SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99439 / January 29, 2024

Admin. Proc. File No. 3-19788

In the Matter of

DECISION DIAGNOSTICS CORP.

OPINION OF THE COMMISSION

SECTION 12(k) PROCEEDING—SUSPENSION OF TRADING

Issuer filed a petition to terminate a trading suspension that was ordered after questions arose regarding: (1) the accuracy of information in the issuer's press releases; (2) significant movement in the price of the issuer's stock and its trading volume following the press releases; and (3) the issuer's ability in light of its financial statements to execute the plans it announced in the press releases. *Held*, petition denied because the public interest and protection of investors required the trading suspension.

APPEARANCES:

Ronald S. Herzog, Goldberg Segalla LLP, White Plains, NY, for Decision Diagnostics Corp.

David Misler, Carlisle Perkins, and *Lesley Atkins* for the Division of Enforcement.

Petition to terminate suspension filed:	May 7, 2020
Last brief received:	July 15, 2020

Decision Diagnostics Corp. ("DECN") filed a timely petition to terminate our order temporarily suspending trading in its securities. Because the record establishes that the public interest and investor protection required the trading suspension, we deny the petition.

I. Background

On April 23, 2020, we issued an order pursuant to Section 12(k) of the Securities Exchange Act of 1934 suspending trading in the securities of DECN (CIK No. 0001144225) through May 7, 2020.[1] The trading suspension order cited "questions regarding the accuracy and adequacy of information in the marketplace since at least March 3, 2020… relate[d] to DECN's press releases, among other things, (i) claiming to have 'technology perfected' to allow it to manufacture and sell a COVID-19 test kit that would provide results 'in 15 seconds, based on a small finger prick blood sample,' and (ii) issuing sales forecasts that up to 525 million COVID 19 test kits would be sold in the first year of production."[2] The Commission concluded "that the public interest and the protection of investors require a suspension of trading."[3]

On May 7, 2020, DECN filed a petition under Rule of Practice 550 requesting termination of the trading suspension.[4] Because the petition was timely—that is, filed before the trading suspension expired[5]—we directed the Division of Enforcement to file the non-privileged factual information before the Commission at the time trading was suspended, which the Division filed on May 20, 2020.[6] We also permitted the parties to submit briefs attaching any evidentiary materials, such as supporting affidavits or declarations, which they have done.[7]

The temporary trading suspension, which lasted only ten days, has already expired. Nonetheless, as we have explained, "entertaining timely challenges to trading-suspension orders enables us to consider adversely affected parties' objections and to develop the record before any subsequent judicial review occurs."[8] As a result, we may consider a timely-filed Rule 550

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1 *Decision Diagnostics Corp.*, Exchange Act Release No. 88735, 2020 WL 2110487 (Apr. 23, 2020).

2 *Id.* at *1.

3 *Id.*

4 17 C.F.R. § 201.550.

5 *Cf. Global Green, Inc.*, Exchange Act Release No. 73855, 2014 WL 7184234, at *1 (Dec. 16, 2014) (dismissing untimely petition), *pet. denied*, 631 F. App'x 868 (11th Cir. 2016) (per curiam).

6 *Decision Diagnostics Corp.*, Exchange Act Release No. 88861, 2020 WL 2502263 (May 13, 2020).

7 On June 28, 2021, the Division filed a Notice of Supplemental Authority. On April 25, 2022, DECN objected to the Division's submission of the Notice of Supplemental Authority. This opinion does not rely on the supplemental authority the Division submitted.

8 *Bravo Enters. Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983, at *6 (Aug. 27, 2015).

petition and provide appropriate relief even if the suspension expired while the petition was pending.[9] We may "vacate an expired trading-suspension order in appropriate circumstances"[10] or provide relief with respect to the collateral consequences that might have arisen as a result of the trading suspension.[11] Here, however, we see no basis for any relief.

II. Analysis

A. The Legal Framework

Section 12(k)(1) of the Exchange Act provides that "[i]f in its opinion the public interest and the protection of investors so require, the Commission is authorized by order . . . summarily to suspend trading in any security" for up to ten business days.[12] Through this provision, Congress gave the Commission broad discretion to determine when to temporarily suspend trading in a security.[13] Under the statute, our inquiry turns on whether we are of the "opinion" that the "public interest" and the "protection of investors" require a trading suspension.[14] We need not find that the issuer has violated the securities laws.[15]

Trading suspensions serve critical investor-protection objectives. They alert the public about our concerns regarding an issuer, protect investors against unfair or disorderly markets, and increase the availability of information in the marketplace.[16] Consequently, we have found it necessary to suspend trading where, for example, there was a lack of current, adequate, or

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9 *Apotheca Biosciences, Inc.*, Exchange Act Release No. 90779, 2020 WL 7632296, at *1 & n.7 (Dec. 22, 2020).

10 *Bravo Enters.*, 2015 WL 5047983, at *6.

11 *Id.* at *6 & n.54, *11 & n.72 (describing collateral consequences); *see also infra* notes 19 and 20 and accompanying text (same).

12 15 U.S.C. § 78*l*(k)(1).

13 *Apotheca Biosciences*, 2020 WL 7632296, at *2 & n.11; *SEC v. Sloan*, 436 U.S. 103, 112 (1978) (recognizing that Exchange Act Section 12(k) represents a "clear mandate from Congress" authorizing the Commission to "summarily suspend trading in a security" for ten days "without any notice, opportunity to be heard, or findings based upon a record")).

14 *Apotheca Biosciences*, 2020 WL 7632296, at *2 & n.13; *see also Bravo Enters.*, 2015 WL 5047983, at *2 & n.13 ("Section 12(k)(1)'s use of the phrase 'in its opinion' augments the breadth of the Commission's discretion . . . . The decisional reference point is our own *subjective* opinion about what action is necessary under the circumstances, as distinguished from an *objective* standard.") (emphasis in original).

15 *Apotheca Biosciences*, 2020 WL 7632296, at *2 & n.12.

16 *See, e.g., Efuel EFN Corp.*, Exchange Act Release No. 86307, 2019 WL 2903941, at * 2 (July 5, 2019).

accurate information about an issuer, and where we had concerns about potential market manipulation or other unusual market activity occurring.[17] As also relevant here, we have suspended trading when there were questions about the accuracy of publicly available information about the company, whether in press releases, public filings, or other statements.[18]

That said, we exercise our statutory authority carefully, mindful that a trading suspension carries significant consequences for an issuer and investors. It prohibits brokers, dealers, and members of a national securities exchange from using any instrumentality of interstate commerce "to effect any transaction in, or induce the purchase or sale of," a security subject to a suspension order while the suspension is in effect.[19] Although trading may resume after a suspension expires, for securities quoted over-the-counter (OTC) rather than listed on national securities exchanges, quoting does not automatically resume. Instead, a broker-dealer generally may not solicit investors to buy or sell the previously suspended stock until certain requirements are met.[20]

Moreover, an issuer does not have a right to be notified that the Commission is considering a trading suspension and is not afforded a pre-suspension hearing or other formal

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17 *Bravo Enters.*, 2015 WL 5047983, at *3-5 (collecting examples).

18 *Id.* at *9 ("press release included potentially misleading statements"); *Myriad Interactive Media, Inc.*, Exchange Act Release No. 75791, 2015 WL 5081238, at *2-4 (Aug. 28, 2015) (there was "conflicting information in the marketplace"); *Immunotech Labs., Inc.*, Exchange Act Release No. 75790, 2015 WL 5081237, at *2-6 (Aug. 26, 2015) ("information available to potential investors was, at best, contradictory and confused").

19 15 U.S.C. § 78*l*(k)(4).

20 Exchange Act Rule 15c2-11 governs the ability of brokers to initiate and resume securities quotations for securities not listed on a national securities exchange. *See* 17 C.F.R. § 240.15c2-11. After a trading suspension of more than four business days (like any other break in quotation of that length), a broker-dealer cannot re-initiate quotations without satisfying the requirements of 15c2-11, which it typically does by filing a Form 211 with FINRA. To do so, the broker must provide certain detailed information about the issuer and have "a reasonable basis under the circumstances for believing the information is accurate in all material respects . . . ." Rule 15c2-11(a) (quoted language in paragraph appears immediately after 15c2-11(a)(5)(xvi)). The Form 211 process thus imposes obligations on a broker, as does the need to gather the requisite information, and these obligations may prevent quoting from resuming. And, as the Form 211 process is proceeding, an issuer's shares cannot trade in a quoted market (as many issuers may prefer), and stockholders and prospective investors are able to trade shares only in the so-called grey market. The discussion above speaks of broker-dealers following the Rule 15c2-11 process, but in some cases a qualified interdealer quotation system may comply with similar requirements. 17 C.F.R. § 240.15c2-11(a)(1)(ii).

process to dispute the grounds for the suspension before it takes effect.[21] Rule of Practice 550 provides that issuers may request a hearing on the suspension, though in most cases the Commission has resolved such challenges only after the suspension has expired.[22]

When we issued the trading suspension order in this case, we reviewed the information before us and determined "that the public interest and the protection of investors require[d] a suspension of trading." As discussed above, DECN filed a petition to challenge the trading suspension under Rule 550. Upon review of the arguments presented in DECN's petition, we conclude that a trading suspension was in the public interest and necessary to protect investors.

B. The information before the Commission established that the public interest and the protection of investors required a trading suspension.

DECN is a Nevada corporation with its principal place of business in Westlake Village, California. The company describes itself on its website as a manufacturer and distributor of blood glucose home testing strips and new concepts for blood testing monitors. It manufactures a "diabetes test strip" named "GenUltimate!" Keith M. Berman serves as DECN's chief executive officer, chief financial officer, and sole director. Berman is solely responsible for issuing DECN press releases, which are not reviewed by anyone else at the company.

On September 27, 2001, DECN filed a Form 10-SB to register its common stock under Exchange Act Section 12(g).[23] On August 5, 2016, DECN filed a Form 15 seeking to terminate voluntarily the registration of its securities.[24] Its common stock is quoted under the ticker

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21 *Sloan*, 436 U.S. at 112.

22 This provision for a post-suspension opportunity to be heard satisfies the requirements of the Due Process Clause. *Xumanii Int'l Holdings Corp. v. SEC*, 670 F. App'x 508 (9th Cir. 2016). An issuer is required to file a Rule 550 petition within the 10-day effective period of the suspension, or the petition will be dismissed as untimely. *Global Green*, 2014 WL 7184234, at *1. However, it is typically not feasible for the Commission to resolve a timely filed Rule 550 petition within the 10-day suspension period, and the suspension therefore will expire by its terms before the Commission reaches its decision. *Cf. Encore Clean Energy, Inc.*, 2012 WL 6185728 (Dec. 12, 2012) (withdrawing trading suspension before the suspension expired where the Commission learned, after the trading suspension order had issued, that the company had five years earlier filed a Form 15 to voluntarily terminate the registration of its securities under Exchange Act Section 12(g), and so was not a delinquent issuer).

23 15 U.S.C. § 78*l*(g).

24 *See* 17 C.F.R. § 240.12g-4(a) (providing for certification of termination of registration under Exchange Act Section 12(g), 15 U.S.C. § 78*l*(g), by filing a Form 15).

symbol DECN on OTC Market Group, Inc. ("OTC Link") (previously "Pink Sheets").[25] Although DECN does not file periodic reports with the Commission, DECN continues to submit unaudited financial statements on OTC Link.

The information before the Commission at the time of the trading suspension provided at least three grounds for our determination that the "public interest and the protection of investors require[d] a suspension of trading": (1) DECN had issued press releases that contained inadequate, misleading, inaccurate, or incomplete information; (2) the dissemination of the press releases had a discernable impact on the price of DECN's stock and its trading volume; and (3) DECN's unaudited financial statements indicated that its financial position would make the pronouncements in the press releases virtually impossible for DECN to achieve.

1. DECN issued press releases containing misleading and inaccurate information.

a. DECN made misleading and inaccurate statements about the availability and production of its test kits and its sales projections.

DECN issued several press releases in March 2020 announcing its entry into screening and testing for COVID-19 by using its "innovative impedance technology" first used for diabetes. For example, on March 3, 2020, DECN issued a press release announcing its "new screening methodology" for COVID-19, stating that the product was "timely, simple to use, cost effective" and would be "commercial [sic] ready in the summer of 2020." In the press release, DECN quoted Berman as saying that DECN had the "technology perfected" for the COVID-19 tests and that the product would be "field tested" in Korea. On March 4, 2020, DECN issued another press release that stated that its purported COVID-19 test would cost $4.94 and that the company would have available samples of the blood of those previously infected with COVID-19. The press release included an image of the purported prototype of the COVID-19 test and stated it would provide users with the expected "NEGATIVE" or "POSITIVE" result.

On March 11, 2020, DECN issued a press release stating that it expected to sell 420 million COVID-19 test kits in the first year of production, beginning in September 2020, and included a projected sales forecast chart showing without explanation an increase in sales from 15,000,000 kits in September 2020 to 105,000,000 kits in March 2021.[26] Berman also asserted,

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[25] The Pink market is one of three "tiered marketplaces" within OTC Link. The Pink market "offers trading in a wide spectrum of equity securities through any broker," has no minimum disclosure or reporting requirements, and "is for all types of companies that are there by reasons of default, distress or design." *See generally Positron Corp.*, Exchange Act Release No. 74216, 2015 WL 470454, at *1 & n.1 (Feb. 5, 2015).

[26] In an affidavit attached as an exhibit to DECN's brief, Berman states that "the lack of any reference to the [March 11 press release] in the [trading suspension] order calls into serious

continued…

again without explanation, that DECN's COVID-19 tests should "allow 80% of the suspected carriers of the Coronavirus to exit the quarantine system in places where Coronavirus is rampant." The press release included a picture of DECN's purported COVID-19 test kit, which looked identical to the company's diabetes glucose test kit.

On March 16, 2020, DECN issued a press release stating that its COVID-19 test kit could produce results "through a finger stick" in "less than one minute." DECN also stated that it was waiting for COVID-19 blood samples so that it could complete its testing and file an "Emergency Waiver" with the FDA. The press release further claimed that DECN planned to "bring at least 100,000 of [its] kits to market in the USA and Canada, and another 100,000 in Europe during the month of May 2020," and increased its forecast to 480 million test kits sold in its first full year of production. On March 17, 2020, DECN announced in a press release that it now anticipated selling 525 million COVID-19 test kits in its first full year of production. The press release included an updated forecast chart reflecting 21 million sales in September 2020 alone and once again included a photograph of the purported COVID-19 test kit.

On March 18, 2020, DECN issued a press release stating that it expected to receive a "major boost" from FDA guidance released on coronavirus test kits. It stated that, as a result of the FDA guidance, the testing kits DECN intended to create had been "validated" at its research and development center in Korea. The press release quoted Berman as saying that he believed the guidance would allow the company to "put these kits into distribution almost immediately."

On March 20, 2020, DECN issued a press release with an updated price for the purported COVID-19 tests, stating that the company would offer COVID-19 test results for $6.95 (an increase of $2.00 from the price in its March 4, 2020 press release), test a patient in under a minute, and require blood derived from a finger prick. On March 23, 2020, DECN issued a press release stating that it had finalized the configuration of the COVID-19 testing kit and that the kits would go into production as soon as the FDA granted it emergency status. DECN stated that the tests would be able to "screen out the 97 or 98 percent of those tested that are negative for COVID-19" and that DECN was creating an "affirmation test," which it described as "a kit that will affirm a positive reading" of its coronavirus testing kits. On March 25, 2020, DECN issued a press release stating that its development team had arrived at a second COVID-19 test methodology that would begin assembly on April 1, with availability in late summer 2020. DECN stated that this second method of testing would have a wholesale price of $9.95, that the second method would also produce results in less than a minute based on a finger prick blood sample, and that this new product would offer a major benefit to the healthcare system.

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question Enforcement's current assertion that this release factored into the decision to issue the Trading Suspension Order." But the information before the Commission at the time of the trading suspension, as supported by a sworn affidavit of a Commission staff member, specifically references this press release. DECN has provided no reason to find that the affidavit does not accurately reflect the information before us at the time of the trading suspension.

Berman told Division staff that the forecasts included in DECN's press releases came from spreadsheets that Berman's assistant maintained that estimated segments of the population, such as religious institutions, that could in theory buy test kits. But at the time of the press releases, DECN had not applied for FDA authorization to sell or distribute its COVID-19 test kit. And, as of April 13, 2020, Berman had stated or suggested in interviews with staff: that he knew the company had no COVID-19 test kits; that he had not seen any of DECN's prototype COVID-19 test kits; that he had no idea how many test kits DECN could produce, and that he knew the test kits would require component parts that were different from DECN's then-current diabetes products, which the company did not yet have and would need before any sales could be made; that he was looking for sources that could provide those component parts but had no idea how much the component parts would cost and the time it would take for the company to obtain the parts in the midst of the pandemic; and that he knew that no COVID-19 test kits could be sold without FDA approval, which the company did not have.

b. DECN made misleading and inaccurate statements related to the status of its application for FDA approval of its test kits.

On April 6, 2020, DECN issued a press release stating that it had filed an Emergency Authorization for its COVID-19 testing kit with the FDA. It stated that the application had been acknowledged "less than three hours later" and assigned for review the next day. The release added that there had been "several contacts" between the FDA Emergency Use Authorization ("EUA") review group and DECN's FDA counsel.

On April 7, 2020, DECN issued a press release announcing that it had received a "Pre-EUA Acknowledgement and device serial number." DECN stated that "it was clear that the FDA review staff was aware that our methodology was different than those slower and older methods that had received FDA EUAs, or were in review." The press release quoted Berman as saying that he had inquired of the FDA and was "assured that this letter from the FDA and the device serial number assigned are exactly what we had been hoping for."

On April 21, 2020, DECN issued a press release stating that it planned to provide an update to shareholders and other interested parties on April 23 on issues concerning the progress of its COVID-19 tests. DECN reiterated that the kit was "currently in the FDA EUA review process."

On April 23, 2020, DECN issued a press release providing an update on the FDA EUA review process. DECN stated that it had "long conversations with FDA staff and management" and had come to an understanding on the testing required to receive the EUA. It stated it would test its products within the following 10 days. DECN published all of the press releases on its website and added to its "About Us" section that "all of our products are FDA cleared." The COVID-19 test kit was listed elsewhere on the website as one of DECN's products.

However, registering a product with the FDA does not confer any rights to the applicant. The tracking number assigned to an application is for internal tracking purposes and does not represent FDA approval. The FDA's review of a pre-EUA submission is not an indication of the FDA's views on the product's potential to be used under an actual EUA or that the company has obtained or submitted all the information necessary for the FDA to review a formal request for consideration of a EUA. Additionally, as of the date of the trading suspension, Division staff were unable to identify *any* FDA-approved medical devices relating to COVID-19 in the FDA's publicly available databases under the name of Berman, DECN, or its subsidiaries.

DECN also did not produce documents substantiating these or any of its press releases, although the Division requested them. DECN argues in its petition that it was not legally required to produce the documents the Division requested. The Division does not argue that it was; rather, the Division says it merely requested documents from DECN on a voluntary basis.

2. DECN's dissemination of misleading and inaccurate statements had a discernible impact on the share price and trading volume of its stock.

Trading charts revealed that DECN's press releases had a significant impact on the price of the stock and its trading volume. DECN consistently closed at $.02 per share from January 7, 2020, through March 2, 2020. After March 2, 2020, it began climbing to a high of $0.50 per share on April 23, 2020. In other words, DECN's stock price rose 2,400% during the period in which DECN issued press releases on the COVID-19 testing kits.

Trading charts also revealed that the price of the stock and its trading volume spiked on days that DECN issued press releases. For example, DECN's share price and trading volume spiked following the April 7 press release announcing the receipt of its "Pre EUA Acknowledgment and device serial number," raising concerns that the market misunderstood the news as indicating that a device had been approved by the FDA.

3. DECN's unaudited financial statements suggested that DECN lacked the financial ability to execute the plans that it announced in its press releases.

DECN had filed a Form 15 in April 2016 terminating its duty to make periodic filings with the Commission, including audited financial statements. As of the date of the trading suspension, DECN continued to submit unaudited financial statements to OTC markets. The unaudited statements identified liabilities of approximately $2.9 million and an accumulated deficit of approximately $47.6 million since DECN's inception, compared to approximately $50,000 in cash and total assets of approximately $5.1 million (the majority of which was the reported value of certain intellectual property). As a result, DECN's unaudited 2019 annual report, which was before the Commission at the time of the trading suspension, included a going concern statement questioning whether DECN could continue as a financially solvent company.

DECN's financial condition at the time of the trading suspension suggested that the company lacked the financial ability to do the things necessary to produce the COVID-19 tests

consistent with its representations in its press releases. DECN had significant debt, limited physical assets, and only about $50,000 in cash at the time it announced its unsupported forecasts. Such financial instability would cast doubts about its ability to: (1) hire qualified scientists and other parties to develop its new product; (2) obtain all of the component parts for the new test kit (and in quantities sufficient to sell over 500 million test kits); (3) manufacture all of the test kits; (4) test the product to make sure it was safe and effective; (5) obtain FDA approval to sell the product; (6) market the product; and (7) distribute the product.

C. DECN's Rule 550 petition does not establish an entitlement to relief.

DECN contends that the trading suspension was "imprudently and improperly issued." It argues that the press releases at issue were accurate. It argues further that there is no evidence DECN was the subject of a "pump and dump" scheme, that its stock was touted by any promoter, or that Berman has purchased, sold, or received any DECN stock since DECN started working on its COVID-19 test kits. According to DECN, it provided sufficient and reliable public information upon which informed investment decisions could be made. But we have considered all of the facts presented and find that our determination to issue the trading suspension was justified. The public interest and the protection of investors required the suspension of trading in DECN's securities because there was an absence of sufficient public information to permit informed investment decisions regarding DECN.

1. DECN's arguments regarding the inadequate, inaccurate, or misleading information in the marketplace do not establish that relief is warranted.

DECN contends that its March 3, 2020, press release regarding having perfected the technology for its proposed COVID-19 test was true because the technology from its diabetes tests had been perfected and the COVID-19 test kits would use the same technology. Yet Berman's April 13, 2020 interview with the Division indicates that he knew at the time of the March 3 press release that the COVID-19 test kits would require component parts that were different from DECN's diabetes products, that DECN did not yet have the necessary component parts to create its new technology, and that he did not know if it could secure the parts necessary to meet the forecasts included in the press releases issued during the relevant period. DECN and Berman also knew at the time of the press releases that DECN had not yet applied to the FDA for approval to sell and distribute the kits. Additionally, DECN did not possess a COVID-19 blood sample on which to test its technology at the time of the March 3 press release, and Berman has not explained how a diabetes test translates into a blood finger prick test for COVID-19.

DECN claims that its March 11, 2020, press release announcing DECN's projection that it would sell approximately 420 million COVID-19 test kits was a forward-looking statement based on an internal analysis DECN performed of likely users of the test kits and the frequency of the testing they would conduct. According to DECN, the forecast was a "good faith projection of the significant demand" it expected for the kits. DECN claims it routinely generates similar studies and forecasts. But these forecasts lacked any basis in fact. At the time of the press release, DECN had not applied for authorization from the FDA to sell or distribute

its COVID-19 test, had not secured the necessary component parts to manufacture the COVID-19 tests, and did not know if it could secure the necessary amount to meet its forecasts. DECN also refused to provide supporting documentation for its forecasts and projections. Under the circumstances, we infer that such evidence does not exist.[27]

DECN argues that the Division has failed to prove that Berman's claim in the March 11 press release that 80% of suspected COVID-19 carriers could exit the quarantine system after using DECN's screening system was unsubstantiated. Berman asserts in an affidavit that this statement was fully supported by facts, data, and information in anecdotal literature, interviews with public health officials, and the media. But he provides no evidence for these assertions.[28]

DECN contends further that its March press releases stating that its COVID-19 test kits would provide results "through a finger-stick" in "less than one minute" were accurate. Yet DECN has not explained how a diabetes test translates into a blood finger prick test for a coronavirus. DECN did not possess a COVID-19 blood sample on which to test its proposed technology, had not yet created a COVID-19 test nor did it have a prototype for its finger-stick COVID-19 test, and had no access to the component parts it needed to create this COVID-19 test.

DECN defends the accuracy of its April 7, 2020, press release announcing the receipt of a Pre-EUA Acknowledgement from the FDA by stating that nothing in the release suggested that pre-EUA registration conferred any approval from the FDA (which, as discussed above, it does not). But the press release stated that FDA review staff viewed DECN's technology as "different than [other] slower and older methods" and that Berman had been assured that the FDA's letter was "exactly what we had been hoping for." Also, as noted above, DECN published the press releases on its website,[29] which at the time included a banner advertisement for COVID-19 test kits across the top of the webpage and listed the COVID-19 test kits as one of DECN's products.

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[27] *See Bravo Enters.*, 2015 WL 5047983, at *12 & n.66 (noting permissibility of "inference that missing or unsupplied information peculiarly available to corporate insiders would have been unfavorable to an issuer seeking relief from a trading suspension").

[28] DECN's reply brief misquotes the March 11, 2020, press release. The reply brief states that Berman claimed the testing kit could allow 80% of suspected carriers to *exist* in the quarantine system. But the press release claimed that the testing kits would allow 80% of suspected carriers to *exit* the quarantine system—a subtle but significant difference.

[29] Berman's affidavit asserts that the Division did not visit DECN's website until May 11, 2020, and therefore that the website information could not have been part of the information before the Commission at the time of the trading suspension. But the Division's affidavits indicate that Commission staff visited DECN's website on numerous occasions before the trading suspension on April 23, 2020. Furthermore, in his first interview with the Commission staff in March 2020 (*i.e.*, before the trading suspension), Berman commented that he had noticed that the Commission staff had visited DECN's website.

Although the product description for the test kits noted that they were still in development, the website elsewhere stated that all of DECN's products were "FDA cleared" (the test kits were not) and had "entered the market as an economical alternative for patients and healthcare providers." At a minimum, the press releases and website statements gave the misleading impression that the test kits were ready or near ready for purchase by the general public.

Finally, DECN asserts that none of the statements it made about its COVID-19 test kit in its press releases was an affirmative misrepresentation because it disclosed that the test kit was in the developmental stage and that actual product development of the COVID-19 test kit necessitated FDA approval. As an initial matter, we note that DECN stated on its website that all of its products (which, according to the website at the time, included COVID-19 test kits) were FDA-approved despite the fact that the FDA had not, and still has not, approved its COVID-19 test kit. In any case, we need not find a fraudulent misrepresentation to impose a trading suspension.[30] At the least, DECN's press releases provided the marketplace with misleading information and provided a substantial basis for our determination to issue a trading suspension.

2. DECN's argument that the volatility in its stock during the time of the press releases was normal does not establish that relief is warranted.

DECN argues that, in the weeks leading up to the trading suspension order, DECN's stock exhibited the price movement typical of a penny stock, with small changes in share price equating to large percentage moves. It adds that market movement was insignificant on several days on which the press releases were issued, thereby demonstrating that the market had a measured assessment of the information DECN disclosed. But the information before the Commission at the time of the trading suspension included a chart tracking DECN's share price and volume that showed significant spikes on each of the days of the significant press releases. The greatest spike occurred following DECN's April 7 press release announcing the receipt of its "Pre EUA Acknowledgement and device serial number." Such a spike raised concerns that the market misunderstood the press release as announcing that a device had been approved by the FDA, and the spikes generally raised concerns about the market's reaction to the press releases.

DECN also argues that since any investor who purchased DECN stock at its daily closing price between March 2, 2020, and April 23, 2020, would, as of July 14, 2020, have held a profitable position, the interests of then-current investors were not taken into consideration in assessing whether a trading suspension was warranted. As discussed above, we recognize the consequences of a trading suspension. For example, although the suspension has expired and trading in DECN has resumed, the lapse in market activity means that broker-dealers must now comply with the information and documentation requirements of Rule 15c2-11 if they wish to

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[30] *Immunotech*, 2015 WL 5081237, at *10 (the Commission need not establish a predicate statutory or regulatory violation in order to suspend trading); *accord Efuel*, 2019 WL 2903941, at *5.

enter quotations on behalf of no customer or on a solicited basis.[31] And while both current and prospective investors could buy and sell DECN shares without published quotations, those investors would need to ask a broker-dealer to submit quotations on their behalf on an unsolicited basis.[32]

But those consequences do not mean it was inappropriate to order a trading suspension where the record indicated that it was in the public interest and necessary for the protection of investors to do so. "Trading suspensions serve a valuable purpose by drawing attention to potential inadequacies or inaccuracies in the publicly available information about a company. We have a compelling interest in alerting the investing public about concerns that we may have regarding an issuer or about potential manipulation in the market for its securities."[33] We must consider "the interests of prospective or potential investors who might be harmed because they purchase shares in reliance on potentially inaccurate or inadequate information about the issuer."[34] After weighing all of the above considerations, we find that our determination to issue the trading suspension was justified. The public interest and the protection of investors required the order suspending trading in DECN's securities, and we find no basis for granting relief.[35]

3. DECN's additional arguments do not establish that relief is warranted.

In an affidavit attached to DECN's brief, Berman argues that the Division could not have obtained the information the Division states that it used to make its determination and that its investigation was "pushed and twisted by a group of outsiders with no connection to the company who on the one hand committed sophisticated cybercrimes and on the other presented stolen documents and volumes of untruths, innuendo and concocted stories to SEC personnel." He states that the Division could not have obtained a picture of DECN's diabetes test kit from its website, and the Division's reliance on images from DECN's website "reads like countless message board postings on [an internet message board] where I am maligned, libeled, and a

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31 *See supra* note 20 (describing Rule 15c2-11 and the Form 211 process).

32 *See Bravo Enters.*, 2015 WL 5047983, at *12 (citing *Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 WL 2499350, at *8 n.48 (June 29, 2012)). Rule 15c2-11 does not restrict a broker-dealer's ability "solely on behalf of a customer" to enter "a quotation that represents the customer's unsolicited indication of interest." 17 C.F.R. § 240.15c2-11(f)(2).

33 *Immunotech*, 2015 WL 5081237, at *10.

34 *Helpeo, Inc.*, Exchange Act Release No. 82551, 2018 WL 487320, at *5 (Jan. 19, 2018) (quoting *Bravo Enters.*, 2015 WL 5047983, at *13); *accord Efuel*, 2019 WL 2903941, at *7; *Immunotech*, 2015 WL 5081237, at *10.

35 *See, e.g.*, *Immunotech*, 2015 WL 5081237, at *4 (denying petition to vacate a trading suspension because respondent's inaccurate and inadequate statements in press releases produced an absence of sufficient public information to permit informed investment decisions and because potentially manipulative trading activity threatened investors and the public interest).

place where outlandish stories (big lies) are conjured up daily." He also claims this group of "outsiders" provided the Commission with "stolen" slides and message board posts.

We did not base the trading suspension order on any of the information Berman cites. Rather, our order relied upon publicly available information on DECN's website, statements DECN made in its press releases, the Division's interviews with Berman, DECN's unaudited financial statements, and trading data. The Division also has confirmed that "[a]t no time prior to the trading suspension did the Division staff assigned to this matter speak to anyone regarding DECN except Berman and his counsel." Nor has the Division relied upon the information described by Berman in connection with its opposition to DECN's petition. Thus, we find that DECN's additional arguments lack merit.

* * *

DECN's request to terminate the trading suspension is denied in all respects.[36]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

[36] We have considered all of the parties' contentions. We have rejected or accepted them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99439 / January 29, 2024

Admin. Proc. File No. 3-19788

In the Matter of

DECISION DIAGNOSTICS CORP.

ORDER DENYING PETITION FOR TERMINATION OF TRADING SUSPENSION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the petition filed by Decision Diagnostics Corp. requesting termination of the Commission's April 23, 2020, order suspending trading in its securities for a period of 10 days be denied.

By the Commission.

Vanessa A. Countryman
Secretary