

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70450 / September 18, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3489 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15504

In the Matter of

BRENDAN N. CONNORS, CPA,

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS, A CEASE-AND-
DESIST ORDER, AND A CIVIL PENALTY**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Brendan N. Connors, CPA (“Respondent” or “Connors”) pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 102(e)(1)(iii) of the Commission’s Rules of Practice.¹

¹Section 4C provides, in relevant part, that:

The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions, a Cease-and-Desist Order, and a Civil Penalty (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds² that:

Summary

1. This matter involves improper tax accounting practices and material weaknesses in internal control over financial reporting at Medifast, Inc. (“Medifast” or “the Company”) from 2006 through 2008. During that time, Respondent Brendan Connors was Medifast’s Vice President of Finance and head of Medifast’s accounting department. He was one of the officials responsible for ensuring that the Company’s financial statements were presented fairly in conformity with generally accepted accounting principles (“GAAP”), and for devising and maintaining a system of internal accounting controls.

2. Connors calculated Medifast’s income tax expense during the years 2006 through 2008 in a manner that did not comply with GAAP. Connors’ improper conduct resulted in Medifast filing periodic reports with the Commission for the years 2006 through 2008 that materially understated its tax expense and overstated its net income after tax. Medifast thus violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder, and Connors willfully³ aided and abetted and was a cause of those violations.

Respondent

3. **Brendan Connors**, age 35, joined Medifast in 2005 as its Vice-President of Finance. He was promoted to Chief Financial Officer in May 2010, and resigned from Medifast in

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

³ A willful violation of the securities laws means “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F. 3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F. 2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearheart & Otis, Inc. v. SEC*, 348 F. 2d 798, 803 (D.C. Cir. 1965)).

November 2012. He is a certified public accountant currently licensed to practice in Massachusetts. He resides in Baltimore County, Maryland.

Other Relevant Entity

4. **Medifast, Inc.** is a Delaware corporation headquartered in Owings Mills, Maryland. Through its operating subsidiaries, Medifast manufactures, distributes, and sells weight loss and other health and diet products and supplements. From 2005 to 2010, Medifast's revenues grew from \$40.1 million to \$257.5 million. Medifast's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and trades on the New York Stock Exchange.

Facts

5. On March 31, 2010, Medifast filed its Form 10-K for the year ended December 31, 2009 and restated its financial statements for the years ended December 31, 2006, 2007, and 2008 (the "2010 Restatement"). The 2010 Restatement was required to correct material errors in the Company's reported income tax expense that were the result of Connors' failure to account for Medifast's income tax provision in conformity with Statement of Financial Accounting Standards 109, *Accounting for Income Taxes* ("FAS 109").

The Accounting Standard

6. FAS 109 establishes standards for companies to account for and report the effects of income taxes.⁴ Due to differences between tax laws and accounting standards for financial statements, some events are recognized for financial reporting purposes and for tax purposes in different years. This can give rise to temporary differences between the tax bases of assets or liabilities and their reported amounts in financial statements. The differences are temporary because the event will become taxable or deductible when the related asset is recovered or the related liability is settled. These temporary differences, or deferred taxes, are accounted for under FAS 109 using an asset and liability approach. A deferred tax asset exists when temporary differences will result in deductible amounts in future years. A deferred tax liability exists when temporary differences will result in taxable amounts in future years. Under FAS 109, a company must recognize both a current tax liability or asset for the amount of taxes payable or refundable for the current year, and a deferred tax liability or asset for the estimated future tax effects attributable to temporary differences.

Connors' Improper Accounting and Failure to Maintain Effective Internal Control

7. As head of Medifast's accounting department, Connors was responsible for selecting, applying, and implementing appropriate accounting policies to ensure that the Company's reported financial statements were prepared in accordance with GAAP. He was also

⁴ Upon the codification of GAAP, which became effective for periods ending after September 15, 2009, FAS 109 became part of Accounting Standards Codification (ASC) 740, *Income Taxes*.

one of the officials responsible for preparing the Company's financial statements and for devising and maintaining a system of internal accounting controls.

8. For the years 2006 through 2008, Connors calculated the Company's year-end income tax provision using a pre-existing spreadsheet that included entries for the calculation of deferred taxes and current taxes ("Tax Spreadsheet"). He used the Tax Spreadsheet to obtain the Company's income tax provision for reporting in the Company's financial statements. Connors, however, lacked the appropriate accounting expertise and knowledge to calculate the Company's tax provision in accordance with GAAP. He failed to properly account for the Company's deferred taxes, including failing to correctly record the deferred tax liability resulting from the depreciation of certain fixed assets for tax purposes faster than for financial statement purposes. He also failed to ensure that the Company had adequate in-house accounting personnel with the knowledge to prepare the Company's income tax provision in accordance with GAAP.

9. In addition, Connors' tax calculations as entered on the Tax Spreadsheets differed materially from the current and deferred income tax provisions that were reported in Medifast's Form 10-K filings. On the Tax Spreadsheet for 2007, for example, Connors calculated the Company's current tax provision as \$1,805,708 and a total deferred tax asset of \$1,079,321. In contrast to those numbers, however, Medifast's Form 10-K for 2007 reported the current income tax provision as \$1,233,000 and a deferred tax expense of \$473,000. On Medifast's Tax Spreadsheet for 2008, Connors calculated a current income tax provision of \$2,578,107 and a total deferred tax asset of \$1,321,072, but Medifast's Form 10-K for 2008 reported the current income tax provision as \$1,711,000 and a deferred tax expense of \$704,000.

10. In fact, both the reported figures for Medifast's income tax provision in its 2007 and 2008 Forms 10-K and the tax provision calculations prepared by Connors on the Company's Tax Spreadsheets for those years were wrong, and Medifast's income tax expense increased significantly as reported in its 2010 Restatement. Connors, who was responsible for preparing the tax disclosure in the Company's reported financial statements, included materially different numbers for the Company's tax provision in its 2007 and 2008 Form 10-Ks than the numbers he had calculated on the Tax Spreadsheets for those years. Connors also failed to ensure that the Company's prior-year income tax returns reconciled with its reported income tax provisions.

The 2010 Restatement

11. Because of Connors' improper tax accounting and failure to maintain adequate internal accounting controls, Medifast materially overstated its net income after tax for 2006, 2007, and 2008 by an average of 12.4% per year:

| Period Ending | 12/31/2006 | 12/31/2007 | 12/31/2008 |
|---|-------------------|-------------------|-------------------|
| Net Income as originally reported: | 5,156,000 | 3,837,000 | 5,435,000 |
| Adjustment to Tax Provision: | (583,000) | (411,000) | (601,000) |
| Net Income Restated: | 4,573,000 | 3,426,000 | 4,834,000 |
| Percentage Decrease in Net Income due to Restatement: | 12.7% | 12.0% | 12.4% |

12. In its 2010 Restatement, Medifast acknowledged that it had a material weakness in its internal controls over financial reporting because the preparation and review process for the calculation of its tax provision was inadequate, which led to errors in the computation of its deferred tax assets, deferred tax liabilities, and the income tax provision. Medifast's audit firm also expressed an adverse opinion in its report on the Company's internal control over financial reporting as of December 31, 2009, due to the material weakness in Medifast's accounting for income taxes.

13. Subsequently, in connection with the audit of Medifast's 2010 internal control over financial reporting, the Company's auditor found that Medifast had a material weakness in its internal control over income tax accounting, including a failure to reconcile its prior-year tax returns with its reported prior-year tax provisions.

Violations

14. Section 13(a) of the Exchange Act requires issuers that have securities registered pursuant to Section 12 of the Exchange Act to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rule 13a-1 requires issuers to file annual reports with the Commission. In addition to the information expressly required to be included in such reports, Rule 12b-20 under the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading. "The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports." *SEC v. Savoy Industries*, 587 F. 2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). A violation of the reporting provisions is established if a report is shown to contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975). As described above, Connors was responsible for preparing Medifast's financial statements for the years 2006 through 2008 and caused Medifast to issue annual reports on Form 10-K for those years which materially misrepresented the Company's financial results. Accordingly, Connors aided and abetted and was a cause of Medifast's violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder.

15. Section 13(b)(2)(A) of the Exchange Act and Rule 13b2-1 require issuers to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets, and prohibit any person from directly or indirectly causing to be falsified any book, record, or account subject to Section 13(b)(2)(A). Scierter is not required to establish a violation of Rule 13b2-1. *See, e.g., SEC v. Das, et al.*, No. 12-2780, slip op. at 17 (8th Cir. July 29, 2013); *SEC v. Softpoint*, 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997), *aff'd*, 159 F. 3d 1348 (2d Cir.1998). Instead, violations of this rule may be established by showing negligent conduct. As described above, Connors was responsible for the Company's improper accounting regarding its tax provision from 2006 through 2008 and caused Medifast's improper recording of its tax provision in its books and records. Accordingly, Connors violated Rule 13b2-1 and aided and abetted and was a cause of Medifast's violations of Section 13(b)(2)(A) of the Exchange Act.

16. Section 13(b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in accordance with GAAP. As discussed above, Connors failed to devise and maintain adequate internal accounting controls with regard to the Company's income tax accounting. As a result, Connors aided and abetted and was a cause of Medifast's violations of Section 13(b)(2)(B) of the Exchange Act.

Findings

17. Based on the foregoing, the Commission finds that Connors violated Rule 13b2-1 of the Exchange Act and willfully aided and abetted and was a cause of Medifast's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Connors' Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Connors shall cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder.

B. Connors is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After one year from the date of this order, Connors may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Connors' work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Connors, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("PCAOB") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Connors, or the registered public accounting firm with which he/she is associated, has been inspected by the PCAOB and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Connors has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and

(d) Connors acknowledges his responsibility, as long as he appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

D. The Commission will consider an application by Connors to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Connors' character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

E. Connors shall, within 180 days of the entry of this Order, pay a civil money penalty in the amount of \$40,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Brendan N. Connors as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

By the Commission.

Elizabeth M. Murphy
Secretary