

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-12905UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
December 18, 2007In the Matter of  
  
COHERENT, INC.

## ORDER DENYING STAY

Pending before the Commission is a request by Coherent, Inc. ("Coherent") for a stay, pursuant to Rule of Practice 401, 1/ of a November 30, 2007, decision of the Board of Directors ("Board") of The Nasdaq Stock Market LLC ("Nasdaq"). For the reasons set forth below, the request for a stay is denied.

## I.

Section 13(a) of the Securities Exchange Act of 1934 requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission containing such information as the Commission's rules prescribe. 2/ Pursuant to Section 13(a), the Commission has promulgated Rules 13a-1 and 13a-13, which require issuers to file annual and quarterly reports. 3/

Nasdaq's rules permit a Nasdaq-listed company that fails to file its annual report with the Commission in a timely manner to seek additional time to file. Under Nasdaq Marketplace Rule 4802(b), a Listing Qualifications Panel ("Panel") may grant the issuer up to 180 days from the date of NASD staff's delisting determination to regain compliance. The issuer may seek review by the Nasdaq Listing and Hearing Review Council ("Council") of a Panel decision pursuant to Nasdaq Marketplace Rule 4807(a). Generally, consideration by the Council does not stay the delisting. 4/ The Board may then call the Council decision for review pursuant to Nasdaq Marketplace Rule 4809(a).

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1/ 17 C.F.R. § 201.401

2/ 15 U.S.C. § 78m.

3/ 17 C.F.R. §§ 240.13a-1 and 13a-13.

4/ Nasdaq Marketplace Rules 4807(a) and (b).

On December 19, 2006, Nasdaq staff notified Coherent that it was in non-compliance with Nasdaq Marketplace Rule 4310(c)(14), requiring that issuers of securities listed on Nasdaq file with Nasdaq copies of all reports required to be filed with the Commission on or before the date that they are required to be filed with the Commission, based on the company's failure to timely file its Form 10-K for the fiscal year ended September 30, 2006 ("2006 Form 10-K"). Coherent subsequently failed to file quarterly reports for the quarters ended December 30, 2006, March 31, 2007, and June 30, 2007. It also received notice that it failed to timely file its Form 10-K for the fiscal year ended September 29, 2007 ("2007 Form 10-K"). Coherent states that its filings were delayed while a Special Committee of its Board of Directors completed a review of the company's historical stock option practices and a related restatement.

Coherent requested a hearing and appeared before a Panel on February 15, 2007. In a decision dated April 3, 2007, the Panel determined to continue Coherent's listing and grant its request for an extension to file the 2006 Form 10-K and any required restatements until June 18, 2007, and an extension to file its Form 10-Q for the quarter ended December 30, 2006, until July 2, 2007, provided, however, that it receive a copy of the Special Committee's final report or a written submission regarding its results. The Panel also noted that Coherent had "responded appropriately" by having an independent committee conduct the review.

Coherent provided the Panel with the Special Committee's results on May 17, 2007. On May 18, 2007, the Council called the Panel decision for review and ordered a stay of the Panel's decision pending further action by the Council. The Council also informed Coherent that any additional information to be presented to the Council must be submitted by August 10, 2007. Coherent provided the Council with an additional submission on that date.

On October 5, 2007, after reviewing the record in this matter, the Council determined to grant Coherent additional time to regain compliance. It gave Coherent until December 4, 2007, to satisfy all of Nasdaq's continued listing requirements, the maximum time permissible under Rule 4802(b).

On November 30, 2007, the Board called for review, stayed the Council's determination to delist Coherent's securities, and gave the company additional time, until December 17, 2007, to regain compliance. The Board noted that Coherent had been in noncompliance with Rule 4310(c)(14) for almost one year from the final due date of its 2006 Form 10-K. The Board also noted that Coherent was not in compliance with Nasdaq Marketplace Rules 4350(e) and 4350(g), which require companies to hold annual meetings of shareholders and to solicit proxies for such meetings. <sup>5/</sup> The Board determined that, in the event Coherent did not file the past due periodic reports by December 17, 2007, its securities would be suspended from trading at the opening of business on December 19, 2007, and Nasdaq would file a Form 25, Notification of Removal from Listing, with the Commission.

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<sup>5/</sup> Coherent states that it has announced that its annual meeting will be held on March 19, 2008.

On December 11, 2007, Coherent filed its delinquent 2006 Form 10-K. That same day, Coherent requested that the Board reconsider its November 30 decision and give it an additional six weeks, or until January 31, 2008, to file its delinquent quarterly reports, and an additional ten weeks, or until February 28, 2008, to file its 2007 Form 10-K. Coherent has indicated, in a telephone call to the Commission's Office of the Secretary, that its reconsideration request has been "orally" denied.

## II.

Under Rule of Practice 401(d), <sup>6/</sup> the Commission may stay an action of Nasdaq on motion by a person aggrieved by the action. In determining whether to stay Coherent's delisting from Nasdaq, the Commission considers: (1) whether there is a strong likelihood that Coherent will succeed on the merits of its request for review; (2) whether, absent a stay, Coherent will suffer irreparable injury; (3) whether there will be substantial harm to the public if the delisting is stayed; and (4) whether staying the delisting will serve the public interest. <sup>7/</sup>

Although any final determination must await a review on the merits, it appears, based on the pleadings filed by the parties thus far, that Coherent has not established a strong likelihood that it will prevail on the merits. The Board reviewed the facts related to Coherent's failure to comply with Nasdaq's filing requirement, including its actions to regain compliance. The Board stayed the Council's determination to delist Coherent's securities and provided additional time for the company to regain compliance. Coherent's claim that it should be given a total of ten more weeks to comply because it has now filed its 2006 Form 10-K does not address the consequences of its other deficiencies. As indicated above, the company remains delinquent on the subsequent three quarterly reports and 2007 Form 10-K. The public continues to be without the information contained in those reports.

Coherent contends that its delisting would be inequitable, given that its delisting is tied, in part, to the end of its fiscal year, and that other similarly-situated companies with different fiscal year ends have received more time. However, Coherent points to no requirement that every company be provided with the same amount of time in order to regain compliance. Pursuant to Nasdaq Marketplace Rule 4300, Nasdaq has broad discretion over the continued listing of securities listed on Nasdaq "in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and

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<sup>6/</sup> 17 C.F.R. § 201.401(d).

<sup>7/</sup> Rules of Practice, 60 Fed. Reg. 32738, 32772 (1995) (comment to Rule 401); ID American Workwear, Inc., Securities Exchange Act Rel. No. 43283 (Sept. 12, 2000), 73 SEC Docket 748, 752; Robert J. Prager, Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 162, 163 (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1988)).

equitable principles of trade, and to protect investors and the investing public.” 8/ The Board exercised that discretion, stating that it considered “the actions of the company to identify and address the underlying problems that caused its failure to file . . . and its progress towards regaining compliance,” in allowing Coherent extra time beyond that granted by the Council to fulfill its filing obligations.

The Commission has recognized the “critical importance” of “ensuring that listed companies have filed accurate, up-to-date annual reports under the [Securities Exchange] Act [of 1934].” 9/ In Navistar International Corporation, 10/ the Commission stated that the New York Stock Exchange LLC, which at the time had discretion to allow late filers to remain listed for more than twelve months under “certain very rare circumstances,” “nearly always should determine not to extend the twelve-month period for a late filer to remain listed on the Exchange. The refusal to exercise discretion in most cases is consistent with the purposes of the Exchange Act given the importance of current financial information about the issuer.” 11/ The Commission emphasized that “[r]equiring public companies to file appropriate reports ensures the maintenance of fair and honest markets in securities. Such reports provide a valuable function by disseminating information to the investing public.” 12/ The Commission also reiterated that it “strongly believes that listed companies that no longer satisfy exchange listing standards should be delisted quickly in accordance with exchange rules and the Exchange Act,” 13/ noting that, “[i]n these circumstances, delisting serves to ‘protect the public from

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8/ Nasdaq Marketplace Rule 4300.

9/ Order Granting Approval to a Proposed Rule Change Relating to Section 802.01E of the Listed Company Manual Concerning Continued Listing of Companies that Fail to File Their Securities Exchange Act of 1934 Annual Reports in a Timely Manner, Exchange Act Rel. No. 53152 (Jan. 19, 2006), 87 SEC Docket 515, 517; see also Order Approving Rule Change Amending Annual Report Timely Filing Requirements, Exchange Act Rel. No. 55198 (Jan. 30, 2007), \_\_\_ SEC Docket \_\_\_.

10/ Navistar Int’l Corp., Order Denying Stay, Exchange Act Rel. No. 55304 (Feb. 13, 2007), 89 SEC Docket 3384.

11/ Id., 89 SEC Docket at 3390-91.

12/ Id. at 3392 (quoting SC&T Int’l. Inc., 54 S.E.C. 320, 326 (1999) (citing Exchange Act § 2, 15 U.S.C. § 78b)).

13/ Id. (quoting Removal from Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 52029 (July 14, 2005), 85 SEC Docket 3615, 3618).

being misled into believing that these companies retain the imprimatur of an exchange listing.” <sup>14/</sup>

Furthermore, Coherent has not established that it will suffer irreparable harm or that there will be substantial harm to the public absent a stay of Nasdaq’s delisting decision. The Commission previously has held that “the fact that a security is delisted does not necessarily result in irreparable harm to the issuer since its securities may continue to trade in other markets.” <sup>15/</sup> Additionally, Coherent may seek to be re-listed on Nasdaq if it achieves compliance with the Commission’s reporting requirements, and it may then be reinstated to indices from which it is removed as a result of the delisting. <sup>16/</sup> Although existing Coherent shareholders may be disadvantaged, it appears that this detriment is outweighed by the public

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<sup>14/</sup> Id. (quoting Removal from Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934, 85 SEC Docket at 3618).

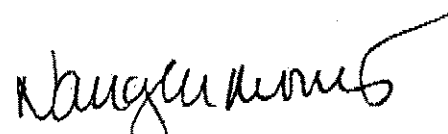
<sup>15/</sup> JD American Workwear, Inc., 73 SEC Docket at 753-54; see also E. St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 704 (7th Cir. 2005) (stating that claims of “speculative injuries” do not demonstrate irreparable harm); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that “injury must be certain and great; it must be actual and not theoretical”).

<sup>16/</sup> Nasdaq notes, in its response to Coherence’s stay request, that the company could be relisted “without even having to pay another listing fee” once it regains compliance.

interest in Coherent's compliance with the disclosure requirements so that both existing and prospective investors will have full, current information about Coherent. 17/

Accordingly, IT IS ORDERED that the request for a stay of the Nasdaq Stock Market LLC's November 30, 2007, decision granting Coherent, Inc. until December 17, 2007, to file its delinquent periodic reports, including all required financial restatements, or face suspension of trading of its common stock as of the opening of business on December 19, 2007, and subsequent delisting be, and it hereby is, denied.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.



Nancy M. Morris  
Secretary

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17/ See JD American Workwear, 73 SEC Docket at 754 (reaching similar conclusion); see also Biorelease Corp., 52 S.E.C. 219, 224 (1995) (noting that, while delisting may hurt existing investors, their interests are outweighed by the interests of prospective future investors).