

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
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 :
LORSIN, INC., :
LORETTA M. LOCKHART, : INITIAL DECISION
CRAIG K. HJALMARSON, : May 11, 2004
RUSSELL MANAGEMENT, INC., :
GEORGE R. SIEMBIDA, :
HAROLD ENGEL, JR., :
MICROCAP MARKETING, INC., :
and SHANE M. NELSON :

APPEARANCES: Susan F. LaMarca and Robert J. Durham for the Division of Enforcement,
United States Securities and Exchange Commission

Loretta M. Lockhart, pro se, Craig K. Hjalmarson, pro se, and for
Lorsin, Inc.
George R. Siembida, pro se, and for Russell Management, Inc.
Harold Engel, Jr., pro se
Mark J. Griffin for Shane M. Nelson and MicroCap Marketing, Inc.

BEFORE: Robert G. Mahony, Administrative Law Judge

INTRODUCTION

On October 23, 2003, the Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP), pursuant to Section 8A of the Securities Act of 1933 (Securities Act), against Lorsin, Inc. (Lorsin), Loretta M. Lockhart (Lockhart), Craig K. Hjalmarson (Hjalmarson) (collectively, Lorsin Respondents), Russell Management, Inc. (Russell Management), George R. Siembida (Siembida), Harold Engel, Jr. (Engel), MicroCap Marketing, Inc. (MicroCap), and Shane M. Nelson (Nelson). The OIP alleges that Respondents violated Section 5(a) and 5(c) of the Securities Act by offering and selling securities without a registration statement filed or in effect

as to those securities. All Respondents received service of the OIP and have filed answers.¹ All Respondents, except for Siembida and Russell Management, claim exemptions from registration.

On January 8, 2004, the Division of Enforcement (Division) filed a motion for summary disposition. On February 11, 2004, the Lorsin Respondents filed a response. On February 13, 2004, Engel filed a response. On February 18, 2004, Nelson and MicroCap filed a response. Siembida and Russell Management did not file responses. The Division filed its reply on February 20, 2004, and a supplement to its motion on March 16, 2004, showing how it calculated the disgorgement it is seeking. On March 17, 2004, all parties attended a final prehearing conference on the motion for summary disposition. On March 25, 2004, the Lorsin Respondents filed a reply, and on March 30, 2004, Nelson and MicroCap filed a reply.²

STANDARD FOR SUMMARY DISPOSITION

After a respondent files an answer, a party may make a motion for summary disposition of any or all allegations in an order instituting proceedings. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted, pursuant to Rule 323 of the Commission's Rules of Practice. The administrative law judge may grant the motion if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(a)-(b).

Although the Federal Rules of Civil Procedure do not govern these administrative proceedings, they do provide guidance. Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, once a motion for summary judgment has been made and properly supported, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "A non-moving party must produce evidence in the record and 'may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not

¹ On December 2, 2003, Siembida filed a letter, which I construe as an answer for him and Russell Management.

² The Division's motion for summary disposition contains a declaration of Division attorney Robert J. Durham, with twenty exhibits attached thereto. The Division's motion for summary disposition will be cited as "(Motion at ____)," and the exhibits attached to the declaration will be cited as "(Div. Ex. ____)." The March 16 supplement will be cited as "(Motion Supp.)," and the exhibit pages will be cited as "(Div. Supp. Ex. at ____)." The Lorsin Respondents' answer will be cited as "(Lorsin Ans. ____)," and their response will be cited as "(Lorsin Resp. at ____)." Engel's answer will be cited as "(Engel Ans. at ____)." Engel's response contained an affidavit and attached exhibits. Engel's response will be cited as "(Engel Resp. at ____)," the affidavit will be cited as "(Engel Aff. ____)," and the attached exhibits will be cited as "(Engel Ex. ____)." Nelson's and MicroCap's answer will be cited as "(MicroCap Ans. ____)," their response will be cited as "(MicroCap Resp. at ____)," and their reply will be cited as "(MicroCap Reply at ____)." The March 17 prehearing conference transcript will be cited as "(Tr. ____)."

credible.’’ SEC v. Lybrand, 200 F. Supp. 2d 384, 391 (S.D.N.Y. 2002) (quoting Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993)).

FINDINGS OF FACT³

ProActive Computer Services, Inc.

In 2002, ProActive Computer Services, Inc. (ProActive),⁴ was a public company whose securities were quoted on the Pink Sheets under the symbol PAVP. (Motion at 3; Div. Ex. 8; MicroCap Resp. at 3.) Nelson operated MicroCap, a company that advertised microcap companies and thinly traded penny stocks. (Motion at 3; Div. Ex. 1 at 31.) During the first quarter of 2002, ProActive, through its chief executive officer (CEO), Carey Cooley, hired Nelson and MicroCap to disseminate information about ProActive. (MicroCap Ans. ¶ 24; Motion at 3; Div. Exs. 1 at 42-45; 9; MicroCap Resp. at 4.) For these services, ProActive agreed to compensate Nelson and MicroCap with 1,000,000 restricted and 500,000 purportedly free-trading ProActive shares. (MicroCap Ans. ¶ 24; Div. Exs. 1 at 53-54; 9; MicroCap Resp. at 4.) Nelson signed the agreement with ProActive on behalf of MicroCap. (MicroCap Ans. ¶ 24; Div. Ex. 9.) Thereafter, Nelson and MicroCap disseminated information regarding ProActive on Web sites controlled by Nelson and by an electronic newsletter. (MicroCap Ans. ¶ 26; Motion at 3; Div. Ex. 1 at 38, 42-43.)

Nelson and MicroCap received the 1,000,000 restricted shares due under the agreement directly from ProActive. Nelson understood that this stock was restricted. (Div. Ex. 1 at 53-54.) Pursuant to their agreement with ProActive, Nelson and MicroCap also received 500,000 ProActive shares from Scott Wilding (Wilding)⁵ and another source.⁶ (Motion at 4; Div. Ex. 1 at 53-54; MicroCap Resp. at 4.) Wilding, who had previously paid the CEO of ProActive \$4,000 for the stock, delivered 300,000 ProActive shares to Nelson’s brokerage account on March 19, 2002. (Motion at 4; Div. Exs. 1 at 53-54; 6 at 80-83; 7 at 48-52; MicroCap Resp. at 4; Div. Supp. Ex. at MSC60, PFS617.) According to Nelson and MicroCap, the stock transferred by Wilding was free trading. (MicroCap Resp. at 4.)

Nelson and MicroCap sold the 300,000 ProActive shares delivered by Wilding on the open market without a registration statement filed or in effect. During March 2002, Nelson and

³ Pursuant to Rule 323 of the Commission’s Rules of Practice and based on the Commission’s public official records, I have taken official notice that the Lorsin Respondents, Russell Management, Siembida, Engel, MicroCap Marketing, and Nelson did not have a registration statement filed or in effect for their respective offers and sales of stock.

⁴ ProActive consented to a cease-and-desist order, pursuant to Section 8A of the Securities Act. Energy & Engine Tech. Corp., 81 SEC Docket 1301 (Oct. 23, 2003).

⁵ Wilding and the company he was operating, Research Investment Group, Inc., were ordered to cease and desist from violating Section 5(a) and 5(c) and to pay disgorgement in the amount of \$121,715, pursuant to a default order. Research Inv. Group, Inc., Securities Act Rel. No. 8387, ___ SEC Docket ___ (Feb. 17, 2004).

⁶ MicroCap and Nelson admitted that they received 300,000 ProActive shares from Wilding and 200,000 ProActive shares from HY Systems. (MicroCap Resp. at 4.) The 300,000 shares from Wilding are the only ProActive shares at issue in this proceeding. (Motion at 14-16.)

MicroCap sold 100,000 ProActive shares in four separate transactions and, on July 8, 2002, they entered into a transaction whereby they sold the remaining 200,000 ProActive shares. Nelson and MicroCap received \$1,340.50 from their sales of ProActive stock. (Motion at 4; Div. Supp. Ex. at MSC60, PFS581, PFS604-636, SWS30-41; Tr. 8.)

Tridon Enterprises, Inc.

In 2001, Tridon Enterprises, Inc. (Tridon), was a public company whose common stock was traded on the Over-the-Counter (OTC) Bulletin Board. (Motion at 5; Div. Ex. 10 at 6.) Tridon had no operations during the spring of 2001. (Motion at 5; Div. Ex. 10 at 4.) Lorsin was a Florida corporation that primarily created investor awareness for public companies traded on the OTC Bulletin Board in exchange for companies' stock or cash. (Lorsin Ans. ¶ 3; Motion at 4; Div. Ex. 2 at 23-26.) Lockhart, the sole director and officer of Lorsin, and Hjalmarson, the manager, "provided and disseminated information regarding public companies" through Lorsin. (Lorsin Ans. ¶¶ 3-5; Motion at 4.)

In spring 2001, Lorsin was hired to place Tridon's press releases and company information on its Web site, GreedorFear.com. (Lorsin Ans. ¶ 29; Motion at 5.) Hjalmarson negotiated the agreement on behalf of Lorsin with Brian Brick (Brick), the CEO of Tridon. (Motion at 5; Div. Ex. 2 at 56.) Pursuant to the arrangement, the Lorsin Respondents launched a promotional campaign for Tridon and, as compensation, received Tridon stock, which they contend was free trading. (Lorsin Ans. ¶¶ 30-31; Div. Exs. 2 at 56; 5 at 31-32.)

Because Brick did not have the stock to transfer to the Lorsin Respondents, he arranged for another stockholder, Paul Ebeling (Ebeling), the principal of Extreme Pursuits, to transfer 10,000 Tridon shares to a Lorsin brokerage account. (Motion at 5; Div. Ex. 5 at 31-32; Motion Supp.; Div. Supp. Ex. at FIS207, FIS304, FIS309.) Ebeling was the past president of Tridon and held between six and fifteen percent of Tridon's stock. (Motion at 6; Div. Exs. 5 at 23-24; 10 at 21.) In exchange for this transfer, Tridon agreed to provide Extreme Pursuits with newly issued restricted Tridon common stock. (Motion at 6; Div. Ex. 11.) Hjalmarson understood that Tridon had arranged for the stock to be forwarded by either Extreme Pursuits or Ebeling. (Motion at 5; Div. Ex. 2 at 59-60.)

The Lorsin Respondents sold the 10,000 Tridon shares that they received pursuant to the arrangement with Tridon on the open market for \$880, without a registration statement filed or in effect. The Lorsin Respondents sold this stock on January 22, 2002, in two separate transactions, within three months of receipt. (Div. Supp. Ex. at FIS207-214, FIS272, FIS304, FIS309; Tr. 6.)

Energy & Engine Technology Corp.

From late 2001 through 2002, Energy & Engine Technology Corp. (Energy & Engine)⁷ was a public company whose common stock was quoted on the OTC Bulletin Board under the symbol EENT. (Motion at 6; Div. Ex. 12 at 10.) Energy & Engine hired Siembida and his company, Russell Management, to promote its stock on the Internet and the terms of their agreement were set

⁷ Energy & Engine consented to a cease-and-desist order, pursuant to Section 8A of the Securities Act. Energy & Engine Tech. Corp., 81 SEC Docket 1301 (Oct. 23, 2003).

forth in writing. (Motion at 6; Div. Exs. 4 at 26-35; 13.) Pursuant to their agreement, Energy & Engine agreed to transfer to Siembida 200,000 shares issued by the company in connection with a Form S-8 registration statement. (Motion at 6; Div. Ex. 13.)

Siembida's agreement with Energy & Engine further provided that he would be subcontracting with others and that the company would be featured on WillyWizard.com. (Motion at 7; Div. Exs. 4 at 30-31; 13.) WillyWizard.com is a Web site operated by Engel. (Engel Aff. at 1.) Siembida had contacted Engel in December 2001 to promote Energy & Engine on Engel's Web site, and they had entered into a subcontract arrangement. (Motion at 7; Div. Exs. 3 at 16-17, 20; 4 at 37-40.) Engel arranged for the CEO of Energy & Engine, Will McAndrew, to be interviewed live via the Internet, as provided for in the original agreement between Siembida, Russell Management, and Energy & Engine. (Motion at 7; Div. Exs. 3 at 18-20; 13.) Engel also posted information about Energy & Engine on WillyWizard.com. (Motion at 7; Engel Ex. A.)

Engel further subcontracted with the Lorsin Respondents, Nelson, and MicroCap, who agreed to disseminate information about Energy & Engine on their respective Web sites in return for a portion of the Energy & Engine shares that Engel received from Siembida. (Lorsin Ans. ¶¶ 16, 17; Div. Ex. 3 at 21-26; MicroCap Resp. at 5.) Hjalmarson negotiated the subcontract arrangement with Engel on behalf of Lorsin. (Lorsin Ans. ¶ 16; Motion at 7; Div. Ex. 2 at 66-67.) Hjalmarson knew about the arrangements between Energy & Engine and Russell Management, and between Russell Management and Engel. (Div. Ex. 2 at 67.) Additionally, Nelson had utilized subcontractors in previous promotional campaigns for issuers, such as for ProActive, and understood that Engel was subcontracting with him in a similar manner. (Motion at 8; Div. Ex. 1 at 48-49, 80-81.)

In January 2002, Energy & Engine transferred 200,000 shares, which were registered on the Form S-8, to Siembida's account. (Motion at 8; Div. Ex. 19 at PRU130; Tr. 7-8.) Siembida used 185,000 of the 200,000 Energy & Engine shares that he received to pay Engel for promotional efforts on behalf of Energy & Engine. (Motion at 8; Div Exs. 3 at 21-22; 19 at PRU130; Div. Supp. Ex. at PRU177.) According to Engel, this stock was free trading. (Motion at 8; Engel Ans. at 2.) During February and March 2002, Siembida sold the remaining 15,000 Energy & Engine shares that he received on the open market for \$3,390.40, without a registration statement filed or in effect. (Motion at 8; Div. Ex. 19 at PRU130, PRU132, PRU134; Tr. 7-8.) Siembida sold the Energy & Engine stock in four separate transactions and his last sale was on March 4, 2002. (Div. Ex. 19 at PRU130, PRU132, PRU134; Tr. 7-8.)

Engel sold 136,500 of the Energy & Engine shares that he received from Siembida on the open market in thirteen transactions. Engel sold 36,500 Energy & Engine shares on November 26, 2002, for \$2,007.50 and 100,000 Energy & Engine shares during the period of April 30, 2002, through November 27, 2002, for \$6,160, without a registration statement filed or in effect for any of the sales. (Motion at 8; Div Ex. 19 at PRU130; Div. Supp. Ex. at PRU167, PRU177-187, ET380-419; Tr. 7.)

Engel also transferred a portion of the Energy & Engine shares that he received from Siembida to the Lorsin Respondents, Nelson, and MicroCap as payment for disseminating information about the company. (Lorsin Ans. ¶ 17; Motion at 8; Lorsin Resp. at 4; MicroCap Resp.

at 5.) According to the Lorsin Respondents, Nelson, and MicroCap, the Energy & Engine stock that they received from Engel was free trading. (Lorsin Resp. at 4; MicroCap Resp. at 12.)

Engel transferred a total of 31,500 Energy & Engine shares to a Lorsin brokerage account, and the Lorsin Respondents ultimately sold 10,000 of those shares on the open market for \$1,040,⁸ without a registration statement filed or in effect. The Lorsin Respondents sold the Energy & Engine stock in two transactions occurring within four months of receipt, and the last sale was on May 9, 2002. (Lorsin Ans. ¶¶ 17, 21; Motion at 8; Div. Supp. Ex. at PRU177, PRU179, PRU192, PRU194-201, SAL225-238; Tr. 6.)

In January 2002, Engel transferred 10,000 Energy & Engine shares to Nelson's brokerage account and the shares were sold in two separate transactions during February 2002. In March 2002, Engel transferred 1,000 Energy & Engine shares to Nelson's brokerage account and the shares were sold in one transaction on August 6, 2002. (Motion at 8; Div. Ex. 3 at 25-26; MicroCap Resp. at 5; Div. Supp. Ex. at PRU156, PRU161; PRU177, PRU179.) Nelson and MicroCap sold the 11,000 Energy & Engine shares on the open market for \$2,042, without a registration statement filed or in effect. (Motion at 8; Motion Supp; Div. Supp. Ex. at PRU148, PRU156-59, PRU161, PRU164, PRU177, PRU199, PFS604-610, PFS687-688, PFS703-709; Tr. 8.)

CONCLUSIONS OF LAW

Registration Under the Securities Act

It is a violation of Section 5(a) and 5(c) of the Securities Act to sell or offer to sell securities by use of the mails or interstate commerce, unless a registration statement has been filed or is in effect as to such securities. To establish a prima facie case for an alleged violation of Section 5, the Division must prove that: (1) no registration statement was filed or in effect as to the securities; (2) the respondents sold or offered to sell the securities; and (3) the mails or interstate commerce were used in connection with the sale or offer of sale. See SEC v. Continental Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972).

As with the antifraud provisions, the jurisdictional means requirement is liberally construed to encompass even intrastate telephone calls and tangential mailings. SEC v. Softpoint, Inc., 958 F. Supp. 846, 861 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. N.Y. 1998). Scierter is not required for a violation of Section 5 of the Securities Act. Id. at 859-60.

Following the establishment of a prima facie case for a violation of Section 5 of the Securities Act, the burden normally shifts to respondents to show that the securities offered were exempt from the registration requirements. See SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953). Further, exemptions from registration are construed narrowly. SEC v. Murphy, 626 F.2d 633, 641 (9th Cir. 1980). However, for purposes of summary disposition, the Division, as the moving party, carries the burden of proof and must show that no genuine issues of material fact

⁸ The Division contends that the Lorsin Respondents received \$998 from their public sales of Energy & Engine stock. (Motion Supp.) However, its calculation is inaccurate and was adjusted to correspond to the Lorsin Respondents' brokerage records. (Div. Supp. Ex. at SAL238.)

are in dispute. See id. (discussing burden in context of summary judgment under the Federal Rules of Civil Procedure). The Division must show that there are no material facts in dispute as to Respondents' exemption claims or that, even if the evidence and any inferences that could be drawn therefrom are viewed in a "light most favorable" to Respondents, it is still entitled to judgment as a matter of law. See id.

Siembida and Russell Management offered and sold 15,000 of the shares they received from Energy & Engine on the open market for \$3,390.40. There was no registration statement filed or in effect for their offers or sales of Energy & Engine stock. Further, Siembida and Russell Management have not claimed any exemptions from registration. Accordingly, Siembida and Russell Management violated Section 5(a) and 5(c) of the Securities Act by offering and selling Energy & Engine stock on the open market for \$3,390.40 without a registration statement filed or in effect. The Division's motion for summary disposition will be granted as to Siembida and Russell Management.

Nelson and MicroCap also offered and sold ProActive stock for \$1,340.50 and Energy & Engine stock for \$2,042, on the open market. The Lorsin Respondents offered and sold Tridon stock for \$880 and Energy & Engine stock for \$1,040, on the open market. Engel offered and sold Energy & Engine stock for \$8,167.50, on the open market. There was no registration statement filed or in effect for any of the Respondents' offers or sales during the relevant time period.

Nonetheless, Nelson, MicroCap, the Lorsin Respondents, and Engel claim their transactions are exempt from registration under Section 4(1) of the Securities Act. The Division contends that these Respondents were underwriters who do not qualify for an exemption under Section 4(1) of the Securities Act.

Exemptions Under Section 4(1) of the Securities Act

Section 4(1) of the Securities Act provides exemptions from registration for "transactions by any person other than an issuer, underwriter or dealer." The intent of Section 4(1) was to place an exemption in the Securities Act for "routine trading transactions between individual investors." Rule 144 of the Securities Act, Preliminary Note; see also Owen V. Kane, 48 S.E.C. 617, 619 (1986); H.R. Rep. 73-85, at 15-16 (1933) (discussing broad line drawn in Section 4(1) between distribution and trading). In carving out this exemption, Congress refused to extend it to underwriters, which it defined broadly to encompass "all persons who might operate as conduits for securities being placed into the hands of the investing public." 1 Thomas Lee Hazen, The Law of Securities Regulation 431 (4th ed. 2002) (cited in Lybrand, 200 F. Supp. 2d at 393). An "underwriter" is defined under Section 2(a)(11) of the Securities Act as:

any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; . . . As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled

by the issuer, or any person under direct or indirect common control with the issuer.

In other words, underwriter status may attach to a person who either: 1) purchases stock from an issuer with a view to distribution of the stock; or 2) offers or sells stock for an issuer in connection with a distribution. Lybrand, 200 F. Supp. 2d at 393; Securities Act Section 2(a)(11). Since the Division contends that Respondents qualify as underwriters as a result of “obtain[ing] shares of an issuer’s stock with a view to selling the stock to the public,” the relevant analysis is whether Respondents acquired stock from an issuer with a view to distribution. (Motion at 14.) An acquisition is made with the requisite view to distribution if the shares are initially acquired from an issuer for the purpose of resale and not with an investment purpose in mind. Ackerberg v. Johnson, 892 F.2d 1328, 1336 (8th Cir. 1989). Rather than looking at the subjective intent of the security holder, an objective analysis is utilized and the amount of time the stock was held before resale is considered. Id.; see also Rule 144 of the Securities Act, Preliminary Note.

Additionally, the view must be to distribution, which is generally considered tantamount to a public offering. Ackerberg, 892 F.2d at 1336; see also Wonsover, 69 SEC Docket 694, 705 n.25 (Mar. 1, 1999) (“The term ‘distribution’ refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public.”), cited in Kirby, 79 SEC Docket 1081, 1088-89 (Jan. 9, 2003), appeal pending, No. 03-1062 (D.C. Cir.). “[A] public offering is defined not in quantitative terms, but in terms of whether the offerees are in need of the protection which the Securities Act affords through registration.” Ackerberg, 892 F.2d at 1337 (discussing holding in Ralston Purina, 346 U.S. 119); Strathmore Sec., Inc., 43 S.E.C. 575, 581-82 (1967).

The Division claims that as a matter of law Respondents were underwriters who did not qualify for exemptions. Therefore, the issue is whether Nelson, MicroCap, the Lorsin Respondents, and Engel were acting as underwriters when they received and sold the securities.

Nelson and MicroCap

ProActive

Nelson and MicroCap contend that they did not receive stock from the issuer, ProActive, but from Wilding and that the Division failed to establish Wilding’s relationship to the parties. (MicroCap Resp. at 11.) The ProActive shares did not bear a restrictive legend and “[b]ased on the totality of the circumstances, Nelson believed that the shares were free-trading shares, received from someone other than an issuer.” (MicroCap Resp. at 12.)

Nelson and MicroCap entered into an agreement with ProActive whereby they agreed to promote ProActive in exchange for 500,000 purportedly free-trading shares. Nelson and MicroCap admit that they received 500,000 ProActive shares from Wilding and another source. (MicroCap Resp. at 4.) In investigative testimony, Nelson stated that Wilding transferred 300,000 of the 500,000 purportedly free-trading shares due under Nelson’s agreement with ProActive. (Div. Ex. 1 at 53-54; MicroCap Resp. at 4.) Thus, the claim that the ProActive shares lacked restrictive legends is unavailing because Nelson knew the source of the 300,000

shares. See generally Dale Dwight Schwartzenhauer, 50 S.E.C. 1155, 1159 (1992) (review of NASD proceeding) (“[I]n light of [Respondent’s] knowledge of the source of the securities, the lack of a legend was an inadequate basis for assuming that sales of such shares were proper.”).

Moreover, “[i]t is settled that the Government need not prove that an ‘underwriter’ acquired the ‘control’ shares directly from the ‘issuer’ or control person.” See United States v. Re, 336 F.2d 306, 317 (2d Cir. 1964) (citing SEC v. Culpepper, 270 F.2d 241, 246-47 (2d Cir. 1959)); see generally SEC v. N. Am. Research & Dev. Corp., 424 F.2d 63, 71 (2d Cir. 1970) (“The supplementary provisions and definitions [to Section 6 of the Securities Act] are so designed as to prevent any circumvention of the registration requirement by devious and sundry means.”). I conclude that Wilding was merely an intermediary carrying out ProActive’s contractual obligation and that Nelson and MicroCap acquired the shares, albeit indirectly, from the issuer.

Further, Nelson and MicroCap do not contend that they intended to invest in ProActive. Rather, the record clearly establishes that Nelson and MicroCap intended the stock to be compensation for services and to sell the stock upon receipt. Nelson’s and MicroCap’s intention is supported by their view that the ProActive stock was free trading and by their public sales of 100,000 shares within one month of receipt and 200,000 shares within five months of receipt. See Ackerberg, 892 F.2d at 1336 (“[C]ourts look to whether the security holder has held the securities long enough to negate any inference that his intention at the time of acquisition was to distribute them to the public.”); see also Rule 144 of the Securities Act (incorporating one-year rule in its safe harbor provision). Even viewing all of the evidence and inferences in a light most favorable to Nelson and MicroCap, I conclude as a matter of law that Nelson and MicroCap were underwriters and do not qualify for an exemption under Section 4(1) of the Securities Act.

Accordingly, I find that Nelson and MicroCap violated Section 5(a) and 5(c) of the Securities Act when they offered and sold ProActive stock on the open market without a registration statement filed or in effect. The Division’s motion for summary disposition will be granted as to Nelson and MicroCap.

Energy & Engine

Energy & Engine stock passed from the issuer to Siembida. Siembida then transferred a portion of the Energy & Engine stock to Engel, who ultimately paid Nelson and MicroCap 11,000 Energy & Engine shares for promoting the company. Nelson and MicroCap argue that since they received the stock from Engel, who was not an issuer, they were not underwriters when they offered and sold the Energy & Engine stock. (MicroCap Resp. at 12.) Nelson and MicroCap contend that the shares were initially registered pursuant to a Form S-8 registration statement and did not bear a restrictive legend. (MicroCap Resp. at 12.) Nelson “did not know the ultimate source of the shares, or their initial origin, and therefore is entitled to the inference that his taking was not with a view to the distribution of the securities from the issuer.” (MicroCap Reply at 6.)

I conclude that Nelson and MicroCap received stock from the issuer, Energy & Engine. Energy & Engine agreed to pay Siembida and Russell Management for promotional activities, knowing that some of the stock paid would go to subcontractors. Nelson and MicroCap were

two of these subcontractors. The stock may have passed through two intermediaries, Siembida and then Engel, but it was always stock paid by the issuer as compensation for promotion by Nelson and MicroCap. Further, since Nelson knew this was a subcontractor arrangement and was familiar with such arrangements, he cannot now claim ignorance regarding the source of the stock for the promotional campaign. I find that Nelson knew it was the issuer, Energy & Engine, who was benefiting from his services. Thus, the lack of a restrictive legend does not support Nelson's argument.

The record also reflects that Nelson and MicroCap had a view to distribution upon acquisition of the stock. They did not intend to invest in the company, but viewed the shares as compensation. As Nelson acknowledged, he "thought he was being paid by shares for his services in providing information on this company." (MicroCap Reply at 6.) Nelson and MicroCap perceived the Energy & Engine stock as free trading and resold, on the open market, 10,000 shares within two months of receipt and 1,000 shares within six months of receipt. I conclude that Nelson and MicroCap were underwriters in connection with the Energy & Engine stock. Accordingly, they do not qualify for an exemption under Section 4(1) of the Securities Act.

Accordingly, I find that Nelson and MicroCap violated Section 5(a) and 5(c) of the Securities Act when they offered and sold Energy & Engine stock on the open market without a registration statement filed or in effect. The Division's motion for summary disposition will be granted as to Nelson and MicroCap.

Lorsin Respondents

Tridon

The Lorsin Respondents generally claim that they "did not sell securities for an issuer or receive shares from an issuer" and, thus, were not underwriters. (Lorsin Resp. at 1.) They further claim that no arrangement was made between Tridon and themselves. When Ebeling gave the Lorsin Respondents the Tridon stock, he told them that it was "free and clear." Further, Ebeling informed Hjalmarson that he was a friend of Brick, the CEO of Tridon, and a stockholder, unaffiliated with Tridon. (Lorsin Resp. at 2-3.)

However, the Lorsin Respondents did in fact have an agreement with Tridon to disseminate information about the company in exchange for stock and the evidence clearly shows the existence of this agreement. Brick, the CEO of Tridon, did not have any stock to pay the Lorsin Respondents for their promotional activities. Thus, he arranged for another stockholder, Ebeling, to transfer 10,000 shares of his Tridon stock to the Lorsin Respondents. Hjalmarson knew the Tridon stock was being transferred from Ebeling because "he was the only one who had the free trading shares." (Div. Ex. 2 at 60.) The Lorsin Respondents cannot now claim that they had no knowledge that the stock came from Tridon, the issuer, as payment for their services. Further, Ebeling's contentions that the shares were free trading and that he was just a friend of Brick are irrelevant. Registration of securities is transaction-specific and subsequent transactions must be registered or qualify for an exemption. SEC v. Cavanagh, 155 F.3d 129, 133-34 (2d Cir. 1998);

Allison v. Ticor Title Ins. Co., 907 F.2d 645, 648 (7th Cir. 1990) (“Section 5 (the registration requirement) applies to transactions; each sale must be registered or exempt.”).

The Lorsin Respondents do not contend that they had an investment objective in Tridon. Rather, the record establishes the Lorsin Respondents’ intentions to obtain Tridon stock as compensation for their promotional services and then sell it on the open market. The Lorsin Respondents’ resales of the 10,000 shares within three months of receipt indicate their lack of investment intent. As a matter of law, the Lorsin Respondents acted as underwriters in the Tridon distribution. Thus, they are not entitled to an exemption under Section 4(1) of the Securities Act.

Accordingly, I find that the Lorsin Respondents violated Section 5(a) and 5(c) of the Securities Act when they offered and sold Tridon stock on the open market without a registration statement filed or in effect. The Division’s motion for summary disposition will be granted as to the Lorsin Respondents.

Energy & Engine

As noted, the Lorsin Respondents set forth a general claim that they “did not sell securities for an issuer or receive shares from an issuer,” and, thus, were not underwriters. (Lorsin Resp. at 1.) Since they did not specify which shares they were referring to, this argument will also be viewed in connection with Energy & Engine. The Lorsin Respondents also claim that Hjalmarson did not negotiate with Engel and that Engel told them the shares were “free trading (no registration required).” (Lorsin Resp. at 3-4.)

I conclude that the Lorsin Respondents acted as underwriters. The Lorsin Respondents claim that Hjalmarson did not negotiate with Engel, but that contention is immaterial. During investigative testimony, Hjalmarson stated: “I think Russell set [up the deal] with EENT, and then Russell set it up with [Engel] and [Engel] asked me to help.” (Div. Ex. 2 at 67.) Thus, Hjalmarson knew about the two subcontracting arrangements. Further, the existence of two subcontracting intermediaries does not change the fact that the Lorsin Respondents ultimately received stock from the issuer, Energy & Engine, as compensation for promoting the company. Despite Engel’s representations to the contrary, the Energy & Engine stock was not free trading; rather, their subsequent transactions had to be registered or qualify for an exemption. The Lorsin Respondents also resold the stock on the open market within a four-month period. Based on the objective evidence in the record, I find the Lorsin Respondents did not intend for the Energy & Engine stock to be an investment. Instead, the Lorsin Respondents had a view to distribution upon receipt of the Energy & Engine stock. Since the Lorsin Respondents acted as underwriters for their transactions in Energy & Engine, they did not qualify for an exemption under Section 4(1) of the Securities Act.

Accordingly, I find that the Lorsin Respondents violated Section 5(a) and 5(c) of the Securities Act when they offered and sold Energy & Engine stock on the open market without a registration statement filed or in effect. The Division’s motion for summary disposition will be granted as to the Lorsin Respondents.

Engel

Energy & Engine

Engel claims that he received Energy & Engine shares registered pursuant to a Form S-8 registration statement from the issuer that are exempt from registration. (Engel Resp. at 4-8.) Engel also claims that he “did not purchase any securities from the issuer nor did he offer any securities or sell any securities for an issuer in connection with any kind of distribution. Instead, [he] received securities for compensation for bona fide services rendered.” (Engel Resp. at 9.)⁹

Regardless of whether Engel was qualified to receive the Energy & Engine shares from the issuer, no registration statement was filed or in effect for Engel’s subsequent offers or sales of stock. Further, the Division has submitted ample evidence to show Engel’s underwriter status, which Engel, lacking factual support, can dispute only through general conclusory statements. See Lybrand, 200 F. Supp. 2d at 391. The record shows that Energy & Engine, the issuer, paid Engel in stock for his promotional services. Energy & Engine knew it was paying its stock to Siembida’s subcontracted promoters, including the operator of the WillyWizard.com Web site. Engel is the operator of this Web site. Engel knew he was ultimately working for the company, which is apparent from the fact that he interviewed Energy & Engine’s CEO and posted information about the company on his Web site. Thus, the record provides no support for Engel’s contention that he did not acquire Energy & Engine stock from the issuer. Engel received the stock as compensation for services rendered and not for an investment purpose. Thereafter, Engel offered and sold 136,500 shares of the Energy & Engine stock in less than a year from the time of receipt. I credit this evidence to support my finding that Engel acquired the Energy & Engine stock with a view to distribution. Based on the foregoing, Engel does not qualify for any exemption from registration.

Accordingly, I find that Engel violated Section 5(a) and 5(c) of the Securities Act when he offered and sold Energy & Engine stock on the open market without a registration statement filed or in effect. The Division’s motion for summary disposition will be granted as to Engel.

SANCTIONS

I have concluded that there are no material facts in dispute and that the Division is entitled to summary disposition as a matter of law. The remaining issue is what, if any, sanctions are appropriate. The Division requests cease-and-desist orders and disgorgement, plus prejudgment interest, against all Respondents.

Cease And Desist

⁹ Engel’s contention that the SEC should have issued a stop order, pursuant to Sections 8(d) and 8(e) of the Securities Act, is without merit. (Engel Answer at 3.) “The SEC cannot be estopped from seeking to enjoin issuers who are selling to the public unregistered shares of stock through the use of the mails, since the SEC may not waive the requirements of an act of Congress.” SEC v. Liberty Petroleum Corp., Fed. Sec. L. Rep. (CCH) [1971-1972 Transfer Binder] ¶ 93,209, at 91,348 (N.D. Ohio Sept. 2, 1971). The Division’s motion to strike is granted.

Section 8A of the Securities Act authorizes the Commission to enter a cease-and-desist order against a person who “is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder.” When deciding whether a cease-and-desist order is warranted, the Commission considers the following factors:

the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent’s state of mind, the sincerity of the respondent’s assurances against future violations, the respondent’s recognition of the wrongful nature of his or her conduct, and the respondent’s opportunity to commit future violations. In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings.

KPMG Peat Marwick LLP, 74 SEC Docket 384, 436 (Jan. 19, 2001), reconsideration denied, 74 SEC Docket 1351 (Mar. 8, 2001), petition denied, 289 F.3d 109 (D.C. Cir. 2002); see also Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff’d on other grounds, 450 U.S. 91 (1981). “This inquiry is a flexible one and no factor is dispositive.” KPMG, 74 SEC Docket at 436; see also WHX Corp. v. SEC, 362 F.3d 854, 861 (D.C. Cir. 2004) (requiring rational explanation of factors analyzed by the Commission in KPMG to support imposition of cease-and-desist order).

Siembida and Russell Management

“The purpose of the registration requirement, and of the Securities Act as a whole, is to ‘protect investors by promoting full disclosure of information thought necessary to informed investment decisions.’” Lybrand, 200 F. Supp. 2d at 392 (quoting Ralston Purina Co., 346 U.S. at 124). Siembida and Russell Management committed serious violations of the securities laws by denying the purchasers of their Energy & Engine stock the ability to make informed investment decisions. The violations were also recent as well as recurrent. In 2002, Siembida and Russell Management sold unregistered Energy & Engine stock on the open market in four separate transactions. Neither acknowledges the wrongful nature of their conduct and both fail to assure against future violations; instead, Siembida blames the issuer. I find that the nature of their work, promoting companies in exchange for what they believe to be free-trading stock, will provide opportunities for Siembida and Russell Management to continue to violate the registration requirements of the Securities Act. Thus, I will order Siembida and Russell Management to cease and desist from committing or causing violations of Section 5(a) and 5(c) of the Securities Act.

Nelson and MicroCap

Nelson and MicroCap denied the investing public the protections of Section 5 of the Securities Act by distributing stock on the open market in two unregistered distributions. Their violations were serious and recurrent. Nelson and MicroCap sold unregistered ProActive stock in five separate transactions and sold unregistered Energy & Engine stock in three separate transactions. Additionally, these violations are recent since they occurred in 2002. Nelson and MicroCap still contend that the stock they received in ProActive and Energy & Engine was free trading and fail to acknowledge any wrongful conduct by offering and selling this stock on the open

market without a registration statement. Nelson and MicroCap do not provide assurances against future violations. Since Nelson stated during investigative testimony that the nature of MicroCap's business is to provide advertisement for new companies in exchange for "cash and free trading stock, and restricted stock," I find that their occupation presents a substantial likelihood of opportunities for future violations. (Div. Ex. 1 at 31-32.) Accordingly, I will order Nelson and MicroCap to cease and desist from committing or causing violations of Section 5(a) and 5(c) of the Securities Act.

Lorsin Respondents

The Lorsin Respondents also committed serious violations of the securities laws, which harmed the investing public by distributing stock on the open market without the necessary disclosures found in a registration statement. The Lorsin Respondents' violations were recurrent because they participated in both the Tridon distribution and the Energy & Engine distribution. Moreover, they entered into multiple unregistered transactions during each distribution, selling Tridon stock in two separate transactions and Energy & Engine stock in two separate transactions. These violations were also recent because they occurred in 2002. The Lorsin Respondents fail to acknowledge any wrongful conduct, claiming that the stock they received in Tridon and Energy & Engine was free trading and that they were exempt from any registration requirements. The Lorsin Respondents indicate that the nature of their business is to enter into such arrangements with issuers to receive cash or stock in exchange for their services. Thus, I find a substantial likelihood that they will have the opportunity for future violations of the securities laws. The Lorsin Respondents have also failed to provide any assurances against future violations. Based on the foregoing, I will order each of the Lorsin Respondents to cease and desist from committing or causing violations of Section 5(a) and 5(c) of the Securities Act.

Engel

Engel also committed a serious violation by circumventing the registration requirements of the Securities Act and, thus, denying the investing public necessary information. Engel's actions were recurrent and recent. In 2002, he sold unregistered shares of Energy & Engine on the open market in thirteen separate transactions. Engel fails to acknowledge any misconduct, instead contending that he "has acted within the guidelines provided by the Securities Act." (Engel Resp. at 10.) Engel fails to provide any assurances against future violations. Further, Engel is in the practice of entering into arrangements with issuers that are similar to the one he entered into with Energy & Engine. Engel states that from "time to time [he] is approached and asked to assist in building a corporate image by allowing the company to advertise on his website." (Engel Resp. at 3.) Engel's submissions also indicate that it is not atypical for him to receive payment in securities from these companies. Thus, I find a substantial likelihood that he will have the opportunity for future violations of the securities laws. Accordingly, I will order Engel to cease and desist from committing or causing violations of Section 5(a) and 5(c) of the Securities Act.

Disgorgement

Section 8A(e) of the Securities Act authorizes disgorgement of ill-gotten gains, including reasonable interest, in cease-and-desist proceedings. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he would have been absent the violative activity.

The Commission has stated that disgorgement “may be ordered only against those who received such unjust enrichment.” Kenneth L. Lucas, 51 S.E.C. 1041, 1046 (citing Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993)). In cases where an individual respondent’s actions are inextricably interwoven with those of a business entity, joint and several liability is appropriate. SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 (E.D. Mich. 1991); SEC v. R.J. Allen & Assoc., Inc., 386 F. Supp. 866, 881 (S.D. Fla. 1974).

The Division seeks disgorgement of the payments received by Respondents from their sales of unregistered stock. Respondents agree with the monetary amounts submitted by the Division.¹⁰ Engel and the Lorsin Respondents contend that brokerage fees should not be included in the calculations. However, in calculating the disgorgement amount, there is no requirement to take into account the expenses incurred by the respondent in the course of perpetrating the scheme. SEC v. Hughes Capital Corp., 917 F. Supp. 1080, 1086-87 (D.N.J. 1996), aff’d, 124 F.3d 449 (3d Cir. 1997); Great Lakes Equities Co., 775 F. Supp. at 214-15.

Based on the facts, Siembida and Russell Management are jointly and severally liable and will be required to disgorge \$3,390.40, plus prejudgment interest. Nelson and MicroCap are jointly and severally liable and will be required to disgorge \$3,382.50, plus prejudgment interest. The Lorsin Respondents are also jointly and severally liable and will be required to disgorge \$1,920, plus prejudgment interest. Engel will be required to disgorge \$8,167.50, plus prejudgment interest.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that the Division of Enforcement’s Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Loretta M. Lockhart, Craig K. Hjalmarson, Lorsin, Inc., George R. Siembida, Russell Management, Inc., Harold Engel, Jr., Shane M. Nelson, and MicroCap Marketing, Inc., shall CEASE AND DESIST from committing or causing any violations or future violations of Section 5(a) and 5(c) of the Securities Act of 1933.

¹⁰ In the Motion Supp., the Division requested \$1,844 in disgorgement from the Lorsin Respondents, but based on the brokerage records that were attached to the Motion Supp., the Lorsin Respondents received \$1,920 from their unregistered sales of Tridon and Energy & Engine stock. The disgorgement amount for the Lorsin Respondents has been adjusted accordingly.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Loretta M. Lockhart, Craig K. Hjalmarson, and Lorsin, Inc., shall DISGORGE, jointly and severally, One Thousand Nine Hundred Twenty Dollars (\$1,920.00), plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Prejudgment interest is due from June 1, 2002, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, George R. Siembida and Russell Management, Inc., shall DISGORGE, jointly and severally, Three Thousand Three Hundred Ninety Dollars and Forty Cents (\$3,390.40), plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Prejudgment interest is due from April 1, 2002, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Harold Engel, Jr., shall DISGORGE Eight Thousand One Hundred Sixty-Seven Dollars and Fifty Cents (\$8,167.50), plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Prejudgment interest is due from December 1, 2002, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Shane M. Nelson and MicroCap Marketing, Inc., shall DISGORGE, jointly and severally, Three Thousand Three Hundred Eighty-Two Dollars and Fifty Cents (\$3,382.50), plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Prejudgment interest is due from September 1, 2002, through the last day of the month preceding which payment is made.

Payment of disgorgement shall be made by certified check, U.S. postal money order, bank cashier's check, bank money order, or wire transfer payable to the Securities and Exchange Commission on the first day following the day this Initial Decision becomes final. The payment shall be mailed or delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop-3, Alexandria, Virginia 22312. The payment shall be accompanied by a letter that identifies the name and number of this proceeding and the name of the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement, Susan F. LaMarca, Securities and Exchange Commission, 44 Montgomery Street, Suite 1100, San Francisco, CA 94104-4691.

This order shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission

enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge