

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

**SECURITIES AND EXCHANGE
COMMISSION**

Plaintiff,

v.

DAVID ERIC NESVISKY,

Defendant.

Civil Action No. _____

COMPLAINT

Plaintiff Securities and Exchange Commission (“Commission”) alleges:

SUMMARY

1. In the third quarter of 2003, Quovadx, Inc. (“Quovadx” or the “Company”), a Colorado-based software company, fraudulently recognized approximately \$380,000 in revenue from three purported sales of software licenses to one of its resellers, MicroStar, Inc. (“MicroStar”), an Ohio company that sells software licenses and maintenance services to the healthcare industry. These purported sales were part of a parking arrangement designed to accelerate revenue recognition for Quovadx from transactions that Quovadx was in the process of negotiating with other customers but had been unable to finalize before the end of the quarter. MicroStar had neither the ability nor the intent to pay for the licenses unless and until Quovadx found customers to buy the licenses. As a result, Quovadx improperly recognized approximately \$380,000 in revenue from the purported sales to MicroStar and materially overstated its software licensing revenue by approximately 14% for the third quarter of 2003.

2. Defendant David Nesvisky (“Nesvisky”) was Quovadx’s Executive Vice President of Sales during the relevant time. Nesvisky reported directly to Quovadx’s President and CEO. Nesvisky proposed parking the software licenses with MicroStar in order to accelerate Quovadx’s recognition of revenue from the sale of those licenses and participated in structuring the parking arrangement. Quovadx’s President and CEO approved this parking arrangement, which resulted in the fraudulent recognition of revenue. Nesvisky subsequently participated in a plan to channel an unrelated payment which created the appearance that MicroStar had partially paid for its “purchases.” Nesvisky also signed an annual management representation letter that failed to disclose the true facts and circumstances of the MicroStar transactions to Quovadx’s auditor.

3. By the conduct described below, Nesvisky violated, or aided and abetted violations of, the antifraud, reporting, books and records, and internal controls provisions of the federal securities laws. Unless enjoined by order of this Court, Nesvisky is likely to commit such violations in the future. The Commission seeks a judgment permanently enjoining the defendant from further securities law violations and imposing civil monetary penalties.

JURISDICTION

4. This Court has jurisdiction pursuant to Section 22 of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77v(a)] and Sections 21 and 27 of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78u and 78aa].

5. Nesvisky, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, in connection with the transactions, acts, practices, and courses of business described in this Complaint, certain of which have occurred within this judicial district.

THE DEFENDANT

6. While employed at Quovadx, David Nesvisky, age 45, resided in Englewood, Colorado. He currently resides in North Carolina. He was executive vice president of sales at Quovadx from approximately March 2002 until May 2004.

RELATED ENTITY

7. Quovadx, a Delaware corporation based in Englewood, Colorado, is a software company that licenses software and sells related services to the healthcare industry. Quovadx's stock was registered with the Commission under Section 12(g) of the Exchange Act and traded on the NASDAQ National Market. During 2002 and 2003, Quovadx derived about one-third of its reported revenue from software licensing fees, with the rest coming from software maintenance and service contracts. Quovadx separately reported its software licensing revenue, which included sales of both software and licenses. During the relevant period, Quovadx had a continuously effective offering of securities pursuant to Form S-8. It also registered an offer of securities pursuant to Form S-4 in the fourth quarter of 2003.

RELEVANT ACCOUNTING STANDARDS

8. As a public company, Quovadx was required to file quarterly and annual reports with the Commission that presented its financial results in conformity with Generally Accepted Accounting Principles ("GAAP"). The American Institute of Certified Public Accountants' Statement of Position 97-2, *Software Revenue Recognition* ("SOP 97-2") and related interpretations are the principal GAAP provisions governing the recognition of revenue for sales of software and software licenses.

9. Under SOP 97-2, a company may not recognize revenue from a software license sale unless and until there is: persuasive evidence of an arrangement; delivery of

the software; a fixed or determinable seller's fee; and a reasonable probability of collecting the accounts receivable. Further, if payment is substantially contingent on the buyer's success in distributing the product to the customer, either due to the terms of the deal or because the buyer is so undercapitalized that it cannot pay until it sells the product, the seller may not recognize the software license revenue at the time of sale. In its financial reports filed with the Commission, Quovadx claimed that it had recognized revenue in accordance with GAAP.

FACTUAL ALLEGATIONS

10. In late September 2003, Nesvisky learned from his sales staff that transactions Quovadx had been negotiating with three customers were not likely to close until the fourth quarter. Nesvisky asked his sales staff to find other Quovadx customers who might be willing to hold the software products in their inventory pending resale to these three customers. One of his salespersons contacted the president of MicroStar, who agreed to this arrangement. Nesvisky proposed this parking arrangement to Quovadx's then President and CEO. Quovadx's President and CEO approved this arrangement, stating to Nesvisky in an e-mail that: "We need \$8m, so let's get it done. We're too close to miss the q."

11. Thereafter, Quovadx entered into three separate software license purchase contracts with MicroStar. Nesvisky's sales staff also reached a verbal side-agreement with MicroStar whereby MicroStar would not have to pay Quovadx unless and until the customers with whom Quovadx had been negotiating bought the software from MicroStar or Quovadx found other customers for MicroStar. Despite the material contingency embodied in the verbal side-agreement with MicroStar, Quovadx treated the

MicroStar contracts as bona fide sales agreements and recorded approximately \$380,000 of revenue in the third quarter.

12. Shortly after Quovadx filed its quarterly report, Nesvisky and others learned that MicroStar had not paid for any of the software licenses because the anticipated customers had declined to buy the licenses from MicroStar. Quovadx did not reverse the revenue. Instead, with the approval of members of Quovadx's senior management, Nesvisky directed Quovadx's sales staff to find alternative customers to buy the software licenses from MicroStar. Quovadx's sales staff was unable to find other buyers.

13. In December 2003, Nesvisky learned that one of the three anticipated customers had purchased *different* software licenses for approximately \$257,000 from a Quovadx subsidiary in the United Kingdom. Nesvisky conferred with Quovadx's then controller and they determined to apply the customer's payment against MicroStar's outstanding account receivable. When the customer made the payment in February 2004 to Quovadx's U.K. subsidiary, the U.K. subsidiary reversed the transaction between it and the customer from its books and sent the approximately \$257,000 to Quovadx's U.S. offices. Then, with Nesvisky's knowledge and participation, Quovadx wired this money to MicroStar with the instruction that MicroStar wire it back to Quovadx, less \$10,000 as payment to MicroStar for holding the licenses. MicroStar complied with the instructions. By channeling the payment through MicroStar, Quovadx created the false appearance that MicroStar had paid a significant portion of what it owed. At Nesvisky's direction, Quovadx's employees continued to search for additional opportunities to channel software license sales through MicroStar to eliminate the remaining balance.

14. On or about February 9, 2004, in conjunction with the audit of Quovadx's annual report for 2003, Nesvisky signed a management representation letter to Quovadx's auditor. In the letter, Nesvisky represented that Quovadx's written sales agreements constituted the totality of the arrangements with Quovadx's customers and that there were no side-agreements.

15. In August 2004, after Quovadx terminated Nesvisky's employment, Quovadx reversed all three of the purported software license sales to MicroStar.

FIRST CLAIM FOR RELIEF

Violations of Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)]

16. The Commission realleges and incorporates herein by reference paragraphs 1 through 15 above.

17. Section 17(a)(3) of the Securities Act prohibits a person from engaging in any transaction, practice, or course of business which would operate as a fraud or deceit upon a purchaser in the offer or sale of any securities. One of the ways a person violates Section 17(a)(3) is to engage in transactions, practices or courses of business that result in materially false or misleading statements or material omissions in Commission filings or in other statements disseminated to investors.

18. Nesvisky proposed and structured the parking arrangement between Quovadx and MicroStar in the third quarter of 2003. The arrangement had no legitimate business purpose and MicroStar would not pay for the software licenses unless it could resell them to customers identified by Quovadx. Further, at Nesvisky's suggestion and with his involvement, Quovadx funneled an unrelated payment through MicroStar that made it appear that MicroStar had partially paid for the licenses.

19. By engaging in the conduct described above, Nesvisky violated Section 17(a)(3) of the Securities Act.

SECOND CLAIM FOR RELIEF

Violation of Exchange Act Rule 13b2-2 [17 C.F.R. § 240.13b2-2]

20. The Commission realleges and incorporates herein by reference paragraphs 1 through 19 above.

21. Exchange Act Rule 13b2-2 prohibits any director or officer of an issuer from directly or indirectly making or causing to be made misleading statements to an accountant in connection with an audit.

22. Nesvisky made materially false or misleading statements and omitted to disclose material information to Quovadx's auditor in the management representation letter he signed on February 9, 2004. Contrary to his representations in the letter, Nesvisky knew (1) that a substantial portion of the MicroStar receivable was to be paid with proceeds from an unrelated transaction and (2) that any further payment for the third quarter "purchases" depended upon Quovadx identifying customers to purchase the software licenses from MicroStar.

23. By reason of the foregoing, Nesvisky violated Exchange Act Rule 13b2-2.

THIRD CLAIM FOR RELIEF

Aiding and Abetting Violations of Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 12b-20, 13a-11 and 13a-13 [17 C.F.R. §§ 240.12b-20, 13a-11 and 13a-13]

24. The Commission realleges and incorporates by herein by reference paragraphs 1 through 23 above.

25. Section 13(a) of the Exchange Act and Rules 13a-11, and 13a-13 thereunder require that issuers with securities registered under Section 12 of the Exchange Act, such as Quovadx, file periodic reports with the Commission that are

complete and accurate in all material respects. Exchange Act Rule 12b-20 requires that, in addition to the information expressly required to be included in a statement or report, an issuer must 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.

26. Quovadx materially overstated its software licensing revenue in the third quarter of 2003 by improperly recognizing revenue from the three purported sales of software licenses to MicroStar. As a result, Quovadx's quarterly report for the third quarter of 2003 and the earning release attached to its Form 8-K for that quarter contained materially inaccurate and misleading statements. By proposing and structuring the parking arrangement between Quovadx and MicroStar in the third quarter of 2003 and channeling an unrelated payment through MicroStar that made it appear that MicroStar had partially paid for the licenses, Nesvisky knowingly provided substantial assistance to Quovadx in its violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-11 and 13a-13 thereunder.

27. By reason of the foregoing, Nesvisky aided and abetted Quovadx's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-11 and 13a-13 thereunder.

FOURTH CLAIM FOR RELIEF

Aiding and Abetting Violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78m(b)(2)(A) and 78m(b)(2)(B)]

28. The Commission realleges and incorporates herein by reference paragraphs 1 through 27 above.

29. Section 13(b)(2)(A) of the Exchange Act requires that issuers with securities registered under Section 12 of the Exchange Act, such as Quovadx, make and keep books,

records, and accounts that accurately and fairly represent the transactions of the company.

Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and to maintain accountability of assets.

30. Quovadx's books and records were materially inaccurate during the relevant time period because they overstated software licensing revenue and did not accurately or fairly reflect the transactions of the company. Quovadx also failed to maintain internal controls sufficient to ensure that revenue recognition would occur properly and that its financial statements would be prepared in conformity with GAAP. Accordingly, Quovadx violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

31. By proposing and structuring the parking arrangement between Quovadx and MicroStar in the third quarter of 2003 and channeling an unrelated payment through MicroStar that made it appear that MicroStar had partially paid for the licenses, Nesvisky knowingly provided substantial assistance to Quovadx in its violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

32. By reason of the foregoing, Nesvisky aided and abetted Quovadx's violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

PRAYER FOR RELIEF

The Commission respectfully requests that this Court enter a final judgment against Defendant Nesvisky:

- A. finding that Defendant Nesvisky committed the violations alleged above;
- B. permanently enjoining Defendant Nesvisky from: violating Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)]; violating or aiding and abetting violations of Exchange Act Rule 13b2-2 [17 C.F.R. § 240.13b2-2]; and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78m(a), 78m(b)(2)(A) and 78m(b)(2)(B)] and Rules 12b-20, 13a-11, and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 13a-11 and 13a-13];
- C. ordering Defendant Nesvisky to pay an appropriate civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77(t)(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78(u)(d)(3)];
- D. retaining jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and
- E. granting such other and additional relief as this Court deems just and proper.

Dated: July 17, 2007


Richard E. Simpson
Thomas W. Peirce

Attorneys for Plaintiff
Securities and Exchange Commission
100 F. Street N.E.
Washington, DC 20549
(202) 551-4492 (Simpson)