

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

MARK LESLIE, KENNETH E. LONCHAR,
PAUL A. SALLABERRY, MICHAEL M.
CULLY and DOUGLAS S. NEWTON,

Defendants

Civil Action No.

FILED

AUG - 2 2007

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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FINAL JUDGMENT AS TO DEFENDANT MICHAEL M. CULLY

The Securities and Exchange Commission having filed a Complaint and Defendant Michael M. Cully having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction, to which Defendant consents); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate

1 commerce, or of the mails, or of any facility of any national securities exchange, in connection with
2 the purchase or sale of any security:

- 3 (a) to employ any device, scheme, or artifice to defraud;
- 4 (b) to make any untrue statement of a material fact or to omit to state a material fact
5 necessary in order to make the statements made, in the light of the circumstances
6 under which they were made, not misleading; or
- 7 (c) to engage in any act, practice, or course of business which operates or would
8 operate as a fraud or deceit upon any person.

10 **II.**

11 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant
12 and Defendant's agents, servants, employees, attorneys, and all persons in active concert or
13 participation with them who receive actual notice of this Final Judgment by personal service or
14 otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act
15 [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of
16 transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- 18 (a) to employ any device, scheme, or artifice to defraud;
- 19 (b) to obtain money or property by means of any untrue statement of a material fact or
20 any omission of a material fact necessary in order to make the statements made, in light of
21 the circumstances under which they were made, not misleading; or
- 22 (c) to engage in any transaction, practice, or course of business which operates or would
23 operate as a fraud or deceit upon the purchaser.

25 **III.**

26 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant and
27 Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation
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1 with them who receive actual notice of this Final Judgment by personal service or otherwise are
2 permanently restrained and enjoined from violating Section 13(b)(5) of the Exchange Act [15 U.S.C.
3 § 78m(b)(5)] and Exchange Act Rule 13b2-1 [17 C.F.R. § 240.13b2-1] by knowingly circumventing
4 or knowingly failing to implement a system of internal accounting controls, or knowingly falsifying,
5 or directly or indirectly falsifying or causing to be falsified, any book, record, or account described in
6 Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78m(b)(2)].
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8 IV.

9 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant
10 and Defendant's agents, servants, employees, attorneys, and all persons in active concert or
11 participation with them who receive actual notice of this Final Judgment by personal service or
12 otherwise are permanently restrained and enjoined from violating Exchange Act Rule 13b2-2 [17
13 C.F.R. § 240.13b2-2] by, directly or indirectly, in the capacity of a director or officer of an issuer, (a)
14 making or causing to be made a materially false or misleading statement, or (b) omitting to state, or
15 causing another person to omit to state, any material fact necessary in order to make the statements
16 made, in light of the circumstances under which the statements were made, not misleading to an
17 accountant in connection with (1) any audit, review or examination of the financial statements of the
18 issuer required to be made or (2) the preparation or filing of any document or report required to be
19 filed with the Commission pursuant to the rules promulgated under Section 13 of the Exchange Act
20 or otherwise.
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23 V.

24 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant
25 and Defendant's agents, servants, employees, attorneys, and all persons in active concert or
26 participation with them who receive actual notice of this Final Judgment by personal service or
27 otherwise are permanently restrained and enjoined from aiding and abetting any violation of Section
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1 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Exchange Act Rules 12b-20, 13a-1, 13a-11, and
2 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13], by knowingly providing
3 substantial assistance to an issuer that files with the Commission any periodic report or statement
4 pursuant to Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Exchange Act rules and
5 regulations, which contains any untrue statement of material fact, or which omits to state a material
6 fact necessary in order to make the statements made, in the light of the circumstances under which
7 they were made, not misleading, or which fails to comply in any material respect with the
8 requirements of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and the rules and
9 regulations thereunder.
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11 **VI.**

12 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant
13 and Defendant's agents, servants, employees, attorneys, and all persons in active concert or
14 participation with them who receive actual notice of this Final Judgment by personal service or
15 otherwise are permanently restrained and enjoined from aiding and abetting any violation of Sections
16 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A) and (B))] by
17 substantially assisting the failure by any issuer which has a class of securities registered pursuant to
18 Section 12 of the Exchange Act [15 U.S.C. § 78l] or is required to file reports pursuant to Section
19 15(d) of the Exchange Act [15 U.S.C. § 78o(d)] to:
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- 22 (A) make and keep books, records, and accounts, which, in reasonable detail, accurately
23 and fairly reflect the transactions and dispositions of the assets of the issuer; or
 - 24 (B) devise and maintain a system of internal accounting controls sufficient to provide
25 reasonable assurances that (i) transactions are executed in accordance with
26 management's general or specific authorization; (ii) transactions are recorded as
27 necessary (I) to permit preparation of financial statements in conformity with
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1 generally accepted accounting principles or any other criteria applicable to such
2 statements, and (II) to maintain accountability for assets; (iii) access to assets is
3 permitted only in accordance with management's general or specific authorization;
4 and (iv) the recorded accountability for assets is compared with the existing assets at
5 reasonable intervals and appropriate action is taken with respect to any differences.
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7 **VII.**

8 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, pursuant to Section
9 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15
10 U.S.C. § 77t(e)], Defendant is prohibited, for five years following the date of entry of this Final
11 Judgment, from acting as an officer or director of any issuer that has a class of securities registered
12 pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports
13 pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].
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15 **VIII.**

16 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant
17 is liable for disgorgement of \$153,322, representing profits gained as a result of the conduct alleged
18 in the Complaint, together with prejudgment interest thereon in the amount of \$28,148.67, and a civil
19 penalty in the amount of \$35,000 pursuant to Section 21(d) of the Exchange Act. Defendant shall
20 satisfy this obligation by paying \$216,470.67 within ten business days to the Clerk of this Court,
21 together with a cover letter identifying Michael M. Cully as a defendant in this action; setting forth
22 the title and civil action number of this action and the name of this Court; and specifying that
23 payment is made pursuant to this Final Judgment. Defendant shall simultaneously transmit
24 photocopies of such payment and letter to the Commission's counsel in this action. By making this
25 payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds, and no
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1 part of the funds shall be returned to Defendant. Defendant shall pay post-judgment interest on any
2 delinquent amounts pursuant to 28 U.S.C. § 1961.

3 The Clerk shall deposit the funds into an interest bearing account with the Court Registry
4 Investment System ("CRIS") or any other type of interest bearing account that is utilized by the
5 Court. These funds, together with any interest and income earned thereon (collectively, the "Fund"),
6 shall be held in the interest bearing account until further order of the Court. In accordance with 28
7 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States
8 Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on
9 the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall
10 not exceed that authorized by the Judicial Conference of the United States.

12 The Commission may by motion propose a plan to distribute the Fund subject to the Court's
13 approval. Such a plan may provide that Fund shall be distributed pursuant to the Fair Fund
14 provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such
15 Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this
16 Judgment shall be treated as penalties paid to the government for all purposes, including all tax
17 purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or
18 reduction of any award of compensatory damages in any Related Investor Action based on
19 Defendant's payment of disgorgement in this action, argue that he is entitled to, nor shall he further
20 benefit by, offset or reduction of such compensatory damages award by the amount of any part of
21 Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related
22 Investor Action grants such a Penalty Offset, Defendant shall, within 30 days after entry of a final
23 order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount
24 of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs.
25 Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change
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1 the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related
2 Investor Action" means a private damages action brought against Defendant by or on behalf of one or
3 more investors based on substantially the same facts as alleged in the Complaint in this action.
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5 **IX.**

6 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that the Consent
7 is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant
8 shall comply with all of the undertakings and agreements set forth therein.
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10 **X.**

11 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that this Court
12 shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.
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14 **XI.**

15 There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil
16 Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

17 Dated: 8-1-07

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19 UNITED STATES DISTRICT JUDGE
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