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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of

Timbervest, LLC,

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

Respondents.

REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

Respondents Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden III, Donald David Zell, Jr., and Gordon Jones II have submitted evidence showing that the Commission's order requiring Respondents to disgorge a $403,500 disposition fee should be vacated. In particular, they submitted a letter from Monroe Hill, the Executive Director, Senior Legal Counsel at AT&T, to the Commission's Atlanta Regional Office stating that Respondents had agreed to pay AT&T "an amount that is in full and complete satisfaction of any claims . . . including interest or losses relating to the $403,000 [sic] disposition fee that the [Respondents] received in connection with the Tenneco Core property transaction, and [the payment] eliminates potential unjust enrichment by the [Respondents] . . . ." Respondents also submitted two declarations from David Zell (the "Zell Declarations") establishing that the $403,500 disposition fee had been repaid with interest to AT&T and that Respondents themselves had been the source

of the funds. In light of this evidence, Respondents seek vacatur of the Commission's disgorgement order.

The Division opposes this request by arguing that (1) the bases for AT&T's suit was different than the basis of the Commission's disgorgement order (in fact, the bases are identical); (2) the settlement amount is not attributable to the same conduct as the Commission's disgorgement order (in fact, it is the same); and (3) there is insufficient evidence of the repayment (in fact, the evidence presented shows everything the Commission needs to vacate its order).

The purpose of disgorgement is to prevent unjust enrichment. It is "designed to deprive a wrongdoer of his unjust enrichment . . . ." *SEC v. First City Fin'l Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Disgorgement is not supposed "to punish the wrongdoer but rather to prevent the unjust enrichment of the wrongdoer by depriving him of ill-gotten gains." *SEC v. Bilzerian*, 814 F. Supp. 116, 120 (D.D.C. 1993), *affirmed*, 29 F. 3d 689 (D.C. Cir. 1994). The Commission issued a Final Order on September 17, 2015, finding that Respondents had been unjustly enriched by the disposition fee Respondents received on the sale of the Alabama Property.

Since the Commission's ruling, Respondents repaid the disposition fee to the allegedly harmed party. They accordingly submitted two declarations to the Commission that state, under penalty of perjury, that they have repaid the $403,500 disposition fee, plus interest, to their client. They submitted a letter written from the alleged victim that was sent directly to the Commission's Atlanta Regional Office informing the Commission (1) that Respondents had settled a lawsuit brought by AT&T, (2) that the settlement included the $403,500 disposition fee plus interest, and (3) that the settlement eliminated any unjust enrichment to Respondents. The Division has not submitted (or even alluded to) any evidence to the contrary.

The uncontroverted evidence shows that Respondents have not been unjustly enriched and that the Commission's disgorgement order should be vacated. The Division argues, however, that the disgorgement order must stand when considering three factors enumerated in the Commission's July 5, 2016 Order—"the basis of AT&T's lawsuit against respondents, the extent to which the settlement amount is attributable to the misconduct underlying the Commission's disgorgement order, and whether respondents themselves paid the settlement amount." (Order at 2, n.6.) But each of these factors weighs firmly in favor of vacating the disgorgement order, and the Division's arguments to the contrary are belied by the facts and basic logic.

First, the basis of AT&T's lawsuit is undoubtedly the same as the basis for the Commission's disgorgement order. A cursory glance at the complaint and the Commission's order shows this to be the case. Indeed, AT&T relied specifically upon these proceedings in bringing suit and specifically sought recovery of the $403,500 disposition fee ordered disgorged here for precisely the same underlying conduct. Complaint ¶¶ 2-3, 69. The Division's only argument that the bases of the two lawsuits are different is that in its suit, AT&T, in addition to seeking recovery of the disposition fee, *also* sought the return of Timbervest's management fees and the difference in the price of the Alabama Property as sold and as it purportedly should have been valued. But regardless of whether AT&T's lawsuit was based in part on additional claims, there is no doubt that one of the claims was based on the exact same disposition fee at issue in this matter and that the settlement required Respondents to pay AT&T the entire disposition fee plus interest.

Moreover, the Division conveniently ignores that it too sought disgorgement of all of Timbervest's management fees and that the ALJ specifically found (albeit incorrectly) that there was a difference in the Alabama Property's true value and the amount for which it was sold. The

Division also ignores that the alleged conduct underlying the Commission's disgorgement order *and* AT&T's suit was identical: Timbervest's sale of the Alabama Property and later purchase of that same property on behalf of another client. The factual bases for the two proceedings are the same, and the Division's strained attempt to argue otherwise is illogical and wrong.

Second, the settlement amount is attributable to the same conduct underlying the disgorgement order. The letter from Mr. Hill, AT&T's in-house counsel, is clear that the settlement amount "is in *full and complete satisfaction* of any claims . . . *including interest or losses relating to the $403,000* [sic] *disposition fee*" and that the settlement "eliminates potential unjust enrichment by the [Respondents]."[1] The Division has no evidence or any other basis for its position that Mr. Hill has made a false statement to the Government. Such a shameful position is completely uncalled for.

The Division asks the Commission to disregard all of this uncontroverted evidence. In support of this preposterous position, it cites cases that stand only for the basic proposition that when a party is unjustly enriched in an amount *more* than that which it compensated its client, a court can order disgorgement of the *excess* amount. *See, e.g.*, *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1457 (2d Cir. 1996) (A "settlement amount may properly . . . be taken into account by the court in calculating the amount to be disgorged"; giving offset for entire settlement amount paid, but determining that unjust enrichment exceeded that amount); *SEC v. Penn Central Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976) (noting that offsetting disgorgement in light of a settlement is appropriate, but that the court may still order disgorgement of unjust enrichment that exceeds the settlement amount); *SEC v. Prime One Partners, Corp.*, 1997 WL 222329, at *1 (9th Cir. Apr. 30, 1997) ("Of course, any money returned to investors would not be subject to

[1] The settlement was also approved by a third-party ERISA fiduciary.

disgorgement."). Here, Respondents have submitted evidence that they returned the entire $403,500 disposition fee plus interest to AT&T. AT&T has submitted evidence that the settlement amount fully compensates them for all claims, including the $403,500 disposition fee and interest and eliminates any unjust enrichment to Respondents. There is no additional unjust enrichment, and there are no further sums left to be disgorged.

The Division also claims that the settlement amount cannot be attributable to the same conduct underlying the Commission's disgorgement order because AT&T's complaint sought damages on top of the $403,500 disposition fee. The Division seems to base this argument on the fact that it has not seen the total dollar amount Respondents paid AT&T.[2] But the specific sum is irrelevant. The Supplemental Zell Declaration states that the $403,500 disposition fee plus interest has been returned to AT&T. AT&T states that it has been compensated "*in full*" for all claims, including the $403,500 disposition fee plus interest. That Respondents paid AT&T a higher amount only confirms that the disposition fee has undoubtedly been paid. The Division's suggestion that it needs to see the specific dollar figure to determine whether the entire $403,500 disposition fee plus interest has been returned to AT&T is disingenuous at best.

None of the cases cited by the Division support this illogical argument. For example, in *Montford*, AP File No. 3-14536, 2014 WL 1744130 (May 2, 2014), the Commission merely noted that if a settlement payment were made on an entirely different matter, an offset would be inappropriate. Likewise, in *SEC v. Nadel*, 2016 WL 639063, at *17 (E.D.N.Y. Feb. 11, 2016), the court denied an offset of a disgorgement order when the settlement did not relate to the misconduct that was found to have violated the securities laws. Finally, in *Currency Trading Int'l, Inc.*, 175 F. App'x 934, 935-36 (9th Cir. 2006), the SEC itself conceded that offset would

[2] The settlement agreement is confidential, and Respondents are barred from disclosing the details of that settlement agreement absent a court or government order.

be appropriate when payments made to investors "whose transactions were the basis of the disgorgement award." Here, the underlying conduct is identical: the sale of the Alabama Property and later purchase of the Alabama Property by a different Timbervest client. *Compare* Complaint ¶¶ 2, 24-42, 69, *with* Final Order and Opinion at 30-32.

Third, as set forth in the Zell Declarations, Respondents paid these settlement amounts themselves, without contribution from an insurance provider or any other third party. The Division admits that it has no evidence to the contrary. It then stunningly concludes, though, that this evidence is irrelevant because, according to the Division, the evidence consists only of "generic statements, absent document corroboration." But the declarations were not "generic statements." The Supplemental Zell Declaration details which Respondents gave money and how the money was routed through accounts from Timbervest, to Respondents' attorneys, and then to AT&T. The Division, ignoring these details, cites to a number of cases—none of which state that declarations and a letter from the alleged victim saying that it has been repaid is insufficient. Instead, they held only that a *lesser* showing of proof may be insufficient. For example, in *David Disraeli*, 2007 WL 4481515 at *17 (Dec. 21, 2007), the Commission found only that the Respondent's statement of repayment and documents created only by the Respondent, standing alone, were insufficient to show that a settlement payment had been made. In *Prime One Partners*, the defendant submitted *only* a declaration with no further evidence. And in *SEC v. Narvett*, 2014 WL 5148394 at *2 (E.D. Wisc. Oct. 14, 2014), the court allowed offsets for all the repayments for which there was some support other than just the defendant's assertion of repayment.

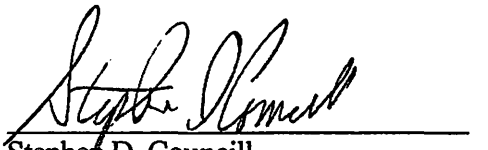
The Division wants more than sworn testimony and a letter from AT&T that it has been repaid to establish repayment. Curiously, though, it and the ALJ previously conceded that

Respondents should not be forced to disgorge advisory fees earned on the sale of two properties because Respondents had returned those fees to AT&T. The evidence in support of repayment was nearly identical—sworn testimony and a letter from Timbervest that the sums had been repaid. The evidence here is even stronger. There are sworn statements from Mr. Zell. And there is a letter, not from Respondents, but from the alleged victim stating that the $403,500 disposition fee plus interest has been repaid and that any unjust enrichment to Respondents has been eliminated.

CONCLUSION

The Division's response is indicative of the way it has litigated this entire matter. Faced with concrete, unrefuted evidence that is contrary to its position, it responds by making illogical arguments, implying that contrary evidence is untrustworthy, misleadingly citing inapposite case law, and ignoring Respondents' relevant case law. It makes attacks on Respondents that are persistent and personal. The Division's insistence on seeking every theoretical sanction against Respondents, including those that should be unavailable to it, reeks of a desire to punish, not of deterrence or remediation. If the purpose of disgorgement is to remediate and not to punish, as the Commission found in its Final Opinion and Order, the unrefuted evidence submitted by Respondents showing they have returned the $403,500 plus interest to AT&T compels a decision to vacate the disgorgement order.

Dated: August 1, 2016



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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents' Reply Brief in Further Support of Motion for Leave to Adduce Additional Evidence complies with the length limitations of SEC Rule of Practice 450(d). I further certify that this brief was prepared using Microsoft Word 2010 and that the word count for the document is 2,000 words.

This 1st day of August, 2016.

Stephen D. Councill

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing upon counsel of record in this matter by causing same to be delivered to the following as indicated below:

Via Facsimile (202) 772-9324
and Overnight Delivery

Secretary Brent J. Fields
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This 1st day of August 2016.

Stephen D. Councill