

S.E.C. Drops Case Against Software Executives

By JENNY ANDERSON

In an unusual retreat, the Securities and Exchange Commission has dropped a lawsuit against the former president and chief executive of the TenFold Corporation, a software developer that the commission has been investigating for more than five years.

The commission voted last week to drop all charges against Gary Kennedy, the former chief executive of TenFold, and declined to approve settlements with two other company executives, according to people briefed on the closed-door meeting. The commissioners unanimously decided that it would be unfair to settle with the two executives when it was simultaneously voting to drop similar charges against the former chief executive. The proceedings of S.E.C. meetings where enforcement matters are discussed are not made public.

While the commission contends that the evidence changed, forcing them to respond accordingly, Mr. Kennedy's lawyer argued that their case was always weak. "The S.E.C. enforcement staff was using an aggressive, though untested argument as to what information must be disclosed to investors," the lawyer, Daryl Rains, said in a statement.

But John Nester, an S.E.C.

spokesman, said, "The decision was based on new evidence that emerged during the course of the litigation, and does not presage any new approach by the commission."

Federal regulators back down after a five-year legal battle.

The S.E.C. sued TenFold and four company executives in 2002, accusing them of failing to disclose in an initial public offering as well as subsequent financial filings problems the company was having with certain large projects. The commission argued that the company was required to provide known trends and uncertainties to investors. Mr. Kennedy's lawyer has long contended that the company's lawyer approved the decision not to disclose facts about certain business deals.

The company settled with the commission in 2002. Staff lawyers had more recently reached tentative settlements with the former chief financial officer, Robert P. Hughes, and the former controller, Stanley G. Hanks, which were presented to the commission late last week. But new evidence that had been uncovered

prompted the commission to retreat from proceeding against Mr. Kennedy.

"I am thrilled and amazed," said Stuart L. Gasner, a partner with Kekker & Van Nest who represented Mr. Hughes. "My takeaway is that they finally came around to accept our view of the case."

According to Mr. Rains, Mr. Kennedy's lawyer, the new evidence related to the company lawyers' approval of Mr. Kennedy's disclosure. Mr. Rains had to sue TenFold to provide that privileged information and in August a Utah court ordered those documents released, weakening the S.E.C.'s case against him.

It is unclear why it took so long for the case to be voted upon.

"We've had five and a half years of litigation, millions of pages of discovery, hundreds of days of sworn testimony and we got to 30 days before trial and they decided to dismiss?" Mr. Rains said. "We're mostly relieved but, gee, it would have been nice five years ago."

Mr. Rains contends that the S.E.C. did not have a strong enough legal theory in arguing that the company was required to give regular updates on positive and negative business developments.

Mr. Nester disagreed on this point. "The case did not turn on any change in legal theory," he said. "It turned on the new evidence."