

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73046 / September 10, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16075

In the Matter of

Neil Gagnon,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER AND CIVIL PENALTY

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Neil Gagnon (“Gagnon” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and Civil Penalty (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws.
2. Section 13(d) of the Exchange Act and the rules promulgated thereunder require any person or group who directly or indirectly acquires beneficial ownership of more than 5% of a Section 12 registered equity security to file a statement with the Commission disclosing certain information relating to such beneficial ownership. Section 13(d) is a key provision that allows shareholders and potential investors to evaluate changes in substantial shareholdings. See 113 Cong. Rec. 855 (1967). The duty to file is not dependent on any intention by the stockholder to gain control of the company, but on a mechanical 5% ownership test.
3. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of inside information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.
4. While subject to these reporting requirements due to his beneficial ownership of the registered common stock of General Finance Corporation ("GFN") and NTS, Inc. ("NTS"), Respondent violated Section 16(a) by failing to timely file multiple reports of transactions in GFN's and NTS's securities and violated Section 13(d) by failing to timely file a Schedule 13D and required amendments with respect to Respondent's beneficial ownership of GFN's securities.

Respondent

5. Neil Gagnon, age 73, is the managing member and principal shareholder of Gagnon Securities LLC ("GS"). GS has been registered with the Commission as an investment adviser

¹ 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.

since October 2005 and as a broker-dealer since June 2000. Gagnon acquired beneficial ownership of more than 5% of GFN's common stock by June 2007, became a greater than 10% beneficial owner by September 2007, and acquired beneficial ownership of more than 20% of GFN's common stock by December 2009. Gagnon acquired beneficial ownership of more than 5% of NTS's common stock by November 2007, and became a greater than 10% beneficial owner by January 2008.

Issuers

6. GFN is a Delaware corporation with its principal place of business in California. GFN's common stock is and has been at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the NASDAQ stock market (ticker: GFN).

7. NTS, formerly known as XFone, Inc., is a Nevada corporation with its principal place of business in Texas. NTS's common stock is and has been at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the NASDAQ stock market (ticker: NTS).

Applicable Legal Framework

8. Under Section 13(d)(1) of the Exchange Act, any person who has acquired beneficial ownership of more than 5% of any equity security of a class registered under Section 12 of the Exchange Act must publicly file, within 10 days after the acquisition, a disclosure statement with the Commission. Rule 13d-1(a) requires the statement to contain the information specified by Schedule 13D, which includes, among other things, the identity of the beneficial owners, the amount of beneficial ownership, and plans or proposals regarding the issuer.

9. The term "beneficial owner" is defined broadly under Section 13(d) of the Exchange Act, through the application of Rule 13d-3, to include "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. More than one person may be a beneficial owner of the same securities. Because this definition of beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity.²

² See Amendments to Beneficial Ownership Reporting Requirements, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998). If the organizational structure of the parent and related entities are such that the voting and investment powers over the subject securities are exercised independently, attribution may not be required for the purposes of determining the aggregate amount owned by the controlling persons if certain conditions concerning independence are met. Id.

10. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder require a filer to amend a Schedule 13D promptly as material changes occur in disclosures previously made. An acquisition or disposition of 1% or more of a class of securities is deemed material for purposes of Rule 13d-2. Any delay in filing beyond the date the filing reasonably can be made may not be prompt.³

11. As an alternative to filing on Schedule 13D, certain statutory provisions and rules allow the use of short-form disclosure statements on Schedule 13G with differing timing requirements under certain conditions. Rule 13d-1(c) provides that, in lieu of filing a Schedule 13D, a person may file a short-form statement on Schedule 13G within 10 days after the triggering acquisition if the person “has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect,” and is not directly or indirectly the beneficial owner of 20% or more of the class of securities (a “Passive Investor 13G Filer”). Under Rule 13d-1(f), a person who has filed a Schedule 13G pursuant to Rule 13d-1(c) must file a Schedule 13D within 10 days after beneficial ownership first equals 20% of the class and is prohibited from voting or acquiring additional securities of the class until 10 days after the Schedule 13D is filed.

12. Rule 13d-1(b) also provides certain qualified institutional investors, such as registered investment advisers and broker-dealers, with an additional alternative by permitting a Schedule 13G to be filed in lieu of Schedule 13D within 45 days after the end of the calendar year in which they made the triggering acquisition, so long as the specified institutions acquired beneficial ownership of the securities “in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect” (a “Qualified Institution 13G Filer”). A parent holding company or control person of a Qualified Institution 13G Filer may also file on Schedule 13G under Rule 13d-1(b), provided that the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries and affiliates that are not eligible as Qualified Institution 13G Filers, does not exceed 1% of the class of securities (a “Qualified Control Person 13G Filer”). Under Rule 13d-1(g), any person who has filed a Schedule 13G pursuant to Rule 13d-1(b) and thereafter ceases to be a person permitted to file under such rule must file within 10 days thereafter a Schedule 13D or an amendment to Schedule 13G if such person satisfies the requirements of Rule 13d-1(c).

13. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, “insiders”). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means any person who is deemed a beneficial

³ SEC Release No. 34-39538, at n. 14.

owner under Section 13(d) of the Exchange Act and the rules thereunder, except that persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers are not deemed the beneficial owner of any securities held by the qualified institution “for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business . . . as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer.”

14. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of the Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer in which the insider has or is deemed to have a direct or indirect pecuniary interest. To keep this information current, insiders must file Form 4 reports disclosing transactions resulting in a change in beneficial ownership within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer’s fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer’s most recent fiscal year and any transactions eligible for deferred reporting (unless the insider has previously reported all such transactions).

15. There is no state of mind requirement for violations of Sections 16(a) and 13(d) and the rules thereunder.⁴ The failure to timely file a required report, even if inadvertent, constitutes a violation.⁵

⁴ See Lexington Resources Inc., et al., 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (“A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)].”); Robert G. Weeks, et al., 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 2, 2002) (“No showing of scienter is required to prove violations of these reporting provisions.”); see also SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (“Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.”).

⁵ Cf. Oppenheimer & Co., Inc., 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (“We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation.”); see generally SEC Release No. 34-47809 (noting that an issuer’s eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders

Respondent Failed to File Required Section 16(a) Reports on a Timely Basis

16. Respondent has been subject to the reporting requirements of Exchange Act Section 16(a) as a greater than 10% beneficial owner of GFN’s common stock since September 2007 and as a greater than 10% beneficial owner of NTS’s common stock from January 2008 to July 2012.⁶ Respondent filed initial statements of beneficial ownership on Form 3 on September 27, 2007 with respect to GFN and on January 10, 2008 with respect to NTS.

17. Subsequently, Respondent did not file until May 2012 any of the required reports on Forms 4 and 5 for reportable transactions in GFN’s or NTS’s securities from March 2008 through March 2012. Respondent filed a total of 10 Forms 5 and 1 Form 4 on May 21 and 24, 2012, to report transactions in GFN’s securities on more than 75 dates from March 2008 through March 2012 that were required to be reported on Form 4 within two business days of the date of the transactions. Respondent also filed a total of 8 Forms 5 and 1 Form 4 on May 21 and 23, 2012 to report transactions in NTS’s securities on more than 100 dates from March 2008 through March 2012 that were required to be reported on Form 4 within two business days of the date of the transactions. Thereafter, Respondent also failed to file on a timely basis additional transactions required to be reported on Form 4 within two business days.

18. Respondent’s late reports with respect to GFN include transactions executed on the following dates, which primarily involved open-market sales of GFN’s common stock:

<u>Date of Trans.</u>	<u>Due Date</u>	<u>Date Filed</u>
7/22/2010	7/26/2010	5/21/2012
9/15/2010	9/17/2010	5/21/2012
9/17/2010	9/21/2010	5/21/2012

“does not change the fact that any Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)” (emphasis added); Herbert Moskowitz, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (“evidence of both motive for non-disclosure and actual market impact ... is irrelevant” to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

⁶ Respondent was not eligible under Exchange Act Rule 16a-1(a)(1)(vii) to exclude any securities over which he is deemed to have direct or indirect beneficial ownership under Rule 13d-3 with respect to both GFN and NTS. At all relevant times, the aggregate amount held directly by Respondent, and directly and indirectly by Respondent’s affiliates other than GS, exceeded 1% of the relevant class of common stock, and at certain times exceeded 10% of the class.

<u>Date of Trans.</u>	<u>Due Date</u>	<u>Date Filed</u>
9/27/2010	9/29/2010	5/21/2012
10/1/2010	10/5/2010	5/21/2012
4/19/2011	4/21/2011	5/21/2012
4/20/2011	4/22/2011	5/21/2012
4/21/2011	4/25/2011	5/21/2012
4/25/2011	4/27/2011	5/21/2012
6/1/2011	6/3/2011	5/21/2012
6/3/2011	6/7/2011	5/21/2012
8/8/2011	8/10/2011	5/24/2012
9/14/2011	9/16/2011	5/24/2012
3/15/2012	3/19/2012	5/24/2012
6/1/2012	6/5/2012	1/14/2013
2/6/2013	2/8/2013	2/13/2013
2/13/2013	2/15/2013	2/20/2013
2/27/2013	3/1/2013	3/5/2013

19. Respondent's late reports with respect to NTS include transactions executed on the following dates, which primarily involved open-market sales of NTS's common stock:

<u>Date of Trans.</u>	<u>Due Date</u>	<u>Date Filed</u>
10/7/2010	10/12/2010	5/21/2012
10/8/2010	10/13/2010	5/21/2012
10/14/2010	10/18/2010	5/21/2012
11/4/2010	11/8/2010	5/21/2012
11/9/2010	11/12/2010	5/21/2012
11/10/2010	11/15/2010	5/21/2012
11/15/2010	11/17/2010	5/21/2012
11/16/2010	11/18/2010	5/21/2012
1/19/2011	1/21/2011	5/21/2012

<u>Date of Trans.</u>	<u>Due Date</u>	<u>Date Filed</u>
1/26/2011	1/28/2011	5/21/2012
1/27/2011	1/31/2011	5/21/2012
1/28/2011	2/1/2011	5/21/2012
1/31/2011	2/2/2011	5/21/2012
2/1/2011	2/3/2011	5/21/2012
9/26/2011	9/28/2011	5/21/2012
11/2/2011	11/4/2011	5/21/2012
12/19/2011	12/21/2011	5/21/2012
12/20/2011	12/22/2011	5/21/2012
12/21/2011	12/23/2011	5/21/2012
1/9/2012	1/11/2012	5/21/2012
1/27/2012	1/31/2012	5/21/2012
2/15/2012	2/17/2012	5/23/2012
2/16/2012	2/21/2012	5/23/2012
2/17/2012	2/22/2012	5/23/2012
2/21/2012	2/23/2012	5/23/2012
2/28/2012	3/1/2012	5/23/2012
3/5/2012	3/7/2012	5/23/2012
6/26/2012	6/28/2012	7/12/2012
6/27/2012	6/29/2012	7/12/2012
6/28/2012	7/2/2012	7/12/2012
7/3/2012	7/6/2012	7/12/2012
7/5/2012	7/9/2012	7/12/2012

20. Respondent also failed to timely file required Forms 5 with respect to GFN and NTS to report transactions that should have been reported on Forms 4 during this time period but were not.

21. As a result of the conduct described above, Respondent violated Section 16(a) of the Exchange Act and Rule 16a-3 thereunder.

Respondent Failed to Timely File Schedule 13D Statements and Amendments

22. Respondent has been subject to the reporting requirements of Exchange Act Section 13(d) since acquiring beneficial ownership of more than 5% of GFN's common stock as of June 29, 2007, and remains subject to those requirements. Respondent filed a Schedule 13G as a Passive Investor 13G Filer pursuant to Rule 13d-1(c) on July 9, 2007. Respondent and GS thereafter jointly filed a Schedule 13G purportedly pursuant to Rule 13d-1(b) as a Qualified Control Person 13G Filer and a Qualified Institution 13G Filer. However, Respondent was not eligible as a Qualified Control Person 13G Filer because the aggregate amount held directly by Respondent, and directly and indirectly by Respondent's affiliates other than GS, exceeded 1% of GFN's class of common stock.

23. By December 31, 2009, Respondent was also no longer eligible to file on Schedule 13G as a Passive Investor 13G Filer because Respondent's beneficial ownership exceeded 20% of GFN's class of common stock. As a result, Respondent was required to file a Schedule 13D within 10 days of the date on which Respondent's beneficial ownership equaled or exceeded 20% and was prohibited from the time of the acquisition of 20% or more of the class until the expiration of the tenth day from the date of the filing of the Schedule from voting the securities or acquiring additional beneficial ownership under Rule 13d-1(f). From December 2009 until April 5, 2012, Respondent incorrectly filed on Schedule 13G and acquired beneficial ownership of additional GFN securities while prohibited from doing so. Respondent's transactions also triggered the requirement that Respondent file multiple amendments during this time period.

24. In addition, Respondent thereafter failed to timely file amendments required as a result a disposition of more than 1% of GFN's common stock in transactions. For example, by January 14, 2013, Respondent had disposed of more than 1% of GFN's common stock beneficially owned and between January 15, 2013 and January 22, 2013 disposed of additional GFN common stock constituting more than 1% of the class. Respondent did not file an amendment reflecting such dispositions until April 25, 2013.

25. As a result of the conduct described above, Respondent violated Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 promulgated thereunder.

Respondent's Remedial Efforts

26. Respondent has represented that his delinquent filings prior to May 2012 resulted from the failure of GS's outside counsel and GS personnel to correctly advise him of his obligations and to make timely filings on his behalf. Respondent's reliance on GS personnel and consultation with counsel does not excuse his violations because an insider retains legal

responsibility for compliance with the filing requirements.⁷ In addition, here, Respondent has not offered adequate evidence of the scope of the engagements of counsel, the factual circumstances upon which counsels' advice was predicated, or that Respondent and GS personnel fully complied with such advice.

27. In determining to accept Respondent's Offer, the Commission considered certain remedial acts undertaken by Respondent, circumstances relating to Respondent's representations as to reliance, and cooperation afforded to Commission staff.

IV.

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

Accordingly, pursuant to Sections 21B and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(d) and 16(a) of the Exchange Act and Rules 13d-1, 13d-2 and 16a-3 promulgated thereunder.

B. Respondent shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$75,000 to the Securities and Exchange Commission, for transmission 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:

⁷ See SEC Release 34-37260 (May 31, 1996) ("Each beneficial owner [making a joint or group filing] will retain individual liability for compliance with the filing requirements, including the obligation to assure that the filing is timely and accurately made."); SEC v. Levy, 706 F. Supp. 61, 63-69 (D.D.C. 1989) (defendant asserting that his attorney "misinformed defendant about his obligation to disclose" information on Schedule 13D held liable because scienter is not an element of such violations); see also SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1315 n.28 (D.D.C. 1981) ("Compliance with federal securities laws cannot be avoided simply by retaining outside counsel to prepare required documents."); Bettina Bancroft, 53 SEC Docket 1955, 1993 WL 81744, at *3 (Mar. 23, 1993) ("Although the Commission encourages individuals to obtain professional assistance in meeting their filing obligations, Section 16 of the Exchange Act places the responsibility to report changes in securities ownership on insiders.").

- (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 Neil Gagnon 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 Timothy Casey, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

By the Commission.

Jill M. Peterson
Assistant Secretary