

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 54824 / November 28, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Rel. No. 2517 / November 28, 2006

Admin. Proc. File No. 3-10764

In the Matter of  
Kenneth W. Haver, CPA

ORDER DENYING MOTION TO REOPEN PROCEEDING OR VACATE SUSPENSION

I.

On March 4, 2002, the Commission filed a complaint in federal district court against Kenneth W. Haver, a certified public accountant and formerly the chief financial officer of Telxon Corporation ("Telxon"), seeking an injunction against violating the federal securities laws. The complaint alleged that Haver "knowingly or recklessly violated or aided and abetted violations of" the antifraud, reporting, and recordkeeping provisions of the Securities Exchange Act of 1934 and rules thereunder. The complaint alleged specifically that Haver "caused Telxon to improperly recognize revenue for three purported sales transactions" on financial statements contained in a Form 10-Q for the quarter ended September 30, 1998, which "inflated Telxon's quarterly revenues by 23% and quarterly profits by 270%." On March 13, 2002, Haver, without admitting or denying the allegations in the complaint, consented to the entry of a permanent injunction. The federal district court imposed the injunction, without the presentation of any evidence or the adjudication of any issue of fact or law, on April 9, 2002. <sup>1/</sup>

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<sup>1/</sup> See SEC v. Haver, Docket No. 5:02 CV 414 (N.D. Ohio Apr. 9, 2002). The court enjoined Haver from violating Exchange Act Sections 10(b) and 13(b)(5) and Rules 10b-5 and 13b2-1 thereunder and from aiding and abetting violations of Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) and Rules 12b-20, 13a-1, and 13a-13 thereunder. Haver also consented to, and the court imposed, a civil penalty of \$75,000.

On March 13, 2002, the same day as he consented to the entry of the permanent injunction, Haver submitted an offer of settlement to the Commission which stated that, "in anticipation of the institution of public administrative proceedings against him" pursuant to Commission Rule of Practice 102(e), he consented to a suspension from appearing or practicing before the Commission as an accountant. The Commission imposed the suspension on April 24, 2002 (the "Rule 102(e) Order"). <sup>2/</sup> The Commission based the suspension on the existence of the federal court injunction entered with Haver's consent. Rule 102(e)(3) provides that the Commission may suspend from appearing or practicing before it an accountant who has been permanently enjoined, in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the federal securities laws or the rules and regulations thereunder. <sup>3/</sup> The Rule 102(e) Order made no findings regarding the misconduct alleged in the injunctive complaint. Haver consented to the suspension without admitting or denying any findings, except that he admitted the permanent injunction had been entered against him. The Rule 102(e) Order provided that Haver could apply for reinstatement after five years.

Haver now seeks relief from the Rule 102(e) Order. According to Haver, "compelling new evidence" obtained in a related class action by Telxon shareholders against Haver, Telxon, and its auditor, PricewaterhouseCoopers LLP ("PWC"), justifies such relief. The "new evidence" proffered by Haver consists of PWC workpapers produced in the class action which suggest, according to Haver, that Telxon disclosed the three violative transactions to PWC. Haver contends that "the Commission's finding that [he] acted knowingly or recklessly when accounting for [the three violative transactions] . . . was, to a large degree, supported by the testimony of the senior members of the PWC engagement team that Mr. Haver failed to disclose these transactions to the engagement team voluntarily and in response to specific inquiry." Haver argues, therefore, that the "[e]vidence produced by PWC in the securities litigation . . . establishes that this testimony . . . was false and otherwise not credible" and that Haver "did not act with a knowing or reckless intent to defraud."

Haver claims that he "did not have access to PWC's workpapers . . . in support of his defense to the Commission's charges" at the time of his settlement. Haver asserts further that the Commission did not have access to "some" of these workpapers, noting that the judge in the class action lawsuit found that PWC had not "produced a complete set of workpapers to the SEC in good faith." According to Haver, the "existence of compelling evidence (none of which Haver had access to at the time he consented to the Rule 102(e) Order, and some of which was unlawfully withheld from the SEC by Telxon's auditor) supporting Haver's position that he did not act willfully when misreporting the subject transactions, is a compelling circumstance supporting his request for equitable relief."

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<sup>2/</sup> Kenneth W. Haver, CPA, Securities Exchange Act Rel. No. 45814 (Apr. 24, 2002), 77 SEC Docket 1427.

<sup>3/</sup> 17 C.F.R. § 201.102(e)(3).

Haver seeks two forms of relief. First, he seeks "reconsideration of [the Commission's] findings that Mr. Haver violated Sections 10(b) and 13(b)(5) and Rule 13b2-1 of the Exchange Act." Second, he requests that the Commission "reconsider his acceptance of a suspension from practice before the Commission as a term required in settlement of all charges brought against him." Haver notes that the Ohio Accountancy Board revoked his CPA certificate solely on the basis of his acceptance of a suspension from practice before the Commission. <sup>4/</sup>

The Division of Enforcement opposes Haver's request on the grounds that he has not "demonstrated compelling facts or circumstances that would support a grant of relief." According to the Division, "Haver does not present a basis for vacating or modifying the sanctions imposed in the Rule 102(e) proceedings," which were based, not on a hearing with a record, but on the consent injunction entered against Haver. The Division notes that the revocation of his CPA certificate by the Ohio Accountancy Board was a foreseeable consequence of the Commission's suspension order. The Division also notes that, as early as next April, Haver may apply for reinstatement to resume appearing or practicing before the Commission.

For the reasons discussed below, we have determined to deny Haver's requested relief.

## II.

We have generally considered petitions to vacate orders imposed with a respondent's consent in the context of petitions to vacate administrative bar orders imposed in settled proceedings. <sup>5/</sup> In these cases, we have stated that our "long-standing approach to petitions to vacate or modify . . . reflects [our] statutory obligation to ensure that a request for relief or modification comports with the public interest and investor protection." <sup>6/</sup> The factors that guide this public interest/investor protection inquiry are:

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<sup>4/</sup> In his reply brief, Haver states that his petition is "fairly characterize[d]" as a "request to vacate the suspension from appearing or practicing before [the Commission]."

<sup>5/</sup> See, e.g., William Masucci, Exchange Act Rel. No. 53121 (Jan. 13, 2006), 87 SEC Docket 347 (considering petition to vacate a bar imposed with respondent's consent after respondent consented to injunction by a federal district court); Jesse M. Townsley, Exchange Act Rel. No. 52161 (July 29, 2005), 85 SEC Docket 4341 (same); see also Mark S. Parnass, Exchange Act Rel. No. 50730 (Nov. 23, 2004), 84 SEC Docket 727; Peter F. Comas, Exchange Act Rel. No. 49894 (June 18, 2004), 83 SEC Docket 251; Stephen S. Wien, Exchange Act Rel. No. 49000 (Dec. 29, 2003), 81 SEC Docket 3758; Ciro Cozzolino, Exchange Act Rel. No. 49001 (Dec. 29, 2003), 81 SEC Docket 3769; Edward I. Frankel, Exchange Act Rel. No. 49002 (Dec. 29, 2003), 81 SEC Docket 3778.

<sup>6/</sup> Wien, 81 SEC Docket at 3764; see also Cozzolino, 81 SEC Docket at 3774; Frankel, 81 SEC Docket at 3784.

the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement's response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors. <sup>7/</sup>

Not all of these factors will be relevant in determining the appropriateness of relief in a particular case, and no one factor is dispositive. <sup>8/</sup> We have held that bars should "remain in place in the usual case and be removed only in compelling circumstances." <sup>9/</sup> We agree with the Division of Enforcement, which, as indicated, opposes Haver's request, that Haver's petition does not present such compelling circumstances.

We have noted previously our "strong interest" in the finality of our settlement orders. <sup>10/</sup> "Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action." <sup>11/</sup> "If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would

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<sup>7/</sup> Wien, 81 SEC Docket at 3765-66; see also Cozzolino, 81 SEC Docket at 3774-75; Frankel, 81 SEC Docket at 3784-85.

<sup>8/</sup> Wein, 81 SEC Docket at 3765 (stating that, in considering the factors that guide this public interest/investor protection inquiry, "no one factor is dispositive"); cf. IFG Network Secs., Exchange Act Rel. No. 54127 (July 11, 2006), \_\_ SEC Docket \_\_, \_\_ (stating that, in considering the factors that determine whether a cease-and-desist order is appropriate, "not all factors need to be considered, and no factor is dispositive").

<sup>9/</sup> Wien, 81 SEC Docket at 3766; see also Masucci, 87 SEC Docket at 348; Townsley, 85 SEC Docket at 4343; Parnass, 84 SEC Docket at 729; Comas, 83 SEC Docket at 252-53; Cozzolino, 81 SEC Docket at 3775; Frankel, 81 SEC Docket at 3785.

<sup>10/</sup> Putnam Invest. Mgmt., Order Denying Motion to Vacate Administrative Orders, Exchange Act Rel. No. 50039 (July 20, 2004), 83 SEC Docket 1262, 1265.

<sup>11/</sup> David T. Fleischman, 43 S.E.C. 518, 522 (1967) (finding that "the failure of a respondent to testify and adduce available evidence to meet the charges against him . . . does not entitle him to have the proceedings reopened after the issuance of an adverse decision") (quoted with approval in Gross v. SEC, 418 F.2d 103, 108 (2d Cir. 1969)).

always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed." 12/

Haver acknowledges that "the Commission, as a matter of policy, does not generally 'revisit' matters that are closed," but contends that "the circumstances presented here warrant an exception to any such rule." One such circumstance, according to Haver, is his claim that "the Commission found that he acted intentionally or recklessly . . . chiefly on the basis of the false testimony of members of the PWC engagement team that he did not disclose the[] [violative] transactions to his auditors." Haver claims that his new evidence -- certain PWC workpapers -- establishes that he made the appropriate disclosures and did not act intentionally or recklessly.

Haver misconceives the basis for our suspension. The Rule 102(e) Order contained no finding that Haver acted knowingly or recklessly. We based the order on the district court's injunction and Haver's offer of settlement. Commission Rule of Practice 102(e)(3)(iv) provides that one who, like Haver, "has consented to the entry of a permanent injunction . . . shall be presumed . . . to have been enjoined by reason of the misconduct alleged in the complaint." 13/ The injunctive complaint against Haver alleged, as noted above, that he knowingly or recklessly violated the federal securities laws. Haver, therefore, is deemed enjoined by reason of such knowing or reckless violations. We did not, and were not required to, make any findings regarding Haver's misconduct, 14/ and so do not consider here whether Haver's alleged new evidence refutes such findings. 15/

Haver also fails to appreciate the significance of his offer of settlement. Commission Rule of Practice 240(c)(4) provides explicitly that a settling respondent waives all hearings, the filing of proposed findings of fact and conclusions of law, proceedings before, and an initial

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12/ Miller v. SEC, 998 F.2d 62, 65 (2d Cir. 1993) (affirming Commission order denying a petition to set aside a censure imposed by the Commission with respondent's consent).

13/ 17 C.F.R. § 201.102(e)(3)(iv).

14/ Cf. Milton J. Shuck, 38 S.E.C. 69, 72 (1957) (finding it unnecessary to determine whether respondent violated Exchange Act Section 15(c)(3) where court had enjoined respondent from violating that provision because "the existence of the injunction . . . itself clearly furnishe[d] a statutory basis for revocation of registrant's registration under Section 15(b) of the Exchange Act"), aff'd, 264 F.2d 358 (D.C. Cir. 1958).

15/ We did not make any findings regarding whether Haver acted knowingly or recklessly because such findings could conflict with the basis for the district court's injunction. Haver could request that the court now vacate his injunction. See Fed. R. Civ. Pro. 60(b). We do not intend to suggest in this order any view regarding such a petition.

decision by, a hearing officer, and all post-hearing procedures. 16/ Moreover, Haver's offer of settlement states expressly that "[b]y submitting this Offer, Haver hereby acknowledges his waiver of those rights specified in Rules 240(c)(4) and (5) of the Commission's Rules of Practice." Haver does not suggest that his offer to settle was not voluntary, knowing, or informed. 17/ Haver thus forfeited his opportunity to adduce his evidence, 18/ which would require evaluation at the hearing before an administrative law judge that Haver waived. Haver may not now complain that the record is inaccurate or incomplete. 19/

Haver contends that another circumstance warranting relief is the action of the Ohio Accountancy Board in revoking his CPA certificate "solely on the basis of his acceptance of a suspension from practice before the Commission." According to Haver, "an automatic loss of his Ohio CPA certificate was an unforeseeable consequence of his consent to a suspension." Although, as noted above, one of the factors we consider in evaluating petitions to vacate bar orders is whether the petitioner has identified verifiable, unanticipated consequences of the bar, we do not believe that revocation of Haver's CPA certificate was an "unforeseeable consequence" of the suspension. Ohio law provides that the accountancy board may "revoke, suspend, or refuse to renew any CPA certificate" based on the "suspension or revocation of the right to

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16/ 17 C.F.R. § 201.240(c)(4) (2001).

17/ Cf. Sargent v. Dep't of Health and Human Servs., 229 F.3d 1088, 1091 (Fed. Cir. 2000) ("It is well-established that in order to set aside a settlement, an appellant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake.").

18/ See William H. Pike, Investment Company Act Rel. No. 20417 (July 20, 1994), 57 SEC Docket 589, 590-91 (rejecting applicant's request that we either expunge an order entered with his consent or allow him to litigate the issues in a reopened administrative proceeding on the ground that he could produce evidence that his misconduct "was far less significant than would appear" because regardless of the significance of any such evidence, applicant had "forfeited the opportunity to adduce it").

19/ See Edward I. Frankel, 52 S.E.C. 1237, 1239 n.5 (1997) (rejecting petition to vacate bar order where petitioner contended that bar order "relied upon erroneous information" because respondent "elected to settle the matter and did not develop the record further" and thus could not "now complain that the record is inaccurate or incomplete"); Cf. Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988) (refusing to set aside a settlement despite plaintiff's assertion that evidence discovered in a subsequent proceeding revealed that defendants perjured themselves at their depositions and concealed evidence because plaintiff "voluntarily chose to settle the action" and could not "be heard now to complain that he was denied the opportunity to uncover the alleged fraud" where "nothing prevented plaintiff during the pendency of the prior proceeding" from attempting to obtain the evidence that plaintiff believed impeached the defendants' testimony).

practice before any state or federal agency." 20/ Haver therefore was in a position to anticipate and foresee the action of the Ohio board. The Ohio Board's action is not a basis for relief. 21/

The other factors noted above that we generally consider in determining whether it is appropriate to vacate an administrative bar order also suggest that vacating Haver's suspension is inappropriate here. The underlying misconduct alleged in the injunctive complaint involved antifraud violations, and "the fact that a person has been enjoined from violating antifraud provisions 'has especially serious implications for the public interest.'" 22/ The time that has passed since issuance of the suspension further militates against relief because even the five-year period after which Haver may apply for reinstatement has not yet elapsed. Under these circumstances, and based on our consideration of the factors previously identified, it would not comport with the public interest or investor protection to vacate Haver's suspension.

Accordingly, it is ORDERED that the motion of Kenneth W. Haver to reopen the proceeding or vacate the suspension imposed on April 24, 2002, be, and it hereby is, denied.

By the Commission.

Nancy M. Morris  
Secretary

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20/ See OH. REV. CODE ANN. § 4701.16.

21/ Cf. Townsley, 85 SEC Docket at 4342, 4344 (denying motion to vacate bar order on the ground that "the bar order has prevented [movant] from becoming registered as a commodity trading advisor with the National Futures Association" because movant's inability to become so registered "was a consequence of the bar that he should have anticipated").

22/ Michael T. Studer and Castle Secs. Corp., Exchange Act Rel. No. 50411 (Sept. 20, 2004), 83 SEC Docket 2853, 2861 (quoting Marshall E. Melton, Investment Advisers Act Rel. No. 2151 (July 25, 2003), 80 SEC Docket 2812, 2825).