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Whistleblowers: The Challenges for In-House Counsel

Kevin Edmundson

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 78528 / August 10, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17371

In the Matter of

BlueLinx Holdings Inc.,

Respondent.

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

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 BlueLinx Holdings Inc. (“BlueLinx” or “Respondent”).

II.

In anticipation of the institution of these proceedings, BlueLinx 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 it 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 Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

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

Respondent

1. BlueLinx is a Delaware corporation with its headquarters located in Atlanta, Georgia. BlueLinx’s common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange. BlueLinx files periodic reports, including reports on Forms 10-K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder. BlueLinx has approximately 1,700 employees.

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.

Facts

A. Statutory and Regulatory Framework Protecting Whistleblowers

2. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, amended the Exchange Act by adding Section 21F, “Whistleblower Incentives and Protection.” The congressional purpose underlying these provisions was “to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.”²

3. Congress explicitly noted the importance of providing financial incentives to promote whistleblowing to the SEC as it determined that “a critical component of the Whistleblower Program is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.”³

4. To fulfill this Congressional purpose, the Commission adopted Rule 21F-17, which provides in relevant part:

- (a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.

Rule 21F-17 became effective on August 12, 2011.

B. BlueLinx’s Severance Agreements

5. Beginning prior to August 12, 2011, and continuing through the present, BlueLinx entered into agreements with certain employees who were leaving the company and who were receiving severance or other post-employment consideration from BlueLinx. A severance agreement is a contract between an employer and a former employee documenting the rights and responsibilities of both parties incidental to the employee’s departure.

6. During the period from August 12, 2011 through the present, BlueLinx used several forms of severance agreements, variously termed: (1) “Confidential Severance Agreement and General Release (“Termination Agreement”); (2) Separation Agreement; (3) Settlement Agreement and Full and Final Release of Claims (“Settlement Agreement”); (4) Release Agreement; and (5) a Letter Agreement that was a severance agreement in the form of a letter to the departing employee (collectively, “Severance Agreements”). The vast majority of non-

² See *“Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934,”* Release No. 34-64545, at p.197 (Aug. 12, 2011) (“*Adopting Release*”).

³ See *The Restoring American Financial Stability Act of 2010*, Committee on Banking, Housing, and Urban Affairs Report (April 30, 2010).

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