SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10077 / May 5, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 77773 / May 5, 2016

Admin. Proc. File No. 3-15619

In the Matter of

JOSEPH P. DOXEY

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Remand of Proceeding

Evidence did not support summary disposition of allegations of antifraud and registration violations. *Held*, matter is remanded for further proceedings.

APPEARANCES:

Joseph P. Doxey, *pro se.*

Ryan Farney, Nina B. Finston, and *James E. Smith*, for the Division of Enforcement.

Appeal filed: June 10, 2014
Last brief received: August 13, 2014

This matter concerns a series of press releases and offers and sales of securities by Pure H20 Bio-Technologies, Inc. ("Pure H20" or the "Company") and its chief executive officer, Joseph P. Doxey. The press releases concerned Pure H20's efforts to bring to market a water disinfection system, the Integrated Hospital Potable Water Disinfection System (the "System"), for use by hospitals and other medical facilities. Pure H20 sought certification for the System by NSF International, which had developed a protocol for certifying water purifiers. Although certification was not legally required to sell its System, the Company saw NSF certification as critical to marketing the System to hospitals. Pure H20, through Doxey, also offered and sold unregistered securities to raise capital for the development of the System.

Doxey appeals from an initial decision in which, on summary disposition, the administrative law judge found that Doxey had violated the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 because he made material misrepresentations and omissions concerning, among other things, the certification process, and violated the registration provisions of the Securities Act when he orchestrated unregistered offers and sales of Pure H20 stock. The law judge ordered Doxey to cease and desist from committing or causing those violations and disgorge $57,654 plus prejudgment interest, and barred him from acting as an officer or director of a public issuer or participating in an offering of penny stock. Doxey proceeded *pro se* before the law judge, and proceeds *pro se* in this appeal to the Commission.

After reviewing the record and applying the same summary disposition standard as the law judge,[1] we find that disputed issues of material fact exist with regard to both the alleged fraud and registration violations. We, therefore, are remanding all the claims to the law judge, directing that further proceedings and a hearing be held consistent with this opinion.

I. Fraud Allegations

A. Background

The Division alleged in the Order Instituting Proceedings ("OIP") that Doxey violated the antifraud provisions of the Securities Act and the Exchange Act when Pure H20 issued six press releases about its efforts to obtain certification by NSF. The Division alleged that the press releases were false and misleading because they stated that NSF certification was expected in four months or less or was already "underway" when, in fact, "the NSF certification process never commenced" and the "time required to complete certification was beyond that referenced in the press releases." The Division also alleged that the press releases failed to disclose that the Company lacked the resources to obtain NSF certification.

Separately, the Division alleged that Doxey made material misrepresentations to William J. Daniels, Observation Capital's sole owner, officer, and director, to induce Observation Capital to purchase Pure H20 stock. The Division claims that, in a meeting in late summer 2008, Doxey

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[1] Under our Rule of Practice 250, a motion for summary disposition may be granted "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 (Feb. 4, 2008) ("[C]ourts have upheld summary disposition where no genuine issue of material fact is in dispute."). Rule 250 also provides that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323." 17 C.F.R. § 201.250(a). In determining whether summary disposition is warranted, we view the evidence and factual inferences "in the light most favorable to the nonmoving party." *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014).

represented to Daniels that the Company's System "was completely built, that an inventory of the product had been amassed, and that [the System] was then undergoing NSF certification." Those statements, according to the Division, were false and misleading.

On the Division's motion for summary disposition, the law judge held that Doxey "made numerous misrepresentations and omissions [in the Press Releases] in connection with sale of securities in interstate commerce." The law judge held that Doxey's misrepresentations and omissions were "material" and that he "acted with a high degree of scienter by knowingly distributing" the misleading press releases. The law judge made no findings about the allegations that Doxey fraudulently misled Daniels about Pure H20's prospects during a 2008 meeting.

B. Analysis

For Doxey to be liable for fraud under Securities Act Section 17(a), the Division must prove that he, in the offer or sale of securities, employed a device, scheme, or artifice to defraud; obtained money or property by means of any untrue statement of material fact; or engaged in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.[2] For Doxey to be liable under Exchange Act Section 10(b) and Rule 10b-5, the Division must prove that he, in connection with the purchase or sale of securities, employed any device, scheme, or artifice to defraud; made any untrue statement of material fact; or engaged in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[3]

Scienter is required to establish violations of Section 17(a)(1) and Section 10(b) and Rule 10b-5.[4] Scienter— a "mental state embracing intent to deceive, manipulate, or defraud"[5]— may be shown by recklessness, "'an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.'"[6]

Because Doxey appeals from a decision on a motion for summary disposition, we construe the facts and draw all reasonable inferences regarding the allegations in the light most

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2 *See* 15 U.S.C. § 77q(a).

3 *See* 15 U.S.C. § 78j(b) (providing that it is "unlawful for any person, directly or indirectly, . . . to use or employ, in connection with the purchase or sale of any security[,] . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules); 17 C.F.R. § 240.10b-5.

4 *See Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *13 (Sept. 29, 2009).

5 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

6 *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *5 (Dec. 21, 2007) (alterations in original) (quoting *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003)); *accord Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008).

favorable to Doxey.[7] In so doing, we conclude that, contrary to the law judge's findings, there are material facts in dispute that preclude finding, on summary disposition, that Doxey engaged in fraud. Specifically, there are material facts in dispute about whether the statements in the press releases are false or misrepresentations and, if they are, whether Doxey acted with scienter.[8]

With respect to the statements in the press releases, the following is undisputed. Pure H20 engaged an independent laboratory to conduct testing on the System it had developed. By early 2008, the laboratory's testing showed that the System met the NSF protocol for most types of contaminants. However, for cryptosporidium, a type of water-born parasite, test results showed that the Company's system did not achieve the level of purification required by the NSF protocol.

Thereafter, Doxey drafted and disseminated the six press releases issued between April 2008 and May 2009. All of these releases contained similar language regarding the prospect of obtaining NSF certification. The April 1, 2008 and October 22, 2008 press releases, for example, both stated that NSF certification was "expected to be completed within a few short months and has a high likelihood for success." Similarly, the January 29, 2009 and April 1, 2009 press releases stated that "[c]ertification of this system is expected to be completed within this 1st quarter and has a high likelihood for success." The March 3, 2009 press release stated that Pure H20 was "anxiously awaiting final certification," and the May 4, 2009 press release stated that NSF certification was "underway."

The Division contended that the statements about the possibility of obtaining NSF certification were materially false and misleading. The law judge agreed, finding that the certification work was not yet underway and Pure H20 could not have met certification requirements without additional funds, which it did not have.

But our review of the evidence, in the light most favorable to Doxey, reveals that there are facts that suggest that these statements were not false. For example, Doxey testified during the investigation that all that had to be done to meet the required reduction threshold was to "increase the contact time"—*i.e.*, increase the amount of time the disinfection agent is in contact with the water—which Doxey believed "was no big deal." In other portions of his testimony he indicated that Pure H20 could have easily modified the System (or modified the test performed) in order to meet the required level of cryptosporidium reduction for the NSF protocol. Doxey also testified about the ultimate cost and timeline for NSF certification, including that an unidentified NSF official told him that certification could be completed within 30 days and that NSF ultimately agreed to complete the certification process for $25,000, which was less than the

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[7] *See supra* note 1.

[8] Although violations of Sections 17(a)(2) and (3) do not require scienter, *see SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) (stating that to show a violation of Section 17(a)(2) or (3), the SEC need only demonstrate negligence), the law judge did not make findings concerning Doxey's conduct in the offers and sales to Daniels and Observation Capital, including whether Doxey's conduct was negligent or violated 17(a)(2) and (3).

proceeds from the Company's stock offering.[9] All of this testimony, if credited, would be consistent with the statements in the press releases that certification was underway, had a high likelihood of success and would be completed in short order.

Although the Division, in essence, argues that Doxey's testimony should not be credited, neither it nor the law judge identified any evidence that—at least as required to prevail on a summary disposition motion—establishes as a matter of law that the statements were false or misleading. In fact, there was evidence that supports Doxey's statements about the progress, timing, and likelihood of certification. Doxey submitted an exhibit that appears to be a signed contract between Pure H20 and NSF dated April 2008, and both Doxey and a NSF employee testified during the investigation that NSF agreed to accept the testing that the Company had already conducted through the independent lab.[10] A NSF employee also testified that "[a]verage certification time . . . would be three to four months," depending on the amount of testing involved, and that, if there were not a lot of testing, certification could cost $25,000 or less.[11]

In light of this evidence, we cannot find that the statements in the press releases were false or misleading as a matter of law. There is evidence at this point in the proceeding suggesting that Doxey had a basis for representing that the certification was "underway" and for predicting that NSF certification would be obtained within the schedule indicated in the press releases, and that Pure H20 could have obtained certification relatively quickly, without raising a significant amount of additional funds.

Furthermore, this and other evidence creates a material dispute as to Doxey's scienter. In his answer to the OIP, Doxey denied that he had made any misrepresentations or acted with scienter and the evidence discussed above, including his testimony and that of NSF employees, suggests he could have believed the statements made were true. The law judge nonetheless concluded that Doxey's investigative testimony contained admissions about his knowledge of the accuracy of the press releases. Specifically, the law judge found scienter because Doxey (1) "conceded" that investors would have to "read between the lines" of the press releases to understand that "NSF certification was contingent on obtaining money," (2) "he acknowledged that the April 2009 Press Release did not address the fact that Pure H20 had to conduct further cryptosporidium testing prior to going to NSF for certification testing," and (3) "he generally

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[9] *See* Farney Decl., Ex. 7 at 14-15 (Doxey Tr. 50-51) ("I negotiated NSF all the way down to $25 thousand . . . . I asked NSF, I said how long is this going to take, and they told me 30 days . . . . I asked if she would put that in writing, she said I'll put 120 days in writing.").

[10] In investigative testimony before the Division, NSF employee Ellen Van Buren testified that "NSF looked into that other lab and determined we would be able to accept that test data." Farney Decl., Ex. 6 at 15 (Tr. 54).

[11] *See* Farney Decl., Ex. 6 at 9-10 (Van Buren Tr. 31-32, 34-36). Van Buren testified that although "it would be difficult to get a certification done for twenty-five thousand dollars," it was "possible" depending "on the specifics of the product," and that $25,000 for certification was not "a minimum in any way." *Id.* at 9 (Van Buren Tr. 32).

admitted that aspects of the Six Press Releases did not reflect Pure H20's and the System's status at the time."[12]

But, again, viewing the evidence and the factual inferences in the light most favorable to Doxey, we cannot conclude that his investigative testimony establishes as a matter of law that he acted with scienter. The three "admissions" in Doxey's investigative testimony must be considered alongside the other parts of his testimony. Doxey consistently and repeatedly maintained throughout his testimony that he believed in the fundamental accuracy of the statements in the press releases. And he repeatedly disclaimed any intent to deceive. For example, Doxey stated, "I have to say now reviewing all these press releases I did not give my undivided attention to thoroughly write these things the proper way but there was no intent for me to misrepresent anything."[13]

In any event, it is not clear that the "admissions" are in fact, acknowledgements by Doxey that he intended to deceive. While he did acknowledge that the April 2009 press release did not specifically disclose the need for further cryptosporidium testing prior to sending the System to NSF, he also testified that the further cryptosporidium testing that was needed could be completed within approximately "a week" and was "no big deal." Separately, although the law judge found that Doxey "generally admitted that aspects of the Six Press Releases did not reflect Pure H20's and the System's status at the time," the transcript pages cited by the law judge contain no general admissions about the falsity of the Press Releases that we can discern. Finally, the statement that investors would have to "read between the lines" of the press releases to understand that "NSF certification was contingent on obtaining money," is not an admission by Doxey that he intended to mislead investors by issuing the press releases. The record suggests, as we noted, that whatever the money required to be raised, Doxey and others believed it could be less than $25,000, and therefore not a barrier to obtaining certification.

For these reasons, we hold that it was error to grant summary disposition as to the Division's fraud allegations. We therefore are remanding with instructions to the law judge to conduct an evidentiary hearing on those claims.

II. Registration Allegation

A. Background

We also hold that it was error to grant summary disposition as to the claims under Section 5 of the Securities Act. The Division alleged that Doxey violated Sections 5(a) and 5(c) by

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[12] *Doxey*, 2014 WL 1943919, at *10, 16 (internal citations omitted).

[13] Scienter may also be shown if Doxey recklessly disregarded the accuracy of the statements at issue. *See, e.g.*, *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998) (holding in the context of misrepresentations that scienter "may be established through a showing of reckless disregard for the truth" of the statements made). But, as discussed above, because there are genuine factual disputes about whether the statements in the press releases were materially false or misleading, we cannot conclude, as a matter of law, that Doxey was reckless with regard to their accuracy.

orchestrating the offer and sale of nearly 360 million Company shares to Observation Capital. Although undisputed evidence establishes many of the facts necessary for certain elements of those claims, there are material disputes as to others that preclude a finding of liability on a motion for summary disposition. We begin by summarizing the relevant evidence and then apply the pertinent legal principles governing the analysis for a Section 5 claim.

Between October 2008 and May 2009, Pure H20 offered and sold nearly 360 million shares of its stock to Observation Capital, LLC in 12 transactions, generating total sales proceeds for the Company of $57,654. Testimony and documentary evidence show that Doxey personally orchestrated the offers and sales of the stock on behalf of Pure H20 with Doxey negotiating the terms of the sales with Daniels, including via telephone and e-mail. The subscription agreements were all signed by Doxey on behalf of Pure H20. And instruction letters in the record show that Doxey directed the transfer agent to issue the Pure H20 shares—specifically indicating that the shares could be issued without a restrictive legend. The instruction letters and related correspondence also show that Doxey communicated with the transfer agent via facsimile and e-mail. Doxey did not submit any evidence to the contrary concerning his involvement in the offers and sales.

The record also contains legal opinion letters procured by Doxey, which contended that the sales were exempt from registration under Rule 504 of Regulation D and that the shares "may be issued without a legend restricting the resale thereof." The Division submitted an EDGAR printout of Pure H20's filings during the relevant period showing that Pure H20 never filed a registration statement for the 12 transactions. Doxey did not challenge the evidence or dispute the allegation that the Company had not filed any registration statements.

B. Analysis

Section 5(a) of the Securities Act prohibits the sale of any security, in interstate commerce, "unless a registration statement is in effect."[14] Section 5(c) similarly prohibits the "offer to sell" any security, in interstate commerce, "unless a registration statement has been filed as to such security."[15] The Division can establish a prima facie case that Doxey violated Section 5 by demonstrating that (1) Doxey directly or indirectly sold and offered to sell securities; (2) through the use of interstate facilities or the mails; (3) when no registration statement was in effect or filed for those securities.[16] Section 5 imposes strict liability on sellers engaged in unregistered transactions,[17] and the Division is not required to show scienter. Once

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14 15 U.S.C. § 77(e)(a).

15 15 U.S.C. § 77e(c).

16 *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *7 (Jan. 6, 2012), *petition denied*, 739 F.3d 1243 (9th Cir. 2014); *SEC v. Cavanaugh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953)); *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004).

17 *Calvo*, 378 F.2d at 1215.

the Division has established a prima facie case, the burden shifts to the respondent to show that the securities are exempt from the registration requirements.[18]

We find that there are no disputed issues of material fact as to the prima facie violation of Section 5 by Doxey. And we find as a matter of law that the transactions were not exempt from registration under Securities Act Section 4(a)(1) or Rule 504(b)(1)(iii) of Regulation D. But we find that there was insufficient evidence in the record to make a determination, as a matter of law, concerning Doxey's claim that the transactions were exempt from registration under Rules 504 and 506 of Regulation D. If the transactions were exempt, as Doxey alleges, then he is not liable under Section 5 of the Securities Act. Consequently, we are remanding the Section 5 claims to the law judge for the purpose of determining whether the transactions were exempt under either Rule 504 or 506.[19]

1. Doxey's prima facie violation

a. Doxey sold securities.

"To demonstrate that a defendant sold securities, the SEC must prove that the defendant was a 'necessary participant' or 'substantial factor' in the illicit sale."[20] The offers and sales would not have taken place without Doxey's involvement. He was the sole person responsible for offering and selling Pure H20 stock to Observation Capital in the 12 different transactions. Doxey orchestrated every aspect of the offers and sales on behalf of Pure H20: he negotiated the sales, signed the subscription agreements, procured legal opinion letters, and directed the transfer agent to issue the shares. In opposing the Division's motion for summary disposition, Doxey offered no evidence to the contrary. Doxey was therefore certainly a "necessary participant" or "substantial factor" in the securities transactions.[21]

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18 *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1086 (9th Cir. 2010); *Cavanaugh*, 445 F.3d at 111 n.13.

19 Because Doxey has made no argument in this regard, we do not specifically address Section 4(a)(2) of the Securities Act, which states that the provisions of Section 5 shall not apply to the transactions of an issuer not involving any public offering, 15 U.S.C. § 77d(a)(2), but the law judge may consider the application of Section 4(a)(2) on remand.

20 *Calvo*, 378 F.3d at 1215.

21 *See, e.g., SEC v. Imperiali, Inc.*, 594 F. App'x 957, 960 (11th Cir. 2014) (holding that the founder and chief executive of the issuer was a "substantial factor" in the sale of securities when he "dictated or personally prepared press releases and memoranda to tout" the company stock, filed a Form D on behalf of the company "that included information about the sale of stock and bore his signature as the president of the company," and acted as the "closer" for the company's sales to investors).

b. Doxey used instrumentalities of interstate commerce.

There is no dispute that Doxey used instrumentalities of interstate commerce to offer and sell the Pure H20 stock. He communicated via facsimile, e-mail, and telephone with relevant individuals such as Daniels and the transfer agent, all of which establish the jurisdictional nexus for Section 5 liability.[22]

c. There was no registration statement in effect.

It is undisputed that there was no registration statement filed or in effect for any of sales of the Pure H20 shares offered and sold to Observation Capital.

2. Claimed Exemptions

Because the Division established a prima facie violation of Section 5, the burden shifted to Doxey to prove the existence of an applicable exemption. "It is well-established that exemptions from the general policy of the Securities Act requiring registration are strictly construed against the claimant of such an exemption and the burden of proof is on the claimant."[23] "Registration exemptions are construed strictly to promote full disclosure of information for the protection of the investing public. Evidence in support of an exemption must be explicit, exact, and not built on conclusory statements."[24]

To meet this burden, Doxey argued below that sales of Pure H20 stock were "extended certain exemptions under Rules 504, 506, and 144." But the law judge found that, beyond conclusory arguments, Doxey had not provided any evidence that these exemptions were applicable to his sales and, therefore, Doxey failed to meet his burden.

In his appeal, Doxey makes no specific arguments about the Section 5 claims, and asserts only that he "disagrees with [the] finding in its entirety." But in light of Doxey's *pro se* status and the particular posture of this case, we consider the evidence and Doxey's assertion in his reply to the Division's motion for summary disposition that Pure H20 "was extended certain exemptions under Rule 504, 506 and 144."

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[22] *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997) (noting that the required interstate nexus of Section 5 is "broadly construed" and is satisfied by even "tangential mailings or intrastate telephone calls"), *aff'd*, 159 F.3d 1348 (2d Cir. 1998); *cf. United States v. Forehand*, 577 F. App'x 942, 947 (11th Cir. 2014) (affirming a conviction for violation of the Securities Act and noting that the interstate nexus was satisfied by use of "the mail, telephones, and the internet").

[23] *Robert G. Weeks*, Exchange Act Release No. 48684, 2004 WL 828, at *12 (Oct. 23, 2003) (internal quotation marks and alterations omitted); *see also SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953).

[24] *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *8,

a. Rule 504 of Regulation D

Securities Act Rule 504 of Regulation D provides for an exemption from Section 5's registration requirements for offers and sales by issuers if certain conditions are satisfied.[25] Regulation D was adopted in 1982 and the exemptions provided in the regulation were designed to simplify existing rules, eliminate unnecessary restrictions on small businesses, and achieve uniformity between state and federal exemptions in order to facilitate capital formation consistent with the protection of investors.[26] Regulation D was amended in 1999 to restrict resales of securities issued under a Regulation D exemption.[27]

First, the issuer must not be subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act; an investment company; or a development stage company that does not have a specific business plan or purpose, as described in Rule 504(a)(3).[28] Pure H20 was not subject to Exchange Act reporting requirements, and was not an investment or development stage company.

Second, for the exemption under Rule 504 to apply, the aggregate price of the offers and sales cannot exceed $1,000,000 in any 12-month period.[29] Pure H20's aggregate sales of $57,654 met this requirement.

Third, the offers and sales must satisfy certain requirements of Rule 502—including Rule 502(c)'s prohibition on the use of general solicitation or general advertising, and Rule 502(d)'s requirement that the issuer exercise reasonable care to limit resales, except as provided under Rule 504(b)(1).[30]

There is insufficient evidence to determine as a matter of law that Doxey or Pure H20 engaged in general solicitation or general advertising. On remand, the law judge should consider

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25 *See* 17 C.F.R. § 230.504.

26 Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389, 1982 WL 35662, at *2 (Mar. 8, 1982); *see also* Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Securities Act Release No. 7644, 1999 WL 95490, at *1 (Feb. 25, 1999) (adopting amendments to Regulation D).

27 *Id.* (adopting amendments that, among other things, restricted resales of securities issued under a Regulation D exemption, except as provided under Rule 504(b)(1)).

28 17 C.F.R. § 230.504(a) (2009).

29 17 C.F.R. § 230.504(b)(2) (2009).

30 *See* 17 C.F.R. § 230.504(b)(1) (2009) ("To qualify for exemption under this Rule 504, offers and sales must satisfy the terms and conditions of Rules 501 and 502(a), (c) and (d) . . . ."); *Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption*, 1999 WL 95490, at *3 ("[T]he rule establishes the general principle that securities issued under the exemption, just like the other Regulation D exemptions, will be restricted, and prohibits general solicitation and general advertising.").

the nature of the relationship, if any, between Doxey and Daniels prior to the offers and sales in 2008. In Doxey's reply to the Division's motion for summary disposition, Doxey refers to two contracts between Pure H20 and Observation Capital that pre-date the period of offers and sales alleged in the OIP—a contract to pay third party debt and a consulting agreement. Those contracts suggest that there may have been a pre-existing substantive relationship between Doxey and Daniels. If such a relationship is found to have existed prior to the offers and sales at issue in this matter, that would be a means of demonstrating compliance with the limitation on the manner of offering found in Rule 502(c).[31]

There is likewise an insufficient factual record on which to determine that Pure H20 failed to exercise reasonable care to limit resales which, if true, would make the Rule 504 exemption unavailable. Although Doxey directed the transfer agent to issue the securities without a restrictive legend, compliance with the three-part method specified in Rule 502(d), including the requirement that a restrictive legend be placed on a securities certificate, is "not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision."[32]

Doxey's legal counsel cited and relied on Rule 504(b)(1)(iii) when opining that the Pure H20 transactions were exempt from registration. Rule 504(b)(1)(iii) provides an exception to Rule 504's prohibition on general solicitation and requirement that an issuer exercise reasonable care to limit resales. That exception requires that the offers and sales be made "[e]xclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as the sales are made only to "accredited investors" as defined in Rule 501(a)."[33] We conclude that, as a matter of law, the state law exemption is unavailable for the 12 Pure H20 transactions.

The opinion letters that Doxey obtained relied on Rule 109.4 of the Texas Administrative Code.[34] That provision provides an exemption from state-law registration requirements for "the

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[31] The question of whether Doxey or Pure H20 engaged in general solicitation also would inform an analysis under Section 4(a)(2) of the Securities Act.

[32] Rule 504 was intended to facilitate capital formation, particularly by small businesses, while permitting general solicitation and the issuance of "freely tradable" securities only in certain circumstances to curb potential abuses of the exemption. *Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption*, 1999 WL 95490, at *1. We note that Doxey, as a *pro se* small business owner, should be afforded the opportunity to present evidence concerning whether he met the requirements for the exemption.

[33] 17 C.F.R. § 230.504(b)(1)(iii) (2009).

[34] In 2005, Rule 109.4 superseded the Rule 109.3(4) referenced in the Pure H20 opinion letters. The opinion letters also generally reference Sections 5.H, 5.T and 7 of the Texas Securities Act. Section 7 does not provide for an exemption but instead lays out the requirements for registration, and it is therefore inapplicable. Section 5.H provides for an exemption for offers or sales to entities such as banks and registered broker-dealers, and as there is no claim or evidence that Observation Capital was such an entity, it is also inapplicable.

(continued…)

offer and sale of any securities" to (1) an "institutional accredited investor," with certain exceptions not relevant here; (2) any "qualified institutional buyer"; or (3) "a corporation, partnership, trust, estate, or other entity (excluding individuals) having net worth of not less than $5 million, or a wholly-owned subsidiary of such entity, as long as the entity was not formed for the purpose of acquiring the specific securities." Rule 109.4 is not a statutory scheme, as Rule 504(b)(1)(iii) requires, that permits general solicitation. It only exempts those sales and offers made to institutional accredited investors, qualified institutional buyers, and certain other entities. It does not permit sales and offers of unregistered securities to the general public. As a result, Rule 109.4 of the Texas Administrative Code does not, as a matter of law, meet the standards that would be required to make use of the Rule 504(b)(1)(iii) exemption.

The law judge concluded that the transactions were not entitled to a Rule 504(b)(1)(iii) exemption for a different reason. The law judge determined that Daniels and Observation Capital were not accredited investors.[35] Although there is evidence in the record showing that Daniels and Observation Capital did not meet the criteria of accredited investors at the time of the sales,[36] the definition of an "accredited investor" under Rule 501(a) includes persons "who the issuer reasonably believes comes within" the specified criteria.[37] There is evidence in the record that, when viewed in the light most favorable to Doxey, suggests that Doxey could have reasonably believed that Observation Capital had accredited investor status. For example, in the subscription agreements signed by Daniels, Observation Capital "represents" and "warrants" that "it is an 'accredited investor' under Rule 501 of Regulation D." And among the evidence submitted by Doxey is an investor questionnaire apparently completed by Daniels attesting that he satisfies the criteria of an accredited investor.[38] This is enough to raise a triable issue of fact on whether Doxey reasonably believed Observation Capital was an accredited investor. Although the Rule 504(b)(1)(iii) exemption is unavailable, the law judge should determine

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(…continued)

Finally, Section 5.T is the statutory provision which permits the Texas Securities Board to promulgate exemptions by rule, such as Rule 109.4.

[35] The relevant categories of persons considered "accredited investors" under Rule 501(a) include "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000," "[a]ny natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year," and "[a]ny entity in which all of the equity owners are accredited investors." 17 C.F.R. § 230.501(a)(5), (6), and (8) (2009).

[36] In his Answer to the OIP and investigative testimony, Daniels said that at the time he invested he believed he was an accredited investor, but he conceded in his testimony that he did not actually meet the definition of an "accredited investor."

[37] 17 C.F.R. § 230.501(a) (2009).

[38] *But see Use of Electronic Media*, Securities Act Release No. 7856, 2000 WL 502290, at *12 (April 28, 2000) (stating that self-accreditation raises significant concerns as to whether the offerings involve general solicitations).

whether Doxey's belief regarding Observation Capital was reasonable, because—as we explain below—that belief is relevant to determining whether a Rule 506 exemption was applicable.

b. Rule 506 of Regulation D

The version of Rule 506 in effect at the time of the transactions permitted an issuer to raise funds in an unregistered offering from no more than 35 purchasers of securities (or what the issuer reasonably believed was no more than 35 purchasers in any offering under Rule 506).[39] For the purpose of calculating the number of purchasers, accredited investors, among others, are excluded, meaning that for an offering under Rule 506 funds could be raised from an unlimited number of accredited investors.[40] Each purchaser in the offering who was not an accredited investor must, either alone or with his purchaser representatives, have had "such knowledge and experience in financial and business matters that he [was] capable of evaluating the merits and risks of the prospective investments, or the issuer reasonably believe[d] immediately prior to making any sale that such purchaser [came] within this description."[41]

Further, the Company could not rely on Rule 506 unless the offers and sales satisfied all the terms and conditions of Rules 501 and 502,[42] including Rule 502(c)'s prohibition on general solicitation or general advertising,[43] and Rule 502(d)'s requirement to exercise reasonable care to limit resales.[44] As discussed above, we remand on the issues of whether Doxey or Pure H20 engaged in general solicitation or advertising and exercised reasonable care to limit resales, and believe there is enough evidence to raise a triable issue of fact on whether Doxey reasonably believed Observation Capital was an accredited investor or had the requisite knowledge and

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39 *See* 17 C.F.R. § 230.506(b)(1)(i) (2009).

40 *See* 17 C.F.R. § 230.501(e) (2009).

41 *See* 17 C.F.R. § 230.506(b)(1)(ii) (2009).

Rule 506 was amended on July 10, 2013. *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Securities Act Release No. 9415, 2013 WL 3817300, at *3 (July 10, 2013).

42 *See* 17 C.F.R. § 230.506(b)(1) (2009).

43 *See* 17 C.F.R. § 230.502(c) (2009).

44 *See* 17 C.F.R. § 230.502(d) (2009). To claim the Rule 506 exemption for sales to non-accredited investors, those investors must be furnished with certain information within a reasonable time prior to sale (as described in Rule 502(b)). *See* 17 C.F.R. § 230.502(b) (2009).

Unlike Rule 504, the version of Rule 506 in effect at the time of Doxey's alleged misconduct provided no exception to these requirements. Rule 506 was amended in 2013, with Rule 506 becoming Rule 506(b) and the addition of Rule 506(c). An issuer may rely on the Rule 506(c) exemption if it has engaged in general solicitation so long as it sold securities only to accredited investors and took reasonable steps to verify the accredited investor status of the purchasers in the offering. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 2013 WL 3817300, at *8.

experience under Rule 506(b)(2)(ii). If the evidence establishes that Doxey did not engage in general solicitation or advertising and exercised reasonable care to limit resales, and that the Company reasonably believed that Observation Capital qualified as an "accredited investor" or a purchaser with the requisite knowledge and experience immediately prior to each sale, the law judge should determine whether the transactions are exempt from registration under Rule 506.

c. Rule 144

We find that the transactions were not exempt pursuant to Rule 144, the remaining provision cited by Doxey before the law judge. Rule 144 provides a safe harbor from being deemed an "underwriter" under Securities Act Section 2(a)(11). Rule 144 is relevant to an analysis of whether a transaction is by a person that falls within the Section 2(a)(11) definition of an underwriter in light of Section 4(a)(1), which exempts from registration transactions "by a person other than an issuer, underwriter or dealer."[45] It is not relevant to whether an *issuer* is required to register transactions, or whether an exemption applied to an issuer. Pure H20 was indisputably an issuer, and therefore its offers and sales to Observation Capital were not exempt from registration under Section 4(a)(1).

III. Other Arguments Raised in Doxey's Petition

A. Waiver of Hearing

On appeal, Doxey suggests that the law judge acted unfairly in granting the Division's motion for summary disposition and denying him a hearing. He contends that the law judge "promised" at a prehearing conference that Doxey could "go through" the allegations "item by item in order to show the [law judge] where the Division went wrong." Based on our review of the January 9, 2014 prehearing conference transcript, the law judge clearly informed Doxey that pursuant to the OIP he had a right to a hearing by January 24, told Doxey he could waive that right and submit his arguments in writing in connection with the Division's motion for summary disposition, and made clear to Doxey that, depending on the law judge's review of the matter on summary disposition, Doxey may or may not ultimately get a hearing.[46] Based on this

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[45] 15 U.S.C. § 77d(a)(1).

[46] After explaining the process at the prehearing conference, the law judge summarized Doxey's options this way:

[T]here's two possibilities. One possibility, if you insist, if you demand your right to [have a hearing] within 30 and 60 days after service of the OIP, then we would have to do it no later than January 24th. . . . The other possibility is if you're willing to waive your right to doing it on the 24th, then we can have these motions that I've talked about. And if I determine that we ought to have a hearing, a live, in-person hearing, where you can cross examine the Division's witnesses and put on your own witnesses and so forth, then that would be sometime down the road . . . . So what I'm asking you is, do you want to do it within the next two weeks, or do you want to wait and see?

information, Doxey told the law judge that he wanted to "wait and see" if the law judge determined a hearing was necessary.

The question is whether Doxey is now, given our determination to remand, entitled to a hearing. We conclude that he is. Although the Division argues that Doxey "waived his right to an in-person hearing" and "cannot now complain when the summary disposition process did not work out to his liking," Doxey only waived his right to a hearing *by January 24, 2014*, and agreed to take part in the summary disposition briefing (which had the potential to make a hearing unnecessary).

For the reasons we have explained, we find that summary disposition on Doxey's liability for violations of the antifraud provisions and the Section 5 claims was in error and conclude that a remand to the law judge is necessary.

B. Remedial Relief

Because we are remanding the case for further proceedings regarding the Division's allegations, we do not address Doxey's arguments about the appropriateness of the remedial relief imposed by the law judge.

An appropriate order will issue.

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields

Secretary

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No.

SECURITIES EXCHANGE ACT OF 1934

Release No.

Admin. Proc. File No. 3-15619

In the Matter of

JOSEPH P. DOXEY

ORDER REMANDING PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is

ORDERED that this matter instituted against Joseph P. Doxey be remanded to an administrative law judge for further proceedings, and the holding of a hearing, in accordance with that opinion.

By the Commission.

Brent J. Fields
Secretary