



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17740

In the Matter of

AUGUSTINE CAPITAL
MANAGEMENT, LLC (F/K/A
AUGUSTINE CAPITAL
MANAGEMENT, INC.), JOHN T.
PORTER, and THOMAS F.
DUSZYNSKI, CPA,

MOTION TO STAY PENDING
COMMISSION CONSIDERATION OF
OFFER OF SETTLEMENT

Respondents.

Pursuant to Rule 161 of the Commission's Rules of Practice, and for their motion to stay the proceedings pending Commission Consideration of an Offer of Settlement, Respondents Augustine Capital Management, LLC, John T. Porter and Thomas F. Duszynski (collectively, "Respondents") state as follows:

1. This action commenced on December 20, 2016 with the issuance of the Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP").
2. On February 9, 2017, the Honorable Carol Fox Foelak issued an order setting forth a prehearing schedule and setting the hearing in this matter to commence on October 16, 2017.
3. Since that time, the Division of Enforcement (the "Division") and Respondents have been actively engaged in settlement negotiations.
4. On July 24, 2017, the Division provided the Respondents with a draft settlement order and offer. On July 28, 2017, all Respondents informed the Division that they agree to the sanctions sought by the Division as part of a settlement, including a

disgorgement amount, civil money penalties, and bars from association with an investment adviser, broker-dealer and others. The Respondents and the Division are currently in the process of discussing changes to certain language of the draft settlement offer, so that it can be submitted to the Commission for consideration.

5. Accordingly, to allow the Respondents the time necessary to complete this settlement process with the Division, the Respondents respectfully request that the Court stay all proceedings and deadlines pending submission and consideration of a settlement offer to the Commission.

6. The Administrative Law Judge has good cause to stay the proceedings and all impending deadlines.

7. First, pursuant to the Rule 161(c)(2)(i) of the SEC's Rules of Practice, the parties have reached an agreement in principle on all major terms of a settlement of the Division's claims. *See Registration Statement of First Xeris Corp.*, Exchange Act Release No. 2739, 2015 SEC LEXIS 2167 (May 29, 2015)(requiring an agreement on the major terms of settlement in order to enter a stay). This standard has been met here because the Respondents have agreed to the all of the relief sought by the Division.

8. In another administrative proceeding, the administrative law judge recognized that one such "major settlement term" pursuant to 17 C.F.R. § 201.161(c)(2)(i) includes agreeing to accept a bar from association with any broker or dealer. *See William J. Herisko*, Exchange Act Release No. 61945, 2010 SEC LEXIS 1172 (April 20, 2010). Because the Division and Respondents in the instant case have agreed to various sanctions, including a bar from certain associations, they have agreed to major settlement terms.

9. Unlike *In the Matter of David B. Havanich*, in which a stay order entered pursuant to Rule 161(c)(2)(i) was vacated because additional proceedings were required to

determine the amount of disgorgement and civil monetary penalties, the amount of disgorgement and civil money penalties here have been fixed and agreed upon by the Division and Respondents. *See David B. Havanich*, Exchange Act Release No. 2740, 2015 SEC LEXIS 2168 (May 29, 2015).

10. The material terms of a settlement agreement are generally considered to be those terms upon which the “settlement hinges.” *See Transclean Corp. v. Motorvac Techs.*, No. 01-287 (JRT/FLN), 2002 U.S. Dist. LEXIS 19312, at *26 (D. Minn. Sep. 30, 2002) (citing several cases in which courts held that a valid settlement was reached when the amount of damages was agreed upon by the parties or when the parties agreed to dismiss the claims at issue in exchange for a specific monetary amount). Leaving non-material “‘matters for later negotiation’ will not defeat a settlement when all of the material terms were agreed upon.” *Id.* (citation omitted); *see also Ayala v. Aerotek, Inc.*, No. 15-3095 (MJD/SER), 2017 U.S. Dist. LEXIS 467, at *7 (D. Minn. Jan. 3, 2017) (holding that a settlement agreement was enforceable where it included the agreement’s material terms—namely, the payment of an amount certain in exchange for a general release of claims). Because Respondents and the Division have agreed to precise monetary payments as well as non-monetary relief, they have come to an agreement regarding material terms of the settlement.

11. Granting a stay pending the Commission’s consideration of the settlement offer would give the Parties additional time to finalize the specific language of the offer.

12. Rule 161(c)(2)(i)(A) provides for a stay to be entered in the exact scenario presented here. Where the parties have agreed on the material terms and need to resolve the language of any settlement offer to be submitted, Rule 161(c)(2)(i)(A) allows fifteen days from the date of entry of a stay order for the offer to be finalized and submitted. The offer is not required to be submitted to the Commission first before an order for a stay can be entered.

13. Additionally, granting a stay would conserve the Commission's and the Respondent's resources because several depositions remain to be taken and expert reports must be prepared and exchanged. Moreover, a stay would serve the public interest by facilitating settlement discussions and a more efficient resolution of this case.

14. Respondents expect to be able to provide the Division with a signed Offer of Settlement within fifteen business days of the entry of a stay order in this proceeding, as required by Rule 161(c)(2)(i)(A).

WHEREFORE, for the reasons set forth above, the Respondents respectfully request that the Administrative Law Judge enter an order staying all proceedings and deadlines pending the Commission's acceptance of a settlement offer or filing of a notice pursuant to Rule 161(c)(2)(ii).

Dated: August 1, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

Respondents.

Randall Lehner, an attorney, hereby certifies that on August 1, 2017, he filed the foregoing Motion to Stay Pending Commission Consideration of Settlement Offer with the Office of the Secretary to be served on the following via UPS Next Day Air:

The Honorable Carol Fox Foclak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557

Johnathan S. Polish
Amy S. Cotter
Jaclyn J. Janssen
Division of Enforcement
Securities and Exchange Commission
Chicago Regional Office
175 W. Jackson Blvd. 14th Floor
Chicago, IL 60604

Dated: August 1, 2017

By: 

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