

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54095 / July 5, 2006

Admin. Proc. File No. 3-11832

In the Matter of

EAGLETECH COMMUNICATIONS, INC.
c/o Rodney E. Young, President and CEO
7241 NW 6th Street
Plantation, Florida 33317

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to comply with periodic filing requirements

Issuer admitted failing to file periodic reports for three years and stated that it would be unable to cure delinquencies or meet current filing obligations. Held, it is necessary and appropriate for protection of investors to revoke the registration of issuer's securities.

APPEARANCES:

Rodney E. Young, for Eagletech Communications, Inc.

Anthony T. Byrne, for the Division of Enforcement.

Appeal filed: July 6, 2005

Last brief filed: September 20, 2005

Oral argument held: February 13, 2006

I.

Eagletech Communications, Inc. ("Eagletech") appeals from an administrative law judge's decision finding that Eagletech had violated Section 13(a) of the Securities Exchange Act of 1934 and Rules 13a-1 and 13a-13 thereunder by failing to file its quarterly reports for any period after December 31, 2001 and its annual reports for any period after March 31, 2001. 1/

On that basis, the law judge revoked the registration of Eagletech's securities. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 2/

II.

Eagletech is a Nevada corporation with its principal place of business in Plantation, Florida. Eagletech was organized to manufacture and distribute a telecommunications device developed for, and marketed to, small businesses. Eagletech's common stock is registered with the Commission pursuant to Exchange Act Section 12(g). 3/ Eagletech admits that it has not filed any quarterly reports with the Commission for any period after December 31, 2001, and that it has not filed any annual reports with the Commission for any period after March 31, 2001, as alleged in the Order Instituting Proceedings. 4/ At the prehearing conference, Eagletech represented that its ability to cure its delinquencies and make current filings depended on the outcome of pending litigation.

Eagletech asserts that it has been the victim of two separate manipulations by third parties. In the first of these, Eagletech alleges that a group used Eagletech's stock as a vehicle for a "pump-and-dump" scheme. 5/ Eagletech also alleges that a second group subjected

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- 1/ Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic reports with the Commission in accordance with the rules established by the Commission. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports with the Commission, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports with the Commission. The law judge decided the case on the Division of Enforcement's motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250.
- 2/ Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of a proceeding if that member has reviewed the oral argument transcript prior to such participation. Chairman Cox conducted the required review.
- 3/ 15 U.S.C. § 78l(g).
- 4/ The last submission Eagletech filed was a June 28, 2002 notice to the Commission that it could not timely file its annual report for the fiscal year ended March 31, 2002.
- 5/ On February 15, 2005, the day the Commission instituted these proceedings, the Commission filed a civil injunctive action in the United States District Court for the District of New Jersey against seventeen individuals alleging that those defendants fraudulently sold Eagletech stock between August 1999 and December 2001 as part of a pump-and-dump manipulation. See SEC v. Labella, No. 05-CIV-852 (WGB) (D.N.J.). In January 2005, the United States Attorney for the District of New Jersey indicted four individuals for criminal securities manipulation in connection with the same pump-and-dump scheme targeting Eagletech stock. See United States v. Labella, No. 05-CR-87 (D.N.J.).

Eagletech's stock to "naked" short selling between January 2000 and August 2002. ^{6/} Eagletech blames these alleged schemes for the financial decline of the company. While we make no findings as to the cause, Eagletech was experiencing extreme financial difficulties at the time it ceased making the filings at issue here. In its last quarterly report, filed on February 19, 2002, for its fiscal quarter ending December 31, 2001, Eagletech reported net losses exceeding \$16 million and a net working-capital deficiency exceeding \$2 million. Eagletech also reported that it was delinquent in its accounts payable, interest payments on its convertible notes, and employee salaries. Eagletech also stated that there were substantial doubts about its ability to continue as a going concern. By June 28, 2002, Eagletech's situation had deteriorated to the point that it filed a notice with the Commission stating its inability to file timely its annual report because it could not prepare its financial statements. Eagletech's former outside auditor has since resigned. At one time, Eagletech maintained an office in Fort Lauderdale, Florida, but it now operates from the president's home in Plantation, Florida.

Eagletech represents that it has taken steps to redress the injuries it has suffered as a result of the alleged criminal schemes. Eagletech has sued forty individuals allegedly involved in the separate schemes identified by Eagletech. ^{7/} Eagletech represented at the prehearing conference that any monetary recovery in its civil litigation would be used to fund an effort to cure its filing delinquencies and file current reports. As of the date of the prehearing conference, a trial date had not been set for Eagletech's civil case against the alleged manipulators, although Eagletech expected that the trial would be scheduled for some time in 2006.

III.

Eagletech admits that it has failed to file the annual or quarterly reports required under Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder for any period after December 31, 2001. Eagletech's representation regarding its current inability to cure its filing delinquencies or make current filings suggests that the delinquencies are likely to continue for the indefinite future.

Eagletech asserts as an affirmative defense that it has been the victim of criminal activity by third parties that has made Eagletech financially unable to comply with its filing obligations. Even if the facts are as Eagletech represents them to be, however, the alleged criminal activity does not alter the fact of Eagletech's failure to file its quarterly and annual reports or its present inability to cure these deficiencies, the only matters relevant to this proceeding.

Eagletech devotes much of its brief to a description of the short-selling scheme and

^{6/} "Naked" short selling is a technique in which speculators sell shares they do not own and never deliver, causing failed transactions and, typically, downward pressure on the stock's price. See Short Sales, 68 Fed. Reg. 62,972, 62,975 (Nov. 6, 2003) (Notice of Proposed Rulemaking for Regulation SHO).

^{7/} Eagletech asserts that neither the Commission nor any other law enforcement agency has taken any action against the alleged naked short sellers.

Eagletech's efforts to bring it to the Commission's attention. In this connection, Eagletech criticizes the Commission's alleged lack of understanding of the impact of naked short selling on the markets. In particular, Eagletech identifies perceived inadequacies in the Commission's recently adopted Regulation SHO, a measure addressing abuses in short selling. ^{8/} Eagletech then argues on this basis that Eagletech shareholders are, or will be, victims of two takings of property by the Commission without due process and without just compensation in violation of the Takings Clause of the Fifth Amendment. ^{9/} Eagletech alleges that the first taking occurred when the Commission adopted Regulation SHO. Eagletech alleges that Regulation SHO deprived Eagletech shareholders of property in violation of the Fifth Amendment "when it 'grandfathered' all pre-Regulation SHO delivery failures." Eagletech then alleges that an illegal taking will occur when the Commission's deregistration of Eagletech's stock "leaves behind a pool of shareholders who hold shares which exceed the number of shares issued by the company." Eagletech argues that

Grandfathering and De-registration, both acts of "Discretion of the Law" by the Commission, has and will reward the criminal perpetrators by the inverse taking of the value of the shares from legitimate shareholders who paid for those shares with hard earned cash and transfers or will transfer 100% of the value to a group of manipulators who have broken the law by selling counterfeit shares of the company that they will never be required to deliver. ^{10/}

This deregistration proceeding is not the appropriate forum in which to argue a claim that adoption of Regulation SHO somehow resulted in an unconstitutional taking. Regulation SHO was promulgated and adopted pursuant to the requirements of the Administrative Procedure Act, ^{11/} and all interested and affected persons were afforded ample process in that rulemaking by which to assert their rights. Affected parties have received all the process that is due under the provisions of the Administrative Procedure Act.

With respect to any revocation of the registration of Eagletech's securities that may result from this proceeding, the process that is due to Eagletech is specified in the Exchange Act and includes the instant review proceeding as a component. Moreover, the deregistration of Eagletech's securities, should it occur, would not be a taking, much less an uncompensated taking. The revocation of the registration of Eagletech's securities would lessen, but not eliminate, the shareholders' ability to transfer their Eagletech securities, which, in turn, may

^{8/} See 17 C.F.R. §§ 242.200-203. The Commission adopted Regulation SHO on July 28, 2004, with a compliance date of January 3, 2005.

^{9/} The Fifth Amendment provides that, in pertinent part, "[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

^{10/} The record does not reflect whether Eagletech refers to an actual counterfeiting of share certificates or a situation in which naked short sales reflect sales volume that exceeds the number of publicly available shares.

^{11/} 5 U.S.C. § 500 *et seq.*

further diminish the value of the securities. The diminution of property values caused by government action is not a regulatory taking. ^{12/} We find that the revocation of the registration of Eagletech's securities would not constitute an unconstitutional uncompensated taking.

We conclude that Eagletech has violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

IV.

Under Exchange Act Section 12(j), the Commission is authorized, "as it deems necessary or appropriate for the protection of investors," to revoke the registration of a security or suspend for a period not exceeding twelve months if it finds, after notice and an opportunity for hearing, that the issuer of the security has failed to comply with any provision of the Exchange Act or rules thereunder. ^{13/} In determining an appropriate sanction under Section 12(j) when an issuer has violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder by failing to make required filings we are guided by our recent decision in Gateway International Holdings, Inc. ^{14/} There we held that

[o]ur determination, in such proceedings, of what sanctions will ensure that investors will be adequately protected therefore turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand. In making this determination, we will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and the credibility of its assurances, if any, against further violations. ^{15/}

Failure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." ^{16/} Proceedings initiated under Exchange Act Section 12(j) are an important remedy to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports, and thereby deprive investors of accurate, complete, and timely

^{12/} Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978) (stating that courts "uniformly reject the proposition that diminution in property value" is a regulatory taking).

^{13/} 15 U.S.C. § 78m(j).

^{14/} Exchange Act Rel. No. 53907 (May 31, 2006), __ SEC Docket ____.

^{15/} Gateway, __ SEC Docket at ____ (footnote omitted).

^{16/} SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977).

information upon which to make informed investment decisions. ^{17/} Here, Eagletech's failure to comply with its reporting obligations under Section 13 has deprived the investing public of such information with respect to Eagletech's operations and financial condition for a period of more than three years. These are serious and recurring violations.

Eagletech has stated that its violations will continue unless and until it receives a monetary recovery in its civil litigation against the alleged manipulators, a recovery the amount, timing, and likelihood of which are at best speculative. While Eagletech's asserted financial inability to comply with its reporting obligations suggests not only that there is no basis for concluding that Eagletech's failure to file is the product of a desire to flout the law, but that such failure may be, in fact, unavoidable, Eagletech nonetheless is unable to remedy its past violations or ensure future compliance.

In weighing the harm to the current and prospective shareholders from the sanction we impose, we note that in any deregistration current shareholders could be harmed by a diminution in the liquidity and value of their stock by virtue of the deregistration. Here, however, the liquidity and value of Eagletech stock are already greatly diminished by the financial straits in which the corporation finds itself, and deregistration is unlikely to have a significant additional incremental effect. On the other hand, both existing and prospective shareholders are harmed by the continuing lack of current, reliable, and audited financial information, a harm for which, as Eagletech concedes, there is no cure in sight. Therefore, suspension of registration for a period not exceeding twelve months in the hope Eagletech would be able to return to compliance within that period would almost certainly result only in the necessity for another proceeding under Section 12(j) at the end of that period. Accordingly, we conclude that deregistration is necessary and appropriate for the protection of investors.

Eagletech objects to the Commission's apparent failure to respond to Eagletech's urging that the Commission take action against the individuals Eagletech believes engaged in the naked short-sale manipulation. The Division has construed these objections as an attempt to argue that Eagletech is the victim of improper selective prosecution because the Commission has proceeded against Eagletech but not the naked short sellers. To succeed on a claim of improper selective prosecution, Eagletech must establish that it was singled out for enforcement action while others who were similarly situated were not, and that its prosecution was motivated by arbitrary or unjust considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right. ^{18/} Eagletech has failed to allege, much less prove, any of these elements, and we find that Eagletech was not the victim of improper selective prosecution. To the extent that the gravamen of Eagletech's complaint is that the Commission has decided not to take enforcement action against the naked short sellers, any such decision would be within the

^{17/} See e-Smart Tech., Inc., Exchange Act Rel. No. 50514 (Oct. 12, 2004), 83 SEC Docket 3586, 3590-91 n.14.

^{18/} See United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992); Brian Prendergast, Securities Exchange Act Rel. No. 44632 (Aug. 1, 2001), 75 SEC Docket 1525, 1542.

Commission's prosecutorial and regulatory discretion and would be presumptively unreviewable. 19/

Accordingly, we find that it is necessary and appropriate for the protection of investors to revoke the registration of all classes of Eagletech's securities.

An appropriate order will issue. 20/

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS and NAZARETH).

Nancy M. Morris
Secretary

19/ Heckler v. Chaney, 470 U.S. 821, 831-35 (1985); Board of Trade of City of Chicago v. SEC, 883 F.2d 525, 531 (7th Cir. 1989).

20/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
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ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of Eagletech Communications, Inc., be, and it hereby is, revoked pursuant to Section 12(j) of the Securities Exchange Act of 1934.

By the Commission.

Nancy M. Morris
Secretary