

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

ACOUSTICA ASSOCIATES, INC.,
Defendant.

Civil Action No. 677-71

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiff, Securities and Exchange Commission (Commission), has brought this action for injunctive relief to compel defendant, Acoustica Associates, Inc. (Acoustica), timely to file reports with the Commission as required by Section 13(a) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78m(a) and to do so in proper form in accordance with the rules and regulations adopted by the Commission under those provisions, and to restrain defendant, Acoustica, permanently from violating Section 13(a) of the Exchange Act and the rules and regulations promulgated thereunder by failing to file with the Commission timely and proper reports as required by such provisions. The Commission is authorized to obtain such injunctive relief pursuant to Sections 21(e) and 21(f) of the Exchange Act, 15 U.S.C. 78u(e) and 78u(f) and this Court has jurisdiction of this action under Sections 21(f) and 27 of the Exchange Act, 15 U.S.C. 78u(f) and 78aa. This Statement of Points and Authorities is filed by the plaintiff, Securities and Exchange Commission, in support of its Motion for Summary Judgment.

Statement

Acoustica is the issuer of a class of common stock that has been registered with the Commission under Section 12 of the Exchange Act, 15 U.S.C. 78l since September 16, 1965. As a result of this registration of a class of securities, defendant, Acoustica, is required to file reports with the Commission in Washington, D.C. pursuant to Section 13(a) of the Exchange Act.

Pursuant to rules adopted under Section 13(a) of the Exchange Act, Acoustica was required to file on or before June 28, 1967 an annual report on Form 10-K for the fiscal year ended February 28, 1967. 1/

Acoustica failed to file such report until October 9, 1967 and was, therefore, in excess of three months delinquent in its required reporting. Pursuant to the same provisions of law, Acoustica was also required to file on or before June 28, 1968 an annual report on Forms 10-K for the fiscal year ended February 29, 1968. Acoustica requested and was granted an extension of time pursuant to Rule 12h-25 under the Exchange Act, 17 CFR 240.12b-25, within which to file such report until July 29, 1968.

Acoustica failed to file such report until November 25, 1968, and such report was filed without the required certified financial statements. 2/ Acoustica failed to file an amendment to such report containing the required certified financial statements until February 24, 1969, and was, therefore, seven months delinquent in satisfying its reporting obligations. Acoustica was also required pursuant to the same reporting provisions of the Exchange Act to file on or before June 28, 1969 an annual report on Form 10-K for the fiscal year ended February 28, 1969. Acoustica failed to file such report until October

31, 1969 and was, therefore, in excess of four months delinquent in its required reporting. In addition, Acoustica was required to file on or before June 28, 1970 an annual report on Form 10-K for the fiscal year ended February 28, 1970. Acoustica filed such report on or before June 28, 1970 without the required certification of the financial statements. ^{3/} An amendment to such report containing the required certified financial statements was filed with the Commission on November 1, 1971 one year and four months after the proper report was required to be filed.

Pursuant to rules adopted under Section 13(a) of the Exchange Act, Acoustica was required to file on or before October 15, 1965, a semi-annual report on Form 9-K for the six-month period ended August 31, 1965. ^{4/} Acoustica failed to file such report until February 8, 1966 and was, therefore, almost four months deficient in its required reporting. Pursuant to the same provision of the Exchange Act, Acoustica was required to file on or before October 15, 1966, a semi-annual report on Form 9-K for the six-month period ended August 31, 1966. Acoustica failed to file such report until February 9, 1967 and was, therefore, almost four months delinquent in satisfying its reporting obligations. These provisions also required Acoustica to file on or before October 15, 1967 its semiannual report on Form 9-K for the six-month period ended August 31, 1967. Acoustica failed to file such report until December 19, 1967, and was therefore, in excess of two months delinquent in its required reporting. Acoustica also was required to file on or before October 15, 1968 its semi-annual report on Form 9-K for the six-month period ended August 31, 1968. Acoustica failed to file such report until March 4, 1971 and was, therefore, in excess of two years, 4 months delinquent in its required reporting. Finally Acoustica was required to file on or before October 15, 1969 its semi-annual report on Form 9-K for the six-month period ended August 31, 1969. Acoustica failed to file such report until October 19, 1970 and was, therefore, in excess of one year delinquent in its required reporting.

STATUTORY PATTERN

The Exchange Act was enacted “To provide for the regulation of securities exchanges and over-the-counter markets operating in interstate and foreign commerce and through the mails to prevent inequitable and unfair practices on such exchanges and markets . . .” ^{5/} For certain enumerated reasons, Congress found it necessary “to provide for regulation and control” of transactions conducted upon securities exchanges and over-the-counter markets, “to require appropriate reports, and to impose requirements necessary to make such control reasonably complete and effective . . .” ^{6/} As a part of the complete scheme of regulation, Congress imposed certain obligations directly upon the issuer of a security. ^{7/} Thus, Section 12(g)(1)(B) requires “Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce” to register any security with the Commission if at the end of a fiscal year “the issuer has total assets exceeding \$1,000,000 and a class of equity security . . . held of record by five hundred or more . . . persons . . .” ^{8/} Registration pursuant to Section 12(g) may be accomplished by the filing of a registration statement with the Commission pursuant to the requirements of Regulation 12B, General Rules and Regulations under the Securities Exchange Act of 1934. ^{9/} Form 10 is the form prescribed by the Commission for filing a

Section 12(g) registration statement, and the issuer must provide the information specified by that form.

Initial registration of a security pursuant to Section 12(g) gives rise to a continued obligation to file current information with the Commission pursuant to Section 13(a) of the Exchange Act. 10/

It would be difficult to overstate the importance of the disclosure provisions of the Securities Exchange Act, see, e.g., Wheat, Disclosure to Investors -- A Reappraisal of Administrative Policies Under the '33 and '34 Acts 49-50 (CCH ed., 1969), since these disclosures serve several vital purposes. Information required to be disclosed in periodic reports enables investors to make informed investment decisions and provides security holders with a basis for evaluating management's performance. 11/ Similarly, timely public disclosure of material corporate information insures an accurate and honest market for the company's securities. The importance and function of the disclosure provisions contained in the Exchange Act were aptly summarized by the House Committee which considered that Act:

"No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys and sells. The idea of a free and open market place is built on the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price . . . The hiding and secreting of important information obstructs the operation of the markets as indices of real value . . . The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market . . . Delayed, inaccurate, and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculates on inside information

"The reporting provisions of the Securities Exchange Act are a very modest beginning to afford . . . long denied aid . . . in the way of securing proper information for the investor. 12/

Among the periodic reports which presently must be filed by an issuer subject to the statutory reporting requirements of Section 13(a) of the Exchange Act are annual reports on Commission Form 10-K and quarterly reports on Commission Form 10-Q. 13/ Form 10-K recently was amended 14/ and 15/ Form 10-Q recently was adopted (to supplant Form 9-K, the semi-annual report), both effective January 1, 1971, in order to make the disclosures previously required more timely and meaningful. Prior to the recent amendments of these forms, corporations subject to the periodic reporting requirements were required to file their Form 10-K annual reports within 120 days after the close of their fiscal year. 16/ Semi-annual reports on Form 9-K were required to be filed within 45 days after the first half of the fiscal year. 17/

Argument

I. Defendant Has Repeatedly Violated the Reporting Requirements of the Securities Exchange Act

The undisputed facts in this action are clear that Acoustica has engaged in a steady course of continuing violations of the reporting requirements of the Exchange Act. From the very inception of its reporting obligations Acoustica has demonstrated a marked inability to file timely and proper periodic reports. Indeed it appears that Acoustica has become increasingly callous in its disregard of the reporting requirements of the Exchange Act. Thus, Acoustica was required to file its annual report on Form 10-K for the fiscal year ended February 28, 1966 on or before June 28, 1966. Acoustica was unable to file that report within the required 120 days, and an extension of time within which to file that report was granted until July 15, 1966 at Acoustica's request. Nevertheless Acoustica failed to file its report until July 26, 1966.

Acoustica's eleven day delinquency in filing its annual report for the fiscal year ended February 28, 1966 was expanded to a 103 day delinquency in 1967 when Acoustica failed to file its annual report on Form 10-K for the fiscal year ended February 28, 1967 until October 9, 1967. In 1968, Acoustica asked for and was granted a 31 day extension of time within which to file its annual report for the fiscal year ended February 29, 1968 until July 29, 1968. Notwithstanding this extension of time Acoustica did not file that report until November 25, 1968, and the report as filed was deficient because it lacked certified financial statements. It was not until February 24, 1969 that Acoustica amended that form to include certified financial statements. Thus Acoustica required almost one full year to file a report which the statute provides should be filed in 120 days. Acoustica's annual report for the fiscal year ended February 28, 1969 was not filed until October 31, 1969, or 125 days after the report was required to be filed. Acoustica purported to file its annual report for the fiscal year ended February 28, 1970 within the allotted 120 days. However, that report was deficient in that it lacked certified financial statements, and it was not until November 1, 1971 that Acoustica amended its annual report for 1970 to include the properly certified financial statements. Consequently, Acoustica, which was required to file that report in complete and proper form on or before June 28, 1970, was one year and four months delinquent. Furthermore such report was not amended until almost six months after this action was instituted.

A similar pattern of delinquency in filing reports required to be filed by the Exchange Act emerges in the history of Acoustica's filing of semi-annual reports on Form 9-K. These reports were required to be filed on or before October 15, of each year 1965 through 1969. Acoustica filed its semi-annual report for the six-month period ended August 31, 1965 on February 8, 1966, 116 days after it was required to be filed. Acoustica's semi-annual report for August 31, 1966 was filed 117 days delinquent. Acoustica's semi-annual report for August 31, 1968 was not filed until March 4, 1971, an incredible two years and four months after it was required to be filed. Similarly, Acoustica's semi-annual report for August 31, 1969 was not filed until October 19, 1970 and was, therefore, filed one year after it was due. In effect, shareholders of Acoustica and members of the financial community were permanently deprived of timely financial

information required to be filed by Acoustica in its semi-annual reports for August 31, 1968 and 1969. By the time these reports were filed, the information supplied therein was no longer relevant to current investment decisions involving the purchase, sale or retention of shares of Acoustica's common stock.

Acoustica has been subject to the periodic reporting requirements of the Exchange Act at all times material to this action. Its failure to comply with the spirit of the reporting provisions poses an immediate and continuing threat to the maintenance of a high level of public investor awareness of the company, which Congress deemed to be an essential facet of an informed and nonmanipulated market place.

II. This Court Should Issue A Permanent Injunction To Bar Acoustica From Further Violations Of Section 13(a) Of The Securities Exchange Act.

Pursuant to Section 13(e) of the Exchange Act, 15 U.S.C. 78u(e), this Court may issue a permanent injunction upon a showing that defendant is engaged or is about to engage in acts and practices which constitute or will constitute a violation of any of the federal securities laws; and neither irreparable injury nor inadequacy of any other relief, such as are required in private injunctive actions, must be shown by the Commission -- it is sufficient that the statutory conditions alone be satisfied. 18/

Acoustica's past violations of the Exchange Act (which Acoustica does not dispute), by their very nature, demonstrate a substantial likelihood that Acoustica will continue to engage in such violations. Future violations of the securities laws may properly be inferred from past violations, 19/ and this inference is significantly strengthened when a defendant does not attempt to cease its illegal activity until the institution of an investigation or an injunctive action. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). 20/

In its Answer, defendant urged against entry of a permanent injunction on the basis that since July 1970 it has been under new management which was not responsible for past violations in the reporting requirements and which has made a good faith effort to rectify past violations and comply with current filing requirements. The defendant's assertion of good faith is, of course, irrelevant to the issue of whether defendant's failures to comply with the reporting provisions constitute violations of Section 13(a) of the Exchange Act and the rules and regulations thereunder. Section 13(a) and the rules and regulations thereunder are clear and unequivocal. They are satisfied only by the filing of complete, accurate, and timely reports. In passing it can be noted that if an issuer registered pursuant to Section 12 is in good faith unable to comply with the reporting requirements of Section 13(a) and the rules and regulations thereunder it can apply to the Commission for an order exempting it in whole or in part from the provisions of Section 13(a). 21/ The defendant has not applied for any such order. In addition, if information required to be filed is unknown or not reasonably available because the obtaining of such information involves unreasonable effort or expense or because it rests solely within the knowledge of another person not affiliated with the issuer, there are provisions for the

omission of that information. 22/ The defendant has never attempted to use these provisions.

The Commission believes that the new management's record in filing reports speaks for itself and on its face indicates a reasonable likelihood of future violations.

The new management took office in the defendant in July 1970. On September 16, 1970 the Commission's staff sent a letter to the defendant's directors demanding that the defendant amend its annual report on Form 10-K for the fiscal year ended February 28, 1970 by filing a certified balance sheet and a certified profit and loss statement. Because it was not filed on April 5, 1971, the Commission instituted this suit to compel the filing of such amendment. An amendment containing the properly certified financial statements was not filed with the Commission until November 1, 1971 or sixteen months after defendant's present management took office.

Furthermore, present management's failure to file timely and proper reports which have become due since the institution of this action does nothing to allay the Commission's fears that defendant Acoustica will continue its pattern of habitually filing late and improper forms. Defendant Acoustica's annual report on Form 10-K for the fiscal year ended February 28, 1971 was required to be filed on or before May 29, 1971. A report purporting to be the proper report was filed on June 8, 1971. However, this report was submitted in improper form and without financial statements. On November 1, 1971 defendant filed an amendment to its annual report for the year ended February 28, 1971, by filing that report on proper form but with uncertified financial statements. Thus, said report was still deficient in that it lacked the required certified financial statements. On February 4, 1972 Acoustica amended its February 28, 1971 annual report to include the required certified financial statements. 23/

Further evidence of the failure of defendant's present management to file timely reports was the failure to file timely quarterly reports on Form 10-Q for the three month period ended May 31, 1971 and the six month period ended August 31, 1971. The three month report was required to be filed on or before July 15, 1971 but was not filed until October 4, 1971, and the six month report was required to be filed on or before October 15, 1971 but was not filed until December 29, 1971. Thus, each of these reports was filed two and one half months after the required date.

The evidence shows that defendant's present management has not reversed the pattern of violations of the reporting requirements of the Exchange Act. Therefore, defendant's protestations of attempted good faith compliance ought not to be heeded.

III. Summary Judgment Is A Proper Means of Enjoining Violations Of The Exchange Act Where, As Here, No Genuine Issue Of Material Fact Exists

The purpose of summary judgment under Rule 56 of the Federal Rules of Civil Procedure is "to dispose of cases in which 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Community of Roquefort

v. William Faehndrich, Inc., 303 F. 2d 494, 498 (C.A. 2, 1962), quoting Rule 56(c). In accordance with this purpose summary judgment has been granted enjoining violations of Section 13(a) of the Exchange Act of facts substantially similar to those before this court. Securities and Exchange Commission v. Atlas Tack Corporation 93 F. Supp. 111 (D. Mass. 1950). See also, Securities and Exchange Commission v. Union Corporation of America, 205 F. Supp. 518 (E.D.Mo. 1962), aff'd. 309 F. 2d 893 (C.A. 8, 1962). Summary judgment has been extensively recognized to be a proper means of enjoining violations of the Federal securities laws. See Securities and Exchange Commission v. Golconda Mining Co., 291 F. Supp. 125, (S.D.N.Y. 1968); Securities and Exchange Commission v. Latta 250 F. Supp. 170 (N.D.Cal.,1965), affirmed 356 F. 2d 103 (C.A. 9) certiorari denied, 384 U.S. 940 (1966); Securities and Exchange Commission v. Searchlight Consolidated Mining and Milling Co., 112 F. Supp 726 (D. Nev., 1953); Securities and Exchange Commission v. Payne, 35 F. Supp. 873 (S.D. N.Y., 1940); Securities and Exchange Commission v. Larson (E.D. Mich., 1941) 4 F.R. Serv. 36 a. 54, Case 1. p. 565; Moore, Federal Practice, Section 56.17 (54) p. 2667.

CONCLUSION

For the foregoing reasons, the Commission's Motion for Summary Judgment requiring defendant to file timely and proper reports and permanently enjoining defendant from further and future violations of Section 13(a) of the Securities Exchange Act should be granted.

Respectfully submitted,

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1/ See, Rule 13a-1, 17 CFR 240.13a-1.

2/ See Instructions to Financial Statement, Form 10-K (as in effect for fiscal years ended prior to December 31, 1970) 17 CFR 249.310.

3/ See Instructions As to Financial Statements, Form 10-K (as in effect for fiscal years ended prior to December 31, 1970.)

4/ See Rule 13a-13 (as in effect for six-month periods ending before or on December 31, 1970) 17 CFR 240.13a-13.

5/ Preamble, Securities Exchange Act, 15 U.S.C. 78 (1970).

6/ Section 2, Securities Exchange Act, 15 U.S.C. 78b.

7/ Issuer is defined in Section 3(a)(8) of the Securities Exchange Act as “ person who issues or proposes to issue any security”. There are certain exceptions to this definition which are not applicable in the instant matter.

8/ 15 U.S.C. 78l(g)(1)(B).

9/ 17 CFR 240.12b.

10/ Section 13(a) provides in pertinent part:

“Every issuer of a security registered pursuant to Section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security --

(1) such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12

(2) such annual reports . . . certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports . . . as the Commission may prescribe”

11/ Thus, for example, the periodic reports require timely public disclosures with respect to corporate transactions involving officers, directors and principal shareholders of the reporting company and its subsidiaries, thereby providing shareholders with the opportunity to observe to what extent, if any, management is engaged in self-dealing.

12/ H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 13 (1934).

13/ Pursuant to Rule 0-1(a)(4) under the Securities Exchange Act, 17 CFR 240.0-1(a)(4), forms adopted by the Commission for registration and periodic reports, as well as the instructions thereto, are deemed rules and regulations of the Commission. Failure to comply with the reporting requirements of a particular form, therefore, constitutes a violation of the Commission’s rules and regulations.

14/ See Securities Exchange Act Release No. 9000, (‘70-’71), CCH Fed. Sec. L. Rep. Para. 77, 919 (Oct. 21, 1970).

15/ See Securities Exchange Act Release No. 9004, (‘70-’71), CCH Fed. Sec. L. Rep. Para. 77, 920 (October 28, 1970).

16/ Annual reports now are required to be filed within 90 days after the end of the issuer's fiscal year with the exception of certain schedules which may be filed within 120 days.

17/ Form 10-Q quarterly reports are due 45 days after the end of the first three fiscal quarters of each fiscal year. No Form 10-Q Report is required at the end of the last fiscal quarter; the Form 10-K annual report encompasses the information that otherwise would be required in the form 10-Q for the issuer's last fiscal quarter.

18/ Securities and Exchange Commission v. Boren, 283 F. 2d 312, 313, (C.A. 2, 1960); Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 249 (C.A. 2, 1959); Securities and Exchange Commission v. Torr, 87 F. 2d 446, 450 (C.A. 2, 1937); Securities and Exchange Commission v. Bennett & Co., 207 F. Supp. 919, 923 (D.N.J., 1962); III Loss, Securities Regulations 1979 (2d. ed., 1961)

19/ See, e.g., Securities and Exchange Commission v. MacElvain, 417 F.2d 1134, 1137 (C.A. 5, 1969), certiorari denied, 397 U.S. 972 (1970); Securities and Exchange Commission v. Boren, *supra*, 283 F. 2d 312; Securities and Exchange Commission v. Culpepper, *supra*, 270 F. 2d at 245-250; Tanzer v. Huffines, 408 F. 2d 42,43 n.1 (C.A. 3, 1969); Securities and Exchange Commission v. Keller Corp., 323 F. 2d 397, 402 (C.A. 7, 1963); Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 285 F. 2d 162, 180-181 (C.A. 9, 1960), certiorari denied, 366 U.S. 919 (1961).

20/ Accord, Securities and Exchange Commission v. Boren, *supra*, 283 F. 2d 312; Securities and Exchange Commission v. Universal Services Association, 106 F.2d 232, 239,240 (C.A. 7, 1939), certiorari denied, 308 U.S. 622 (1940) Otis & Co. v. Securities and Exchange Commission, 106 F. 2d 579 (C.A. 6, 1939).

21/ See, Exchange Act, Section 12(h), 15 U.S.C. 78l(h).

22/ General Rules and Regulations Under the Exchange Act, Rule 12b-21, 17 CFR 240.12b-21.

23/ Acoustica has informed the Commission that it originally mailed these certified financial statements to the Commission on November 15, 1971, however, the Commission has no record of having received them. Plaintiff does not maintain that the additional period of delay before these certified financial statements were filed ought to be critical. By November 1971 the information was already half a year late.