INITIAL DECISION RELEASE NO. 329
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12519

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	
COSMETIC CENTER, INC.,	:	INITIAL DECISION AS TO IMPAX
DISCOVERY ZONE, INC.,	:	LABORATORIES, INC.
DONLAR BIOSYNTREX CORP.,	:	April 30, 2007
DONLAR CORP.,	:	
IMPAX LABORATORIES, INC.,	:	
PHOENIX WASTE SERVICES	:	
COMPANY, INC., and	:	
TELYNX, INC.	:	

APPEARANCES: Stephen L. Cohen, David S. Frye, Paul W. Kisslinger, Neil J. Welch, Jr., and John D. Worland, Jr., for the Division of Enforcement, Securities and Exchange Commission

Joseph O. Click, Joseph N. Cordaro, and Michael Joseph for Impax Laboratories, Inc.

Stephen J. Crimmins for witness Thomas A. Valvano

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) instituted this proceeding on December 29, 2006, pursuant to Section 12(j) of the Securities Exchange Act of 1934 (Exchange Act). The Order Instituting Proceedings (OIP) alleges that Respondents have classes of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act and that they are all delinquent in filing required periodic reports. The allegations against Respondents Impax Laboratories, Inc. (Impax), and Discovery Zone, Inc. (Discovery), remain unresolved.[1]

[1] See Cosmetic Center, Inc., Exchange Act Release No. 55250 (Feb. 7, 2007) and Cosmetic Center, Inc., Exchange Act Release No. 55278 (Feb. 12, 2007). The Division of Enforcement (Division) is negotiating a settlement with the bankruptcy trustee for Discovery.

I granted Impax's request for a public hearing over the objections of the Division. The hearing was held on February 26 and 27, 2007.[2] The Division called seven witnesses and introduced thirty-nine exhibits.[3] At Impax's request, I granted a protective order that limited four Division exhibits from public disclosure. 17 C.F.R. § 201.322. Impax called one expert and two fact witnesses and introduced one exhibit.[4] The last brief was filed on April 20, 2007.

The findings and conclusions in this Initial Decision are based on the entire record. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this Initial Decision.

FINDINGS OF FACT

Impax, a Delaware corporation, is the result of the merger in December 1999 of Global Pharmaceuticals, a public company, and Impax Pharmaceuticals, a private company. (Tr. 220.) Impax manufactures and distributes generic and selected branded pharmaceutical products. Manufacturing is performed in Hayward, California; packaging occurs in Philadelphia, Pennsylvania; and corporate offices and a distribution facility are in New Britain, Pennsylvania. (Tr. 370.) Dr. Charles Chiin Hsiung Hsiao has chaired Impax's board since December 1999 and was co-chief executive officer from 1999 until 2003. (Tr. 240-41.) Dr. Chung-Chiang (Larry) Hsu has been Impax's chief operating officer (COO) since 1999 and its president and chief executive officer (CEO) since October 2006. (Tr. 219-20.) Barry R. Edwards is listed as CEO on several documents that Impax issued in 2004 and 2005. (Div. Exs. 33, 39, 41.)

Impax has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. (Answer at 1; Tr. 220.) As of March 31, 2001, the number of persons and institutions owning over five percent of Impax's securities totaled twenty-two. (Div. Ex. 9 at 10-12.) J.P. Morgan Chase & Co. owned 11.7 percent of Impax common stock on February 29, 2004. (Div. Ex. 30 at 11.) As of December 14, 2006, Impax's common stock, its only publicly traded security, was quoted on Pink Sheets LLC (Pink Sheets), it had thirty-eight market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-

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[2] Citations to Impax's Answer are noted as (Answer __.). Citations to the hearing transcript are noted as (Tr. ___.). Citations to the Division's and Impax's exhibits are noted as (Div. Ex. ___ at ___.) and (Impax. Ex. __ at __.), respectively. Citations to the Division's and Impax's posthearing briefs are noted as (Div. Brief at ___.), (Impax Brief at ___.), and (Div. Reply at ___.), respectively.

[3] I grant the Division's request, made after the hearing closed, to withdraw Division Exhibit 88. Impax does not object to the request.

[4] I refused to qualify one of Impax's proposed witnesses as an expert. His report and two other proposed exhibits were not allowed into evidence.

11(f)(3).[5] During the six months ended December 14, 2006, Impax's common stock had an average daily trading volume of 261,427 shares. (Tr. 372.) According to Arthur A. Koch, Jr. (Koch), Impax had: (1) $29.1 million in cash and investments on December 31, 2006; and (2) 600 employees on February 27, 2007.[6] (Tr. 370.) Koch appears to have made most of the policy decisions for Impax on the matters at issue in this Initial Decision. (Tr. 338.)

Impax has not filed a required periodic report with the Commission since it filed a Form 10-Q for the period ended September 30, 2004. Impax claims that it has been unable to complete an audit of its financial statements for 2004 solely because of "inordinately complex" revenue recognition issues from a multiple-element Strategic Alliance Agreement (Agreement) that it entered in 2001 with Teva Pharmaceuticals, Curacao, N.V. (Teva), the United States subsidiary of Teva Pharmaceuticals Industries, Ltd., headquartered in Israel. (Tr. 141, 323-26, 365; Div. Exs. 10, 42.) The Agreement provided for: (1) Impax to develop and manufacture twelve new generic products that Teva would market under an exclusive license, with profits shared by Impax and Teva; (2) Teva to lend Impax $22 million and purchase $15 million of Impax's common stock; (3) Impax to repay the loan with shares of Impax common stock at Impax's option; (4) interest and principal forgiveness to occur to the extent Impax met specific product-development milestones or in exchange for retention of market exclusivity; (5) Impax to repurchase a portion of its shares for nominal consideration when a specified milestone had been achieved; and (6) the parties to share specified regulatory and patent-litigation expenses. (Answer at 2-3; Div. Ex. 10.)

Impax began sending products to Teva for distribution under the Agreement in early 2004. (Tr. 150.) Through the third quarter of 2004, Impax's revenue recognition policy was to recognize the cost reimbursement and profit components of revenue from Teva "at the time title and risk of loss of the products passed from Teva to Teva's customers." (Answer at 3.) Impax restated its financials for the first two quarters of 2004, for reasons that are unrelated to the issues presented here.[7] (Tr. 367-68.)

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[5] The Pink Sheets provide pricing and financial information for the over-the-counter securities market. (Impax Ex. 4 at 3.) The piggyback exemption suspends Exchange Act Rule 15c2-11's information maintenance requirements under certain conditions.

[6] Koch became Impax's senior vice president in February 2005 and chief financial officer (CFO) on April 1, 2005. (Tr. 321.) Koch replaced Cornel Spiegler, Impax's CFO since before the 1999 merger. (Tr. 322.) Koch is a graduate of Temple University in Philadelphia, Pennsylvania, with a degree in business. Koch, a certified public accountant (CPA), spent eight years with Peat Marwick, including six years as an auditor, and served as CFO for several other companies before joining Impax. (Tr. 320-21, 384.) Koch also is Impax's compliance officer. (Tr. 366.)

[7] In March 2005, Impax and Teva agreed to the net sales and margins allocable to Impax in 2004. At Impax's request, they also agreed to modify the Agreement effective January 1, 2005, "to deal with all the net sales deductions" to remove some of the variations possible with estimates by replacing them with fixed percentages, which simplifies the accounting under the Agreement. (Tr. 160-62; Div. Ex. 42.)

Early in 2005, Impax's independent auditor, Deloitte & Touche LLP (Deloitte), questioned Impax's method of recognizing revenue under the Agreement while auditing Impax's 2004 financial statements.[8] (Tr. 329-30; Div. Ex. 47 at 12 (under seal).) Deloitte advised Impax to obtain the views or concurrence of the Commission's Office of the Chief Accountant (OCA) on the appropriate way to account for the Agreement before it filed its 2004 financial statements. (Tr. 214-15, 294, 330.) Deloitte recommended an OCA review because the Agreement is complex and it is challenging to find appropriate accounting literature, either by direct application or analogy, that relates to various aspects of the Agreement. (Tr. 214.) According to Impax, Deloitte could not develop an in-house consensus on the appropriate accounting method. Impax and Deloitte have not disagreed on a particular method; rather, Impax has been trying to find a method that Deloitte will accept. (Tr. 331-32.) The issue is when revenue should be recognized, not if it should be recognized. (Tr. 407.)

The Commission encourages companies and their auditors to consult with OCA by way of a "pre-clearance or pre-filing process" on unusual, complex, or innovative issues for which no authoritative guidance exists. (Tr. 32.) "Guidance for Consulting on Accounting Matters with the Office of the Chief Accountant" is posted on the Commission's Web site. (Tr. 37; Div. Ex. 43.) The pre-clearance protocol specifies that "the conclusion of the company's auditor with respect to the accounting, auditing, or independence issue" involved is one of the pieces of information that should be provided. (Div. Ex. 43 at 4.) In most situations, the registrant's pre-clearance request occurs after the registrant and its auditor reach an agreement on the issue and the registrant makes the request with its auditor's consent. (Tr. 41, 43.) Typically, given that the registrant has completed its analysis and the auditors have shared their views, the OCA completes the process in two to three weeks. (Tr. 45-46.) Occasionally, there are situations where a registrant and its auditor disagree or where an old auditor and a new auditor reach a different conclusion, but in all situations there is an auditor's conclusion. (Tr. 41-42.)

OCA relies heavily on the auditor's opinion and expects the registrant and its auditor to either agree or agree to disagree on the accounting issues that are the subject of the inquiry. (Tr. 62.) It is highly unlikely that OCA would give an opinion without the auditors signing off on the proposed method of accounting. (Tr. 129.) To conclude the pre-clearance process, the registrant submits a "closing letter" to OCA setting out the registrant's position and stating that OCA does not object to the position. (Tr. 43.) The Division of Corporation Finance (Corporation Finance) does not challenge a registrant on an issue that OCA has pre-cleared. (Tr. 43-44.)

Impax did not file its Form 10-K for 2004 that was due on March 31, 2005. Instead, Impax filed a notification of late filing on Form 12b-25 stating that it expected to file its 2004 Form 10-K within the fifteen-day extension provided by the Commission.[9] (Div. Ex. 37.) In a

[8] Impax insists that Deloitte informed it in late March 2005 that it was not able to reach a consensus on the revenue recognition issue, but it previously asserted that it began discussing the issue with Deloitte in February 2005. (Div. Ex. 41 at 12; Impax Brief at 50.)

[9] Impax has not allowed its officers and directors to buy or sell Impax common stock since it has become delinquent in its filings. (Tr. 366-67.)

press release issued March 31, 2005, Impax cited as causes for the filing delay: (1) additional time needed to complete the year-end financial closing; (2) the restatements made to its financials for the first two quarters of 2004; and (3) the internal control evaluation mandated by Section 404 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).[10] (Tr. 377-79; Div. Ex. 39.)

In the spring of 2005, Impax retained FTI Consulting, Inc. (FTI), "a multi-disciplined consulting firm with leading practices in the area of bankruptcy and financial restructuring, economic consulting, litigation consulting, and forensic accounting" to advise its outside legal counsel and chief financial officer.[11] (Tr. 273-75; Impax Ex. 4 at 2.)

On May 26, 2005, Impax sought advice from OCA by way of a written letter (May 2005 pre-clearance request). Impax's May 2005 pre-clearance request stated that:

> Deloitte has advised us that it believed the draft did not clearly present all of the pertinent facts related to our relationship with Teva under the [Agreement] or clearly present the proposed accounting or the basis for such accounting. Deloitte has also advised us that it has not yet concluded whether it agrees with the proposed accounting described in this letter. Based on the foregoing, Deloitte advised management of Impax that it did not believe the draft letter was in an appropriate condition for submission to the staff of the Commission and accordingly, advised [Impax] not to send this letter to the staff at this time.

(Tr. 61-62, 65; Div. Exs. 47 at 12 (under seal), 83.)

Impax's May 2005 pre-clearance request was unusual. (Tr. 387.) One OCA reviewer does not recall ever seeing a pre-clearance submission with such a strong expression of the auditor's view.[12] (Tr. 62-63.) On receiving the pre-clearance request, OCA questioned whether it should process the submission considering Deloitte's position that the submission was

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[10] Nasdaq informed Impax on April 5, 2005, that its common stock was subject to delisting from The Nasdaq Stock Market for failure to file its 2004 Form 10-K. (Tr. 380; Div. Ex. 41.)

[11] FTI's letterhead states the name as FTI Ten Eyck and its address as King of Prussia, Pennsylvania. (Div. Ex. 83.) Ernest Ten Eyck (Ten Eyck), a graduate of George Washington University and a CPA with ten years' experience with a national accounting firm and six years as an assistant chief accountant in OCA, is the lead person at FTI on the engagement. (Tr. 272-74.) Ten Eyck would rate Impax's revenue recognition issue as "an eleven" on a complexity scale measuring from one to ten. (Tr. 280.) According to Ten Eyck, independent auditors are reluctant to give accounting advice to clients since enactment of Sarbanes-Oxley, so accounting consultants work as subject matter experts on difficult accounting issues for public companies. (Tr. 291.)

[12] OCA assigned a team led by lead accountant, Tony Lopez (Lopez), Pamela Schlosser, J.J. Mathews, and Todd Hardiman (Hardiman) from Corporation Finance's Office of Chief Accountant to work on the issue. (Tr. 37, 40.)

incomplete because it lacked sufficient factual information. (Tr. 65-66, 68.) Two OCA reviewers considered the submission incomplete as to factual content and accounting analysis. (Tr. 63-64, 67-68, 97, 102.) One OCA reviewer found it alarming that Deloitte was not comfortable with the submission and that Deloitte believed the submission did not disclose all the relevant facts. (Tr. 60-62.)

Deloitte had informed Impax what a pre-clearance submission needed to address so the deficiencies in the May 2005 pre-clearance request were not from Impax's lack of understanding. (Tr. 216.) Koch was frustrated by delays in obtaining feedback from Deloitte's national office. (Tr. 338, 392.) He decided that Impax would file the May 2005 pre-clearance request even though Deloitte told him that the submission did not address all the facts and OCA's guidelines advised that the company's auditor should concur with the proposal before it was presented to OCA. (Tr. 338, 382, 385.) Koch claims to have thought OCA would consider "a very narrow issue under the [Agreement]" and this would shorten the overall time to resolution of the accounting issue. (Tr. 384.) Koch believes Impax's submission was complete on the single issue of Impax's sales of product in 2004. (Tr. 385, 387.) He envisioned that Impax could offer to Deloitte "OCA's determination, which would shorten the auditor's analysis." (Tr. 340, 384.) FTI found the May 2005 pre-clearance request adequate and complete from an accounting perspective, but warned Impax that there was the potential that OCA would not respond positively until Deloitte agreed with Impax's methodology. (Tr. 281-82. 285.) FTI and Impax's outside legal counsel advised Impax to submit the May 2005 pre-clearance request. (Tr. 388.)

OCA considered that Impax was in a time crunch. To keep the issue moving toward resolution, OCA had a conference call with Impax on June 10, 2005, concerning the May 2005 pre-clearance request. OCA and Deloitte voiced many questions on the conference call. (Tr. 68-69.) At the call's conclusion, OCA suggested that Impax and Deloitte continue working on the issues and that Impax consider making a follow-up submission with OCA that addressed more of the issues in depth. (Tr. 69-70, 97.)

Impax issued a press release on August 3, 2005, that discussed the impact on revenue and net income of three different methods of revenue recognition under the Agreement. (Tr. 345; Div. Ex. 55.) The press release stated that whatever revenue recognition policy was ultimately adopted would not impact Impax's liquidity or cash position. According to Koch, that meant that "we were dealing with revenue recognition and that we were not talking about an effect on [Impax's] liquidity or cash." (Tr. 395-96; Div. Ex. 55.) Impax anticipates, however, having to restate its financial statements if OCA approves the method it proposed in its latest pre-clearance submission. (Tr. 193.) Any restatement may impact Impax's liquidity or cash position. (Tr. 199.) Impax issued the press release in an attempt to keep its listing on Nasdaq. (Tr. 345-46.) Nevertheless, Nasdaq de-listed Impax's common stock on August 8, 2005. (Div. Ex. 57.)

Impax did not have any substantive dialogue with OCA between June 10, 2005, and November 7, 2005, when it filed a second, more detailed, written pre-clearance submission with OCA (November 2005 pre-clearance request). (Tr. 71-72, 103; Div. Ex. 61 (under seal).) The November 2005 pre-clearance request did not contain an auditor's opinion on the accounting treatment that Impax proposed to OCA (Tr. 282.) Deloitte did not object to submission of the November 2005 pre-clearance request; however, Deloitte needed Impax to supply it with

evidentiary material in six separate areas before Deloitte could reach a conclusion on the accounting Impax proposed. (Div. Ex. 61 at 20-21 (under seal).).

One OCA reviewer had "some pause" and did not feel comfortable expressing any view until OCA received Deloitte's position, given that Deloitte was still unwilling to say that the November 2005 pre-clearance request was complete and to express a view. (Tr. 74-76, 78.) Another OCA reviewer found Impax's November 2005 request more complete factually, but still notably deficient in accounting analysis. (Tr. 97, 102-03, 106-07.) Koch claims an OCA reviewer represented to Deloitte that OCA would consider the request because it was taking Deloitte so long to formulate its position.[13] (Tr. 341-42.) FTI believed Impax's November 2005 pre-clearance request "was very solid."[14] (Tr. 282.)

OCA had a second conference call with Impax on January 3, 2006. (Answer at 4.) OCA "declined to express its views concerning [Impax's] proposal until the Company's auditors' views were made known." (Answer at 4; Tr. 342.) A member of the OCA team suggested that Impax take "a clean sheet of paper and [begin] from square one."[15] (Tr. 342-43, 398.) At the conclusion of the conference call, OCA considered that it was up to Impax to take the next step to resolve the matter. (Tr. 79.) One OCA team member believes Impax committed to providing OCA with a new accounting analysis. (Tr. 105-06.)

On March 29, 2006, Corporation Finance sent Impax written notice that if it did not file all required reports within fifteen days, it may be subject to an administrative proceeding to revoke its registration pursuant to the Exchange Act. (Div. Ex. 64.)

On August 9 and November 9, 2006, Impax stated in Form 12b-25 filings that it continued to consult with OCA on the revenue recognition issue that prevented it from closing its 2004 financials. (Div. Exs. 100, 102.) It made this representation because it claimed to be fully engaged in responding to the points OCA raised in the telephone conferences. (Tr. 359.)

For thirteen months following the January 3, 2006, conference call, Impax exchanged a series of "white papers" and draft submissions with Deloitte, FTI, and its legal representatives that addressed each of the accounting issues in the Agreement. When Deloitte was satisfied with the analysis, around July 16, 2006, Impax drafted a third pre-clearance submission that it filed with OCA on February 2, 2007, the same day Deloitte informed Impax that it concurred with the method Impax proposed.[16] (Tr. 8, 347-49, 358; Div. Ex. 79 (under seal).) Impax's February

[13] Impax did not call Lopez or Bill Platt of Deloitte to testify and confirm the conversation.

[14] Ten Eyck thought it possible that OCA would render an opinion despite Deloitte's position. He believed OCA might respond in a way that would elicit a reaction from Deloitte so that Impax was not "left with this great unknown of what is Deloitte's concept." (Tr. 283-84, 289.)

[15] The Deloitte representative was struck by this comment. (Tr. 186.) He thought it was a good suggestion given that Impax and Deloitte had spent considerable time and effort and had not yet reached a conclusion. (Tr. 187.)

[16] It is highly unusual for OCA to be involved with the same issue for almost two years. (Tr. 47.)

2007 pre-clearance submission was the first submission that contained an appendix and analysis and dealt with all the multiple elements of the Agreement. (Tr. 285-87; Div. Ex. 79 (under seal).) The submission states that Deloitte believes the revenue recognition model that Impax proposed is "acceptable," but that application of the model may not result in financial statements that provide transparent financial information to investors. (Tr. 8, 109, 190, 402; Div. Ex. 79 at 29-30 (under seal).) Impax and OCA had another conference call on February 15, 2007.[17] OCA currently has the submission under consideration. (Tr. 112.)

PricewaterhouseCoopers was Impax's independent auditor before Deloitte. (Tr. 171.) Deloitte audited Impax's 2003 Form 10-K, and performed quarterly reviews of Impax's first, second, and third quarter 2004 Forms 10-Q. (Tr. 169, 175, 217.) Deloitte informed Impax on November 21, 2005, that it would complete work on the 2004 audit but it would not serve as Impax's auditor for periods subsequent to 2004. (Tr. 398; Div. Ex. 65 at 2.) Deloitte has completed a significant amount of work on the 2004 audit. (Tr. 203.) Deloitte will not complete the 2004 audit until Impax develops a revenue recognition policy that is acceptable to Deloitte. (Tr. 33.) In November 2006, Impax retained Grant Thornton LLP (Grant Thornton) as its independent auditor for its 2005 and 2006 financial statements and for its internal controls. (Answer at 6; Tr. 254.) Impax does not consider it unusual "under the circumstances of Sarbanes-Oxley" to have had three different auditors from 2002 to 2006. (Tr. 404.)

The Commission suspended trading in Impax securities from December 29, 2006, through January 16, 2007, pursuant to Section 12(k) of the Exchange Act, because there was a lack of current and accurate information concerning Impax's securities. Cosmetic Center, Inc., File No. 500-1, Order of Suspension of Trading. (Answer at 2.) Impax claims that the day before the suspension, its shares traded at $9.80 per share and its market capitalization was $600 million. (Answer at 2.) When Impax resumed trading on January 17, 2007, "dealers were only permitted to publish only unsolicited quotations, meaning quotations (limit orders) on behalf of a customer that represents the indication of interest." (Impax Ex. 4 at 3.)

ISSUES

The OIP alleges that Impax has violated Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1 and 13a-13 by failing to file required periodic reports since it filed its Form 10-Q for the quarter ended September 30, 2004. The OIP specifies that Impax has not filed Forms 10-K for 2004 and 2005 and Forms 10-Q for the first three quarters of 2005 and 2006.[18] The issues are whether the allegations are true and, if so, what, if any, sanction is necessary and appropriate for the protection of investors.

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[17] Impax indicates that it has conferred with OCA twice. (Impax Brief at 60.)

[18] The OIP was issued before Impax's Form 10-K for 2006 was due to be filed with the Commission. The due date had passed when this Initial Decision was issued and Impax had not made the filing.

CONCLUSIONS OF LAW

Exchange Act Section 13(a) requires issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Exchange Act Rule 13a-1 requires issuers to file timely annual reports. Exchange Act Rule 13a-13 requires issuers to file timely quarterly reports.

It is undisputed that the allegations in the OIP are true. Impax has a class of securities registered with the Commission pursuant to Exchange Act Section 12(g) and Impax violated Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13 by failing to file required periodic reports with the Commission since it filed a Form 10-Q for the period ended September 30, 2004. (Answer at 1.)

SANCTIONS

Exchange Act Section 12(j) authorizes the Commission, where it finds the issuer has violated the statute or regulation, to suspend for a period not exceeding twelve months or to revoke the registration of a security, "as it deems necessary or appropriate for the protection of investors." Impax admits that the alleged violations occurred. The only issue is whether sanctions are warranted.

Arguments of the Parties

Impax argues that under the unique facts of this case, suspension or revocation is an inappropriate remedy for Impax's violations and unnecessary to protect public investors.[19] (Tr. 25, 138; Impax Brief at 1, 70-71.) Impax claims that the Agreement is one of the most comprehensive agreements in existence and it committed the violations only because it has been difficult and time consuming to resolve accounting issues of extraordinary complexity. (Tr. 326, 403; Impax Brief at 44.) Impax also maintains that the period of violations is much shorter than the usual Section 12(j) proceeding. (Impax Brief at 66.) Impax characterizes its violations as serious but not egregious and urges additional forbearance. (Tr. 140; Impax Brief at 2, 43.) Impax claims the violations are isolated, not recurrent, because developing a new revenue recognition policy for the Agreement is an isolated instance. (Impax Brief at 43-44.)

Impax contends that imposing suspension or revocation is inappropriate on these facts and that Exchange Act Section 12(j) is not a strict liability provision.[20] Impax represents that it

[19] Impax does not challenge the Commission's reporting requirements. (Tr. 137.) It does not claim the information that is available satisfies the requirements of a Form 10-K. (Tr. 121.) Impax does not contend that the information available to the public includes all the information that would be disclosed in Impax's Form 10-K. (Tr. 119.)

[20] It appears that Impax believes the Division is arguing for an automatic suspension or revocation because of the admitted violations. In response, Impax argues that the provisions of Exchange Act Section 12(j) are not automatic because: (1) the statutory language is permissive; (2) the Commission historically has not automatically suspended or revoked an issuer's registration for failing to file reports; (3) if suspension or revocation were deemed necessary or

has done everything it could do to become current in its reporting given the complex issue of revenue recognition posed by the Agreement. (Tr. 137, 337; Impax Brief at 46, 58.) Impax claims that because of the "multiple deliverables" under the Agreement and "various features potentially requiring accounting as derivative financial instruments, the analyses required to determine the appropriate method of recognizing revenue under the agreement have been unusually complex." (Answer at 5.) It claims that the time spent obtaining Deloitte's concurrence has been lengthy despite the diligence of all involved:

> primarily because of the sheer complexity of the accounting issues, the auditors' internal procedures, and the fact that the auditors, due to the nature of their role as auditors, have been reluctant to advise Impax what method will be acceptable to them, as distinct from reacting to Impax's proposals with questions, comments and suggestions in a process akin to the Socratic method.

(Impax Brief at 2.)

The gist of Impax's position is that its violations occurred because of facts beyond its control, such as accounting complexities arising from the inordinately complex and unique Agreement, delays by Deloitte, and Sarbanes-Oxley. Impax maintains there is little discussion in the accounting literature that is directly on point and that it has had to analyze the various accounting issues by analogy. (Tr. 360.) Impax claims to have spent over $3 million trying to resolve the revenue recognition issue and complete its 2004 audit. (Answer at 5; Tr. 334.)

Impax believes it currently has several thousand shareholders, including institutions and other sophisticated investors. It maintains that since its last required filing, it has continuously apprised investors and the market of significant developments by use of over forty filings on Form 8-K, postings on its Web site, and presentations at investor conferences. (Answer at 2; Impax Brief at 3-4.) Impax contends that there is sufficient information in the public domain for investors to make reasonably informed investment decisions on whether to purchase, sell, or hold Impax securities so that it is not necessary or appropriate to suspend or revoke the registration of any class of Impax securities. (Answer at 1; Tr. 133.)

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appropriate in every instance, then Congress would not have limited the Commission's ability to suspend trading ex parte for only ten days in Exchange Act Section 12(k); (4) suspension or revocation is considered draconian; (5) the Commission has less drastic remedies available in Exchange Act Section 15(c)(4); and (6) whether suspension or revocation is necessary or appropriate depends on the particular facts at issue. (Impax Brief at 34-37.) The Division denies making such an argument. (Div. Reply at 2.)

In support of its position, Impax introduced expert testimony from Simon Z. Wu (Wu).[21] (Impax Ex. 4.) Wu concludes that the market for Impax stock from November 16, 2004, through December 28, 2006, has been an "efficient market," even without periodic financial reports.[22] (Impax Ex. 4 at 3, 15.) He defines an efficient market as one where all known relevant information, even false information, is continually incorporated into the stock price and that the market price is an unbiased estimate of the company's true value. (Tr. 444, 470; Impax Ex. 4 at 6.) Wu based his conclusions on several factors. Wu found that the trading activity of Impax stock was much more active and liquid than an average small-cap stock before and after the Commission suspended trading. (Impax Ex. 4 at 7-8.) According to Wu, the average daily trading in Impax common stock pre-suspension was over 550,000 shares while the NASDAQ Small-Cap Average was less than 50,000. The same figures post-suspension are over 256,000 shares for Impax as compared with 58,000 shares for the NASDAQ Small-Cap Average.

Wu concludes further that active trading in Impax stock indicates that the stock is trading efficiently, investors are not significantly concerned about Impax's delinquent filings, and that the stock price likely reflects a risk component reflecting uncertainty about Impax's future. (Tr. 474; Impax Ex. 4 at 9.) Impax's stock price went from about sixteen dollars per share in July 2005, to a little more than ten dollars per share in early August 2005, and increased from six to seven dollars per share between September 5 and 8, 2006, on a positive report by Lehman Brothers.[23] (Impax Ex. 4 at 11-12.) Wu also concludes that information about Impax was readily and consistently available to the trading community because five to twelve analyst firms issued reports on Impax and it was mentioned in over 1,500 news articles. (Impax Ex. 4 at 12-13.) Wu's research shows that in 2006 more than twenty-five institutional investors held Impax shares and these holdings constituted over forty percent of the total shares outstanding. Wu considers the extent of institutional holdings as evidence that Impax's stock price likely reflects all publicly available information and closely represents Impax's true value. (Impax Ex. 4 at 14.)

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[21] Wu received Ph.D and M.A. degrees in economics with a specialty in finance, international finance, and econometrics from Vanderbilt University and a B.B.A. degree in economics from Belmont University. Wu was a senior economist with the National Association of Securities Dealers and subsequently the Nasdaq Stock Market from 1998 to 2002 where he authored many studies on a variety of subjects. Wu has presented expert testimony on behalf of parties in securities matters, has published research papers, and made presentations before organizations consisting of finance and securities professionals. (Impax Ex. 4 at Appendix B.)

[22] I deny the Division's renewed motion to strike Wu's expert testimony. (Div. Brief at 47-48.) It is a close question whether Wu's opinions are relevant. I affirm my ruling at the hearing and allow his testimony into evidence given the broad admissibility standard that applies generally to the conduct of administrative proceedings and the Commission's pronouncement in City of Anaheim, 54 SEC 452, 454 & n.7 (1999) ("law judges should be inclusive in making evidentiary determinations") (multiple citations omitted). 17 C.F.R. § 201.320.

[23] The record contains no explanation why trading in Impax common stock was so much greater than trading for the NASDAQ Small-Cap Average or why Impax's stock price changed so dramatically in July and August 2005 and September 2006.

Wu believes "that an efficient market also protects small retail investors, as the stock price is unlikely to deviate much from its true underlying value." (Impax Ex. 4 at 14.)

The Division disputes Impax's claim that it has been diligent and reasonable in efforts to comply with the reporting requirements and asserts that the availability of alternative information does not create an exception to the requirements that an issuer of registered securities file periodic reports. (Tr. 15; Div. Brief at 43.) The Division faults Impax for ignoring "the most basic principle of corporate governance that a public company is charged with having in place sufficient resources, expertise, and internal controls to be able to account for its business decisions." (Reply Brief at 9.) The Division argues that it is appropriate to revoke the registration of Impax common stock given Impax's continuing egregious violations of Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1 and 13a-13. The Division is unaware of any Initial Decision in an Exchange Act Section 12(j) proceeding where the Commission failed to revoke the registration of an issuer that was not compliant when the Initial Decision was issued. (Div. Brief at 35; Div. Reply at 6.)

The Division contends the following factors show that revocation is appropriate: (1) Impax created a morass by choosing to enter a complicated Agreement that overwhelmed its accounting capability; (2) Impax's internal control weaknesses compounded its accounting problems; (3) Impax made false or misleading representations on its Web site until approximately February 27, 2007, in Form 12b-25 filings, to the Nasdaq Listing and Qualifications Panel, and in press releases; (4) Impax has manipulated and misused the OCA pre-clearance process; (5) Impax and its officers have violated Sections 13(d) and 16(a) of the Exchange Act and Exchange Act Rules 13d-2, 16a-2, and 16a-3[24]; and (6) Impax's assurances against future violations are not credible. (Div. Brief at 36-44.) The Division characterizes Impax's violations as continuous and unending. It maintains that Impax's president and CEO, and CFO had a high degree of culpability. (Div. Brief at 37.)

Gateway Criteria

In Gateway Int'l Holdings, Inc., 88 SEC Docket 430 (May 31, 2006), the leading case on the application of Exchange Act Section 12(j), the Commission stated:

> [to] ensure that investors will be adequately protected therefore turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand. In making this determination, we will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to

[24] The Division introduced evidence and arguments to address alleged reporting violations by Impax officers pursuant to Sections 13(d) and 16(a) of the Exchange Act and rules thereunder. (Div. Brief at 29-32; Div. Reply at 11-12.) I have not considered this evidence in reaching a decision because these allegations were not in the OIP.

remedy its past violations and ensure future compliance, and the credibility of its assurances, if any, against further violations.

Gateway, 88 SEC Docket at 439. The Commission reaffirmed Gateway in America's Sports Voice, Inc., Exchange Act Release No. 55511 (March 22, 2007).

Impax's violations are serious and recurrent. "Failure to file periodic reports violates a central provision of the Exchange Act." Gateway, 88 SEC Docket at 441. The purpose of the periodic reporting requirements is to supply investors with current and accurate financial information about an issuer so that they can make an informed investment decision. These requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977) (quoting legislative history). Requiring audited financial statements is a means of assuring accurate financial statements. Investors have not had access to audited financial statements from Impax since calendar year 2003 because it has not filed annual reports for 2004, 2005, and 2006. In addition, Impax has not filed quarterly reports for the first three quarters of 2005 and 2006. The fact that Impax failed to file three annual reports and six quarterly reports covering a period of more than two calendar years also shows that the violations were recurrent.

Impax committed the violations with a high degree of culpability. The knowledge of Impax's officers is attributable to Impax. Impax's President, CEO, COO, and CFO knew that Impax was required to file periodic reports and that it had not done so since the last quarter of 2004. (Tr. 219-221, 322-23.) See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1096-96 nn.16-18 (2d Cir. 1972) (holding that the knowledge of individuals is imputed to the corporation they controlled).

Impax's culpability is established by the following facts. Impax allowed:

(1) almost two months to pass from the due date for filing its Form 10-K for 2004, until May 26, 2005, when it filed its first pre-clearance request to OCA. In addition, it filed a pre-clearance request on May 26 that it knew was materially deficient;

(2) more than five months to pass between its May 2005 pre-clearance request and filing its second pre-clearance request on November 7, 2005. In addition, the November 2005 pre-clearance request did not contain an auditor's opinion when Impax knew that OCA required one;[25] and

(3) more than fourteen months to pass between the November 2005 pre-clearance request and February 2, 2007, when Impax filed its most recent pre-clearance request.

[25] Ten Eyck knew OCA's pre-clearance protocol requires that the auditor take a position on the accounting method proposed in the pre-clearance request; however, Deloitte did not take a position on the method Impax proposed in its first two pre-clearance submissions. (Tr. 287.)

There is no evidence to support Impax's complaints that Deloitte caused the delay in filing its Form 10-K for 2004.[26] (Tr. 388, 391-92.)

The facts do not support Koch's testimony that filing required reports was his highest priority. (Tr. 332.) The evidence is persuasive that the delay in completing the audit of Impax's 2004 financials was Impax's failure to supply information within its control to its auditors and to OCA. For example:

(1) Deloitte considered Impax's May 2005 pre-clearance request incomplete because it did not clearly present the relevant facts and considerations under the Agreement and consider and/or develop all the appropriate accounting considerations. (Tr. 178, 385.) In the June 2005 conference call on the May 2005 pre-clearance request, OCA raised twelve or thirteen questions for Impax and Deloitte to consider in resolving the issue. (Tr. 65-67.) A representative from Deloitte had many of the same questions as OCA. (Tr. 68, 179, 389.)

(2) Impax's November 2005 pre-clearance request states that Deloitte was unable to form a conclusion on the completeness, accuracy, or propriety of the proposed accounting issue in light of the additional information and evidence it requested from Impax on at least six items. (Tr. 73-74, 78-79, 184-85, 212-14; Div. Ex. 61 (under seal) at 20.) According to OCA, there was still a host of issues and the status was the same as five months earlier. (Tr. 75.)

(3) On April 11, 2006, more than fifteen months after the audit year ended, Impax had not completed responses to the 100-plus items on Deloitte's list of open audit items on the 2004 audit, some of which were unrelated to the revenue recognition issues. (Div. Ex. 65 at 2.)

(4) In the conference call on January 3, 2006, OCA posed six to ten questions that it needed answered before it could begin a dialogue with Impax. Some of these questions were inquiries it posed on the May 2005 pre-clearance request (Tr. 76-77.) Deloitte participated in the call and also had several open questions for Impax. (Tr. 76-77, 186.)

(5) Impax committed to provide OCA with a new accounting analysis on the January 3, 2006, conference call and failed to do so. (Tr. 105-07, 127.) Hardiman closed his file in Corporation Finance on April 12, 2006, when Impax failed to provide information. OCA closed its file in May 2006 for the same reason. (Tr. 79-80, 105, 127.)

Impax takes no responsibility for the violations. It introduced voluminous evidence in an attempt to show that it did all it could do to remedy its past violations and ensure future compliance. The facts, however, show that Impax is solely responsible for the violations. First, it is well settled that the issuer, not the auditor, is responsible for preparing and filing financial

[26] Following the second conference call, Impax submitted five "white papers" to Deloitte with the final submission on June 7, 2006. Deloitte notified Impax on July 16, 2006, that the analysis was sufficient to consider a further pre-clearance submission. Similarly, Impax submitted several drafts of the most recent pre-clearance submission to Deloitte with the final submission on January 16, 2007. Deloitte indicated its concurrence on February 2, 2007. (Tr. 358.)

statements. (Tr. 171.) Impax cannot blame others for its inability to account for a contract that it entered to further its business interests. (Tr. 146.) Impax's accounting department had fewer than four CPAs when it entered the Agreement, which it characterized as an inordinately complex strategic alliance with multiple elements.[27] (Tr. 405-06.) After dealing with Impax, one OCA team member concluded that perhaps Impax or certain members of management were overwhelmed by the "amount of work that needed to go into this analysis." (Tr. 87.)

Second, strategic alliance agreements with multiple-element arrangements are common in the pharmaceutical and biotech industries. (Tr. 99.) The weight of the evidence is that the accounting issues that are preventing completion of Impax's 2004 audit are not unique and inordinately complex. The support for Impax's position comes from its CFO and its accounting consultant. The other accountants and auditors agreed that the Agreement represented an extremely complicated transaction that generated complex accounting issues, but they did not consider the issues unique or inordinately complex. (Tr. 87, 204, 214-15.) In fact, one OCA team member found the accounting issues presented by the Agreement not particularly complex compared with other issues that OCA has resolved. (Tr. 99-102, 125.) Moreover, Teva's controller and vice president of finance rated the Agreement in the middle on a complexity scale of one to ten, compared to Teva's many other strategic agreements that involve multiple commercial markets outside the United States. (Tr. 143-44, 159.) Teva has entered more complex strategic alliances involving international commercial markets, yet it has managed to be current in all its Commission filings. (Tr. 144.)

Impax's statements that it can complete its 2004 through 2006 audits and file its delinquent annual reports within eight to twelve weeks of a favorable response from OCA lack credibility in view of its many failures over the past several years to perform on other time estimates. (Answer at 6; Tr. 361.) On March 16, 2005, Impax represented in a Form 12b-25 filing with the Commission that it expected to file a Form 10-K for 2004 by the end of March 2005. (Div. Exs. 37, 39, 108.) On May 19, 2005, Koch made a similar representation to Nasdaq. (Tr. 381.) Donohoe Advisory Associates, LLC (Donohoe), hired to assist with Impax's Nasdaq de-listing hearing, represented in a July 6, 2005, letter to The Nasdaq Listing Qualifications Panel that:

> Given the delay in completing the OCA process, which is principally due to the delay in obtaining Deloitte's comments regarding the supplemental submission (a circumstance unfortunately outside of the Company's control), the Company is not in a position to file the Forms 10-K and 10-Q as it intended to do by July 5 and 15, 2005, respectively. The Company does, however, believe that it will make the necessary filings by the end of July.

(Tr. 389-91; Div. Ex. 50.) On July 26, 2005, Donohoe requested another extension until September 13, 2005, by which time Impax will file the 2004 Form 10-K and Forms 10-Q for the March 31 and June 30, 2005, quarters. (Div. Ex. 54 at 2.) On August 11, 2005, Impax filed a

[27] Since 2005, Impax's accounting department has had twenty-four people, including four CPAs. (Tr. 405.)

Form 12b-25 in which it represented that it could not timely file its Form 10-Q for the second quarter of 2005, but that it would make the filing within fifteen days of the prescribed due date.[28] In the text of the filing, Impax also stated that it was unable to predict the date on which it would make the filing. Impax made none of the promised filings.

Other Considerations

There is no guarantee that Deloitte will complete the audit of Impax's 2004 financials. (Tr. 254.) In addition, Deloitte would not or could not estimate how long it will take to audit Impax's 2004 financials after OCA pre-clears Impax's proposed method of treating revenue recognition under the Agreement.[29] (Tr. 190.) If and when OCA approves the method Impax has suggested, Impax anticipates having to restate certain financial statements and Deloitte and Grant Thornton will do the following accounting and auditing tasks: (Tr. 193.)

(1) Impax must reflect the pre-cleared method in its 2004, 2005, and 2006 financial statements (Tr. 192-93, 260.);

(2) Deloitte will need to assess the impact of Impax's conclusions on its auditing procedures and complete the 2004 audit (Tr. 193-94);

(3) Grant Thornton's audits for 2005 and 2006 depend on Deloitte completing the 2004 audit. (Tr. 256-57.) Grant Thornton will coordinate with Deloitte to perform the work-paper review of the work that Deloitte did for the 2004 audit. (Tr. 258-61.) Grant Thornton will then complete procedures it is performing in connection with the 2005 and 2006 audit. Grant Thornton estimates it has completed sixty to sixty-five percent of its work in connection with the audits of Impax's 2005 financial statements and its internal controls in 2005. (Tr. 256.) Grant Thornton began field work on Impax's 2006 financials and internal controls in January 2007, and a fair amount of work still needs to be completed. (Tr. 257.) Grant Thornton will also need to obtain the customary management representation letter, letters from external legal counsel, and review Impax's other filings (Tr. 261.); and

(4) Internally, Grant Thornton will clear all accounting issues at the engagement team level and with the concurring partner on the engagement. In this situation, a regional technical review will look at the conclusions in the OCA submission and the audit procedures performed and Grant Thornton's national accounting principals group intends to look at the issue and conclusions. (Tr. 261-62.)

[28] I grant the Division's request and take official notice of the filing. 17 C.F.R. § 201.323.

[29] Impax will have to reflect the OCA-approved revenue recognition method to its 2004 financials and account for the direct and indirect impacts and prepare 2004 final financial statements that Deloitte will audit. (Tr. 191.) Before it issues an audit opinion on the 2004 financial statements, Deloitte would need to understand what occurred in subsequent years and would rely on the audits of the successive auditor, Grant Thornton. (Tr. 192.)

Wu's opinions that an efficient market for Impax's common stock exists and that holdings by institutional investors show that Impax's stock price likely reflects all publicly available information and closely represents Impax's true value do not alter the requirement that public companies must regularly file reports that are prepared in conformity with accounting standards and audited by an independent accountant to protect investors. Gateway, 88 SEC Docket at 437-38 (citations omitted).

Impax actively promotes the buying and selling of its common shares. (Tr. 371-72.) It appears that some of the information it has conveyed to the public is questionable or incorrect. For example, on February 27, 2007, Impax's Web site erroneously represented that it traded on the Nasdaq Global Market. (Tr. 397; Div. Ex. 107.) In addition, Impax falsely suggested in Commission filings that it continued to consult with OCA. In fact, Impax did not supply OCA with information OCA requested and it did not engage with OCA in any ongoing dialogue following the pre-clearance submissions and related conference calls. (Tr. 71-72, 78-80, 82, 103-07, 124; Div. Exs. 100, 102.) Impax has been less than forthright in disclosing to the public that until February 2007, it has been unable to obtain auditor approval for accounting for financial elements of the Agreement. (Tr. 378-79.)

The 2004 audit will be the first year that Impax must comply with Section 404 of Sarbanes-Oxley. (Tr. 195.) Deloitte identified material weaknesses in Impax's internal controls over financial reporting as of December 31, 2004.[30] (Tr. 195-97.) In addition to all the delays that have been described, Impax waited until June 27, 2005, to file a Form 8-K that disclosed this information.[31]

For all the reasons stated above, I find that a sanction is necessary and appropriate for the protection of investors. I find further that suspension is inappropriate given that Impax has not brought itself into compliance despite notice from Corporation Finance on March 29, 2006, that the Commission might revoke its registration if it failed to file the required reports within fifteen days and Commission suspension of trading in Impax securities from December 2006 through January 16, 2007. See Gateway, 88 SEC Docket at 441 n.34. I find the registration of Impax's registered securities should be revoked.

[30] "A material weakness, as defined in PCAOB Auditing Standard No. 2, is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected." (Tr. 196-97; Div. Ex. 93.)

[31] The material weaknesses include: (1) the Agreement with Teva; (2) Impax's financial close and reporting process; (3) Impax's billing controls for non-electronic data interchange orders; (4) Impax's inventory valuation procedures; and (5) Impax's reserve for shelf-stock protection. (Tr. 196-97; Div. Ex. 93, Exhibit 99.2 at 2.) According to Impax, the Form 8-K identified the corrective action it had taken to remedy the material weaknesses. (Tr. 365-66.)

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items described in the record index issued by the Secretary of the Commission on April 12, 2007.

ORDER

I ORDER, pursuant to Section 12(j) of the Securities Exchange Act of 1934, that the registration of all classes of the registered securities of Impax Laboratories, Inc, be, and hereby is, REVOKED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge