

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 68506 / December 20, 2012

Admin. Proc. File No. 3-14770

In the Matter of

AMS HOMECARE, INC.

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

I.

AMS Homecare, Inc., a British Columbia corporation with stock registered with the Commission pursuant to § 12(g) of the Securities Exchange Act of 1934,¹ appeals from the initial decision of an administrative law judge.² The law judge revoked the company's registration based on her finding that it had violated § 13(a) of the Exchange Act,³ and Rules 13a-1 and 13a-13 promulgated thereunder,⁴ in that the company failed to file any of its required periodic reports since October 17, 2007, when it filed a Form 20-F for the period ended February 28, 2007.⁵ The law judge issued the initial decision without holding a hearing in the case and without any motion for summary disposition having been filed by either party.

The relevant chronology is as follows. On February 24, 2012, we issued an Order Instituting Proceedings against AMS Homecare, which directed "that a public hearing for the purpose of taking evidence on the questions set forth in [the OIP] shall be convened" to determine whether the company had violated the periodic reporting requirements of the federal securities laws and whether it was "necessary and appropriate for the protection of investors" to suspend or revoke AMS

¹ 15 U.S.C. § 78l(g).

² *Amer. United Gold Corp., et al.*, Initial Decision Release No. 460, 2012 WL 2179124 (June 14, 2012).

³ Exchange Act § 13(a), 15 U.S.C. § 78m(a), requires issuers of securities registered pursuant to Exchange Act § 12 to file periodic reports in accordance with Commission rules.

⁴ Rule 13a-1, 17 C.F.R. § 240.13a-1, requires registrants to file annual reports, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires registrants to file quarterly reports.

⁵ AMS is a foreign private issuer, as defined by Exchange Act Rule 3b-4(c). 17 C.F.R. § 240.3b-4(c). As such, the company has filed its required annual reports on Form 20-F. 17 C.F.R. § 249.220f. Form 20-F is similar to Form 10, filed by U.S. corporations.

Homecare's registration.⁶ After two prehearing conferences in which both AMS Homecare and the Division of Enforcement participated,⁷ the law judge issued an initial decision finding that AMS Homecare had violated the reporting requirements, as alleged, and revoked its registration. Thereafter, the company filed a timely appeal, and the parties filed briefs in accordance with the briefing schedule that was issued.

II.

A. AMS Homecare appealed the law judge's decision to revoke its registration.

In its briefs, AMS Homecare did not dispute the underlying factual allegations of the OIP (*i.e.*, that it had failed to comply with Exchange Act reporting requirements for a multi-year period), but argued that, because of various circumstances, "the sanctions are not necessary"⁸ The Division, in its brief, argued that the company's failure to file periodic reports since 2007 justified the law judge's decision to revoke the registration of its securities. The Division further identified filing deficiencies not mentioned in the OIP (or addressed by the law judge) that, according to the Division, provided additional support for its claim that revocation was necessary to protect investors.⁹ These include the Division's allegation that AMS Homecare's sole officer failed to make required filings related to his personal holdings of the company's stock.¹⁰ The Division also argued,

⁶ *Amer. United Gold Corp., et al.*, Exchange Act Release No. 66456, 2012 WL 1028961, at *2 (Feb. 24, 2012).

⁷ *See* 17 C.F.R. § 201.221 (setting forth procedures applicable to prehearing conferences).

⁸ AMS Homecare's Opening Br. in Support of Pet. for Review at 6. Among other things, AMS Homecare argues that the company was not given enough time to return to compliance and provides "much needed assistance to the community as a whole." *Id.* at 4-5.

⁹ Although AMS Homecare admits that it failed to make the required filings as alleged in the OIP, Exchange Act § 12(j) authorizes revocation for violations of Exchange Act filing requirements only if, as indicated above, it is "necessary or appropriate for the protection of investors." 15 U.S.C. § 78l(j). In determining whether sanctions further the protection of investors, we consider, among other things, the following: (i) the seriousness of the issuer's violations; (ii) the isolated or recurrent nature of the violations; (iii) the degree of culpability involved; (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (v) the credibility of its assurances, if any, against further violations. *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 WL 1506286, at *4 & n.27 (May 31, 2006) (citing *Steadman v. SEC*, 603 F.2d 1126, 1139-40 (5th Cir. 1979) (citation omitted), *aff'd on other grounds*, 450 U.S. 91 (1981)). Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive." *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007) (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008)).

¹⁰ *See* Exchange Act § 13(d), 15 U.S.C. § 78m(d) (requiring any beneficial owner of more than five percent of any Exchange Act registered securities to disclose the extent of his or her ownership stake); Exchange Act § 16(a), 15 U.S.C. § 78p(a) (requiring officers and directors to disclose their initial ownership stake in the registrant and any changes in their ownership stake).

for the first time on appeal, that the company's 2007 annual report (the last one it filed) lacked required audited financial statements.¹¹

B. The Commission requested additional briefing by the parties.

In their merits briefs in this appeal, neither party directly addressed the unusual procedural posture of the case, *i.e.*, that the initial decision was issued without a hearing and without either party filing a motion for summary disposition. As a result, the parties were asked to file additional briefs regarding the procedural posture of the appeal, specifically addressing whether the Rules of Practice authorize issuance of an initial decision in the absence of a hearing or a motion for summary disposition and, consequently, whether the proceeding should be remanded for the purpose of conducting a hearing in the matter (during which motions for summary disposition may be made).¹²

In its response to the additional briefing order, the Division argues that the law judge acted appropriately, citing Rules of Practice 111 and 250(b), which, respectively, authorize hearing officers to "do all things necessary and appropriate to discharge his or her duties"¹³ and to grant motions for summary disposition filed by either party, under certain circumstances.¹⁴ According to the Division, the law judge's disposition of the case "was, in essence, a modified summary disposition procedure consented to by the parties which benefited all involved."¹⁵ Noting that the "violation was uncontested" and that the law judge had given the company the opportunity to cure its delinquency, the Division claims that there was no prejudice to AMS Homecare and that the law judge's approach appropriately "conserved the resources of the respondent," the Division, and the law judge because the parties did not have to file "summary disposition briefs, declarations, and exhibits."¹⁶

¹¹ The OIP did not allege any deficiency with respect to this 2007 filing. The Division, however, attached to its brief a declaration that supports the new allegations. The Division introduced no evidence to support these allegations before the law judge, presumably because the initial decision was issued at such an early stage in the proceeding.

¹² *AMS Homecare, Inc.*, Order Directing the Filing of Additional Briefs, Exchange Act Release No. 68078, 2012 WL 5197254, at *1 (Oct. 22, 2012).

¹³ 17 C.F.R. § 201.111.

¹⁴ 17 C.F.R. § 201.250 (permitting either party in an administrative proceeding to file, after the respondent's answer to the OIP has been filed and before a hearing is held, a motion for summary disposition of allegations in the OIP).

¹⁵ The Division's Br. in Opp'n to AMS Homecare, Inc.'s Pet. for Review at 1.

¹⁶ *Id.* at 4-6. In its response to the additional briefing order, which was filed late, AMS Homecare asserts that the procedure followed by the law judge was not "appropriate" and argues in favor of remanding the proceeding for a hearing to permit the company to introduce evidence in support of its public interest arguments against revocation. AMS Homecare's Br. in Response to the Commission's Oct. 22, 2012 Order Directing the Filing of Additional Briefs with Regards to AMS Homecare Inc.'s Pet. for Review of July 31, 2012, at 7. *See infra* note 9.

C. Remanding the proceeding to the law judge is appropriate under the circumstances.

We conclude that a remand for further proceedings before the law judge is warranted. Both the OIP and the Rules of Practice contemplate the holding of a hearing prior to the issuance of an initial decision in the absence of a successful motion for summary disposition by one of the parties, and we see no justification for departing from those procedural requirements here.¹⁷ In reaching this conclusion, we note that it is not clear that AMS Homecare consented to the procedures adopted by the law judge.¹⁸ Moreover, it appears that there are issues in this case that were not developed below, such as the additional filing deficiencies (identified by the Division subsequent to issuance of the initial decision) that the Division cites as further support for its argument that revocation is necessary for the protection of investors.¹⁹ As provided by our rules, evidence regarding these issues should first be submitted to and considered by the law judge, with the opportunity given to the opposing party to challenge such evidence. Summary disposition, provided the applicable procedural provisions are followed, may eliminate the need for a hearing but only "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law."²⁰ We cannot determine, at this point, whether summary disposition is appropriate here, nor, under our rules, is that an appropriate determination for us to make.²¹

¹⁷ We have previously remanded cases because of a failure to comply with procedures set forth in our Rules of Practice even when the non-compliance was unlikely to have resulted in prejudice. *See, e.g., Byron S. Rainer*, Exchange Act Release No. 59040, 2008 WL 5100855, at *2 (Dec. 2, 2008) (remanding proceeding where respondent denied adequate opportunity to review investigative file, as required by Rule of Practice 230(a)); *Jose P. Zollino*, Exchange Act Release No. 51632, 2005 WL 1006826, at *3 (Apr. 29, 2005) (remanding proceeding where no prehearing conference was held, as required by Rule of Practice 221, and where respondent did not receive an adequate opportunity to review investigative file).

¹⁸ At the second prehearing conference, after the law judge stated her intention to revoke the company's registration, AMS Homecare's CEO objected, arguing that the company should have received additional time to make its filings prior to the issuance of an initial decision. In its petition for review, the company argued, "[w]hen the pre-hearing [conference] for May 16, 2012 was set the requirement was not necessarily to present audited financial statements and [an annual report] but only to determine how much progress had been made if they were not ready by this May 16, 2012 date." AMS Homecare's Pet. for Review at 3.

¹⁹ *Cf. Gravatt v. The Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196, 2004 WL 1257716, at *2 (9th Cir. 2004) (discussing FED. R. CIV. P. 56, which provides for summary judgment) (unpublished), where the court noted:

there is a big difference between considering the motion [for summary judgment] sua sponte and doing so with the benefit of adversarial briefing. Counsel often will raise issues that may not be evident to the court, and even introduce additional evidence that might not yet be in the record, to survive an opponent's summary judgment motion.

We note that, although Rule 56 "does not govern Commission administrative proceedings," *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *6 & n.26 (Feb. 4, 2008), our Rule 250 was modeled on Rule 56. *Kornman v. SEC*, 592 F.3d 173, 182 (D.C. Cir. 2010).

²⁰ 17 C.F.R. § 201.250(b). In considering such a motion, the facts of the pleadings of the non-moving party are accepted as true, "except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted by Rule 323." 17 C.F.R. § 201.250(a).

²¹ The Division asks that, if we determine that a remand is necessary, we order the ALJ to summarily dispose of this case based on the pleadings already filed. For the reasons discussed herein, we deny that request. We take no position at
(continued...)

Accordingly, it is ORDERED that the proceeding against AMS Homecare be, and is, remanded for further consideration in accordance with the preceding discussion.

By the Commission.

Elizabeth M. Murphy
Secretary

(...continued)

this time whether a proper motion for summary disposition that complies with the procedural requirements of Rule 250 should be granted.