UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
June 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14587

In the Matter of the Appeal of:	:	**ABSOLUTE POTENTIAL, INC.'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW**
ABSOLUTE POTENTIAL, INC. (F/K/A ABSOLUTE WASTE SERVICES, INC.),	:	

RESPONDENT ABSOLUTE POTENTIAL, INC.'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW OF THE INITIAL DECISION

June 6, 2012

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I. INTRODUCTION

Respondent Absolute Potential, Inc. ("Absolute"), by and through its undersigned attorneys, and pursuant to Rule 450 of the Rules of Practice of the Securities and Exchange Commission (the "Commission"), submits its Reply Brief in Support of its Petition for Review of the February 15, 2012 Initial Decision (the "Initial Decision") in this matter. In support of its Reply Brief, Absolute states as follows:

The Division of Enforcement (the "Division") has admitted that Absolute provided undisputed evidence showing that it had a source of income to make its required filings now and in the future and that it had made a sworn commitment to do so. Yet, the Division also admits that the ALJ did not rely on this undisputed evidence when deciding to order revocation. That choice – to not rely on undisputed evidence that was clearly material to the Initial Decision – constitutes reversible error.

The ALJ's refusal to follow the holdings in *Diatect* and *E-Smart* also constitutes reversible error. All of the authority cited by Absolute and the Division holds that revocation of an issuer's

registration is not a proper sanction when the issuer has become current in its filings, as Absolute has done here. Moreover, the other factors that courts assess in determining what, if any, sanctions should be imposed for delayed filings, all weigh against the imposition of any sanctions here. Unable to distinguish the facts of this proceeding from those of *Diatect* and *E-Smart,* the Division resorts to arguing that those cases do not apply here because *Impax* was decided after those cases. That argument fails because *Impax* is entirely distinguishable from the instant case. The strongly compelling factors present in this proceeding, and to a lesser degree in *Diatect* and *E-Smart,* were not present in *Impax.* In contrast, *Impax* still was not current with its filings nearly a year after the Initial Decision ordering revocation. Absolute is in compliance with all of its reporting obligations, as it promised, and has been since prior to the start of briefing on summary disposition. Accordingly, the Initial Decision should be reversed, and the case dismissed.

II. ARGUMENT

A. The ALJ Is Not Permitted to Weigh Evidence on Summary Disposition, Let Alone Ignore Undisputed Evidence in Doing So.

As the Division recognizes in its Response Brief, hearing officers are not permitted to weigh evidence when considering motions for summary disposition. (*See* Response Brief at 6-7). In *Edward Becker,* Initial Decision Rel. No. 252 (June 3, 2004), a case cited by the Division in its Response, the administrative law judge made clear by analogy to Rule 56 of the Federal Rules of Civil Procedure that "[a]t 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." *Becker,* Rel. No. 252 at 5, citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). Likewise, undisputed evidence may not be ignored at the summary judgment phase. *See, e.g., Cloaninger ex rel Estate of Cloaninger v. McDevitt,* 555

F.3d 324, 333 (4th Cir. 2009) (holding that, while the court was obligated to take the facts in the light most favorable to the movant for summary judgment, it was not permitted to ignore undisputed facts in the record); *see also Anderson v. Potter,* 723 F.Supp.2d 368, 373 (D.Mass. 2010) ("The district court's role at summary judgment is closely akin to ruling on a motion for judgment as a matter of law. [...] The trial judge must accept all admissible evidence that favors the non-moving party *and all other clearly undisputed evidence*...") (emphasis supplied).[1]

Yet, that is precisely what the Initial Decision did here -- it impermissibly weighed evidence to determine the truth of Absolute's assurances against future reporting violations, and in doing so, ignored undisputed evidence in the record regarding Absolute's financial ability and commitment to remain current with its filings. In fact, the Division admits that the ALJ "put more weight on the fact that Absolute's reports show no revenues..." and that Absolute's evidence regarding Augustine Capital Management's ("Augustine") funding "was not persuasive to the ALJ." (Response Brief at n. 5, p. 17). With regard to Absolute's evidence about its funding source, the Division further admits that it "does not dispute these facts, and the ALJ did not rely upon them." (Response Brief at 8). But that is the point: the ALJ was not entitled to choose which facts to rely on when concluding erroneously that Absolute lacked the funds to remain current with its filings. The ALJ was not entitled to "put more weight" on the Division's set of facts, or the ALJ's unilateral view of those facts, while finding Absolute's undisputed set of facts "unpersuasive."

Although Absolute disputes that it ever "agreed that...there appeared to be no disputed issues of material fact" during the prehearing conference on November 18, 2011 (Response Brief at 3), whether or not it made such a representation is irrelevant to this issue. The question of

[1] Absolute's citation to federal cases interpreting F.R.C.P. 56 is appropriate given the similarities between the SEC's summary disposition procedures and F.R.C.P. 56 summary judgment procedures, and because the Division invoked Rule 56 in its Response Brief and cited to federal cases interpreting the same. *See* Response Brief at 6-7.

Absolute's ability to pay for future filings was never raised until the ALJ unilaterally did so in the Initial Decision with no prior notice.[2] The Initial Decision's reliance on one set of facts to the exclusion of another in order to support a factual finding unilaterally raised by the ALJ is the problem. Such reliance was improper and constitutes reversible error. *Anderson,* 477 U.S. at 249; *Cloaninger,* 555 F.3d at 333; *Anderson,* 723 F.Supp.2d at 373.

B. Whether or Not Absolute's Funding Constitutes "Revenue" Is a Distinction Without a Difference.

The Division argues at length trying to distinguish Absolute's funding from traditional "revenue." (Response Brief at 8). But this is a distinction without a difference. Absolute presented four overwhelming and undisputed pieces of evidence, all of which were admitted into evidence, which demonstrate that it has had and will have the financial resources to have its financial statements prepared and audited and to file its periodic reports. This evidence included: (1) Absolute's Forms 10-K, which were part of the evidentiary record and reviewed by the ALJ for the Initial Decision, which establish that Augustine has consistently advanced significant funds to Absolute year after year – nearly $1 million to date (*see* Group Ex. G to Opening Brief); (2) Absolute incurred approximately $62,000 in auditors' and accountants' fees to bring current all of its periodic filings with the Commission (*see* Ex. E to Opening Brief, ¶¶ 2, 5); (3) Absolute ensured that it had established regular and reliable relationships with these auditors and accountants to enable it to meet its filing obligations in the future (*id.*) and (4) Absolute provided a declaration from its CEO and director pledging that Absolute would remain current with its periodic filings in the future, that it understood this obligation and its importance, and that it would take all necessary steps to ensure ongoing compliance. (*Id.* ¶ 5).

[2] The Division states in passing in its Response Brief that during summary disposition briefing it argued that "Absolute's efforts to become current provided insufficient assurance that Absolute would remain current in the future...." (Response Brief at 4). The Division never raised the argument that Absolute was unlikely to remain current with its filings due to a lack of funding, and accordingly, that argument has been waived by the Division.

At the very least, this evidence creates a genuine issue of material fact as to whether Absolute is likely to remain current with its periodic filings in the future – regardless of how its funding source is characterized. All of this evidence means that the grant of summary disposition is reversible error.

C. Commission Precedent Holds that Revocation Is Not Appropriate Under the Compelling Circumstances Presented Here.

1. Absolute is Unlike Any of the Respondents in Cases Where Revocation Was Ordered.

Just as it did throughout the course of summary disposition briefing, the Division continues to attempt to fit Absolute into the same box as respondents in cases like *Impax Laboratories, Inc.*, Securities Exchange Act of 1934 Rel. No. 57864 (May 23, 2008), *Freedom Golf Corp.*, Initial Decision Rel. No. 227 (May 15, 2003), *Biologic, Inc.*, Initial Decision Rel. No. 322 (Nov. 9, 2006), and *WSF Corp.*, Initial Decision Rel. No. 204 (May 8, 2002) (Response Brief at 10-12). But as Absolute has explained in prior briefing, it bears no resemblance to these respondents.

In *Impax,* the respondent was appealing a revocation order, but still had not filed any of its delinquent reports in the 43 weeks since the initial decision. *See* Rel. No. 57864 at 13-14. It failed to meet four self-imposed deadlines for filing these reports and offered no representation about when it could become current, or any assurance against future violations. *Id.* Impax was also an "expanding company with demonstrated growth objectives," and "an active and growing pharmaceutical business with $46 million in cash and a current market capitalization of approximately $700 million," in which stock had been continually trading during the period of delinquency. *Id.* at 15.

In *Freedom Golf Corp.*, the respondent admitted that it lacked funds for an audit and for the required filings, and was unable to provide any representation about when it could become

current, much less provide credible assurances against future violations. *See* Initial Decision Rel. No. 227 at 2. In *Biologic,* the respondent, despite assuring the Commission that it would become current within 60 days of its answer, was still delinquent as to the three annual reports and ten quarterly reports in question on the date of summary disposition. *See* Initial Decision Rel. 322 at 5. Similarly, the respondent in *WSF Corp.* had defaulted in the proceeding, had no auditor, and failed to become current by the date of the initial decision ordering revocation. *See* Initial Decision Rel. No. 204 at 2.

In stark contrast, Absolute became current with its filings prior to the commencement of summary disposition briefing and provided unrebutted assurances against future violations, as discussed in Section I.B., *supra.* In addition, the potential for any harm to an investor has been non-existent because no public market or trading has occurred in Absolute's shares for over five years. (*See* Exhibit 2 to Absolute's Response to the Division's Motion for Summary Disposition). Absolute's common stock has not traded on a public market since 2003, and there has been no bid price for those shares since the end of 2006. *Id.* In addition, Absolute did not issue any new shares to outside investors during the period of its delayed filings. It has had the same 275 common stockholders since 2006. Thus, the key factors leading to registration revocation in *Impax, Freedom Golf Corp.,* and all the other cases cited by the Division – namely, the respondent's failure to become current, the significant risk of future violations and the greater need for investor protection given the respondent's business activity and/or frequency of trading – are simply not present here.

2. Revocation is Not Appropriate Where a Respondent Becomes Current With Its Filings, So the Holdings in *E-Smart* and *Diatect* Apply Here.

Still unable to cite a single case where the Commission has ordered revocation despite a respondent becoming current with its filings as of the date of summary disposition (as Absolute

has done here), the Division again resorts to quoting *dictum* from *Gateway Int'l Holdings, Inc.,* Securities Exchange Act of 1934 Rel. No. 53907 (May 31, 2006) (Response Brief at 17-18). Even that dictum does not support the Division's position. Quoting from a footnote in *E-Smart Technologies, Inc.,* Securities Exchange Act of 1934 Rel. No. 50514 (October 12, 2004), *Gateway* simply states that a determination to revoke an issuer's registration will not necessarily be reconsidered because the issuer has returned to reporting compliance. *Gateway,* Rel. No. 53907 at 6, quoting *E-Smart*, Rel. No. 50514 at n. 18. But *Gateway* does not hold that an Initial Decision to revoke registration where the issuer has returned to reporting compliance can never be reversed.

Moreover, Absolute is not asking the Commission to reconsider its prior ruling. Instead, Absolute's position is that the circumstances of this case – where the issuer returned to reporting compliance prior to summary disposition briefing, but the Initial Decision ordered revocation based on an improper weighing of the evidence – justify a reversal of that Initial Decision. Accordingly, *E-Smart's* holdings apply, and revocation should not be affirmed here. *See* Rel. No. 50514 at 3 (remanding proceeding ordering revocation against E-Smart where it brought its periodic filings current subsequent to the revocation order and holding that a respondent's subsequent filing history is an important factor in a sanctions analysis); *see also* Initial Decision on Remand, Rel. No. 272 (February 3, 2005) at 9 (finding revocation no longer necessary since E-Smart had become current with its filings and since revocation would harm investors unfairly).

The holding in *Diatect Int'l Corp.,* Initial Decision Rel. No. 344 (January 30, 2008) also applies despite the Division's unsuccessful attempts to distinguish it on the sole basis that it was decided four months prior to *Impax. Impax,* which did not overturn or even reject the holdings in *Diatect* or *E-Smart,* is distinguishable on several independent grounds, as discussed *supra*, so its

timing is of no import here. In *Diatect*, the administrative law judge refused to impose revocation where the respondent became current in its filings prior to a decision being issued. The judge held that the respondent "...has recently devoted significant resources to satisfying its reporting obligations. [...] [The respondent] **is entitled to credit for becoming current, even if it did not begin to take its filing obligations seriously until after the Commission issued the OIP**". *Diatect,* Initial Decision Rel. No. 344 at 5-6 (emphasis added). Absolute should be given the same credit here.[3]

Furthermore, Absolute has demonstrated its commitment to future reporting compliance. It has met all of its obligations and has remained current with its filings since the start of summary disposition briefing, including the timely filing of its Form 10-Q for Fourth Quarter 2011 on February 14, 2012 and its Form 10-Q for First Quarter 2012 on May 11, 2012.[4]

3. Even Applying *Impax,* Absolute Has Made A "Strongly Compelling Showing" With Respect to All the *Gateway* Factors.

Even if *Impax* established the standard for determining whether to order revocation under these circumstances (and it does not), Absolute has made a "strongly compelling showing" with respect to the other *Gateway* factors. Indeed, the facts surrounding Absolute's remedial measures are even more compelling than those of *E-Smart* or *Diatect.*

Absolute became current with its filing obligations, not just prior to its appeal of the Initial Decision as in *E-Smart,* or just prior to the issuance of the Initial Decision as in *Diatect*, but prior to the commencement of summary disposition briefing. Absolute did not wait to see the result of the Initial Decision or even the contents of the Division's briefs before becoming current. Instead,

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[3] The Division's reference to the allegedly delinquent current status of the respondent in *Diatect,* (Response Brief at 18, n. 6), is prejudicial and should be stricken. It has no bearing or relevance whatsoever on Absolute's likelihood of future reporting compliance.

[4] As the Division has asked in its Brief (at 2, n. 2), Absolute requests that, pursuant to Rule of Practice 232, the Commission take official notice of this and all other information and filings on EDGAR referred to in this brief and/or filed as exhibits during the course of summary disposition.

it spent considerable time and money to become current in the span of six weeks before the parties had even filed their summary disposition briefs. There is nothing "flippant" about these efforts, and they should not be taken lightly.

Moreover, the Division's argument that Absolute did not "[keep] its word" when it "failed" to "make all of its filings by the end of the year," thereby making it impossible to trust Absolute to make its future filings in a timely manner, (Response Brief at 18), is fallacious at best. On the prehearing conference call on November 16, 2011, Absolute represented to the ALJ that it would make every effort to become current with its filings by the end of 2011. Sixteen of the twenty-one filings were indeed made by December 31, 2011, and the remaining five filings were made within a week after that date. Given that the holidays and the New Year occurred during that time period, the Division's effort to cast doubt on Absolute's substantial efforts should be rejected. In addition, Absolute has demonstrated that its assurances of future compliance are credible by timely filing its last two Forms 10-Q.

The other *Gateway* factors also weigh against revocation. First, the seriousness of Absolute's delay in making its periodic filings is mitigated by its significant efforts to become current in a short period of time. *See E-Smart,* Initial Decision on Remand, Rel. No. 272, at 9; *see also Diatect,* Initial Decision Rel. No. 344 at 5-6. Contrary to the Division's argument, the seriousness factor cannot be assessed in a vacuum without also considering what an issuer did to remedy the delay and how. Second, although Absolute's delay in making its periodic filings extended over several years, Absolute was not accused of violating other securities laws. Absolute lacks any prior securities enforcement history, so it cannot be characterized as a recurrent violator. Third, Absolute's significant efforts to become current in its filings over a short period of time demonstrate a lack of culpability. The Division's attempts to paint a picture

of Absolute as having a master plan to avoid its filing obligations and then wait until it faces an enforcement proceeding to become current, (*see* Response Brief at 14), are pure fiction. Absolute's delayed filings were not part of an intentional effort to avoid the securities laws. Instead, Absolute's substantial efforts to become current demonstrate its good faith intent to cure its past deficiencies and avoid them in the future. Absolute is not trying to derive more benefit than warranted from these efforts. Rather, Absolute is highlighting them to show how they should have affected the analysis of the *Gateway* factors in the Initial Decision.

Finally, as Absolute has argued throughout this appeal, it has made a strong showing of its efforts to remedy any alleged past violations and its intention to ensure future compliance with its filing obligations. In addition to the time and money spent on becoming current and the undisputed, unrebutted evidence in the record regarding Absolute's significant funding source, Absolute ensured it had regular and reliable relationships with accountants and auditors who were able, and remain able, to perform the necessary work and analysis to complete Absolute's periodic filings. (Ex. E to Opening Brief ¶ 2). Absolute also instituted processes to make its future periodic filings on a timely basis and presented undisputed evidence, which was admitted into the record, that it understands its filing obligations and has taken and will take all necessary steps to meet those obligations. (*Id.* ¶ 5).

4. The Division's Argument Regarding Proxy Requirements Is Incorrect and Improper and Should be Ignored.

The Division has revived the argument it first raised in its Motion for Summary Disposition that Absolute allegedly has violated Sections 14(a) and/or 14(c) of the Exchange Act by failing to file any proxies or information statements for actions involving shareholder consent. (Response Brief at 15-16). The Division's argument now is just as wrong as it was then.

Absolute has filed several information statements pursuant to Section 14(c), which were reflected in Exhibit 3 to the Declaration of Neil Welch filed with the Division's Motion. (*See* Declaration of Thomas Duszynski, dated January 19, 2012, ¶ 7, attached as Ex. 1 to Absolute's Response in Opposition to the Division's Motion for Summary Disposition). Moreover, the Division's arguments create the misimpression that Absolute had solicited proxies and therefore was required to file proxy statements with the Commission. In fact, Absolute has not sought any proxies from shareholders since the current director and management assumed control of Absolute. (Id.) The Division has absolutely no evidence, let alone evidence admitted as part of the record during the course of summary disposition briefing, that Absolute has violated these sections of the Exchange Act. It only has presented conclusory and unsupported allegations about this issue that do not come close to constituting evidence. The Division's revival of this argument is, at best, an attempt to distract from the genuine factual issues in question and, at worst, an argument made in bad faith.

D. The Division's Position Does Not Support the Policy Goal of Providing Information to The Investing Public.

The Commission has made clear that the spirit and purpose behind sanctions in these types of proceedings is to accomplish a singular goal: the protection of the investing public. *Gateway Int'l Holdings, Inc.,* Securities Exchange Act of 1934 Rel. No. 53907 at 10 (May 31, 2006). Absolute has respectfully raised the question of whether the sanctions that the Initial Decision imposes against Absolute furthers that goal. Rather, the Initial Decision sends the message to other companies that have fallen behind with their reporting requirements that they should not try to become current because their registration will be revoked regardless. As a result, investors would continue to be without current financial information, which is precisely the result the Commission seeks to avoid.

The Division's only response to this result is to state that Absolute can file a new registration. Doing so allegedly will put "all investors on an even playing field" because current investors will own the same amount of shares as they did before, "though their shares will no longer be devalued because of the company's prior delinquent status," while new investors will benefit financially from the "transparency of a company in compliance." (Response Brief at 19). Yet the Division has presented no evidence that Absolute's shares are currently devalued because of any past reporting delays. The Division's argument also assumes that the value of shares would not fall due to revocation and would rise after re-registration. There is absolutely no evidentiary support for any of these conclusions.

But more importantly, the Division's rhetoric begs the question: if companies can immediately re-register their securities and increase the value of their shares, then what purpose does revocation serve? Given the stated importance of reporting requirements for providing the investing public with information, revocation here would undermine the flow of that information to Absolute's investors. If Absolute's registration is revoked, it no longer will be obligated to make periodic filings. The Division's position therefore elevates form over substance to the detriment of Absolute's investors and all other investors of delinquent companies. For the protection of these investors, the Commission should encourage delinquent registrants to make the effort to become current. Permitting the Initial Decision to stand will create the opposite incentive and run counter to the goal of providing the investing public with information.

III. CONCLUSION

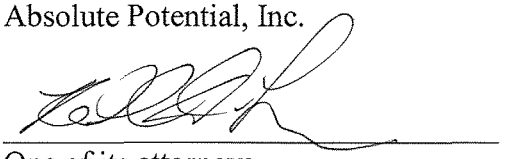
For the foregoing reasons, Absolute respectfully requests that the Commission enter an Order reversing the February 15, 2012 Initial Decision in its entirety, including but not limited to the portion of the Initial Decision imposing sanctions against Absolute. In the alternative,

Absolute requests that this proceeding be remanded to the Administrative Law Judge with instructions on how to reconsider the imposition of sanctions, if any, against Absolute.

DATED: June 6, 2012

Respectfully submitted,

Absolute Potential, Inc.

By: 

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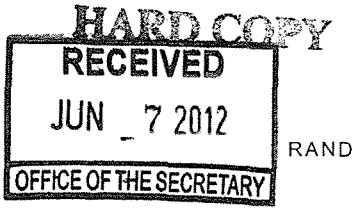

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June 6, 2012

VIA FACSIMILE
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Washington, D.C. 20549

Re: In the Matter of: Ablest, Inc., et al.
SEC Administrative Proceeding File No.: 3-14587

Dear Ms. Murphy:

Enclosed for filing please find the original and four (4) copies of Respondent Absolute Potential, Inc.'s (f/k/a Absolute Waste Services, Inc.), Reply in Support of Its Petition for Review, in connection with the above-referenced matter. Please return a file stamped copy of each of the aforementioned to our office in the self-addressed stamped envelope.

Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Randall D. Lehner

RDL/kjd
Enclosures

cc: All Parties of Record w/encl. (See Attached Certificate of Service)

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Attached please find Absolute Potential, Inc.'s Reply Brief in Support of Its Petition for Review.

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