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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17551

In the Matter of

MED-X, Inc.,

Respondent.

MED-X's RESPONSIVE POST-HEARING BRIEF

April 7, 2017

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Pursuant to the Post-Hearing Orders dated January 27, 2017 and March 16, 2017, Respondent Med-X, Inc., through its undersigned counsel, submits its Responsive Post-Hearing Brief.

Preliminary Statement

After all the evidence and arguments in this matter have been considered (including the Division's Post-Hearing Brief), this Court will be left with the undeniable fact that never before in the history of the securities laws has an issuer been permanently suspended from using the exemption under Regulation A or had their registration revoked based on one late mandatory filing. This Court should decline to make Med-X the first.

Here, the Commission originally sought to permanently suspend Med-X's exemption under Regulation A based *solely* on that late filing. The Temporary Order of Suspension, dated September 16, 2016, by its terms would have automatically become permanent unless Med-X requested a hearing and challenged the Government's actions. If Med-X had not done so, and had not accepted the costs and risks of putting the Government to its proof, Med-X would have been the first issuer under Regulation A (old or new) ever to have been permanently suspended from the exemption solely for one late filing.

The Commission later added what it thought would be a death blow to this tiny business, claiming that because sales were made pursuant to the qualified offering during a period when the annual report was late, the Company now had violated the Securities Act by selling shares that were not entitled to the exemption. (See Div. Br. 1, 6, 17, 30, 32.) According to the Division of Enforcement (the "Division"), those sales during the

period that Med-X was unaware that it was past due on a filing are sufficient to automatically turn a filing violation into a strict liability offense, stripping this Court of all discretion under Rule 258 to deny a permanent suspension. And the Division would have this dramatic reduction in this Court's powers occur despite the fact that not a word of Rule 258 was changed with the amendments to Regulation A+.

If that "automatic suspension" line of attack fails – as it should – the Division then labels the stock sales an "aggravating factor" under *Gateway* that turns the missed, and promptly corrected, filing into a basis for excluding this cash-strapped company from raising any money except through a full-fledged registered offering.

Gerald Laporte, the long-serving former Chief of the SEC's Office of Small Business Policy, decried the Division's brass-knuckled approach to this case, describing the theory of an automatic permanent suspension under these facts as a "gotcha" rule that is inconsistent with decades of custom and practice of the Commission. (Laporte Tr. 192:1-20.) To this day it is unclear why no one at the SEC returned Med-X's call explaining the late filing and their immediate efforts to fix it,[1] but instead rushed to obtain a temporary suspension based solely on the fact that Med-X's filing was late.[2]

The *first* question raised by the Division's Post-Hearing Brief is whether this Court *must* permanently suspend Med-X from using the Regulation A exemption because, during the period it *unknowingly* was late in filing an annual report, it happened to sell shares in the offering. For this proposition, the Division strings together three Rules (Rules 251(d)(3)(i)(F), 260 and 258) to conclude that strict liability is required

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1 Mr. Henseler, the SEC official who sent the missed filing letter and who Mr. Richardson left a voicemail with (RESP. Ex. G-3), was on the Government's witness list but was not called to testify.

2 Mr. Laporte's successor, Sebastian Gomez-Abero, testified that the SEC later discovered – based on Med-X's filing of the delayed report, that shares had been sold. (See Gomez Tr. 89:23-91:4.)

under Regulation A.[3] But beyond the fact that Rule 260 by its terms has no applicability to a Rule 258 proceeding, nothing in Rule 251, 260 or, more importantly, Rule 258 *requires* this Court to impose a permanent suspension for a violation of Regulation A. Under the new Regulation A, a temporary or permanent suspension under Rule 258 is permissive – the same as it has been for over sixty years. Consequently, this Court has the discretion to decide whether, based on the violation *and* other facts and circumstances, a permanent suspension should be imposed or, as Med-X submits, the temporary suspension should be vacated.

The Division's Post-Hearing Brief ignores the fact that throughout the history of Regulation A, courts and the Commission have routinely considered relevant facts and circumstances – extenuating and aggravating – in deciding whether to impose a permanent suspension for a late filing. In its Post-Hearing Brief, the Division argues that there is a "dearth of case law" supporting Med-X's position that such facts and circumstances should be considered. (Div. Br. 28.) This assertion is recklessly incorrect, as evidenced by the many Regulation A cases cited in Med-X's Post Hearing Brief.[4]

It is also belied by cases cited by the Division in its Post-Hearing Brief, in which the Commission opted to weigh heavily the fact that an issuer's Regulation A offering involved fraud or material misrepresentations, rendering a permanent suspension in the public interest. The SEC's own cases – and many dozens more where a permanent suspension was imposed -- stand for the unchallenged proposition that where *fraud* or other *material misrepresentations* are at issue, a permanent suspension *may* be

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[3] "By its terms, Regulation A+ provides for the entry of a permanent suspension because Med-X failed to comply with the requirements of the exemption by making sales in a continuous offering at a time when it had failed to comply with the filing requirement. [footnote omitted]. No other showing is required in a Rule 258 proceeding concerning the appropriateness of a permanent suspension." (Div. Br. 25.)

[4] Med-X Br. 24-36.

appropriate under those circumstances. And other than to argue that an exemption is a "privilege" and therefore should be treated differently, the Division has no answer as to why analogous proceedings under Section 12(j) for missed filings do take into account the relevant facts and circumstances (the *Gateway* factors) in fashioning an appropriate remedy, but this Court should not. It is, after all, in the public interest that *all* required disclosures be made, whether for exempted companies or registered companies. No cases cited by the Division, and certainly not the language of Rule 258, strip this Court of the discretion it has applied for decades to equitably weigh all relevant facts and circumstances in deciding whether to impose a permanent suspension.

The *second* question raised by the Division's Post-Hearing Brief is whether the relevant facts and circumstances in this case support the harsh penalty of a permanent suspension. As a preliminary matter, it is far from clear that a late filing, followed by stock sales, automatically results in a violation of Section 5 of the 1933 Act for those sales. The Division cites no case law supporting this proposition and at least one decision by the Ninth Circuit Court of Appeals directly addressing Regulation A disagrees.

Setting that issue aside, the evidence developed in this case is a far cry from that typically required to support a permanent suspension. There is no evidence of fraud or misrepresentations, or repeated willful violations – the bellwether of permanent suspension decisions. Even more critically, the Division failed at the hearing and in its Post-Hearing Brief to offer any *proof* that a single investor was harmed by Med-X's actions. The Division, although armed with the names and contact information of all investors (including those who purchased when the annual report was late), called not one investor as a witness to say they felt misled or harmed in any way because of the delayed

report.[5] Indeed, the Government adduced no evidence of a single complaint by *any* investor about Med-X. And with respect to the information in the delayed report, the Division fails to identify any facts that would materially alter or change the financial landscape presented in the offering circular: this is an early-stage company with virtually no revenues that is encumbered by ongoing expenses. It is no wonder the Division chose *not* to call any investors to support their burden of showing public harm.

Instead, the Government points to the unremarkable fact that some stock sales were made when the annual report was unknowingly late as an "aggravating" factor. The only expert in the case, Mr. Laporte, indicated there is nothing unexpected or "aggravating" about this. (Laporte Tr. 181:15-25.) The Division's brief also *for the first time* claims that Med-X continued to sell stock after the notice of temporary suspension was received by Med-X. (Div. Br. 35.) But the Division failed to develop evidence to support this belated, un-charged assertion and instead asks this Court to infer it from the fact that a spreadsheet contains a "date" column with entries for September 27, 2016.

Med-X is unfairly hamstrung in responding to this previously unasserted claim, particularly because the parties already agreed to the period during which Med-X sold shares. The Stipulations section of the parties' Joint Prehearing Statement provides:

> The parties agree to stipulate . . . (b) that Med-X, Inc. sold a to be verified number of shares of Med-X, Inc. stock at $0.60 per share **between May 1, 2016 and September 20, 2016.**

(Joint Prehearing Statement at ¶ 4; emphasis added.) Never before has the Division taken the position that shares were improperly sold outside this agreed-upon period. Now having failed to elicit testimony as to what the September 27th date represents or, more

[5] It is uncontested that every investor received the primary offering document: the qualified offering circular.

importantly, whether any sales were made after the temporary order of suspension was received, the assertions in the Government's brief are unreliable and not evidence.

Indeed, had this theory been proffered before the filing of the Post-Hearing Brief it would quickly have been shot down, because no sales were made after September 20th. As the Division well knows (which explains the parties' Joint Prehearing Stipulation and why this theory was never previously raised in briefs or at the hearing), September 27th reflects the date on which funds from sales preceding September 20 were cleared by FundAmerica to be released to Med-X. They do not reflect new sales. "Evidence" on this uncharged, unalleged, and un-developed assertion should be disregarded.[6]

Similarly, in what can only be an act of desperation, the Division (again for the first time) claims without evidentiary support that Med-X deliberately failed to disclose in its late-filed annual report that a temporary suspension had been issued. (Div. Br. 35.) This, the Government asserts, is evidence of indifference to disclosure rules. The reality, as supported by the evidence, is quite different and undercuts the Government's sinister claim: At the time the annual report was filed on September 19th, Med-X was unaware of the temporary suspension. The notice of that suspension was dated September 16, 2016 and was sent from Washington, DC to Med-X in California via first class mail (certified). Had the Government raised this issue with witnesses and not just in its Post-Hearing Brief, it would have been apparent this theory, too, fails to stand up.[7]

As fully developed herein, the Division's approach to this matter appears to be more of a persecution rather than an exercise in measured regulatory oversight. The

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[6] Alternatively, Med-X welcomes the opportunity to open the record on this point so that witnesses can be called and source documents explained to provide cognizable evidence.

[7] It would be a simple thing to confirm via USPS tracking when the certified letter was accepted, and witnesses could testify as to how the letter was handled.

history of Regulation A and the securities laws in addressing delinquent filings, the inadvertent nature of the violation, and the Government's failure to present cognizable evidence of actual harm to the public all support an order (i) denying a permanent suspension and (ii) vacating the temporary suspension that has been in place since last September.

Argument

I. The Division has failed to show that a permanent suspension is mandated under the Rules.

Rule 260 is the linchpin of the Division's theory that a failure to file a report, followed by stock sales, must automatically result in a permanent suspension. In its Post-Hearing Brief, the Division asserts that

> In promulgating Regulation A+, the Commission considered what deviations from Regulation A+ would be deemed significant for purposes of Rule 260, a rule that sets forth when a failure to comply with Regulation A+ will not result in the loss of an exemption from the requirements of Section 5.

(Div. Br. 21.) However, as developed during the hearing, and as is evident from the Rule itself, not a single provision of Rule 260 is applicable to this Rule 258 proceeding. (Laporte Tr. 190:23-25.)

Rule 260(a) contains provisions that, if established by the issuer, will insulate the issuer from claims that an offer or sale "to a *particular* individual or entity" violated section 5. This entire subparagraph (a) concerns only the issuer's potential exposure to *private* claims by a "particular individual or entity" for insignificant violations of Regulation A.[8] Paragraph (a), including its subparts, is irrelevant to Rule 258

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8 See Gomez Tr. 99:15-103:8; Laporte Tr. 191:5-14.

proceedings brought by the Division seeking to permanently suspend the issuer from the exemption.

To the extent that an issuer might one day claim that the language about "insignificant" and "significant" deviations in Rule 260(a) may apply to proceedings with the Government, Rule 260(b) strikes that down:

> (b) **Action by the Commission.** A transaction made in reliance upon Regulation A must comply with all applicable terms, conditions and requirements of the regulation. Where an exemption is established only through reliance upon subparagraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under Section 20 of the Exchange Act.

In other words, although Rule 260 provides a safe harbor against some claims brought by a private litigant, the language regarding "significant" and "insignificant" deviations is *not applicable* to cases brought by the Commission. (E.g., Laporte Tr. 191:15-25; Gomez Tr. 103:9-104:3.)

Rule 260(c) drives the above points home. It states:

> (c) **Suspension.** This provision provides no relief or protection from a proceeding under Rule 258.

In other words, Rule 260, which provides that some deviations may be deemed "insignificant" and others "significant," is absolutely irrelevant to a Rule 258 proceeding. (Laporte Tr. 190:23-191:4.) When it comes to such a proceeding, there is no "safe harbor" under Rule 260(a). In suspension proceedings, the Commission must do as it has for decades under Regulation A, and apply its discretion to determine whether to issue a permanent suspension or vacate a temporary one. That discretion is not wrested from the Commission by Rule 260.

In its Post-Hearing Brief, the Division suggests that the above-noted language in Rule 260 is new, designed to address the new reports required of Tier 2 issuers like Med-

X. (See Div. Br. 18-22; "The Commission stated its intent that significant deviations from [the filing] requirement would result in the loss of the Regulation A+ exemption.") The Division then selectively quotes language from the adopting release of Regulation A+ as support for the notion that Rule 260 is somehow a new regime requiring strict liability:

> [The final Rules] *explicitly classify as significant those deviations* that are related to issuer eligibility, aggregate offering price, offers and *continuous or delayed offerings.* This provision benefits investors by *providing certainty about the provisions from which the issuer may not deviate without losing the exemption.*

(Id. at 22.) But the omitted language the Division chose to bracket above ("[The final Rules]") is important. The omitted phrase is "Further, *as in existing Regulation A . . . .*" Thus, the Commission noted that Rule 260 in the context of A+ continued the pre-existing practice and procedure in assessing suspensions, and a court maintains discretion in a Rule 258 proceeding to decide whether to issue a permanent injunction. (See also Laporte Tr. 190:20-22.) Indeed, the adopting release notes that no revisions to Rule 260 were proposed (p. 197) and that the Commission is "not expanding the list of provisions from which an issuer may not deviate." (p. 199.)

Most important, notwithstanding the language in Rule 260 addressing private rights of action, the adopting release states:

> We note that whether a deviation from the requirements would be significant to the offering as a whole *would depend on the facts and circumstances related to the offering and the deviation.*

(p. 199.) Thus, even the adopting release recognizes the importance of analyzing the facts and circumstances surrounding the deviation.

Under the Division's theory, if Rule 260 automatically requires a permanent suspension, there would be no need for a Rule 258 proceeding at all.[10] Rule 260 could simply say "For any violation of Rule 251(d)(3) the Commission shall enter a permanent suspension enjoining the issuer from the exemption." Or one would expect Rule 258 to say something similar. But they do not.[11] Even the Division's witness, Mr. Gomez, agreed that Rule 258 is permissive and does not require an automatic suspension for a violation of Regulation A. (See, e.g., Gomez Tr. 77:21-78:12.) This Court has the discretion to make that decision. (E.g., Gomez Tr. 78:13-79:6.) And as discussed in Med-X's Post-Hearing Brief and at pages 11-13 herein, decades of Regulation A proceedings for violations, including those for missed filings, have established that the relevant facts and circumstances *are* regularly considered and weighed when determining the appropriate remedy for a violation.

* * *

The discretion afforded the Commission and this Court has not changed in over 60 years. Had the Commission wanted a Rule 251 violation to *require* a permanent suspension in a Rule 258 proceeding – strict liability -- it would have amended Rule 258 to say so. That it did not is dispositive.

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[10] In its Post-Hearing brief the Division itself retreats from its position that Rule 260 applies to these Rule 258 proceedings, stating "It is not necessary to determine in this proceeding whether Rule 260 applies to this administrative proceeding. The Respondent's expert disputed its applicability here, explaining that the rule was properly addressed to what deviations would be deemed significant for purposes of private liability under section 12 . . . ." (Div. Br. 21 n.15.) The Division then argues that if failing to file a report on time is significant in the context of private actions it should be here as well. The critical distinction, ignored by the Government, is that private litigants may not have their disputes addressed in the context of a Rule 258 proceeding, which for decades has given courts the power to equitably address violations of Regulation A.

[11] As stated by the Supreme Court: "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

II. The Division is wrong that there is a "dearth of case law" to support application of the *Gateway* "facts and circumstances" analysis under Regulation A.

In arguing that this Court in a Rule 258 proceeding must refuse to consider the facts and circumstances surrounding the deviation, the Division states that "the *Gateway* analysis has never been applied to the suspension of an exemption from registration . . . ." (Div. Br. 27.) It goes on to posit that "[t]he dearth of case law consistent with Med-X's proposal makes sense: the *suspension of a privilege* for failing to comply with an exemption under the 1933 Act and the *revocation of registration* for failing to comply with the reporting requirements mandated as a result of registering shares . . . are, and ought to be, analyzed differently." (Div. Br. 28.) But this dichotomy is false and is not supported by decades of precedent regarding Regulation A.

As set forth in Med-X's Post-Hearing Brief (pp. 24-36), there is ample precedent in historic Regulation A suspension hearings for considering the facts and circumstances of a deviation when fashioning a remedy. Like the present case, the numerous cases cited by Med-X concern periodic filings that were mandated by Regulation A (semi-annual reports). Those filings were deemed important to allow investors and the Commission to track an issuer's sales and use of proceeds from an offering. Like the annual report at issue here, a failure to timely file those mandatory reports was a violation of Regulation A. And in those cases, which came long before *Gateway*, the Commission took into account relevant facts and circumstances in deciding whether to impose a permanent suspension or vacate a temporary suspension.[13]

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[13] Other examples abound under (pre-amendment) Regulation A. E.g., *In the Matter of Laboratory of Electronic Engineering, Inc.* SEC Release No. 3650. 1956 WL 7204; *In the Matter of M.H.Hubbard Associates, Inc.* SEC Release No. 4882, 1967 WL 88869; *Appel Oil & Gas Corp.* SEC Release No. 3920,

Although inconsistent with its position that exemption cases do not take into account relevant facts and circumstances, the Division cites suspension cases under Regulation A that do just that. (Div. Br. 28-29.) In deciding to impose a permanent suspension, the Commission in those cases analyzed the relevant circumstances, and concluded that fraud, misleading statements and actual public harm may support a suspension. In fact, all early Regulation A cases cited by the Division address allegations of fraud and misstatements, obvious "aggravating" factors not at issue here.

In *Tabby's International, Inc.* (Div. Br. 28 n.25) the court agreed with the Commission's findings at a suspension hearing that "the offering was permeated with fraud" and "fraudulent or manipulative practices were utilized in the offering." The court differentiated this case from others which involved violations of Regulation A rules where the suspensions were vacated, recognizing that those cases "involved far less serious noncompliance." The district court, like the Commission, analyzed the case "under the circumstances" and not in the rigid framework of strict liability.[14] *Tabby's* is therefore consistent with Med-X's position.

American Television[15] (Div. Br. 29 n.27) resulted in a permanent suspension under facts and circumstances where "the offering circular contained untrue and misleading statements of material facts, and [where] the offering was being conducted in violation of Section 17(a) of the Act." Likewise, *Trademart* (Div. Br. 28) involved multiple findings that the issuer materially mislead the public and had numerous failures to disclose required information. The Commission found that the filings violated anti-

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1958 WL 6427; *The Digit-Ometer Company*, SEC Release No. 3930, 1958 WL 6436; *Southwestern Uranium Trading Corp.*, SEC Release No. 3572, 1955 WL 6128; *In the Matter of Dakota-Montana Oil Leaseholds*, SEC Release N. 3481, 1953 WL 5683.

[14] *Tabby's Int'l, Inc. v. SEC*, 479 F.2d 1080, 1082-83 (5th Cir. 1973).

[15] *In re Am. Television & Radio Co.*, 40 S.E.C. 641, 1961 WL 61056 (Apr. 18, 1961).

fraud provisions under the Act and in view of the serious nature and number of the deficiencies, the suspension was made permanent.[16] *In the Matter of Robert Mfg*, (Div. Br. 28-29) is inapposite because the respondent did not object to a permanent suspension, but even there an offering circular that was found to be materially deficient in several respects.[17]

Far from proving that a *Gateway*-type analysis is inapplicable in exemption cases like this one, the Government's cases support the opposite. In deciding whether to permanently suspend an exemption under Regulation A the facts and circumstances *do* matter. Equitable considerations *should* be weighed. And a court will take them into account in fashioning an appropriate remedy.

Although the pre-Amendment Regulation A cases cited by the Division are inapposite because they address allegations of fraud and material misstatements in the offering (and not missed filings, like the many cases cited by Med-X in its Post-Hearing brief), they are significant in demonstrating that both parties here accept the validity of historical Regulation A precedent, and agree that such precedent is pertinent here and should be considered by this Court.

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16 *In re Mutual Employees Trademart, Inc.*, 1962 WL 68472 (Apr. 17, 1962).

17 *In re Robert Mfg. Corp.*, 45 S.E.C. 518, 1974 WL161431 (Apr. 30, 1974).

III. Contrary to the Division's position, it is appropriate for this Court to examine late filings of periodic reports for registered companies because they are analogous and instructive on the appropriate discretion to apply to Med-X.

Not surprisingly, the Division tries to distinguish between late filings under Regulation A and the late filings of registered companies. This artificial distinction is needed because the Commission has never in its history enforced mandatory reporting rules for registered companies as it is attempting to do for Med-X. The Commission has certainly not pursued a revocation case absent some combination of fraud or misleading disclosures, a failure to cooperate, repeated failures to file, and a high likelihood of future violations.

The only expert in this case opined that it *is* instructive to compare how Med-X is being treated for filing a late report to how public companies are treated for the same violation. (See, e.g., Laporte Report, Resp. Ex. I, ¶ 9.) Section 13(a) and Rules 13a-1 and 13a-13 require registered public companies to file annual and quarterly reports with the Commission. Periodic reports for registered companies are as important to investors as are periodic reports for Regulation A issuers.

Just like compliance with Regulation A reporting rules, a registered company's compliance with reporting rules "is mandatory and may not be subject to conditions from the registrant."[18] Also, as with Regulation A periodic filings, scienter is not required to establish violations of Exchange Act Section 13(a) and rules thereunder.[19] Without question, reports for registered companies are deemed important to the public. Thus,

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[18] *America's Sports Voice, Inc.*, Exchange Act Release No. 55511, 2007 SEC LEXIS 1241, at *12 (Mar. 22, 2007), recons. denied, Exchange Act Release No. 55867, 2007 SEC LEXIS 1239 (June 6, 2007).

[19] See *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998); *SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978).

registered companies who fail to timely file required periodic reports violate Exchange Act Section 13(a) and Rules 13a-1 and 13a-13.

Yet, in every single case that has reached an administrative hearing, there are multiple repeated late or missing filings as well as multiple attempts by the Commission to get the issuer in compliance.[20] In fact, Med-X and its expert boldly proclaimed that they were unaware of any instance in the history of the SEC where the Commission issued the harshest penalty available because of a single delinquent filing. With ample time to produce such a case or scenario, the Division has not met the challenge.

For these and the reasons set forth in Med-X's Post-Hearing Brief, application of the *Gateway* factors is appropriate here.

IV. The Division's post-hearing attempt to introduce "evidence" of actual harm to investors and to satisfy the *Gateway* factors falls flat.

Reluctantly applying selected *Gateway* factors to this case (Div. Br. 31-41), the Division concludes its Post-Hearing Brief with the statement that "the public should be protected by permanently suspending Med-X's exemption . . . ." (Div. Br. 49.) Yet what is missing from the record on the hearing is any evidence of actual harm to any current or potential investors of Med-X, or other aggravating circumstances under *Gateway* that are sufficient to support the potentially "catastrophic" consequences of a permanent suspension.

A. The Division failed to introduce any evidence at the hearing that the late filing and stock sales resulted in actual harm to investors.

Med-X provided the Division with the names and direct contact information of all investors, including those who purchased shares between May 1, 2016 (when the annual

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20 Mr. Laporte testified that late-filing cases are often handled by an SEC staffer calling up the registrant and "screaming at them." (Laporte Tr. 175:14-21.)

report became delinquent) and September 20, 2016 (when Med-X stopped selling shares). At the hearing, the Division was quick to use that information to roll out charts (DIV. Exs. 15, 16 and 17) and testimony from a financial economist to show that 150 investors purchased shares after the report was due. But tellingly, the Division failed to produce a single investor who claimed to be harmed by the late-filed report. There is no evidence that any of the 150 investors (i) were upset with their investments, (ii) would like to rescind their investments, (iii) would not have invested if they had timely access to the 1-K, or (iv) felt misled in any way by Med-X.

All of these Med-X investors had the last offering circular, dated February 3, 2017. This document (which was essentially twice-qualified by the Commission) contains extensive disclosures about the nature and risks of investing in Med-X, and is the primary disclosure document. Although the Division included the annual report on its exhibit list and moved it into evidence, it elicited no testimony from *any* witnesses as to its contents. The Division's main witness, Mr. Gomez, testified that investors who bought shares without the annual report on file made their decision without the benefit of updated financials. (Gomez Tr. 51:15-25). But he was not asked to identify information in the annual report that he believed would be important to potential investors.

No expert testimony was proffered by the Division. In fact, the only expert testimony on this point is that the annual report is *not* designed for prospective investors, as there is no requirement that it be provided to them. (Laporte Tr. 214:12-20). Ironically, although it elicited no testimony to support the theory that there was any harm to investors, the Division's Post-Hearing brief criticizes Mr. Laporte for his conclusion, based on his extensive experience, that "I'm not sure that there was any harm that was

necessarily done by selling to these people." (Id; see Div. Br. 40 n.41.) As it stands, Mr. Laporte's testimony is the only evidence on this point, as is his conclusion that "I'm not sure the mix of information that [the investors] would have gotten would have been any different even if the report had been filed." (Laporte Tr. 214:22-215:5.)

(i) The annual report did not materially change the mix of information available to investors.

Instead of testimony at the hearing, the Division now belatedly cherry-picks numbers from the annual report and makes assumptions about "crucial" information that was it asserts was not provided to investors. This post-hoc exercise fails, and shows that even if the Division's briefing amounted to cognizable evidence, Mr. Laporte's conclusion that there was no harm to investors was correct.

In its Post-Hearing Brief, the Division for the first time complains that the following information contained in the belatedly-filed annual report was not available to investors, and would have been material to an investment decision:[24]

1) Med-X's revenue declined from $360.00 in 2014 (inception of the company) to $200.00 in 2015 (see DIV. Ex. 11 at DIV000274);

2) Med-X's net loss increased from ($16,135) in 2014 (inception of the company) to ($402,227) in 2015 (Id.);

3) In 2015 Med-X gave an affiliate a $40,000, short-term loan which (as the Division asserts) was repaid; and

4) In June 2016 Med-X borrowed $50,000 from an affiliate which was repaid in September 2016.

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[24] Stymied by the fact that it adduced no evidence regarding any harm to investors concerning the belatedly filed annual report, the Division resorts to attacking the testimony of Mr. Laporte, who ran the SEC's Office of Small Business Policy for eleven years, as "betray[ing] an apparent lack of awareness of the significance of annual reports." (Div. Br. 40 n.41.)

(See Div. Brief, pp. 10, 40-41, n.42; DIV. Ex 11). But the reality is that there was nothing new about this information, and the primary offering document – the offering circular – was brutally clear about the Company's financial situation and lack of revenue.[25] The above-cited issues raised by the Division are addressed as follows:

(1) and (2) Med-X's decline in revenue from 2014 to 2015, and increased net loss. The financials disclosed in the offering circular (which every investor received) reported $0 in sales for the first six months of 2015, expenses of $138,304 and thus a loss for the first half of 2015 of ($138,304). (Offering Circular dated February 3, 2016, RESP. Ex. E, p. F-17)[26]. In discussing the first half of 2015, the offering circular stated "Currently operating costs exceed revenue because *we do not have sales*. We cannot assure when or if revenue will exceed operating costs." (RESP Ex. E, p. 38; emphasis added.)[27]

The offering circular continued:

> Since inception, our capital needs have primarily been met from the private placement of our common stock . . . . We will have additional capital requirements during 2015 and 2016. We do not expect to be able to satisfy our cash requirements through online sales, and therefore we will attempt to raise additional capital through the sale of our common stock.

(Id. p. 39). Investors were informed that "We cannot assure that we will have sufficient capital to finance our growth and business operations or that such capital will be available on terms that are favorable to us or at all. *We are currently incurring operating deficits that are expected to continue for the foreseeable future."* (Id; emphasis added.)[28]

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[25] Indeed, the offering circular contained information for the first six months of 2015. The belatedly-filed annual report included the second-half numbers for 2015.

[26] RESP. Ex. E page 53 of 65.

[27] RESP. Ex. E page 56 of 65.

[28] The Company expected ultimately to earn revenues from several sources, including harvesting and selling high quality, custom bred Cannabis for the California medical and recreational markets for compound identification and extraction . . . (RESP. Ex. E, p. 38 (p. 55 of 65). Numerous risk disclosures

As such, all 150 investors who the Division argues (without evidentiary support) were harmed by the delayed disclosure *knew* from the offering circular that they could expect *no* sales or a decrease of sales from 2014 to 2015. The Division's theory that investors were materially prejudiced because they did not know *specifically* that revenue fell from $360.00 in 2014 to $200.00 in 2015 is representative of the lengths they go to find liability. With these numbers, the testimony of Mr. Mills and Mr. Laporte that the annual report probably would not have mattered makes perfect sense. Number 1 above was covered by the offering circular.

As to the higher net loss in 2015 ($402,227) compared to the company's first year of operations in 2014 ($16,135), it does not take a leap of logic to assume that because the Company had $138,304 in losses *in the first half of 2015* (Resp. Ex. E, p. F-17, page 53 of 65) with "no revenue" (RESP. Ex. E, p. 38 (page 56 of 65)) during the first six months and little chance of increased revenues, it would likely have larger losses for all of 2015 than it did in 2014. Thus, No. 2 above was covered by the offering circular.

(3) **A short-term loan by Med-X to an affiliate.** Trying to show that Med-X deprived its investors of material information, the Division points to a disclosure in the late-filed annual report regarding a short-term loan that Med-X gave to an affiliate. (Div. Br. 10, 40 fn.42.) The Division states that the 2015 late report "indicated that on April 14, 2015, Med-X lent PSH $40,000 as a short-term, interest free loan for 60 days. (DIV. Ex. 11, DIV0274)"

Here, too, the Division's flawed attempt to show that investors were deprived of possibly important information is disproved by the offering circular. That document

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were made on this and other issues (e.g., "No revenue is expected from the sale of Cannabis or medicinal Cannabis compounds for medical or recreational use until such sale is legal under federal and state law." Id. at 38 (p. 55 of 65).)

(RESP. Ex. E) was given to every investor, and specifically states that "On April 14, 2015, the Company loaned Pacific Shore Holdings, Inc. $40,000 as a short-term non-interest bearing loan to be repaid in sixty days. The loan was repaid in full on May 29, 2015." (Id. at F-13 (p. 50 of 65) and again at F-14 (p. 52 of 65.) The fact that this information *was* provided to investors, even before the late-filed annual report was filed, disproves the Government's theory that investors were somehow harmed, and buttresses the testimony of Mr. Mills and Mr. Laporte that the delayed report did not really change the total mix of information available to investors.

(4) **Med-X borrowed $50,000 from an affiliate as a short-term advance.** The Division attacks Mr. Mills's testimony that "I don't think [the annual report] would have made any difference" to investors, pointing to the above (3) items and stating that the late-filed 2015 annual report also disclosed that "in **June 2016** Med-X borrowed $50,000 from PSH as a short-term advance which was to be repaid in September 2016. (DIV. Ex. 11.)" (Id. at F-16, page 64 of 189; emphasis added.) Of course, had the annual report been filed on or before April 30, 2016 as required, it could not have included disclosures about events that took place later that year, in June 2016. This "aggravating factor," like the previous three, does not stand up to the facts.

Thus, the sophisticated investors who purchased shares without being able to access the 2015 annual report on EDGAR were told in Med-X's offering circular (which they were given) that this was a highly risky start-up company with few prospects for revenues and likely continued losses.[29] On these facts, it is not surprising that the Division produced no investor claiming to have suffered any harm. The Division's post-

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29 And they knew certain transactions were done with affiliates.

hearing argument that these items are aggravating factors that harmed investors is without merit.

(ii) The Division's assertion that Med-X improperly sold shares after learning of the temporary suspension and purposely omitted the temporary suspension order from the late-filed annual report is reckless and not supported by the evidence.

Recognizing the weaknesses of their claims that the above disclosure items support any actual harm, and knowing that it lacks evidence under a *Gateway*-type analysis to support a permanent suspension, the Division's Post Hearing Brief attempts to portray Med-X as a "significant, persistent" violator of Regulation A by claiming that Med-X (i) continued selling shares *after* the SEC's order temporarily suspending Med-X's Regulation A exemption, and (ii) purposely failed to disclose in the late-filed report that the SEC had temporarily suspended its Regulation A exemption. (Div. Br. 35.) These actions, the Division asserts, provide an adequate basis to support a permanent suspension. (See id.)

But like many of the Division's assertions in this case, these too are unsupported by the evidence. First, the Division failed to elicit any testimony supporting its never-before-asserted claim that Med-X continued selling shares after receiving notice of the temporary suspension order. The notice of the temporary suspension was dated September 16, 2016, and was sent by certified mail to Med-X in California from the SEC in Washington, DC. (DIV. Exs. 9, 9A, 10, 10A.) Mr. Richardson (Med-X's SEC filings counsel) had previously left a voicemail for the SEC's Mr. Henseler on September 6th indicating that Med-X accepted responsibility for the filing error and would correct it shortly (RESP. Ex. G3; Richardson Tr. 281:3-282:2) but no one from the SEC returned

his call or provided any notice of the temporary suspension other than the Notice Letter. (See Richardson Tr. 282:18-20.) The Division elicited no testimony at the hearing as to when that letter was received by Med-X, or the actions that were taken upon receipt.

Instead, the Division refers to a chart containing the names of all Med-X investors[30] (DIV. Ex. 15), and claims it shows that some sales were made on September 27, 2016, "more than 10 days after the Commission's September 16, 2016 order temporarily suspending Med-X's Regulation A exemption." (Div. Br. 35.) But the Division elicited no testimony as to what the September 27, 2016 date reflects, nor did it ask any witnesses whether sales were made after the notice of suspension was received.

It is fundamentally unfair for the Division to inject this new theory for the first time in its Post-Hearing Brief. Had it been raised previously, Med-X would have addressed it and demonstrated that there were no sales after September 20th and that the September 27th date on the chart (which was created by Med-X) reflects funds from prior sales being released to Med-X by FundAmerica, the broker-dealer handling sales and collecting proceeds from investors. It does not reflect "sales" after September 20th.

But the reason this did not come up at the hearing is simple: In their Joint Prehearing Statement, the parties stipulated to the period during which Med-X sold shares:

> The parties agree to stipulate . . . (b) that Med-X, Inc. sold a to be verified number of shares of Med-X, Inc. stock at $0.60 per share **between May 1, 2016 and September 20, 2016.**

(Joint Prehearing Statement at ¶ 4; emphasis added.) Never before has the Division taken the position that shares were improperly sold outside this agreed-upon period. Now

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30 Med-X produced information regarding all of its investors voluntarily to the SEC. (See Reilly Tr. 144:23-145:1.)

having failed to elicit cognizable testimony as to what the September 27th date represents or, more importantly, whether any sales were made after the temporary order of suspension was received, the assertions of "fact" in the Government's brief are unreliable and not evidence. To consider such "evidence" on a newly asserted claim notwithstanding the parties' stipulation would be profoundly unfair.

The claim that Med-X improperly omitted the fact of the temporary suspension from its annual report fails for the similar reasons. Quite simply, the SEC adduced no evidence to support its new theory that Med-X was aware of the temporary suspension when it filed the 1-K on September 19th at 17:53:12 Eastern Time, early afternoon West Coast time.[31] Having failed to address this issue at the hearing, it is fundamentally unfair to accept the Division's interpretation of the facts now. All inferences and ambiguities should be decided against the Division, and in the favor of Med-X.

(iii) It is far from clear that stock sales subsequent to a delayed report result in a Section 5 violation as to those sales.

Because it wishes to label Med-X a "securities violator" rather than a "late-filer," the Division repeatedly claims that Med-X's sale of stock during the period the annual report was late resulted in a violation of Section 5. (Div. Br. 1, 6, 15, 16, 17, 30, 32.) But while this Court need not rule on this issue to exercise its powers under Rule 258, it

[31] It is of no moment that the SEC "publically announced" the temporary suspension of Med-X's exemption in a press release dated September 16, 2016. (Div. Br. 36 n.37.) The Division did not ask any witness when such notice was received. This Court may, however, take notice of a filing by Med-X on Form 1-U in December 2016 that states it did not receive the letter notifying it of the suspension until September 22, 2016.
https://www.sec.gov/Archives/edgar/data/1620704/000147793216012593/0001477932-16-012593-index.htm. Any doubt about the date could have been readily addressed at the hearing simply by tracking the certified mail. The date in paragraph 24 of Med-X's Post-Hearing Brief is in error.

is far from clear that those sales resulted in Section 5 violations.[32] Indeed, the Division cites no authority for this proposition (other than stating the obvious that a security must be registered or be subject to an exemption). Conversely, federal case law indicates that a violation of a Rule does *not* retroactively extinguish an exemption, and does not turn sales pursuant to an exemption into sales in violation of Section 5.

In *SEC v. Blazon Corp.*, 609 F.2d 960 (9th Cir. 1979), the defendant obtained an exemption under Regulation A to sells shares. Thereafter, the circumstances of the offering changed but the defendant failed to properly amend its offering materials as required by Rule 256(e). This failure resulted in the offering statement becoming false and misleading in violation of Regulation A. In *Blazon,* as here, the Commission argued that once the offering materials became false and misleading because defendant failed to file a required report, the exemption was lost and all sales of the company's stock thereafter were in violation of Section 5. (Id. at 968.)

The Ninth Circuit disagreed stating: "We think that this argument misinterprets Section 3(b) and the exemption provided under Reg A. False and misleading Reg A registration materials do not automatically produce a violation of section 5." (Id.) The Ninth Circuit noted that exemptions from the registration requirements of the Securities Act are construed narrowly, and that Reg A requires certain things in order to qualify for the exemption: One is the dollar size of the offering, and another is "the requirement that the issuer must file the appropriate forms with the Commission [in this case, an amended offering circular]. Failure to comply with either . . . requirements [sic] will result in a loss of the exemption and a violation of section 5." (Id.)

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[32] As previously noted, there is only one violation that set these events in motion: the inadvertent late filing of an annual report. It is unexceptional, and certainly not "aggravating," that shares were sold when Med-X was unaware that any filing was delinquent.

But the court ruled that the analysis does not stop there. An incomplete or inadequate filing, or one that becomes incomplete or inadequate over the course of the offering, "will not result in an automatic loss of the Reg A exemption. *Reg A provides the Commission with a less severe mechanism to deal with such problems [-] the Commission may suspend the exemption.*" (Id. at 969; emphasis added.) In an accompanying footnote, the Ninth Circuit cited Rule 261, which like current Rule 258 "provides the procedure by which a Reg A exemption may be suspended." (Id. at n.4.) That Rule, like current Rule 258, allowed the entry of a temporary or permanent order suspending the exemption for violations of Regulation A. (Id.)

In rejecting the Commission's assertion that a violation automatically resulted in the loss of a pre-existing exemption, and therefore in violations of Section 5 for stock sales, the Ninth Circuit stated: "If the Commission's claim were allowed, the procedure for suspension of the exemption adopted by Reg A would be circumvented." (Id.) That is the case here. [33]

Here, as in *Blazon,* the Division is over-reaching by claiming that a violation of the reporting rule results in an immediate loss of the exemption, causing subsequent stock sales to violate Section 5. Rule 258 has not been amended by Regulation A+ and this Court has full discretion to decide whether a permanent suspension of the exemption is appropriate under the facts and circumstances. The Division's effort to tip the *Gateway*

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[33] See also *Securities and Exchange Commission v. Southwest Coal,* 624 F.2d 1312 (1980). There, the court held that a post-filing occurrence (an injunction) that would have rendered the Regulation B exemption unavailable to an offeror for any subsequent offerings does not, aside from its use as grounds for formal suspension proceedings, result in the dissolution of previously acquired exemptions under which the offeror was conducting outstanding offerings. The court cited *Blazon* and 3 L. Loss, *Securities Regulation* 626, 628 (2d ed. 1961) for support of its ruling. Consequently, sales of securities from outstanding offerings in between the violation (the injunction) and the formal suspension of the issuer's exemptions were made under a viable Regulation B exemption and, therefore, were not in violation of Securities Act, Section 5.

scales in its favor by labeling Med-X a "securities laws violator" is misplaced and must fail.

(iv) A settlement of state law claims by an affiliate of Med-X involving conduct occurring three years before Med-X was formed cannot be the basis for imposing a permanent suspension.

Desperate to find some "aggravating conduct" to weigh against Med-X, the Division attacks Mr. Mills's character by resurrecting irrelevant state regulatory settlements with a company *other* than Med-X. (Div. Br. 11-13.) The regulatory settlements in Pennsylvania and California each involved the same "cold calls" for stock sales in Pacific Shore Holdings (now an affiliate of Med-X) that occurred some three years *before* Med-X came into existence. (See, e.g., DIV. Exs. 22 and 23.) Evidence regarding these settlements (allowed over Med-X's objection with the Court recognizing that it may not be overwhelmingly relevant)[34] showed that the allegations of wrongdoing were not adjudicated at trial, and there was no admission of any liability. (Mills Tr. 335:21-336:7; DIV. Ex. 22.) Pennsylvania imposed an "administrative assessment" of $3,500 (plus legal and investigative costs of $1,500) (id.), and California ordered Mills and Pacific Shore Holdings to "cease and desist" from future violations. (DIV. Ex. 23.)

These unadjudicated matters involving a separate entity have no bearing on the facts here. And far from being swept under the rug, Med-X was fully transparent about the investigations, disclosing them to every single investor in the Med-X offering circular. (RESP. Ex. E, p. 25; Mills Tr. 334:12-23.)[35]

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[34] Hearing Transcript at 320:1-321:1.

[35] When questioned at the hearing about these unrelated matters, Mr. Mills speculated that if a cold call was made, it could have been by his ex-brother-in-law. (Mills Tr. 325:4-19.) The Division now tries to claim that such testimony is somehow inconsistent with Mr. Mills's statement that "I still believe that this is speculative. I don't think that this actually even happened." (Mills Tr. 323:2-3.) The Division may

And the Division itself loses credibility when it argues in its Post-Hearing Brief that Mr. Mills demonstrated "a lack of candor" and an "indifference to providing accurate information" when, at a Cannabis industry seminar, he used a rounded number and told the audience that Med-X "raised about $1.5 million on [a] 506(c) offering." (Div. Br. 38-39.) What is the shocking reality that, according to the Division, should justify a permanent suspension for Med-X and potential losses for all of its investors? The specific number, as Mr. Mills stated in his sworn testimony, was just under $1.2 million. (Id; Mills Tr. 300:11-301:25.)

* * *

In sum, with all the powers the Government can bring to bear against this tiny company, it has failed to prove that there has been any harm to the public, or the existence of any aggravating factors under *Gateway* sufficient to justify the permanent loss of the exemption.[37] The only evidence is that the public interest will be served by *vacating* the temporary suspension, and protecting Med-X and more than seven hundred investors from the "catastrophic" harm that could result from a permanent suspension.[38]

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be unhappy it could not force Mr. Mills to accept its post-hoc theories about the facts, but that does not mean that Mr. Mills was "inconsistent" and demonstrated a "lack of candor" as the Division now claims. (Div. Br. 38.)

[37] The Division devotes eight pages of its Post-Hearing Brief to arguing that "the involvement of counsel in Med-X's failures provides no defense." (Div. Br. 41-48.) But Med-X does not claim reliance on counsel as a defense, nor does it deny that the actions of counsel are properly attributed to the Company. The Division's argument as to Mr. Richardson is therefore misplaced. But Mr. Richardson's testimony *is highly relevant* to assist this Court in determining, when applying *Gateway*-type factors to the circumstances here, whether a permanent suspension is fair and equitable. (Med-X Post-Hearing Br. 32-35.)

[38] See Med-X Post-Hearing Br. 34-35, 45-48. With no allegations of fraud, or proof of actual harm it is in the public interest to vacate the Med-X temporary suspension. In the past, the Commission routinely has applied this approach. See, e.g., *In the Matter of Holiday Mine, Inc.*, Release No. 4394, 1961 WL 61616 (Despite issuer's failure to cooperate with Commission regarding deficiencies in its offering circular, the Commission concluded it would be in the public interest to afford the issuer a further opportunity to amend its filings and to vacate the temporary suspension order if such filings contained no material deficiencies.)

In a 1952 address discussing the proposed suspension rules SEC Commissioner Clarence H. Adams stated that "the proposed revision of Regulation A provides for the suspension or termination of the

V. The Commission's treatment of Med-X for a failure to file appears arbitrary or capricious when compared to other late filers.

Current Acting Chairman of the SEC Michael S. Piwowar recently stated:

> Our enforcement program could also benefit from a look through the lens of fairness. In order to ensure that the Commission does not engage in arbitrary or capricious conduct in enforcement matters, the Commission should formulate and adhere to a consistent set of guidelines when conducting our enforcement proceedings. [39]

Unfortunately, it does not appear that the Commission has acted in accordance with this vision for enforcement when it comes to Med-X.

First, past precedent under Regulation A as well as for registered companies often recite facts about the Commission making repeated attempts to contact the issuer and get them to comply.[40] Similarly, Mr. Laporte testified that when periodic reports were late (and they were often late) SEC staff members would call and scream at the issuers to get them to comply. (Laporte Tr. 175:14-21.) Yet here, Med-X was sent only one letter regarding the late report and the Commission did not follow-up on Mr. Richardson's phone call wherein he accepted responsibility and informed the Commission that the report would be filed soon thereafter. In fact, the Commission did not even produce at the hearing the person (Mr. Henseler) who signed the letter or received the call.

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exemption in certain instances, chiefly where the Commission finds that fraud is being perpetrated or would be perpetrated in connection with the offering." Commissioner Adams further explained that the remedy of suspension under Regulation A "is merely a power reserved in the Commission to prevent the perpetration of fraud on small investors." See *Further Steps In Investor Protection,* SEC Commissioner Clarence H. Adams. Thirty-Fifth Annual Convention of the National Association of Securities Administrators (September 3, 1952).

[39] Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC, Commissioner Michael S. Piwowar, Washington DC, Feb. 20, 2015 https://www.sec.gov/news/speech/022015-spchcmsp.html

[40] E.g., *In the Matter of William Baxter*, 42 S.E.C. 635, S.E.C. Rel. No. 4783, 1965 WL 87562 (June 4, 1965)(Regulation A issuer failed to file reports "despite repeated requests from our staff that it do so," but because issuer misunderstood reporting requirements and ultimately filed the required report, and no other deficiencies were alleged, "under the circumstances" there was no reason to issue a permanent suspension and the temporary suspension was vacated.); *In the Matter of Holiday Mine, Inc.*, Release No. 4394. 1961 WL 61616 (the issuer's offering was suspended due to its failure to cooperate with the staff of the Commission by not responding to letters requiring amendments to its offering circular).

Thereafter, the Commission issued the temporary suspension knowing that Med-X was working on the filing and without knowing that any sales had been made.

In *Mutual Employees Trademart, Inc.*, 40 S.E.C. 128, 130 (1960), the court acknowledged a long-standing procedural rule:

> Our informal procedure described in 17 CFR 202.3 states that while it is 'the usual practice' to bring deficiencies to the attention of the issuer and to afford a reasonable opportunity to discuss the matter and make the necessary corrections, such procedure 'is not generally employed where the deficiencies appear to stem from a deliberate attempt to conceal or mislead or where, for any other reason, the Commission deems formal proceedings necessary in the public interest."

Here, there is no evidence of a deliberate attempt to conceal or mislead. In fact. Mr. Richardson specifically informed Mr. Henseler of his error in calculating the filing date. (RESP. Ex. G3.) Nonetheless, the informal procedure to bring deficiencies to the attention of the issuer and allow it to make the necessary corrections was certainly not followed in the case of Med-X.

Even Mr. Laporte questioned Med-X's treatment by this current regime. (227:11-17.) And Mr. Laporte's uncontradicted opinion was that the Commission's actions in this case were inconsistent with regulatory practices. (Laporte Tr. 170:19-25.) Mr. Laporte, who helped draft Regulation A+ confirmed that is nothing under Rule 258 that mandates a suspension for a late filing. (Laporte Tr. 183:7-18.). As Mr. Laporte testified:

> [T]he Commission isn't usually in the business of issuing gotcha rules for smaller companies. You know, one of the missions of the Commission is to encourage capital formation, and that's not a way to protect investors or encourage capital formation by issuing those types of rules.

(Laporte Tr. 192:15-20.) He further explained that in his experience at the SEC, the Commission does not typically impose sanctions as serious as a permanent suspension for isolated violations of filing requirements. (Laporte Tr. 185:1-9.) And before imposing

such serious sanctions the Commission "always" inquires into the extenuating facts and circumstances." (Laporte Tr. 185:16-20.) This expert testimony is unrebutted.

Despite immediately taking responsibility for its error and fixing the problem, Med-X has been unfairly singled out for a punitive remedy that may destroy the company and in the process, harm its shareholders. This treatment is completely inconsistent with decades of precedent and therefore appears arbitrary and capricious and should be rejected. See, e.g., *Friedman v. Sebelius*, 686 F.3d 813, 826-28 (D.C. Cir. 2012).

CONCLUSION

Since its inception, the suspension remedy under Regulation A has been discretionary in nature. In cases where fraud and/or significant public harm are demonstrated a suspension will likely be made permanent. Conversely, where there is an absence of fraud or demonstrated public harm, temporary suspensions are regularly vacated once the issuer has come into compliance. This vacature serves the public interest by protecting a small business – and its investors -- from the potentially catastrophic effects of a permanent suspension. Under the new Regulation A+ rules, nothing has changed and this Court has the discretion under Rule 258 to equitably remedy an admittedly late filing.

Med-X respectfully submits that for these reasons, and those set forth in its prior filings, and based upon the facts developed at the hearing in this matter, this Court should exercise its discretion and deny the Division's request for a permanent suspension, and instead vacate the temporary suspension that has crippled Med-X for more than six months since it corrected the missed filing.

Dated: April 7, 2017

Respectfully submitted,

___/s/_____

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I hereby certify that true copies of the foregoing document were served on the following, this 7th day of April 2017, in the manner indicated below:

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