

INITIAL DECISION RELEASE NO. 287  
ADMINISTRATIVE PROCEEDING  
FILE NO. 3-11832

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :  
: INITIAL DECISION  
EAGLETECH : June 7, 2005  
COMMUNICATIONS, INC. :  
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APPEARANCES: Justin W. Arnold, Anthony T. Byrne, and James McGovern for  
the Division of Enforcement, Securities and Exchange  
Commission.

Rodney E. Young as chief executive officer of Eagletech  
Communications, Inc.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on February 15, 2005, pursuant to Section 12(j) of the Securities Exchange Act of 1934 (Exchange Act). The OIP describes Eagletech Communications, Inc. (Eagletech or Respondent), as a Nevada corporation with its principal place of business in Fort Lauderdale, Florida. According to the OIP, Eagletech's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The OIP also alleges that Eagletech has not filed its quarterly reports with the Commission for any period after December 31, 2001, or its annual reports for any period after March 31, 2001. As a result, the OIP charges that Eagletech failed to comply with Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1 and 13a-13.

The Commission instituted this proceeding to determine whether these allegations are true, to afford Eagletech an opportunity to establish any defenses to such allegations, and to decide whether the registration of Eagletech's securities should be suspended or revoked.

Eagletech filed its Answer on March 17, 2005. It admitted that it has failed to file the periodic reports alleged in the OIP. Eagletech also offered an affirmative defense that criminal conduct by third parties in connection with the trading of its securities caused its failure to file.

In its Answer, Eagletech presented evidence of the alleged criminal conduct and contended that the Division of Enforcement (Division) failed to investigate it.

I held a telephonic prehearing conference on March 28, 2005. The Division notified Eagletech of the opportunity to inspect and copy its investigative file. I then granted the Division leave to file a motion for summary disposition (Prehearing Conference transcript at 17-27 (Prehearing Conf. at \_\_\_); Order of Mar. 28, 2005). The Division filed its motion for summary disposition, with accompanying exhibits, on April 15, 2005. Eagletech submitted its opposition, with accompanying exhibits, on May 17, 2005. The Division filed its reply on May 25, 2005.

### The Standards for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer promptly to grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

## FINDINGS OF FACT

The exhibits accompanying the Division's motion for summary disposition involve matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on those exhibits (DX \_\_\_), on Respondent's Answer, and on Respondent's opposition to summary disposition, the Division has established, and Eagletech does not contest, the following material facts.

Eagletech was organized to manufacture, market, and distribute "unique communications products" (DX 2 at 10). Rodney E. Young (Young), Eagletech's president and chief executive officer, describes the firm's business as a "'one-number follow-me' service that was a virtual PBX or virtual [telephone] system for small businesses" (Prehearing Conf. at 7). At one time, Eagletech maintained an office in Fort Lauderdale, Florida. It now operates from Young's home in Plantation, Florida (Prehearing Conf. at 4, 6-7).

From August 1999 to August 2002, prices for Eagletech's common stock were posted on the Over-the-Counter Bulletin Board (Answer). At present, prices for Eagletech's common stock are distributed by the Pink Sheets, LLC (Prehearing Conf. at 8).

Eagletech is delinquent in its periodic filings with the Commission. It filed its last annual report on Form 10-KSB on August 14, 2001, for its fiscal year ending March 31, 2001 (Answer; Prehearing Conf. at 8-9; DX 1). It filed its last quarterly report on Form 10-QSB on February 19, 2002, for its fiscal quarter ending December 31, 2001 (Answer; Prehearing Conf. at 9; DX 1).

In the quarterly report filed on February 19, 2002, Eagletech identified several significant impediments to its continued operation, including the need to raise additional capital (DX 2 at 8). In the unaudited financial statements accompanying this quarterly report, Eagletech stated that it had incurred losses of more than \$16 million since inception and had a net working capital deficiency of more than \$2.2 million as of December 31, 2001 (DX 2 at 8). Eagletech also stated that it was delinquent in its accounts payable, convertible notes payable, and salaries to personnel, and that there were substantial doubts about its ability to continue as a going concern (DX 2 at 8).

On June 28, 2002, Eagletech notified the Commission that it could not prepare and file its Form 10-KSB for the fiscal year ending March 31, 2002, in a timely manner (DX 3). Eagletech explained that it was unable to complete its financial statements (DX 3). Eagletech has not made a public filing since June 28, 2002. Eagletech's former outside auditor, Sweeney, Gates & Co., has resigned (Prehearing Conf. at 9).

The Commission's Division of Corporation Finance is the staff office responsible for monitoring issuers' compliance with the periodic filing requirements of the Exchange Act. By letter dated July 30, 2004, the Division of Corporation Finance notified Eagletech that (1) Eagletech was not in compliance with the reporting requirements of Section 13(a) of the Exchange Act and (2) Eagletech could be subject to an administrative proceeding pursuant to Section 12(j) of the Exchange Act, without further notice (DX 4). Eagletech received the

Division of Corporation Finance's delinquency notice (Answer). Following receipt of the letter, Eagletech has failed to bring itself into compliance with the periodic reporting requirements.

In November 2001, Eagletech filed a lawsuit in the Broward County, Florida, Circuit Court against forty defendants (DX 2 at 10, 12). The suit alleges common law fraud, conspiracy, illegal conversion of property, and racketeering, and seeks to recover compensatory and punitive damages. At present, the litigation is still in the discovery stage. Young expects that the matter will be ready for trial in one year (Prehearing Conf. at 18, 20-21). Young stated that a jury award would generate enough money to bring Eagletech's periodic filings current and allow it to implement its business plan (Prehearing Conf. at 18).

## **DISCUSSION AND CONCLUSIONS**

Under Section 12(j) of the Exchange Act, the Commission is authorized, "as it deems necessary or appropriate for the protection of investors," to revoke the registration of a security or to suspend the registration of a security for a period not exceeding twelve months if it finds that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder.

It is uncontested that Eagletech has failed to file any annual or quarterly reports for any period after December 31, 2001. Thus, Eagletech has violated, and continues to violate, Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

### **Affirmative Defense**

Eagletech's affirmative defense cannot succeed, as a matter of law. Eagletech alleges that the price of its common stock has been the subject of two separate criminal price manipulations: first, by a group of pump-and-dump manipulators; and second, by a group of naked short-sellers. It acknowledges that the Commission and the Department of Justice have recently commenced actions against the alleged pump-and-dump manipulators.<sup>1</sup> It asserts that the Commission has not taken appropriate action against the naked short-sellers.<sup>2</sup>

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<sup>1</sup> On the same day that the Commission initiated this administrative proceeding, it filed a related civil injunctive action against seventeen individuals in U.S. District Court for the District of New Jersey. See SEC v. Labella, No. 05-CIV-852 (WGB) (D.N.J.). The civil injunctive action alleges that the defendants fraudulently sold Eagletech stock between August 1999 and December 2001. As a separate matter, the U.S. Attorney for the District of New Jersey obtained indictments in January 2005 against four individuals for criminal securities manipulation activities. See United States v. Labella, No. 05-CR-87 (D.N.J.).

<sup>2</sup> The Commission recently adopted Regulation SHO, Short Sales, 17 C.F.R. § 242.200, to address some of the problems associated with naked short selling. Regulation SHO took effect on January 3, 2005. Eagletech contends that a decision deregistering its securities in this proceeding will have the effect of "grandfathering" all pre-Regulation SHO delivery failures by naked short sellers, who will never have to purchase shares to cover their naked short positions. This policy argument should be addressed to the Commission.

Decisions not to enforce are presumptively unreviewable. Heckler v. Chaney, 470 U.S. 821, 831-35 (1985); Chicago Bd. of Trade v. SEC, 883 F.2d 525, 530-31 (7th Cir. 1989); cf. Kixmiller v. SEC, 492 F.2d 641, 645 (D.C. Cir. 1974). The presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Chaney, 470 U.S. at 833. However, that is not the situation presented here. If Eagletech wishes to pursue this line of argument, it may do so by filing a timely petition for review with the Commission.

### Sanction in the Public Interest

The determination of an appropriate sanction under Section 12(j) of the Exchange Act should be guided by the public interest factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See WSF Corp., 77 SEC Docket 1831 (May 8, 2002), final, 77 SEC Docket 2336 (May 24, 2002).

Under Steadman, several issues should be considered, including: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of its conduct; and (6) the likelihood of future violations. No one factor is controlling.

Section 13(a) of the Exchange Act and the regulations thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Implicit in these rules is the requirement that the reports accurately reflect the financial condition and operating results of the issuer. SEC v. Kalvex, Inc., 425 F. Supp. 310, 315-16 (S.D.N.Y. 1975). No showing of scienter is necessary to establish a violation of Section 13(a) or the regulations thereunder. SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir. 1998); see also SEC v. Wills, 472 F. Supp. 1250, 1268 (D.D.C. 1978).

The purpose of periodic filings is to supply the investing public with current, accurate financial information about an issuer so that the investing public may make informed decisions. As stated in SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977) (quoting legislative history):

The reporting requirements of the [Exchange Act] is the primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities. Congress has extended the reporting requirements even to companies which are "relatively unknown and insubstantial."

I therefore conclude that Eagletech's violations involve an important provision of the Exchange Act. The violations are egregious and ongoing. Eagletech has failed to file three audited annual reports and nine quarterly reports over a period of more than three years. The Division need not establish scienter as an element of the violation of Section 13(a).

Eagletech has offered no assurances against future violations. In fact, Young has indicated that Eagletech cannot become current in its filing obligations, if at all, until after the successful conclusion of its civil lawsuit.

Young has claimed that criminal conduct by others has caused Eagletech's failure to file. This further demonstrates that Eagletech does not appreciate the wrongful nature of its conduct. Nor does Eagletech accept responsibility for its failure to meet its filing obligations. The likelihood of future violations is quite high.

As a result of Eagletech's failure to make the required filings, there is no current, reliable, audited information regarding Eagletech's operations or financial condition. The investing public has no way of knowing if the missing periodic reports really mask significant financial problems and/or potential inaccuracies in Eagletech's most recent financial statements. Viewing the Steadman factors in their entirety, it is necessary and appropriate for the protection of investors to revoke the registration of all classes of Eagletech's registered securities.

### **ORDER**

Based on the findings and conclusions set forth above, IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for June 17, 2005, is cancelled; and
3. The registration of all classes of the registered securities of Eagletech Communications, Inc., is revoked pursuant to Section 12(j) of the Securities Exchange Act of 1934.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the 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. 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 unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

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James T. Kelly  
Administrative Law Judge