UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of

Timbervest, LLC,

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

Respondents.

Post-Hearing Brief on

behalf of Gordon Jones II

REPLY TO THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

ON BEHALF OF GORDON JONES II

Table of Contents

In the absence of facts to support its theory of fraud, the Division speculates on what might have occurred and attributes conduct and knowledge to the collective "Respondents," independent of whether each of the individual respondents was actually involved in the conversations and conduct at issue. In fact, Mr. Jones had no knowledge of the vast majority of events surrounding the Division's allegations. And, based on what he did know, he acted reasonably and in the best interests of his clients. Accordingly, the Division has not and cannot establish that Mr. Jones aided and abetted or caused any violation of the Advisers Act.

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

A. Mr. Jones Had Only a Basic Understanding of ERISA, and ERISA Did Not Serve as a Motivation For Mr. Jones to Approve the Transactions at Issue.

The Division's case is based entirely on the premise that Respondents skirted their fiduciary duties because they knew that a cross trade and the collection of the additional fees violated ERISA. The Division's theory, however, is unsupported by any evidence. As Mr. Schwartz testified, ERISA is a "pretty technical and complicated" body of law. (H'rg Tr. 2146:14). This case is demonstrative of that fact given that two exceptionally qualified experts do not agree on its applicability to the matters at hand. No witness testified that the Respondents were motivated by ERISA concerns on either of these two issues, and there is no documentary evidence that ERISA was a motivation. Nonetheless, because the Division continues to insist that the Respondents, and Mr. Jones in particular, was learned in ERISA and that ERISA therefore must have served as the motivation for his actions, we are compelled to respond to this threshold matter.

The Division first attempts to establish Mr. Jones's knowledge of ERISA by citing the testimony of Mr. Barag. First, Mr. Barag's recollection of his tenure at Timbervest is both

remarkable given the passage of time and filled with inaccurate recollections. Mr. Barag incorrectly recalled information about his employment status, his ownership status, and his compensation. He also invented a Missouri client (including its size, assets and management) and a second BellSouth account, neither of which ever existed; was unable to correctly recall Timbervest's ownership, even after being corrected once; and incorrectly testified about sales and purchase activity by New Forestry. Despite these glaring failures of memory about basic details that were directly pertinent to him and his own admission that he is not a detail guy, the Division touts Mr. Barag as having an "impressive facility [sic] for recalling the details of his time at Timbervest." (Hr'g Tr. 1992:3-5; Div. Br.[1] 50-51.) They then proceed to use his testimony about conversations from over ten years ago as the sole evidence to establish Mr. Jones's "knowledge" about ERISA.

Leaving aside Mr. Barag's memory deficiencies, and, therefore, questionable credibility, he testified that he discussed "ERISA-related things" with Mr. Jones and was of the opinion that Mr. Jones was "knowledgeable about that." (Hr'g Tr. 1943:9-14.) These supposed discussions with Mr. Jones about ERISA, however, centered around general matters related to the 2004 REIT initiative and a monologue Mr. Barag delivered about the penalties of ERISA on his way out the door from Timbervest; otherwise the discussions regarding ERISA were only "tangential" to other matters. (Hr'g Tr. 1942:10-1943:1.) It is undisputed that these supposed discussions revolved around matters wholly separate from the matters at issue here. Furthermore, Mr. Barag clearly stated that he did not have any personal dealings with Mr. Jones on any issues relating to ERISA. (Hr'g Tr. 1943:6-8.) These general and vague supposed conversations with Mr. Barag, without any actual interaction on ERISA matters, hardly establish anything regarding Mr. Jones's ERISA knowledge.

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

Next, the Division cites the testimony of Mr. Boden and Mr. Shapiro for the proposition that Mr. Jones knew more about ERISA than the other Partners. However, when Mr. Boden was asked whom of the Partners knew the most about ERISA, he responded "Gordon, I guess, but I'm not really sure. You'd have to ask them." (Hr'g Tr. 154:8-11.) Likewise, when Mr. Shapiro was asked who between he and Mr. Jones was more knowledgeable about ERISA, he responded "Mr. Jones" because "I just give him the benefit of the doubt being an attorney." (Hr'g Tr. 1727:1-6.) These statements establish nothing. And interestingly, despite Mr. Boden's suggestion, the Division never directly probed Mr. Jones on his actual or substantive knowledge of ERISA.

None of Mr. Barag, Mr. Boden, Mr. Shapiro or any other witness testified as to Mr. Jones's actual or substantive knowledge of ERISA or his understanding of its application to any of the matters in question. However, the Division attempts to take tidbits of ERISA information supposedly imparted by Mr. Barag over ten years ago with respect to wholly different matters and impute not only knowledge about an extremely complex body of law, but also such a degree of knowledge that it was used by Mr. Jones and the other Respondents as a motive. While in its desperate attempt to paint Mr. Jones in a negative light, the Division has even suggested that Mr. Jones had ERISA knowledge because he previously worked at a law firm that had an ERISA practice (which it did not at the time), the fact remains that Mr. Jones was not trained in ERISA, was not an ERISA expert, and did not consider the implications of ERISA with regard to the two issues in this matter. (Div. Opp. Mot. Sum. Disp. at 12-13; Hr'g Tr. 1379:24-1380:10.) While Mr. Jones believed that the New Forestry account was subject to ERISA, his actual ERISA knowledge was shown to be confined to a basic understanding formed in the context of a few specific matters. (Hr'g Tr. 1490:3-5; 1395:7-1398:4.)

Mr. Jones actions or inactions were neither reckless nor negligent in light of his ERISA knowledge and the facts known by him. He understood the Chen transactions to be two separate arms-length transactions that were fully supported by each client's objectives and all objective financial metrics. Even had ERISA been on the top of Mr. Jones's mind, to Mr. Jones's knowledge these transactions would have been fine. Likewise, Mr. Jones understood that Mr. Boden's fee arrangement had been disclosed to and approved by the client. It was not unreasonable for Mr. Jones to assume that this disclosure and approval was sufficient for all purposes.

B. Mr. Jones Did Not Aid, Abet, or Cause Timbervest to Fail to Disclose a Cross Trade of the Tenneco Property.

As a threshold matter, Timbervest did not violate the Advisers Act by failing to disclose a cross trade of the Tenneco Property because there was no cross trade of the Tenneco property. But even if the Court were to conclude that Timbervest violated the Advisers Act by failing to disclose the Tenneco transactions, Mr. Jones cannot be liable for aiding, abetting, or causing the violation because there is no evidence that Mr. Jones had any knowledge of the existence of any purported agreement between Mr. Boden and Mr. Woodall that TVP would repurchase the property at the time he approved the transactions. Indeed, Mr. Jones explained why TVP would *not* have been willing to purchase Tenneco at the price Mr. Wooddall paid at the time. Rather, Mr. Jones reasonably and in good faith believed they were two independent transactions. The Division's attempt to bootstrap failing memories, the lack of documentation and common misstatements as "evidence" of improper conduct only highlights the Division's lack of any real evidence against Mr. Jones and the other Respondents. Further, the Division's arguments regarding Mr. Jones's knowledge of ERISA are irrelevant because there would have been no

ERISA violation if the transactions were independent of each other, as Mr. Jones understood them to be.

1. Mr. Jones Had No Knowledge of Any Agreement Between Mr. Boden and Mr. Wooddall for TVP to Acquire Tenneco.

As illustrated by the Division's own brief, and the testimony of Messrs. Boden, Jones, and Wooddall, Mr. Jones did not participate in any conversations with Mr. Wooddall, he is not alleged to have even been aware of any such conversations, and he did not participate in the drafting or negotiations concerning either the sale of the Tenneco property to Chen Timber or the purchase of it from Chen Timber. (Div. Br. 10-14; Hr'g Tr. 122:15-123:8; 1478:7-1479:7; Hr'g Tr. Wooddall.) No better argument shows how specious the Division's case is than its argument that because Mr. Jones, Mr. Shapiro, and Mr. Zell approved the transaction *and did not testify that Mr. Boden concealed information from them* "[t]he only conclusion, then, is that Boden did, in fact, tell them of the deal with Wooddall and that they are refusing to admit their complicity." (Div. Br. at 27.) This argument is not only nonsensical but also unsupported by the record. How would Mr. Jones even know if Mr. Boden concealed information from him? The Division completely ignores that Mr. Jones testified that he had no knowledge of the arrangement, and had he known, he would have had questions.

> Q Okay. Well, let me ask you a question. Using your remembrance, as the chief compliance officer, if you were aware that there was an understanding to whatever degree regarding the purchase and resale of the same property at the time of the initial transaction, would that cause you any concern?
> A I would have, had I known, likely asked some questions about it, yes.
> Q What questions would you have asked, sir?
> A Why, why was this arrangement, what was the purpose of it, and I would have been sure that we were meeting our fiduciary obligations . . . to New Forestry because that was at the time of the sale the property from New Forestry.

(Hr'g Tr. 1297:1–14.) Thus, the *only* conclusion is not that Mr. Jones knew about the arrangement and is denying complicity, but, assuming such an agreement existed, that he did not know about it and would have questioned it had he known.

Despite these facts, and in lieu of offering evidence to support its allegations against Mr. Jones, the Division attempts to use his lack of recollection against him and speculate that such lack of memory is evidence of improper conduct. The Division argues that because Mr. Jones and the other Respondents do not have recollections of conversations from over seven years ago when the Tenneco transactions were considered by the Investment Committee, they must be lying and covering up their true motivations for approving these transactions. (Div. Br. 14.) Contrary to the Division's contention, if anything, Mr. Jones's lack of recollection highlights his lack of involvement in or concern about the transactions themselves, and further show that he was unaware of any improper arrangement.

The Division also attempts to argue that the lack of contemporaneous documentation of the rationale supporting TVP's purchase of the Tenneco property is evidence that the transactions were not independent. (Div. Br. 15-16.) As Mr. Jones testified, however, Timbervest did not record and keep formal minutes of any of its investment meetings. (Hr'g Tr. at 1245:7-16.) Mr. Jones testified that although he did not have a present recollection of the investment committee discussion (after more than seven years and many hundreds of transactions), he was certain that Timbervest's due diligence on the transaction was similar to all other transactions and that the investment committee approved the transactions. This was based on Timbervest's processes and on his and the Investment Committees' course of conduct. (Hr'g Tr. 1261:17-22; 1525:18-1526:20.) 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." (Hr'g Tr. 1482:23–1483:3; 1524:17-25; 1526:11-20.) Furthermore, the transactions themselves were unquestionably documented. The fact of the matter is that no email or document exists that supports the Division's claim that Mr. Jones knew of any improper arrangement; as he testified, had he known of any such arrangement, he would have questioned it. (Hr'g Tr. 1297:1–14.)

2. Mr. Barag's Conversations with Mr. Jones Regarding ERISA Did Not Raise Red Flags Regarding the Tenneco Acquisition.

The Division further contends that even if Mr. Jones was not aware of the details of Mr. Boden's discussions with Mr. Wooddall (the evidence shows he was not), he was reckless in failing to spot the ERISA issue. This argument fails for at least two reasons. First, the transactions only implicate ERISA if they were a cross trade as the Division contends. If they were two separate transactions, as Mr. Jones reasonably understood them to be, there was no potential for a violation of ERISA.

Second, the testimony of Mr. Barag regarding his general discussions with Mr. Jones and his partners about the ERISA implications of a transfer of property directly from one client to another is fundamentally different from the transaction that Mr. Jones understood was occurring when he approved TVP's acquisition of Tenneco, which, to the best of his knowledge, had been sold to a third-party in an arms-length transaction. Mr. Barag testified that it was he who brought up "[t]he potential of doing a roll-up of BellSouth properties into the REIT." (Hr'g Tr. 1934:15–21.) Mr. Jones recalled some discussion about the possibility of New Forestry properties being included in the REIT, but those transactions never occurred. (Hr'g Tr. 1395:7–22.)

When the opportunity for TVP to acquire Tenneco was presented to Mr. Jones around November 2006, these earlier discussions regarding ERISA did not trigger a red flag because New Forestry did not sell property to TVP. Indeed, Mr. Jones testified, "Timbervest Partners

wouldn't have paid a 12-percent premium for that property." (Hr'g Tr. 1287:1–3.) He then elaborated, "Another one of our clients would not have paid, because we use the same valuation metrics, 12 percent more for that property because it wouldn't have been substantiated by the market conditions." (Hr'g Tr. 1287:9–17.) What Mr. Jones was considering was the acquisition of a property that New Forestry had previously owned from an independent third party, at a price he believed to be below the property's then current market value. (Hr' g Tr. 1483:7-10; 1484:10-1486:2.) Mr. Jones did not consider ERISA because there was no transfer of property between two clients.

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

The Investment Committee separately considered whether each transaction met the needs of the client. As Mr. Jones testified, with respect to New Forestry's sale of Tenneco, "It met their objectives that were in place at the time, which was to create liquidity, and also was an attractive – from an economic standpoint, was an attractive sale that yielded, I think we've established, 11.7 [percent] premium over what we were carrying at the time." (Hr'g Tr. 1484:10–16.) Mr. Jones similarly explained why TVP's acquisition was a good transaction for TVP, "Because, again, ultimately it was an acquisition that met, first, the objectives of the client from an investment objective standpoint, and secondly, the economics of the transaction were quite attractive at the time. It was a – that price ultimately was a discount of what our due diligence valuation yielded by a fairly substantial amount." (Hr'g Tr. 1485:18–1486:2.)

Mr. Jones explained that it would never have occurred to Timbervest to transfer the property from New Forestry to TVP because no price would have been simultaneously in both the clients' best interests.

> Ultimately, the transaction I don't think would ever happen, though, because it's just not consistent with our objectives for either of the clients, for lack of a better term.
>
> I mean, our objective when we sell a property is to sell it for more than what we're carrying it at and to achieve some benefit for the client on the sale, while on the other side, our objective is always to buy at a discount of what we think the fair market value of that property is. And there's really no way to marry up those two goals if you were to have a transaction between two parties such as New Forestry and Timbervest Partners.

(Hr'g Tr. 1489:11–23.)

As he testified repeatedly, Mr. Jones, as a member of the investment committee, approved the sale of Tenneco property by New Forestry solely based on the information known by him – the sale met the client's objective to sell properties to generate liquidity, and the financial terms of the sale were beneficial to and in the best interest of the client based on all financial and market analysis. Likewise, Mr. Jones, as a member of the investment committee, approved the acquisition of Tenneco by TVP because it met TVP's objectives, and the acquisition price was immediately accretive to TVP' s returns. (Hr'g Tr. 1349:6-8; 1355:8-12;1483:7-10; 1484:10-1486:2.) Thus, there was no conflict of interest.

4. Mr. Jones Did Not Conceal the Tenneco Transactions.

Ignoring that a cross trade would not have been logical given that Mr. Wooddall paid New Forestry a premium over the carrying value and TVP purchased at a discount to the estimated value, the Division points to a set of facts it contends concealed the transactions, and, thereby, demonstrates a conflict of interest. Any suggestion that Timbervest concealed the transactions, however, is curious in light of the fact that publicly available real estate records clearly show Timbervest's participation on both the sale and later repurchase of the property and in light of Timbervest's voluntary disclosure of the deals to the Division. (*See* Div. Ex. 79 at 5.) In addition, 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 the transactions or the terms, as evidenced by their unqualified audits for each fund that contained no notes regarding the transactions.

The Division's first argument regarding concealment is that Mr. Carter sent an email that contained a misstatement about the Tenneco repurchase. With respect to Mr. Jones, there is not even a contention that he spoke to Mr. Carter about the repurchase of the Tenneco property or that he was even aware of this email.

Second, the Division contends that the differing descriptions of the Tenneco property contained in the 2006 New Forestry Disposition Report and the Gilliam Spec Book, and a lack of ownership history regarding the property when reported to TVP, evidence concealment. With respect to Mr. Jones, the Division offered no evidence that Mr. Jones drafted or was in any way responsible for the language in the reports. In fact, Mr. Jones testified that he was not involved in the day-to-day business of Timbervest's timberland investments and did not draft the language in the Disposition Report. (Hr'g Tr. 1302:17-18; 1390:22-1391:3; 1266:19–1267:1.)

Next, 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." (Div. Br. at 24–25.) With respect to Mr. Jones, the Division again offered no evidence that Mr. Jones drafted or was in any way responsible for this description. In fact, it is clear that Mr. Jones had no discussions with Mr. Wooddall or anyone else at Chen Timber regarding the sale of Tenneco and would have had no way of knowing whether the offer was "unsolicited" or not. (Hr'g Tr. 122:15-123:8; 1478:7-19.)

Last, the Division contends that there was insufficient financial analysis and valuation surrounding Timbervest's purchase of the property for TVP. With respect to Mr. Jones, he was not involved in the negotiations or analysis of this transaction, nor was he involved in the day-to-

day affairs of the timberland side of the business. (Hr'g Tr. 122:15-123:8; 1478:7-19; 1302:17-18; 1390:23-1391:3.) Mr. Jones has no doubt that the transaction followed the normal Investment Committee process in line with their historical course of conduct. (Hr'g Tr. 1261:17-22; 1525:18-1526:20.) He also testified that he was certain Timbervest conducted "multiple iterations of due diligence valuations." (Hr'g Tr. 1524:17-25.) As a member of the investment committee, Mr. Jones recalls approving the transaction based upon the fact that it met the client's objectives and strategy and was accretive to the client from a financial aspect. (Hr'g Tr. 1261:17:22; 1279:16-19; 1485:3-1486:2)

In sum, Mr. Jones should not be held liable for conduct that the Division did not and cannot prove by a preponderance of the evidence that he aided, abetted, or caused.

5. Mr. Jones Had No Knowledge of Mr. Boden's Efforts to Sell the Glawson Property to Reid Hailey.

The Division claims that the "Respondents" have a history of trying to cross trade properties; however, there is no evidence that anyone other than Mr. Boden had knowledge of any effort to sell the Glawson property to Reid Hailey in October 2005. (Hr'g Tr. 870:24–871:8.) Even under the Division's best evidence, Mr. Boden offered Mr. Hailey an incomplete contract with an option to purchase for which a premium would be paid, facts that differ from those alleged regarding the alleged Tenneco cross trade. Mr. Hailey testified that he had never had any business dealings with Timbervest, LLC. (Hr'g Tr. 870:5–13.) Mr. Hailey further testified he does not even know Mr. Jones. (Hr'g Tr. 869:22–23.) Mr. Jones had no knowledge of any effort to sell Glawson to Mr. Hailey; therefore, the proposed Glawson transaction has no relevance to Mr. Jones's conduct with respect to the Tenneco transactions.

In sum, Mr. Jones understood New Forestry's sale of Tenneco and TVP's acquisition of Tenneco to be independent of each other. Mr. Jones did not know about any purported agreement

between Mr. Boden and Mr. Wooddall regarding Tenneco at the time he approved either New Forestry's sale of Tenneco or TVP's acquisition. Certainly the contracts made no mention of any alleged agreement, and Mr. Wooddall never expressed to anyone, including Mr. Jones or even his lender, that there was one. (*See* Hr'g Tr. 819:18–23; 839:9–12; 863:6–23.) Because Mr. Jones viewed the transactions as two separate transactions, there were no ERISA implications for Mr. Jones to have considered. Sometime before September 15, 2006, Mr. Jones, as a member of investment committee, approved the sale of Tenneco by New Forestry. (Hr'g Tr. 1422:12–17; Resp. Ex. 132.) And, sometime after December 15, 2006, during the due diligence period, Mr. Jones, as a member of the committee, approved the acquisition of Tenneco on behalf of TVP. (*See* Hr'g Tr. 1423:18–1424:4; Resp. Ex. 132.) Mr. Jones approved each transaction because it met the client's objective, was economically accretive and was in the best interest of the client. (Hr'g Hr'g Tr. 1483:7-10; Tr. 1484:10–16; 1485:18–1486:2.) Therefore, the Division failed to establish that Mr. Jones with scienter or negligently caused Timbervest to fail to disclose a cross trade of the Tenneco property because it did not prove that Timbervest engaged in any cross trade, and it did not prove that Mr. Jones knew or should have known of any agreement to sell and repurchase the property.

C. Mr. Jones Did Not Aid, Abet, or Cause Any Failure by Timbervest to Disclose the Payment of Mr. Boden's Fees.

Timbervest did not violate the Advisers Act by failing to disclose the payment of Mr. Boden's advisory fees, and Mr. Jones is not liable for aiding, abetting, or causing the alleged violation. First, Mr. Jones recognized the potential conflict of interest but understood that the fee agreement had been disclosed. Second, Mr. Jones was not aware of any of the "facts" the Division identifies as evidence of concealment at the time he approved the transactions that

resulted in the fees. Finally, it never occurred to Mr. Jones that the payments might be prohibited by ERISA, thus it could not have been a motive for concealing the payment of the fees.

1. Mr. Jones Reasonably Believed that Advisory Fees Were Owed to Mr. Boden and that the Advisory Fee Arrangement Had Been Disclosed to Mr. Schwartz.

When Mr. Jones joined Timbervest in 2004, Mr. Jones was told of Mr. Boden's consulting fee arrangement and that the client, BellSouth, had been notified of the arrangement. (Hr'g Tr. 1314:23-1315:16; Shapiro 1770:10-13.) Mr. Jones was later told of the specifics of Mr. Boden's arrangement. (Hr'g Tr. 1314:23-1318:3; 1322:20-1323:10.) Mr. Jones knew at the time of both the Tenneco sale and the Kentucky sale that Mr. Boden would be paid his fee based on the terms of his consulting fee agreement (Hr'g Tr. 1303:23-25; 1309:16-20) and believed that Mr. Boden was entitled to the fees. (Hr'g Tr. 1308:8-9; 1314:17-22; 1491:4-17.)

In addition, to the best of Mr. Jones's knowledge, the fee arrangement was disclosed to Ed Schwartz of ORG. Mr. Jones recognized the potential conflict of interest raised by the fees that may have been paid under Mr. Boden's consulting arrangement. (Hr'g Tr. 1324:19-20; 1325:24-1326:1.) Mr. Jones discussed the potential conflict of interest with Mr. Shapiro and his other partners. (Hr'g Tr. 1325:12-1326:17.) Because Mr. Shapiro was responsible for the client relationship and frequently spoke with New Forestry's investment manager and fiduciary, ORG, Mr. Jones charged Mr. Shapiro with disclosing the arrangement to them and obtaining their approval. (Hr'g Tr. 1325:12–18; 1327:14–22; 1330:15–19; 1328:15-19; 1331:14-15; 1772:17-20; 1774:17-25; 1776:17-21.) Mr. Jones recalled Mr. Shapiro reporting back to him that Mr. Shapiro discussed the arrangement with Mr. Schwartz and that "Mr. Schwartz was fine with the arrangement." (Hr'g Tr. 1325:12-18; 1337:22-24; 1352:21-25; 1469:21-25.) Mr. Shapiro also confirmed that he reported back to his partners regarding the disclosure to ORG and ORG's acquiescence to the arrangement. (Hr'g Tr. 1789:8-14; 1790:2-7; 1790:14-16.) Mr. Jones was

entitled to rely on Mr. Shapiro's statement that he had disclosed the fee arrangement to ORG and ORG was okay with it. (Hr'g Tr. 1789:4–14.) He had no reason to doubt Mr. Shapiro, his business partner, Timbervest's CEO, and the primary contact for ORG. (Hr'g Tr. 1314:23–1315:16; 1770:10-13.) Accordingly, even if the disclosures were found inadequate, Mr. Jones believed at the time that the arrangement had been disclosed to and approved by ORG. It follows that he could not have acted with scienter or negligently caused the fees not to be disclosed.

2. Mr. Jones Had No Knowledge of Any Efforts to Conceal Mr. Boden's Receipt of the Fees.

Given Mr. Jones's belief that Mr. Boden's fee arrangement was disclosed, it strains credibility to suggest that he participated in any scheme to conceal the fees from the client. While the Division claims the "Respondents took elaborate steps to conceal that they were the recipients of the real estate commissions" (Div. at 34), Mr. Jones had no knowledge of the "efforts" the Division cites. Specifically, Mr. Jones did not know that Mr. Boden would receive the fees through LLCs, and he was not responsible for drafting or reviewing the language in the purchase and sale agreements that the Division argues was misleading. (Div. Br. 34–44.)

Mr. Jones did not learn of Mr. Boden's LLCs or that Mr. Boden received his fees through LLCs until 2012, during the course of the Division's investigation. (Hr'g Tr. 1300:1–6; 1335:5–22.) Mr. Jones was aware that Mr. Boden was being paid a fee, but had no understanding as to how the fee would be paid. (Hr'g Tr. 1309:21–24.) Thus, at the time of the transactions, he did not know that Mr. Harrison had created these entities for Mr. Boden to receive his fees, was not aware of the entities and accounts through which Mr. Boden's fees would flow, and was not aware of the terms on which Mr. Boden had engaged Mr. Harrison. (Hr'g Tr. 731:4-6; 731:18-732:1; 1300:1-6; 1303:23-1305:12; 1307:9-15; 1335:5-22; 1342:21-22.) Mr. Harrison, Mr. Boden's personal attorney who created the LLCs, testified that he did not meet Mr. Jones until

2014 and that he did not have any conversation with any Timbervest partner other than Mr. Boden regarding the LLCs or Mr. Boden's fees. (Hr'g Tr. 730:22-731:6; 731:21–732:4.)

The Division makes much of the language in the purchase and sale agreements for the sale of Tenneco, the Kentucky Lands, and Rocky Fork to Scott Carswell, ignoring the fact that only Mr. Boden had any involvement with the language regarding the LLCs or Mr. Boden's advisory fee in these documents. Mr. Jones did not have day-to-day responsibility for reviewing purchase and sale contracts, for the New Forestry account, or for the timberland investment side of the business. (Hr'g Tr. 1302:17-18; 1304:17-22; 1308:8-14; 1487:4–20; 1517:12-1518:11.) Nor did his responsibilities include investigating the personal structures pursuant to which one of his partners was to receive earned compensation. (Hr'g Tr. 1302:17-18; 1304:19-22; 1308:8-14.) Such details were well beyond Mr. Jones's duties and his workload capacity.

Finally, because Mr. Jones believed Mr. Boden's fee arrangement had been disclosed and did not know that Mr. Boden would share the proceeds of his agreement with his partners, he had no reason to attempt to conceal the payment of the fees. The Tenneco sale to Chen Timber closed on October 17, 2006. (Div. Ex. 11.) The contract for the sale of the Kentucky property is dated December 15, 2006. (Resp. Ex. 34.) In connection with the sale of the Tenneco property, Mr. Boden caused a check to be made to Mr. Jones on January 13, 2007, almost a month after the Kentucky contract had been entered into. Apparently Mr. Boden waited another month or more before giving the check to Mr. Jones as he did not deposit the check until February 22, 2007. (Div. Ex. 15b.) The Kentucky transaction closed on April 3, 2007. (Resp. Ex. 34.) More than a month later, on May 25, 2007, Mr. Boden caused a check to be made to Mr. Jones, which Mr. Jones deposited on June 1, 2007. (Div. Ex. 32a.) At the time Mr. Jones approved both the sale of the Tenneco property and the sale of the Kentucky property, Mr. Jones did not know and had no

expectation that Mr. Boden would later share his profits from his advisory fees. (Hr'g Tr. 1348:14-18; 1349:1-11.) There is no evidence that Mr. Jones contributed to any effort to hide the payment of the fees to Mr. Boden or himself from anyone. At its core, the Division's claim of concealment against Mr. Jones is pure speculation and conjecture.

3. *Mr. Jones Did Not Recognize that the Advisory Fee Agreement Implicated ERISA.*

Despite all the testimony to the contrary, the Division contends that "Respondents" failed to disclose the fees *because they knew they were prohibited by ERISA*. (Div. Br. at 48.) The Division relies solely on Mr. Barag's testimony to establish Mr. Jones's knowledge of ERISA, but this reliance is unpersuasive. Mr. Barag left Timbervest in December 2004, long before the events at issue in this proceeding. (Hr'g Tr. 1930:4.) Mr. Barag testified that he generally "had very little involvement with the BellSouth account." (Hr'g Tr. 1924:8-21.) Mr. Barag did nothing more than caution Mr. Jones and Mr. Shapiro *generally* about their potential liability under ERISA because "getting sued under ERISA is a lot uglier than it is getting sued under a typical investment management agreement," not instruct them on the complexities of the statute. (Hr'g Tr. 1945:17-19.) And although the Division contends that Mr. Barag warned the Partners that they could not receive any compensation outside the Investment Management agreement, Mr. Barag testified that he never discussed commissions with the partners. (Hr'g Tr. 2012:23–6.)

It does not follow from conversations with Mr. Barag in 2004 about ERISA generally or in connection with the REIT that Mr. Jones should have recognized that the payment of the fees might implicate ERISA. Whatever experience or knowledge Mr. Jones may have had with ERISA, they were not analogous to the situation that presented itself. When the fee agreement was entered into, it did not implicate ERISA because Mr. Boden was an independent consultant. Years later, when the fees were paid, Mr. Jones had already recognized the potential conflict of

interest and understood that the matter had been disclosed to and approved by the client. (Jones Br. 8-9.) Mr. Jones did not distinguish between conflicts of interest under the Advisers Act and ERISA, and it did not occur to Mr. Jones that, notwithstanding the disclosure and approval, the payments still might be prohibited by ERISA. (Hr'g Tr. 1521:17-1522:2.) In short, ERISA never occurred to him. (Hr'g Tr. 1379:24–1380:10.) Given that Mr. Jones did not think about the payments in the context of ERISA, ERISA could not have served as a motivation for him to conceal the payment of the fees.

4. Mr. Boden's Sharing of His Profits With Mr. Jones Did Not Create a New Conflict of Interest and Did Not Create a Separate Disclosure Requirement.

At the time Mr. Boden decided to share the profits from his consulting fee arrangement with Mr. Jones, Mr. Jones did not believe that Mr. Boden's gesture created a conflict of interest for Mr. Jones or the other Partners. (Hr'g Tr. 1348:14-1349:11.) Mr. Boden had been paid a fee that he had earned and was entitled to receive pursuant to a consulting arrangement that Mr. Jones believed had been fully disclosed to and approved by the client. (Hr'g Tr. 1352:21-25.) Mr. Jones had approved both sale transactions that triggered the payment of Mr. Boden's fees with no expectation that Mr. Boden would later decide to share his fee proceeds, and, in the case of each approval, weeks prior to the time that Mr. Boden actually made his decision to share his fee proceeds from either sale transaction. (Hr'g Tr. 1348:14-18; 1349:1-11.) Mr. Jones's action of accepting a portion of Mr. Boden's fee proceeds was reasonable in light of the Partners' history and course of dealings. (Hr'g Tr. 1345:22-1346:6.) His acceptance of the proceeds did not create any additional conflict of interest or disclosure requirement. To find to the contrary would be analogous to saying that even if Mr. Boden's fees had clearly been disclosed to and approved by BellSouth, that upon Mr. Boden's decision to share his profits with his Partners, Mr. Jones

and each of the other Partners would have had a duty to disclose this to BellSouth or be in violation of the Advisers Act. Such a proposition is preposterous.

In the end, Mr. Jones cannot be liable for aiding, abetting, or causing any failure by Timbervest to disclose the payment of Mr. Boden's fees because Mr. Jones directed Mr. Shapiro to disclose the arrangement having recognized the conflict of interest, reasonably believed the arrangement had been disclosed, and made no effort to conceal the payment of the fees.

D. Mr. Jones Did Not Flout His Fiduciary Duty With Respect to the Glawson Property.

The Division goes to great lengths to characterize "Respondents' use of the Glawson property" as evidence of a cavalier attitude toward its fiduciary duty (Div. Br. at 54.); however, it did not ask Mr. Jones a single question about Glawson. The Division's attempt to mischaracterize Timbervest's use of the property is inaccurate and totally disregards the significant time and effort expended on the property by Timbervest, and the millions of dollars in added value. With respect to Mr. Jones specifically, although he was not involved in details of the timberland side of the business or New Forestry, he was aware in a general sense of the improvements being made to the Glawson property. He understood the exit strategy for the property and understood that material improvements were needed in order to effectuate the strategy. However, since joining Timbervest in 2004, Mr. Jones visited the Glawson property on exactly one occasion and that was on a timber tour with ORG in 2006. Neither Mr. Jones nor any member of his family has otherwise been to the property, nor has Mr. Jones ever invited anyone to the property.

E. Conclusion.

The claims against Mr. Jones should be dismissed. The Division failed to establish that Mr. Jones aided, abetted, or caused any violation of the Advisers Act. Further, the remedies the

Division seeks are barred by the statute of limitations or are inappropriate based on the facts presented at the evidentiary hearing.

This 18th day of April, 2014.

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