UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

ADMINISTRATIVE PROCEEDING
File No. 3-17884

In the Matter of

UBIQUITY, INC.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

In its Opposition to the Division of Enforcement's Motion for Summary Disposition, Ubiquity, Inc. ("Ubiquity" or "the Company") fails to raise any genuine issue of material fact concerning the application of the *Gateway* factors to this case. *Gateway Int'l Holdings, Inc.*, Securities Exchange Act of 1934 Rel. No. 53907, 2006 SEC LEXIS 1288 (May 31, 2006). Ubiquity's securities registration should be revoked for the following reasons:

First, the affidavits that Ubiquity submitted with the Opposition are insufficient to create a genuine issue of material fact. "A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *see also Edward Becker*, Initial Decision Ref. No. 252, 2004 SEC LEXIS 1135, at *5 (June 3, 2004) (citing federal court cases and drawing analogy between summary disposition under Commission Rule of Practice 250 and summary judgment under Fed. R. Civ. P. 56). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

The affidavits submitted by Ubiquity do not meet these standards and therefore cannot defeat summary disposition. For example, the affidavits of Christopher Carmichael, Connie Jordan, and Brendan Garrison contain the following paragraph:

> During 2015 through 2017, Ubiquity faced significant delays in completing its filings due to its vendors' refusals to provide verified information in response to the company's auditors' requests. I personal[ly] contacted vendors on numerous occasions, for months asking them to provide verified responses to the company's repeated requests for information. The vendors' refusal to comply with simple requests for information needlessly delayed Ubiquity's audit.

(July 10, 2017 Affidavit of Christopher Carmichael ("Carmichael Affidavit), ¶ 3; July 10, 2017 Affidavit of Connie Jordan ("Jordan Affidavit"), ¶ 3; July 10, 2017 Affidavit of Brendan Garrison ("Garrison Affidavit"), ¶ 12.) This conclusory statement about Ubiquity's failed attempts to obtain information from third parties is unsupported by any corroborating evidence. The affidavits do not detail and explain the "repeated requests for information." There is no documentation of Carmichael's, Jordan's, and Garrison's contacting vendors on numerous occasions: No letters, emails, or call logs were submitted with the affidavits. Nor was any evidence documenting the vendors' alleged refusals to comply.

Similarly, the Jordan Affidavit baldly asserts that "Ubiquity has also revised its vendor agreements to include standardized language that requires its vendors to provide the information requested by Ubiquity's auditors within ten (10) days of the auditors' requests." (¶ 6.) Yet, the revised vendor agreements were not submitted with the affidavit or even quoted in it. The affidavit also fails to explain how the earlier vendor agreements supposedly contributed to Ubiquity's delinquent filings.

In addition to lacking supporting evidence, the affidavits do not rely on admissible evidence and, at times, are not based on personal knowledge. For instance, the Jordan affidavit recounts a conversation between Jordan and a shareholder, Rorick Frueh, in which Freuh relayed

a conversation that he allegedly had with one of the third parties who supposedly withheld information that Ubiquity needed to file its periodic reports. Jordan, of course, lacks any personal knowledge of the conversation between Frueh and the third party. Her recounting of the conversation in her affidavit is hearsay within hearsay and bears little indicia of reliability. The conversation as recounted by Jordan is self-serving as it fits perfectly the narrative that Ubiquity has presented in this proceeding to explain its delinquent periodic reports.

To try to cure some of the evidentiary defects surrounding the supposed conversation between Frueh and the third party, Ubiquity submitted an affidavit in which Frueh himself relayed his conversation with the third party. To be sure, the Frueh affidavit eliminates a layer of hearsay from the conversation, but the Frueh affidavit does not render evidence of the conversation any more reliable or admissible. The conversation between Frueh and the third party remains hearsay that cannot meet the Rule of Practice 320(b) standard for admissibility because it does not "bear [] satisfactory indicia of reliability, so that its use is fair." The reliability of the Freuch affidavit itself is questionable. The affidavit appears to have been prepared for some unknown legal proceeding that is unrelated to this case; the affidavit is dated September 16, 2016 — months before this proceeding commenced — and is presented on lined paper that does not match the rest of Ubiquity's pleadings here. Curiously, the affidavit does not carry the caption of this or any other case, even though the Carmichael, Jordan, and Garrison affidavits all carry the caption for this case. The pages of the Frueh affidavit are unnumbered, so it is impossible to tell whether the affidavit is complete as presented. Even accepting the Frueh affidavit at face value, Frueh's recounting of the supposed conversation with the third party is as self-interested as Jordan's because Frueh owns 12,908,143 shares of Ubiquity common stock that will become illiquid and may lose significant value if Ubiquity's registration is revoked.

The Frueh, Jordan, Carmichael, and Garrison affidavits are the only evidence — other than self-serving, litigation-driven 8-Ks — that Ubiquity submitted in support of its Opposition. These affidavits, which are unsupported by evidence and lack indicia of reliability, simply are insufficient to create a genuine issue of material fact to defeat summary disposition.

Second, Ubiquity's Opposition demonstrates that revocation of Ubiquity's securities registration is the only appropriate remedy here. Ubiquity concedes in its Opposition that it has been a public company since 2013 and only managed to file its first three periodic reports on time. (Opposition at 3.) "Thereafter, the company filed its 2014 10-K, and its 10-Qs for the first three quarters of 2015, but filed them late." (*Id.*) Then Ubiquity stopped filing periodic reports altogether. In total, over the course of its four-year existence as a public company, Ubiquity has been delinquent in filing ten periodic reports. Four of those periodic reports remain unfiled as of today. Two more — the Company's 2015 10-K and its 10-Q for the first quarter of 2016 — were filed only after the Commission instituted this proceeding and Ubiquity began litigating to save its registration. This startling track record of wholesale non-compliance with Exchange Act Section 13(a)'s reporting requirements for most of Ubiquity's history as a public company reveals that Ubiquity's violations are not, as the Company now claims, isolated occurrences borne from "the perfect storm of circumstances [that] it recently experienced." (Opposition at 2.)

Further, Ubiquity's Opposition reflects a failure to take responsibility for its Section 13(a) violations. The Company asserts in its Opposition: "Ubiquity was thus held hostage by its vendors. The company's auditors could not complete its financial statements and Ubiquity could not submit periodic filings without SCM's and Sprocket's information as any such statement would be missing material information. Ubiquity was left without any viable alternative." (Opp. at 6 (internal citations omitted).) This argument was made and rejected in *Gateway* and should

be rejected here as well. *Gateway Int'l Holdings, Inc.*, Securities Exchange Act of 1934 Rel. No. 53907, 2006 SEC LEXIS 1288 (May 31, 2006) ("Gateway has not accepted responsibility for its failure to meet its reporting obligations. Gateway seeks to blame its reporting violations on BCI and Nelson, claiming that, beginning in January 2003, those subsidiaries prevented it from obtaining necessary financial information to perform the requisite audits for its annual reports."); Initial Decision No. 294, at 8 ("The record also shows that Gateway does not appreciate the wrongfulness of its conduct nor the requirement that it provide the investing public with timely and accurate information. Gateway's main defense for not making the filings in a timely manner is that it could not obtain financial information from BCI and Nelson.").

In addition to reflecting a failure to take responsibility, Ubiquity's attempt to shift the blame for its Section 13(a) violations reflects a fundamental misunderstanding of the periodic reporting obligations borne by public companies. Ubiquity, and only Ubiquity, is responsible for ensuring timely filing of its periodic reports. That means that the Company must maintain its own accurate books and records and put in place adequate internal controls to obtain financial and business information from third parties, if such information really is needed for the Company to file its periodic reports on time. Ubiquity's claim that it was "held hostage" by third parties strongly suggests that there are material weaknesses in the Company's books and records and internal controls. Such material weaknesses, if they in fact exist, will make Ubiquity's future compliance with its reporting obligations impossible.

Indeed, Ubiquity presents no credible assurances of future compliance. Ubiquity has demonstrated over the course of this proceeding that it cannot comply with its own deadlines, let alone those imposed by Section 13(a). After the Commission instituted this proceeding, the Company promised to become fully compliant by June 30, 2017. By that date, Ubiquity filed

only one of its six delinquent periodic reports. Unable to meet its self-imposed deadline, Ubiquity requested an additional 45 days — until August 15, 2017 — to become current with its delinquent filings. When the hearing officer denied that request, Ubiquity filed one additional periodic report, its 10-Q for the first quarter of 2016. Now the Company remains delinquent in its filings of its 10-Qs for the second and third quarters of 2016, its 10-K for 2016, and its 10-Q for the first quarter of 2017. Having been denied by the hearing officer an extension of time to file these periodic reports, Ubiquity gave itself an extension. In its Opposition, Ubiquity asserts that it "expects to file the balance of its outstanding periodic reports on or before August 31, 2017." (Opp. at 14.) That is two months after the date by which the Company originally promised to become current. By that time, Ubiquity's 10-Q for the second quarter of 2017 will be past due and Ubiquity will be delinquent on yet another filing. Given that Ubiquity's delinquency is continuing and growing even in the midst of a 12(j) proceeding, there is little hope that Ubiquity can achieve and maintain compliance with its periodic reporting obligations.

The low likelihood of Ubiquity's compliance with its reporting obligations is further reduced by the fact that the Company's most recent audited financial statements contain a "going concern" qualification by the auditor. (*See, e.g.*, Garrison Affidavit, Ex. F. at F-1.) Therefore, despite even its best intentions, Ubiquity likely lacks the financial wherewithal to satisfy its periodic reporting obligations. *See e.g.*, *Oraco Resources*, Initial Decision Release No. 891, at 9 (weighing company's going concern qualification in favor of revocation); *Amer. Envir. Corp.*, Initial Decision Release No. 58837 (same).

Under the facts of this case, revocation is the only appropriate remedy. Ubiquity argues in its Opposition that it should face only a cease-and-desist order or a suspension. But Ubiquity's arguments fail for the same reasons that identical arguments failed in *Gateway*:

> Gateway argues that a sanction other than revocation, such as a cease and desist order, would have been more appropriate to address the violations alleged in the OIP. *See e-Smart*, 83 SEC Docket at 3592 n.17 (observing that, in addition to Exchange Act Section 12(j) proceedings, the Commission may bring cease and desist proceedings under Exchange Act Section 21C, or issue an order under Exchange Act Section 15(c)(4) requiring an issuer to comply with the reporting requirements). The OIP, while seeking a cease and desist order against Consalvi under Exchange Act Section 21C, sought only the remedy of revocation or suspension against Gateway, as authorized by Exchange Act Section 12(j). Hence, a cease and desist order is not available in this proceeding with respect to Gateway. Nor do we agree with Gateway's counsel's suggestion during oral argument that, as an alternative to revocation, we suspend the registration of its stock for several months. Gateway failed to file any quarterly or annual reports for nearly two years, and only began efforts to return to compliance after proceedings were instituted. Throughout these proceedings, both before the law judge and during this appeal, Gateway has insisted that it intends to return to full compliance, yet its efforts repeatedly fall short. Under the circumstances, we believe that a suspension would be insufficient to protect investors.

Gateway, 2006 SEC LEXIS 1288, at 12 n. 34.

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For the reasons set forth above, and in its initial papers, the Division respectfully requests that the Administrative Law Judge grant the Division's Motion for Summary Disposition and revoke the registration of each class of Ubiquity's securities registered under Exchange Act Section 12.

Dated: July 17, 2017

Respectfully submitted,

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COUNSEL FOR DIVISION OF ENFORCEMENT

CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, NE, Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served in the form indicated below, on this 17th day of July 2017, on the following persons entitled to notice:

The Honorable Carol Fox Foelak
Administrative Law Judge
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Washington, DC 20549-2557
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