**BEFORE THE**
**SECURITIES AND EXCHANGE COMMISSION**
**WASHINGTON, D.C.**

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| In the Matter of the Application of<br><br>METATRON, INC.<br><br>For Review of Action Taken by<br><br>FINRA |

Admin. Proc. File No. 3-18567

# APPLICANT'S REPLY BRIEF IN RESPONSE TO THE COMMISSION'S ORDER REQUESTING ADDITIONAL BRIEFING

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July 18, 2019

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES[1]

**Page(s)**



[1] All of the authorities listed are attached hereto as exhibits.

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## INTRODUCTION

Pursuant to the Securities and Exchange Commission's ("Commission") Order Requesting Additional Briefing ("Order"), Metatron, Inc. ("Company"), hereby submits this reply brief in further support of its Application for Review of FINRA Action ("Application") of the decision of a subcommittee of the Financial Industry Regulatory Authority, Inc.'s ("FINRA") Uniform Practice Code Committee, which affirmed the Department of Operations' ("Department") denial of the Company's requested corporate action to approve its proposed 1:57 reverse stock split ("Corporate Action") pursuant to FINRA Rule 6490(d)(3)(2). The Department alleged that, because of the Company's failure to file 12 consecutive Annual and Quarterly Reports between March 2006 and December 2008 ("2006-2008 Reports"), it was not current in its reporting obligations, thus, forming the basis for the Department's deficiency determination ("Deficiency Determination").[2]

For the reasons set forth herein, and in the Company's other briefs filed in support of its Application, the Commission should find that it did not have any reporting obligations pursuant to

[2] See Applicant's Reply Brief in Response to the Commission's Order Requesting Additional Briefing at 1.

Section 12(g) ("Section 12(g)") or Section 15(d) ("Section 15(d)") of the Securities Exchange Act of 1934, as amended ("Exchange Act"), at the time of the Deficiency Determination. 17 C.F.R. § 78l(g)(1) (2019); 17 C.F.R. § 78o(d) (2019). Therefore, the Commission should reverse the Deficiency Determination and order FINRA to process the Corporate Action promptly.

## FACTUAL BACKGROUND

In March 2002, the Company filed a Form 10-SB (General Form for Registration of Securities Pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934) with the Commission to register its common stock pursuant to Section 12(g). RP 000001, 004619.[3] In January 2004, while a fully reporting issuer, the Company filed a Registration Statement on Form S-8 ("Initial S-8") to register 3,000,000 shares of common stock that were subject to its 2004 Non-Qualified Stock Option Plan. See Initial S-8, https://www.sec.gov/Archives/edgar/data/1168375/000089706904000106/dkm41.txt; see generally Helpeo, Inc., Exchange Act Release No. 82551, 2008 WL 487320, at *4 n.37 (Jan. 19, 2018) (taking official notice under Rule 323 of EDGAR filings). In February 2004, the Company filed Post-Effective Amendment No. 1 to the Initial S-8 ("Amended S-8"; and, together with the Initial S-8, "Unused S-8") for the Company's Amended and Restated 2004 Non-Qualified Stock Option Plan ("Plan"). See Amended S-8, https://www.sec.gov/Archives/edgar/data/1168375/000089706904000512/dkm110.txt.

From March 2002 until April 2009, when the Company filed the Form 15 to deregister its common stock and terminate its status as a Section 12(g) reporting issuer based upon Rule 12g-4(a)(1), the Company was a fully reporting issuer. 17 C.F.R. § 240.12g-4(a)(1) (2019); RP 004619-004620. Shortly

[3] "RP" refers to the page number in the certified record FINRA filed with the Commission on July 12, 2018, as corrected on August 2, 2018.

thereafter, the Company adopted and, since that date, has been following the OTC Markets Group Inc.'s Alternative Reporting Standards ("Standards"). RP 004622.

## ARGUMENT

Because the proposed Unused S-8 offering was never consummated, the Commission should find that the Company does not have any Section 15(d) reporting obligations, and certainly none after the end of the fiscal year in which the Unused S-8 automatically became effective due to the incorporation of the Company's last filed Annual Report for the year ended March 31, 2006; thus, no investors needed the protections afforded by Section 15(d). The determination of whether the Company is current in its disclosure pursuant to the Standards should be solely dispositive in evaluating whether the Deficiency Determination is proper pursuant to FINRA Rule 6490(d)(3)(2). Accordingly, for the reasons set forth herein, as well as in the Company's other briefs filed with the Commission in its Application, the Commission should reverse the Deficiency Determination.

### I. The Unused S-8 was to register an offering that was never consummated; thus, the Commission should find that it did not trigger any Section 15(d) reporting obligations or, if it did, that the Company does not have any continuing Section 15(d) reporting obligations.

The Unused S-8 was to register 3,000,000 shares of common stock that were subject to the Plan. See Amended S-8. However, no awards were ever granted under the Plan and no shares of common stock were ever issued or issuable pursuant to the Unused S-8.[4] Therefore, no investors purchased securities in that registered offering.

Furthermore, the Plan was subject to stockholder approval and ratification, and any Plan awards made prior to such approval also required stockholder approval (collectively, "Approval"). See Amended S-8. The Approval was never requested or obtained. See XRG Inc., Amendment No. 1 to Annual Report (Form 10-KSB), filed December 19, 2005,

[4] See Applicant's Brief in Response to the Commission's Order Requesting Additional Briefing at 12.

https://www.sec.gov/Archives/edgar/data/1168375/000095014405012877/g98835e10ksbza.htm.

Even if the Approval had been obtained, the Plan had a ten-year term. See Amended S-8, Exhibit 4.1, https://www.sec.gov/Archives/edgar/data/1168375/000089706904000512/dkm110a.txt. Thus, even had the Company obtained the Approval, it could have only granted options under the Plan until 2014. Id.

Accordingly, despite the Unused S-8 becoming effective upon filing, the offering that was registered thereunder was never, and could never have been, consummated. Furthermore, every other registration statement filed with the Commission was either withdrawn or never declared effective. In light of the foregoing, the Commission should find that the Company did not trigger any Section 15(d) reporting obligations upon filing the Unused S-8 or, if it did, that the Company does not have any continuing Section 15(d) reporting obligations.

## II. Section 15(d) should not be interpreted as imposing reporting obligations on the Company because there never were any investors who purchased shares in a registered offering.

The Commission has repeatedly stated that "the purpose of [periodic reporting under] Section 15(d) is to assure a stream of current information about an issuer for the benefit of purchasers in the registered offering, and for the public, in situations where Section 13 of the Exchange Act would not otherwise apply." See Proposed Suspension of Periodic Reporting Obligation, Exchange Act Release No. 34-20263, 1983 WL 470474 at *2 (Oct. 5, 1983). In addition, the Commission stated that the Rule 12h-3(c) limitation with respect to the fiscal year in which a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), becomes effective "is in keeping with the philosophy reflected in Section 15(d) of the Exchange Act that generally the investing public should have available complete information about the issuer's activities at least through the end of the year in which it makes a registered offering." Id. at *3. These public policy reasons of protecting investors in registered offerings do not apply here, as there were no such investors.

No investors purchased shares under the Unused S-8, as no one could, which essentially rendered the Unused S-8 a nullity. Because the offering was never consummated, there were no investors to protect – ever. Furthermore, even if the Company obtained the Approval, it could have only utilized the Unused S-8 for as long as the Company incorporated into it the information required by Securities Act Section 10(a)(3). 15 U.S.C. § 77j(a)(3) (2019). After the Company failed to file its 2006 Annual Report, the Unused S-8 could not have been used even had the Company obtained the Approval. The Company maintained Exchange Act current information during the period it conceivably could have commenced the offering – after it filed the Unused S-8 through the time that it disclosed that the Approval was not obtained, thus providing the investing public with "complete information about the issuer's activities at least through the end of the year in which it makes a registered offering." As noted above, there was no registered offering in connection with the Unused S-8.

Moreover, after the Company filed its Form 15, the Company adopted and, since that date, has been following the Standards. The Standards are designed to provide investors with the basic information a broker-dealer must maintain pursuant to Exchange Act Rule 15c2-11 to solicit trades. 17 C.F.R. § 240.15c2-11 (2019). This information is substantially similar enough to the information required by Section 15(d) and ensures that the Company's stockholders have current information about the Company. Any information that would have been contained in the 2006-2008 Reports is stale and outdated, and is irrelevant to current stockholders. Thus, the Commission should find that this information is sufficient to meet the requirements of FINRA Rule 6490 because the information required by the Standards is the only information that is relevant to the Company's current and prospective stockholders. Further, pursuant to the Company's governing documents, management held, and was entitled to vote, a majority of the Company's outstanding shares of common stock entitled to approve the Corporate Action; thus, the Company did not solicit votes from its other

current stockholders. These stockholders did not need to evaluate any information in connection with the Corporate Action.

**III. The Company believes a facts-and-circumstances analysis is appropriate in determining what, if any, reporting obligations the Company had at the time of the Deficiency Determination.**

The Company acknowledges that it failed to file the 2006-2008 Reports prior to filing its Form 15, and that it did not meet the requirements for suspending Section 15(d) reporting obligations at the time its Section 12(g) reporting obligations were terminated. However, the Company believes an examination of the facts and circumstances is warranted and that such examination will reasonably lay the foundation for finding that the Company has not had any Section 12(g) or Section 15(d) reporting obligations since 2009 and that the filing of the 2006-2008 Reports is unnecessary for purposes of the Corporate Action.

For more than a decade, the Company has faced financial difficulties. Most recently, the Company has been forced to engage in debt and equity financings to continue operations, with the hope that it can begin to generate sufficient revenues. Until then, these financings are the Company's primary source of funds. The Company commenced its Corporate Action in order to increase its stock price and increase the number of shares of common stock available for these financings. Instead, the Company has spent 15 months attempting to obtain approval of the Corporate Action, all the while incurring significant expenses and fees in connection therewith.

If the Corporate Action is not approved, the Company does not have a path forward. This would be detrimental to all current stockholders.

The crux of the issue is the Company's historic inability to prepare the 2006-2008 Reports, and, if the Commission were to determine that the Company has continuing Section 15(d) reporting obligations, its economic inability to update its Standards' reports into Exchange Act reports. As noted previously to FINRA and the Commission, current management does not believe that it ever

had access to sufficient information to prepare the 2006-2008 Reports, even though those periods immediately preceded their appointment. The preparation of Exchange Act reports would require retention of a PCAOB-registered firm – herein, a vain act. The Company does not have the funds to incur significant audit fees respecting decades-old financial statements that management may not even be able to generate, and would be an undue hardship based on the Company's size and scope. Further, any time and energy spent by management in connection with the preparation of these reports would detract from its focus on the Company's business for the benefit of its stockholders. Instead, the Company believes that it is more prudent to allow management to focus on bettering the Company's business, financial conditions, and results of operations, which in turn could increase stockholder value.

As the Company cannot prepare the 2006-2008 Reports and, thereafter, additional Exchange Act reports (were the Commission to determine that the Company has continuing Section 15(d) reporting obligations), then the Company and, more importantly, its stockholders would be forever stuck. Remedying the first deficiency is impossible and the second potential deficiency is impracticable. So, how can the Company and its stockholders move forward without the relief sought? Not only is the Company unable to file historic Exchange Act reports but potentially would have to file future Exchange Act reports until it could suspend its potential Section 15(d) reporting obligations.

If required, the only method to suspend is to (i) become current and (ii) reduce the number of record stockholders to below 300. See 17 C.F.R. § 240.12h-3 (2019). Neither of the methods can be accomplished; thus, the Company and its stockholders are stuck in a "Catch-22." One way to decrease the number of record stockholders is through a radical reverse split, which the Department will not approve because of the alleged deficiency. The Company would need to file the 2006-2008 Reports (and, potentially, more), which it cannot do. Another method to decrease that number is through an

issuer tender offer to small stockholders, which would not be possible if the Commission determines that the Company remains subject to Section 15(d) by virtue of the Unused S-8.

Simply put, Section 15(d) reporting obligations, if extant due to the Unused S-8, are the proverbial gift that keeps on giving. A decade after the Company filed its Form 15, the Company finds itself completely hamstrung without any method to remedy the situation. Thus, if the Commission determines that Section 15(d) reporting obligations were "awakened" by the combination of the Unused S-8 and Form 15, the Company's current stockholders will be harmed substantially and permanently, particularly if the Company concludes that its only remaining option is to liquidate and dissolve.

The Company urges the Commission to apply a facts-and-circumstances analysis and find that, (i) while the Company may have had a duty to file the 2006-2008 Reports at the time it filed the Form 15, (ii) it did not "awaken" Section 15(d) reporting obligations at the time it filed the Form 15 by virtue of the previously filed Unused S-8, and (iii) for purposes of its Corporate Action, the Company has met all current information requirements as set forth by the Standards.

## CONCLUSION

The Company's stockholders do not need the protections contemplated by Section 15(d) because no one purchased shares pursuant to the Unused S-8 or any other registration statement. The Company's compliance with the Standards provides its current and prospective stockholders with sufficient information for purposes of the requested Corporate Action.

Accordingly, in light of the foregoing and for the reasons set forth in the Company's other briefs filed in its Application, the Company respectfully requests that the Commission (A) find that (i) the Company did not trigger Section 15(d) obligations with its Form 15 filing and, therefore, does not have any continuing Exchange Act reporting obligations and (ii) for purposes of FINRA Rule 6490(d)(3)(2), the Company only needs to remain current in its information disclosure pursuant to the

Standards and (B) (i) reverse the Deficiency Determination in all respects and (ii) order FINRA to process the Corporate Action promptly.

Respectfully Submitted,

July 18, 2019

By: _____

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## CERTIFICATE OF SERVICE

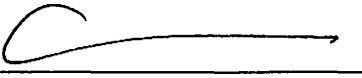
I, Alissa Lugo, certify that on this 18th day of July, 2019, I caused to be filed the original and three copies of the Applicant's Reply Brief In Response to the Commission's Order Requesting Additional Briefing, Administrative Proceeding No. 3-18567, to be served via overnight mail on:

Brent J. Fields, Secretary
Securities Exchange Commission
100 F. St., NE
Room 10915
Washington, DC 20549-1090,

and a true and complete copy of such package via overnight mail upon the following party entitled to notice:

Jante C. Turner
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006.

Respectfully submitted,



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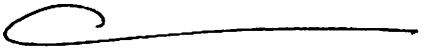
## CERTIFICATE OF COMPLIANCE

I, Alissa Lugo, certify that this Applicant's Reply Brief in Response to the Commission's Order Requesting Additional Briefing, Administrative Proceeding No. 3-18567, complies with the length limitation set forth in the Securities and Exchange Commission's Order Requesting Additional Briefing. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 2,478 words, excluding the cover page, signature block, table of contents, and table of authorities.



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