UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15815

In the Matter of

L&L ENERGY, INC.
and DICKSON LEE

Respondents.

DIVISION OF ENFORCEMENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR DEFAULT AND SANCTIONS AGAINST L&L ENERGY, INC.

The Division of Enforcement of the Securities and Exchange Commission (the "Division") submits this Supplemental Brief in Support of its Motion for Default and Sanctions as to Respondent L&L Energy, Inc. ("L&L") to provide the Court with additional support for the Division's request for disgorgement of $750,000.

A. It is Appropriate to Deem the Allegations in the OIP to be True by Virtue of L&L's Failure to Answer.

As the Court noted in its November 30, 2015 Order Directing Supplemental Briefing, L&L did not participate in the May 5, 2015 prehearing conference and failed to file an Answer to the Commission's Order Instituting Proceedings, which was due May 26, 2015. Pursuant to the Commission's Rules of Practice, failure to file an Answer is grounds for default and a finding that the allegations in the OIP are true. *See* 17 C.F.R. §§ 201.155(a), .220(f), .323; *see also, e.g.,* True Product ID, Inc., Exchange Act Release No. 67366, 104 S.E.C. Docket 197, 2012 WL 2708132 at

*1 (Jul. 9, 2012) (" failure to file an Answer is grounds for default and a finding that the allegations in the OIP are true . . ."); Michael J. Healey, Exchange Act Release No. 53698, 87 S.E.C. Docket 2487, 2006 WL 1071161 at *1 (Apr. 21, 2006) (Respondent "is in default, and the [Court] finds the allegations of the OIP to be true.").

The Division alleged in the OIP that, "During the nearly one-year period in which the purported Acting CFO was falsely represented as the company's Acting CFO, L&L raised approximately $750,000 from investors using stock purchase agreements in which L&L expressly attested to the accuracy of its public filings and private placement documents that referred the investor to publicly available additional information about the company." L&L has not responded to this allegation or to the Division's Motion for Default and Sanctions, so it is appropriate to deem the allegation to be true.[1]

B. The Division Need Only Show that Its Calculation of Disgorgement is a Reasonable Approximation of Ill-Gotten Gains Before the Burden Shifts to Respondent.

The ill-gotten gains from L&L's fraud are the approximately $750,000 raised by L&L during the period from approximately August 2008 to June 2009 in which L&L repeatedly and fraudulently misrepresented to the public that it had certain persons serving in critical executive management roles at the company when, in reality, those persons served in no such roles and the roles were being filled by now-convicted-felon Dickson Lee.

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[1] The Court correctly notes in its November 30 Order that the Division provided additional information in its Brief in Support of Motion for Default and Sanctions about the breakdown of investment amounts from the investors from whom L&L raised money. *See* Initial Div. Brief at 24 ("L&L raised a total of approximately $450,000 from two institutional investors . . . L&L raised an additional $300,000 from eight different investors."). If the Court believes it to be helpful, the Division could submit the documentation upon which these statements were based; however, the Division understands the Court's concern, which the Division attempts to address in this supplemental brief, to be what L&L did with the money it raised during the period of the fraud.

"Calculating the amount of disgorgement requires only a reasonable approximation of profits causally connected to the violation." Donald L. Koch and Koch Asset Mgmt., LLC, Exchange Act Release No. 72179, Investment Advisers Act Release No. 31047, Investment Company Act Release No. 31047, 2014 WL 1998524 at *22 (May 16, 2014) (internal citations and quotations omitted). "Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation." *Id.* (quoting Eric J. Brown, Exchange Act Release No. 66469, 103 S.E.C. Docket 336, 2012 WL 625874 at *15 (Feb. 27, 2012)).

1. A Reasonable Approximation of Disgorgement for Misrepresentations in Company Disclosures is the Amount of Money Raised during the Period of the Misrepresentations.

A reasonable approximation of ill-gotten gains is the amount of money gained while in violation of the law. In addition, "[w]here disgorgement calculations cannot be exact, 'any risk of uncertainty . . . should fall on the wrongdoer whose illegal conduct created that uncertainty.'" *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (quoting *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir.1995)). An example of the application of this principle is seen in *SEC v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993).

In *Bilzerian*, the defendant raised money from investors for the purpose of purchasing the securities of two public companies. *Id.* at 118-19. Using money raised from these investors, Bilzerian acquired control of over five percent of the outstanding shares of the two companies and thus was required to file Schedules 13D publicly disclosing this interest. *Id.* at 118-19. Bilzerian did not file the Schedules 13D on a timely basis, and the Schedules he ultimately filed were

misleading in that they did not disclose that funds from multiple investors were used to acquire the securities. Through these omissions and misleading statements, Bilzerian was able to drive up the market price for the securities of these two companies and sell his interests at a substantial profit. *Id.* at 122.

The court found that "[i]n many cases, separating legal from illegal profit is difficult. . . . " and that under those circumstances, "it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains." *Id.* at 121. The Court also held that it was Bilzerian's burden to rebut the SEC's claim and since Bilzerian did not attempt to do that, the SEC's disgorgement figure "must prevail." *Id.* at 122-23. Similarly, the Division suggests that the reasonable approximation of L&L's ill-gotten gains is the $750,000 it solicited and received from investors while violating the law through its fraudulent public disclosures.

Moreover, where a defendant's profit from fraudulent activity is not apparent, the total proceeds of the fraudulent activity have been held to be a reasonable approximation of ill-gotten gains. For example, in *SEC v. Platform Wireless Int'l Corp.*, 617 F.3d 1072 (9th Cir. 2010), the defendants were found to have violated Section 10(b) of the Exchange Act by making false and misleading statements in connection with their unregistered sales of securities. *Id.* at 1095-96. The SEC alleged that defendants should disgorge all of the proceeds from their stock sales. *Id.* at 1096. The defendants argued that disgorgement should be limited to their profits from the stock sales. *Id.* The court disagreed and found that because defendants had provided no basis from which the court could determine profits, "the entire proceeds from the sale were a 'reasonable approximation' of the profits from the transactions." *Id.* at 1096-97.

The same is true in this case. The proceeds of securities sales made in connection with L&L's false statements are the only reasonable approximation of ill-gotten gains because L&L has provided no alternative basis for determining its profit from those sales. L&L raised $750,000 from investors during the time it was in violation of the law by virtue of the false statements in its public filings and should be required to disgorge this amount.

2. The Court Need Not Ascertain How the Proceeds of the Fraud Were Spent to Determine Disgorgement.

It is appropriate to require L&L to disgorge total proceeds of its securities sales without regard to how the company ultimately spent the money. As an initial matter, the Division has been unable to determine how the money L&L raised from investors through the use of its fraudulent public filings was used because L&L did not provide the complete accounting records the Division sought during its investigation. *See* Declaration of Ricky Sachar ("Sachar Dec.") at ¶ 3. The Division, however, has uncovered no evidence suggesting that the equity investments obtained by L&L by virtue of its false disclosures were ever returned to investors. *Id.* at ¶ 5. In fact, investors did not even receive dividends on their investments. In L&L's Form 10-K for the fiscal year ended April 30, 2010, the company stated:

> Stockholders should have no expectation of any dividends. The holders of our common stock are entitled to receive dividends when, as and if declared by the board of directors out of funds legally available therefore. To date, we have not declared nor paid any cash dividends. The board of directors does not intend to declare any dividends in the foreseeable future, but instead intends to retain all earnings, if any, for use in our business operations.

See Exhibit 2 at 13 to Sachar Dec.

Courts have also routinely held that how proceeds obtained through fraud were used is of no consequence to the proper measure of disgorgement. For example, in *SEC v. JT Wallenbrock &*

Associates, 440 F.3d 1109 (9th Cir. 2005), defendants argued that they should not be required to disgorge money that they had reinvested and had not kept for themselves. *Id.* at 1116. The Ninth Circuit rejected this argument holding, "The manner in which [the defendant] chose to spend the illegally obtained funds has no relevance to the disgorgement calculation. . . ." *Id.*

Similarly, in *SEC v. Kenton Capital, Ltd.*, 69 F. Supp.2d 1 (D.D.C. 1998), defendants argued that their disgorgement should be offset by amounts they showed had been paid out as "legitimate business expenses." *Id.* at 15. The court rejected defendants' argument, noting the "overwhelming weight of authority hold [ing] that securities law violators may not offset their disgorgement liability with business expenses." *Id.* at 16. (quoting *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1086 (D.N.J. 1996)); *see also SEC v. Absolutefuture.com*, 115 Fed. App'x 106, 106-07 (2d Cir. 2004) (rejecting defendants argument that disgorgement should be reduced by amounts transferred to third parties); *SEC v. Great Lakes Equities Co., et al.*, 775 F. Supp. 211, 214–15 (E.D. Mich.1991) (rejecting deductions from disgorgement for overhead, commissions, and other expenses).

As alleged in the OIP and deemed true by virtue of L&L's default, during the relevant period, the company raised containing contained fraudulent misrepresentations. OIP ¶ 35. It is thus appropriate for the Court to order L&L to disgorge the $750,000 it raised during the period of its fraud without regard to how the money was ultimately spent.

CONCLUSION

L&L's conduct violated the antifraud provisions of the Securities Act and the Exchange Act. The Court should find it so liable and impose an order of disgorgement of $750,000, prejudgment interest of $160,772, civil penalties of $2,250,000, and a cease-and-desist order for each of the violations alleged against L&L.

Dated: December 30, 2015

Respectfully Submitted,

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