

**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 finds<sup>1</sup> 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.

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<sup>1</sup> 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.”<sup>2</sup>

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.”<sup>3</sup>

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-

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<sup>2</sup> 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”).

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

management employees who left BlueLinX during the relevant period and who received severance payments were asked to sign Letter Agreements.

7. Although the Severance Agreements differed in certain respects, most of them, other than the Letter Agreements, contained some form of a provision that prohibited the employee from sharing with anyone confidential information concerning BlueLinX that the employee had learned while employed by the company, unless compelled to do so by law or legal process. The confidentiality provisions also required employees either to provide written notice to the company or to obtain written consent from the company's legal department prior to providing confidential information pursuant to such legal process. None of the confidentiality provisions contained an exemption permitting an employee to provide information voluntarily to the Commission or other regulatory or law enforcement agencies.

8. For example, the Termination Agreements defined "Confidential Information" as "data and information relating to the business of BlueLinX which is or has been disclosed to the Employee or of which the Employee became aware as a consequence of or through his relationship to BlueLinX," and contained the following provision:

Employee has not and in the future will not use or disclose to any third party Confidential Information, unless compelled by law and after notice to BlueLinX. \* \* \* If the Employee has any question regarding what data or information would be considered by BlueLinX to be information subject to this provision, the Employee agrees to contact BlueLinX's Legal Department in writing for written clarification.

9. Similarly, the Release Agreements, the Separation Agreements, and the Settlement Agreements each contained the following confidentiality provision:

[The employee shall] hold in a fiduciary capacity for the benefit of the Company [ ] all Confidential Information....For a period of two years, following the [employee's] Termination Date, Executive shall not, without the prior written consent of the Company or as may otherwise be required by law or legal process, communicate or divulge Confidential Information.

10. While several forms of the Severance Agreements included a restriction on the disclosure of confidential information, BlueLinX did not add such a provision to the Letter Agreements until mid-2013.

11. Between September 2011 and mid-2013, approximately eighteen BlueLinX employees signed Severance Agreements that included one of the confidentiality provisions referred to in paragraphs 8 and 9, above.

12. In or about June 2013 – nearly two years after the Commission had adopted Rule 21F-17 – BlueLinX reviewed and revised each of its Severance Agreements, including the Letter Agreement, and either added or amended a number of provisions that a departing employee was required to accept as a condition for receiving monetary severance payments and other consideration from BlueLinX.

13. Specifically, BlueLinx added a confidentiality clause to its form Letter Agreement that was similar to those that had been included in its other Severance Agreements even prior to the effective date of Rule 21F-17. The added confidentiality clause provided:

[The Employee shall not] disclose to any person or entity not expressly authorized by the Company any Confidential Information or Trade Secrets....Anything herein to the contrary notwithstanding, you shall not be restricted from disclosing or using Confidential Information or Trade Secrets that are required to be disclosed by law, court or other legal process; provided, however, that in the event disclosure is required by law, you shall provide the Company's Legal Department with prompt written notice of such requirement in time to permit the Company to seek an appropriate protective order or other similar protection prior to any such disclosure by you.

14. At the same time, BlueLinx amended all of the Severance Agreements, including the Letter Agreement, by adding a clause to the general release provision specifically addressing interactions with governmental agencies and associated financial incentives. The new clause provided that:

Employee further acknowledges and agrees that nothing in this Agreement prevents Employee from filing a charge with...the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other administrative agency if applicable law requires that Employee be permitted to do so; however, Employee understands and agrees that Employee is waiving the right to any monetary recovery in connection with any such complaint or charge that Employee may file with an administrative agency. (Emphasis added.)

15. Approximately 160 BlueLinx employees have signed Severance Agreements that contained the provisions described in paragraphs 13 and 14, above.

16. By including those clauses in its Severance Agreements, BlueLinx raised impediments to participation by its employees in the SEC's whistleblower program. By requiring departing employees to notify the company's Legal Department prior to disclosing any financial or business information to any third parties without expressly exempting the Commission from the scope of this restriction, BlueLinx forced those employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits.

17. Further, by requiring its departing employees to forgo any monetary recovery in connection with providing information to the Commission, BlueLinx removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations.

18. Restrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission and to accept financial awards for providing information to the Commission, such as those contained in the Severance Agreements, undermine the purpose of Section 21F, which is to "encourage individuals to report to

the Commission,”<sup>4</sup> and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations.

### **Violation**

19. Through its conduct described above, BlueLinx violated Exchange Act Rule 21F-17.

### **Undertaking**

20. BlueLinx undertakes that, from the date of the issuance of this Order, it will include the following provision in all of its Severance Agreements and/or any other agreements with its employees that include prohibitions on the use or disclosure of confidential information relating to the company:

“Protected Rights. Employee understands that nothing contained in this Agreement limits Employee’s ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other federal, state or local governmental agency or commission (“Government Agencies”). Employee further understands that this Agreement does not limit Employee’s ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by any Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee’s right to receive an award for information provided to any Government Agencies.”

21. BlueLinx undertakes that, within sixty (60) days from the date the Commission enters this Order, it will make reasonable efforts to contact BlueLinx former employees who signed any of the Severance Agreements from August 12, 2011 to the present, and provide them with an Internet link to the Order<sup>5</sup> and a statement that BlueLinx does not prohibit former employees from: (1) providing information to, or communicating with, Commission staff without notice to the Company; or (2) accepting a whistleblower award from the Commission pursuant to Section 21F of the Exchange Act.

22. BlueLinx undertakes to certify, in writing, its compliance with the undertakings set forth above. The certification shall identify each undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Antonia Chion, Associate Director, with a copy to the Office of the

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<sup>4</sup> See *Adopting Release*, at 201.

<sup>5</sup> BlueLinx further agrees to provide a paper copy of the Order to any former employee who requests it.

Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of completion of the undertakings.

23. In determining whether to accept the Offer, the Commission has considered each of the undertakings set forth above.

#### IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent BlueLinx cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 21F-17;

B. Respondent shall pay a civil money penalty in the amount of \$265,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3) pursuant to the terms of the payment schedule set forth in paragraph C below. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying BlueLinx as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549.

C. BlueLinx shall pay the penalty due of \$265,000.00 in four installments to the Commission according to the following schedule:

- (1) \$25,000.00 within five (5) days of entry of this Order;

- (2) \$60,000.00 within ninety (90) days of entry of this Order;
- (3) \$80,000.00 within one hundred eighty (180) days of entry of this Order;
- (4) \$100,000.00 within two hundred seventy (270) days of entry of this Order.

Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. § 3717 on any unpaid amounts due after twenty-one (21) days of the entry of the Order. Prior to making the final payment set forth herein, BlueLinx shall contact the staff of the Commission for the amount due for the final payment. If BlueLinx fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within thirty (30) days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields  
Secretary