

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

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CLERK U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

SECURITIES AND EXCHANGE COMMISSION, )

Plaintiff, )

v. )

DIGITAL LIGHTWAVE, INC.  
and BRYAN J. ZWAN )

Defendants, )

CASE NO. 8:00CV 44-T  
26F

COMPLAINT FOR  
INJUNCTIVE AND  
OTHER RELIEF

Plaintiff, Securities and Exchange Commission ("SEC" or "Commission") alleges  
that:

INTRODUCTION

1. This matter involves an "earnings management" scheme in which Digital Lightwave, Inc. ("Digital") overstated revenues and earnings in two quarters to meet analysts' expectations. As a result of this scheme, Digital included materially false financial statements and other false and misleading information in quarterly filings made with the Commission on Forms 10-Q for the quarters ended June 30, 1997 and September 30, 1997. Digital also issued false press releases to the public, which materially overstated its revenues and earnings. Bryan J. Zwan ("Zwan"), Digital's then chief executive officer, was the person principally responsible for making the false filings and issuing the false press releases. Zwan also signed the fraudulent filings on behalf of Digital. Specifically, Digital's filings with the Commission materially overstated its revenues and accounts

receivable by prematurely or incorrectly recognizing revenues on certain transactions which were incomplete or contained contingencies. Zwan also made materially false statements and omissions to Digital's independent auditors in connection with their review of Digital's second and third quarter 1997 financial statements. Injunctive relief is required in order to prevent Digital and Zwan from engaging in similar conduct again.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to Sections 20(d) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(d) and 77v(a), and Sections 21(d), 21(e) and 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d), 78u(e) and 78aa.

3. The Commission brings this action pursuant to authority conferred on it by Sections 20(b) and 20(d) of the Securities Act, 15 U.S.C. §§ 77t(b) and 77t(d), and Sections 21(d) and 21(e) of the Exchange Act, 15 U.S.C. §§ 78u(d) and 78u(e).

4. Certain of the acts and transactions constituting violations of the Securities Act and the Exchange Act occurred within the Middle District of Florida and elsewhere. In addition, Digital maintained and operated a headquarters office in Clearwater, Florida and engaged in the acts and practices complained of herein within the Middle District of Florida. Finally, Zwan resided in the Middle District of Florida.

5. Digital and Zwan, directly or indirectly, made use of the means and instrumentalities of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the acts, practices, and courses of business complained of herein.

### **DEFENDANTS**

6. Digital Lightwave, Inc. is a publicly traded, Delaware corporation with its principal executive offices in Clearwater, Florida. Digital is a manufacturer of network test equipment products for advanced, high-speed telecommunication networks. The company's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is quoted on the Nasdaq national market system. At all times relevant hereto, Digital was required to make and file periodic reports with the SEC. Digital's securities are still publicly traded.

7. Bryan J. Zwan, age 52, resides in Belleair, Florida. He was Digital's president, chief executive officer and chairman of the board until December 1998. From December 1998 until July 6, 1999, Zwan was chairman and chief technical officer. He is currently a director. During the relevant period in 1997, Zwan owned 74.6% of Digital's outstanding common shares. Zwan is still Digital's largest shareholder.

### **BACKGROUND**

8. On February 6, 1997, Digital completed its initial public offering ("IPO") at a price of \$12.00 per share and a corresponding market capitalization of over \$314 million. On April 16, 1997, Digital reported its first quarter revenues and earnings for the period ended March 31, 1997, which were substantially below Wall Street analysts' ("analysts") expectations. After the release of its first quarter financial results, Digital's stock price declined precipitously from \$7.50 to \$4.18 per share. A mere two months after its IPO, Digital's stock was trading about 65% percent below the IPO price. Consequently, management's credibility with analysts and investors suffered a severe blow after only one quarter as a public company.

**THE FRAUDULENT EARNINGS MANAGEMENT SCHEME**

9. As the second quarter of 1997 was coming to a close, Zwan learned that Digital was behind in sales orders and that if he did not address the problem, the company's sales results would not meet analysts' expectations for the second consecutive quarter. Zwan understood that it would be important for Digital to meet or exceed analysts' expectations for the next several quarters.

10. Zwan began to oversee and participate actively in Digital's sales activities during the last two weeks of the quarter. He began negotiating and approving various sales transactions, and making decisions on how those transactions should be structured. He also implemented policies on how best to maximize revenues. In his endeavor to meet or beat analyst expectations, Zwan employed fraudulent revenue recognition policies, which resulted in the material overstatement of Digital's revenues and accounts receivable for the second quarter of 1997.

11. Specifically, the company began recognizing revenues based on verbal purchase orders ("Verbal POs") and a fraudulent bill and hold transaction. As a result, Digital was able to exceed analysts' expectations, reporting revenues of \$5.3 million and earnings of \$.05 per share for the quarter.

12. On August 14, 1997, the company filed with the Commission its second quarter Form 10-Q, which included the materially false financial information.

13. In the third quarter of 1997, Digital, through Zwan, again employed the fraudulent revenue recognition policies, and was able to exceed analysts' expectations for the second consecutive quarter. This time Digital reported revenues of \$8.3 million and earnings of \$.08 per share. These results were materially overstated because most of the

reported revenues were again based on fraudulent bill and hold transactions and Verbal POs. Digital's third quarter Form 10-Q, which was filed on November 13, 1997, contained the fraudulent financial results.

**DIGITAL'S FALSE AND MISLEADING FORM 10-Q  
FOR THE QUARTER ENDED JUNE 30, 1997**

14. Digital's Form 10-Q for the quarter ended June 30, 1997 contained false financial statements, which materially overstated its revenues by approximately \$2.3 million (representing 43.9% of total revenues) and its accounts receivable by approximately \$2.3 million (representing 5.4% of its total assets).

**The Bill and Hold Transaction with MFS WorldCom Network Services**

15. On June 30, 1997, the last day of the quarter, Digital falsely recorded revenues of \$1.5 million for 40 units of a 60 unit order from MFS WorldCom Network Services ("MFS"). This was Digital's first bill and hold transaction and represented approximately 28.4% of the company's total sales for that quarter. Although the transaction was based on a letter agreement with MFS dated July 3, 1997, after the close of the second quarter, it was recorded in the second quarter.

16. The MFS transaction and the terms and conditions contained in the July 3, 1997 letter agreement did not meet the revenue recognition requirements for bill and hold transactions for several reasons. First, the MFS letter agreement did not specify that the risk of ownership had passed to MFS. Second, it was Digital, and not MFS, who decided to structure the transaction as bill and hold. In addition, the units were not complete and ready for shipment at the time the revenue was recognized as required under bill and hold. Although Digital was required to include certain software features into the units, these

features were not required to be incorporated into the units until August 15, 1997 and October 31, 1997. The units were also not complete because each unit lacked an asynchronous transfer mode board, which was a critical and material component of the units in this order.

17. The MFS letter agreement also contained specific performance obligations on the part of Digital such that the earnings process was not complete. For example, the letter agreement contained penalty clauses if Digital failed to release the required software by certain deadlines. Further, the letter agreement stated that if Digital failed to meet these specified terms and conditions the deal would be null and void.

18. There was also no fixed delivery schedule contained in the MFS letter agreement as required for bill and hold transactions. In fact, the units were not shipped to MFS until the end of October 1997. Finally, payment for the shipment was not required until November 30, 1997, five (5) months after the sale was recognized as revenue. Indeed, the invoice was not sent until the end of November 1997.

19. Despite terms and conditions contained in the MFS letter agreement, which demonstrated that the earnings process was not complete at the time the sale was recorded, Digital fraudulently recorded revenue of \$1.5 million for the MFS order.

**The Ameritech and TCG Verbal Purchase Orders**

20. During the last four days of the second quarter of 1997, Digital fraudulently recorded revenue on shipments of units to Ameritech Corp. ("Ameritech") and Teleport Communications Group ("TCG").

21. The Ameritech shipment consisted of seven (7) units, which was recorded as revenue totaling \$246,750--approximately 4.6% of Digital's revenues for that quarter. At

the time Digital recorded the revenue for these units, this was not a real order. This is evidenced by a written agreement between Digital and Ameritech which provided that Ameritech would only obligate itself to purchase a unit through a written purchase order ("PO"). These units were in fact not shipped to Ameritech because Digital never received a commitment from Ameritech to purchase them. Instead, the units were shipped and placed with a Digital salesperson. Ameritech did not submit POs to Digital committing itself to purchase the units until well after the close of the quarter. Further, invoices for these units were not issued by Digital until after the company received the POs.

22. The TCG transaction was recorded as revenue totaling \$315,750 and was also improperly included in Digital's revenues for the second quarter of 1997 because TCG had not committed itself to purchase the units. Consisting of three (3) shipments totaling eight (8) units, this transaction represented approximately 5.9% of Digital's total revenues for that quarter. Two of the TCG units were shipped directly to a Digital salesperson, who was informed a few weeks later by TCG that it would not be purchasing them. Five of the units were shipped to TCG's Chicago office where they were immediately refused and returned to Digital's salesperson. TCG ultimately only purchased one unit in late October 1997.

#### **The U.S. West Demonstration Units**

23. In early June 1997, Digital initiated a strategy to secure U.S. West as a customer. Digital knew, however, that U.S. West did not have an allocation in its capital budget to purchase Digital's units. In response, Digital proposed that U.S. West accept units on a demonstration basis. U.S. West agreed to do so. As part of this agreement, there was an understanding that if a capital budget were to become available, U.S. West could

consider purchasing the units. In the alternative, U.S. West could simply return the units and incur no liability.

24. During the last few days of the second quarter of 1997, Digital fraudulently recorded seven (7) units shipped to U.S. West, Inc. ("U.S. West") as revenues. These units were in fact, demonstration units for which there was never a firm commitment by U.S. West to purchase them. In spite of this, Digital recorded these units as revenues totaling \$264,450, which represented approximately 5% of the total revenues for the quarter. The demonstration units were all later returned to Digital.

**Zwan's Knowledge and Role in the Above Second Quarter Transactions**

25. During the relevant period, all of Digital's vice-presidents reported directly to Zwan and were required to provide him with weekly reports on their various priority projects. Zwan was the sole officer involved in all aspects of Digital's operations including sales, finance, manufacturing and research and development.

26. Under Zwan's authority, Digital implemented the fraudulent policies of using bill and hold, Verbal POs, and demonstration units as a basis for recognizing revenues.

27. Zwan was aware of the revenue recognition requirements for a bill and hold transaction because Digital's chief accounting officer sent him an electronic message ("e-mail") on the last day of the second quarter of 1997 setting forth those criteria. The e-mail also raised concerns about the numerous Verbal POs recorded as revenue pursuant to Zwan's instructions to the accounting staff. Zwan ignored this e-mail and proceeded



improperly to record Verbal POs and bill and hold transactions to fraudulently increase Digital's revenues.

28. Zwan, despite knowing the revenue recognition criteria for a bill and hold transaction, was directly responsible for negotiating and approving the MFS transaction that was recorded as revenue on a bill and hold basis. Zwan knew that this transaction violated the revenue recognition requirements for a bill and hold transaction for the reasons previously set forth above in paragraphs 15-19.

29. Zwan knew that the U.S. West demonstration units could not be recognized as revenue. Despite this knowledge, Zwan allowed Digital to recognize the U.S. West demonstration units as revenue in the second quarter.

30. Zwan also approved shipping units to salespersons and recognizing the associated revenue in connection with the TCG and Ameritech transactions when no POs or other written orders existed.

31. Furthermore, on a weekly basis, Zwan received copies of Digital's so called "sales bible," which was a spreadsheet listing all transactions recorded as revenues. The "sales bible" also reflected whether a transaction was based on a Verbal PO and whether an invoice was sent. Digital's accounting department maintained the "sales bible" and all transactions contained in the spreadsheet were listed in chronological order and updated on a daily basis. This document allowed Zwan to track the status of all fraudulent Verbal POs and the fraudulent MFS bill and hold transaction.

32. On August 13, 1997, Zwan signed Digital's fraudulent second quarter Form 10-Q.

**DIGITAL'S FALSE AND MISLEADING FORM 10-Q  
FOR THE QUARTER ENDED SEPTEMBER 30, 1997**

33. Digital's Form 10-Q for the quarter ended September 30, 1997, contained false financial statements which materially overstated its revenues by approximately \$6.6 million (representing 79.3% of total revenues) and its accounts receivable by approximately \$8.67 million (representing 17.3% of its total assets).

**The LDDS WorldCom, MFS and Transnetworks  
Bill and Hold Transactions**

**a. LDDS WorldCom**

34. On September 30, 1997, the last day of the third quarter, Digital fraudulently recognized \$3.475 million as revenue for an order from LDDS WorldCom ("LDDS") for 100 units. The LDDS order was structured as a bill and hold transaction and constituted approximately 41.7% of Digital's reported revenues that quarter.

35. The LDDS transaction failed to meet the requirements of revenue recognition for bill and hold transactions. First, the LDDS letter agreement to purchase the units did not specify that the risk of ownership had passed to LDDS. The units were also not completely manufactured and ready for shipment. As a pretense that they were complete, and therefore could be recorded as revenue under a bill and hold transaction, parts for the units were placed in 100 individual boxes and were shipped to an off-site storage warehouse on September 30, 1997.

36. The transaction also failed to comply with the requirements of revenue recognition for bill and hold transactions because the agreement contained specific performance obligations on Digital's part. For example, the agreement specified that if

Digital failed to meet its terms and conditions the agreement would be null and void. In addition, Digital's regular billing practice was altered because LDDS was not required to pay for any of the units until after they were shipped, which was not anticipated to happen before 1998. Finally, LDDS did not provide a fixed delivery schedule to Digital and only committed to take delivery by December 31, 1998.

37. Ignoring terms and conditions which clearly violated the bill and hold requirements, Digital fraudulently recognized \$3.475 million in revenue in the third quarter for this transaction.

**b. MFS**

38. Digital also falsely recognized \$750,000 as revenue in the third quarter of 1997 for the remaining 20 units of the 60 unit order placed by MFS in the second quarter. This portion of the order constituted approximately 9% of Digital's reported revenues during the third quarter. The MFS transaction violated the requirements of revenue recognition for a bill and hold transaction. For example, among other things, the MFS letter agreement did not specify that the risk of ownership had passed, and the letter agreement contained specific performance obligations by Digital, and had no fixed delivery schedule.

**c. Transnetworks**

39. Digital also entered into a bill and hold transaction with Transnetworks, Inc. ("Transnetworks") on the last day of the third quarter of 1997. This order, which consisted of 40 units, was falsely recognized as \$900,000 in revenue (approximately 10.8% of Digital's reported revenues in that quarter).

40. The Transnetworks transaction violated the requirements of revenue recognition for bill and hold transactions. First, the agreement did not specify that the risk

of ownership had passed to Transnetworks. In addition, the units were not complete and ready for shipment at the time the revenue was recorded. In particular, Digital was required to incorporate certain software features into the units which were not anticipated to be completed until the third quarter of 1998. Moreover, as required in a bill and hold transaction, Transnetworks did not provide a fixed delivery schedule to Digital. Transnetworks, in fact, never accepted delivery of any of the units and canceled the order. Finally, Digital's regular billing practice was altered from "net 30" because Transnetworks was not obligated to pay for the units until after 1997.

41. Despite terms that clearly did not meet the requirements of revenue recognition for bill and hold transactions, Digital improperly recognized the transaction as revenue.

#### **The Advantis and NEC America Verbal Purchase Orders**

##### **a. Advantis**

42. On September 30, 1997, the final day of the third quarter, Digital recognized \$1.104 million in revenue for a 37 unit order from Advantis, which was based on a verbal commitment from one of Advantis' employees. This order constituted approximately 13.2% of Digital's reported revenues that quarter.

43. The day after the revenue was recorded, the sales department advised Zwan that there were problems with the order and that Advantis would not be sending a PO or other confirmation of the order. In a desperate attempt to secure a bona fide commitment for the sale, Zwan immediately sent Digital's vice-president of sales to Advantis in New York. While at Advantis, the salesperson kept Zwan apprised of the situation. Eventually, he was informed that due to budgetary constraints, even if Advantis were to place an order,

it would not exceed \$724,000. After two weeks of futile effort, the salesperson was unable to secure a commitment from Advantis to purchase the units.

44. Despite not having received any commitment from Advantis to purchase the units, Digital fraudulently included the Advantis transaction as third quarter revenues. As of the date its third quarter Form 10-Q was filed, Digital still had not received any commitment from Advantis to purchase the units. Digital treated this transaction as yet another bill and hold transaction since the company had no immediate plans to ship the units to Advantis.

#### **NEC America**

45. On September 30, 1997, Digital also improperly recognized \$386,610 as revenue for a purported ten (10) unit order from NEC America ("NEC"). This transaction, which constituted approximately 4.6% of Digital's reported revenues for that quarter, was recorded in response to an NEC employee who had indicated some interest in purchasing the units. Digital knew that NEC required written POs and budget allocation before NEC would obligate itself to purchase the units. Despite this, Digital recognized the revenue and shipped the units and placed them with a Digital salesperson until a commitment to purchase was received from NEC. NEC ultimately never purchased the units.

#### **Zwan's Knowledge and Role in the Above Third Quarter Transactions**

46. Zwan knew the revenue recognition requirements for bill and hold transactions and that Verbal POs could not be recognized as revenue in the absence of a firm commitment to purchase.

47. Zwan, despite knowing the revenue recognition criteria for bill and hold transactions, was directly responsible for negotiating and approving the LDDS,

Transnetworks, Advantis and MFS transactions that were recorded as revenues on bill and hold bases. Zwan knew that these transactions violated the revenue recognition requirements for bill and hold transactions for the reasons previously set forth above in paragraphs 34-44.

48. Zwan also allowed Digital to ship the NEC units to a salesman because NEC had not made a firm commitment to purchase the units. Zwan knew that these units were recognized as revenue by Digital in its third quarter of 1997.

49. During the fourth quarter of 1997, Zwan was still receiving, on a weekly basis, copies of Digital's so called "sales bible," which clearly showed all the Verbal POs which had been recognized as revenue in the second and third quarters. The "sales bible" showed that firm commitments to purchase these units still had not been received.

50. On November 13, 1997, Zwan signed Digital's fraudulent third quarter Form 10-Q.

#### **DIGITAL'S FALSE AND MISLEADING PRESS RELEASES**

51. On July 16, 1997, Digital, through Zwan, issued a press release announcing its second quarter financial results. The financial information contained in the press release was materially false and misleading because it included revenues from the MFS bill and hold order.

52. The press release also included revenues for the Ameritech order--for which Digital did not receive a PO until after the press release was issued--and the TCG orders.

53. In addition, the press release included revenues from the U.S. West demonstration units. The press release also specifically mentioned U.S. West as a "new

customer” despite the fact that U.S. West had purchased no units from Digital and had merely received units on a demonstration basis.

54. Digital, through Zwan, issued a press release on October 16, 1997, announcing its third quarter results. This press release was also false and misleading because it improperly included revenues based on the fraudulent bill and hold and Verbal PO transactions, which were recorded in the quarter. For example, the press release included the \$3.475 million LDDS transaction and the \$1.104 million in revenue for the Advantis order, even though LDDS was an improper bill and hold transaction and the company had received no commitment from Advantis to purchase the units at the time of the announcement.

#### **ZWAN’S FRAUDULENT PLEDGE OF HIS DIGITAL SHARES**

55. On September 4, 1997, in the midst of Digital’s fraudulent revenue recognition scheme, Zwan increased a personal line of credit he had with NationsBank and collateralized the loan with his stock in Digital. Specifically, Zwan increased the line of credit from \$1.5 million to \$5 million and pledged approximately 1.68 million shares of Digital stock as collateral for the loan. Zwan then borrowed approximately \$2 million against the line of credit and used \$1.83 million of those funds to pay back a personal loan he had taken from Digital.

#### **MISLEADING STATEMENTS AND OMISSIONS IN CONNECTION WITH COOPERS’ QUARTERLY REVIEWS OF DIGITAL’S FINANCIAL STATEMENTS**

56. On July 10, 1997, Coopers & Lybrand (“Coopers”) conducted a quarterly review of Digital’s financial results for the second quarter of 1997. Coopers also conducted a review of Digital’s third quarter financial statements on October 15, 1997.

57. In connection with the reviews, Coopers was provided with management representation letters. Zwan signed the second quarter and third quarter management representation letters. These letters falsely represented, among other things, that: (1) “[t]here are no material transactions that have not been properly reflected in the financial statements”; (2) “[t]here have been no changes...in the company’s accounting principles and practices” and (3) “[t]he company’s accounting principles, and the practices and methods followed in applying them, are as disclosed in the financial statements”.

**FAILURE TO IMPLEMENT ADEQUATE INTERNAL ACCOUNTING CONTROLS AND TO PROPERLY MAINTAIN BOOKS AND RECORDS**

58. Digital failed to make and keep books and records which accurately reflected its financial and accounting transactions, and failed to maintain a system of internal accounting controls sufficient to provide assurances that accounting transactions were recorded as necessary to permit the proper preparation of financial statements in conformity with GAAP.

59. As described above, Zwan aided and abetted or caused Digital’s failure to make and keep books and records which accurately reflected its financial and accounting transactions, and its failure to maintain a system of internal accounting controls sufficient to provide assurances that accounting transactions were recorded as necessary to permit the proper preparation of financial statements in conformity with GAAP because of his participation in Digital’s improper recognition of revenues.



**COUNT ONE -- FRAUD**

**VIOLATIONS OF SECTION 10(b) OF THE SECURITIES  
EXCHANGE ACT OF 1934 AND RULE 10b-5, THEREUNDER**

60. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

61. During the second and third quarters of 1997, defendants Digital and Zwan each, directly or indirectly, by use of the means or instrumentalities of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of securities, as described herein, knowingly, willfully and/or recklessly:

- (i) employed devices, schemes or artifices to defraud; (ii) made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or
- (iii) engaged in acts, practices or courses of business which operated, or would have operated as a fraud or deceit upon any person in connection with the purchase or sale of such securities, through acts which included, but are not limited to, making the misrepresentations and omissions of material fact described in paragraphs 1 through 59, above.

62. By reason of the foregoing, defendants Digital and Zwan each violated and, unless enjoined, will again violate Section 10(b) of the Exchange Act and Rule 10b-5, thereunder.

**COUNT TWO – FRAUDULENT PLEDGE OF STOCK**

**VIOLATIONS OF SECTION 17(a)(1)  
OF THE SECURITIES ACT OF 1933**

63. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

64. On September 4, 1997, in the midst of Digital's fraudulent earnings management scheme, Zwan increased a personal line of credit he had with NationsBank and collateralized the loan with his stock in Digital and thereby, directly and indirectly, by use of the means or instruments of transportation or communication in interstate commerce and by use of the mails, in the offer or sale of securities, as described herein, knowingly, willfully or recklessly employed devices, schemes or artifices to defraud.

65. By reason of the foregoing defendant Zwan, directly and indirectly, violated, and unless enjoined will continue to violate Section 17(a)(1) of the Securities Act, 15 U.S.C. § 77q(a)(1).

**COUNT THREE – FRAUDULENT PLEDGE OF STOCK**

**VIOLATIONS OF SECTION 17(a)(2) and 17(a)(3)  
OF THE SECURITIES ACT OF 1933**

66. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

67. On September 4, 1997, in the midst of Digital's earnings management scheme, Zwan increased a personal line of credit he had with NationsBank and collateralized the loan with his stock in Digital and thereby, directly and indirectly, by use of the means or instruments of transportation or communication in interstate commerce and by use of the mails, in the offer or sale of securities, as described herein: (i) obtained money

or property by means of untrue statements made, in the light of the circumstances under which they were made, not misleading; and (ii) engaged in transactions, practices and courses of business which operated and will operate as a fraud or deceit upon purchasers and prospective purchasers of such securities.

68. By reason of the foregoing defendant Zwan, directly and indirectly, violated, and unless enjoined will continue to violate Section 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. § 77q(a)(2) and 77q(a)(3).

#### **COUNT FOUR -- RECORDKEEPING**

##### **VIOLATIONS OF SECTIONS 13(b)(2) OF THE SECURITIES EXCHANGE ACT OF 1934**

69. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

70. At all relevant times, Digital was an issuer subject to these recordkeeping requirements as set forth in Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

71. During the second and third quarters of 1997, Digital violated Sections 13(b)(2)(A) and (B) of the Exchange Act by, among other things, failing to make and keep books, records, and/or accounts, which, in reasonable detail, accurately and fairly reflected its transactions and the dispositions of its assets and failed to maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements.

72. Zwan aided and abetted or caused Digital's failure to make and keep books and records which accurately reflected its financial and accounting transactions, and its

failure to maintain a system of internal accounting controls sufficient to provide assurances that accounting transactions were recorded as necessary to permit the proper preparation of financial statements in conformity with GAAP because of his participation in Digital's improper recognition of revenues.

73. By reason of the foregoing, defendant Digital violated, and, unless enjoined, will again violate Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Zwan aided and abetted or caused Digital's violations, and, unless enjoined, will again aid and abet or cause violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act .

#### **COUNT FIVE – FINANCIAL REPORTING**

##### **VIOLATIONS OF SECTION 13(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULES 13a-13 AND 12b-20**

74. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

75. Section 13(a) of the Exchange Act requires all issuers subject to the reporting requirements of the Exchange Act to file periodic and other reports with the SEC containing such information as the SEC's rules prescribe. Rule 13a-13, promulgated pursuant to Section 13(a), require issuers to file with the SEC quarterly reports. In addition to any information expressly required to be included in a statement or report, Rule 12b-20 requires the addition of such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

76. At all relevant times, Digital was an issuer subject to these reporting requirements.

77. During the second and third quarters of 1997, Digital violated Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder by filing with the SEC materially false financial and informational statements for Digital in periodic reports on Forms 10-Q.

78. Zwan aided and abetted or caused Digital's violations of Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder by filing with the SEC materially false financial and informational statements for Digital in periodic reports on Forms 10-Q.

79. By reason of the foregoing, defendant Digital violated, and, unless enjoined, will again violate Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder and Zwan aided and abetted or caused Digital's violations, and, unless enjoined, will again aid and abet or cause violations of Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder.

**COUNT SIX – MISREPRESENTATIONS AND OMISSIONS TO AUDITORS**

**VIOLATIONS OF EXCHANGE ACT RULE 13b2-2**

80. Paragraphs 1 through 59 are hereby reincorporated and realleged by reference.

81. As alleged in paragraphs 56-57, above, Zwan directly or indirectly, made or caused to be made materially false or misleading statements or omissions to Digital's independent auditors in connection with their quarterly reviews of Digital's financial statements for the quarters ended, June 30, 1997 and September 30, 1997.

82. By reason of the foregoing acts and practices, defendant Zwan violated Exchange Act Rule 13b2-2.

WHEREFORE, the SEC respectfully requests that the Court:

**I.**

**DECLARATORY RELIEF**

Declare, determine and find that defendants Digital and Zwan, each committed the violations of the federal securities laws alleged herein.

**II.**

**PERMANENT INJUNCTION**

Issue a Permanent Injunction, restraining and enjoining defendant Digital, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with it, and each of them, from violating Section 10(b) of the Exchange Act, [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5], thereunder, and Sections 13(a) and 13(b)(2) of the Exchange Act [15 U.S.C. §§ 78m(a) and (b)(2)] and Rules 13a-13 and 12b-20 [17 C.F.R. §§ 240.13a-13, 240.12b-20], thereunder.

**III.**

**PERMANENT INJUNCTION**

Issue a Permanent Injunction, restraining and enjoining defendant Zwan, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, and each of them, from violating from violating Section 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(1), 77q(a)(2) and 77q(a)(3)], Section 10(b) of the Exchange Act, [15 U.S.C. § 78j(b)], and Rules 10b-5 [17 C.F.R. § 240.10b-5] and 13b2-2 [17 C.F.R. §240.13b2-2], thereunder, and from aiding and abetting violations of Sections 13(a) and 13(b)(2) of the Exchange Act [15 U.S.C. §§

78m(a) and (b)(2)] and Rules 13a-13 and 12b-20 [17 C.F.R. §§ 240.13a-13, 240.12b-20], thereunder.

**IV.**

**CIVIL PENALTY**

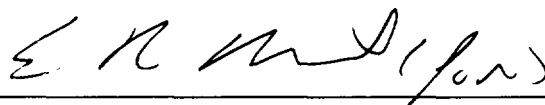
Issue an Order directing defendant Zwan to pay a civil penalty pursuant to Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3), for his violations of the federal securities laws as complained herein.

**V.**

**FURTHER RELIEF**

Grant such other and further relief as may be necessary and appropriate. Further, the SEC respectfully requests that this Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that may hereby be entered, or to entertain any suitable application or motion by the SEC for additional relief within the jurisdiction of this Court.

Respectfully submitted,



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Dated March 28, 2000

\* Designated as Trial Counsel pursuant to Local Rule 1.05(c)