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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 21, 2014

Administrative Proceeding
File No. 3-15864

In the Matter of :
:
IMAGING DIAGNOSTIC SYSTEMS, INC. :
:
Respondent. :
_____ :

**DIVISION OF ENFORCEMENT’S AMENDED REPLY IN SUPPORT
OF MOTION FOR SUMMARY DISPOSITION**

I. Introduction

Respondent Imaging Diagnostic Systems, Inc. (“Imaging”) makes two main arguments against revocation of its securities registration. First, the company incorrectly argues there are material facts in dispute prohibiting the Law Judge from granting summary disposition. However, Imaging is wrong; in fact it admitted every factual allegation against it in its Answer to the Order Instituting Proceedings (“OIP”). Thus there is no dispute as to any *material* fact applicable to summary disposition – Imaging has admitted it is delinquent in filing one Form 10-K annual report and three Form 10-Q quarterly reports. Thus, there is no dispute that the company is in violation of Section 13(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Exchange Act Rules 13a-1 and 13a-13. Accordingly, summary disposition is appropriate here.

Second, Imaging sets forth a number of facts it claims weigh against revocation of its securities as a sanction in this case. Most of these facts concern the company purportedly

obtaining sufficient financing to continue in business and bring its delinquent filings current by August 31, 2014. Even taking these facts as true, which the Law Judge must do under the standards for summary disposition, Imaging's plans to become current in its filings are insufficient to avoid revocation of its securities registration as a sanction. As discussed in more detail in our motion for summary disposition and below, several Commission cases hold that even if a respondent becomes current in its filings during an Exchange Act Section 12(j) proceeding, revocation is an appropriate sanction (as the Law Judge herself noted at the pre-hearing conference in this matter). *See, e.g., In the Matter of Absolute Potential, Inc.*, AP File No. 3-14587, 2014 WL 1338256 at *4 (Comm'n Opin. April 4, 2014).

Accordingly, pursuant to Commission Rule of Practice 250(b), the Law Judge should grant the Division of Enforcement's summary disposition motion and revoke the registration of each class of the company's securities.

II. There Are No Material Facts In Dispute

The OIP sets forth the material facts relevant to whether summary disposition is appropriate, all of which Imaging admitted in its answer:

- Imaging's securities are registered with the Commission under Exchange Act Section 12(g), and the company's common stock is quoted on the OTC Link operated by OTC Markets Group Inc. under the symbol "IMDS." OIP at ¶ II.A.1; Answer at ¶ II.1.
- Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic annual and quarterly reports. OIP at ¶ II.A.3; Answer at ¶ II.3.
- At the time the Commission instituted the OIP, Imaging had not made its three most recent required filings: its Form 10-K for the fiscal year ending June 30, 2013, its Form 10-Q for the quarter ending Sept. 30, 2013, and its Form 10-Q for the quarter

ending December 31, 2013.¹ OIP at ¶ II.A.1; Answer at ¶ II.1.

- Furthermore, Imaging has not filed any Forms 12b-25 explaining its inability to timely file these periodic reports. OIP at ¶ II.A.1; Answer at ¶ II.1.
- As a result of its failure to file the required periodic reports, Imaging is in violation of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13. OIP at ¶ II.B.4; Answer at ¶ II.4.

Those are the only material facts relevant to summary disposition on the issue of Imaging's violations of Section 13(a) and Rules 13a-1 and 13a-13. The other facts Imaging has introduced are relevant only to the issue of what sanction is appropriate based on the company's violations of the Exchange Act. A hearing is not necessary because: (1) Imaging has admitted facts showing it violated the Exchange Act; and (2) the Law Judge may take the other facts Imaging has introduced as true for purposes of this motion – thereby negating the need for any hearing to elicit these facts.

In this situation, therefore, granting the Division's summary disposition motion is appropriate. *In The Matter Of Investco, Inc.*, AP File No. 3-11228, 2003 WL 22767599 at *1-*2 (Init. Dec. Nov. 24, 2003) (granting summary disposition where issuer admitted it had failed to file two annual and four quarterly reports in violation of the Exchange Act but argued against revocation based on an infusion of cash and plans to become current in filings); *In the Matter of Circadian, Inc.*, AP File No. 3-14301, 2011 WL 7855478 at *2-*5 (Init. Dec. July 18, 2011) (issuer became current in delinquent filings during administrative proceeding, but summary disposition on Section 13(a) violations still appropriate); *In the Matter of Ocean Resources, Inc.*, AP File No. 3-13139, 2008 WL 5262370 at *2-*5 (Init. Dec. Dec. 18, 2008) (same); *In the*

¹ Since the Commission instituted the OIP, Imaging has failed to make another required filing, its Form 10-Q for the quarter ending March 31, 2014. Commission Attestation, attached as Exhibit 2 to the Motion for Summary Judgment. Imaging does not dispute this fact either.

Matter of AIC Int'l, Inc., AP File No. 3-12408, 2006 WL 3794352 at *2-*6 (Init. Dec. Dec. 27, 2006) (granting summary disposition because issuer had failed to file required annual and quarterly reports despite finding there were two material facts in dispute relating to issuer's diligence in completing reports and plans to become current; the Law Judge found those facts relevant to the imposition of sanctions only).

The situation here is almost identical to that of the issuer in *Investco*. Just as Imaging does here, the issuer there admitted it had failed to make the required filings, but argued against revocation based on an infusion of cash and plans to become current. Nonetheless, the Law Judge granted summary disposition because the company had admittedly violated Exchange Act Section 13(a) (as discussed in more detail below, *Investco* is also persuasive authority that revocation is the appropriate sanction). The situation is also very similar to the one in *AIC*, where the Law Judge granted summary disposition in favor of the Division despite finding disputed material facts about whether company management acted diligently and could become current in filings. The Law Judge there found those facts relevant only to the issue of sanctions.

Accordingly, under well-established Commission authority, summary disposition in favor of the Division based on Imaging's violations of Section 13(a) is appropriate. That leaves the issue of sanctions for determination and, as we argue in more detail below, revocation is the appropriate sanction.

III. The Law Judge Should Revoke Imaging's Securities Registration

Imaging's arguments that the factors the Commission set forth for consideration in *In the Matter of Gateway Int'l Holdings Inc. and Lawrence A. Consalvi*, AP File No. 3-11894, 2006 WL 1506286 at *4 (Comm'n Opin. May 31, 2006), do not justify revocation are unavailing. The

company makes three primary arguments. First, it claims its failure to make four required filings is neither serious nor recurrent enough (the first two *Gateway* factors) to justify revocation. This is wrong, as we discuss in the next section. Second, the company incorrectly argues its degree of culpability (the third *Gateway* factor) weighs against revocation. And third, Imaging claims its plans to become current in its filings justify a lesser sanction. *Absolute Potential* and other Commission precedent contradict this argument.

A. Imaging's Four Missed Filings Are Serious And Recurrent

One way in which Imaging attempts to distinguish its situation from that of the issuer in *Absolute Potential* (as the Law Judge requested it to do at the pre-hearing conference) is that the company in that case missed more filings. Imaging claims its failure to make four filings, compared to its prior years of complying with Section 13(a), is not serious enough to justify revocation as a sanction.

The company's focus on the number of missed filings misses the point. As the Commission held in *In the Matter of China-Biotics, Inc.*, AP File No. 3-14581, 2013 WL 5883342 at *11 (Comm'n Opin. Nov. 4, 2013): "the reporting requirements are one of the primary statutory tools for protecting the integrity of the securities marketplace. . . . Timely filing of *each* report is statutorily required. Exchange Act Section 12(j) does not require a minimum number of missed filings before an administrative proceeding may be brought or before revocation may be considered." (emphasis added).

Under that standard, the Commission and Law Judges have revoked registration for fewer or a similar number of delinquent filings than in this case. *In the Matter of IAC Holdings, Inc.*, AP File No. 3-13431, 2009 WL 1138820 at *1 (Order Making Findings And Revoking Registration

By Default, April 28, 2009) (revoking registration for two delinquent filings); *In the Matter of iBIZ Technology Corp.*, AP File No. 3-12207, 2006 WL 1675913 at *2 (Init. Dec. June 16, 2006) (revoking registration after one missed 10-K and two missed 10-Q reports); *In the Matter of Freedom Golf Corp.*, AP File No. 3-11082, 2003 WL 21106567 at *2 (Init. Dec. May 15, 2003) (revoking registration after two missed filings).

Under these cases and the standards set forth in *China Biotics*, which Imaging failed entirely to address in its response, Imaging's four missed filings are serious and recurrent enough to justify the Law Judge revoking its securities registration.

B. Imaging And Its Management Are Culpable

Another way in which Imaging attempts to distinguish *Absolute Potential* is by claiming that its failure to file periodic reports was due solely to financial problems, while the *Absolute Potential* issuer had additional problems, including ineffective internal controls. Imaging Response at 12. This is simply not true. As shown in the Division's summary disposition motion, during the time Imaging has been delinquent in its filings, the Commission filed a civil injunctive action against the company and its two top officers alleging the officers and the company, among other things, committed fraud and accounting violations, and lacked sufficient internal controls. Division Motion at 4.

In addition, the settlement of the lawsuit resulted in the removal of Imaging's two top officers. Division Motion at 4-5. Thus, Imaging's problems ran well beyond strictly financial, and were of the type the Commission indicated justified revocation in *China Biotics*: "significant changes to the company's financial results, changes to its business model, turnover in management, and major financial investments" "is precisely the kind of material information that

must be disclosed on a timely basis under Exchange Act Section 13 to ensure fair dealing in a company's securities." *China-Biotics*, 2013 WL 5883342 at *11.

Imaging's failure to timely disclose all of its problems further demonstrate the company's culpability. The company's claim in its response that it *did* timely disclose major events is simply wrong. Imaging Response at 11. While Imaging filed a Form 8-K on September 30, 2013, explaining it lacked the finances to file its Form 10-K for the year ending June 30, 2013, it filed *nothing* explaining its three subsequent delinquent quarterly reports. The company has admitted it did not file the required Forms 12b-25 explaining these missed filings. Imaging Answer at ¶ II.1.

But perhaps the single fact that most demonstrates Imaging's culpability is the company's statement in its response that the missed reports would not have given investors any more information than they had, and since there was little investor interest in the company anyway "it is difficult to imagine how the delinquent filings could have further discouraged investor interest."

This "no harm, no foul" argument clearly demonstrates Imaging does not understand either the crucial role periodic reports play in the marketplace or the seriousness of its violations. Periodic reports are lengthy documents that disclose far more than a single event like the two Form 8-Ks Imaging filed. They provide detailed financial information, reports of significant events, and management's discussion and analysis of those events and ongoing activities, among other things. The Commission has repeatedly opined on the significance of these reports. *In the Matter of Appiant Technologies*, AP File No. 3-13998, 2010 WL 4732979 at *4 (Init. Dec. Nov. 22, 2010) ("failure to file periodic reports violates a crucial provision of the Exchange Act"); *In the*

Matter of Markland Technologies, AP file No. 3-13147, 2008 WL 5221033 at *4 (Init. Dec. Dec. 15, 2008) (“The purpose of the periodic reporting requirements is to publicly disclose current, accurate financial information about an issuer so that investors may make informed decisions”); *SEC v. Beisinger Indus. Corp.*, 552 F2d 15, 18 (1st Cir. 1977) (“The reporting requirements of the Securities Exchange Act of 1934 is the primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities”); *China-Biotics, Inc.*, 2013 WL 5883342 at *11 (“the reporting requirements are one of the primary statutory tools for protecting the integrity of the securities marketplace”).

Thus, Imaging’s actions demonstrate the company’s culpability, and justify revocation as a sanction.

C. Imaging’s Attempts To Remedy Its Violations

The remaining *Gateway* factor Imaging addresses in detail is its plans to remedy its past violations by becoming current in its filings in the next two months. Even assuming this were to happen, it is insufficient to justify any other sanction than revocation. Even in cases where an issuer *has* become current during Section 12(j) proceedings, the Commission and Law Judges have held revocation to be the proper sanction. *Absolute Potential*, 2014 WL 1338256 at 4; *Circadian*, 2011 WL 7855478 at *2-*5 (issuer became current in delinquent filings during administrative proceeding, but summary disposition on Section 13(a) violations still appropriate); *Ocean Resources, Inc.*, 2008 WL 5262370 at *2-*5 (same). *See also Investco*, 2003 WL 22767599 at *1-*2, in which identically to the situation here, the company argued it had obtained financing and planned to become current in its filings. The Law Judge there still held revocation was the appropriate sanction, finding that “despite Investco’s current efforts, I

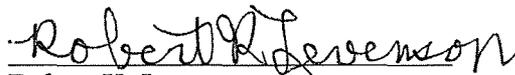
cannot find any assurance against future filing violations.” *Id.* at 2.

Imaging also has not provided any assurance against future violations. *Plans* to become current, in light of these stringent standards, are insufficient to justify a lesser sanction than revocation.

IV. Conclusion

As the Commission has stated, the “recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation.” *In the Matter of Impax Labs., Inc.*, AP File No. 3-12519, 2008 WL 2167956 at *8 (Comm’n Opin. May 23, 2008). Given how strongly the other *Gateway* factors weigh in favor of revocation, the Law Judge should grant the Division’s summary disposition motion and revoke each class of Imaging’s securities registered with the Commission under Exchange Act Section 12.

Respectfully submitted,



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