, and the document itself states, in relevant part: "In the event my real estate firm arranges a trade of property already owned by New Forestry LLC, you agree that I shall be compensated on the above stated commission

[73] *Id.* at 370:21–371:3.
[74] *Id.* at 376:20–377:18.
[75] *See* Div. Post-Hearing Br. at 41.
[76] Tr. at 373:15–22 (Boden).
[77] *Id.* at 373:15–374:2.
[78] *Id.*
[79] *Id.* at 509:24–511:28.
[80] Div. Post-Hearing Br. at 42.

percentages based on the value of the property traded."[81] Even if not countersigned by Mr. Chambers or a written contract itself, Mr. Suter's letter showed that he had an underlying agreement in place to receive a commission in connection with New Forestry's properties. Indeed, Mr. Boden testified that, upon seeing this letter, it "looked like there was some sort of an agreement here behind this that I needed to be aware of or at least concerned about."[82]

Simply put, Mr. Boden did not know what other brokerage agreements related to New Forestry's property that Mr. Chambers might have entered into. Mr. Boden had never met Mr. Chambers, and the circumstances surrounding Mr. Thwaite's agreement (that it had been memorialized very close to the time Mr. Chambers left Timbervest), gave him pause about what other brokerage agreements might exist.[83] The Division tries to divert attention from Mr. Boden's reasonable concerns by suggesting that Mr. Boden should have called up Mr. Chambers to ask whether there were any other agreements.[84] While, theoretically, Mr. Boden could have asked Mr. Chambers whether he had made any other oral agreements, given the strained nature of the relationship between Timbervest and Mr. Chambers surrounding his departure from the company, Mr. Boden did not know if Mr. Chambers would have even spoken to him.[85] And given the somewhat suspicious circumstances of Mr. Thwaite's agreement, Mr. Boden was not in a position to trust what Mr. Chambers had to say on the matter. The prudent thing to do, therefore, was for Mr. Boden to seek advice from his attorney on how best to protect his assets in case of a claim by an unknown broker or other third party, which is exactly what he did. Mr. Boden waived the attorney-client privilege with respect to this matter, showing that he had nothing to hide.

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[81] Tr. at 521:23–523:9 (Boden); Resp. Ex. 86 (January 4, 1999 letter from Robert T. Suter to Robert Chambers).
[82] Tr. at 522:23–523:1 (Boden).
[83] *Id.* at 376:20–377:18.
[84] Div. Post-Hearing Br. at 42
[85] Tr. at 378:7–20 (Boden).

Moreover, as set forth in Timbervest's Post-Hearing Brief, Mr. Harrison's advice to use LLCs was reasonable.[86] LLCs are a common asset protection vehicle used throughout the real estate industry in general, and, as explained by Mr. Wooddall, in the timberland industry specifically.[87] Timbervest itself sets up special purpose LLCs for each of its funds in each state that the fund owns properties or a on a project-by-project basis, resulting in hundreds of Timbervest-created LLCs.[88] Mr. Harrison reasonably believed that using LLCs would help protect Mr. Boden's personal assets and would limit any potential claim, by a broker or any other third party, to the amount of fees.[89] Mr. Harrison testified that he did not intend to conceal Mr. Boden's identity in setting up the LLCs.[90] There is no evidence that Mr. Boden and Mr. Harrison engaged in any discussions about concealing Mr. Boden's identity at any time.

The Division attempts to discredit Mr. Harrison by arguing that Mr. Harrison was complicit in a fraud against New Forestry.[91] The Division has not, of course, brought charges against Mr. Harrison, belying the Division's contention that he engaged in a fraud. Moreover, the suggestion that Mr. Harrison would be in cahoots to conceal the beneficiary of the fee and to perpetrate a fraud against New Forestry is outrageous. Mr. Harrison is an attorney in good standing with no bar complaints.[92] He has been a lawyer for 25 years, and he would not risk his career to help a client, or even a friend, engage in any sort of fraud or deceit.[93] And although the Division attempts to argue that because of Mr. Harrison's friendship with Mr. Boden, he would have asked a lot of questions about what Mr. Boden's fees were and where they came from,[94] the

[86] Post-Hearing Br. at 19–20.
[87] Tr. at 592:19–593:6 (Harrison); *id.* at 824:24–825:18 (Wooddall).
[88] *Id.* at 499:11–16 (Boden).
[89] *Id.* at 613:2–16 (Harrison).
[90] *Id.* at 619:13–18.
[91] Div. Post-Hearing Br. at 44.
[92] Tr. at 727:20–24 (Harrison).
[93] *Id.* at 727:25–728:12.
[94] Div. Post-Hearing Br. at 44.

opposite is the more logical explanation. That is, because they had a close friendship, there was no need for Mr. Harrison to ask a lot of questions about the fees. Mr. Boden said he would be receiving fees and asked for the best way to protect his assets; Mr. Harrison came up with the LLC structure.[95] Mr. Harrison did not need to spend a lot of time on analysis or ask questions about this issue—it was a simple request made by a long-time friend and client.

The Division's assertion that Mr. Harrison's fee for performing this work was "consistent with a reward for helping to conceal the real beneficiaries of the fee payments" is offensive.[96] Mr. Boden and Mr. Harrison agreed to a 10% contingency fee.[97] The fee was agreed to before any payments were made to Mr. Boden and before Mr. Boden knew whether he would ever receive any.[98] If Mr. Boden had never received a fee, Mr. Harrison would have received nothing for his legal services. Mr. Harrison therefore willingly bore the risk that all of his efforts and advice would result in no compensation should no sales occur. This is the nature of contingency fee work. Mr. Boden did, however, receive two fees, and Mr. Harrison was paid, in accordance with their agreement, a 10% fee. A 10% contingency fee is significantly less than most attorneys' contingency fees and is not indicative of any sort of fraudulent scheme.

There is no evidence to support the Division's misguided attempts at painting Mr. Harrison as complicit in any sort of fraudulent scheme. Instead, the record amply suggests that Mr. Harrison acted reasonably in giving sound legal advice to Mr. Boden on how to receive fees and did not intend to hide the ultimate beneficiary of those fees from anyone.

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[95] Tr. at 613:2–16, 727:25–728:6 (Harrison).
[96] Div. Post-Hearing Br. at 44.
[97] Tr. at 675:25–676:2 (Harrison).
[98] *Id.*

ii. Errors in the purchase and sale agreements are not evidence of an intent to conceal.

The Division next argues that because there were errors in the purchase and sale agreements ("PSAs") in which Mr. Boden received a fee, Timbervest must have intended to conceal the fees.[99] Had Timbervest actually intended to conceal the fees (which it did not), intentionally inserting erroneous descriptions of the fees into the PSAs (as the Division contends happened) would not be an effective way to accomplish this. New Forestry did not regularly review the PSAs.[100] It makes no sense to "conceal" payments in a document that no one outside of Timbervest would have reviewed. Even if BellSouth and ORG had reviewed the PSAs, the documents reveal that a fee was paid. The Division presented no evidence that anyone at Timbervest made affirmative statements to BellSouth or ORG misrepresenting who was paid these, or any other, fees.

Moreover, there is no evidence to support the Division's theory that Timbervest intentionally inserted errors into the PSAs. Mr. Boden testified that he gave the drafters of the contracts the name of the LLC through which he would be receiving his fee and the percentage of the sales price that he was owed.[101] He was not responsible for any other language in the PSAs about which the Division complains.[102] Mr. Boden was focused on negotiating and closing deals. He did not focus on the details of contract language. His concern was to ensure that his fee, at the agreed percentage, was included in the PSAs.

It is true that Mr. Boden, who was not focused on the contract language, failed to catch that the PSAs described his work as being on behalf of the "Purchaser" or on behalf of "the parties," but the counterparties to the PSAs also failed to catch or correct the mistakes. For

[99] Div. Post-Hearing Br. at 37–41.
[100] *See* Tr. at 1088:23–25 (Ranlett).
[101] *Id.* at 172:18–173:9, 303:24–304:19, 353:9–354:7 (Boden).
[102] *See id.* at 172:18–173:17, 303:24–304:19, 353:9–354:17.

example, Mr. Wooddall failed to notice or call to anyone's attention that the PSA included language that Fairfax Realty Advisors, LLC was an advisor to the Purchaser (him). There is no evidence that he saw or wanted to correct the error or that he was complicit in some fraud. Therefore, despite this error in the PSA, the payment was correctly classified as a payment by the seller (New Forestry) on the closing statement.[103] There would be no reason to insert erroneous language in the PSA but then correct the error on the closing statement.

Similarly, there is no evidence that Mr. Carswell caught or attempted to correct the error that Woodson & Company, LLC acted as an advisor to the parties in the transaction. And although the rate was also incorrect in the Carswell–Rocky Fork contract by ½%, as discussed above, there is no evidence that this was anything more than an administrative error that, even if never corrected, would have been in favor of New Forestry.[104] Should this deal have proceeded to a closing, it is likely that the error would have been caught and corrected, but the deal never made it that far.

The errors in the PSAs were nothing more than innocent mistakes. They resulted in no harm to the client. There is no evidence that Timbervest intentionally caused errors to be inserted into the PSAs, and there is no evidence to support the theory that, even if it did intentionally cause those mistakes (which it did not), the mistakes were, in any way, shape, or form, designed to conceal Mr. Boden's fee payments. Rather, the Division simply uses innuendo and speculation about these mistakes to fill in the gaps of its fictional story that Timbervest perpetrated a fraud.

iii. That fees were paid to an unlicensed broker does not demonstrate an intent to conceal.

The Division also contends that because Mr. Boden's fees were paid to LLCs that were not licensed brokers, this "demonstrates most compellingly" that the LLCs were designed to

[103] *Id.* at 173:3–25.
[104] *Supra* Section III(a).

conceal Mr. Boden's fee payments.[105] This argument is nonsensical. If Mr. Boden or Mr. Harrison knew that it was improper to receive his fees in this manner, they would not have used an unlicensed broker. It makes no sense to try to conceal fees by using a structure that is, as the Division seems to think, improper on its face and would render Mr. Boden "much more vulnerable" to claims by third party brokers.[106] That is, if Mr. Boden was trying to conceal his fees, it does not help to use an entity that may call attention to itself because of brokerage licensing statutes.

Moreover, it is not clear that the payment of these fees violated any brokerage licensing statutes. Importantly, Mr. Boden's fees were not brokerage commissions; they were advisory fees.[107] They were compensation for the approximately 20 months of otherwise unpaid work that Mr. Boden did on behalf of New Forestry from which New Forestry received direct benefits.[108] And although they were triggered by sales, they were not compensation specifically for the sale but for the all the work necessary to create a sales process for New Forestry.[109]

Even if they were brokerage commissions, Mr. Boden would have a colorable argument that there was nothing improper about receiving them through two unlicensed LLCs. In its brief, the Division cites the general real estate licensing statute in Georgia, but neglected to mention that the Georgia code also provides an exception to licensing for persons "who, as owner or through another person engaged by such owner on a full-time basis or as owner of a management company whose principals hold a controlling ownership of such property, provides property management services . . . or otherwise deals with property owned by such persons." O.C.G.A. § 43-40-29(a). Because Mr. Boden worked full-time on behalf of New Forestry, he, and the LLCs

[105] Div. Post-Hearing Br. at 42–44.
[106] *Id.* at 44.
[107] Tr. at 386:1–3 (Boden).
[108] Post-Hearing Br. 2–8.
[109] *See* Tr. at 505:21–506:8 (Boden); *id.* at 1491:4–17 (Jones); *id.* at 1771:10–15 (Shapiro).

he used to collect his fees, were arguably exempt from having to be licensed in Georgia. He is based in Georgia and therefore would have reasonably assumed he was in compliance with the licensing statute. The propriety of receiving commissions under the state licensing statutes, however, is not really at issue. These statutes do not form the basis for an Advisers Act violation. The Division's focus on them is nothing more than a red-herring that diverts the Court's attention from the facts and the evidence that Timbervest did not intend to conceal the payments of fees to Mr. Boden from anyone. The Division's entire argument that Timbervest intended to conceal Mr. Boden's fees is simply part of its unsupported and baseless tale of fraud and deceit.

c. Timbervest disclosed the fee arrangement to ORG.

A conclusion that Timbervest concealed the fees from New Forestry would be particularly unreasonable in light of the fact that, as established at the hearing and in its Post-Hearing Brief, Timbervest disclosed Mr. Boden's fee arrangement to ORG.[110] As has been shown, Mr. Shapiro had a conversation with Mr. Schwartz about Mr. Boden's fee agreement in 2005.[111] Mr. Shapiro does not recall exactly what was said during the conversation, but he walked away thinking it was fine.[112] The Division asserts that Mr. Shapiro presented only a "hypothetical scenario" to Mr. Schwartz and did not disclose any of the details of the agreement, including its duration, the properties subject to it, who would pay the fees, or who would receive the fees.[113] Interestingly, the Division accepts this story from Mr. Schwartz but does not even attempt to explain why Mr. Shapiro and Mr. Schwartz would even be having a conversation, long before any fees were actually paid, about a fee agreement that did not exist. The Division therefore implicitly acknowledges that Mr. Boden's consulting agreement did in fact, exist.

[110] Post-Hearing Br. at 9–15.
[111] *Id.* at 9–10.
[112] Tr. at 1776:17–1777:2 (Shapiro).
[113] Div. Post-Hearing Br. at 45–46.

Moreover, the Division's contention that Timbervest did not disclose Mr. Boden's fees to ORG ignores that this version of events is not supported by the evidence. Mr. Shapiro testified that he could not remember exactly what was said but that he had "gotten the okay" from Mr. Schwartz.[114] Mr. Shapiro reported this back to his partners.[115] Indeed, the only basis for the Division's assertion is the self-serving testimony of Mr. Schwartz, whose testimony was designed to cover his own potential liability.[116] The Division completely disregards that Mr. Schwartz originally told a different story both to the Division and to Timbervest's outside and general counsel, that Mr. Schwartz has made statements since his investigative testimony to at least one other client that he knew of and agreed to Mr. Boden's fee arrangement,[117] and that Mr. Schwartz gave inconsistent testimony even during the evidentiary hearing. It also fails to recognize that, at a minimum, Mr. Schwartz was mistaken about the conversation and simply misremembered exactly what was said during a conversation that took place nearly ten years ago.[118]

Although acknowledging that some conversation about the fees occurred between Mr. Schwartz and Mr. Shapiro, the Division argues, unconvincingly, that Timbervest knew ORG would not consent to the fee agreement because of ERISA.[119] The Division has two theories to support this argument. First, it cites to Mr. Barag's testimony that he had a conversation with the

[114] Tr. at 1776:17–1777:2 (Shapiro). The Division continues to distort Mr. Shapiro's investigative testimony about the response he received from Mr. Schwartz during this conversation. The Division claims that Mr. Shapiro's recollection is that Mr. Schwartz had "no response" to the disclosure. Div. Post-Hearing Br. at 53. That is clearly not what Mr. Shapiro's testimony reflects. Mr. Shapiro testified, both in his investigative testimony and at the evidentiary hearing, that Mr. Schwartz's response during the conversation was that the agreement was fine and was not a big deal. Tr. at 1785:1–23 (Shapiro). It was such a non-event that Mr. Shapiro cannot recall Mr. Schwartz's exact words. *Id.*

[115] *See id.* at 414:17–22 (Boden); *id.* at 1325:12–18, 1337:20–24, 1352:21–25 (Jones); *id.* at 1756:19–23 (Shapiro).

[116] *See* Post-Hearing Br. at 10–15.

[117] The Division goes so far as to assert that no witness besides Mr. Shapiro testified that they heard Mr. Schwartz say the agreement was acceptable. Div. Post-Hearing Br. at 54. This is simply wrong. Mr. Jones testified that he heard Mr. Schwartz say, on multiple occasions, that he knew about and approved of Mr. Boden's consulting agreement. Tr. at 1471:10–21 (Jones).

[118] *See* Post-Hearing Br. at 15.

[119] Div. Post-Hearing Br. at 48.

Partners before leaving Timbervest, purportedly reminding them that Timbervest could not receive any compensation outside of its investment agreement.[120] That Mr. Barag recalls such a conversation from nearly ten years ago regarding an account that he admittedly had "very little to do with" and that was "almost entirely run and managed by David Zell," while being unable to correctly account for the most basic facts regarding his tenure at Timbervest is questionable. In any event, there is no evidence that a single, vague conversation years before was in the Partners' minds in seeking consent to the agreement from Mr. Schwartz. And the Division completely ignores that later in his testimony, Mr. Barag specifically testified that he had no conversation with the Partners about commissions, rather his "advice was to be mindful to take care of their client, BellSouth."[121] There was "[n]ever" a discussion about commissions.[122]

The Division's second theory is that Timbervest knew the fees were a prohibited transaction under ERISA and that a client could not consent to a prohibited transaction.[123] As discussed, the Partners were not experts in ERISA, and they did not view the payment of fees to Mr. Boden as an ERISA issue.[124] All the evidence points to the fact that the Partners never even thought about ERISA at the time. Even if they had, Timbervest had just received a REOC opinion letter for Timbervest Crossover Partners when the only three investors were the same three BellSouth pension plans through the same nominee partnership structure used to invest in New Forestry.[125] It is reasonable to assume that they would have believed New Forestry to be a REOC as well. In any event, Timbervest obtained consent from ORG, which held itself out to be

[120] *Id.* at 66.
[121] Tr. at 2012:23–2013:6 (Barag).
[122] *Id.*
[123] Div. Post-Hearing Br. at 48.
[124] *See* Post-Hearing Br. at 37; Tr. at 296:4–16, 505:23–506:8 (Boden); *id.* at 1379:24–1380:10, 1491:11–17 (Jones); *id.* at 1574:15–1575:1 (Zell); *id.* at 1771:4–1772:8 (Shapiro).
[125] *Id.* at 1402:3–1403:2 (Jones); *id.* at 1674:2–12 (Zell).

a qualified pension asset manager ("QPAM").[126] Contrary to the Division's statements, QPAMs can, in certain circumstances, consent to prohibited transactions.[127] Thus, there is a reasonable basis for Timbervest's reliance on ORG's approval, given ORG's QPAM and fiduciary status.

The Division also complains that if Timbervest had disclosed the fee agreement, there would have been some documentation to corroborate the disclosure.[128] But this case is old. The disclosures were made nearly a decade ago, and emails and other documents at Timbervest and BellSouth from that period no longer exist.[129] Investment advisers are required to keep documentation only for five years.[130] There has been no allegation that Timbervest did not fulfill its record-keeping requirements under the Advisers Act. Timbervest specifically and voluntarily informed the Division about the fees paid to Mr. Boden on May 2, 2012.[131] The sale of Tenneco and the Kentucky lands had occurred more than five years ago at that point, but the Division took its time pursuing any claim related to the fees. In fact, it waited more than 16 months before bringing charges but now claims that Timbervest should have maintained documentation that it was not required to maintain. The lack of availability of documentation a decade after the disclosure of the fee agreement to Mr. Schwartz should be held against the Division, not the Respondents.

IV. The Chen transactions were not a cross trade and were beneficial to each client.

The second set of transactions that the Division believes resulted in a violation of the Advisers Act centers on the Tenneco/Gilliam property in Alabama. The Division has, at various times, characterized these transactions as a parking arrangement or as a cross trade. They were

[126] *Id.* 2145:22–2146:5 (Schwartz).
[127] *See* Department of Labor Prohibited Transaction Class Exemption 84-14.
[128] Div. Post-Hearing Br. at 47–48.
[129] *See* Tr. at 1655:21–1656:2 (Zell).
[130] *See* 17 C.F.R. 275.204-2.
[131] Div. Ex. 126 (May 25, 2012 letter from Frank Ranlett to Joel Shapiro).

neither. And although memories have faded surrounding the details of the transactions, all the objective evidence indicates that they were beneficial to both New Forestry and to TVP.

a. The Chen transactions represent neither a parking arrangement nor a cross trade.

The Division's Order Instituting Proceedings charges Timbervest with violating the Advisers Act by conducting a parking arrangement with the Tenneco property. As shown in Timbervest's Post-Hearing Brief, even assuming that Mr. Boden had suggested to Mr. Wooddall that Timbervest might eventually like to repurchase the property,[132] there was no parking arrangement because Mr. Wooddall bore all the risk in the transactions.[133] The Division itself acknowledges that there were no restrictions on what Mr. Wooddall could do with the property after purchasing it.[134] Implicitly recognizing that it cannot prove that there was a parking arrangement, the Division in its Post-Hearing Brief, for the first time, argues that the transactions were a "prearranged cross trade," rather than a parking agreement.[135]

The Division ignores that a "cross trade" is a term of art. The Advisers Act's prohibitions on cross trades, and ERISA's prohibitions on cross trades, do not apply simply because one client sells a security or investment vehicle and another client later purchases a security or investment vehicle. Rather, under the Advisers Act, a cross trade occurs only when an adviser has clients on both sides of the same transaction. 17 C.F.R. 275.206(3)-2. There is no doubt that that is not what happened here. And under ERISA, a cross trade occurs only when there is a

[132] Mr. Boden does not recall ever having this discussion with Mr. Wooddall. Interestingly, although listed on its witness list, the Division did not call Andrew Johnson to corroborate Mr. Wooddall's story that Mr. Boden offered to repurchase the property during a meeting at Houston's in Atlanta, even though Mr. Wooddall testified that Mr. Johnson was at the meeting. Tr. at 759:11–761:1 (Wooddall). There is a difference in recollection about what occurred at this meeting, and Mr. Johnson's corroborative testimony could have potentially won the issue for the Division. The only reasonable conclusion, therefore, is that Mr. Boden did not propose to repurchase the property during this meeting.
[133] Post-Hearing Br. at 23–25.
[134] Div. Post-Hearing Br. at 13.
[135] *Id.* at 11–14.

purchase and a sale *between* a fund and any other account managed by the same investment manager with no third party that has obtained ownership in between, as Chen Timber did here. *See* 29 C.F.R. 2550.408b-19(c)(6). Likewise, there is no doubt that this is not what happened with the Tenneco property.

Nor is there any evidence that any of the Partners considered the Tenneco transactions to be a cross trade, under either the Advisers Act or under ERISA. If they had considered it to be a cross trade, they still would have been able to effectuate the transactions, there just would have been steps to be taken under both laws and the applicable fund documents.[136] The fact that cross trades can be proper under both ERISA and under the Advisers Act with certain disclosures belies any conclusion that the Partners were attempting to orchestrate a cross trade and simply did not want to go through the disclosure process.

The Division is attempting to hold Timbervest liable for restrictions that do not exist. Timbervest could, in theory, be held liable for a violation of the Advisers Act if there were a parking arrangement, which there was not. Timbervest also could, in theory, be held liable for a violation of the Advisers Act if there were a cross trade without the requisite disclosures, which there was not. There is no basis, however, to hold Timbervest liable for two separate transactions unless they were in some way harmful to either New Forestry or to TVP.

b. The Division ignores the realities of timberland valuations.

Both New Forestry's sale of Tenneco to Chen Timber and TVP's purchase of the property were excellent deals for Timbervest's clients. As explained in Timbervest's Post-Hearing Brief, New Forestry was able to dispose of a property that did not fit its strategy at a

[136] *See* 17 C.F.R. 275.206(3)-2; 29 C.F.R. 2550.408b-19 (a); Div. Ex. 46 (New Forestry, LLC Limited Liability Company Agreement).

price that was 11.7% above carrying value.[137] TVP, in turn, was able to acquire a property that fit its strategy at a price below what every objective economic indicator available at the time showed the value to be.[138]

The Division's only response to the compelling, objective evidence on this point is to suggest that it is implausible that "the property's value increased by nearly 8% in only a few weeks."[139] Timbervest has shown that the value of Tenneco *did* increase by nearly 8% during the relevant dates, but the relevant dates were not "only a few weeks" apart.[140] The Division uses the closing date of New Forestry's sale (October 17, 2006) and the date that a *draft* contract was first sent to Mr. Wooddall on behalf of TVP (November 30, 2006) to argue that it is implausible that the value increased $1.05 million during that time.[141] Those dates, however, are not the relevant dates for measuring the price of the transactions as compared to the value of the property at the time.

Testimony at the hearing established that the price for New Forestry's sale of the property was not established on the closing date. Rather, the Partners determined that the price of the contract was a great deal for New Forestry based on the value of Tenneco well before the contract date (September 15, 2006).[142] The Investment Committee would have approved the sale, and the attendant price, before the first contract was signed in July.[143] The Partners determined that the contract price for TVP's purchase of the property was appropriate given the value of the

[137] Post-Hearing Br. at 20–21, 26–31. The Division suggests that Tenneco did, in fact, fit New Forestry's investment objectives because it was classified as "core" timberland. The Division asserts that the designation of the property as "core" "signifies that the property was strategic to the portfolio." Div. Post-Hearing Br. at 22. But this is a mischaracterization of the record, and the testimony cited does not say that. In fact, Mr. Boden testified that the "core" designation signified that Tenneco was a "big, bulky tract to be managed and probably sold in one unit versus [the noncore] that could be sold in individual pieces to realize higher numbers." Tr. at 110:11–111:10 (Boden).
[138] Post-Hearing Br. at 22, 26–31.
[139] Div. Post-Hearing Br. at 2.
[140] Post-Hearing Br. at 26–31.
[141] *See* Div. Post-Hearing Br. at 2.
[142] *See* Tr. at 224:13–225:10 (Boden).
[143] *Id.* at 1422:11–20 (Jones).

timberland at the end of the due diligence period (January 15, 2007), not at the time of the draft contract or even the executed contract (December 15, 2006).[144] When looking at the relevant dates, it is clear that it increased by more than 8%.[145] As Mr. Woodall testified and as these transactions demonstrated, Mr. Boden is "as good a negotiator as there is," and he was able to secure great deals for both New Forestry and TVP.[146]

The Division appears to have only two complaints about these valuations. First, it suggests that because financial analyses and models were not introduced by Timbervest at the hearing, Timbervest never actually analyzed the potential transactions.[147] This argument misses the mark. Remarkably, the Division ignores that one of its very own exhibits contains such financial models.[148] Moreover, Timbervest introduced evidence that all the objective financial indicators—including appraisals, timber prices, timber growth, and other contract prices—supported both contract prices.[149] And although Timbervest did not introduce evidence of the financial analyses and models used to evaluate the transactions, Timbervest both produced such documents to the Division and originally listed a version of one of the models on its Exhibit List.[150] Mr. Jones likewise testified that the Investment Committee would have approved the transactions in the same way it approves every transaction based on his and his partners' courses of conduct. He explained, "I mean, that's our process . . . on every acquisition and disposition. I would have no reason to doubt that it wasn't done in the same manner with respect to both the sale on September 15th and the later repurchase of that property."[151] Mr. Jones also was certain that Timbervest did "multiple iterations of due diligence valuations" and that Timbervest

[144] Div. Ex. 18 (December 15, 2006 Timberland Purchase Agreement); Tr. at 1423:18–1424:16 (Jones).
[145] Post-Hearing Br. at 26–31.
[146] Tr. at 851:21–22 (Wooddall).
[147] Div. Post-Hearing Br. at 17.
[148] Div. Ex. 20 (Gilliam Forest Acquisition File).
[149] Post-Hearing Br. at 26–31.
[150] Dec. 20, 2013 Resp. Ex. List, Exhibit No. 2.
[151] Tr. 1482:23–1483:3 (Jones).

performed the same level of due diligence with respect to the Tenneco acquisition by TVP as it had on all other acquisitions and dispositions.[152] For the Division to suggest that Timbervest never analyzed the transactions is disingenuous at best.

The Division's second complaint seems to be that Timbervest's valuations were inaccurate in some way. The Division suggests that Timbervest's valuations could not be what they actually were. Interestingly, though, the Division investigated Timbervest's valuation methods for years. During this period, Timbervest responded to subpoenas and gave investigative testimony about its valuation process, how Timbervest values timberland, and why timberland values fluctuate from quarter to quarter.[153] The Division never brought charges against Timbervest related to its valuation methods but now claims that they could not possibly support an 8% change in valuation of property over a quarter-long period. Timbervest has shown, however, that timberland prices fluctuate in value and can do so in relatively short periods. Plum Creek, the largest timberland owner and timberland REIT in the United States, saw its stock price increase 15% during the fourth quarter of 2006, and the NCREIF timberland index for timberland properties in the South increased 8.5% in the fourth quarter of 2006.[154]

Timbervest consistently used an objective timberland valuation policy that was fully disclosed to, understood by, and agreed to by its clients.[155] Timbervest employs accounting and forestry experts to demonstrate its valuations. PWC, New Forestry's auditor, described Timbervest's valuation process as "top-notch."[156] Using this policy, the value of the Tenneco property decreased 6.22% in the third quarter of 2006 and increased 7% in the fourth quarter of

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[152] *Id.* at 1524:17:25; 1526:11-20.
[153] *See, e.g.*, Div. Ex. 110 (Aug. 26, 2010 subpoena to Timbervest); Div. Ex. 111 (Sep. 1, 2010 subpoena to Timbervest); Div. Ex. 112 (Oct. 12, 2011 subpoena to Timbervest); Div. Ex. 113 (Nov. 18, 2011 subpoena to Timbervest); Div. Ex. 114 (Dec. 1, 2011 subpoena to Timbervest).
[154] Div. Ex. 83 at tab 12 (March 7, 2013 Meeting Notebook); Tr. at 205:11–15 (Boden); Tr. at 853:24–854:17 (Wooddall).
[155] Tr. at 1173:8–15 (Ranlett); *id.* at 1281:7–16, 1289:9–10, 1464:6–12 (Jones).
[156] Resp. Ex. 75 (April 18, 2011 email from Joel Shapiro to Gordon Jones and others).

2006. These value swings were not abnormal and would surprise no one familiar with timberland investing, including Mr. Wooddall and Mr. Ranlett.[157] Again, using the metrics set forth in its valuation policy, the Tenneco property in fact increased in value by more than 8% between the sale by New Forestry and the purchase by TVP. And the transactions were conducted at fair prices and were unquestionably beneficial to both New Forestry and TVP, respectively.[158] The Division's entire theory that the value of Tenneco could not have increased during the fourth quarter of 2006 is nothing more than a backdoor attempt to revive its valuation concerns, which it already has spent three years investigating and for which it determined not to bring charges.

c. The details of the transaction are understandably hazy.

These transactions took place in 2006 and 2007, long before the Division began investigating Timbervest and long before it ultimately brought charges in late 2013. Since the Chen transactions have taken place, Timbervest has conducted hundreds of transactions.[159] And for every one transaction that was consummated, there are many more that were considered but never completed.[160] The Partners simply do not have specific memories about the details surrounding these two transactions with Chen Timber out of all the hundreds that have been completed and hundreds more that have been considered. While the Partners did not have a memory of all the transactions' details, they remembered the transactions themselves, as evidenced by their voluntary disclosure of the transactions to the Division.[161] In December 2011, as part of its valuation investigation, the Division sent a subpoena to Timbervest seeking documents related to "Interfund Transfers," defined as the "purchase, sale, or exchange of land between any . . . Separate Client Account managed by Timbervest, on the one hand, and any

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[157] *See* Tr. at 849:18–850:3, 854:3–17 (Wooddall); *id.* at 1084:5–10, 1202:7–14, 1205:3–8, 1206:18–22 (Ranlett).
[158] *Id.* at 772:21–22 (Wooddall); *id.* at 1279:12–19, 1484:10–1486:2 (Jones).
[159] *Id.* at 460:3–22 (Boden).
[160] *See id.* at 460:3–22.
[161] Div. Ex. 79 at 5 (February 14, 2012 letter from Stephen D. Councill to Robert K. Gordon).

other Timberland fund . . . managed by Timbervest, on the other hand."[162] The Chen transactions did not fit this definition. Nevertheless, and despite the fact that Timbervest had already produced to the Division all its acquisition and disposition closing binders (including both Chen transactions), Timbervest specifically alerted the Division to "a timberland sale made by New Forestry, LLC to Chen Timber, LLC on October 17, 2006 [and a sale of the property] by Chen Timber, LLC to Timbervest Partners Alabama, LLC on February 1, 2007."[163]

Despite these facts, the Division suggests that the Partners are "feigning ignorance" about how the repurchase came about because the Partners somehow knew that the transaction was prohibited by ERISA (which it was not).[164] As explained above, there is no evidence to support the argument that the Partners had discussed ERISA with respect to the Tenneco transactions. The only things that the Division has to support this theory is an email from Mr. Shapiro that references ERISA (in an unrelated context) and Mr. Barag's testimony that, in 2003 or 2004, there was a conversation about potentially transferring properties from New Forestry to the new Timbervest REIT in an *actual* cross trade.[165] A vague conversation from 2003 or 2004 and an email referencing ERISA is not evidence that supports that the Partners had ERISA in mind when engaging in the Chen transactions. Indeed, in response to the idea of cross trading properties between New Forestry and the REIT, Mr. Barag testified that Mr. Zell did not want to engage in such transactions because it would suggest that "Timbervest was more interested in getting control of the assets than maximizing performance of the separate account," and the

[162] Div. Ex. 114 (December 1, 2011 Subpoena to Timbervest).
[163] Div. Ex. 79 at 5 (February 14, 2012 letter from Stephen D. Councill to Robert K. Gordon).
[164] Div. Post-Hearing Br. at 62.
[165] Div. Post-Hearing Br. at 27, 62. In the Division's mind, Mr. Barag is an expert in ERISA who could competently testify about the Partners' knowledge of the law. But Mr. Barag's testimony does not support this conclusion. Indeed, when asked, he could not even provide the correct definition of a REOC, instead providing a definition that is inconsistent with the law. Tr. 1972:3–7 (Barag). Because Mr. Barag clearly does not understand the intricacies of ERISA, he has no basis to testify to the Partners' understanding of the same.

Division describes the email in 2006 as Mr. Shapiro "flagging Gruber's proposed cross trade as problematic."[166]

The Division has no explanation for why Mr. Zell and Mr. Shapiro would have refused to engage in a cross trade earlier but then supposedly approve of one later. There was no motive suggested or apparent to seek to acquire the Tenneco property from New Forestry and for TVP. The Partners received no benefit from the transaction, and there is no suggestion that the property itself was something in which the Partners were interested. The Respondents' testimony is the only reasonable conclusion—they did not view these transactions as cross trades that were prohibited by ERISA (because they were not, in fact, cross trades that were prohibited by ERISA or any other law).

d. There was no concealment of the Chen transactions.

The Division also argues that Timbervest concealed the Chen transactions and that this concealment shows that Timbervest intended to defraud New Forestry and/or TVP about the transactions.[167] The suggestion that Timbervest concealed the transactions is curious in light of the fact that publicly available real estate records clearly show TV's involvement in both the sale and later repurchase of the property and in light of TV's voluntary disclosure of the deals to the Division.[168] There is no evidence that Timbervest attempted to conceal the transactions, and there is no evidence that had anyone from BellSouth or any of the investors in TVP asked about the property, that they would not have received all the details about the properties. In fact, both New Forestry and TVP had the same auditing firm during this period. The auditors were aware of the sale of Tenneco by New Forestry and the later repurchase by TVP but took no issue with

[166] Tr. at 1936:22–1937:12 (Barag); Div. Post-Hearing Br. at 16.
[167] Div. Post-Hearing Br. at 19–26.
[168] *See* Div. Ex. 79 at 5 (February 14, 2012 letter from Stephen D. Councill to Robert K. Gordon).

the transactions or the terms as evidenced by their unqualified audits for each fund that contained no notes regarding the transactions.

The Division begins by arguing that Mr. Boden lied to Mr. Wooddall about the need for TVP to raise funds before committing to repurchase the property and that this somehow "shows that Boden involved Wooddall in order to conceal Timbervest's cross trade of Tenneco from New Forestry."[169] This argument is completely nonsensical. All Mr. Boden supposedly said is that he could not promise to buy the Tenneco property back; there was no concealment of the deal itself. Moreover, there is no evidence that Mr. Boden was not completely honest about needing to raise funds before committing to a repurchase of the property. As the Division acknowledges, TVP II was in a fundraising mode at the time.[170] It is therefore at least equally plausible that Mr. Boden was considering the repurchase of the property for TVP II, and when he realized prices were increasing, Timbervest elected to buy it for TVP I, which still had funds available for the purchase. Irrespective of which fund Mr. Boden may have had in mind potentially to purchase the property, all his purported statement shows is that Mr. Boden wanted to induce Mr. Wooddall to purchase the property but refused to commit, promise, guarantee, or otherwise agree in writing or in any enforceable manner to its repurchase. A refusal to commit to a repurchase is inconsistent with both a parking arrangement and a cross trade, and it is not evidence of an intent to conceal.

The Division next points to an email from Barrett Carter, a Timbervest employee, sent on the day that the purchase of Tenneco by TVP closed, in which he explained his understanding that it "just happened to work out that one client sold it to another party and another client wound

[169] Div. Post-Hearing Br. at 12–13.
[170] *Id.* at 12, n.5.

up buying it back from that party."[171] While the Division claimed that this statement could only have come from someone else, Mr. Carter testified that he may have had personal knowledge about this fact based on his prior work on the property.[172] Mr. Carter went on to explain that the buyer (Chen Timber) had been presented with a different opportunity and approached Timbervest with the idea of buying it back.[173] While the second statement appears to be incorrect, there is no evidence that Mr. Carter sent this email with an 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.[174] 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 an intent to conceal the transaction from New Forestry.

The Division next lobs a series of complaints about New Forestry's Annual Report and the Spec Book for TVP's purchase of the timberland.[175] It first complains that there are seemingly inconsistent descriptions in the two documents about the property. These differences are indicative of different writing styles or possibly salesmanship, but not fraud. The property characteristics highlighted by one person are likely to be different from those highlighted by another at a later time. Similarly, the property characteristics important to a buyer and to a seller are different and are dependent on the strategy of the fund.[176] It is no surprise that the Timbervest personnel responsible for drafting the documents would want to downplay the characteristics of the property when trying to inform New Forestry about the sale of the property and would want

[171] Div. Post-Hearing Br. 19–21; Div. Ex. 19 (February 9, 2007 email from David Zell to Barrett Carter and others).
[172] Tr. at 941:16–942:9 (Carter).
[173] Div. Ex. 19 (February 9, 2007 email from David Zell to Barrett Carter and others).
[174] Tr. at 934:13–25 (Carter).
[175] Div. Post-Hearing Br. at 21–24.
[176] Tr. at 1267:2–7, 1272:5–17 (Jones)

to advertise the characteristics when trying to inform TVP about the purchase. Moreover, the descriptions, although written with a different tone, are not actually inconsistent. For example, there is no inconsistency in telling New Forestry that the property would not produce significant returns for several years and explaining to TVP that there would be "*growing* cash flow" from the timberland. Nor is there any inconsistency between explaining to New Forestry that the property is in the poorest area of Alabama and to TVP that the property was "within a short drive of several large cities" (as almost all of Alabama is). Additionally, while access may be characterized as challenging when a timberland property has multiple parcels with road divisions to a seller needing to sell an entire property, it can be characterized as a positive for a buyer with a strategy of selling the property in many parcels for recreational use over many years.

The Division also grumbles that the Spec Book to TVP failed to disclose Timbervest's prior management of the land.[177] The Division suggests that TVP would have reviewed this Spec Book, but as Mr. Jones testified, Spec Books are "prepared for internal use and use by our investors on a selective basis."[178] Moreover, while the Division claims that there was "no good explanation" for this omission,[179] Mr. Boden testified that the Spec Books typically do not give any detailed management history but rather only the most recent owner.[180] Given that Spec Books have been drafted by different personnel over the years and follow a pre-determined structure with pre-determined information, there actually would be "no good explanation" for this Spec Book to differ from any others Timbervest has produced over the years, and it in fact did not. Regardless, ample testimony established that this Spec Book was never finalized, and a

[177] Div. Post-Hearing Br. at 25.
[178] Tr. at 1270:13–23 (Jones).
[179] Div. Post-Hearing Br. at 25.
[180] Tr. at 248:20–249:12 (Boden).

non-final document does not support the conclusion that Timbervest attempted to conceal the transactions.[181]

Finally, the Division complains about the description in an August 2006 disposition report to ORG of Chen's offer to New Forestry to purchase Tenneco as "unsolicited."[182] Mr. Boden agreed that this language was inaccurate but stated categorically that he did not draft it.[183] Multiple internal personnel review and revise these documents on Timbervest's behalf.[184] No one is sure how the term got into a document drafted eight years ago; it could have been something as simple as meaning that there was no broker involved. But it is not indicative of an intent to conceal the transactions.

Nor is the simple fact that Mr. Ranlett testified that he would have wanted to know about the transactions evidence of an intent to conceal, as the Division suggests.[185] Frankly, Mr. Ranlett's opinion on the matter about what AT&T would have wanted to know is irrelevant. There was nothing to offer or tell to AT&T. The sale of the Tenneco property from New Forestry closed before the BellSouth and AT&T merger, and TVP's purchase of the property was under contract before the merger closed.[186] Further, Mr. Ranlett never even met with Timbervest until after TVP's purchase of the property had closed, and he did nothing after AT&T took over the account to find out what BellSouth or ORG knew about Timbervest's management over the prior years.[187] He acknowledged that Timbervest had full discretion to sell New Forestry properties and had no obligation to inform him of these transactions.[188] There is, therefore, no evidence from which to conclude that Timbervest intended to, or did, conceal the transactions from New

[181] *Id.* at 244:10–245:23, 248:8–19.
[182] Div. Post-Hearing Br. at 24–25.
[183] Tr. at 117:8–25 (Boden).
[184] *See id.* 118:5–8.
[185] Div. Post-Hearing Br. at 17–18.
[186] *See* Resp. Ex. 132 (Tenneco/Gilliam Timeline).
[187] *See* Tr. at 1043:18–25, 1147:3–1149:1, 1189:9–14 (Ranlett).
[188] *Id.* at 1139:5-14.

Forestry. The Division's speculation on this point is just another chapter in its fiction about Timbervest's fraud.

e. The attempts to sell Glawson in 2005 are unrelated to the Chen transactions.

In addition to alleging attempts to conceal the transaction, the Division has argued that Timbervest acted with scienter because it previously tried to conduct a cross trade of New Forestry's Glawson property.[189] There was no such cross trade, and the 2005 attempts to sell Glawson are wholly unrelated to the Chen transactions.

In 2005, Mr. Boden attempted to sell the Glawson property on New Forestry's behalf.[190] As part of these efforts, Mr. Boden contacted Reid Hailey to see if he was interested in purchasing the property.[191] The property, located within a short drive of Atlanta, was not core timberland and stood the best chance at being sold and developed as a residential, single-family real estate property.[192] However, at the time, the Alcovy River Watershed Management Act was passed; this act had a dramatic impact on the ability to develop the property for single family homes "because it changed the [allowed] density markedly and also required a sewer implementation plan."[193] Although Mr. Boden talked to multiple developers about purchasing the tract, they gave only "conditional interest" because of the new legislation; they wanted to better understand the act before agreeing to purchase it.[194]

With that in mind and trying to secure a sale for New Forestry, Mr. Boden approached Reid Hailey, a Georgia real estate investor, about the possibility of purchasing Glawson.[195] Because of the conditional interest given by other developers, Mr. Boden believed that

[189] Div. Post-Hearing Br. at 28–33.
[190] Tr. at 255:11–21, 277:9–12 (Boden).
[191] *Id.* at 255:11–21.
[192] *Id.* at 272:24–273:6.
[193] *Id.* at 277:9–18; *see also id.* at 273:7–12.
[194] *Id.* at 274:16–22.
[195] *See id.* at 255:11–21.

presenting the property for sale, along with selling an option to a developer to later purchase the property, might make the deal less risky to Mr. Hailey and give him "a little clarity on [a potential] exit" from the property.[196] Mr. Boden knew that it would take Mr. Hailey a month or two to raise the capital necessary to purchase the property.[197] During this period, Mr. Boden would have plenty of time to talk to developers and potentially marry up Mr. Hailey with an interested developer.[198] In Mr. Boden's mind, if Mr. Hailey accepted this deal, Mr. Hailey could potentially mitigate his risk by having a developer with an option to purchase it. If the developer did not purchase it, Mr. Hailey would still get $100,000 in the option price upfront and have a property that he would have necessarily "evaluated and wanted to buy, wanted to own."[199]

Despite the Division's assertions, the option was not "part and parcel of the deal."[200] Mr. Boden testified that he would have been happy to sell the property to Mr. Hailey without an option.[201] But Mr. Hailey never made an offer.[202] He did, however, briefly consider the deal that Mr. Boden presented to him; ultimately, though, Mr. Hailey was not interested in the transaction.[203] There were no further discussions or negotiations about the sale of Glawson to Mr. Hailey, and the potential deal quickly fell through.[204]

As part of presenting Mr. Hailey with this proposal, Mr. Boden asked Mr. Harrison to prepare an option contract that would illustrate what Mr. Boden had in mind.[205] As Mr. Harrison testified, "it's quite common, if you're beginning discussions on a possible transaction, you

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[196] *Id.* at 275:22–276:8.
[197] *Id.* at 281:24–282:9.
[198] *Id.*
[199] *Id.* at 341:22–342:2.
[200] Div. Post-Hearing Br. at 30.
[201] Tr. at 280:20–24 (Boden).
[202] *Id.*
[203] *Id.* at 275:23–276:8.
[204] *Id.* at 278:25–279:7, 344:18–347:3 (Boden)
[205] *Id.* at 263:2–3 (Boden).

might send someone the form of what the contract might look like."[206] Mr. Harrison knew that the deal had not taken shape yet.[207] Mr. Harrison, on his own and without direction from Mr. Boden, decided to insert a placeholder entity, Willow Run Investments, LLC (a previously set up and unused entity) to hold the option; Mr. Harrison also decided, on his own and without direction from Mr. Boden, to draft an assignment of the option.[208]

Mr. Boden did not know why Willow Run was listed as the option holder.[209] He picked up the documents from Mr. Harrison on his way to meet with Mr. Hailey.[210] He did not have time to look through the documents to see exactly what they said before presenting them to Mr. Hailey.[211] Mr. Harrison, for his part, knew that option holder had not yet been defined, so he inserted Willow Run as a placeholder.[212] Because Mr. Harrison had set up Willow Run earlier for an unrelated business venture (with which Mr. Boden had no involvement), his name and address appeared as the contact information for Willow Run.[213]

As mentioned, after one brief meeting about this potential transaction, discussions ended.[214] Mr. Hailey informed Mr. Boden shortly after this one meeting that he was uninterested in pursuing the deal because it was not a good fit for his company.[215] The Division suggests that the proposal fell apart because of a letter sent on behalf Zachry Thwaite (one of the brokers with whom Mr. Chambers had entered into a commission agreement).[216] Mr. Thwaite's attorney sent a letter to Timbervest informing the Partners that Mr. Thwaite was entitled to a commission on

[206] *Id.* at 707:5–8 (Harrison).
[207] *Id.* at 704:1–5.
[208] *Id.* at 265:9–23, 278:11–15 (Boden); *id.* at 709:25–710:20 (Harrison)
[209] *Id.* at 278:4–15 (Boden)
[210] *Id.* at 278:22–279:7.
[211] *Id.*
[212] *Id.* at 704:1–5, 709:25–710:20 (Harrison).
[213] *Id.* at 571:2–8, 660:17–662:11, 707:23–709:21.
[214] *Id.* at 278:25–279:7, 344:18–347:3 (Boden)
[215] *Id.* at 278:25–279:7; Tr. at 873:1–8 (Hailey).
[216] Div. Post-Hearing Br. at 32–33.

the sale of the Glawson tract.[217] But this letter was sent nearly one year after the proposal fell through; there is no possible way that it would have been the motivation for Mr. Boden to abandon the proposal. Rather, Mr. Boden stopped trying to sell Glawson to Mr. Hailey because, as he testified, Mr. Hailey was not interested in the transaction.[218]

The Division tries to paint this transaction as an attempted cross trade (although, of course, even if consummated, it would not have been a cross trade because it did not involve Timbervest's clients on both sides of the transaction) that somehow supports its conclusion that the Chen transactions were a cross trade.[219] To show that the Glawson sale was a potential cross trade, the Division relies only on the testimony of Mr. Hailey.[220] Mr. Hailey had only a vague recollection of the negotiations because it took place more than eight years ago.[221] He did not remember whether he asked who would be the option holder and only "assumed" that "whoever owned the property . . . wanted to sell it and then sometime later they wanted to buy it back."[222] Mr. Hailey's vague recollection of this undeveloped transaction is not enough to support the theory that this deal would have constituted a cross trade. Further, Mr. Hailey is not a credible witness. In fact, he told counsel for the Partners that his testimony at the evidentiary hearing "would go much more favorable" for the Respondents if Messrs. Boden, Shapiro, and Zell paid a capital call from another unrelated (and subsequently foreclosed upon) financial venture

[217] Div. Ex. 152 (June 27, 2006 letter from Kirk M. McAlpin, Jr. to William Holley, II). The Division says that Mr. Thwaite became aware of the potential Glawson sale because "Hailey and Thwaite were friends," so Mr. Hailey wanted to keep Mr. Thwaite informed about the transaction. Div. Post-Hearing Br. at 33. This is just another in a long string of the Division's mischaracterization of the record. In fact, Mr. Hailey specifically testified that he did not know Mr. Thwaite. Rather, Mr. Thwaite was a friend of a friend. Tr. at 872:25–873:16 (Hailey). When Mr. Hailey was considering the transaction, he met Mr. Thwaite, who informed Mr. Hailey about a "broker's lien" on the Glawson property. *Id.* Mr. Hailey therefore sent him the documents prepared by Mr. Harrison. *Id.* at 873:19–874:2.
[218] Tr. at 873:1–8 (Hailey).
[219] Div. Post-Hearing Br. at 28–33.
[220] *See generally id.*
[221] *See* Tr. at 871:3–8 (Hailey).
[222] *Id.* at 872:6–9.

sponsored by Mr. Hailey.[223] Their decision to refuse to fund this capital call harmed Mr. Hailey personally, and he was motivated to provide unhelpful testimony against the Respondents.[224] Mr. Hailey's testimony can be entirely discredited on this basis alone. The whole of his testimony was irrelevant, too speculative, and a waste of the Court's time.

In an attempt to bolster its argument that the proposed Glawson transaction was to be a cross trade, the Division again resorts to attacking Mr. Harrison's ethics as an attorney based on nothing more than speculation.[225] It weaves a ludicrous argument that Mr. Harrison was part of a scheme to cross trade the property and that he would have received a $75,000 fee (the draft assignment price) for accomplishing it.[226] There is zero evidence to support this. As explained above, Mr. Harrison simply drafted the assignment agreement on his own.[227] Mr. Harrison thought the assignment was needed, but he does not remember why.[228] There was only one brief conversation between Mr. Boden and Mr. Harrison about the option contract, so it is very likely that Mr. Harrison could have misunderstood what Mr. Boden wanted.[229] For Mr. Boden's part, he testified that he wanted only a draft option agreement from Mr. Harrison, not an assignment.[230] He never even saw the draft assignment agreement or other documents prepared by Mr. Harrison until December 2013.[231]

There is simply no evidence from which it would be reasonable to conclude that the efforts to sell Glawson to Mr. Hailey in 2005 were an attempted cross trade. There is also no

[223] *Id.* at 889:23–890:13.
[224] *Id.* at 891:21–25.
[225] Div. Post-Hearing Br. at 29–30.
[226] *Id.* The Division argues that Mr. Harrison testified that his finances were not in good shape during this time and so he needed this fee. *Id.* at 30. Mr. Harrison did not say this. The portion of the transcript to which the Division cites is a reference to Mr. Harrison's personal finances in late 2006, not in 2005. *See generally* Tr. at 717:5–719:13 (Harrison).
[227] *See* Tr. at 265:9–23 (Boden).
[228] *See id.* at 697:22–698:3, 705:4–706:9 (Harrison).
[229] *Id.* at 279:24–280:5 (Boden).
[230] *Id.* at 265:9–23.
[231] *Id.* at 279:24–280:5.

evidence that Timbervest attempted to move Glawson from New Forestry into TVP (the only other comingled fund at Timbervest at the time). As Mr. Boden testified, "the Glawson property is not a property that's a fit for . . . the strategy of TVP I."[232] TVP invested primarily in timberland assets with an average cost basis at around $1,000 per acre.[233] The Glawson property was not a timberland property—the timber had been cut in 2001 and 2002, and the value of Glawson at the time was nearly $5,700 an acre.[234] It was not a property that fit TVP's strategy in any way, and there is no evidence that Timbervest was attempting to acquire Glawson for TVP. The unconsummated Glawson transaction therefore was not an attempted cross trade.

V. The Division's arguments concerning the development of the Glawson property are irrelevant and mischaracterize its use.

The Division spends much of its Post-Hearing Brief complaining about Timbervest's development of the Glawson property and claiming that this development somehow "demonstrates [Respondents'] cavalier attitude toward their fiduciary duties."[235] The Division's quibbles about the Glawson property are irrelevant to a determination of whether Timbervest violated the Advisers Act. Had Timbervest or the Partners breached their fiduciary duties in the development of the property, the Division surely would have brought charges related to it, as the development occurred in 2008 and therefore within the statute of limitations. But there have been no charges related to the Glawson property. Nothing was even alleged in the OIP about the Glawson property. This Court therefore should properly dismiss the Division's assertions out of hand. Nevertheless, and out of an abundance of caution, Timbervest briefly responds below.

It is important to understand the condition of this property and why it needed to change if New Forestry had any hopes of attracting a purchaser. The Glawson property is located in

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[232] *Id.* at 436:24–467:7.
[233] *Id.* at 437:8–25.
[234] *Id.*
[235] Div. Post-Hearing Br. at 54–57.

Georgia, a short driving distance from Atlanta.[236] The timber on the property had been cut by the previous Timbervest management in 2001 and 2002, so it was no longer a strategic timberland property.[237] As Mr. Shapiro explained, the property was essentially "nuked" and "looked as if a bomb went off."[238] Timbervest initially intended to sell the property to a single-family residential developer.[239] However, because of the additional restrictions instituted by the Alcovy Watershed Management Act and the collapse of the housing market, the interest in developing the property as a single-family residential community evaporated.[240]

By 2008, Timbervest knew it had to change strategies with the property. It could not generate revenue from timber (because the timber had been cut), yet the land value per acre was exceptionally high due to the proximity to Atlanta.[241] The opportunity to sell the property to a residential developer had collapsed along with the economy and the housing market.[242] So Mr. Boden and Mr. Zell, along with the regional forester responsible for overseeing the property, developed "a plan whereby this would be the premier hunting piece of property for sale within 45 minutes of Atlanta."[243] Timbervest knew about a similar hunting "club" within 30 minutes of the Glawson property where people pay $20,000 to $25,000 to join and then thousands of dollars a year to hunt on the property.[244] Timbervest thought that a similar high-end hunting preserve would "be the right exit" strategy for New Forestry.[245]

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[236] Tr. at 1867:2–9 (Shapiro).
[237] *Id.* at 437:8–25 (Boden).
[238] *Id.* at 1867:23–1868:5 (Shapiro).
[239] *Id.* at 272:24–273:6 (Boden).
[240] *Id.* at 1867:10–1868:5 (Shapiro).
[241] *Id.* 1867:2–1868:5.
[242] *Id.* at 1867:23–1868:5.
[243] *Id.* at 1868:6–9.
[244] *Id.* at 1870:4–13.
[245] *Id.* at 1870:14–21.

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.[246] It purchased additional nearby acreage that had water features.[247] It built bridges, cleared fields, enhanced the wildlife, added hunting improvements, built fences and a new entrance, and added additional water features.[248] It also built a structure to serve as an amenity for potential hunters.[249] 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.[250] Timbervest was successful in adding "many, many millions" to Glawson's value.[251] 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.

The Division does not contest that these improvements added value to the property. But nearly all the Division's specific complaints are about work done to increase the value of the properties. For example, the Division says that Timbervest "flouted" its fiduciary duties by "construct[ing] a hunting lodge on the Glawson property."[252] There was no hunting lodge.[253] While the top portion contains "a tiny kitchen and a little fireplace area and a stand-up bathroom," it did not contain a bedroom, did not have a certificate of occupancy, and was not

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[246] Tr. at 1868:10–16.
[247] *Id.*
[248] *Id.* at 1868:10–1869:7.
[249] *Id.* at 1868:17–23.
[250] *Id.* at 1871:24–1872:4.
[251] *Id.* at 1879:22–1880:3.
[252] Div. Post-Hearing Br. at 4.
[253] The only evidence that there was a "hunting lodge" comes from Frank Ranlett's testimony. Mr. Ranlett has never been to the Glawson property; he based his characterization of the structure solely on photographs. *See* Tr. at 1214:19–1215:4 (Ranlett).

used to host overnight hunting trips.[254] The primary purpose of the structure was to provide a pad and storage area for equipment used in connection with the improvements made on the property.[255] However, because of the significant per acre value of this property, it made little sense to erect a "shed" that would serve no future purpose to a buyer and likely would detract from the overall property value. Therefore, Timbervest determined that the incremental cost of constructing a nicer looking structure that would serve as an amenity to a future owner would be beneficial to the value of the property and the client. The entire structure cost $200,000 but was part of the process that added millions of dollars in value to the property.[256]

It is interesting that the Division focuses solely on improvements made to the Glawson property while ignoring improvements made on numerous other New Forestry properties. As documentation given to the Division during its three year focus on valuations shows, Timbervest spent millions of dollars on improvements of New Forestry properties. Improvements such as structures, roads, bridges, entrances, fences, water features and game management were common. In fact, the one New Forestry property that Mr. Ranlett visited personally, the St. Aurelie property in Maine,[257] contains both a United States and Canadian customs house, a two-story office, a bunk house for workers, a bridge across an international border, truck and timber weighing scales, and over thirty sugar maple production facilities. Over the years Timbervest, on behalf of New Forestry, has spent millions of dollars in construction and improvements on this property. Such improvements, whether on St. Aurelie, Glawson, or other New Forestry properties, were part and parcel to Timbervest's duties as manager of New Forestry. Timbervest

[254] *Id.* at 1868:24–1869:2 (Shapiro).
[255] *Id.* at 1871:21–24.
[256] *Id.* at 1868:17–1869:2.
[257] *Id.* at 1078:1–23 (Ranlett).

had full discretion to implement management and improvement plans, and the details of these plans were not reported to AT&T, nor were they required to be.[258]

The Division next complains that Timbervest created a "hunt club"[259] composed of Timbervest employees and that they were given a free lease of the property for hunting. As Mr. Shapiro testified, this "hunt club" was composed of Timbervest employees and certain other individuals who were possibly going to attend a *one-time event* on the property in an effort to create knowledge about and interest in the property.[260] The "hunt club" was put in place solely for insurance purposes.[261] In addition, this license was part of New Forestry's records, was known and discussed with New Forestry's auditors, and was not hidden from anyone, including AT&T.[262]

The Division's next concern is that Timbervest cancelled a revenue-generating lease and supposedly gave the "hunt club" a free one.[263] It is true that Timbervest cancelled a revenue-generating lease.[264] It did so to get hunters off the property while Timbervest was implementing improvements to the property to avoid interference from hunters. As Mr. Shapiro explained, "[i]f you have hunters on there, you're going to decimate the wildlife population," and when working on property improvements "the last thing you want out there are people with guns, doesn't work."[265] Moreover, the hunting lease income of $5,000 to $6,000 per year was an immaterial amount for New Forestry.[266] The development of the property as a hunting preserve, in contrast,

[258] *See* Div. Ex. 46 (New Forestry, LLC Limited Liability Company Agreement).
[259] Div. Post-Hearing Br. at 55.
[260] Tr. at 1897:8–12, 1898:17–21, 1899:3–16 (Shapiro).
[261] *Id.*
[262] *Id.* at 1897:13-16; Div. Ex. 168 (February 23, 2010 email from Bob Boardman to Martin L. Tanenbaum).
[263] Div. Post-Hearing Br. at 55.
[264] *See* Tr. at 1882:11–15 (Shapiro).
[265] *Id.* at 1869:18–23, 1883:11-16.
[266] *Id.* at 1882:14-15.

created two or three million dollars' worth of value.[267] So while New Forestry temporarily gave up some income, the development of the property more than made up the shortfall. In addition, the "free" license was a one-time event to showcase the property and "to get an aura around" it.[268] Timbervest therefore invited qualified individuals who may eventually want to purchase the property.[269] As Mr. Shapiro explained, "You can't sell a hunting area if people don't know about it."[270]

The Division also complains that Timbervest supposedly held annual dove hunts and conducted timber tours on the property.[271] The dove hunts held on the property were another attempt to provide exposure to the property.[272] By inviting people who were qualified to purchase the property and by showcasing the features and amenities of the property, Timbervest was able to generate a buzz around the property. Importantly, the dove hunts were never hidden from BellSouth or AT&T. Indeed, PWC, New Forestry's auditor, knew about the dove hunts and provided guidance on the best way to account for the hunts.[273] Had Timbervest been intending to hide this information from the client, it never would have shared it with the auditor. Likewise, the timber tours were never hidden from BellSouth or AT&T. In fact, Timbervest invited Frank Ranlett, Steve Burger, and others from AT&T on many timber tours.[274] Although AT&T representatives never accepted the invitations, that does not mean that the tours themselves were improper in any way. Timbervest conducts tours on properties owned by all of Timbervest's

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[267] *Id.* at 1870:14–21.
[268] *Id.* at 1898:9–21.
[269] *Id.*
[270] *Id.*
[271] Div. Post-Hearing Br. at 55.
[272] *See* Tr. at 1903:14–1904:3 (Shapiro).
[273] Div. Ex. 168 (February 23, 2010 email from Bob Boardman to Martin L. Tanenbaum); Tr. at 2263:23–2265:8 (Shapiro).
[274] Tr. at 1874:2–14, 1874:25–1875:5 (Shapiro).

funds, not just New Forestry's properties.[275] Timber tours are the only way that Timbervest can show, demonstrably, what investment manager services it can provide. They are akin to a commercial property investment manager giving tours of buildings owned by another investor. They did not harm New Forestry in any way or put Timbervest's interests ahead of the fund's. If anything, the timber tours induced Timbervest to keep Glawson in pristine condition to show to other potential buyers and investors.[276]

Finally, the Division finds it suspicious that Timbervest never listed Glawson for sale with a broker.[277] Yet, many properties were sold through the use of in-house resources and not by the use of outside brokers.[278] The Division thinks this means that Timbervest never marketed Glawson and never intended to sell the property.[279] This ignores, of course, the efforts that Mr. Boden went to in 2005 to try to sell the property.[280] It also ignores that Timbervest invited persons to the property who had both the recreational interests and financial wherewithal to purchase it.[281] Moreover, the improvements on the property had not yet been completed when AT&T terminated Timbervest's investment management agreement.[282] Timbervest was still in the process of finishing the water features on the property and was waiting to get certain licenses from the Army Corps of Engineers.[283] It would make no sense to list the property for sale before finishing those amenities because they would add more value to the land. Timbervest could have therefore maximized the sales price by waiting until all improvements were complete.

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[275] *See id.* at 1881:18–19.
[276] *Id.* at 1871:24–1872:4.
[277] Div. Post-Hearing Br. at 56.
[278] *See* Tr. at 1760:12–19 (Shapiro).
[279] Div. Post-Hearing Br. at 56.
[280] *See* Tr. at 255:11–21, 277:9–12 (Boden).
[281] *See id.* at 1898:16–21 (Shapiro).
[282] *Id.* at 2269:1–13.
[283] *Id.*

The Division ignores 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.[284] 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."[285] 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.[286] 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 sum, all the improvements Timbervest made to the Glawson property were just that—improvements made for the benefit of the property and the New Forestry portfolio. The improvements, along with the substantial time and effort Timbervest dedicated to this property, increased its value substantially and followed a well-conceived management plan to provide New Forestry with an exit strategy on a property that was no longer timberland and could not easily be developed into residential property. The improvements to the Glawson property have no relevance to whether Timbervest violated the Advisers Act and do not demonstrate that "Respondents flouted their fiduciary duty."

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[284] Resp. Ex. 146 at 28 (2011 New Forestry Annual Report and 2012 Outlook).
[285] *Id.* at 27.
[286] *Id.*

VI. There was no violation of the Advisers Act.

As laid out in Timbervest's Post-Hearing Brief, there was no violation of the Advisers Act with respect to either Mr. Boden's fees or the Chen transactions.[287] The Division has failed to show that Timbervest knowingly or negligently made a material omission to a client. Those arguments will not be repeated here, except to address the Division's apparent misunderstanding of the law. Throughout its Post-Hearing Brief, the Division argues that the Respondents' explanation for the innocent facts set forth above are "unconvincing" or "unpersuasive."[288] This confuses the issue. The burden of proof is on the Division to prove that Timbervest knowingly or negligently made a material omission to a client. *See, e.g.*, *In the Matter of Raymond J. Lucia Cos., Inc.*, A.P. File No. 3-15006, 2013 WL 6384274, at * (Dec. 6, 2013) (Elliot, J.) (explaining that the Division must prove all the elements of its claim to establish violations under §§ 206(1) and (2)). It has not met its burden of proof here, and this Court should therefore find that there has been no violation of the Advisers Act.

VII. The relief sought is extreme and excessive.

The Division seeks three forms of relief against Timbervest: (1) an associational bar and suspension, (2) disgorgement, and (3) a cease-and-desist order. None of these remedies is warranted here, and the specific form of relief sought by the Division is barred by the statute of limitations and is excessive.

a. Associational bars and suspensions are barred by the statute of limitations.

Despite clear law on the issue, and your Honor's repeated statements that an associational bar would not be imposed in this case, the Division insists on arguing that an associational bar

[287] Post-Hearing Br. at 33–53.
[288] *See, e.g.*, Div. Post-Hearing Br. at 32, 38, 44.

should be imposed and that such a remedy is not barred by the statute of limitations.[289] This issue has been briefed exhaustively by the parties—both in the Motion for Summary Disposition and in the Post-Hearing Briefs.[290] Timbervest will not burden the Court with more of the same except to address the Division's new contention that deciding whether to impose an associational bar does not depend on the statute of limitations but rather on a "fact-intensive inquiry focusing heavily on the realistic threat of future harm to the public."[291]

Both federal case law and decisions of the Commission hold that associational bars are penal and therefore barred by the statute of limitations. *See, e.g.*, *SEC v. Bartek*, 484 F. App'x 949, 956 (5th Cir. 2012) (per curiam), *cert. dismissed*, 133 S. Ct. 1658 (2013); *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996); *Raymond J. Lucia Cos., Inc.*, Admin. Proc. No. 3-15006, 2013 WL 3379719, at *35 (July 8, 2013); *In re Terence Michael Coxon*, Admin. Proc. File No. 3-9218, 64 SEC Docket 712, 1997 WL 186896, at *1 (Apr. 8, 1997). The cases cited by the Division do not change the analysis. Importantly, *not a single one* of the Division's cases imposes an associational bar that was otherwise barred by the statute of limitations based on some threat of future harm. Only one even imposed an associational bar, but in that one, *In re Valdislav Steven Zubkis*, 2005 WL 3299148 (Dec. 2, 2005), the statute of limitations was not at issue because the Respondent had been enjoined four years earlier in federal court. That injunction, not any other conduct, was the basis for the Division's action, and the statute of limitations was not in issue. The other cases cited by the Division are inapposite. For example, *SEC v. Brown*, 740 F. Supp. 2d 148 (D.D.C. 2010), was decided on a motion to dismiss. No associational bar was ever imposed. Instead, one defendant settled before trial without an

[289] *Id.* at 79–83.
[290] Resp. Motion for Summary Disposition at 21–25; Div. Response to Resp. Motion for Summary Disposition at 19–22; Post-Hearing Br. at 43–44.
[291] Div. Post-Hearing Br. at 80.

associational bar, and the other had an injunction (the federal court equivalent of a cease-and-desist order) imposed to refrain from violating an accounting bar that had been entered years earlier. Likewise, *SEC v. Jones*, 476 F. Supp. 2d 374 (S.D.N.Y. 2007), did not even address associational bars. It focused on whether civil penalties and an injunction were barred by the statute of limitations and concluded that these remedies were, in fact, unavailable due to the passage of time.

The Division has no support on point for its contention that an associational bar can be imposed based solely on some inchoate threat of future harm, despite the statute of limitations having run. Even if such support did exist, it is clear that there is no basis for believing that Timbervest poses any threat of harm to its investors. The Division knew about the transactions giving rise to this action by May 2012. At that point, the transactions were already old, and the statute of limitations had already run. But instead of seeking emergency relief (which could have been expected if the Division was seriously concerned about investors' risk), it waited more than 17 months before even filing the OIP, and even then, did not plead that there was a risk of future harm to investors. The statute of limitations has run, and an associational bar cannot be imposed.

b. The disgorgement sought by the Division is excessive.

The Division seeks three types of "disgorgement" from Timbervest and the Partners. First, it seeks return of all Timbervest's management fees from 2006 until 2012.[292] Second, it asks for disgorgement of the disposition fees from the Tenneco and Kentucky land sales.[293] Finally, it requests additional interest from Mr. Boden's fees, which were already voluntarily returned to AT&T with interest.[294] What the Division seeks is nothing more than a back door to a

[292] *Id.* at 72–77.
[293] *Id.* at 77–78.
[294] *Id.* at 78–79.

civil penalty, which is barred by the statute of limitations, and the Division's theories of disgorgement represent a fundamental misapplication of disgorgement law.

Disgorgement is an equitable remedy designed to deprive a wrongdoer of ill-gotten gains by requiring the return of proceeds of illegal activity. It is designed to prevent defendants from profiting from illegal activity. *See, e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). The primary purpose of disgorgement is to correct unjust enrichment and restore Respondents to the status quo ante. *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 96 (2d Cir. 2004). Even the cases cited by the Division explain that disgorgement must be *directly* tied to ill-gotten gains received from the fraud and cannot be imposed above an amount wrongfully acquired. *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402 (S.D.N.Y. 2009); *SEC v. Jones*, 476 F. Supp. 2d 374 (S.D.N.Y. 2007). Courts have made clear that when disgorgement exceeds the gains directly caused by misconduct, disgorgement ceases to be an equitable remedy and becomes a penalty. *See, e.g.*, *Zacharias v. SEC*, 569 F.3d 458, 473 (D.C. Cir. 2009) (explaining precedent holding that "disgorgement may not be used punitively"); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (holding that disgorgement extends only to the amount by which defendant profited and stating that any further sum would constitute a penalty assessment); *SEC v. Willis*, 472 F. Supp. 1250, 1276 (D.D.C. 1978) ("When the amounts to be disgorged cannot be related with sufficient certitude to defendants' securities law violations, the SEC's disgorgement request takes on the character of a plea for punitive relief."). Applying these legal standards to the Division's requests, it is clear that what the Division seeks is not actually disgorgement but a penalty designed to circumvent the statute of limitations.

i. Timbervest's management fees are not subject to disgorgement.

The Division contends that Timbervest should disgorge all of the management fees it received from its management of New Forestry's assets from 2006 to 2012.[295] The Division first indicated that Timbervest should be required to disgorge all of its management fees for this period in its Response to Respondents' Motion for Summary Judgment.[296] In that brief, the Division theorized that management fees could potentially be subject to disgorgement under ERISA, and they therefore should be imposed here.[297] However, the Investment Advisers Act does not authorize remedies based on ERISA violations or relief available under ERISA. The Division implicitly recognizes this fact but now attempts to argue that disgorgement of the management fees is based on the idea that "[b]ut for the concealment of the prohibited transactions, Timbervest certainly would have been terminated as soon as AT&T discovered the fraudulent conduct."[298] This, of course, is not the standard for disgorgement. Disgorgement does not look to what would happen but for some alleged concealment, but looks to the status quo ante. *See, e.g.*, *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 96 (2d Cir. 2004) (the purpose of disgorgement is to restore the parties to the status quo ante). Using this standard would consider what would have happened if there were no dispute about whether the proper disclosures were made, not what would have happened if (i) the transactions took place, (ii) the transactions led to a violation of the Advisers Act, and (iii) Timbervest then told AT&T that it had perpetrated a fraud in the transactions, as the Division contends and all of which is nonsensical. The proper analysis is what would have happened had there been no violation.

[295] *Id.* 72–77.
[296] Div. Opposition to Respondents' Motion for Summary Judgment at 24.
[297] *Id.*
[298] Div. Post-Hearing Br. at 73.

The cases cited by the Division show this to be the standard for disgorgement. Although the Division argues that these cases stand for the proposition that "[d]isgorgement of salaries or other forms of compensation may be an appropriate remedy," a review of these cases makes it clear that compensation is an appropriate remedy only when such compensation is received *because of* fraudulent conduct. For example, in *SEC v. Koenig*, 532 F. Supp. 2d 987 (N.D. Ill. 2007), a district court ordered disgorgement of the defendant's bonuses (not his entire compensation), when he was found liable for inflating the company's earnings per share and his bonuses were directly tied to earnings per share. There, the court looked at what the bonuses would have been absent the fraud, not whether the defendant would have been terminated in light of the fraud. Likewise, in *SEC v. Church Extension of Church of God, Inc.*, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005), a district court ordered $100,000 of defendants' salaries to be disgorged after the defendants orchestrated a scheme that caused a $30 million investor loss and *enabled* defendants to maintain their employment by keeping the company afloat. Similarly, in *SEC v. Conaway*, 2009 WL 902063 (E.D. Mich. Mar. 31, 2009), the court denied defendant's motion for summary judgment as to disgorgement when the court determined that there was a fact dispute as to whether the defendant had maintained a fraudulent scheme simply to "continue to reap the benefit of a salary or other employment related benefits."

Even the most on-point case the Division cites, *SEC v. Black*, 2009 WL 1181480 (N.D. Ill. Apr. 30, 2009), does not support the Division's request to disgorge any of Timbervest's management fees. In that case, the defendant was involved in extreme acts of misconduct for which he had already been found guilty on three mail fraud charges and one obstruction of justice charge. The SEC's entire case in *Black* relied on the collateral estoppel effect of the criminal case and stipulations of facts. The SEC's theory was that had Black made the proper disclosures from the outset, he would have been terminated. Here, in contrast, the Division contends that had Timbervest violated the Advisers Act and then disclosed its fraud, that it would have been terminated. Importantly, there was no dispute that Black had made no disclosure in a proxy statement. Here, a disclosure indisputably occurred, and the dispute is whether it was sufficient. Finally, the *Black* court recognized that the amount of disgorgement should be reduced to the extent Black provided "real and valuable services." 2009 WL 1181480, at *4. As discussed more thoroughly below, there is no doubt that Timbervest provided real and valuable services to New Forestry.

The Division has alleged that Timbervest violated the Advisers Act by omitting to inform BellSouth and AT&T about (1) the payment of advisory fees to Mr. Boden, and (2) an alleged cross trade of New Forestry's properties. Even if these omissions did result in a violation of the Advisers Act (which they did not), there is no connection between Timbervest's management fees and the transactions that led to these purported violations. The Division presented no evidence that Timbervest was not entitled to receive its management fees from New Forestry. Even if Timbervest had not engaged in the transactions at issue and sold properties on New Forestry's behalf, Timbervest still would have received its management fees. In fact, its management fees would have been even *higher* than they were because management fees are determined as a percentage of the value of assets under management.[299] Because the management fees Timbervest received from New Forestry have no causal connection to and are utterly divorced from the alleged omissions and the transactions giving rise to the alleged violations, imposing disgorgement of them would amount to a penalty barred by the statute of limitations. *See In the Matter of Abraham & Sons Capital*, Exchange Act Release No. 1956,

[299] *See* Tr. at 1742:4–9 (Shapiro).

2001 WL 865448 (July 31, 2001) (rejecting disgorgement of management fee where there was no allegation of wrongdoing in connection with the fee sought to be disgorged).

Further, there is nothing but speculation to support the Division's theory that BellSouth or AT&T would have terminated Timbervest in 2006 or 2007 had they known about the transactions at issue. In fact, the evidence available suggests that they would *not* have done so. The Division contends that AT&T "immediately terminated Timbervest upon discovering its misconduct," but the facts do not support this.[300] AT&T knew that the Division had begun investigating Timbervest in 2009.[301] It also specifically knew about the transactions that gave rise to these events in early 2012, but it waited nearly six months before deciding to terminate the investment management agreement.[302] As Mr. Jones testified, this decision was based on AT&T's disappointment in the fact that Timbervest had not been successful in making the investigation go away and in its concern about potential publicity and the investigation being a distraction to Timbervest's management of New Forestry.[303] AT&T's termination letter did not mention that AT&T was upset with the transactions leading to this action; in fact, AT&T stated that it "appreciated the services provided by Timbervest to BellSouth and to AT&T over the years . . . ."[304] In addition, AT&T is still an investor in TCP.[305] Thus, Timbervest's management fees cannot be subject to disgorgement based on a speculative theory thata client might have terminated Timbervest in 2006.

Even assuming that the fees could, theoretically, be subject to disgorgement, the Division has not set forth a "reasonable approximation" of the profits Timbervest received from the

[300] Div. Post-Hearing Br. at 65.
[301] *See* Tr. 1152:17–1153:3 (Ranlett).
[302] Div. Ex. 123 (August 29, 2012 letter from Stephen T. Burger to Joel Shapiro); *see* Div. Ex. 126 (May 25, 2012 letter from Frank Ranlett to Joel Shapiro).
[303] Tr. 1476:11–1477:2 (Jones); *see also id.* at 1153:12–16 (Ranlett).
[304] Div. Ex. 123 (August 29, 2012 letter from Stephen T. Burger to Joel Shapiro).
[305] Tr. at 1479:25–1480:3 (Jones).

allegedly wrongful conduct. The Division claims that a D.C. Circuit decision, *Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009) sets forth a burden-shifting analysis under which the Division must first show a "reasonable approximation" of the profits received from wrongful conduct and then the burden shifts to the Respondents to show that the approximation is inaccurate. *Zacharias* does not create a burden-shifting analysis. Instead, it says that the Division bears the burden of proving a "reasonable approximation" of the amounts subject to disgorgement. The burden does not shift to Respondents. Rather, *Zacharias* stands for the unremarkable proposition that, if the Division does, in fact, prove a "reasonable approximation" of the Respondents' ill-gotten gains and the Respondents do not show that it is incorrect, the risk in any uncertainty in the Division's approximation falls to the Respondents.

Here, the Division has failed to prove a reasonable approximation of any ill-gotten gains. First, as explained above, there is no causal connection between Timbervest's management fees and the transactions that resulted in fees to Mr. Boden or the Chen transactions. Second, the Division's assertion that the management fees from the New Forestry account can be reasonably approximated using the Partners' draws reflects a fundamental misunderstanding of basic accounting. Despite the Division's assertions to the contrary, the Partners' draws do not represent "pure profits."[306] Rather, the draw represents a combination of profit, return of capital, and borrowing. Using the draws to approximate Timbervest's management fees also would double count the disposition fees that the Division claims should be subject to disgorgement, as any portion of those fees paid to the Partners was done so as part of their draw.

Moreover, the Division arrives at a $12 million figure through nothing more than speculation. Although the Division surely could have requested this information, it does not even

[306] Div. Post-Hearing Br. at 73.

have Timbervest's financials for 2009, 2010, 2011, or 2012.[307] Yet, it believes that it can determine both the amount of management fees earned by Timbervest during those years and the Partners' annual draws during those years simply by averaging those amounts from 2006, 2007, and 2008. But the 2006, 2007, and 2008 numbers themselves show that this is not a reasonable way to approximate Timbervest's financials. Timbervest's management fees between those three years ranged between approximately $5.49 million and $12.9 million, a swing of more than $7 million in only three years.[308] Likewise, the distributions to the Partners ranged between approximately $2.8 million and $8.48 million, a swing of nearly $6 million.[309] And indeed, the percentage of Timbervest's management fees coming from New Forestry decreased from 46% in 2006 to 29% in 2008.[310] The significant volatility of these numbers for the three years for which the Division does possess financial documentation shows that using an average of those amounts does not result in a "reasonable approximation" of the percentage of profit derived from New Forestry, much less a "reasonable approximation" of the amount of gains Timbervest and the Partners received from the allegedly improper transactions.

Finally, the Division's calculations fail to take into account that Timbervest provided bona fide services to New Forestry during all the years from 2006 up to and including 2012. Case law recognizes that it is appropriate to reduce any disgorgement by the value of real services provided. *See, e.g.*, *SEC v. Church Extension of Church of God, Inc.*, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005) (defendants provided real and valuable services, so the amount of disgorgement was reduced); *SEC v. Black*, 2009 WL 1181480 (N.D. Ill. Apr. 30, 2009) (noting

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[307] *Id.* at 76.
[308] Div. Ex. 71 (Ironwood Capital Partners Consolidated Financials for the Year Ended December 31, 2006); Div. Ex. 72 (Ironwood Capital Partners Consolidated Financials for the Years Ended December 31, 2008 and 2007).
[309] Div. Ex. 71(Ironwood Capital Partners Consolidated Financials for the Year Ended December 31, 2006); Div. Ex. 72 (Ironwood Capital Partners Consolidated Financials for the Years Ended December 31, 2008 and 2007).
[310] Div. Ex. 71(Ironwood Capital Partners Consolidated Financials for the Year Ended December 31, 2006); Div. Ex. 72 (Ironwood Capital Partners Consolidated Financials for the Years Ended December 31, 2008 and 2007).

that it would be appropriate to reduce the amount of disgorgement by the value of services provided). Here, there is no doubt that Timbervest provided real, valuable services, including, but not limited to, timber and property management, property improvements, preparation and implementation of management plans, timber harvests, silviculture activities, property acquisitions and dispositions, oil, gas, and mineral plans and oversight, hunt lease administration, lease and license administration, financial analysis, accounting functions, audit oversight, tax preparation and filing oversight, quarterly and annual reporting, and legal services and legal oversight. These management fees were actually earned for Timbervest's management of properties not even subject to this action. That is, because Timbervest sold both Tenneco and the Kentucky lands out of New Forestry's portfolio, it no longer received management fees for those properties. On top of that, timberland sales conducted by Timbervest on New Forestry's behalf added more than $115 million in value to New Forestry during this same period.[311] This far exceeds the amount of management fees paid by New Forestry to Timbervest.

Under these circumstances, there is no basis to "disgorge" Timbervest's management fees received from New Forestry from 2006 to 2012, and even if there were, the Division's calculation of these amounts is not a reasonable approximation of the amounts gained from Timbervest's alleged wrongdoing.

ii. Timbervest's disposition fees are not subject to disgorgement, and it correctly calculated interest on Mr. Boden's fees.

In addition to seeking disgorgement of Timbervest's management fees, the Division requests disgorgement of Timbervest's disposition fees and an additional amount of interest on Mr. Boden's fees, which were previously voluntarily returned to AT&T with interest.[312] As explained in Timbervest's Post-Hearing Brief, the disposition fees are not a proper measure of

[311] Resp. Ex. 141 (New Forestry land sales from April 2004 – December 2007).
[312] Div. Post-Hearing Br. at 77–79.

disgorgement.[313] Timbervest was contractually entitled to the disposition fees for both the sale of Tenneco and the sale of the Kentucky lands.[314] It would have received a disposition fee even if Mr. Boden had not received an advisory fee on the sales and even if TVP had not ended up later purchasing Tenneco. Because the disposition fees did not flow from any alleged wrongdoing, they cannot be the subject of disgorgement.

Additionally, Timbervest provided real and valuable services in connection with the sales of both properties. Such services included, but were not limited to, strategic planning, property preparation, property analysis, marketing, negotiations, financial analysis and legal services, and legal, accounting, and tax matters. These efforts led to revenues of approximately $40 million for New Forestry.

Likewise, there is no additional interest that needs to be provided with respect to Mr. Boden's fees. When Timbervest decided to return Mr. Boden's fees to AT&T, it paid $93,315.27 in interest. In choosing the interest rate to apply to the reimbursement, Timbervest sought to make up for lost earnings New Forestry would have received had the amount of the fees remained invested in New Forestry from the date the fees were paid until the date they were reimbursed. Because the funds from which the fee payments were made would have otherwise remained invested in New Forestry, the most accurate and appropriate interest rate was the actual rate of return New Forestry realized during the relevant periods. With respect to the Tenneco fee payment, the annualized rate of return for the period from September 30, 2006 through March 31, 2012 was 0.40%. With respect to the Kentucky lands fee payment, the annualized rate of return for the period from March 31, 2007 through March 31, 2012 was negative 1.15%. Timbervest ultimately chose to use the 90-day Treasury rate in effect during the period

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[313] Post-Hearing Br. at 52–53.
[314] *See* Div. Ex. 54 (New Forestry Fee Agreements).

commencing on October 17, 2006 (the date of the first fee payment) to June 7, 2012 (the date of the repayment). This calculation yielded an interest rate of 1.5%. The 90-day Treasury rate materially exceeded the rates of return for New Forestry during each of the relevant periods, and, therefore put AT&T in a superior financial position than it would have been in had the funds remained invested in New Forestry. Because Timbervest has returned interest to AT&T in an amount over and above what AT&T would have otherwise received, no additional interest should be subject to disgorgement.

c. A cease and desist order is inappropriate.

Finally, the Division seeks a cease-and-desist order against Timbervest.[315] Timbervest has shown, on multiple occasions that a cease-and-desist order is inappropriate because (1) its conduct was not egregious; (2) any incidents were isolated; (3) Timbervest did not act with scienter; (4) Timbervest and the Partners have offered assurances against future violations; (5) any violations were not recent; and (6) there has been no harm to Timbervest's investors.[316] The Division counters that a cease-and-desist order is appropriate, focusing primarily on the egregiousness and risk-of-future violations factors.

But the Division's egregiousness argument is based almost entirely on the assertion that "AT&T immediately terminated Timbervest upon discovering the misconduct" and has supposedly contemplated its own lawsuit.[317] First, as discussed above, AT&T did not "immediately" discharge Timbervest.[318] Rather, it waited three years after the Division began its investigation and six months after learning about these specific transactions to terminate

[315] Div. Post-Hearing Br. at 67–71.
[316] Post-Hearing Br. at 45–51; Resp. Motion for Summary Disposition at 29–35.
[317] Div. Post-Hearing Br. at 68.
[318] *See supra* Section VII(b)(i).

Timbervest.[319] When it did terminate Timbervest, it specifically thanked Timbervest for the years of service provided to both BellSouth and AT&T.[320] Moreover, AT&T has not brought suit against Timbervest, and contrary to the Division's assertions to the contrary, there was no testimony at the hearing about any contemplated suit. Indeed, AT&T remains a Timbervest client today.[321] This is therefore not a basis on which to find that Timbervest acted egregiously. Instead, as has been shown, Timbervest acted, at all times, with the good faith belief that the subject transactions were not only allowable, but were beneficial to New Forestry and to TVP.

The Division also argues that there is a likelihood of future misconduct because TVP III, another comingled fund managed by Timbervest, will not wind up until 2021 and because Timbervest may launch additional funds in the future.[322] But the simple fact that Timbervest intends to remain in the business does not mean that there is a likelihood of future misconduct. There have been no allegations of wrongdoing since 2007, and as explained in Timbervest's Post-Hearing Brief, the results of this investigation have been so severe that there is no real risk that Timbervest or the Partners would engage in anything that even smelled suspicious or improper.[323]

Timbervest's conduct was not egregious and there is no likelihood of future misconduct. Moreover, the alleged violations resulted in isolated incidents that occurred nearly a decade ago. And importantly, even Mr. Ranlett agreed that AT&T was not harmed in any way by Timbervest's alleged misconduct. In these circumstances, a cease-and-desist is not appropriate, and one should not be imposed here.

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[319] Div. Ex. 123 (Aug. 29, 2012 letter from Stephen T. Burger to Joel Shapiro); Div. Ex. 126 (May 25, 2012 letter from Frank Ranlett to Joel Shapiro).
[320] Div. Ex. 123 (Aug. 29, 2012 letter from Stephen T. Burger to Joel Shapiro).
[321] Tr. at 1479:25–1480:3 (Jones).
[322] Div. Post-Hearing Br. at 69–70.
[323] Post-Hearing Br. at 49–50.

VIII. Conclusion

This Court should find for Timbervest on each of the Division's claims. The Division has failed to prove that the Timbervest violated the Advisers Act. There was no material omission or misstatement made negligently or with an intent to deceive in connection with either the Chen transactions or Mr. Boden's fees. On top of that, the remedies the Division seeks are barred by the statute of limitations or excessive based on the facts presented at the evidentiary hearing.

This 18th day of April, 2014.

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